VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 10-28
TODD ABEL	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 23, 2010, Todd Abel ("Grievant") filed a grievance with the Vermont Labor Relations Board, 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 Corrections Bargaining Unit effective July 1, 2008 to June 30, 2010 ("Contract") by dismissing him from employment as a Correctional Officer I. Specifically, Grievant alleged that the Employer violated Articles 5, 14, 15 and 17 of the Contract because: 1) the dismissal was in retaliation for Grievant's complaint and grievance activity, 2) the dismissal was not based on fact or supported by just cause, 3) the Employer improperly bypassed progressive discipline and progressive corrective action, 4) the Employer failed to apply discipline with a view toward uniformity and consistency, 5) the Employer failed to impose discipline within a reasonable time of the alleged offense, 6) the dismissal decision constituted a discriminatory application of rules and regulations, and 7) the Employer's application of work rules to him was unreasonable.

A hearing was held in the Labor Relations Board hearing room in Montpelier on June 2, 2011, before Board Members Richard Park, Chairperson; Gary Karnedy and Louis Lacroix. Assistant Attorney General Kurt Kuehl represented the Employer.

Grievant represented himself. Grievant and the Employer filed post-hearing briefs on June 20 and 23, 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 . . .

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.

    . . .

    f. The parties agree that there are appropriate cases that may warrant the State:
        (1) bypassing progressive discipline . . .

. . .

2. The appointing authority or authorized representative . . . may dismiss an employee for just cause with two (2) weeks' notice or two (2) weeks' pay in lieu of notice. . .

. . .

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:

    . . .

    (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.

. . .

(State's Exhibit 16

2. Grievant was a permanent status corrections officer at Northern State Correctional Facility ("NSCF") in Newport, Vermont, from 1999 until he was dismissed on June 24, 2010. At the time of his dismissal, he was a Correctional Officer I (State's Exhibit 12).

3. Grievant certified on August 9 and 19, 1999, that he read and fully understood the Department of Corrections Work Rules. The Work Rules did not change from 1999 to Grievant's dismissal (State's Exhibits 13 and 14).

4. Grievant received training on the appropriate use of force at the Vermont Correctional Academy when he began employment as a correctional officer. During his employment, he received training on advanced communication techniques ("ACT") and advanced physical control techniques. The training emphasized the use of verbal communication skills rather than resorting to the use of force when interacting with inmates (State's Exhibit 6).

5. Grievant received overall performance ratings of "satisfactory" on each of the performance evaluations he had received during his tenure of employment. The annual performance evaluation Grievant received covering the period April 24, 2004 through April 24, 2005, included the following provisions:

. . .
SUPERVISOR COMMENTS: . . . Todd has also been given feedback regarding his behavior with offenders. The appropriateness of some of Mr. Abel's behavior has been questioned in more than one situation. I would challenge Officer Abel within the next rating period to practice the ACT skills trained by the department and to follow professional standards by not engaging in any activity that could be perceived as inappropriate or horseplay.
. . .
PERFORMANCE EXPECTATIONS FOR THE NEXT EVALUATION PERIOD
(Identify any changes or additions to employee's job duties or performance expectations for the next rating period)
. . . Officer Abel's performance does concern me in his relationships he established with some offenders. When starting a new position or post, Todd seems to be on top of what is expected of a correctional professional, but as time goes by Todd's relationships with offenders becomes questionable and may border on inappropriate. In the next rating period Todd will need to follow his post orders and keep offenders accountable to the facility handbook. I would also expect during the next rating period that officer Abel role models and communicate to offenders by using the standards set forth by ACT. I would challenge Todd to maintain the department's professional standards at all times.
. . .
(State's Exhibits 11, 19)

6. On November 8, 2006, Grievant, VSEA and the Employer entered into a Stipulation and Agreement. It provided in pertinent part:

1. The parties agree that Abel shall receive a disciplinary suspension of 15 days . . .

2. If no further violations of DOC Work Rules occur prior to November 1, 2011, the letter of suspension shall at Abel's request by removed from his official personnel file;

3. The parties agree that DOC shall place the attached letter in Abel's official personnel file indicating that he has received a fifteen work day disciplinary suspension for misconduct and the reasons for misconduct and the reasons for that suspension. Abel and VSEA agree that there is just cause for imposition of this 15 day disciplinary suspension . . .
. . .
(State's Exhibit 20)

7. Attached to the Stipulation and Agreement was a letter from NSCF Superintendent Stuart Gladding to Grievant which provided in pertinent part:

> This letter is to document that you have received a 15 day disciplinary suspension. The reason for this suspension is that you violated DOC Work Rule #13 as it relates to maintaining appropriate boundaries in your interactions with inmates. . .
>
> It is fundamental to your ability to perform the duties of a Correctional Officer that you maintain a level of courtesy with inmates while avoiding behavior which gives the appearance of a special relationship with the inmate. You have been counseled many times in the past about interactions with inmates that involve pushing, shoving, punching, and other "horseplay". This will absolutely not be tolerated in the future.
>
> Although I do not expect any of this behavior to be repeated, please understand that if you engage in any actions of a similar nature in the future, you may be subject to disciplinary action, up to and including dismissal.
> (State's Exhibit 21)

8. On May 8, 2009, NSCF Superintendent Michael Bellizzi provided Grievant with a letter of supervisory feedback. It stated in pertinent part:

> . . . (T)here are a number of issues that I need to address with you. I am therefore providing you with Supervisory Feedback on those issues.
>
> First of all, touching or striking offenders with a flashlight is prohibited by Work Rule #6. It is prohibited no matter how it is done. It does not matter whether an offender was touched with a little force or a lot of force. It does not matter whether it was done just joking or horsing around or with the intent to hurt the offender. You are not authorized to touch offenders unless you are engaged in a use of force that is authorized by DOC policy.
> . . .
> You will be subject to disciplinary action up to and including dismissal for future violations of DOC Work Rule #6 or any other Work Rule. On November 2, 2006, you signed an agreement with DOC providing for your suspension without pay for a period of fifteen (15) workdays. Your suspension letter provided you with clear notice that interactions with offenders that involved pushing, shoving, punching, and other horseplay "absolutely will not be tolerated in the future." You will be subject to disciplinary action up and including dismissal for engaging in horseplay with offenders. . .
> (State's Exhibit 21)

9. Grievant and other correctional officers were trained that inmates will try to manipulate staff and that officers should not allow this to happen. The risk of manipulation is a significant reason why the Employer prohibits officers engaging in

horseplay with offenders; that inmates may try to use an officer's use of horseplay against them to gain something they want or avoid undesirable action taken against them.

10. Also, engaging in horseplay or other inappropriate use of force against an inmate in an open area of a correctional facility unit can place an unarmed and solitary officer at an unnecessary risk of engaging in physical altercation with many inmates. Often, an unarmed, solitary officer will be in an open area containing many inmates. Horseplay, or the reaction to it as something other than horseplay, could provoke a situation seriously endangering the life or health of the officer and/or inmates.

11. Grievant was a VSEA Steward. In this role, he made complaints to management on behalf of other correctional officers. There was an instance in which Grievant filed a complaint on behalf of an officer alleging that the officer's shift bidding may have been affected because he did not know of a vacancy. As a result of the complaint, the Employer reopened the shift bidding process so that the officer could submit his shift bid again.

12. On December 31, 2009, Grievant moved inmates Michael Haines and Jessie Beeshaw from the CA Unit at NSCF to another unit to investigate whether they had stolen property from another inmate in the CA Unit. When Grievant informed Haines that he was moving him to another unit, Haines mentioned to Grievant that Grievant had sexually assaulted him a few days earlier and that this would be brought up at the investigation. Grievant then completed a facility report form setting forth the allegation made by Haines, and stating that "the allegations are false". Grievant gave the completed form to Scott Morley, the NSCF Security and Operations Supervisor (State's Exhibit 1).

13. After receiving the report, Morley investigated the allegation made by Haines. Morley interviewed Haines who indicated that Grievant had "bag-tagged" him, which he described as Grievant striking him in the testicles with the back of his hand. Haines told Morley that inmates Stephen Green and Jesse Beshaw had witnessed Grievant's action. Morley then separately interviewed Green and Beshaw. Both indicated that Grievant had hit Haines in the groin area with the back of his hand.

14. On January 4, 2010, Morley sent a memorandum to NSCF Superintendent Jay Simons. The memorandum provided in pertinent part:

> . . .
> Essentially Officer Abel accuses Inmate Michael Haines of making a false allegation that he sexually assaulted him. This prompted me to have a discussion with Inmate Haines. Inmate Haines reports to me that Officer Abel physically assaulted him by hitting him in the groin area. He calls it a "bag tag". Inmate Haines also states that Inmates Green and Beshaw were witnesses to this incident. I have now also discussed the situation with both potential witnesses. They both report similar stories.
>
> I have pressed all three for details of date and time. None of the three seem to be able to inform me of the exact date and time. From what the three of them report it seems the timeline is about 1 week ago in the CA Unit between 10:00 headcount and lunch. They all report the incident took place near cell CA33 "bottom tier left".
> (State's Exhibit 2)

15. January 4, 2010, was Simons's first day as NSCF Superintendent. Superintendent Simons reported the allegation by Haines to Robert Kupec, the Department of Corrections Facilities Executive. Simons also began an investigation of the allegation. He instructed NSCF staff to review facility surveillance video of the CA Unit where Grievant worked and the inmates had indicated the incident occurred. Subsequently, staff directed Superintendent Simons to video recorded on December 19, 2009, which they thought showed the incident alleged by Haines (State's Exhibit 3).

16. By letter dated January 13, 2010, Superintendent Simons informed Grievant that he was temporarily relieved from duty with pay for up to 30 workdays to permit the Agency of Human Services Investigations Unit ("AHSIU") to conduct an investigation into whether Grievant committed misconduct by his interactions with Haines on or about December 19, 2009 (State's Exhibit 7).

17. AHSIU Chief Peter Canales conducted the investigation. Canales interviewed Grievant on January 20, 2010. During the interview, Grievant told Canales that he had used vulgar language with inmates. Grievant agreed that it was not appropriate to use force or put his hands on an offender if there is not an imminent threat of danger or harm to himself or someone else. He further agreed that it is appropriate to strike an offender only during a legitimate use of force. Grievant stated that he did not recall whether he struck Haines in the genital area or engaged in horseplay with him. Grievant indicated that it was possible he engaged in horseplay with Haines (Grievant's Exhibit H, State's Exhibit 8).

18. Canales reviewed the December 19, 2009, video, with Grievant during the January 20 interview. When Grievant watched the video, he stated that the inmate shown on the video was not Haines because the inmate on the video had facial hair and Haines does not have facial hair. Grievant told Canales that he did not remember any of the incident shown on the video, and indicated that he could have been trying to retrieve a gambling ledger (Grievant's Exhibit H, State's Exhibit 8).

19. Canales separately interviewed inmates Haines, Green and Beshaw on January 29, 2010. Haines told Canales that Grievant struck him in the testicles with the back of his hand while he was standing in the day room on the lower level of the CA

Unit, and that this had caused him pain. The inmate shown on the December 19 video was sitting in a chair when Grievant interacted with him (Grievant's Exhibit H, State's Exhibit 8).

20. Green indicated in his January 29 interview with Canales that Grievant had made a tapping motion with the back of his hand towards Haines's groin area. Green indicated that he could not say whether Grievant hit Haines, but that it appeared that he did due to the bodily movement made by Haines. Beshaw told Canales that Grievant hit Haines with the back of his hand in the testicles (Grievant's Exhibit H, State's Exhibit 8).

21. As a result of Canales's interviewing of witnesses and a discussion Canales had with Morley and Superintendent Simons, it was determined that Grievant's interaction with the inmate shown on the December 19 video was not the incident complained about by Haines. Canales sent a February 1, 2010, e-mail to Marty Raymond, Grievant's VSEA representative, informing him of this determination, and stating: "Based on this information it seems as though there are two separate incidents in which CO Abel, unprovoked, struck an offender in the groin area." Canales indicated that he would like to meet again with Abel (State's Exhibit 9).

22. Canales had a second interview with Grievant on February 5, 2010. Raymond was present to represent Grievant. Grievant indicated that he could not remember if he struck Haines or the unidentified offender in the December 19 video in the groin area. Grievant told Canales that it was "bad" of him to place his hand on the inmate's shoulder shown in the video because he should not touch offenders. Grievant told Canales that he could not remember much from the beginning of December to the middle of January which he attributed to taking the medication Chantix prescribed by his

physician to assist him to stop smoking. Canales asked Raymond to provide him with medical records in connection with Grievant being prescribed Chantix (State's Exhibit 8).

23. Raymond provided Canales with a memorandum dated February 15, 2010, from a physician's assistant at Orleans Family Medicine, providing:

> Todd Abel was prescribed Chantix on 12/14/2009 to assist with smoking cessation. Mr. Abel reports that he discontinued this medication 01/15/2010 because of side effects including confusion, short term memory loss, and mood changes. Neuropsychiatric side effects have been reported in patients taking Chantix. These side effects are noted in the official Chantix web site www.chantix.com.
> (Grievant's Exhibit E)

24. Canales submitted his investigation report to the Department of Corrections Commissioner and Deputy Commissioner on February 23, 2010. There was a meeting of Department of Corrections management and Agency of Human Services human resources staff on March 3, 2010, to discuss what action to take based on the investigation. It was determined at the meeting that Superintendent Simons would interview NCSF facility staff and inmates, and further review the December 19, 2009, video to determine the identity of the inmate in the video (State's Exhibit 8).

25. Subsequent to the March 3 meeting, Simons viewed the December 19, 2009, video with staff and inmates, and spoke with inmates and staff to attempt to identify the inmate on the video. These attempts were unsuccessful.

26. There was a meeting of Department of Corrections management and Agency of Human Services human resources staff in early May to discuss whether to take disciplinary action against Grievant. Subsequently, Superintendent Simons sent a letter to Grievant dated May 10, 2010, which provided in pertinent part:

As a result of your behavior described below, the Department of Corrections ("DOC") is contemplating a serious disciplinary action up to your dismissal from the position of Correctional Officer I. . ..

This action is contemplated for the following reasons:

These charges are based on a February 23, 2010, Investigative Report by Peter Canales, AHS Investigations Unit Chief, which is attached and is fully incorporated herein and may be consulted for additional information regarding the charges. A supplemental investigation report dated April 30, 2010, that I prepared is also attached.

I. Relevant Sections of DOC Directives, DOC Work Rules, State Policies and State Statutes:

A. DOC Work Rules:

DOC Work Rules provide, in relevant part:

> **Work Rule #1:**
> No employee shall violate any provision of the collective bargaining agreement or any State or Department work rule, policy, procedure, directive, local work rule or post order.
>
> **Work Rule #6:**
> No employee shall . . . engage in verbal or physical behavior . . . which is malicious, demeaning, harassing or insulting. Such behaviors include . . . treating inmates in a demeaning manner with no legitimate rehabilitative justification. No employee shall exhibit behaviors which are physically or mentally abusive towards offenders.
>
> **Work Rule #9:**
> No employee, whether on or off duty, shall comport himself or herself in a manner that reflects discredit on the Department.
>
> **Work Rule #10:**
> No employee, whether on or off duty, shall violate any law or ordinance. Any conduct constituting a felony or misdemeanor can be the basis for disciplinary action whether or not prosecution or conviction results. A formal adjudication of felonious or misdemeanant behavior is not necessary before a decision to discipline is made.

B. **DOC Directive 413.01**, the Department's "A" Directive regarding Use of Force, states in relevant part:

PROCEDURAL GUIDELINES

1. Conflict Resolution: Conflict shall be resolved at the **<u>lowest level of intervention</u>** compatible with the safety of staff, the public, inmates and the need to maintain order. **Physical force shall only be used when alternatives to physical force have proven inadequate or the emergent situation does not provide the time or opportunity** . . .

3. <u>Prohibitions on the Use of Force</u>
a. Staff shall not use force prior to employing non-physical alternatives, except in an emergent situation . . .
c. **Staff shall not use or permit the use of force as punishment or discipline.**
(emphasis added)

C. **State Policy 5.6** provides, in relevant part:
Required Conduct . . .
3. Employees shall conduct themselves in a manner that will bring discredit or embarrassment to the State of Vermont, whether on or off duty.

D. **Article 14, Section 3 of the Corrections Unit Agreement** provides that an employee may be dismissed ". . . immediately without 2 weeks' notice or 2 weeks' pay in lieu of notice for . . . (e) conduct which places in jeopardy the . . . health of a . . . person under the employee's care.

E. **Vermont Statutes:**

13 V.S.A. § 1021. Definitions
For the purposes of this chapter:
(1) "Bodily injury" means physical pain, illness or any impairment of physical condition.

13 V.S.A. § 1023. Simple assault
(a) A person is guilty of simple assault if he or she:
(1) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; . . .
(b) A person who is convicted of simple assault shall be imprisoned for not more than one year or fined not more than $1,000.00, or both, unless the offense is committed in a fight or scuffle entered into by mutual consent, in which case a person convicted of simple assault shall be imprisoned not more than 60 days or fined not more than $500.00 or both.

II. Violation of DOC Work Rules 1, 6, 9 & 10, State Personnel Policy 5.6, DOC Directive 413.01 and 13 V.S.A. 1023, Conduct Jeopardizing Life or Health of an Offender – Inappropriate Horseplay and/or Use of Force re: Offender MH:

. . .

The preponderance of the evidence appears to establish that you struck and/or touched MH in his groin with the back of your hand in the CA Unit at some time in late December, 2009, causing him physical pain. The evidence also appears to establish that you have engaged in a course of conduct that involves repeated instances of both using profane and inappropriate language with offenders and repeated instances of engaging in horse play with them. Given your claimed failures of memory, it appears that you do not directly deny or dispute the evidence provided by the offenders. In fact, you admit that it was possible that you engaged in horse play with Offender MH.

You appear to have violated 13 V.S.A. 1023, and to have committed a Simple Assault against Offender MH, and thereby violated DOC Work Rule #10, by striking and/or touching him in a manner that caused him physical pain. You appear to have violated DOC Work Rule #6 & #9 and State Personnel Policy 5.6, by engaging in behavior that was demeaning, harassing or insulting to MH, and that embarrassed and reflected discredit on DOC and the State. You admit to knowing that you are prohibited from touching offenders unless doing so is authorized as a use of force by DOC Directive 413.01. You appear to have violated DOC Directive 413.01 and Work Rules #1 and #6 by striking and/or touching Offender MH when no touching or use of force had any rehabilitative justification or was an authorized use of force. You also violated DOC Work Rule #6 by making the derogatory and abusive/vulgar comments MH attributed to you. It also appears that your actions jeopardized the life or health of Offender MH when you struck or touched him in the groin.

III. Violation of DOC Work Rules 1, 6 & 9, State Personnel Policy 5.6, and DOC Directive 413.01 – Inappropriate Horseplay and/or Striking/Touching or Attempting to Strike/Touch an Offender in his Lap Area on December 19, 2009:

. . .

The preponderance of the evidence appears to establish that you engaged in inappropriate actions toward an unknown offender on December 19, 2009. It appears clear that you placed your right hand on the neck or shoulder of the offender and in so doing violated DOC Directive 413.01 and Work Rules #1, #6 & #9, as well as State Personnel Policy 5.6, by touching the offender in a situation where no use of force was authorized or justified. In your second investigative interview, you indicated that placing your hand on the shoulder of the offender was “bad on (your) behalf” because you know you should not touch offenders.

It also appears that you acted inappropriately by striking or touching the offender in the area of his lap, or attempting to do so. It appears that the video shows another incident of horseplay between you and the offender. It appears that your actions in the video violated DOC Work Rules #1, #6 & #9, State Personnel Policy 5.6, and DOC Directive 413.01, by striking or touching, or attempting to strike or touch the offender in the area of his lap, where there was no legitimate justification for those actions. It appears you violated Work Rule 6 by engaging in demeaning, harassing or insulting horse play actions toward the offender and violated Work Rule #9 and State Personnel Policy 5.6 by engaging in actions that embarrassed and reflected discredit on the State and DOC.

IV. Conclusion:

It appears that your conduct provides just cause for a disciplinary action up to and including dismissal. On November 2, 2006, you entered into an Agreement with DOC providing for you to be suspended without pay for a period of fifteen (15) workdays. Your suspension letter provided you with clear notice that interactions with offenders that involved pushing, shoving, punching, and other horseplay "absolutely will not be tolerated in the future." In addition, you received Supervisory Feedback in May, 2009, in which you were reminded of DOC's expectations for your behavior, including the prohibition regarding touching offenders except during a legitimate use of force and the prohibition against using inappropriate language toward offenders.

IV. Process:

You must notify me within twenty-four (24) hours after receiving this letter whether you wish to respond to the above allegations. You must also then indicate whether you wish to respond in writing or orally in a meeting. . . (State's Exhibit 10, Grievant's Exhibit B)

27. The May 10, 2010, letter accurately set forth the provisions of the Contract, statutes, DOC Work Rules, DOC Directive and State Personnel Policy cited in the letter (State's Exhibits 4, 13, 14, 15, 16, 17, 18).

28. Pursuant to the May 10 letter, Superintendent Simons held a Loudermill meeting with Grievant and VSEA Representative Raymond on May 20, 2010. Thereafter, there was another meeting of Department of Corrections management and Agency of Human Services human resources staff to determine what action to take.

29. Superintendent Simons sent Grievant a letter dated June 24, 2010, providing in pertinent part: “This is to notify you of your dismissal from the position of Correctional Officer I, effective Thursday, June 24, 2010, for gross misconduct. You will not receive two weeks pay in lieu of two weeks notice. . . The reasons for this action are those that are outlined in the above-referenced letter of May 10, 2010 . . . which are incorporated herein by reference. . .” (State’s Exhibit 12)

30. In dismissing Grievant, Superintendent Simons determined that Grievant had engaged in very serious offenses that went to the heart of his duties as a Correctional Officer I by engaging in horseplay on two separate occasions by striking, or attempting to strike, two different offenders in the groin with his hand. He concluded that the seriousness of Grievant’s actions were exacerbated because he received prior serious disciplines and warnings for similar horseplay misconduct, including the 15 day suspension he previously received. Simons took into account that Grievant had received overall performance ratings of “satisfactory” on each of the performance evaluations he had received during his tenure of employment. He concluded that Grievant’s actions had destroyed the trust of Grievant’s supervisors that he would adhere to work rules, directives and procedures, and that he would maintain appropriate relationships with offenders. Simons determined that Grievant had clear notice from work rules, policies, his 15 day suspension, and supervisory feedback that his actions were prohibited. He concluded that there was no potential for Grievant’s rehabilitation given his repeated failure to comply with training and directives. Simons determined that Grievant had not produced medical evidence on his use of Chantix to provide a reasonable basis upon which to excuse his behavior (State’s Exhibit 11).

31. We conclude by a preponderance of the evidence that Grievant struck and/or touched inmate Michael Haines in the groin with the back of his hand in the CA Unit at some time in late December, 2009. The Employer has not established by a preponderance of the evidence that this caused Haines physical pain. We further conclude by a preponderance of the evidence that Grievant used profane and inappropriate language with offenders on repeated instances.

32. We conclude by a preponderance of the evidence that Grievant placed his hand on the neck or shoulder of an unknown offender on December 19, 2009, when this was not authorized or justified. The Employer has not established by a preponderance of the evidence that Grievant struck or touched this offender in the area of his lap, or attempted to do so.

33. Grievant was a VSEA member and VSEA Steward. He filed grievances on behalf of NSCF employees in his role as Steward. At the time he dismissed Grievant, Superintendent Simons was not aware that Grievant was a VSEA member and VSEA Steward, or that he had filed grievances on behalf of employees, at the time he dismissed Grievant.

34. Morley did not participate in the decision to dismiss Grievant.

OPINION

Grievant contends that the Employer violated Articles 5, 14, 15 and 17 of the Contract in dismissing him from employment because: 1) the dismissal was in retaliation for Grievant's complaint and grievance activity, 2) the Employer failed to impose discipline within a reasonable time of the alleged offense 3) the dismissal was not based

on fact or supported by just cause, 4) the Employer improperly bypassed progressive discipline and progressive corrective action, 5) the Employer failed to apply discipline with a view toward uniformity and consistency, 6) the dismissal decision constituted a discriminatory application of rules and regulations, and 7) the Employer's application of work rules to him was unreasonable.

We first address Grievant's contention that the Employer violated Article 5 of the Contract by dismissing him as a result of discrimination and retaliation against him due to his grievance activities. In cases where employees claim the employer took action against them for engaging in protected activities, the Board employs the analysis used by the United States Supreme Court in Mt. Healthy City School District Board of Education v. Doyle[1]: 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]

Grievant engaged in the protected conduct of complaint and grievance activities in his role as VSEA Steward. Grievant must demonstrate that this protected conduct was a motivating factor in the Employer's decision to dismiss him. The factors the Board reviews in determining whether protected conduct constituted a motivating factor in an employer's adverse action against an employee are: 1) whether the employer knew of the protected activities, 2) whether a climate of coercion existed, 3) whether the timing of the action was suspect, 4) whether the employer gave protected activity as a reason for the

[1] 429 U.S. 274 (1977).
[2] Grievance of Sypher, 5 VLRB 102 (1982). Grievance of Roy, 6 VLRB 63 (1983). Grievance of Cronin, 6 VLRB 37 (1983). Grievance of Danforth, 22 VLRB 220 (1999).

decision, 5) whether the employer interrogated the employee about protected activity, 6) whether the employer discriminated between employees engaged in protected activities and employees not so engaged, and 7) whether the employer warned the employee not to engage in such activity.[3]

Grievant has not demonstrated that his grievance activities constituted a motivating factor in the dismissal decision. Superintendent Simons, the appointing authority who dismissed Grievant, was unaware of Grievant's protected activities. Grievant has not demonstrated that any of the other factors discussed above providing evidence of animus for protected conduct existed here. Under these circumstances, we dismiss Grievant's claims of discrimination and retaliation based on his protected activities.

We next address Grievant's contention that the Employer violated the requirement of Article 14 of the Contract that "the State will act promptly to impose . . . discipline within a reasonable time of the offense." Grievant contends that the Employer violated this provision of the Contract by not acting to dismiss Grievant until four months after receiving Peter Canales's investigation report. Grievant also requests that the Board consider that the Employer only placed Grievant on temporary relief from duty with pay for a period of up to 30 days when it commenced its investigation.

We conclude that the Employer's delay does not provide a reasonable basis to rescind the disciplinary action imposed on Grievant. A significant part of the delay was caused by the Employer mistakenly operating under the assumption that an incident captured on video was the same incident alleged by an inmate which formed the original

[3] Ohland v. Dubay, 133 Vt. 300, 302-303 (1975). Horn of the Moon Workers Union v. Horn of the Moon Cafe, 12 VLRB 110, 126-27 (1988).

basis for the investigation of Grievant. Once this misunderstanding was corrected and Grievant was investigated for two alleged incidents, the one captured on video and the other alleged by an inmate, Grievant substantially contributed to the delay in investigating the video incident because he claimed he could not remember this incident and could not identify the involved inmate. This reasonably led the Employer to spend considerably more time interviewing staff and inmates in an attempt to identify the inmate. Delays such as occurred here in investigating alleged misconduct substantially caused by unforeseen complications and Grievant's claimed lack of memory do not provide a sound basis to conclude that the Employer did not discipline Grievant within a reasonable time of the offense.[4]

Also, Grievant has not demonstrated that he was prejudiced by the timing of disciplinary action. Absent demonstrated prejudice, we are not prepared to conclude that the time it took the Employer to impose disciplinary action against Grievant affected the validity of the ultimate decision to dismiss him.[5]

The remaining allegations made by Grievant can all be reviewed in connection with Grievant's primary claim that the Employer dismissed him without just cause. The ultimate criterion of just cause is whether an employer acted reasonably in discharging an employee for misconduct.[6] There are two requisite elements which establish just cause for dismissal: 1) it is reasonable to discharge an employee because of certain conduct, and 2) the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge.[7]

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[4] Grievance of Kerr, 28 VLRB 264, 276-77 (2006).
[5] Grievance of Scott, 22 VLRB 286, 301-02 (1999). Grievance of Sileski, 28 VLRB 165, 191 (2006).
[6] In re Grievance of Brooks, 135 Vt. 563, 568 (1977).
[7] Id. In re Grievance of Yashko, 138 Vt. 364 (1980).

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.[8] Once the underlying facts have been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven facts.[9]

The Employer made various charges against Grievant, as detailed in Finding of Fact No. 26. The Employer first charges Grievant with misconduct in violation of Department of Corrections ("DOC") Work Rules 1, 6, 9 and 10; State Personnel Policy 5.6; DOC Directive 403.01; 13 V.S.A. §1023; and Article 14, Section 3(e) of the Contract by striking and/or touching inmate Michael Haines in the groin with the back of his hand in the CA Unit, causing him physical pain. The Employer has established this charge to the extent of demonstrating by a preponderance of the evidence that Grievant struck and/or touched Haines in the groin with the back of his hand in the CA Unit. The Employer has not established the charge by a preponderance of the evidence that this caused Haines physical pain.

The Employer has established violations of the cited rules, State personnel policy, DOC directive, statute and collective bargaining agreement provision except for Work Rule 10 and 13 V.S.A. §1023. The alleged violations of this work rule and statute were based on the charge by the Employer that Grievant committed a simple assault on Grievant by striking and/or touching him in a manner that caused him physical pain. Since the Employer has not established that Grievant caused Haines physical pain, the Employer has not demonstrated that Grievant violated this work rule and statute. In sum, the Employer did not establish the entirety of its charge against Grievant with respect to

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[8] Grievance of Colleran and Britt, 6 VLRB 235, 265 (1983).
[9] Id. at 266.

his interactions with Haines, but did establish that Grievant engaged in inappropriate horseplay with him.

The Employer next charges Grievant with violating Work Rule No. 6 by repeated instances of using profane and inappropriate language with offenders. The Employer has established by a preponderance of the evidence that Grievant used profane and inappropriate language with offenders on repeated instances. This constituted "verbal . . . behavior . . . which is malicious, demeaning, harassing or insulting" in violation of Work Rule No. 6.

The Employer charges Grievant with repeated instances of engaging in horseplay with them. The Employer established the essence of this charge through proving Grievant engaged in inappropriate horseplay with Haines following a work history which included other instances of engaging in horseplay with inmates.

Finally, the Employer charges Grievant with violating DOC Work Rules 1, 6 and 9; State Personnel Policy 5, 6 and DOC Directive 413.01 through engaging in inappropriate actions toward an unknown offender on December 19, 2009, by: 1) placing his right hand on the neck or shoulder of the offender when this was not authorized or justified; and 2) striking or touching the offender in the area of his lap, or attempting to do so.

The Employer has established by a preponderance of the evidence that Grievant placed his hand on the neck or shoulder of the unknown offender, when this was not authorized or justified. The Employer has not established by a preponderance of the evidence that Grievant struck or touched this offender in the area of his lap, or attempted to do so. The Employer has established violations of the cited rules, State personnel

policy, and DOC directive except for Work Rule 6. Work Rule 6 prohibits behavior which is "malicious, demeaning, harassing or insulting". Although Grievant's physical touching of the offender was not authorized or justified, the State has not established that it rose to the level barred by Work Rule 6.

In sum, the Employer has established some of the charges against Grievant. The fact that all of the charges against Grievant have not been proven in their entirety does not necessarily mean that his dismissal was without just cause. Failure of an employer to prove by a preponderance of the evidence all the particulars of a dismissal letter does not require reversal of a dismissal action.[10] In such cases, the Board must determine whether the proven charges justify the penalty.[11]

We look to the factors articulated in Colleran and Britt to determine whether the Employer exercised its discretion within tolerable limits of reasonableness.[12] The pertinent factors here are: 1) the nature and seriousness of the offenses and their relation to Grievant's duties and position, 2) the clarity with which Grievant was on notice of any rules that were violated in committing the offenses, 3) Grievant's past disciplinary record, 4) Grievant's past work record including length of service and performance on the job, 5) the effect of the offenses upon Grievant's ability to perform at a satisfactory level and their effect on supervisors' confidence in Grievant's ability to perform assigned duties, 6) the consistency of the penalty with those imposed upon other employees for the same or similar offenses, 7) mitigating circumstances surrounding the offense, 8) the potential for

[10] Grievance of McCort, 16 VLRB 70, 121 (1993).
[11] Id.
[12] 6 VLRB at 268-69.

Grievant's rehabilitation, and 9) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

We first consider the nature and seriousness of Grievant's offenses and their relation to Grievant's duties and positions. Although we have concluded that Grievant's offenses were not as serious as alleged by the Employer, his proven offenses were serious. He engaged in inappropriate horseplay with an inmate, unauthorized and unjustified physical touching of an inmate, and use of profane and inappropriate language with offenders on repeated instances. Grievant's conduct violated his responsibility to professionally interact with offenders in his care and to not jeopardize their health. The seriousness of Grievant's actions are exacerbated because he received prior performance feedback, counseling and discipline for similar actions, including a 15-day suspension several years earlier.

The serious nature of Grievant's offenses are evident when their implications are closely examined. Grievant placed himself at risk of manipulation by offenders due to his inappropriate interactions. The danger of manipulation was evident in Grievant's inappropriate horseplay with inmate Haines. Haines attempted to use Grievant's horseplay against him when Grievant transferred Haines to another unit to investigate charges that Haines had engaged in misconduct. Also, the inappropriate actions by Grievant with Haines and the unidentified offender placed him, as an unarmed and solitary officer, at an unnecessary risk of engaging in physical altercation with many inmates gathered in the common area of the CA Unit. This had the potential of seriously provoking situations endangering the life or health of Grievant and/or inmates.

He had fair notice that his offenses could result in his dismissal. Fair notice exists when the employee knew or should have known that the conduct was prohibited.[13] Training, work rules and a directive received by Grievant provided fair notice that the misconduct he engaged in was prohibited.

Also, in November 2006, Grievant executed a Stipulation and Agreement with the Employer providing that Grievant receive a 15 day disciplinary suspension. As part of the agreement, Grievant received a letter of discipline warning him that, if he engaged in interactions with inmates that involved pushing, shoving, punching and other horseplay, he "may be subject to disciplinary action, up to and including dismissal." Further, Grievant received supervisory feedback in May 2009 warning him that he was not authorized to touch offenders unless engaged in an authorized use of force, and that he "will be subject to disciplinary action up to and including dismissal for engaging in horseplay with offenders". Grievant had ample notice that the offenses for which he was dismissed could result in his dismissal.

Grievant had a satisfactory performance record during his eleven years of employment. However, his satisfactory performance is more than offset in his work record by a disturbing propensity to repeatedly engage in inappropriate interactions with inmates for which he had received counseling many times and a 15 day disciplinary suspension.

Grievant's offenses have demonstrated that he does not have the ability to satisfactorily perform his duties and responsibilities on a consistent basis. His supervisors reasonably have lost confidence that he will adhere to DOC work rules, directives, policies and directives as they critically relate to interactions with offenders.

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[13] Grievance of Towle, 164 Vt. 145, 150 (1995). Grievance of Brooks, 135 Vt. at 568.

Grievant has presented no evidence that he was treated inconsistently with other officers engaging in similar offenses. He also has not demonstrated that the Employer applied rules and regulations to him in a discriminatory manner, or that the Employer's application of work rules to him was unreasonable.

Grievant has not presented mitigating circumstances diminishing the severity of his misconduct. He claims that his use of the prescription drug Chantix to quit smoking caused a side effect that prevented him from remembering the incidents with the two inmates that primarily caused his discharge. In reviewing the evidence in its entirety, we do not find this claim of Grievant credible.

Grievant has not demonstrated a potential for rehabilitation. His failure to take responsibilities for his actions and admit wrongdoing, and his propensity to repeatedly engage in inappropriate interactions with inmates, understandably have resulted in lack of supervisory confidence that his misconduct in this case will not be repeated. The Employer acted reasonably in determining Grievant engaged in gross misconduct and there was no alternative sanction to dismissal that would be effective. In sum, just cause existed for Grievant's dismissal.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of Todd Abel is dismissed.

Dated this 19th day of July, 2011, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ Gary F. Karnedy

Gary F. Karnedy

/s/ Louis P. Lacroix

Louis P. Lacroix