VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 10-46
CLINT GLOVER	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On October 25, 2010, Attorney William Cobb filed a grievance with the Vermont Labor Relations Board on behalf of Clint Glover ("Grievant"), contending that the State of Vermont Department of Corrections ("Employer") violated the collective bargaining agreement between the State and the Vermont State Employees' Association ("VSEA") for the Supervisory Bargaining Unit effective July 1, 2008 to June 30, 2010 ("Contract") by imposing the disciplinary action of demoting Grievant from a Correctional Facility Shift Supervisor to Correctional Officer I. Specifically, Grievant alleged that the Employer violated Articles 5 and 14 of the Contract because: 1) the demotion was in retaliation for Grievant's complaint and grievance activity, 2) Grievant was disciplined without just cause, and 3) the Employer improperly bypassed progressive discipline.

Hearings were held in the Labor Relations Board hearing room in Montpelier on April 21 and May 26, 2011, before Board Members Richard Park, Chairperson; James Kiehle and Gary Karnedy. Assistant Attorney General William Reynolds represented the Employer. Attorney William Cobb represented Grievant. The Employer and Grievant filed post-hearing briefs on June 14 and 17, respectively.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

. . .

ARTICLE 5
NO DISCRIMINATION OR HARASSMENT; and AFFIRMATIVE ACTION

1. **NO DISCRIMINATION, INTIMIDATION OR HARASSMENT**

In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination, neither party shall discriminate against, intimidate, nor harass any employee because of . . . membership or non-membership in the VSEA, filing a complaint or grievance, or any other factor for which discrimination is prohibited by law.

. . .

ARTICLE 14
DISCIPLINARY ACTION

1. No permanent or limited status employee covered by this Agreement shall be disciplined without just cause. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:
    a. act promptly to impose discipline . . . within a reasonable time of the offense;
    b. apply discipline . . . with a view toward uniformity and consistency;
    c. impose a procedure of progressive discipline . . .
    d. In misconduct cases, the order of progressive discipline shall be:
        (1) oral reprimand;
        (2) written reprimand;
        (3) suspension without pay;
        (4) dismissal.
        . . .
        (6) The parties agree that there are appropriate cases that may warrant the State:
            (i) bypassing progressive discipline . . .
        . . .
        (7) . . . Nothing in this Agreement shall be construed to limit the State's authority or ability to demote an employee under section 1(d) . . . of this section, for just cause resulting from misconduct or performance, but the State shall not be required to do so in any case. . .

. . .

3. Notwithstanding the provisions of paragraph 2 above, the appointing authority or authorized representative . . . may dismiss an employee immediately without two (2) weeks' notice or two (2) weeks' pay in lieu of notice for any of the following reasons:
    (a) gross neglect of duty;
    (b) gross misconduct;
    . . .

(e) conduct which places in jeopardy the life or health of a co-worker or of a person under the employee's care.

. . .

ARTICLE 15
GRIEVANCE PROCEDURE

1. **PURPOSE**
(a) The intent of this Article is to provide for a mutually satisfactory method for settlement of complaints and grievances, as defined in Section 2 of this Article, filed by an individual, unit, or the duly certified bargaining representative. It is expected that employees and supervisors will make a sincere effort to reconcile their differences as quickly as possible at the lowest possible organization level.

. . .

2. **DEFINITION**
(a) "Complaint" is an employee's or group of employees' informal expression to the immediate supervisor of dissatisfaction with aspects of employment or working conditions under a collective bargaining agreement that are clearly identified to the supervisor as a grievance complaint.
(b) "Grievance" is an employee's, group of employees' or the employee's collective bargaining representative's expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under a collective bargaining agreement or the discriminatory application of a rule or regulation.

. . .

(Joint Exhibit 1)

2. Grievant was a Correctional Facility Shift Supervisor at the Northern State Correctional Facility ("NSCF") in Newport from 1997 until he was demoted to a Correctional Officer I in 2009. Grievant has been employed by the Employer since 1987 (State's Exhibit 14).

3. Grievant has a past disciplinary record of a 3-day suspension in 1989, a 5-day suspension in 1991 for negligence relating to an inmate escape, and a 3-day suspension in 1994 for driving to work while his license was under suspension (State's Exhibit 14).

4. Grievant received annual performance evaluations rating his overall performance as “excellent” from 1999 to 2008 (State’s Exhibit 14).

5. Superintendent Michael Bellizzi approached Grievant and other NCSF employees in 2007 to discuss whether they were interested in being on an audit team. He discussed with them working on the audit team without compensation. Grievant declined Bellizzi’s invitation to join the team without compensation. A number of employees, including Grievant, approached Joseph Silvestri, a VSEA Steward at NCSF, to express concern that Superintendent Bellizzi was requesting employees to join the audit team without compensation. Silvestri spoke to Bellizzi about the issue. Silvestri did not inform Bellizzi which employees had raised the issue. There was no subsequent complaint or grievance filed by VSEA or employees under the Contract on this issue.

6. The Department of Corrections Work Rules provide in pertinent part:

> **Work Rule #1:**
> No employee shall violate any provision of the collective bargaining agreement or and(sic) State or Department work rule, policy, procedure, directive, local work rule or post order.
>
> **Work Rule #2:**
> An employee shall not use State property or equipment for his/her private use or for any other use than that which serves the public interest.
>
> **Work Rule #3:**
> No employee shall, while on duty or engaged in activity associated with the Department of Corrections, endanger the safety of any member of the public. Employees shall be responsible to promptly report, to their immediate supervisor, any such conduct by another employee, volunteer or offender which endangers the safety of others.
>
> . . .
>
> **Work Rule #9:**
> No employee, whether on or off duty, shall comport himself or herself in a manner that reflects discredit upon the Department.

. . .
(State's Exhibit 10)

7. Northern State Correctional Facility Post Order 403.00.89 provides in pertinent part:

> **Definitions:**
> Correctional Facility Shift Supervisor (CFSS) – An individual who is responsible for the order and well-being of a correctional facility during the course of their respective shift. It is the duty of the Shift Supervisor to address and deal with day to day issues within a correctional setting as they arise. . .
>
> **Responsibilities/Duties/Procedures:**
> THE 3rd SHIFT SUPERVISOR
> . . .
> 11) Fill out Vermont Department of Corrections Population Status-Security Form. All Special Observation Sheets must be checked sorted and placed in the appropriate LUS mail box. Assure the following is completed prior to forwarding:
> i. Proper entries
> a. Timely
> b. Accurate
> c. Legible comments and signatures
> ii. Signed by Shift Supervisor at least once during shift
> 12) Check all inmates on observations (Supervisor must sign all Observation sheets)
> . . .
> 14) Inspect all posts ensuring all staff is following their post orders and facility procedures
> . . .
> 17) Inspect all posts ensuring all staff is following their post orders and facility procedures
> 18) Address staff misconduct issues appropriately.
> . . .
> (State's Exhibits 10, 18)

8. Grievant was familiar at all times relevant with the above-cited Work Rules, Directive and Post Order. Grievant understood that part of his responsibilities as Shift Supervisor was to ensure that officers on his shift complied with post orders and

proper procedures. He also understood that he was expected to serve as a role model for less experienced officers.

9. State Personnel Policy 11.7**,** Electronic Communications and Internet Use, provides in pertinent part:

> Authorized Limited Personal Use
> Internet, electronic and wireless communication devices and services, and email capabilities are resources to facilitate the work of State government. This policy provides for use by authorized State employees that is consistent with Personnel Policies and Procedures, Number 5.6, entitled "Employee Conduct", which states that employees shall not use or attempt to use State personnel, property, or equipment for their private use or for any other use not required for the proper discharge of their official duties. That policy has been interpreted to allow a limited degree of personal use of State telephones for private calls when such use meets certain guidelines. Similar allowances will be applied to Internet, electronic and wireless communication devices and services, and email capabilities where personal use meets all of the following tests. No such use will be allowed where any of the following is not met:
>
> - The user must be authorized to use the equipment by management. Managers will exercise reasonable discretion in determining which employees will be denied personal use of Internet or electronic and wireless communication devices and services, including when such use is denied because of abuse or violation of this policy.
> - The use must not interfere with an employee's performance of job duties.
> - The use must not impose a burden on State resources as a result of frequency or volume of use.
> - The use must not otherwise violate this policy, including the prohibition on visiting sites that include potentially offensive or disruptive material. The fact that the use occurs in a private setting or outside of scheduled work hours does not affect this prohibition.
>
> RULES FOR USE OF SYSTEMS OR INTERNET SERVICES . . .
> 7. Use of the Internet . . is for State business. The only exception is for personal use that fully complies with the limited personal use described by this policy. . . Any use that is not for State business or authorized limited personal use consistent with this policy may result in revocation of Internet access, other appropriate administrative action, or disciplinary or corrective action.
> . . .

(State's Exhibits 10, 16)

10. State Personnel Policy 5.6 provides in pertinent part:

> Required Conduct: . . .
> 2. Employees shall devote their full time, attention, and effort to the duties and responsibilities of their positions during their scheduled work time . . .
> 3. Employees shall conduct themselves in a manner that will not bring discredit or embarrassment to the State of Vermont, whether on or off duty.
>
> Prohibited Conduct: . . .
> 2. Employees shall not use . . . State . . . property, or equipment for their private use or for any use not required for the proper discharge of their official duties.
> . . .
> (State's Exhibits 10, 16)

11. The conducting of special observation checks at staggered intervals not to exceed every fifteen minutes on inmates under close observation ("special observation checks") are a fundamental part of a correctional officer's duties. Officers are required to log the checks they perform on a Special Observation Monitoring Sheet. The Monitoring Sheet indicates that inmates under close observation are to receive "physical checks at staggered intervals not to exceed every 15 minutes (e.g., 5, 10, or 12 minutes)" (State's Exhibit 1).

12. Grievant has received extensive training in suicide prevention, which includes instruction on the proper manner in which special observation checks are done. Grievant took the Suicide Prevention course 11 times from 1996 through 2006. Steve Dykeman taught the Suicide Prevention course for the Employer from 1995 until 2005 or 2006. Dykeman taught correctional officers that observation checks should be done within 15 minutes or less. Dykeman has never taught officers that it was permissible to do a check within 3 minutes of 15 minutes such that a check could be done 18 minutes

after the last check. Grievant took the Suicide Prevention course from Dykeman on multiple occasions (State's Exhibits 17, 19).

13. There have been occasions when special observation checks have saved inmate lives. On one occasion, an officer properly conducting a check discovered that an inmate had tied an elastic band around his neck. The officer came to the aid of the inmate to save his life. Another officer who varied his checks so they were done less than 15 minutes apart came to the aid of an inmate whom had cut himself significantly and was bleeding.

14. Inmate MH was lodged at NSCF on August 13, 2008. Medical staff determined that MH was suffering from alcohol withdrawal. As a result of his medical condition, MH was placed in the AC observation cell, a glassed-in cell about twenty feet from the AC desk. MH was held under close custody which required observation checks not to exceed 15 minutes. MH remained in the AC observation cell from August 13 to the morning of August 18 (State's Exhibits 20).

15. Grievant was the lone Shift Supervisor on duty at NSCF on the third shift beginning at 10 p.m. on August 17, 2008, and ending at 6 a.m. on August 18, 2008. Correctional Officer II Philip Brochu was the AC Officer for the third shift. Correctional Officer Meyers also was on duty.

16. Grievant was aware during the August 17-18 third shift that MH was suffering from alcohol withdrawal. On the evening of August 17 and early morning of August 18, MH had become more agitated and had initially refused to take his medication. Grievant was aware that MH had earlier injured his arm and that there was a concern expressed by the on-duty nurse that he would reinjure it. Grievant also

understood that MH could have a seizure as a result of an alcohol withdrawal. Grievant had two conversations with MH during this period, and observed that MH was hallucinating and confused about the reason he was being held. MH asked for beer, which he imagined that he saw in the AC area. MH ultimately agreed to take his medication, and he subsequently became quiet.

17. At approximately 6:05 a.m. on August 18, Correctional Officer II Doug Oliver, the first shift AC Officer, found MH lying on the floor of the AC observation cell. MH was unresponsive and cold to the touch. Oliver and a nurse on duty attempted to revive MH using CPR. MH was transported to North Country Hospital where he was pronounced dead at 6:53 a.m. (State's Exhibit 3).

18. The Employer commenced an investigation into the circumstances surrounding the death of MH. Brochu and Grievant were placed on temporary relief from duty with pay on August 18 and 19, 2008, respectively, pending the completion of the investigation. Peter Canales, Chief of the Agency of Human Services Investigations Unit, was assigned to conduct the investigation. On August 26, 2008, Brochu resigned from employment (State's Exhibit 4, 5, 6).

19. The investigation conducted by Canales included review of a video recording of the AC area of NSCF on the evening of August 17 and morning of August 18, 2008. A review of the video recording indicates that Brochu did not conduct a majority of the required special observation checks on MH. The recording shows that, starting at 2:39 a.m., Grievant observed Brochu and Meyers sitting in front of the AC computer monitor watching non-work related material. At times, Grievant was able to see Meyers with his feet up on the AC counter and Brochu leaning back in his chair with his

hands behind his head. The video shows that Meyer and Brochu spent a substantial portion of the shift watching non-work related material on the computer (State's Exhibit 2).

20. During the period between 3:36 a.m. and 4:23 a.m., with a two minute interruption at 3:53 a.m. when Grievant went to his office adjacent to the AC area, the recording indicates that Grievant was standing at the AC desk where he could see that Brochu and Meyers were watching non-work related material on the computer. For much of this time, Grievant appears to be watching the computer screen along with Brochu and Meyers. During this period, Grievant was able to observe that Brochu did not do any of the required special observation checks on MH (State's Exhibit 2)

21. Brochu falsely indicated on the Special Observation Monitoring Sheet which he completed on MH for August 18, 2008, that he did the 15-minute checks at the following times during the early morning of August 18: 12:15, 12:30, 12:45, 1:00, 1:15, 1:30, 1:45, 2:00, 2:15, 2:30, 3:00, 3:15, 3:30, 3:45, 4:15, 4:30, 5:00, 5:15, 5:30, 5:45. Grievant was required by NSCF Post Order 403.00.89 to sign the Special Observation Monitoring Sheet completed on inmates at least once during a shift. Grievant signed off on the Special Observation Monitoring Sheet completed by Brochu on MH at 12:22 a.m., at which point Brochu had reported doing checks at 12:00 and 12:15 (State's Exhibits 1, 9, 18).

22. Grievant did not have notice prior to August 17, 2008, that Brochu had a problem with completing special observation checks, or that Brochu was falsely reporting the completion of the checks.

23. The shift supervisor's office at NSCF is adjacent to the AC area and has a window that looks out on the AC desk. At no time during the evening of August 17-18 did Grievant confront Brochu about the hours he spent watching non-work related material on the computer. Grievant also did not speak to Brochu about any missed observation checks on MH (State's Exhibit 20).

24. Canales interviewed Grievant on September 4, 2008, as part of his investigation. Grievant stated in the interview that it was a "normal practice" for Brochu to use the DOC computer during work hours for activities unrelated to his work duties, such as watching music sites and sport sites. Grievant identified YouTube as a "big favorite" of DOC staff on all the shifts. He stated that the use of the computer to watch non-work related material was activity that occurred on all shifts, seven days a week, 365 days a year. Grievant indicated that he did not address the issue of officers using computer for non-work purposes as long as it did not affect their performance, and the officer did the job when it needed to get done. He stated his practice in this regard was standard practice at the facility (State's Exhibit 8).

25. Canales sent an Investigation Report to the Department of Corrections Commissioner and Deputy Commissioner on October 6, 2008 (State's Exhibit 9).

26. Superintendent Michael Bellizzi sent a letter to Grievant dated October 31, 2008, which provided in pertinent part:

> As a result of your behavior described below, the Department of Corrections ("DOC") is contemplating serious disciplinary action up to your dismissal from the position of Correctional Facility Shift Supervisor ("CFSS"). . .
>
> This action is contemplated for the following reasons:

These charges are based on an October 6, 2008, Investigative Report by Peter Canales, Chief, AHS Investigations Unit, which is attached and may be consulted for additional information regarding the following charges.
. . .

II. Violations of Work Rules 1, 3 & 9, NCSF Post Order 403.00.89, State Personnel Policy 5.6, Gross Neglect, Gross Misconduct, and Conduct Jeopardizing Life or Health of an Offender – Failure to Enforce Compliance With Requirements for Special Observations on Offender MH:

You were the supervisor in charge of the Northern State Correctional Facility ("NSCF") on the night shift of August 17-18, 2008. Correctional Officer Phillip Brochu . . was assigned to the Admission Control ("AC") during that shift.

NSCF was responsible during that shift for conducting Special Observations at intervals not exceeding every fifteen (15) minutes on Offender MH. . .

During that shift, CO II Brochu's entries on the Special Observations Monitoring Sheet reflected that he conducted a special observation on Offender MH exactly every 15 minutes. However, the AC video shows that he rarely left the AC desk during the shift. . . it appears that CO II Brochu failed to conduct about two out of every three special observations on MH for which he was responsible.

The AC video shows that CO II Brochu spent much of the time on that shift watching things on his computer. Your supervisor's office was adjacent to the AC area, and you could observe CO II Brochu's movements and actions from your office. In addition, you were physically present in the AC area on a number of occasions during the shift.

In fact, between 0336 hours until 0423 hours, you spent about forty-seven (47) minutes standing by the AC desk. You were there for about 19 minutes initially, then went to your office for less than a minute, and then returned to the AC desk for about another 26 minutes. It appears that you were watching something on CO II Brochu's computer screen for a substantial part of that time. During that period of time, the video shows that CO II Brochu never left his desk to do a special observation on Offender MH despite the fact that such observations were due and MH was not visible in his cell. It appears that CO II Brochu should have conducted about three special observations during the time you were standing around his desk.
. . .
You . . indicated that you were aware that Offender MH was delusional, and that he had been "rambunctious" on your shift to the point that he injured his arm. You knew that MH was refusing to take his medication and that, given his medical condition, this could lead to a seizure. As such, you knew that, as the supervisor in charge, you needed to be prepared to arrange for transport of MH to the emergency room if necessary.

You knew or should have known that CO II Brochu had failed to conduct special observations on Offender MH for which he was responsible. You knew or should have known that CO II Brochu had falsified numerous entries on the Special Observations Monitoring Sheet he kept on Offender MH. You knew or should have known that, between about 0336 hours and 0423 hours, the time you spent almost continuously at the AC desk with CO II Brochu, that he never left his desk to conduct the three special observations that came due during that time. You obviously knew that, instead of conducting these checks, CO II Brochu was quite openly using the DOC computer at his desk for non-work-related activities.

It appears that you violated DOC Work Rules 1 & 9 and Personnel Policy 5.6, by failing to enforce Post Order 403.00.89 and failing to ensure that CO II Brochu was conducting special observations on Offender MH in accordance with DOC expectations, Directives and Procedures. It appears that you were grossly neglectful, committed gross misconduct, and jeopardized the health or safety of Offender MH in failing to do your job as a Shift Supervisor. It appears that you also violated your responsibility to act as a role model for subordinate officers.

III. Violation of Work Rules 1, 2 & 9, State Personnel Policies 5.6 & 11.7 – Excessive Personal Use DOC Computer as well as allowing CO II Brochu to Engage in Excessive Personal Use of DOC Computer:

You stated in your investigative interview that it was a “normal practice” for CO II Brochu to use the DOC computer during work hours for activities unrelated to his work duties. You identified YouTube as a “big favorite” of DOC staff, along with other music and sport sites. You said you don’t address the issue of officers using computer for non-work purposes as long as it doesn’t affect their performance. You said that personal use of the DOC computer occurs on all shifts, 7 days a week, 365 days a year. You made it clear that you expect staff to get their job done correctly and on time, and that you only allow personal use of the computer during times when other duties are done and during slow times. You claimed that other supervisors follow a similar practice.

Both DOC Work Rule 2 and Personnel Policy 5.6 state that employees are prohibited from using State equipment for their private use or any other use that doesn’t serve the public interest. Personnel Policy 11.7 states that Policy 5.6 has been interpreted to allow limited personal use of State telephones and that limited personal use of computers is also allowed. However, Policy 11.7 makes it clear that the personal use of computers must be truly limited and approved by management, and DOC has not approved the extensive personal use of computers in which CO II Brochu engaged on August 17-18, 2008.

It appears that you violated Work Rules 1, 2 & 9, as well as State Personnel Policies 5.6 and 11.7, by allowing CO II Brochu and other officers on a regular basis to engage in personal use of the DOC computers to an extent that greatly

> exceeds any reasonable interpretation of the limited personal use exception provided for by Policies 5.6 and 11.7. The job of a Corrections employee is <u>not</u> limited to whatever special observations or unit tours, etc., that are specifically required by DOC Directive, Post Orders, etc. The job of a Corrections employee also includes diligently observing the behavior of offenders in the units to which they are assigned. DOC employees are paid to watch the units – not to watch videos on the computer. With your training and experience, it is inexplicable that you would think otherwise.
>
> It also appears that you violated the same Work Rules and State policies yourself between about 0336 hours and 0423 hours, when you for extended periods of time ignored your job responsibilities and watched along with CO II Brochu whatever videos, etc., he had playing on the DOC computer at his desk.
>
> It appears that your conduct provides just cause for bypassing progressive discipline and for your dismissal.
>
> You must notify me within twenty-four (24) hours after receiving this letter whether you wish to respond to the above allegations. . .
> (State's Exhibit 10, Grievant's Exhibit 3)

27. On February 26, 2009, Bellizzi held a *Loudermill* meeting with Grievant and VSEA Representative Marty Raymond to allow Grievant to respond to the allegations. After the meeting, Bellizzi met with members of the staffing group of the Employer to discuss what discipline should be imposed on Grievant (State's Exhibit 13).

28. Superintendent Bellizzi sent a letter to Grievant dated April 2, 2009, which provided in pertinent part:

> This is to provide official notification of your disciplinary demotion to Correctional Officer I, effective Monday, April 6, 2009. . .
>
> The reasons for your demotion were outlined in the letter of October 31, 2008 . . ., and those reasons are incorporated herein by reference. One of the reasons for your demotion is your excessive personal use of the DOC computer. During the investigation, you stated that you believed it was acceptable for an officer to engage in personal use of the computer if (the officer) had done his checks, headcounts, etc., and had some "down time." I disagree with that interpretation of policy.
> . . .
> State Policy 11.7 makes it clear management may use its discretion to determine whether an employee may use computers for their personal use. Based on the

> facts of this case, I have determined that you will not be allowed to use the computers for personal use. Assuming you comply with this requirement for a year, I will review at that time whether to allow you the limited personal use of the computer that is outlined by Policy 11.7.
>
> You will be subject to discipline up to and including dismissal for future personal use of DOC computers in violation of this letter, for failing to discharge your responsibilities associated with checks on inmates, or for other misconduct or violation of DOC Work Rules.
> . . .
> (State's Exhibit 15, Grievant's Exhibit 4)

29. On April 2, 2009, after discussions with legal counsel, Bellizzi signed a document entitled "Twelve Factors" which contained an analysis supporting the decision to demote Grievant. The document stated that MH "died during the shift" in which Grievant was Shift Supervisor on August 17-18, 2008. The document later referred to "(t)he death of the inmate during CFSS Glover's shift". The evidence fails to clearly establish that MH died during the shift worked by Grievant (State's Exhibit 14).

30. In deciding to impose the disciplinary action of demotion on Grievant, Superintendent Bellizzi determined that Grievant violated rules, policies and post orders, and engaged in gross neglect of duty, gross misconduct and conduct that placed others in jeopardy by failing to ensure that Brochu conducted special observations on MH during his shift. Bellizzi also considered that Grievant violated work rules and policies by allowing Brochu to engage in extensive personal use of the DOC computer during the shift, and by ignoring his duties for an extended time while watching non-work related material on the computer. Bellizzi considered Grievant's past disciplinary record and performance history. He concluded that DOC management had lost confidence in Grievant's ability to perform at a satisfactory level as a supervisor. Bellizzi considered that the Employer had not previously encountered a case involving a supervisor engaging

in similar conduct. Bellizzi also determined that Grievant's offenses adversely impacted the reputation of the Employer because of media coverage resulting from MH's death. He decided that no sanction short of demotion to Correctional Officer I would adequately address Grievant's misconduct (State's Exhibit 14).

31. Superintendent Bellizzi was contacted by two prisoner rights and advocacy groups who were interested in seeing the August 17-18 video recording of the AC area. Bellizzi watched the video on three occasions with a representative of one of these groups, and discussed the matter with representatives of the two groups. He was embarrassed at the correctional employees' actions portrayed on the video.

32. The Employer has dismissed correctional officers for failing to conduct observation checks and falsifying the recording of observations. Grievance of Ducas, 28 VLRB 238 (2006).

33. The processing of the Step II and III grievances filed in this matter were delayed in part by agreement of the parties.

OPINION

The issue before us is whether the Employer violated Articles 5 and 14 of the Contract by demoting Grievant from his shift supervisor position to a Correctional Officer I position.[1]

[1] Grievant asserted in his grievance filed with the Board and in his post-hearing brief that the decisions issued at the earlier steps of the grievance procedure, Steps II and III, were issued in an untimely manner. However, Grievant cited no provision of the contract which he alleged was violated by this action. Since Section 18.3 of Board *Rules of Practice* requires that a grievance must contain specific references to the pertinent section or sections of the collective bargaining agreement which are alleged to be violated, we decline to consider this issue.

We first address Grievant's contention made in his grievance filed with the Board that the Employer violated Article 5 of the Contract by demoting him in retaliation for his complaint and grievance activities. Grievant alleged in his grievance that the Employer violated Article 5 because he was demoted in retaliation for his criticism of NCSF operations.

In cases where an employee claims that the employer took action against him or her for engaging in protected activities, the Board has determined that it will employ the analysis used by the United States Supreme Court: once the employee has demonstrated his or her conduct was protected, she or he must then show the conduct was a motivating factor in the decision to take action against him or her. Then the burden shifts to the employer to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct.[2] This so-called *Mt. Healthy* analysis has been employed by the VLRB in protected activity grievance cases involving filing of complaints and grievances.[3] The Vermont Supreme Court has approved use of such analysis.[4]

It is unclear whether Grievant is continuing to assert his claim that Article 5 of the Contract was violated since he did not address this issue in his post-hearing brief. In any event, Grievant has not presented evidence supporting a violation of this article.

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[2] Grievance of Sypher, 5 VLRB 102 (1982). Mt. Healthy School District Board of Education v. Doyle, 429 U.S. 274 (1977). Grievance of McCort, (Unpublished decision, Supreme Ct. Docket No. 93-237, 1994).
[3] Grievances of Cray, 25 VLRB 194 (2002); *Affirmed*, Sup.Ct. Dock. No. 2002-538 (November 6, 2003); Grievance of Brewster, 23 VLRB 314 (2000); Grievance of Cronin, 6 VLRB 37 (1983); Grievances of McCort, 16 VLRB 70 (1993), *Affirmed*, (Unpublished decision, Sup.Ct. Dock. No. 93-237, 1994); Grievance of Day, 16 VLRB 312 (1993); Grievance of Danforth, 22 VLRB 220 (1999), *Affirmed*, 172 Vt. 530 (2001); Grievance of Greenia, 22 VLRB 336 (1999).
[4] Grievance of Cronin, (Unpublished decision, February 4, 1987); Morrissey, 149 Vt. 1 (1987); McCort, supra; Grievance of Robins, 169 Vt. 377 (1999).

"Complaint" has a specific meaning under the Contract. Article 15 of the Contract defines a complaint as "an employee's . . . informal expression to the immediate supervisor of dissatisfaction with aspects of working employment or working conditions under a collective bargaining agreement that are clearly identified to the supervisor as a grievance complaint". "Grievance" also has a specific meaning under the Contract. Article 15 defines a grievance as "an employee's . . . expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under a collective bargaining agreement or the discriminatory application of a rule or regulation."

Grievant has not presented evidence that he was engaged in complaint or grievance activities as defined by the Contract which could have formed a basis for the Employer to retaliate against Grievant. His claim of retaliation against him for criticism of NCSF operations is not supported by evidence that he presented complaints and grievances as defined by the Contract over such matters.

Evidence was presented indicating that a number of employees, including Grievant, approached a VSEA Steward in 2007 to express concern that Superintendent Bellizzi was requesting employees to join the audit team without compensation. The VSEA Steward spoke to Bellizzi about the issue, but did not inform Bellizzi which employees had spoken to him about the issue. No subsequent complaint or grievance was filed under the Contract on the issue. Given the lack of a complaint or grievance filed under the Contract, and absent evidence that Bellizzi was aware Grievant had spoken to the VSEA Steward on this issue, we conclude that Grievant's claim of retaliation for engaging in protected complaint and grievance activities is not supported by the evidence on this issue.

Grievant next contends that the Employer violated Article 14 of the Contract because he was disciplined without just cause, and the Employer improperly bypassed progressive discipline. To establish just cause for discipline, it is necessary for the Employer to show that disciplining the employee for certain conduct is reasonable; and the employee had fair notice, express or implied, that such conduct would be grounds for discipline.[5] On the issue of fair notice, the ultimate question is whether the employee knew, or should have known, the conduct was prohibited.[6]

The burden of proof on all issues of fact required to establish just cause is on the employer, and that burden must be met by a preponderance of the evidence.[7] Once the underlying facts have been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven facts.[8]

The Employer first charges Grievant with violating Department of Corrections Work Rules No. 1 and 9, and Personnel Policy 5.6, by failing to enforce Post Order 403.00,89, and failing to ensure that Correctional Officer II Brochu was conducting special observations on offender MH in accordance with expectations, directives and procedures. The Employer contends that Grievant was grossly neglectful, committed gross misconduct, and jeopardized the life or health of MH in failing to do his job as shift supervisor. The Employer further asserts that Grievant violated his responsibility to act as a role model for subordinate officers.

We conclude that the Employer has established this charge by a preponderance of the evidence. The evidence establishes that Grievant stood in the AC area observing

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[5] In re Grievance of Brooks, 135 Vt. 563, 568 (1977). Grievance of Nunes, 20 VLRB 282, 290 (1997).
[6] Brooks, 135 Vt. at 568. Grievance of Towle, 164 Vt. 145 (1995).
[7] Grievance of Colleran and Britt, 6 VLRB 235, 265 (1983).
[8] Id. at 266.

Brochu at the AC desk failing to do required special observations checks on MH, at staggered intervals not to exceed every fifteen minutes, while watching non-work related material on the computer. During one 47 minute period, Grievant stood by and watched Brochu miss a minimum of two checks. At no time during the shift did Grievant confront Brochu about the time he spent watching non-work related material on the computer. Grievant also did not speak to Brochu about missed observation checks on MH.

In so doing, Grievant violated Post Order 403.00.89 which required him to ensure that employees were following their post orders and that special observation sheets were checked for timeliness and accuracy, and also required him to address staff misconduct issues appropriately. He also violated Work Rule No. 1 which prohibits employees from violating post orders. His neglect of his supervisory duties brought discredit on the Employer, and he thereby violated Work Rule 9 and Personnel Policy 5.6.

The Employer also has established that Grievant was grossly neglectful, committed gross misconduct, and jeopardized the life or health of MH in failing to do his job as shift supervisor. Grievant put MH's health or life at risk by failing to take any action as Brochu missed multiple observation checks on an inmate whom Grievant knew was suffering from alcohol withdrawal. This was gross neglect of duty and gross misconduct under the circumstances. It also constituted, as charged, violation of Grievant's responsibility to act as a role model for subordinate officers. This is because he inappropriately gave tacit permission to Brochu to engage in serious neglect of duties by failing his duty as a supervisor to confront Brochu on his misconduct.

The Employer also charges Grievant with violating Work Rules No. 1, 2 and 9, and Personnel Policies 5.6 and 11.7 by allowing Brochu to engage in excessive personal

use of the work computer, and by engaging in excessive personal use of the computer himself. We conclude that the Employer has established this charge by a preponderance of the evidence. The evidence establishes that Brochu spent a substantial portion of his shift watching non-work related material on the computer, and that Grievant observed Brochu engage in personal use of the computer for an excessive amount of time. The evidence also establishes that Grievant watched non-work related material on the computer for approximately 45 minutes during the shift, also constituting excessive personal use of the work computer.

The policies and work rules cited by the Employer generally permit a limited degree of personal use of a work computer when it does not interfere with an employee's performance of duties. Grievant violated these policies and work rules by allowing Brochu to engage in excessive personal use of the work computer accompanied by non-performance of duties. He further violated these policies and work rules by himself engaging in excessive personal use of the computer instead of preventing Brochu from doing so.

The charges against Grievant having been proven, we look to the factors articulated in Colleran and Britt[9] to determine whether the proven charge justifies a disciplinary demotion. The pertinent factors here are: 1) the nature and seriousness of the offense and its relation to Grievant's duties, 2) the employee's job level and type of employment, including supervisory role, 3) the clarity with which Grievant was on notice of the prohibited conduct, 4) Grievant's past disciplinary record, 5) Grievant's past work record, 6) the effect of the offense upon supervisors' confidence in Grievant's ability to perform assigned duties, 7) the consistency of the penalty with those imposed on other

[9] 6 VLRB at 268-69.

employees for the same or similar offenses, 8) the impact of the offense upon the reputation of the Employer, 9) the potential for Grievant's rehabilitation, and 10) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Grievant's misconduct was serious. The Board has held that failure to do proper special observation checks constitutes a "serious neglect of duties that places in jeopardy both the life and health of offenders.[10] Grievant engaged in gross neglect of his supervisory duties and gross misconduct by failing to take any action as Brochu missed multiple observation checks on an inmate whom Grievant knew was suffering from alcohol withdrawal. His actions placed in jeopardy the life or health of an inmate who had a serious medical condition which required frequent observation checks.

Grievant correctly points out that the evidence does not establish that MH died on Grievant's shift and also does not establish that Grievant caused MH's death. However, the fact that MH died is not the basis for the charges of Grievant's misconduct. Grievant's misconduct was discovered as a result of the inmate's death, but was not dependent on it.

Grievant also committed serious misconduct by allowing Brochu to engage in excessive personal use of the work computer accompanied by non-performance of duties, and by engaging in excessive personal use of the computer himself instead of preventing Brochu from doing so. Grievant violated his responsibilities to properly supervise Brochu and act as a role model for subordinate officers through this offense.

Grievant seeks to minimize his deficiencies related to excessive personal use of work computers by asserting that it was standard practice at NSCF to use work computers for non-work related activities. This claim by Grievant fails by failure to demonstrate that

[10] Grievance of Ducas, 28 VLRB 238, 256 (2006).

the extent of personal use exhibited by Brochu and him during the shift in question was typical at NSCF. The applicable policies permit a limited degree of personal use of a work computer when it does not interfere with an employee's performance of duties. Grievant has not demonstrated that the standard practice at NSCF went beyond this limited personal use.

Grievant had fair notice as an experienced and trained supervisor that his conduct was prohibited. Grievant received extensive training on suicide prevention and importance of doing observation checks on inmates. He also was aware that he was responsible for enforcing and complying with the policies and procedures that were violated here.

Grievant's past disciplinary record and work record at the time discipline was imposed operates in his favor. Although he had past disciplinary actions, he had not been disciplined in the previous 15 years. His work record was good since he consistently received excellent performance evaluations during the preceding ten years.

Nonetheless, Grievant's serious offenses reasonably caused his supervisors to lose confidence in Grievant's ability to perform at a satisfactory level as a supervisor. Protecting the health and safety of offenders in the Employer's custody is a critical responsibility of correctional officers and supervisors. Given his knowledge of MH's medical condition and his interactions with MH that evening, Grievant should have been aware of the importance of performing observation checks on him. However, instead of ensuring that Brochu properly performed checks, Grievant neglected his supervisory responsibilities in this regard. Further, Grievant ignored Brochu's disregard of policies on

use of computers and then joined him in excessive personal use of the work computer while an inmate requiring frequent observation was left unattended.

Grievant has failed to show that he was treated inconsistently with other supervisors committing similar offenses. He has not presented evidence of any other supervisors whom were treated more leniently than he was for engaging in similar misconduct. In fact, there is no evidence of a supervisor engaging in similar misconduct.

Also, Grievant's offenses adversely impacted the Employer's reputation. Prisoner rights and advocacy groups watched the video recording showing the misconduct of Grievant and Brochu. Their actions were embarrassing to the Employer and harmed its reputation.

Grievant has not demonstrated that he is a good candidate for rehabilitation as a supervisor due to his ongoing failure to take responsibility for his misconduct. Grievant contends that the Employer inappropriately bypassed progressive discipline. We disagree. Grievant engaged in serious misconduct jeopardizing the life or health of an offender and demonstrated gross neglect of his duties as a supervisor. The Employer reasonably concluded under the circumstances that alternative sanctions to demotion were not adequate or effective to deter such misconduct by Grievant in the future. In sum, just cause existed for the disciplinary demotion of Grievant.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of Clint Glover in Docket No. 10-46 is dismissed.

Dated this 12th day of August, 2011, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
Richard W. Park, Chairperson

_____
James C. Kiehle

_____
Gary F. Karnedy