VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 10-44
JOHN ALEXANDER	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On October 15, 2010, John Alexander ("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, 2010 to June 30, 2012 ("Contract") by dismissing him from employment with the Rutland Probation and Parole office. Specifically, Grievant alleged that the Employer violated Articles 5 and 14 of the Contract because: 1) the dismissal was not based on fact or supported by just cause, 2) Grievant was subject to discrimination and harassment on the basis of disability, and 3) the Employer failed to afford Grievant his right to VSEA representation when questioning him about the incident which precipitated his dismissal.

Hearings were held on August 18, September 14, and September 29, 2011, before Board Members Linda McIntire, Acting Chairperson; James Kiehle and Alan Willard. The August 18 and September 14 hearings were held in the Labor Relations Board hearing room in Montpelier. The September 29 hearing was held at Castleton State College. Assistant Attorney General Marie Salem represented the Employer. Attorney Jeffry Taylor represented Grievant at the August 18 hearing. Grievant represented himself at the September 14 and 29 hearings. At the August 18 hearing, Grievant

withdrew his claim that he was subject to discrimination and harassment on the basis of disability. The Employer and Grievant filed post-hearing briefs on October 20 and 21, 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 . . .;

. . .

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:
   . . .
   (a) gross neglect of duty;
   (b) gross misconduct;
   . . .

7. Whenever an employee is required, by his or her supervisor or management, to give oral or written statements on an issue involving the employee, which may lead to discipline against the employee, or whenever an employee is called to a meeting with management where discipline is to be imposed on the employee, he or she shall be notified of his or her right to request the presence of a VSEA representative and, upon such request, the VSEA representative shall have the right to accompany the employee to any such meeting. The notification requirement shall not apply to the informal initial inquiry of the employee by his or her supervisor without knowledge or reason to believe that discipline of the employee was a likely possibility. . .

2. State Personnel Policy 5.6 provides in pertinent part:

. . .

REQUIRED CONDUCT

(1) It shall be the duty of employees to fulfill to the best of their ability the duties and responsibilities of their position. Employees shall pursue the common good in their official activities, and shall uphold the public interest, as opposed to personal or group interests.
(2) Employees shall devote their full time, attention, and effort to the duties and responsibilities of their positions during their scheduled work time, except when other activities are authorized by law, rule, or contractual agreement, or are approved by the appointing authority.
(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.

. . .

(State's Exhibit 1)

3. State of Vermont Personnel Policy 17.0 provides in pertinent part:

EMPLOYMENT RELATED INVESTIGATIONS

. . .

EMPLOYEE COOPERATION WITH EMPLOYMENT INVESTIGATIONS

State employees have an obligation to cooperate with their employer regarding employment investigations. It is part of the responsibility of an employee to answer truthfully and fully the work-related inquiries of the State. Refusing to answer, answering incompletely, or answering untruthfully, questions relating to work is a misconduct offense for which an employee may be disciplined up to and including dismissal.

. . .

(State's Exhibit 1)

4. Department of Corrections ("DOC") Work Rules provide in pertinent part:

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.

. . .

4. Employees shall be honest and complete in their descriptions, whether given orally or in writing to the employer of events occurring in the work place and in all other circumstances related to their employment.

5. Employees shall cooperate fully with any inquiry or investigation, whether formal or informal, . . . by the Department. This shall include answering fully and truthfully any questions related to their employment.

6. No employee shall, while on duty or engaged in an activity associated with the Department of Corrections, engage in verbal or physical behavior towards employees, volunteers or members of the public, which is malicious, demeaning, harassing or insulting. Such behaviors include, but are not limited to: profane, indecent or vulgar language or gestures, actions or inactions which are rude. . .

9. No employee, whether on or off duty, shall comport himself or herself in a manner that reflects discredit upon the Department.

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.

. . .

(State's Exhibit 1)

5. 13 V.S.A. §§ 1023, 1026 and 1028a provide in pertinent part:

- <u>§1023, Simple Assault</u>
  (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; or . . .
  (3) attempts by physical menace to put another in fear of imminent serious bodily injury.
  . . .
- <u>§ 1026, Disorderly Conduct</u>
  A person who, with intent to cause public inconvenience, or annoyance or recklessly creating a risk thereof:
  (1) Engages in fighting or in violent, tumultuous or threatening behavior; or
  (2) Makes unreasonable noise; or

(3) In a public place uses abusive or obscene language . . .

- § 1028a, Assault of Correctional Officer . . .
  A person convicted of a simple or aggravated assault against an employee of the department of corrections whose official duties or job classification includes the supervision or monitoring of a person on parole, probation, or serving any sentence of incarceration whether inside or outside of a correctional facility, and who was performing a lawful duty, in addition to any other penalties imposed under sections 1023 and 1024 of this title, shall:
  (1) For the first offense, be imprisoned not more than one year; and
  (2) For the second offense and subsequent offenses, be imprisoned not more than 10 years.

. . .

6. Grievant was employed by DOC from 1988 until he was dismissed on September 16, 2010. Grievant held positions in both correctional facilities and field offices of the department.

7. Grievant took various trainings during his employment on use of force and conflict resolution. He received training in Non-Abusive Physical and Psychological Intervention ("NAPPI") several times. Employees are instructed in NAPPI training to use the least forcible intervention in a conflict situation. The preferred approach is for employees to create a "blocking" distance to remove themselves from physical danger. The trainings completed by Grievant stressed the use of verbal communication skills, de-escalation techniques and creating distance, with physical force being resorted to only if necessary. The DOC has provided training to employees for several years in Advanced Communications Techniques ("ACT") which involves teaching of skills to de-escalate a situation before it results in a physical altercation. Grievant never received ACT training (State's Exhibit 8).

8. In September 2006, Grievant was working as a Probation Officer in the Rutland Probation and Parole District Office. On September 7, 2006, Rutland Probation and Parole District Manager Michael O'Malley issued a letter of reprimand to Grievant for being absent from work without approval because he did not provide doctor's notes for two days he called in sick despite a requirement to provide a doctor's notes for all requested sick leave (State's Exhibit 3, p.15-16).

9. On December 5, 2006, Grievant's immediate supervisor, Mary Stephens, Community Corrections Program Supervisor, issued a letter of reprimand to Grievant for violating DOC Work Rule No. 9. The basis for the reprimand was that Grievant failed to prepare and submit a report on an offender which resulted in cancellation of a court hearing (State's Exhibit 3, p.17).

10. On January 25, 2007, Stephens issued a letter of reprimand to Grievant for violating DOC Work Rule No. 1 and State Personnel Policies and Procedures by failing to take an unpaid meal break (State's Exhibit 3, p.18).

11. In March 2007, Stephens began a requirement for Grievant to submit a weekly work report that would show what offender contact work Grievant had done during the week and what he planned for the following week. On April 20, 2007, Stephens issued a letter of reprimand to Grievant for not submitting a weekly work report. Stephens informed Grievant that "(f)ailure to submit work reports as required will result in progressive discipline (State's Exhibit 3, p. 19).

12. On April 27, 2007, Stephens suspended Grievant for one day for again failing to submit a weekly work report (State's Exhibit 3, p.20).

13. On May 10, 2007, Stephens suspended Grievant for four days for again failing to submit a weekly report. Stephens stated in the letter of suspension in pertinent part:

> . . .
> This is a work directive. I conduct electronic reviews of the caseloads of all Pos I supervise. Your case contact is insufficient in a significant number of cases and minimal in many others. In an effort to help you better organize and perform your work, I instituted the required work report. The first report was due on Friday, April 6, 2007. You submitted a copy of your electronic caseload report; it did not comply in any substantive way with the directions I gave you for the required report. On 4-13/07 you submitted a compliant report. Since then, you have not submitted any report at all. I am at a loss as to how to persuade you to comply with my lawful and reasonable order; you leave me no choice but to continue with progressive discipline.
>
> Based on the foregoing, I am suspending you without pay for four (4) days. . .
>
> Please understand that you must comply with my directive; your failures to comply have made this a very serious matter. Continued failure to follow this directive may result in further discipline, up to and including dismissal. (State's Exhibit 3, p. 21-22).

14. Stephens provided Grievant with an unsatisfactory performance evaluation covering the period April 28, 2006, to April 28, 2007. Stephens placed Grievant in a prescriptive period for remediation from May 22, 2007, to August 22, 2007, stating: "John, you <u>must</u> satisfactorily meet all the requirements of your job duties as detailed above to keep your position with the Department of Corrections". A prescriptive period for remediation is the second step in a four step procedure for progressive corrective action set forth in the Contract. The order of progressive corrective action is: 1) oral or written feedback, 2) written performance evaluation with a specified prescriptive period for remediation, 3) warning period, and 4) dismissal (State's Exhibit 3, p.11-13).

15. Grievant was on medical leave from July 2007 to January 2009. Grievant's prescriptive period for remediation resumed upon his return to work from medical leave in January 2009 (State's Exhibit 3, p.23).

16. Grievant held the position of Substance Abuse Team Leader immediately prior to going on medical leave. Upon his return to work from medical leave, Grievant moved into a Program Team Leader position on the Domestic Violence Team. Shortly thereafter, Grievant requested a transfer to a Telephone Monitoring Officer position with the Court and Reparative Services Unit. The Employer granted this request. As a result, Stephens no longer supervised Grievant. Instead, Chris Dinnan became Grievant's supervisor.

17. On August 13, 2009, Dinnan suspended Grievant for one day for tardiness and not informing Dinnan of his late arrivals (State's Exhibit 3, p.25).

18. Subsequently, Grievant requested to be transferred to a Community Service Team Leader ("CSTL") position. The Employer granted this request, and Grievant assumed the duties and responsibilities of the position in January 2010. Tim Solari was his supervisor in this position. CSTL's supervise work crews of offenders who perform work at various sites in the community for low rates.

19. In the spring of 2010, there was an opening for a temporary CSTL in the Rutland Probation and Parole office. Scott Stevens, along with Grievant, were the two permanent CSTL's in the Rutland office. Stevens and Ron Taylor were friends. Stevens told Taylor of the temporary position and Taylor applied for it. In April 2010, DOC hired Taylor as a CSTL in the Rutland office. Taylor was hired as a temporary employee. Grievant, Taylor and Stevens thus became the three CSTL's working out of the Rutland

office. Prior to Taylor's hiring, Stevens and Grievant were friendly and had socialized with each other. Each CSTL was responsible for a group of offenders serving as a work crew. At times, two work crews would work on the same project. No CSTL had supervisory authority over another CSTL.

20. Grievant and Taylor developed a contentious work relationship within a few weeks of Taylor beginning employment. On one morning in late May or early June prior to beginning their work assignments in the community, Grievant and Taylor had a loud argument in the probation and parole office. Solari overheard their argument and told both employees to calm down. Solari told Grievant and Taylor that their behavior was inappropriate. There were a few occasions where Taylor met with Solari and told him that Grievant was verbally abusive to offenders on the work crews. Taylor, Stevens and Solari met on a few occasions to discuss Taylor and Grievant not getting along (State's Exhibit 9, p.295).

21. Grievant and Taylor made arrangements to take their respective work crews to mow the Poultney Cemetery on June 10, 2010. Each of them transported a work crew of offenders to the cemetery in separate vehicles.

22. Grievant became upset in the morning while the work crews were mowing the cemetery when he discovered that one of the offenders mowing grass in the lower part of the cemetery, Andy DeLong, left that area to work in the upper part of the cemetery. Grievant walked from the lower part of the cemetery to the upper part to address this situation. Taylor was working in the upper part of the cemetery. When Grievant reached the upper part of the cemetery, he and Taylor had a heated discussion concerning placement of offenders around the cemetery and Grievant's treatment of the

offenders. Grievant and Taylor were both angry during their discussion, yelled at each other, and used profanity (State's Exhibits 12, 13, 14; Grievant's Exhibits 11, 20).

23. Grievant escalated the verbal confrontation by initiating a physical altercation with Taylor through throwing a punch at him. This led to a physical fight between Grievant and Taylor where they both landed punches on each other and ended up on the ground. The physical fight was witnessed by five of the offenders – Andy DeLong, Jodi Santos, Steven Burke, Scott Royce and Dan Parker. Each of the offenders observed Grievant initiating the aggressive physical action in the confrontation with Taylor. Grievant did not have a welt on his forehead as a result of the altercation with Taylor (State's Exhibits 12, 13, 14; Grievant's Exhibits 11, 20).

24. During the confrontation between Grievant and Taylor, Taylor indicated to Grievant that he knew about his being "bi-polar" and "ADHD".

25. Immediately after the incident, Grievant contacted Scott Stevens by telephone and told him that he and Taylor had an argument and that Taylor had head-butted him in the face which led to a physical fight between them. Grievant told Stevens to tell Rutland Probation and Parole District Manager Michael O'Malley that Taylor needed to be terminated for assaulting him. Stevens told Grievant that he would pass on the information to O'Malley but that Grievant would have to call O'Malley himself. Shortly thereafter and prior to Stevens informing O'Malley of the situation, Taylor contacted Stevens by telephone. Taylor told Stevens that while he and Grievant were having an argument, Grievant punched Taylor in the head which then led to a physical fight between them (State's Exhibit 9, p.296).

26. After Grievant spoke with Stevens, he immediately contacted O'Malley by telephone. Grievant told O'Malley that Taylor had attacked him and made disparaging remarks about him. O'Malley told Grievant to return to the office with the work crew. Stevens came into O'Malley's office while O'Malley was speaking with Grievant. When O'Malley finished his conversation with Grievant, Stevens told O'Malley that Taylor had called Stevens and told him there was a physical altercation between him and Grievant. O'Malley told Stevens to contact Taylor and tell him to return to the office with his work crew (State's Exhibit 9, p.299).

27. Taylor returned to the office before Grievant. O'Malley instructed Taylor to complete a report on the incident. Grievant arrived at the office shortly thereafter. O'Malley instructed him to complete a report on the incident. Taylor and Grievant completed their reports and submitted them to O'Malley. Taylor indicated in his report that Grievant had initiated the physical altercation. Grievant reported that Taylor had initiated it. O'Malley sent Taylor and Grievant home after they submitted their reports (State's Exhibit 9, p.293-294, 297-298; Grievant's Exhibits 9, 10).

28. Taylor's temporary employment ended on June 10 as a result of the incident with Grievant.

29. O'Malley hand-delivered a letter to Grievant on June 11, 2010, which provided in pertinent part:

> You are hereby temporarily relieved from duty, with pay, for a period of up to thirty (30) work days, in order to permit the State to conduct and complete an investigation into allegations of misconduct including, but not limited to, whether you committed misconduct in the circumstances occurring on June 10th while you and another DOC employee were supervising an offender work crew. You and the other DOC employee were involved in a physical confrontation, and you both blame the other party for causing the fight. The potential DOC Work

> Rule and State Policy violations include, but are not limited to: DOC Work Rules 1, 6, 9, 10, and State Personnel Policy 5.6.
> . . .
> **Duties Regarding Investigation.** You are also advised that Personnel Policy 17.0 provides: "State employees have an obligation to cooperate with their employer regarding employment investigations. It is part of the responsibility of an employee to answer truthfully and fully the work-related inquiries of the State."
>
> Refusing to answer, answering incompletely, or answering untruthfully, questions relating to work is considered misconduct for which an employee may be disciplined up to and including dismissal.
>
> Do not take any action injurious to the integrity of the investigation, including but not limited to: (1) threatening or harassing any witness or complainant; (2) colluding with any individual to fabricate or misrepresent facts pertaining to the investigation; or (3) destroying or altering evidence pertaining to the investigation. Failure on your part to follow this directive may lead to disciplinary action being taken against you up to and including your dismissal.
>
> Be advised if you choose to speak with other state employees or witnesses who are not VSEA representatives or Stewards about the facts or allegations concerning the matters under investigation, we have the right to interview those individuals about those conversations and any information arising from those interviews could be considered by the DOC in imposing discipline.
> . . .
> (State's Exhibit 3, p.27-28)

30. O'Malley hand-delivered a letter to Grievant on June 21, 2010, informing him that the "Agency of Human Services Investigation Unit has been assigned to investigate allegations that you have engaged in misconduct including but not limited to DOC Work Rules #1, #9 and #10 by your actions on or about June 10, 2010." O'Malley indicated that he had asked Peter Canales of the Agency of Human Services Investigations Unit or his designee to investigate these allegations. O'Malley also repeated the content of what he included under the heading "Duties Regarding Investigation" in the June 10, 2010, letter which he provided to Grievant (State's Exhibit 9, p.300-301).

31. Grievant visited Scott Stevens at Stevens's home a few weeks after the June 10 incident. Grievant told Stevens that he was concerned that Taylor knew about his personal problems and that Stevens was the only one who knew of them. The Employer has not established by a preponderance of the evidence that Grievant attempted to persuade Stevens during this conversation or at any other time to falsely report to Canales during the investigation that Grievant had previously told Stevens about his mental health history.

32. On June 29, 2010 and August 5, 2010, Canales conducted interviews of Grievant. In both interviews, Grievant admitted striking Taylor several times. Grievant denied initiating the physical altercation. Grievant told Canales that he had a welt on his forehead from being struck by Taylor. Canales also interviewed Taylor and offenders who witnessed the June 10 incident. Taylor told Canales that Grievant had initiated the physical altercation. Offenders Santos, Burke, Royce and DeLong each indicated that they had observed Grievant throw the first punch in the incident (State's Exhibit 9).

33. O'Malley sent Grievant a letter dated September 2, 2010, which provided in pertinent part:

> As a result of your behavior described below, the Department of Corrections is contemplating imposing serious disciplinary action up to and including dismissal from your position as a Community Service Team Leader with the DOC. You have the right to respond to the specific allegations listed below, either orally or in writing, before the final decision is made. You have the right to be represented by the Vermont State Employees' Association, Inc., or private counsel at your own expense, during proceedings connected with this action.
>
> Disciplinary action is contemplated for the following reasons:
>
> These charges are based on an Investigative Report and an Addendum dated July 26, 2010 and August 13, 2010 respectively, prepared by State Investigator Peter Canales. The Report and Addendum are attached, incorporated herein by reference, and may be consulted for further information regarding the charges summarized below.

. . .

B. <u>Violation of DOC Work Rules 1, 4, 5, 6, 9, & 10; Vermont Personnel Policies 5.6 & 17.0; Vermont Statutes 13 V.S.A. §§ 1023, 1026, & 1028a; and Directives in Commencement of Investigation Notice.</u>

Investigation

On June 10, 2010, you were involved in a physical and verbal altercation with a temporary employee, Community Service Team Leader Ronald Taylor ("CSTL Taylor"), while you supervised offenders performing lawn maintenance at the Poultney Cemetery.

While maintaining the grounds in a lower portion of the cemetery, Offender AD slipped on the grass, which nearly resulted in his foot sliding under the deck of the mower. He then moved to another area of the cemetery. Upon discovering that Offender AD had moved from his assigned location, you questioned his actions.

Offender AD and SB then approached CSTL Taylor at the upper portion of the cemetery, claiming they could not work in the lower portion because you were "belittling" and "berating" them. After he calmed down the offenders, CSTL Taylor instructed them to mow the upper portion instead.

Subsequently, you and CSTL Taylor engaged in a heated discussion concerning the offenders and their placement around the cemetery. According to CSTL Taylor, you approached him in a "very aggressive manner" asking him "what the hell he's doing" because you were the work crew boss, not him.

After engaging in an inappropriate verbal altercation, you elevated the conflict by punching CSTL Taylor in the face and shoving him to the ground. After wrestling on the ground, you also jumped on his back and punched him in the back of the head several times. CSTL Taylor responded in kind, and you fought in front of the inmates you were supposed to be supervising. CSTL Taylor was apparently later transported to the hospital by ambulance due to head injuries he sustained during the altercation.

On June 29, 2010 and August 5, 2010, Peter Canales, State Investigator, conducted two separate investigative meetings with you. In both interviews, you admitted punching and striking CSTL Taylor several times. You denied being the initial aggressor of the physical and verbal confrontation.

During the course of his investigation, Mr. Canales interviewed eight (8) offenders, all of whom were under your supervision on the day at issue. Four (4) offenders said they witnessed the incident between you and CSTL Taylor, and all known witnesses said you were the initial aggressor. They observed you punch, or at least attempt to punch, CSTL Taylor first. CSTL Taylor also stated that you

were the aggressor and that you punched him before he had any physical contact with you.

Inappropriate Verbal Behavior

You admit to engaging in a verbal altercation with a co-worker while on duty. You acknowledged that you and CSTL Taylor were shouting "back and forth", and that you referred to him as being "fucking nuts." It appears you engaged in verbal behavior towards a fellow employee that was profane, indecent and/or vulgar as well as malicious, demeaning, harassing and/or insulting, and therefore it appears your verbal behavior violated DOC Work Rules 1 and 6. Further, it appears your verbal behavior violated 13 V.S.A. §1026 ("Disorderly Conduct"), as well as Vermont Personnel Policy 5.6 and DOC Work Rule 9 by failing to devote your full time, attention and effort to your duties, and by conducting yourself in a manner that could bring discredit or embarrassment to the State of Vermont. You also failed to comply with Vermont Personnel Policy 5.6, which requires employees to fulfill to the best of their ability the duties and responsibilities of their position.

Assaulting a Co-Worker While on Duty

You admit to assaulting a co-worker while on duty. Moreover, despite your claim to the contrary, it appears you started the physical confrontation by throwing the first punch. By assaulting a fellow employee while on duty, you engaged in behavior that was malicious, demeaning, harassing and/or insulting, and appear to have violated DOC Work Rules 1 and 6. In addition, it appears your assault of CSTL Taylor violated 13 V.S.A. §§ 1023 ("Simple assault"), 1026 ("Disorderly Conduct") and 1028a ("Assault of Correctional Officer"); accordingly, you also violated DOC Work Rule 10 . . . It also appears you violated Vermont Personnel Policy 5.6 and DOC Work Rule 9 by failing to devote your full time, attention and effort to your duties, and by conducting yourself in a manner that could bring discredit or embarrassment to the State of Vermont. You also failed to comply with Vermont Personnel Policy 5.6, which requires employees to fulfill to the best of their ability the duties and responsibilities of their position.

Dishonesty during Investigation

It also appears you were untruthful when you claimed you did not initiate the physical altercation. Indeed, you are the only witness who claims Taylor made the first contact. Moreover, while you claimed you only pushed Taylor away, the witnesses claim you punched Taylor. In addition, you claimed you suffered a welt on your forehead, but the witnesses stated you sustained no visible injuries as a result of the altercation.

It also appears you tried to compromise the integrity of the investigation by attempting to persuade CSTL Stevens to falsely report to the State Investigator that you previously told CSTL Stevens about your alleged mental health history. CSTL Stevens states he did not know anything about your mental health history.

It seems you tried to influence CSTL Stevens to provide false testimony that may have helped you impugn CSTL Taylor, and/or otherwise influence the investigation. Your solicitation of fabricated evidence was misconduct.

More specifically, your failure to honestly recount the events in question and your attempt to compromise the investigation by encouraging an employee to be dishonest violated DOC Work Rules 1, 4, and 5; Vermont Personnel Policies 5.6 and 17.0; as well as the directives provided in the DOC letter dated June 21, 2010 prohibiting you from colluding with any individual to fabricate or misrepresent facts pertaining to the investigation.

C. <u>Conclusion</u>

Your actions described above appear to constitute misconduct, gross neglect of duty and/or gross misconduct. Your actions are extremely serious because you jeopardized the safety of the public, the offenders and the DOC staff. The seriousness of your offenses is exacerbated by the fact you assaulted your fellow employee while supervising offenders in a public place, which plainly impaired your ability to properly supervise the offenders and protect the public. Your verbal and physical behavior was dangerous, disruptive, and unacceptable. As a supervising CSTL, you egregiously violated your duty to act as a role model for offenders. You also violated your duty to be honest to your employer concerning the details of the investigation, and you attempted to mislead the Investigator. There are few offenses more serious than misleading your employer. Your actions discredit and undermine the reputation of the Department of Corrections and the State of Vermont, and raise a significant question about your ability to satisfactorily – and credibly – carry out the responsibilities of your position.

Accordingly, based on the above information, it appears that your conduct provides just cause for disciplinary action up to and including dismissal from your position as Community Service Team Leader with the DOC.

Your disciplinary history as a state employee will also be considered in making a determination. Our records indicate your disciplinary history is as follows:

- Unsatisfactory Evaluation (April 28, 2006) (PPR);
- Letter of Reprimand (September 7, 2006);
- Letter of Reprimand (December 5, 2006);
- Letter of Reprimand (April 20, 2007);
- Suspension, One (1) day (June 19, 2007);
- Suspension, Four (4) days (June 26, 2007);
- PPR Extension (February 22, 2008);
- Suspension, One (1) day (August 19, 2009); and

- Temporary Relief from Duty (June 11, 2010).

D. <u>Process</u>

> You must notify me within <u>twenty-four (24) hours</u> 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 1)

34. O'Malley sent Grievant a letter dated September 16, 2010, which provided in pertinent part:

> This is to notify you of your dismissal from the position of Community Service Team Leader, effective September 16, 2010, for misconduct and/or gross misconduct. You will not receive two weeks pay in lieu of two weeks notice. By letter dated September 2, 2010, you were notified that DOC was contemplating your dismissal, and were given an opportunity to respond to charges of misconduct. I met with you and your VSEA Representative, Kathi Partlow, on September 10, 2010, to hear your response. I have taken your response into consideration in making this decision.
>
> The reasons for this action are those that are outlined in the above-referenced letter of September 2, 2010 . . ., which are incorporated herein by reference.
>
> . . .
> (State's Exhibit 4)

<u>OPINION</u>

Grievant contends that the Employer violated Article 14 of the Contract by dismissing him from employment with the Rutland Probation and Parole office because: 1) the Employer failed to afford Grievant his right to VSEA representation when questioning him about the incident which precipitated his dismissal; and 2) the dismissal was not based on fact or supported by just cause.

Grievant contends that the Employer violated Article 14, Section 7, of the Contract because Rutland Probation and Parole District Manager Michael O'Malley did

not advise Grievant of his right to VSEA representation on June 10, 2010, when he required him to provide a written report of the incident between Grievant and Taylor. Article 14, Section 7, provides in pertinent part:

> Whenever an employee is required, by his or her supervisor or management, to give oral or written statements on an issue involving the employee, which may lead to discipline against the employee . . . he or she shall be notified of his or her right to request the presence of a VSEA representative and, upon such request, the VSEA representative shall have the right to accompany the employee to any such meeting. The notification requirement shall not apply to the informal initial inquiry of the employee by his or her supervisor without knowledge or reason to believe that discipline of the employee was a likely possibility.

Pursuant to this contract provision, employees are to be notified of the right to request the presence of a VSEA representative whenever a supervisor, manager or investigator of the employer is requiring an employee to give oral or written statements on an issue involving the employee, and it is reasonable for the supervisor, manager or investigator to suspect that the statements may lead to discipline against the employee.[1]

The evidence before us is not sufficient for us to conclude that, when O'Malley required Grievant to provide a written report of the incident between Grievant and Taylor, it was reasonable for him to suspect that statements made by Grievant may lead to discipline against Grievant. Grievant told O'Malley immediately after the incident, and prior to being required to provide a written report, that Taylor had attacked him and made disparaging remarks about him. The evidence before us does not indicate that O'Malley was aware prior to requiring Grievant to write a report of Taylor's version of events – i.e., that Grievant had initiated the physical altercation.

Given these circumstances, there is insufficient evidence for us to conclude that it was reasonable for O'Malley to suspect that statements made by Grievant in his written

[1] Grievance of Rosenberger, 28 VLRB 197, 212-214 (2006).

report may lead to discipline against him. Moreover, we note that we have placed no reliance on the written report submitted by Grievant in determining the facts of the June 10 incident.

We turn to addressing Grievant's contentions 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.[2] 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.[3]

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.[4] Once the underlying facts have been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven facts.[5]

The Employer made various charges against Grievant, as detailed in Finding of Fact No. 33. The Employer first charges Grievant with misconduct in violation of Department of Corrections ("DOC") Work Rules 1, 6 and 9; State Personnel Policy 5.6; and 13 V.S.A. §1026; by engaging in a verbal altercation on June 10, 2010, with co-worker Ron Taylor while Grievant was on duty.

The Employer has established this charge by demonstrating by a preponderance of the evidence that Grievant engaged in an angry discussion with Taylor while they were working at the Poultney Cemetery in which they yelled at each other and used profanity.

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[2] In re Grievance of Brooks, 135 Vt. 563, 568 (1977).
[3] Id. In re Grievance of Yashko, 138 Vt. 364 (1980).
[4] Grievance of Colleran and Britt, 6 VLRB 235, 265 (1983).
[5] Id. at 266.

This violated the cited Work Rules as charged because Grievant engaged in malicious and vulgar verbal behavior towards a co-worker, and reflected discredit upon the Employer. Grievant also violated Policy 5.6 in that his shouting match with Taylor was contrary to performing his duties and brought discredit and embarrassment to the Employer. Grievant also engaged in disorderly conduct in violation of 13 V.S.A. §1026 as charged because he recklessly created a risk of public inconvenience or annoyance by his use of abusive or obscene language in a public place.

The Employer next charges Grievant with violating DOC Work Rules 1, 6, 9 and 10; State Personnel Policy 5.6; and 13 V.S.A. §§1023, 1026, and 1028a; by assaulting Taylor on June 10, 2010, while on duty and starting the physical confrontation by throwing the first punch.

The Employer has established this charge by demonstrating by a preponderance of the evidence that Grievant assaulted Taylor on June 10, 2010, while on duty and starting the physical confrontation by throwing the first punch. This violated each of the work rules, personnel policy and statutes cited by the Employer in support of this charge except for 13 V.S.A. §1028a. A necessary element of violating §1028a is being convicted of simple or aggravated assault, and Grievant was not so convicted. Grievant engaged in physical behavior with malice towards Taylor in the presence of offenders he was supposed to be supervising. This was entirely at odds with performing the duties of his position, and brought discredit and embarrassment to the Employer. He violated 13 V.S.A. §§ 1323 and 1326 as charged by engaging in simple assault and disorderly conduct.

The Employer further charges Grievant with dishonesty during the investigation of the June 10 incident with Taylor, specifically: 1) being untruthful when he claimed he did not initiate the physical altercation, did not punch Taylor, and that he suffered a welt on his forehead; and 2) attempting to compromise the integrity of the investigation by attempting to persuade CSTL Scott Stevens to falsely report to the investigator that he previously told Stevens about his alleged mental health history. The Employer contends that Grievant's failure to honestly recount the events in question and his attempt to compromise the investigation by encouraging an employee to be dishonest violated DOC Work Rules 1, 4, and 5; Vermont Personnel Policies 5.6 and 17.0; and the directives provided in the June 21, letter from the Employer prohibiting him from colluding with any individual to fabricate or misrepresent facts pertaining to the investigation.

The Employer has established this charge to the extent of establishing that Grievant was untruthful during the investigation when he claimed he did not initiate the physical altercation, did not punch Taylor, and that he suffered a welt on his forehead. In so doing, Grievant violated Work Rules 1, 4 and 5, and Personnel Policy 17.0, which require employees to cooperate with employer investigations and be truthful during them.

The Employer has not established the portion of this charge concerning Grievant attempting to compromise the investigation. The Employer has not established by a preponderance of the evidence that Grievant attempted to persuade Stevens during this conversation or at any other time to falsely report to Canales during the investigation that Grievant had previously told Stevens about his mental health history.

In sum, the Employer has established most 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.[6] In such cases, the Board must determine whether the proven charges justify the penalty.[7]

We look to the factors articulated in Colleran and Britt to determine whether the Employer exercised its discretion within tolerable limits of reasonableness.[8] 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) the potential for Grievant's rehabilitation, and 8) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by Grievant or other employees.

We first consider the nature and seriousness of Grievant's offenses and their relation to Grievant's duties and responsibilities. Grievant's proven offenses were serious. The argument engaged in by Grievant with a co-worker at a worksite which erupted into a physical fight initiated by him constitutes egregious conduct and are serious offenses. The fact that the fight occurred in the presence of offenders whom

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[6] Grievance of McCort, 16 VLRB 70, 121 (1993).
[7] Id.
[8] 6 VLRB at 268-69.

Grievant was supposed to be supervising increases the seriousness of Grievant's misconduct.

Grievant exacerbated his misconduct by his dishonesty during the Employer's investigation of the charges against him. Dishonesty is a serious offense by an employee against an employer.[9] The nature of the duties of a correctional employee who supervises offenders requires accurate and truthful reporting of incidents, and in previous cases we have upheld dismissals of correctional employees where their dishonesty to the employer has been a proven charge.[10]

Grievant 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.[11] Grievant clearly had implied notice that engaging in a heated argument with a co-worker and physical acts of violence against that co-worker at a worksite in the presence of offenders whom Grievant was supposed to be supervising was prohibited. Also, training and work rules received by Grievant provided fair notice that the misconduct he engaged in was prohibited.

Grievant also should have known that his dishonesty was prohibited. Honesty is an implicit duty of every employee, and thus an employee should know that dishonest conduct is prohibited.[12] Moreover, Grievant had explicit notice through DOC Work Rules 4 and 5 that dishonesty was prohibited.

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[9] In re Carlson, 140 Vt. 555, 559 (1982).
[10] Grievance of Kerr, 28 VLRB 264, 281 (2006). Charnley and Leclair, 24 VLRB at 146, 155. Grievance of Johnson, 9 VLRB 94 (1986). Grievance of Pretty, 22 VLRB 260 (1999). Grievance of Corrow, 23 VLRB 101 (2000). Grievance of Newton, 23 VLRB 172 (2000).
[11] Grievance of Towle, 164 Vt. 145, 150 (1995). Grievance of Brooks, 135 Vt. at 568.
[12] Carlson, 140 Vt. at 560.

Grievant's past work record and disciplinary record on balance does not support his retention of employment. Although he had a lengthy service of 22 years with the Department of Corrections, his performance and work record declined substantially in the several years preceding his dismissal. He received an overall unsatisfactory performance evaluation approximately three years preceding his dismissal and was placed in a prescriptive period for remediation, the second step in a four step procedure for progressive corrective action set forth in the Contract. He received three disciplinary suspensions and three disciplinary letters of reprimand during his last four years of employment. Grievant's significant performance deficiencies and extensive disciplinary record during this period weigh in favor of his dismissal.

Grievant's offenses, considered together with his performance and misconduct record, demonstrated that he was unable to reliably perform his duties and responsibilities. The Employer reasonably lost confidence that he would be able to perform his assigned duties.

Grievant has not established that he was treated inconsistently with other employees engaging in similar offenses. Grievant has not demonstrated a potential for rehabilitation given his offenses, performance and disciplinary record, and failure to take responsibility for his misconduct. The Employer acted reasonably in determining Grievant engaged in gross neglect of duty and gross misconduct and there was no alternative sanction to dismissal that would be effective. The Employer was justified in bypassing lower levels of discipline given Grievant's serious misconduct. 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 John Alexander is dismissed.

Dated this 1st day of December, 2011, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
Linda P. McIntire, Acting Chairperson

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James C. Kiehle

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Alan Willard