## Timeliness of Discipline

Under contract language requiring the employer to "act promptly to impose discipline . . . within a reasonable time of the offense", the Board concluded that this provision was violated in one case when management charged an employee with an offense that was brought to management's attention three years earlier.[1] The Board decided the contract language was violated in another case when an employee was not charged with an offense until five and one-half months after an incident requiring a simple investigation.[2] In both cases, the Board concluded that management was precluded from disciplining the employees for the alleged offenses.

In a 2016 decision concerning a dismissed state employee, the Board majority determined this contract provision was violated when the employer did not notify the employee for nearly nine months after the employer had knowledge of the alleged misconduct, and dismissed the employee nearly a year after such knowledge, under circumstances where no witnesses were interviewed during the employer's investigation. The Board ultimately concluded that the due process violations and examination of the alleged misconduct underlying the employee's dismissal resulted in reducing the dismissal to a 30-day suspension.[3]

The Supreme Court reversed this decision on appeal and reinstated the dismissal.[4] The Court held that the lengthy delay in imposing discipline did not preclude an employer from dismissing an employee absent a showing of prejudice and actual harm to the employee.[5] The Court determined that the evidence did not establish prejudice to the employee since he continued to work and receive his salary

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[1] Grievance of Gorruso, 9 VLRB 14, 34 (1986), *Reversed on Other Grounds,* 150 Vt. 139 (1988).
[2] Appeal of Wells, 16 VLRB 52 (1993).
[3] Grievance of Lepore, 33 VLRB 290.
[4] 2016 VT 129.
[5] Id. at ¶ 25 – 26.

during the investigation, thereby suffering no monetary loss; and there was no discernable effect on the preservation of facts or testimony or any other adverse effect on the employee's ability to defend against the charges.[6] The Court further found no showing of prejudice where there was no evidence that the employer either sought to, or did, obtain any unfair advantage over the employee through the delay in disciplining him.[7]

In subsequent cases where the Board concluded that the State violated the procedural due process protections negotiated by the parties of timely taking disciplinary action, but there was not a showing of prejudice and actual harm to the employee under the standards set forth by the Court, the Board issued a cease and desist order to the State requiring the State in the future to adhere to these procedural due process protections.[8]

There have been several other cases where the Board has concluded this contract language was not violated. The Board determined that an employer acted reasonably in completing an investigation in five months into alleged misconduct by three correctional officers where the employer's investigation was complicated because criminal charges were brought against the employees.[9] Similarly, the Board determined in another case that imposition of discipline on an employee was not unreasonably delayed where dismissal occurred four and one-half months after criminal charges were brought against an employee and the employer commenced an investigation of his alleged misconduct.[10] The Board determined in a further case that the dismissal of a correctional officer occurred within a reasonable time of the

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[6] Id. at ¶ 25.
[7] Id. at ¶ 26.
[8] Grievance of Gibson, 35 VLRB 182, 195 (2019). Grievance of Harris, 35 VLRB 344, 378-81 (2020).
[9] Grievances of Charnley, Camley and Leclair, 24 VLRB 119, 141-142 (2001).
[10] Grievance of Brown, 24 VLRB 159, 174 (2001).

offense, even though the conduct engaged in by the officer leading to her dismissal occurred six and one-half months prior to her dismissal, because a significant part of the delay was caused by the employee's union representative and a disagreement of the parties which had to be resolved through the grievance procedure.[11]

The Board held in another case that a delay of four months after receiving the investigator's report did not provide a reasonable basis to rescind the dismissal of a correctional officer where the delays were substantially caused by unforeseen complications and the dismissed officer's claimed lack of memory.[12] Elsewhere, the Board concluded that a six and one-half month period before discipline was imposed was reasonable where there were a number of allegations against the employee which resulted in an extensive investigation, including allegations on two issues which did not surface until the investigation of other allegations was well underway.[13]

Also, the Board had indicated in several cases that, absent demonstrated prejudice by the disciplined employee, it was not prepared to conclude that the time it took the employer to impose disciplinary action on the employee affected the validity of the disciplinary action. In these cases, employees were on temporary relief from duty with pay status during the investigation and did not demonstrate that they were prejudiced by the timing of the disciplinary action.[14]

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[11] Grievance of Kerr, 28 VLRB 264, 277 (2006).
[12] Grievance of Abel, 31 VLRB 256 (2011).
[13] Grievance of Richardson, 31 VLRB 359, 383 (2011).
[14] Id. Grievance of Frank, 35 VLRB 537, 555-56 (2020). Grievance of Abel, 31 VLRB at 274. Grievance of Sileski, 28 VLRB 165, 191 (2006). Grievance of Scott, 22 VLRB 286, 301-02 (1999).