Just Cause Standard

The collective bargaining contracts between the State and VSEA, and between the State Colleges and the VSEA, provide that no employee shall be discharged except for just cause. In application, the meaning of this short, simple clause is not easily ascertained. The Vermont Supreme Court has defined just cause for dismissal as:

> ...some substantial shortcoming detrimental to the employer's interests which the law and a sound public opinion recognize as a good cause for dismissal... The ultimate criterion of just cause is whether the employer acted reasonably in discharging the employee because of misconduct... a discharge may be upheld as one for 'cause' only if it meets two criteria of reasonableness: one, that it is reasonable to discharge employees because of certain conduct and the other, that the employee had fair notice, express or implied, that such conduct would be ground for discharge.[1]

The Court has indicated that just cause analysis should "center upon the nature of the employee's misconduct."[2] In deciding whether there is just cause for dismissal, it is appropriate for the VLRB to determine the substantiality of the detriment to the employer's interests.[3]

The standard for implied notice is whether the employee should have known the conduct was prohibited.[4] This is an objective standard.[5] Knowledge that certain behavior is prohibited and subject to discipline is notice of the possibility of dismissal.[6]

In carrying out its function to hear and make final determination on whether just cause exists for discipline, the VLRB determines *de novo* and finally the facts

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[1] In re Grievance of Brooks, 135 Vt. 563, 568 (1977).
[2] In re Morrissey, 149 Vt. 1, 13 (1987). Grievance of Merrill, 151 Vt. 270, 273 (1989).
[3] Merrill, 151 Vt. at 273-274.
[4] Grievance of Towle, 164 Vt. 145 (1995). Grievance of Brooks, 135 Vt. 563, 568 (1977).
[5] Grievance of Towle, 164 Vt. at 150. Grievance of Hurlburt, 175 Vt. 40, 50 (2003).
[6] Grievance of Towle, 164 Vt. at 150. Grievance of Gorruso, 150 Vt. 139, 148 (1988).

of a particular dispute, and whether the penalty imposed on the basis of those facts is within the law and the contract.[7] In large measure, this is an objective standard requiring review of the penalty imposed on the basis of facts actually found by the Board.[8] 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.[9]

The Board also has indicated that an employer presents insufficient evidence when it seeks to establish a charge against an employee in a discipline case in reliance on the investigation report submitted by an investigator. Investigation reports are admitted into evidence by the Board to indicate the information that was relied on by management in taking disciplinary action, but they are not admitted to establish the truth of charges against an employee.[10] The Board noted that hearings before the Board are *de novo*, and a *de novo* hearing means that "the case shall be heard the same as though it had not been heard before."[11] As such, the Board acts as an impartial trier of fact and is not bound by any findings or conclusions made during any earlier proceedings.[12]

Once the underlying facts have been so proved, the Board must determine whether just cause exists for the discipline imposed by the employer based on the proven facts. The Board determines whether the action taken by the employer was reasonable based on the proven charges.[13] If the employer establishes that management responsibly balanced the relevant factors in a particular case and struck a reasonable balance, its penalty decision will be upheld.[14]

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[7] Grievance of Colleran and Britt, 6 VLRB 235, 265 (1983).
[8] Id.
[9] Id.
[10] Grievance of Farnsworth, 35 VLRB 519, 534 (2020).
[11] Id.; *citing* In re Danforth, 174 Vt. 231, 238 (2002).
[12] Id.
[13] Grievance of Simpson, 12 VLRB 279, 295 (1989).
[14] Colleran and Britt, 6 VLRB at 235.

Failure of the employer to prove by a preponderance of the evidence all the particulars of the dismissal letter does not require reversal of a dismissal action.[15] In such cases, the VLRB must determine whether the remaining proven charges justify the penalty.[16]

The Board has applied the just cause standard for dismissal to a grievance filed by a non-unionized University of Vermont employee, where such standard was contained in a binding rule of the University.[17]

Also, the Board has held that there is no substantive difference between a "cause" standard for discipline and a "just cause" standard. The analysis the Board employs when "cause" is the operative standard is the same the Board applies when reviewing disciplinary actions against state employees covered by the "just cause" standard.[18]

The Board has rejected contentions made by employers that some dismissals are *per se* just.[19] The Board stated in one case:

> We refuse to hold that some dismissals are *per se* just. The language of the provision at issue expressly provides that the Board's authority of review extends to "any case involving a . . . dismissal", and the facts indicate there was no discussion during bargaining about excluding certain offenses from consideration under that provision. Moreover, each case involves a question of degree and we must look to all the circumstances of a case to determine whether a dismissal is just. [20]

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[15] Grievance of Regan, 8 VLRB 340, 366 (1985).
[16] Grievance of Colleran and Britt, supra.
[17] Grievance of Lightburn, 15 VLRB 372, 392 (1992).
[18] Grievance of Eroncig, 35 VLRB 430, 444 (2020). Grievance of Morrissey, 7 VLRB 129, 161 (1984). Grievance of Russell, 7 VLRB 60, 81 (1984).
[19] Grievance of Sherman, 7 VLRB 380, 405 (1984). Grievance of Carosella, 8 VLRB 137, 161 (1985). Grievance of Harris, 35 VLRB 344, 372-73 (2020).
[20] Grievance of Sherman, 7 VLRB at 405.

In another case, the Board expressed the view that an employer must select an appropriate disciplinary sanction based on the specific facts of the particular case before it; it may not automatically impose a fixed penalty for a specific category of misconduct regardless of individual factors. [21]

The Board held similarly in another case where the employer requested that the Board uphold a dismissal as *per se* just due to a 30 day "last chance" suspension received by an employee. The Board declined to hold that the dismissal was *per se* just without examining all the circumstances of the case to determine whether just cause existed for his dismissal. The Board elaborated:

> This does not mean that the "last chance" provision is without effect. It provided clear notice to Grievant that future dishonesty was prohibited and could be met with the ultimate sanction of dismissal. The significance of the "last chance" provision is further enhanced in that Grievant received the most severe penalty permitted by the Contract short of a dismissal – a 30 day suspension. It is accorded substantial weight when determining whether just cause existed for Grievant's dismissal.[22]

The collective bargaining contracts between the State and VSEA distinguish between the progressive sanctions that are available in misconduct cases and the progressive sanctions that are available in performance cases, leading the VLRB to conclude that the parties intended a distinction between misconduct and nonperformance. The Board stated that "consistent with this intent, and as a matter of logic, neither of the two requisite elements of just cause – 'reasonableness' and 'fair notice' – can be determined without first categorizing the employee's underlying actions as a question of misconduct or a question of performance."[23]

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[21] Grievance of Hurlburt, 9 VLRB 174, 188-89 (1986).

[22] Grievance of Harris, 35 VLRB 344, 373 (2020).

[23] Grievance of Roy, 13 VLRB 167, 182 (1990).

In one case, the Board concluded that the State did not meet the burden of proving that a social worker knew, or should have known, that judgments he made could lead to discipline. The Board determined that any deficiencies were matters of judgment impacting on the safety of children for which precise guidelines did not exist, or making a choice between competing priorities. The Board held these were issues of performance, rather than instances of misconduct.[24]

However, in subsequent decisions, the Board concluded that all matters of judgment are not necessarily performance issues to be handled outside the discipline route. In one of the cases, the Board determined that just cause existed for the disciplinary actions of written reprimand and suspension of a State Agency of Transportation auditor for a one-year pattern of a propensity to demonstrate bad judgment by making inappropriate comments, exhibiting rude behavior, and failing to control himself in his professional dealings.[25]

Similarly, the Board upheld the reprimand of a Motor Vehicle Examiner for engaging in rude and unprofessional behavior where the employer demonstrated that there was a pattern of customer complaints against the employee for engaging in rude, condescending and demeaning behavior, and the employer had informed the employee that he needed to improve his behavior in this regard.[26] The Board held that the employee's exercise of judgment is appropriately treated as misconduct where the behavior at issue is recurring and the employee knows that the behavior is inappropriate but engages in it anyway.[27]

In another case, the Board concluded that it was reasonable for the State to treat as misconduct the failure of a correctional officer to conduct any observation

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[24] Id. at 182-185.
[25] Grievance of McCort, 16 VLRB 70 (1993).
[26] Grievances of MacDonald, 28 VLRB 55, 65-69 (2005).
[27] Id. at 67.

checks on inmates, untimely checks, and insufficient checks given the serious neglect of duties by him which placed in jeopardy the life or health of inmates under his care.[28] Neglect of duties was involved in another case in which a probation and parole officer received the disciplinary actions of: 1) a written reprimand for failure to timely complete a pre-sentence investigation report on a convicted person to submit to the sentencing court which caused the court to cancel the sentencing hearing, and 2) a suspension for taking nearly two months to complete an out of state transfer request for an inmate who had been approved for parole. The Board concluded that the State was justified in treating the actions as misconduct rather than a question of performance given the officer's neglect of duties, indifference to meeting deadlines and timely carrying out his duties, and failing to do what a reasonably prudent person under the officer's circumstances would have done.[29]

The Board concluded in another case that the State did not demonstrate the validity of addressing a liquor control inspector's deficiencies in recording of his time worked as a question of misconduct, and instead would have acted appropriately by dealing with the employee's failings as a question of performance and applying progressive corrective action. The circumstances were that the inspector displayed sloppy and incomplete time recording procedures with substantial room for improvement, but the employer had not demonstrated by a preponderance of the evidence that the inspector intended to misrepresent his work on the days in question or mislead the employer through his deficiencies.[30]

If the Board concludes that some of the matters for which an employee was dismissed should have been treated as questions of performance rather than misconduct, this presents the question of what effect this has on the ultimate question

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[28] Grievance of Ducas, 28 VLRB 238, 255-57 (2006).
[29] Grievance of Lawrence, 17 VLRB 360, 369-372 (1994).
[30] Grievance of Jacobs, 31 VLRB 204, 229-30 (2011).

of whether just cause existed for an employee's dismissal. In a recent dismissal case in which the Board reduced the dismissal of a state employee to a 30 day suspension, the Board stated as follows in this regard:

> It is evident by the record that the Employer took into account issues with Grievant's performance in deciding to dismiss Grievant and viewed Grievant as a poor candidate for rehabilitation in part at least due to not improving his performance over time. The Employer did not exercise its discretion within tolerable limits of reasonableness by placing such weight on Grievant's performance. We so conclude because the Employer had taken no progressive corrective action steps to address performance deficiencies of Grievant prior to dismissing him. The Contract specifies progressive corrective action steps to address performance issues and allows bypass of such steps only in appropriate cases. The record is devoid of evidence justifying bypass of corrective action with respect to Grievant.[31]

[31] Grievance of Farley, 35 VLRB 43, 63 (2019).