

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 19-17
ASIF KALIM)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 18, 2019, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Asif Kalim ("Grievant"), an employee of the Vermont Department of Mental Health. VSEA alleged that the State of Vermont Department of Mental Health ("Employer") violated Article 14 of the collective bargaining agreement between the State of Vermont and VSEA for the Non-Management Bargaining Unit, effective July 1, 2018, to June 30, 2020 ("Contract"), by: 1) dismissing Grievant without just cause, 2) improperly bypassing progressive discipline, and 3) failing to apply discipline with a view toward uniformity and consistency.

Hearings were held on November 7 and November 25, 2019, in the Labor Relations Board hearing room in Montpelier before Labor Relations Board Members Richard Park, Chairperson; David Boulanger and Karen Saudek. VSEA Staff Attorney Kelly Everhart represented Grievant. Laura Rowntree and Rachel Smith, Assistant Attorney Generals, represented the Employer. Grievant and the Employer filed post-hearing briefs on December 13, 2019.

FINDINGS OF FACT

1. The Contract provides in pertinent part:
...

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 designated representative . . . may dismiss an employee with just cause with two (2) weeks' notice or two (2) weeks' pay in lieu of notice. . .
 - 3. Notwithstanding the provisions of paragraph 2 above, the appointing authority or authorized representative . . . may dismiss an employee immediately without two (2) weeks' notice or two (2) weeks' pay in lieu of notice for any of the following reasons:

...

 - (b) gross misconduct;

...
 - 8. The appointing authority or authorized designee may suspend an employee without pay for reasons for a period not to exceed thirty (30) workdays. . .
- ..
- (State Exhibit 1, Grievant Exhibit 2)

2. State of Vermont Personnel Policies and Procedures have provided as follows in pertinent part at all times relevant:

...

Number 5.6 EMPLOYEE CONDUCT

...

1. It shall be the duty of employees to fulfill to the best of their ability the duties and responsibilities of their position.

...

3. Employees shall conduct themselves in a manner that will not bring discredit or embarrassment to the State of Vermont . . .

...

Number 17.0 EMPLOYMENT RELATED INVESTIGATIONS

...

RESPONSIBILITIES

...

D. Employees shall:

- Cooperate with investigations, and provide truthful and complete information in accordance with State Personnel Policies and local Work Rules. Refusing to answer, answering incompletely, or answering untruthfully, questions related to work is considered misconduct for which an employee may be disciplined up to and including dismissal from their employment with the State.

...

(State Exhibit 2

3. Grievant began work at VPCH in May 2014 as a Mental Health Specialist. He was promoted a short time thereafter to Mental Health Recovery Specialist. He remained in that position until his dismissal. Grievant's primary duty as a Mental Health Recovery Specialist was to conduct therapeutic groups. Grievant promoted the recovery of patients through the use of therapeutic communication and support while encouraging patient participation in groups. Groups provided patients with an opportunity to engage in therapeutic activities regarding their treatment plan, goals, obstacles and aspirations for when they were released from VPCH.

4. The Employer never provided Grievant with a performance evaluation during his employment. The evidence indicates that Grievant was well-liked by patients, was respectful of them, used effective approaches with them, and generally developed good rapport with patients. Most of Grievant's co-workers enjoyed working with him.

5. VPCH, at all times relevant, had a written procedure for Emergency Involuntary Procedures. "Emergency Involuntary Procedures" ("EIP's") "mean restraint, seclusion or emergency involuntary medication" of patients. "Restraint" means "any manual method, physical hold or mechanical device, material or equipment that immobilizes or reduces the ability of a patient to move his or her arms, legs, body or head freely, or a drug or medication when it is used as a restriction to manage the patient's behavior or restrict the patient's freedom of movement and is not a standard treatment for the patient's condition". EIP's "may only be

used to prevent the imminent risk of serious bodily harm to the patient, a staff member or others”. Under the procedure, use of EIP’s “must be implemented in accordance with safe and appropriate restraint and seclusion techniques as determined by hospital policy.” Physical restraint is required to be “in the least intrusive and least restrictive manner” (State Exhibit 3).

6. EIP’s are required when de-escalation techniques do not work. De-escalation involves verbally communicating with patients to address and seek to correct their behavior. There are often debriefings after EIP’s in which involved staff and supervisors discuss what happened during the EIP.

7. VPCH, at all times relevant, followed Pro-ACT principles. Pro-ACT is a program used at VPCH to provide guidelines to employees on how to attempt to de-escalate patients by prioritizing patient and staff safety and well-being. Among the Pro-ACT principles when a restraint is used are to incorporate evasion, use restraint as a last resort, avoid pain, and restrain only as a team (State Exhibit 4).

8. Grievant completed Pro-ACT refresher training courses on nine different dates between November 26, 2014, and October 5, 2016. No such training opportunities were offered to him after October 5, 2016, due to lack of trainers for such courses (State Exhibit 9, Grievant Exhibit 4).

9. It is not unusual for VPCH staff to become injured due to their interactions with patients. There have been occasions when employees are out of work and receiving workers’ compensation benefits due to injuries sustained in EIP’s.

10. Kathy Bushey, Associate Nurse Executive, issued Grievant an oral reprimand on December 15, 2016, for refusal of a direct order. The circumstances were that Grievant was not

feeling well, was mandated to work a second shift, and he refused to work the additional shift (State Exhibits 5, 24, p.59; Grievant Exhibit 3).

11. There are four units at VPCCH: A Unit, B Unit, C Unit and D Unit. A and B Units share a nursing station, commonly referred to as “the bubble”.

12. Grievant worked the second shift at all times relevant. At the beginning of his shift on April 14, 2018, Grievant came out of the bubble onto B Unit. He inquired in a loud voice in the presence of Emily Delano, Mental Health Specialist, and Blake Hutchins, Associate Mental Health Specialist, what the foul odor was on the unit. Grievant did not know the source of the odor. There is no evidence that there was a patient present when he made the statement. Delano told Grievant to lower his voice and said that his remarks were patient-shaming. Grievant responded that this was not patient-shaming and that Delano did not understand the meaning of patient-shaming.

13. Grievant then left the unit and walked into the nursing station. The nursing station was not accessible to patients. The door to B Unit shut behind him. Grievant was frustrated and angry about Delano’s accusation of patient-shaming. He stated words to the effect of some people should not work in mental health and used the word “retarded”. Grievant did not use Delano’s name during his outburst. Grievant did not direct these comments to anyone in particular, but two employees in the nursing station area, Lee Flanders and Nurse Malaysia Goodnow, overheard his comments and understood that he was referring to his conversation with Delano.

14. It is not unusual for B Unit to have an unpleasant odor due to trash, exhaust, gas, carpet cleaning solution, feces, urine or body odor of patients. It is not unusual for employees to comment about the odor of a unit. It is not unusual for VCPH staff to make emotional comments

in the course of their challenging work. There have been occasions when staff have referred to other staff in a derogatory manner. There have been occasions when staff have received supervisory feedback for this conduct, other times when staff have not been disciplined for this conduct, and other occasions where they have been disciplined.

15. Delano sent an email on April 14, shortly after the incident, to Nursing Supervisor Lynne Coffey, providing in part:

I want to address something that occurred on the unit tonight involving Asif Kalim. . . Tonight as I was sitting at the help desk with Blake, Asif came onto the unit and proceeded to loudly comment how terrible the unit smelled in what can only be described as a demeaning manner. I promptly confronted him, informing him that it was unprofessional of him to talk so loudly on the unit about patient odor, and that they would probably find his remarks shameful. He stated that he didn't mind that his words could be patient shaming, and continued to reiterate his opinion on the matter. I told him he should take his concerns else ware(sic) if he couldn't be professional. He then proceeded to belittle me as he made his way into the nurses station, asking me if I even knew what patient shaming was, and commenting on how long I have worked at VCPH. . . (State Exhibit 11, Grievant Exhibit 5)

16. Upon review of the email from Delano shortly after it was sent, Coffey requested that the employees who had heard Grievant's statements in the bubble send her emails reporting what they had observed. Malaysia Goodnow, Registered Nurse, sent an email on April 14, 2018, to Coffey, providing:

. . . This evening while returning to break, at roughly 1910, I was in the treatment planning room when Asif stormed in shouting that Emily was "retarded" multiple times and stating that she "shouldn't even work in Mental Health" and that she "needs to learn how to do her job." At the time I did not confront him, but simply walked out on the floor, but when I saw that Emily appeared upset, it only seemed right to say something, especially because his use of derogatory language is offensive and completely against the code of civility. . . (State Exhibit 12, Grievant Exhibit 6)

17. VPCH employee Lee Flanders sent an email on April 14, 2018, to Coffey, providing:

At about 710 pm on Saturday, April 14, 2018, I was sitting at the computer looking at my emails when Asif came in the bubble from B side. He was talking with Emily. The door shut, Emily stayed on B unit and I heard Asif say more than once either being a retard or was a retard. He was in the process of finishing up the conversation with Emily. So it was pretty obvious that he was referring to Emily.
(State Exhibit 13, Grievant Exhibit 7)

18. Following receipt of the emails, Coffey and Charge Nurse Joan Colburn met with Grievant the evening of April 14 to discuss the incident with Delano. Grievant admitted to inquiring about the odor in the unit and making a comment in the bubble to the effect of “this whole mess is just retarded”. Coffey and Colburn provided Grievant with feedback. They directed him to refrain from using words like “retard”, informed him that discussing odor on the unit should not be done in front of patients, and told him that it was unprofessional to call colleagues names. Grievant agreed with the feedback. Coffey did not view Grievant’s comments as patient-shaming. Grievant thought that the feedback he received resolved the issue. Coffey reported the incident between Grievant and Delano up the chain of command. Coffey has the ability to provide feedback to employees. She does not have the authority to discipline them. Coffey considers Grievant to be honest.

19. At some time in the spring of 2018, Grievant was at a whiteboard at the beginning of his shift writing down the schedule for groups in which he was going to be involved. Patient CV rushed down the hallway toward Grievant. She took a swing at Grievant. He dropped the dry eraser he was holding to catch her arm in an attempt to avoid being assaulted. CV then swung at Grievant with her other arm which he again caught. Grievant backed CV to the help desk that was several feet away. Grievant was unable to evade CV because he was against the whiteboard and the incident developed so quickly. While restraining CV, Grievant made an attempt to dialogue with her to see if she would agree to act safely so he could let her go. She did not respond. He also asked her if she wished to go to the seclusion room. Again, CV did not respond.

20. There were no staff close enough to respond quickly to assist Grievant in restraining CV before he placed both his hands on her by himself. Grievant held CV's wrists for seconds. When DeForge and Goodnow arrived to assist, Grievant allowed them to take over the restraint and escort CV elsewhere. There was not a staff debriefing following this incident.

21. CV was not injured as a result of the restraint. She did not complain about Grievant's conduct. She did not request to file a patient event form regarding the restraint.

22. One of the Pro-ACT principles is that restraints of patients should be performed by at least two staff, rather than one employee, for patient and staff safety reasons. The general practice at VPCH is for employees to attempt to act consistent with Pro-ACT principles. However, there are occasions when it is not practical or possible during restraints to be Pro-ACT compliant. Grievant's restraint of CV was not Pro-ACT compliant. There have been occasions at VPCH where staff have been disciplined for not complying with Pro-ACT principles, and other occasions when they have not been disciplined for not so complying.

23. Charge Nurse Roger Hill did not observe the incident with CV, but it was verbally reported to him. Shortly thereafter, Hill approached Grievant and provided him with verbal feedback. He told Grievant that it was dangerous to restrain a patient by oneself and to avoid doing so in the future. Grievant agreed that staff should attempt if possible to restrain patients with no fewer than two staff, and that he had restrained CV by himself only out of necessity because he was unable to evade her when she swung at him. Grievant and Hill believed the feedback Hill provided Grievant addressed the situation and resolved the issue. Hill did not report the restraint of CV to his superiors. Grievant did not subsequently restrain a patient by himself. Hill considers Grievant to be honest.

24. On May 1, 2018, Grievant entered the B Unit to conduct wrap-up groups with patients on the unit. Wrap-up groups are specific groups at the end of the day to engage patients in how their day went. Upon entry to the unit, Grievant in a loud voice addressed a patient by asking him words to the effect of :”Hey, how are you doing today?” Delano was with a group of employees gathered outside the “quiet room” on the unit. The quiet room is a place where patients can elect to go to calm down. Delano told Grievant that patient AH was in the quiet room, that now was not the time to speak loudly, and asked Grievant to lower his voice. Grievant responded by stating that Delano should not tell him how to do his job and that he needed to complete his work with groups.

25. Shortly thereafter, Grievant entered the quiet room where AH was located, asked him how he was doing and if he was interested in participating in a wrap-up group that evening. AH exited the quiet room and engaged in an approximate 45 minute conversation with Grievant. Grievant and AH had a constructive conversation on AH’s goals and plans for when he was released. Grievant had a good rapport with AH during this time.

26. After his conversation with AH, Grievant entered the bubble and overheard Delano speaking to Colburn about the interaction with Grievant that evening. Grievant disagreed with the characterization of the incident by Delano and provided Colburn with his version of events. Colburn advised Delano and Grievant to send an email to her if they had complaints.

27. That evening, Delano sent an email to supervisors Stephanie Shaw, Kenneth Chriscaden and Joan Colburn, providing in part:

. . . Tonight on B Unit we were dealing with the escalation of a patient; all the staff on the floor had decided to give this patient space to calm down in the quiet room, and were standing outside quietly waiting for him to deescalate. Asif came out on the unit and called to another patient in a very loud voice asking him about his evening, trying to complete his wrap up group. I informed Asif that we were having an issue on the unit and that now was not the time to be talking loudly, and asked him if he could lower his voice.

He then proceeded to raise his voice in response. I reiterated the need for lowered voices on the unit, to which he continued to raise his voice, coming closer into my personal space, and told me not to tell him how to do his job. He then walked through the gathering of staff outside the quiet room without addressing anyone and quickly opened the door and leaned in to loudly address the patient we were attempting to let cool off. Thankfully the patient had calmed himself down enough by that time, and Asif was not harmed. . . I feel that his actions placed everyone's safety at risk, including the patients. I immediately went to speak with Joan about my concerns on what had just transpired. Asif came in while we were talking and started to berate me for approaching him on the unit. . . He yelled at me and told me not to tell him how to do his job. I felt threatened and became upset. Joan intervened to deescalate him. . .
(State Exhibit 14, Grievant Exhibit 9)

28. On May 17, 2018, VPCH Patient AH received involuntarily administered medication pursuant to a court order. AH was large and very strong. He exhibited manic, volatile and intimidating behavior. This was AH's first stay at VPCH, and May 17 was the first time he was required to receive medication against his will. AH had to be restrained when the medication was administered, and he reacted violently. AH threw furniture that was weighted to prevent it from being thrown, thereby creating a divot in the floor. Despite this incident, Charge Nurse Roger Hill told AH he would be permitted to go to the yard if he remained calm for ten minutes. After a period of calm, AH was escorted to the yard by two mental health specialists.

29. The yard is rectangular, approximately 80 feet by 40 feet. It has a basketball court, walking path, grassy knoll and benches.

30. Grievant, Mental Health Specialist Zachary Bean, and a few other staff were in the yard with patients. Grievant was in the yard walking with a patient. AH proceeded to kick a ball which came near the patient with whom Grievant was walking. Grievant told AH he needed to be careful or that he would have to go inside. AH grew agitated and called Grievant a "cunt". AH asked Grievant if he wanted to be punched in the face again. AH had punched Grievant in the face a few days earlier during an EIP, resulting in Grievant receiving medical attention. Grievant told AH not to threaten him. AH responded that it was not a threat.

31. AH then charged Grievant. Grievant moved out of the way to evade AH. Grievant and Mental Health Specialist Zachary Bean initiated an EIP by going “hands on” with AH. They secured both of AH’s arms, Grievant on his left arm and Bean on his right arm, as they attempted to escort him from the yard to inside the facility. Bean took the lead in verbally communicating with AH, attempting to calm him down. AH resisted by thrashing about and attempting to kick Grievant. As a result, Bean and Grievant brought AH to the ground so that he was lying on his back. A staff emergency was called at this point, summoning other staff to assist in restraining AH.

32. Approximately six other staff appeared to assist in restraining AH. When other staff arrived, Grievant repositioned himself so one or both of his knees were on the ground with AH’s left arm under Grievant’s shins. One of Grievant’s hands was on AH’s upper left arm and his other was positioned to block AH from spitting on him or biting him. AH continued to strenuously resist during the restraint. DeForge arrived after the restraint was initiated by staff. Eventually, Charge Nurse Hill arrived with the restraint bed. Staff moved AH to the restraint bed and carried him out of the yard back into the facility.

33. AH was yelling during the restraint. It is not unusual for patients to yell during restraints because they do not like to be restrained.

34. There was not a staff debriefing following the EIP involving AH.

35. Danielle DeForge sent an email to Nurse Roger Hill on May 17, 2018, providing in pertinent part:

. . . I’ve been thinking about something that I saw during the EIP with A.H. and it’s been on my mind for the past few hours.

I saw what I think was a staff person purposely inflicting pain on the patient and I think it needs to be addressed.

When I came to the scene in the yard I was watching it all very carefully. There were several people all around the patient restraining him. . . As I approached, I saw Asif

kneeling on A.H.'s wrist. Full body weight on his left wrist while restraining his left arm with both of his hands. A.H. was saying "ouch, my fucking wrist, get off my fucking wrist what the fuck". Asif did not move and continued to kneel directly on his wrist. This is NOT PROACT and is very disturbing that Asif thinks this is okay to do. . .

In addition to this, last month C.V. took a swing at Asif as she thought he was someone else. He (by himself) took both of her wrists and pushed her onto the help desk. A staff person had her feet and I was over his shoulder watching the grip he had on her wrists. It was very tight. He was restraining her, and stooping into her face, overpowering her and saying "stop it. Do you want to go to the seclusion room"? . . . I said to Asif at the time "Asif, ease up on the wrist, I'm right here to get that arm." I was ready to take C.V.'s other arm and do a proper PROACT move, but he did not move. . .
(State Exhibit 15, Grievant Exhibit 8)

36. Hill forwarded DeForge's email to Lynne Coffey and Kenneth Chriscaden, and stated as follows in an accompanying email sent on May 17:

I looked in all of my documentation about . . what Danielle talks about Asif holding C.V. with both hands. I didn't think I need it. I remember addressing this with Asif to let him know how dangerous that was. I remember he agreed and would not do that again. I figured that would resolve it. . .
(State Exhibit 15, Grievant Exhibit 8)

37. Hill's statement in his email that "I didn't think I need it" meant that he did not need to report the CV restraint any further because he had spoken to Grievant about it.

38. No other staff present during the restraint of AH made a verbal or written complaint of Grievant's actions during the restraint of AH. None of the staff testified that they had observed Grievant kneeling on AH's wrist, that AH was yelling at Grievant to get off his wrist, or that other staff tried to get Grievant to remove his knee from AH's wrist. No other staff reported or testified that Grievant was inflicting pain on AH. One of the intervening staff, Blake Hutchins, heard AH say something to Grievant to the effect that "you're hurting my arm". Another of the intervening staff, Steve Clark, lay across AH's legs during the restraint.

39. A few days after the restraint, DeForge spoke with AH about how he was feeling as a result of the restraint. AH indicated he was not doing so well. AH lifted his shirt to display a

bruise on his arm, and mentioned Grievant. DeForge prompted AH to speak with Charge Nurse Ian Anderson. On May 19, Anderson completed a Patient Event Form documenting AH making an allegation against Grievant concerning the May 17 incident. Anderson stated: “Patient stated that Asif used excessive force to his left bicep and axillary during a manual restraint on 5/17/2018 . . . that resulted in bruising. Pt. stated ‘Asif did this in retaliation for me punching him in the face’ ”. A photo of AH’s arm accompanying the report indicated bruising on AH’s upper bicep; there is no visible bruising on AH’s wrist (State Exhibit 16, Grievant Exhibit 14).

40. The VPCCH submitted a report on May 21, 2018, concerning the possible maltreatment of AH during the May 17 EIP to the State of Vermont Adult Protective Services, Division of Licensing and Protection (Grievant Exhibit 15).

41. Charles Kirk conducted an investigative interview of Grievant on August 29, 2018. Grievant did not realize when he went into the interview that he would be questioned about the April 14, 2018, incident. Among the exchanges between Kirk and Grievant during the interview are the following:

Kirk:	Did you go into the nurses’ station, the bubble as its being described to me, and did you make any remarks about Emily being retarded? Did you refer to -
Grievant:	Never. I would never call a co-worker retarded.
Kirk:	In that context on that day, would you have been saying anything is retarded? Because there is a couple witnesses here that also wrote reports saying that you used that term and it was in reference to Emily.
Grievant:	I do not believe so. I don’t think so – that’s not in my character to call things or individuals retarded, situations by and large.
Kirk:	Okay. And the people that have reported that there were remarks said by you that were – you were using the term retarded. Malaysia Goodnow. Who is she?
Grievant:	She is an RN that works there. I think she is a first-year nursing graduate.

Kirk: Okay. And then who is Lee Flanders?

Grievant: He's an MHS, I believe an MHS.

...

Kirk: And just so I'm clear, I'll give you guys a chance to read these. This is the email that was written by Malaysia. I'll give you guys an opportunity to read it. This is the one that was written by Lee Flanders, so you guys can look at it. That's what's being reported to me. So -

Grievant: I might have said she shouldn't work in the hospital. Yes. But I didn't call her retarded. I don't recall calling her retarded.

...

Grievant: And I might have said she needs to learn how to do her job, because if she is going to continue working for the state, even though maybe she shouldn't.

...

Kirk: Okay. Now as far as going in and saying somebody's retarded, you don't remember making those statements?

Grievant: I do not. And I don't use the word retarded very often. Especially to refer to things or people.

Kirk: Okay. So despite what they are reporting, you say you didn't do that, that part.

Grievant: I think I had been upset with her, like this person shouldn't be working here.

Kirk: Right.

Grievant: I don't recall using the word retarded.

...

Kirk: . . . On May 17, there was a restraint of this patient AH out in the rec yard that you were involved in. Do you recall that event?

Grievant: Yeah. I do. . .

...

Grievant: . . . And then he started to move forward, and so we proceeded to walk. And then at that point he proceeded to kick me. And so with his arm on the left side he went to kick, and I evaded again despite holding his arm. And then Zach and I brought him to the ground in the activity yard at that point. Just holding his arms. And other staff were responding. In the meantime, while we are holding his arms, he's trying to bite and spit at me. And so I put a little shield up with my hand so he can't bite my arm and spit in my face.

...

Kirk: On this particular day when you get him on the ground, did you kneel on any of his extremities?

Grievant: I don't – no. I didn't kneel on his extremities. I do remember kneeling over his arm because he was trying to like raise his arm. And so while holding his arm, I think I – do you want me to show you?

Kirk: Sure.

Grievant: Well like his arm is across like that. Might have been holding his arm. And then, you know, over his arm, so that if I couldn't hold him, he would hit my shins.

Kirk: Okay. So the recorder couldn't see that, but you were kneeling down. You were showing the arm would have been under your left leg. And you were kneeling with your right, but that wasn't on his wrist?

Grievant: Correct.

Kirk: Okay. Because I had a couple people say that you were kneeling briefly on the wrist.

Grievant: No. I wouldn't use that technique.

Kirk: Okay. Would that – that would be inconsistent with the PROACT, correct? Kneeling on the extremity or on the person?

Grievant: Correct.

Kirk: . . . So I've got a couple of people that are saying that they saw you actually kneeling on that wrist.

Grievant: I don't recall that at all.

Kirk: Again, this guy is flopping, fight-

Grievant: Sure. . . His wrist may have come under my arm or my knee, but I wouldn't be kneeling on his wrist. I don't think I was. I think he might have been flopping around, and it came underneath, you know, where I was kneeling. So it might have been pinned down, I guess

Kirk: Yeah. It's easy for someone to sit here and Monday morning quarterback or something. When you've got a guy fighting for all it's worth. Is it possible that you may have kneeled briefly on the wrist and don't recall it?

Grievant: Not intentionally for sure.

Kirk: Not intentionally.

Grievant: And I don't recall it. I do remember kneeling over his arm, because I remember that I was fearful of his arm coming up and striking me or someone else.

Kirk: Yeah.

Grievant: And so again, before everyone else responded, you know, putting a little extra security beyond what my arms were able to do.

Kirk: Okay.

Grievant: But I don't think I pinned his arm down with my knee, his wrist.

Kirk: So there was no retaliation for punching you in the face earlier?

Grievant: Absolutely not. . .

. . .

Kirk: Prior to this particular restraint, do you recall Roger Hill had to speak to you about a restraint on another patient, CV, with holding her arms? Do you remember Roger talking to you about that?

Grievant: Yeah.

. . .

Kirk: What Roger is reporting is . . you had ahold of both of the patient's hands and were pushing her backwards on a desk. And he didn't feel that this was appropriate. That you should have stepped to the side and controlled

one arm or so another staff to take the other arm. That's what he said he spoke to you about.

Grievant: Yeah. And I agreed with him completely. Because of the way – I think that positioning occurred because of the way the EIP unfolded, and so she had hit somebody, was going to hit somebody. . . . I went to restrain her and – from hitting somebody. I grabbed one arm. And as a PROACT, you know, was holding that arm back, and then she went to swing at me with the other arm. So I was already against the desk. And then just block the other arm from striking my face. :

...

(State Exhibit 6 and Grievant Exhibit 11, pages 3, 18 – 20, 23, 39, 44-48, 51 – 52)

42. Kirk completed investigative reports on October 5, 2018, on allegations that Grievant spoke inappropriately to co-workers and patients, and used inappropriate force on patients AH and CV (State Exhibits 7, 8).

43. DMH Interim Commissioner Mourning Fox sent Grievant a letter dated November 20, 2018, providing in pertinent part:

As a result of your behavior described below, DMH is contemplating serious disciplinary action, up to and including dismissal from your position as a Mental Health Recovery Specialist. You have the right to respond to the specific allegations listed below, either orally or in writing, before a final decision is made. You have the right to be represented by . . . VSEA . . . during proceedings connected with this action.

The below charges are based on your conduct, which is summarized in an Investigation Report . . . prepared by AHS Investigations Unit Investigator Charles Kirk. . . The Investigative Report is attached to this letter, fully incorporated herein by reference, and may be consulted for further information regarding the charges summarized below.

A. Relevant Provisions of the Non-Management Unit Collective Bargaining Agreement (“CBA”), State Personnel Policies (“PP”), and Department of Mental Health (“DMH”) Training (that) you are charged with violating

- CBA Article 14, Immediate Dismissal
- PP 5.6, Employee Conduct
- PP 8.0, Disciplinary Action
- PP 9.1, Immediate Dismissal
- PP 17.0, Employment Investigations
- VPCH Procedure, Professional Behavior and Personal Boundaries
- VPCH Procedure, Emergency Involuntary Procedures

- VPCH Procedure, Positive Behavior Supports
- DMH Pro-ACT Training

B. Potential Violations of Vermont Personnel Policies and the Collective Bargaining Agreement

You are currently employed as a Mental Health Recovery Specialist at the DMH's VPCH. The State became aware that you may have engaged in misconduct when two complaints were filed regarding your conduct on the hospital units and towards your colleagues. One of your colleagues then reported witnessing you engage in an improper use of force with patient A.H. during a manual restraint. Subsequently, A.H. filed a grievance over the same incident and reported that you used excessive pressure during the manual restraint that resulted in bruising. A.H. further alleged that you inflicted pain on him as retaliation for a previous incident where he assaulted you.

Unprofessional Interactions with Staff and VPCH Patients

On April 14, 2018, a staff member made a report to a nurse supervisor alleging that you spoke inappropriately to her and made inappropriate comments in the presence of patients. She reported that you walked onto the unit and were speaking very loudly and made comments about the foul odor. She explained that there was a patient with hygiene issues who was more than likely the cause of the foul odor. She requested that you lower your voice because your comments had the potential to offend that patient. She advised you that your comments were not appropriate. You continued to make loud comments related to the odor. When the staff member finally told you that it was best if you left, you proceeded to belittle her loudly in the presence of patients and staff. A witness reported hearing you call your colleague a "retard".

Your colleague made a second report regarding an incident on May 1, 2018, where you again entered the unit and began speaking loudly. At that time, there was a patient who staff were trying to avoid getting agitated and were attempting to give them quiet time. She asked you to keep your voice down, you reportedly got very close to her in a threatening, intimidating manner and told her not to tell you how to do your job. You then continued to walk around the unit being loud and staff feared your behavior would escalate patients.

Provoking a Patient and Excessive Use of Force

On May 17, 2018, while you were in the yard, Patient A.H. allegedly charged you in a threatening manner. This was not the first time you had a violent interaction with A.H. A few days earlier, A.H. punched you in the face and you were left with a black eye. A staff member described your behavior toward A.H. in the following days as hostile and standoffish. She also reported hearing A.H. ask you about your eye and what happened to it. She said you then told A.H., "you happened to me. You did that." A.H. then challenged you about what authority you had in your position. You reportedly told him

that you had the authority and always would have the authority over him. It appears that you were attempting to assert dominance over A.H.

Later in the day on May 17th, A.H. allegedly threw a ball in your direction. It was reported that you told the patient not to throw things. A.H. then became angry and called you a name. You responded by asking, “what did you say?” and began to walk towards A.H. in a threatening manner. At that time, A.H. charged at you and you had to quickly move away to avoid him. Several staff came to assist with de-escalating A.H. You then joined them in performing a manual restraint on A.H., bringing him to the ground. During that restraint, it was reported that you had your knee on A.H.’s wrist and arm which fails to comply with the Professional Assault Crisis Training (“Pro-ACT”) principles.

A.H. was on his back and you were restraining the patient’s arm. While several staff were attempting to communicate with Patient A.H., you were observed “hanging” over the patient’s face, on top of him, holding the patient’s bicep while your right knee was on Patient A.H.’s left wrist. You were heard telling the Patient A.H. this was what was going to happen every time he threatened you. Patient A.H. was telling you to get off his wrist and communicated being in pain. At least two of your co-workers attempted to help get control of A.H.’s arm in an effort to stop you from continuing to inflicting pain on his arm with your knee. However, you did not stop and kept your knee on A.H.s wrist. When a co-worker informed you the restraint technique did not comply with the Pro-ACT principles that all VCPH staff are to abide by, you ignored her and continued to use your knee to restrain A.H.

On May 19, 2018, A.H. made an allegation of abuse against you and reported that he was injured during the May 17th manual restraint. A.H. reported that you used excessive pressure to his bicep and axillary which resulted in bruising. Photographs taken at that time show bruising on his arm that he asserts you caused during the manual restraint. A.H. further alleged that your actions were abusive and in retaliation for him punching you in the face.

When questioned about these allegations as part of the investigation, you admitted that you were out in the yard with A.H. when he threw a ball in your direction. You said that you warned him that if he did not stop his behavior, there would be consequences. A.H. then charged at you and you tried to evade him when several staff came to assist you. When asked about the restraint that followed, you denied restraining A.H. by putting your knee on his wrist or on him at all. Your account is contrary to multiple witness reports. You said that you had your knee placed over A.H.’s arm in case he would get his arm free and strike you or one of your colleagues. You denied that your actions were in retaliation for the previous incident where A.H. punched you in the face.

This incident was the second time in the span of a month where you performed a restraint inflicting pain on a patient. In a separate incident with another patient, Patient C.V. attempted to hit you and you proceeded to take hold of both of her wrists and push her onto the help desk. You did not call for help before doing so. Two other staff members came across the situation and then provided assistance to you. They reported that your

grip on C.V.'s wrists appeared to be very tight. While restraining her, you threatened her by saying something to the effect of "(s)top it. Do you want to go to the seclusion room?" You were provided with feedback from the nurse on duty because your restraint of C.V. was not an acceptable method and was dangerous.

Since your hire at VPCH, you received extensive Pro-ACT training and refresher trainings. You were trained in the Pro-ACT principles when you were hired into your position on May 27, 2014, and since then you have also taken several refresher courses including – "Restraint", "Evasion", "Purpose, Professionalism, Preparation" and "Crisis Communication". Pro-ACT training is designed to enhance safety within the context of individual rights. Manual restraint that deliberately inflicts pain violates a patient's right to be free from "cruel and unusual punishment." The focus of Pro-ACT is restraint using the least amount of force possible, and one of the Pro-ACT principles of "Restraint" is to avoid pain. It states:

Avoid Pain: Pain-inducing methods are ineffective, punitive, and abusive. When the client has a mental or developmental disability, is under the influence of alcohol or drugs, or has a history of being abused, permanent damage may be done before the client registers intense pain. It is also important to remember that people will respond to pain with defensive gestures that can be misinterpreted as aggressive. Do not inflict pain."

There are times when force may be necessary, however, there should only be a reasonable amount used and should not exceed what is absolutely necessary. It is not reasonable to use more force than the patient is using on you. There were at least eight (8) other staff members assisting you in the manual restraint of one person. Although A.H. has been described as being strong, it does not seem necessary that eight (8) people against one would require you to use such force.

Your conduct demonstrates a pattern of provoking, threatening, abusive, forceful and inappropriate behavior towards patients and staff alike. Your conduct towards your co-workers is not taken lightly and I am extremely concerned about your conduct towards patients. The patients at VPCH are mentally ill vulnerable adults who are there to receive care. Your alleged conduct described above with A.H. and C.V. may be considered abuse under 33 V.S.A. § 6902, which defines "abuse" as follows:

- (A) Any treatment of a vulnerable adult which places life, health or welfare in jeopardy or which is likely to result in impairment of health.
- (B) Any conduct committed with an intent or reckless disregard that such conduct is likely to cause unnecessary harm, unnecessary pain, or unnecessary suffering to a vulnerable adult.
- (C) Unnecessary or unlawful confinement or unnecessary or unlawful restraint of a vulnerable adult.
- (D) Intentionally subjecting a vulnerable adult to behavior which should reasonably be expected to result in intimidation, fear, humiliation, degradation, agitation, disorientation, or other forms of serious emotional distress.

VPCH strives to provide excellent care and treatment in a recovery-oriented, safe and respectful environment which promotes empowerment, hope and quality of life for the individuals we serve. As a Mental Health Recovery Specialist, you are entrusted with the safety and well-being of vulnerable adults.

I must be able to trust that you can perform your job in a professional, respectful manner without the use of excessive force and unprofessional interactions with staff and patients. You deny that you inflicted pain on A.H. with your knee, even after being provided with evidence to the contrary. Further, it appears that you were dishonest about calling your colleague a derogatory name. The nature of your DMH position demands that you have strong credibility and perform your duties in an appropriate and safe manner. Dishonesty is a significant violation of State Personnel Policy and the expectations of DMH.

The Vermont Personnel Policies provide employees direction on how to conduct themselves in order to fulfill their duties as public servants. Specifically, it is the duty of all employees to fulfill to the best of your ability the duties and responsibilities of your position, conduct yourself in a manner that will not bring discredit or embarrassment to DMH and/or the State of Vermont, and to be honest in all interactions with your employer. However, your described actions show a lack of good judgment and have the potential to cause DMH to lose confidence in your ability to respond and credibly carry out your duties as a Mental Health Recovery Specialist.

Your described conduct may constitute misconduct and/or gross misconduct, violate the above policies and provisions, and may provide just cause for disciplinary action, up to and including dismissal from your position with DMH.

...

You must notify **HR Administrator Sara Jewett** . . . whether you wish to respond to the above allegations. . .

(State Exhibit 18, Grievant Exhibit 12)

44. On December 22, 2018, the State of Vermont Adult Protective Services, Division of Licensing and Protection, sent a letter to Stephanie Shaw of VPCH concerning the May 17, 2018, incident involving Patient AH. The letter stated in pertinent part: "Please be advised that the investigation has been completed regarding your report submitted on 05/21/2018 concerning the possible maltreatment of a vulnerable adult. Based on the findings of the investigation, the allegation was not substantiated." (Grievant Exhibit 15)

45. A *Loudermill* meeting occurred on January 18, 2019. Grievant, VSEA Representative Michael O'Day, Deputy Commissioner Fox, DMH General Counsel Karen Barber, and Sarah Jewett of the Department of Human Resources were present at the meeting. Prior to the *Loudermill* meeting, Grievant listened to approximately thirteen hours of recordings of the investigative interviews that Kirk had conducted. The transcript for the *Loudermill* meeting provides in part:

...
Fox: So I did want to see demonstrated knee over wrist and such like that. Can you – I'll give you my wrist if you want. . . Come over here. Everyone would like to have the deputy commissioner on the floor once in a while.

...
Fox: So just for the record, Mr. Kalim placed both left and right legs over my left forearm around the ankle area. So it was not just one leg, but it was both legs securing my left arm down. And then Mr. Kalim also demonstrated holding his hand approximately two or three inches above my face to prevent any kind of spit or something of that nature.

...
O'Day: The other allegation would be that you were patient shaming. . .

...
Grievant: I don't normally work on that unit. So now I'm inquiring as to whether a patient might need to be talked to about their hygiene level, or if someone needs to take the trash out. . . And so I turn to Emily, start to discuss – again, so I had numerous conversations with Emily about patient shaming. Start to discuss this with her. And she raises her voice, and tells me to shut up, and just go away. At that point I do . . . I walk away. I walk back into what's called the bubble. . .

...
...
Grievant: Walk into the bubble. Door closes. So now Emily's back on the unit away from me. I'm in the bubble. I'm getting a drink at the water cooler. And there is no staff around other than Lee Flanders who is sitting at one of the computers facing onto the unit, and he's typing away at something. And not visible is Mayaysia Goodnow in the treatment planning room maybe 23 feet away or so. So under my breath, perhaps loudly, I'm muttering about the situation that just transpired. At no point am I talking to anyone, any staff in the vicinity. Just to myself. And I'm saying – and I don't say her name. I don't say her name at all. I say "Maybe some staff shouldn't work here." I say, "This situation is retarded," as opposed to what some of the emails that Malaysia had sent calling Emily retarded. Again, I didn't say her name once or at all. And I would never call a person or a thing

retarded. I rarely use the word. I dislike it in general, you know, implications and context.

Fox: But it seemed appropriate at the moment –

Grievant: I think out of frustration it may have popped into my vocabulary, and it's unfortunate. I acknowledge that that word carries a lot of weight with it. And in the future, instead of muttering something under my breath, and venting in that manner, I would rather keep things to myself and go through a chain of command if I felt like a staff member was unaware of how to do their job or . . . what words they were using in a particular context meant, like patient shaming. . .

...
Fox: You said the situation that was retarded.

Grievant: Yes.

Fox: Was the interaction between you and Emily?

Grievant: Correct. It was the interaction that we had on the unit about patient shaming.

...
Fox: I'm just seeing a dotted line between, and how I'm perceiving some splitting of hairs of I didn't call the person a retard. I called the situation involving them retarded. Splitting hairs pretty thin.

Grievant: Okay, Yeah. No, I agree. And like I said, I don't like using the word. I generally don't. It's not in my character to call people or things –

Fox: And like you said, it came out of frustration.

Grievant: Came out of frustration. In the future I wouldn't do that. Like I said, I would keep my opinions to myself. Certainly wouldn't use words like retarded, and take a concern that I had, an ongoing concern that I had with a supervisor or a charge nurse in this situation. . .

...
Grievant: I think the one point that was of confusion was the use of the word retarded, and like I elaborated on this time, having had time to think about the events that transpired, after being first presented with them from the AHS Investigator Charles Kirk for the first time, on the spot, I now recount or recall – recall the incident much more clearly. And to reiterate, did not call a person or thing retarded. Was venting under my own breath, and I know you said that's splitting hairs . . .

(State Exhibit 19 and Grievant Exhibit 18, pages 30 -33, 38 – 40, 42-43, 70)

46. Deputy Commissioner Fox sent Grievant a letter dated March 19, 2019, providing in pertinent part:

This is to notify you of your dismissal from the position as a Mental Health Recovery Specialist, effective the close of business on March 19, 2019 for gross misconduct.

By letter dated November 20, 2018, you were notified that the Department of Mental Health was contemplating your dismissal, and you were given the opportunity to respond to charges of gross misconduct. I met with you and your representative on January 18, 2019 to hear your response to the November 20, 2018 letter.

The reasons for your dismissal are all those outlined in the above-referenced letter of November 20, 2018 and supporting attachments, which are fully incorporated by reference. You engaged in unprofessional behavior and acted inappropriately towards patients and your colleagues. Instead of being truthful and taking responsibility for your behavior, you were dishonest throughout the investigation and during the January 18, 2019 meeting. You failed to acknowledge the seriousness of your behavior, its impact on facility operations, and the value of integrity.

...

(State Exhibit 21, Grievant Exhibit 17)

47. In deciding to dismiss Grievant, Fox concluded that Grievant's actions were of a very serious nature and intentional. He concluded that calling a co-worker "retarded" on its own constitutes gross misconduct. Further, Fox determined that Grievant was dishonest because his accounts of the incident during the Loudermill meeting were in conflict with his statements during his investigative interview. Fox also concluded that Grievant exhibited dishonesty in providing different accounts of the restraint of AH during the investigative interview and Loudermill meeting. Fox further determined that Grievant engaged in serious misconduct by using unnecessary and excessive force during the restraint of AH. Fox concluded that the confidence management had in Grievant's ability to perform assigned duties was severely depleted by Grievant calling attention to a patient's hygiene, using the word "retard" out on the unit where patients were present, and employing an inappropriate and potentially dangerous non-approved restraint technique on AH. Fox considered Grievant's dismissal consistent with the

penalty imposed on other employees because DMH consistently takes the position that an offense of making untruthful statements in an investigation warrants dismissal. Fox determined that Grievant had fair notice that the actions for which he was dismissed were subject to discipline. Fox considered that Grievant was not a good candidate for rehabilitation because it is difficult to regain trust after an employee provides false statements, Grievant demonstrated an unwillingness to take responsibility for his actions, and his offensive words in the workplace and calling attention to a patient's hygiene made rehabilitation unlikely. Fox concluded that any employment action short of dismissal would not be adequate given the severity and nature of the misconduct Grievant committed (State Exhibits 20, 24; Grievant Exhibit 16).

OPINION

Grievant alleges that the Employer violated Article 14 of the Contract in dismissing him because: 1) the dismissal was not based in fact or supported by just cause, 2) the Employer improperly bypassed progressive discipline and progressive corrective action, and 3) the Employer failed to apply discipline with a view towards uniformity and consistency.

Just cause is some substantial shortcoming detrimental to the employer's interest which is recognized as constituting good cause for dismissal. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). The ultimate criterion of just cause is whether an employer acted reasonably in discharging an employee for misconduct. Id. 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. Id. In re Grievance of Yashko, 138 Vt. 364 (1980).

In carrying out its function to hear and make final determination on whether just cause exists, the Labor Relations Board determines *de novo* and finally the facts of a particular dispute, and whether the penalty imposed on the basis of those facts is within the law and the contract. Grievance of Colleran and Britt, 6 VLRB 235, 265 (1983). 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. Id. Once the underlying facts have been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven facts. Id. at 266.

The Employer charges Grievant with various acts of misconduct. The Employer first contends that Grievant engaged in unprofessional interactions with staff and VPCH patients on a unit at VPCH on April 14, 2018, by: a) walking onto the unit and loudly commenting in the presence of staff and patients about the foul odor in the unit, a remark staff member Emily Delano heard and concluded could offend patients; and b) belittling Delano loudly in the presence of patients and staff, including calling Delano a “retard”.

The severity of this charge is not borne out by a preponderance of the evidence. Although it is established that Grievant inquired in a loud voice what the foul odor was on the unit, he did not attribute the odor to a patient and it was not unusual for the unit to have an unpleasant odor for reasons other than the odor of patients. Also, there is no evidence that a patient was present when he made the statement. These circumstances do not support a conclusion that Grievant engaged in unprofessional interactions with VPCH patients.

Grievant’s discussion with Delano during this incident also does not support a charge of unprofessional interactions with her. It was reasonable for him to express his disagreement with her framing his odor comment as patient-shaming and tell her that she did not understand the

meaning of patient-shaming. The Employer has not established by a preponderance of the evidence that Grievant belittled Delano during the discussion.

The Employer has proven its charge that Grievant acted unprofessionally only to the extent of establishing that Grievant, immediately after the discussion with Delano, walked into the nursing station and stated words to the effect that some people should not work in mental health and he used the word “retarded”. Although Grievant was understandably frustrated and angry about Delano’s accusation of patient-shaming, and the effect of his comment was somewhat diminished by it not being made in the earshot of patients, he acted unprofessionally because two employees in the nursing station area were able to overhear his comments and understood that he was referring to his conversation with Delano.

The Employer makes a further charge against Grievant concerning the April 14 incident. The Employer asserts that Grievant was dishonest during the investigation about calling Delano a derogatory name. The Employer has not established this charge by a preponderance of the evidence. It is established that, during the investigative interview, Grievant stated that he never would call a co-worker “retarded” and that he did not recall using the word “retarded” during the April 14 incident. Nonetheless, even though Grievant did use the word “retarded” during the incident, this investigative interview occurred more than four months after the incident and Grievant did not realize when he went into the interview that he would be questioned about the April 14 incident. The passage of time and lack of notice that the incident would be discussed substantially weakens the charge of dishonesty.

Moreover, on the evening of the incident, Grievant admitted to his supervisors that he made a comment to the effect of “this whole mess is just retarded”. The fact that he admitted to

supervisors making such a comment so close to the incident makes it more unlikely he would then be dishonest about the comment during an investigation of the incident.

The Employer supports its charge of dishonesty on the basis that Grievant's accounts of the incident during the *Loudermill* meeting were in conflict with his statements during the investigative interview. We disagree this supports the dishonesty charge. Prior to the *Loudermill* meeting, unlike the investigative interview, Grievant knew the "retarded" comment was an issue and he listened to approximately thirteen hours of recordings of the interviews conducted by the investigator. This made it reasonable that the benefit of notice and detailed review of the incident allowed Grievant to better recall the incident. Under all the circumstances, the Employer has not established by a preponderance of the evidence that Grievant was dishonest during the investigation of this incident.

The Employer makes another charge against Grievant of unprofessional interactions with staff and VPCH patients stemming from a report made by Delano concerning a May 1, 2018, incident. The Employer charges Grievant with misconduct by again being loud when he entered a unit, engaging in threatening and intimidating behavior toward Delano, and acting to potentially escalate a patient.

The Employer has failed to establish by a preponderance of the evidence that Grievant engaged in misconduct during this incident. Grievant entered the unit to perform a wrap-up group with patients on the unit. He spoke in a loud voice to a patient on the unit but it is not apparent he acted unprofessionally in doing so. When Delano asked Grievant to lower his voice because of another patient in a quiet room, he responded reasonably by telling her she should not tell him how to do his job. The Employer has not established that, in responding to Delano, he acted in a threatening and intimidating behavior. Also, he did nothing by his actions to

negatively affect the patient in the quiet room. In fact, his approach towards this patient was successful in getting the patient to have a constructive conversation with Grievant on his goals and plans for when he was released.

The Employer next charges Grievant with misconduct concerning two incidents of performing restraints on patients. The Employer contends that Grievant used improper methods of restraint and inflicted pain on the patients.

The first incident involved Patient CV. The Employer contends Grievant used inappropriate force on CV when CV attempted to hit him by not calling staff for help, holding CV by her two wrists and inflicting pain on her. The Employer has not established that Grievant acted unreasonably by this restraint. Grievant was unable to avoid restraining CV by evading her because he was against a whiteboard and the incident developed so quickly. There were no staff close enough to respond quickly to assist Grievant before he placed both his hands on her by himself. He grabbed both her wrists to avoid being struck by her.

The Employer has not established that Grievant inflicted pain on CV. Such an allegation depends entirely on a subjective report by an employee without any objective evidence indicating that pain was inflicted on the patient. CV was not injured as a result of the restraint, and she did not complain about Grievant's conduct either during or after the incident. There is no other evidence indicating that CV was acting as if she was in pain as a result of the restraint.

The Employer was critical of Grievant because his restraint was not Pro-ACT compliant. One of the Pro-ACT principles is that restraints of patients should be performed by at least two staff, rather than one employee, for patient and staff safety reasons. Following the incident between Grievant and CV, Charge Nurse Roger Hill, who had not observed the incident but had it verbally reported to him, approached Grievant and provided him with verbal feedback. He

told Grievant that it was dangerous to restrain a patient by oneself and to avoid doing so in the future.

Grievant agreed that staff should attempt if possible to restrain patients with no fewer than two staff, and that he had restrained CV by himself only out of necessity because he was unable to evade her when she swung at him. Grievant and Hill believed the feedback Hill provided Grievant addressed the situation and resolved the issue. Hill did not report the restraint of CV to his superiors.

Given the circumstances in which Grievant found himself in the interaction with CV, an insufficient basis exists to support a charge of misconduct against him warranting discipline. The general practice at VPCH is for employees to attempt to act consistent with Pro-ACT principles. However, there are occasions when it is not practical or possible during restraints to be Pro-ACT compliant. We note that the evidence indicates that non-compliance with Pro-ACT is not uncommon. The incident involving CV is an example of an instance when it was reasonable for Grievant to not be Pro-ACT compliant. The feedback provided by Hill was an appropriate final resolution of the issue.

The other incident in which the Employer charges Grievant for his improper method of restraint and for inflicting pain on a patient involves the May 17, 2018, restraint of Patient AH. The Employer charges Grievant with provoking AH and using excessive force on him.

The Employer asserts that Grievant attempted to assert dominance over AH in the days following AH punching Grievant in the face, and then acted in a threatening manner toward AH when they were in the yard together on May 17, provoking AH to charge Grievant in a threatening manner. The Employer has failed to establish these allegations by a preponderance of the evidence.

The evidence does not indicate Grievant attempted to assert dominance over AH following AH punching him in the face. The Employer also has failed to demonstrate that Grievant acted in a threatening manner toward AH when they were in the yard together on May 17. Instead, it is apparent that AH was the one acting in a threatening manner toward Grievant, and Grievant appropriately informed AH he would need to correct his behavior or he would go inside. AH then became agitated, called Grievant a vulgar name, and threatened him. Then, when Grievant told him not to threaten him, AH charged Grievant. AH was the provocateur under these circumstances, not Grievant.

The Employer further charges Grievant with excessive force during the ensuing restraint of AH on May 17 by having his knee on AH's wrist, telling AH this is what was going to happen every time he threatened him, and failing to remove his knee from AH's wrist after AH indicated he was in pain and told Grievant to get off his wrist, and after other staff tried to get Grievant to remove his knee from AH's wrist. This charge adopts the account of one of the staff who responded late to the scene of the restraint.

The validity of this charge would be strengthened if it was corroborated by other staff present during the restraint. Even though there were approximately seven other staff present during the restraint, none of them corroborated that Grievant had his knee on the patient's wrist, that AH told Grievant to get off his wrist, or that other staff tried to get Grievant to remove his knee from AH's wrist. No other staff present during the restraint of AH made a verbal or written complaint of Grievant's actions during the restraint. No other staff reported or testified that Grievant was inflicting pain on AH. The evidence also does not indicate that Grievant told AH this is what was going to happen to him every time he threatened him.

Also, when AH made an allegation a few days after the May 17 incident about Grievant's actions, the basis of his complaint was not kneeling on his wrist. Instead, he indicated Grievant used excessive force on his bicep and armpit area resulting in bruising. In examining all the evidence, we conclude that the Employer has failed to prove by a preponderance of the evidence that Grievant had his knee on AH's wrist and failed to remove his knee from AH's wrist after AH indicated he was in pain and told Grievant to get off his wrist.

The Employer's charge that Grievant used excessive force on AH on May 17 further includes reliance on AH's claim that Grievant used excessive force on his bicep and armpit area resulting in bruising. A photograph taken of AH's arm at the time he made this claim shows bruising on AH's upper arm area. Also, AH said during the restraint that Grievant was hurting his arm. However, this is not sufficient to establish a charge of excessive force against Grievant. AH continued to strenuously resist during the restraint. It is not surprising that strenuous resistance by a large and strong person such as AH may result in some bruising on his body as the staff attempted to restrain him. There is insufficient evidence to demonstrate that the bruising resulted from excessive force used by Grievant.

We note that, like the incident with CV, there was not a debriefing following the EIP involving AH. There often are debriefings following EIP's. If there had been a debriefing following the AH incident, it could have led to a more contemporaneous, consensual, and accurate description of the event.

In sum, the Employer has not established its charge that Grievant provoked AH and used excessive force on him during the May 17 restraint. Our conclusion in this regard is reinforced by the State of Vermont Adult Protective Services concluding that the allegation of maltreatment of AH during the May 17 incident was not substantiated.

The final charge the Employer makes against Grievant stems from the May 17 incident. The Employer charges Grievant with dishonesty during the investigation of this incident by denying that he put his knee on AH's wrist, and by offering differing accounts at the investigative interview and the *Loudermill* meeting of the placement of his knees during the restraint.

The allegation that Grievant was dishonest during the investigation by denying that he put his knee on AH's wrist can be summarily rejected since we have concluded that the Employer has not proven by a preponderance of the evidence that Grievant did place his knee on AH's wrist. We also conclude that the differing accounts by Grievant at the investigative interview and the *Loudermill* meeting do not establish dishonesty on his part.

The evidence indicated that Grievant had to reposition himself during the restraint of a strenuously resisting patient, and we do not find it significant that demonstrations he provided of the placement of his knees may have been slightly different during the investigative interview and the *Loudermill* meeting that occurred five months apart. It is of greater significance that Grievant consistently took the position during the investigation that his knee was not on AH's wrist than the exact placement of his knees during the restraint.

Thus, the Employer has not established most of the charges made against Grievant. The Employer has only proven the limited charge that Grievant acted unprofessionally by walking into the nursing station, immediately after the discussion with Emily Delano during the April 14, 2018, incident, stating words to the effect that some people should not work in mental health, and using the word "retarded" in reference to his just-concluded conversation with Delano. In such a case where most of charges are not established, the Board must determine whether the

sole proven charge justifies the penalty of dismissal. Grievance of Colleran and Britt, 6 VLRB at 265-266.

We look to the factors articulated in Colleran and Britt to determine whether the Employer exercised its discretion within tolerable limits of reasonableness. 6 VLRB at 268-69. The pertinent factors here are: 1) the nature and seriousness of the offense and its 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 offense, 3) the consistency of the penalty with those imposed upon other employees for similar offenses, 4) Grievant's past disciplinary record, 5) Grievant's past work record, including length of service and performance on the job, 6) the effect of the offense upon Grievant's ability to perform at a satisfactory level and its effect on supervisors' confidence in Grievant's ability to perform assigned duties, 7) the potential for Grievant's rehabilitation, and 8) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

We first consider the nature and seriousness of Grievant's offense and its relation to Grievant's duties and positions. The just cause analysis centers upon the nature of the employee's misconduct. In re Morrissey, 149 Vt. 1, 13 (1987). Grievance of Merrill, 151 Vt. 270, 273 (1989). In deciding whether there is just cause for dismissal, the Board determines the substantiality of the detriment to the employer's interests. Merrill, 151 Vt. at 273-74.

The Employer alleged serious misconduct on Grievant's part based on the numerous charges against him, but most of these charges were not established by a preponderance of the evidence. The only proven charge demonstrated inappropriate conduct on Grievant's part in making derogatory comments about a co-worker that were overheard by other colleagues. These

comments cannot be condoned, but we conclude Grievant's misconduct in this regard does not rise to the level of a serious offense given the context in which the comments were made.

Grievant was angry and understandably frustrated by his interactions with Delano when he made his comments. Also, although his comments were overheard by other staff, he did not direct his comments to anyone in particular. This does not excuse Grievant's emotional outburst, but it mitigates to some extent the level of his misconduct. Further, it is not unusual for VCPH staff to make emotional comments in the course of their challenging work. There have been occasions when staff have referred to other staff in a derogatory manner. There have been instances when staff have received supervisory feedback for this conduct, other times when staff have not been disciplined, and other occasions where they have been disciplined. The circumstances and the culture of the workplace diminish the seriousness of Grievant's misconduct.

Grievant had implied notice that he could be disciplined for his comments. The standard for implied notice is whether the employee should have known the conduct was prohibited. Grievance of Towle, 164 Vt. 145 (1995). Grievance of Brooks, 135 Vt. at 568. Grievant should have known he could be disciplined for making derogatory comments about a co-worker. However, this is balanced against the consistency of the penalty of dismissal that Grievant received compared to the penalty received by other employees committing similar offenses. There was general evidence of occasions when other employees were disciplined for referring to other staff in a derogatory manner, but also instances when employees received supervisory feedback and other times when they were not disciplined. We further note that we have no evidence of specific disciplinary actions imposed on a particular occasion. In this context, the

penalty of dismissal received by Grievant is vastly disproportionate to how other employees were treated for similar offenses.

Grievant's past disciplinary record and work record over more than four years of employment generally operate in his favor. He received one minor discipline, an oral reprimand for an unrelated offense. Although Grievant never received a performance evaluation, the evidence indicates he had a positive work record. Grievant was well-liked by patients, respectful of them, used effective approaches with them, and generally developed good rapport with patients. Most of Grievant's co-workers enjoyed working with him.

Grievant's offense did not adversely impact his ability to perform at a satisfactory level, and did not have a demonstrated adverse effect on supervisors' confidence in Grievant's ability to perform assigned duties. There is no evidence that Grievant's offense was repeated, and it is apparent that Grievant recognized his comments were inappropriate. When Grievant's supervisors provided feedback to him about his comments, and directed him to refrain from using words like "retard" and told him that it was unprofessional to call colleagues names, Grievant expressed agreement with the feedback.

This response by Grievant to this feedback he received, and his positive response as well to the supervisory feedback he received after the CV incident, provides evidence that Grievant is a strong candidate for rehabilitation. Grievant demonstrated that he is open to constructive feedback and willing to use it to guide to his future actions.

Upon consideration of all these factors in determining the legitimacy of the disciplinary action of dismissal imposed by the Employer, we ultimately conclude that the supervisory feedback received by Grievant after his proven offense of making derogatory comments about a co-worker was an adequate and effective alternative measure to deter such conduct by Grievant

in the future. This conclusion is buttressed by the absence of evidence of any similar reoccurrence by Grievant subsequent to receiving this feedback and prior to the imposition of discipline. Thus, we hold that the Employer lacked just cause to dismiss Grievant and we sustain this grievance.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered:

1. The Grievance of Asif Kalim is sustained;
2. Grievant shall be reinstated to his position as Mental Health Recovery Specialist, Vermont Psychiatric Care Hospital, Department of Mental Health;
3. Grievant shall be awarded back pay and benefits from the effective date of his dismissal until his reinstatement, for all hours of his regularly assigned shift plus the amount of overtime Grievant would have worked, minus any income (including unemployment compensation received and not paid back) received by Grievant in the interim;
4. The interest due Grievant on back pay shall be computed on gross pay and shall be at the legal rate of 12 percent per annum and shall run from the date each paycheck was due during the period commencing with Grievant's dismissal, and ending on the date of his reinstatement; such interest for each paycheck date shall be computed from the amount of each paycheck minus income (including unemployment compensation) received by Grievant during the payroll period;
5. The parties shall file with the Labor Relations Board by January 24, 2020, a proposed order indicating the specific amount of back pay and other benefits due

Grievant; and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Board. A hearing on disputed issues, if necessary, shall be held on January 30, 2020, at 9:00 a.m., in the Board hearing room; and

6. The Employer shall remove all references to Grievant's dismissal from his personnel file and other official records.

Dated this 10th day of January, 2020, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ David R. Boulanger

David R. Boulanger

/s/ Karen F. Saudek

Karen F. Saudek