VERMONT LABOR RELATIONS BOARD

GRIEVANCES OF:	)	
	)	DOCKET NO. 10-54
CLINT GLOVER	)	DOCKET NO. 11-15

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On December 23, 2010, Clint Glover ("Grievant") filed a grievance, Docket No. 10-54, with the Vermont Labor Relations Board, contending that the State of Vermont Department of Corrections ("Employer") violated Article 14 of 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 suspending Grievant for one day.

On February 17, 2011, Grievant filed another grievance with the Board, Docket No. 11-15, contending that the Employer violated Article 14 of the Contract by suspending him for three days.

The hearings in Docket Nos. 10-54 and 11-15 were held in the Labor Relations Board hearing room in Montpelier on May 26, 2011, before Board Members Richard Park, Chairperson; James Kiehle and Gary Karnedy. Assistant Attorney General William Reynolds represented the Employer. Grievant represented himself. The Employer and Grievant filed post-hearing briefs on June 17 and 20, respectively.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

. . .

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 . . .
        . . .

. . .

3. . . . (T)he appointing authority . . . may dismiss an employee immediately . . . for . . .(c) refusal to obey lawful and reasonable orders of supervisors.

ARTICLE 28
OVERTIME

I. INTRODUCTION

. . .

(c) It is understood and agreed that determining the need for overtime work, scheduling the hours overtime shall be worked, and requiring overtime work are exclusively employer's rights.

II. DISTRIBUTION OF OVERTIME

(a) Appointing authorities shall make a reasonable effort to distribute overtime as equitably as possible among classified employees . . .
(b) Overtime shall be assigned whenever practicable to volunteers. Assignment of overtime work to volunteers shall not be considered contrary to the concept of equitable distribution of overtime.
(c) With written request and twenty-four hours notice, an employee shall be excluded from further consideration for overtime. Such request may be canceled by the employee and may also be revoked by a supervisor under emergency circumstances or when distributing involuntary overtime . . .

(State's Exhibit 22)

2. 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 #6:**
> No employee shall, while on duty . . . engage in verbal or physical behavior towards employees . . . which is malicious, demeaning, harassing or insulting. . .
> . . .
> **Work Rule #9:**
> No employee, whether on or off duty, shall comport himself or herself in a manner that reflects discredit upon the Department.
> . . .

3. 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. He has been a Correctional Officer I at NSCF since then. Grievant has been employed by the Employer since 1987.

4. Grievant has a past disciplinary record of: 1) a 3-day suspension in 1989, 2) a 5-day suspension in 1991 for negligence relating to an inmate escape, 3) a 3-day suspension in 1994 for driving to work while his license was under suspension, and 4) a disciplinary demotion in April 2009. Grievant received annual performance evaluations rating his overall performance as "excellent" from 1999 to 2008. Labor Relations Board Docket No. 10-46.

5. There are three shifts at NSCF: 1) 6 a.m. to 2 p.m. (first shift), 2) 2 p.m. to 10 p.m. (second shift), and 10 p.m. to 6 a.m. (third shift).

6. It is not unusual for correctional officers at NSCF to be ordered to work overtime on the shift following their regular shift. This is termed "order over". NSCF has

a system of assigning an “order over” so that they are distributed equitably among officers. Officers required to work overtime are placed on an alphabetical list, and shift supervisors go down the list in order when they need to assign an officer to work overtime on the next shift. It is important for shift supervisors to adhere to the system because officers make plans based on the overtime list. If the system is not followed, officers become upset and morale is adversely affected.

7. Security and Operations Supervisor Scott Morley is responsible for handling issues relating to overtime scheduling at NSCF. He reviews correctional officers’ requests to be exempted from an “order over” due to childcare, medical or educational needs.

8. At all times relevant, Grievant was a student at Lyndon State College. Sometime prior to August 26, 2009, Grievant and Morley reached agreement on Grievant being exempted from “order over” at certain times due to his college schedule. Grievant sent an e-mail message to Morley on August 26, 2009, which provided:

> As we discussed the other day, below is my school schedule for this fall semester at LSC beginning next week. This e-mail is per your request to remind you of my need and your approval for accommodation from forced overtime for the days and times indicated.
>
> **Principles Marketing**
> Monday 06:00PM – 08:40PM.
>
> **Advanced Intermediate Accounting I**
> Tuesday 03:00PM – 06:40PM
>
> Again, I thank you for your assistance and support.
> (State’s Exhibit 23)

9. Morley responded to Grievant by e-mail the same day. His response, which he copied to Barbara DeVost, the NCSF employee responsible for preparing the list of correctional officers provided overtime accommodations, provided:

> Thank you for the reminder Clint
>
> Barb – please update the overtime accommodation to reflect Clint be sheltered from order-ins on Monday's and Tuesday's on second shift. This should begin 08/31/09 and in effect thru the course dates.
>
> Clint – please just let us know when the courses are complete.
> (State's Exhibit 23)

10. As of August 26, 2009, Grievant was working on the first shift. At some point between August 26 and October 20, 2009, shift bidding occurred and Grievant was assigned to third shift. Grievant did not contact Morley between August 26 and October 20, 2009, to clarify or change the overtime accommodation confirmed on August 26.

11. On October 20, 2009, Rick Bilodeau was working as shift supervisor on third shift when he realized that there was a need to order an officer to work overtime on first shift. Upon reviewing the "order over" list, Bilodeau determined that it was Grievant's turn to be ordered over. Grievant was working the third shift as a perimeter officer. Bilodeau contacted Grievant by radio and notified him that it was necessary for Grievant to be ordered over for the first four hours of the first shift on October 20 (i.e., 6 a.m. to 10 a.m.). October 20 was a Tuesday. Grievant told Bilodeau that he was exempted from overtime on Tuesdays. Bilodeau checked the overtime book and saw that Grievant was exempted from overtime on second shift on Tuesdays.

12. Bilodeau then went out to the perimeter to speak with Grievant about the order over. Grievant explained that, if he worked four hours of overtime and attended classes that evening at Lyndon, he would not get sufficient sleep before his next shift

later that evening. Bilodeau indicated that he understood the issue raised by Grievant, and that it could be addressed for the future by discussing adjustments to the overtime accommodations with Morley, but that he still needed to order Grievant to work the first four hours of the shift on October 20. Grievant told Bilodeau that he would not be staying for overtime and that he would be leaving at the end of his shift.

13. Grievant left NSCF at 6 a.m. at the end of his shift. When he was leaving, he handed Bilodeau a copy of the August 26, 2009, e-mail exchange between him and Morley.

14. Grievant sent an e-mail message to Morley at 7:25 a.m. on October 20, 2009, which provided:

> Apparently the overtime accommodation was not updated to me now being on third shift. Rick Bilodeau attempted to order me over to work until 10:00 this morning, which would give me less than five hours until my class this afternoon, taking in account for travel. By the time I get out of class and travel back from Lyndon I have less than an hour before I normally would leave my home to get to work.
>
> Since being on third shift I have made no issue, and have been ordered over on Monday morning recently, but there is no way I can be ordered on Tuesday's, not without me causing overtime too.
>
> Could we please word this and explain it to Bilodeau so this sort of confrontation does not reoccur?
> (State's Exhibit 28)

15. Bilodeau completed a Facility Report Form on October 20, 2009, and sent it to Morley. It provided:

> On 10-20-09 I was working as third shift supervisor when the following staff misconduct occurred. At approximately 0340hrs I contacted the Post One officer (COI Clint Glover) by radio and notified him that it was necessary for me to order him over. Officer Glover mentioned that it was a Tuesday and that he has a dispensation. I checked and noted that the note in the overtime book indicated Officer Glover not be ordered for second shift. I then toured post and spoke to COI Glover. Glover explained that if he works until 1000 it leaves him with very

> little sleep as he has a college class in Lyndonville in the evening. I explained that I understood his issue and would speak with SOS Morley on his behalf about it in the future but I would still need to order him.
>
> Officer Glover then told me he would not be staying for the order and would be reporting me for attempting to order him.
>
> At 0600 COI Glover punched out and handed me a copy of an e-mail to SOS Morley about the issue. The e-mail was from August and was in regards to the subject. I will attach the document.
>
> (State's Exhibit 24)

16. NSCF Superintendent Michael Bellizzi reviewed the October 20, 2009, Facility Report Form from Bilodeau, and spoke with Morley about the incident. He did not speak to Grievant. Bellizzi did not receive a recommendation from Bilodeau or Morley on the appropriate discipline. Bellizzi sent Grievant a letter dated October 26, 2009, which provided:

> This is to provide notification that you will be suspended without pay for one (1) workday for refusing an order-over on Tuesday, October 20, 2009 from CFSS Bilodeau.
>
> Your suspension will be served on Friday, November 6, 2009. There are consequences for refusing an order-over and you are aware of these consequences. This behavior violates Work Rule #1.
>
> (State's Exhibit 25)

17. Prior to suspending Grievant for one day for refusing the order-over on October 20, 2009, Superintendent Bellizzi had suspended other correctional officers for one day the first time they refused an order-over. It was the practice at NSCF for a one-day suspension to be imposed the first time an officer refused an order-over.

18. Grievant and Morley had a discussion on October 29, 2009, in which it was agreed that, for the remainder of the fall semester and coming spring semester, Grievant would be exempt from being ordered to work overtime on Mondays, Tuesdays and first shift on Wednesdays. This agreement was confirmed in October 31 and November 2, 2009, e-mail exchanges between Grievant and Morley (State's Exhibit 28).

19. Jay Simons started as NSCF Superintendent on January 4, 2010. He became concerned about the lack of documented supervision of staff. He also concluded that there was a disturbing trend of default performance evaluation ratings of "excellent". A Performance Management Interview ("PMI") is a discussion between a supervisor and a supervised employee about the employee's performance. PMIs are designed to provide employees with feedback on their performance so they have an opportunity to improve before they get their performance evaluations. The NSCF post orders provided that supervisors would conduct PMIs at least once every 60 days. However, supervisors at NSCF had gotten away from doing PMIs. Simons ordered supervisors to conduct PMIs on their staff.

20. In March 2010, Shift Supervisor Bilodeau proceeded to conduct PMIs on the 22 – 24 employees under his supervision. On March 22, 2010, Bilodeau advised Grievant that he was doing PMIs on everyone and that he was going to send out a "float" to relieve Grievant so he could attend a PMI. Grievant told Bilodeau that he refused to do a PMI and that Bilodeau could mark him down as refusing. Bilodeau, who had recently been promoted to Shift Supervisor, had never run into this situation. Bilodeau told Grievant that personally it was okay with him if they didn't do a PMI, but that he would need to check with Morley to see if it was acceptable.

21. Bilodeau sent an e-mail message to Morley on March 23, 2010, informing him of "more PMIs" which he had done. In the e-mail message, Bilodeau noted that Grievant had "refused to attend his PMI". Morley responded later that day by e-mail, stating in part:

> I'm sure you have now thought it through related to Officer Glover. The right thing to do is confront the behavior and meet with Clint.

> After you think about it and gather your thoughts you will know that he does not have a choice to meet with you regarding the matter. Please insure that he does and he does so professionally. Insubordination on his part can lead to your decision to relieve him on the shift and send him home. If that ever happens you need to communicate with either I or Jay and we will schedule a meeting with the employee. The employee is relief of duty(sic) until the meeting occurs.
> . . .
> (State's Exhibit 29)

22. On March 25, 2010, Bilodeau went out to the perimeter and advised Grievant they would have to meet to conduct the PMI because Morley had indicated it was required. Grievant told Bilodeau that he did not want to meet with him. Bilodeau told Grievant he would send an officer out to replace Grievant so that Grievant could meet with him. Shortly after midnight, Bilodeau sent an officer out to relieve Grievant at the perimeter. Bilodeau asked fellow Shift Supervisor Tello Young to be present at the PMI because he thought it may be contentious.

23. When Grievant walked into the Shift Supervisor's office where the PMI was being held, Bilodeau asked him to close the door. Grievant kicked the chair that was holding the door open so that it struck the back of the metal desk that Bilodeau was sitting at with a loud noise. Bilodeau asked Grievant to sit and Grievant refused. Bilodeau informed Grievant that they needed to conduct the PMI. Grievant told Bilodeau that he was refusing to talk with him. Bilodeau told Grievant that he had been informed that staff do not have the option on whether to participate in the PMIs. Grievant raised his voice, banged his coffee mug on the desk, leaned over and said words to the effect of "I don't care, send me home". Grievant walked out of the office. As he left, Bilodeau informed him that if he refused he would be sent home.

24. Grievant returned to the office, and told Bilodeau in a loud voice to "just do your PMI". When Bilodeau attempted to conduct the PMI, Grievant stood with his arms crossed facing away from Bilodeau and not looking at him. Bilodeau used the same PMI format on Grievant as he had on other employees; he pointed out things Grievant had done well and ways his performance could be improved. When Bilodeau asked Grievant questions, Grievant did not answer them. Bilodeau made a comment about Grievant being rude to co-workers and him. Grievant responded in a loud voice and cursed at Bilodeau. Bilodeau asked Grievant what he could do for him, a question he had asked in PMIs done with other employees. Grievant responded with words to the effect of "leave me the fuck alone". Grievant's voice was raised in an angry manner during the meeting. Bilodeau spoke in a composed manner during the meeting. At the conclusion of the meeting, Grievant said to Bilodeau "you're not a thousandth of the person your brother is".

25. Bilodeau completed a Facility Report Form on March 25, 2010, detailing the March 25 incident with Grievant, and sent it to Morley (State's Exhibit 30).

26. Superintendent Jay Simons sent a letter dated April 2, 2010, to Grievant, providing in pertinent part:

> This is to notify you that I have decided to suspend you, without pay, from your position as Correctional Officer I for three (3) workdays for misconduct. . .
>
> The disciplinary action is being taken because you have violated DOC Work Rule #1, No employee shall violate any provision of the collective bargaining agreement or a State or Department work rule, policy, procedure, directive, local work rule or post order, #6, exhibiting behaviors which are physically or mentally abusive towards employees, and #9, comporting oneself in a manner that brings discredit upon the Department. You repeatedly violated these Work Rules on March 22, 2010, when you refused a lawful order by your immediate supervisor to meet with him. You were further insubordinate on March 25, 2010 when again ordered to meet with him. During that meeting you kicked a chair so that it struck

> his desk, leaned into his personal space while using profanity and left the office only to return when ordered. When you did return you again entered his personal space in a threatening manner.
>
> Your behavior in this incident has damaged my confidence in your ability to perform your duties. Please be aware that any further misconduct of the same or similar nature will result in more severe disciplinary action up to and including dismissal.
> (State's Exhibit 31)

OPINION

We need to decide whether to uphold the disciplinary actions of a one- day suspension and a three-day suspension which the Employer imposed on Grievant. We will discuss each of the suspensions in turn.

Docket No. 10-54

Grievant contends that just cause does not exist for the one-day suspension imposed on him on October 26, 2009. 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.[1] 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.[2] Once the underlying facts have been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven facts.[3]

Grievant was charged with misconduct in violation of Department of Corrections Work Rule No. 1 by refusing an order issued by his third shift supervisor Richard Bilodeau that Grievant work overtime the first four hours of the first shift on October 20, 2009. Work Rule No. 1 provides in part that "(n)o employee shall violate any provision

[1] In re Grievance of Brooks, 135 Vt. 563, 568 (1977).
[2] Grievance of Colleran and Britt, 6 VLRB 235, 265 (1983).
[3] Id. at 266.

of the collective bargaining agreement". The applicable collective bargaining agreement allows the appointing authority to immediately dismiss an employee for refusal to obey a lawful and reasonable order of a supervisor. It reasonably follows that an employee violates the collective bargaining agreement by refusing to obey a lawful and reasonable order of a supervisor.

The Employer has established this charge. Grievant disobeyed a lawful and reasonable order of his supervisor to work the overtime. There was an agreement in place that Grievant was exempted from being required to work overtime on second shift. Bilodeau ordered Grievant to work overtime on first shift, a shift for which Grievant had received no exemption from overtime.

We recognize that Grievant's exemption from overtime on second shift was established when he was working on first shift, and that he had subsequently changed to working on third shift prior to October 20. However, this did not excuse Grievant from disobeying Bilodeau's order. Exemptions from overtime are initiated at the request of employees, which requests are then considered by management. When Grievant changed to third shift, he did nothing to change his overtime exemption as a result of his new shift. Absent a prior request by Grievant (and approval by the Employer) to be exempted from overtime for the first shift, the Employer acted appropriately in charging Grievant with disobeying the order to work the first shift on October 20, 2009.

The charge against Grievant having been proven, we look to the factors articulated in Colleran and Britt[4] to determine whether the proven charge justifies a one-day suspension. The pertinent factors here are: 1) the nature and seriousness of the offense and its relation to Grievant's duties, 2) the clarity with which Grievant was on

[4] 6 VLRB at 268-69.

notice of the prohibited conduct, 3) the effect of the offense upon supervisors' confidence in Grievant performing assigned duties, 4) Grievant's past disciplinary record, 5) Grievant's past work record, 6) the consistency of the penalty with those imposed on other employees for the same or similar offenses, and 7) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Grievant's offense of disobeying a lawful and reasonable order of his supervisor was serious. In so doing, he disregarded the important principle of "work now, grieve later". He was on fair notice that disobeying such an order was prohibited. His refusal to obey the supervisor's order had an obvious adverse impact on supervisors' confidence in Grievant performing assigned duties since he directly failed to perform assigned duties in committing the offense.

Grievant's work and disciplinary record is mixed. Grievant had a good performance record, but this is offset by a recent disciplinary demotion, which demotion was upheld by the Board in another decision issued today. 31 VLRB 282. He also had three previous suspensions, although these are not of great significance in our analysis because they occurred many years ago.

The Employer established that the penalty imposed on Grievant of a one-day suspension was consistent with penalties imposed on other employees for the same or similar offenses. It was the practice at a NSCF for a one-day suspension to be imposed the first time an officer refused an order-over, the identical penalty imposed on Grievant for his first such refusal.

We ultimately conclude that it was reasonable for the Employer to determine that alternative sanctions were not adequate to deter such conduct in the future. The Employer

took a reasonable, measured response to a serious offense of refusal to obey a supervisor's order. In sum, the Employer had just cause to suspend Grievant for one day for his offense.

Docket No. 11-15

Grievant contends that just cause did not exist for the three-day suspension imposed on him on April 2, 2010. The Employer suspended Grievant for violating Work Rules Nos. 1, 6 and 9 by refusing lawful orders of his supervisor to meet with him for a Performance Management Interview ("PMI"), and then engaging in threatening and abusive behavior, and using profanity, when he did meet with him for the PMI.

The Employer has established the essence of these charges. When Grievant's actions of March 22 and 25, 2010, are considered in their entirety, we conclude that he declined lawful orders of his supervisor, Richard Bilodeau, to meet with him, and he ultimately did so only under threat of being sent home. He also engaged in threatening and abusive behavior towards Bilodeau when he did meet with him. He was disrespectful towards Bilodeau throughout the meeting. He was threatening by kicking a chair and speaking in a loud, angry voice. He also inappropriately used profanity.

The Employer has established violations of the Work Rules cited in the charges. As discussed above, refusal to obey lawful and reasonable orders of supervisors violates Work Rule No. 1. Grievant violated Work Rule No. 6 by engaging in verbal and physical behavior towards Bilodeau which was demeaning and insulting. This behavior is explicitly prohibited by Work Rule No. 6. He violated the Work Rule No. 9 prohibition

against comporting oneself in a manner that reflects discredit upon the Department by his insubordinate and disrespectful behavior towards his supervisor.

The charges against Grievant having been proven, we look to the Colleran and Britt factors to determine whether the proven charges justify a three-day suspension. The pertinent factors here are: 1) the nature and seriousness of the offenses and their relation to Grievant's duties, 2) Grievant's past disciplinary record, 3) Grievant's past work record 4) the clarity with which Grievant was on notice of the prohibited conduct, 5) the effect of the offenses upon supervisors' confidence in Grievant's ability to perform assigned duties, and 6) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Grievant's offenses were serious. Refusal to obey lawful and reasonable orders of supervisors is conduct explicitly subject to serious discipline under the Contract. Grievant's misconduct in this regard of refusing his supervisor's orders to meet with him was compounded by his serious offense of threatening and disrespectful behavior toward his supervisor when the meeting occurred.

Examination of Grievant's past record does not support his claim that just cause did not exist for the suspension. His good performance record is outweighed by his recent disciplinary record, a disciplinary demotion and one-day suspension in the year preceding the three-day suspension.

Grievant had fair notice that his insubordinate and disrespectful actions were prohibited. His offenses had an obvious adverse impact on supervisors' confidence that he would follow supervisory direction in performing assigned duties.

We ultimately conclude that it was reasonable for the Employer to determine that alternative sanctions were not adequate to deter such conduct in the future. The Employer had ample justification to impose a three-day suspension given the severity of Grievant's offenses. A lesser sanction would not have been sufficient to send a strong message to Grievant that he should not engage in such insubordinate and disrespectful behavior in the future. In sum, just cause existed for the three-day suspension.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievances of Clint Glover in Docket Nos. 10-54 and 11-15 are 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