VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 18-13
JAMES GIBSON	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 28, 2018, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of James Gibson ("Grievant"), an employee of the Vermont Department of Corrections. VSEA alleged that the State of Vermont Department of Corrections ("Employer" or "State") violated Article 14 of the collective bargaining agreement between the State and VSEA for the Supervisory Bargaining Unit, effective July 1, 2016, to June 30, 2018 ("Contract"), by: 1) demoting Grievant without just cause, 2) improperly bypassing progressive discipline and progressive corrective action in demoting him, 3) failing to apply discipline with a view toward uniformity and consistency in demoting him; and 4) causing Grievant prejudice and failing to promptly impose discipline by relieving Grievant from duty and denying him the opportunity to work overtime to accrue compensatory time and causing undue stress for over nine months.

A hearing was held on November 16, 2018, in the Labor Relations Board hearing room in Montpelier before Labor Relations Board Members Richard Park, Chairperson; James Kiehle and Karen Saudek. VSEA Staff Attorney Kelly Everhart represented Grievant. Rachel Allen, Staff Attorney for the State of Vermont Department of Human Resources, represented the Employer. The parties filed post-hearing briefs on January 31, 2019.

FINDINGS OF FACT

1. The Contract provides in pertinent part:

ARTICLE 3
VSEA RIGHTS

. . .
3. VSEA TIME OFF: Subject to the efficient conduct of State business, which shall prevail in any instance of conflict, permission for reasonable time off during working hours without loss of pay and without charge to accrued benefits shall not be unreasonably withheld. . . Subject to the foregoing, time off shall be granted in the following instances to:
. . .
(b) Members of the (VSEA) Council for attendance at any of the four (4) regular council meetings per year. . .
. . .

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 . . .

. . .

g. . . . Nothing in this Agreement shall be construed to limit the State's authority or ability to demote an employee under Section 1(d) . . . for just cause resulting from misconduct . . ., but the State shall not be required to do so in any case. The VLRB may not impose demotion under this Article.

. . .
9. An appointing authority may relieve employees from duty temporarily with pay for a period of up to thirty (30) workdays:
    (a) to permit the appointing authority to investigate or make inquiries into charges and allegations . . . concerning the employee . . .
    (b) . . . The period of temporary relief from duty may be extended by the appointing authority, with the concurrence of the Commissioner of Human Resources. Employees temporarily relieved from duty shall be notified in writing within twenty-four (24) hours with specific reasons given as to the nature of the investigation, charges and allegations. . .

(State Exhibit 6, VSEA Exhibit 7)

2. State of Vermont Personnel Policies and Procedures Number 5.6, Employee Conduct, provides in pertinent part:

> . . .
> **Number 5.6 – EMPLOYEE CONDUCT**
> . . .
> REQUIRED CONDUCT
>
> It shall be the duty of employees to fulfill to the best of their ability the duties and responsibilities of their position. Employees shall pursue the common good in their official activities, and shall uphold the public interest, as opposed to personal or group interests.
> . . .
>
> 3. Employees shall conduct themselves in a manner that will not bring discredit or embarrassment to the State of Vermont, whether on or off duty.
>
> . . .
> (State Exhibit 5)

3. Department of Corrections Work Rules provide in pertinent part:

> 1. No employee shall violate any provision of the collective bargaining agreement or/and State or Department work rule, policy, procedure, directive, local work rule or post order.
> . . .
> 4. Employees shall be honest and complete in their descriptions, whether given orally or in writing to the employer of events occurring in the work place and in all other circumstances related to their employment.
> . . .
> 9. No employee, whether on or off duty, shall comport himself or herself in a manner that reflects discredit upon the Department.
> . . .
> (State Exhibit 4)

4. Grievant was a full-time permanent employee of the State of Vermont Department of Corrections ("DOC") from January 26, 1986, to his retirement on September 29, 2017 (Joint Stipulation of Facts).

5. Grievant worked in several different positions at DOC during his employment. Grievant was a correctional officer at the Northwest Correctional Facility for the first several years of his employment. In 1990, he was promoted to a Community Correctional Officer

position at the St. Albans Probation and Parole District Office. In 2001, he was promoted to a Probation and Parole Officer position, a job which he held until 2011. At that time, he was promoted to a Community Correctional Program Supervisor position in the Probation and Parole district office in St. Albans. He remained in that position until his involuntary demotion in June 2017. During the period Grievant served as Correctional Program Supervisor, his immediate supervisor was Sherry Caforia, District Manager of the St. Albans Probation and Parole Office.

6. Grievant received annual performance evaluations rating his overall performance as at least "satisfactory" or "consistently meets job requirements/standards" during his DOC employment. On three occasions – 2003, 2004 and 2005 – Grievant received overall ratings of "outstanding". In 1988, Grievant received an overall rating of "frequently exceeds job requirements/standards". Grievant received merit pay bonuses in 2003 and 2005 (VSEA Exhibit 9).

7. Grievant was not disciplined during his DOC employment prior to his disciplinary demotion.

8. As a Community Correctional Program Supervisor, Grievant supervised Community Correctional Officers and Probation and Parole Officers. Grievant was responsible for approving the time reports of 6 to 8 employees under his supervision. He also approved requests of employees for leave from work.

9. Grievant's normal working hours as a Community Correctional Program Supervisor were 8 a.m. to 4:30 p.m.

10. Grievant was an active VSEA member. At some point prior to 2016, Grievant was appointed as a member of the VSEA Council.

11. On Friday, September 9, 2016, VSEA held a VSEA Council meeting at the Killington Grand Hotel in Killington, Vermont. Grievant informed his supervisor in advance that he was planning to attend the meeting.

12. On September 9, 2016, Grievant did not report to work. He had an approximate 15 minute phone conversation with a subordinate from his home in St. Albans prior to 8 a.m. that day. He then left his home somewhere by 8 a.m. and traveled in his personal vehicle to Killington to attend the VSEA Council meeting. The trip took between 2 and 2 1/4 hours. Grievant arrived at the meeting at approximately 10 a.m.

13. Grievant attended the meeting between approximately 10 a.m. and 2 p.m. During the meeting, he spoke with other VSEA members and participated in the proceedings. At some point, Grievant learned that after lunch the Council would be debating and voting on which candidates VSEA should endorse for the November 2016 election. Grievant disagreed with VSEA endorsing political candidates. Instead of participating in the debate and vote on endorsing political candidates, Grievant decided to leave the meeting and play golf at the golf course at the Killington Grand Hotel. During lunch, at 1:10 p.m., he made reservations for a golf tee-time of 2:10 p.m. (State Exhibits 1, 2).

14. Grievant left the VSEA Council meeting at 2 p.m., retrieved his golf clubs from his vehicle, and played a round of golf beginning at 2:10 p.m. Grievant generally keeps his golf clubs in his vehicle during golfing season. Grievant plays golf frequently.

15. After finishing his round of golf on September 9, 2016, Grievant drove home. He arrived home at approximately 9 p.m.

16. As a supervisory employee, Grievant did not receive overtime wages for overtime that he works. Instead, he received compensatory time off for hours he worked in excess of his daily normal working hours.

17. On September 14, 2016, Grievant submitted an Application for Leave and/or Compensation for Overtime Work to his supervisor, Probation and Parole District Manager Sherry Caforia. Therein, Grievant requested two hours and fifteen minutes (2.25) of overtime work compensation for "Union Council training" on September 9, 2016. Two hours of the requested overtime was for the VSEA Council meeting; the remaining fifteen minutes was for the phone conversation he had prior to leaving his home that day (State Exhibit 1, VSEA Exhibit 3).

18. The payroll period for state employees is two weeks long. September 9, 2016, fell during the two week period from Sunday, September 4, to Saturday, September 17, 2016.

19. Employees are required to fill out timesheets reporting their hours worked during a time period. Grievant submitted his timesheet for this two-week period on Monday, September 19, 2016. Grievant submitted his timesheet through the State's timekeeping software called "VTHR". When submitting a timesheet in VTHR, employees enter the hours they worked and the leave they took for the time period, and attest that the information they are reporting is accurate. On the timesheet he submitted, Grievant reported eight hours worked and 2 hours and fifteen minutes (2.25) of overtime, or "hours worked over schedule", on September 9, 2016 (State Exhibit 1).

20. On past occasions when Grievant had attended VSEA meetings during regular work hours, he had coded his time at the meeting as time worked. His supervisor never told him

to code it differently. Also, he had claimed travel time to and from the VSEA meetings as time worked, and this had been approved by his supervisor.

21. Grievant's supervisor, District Manager Caforia, has recognized that employees make errors on timesheets and has permitted them to change timesheets due to mistakes they had made when initially submitting the timesheets. During the period he was supervisor, Grievant also allowed employees to correct mistakes they had made on their timesheets.

22. On September 29, 2016, DOC manager Matt Nault reported to the DOC Central Office that employee Glenn Boyde had questioned whether Grievant attended the VSEA Council meeting on September 9, 2016. As a result, the DOC initiated an internal investigation (VSEA Exhibit 1).

23. In early October, 2016, the Employer placed Grievant on temporary relief from duty with pay pending the completion of the investigation. The letter informing him he was placed on temporary relief from duty did not indicate why he was relieved from duty.

24. The internal investigation was placed on hold pending the Vermont State Police initiating an inquiry of the matter. The Vermont State Police concluded its inquiry without issuing any charges against Grievant.

25. Peter Canales, Investigator with the Agency of Human Services Investigative Unit, was assigned to conduct the DOC investigation of the allegations against Grievant. On November 10, 2016, the Employer provided Grievant with a letter providing in pertinent part:

> Peter Canales, Investigator II, has been assigned to investigate allegations that you have engaged in misconduct, including but not limited to, violation of DOC Work Rules, Vermont DHR Policies by misrepresenting to your employer why you needed time away from work and fraud by receiving pay for hours you did not work. You have the right to request union representation . . . at this meeting. . . Peter Canales will meet with you on November 23, 2016, at 8:30 a.m. to discuss details of the allegations. . .

> Duties Regarding Investigation: You are also advised that Personnel Policy 17.0 provides: "State employees have an obligation to cooperate with their employer regarding employment investigations. It is part of the responsibility of an employee to answer truthfully and fully the work-related inquiries of the State."
>
> Refusing to answer, answering incompletely, or answering untruthfully, questions relating to work is considered misconduct for which an employee may be disciplined up to and including dismissal.
> . . .
> (State Exhibit 1)

26. Canales conduced an investigative interview of Grievant on November 23, 2016. VSEA Field Representative Brian Morse represented Grievant. During the investigative interview, Grievant informed Canales that he had attended the VSEA Council meeting on September 9 but that he had left the meeting at 2 p.m. to golf. Grievant stated: "I owe" the State two hours, "I did my math wrong, bottom line", and "this was a clear mistake". Grievant provided Canales with a photo of his golf pass for September 9, indicating his start time as 2:10 p.m. Canales did not ask Grievant during the investigative interview to provide names of individuals who could verify that he attended the September 9 meeting (State Exhibits 1, 3).

27. Canales submitted his Investigative Report to the Employer on December 15, 2016. The DOC staffing group assembled to determine what action to take as a result of the Investigative Report requested that Canales conduct a follow-up investigation regarding the allegations and request, among other things, that Grievant provide a list of persons who could verify when he arrived at and left the September 9 VSEA Council meeting. Canales requested this information of Grievant on December 27, 2016. Grievant provided the information. Canales contacted the individuals, some of whom verified that Grievant arrived at the meeting at approximately 10 a.m. and left the meeting at approximately 2 p.m. Canales submitted an addendum to the Investigative Report on January 12, 2017 (State Exhibits 1, 2; VSEA Exhibit 2).

28. District Manager Caforia sent Grievant a letter dated January 30, 2017, providing in pertinent part:

> As a result of your behavior described below, the Department of Corrections ("DOC") is contemplating imposing serious disciplinary action up to and including dismissal from your position as Community Correctional Program Supervisor. You have the right to respond to the specific allegations listed below, either orally or in writing, before the final decision is made.
>
> The below charges are based on your conduct, summarized in an Investigative Report dated December 15, 2016 and an addendum report dated January 12, 2017, and all related attachments, prepared by Agency of Human Services Investigative Unit Investigator Peter Canales. . .
>
> . . .
>
> A. Relevant Provisions of DOC Work Rules, State Personnel Policies, and the Supervisory Unit Collective Bargaining Agreement ("CBA")
>
> - CBA Article 3
> - CBA Article 14
> - DOC Work Rule 1
> - DOC Work Rule 4
> - DOC Work Rule 9
>
> . . .
>
> B. Potential Violations of DOC Work Rules and State Personnel Policies
>
> You are currently employed as a Community Correctional Program Supervisor at the St. Albans Probation and Parole Officed. The State became aware of allegations that you requested leave to attend a VSEA meeting on September 9, 2016 and claimed eight hours of union meeting leave time and 2.25 hours of overtime for that date on your timesheet, but did not attend the meeting for all of the hours claimed. It then commenced an investigation of those allegations.
>
> The investigation revealed that on September 14, 2016 you submitted an "Application for Leave and/or Compensation for Overtime Work" and reported 2.25 hours of overtime for a phone call and "Union Counsel training on 09/09." On your time report, you claimed eight hours of regular work time (for union meeting leave time) and 2.25 hours for hours worked over schedule for September 9, 2016.
>
> During your November 23, 2016 interview with Investigator Canales, you stated that you attended the VSEA Council meeting in Killington on September 9, but were not present for the entire meeting. You stated that you left your home sometime between 7:45 a.m. and 8:15 a.m. and arrived at the meeting in Killington at approximately 10:00. You claimed you attended the meeting until 2:00 p.m. when you left to play golf. You did not return to the VSEA Council meeting after you left to play golf.

Investigator Canales questioned you about the basis for you claiming eight hours of regular work and 2.25 hours of overtime for September 9, and you stated that you received a work-related phone call prior to leaving your residence that morning and claimed .25 hours of overtime for that call. You further explained that you claimed 2 hours of overtime for your travel from your residence to Killington. When Investigator Canales asked why you claimed overtime for those hours when your work day normally begins at 8:00 a.m., you responded that "I did my math wrong, bottom line."

Investigator Canales asked you about claiming 10 hours of work time, you responded that your time report is not accurate and that you "owe" the State two hours of time. You agreed that your time report is inaccurate by either 2 hours or 4 hours depending on whether you are entitled to be paid for your time traveling back to your residence after you left the meeting at 2:00 to play golf. You explained that because you left the meeting to play golf at 2:00 rather than staying to the end of the meeting at 4:00 you did not claim the two hours it took you to return home after playing golf. You asserted this offset the 2 hours you did not attend the meeting while playing golf.

It seems you violated DOC Work Rules 4 and 9 and Personnel Policy 5.6 when you submitted a timesheet claiming eight hours of union meeting leave time and two hours overtime for September 9, but only worked 6 hours. The timesheet you submitted for that date did not honestly report the hours you attended the VSEA Council meeting on September 9 and for which you were entitled to compensation pursuant to Article 3 of the Supervisory Unit CBA. Falsely reporting that you worked hours you did not actually work and seeking compensation, including overtime compensation, for that time reflects discredit upon the State and DOC because it is a betrayal of the public's trust in State employees. In addition, the aforementioned violations of the identified DOC Work Rules and State Personnel Policies also constitute violations of DOC Work Rule 1.

Accordingly, it appears your conduct provides just cause for disciplinary action up to and including dismissal . . .
(State Exhibit 7)

29. Grievant elected to respond to these allegations in a meeting. The meeting occurred on March 22, 2017.

30. Grievant remained on temporary relief from duty with pay during the entire period of investigation until the time the Employer decided what disciplinary action to impose on him. During the eight and one-half months Grievant was on temporary relief from duty, he felt embarrassed and isolated. He experienced seasonal

affective disorder, and became depressed. He was treated for anxiety. He felt withdrawn and isolated from not going to work and not knowing whether he would have a job.

31. Caforia sent Grievant a letter dated June 19, 2017, that provided in pertinent part:

> This is to provide official notification of your disciplinary demotion to Correctional Services Specialist II, Pay Grade 23, effective June 26, 2017, for your misconduct and violations of State Personnel Policies and DOC Work Rules.
>
> . . . On March 22, 2017, I met with you and VSEA Field Representative Brian Morse to hear your response. I have considered your response in making this decision, but I do not find that any information you provided outweighs the gravity of the offense.
>
> The reasons for your demotion are outlined in the letter dated January 30, 2017, (copy enclosed), and further described in the accompanying reports and attachments, which are incorporated herein by reference. Specifically, you intentionally mis-coded your timesheet and were paid for hours worked, and overtime hours, that you did not actually spend working on State business. Your conduct violated your duty as a Community Correctional Program Supervisor ("CCPS") to act as an appropriate role model for employees under your supervision, and DOC can no longer trust that you will be able to reliably perform duties as a leader, utilize sound judgment, and act as an appropriate role model for other employees. Because of your misconduct, DOC no longer has confidence in your ability to satisfactorily perform the duties of the CCPS. Based upon the totality of the evidence, I find that your demotion is the lowest level of discipline that would appropriately address your misconduct.
>
> Please be advised that you may be subject to discipline up to and including dismissal for future misconduct or for other violations of Personnel Policies and/or DOC Work Rules.
>
> Termination is typically the appropriate action when you lose trust in an employee, but I would like to give you another opportunity to succeed in DOC. I hope that by reducing the scope of your responsibilities and placing you in a position with the opportunity for closer supervision, the corrective action will be effective and assist you to perform successfully. I appreciate your long service to this department, and hope that you can put this behind you, focus on your new position within DOC, and move forward productively and constructively. . .

(State Exhibit 9, VSEA Exhibit 4)

OPINION

VSEA alleges that the Employer violated Article 14 of the Contract by: 1) demoting Grievant without just cause, 2) improperly bypassing progressive discipline and progressive corrective action in demoting him, 3) failing to apply discipline with a view toward uniformity and consistency in demoting him; and 4) failing to promptly impose discipline within a reasonable time of the offense.

We first address VSEA's contention that the Employer violated the requirement of the Contract that "the State will act promptly to impose . . . discipline within a reasonable time of the offense." This is a contract provision that the Board has previously interpreted on many occasions.

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. Grievance of Gorruso, 9 VLRB 14, 34 (1986), *Reversed on Other Grounds,* 150 Vt. 139 (1988). 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. Appeal of Wells, 16 VLRB 52 (1993).

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. Grievance of Lepore, 33 VLRB 290; *Reversed on Other Grounds*, 2016 VT 129.

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. Grievances of Charnley, Camley and Leclair, 24 VLRB 119, 141-142 (2001). 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. Grievance of Brown, 24 VLRB 159, 174 (2001).

The Board determined in a further case that the dismissal of a correctional officer occurred within a reasonable time of the 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. Grievance of Kerr, 28 VLRB 264, 277 (2006).

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. Grievance of Abel, 31 VLRB 256 (2011). 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. Grievance of Richardson, 31 VLRB 359, 383 (2011).

In applying these precedents here, we conclude that the State has violated the requirement of the Contract to "act promptly to impose discipline . . . within a reasonable time of the offense". The Employer imposed the disciplinary action of demotion on Grievant nearly nine months after learning of Grievant's alleged misconduct. The State offered no reasonable explanation why it took such a long period of time to impose discipline. The circumstances involved in other cases of a pending criminal investigation, a complex investigation, or other significant complications where we have found no contract violation are wholly absent in this case. Grievance of Lepore, 33 VLRB at 315.

Once again, like Lepore, the State has flagrantly violated the important procedural due process protections negotiated by the parties of timely taking disciplinary action. Lepore, 33 VLRB at 315-316. The State blatantly disregarded its obligations to adhere to these provisions that are of crucial importance to a person's livelihood and constructive labor relations. Id.

In determining the appropriate remedy for this significant contract violation, it is necessary to at least issue a cease and desist order to the State. Grievance of VSEA, et al (re: Tropical Storm Irene), 32 VLRB 274, 324 (2013). The State is required in the future to adhere to these important procedural due process protections negotiated with VSEA.

In considering whether to grant the further remedy requested by VSEA of reversing the disciplinary action of demotion imposed on Grievant, we are bound by the precedent established by the Vermont Supreme Court in Grievance of Lepore, 2016 VT 129. The Court held there that a delay of nearly a year in imposing discipline did not preclude an employer from dismissing an employee absent a showing of prejudice and actual harm to the employee. The Court determined

that the evidence did not establish prejudice to the employee since he continued to work and receive his salary 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. Id. at ¶ 25. 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. Id. at ¶ 26.

Here, Grievant did not suffer monetary loss due to the inordinate delay. He was on temporary relief from duty with pay during the period of delay, thereby receiving his regular pay. Although he was precluded from the typical overtime that he worked, this did not result in monetary loss because, as a supervisory employee, he received compensatory time off for excess hours he worked in lieu of overtime wages. Also, there was no discernable effect on the preservation of facts or testimony or any other adverse effect on Grievant's ability to defend against the charges. Further, there was no showing of prejudice where there was no evidence that the State either sought to, or did, obtain any unfair advantage over Grievant through the delay in disciplining him.

It is troubling that the delay had adverse psychological effects on Grievant. During the eight and one-half months Grievant was on temporary relief from duty, he felt embarrassed and isolated. He experienced seasonal affective disorder, and became depressed. He was treated for anxiety. He felt withdrawn and isolated from not going to work and not knowing whether he would have a job. These effects on Grievant would have been significantly lessened if the State had proceeded in a timely manner. Nonetheless, these psychological effects on Grievant are outside of the monetary losses, procedural due process impacts, and unfair advantage to the

employer required by the Court in the Lepore decision to show prejudice and actual harm to Grievant that would warrant setting aside the discipline imposed against him.

In sum, our conclusion that the State has violated the Contract by failing to act promptly to impose discipline within a reasonable time of the offense does not result in a determination that Grievant's discipline must be reversed. This should not be interpreted as minimizing the obvious and persistent disregard of an important contract provision by the State. It also should not be viewed as being unmindful of the unnecessary expenditure of public funds due to the excessive time Grievant was on temporary relief from duty with pay.

Grievant next contends that the Employer violated Article 14 of the Contract because the disciplinary demotion imposed on him was without just cause, and the Employer improperly bypassed progressive discipline. To establish just cause for discipline, it is necessary for the Employer to show that disciplining the employee for certain conduct is reasonable; and the employee had fair notice, express or implied, that such conduct would be grounds for discipline. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). Grievance of Nunes, 20 VLRB 282, 290 (1997). On the issue of fair notice, the ultimate question is whether the employee knew, or should have known, the conduct was prohibited. Brooks, 135 Vt. at 568. Grievance of Towle, 164 Vt. 145 (1995).

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. Grievance of Colleran and Britt, 6 VLRB 235, 265 (1983). 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 violating DOC Work Rules 1, 4 and 9, and Personnel Policy 5.6, by intentionally miscoding his timesheet to claim eight hours of union meeting leave time and two hours overtime for attendance at a September 9 VSEA Council meeting, when he should have claimed a total of only six hours. We conclude that the Employer has not proven this charge to the extent of establishing that Grievant committed misconduct by claiming two hours for travel time back home after attending the VSEA meeting. Grievant previously had claimed travel time to and from VSEA meetings as time worked, and this had been approved by his supervisor. Thus, Grievant was not on notice that he could not claim this travel time as union leave.

However, the Employer has established the charge to the extent of establishing by a preponderance of the evidence that Grievant intentionally claimed two hours of overtime to which he was not entitled. We do not find credible Grievant's defense that he made a "mistake"; that he did his "math wrong, bottom line". He submitted an application for compensation for this overtime work five days after the September 9 VSEA meeting. He then again claimed this overtime five days later on September 19 when he submitted his timesheet for the pay period. This meant he had two chances to correctly state his time for September 9 within a short time following the events of that day. We do not find credible that he simply made a mistake in recording this time which would have been fresh in his memory.

Nonetheless, VSEA contends that the Employer's decision to demote Grievant for conduct occurring during VSEA leave time amounts to an inappropriate policing of union time and interference with union activity. VSEA asserts that union leave belongs to the VSEA, and what takes place during VSEA leave time is none of the State's business.

We do not find this argument persuasive. Pursuant to Article 3 of the Contract, Grievant was granted "time off during working hours without loss of pay . . . for attendance at . . . (a VSEA) council meeting". Since Grievant was earning State wages in using leave to attend the VSEA Council meeting, the State is entitled to require an employee to actually attend the meeting to receive the leave. This is not like annual leave taken by an employee where the employee is free to use the leave for whatever purpose he or she wishes without any oversight by the State. Instead, it is leave designated for a specific purpose which the State can ensure is used for that purpose. This is not inappropriate policing of union time or interference with union activity. The State is not interfering with or monitoring what occurs at VSEA meetings. The State is simply ensuring that the leave is properly used by requiring an employee to attend the meeting for which leave has been granted.

In sum, the Employer has established the charge against Grievant to the extent of establishing by a preponderance of the evidence that Grievant intentionally claimed two hours of overtime, on an application for overtime compensation and on his timesheet, to which he was not entitled. This violated, as charged, DOC Work Rule 4 requiring employees to be honest in their descriptions in writing to their employer of all circumstances relating to their employment, DOC Work Rule 9 and Personnel Policy 5.6 providing that employees shall not bring discredit upon the employer, and the general provision of DOC Work Rule 1.

The failure of the Employer to prove by a preponderance of the evidence all the particulars of the disciplinary letter does not require reversal of a disciplinary action. Grievance of Regan, 8 VLRB 340, 366 (1985). In such cases, the VLRB must determine whether the remaining proven charges justify the penalty. Grievance of Colleran and Britt, supra.

We look to the factors articulated in Colleran and Britt, 6 VLRB at 268-69, to determine whether the proven charge justifies a disciplinary demotion. The pertinent factors here are: 1) the nature and seriousness of the offense and its relation to Grievant's duties, 2) the employee's job level and type of employment, including supervisory role, 3) the clarity with which Grievant was on notice of the prohibited conduct, 4) Grievant's past disciplinary record, 5) Grievant's past work record, 6) the effect of the offense upon supervisors' confidence in Grievant's ability to perform assigned duties, 7) the consistency of the penalty with those imposed on other employees for the same or similar offenses, and 8) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Grievant's misconduct was serious. Dishonesty is a serious offense by an employee against an employer. Grievance of Carlson, 140 Vt. 555, 560 (1982). The fact that Grievant was a supervisor exacerbated his misconduct. The Employer reasonably concluded that his misconduct violated his duty as a supervisor to act as an appropriate role model for employees under his supervision. Grievance of Glover, 31 VLRB 282, 303 (2011).

Grievant had fair notice that his dishonesty could be grounds for disciplinary action. Honesty is an implicit duty of every employee and, at a minimum, an employee should know that dishonest conduct is prohibited. Grievance of Carlson, 140 Vt. 555, 560 (1982). Dishonesty by employees is grounds for serious punishment, as is evident by the Board and the Vermont Supreme Court having upheld dismissals for dishonesty in many cases. Id. Grievance of Alexander, 34 VLRB 33, 52-53 ((2017). Grievance of Turcotte, 30 VLRB 24 (2008). Grievance of Cray, 25 VLRB 194 (2002). Grievance of Newton, 23 VLRB 172 (2000). Grievance of Coffin, 20 VLRB 143 (1997). Grievance of Johnson, 9 VLRB 94 (1986); *Affirmed*, Sup.Ct.

Docket No. 86-30 (1989. Grievance of Graves, 7 VLRB 193 (1984); *Affirmed*, 147 Vt. 519 (1986). Grievance of Cruz, 6 VLRB 295 (1983). Grievance of Barre, 5 VLRB 10 (1982).

Grievant's past disciplinary record and work record at the time discipline was imposed operate in his favor. Grievant was not disciplined during 30 years of employment with the Department of Corrections prior to his disciplinary demotion. Also, he received annual performance evaluations rating his overall performance as at least "satisfactory" or "consistently meets job requirements/standards" during his DOC employment, and he received overall ratings of "outstanding" or "frequently exceeds job requirements/standards" on several occasions.

Nonetheless, Grievant's serious offense reasonably caused his supervisors to lose confidence in his ability to perform at a satisfactory level as a supervisor. Given his misconduct of intentionally claiming two hours of overtime to which he was not entitled, his supervisors understandably were concerned that, if he remained a supervisor, he would be in the role of approving the time reports of employees under his supervision. Grievant's supervisors reasonably concluded that Grievant could no longer be trusted to reliably perform his duties as a leader, use sound judgment, and act as an appropriate role model for subordinate employees. Grievance of Glover, 31 VLRB at 303-305.

Grievant has failed to show that he was treated inconsistently with other supervisors committing similar offenses. He has not presented evidence of any other supervisors whom were treated more leniently than he was for engaging in similar misconduct. In fact, there is no evidence of a supervisor engaging in similar misconduct.

Grievant contends that the Employer inappropriately bypassed progressive discipline. We disagree. Grievant engaged in serious misconduct resulting in the Employer reasonably losing trust in him reliably performing his supervisory duties. The Employer reasonably concluded

under the circumstances that alternative sanctions to demotion were not adequate or effective to deter such misconduct by Grievant in the future. In sum, just cause existed for the disciplinary demotion of Grievant.

ORDER

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

1. This grievance is sustained to the extent that the State of Vermont violated Article 14, Section 1(a) of the Contract by failing to promptly impose discipline on Grievant within a reasonable time of the offense, and the State shall cease and desist from failing to impose discipline on employees within a reasonable time of the offense; and
2. This grievance is dismissed in all other respects.

Dated this 26th day of April, 2019, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park
_____
Richard W. Park, Chairperson

/s/ James C. Kiehle
_____
James C. Kiehle

/s/ Karen F. Saudek
_____
Karen F. Saudek