

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 20-22
JAMES FRANK)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 17, 2020, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of James Frank ("Grievant"), a Correctional Officer I with the State of Vermont Department of Corrections ("Employer" or "DOC"). VSEA alleged that the Employer violated Article 14 of the collective bargaining agreement between the State of Vermont and VSEA for the Corrections Bargaining Unit, effective July 1, 2018, to June 30, 2020 ("Contract"), by: 1) dismissing Grievant without just cause, 2) improperly bypassing progressive discipline, 3) failing to apply discipline with a view toward uniformity and consistency; and 4) unreasonably delaying imposing discipline. VSEA further alleged that Grievant's action were protected by the First Amendment.

The Labor Relations Board conducted video hearings through the Microsoft Teams platform on September 17 and 30, and October 5, 2020, before Board Members Richard Park, Chairperson; Alan Willard and Roger Donegan. Assistant Attorneys General Rachel Smith and Laura Rowntree represented the Employer. VSEA General Counsel Timothy Belcher represented Grievant. VSEA and the Employer filed post-hearing briefs on November 9, 2020.

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's Exhibit 3)

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, whether on or off duty.

...

 7. Employees shall not discriminate against, intimidate, nor harass any employee because of . . . sex . . . or any other factor for which discrimination is prohibited by law.

...

Number 11.7 ELECTRONIC COMMUNICATIONS AND INTERNET USE

... These rules also apply to electronic communications or transactions in which a state employee represents him/herself as a State employee, regardless of whether he or she is using or accessing State equipment.

...

RULES FOR USE OF SYSTEMS OR INTERNET SERVICES

...9. Use of agency systems or printers for offensive or disruptive purposes is prohibited. This prohibition includes profanity, vulgarity, sexual content or character slurs. Any inappropriate reference, regardless of whether presented as a statement, language, image, email signature block, audio file, or in any other way that is reasonably likely to be perceived as offensive or disparaging of others on the basis of race, color, age, gender, sexual orientation, gender identity, religions, national origin or disability is also prohibited.

...

(State's Exhibit 2)

3. DOC Work Rules, which Grievant was provided on August 16, 2016, provide in pertinent part:

1. No employee shall violate any provisions of the collective bargaining agreement or State of Vermont work rule, policy, procedure, directive, local work rule or post order.

...

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

...

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

...

(State's Exhibit 1)

4. Grievant was first hired by the DOC in March 2005 as a Correctional Officer I at the Northwest State Correctional Facility ("NWSCF"). He resigned voluntarily in April 2011,

and then reapplied, and was hired, in May 2012 to work as a cook in the Chittenden Regional Correctional Facility. He moved to a Correctional Officer I position in Chittenden in August of 2013. He relocated as a Correctional Officer I to NWSCF in November 2016. He remained in that position until he was dismissed in March 2020 (State's Exhibit 9).

5. Grievant regularly received performance evaluations in the course of his employment with the DOC. His overall performance in the evaluations was rated on a scale of "outstanding", "excellent", "satisfactory", or "unsatisfactory". Grievant's overall performance was always rated "satisfactory" except that he received an overall rating of "excellent" for the annual evaluation he received for the December 21, 2009 to December 21, 2010 period. Grievant consistently received positive comments on the performance evaluations for his interactions with inmates and his care and treatment of them (State's Exhibit 4).

6. Grievant was not disciplined during his employment except for a written reprimand he received in 2008 for violating security practices by failing to properly close a door when he was working in the facility's control room (State's Exhibit 9).

7. A core duty of a correctional officer is the care and custody of the inmates that they are supervising. Correctional officers are responsible for the well-being of inmates and ensuring they are safe.

8. The DOC trained Grievant and other staff on the treatment of transgender inmates, instructing them on proper use of pronouns and other matters. There is no evidence that Grievant did not comply with instructions received during this training prior to the incident leading to his dismissal.

9. One assignment correctional officers may be assigned to is "constant observation" in which an officer is assigned to constantly observe one inmate who is alone in a cell. Among

the reasons inmates are placed on constant observation are for security reasons or mental health issues, such as when an inmate is at serious risk of harming themselves. The officer's duty is to constantly watch the inmate and intervene if needed to prevent self-harm.

10. Constant supervision is not a regularly scheduled assignment because a correctional facility may go days or weeks without an inmate needing constant supervision. When constant observation is needed, it generally is performed by an officer working overtime.

11. When Grievant assumed the Correctional Officer I position at NWSCF in 2016, he was aware that mandatory overtime was part of the job. Mandatory overtime is a job expectation for correctional officers. Management conveys that expectation to prospective correctional officers during the hiring process.

12. When a shift cannot be filled with the officers scheduled to work, officers are allowed to sign up for the unfilled shift as voluntary overtime. A shift that is not filled through voluntary overtime is then filled with officers assigned mandatory overtime. Officers can control to some extent when and whether they will be required to work overtime by volunteering for overtime, which will move them towards the bottom of the order-in list.

13. At some point during Grievant's shift on July 3, 2019, he was informed that, instead of coming in at the start of his regular shift at 2 p.m. the following day, the July 4th holiday, he was required to come in at 10 a.m. The early start was to perform constant observation of a transgender inmate who was suicidal. This upset Grievant because he had plans to spend time with his wife and children on the morning of July 4.

14. When Grievant came home at the end of his shift on the evening of July 3, he consumed a large amount of alcohol. Grievant published a Facebook post late on July 3, 2019, providing:

HAPPY FOURTH OF JULY from the communist haven of VT. Have to go in 4 hours early to sit and watch a he she who wants to hurt/kill self. SO sick of the LIBERAL BULLSHIT! I think its just a p-ssy that won't do it anyway and needs attention. So F anyone elses family and holiday...coz. "I'm needy and want attention on me." I say if it was serious about doing it it would eat a f'in gun, get it over with, and leave the rest of the world alone. Hope they move me somewhere else, rather than watch it,coz. I'll tell it the truth. I'm F'in done with DOC and the commie haven of VT. With any luck they fire me and I'll take their money and benefits, like the f'in freeloaders we watch!
(State's Exhibit 5, VSEA Exhibit 5)

15. Soon after writing this post, Grievant wrote the following comment on it: "GO AHEAD AND REPORT ME UP THE CHAIN OF COMMAND: TIME SOMEONE PISSED IN THEIR ASS KISSING CHEERIOS ANYWAY" (State's Exhibit 5).

16. At the time Grievant wrote this post, he had approximately 600 Facebook "friends". Approximately 100 of these Facebook friends were prior or existing Department of Corrections employees. Grievant's Facebook friends could all see his posts. Grievant's privacy settings were set so that only his Facebook friends could see his posts (State's Exhibit 18, VSEA Exhibit 4).

17. Grievant had been using Facebook for about a decade at this time. He was writing posts on Facebook at least once on a daily basis. He frequently "liked" or commented on other posts. Grievant was aware that his Facebook friends could see his posts.

18. In the first few days after Grievant wrote his Facebook post, the post had 18 comments. There also were 17 instances where persons reacted to the post by clicking on an image that conveyed a "like", a "heart", or a facial expression that conveyed "wow". The comments and posts were mostly supportive of Grievant, but this was not universal (State's Exhibits 5 and 9, VSEA Exhibit 7).

19. Any of Grievant's Facebook friends could share the post with anyone else by taking a screenshot of it and sharing the screenshot, texting it to others, or emailing it.

20. Grievant could have deleted his Facebook post at any point after he made it. He did not do so.

21. The work of correctional officers is often stressful. Mandatory overtime can add to this stress. It is not unusual for officers assigned mandatory overtime to react with expressions of frustration or anger, such as slamming a locker, breaking down in tears or uttering obscenities. Generally, they do so around persons they trust. They generally vent for a short period of time. The venting typically is not directed toward an individual inmate.

22. Transgender inmates are a particularly vulnerable population. There are not many of them. They are perceived as “different” and are susceptible to being harassed. They may develop mental health problems such as depression when they are incarcerated.

23. On the morning of July 4, 2019, James Mann, the first shift supervisor at NWSCF on duty, overheard correctional officers discussing the Facebook post Grievant had sent the previous evening. Mann asked NWSCF Intelligence Officer Ryon Schuller to try to obtain a copy of the post. Schuller was a Facebook friend of Grievant and was able to gain access to the post. At 9:35 a.m., Schuller forwarded Grievant’s Facebook post to Mann.

24. Mann sent NWSCF Superintendent Greg Hale an email at 9:38, attaching Grievant’s Facebook post, and informing him that he was moving Grievant, who was scheduled to come in at 10 a.m., to a different assignment due to “misconduct potential”.

25. Hale forwarded the email chain and Facebook post to Al Cormier, DOC Facilities Executive. Cormier and Hale had an email exchange on how to handle the situation. Cormier stated: “There is no formal social media policy but what he wrote is obviously violating several work rules. I would write it up as a formal investigation and forward it to DHR. Based on what he wrote I would consider him a potential security threat where we could support an RFD (Relief

from Duty) on him.” Hale expressed his agreement and informed Cormier that he would send in a request for an internal investigation (State’s Exhibit 6).

26. On July 9, 2019, NWSCF Assistant Superintendent Michael Beyor sent Grievant a letter informing him that he was “temporarily relieved from duty, with pay, for a period of up to thirty (30) work days, in order to permit the State to conduct and complete an investigation into allegations of misconduct including, but not limited to, violations of DOC Work Rules 6 and 9; concerning allegations that you made inappropriate, threatening comments concerning an inmate on social media while associating yourself as a DOC employee”. Grievant’s temporary relief from duty status was subsequently extended several times. The final extension was through April 21, 2020 (State’s Exhibit 8).

27. Department of Human Resources (“DHR”) Investigator Charles Kirk was assigned to conduct the investigation of Grievant. Kirk met with Grievant and his VSEA Representative Mike O’Day on August 12, 2019. The following exchanges occurred during the interview:

...
Kirk: Did you have training on sexual harassment at some point in your career?

Grievant: Yes.

Kirk: How about training working with special inmates? And when I say special inmates, transgendered inmates; what kind of training did you receive as a correctional officer dealing with that in your population?

Grievant: We – we take all the, you know, the – the mandated ones. I won’t, you know, I’m forty-seven. A lot of it, personally, doesn’t sit well. Now, does that mean I’m going to go out of my way when I’m at work to bother someone? No. Absolutely not.

Kirk: Okay.

Grievant: I get – I try to get around it as best I can. Now, let me rephrase, navigate it the best I can.

Kirk: Yeah.

Grievant: But yeah, no, no. I – I try to find the middle ground to work with, you know, so I don't betray my own principles.

Kirk: Sure.

Grievant: But I don't hurt anybody in the process.

Kirk: Okay.

Grievant: It's – it's a balancing act, and –

...

Kirk: Why did you post that?

Grievant: Well, there was – Mike has given me the number for EAP. Again, being a little old school, forty-seven, going to be forty-seven. I'm a little apprehensive, you know, the half of me says suck it up and deal with it. And the other half is, you know, like trying – why did I post it? I kind of, you know, putting it out there. You know, it's very frustrating. Not – you know, it's not something I would do. I mean I can't tell – I forgot how many I said. I was two or three rocks glasses in straight. . . Except for the ice. . . And I was just, you know, I was throwing it to the wind.

...

Kirk: Okay. Now on this particular day, you said you had been drinking alcohol.

Grievant: I was at home.

Kirk: Yeah, oh yeah, I get it. Yes. You're home; you're off duty.

Grievant: Yes. . . I had been ordered while I was still at work.

Kirk: Okay. So you were at work, working on second shift.

Grievant: Yes.

Kirk: And said be in what, four hours early?

Grievant: Yes. Yes.

Kirk: The following day. So on July 4th.

Grievant: Yes.

Kirk: Okay. So you wrote this. And who were you sending this to on Facebook? Who did you – where did it go?

Grievant: I don't -- well, it was a vague thing. I figured it would just go to the people I had on my list who, you know, are friends and family, and I figured would just, you know, let me vent, you know.

...

Kirk: Was your intent for these remarks to be made out in the public? Is this, in other words, there is a requirement to present yourself in a professional manner, represent the DOC in a professional manner. Was that contrary to that expectation of professionalism in what you wrote in this post?

Grievant: So you're asking me if I was putting it out for public?

Kirk: Yeah. Is this something that you were expressing out in the public?

Grievant: No.

Kirk: Did you see this as something that you were saying amongst friends and family?

Grievant: Yes.

Kirk: Or and that it had – were you aware that it had the potential of being passed out into the public?

Grievant: No, I – I thought would only go to people on my list, friends list, whatever, you know . . this was my, you know, vent, perhaps cry for help. You know, someone tell me I'm not nuts.

...

Kirk: And again, there are some remarks in here about this . . offender being a transgender.

Grievant: I would never at work – I don't have a problem with the way a person lives their life. But I – don't ram it down your neck. I don't ram the way I live my life down your neck. . . I don't want it jammed down mine. And so the way I get around that is I just use their last name as opposed to pronouns. . .

...

Grievant: I was telling Mike earlier, if you showed it to the majority of the clientele of inmates I work with, they would tell you straight up without even seeing the part about the three or four glasses, just bam, he'd have to be three sheets to the wind.

Kirk: Okay.

Grievant: Because that's – that's not me.

...

Kirk: Was this any suggestion that you weren't going to do your job?

Grievant: No.

Kirk: Okay.

Grievant: That was the ramblings of a middle-aged, highly-intoxicated person.

...

(State's Exhibit 10)

28. Kirk submitted his written investigation report to DOC management on September 4, 2019 (State's Exhibit 11).

29. A staffing meeting of DOC managers, DHR staff, and attorneys was held on September 10, 2019, to consider what action to take pursuant to the investigation report. There were more complex legal issues involved with respect to Grievant's case than typical due to off-duty social media use and potential First Amendment issues. The decision was ultimately made to send Grievant a letter informing him that the Employer was contemplating imposing serious disciplinary action against him, up to and including dismissal, and providing him with an opportunity to meet to respond to the allegations against him (State's Exhibit 9).

30. NWSCF Superintendent Greg Hale sent a letter dated October 4, 2019, to Grievant providing in pertinent part:

As a result of your behavior described below, the DOC is contemplating imposing serious disciplinary action, up to and including dismissal from your position as Correctional Officer I. You have the right to respond to the specific allegations listed below, either orally or in writing, before a final decision is made. . .

The below charges are based on your conduct, discussed in an Investigative Report dated September 4, 2019, prepared by Department of Human Resources Investigator Charles Kirk, and the attachments to the report. The report, with its attachments, is attached, fully incorporated by reference, and may be consulted for further information, regarding the charges summarized below.

A. Relevant Provisions of DOC Work Rules and Directives, Vermont Personnel Policies, and the Corrections Unit Collective Bargaining Agreement (“CBA”)

- Corrections CBA Article 14: Disciplinary Action
- Vermont Personnel Policy 5.6: Employee Conduct
- Vermont Personnel Policy 11.7: Electronic Communication
- DOC Work Rule 1, 6, and 9

B. Potential Violations of DOC Work Rules, Vermont Personnel Policies, and the CBA

You are currently employed as a CO1 at NWSCF. It was brought to the attention of the DOC that on July 3, 2019, after being lawfully ordered to work mandatory overtime by reporting to work four (4) hours early on July 4, 2019, you made inappropriate remarks about an inmate on social media which were insensitive, intolerant, disparaging, offensive and threatening in nature, and reasonably likely to be perceived as offensive or disparaging of others on the basis of gender, sexual orientation, and/or gender identity.

. . . (A)fter receiving the order, you posted the following comments on the social media platform Facebook:

1. “[I] have to go in 4 hours early to sit and watch a he she who wants to hurt/kill self.”
2. “I think its just a p-ssy (*sic*) that won’t do it anyways and needs attention.”
3. “I say if it was serious about doing it it would eat a f’in gun, get it over with, and leave the rest of the world alone. Hope they move me somewhere else, rather than watch it,coz. I’ll tell it the truth. I’m F’in done with DOC and the commie haven of VT.”

On August 12, 2019, Kirk interviewed you in response to the listed allegations. When asked why you were at the meeting, you offered that it was regarding a post you made on Facebook. You described your posting as the off-duty rantings of a middle-aged intoxicated person, not meant for public consumption, because you

posted the comments on Facebook for your friends and family. You also stated that it was a cry for help.

It is alleged that when you posted on Facebook as above described, you: represented yourself as a State of Vermont DOC employee required to report for DOC duty; made comments which were insensitive, intolerant, disparaging, offensive, threatening, and reasonably likely to be perceived as offensive or disparaging of others on the basis of gender, sexual orientation, and/or gender identity; brought discredit upon the Department and the State of Vermont; and have called into serious question your willingness to fulfill the responsibility of your position to intervene in a dangerous situation such as inmate self-harm to protect the safety of inmates and staff at risk.

It is further alleged that by your actions you have violated DOC Work Rules 1, 6, and 9, Vermont Personnel Policy 5.6 and 11.7 and have provided just cause for disciplinary action, up to and including dismissal from your position as a CO1 at NWSCF. Your disciplinary history will be taken into consideration when making a decision.

Process

You must notify me within twenty-four (24) hours after receiving this letter whether you wish to respond to the above allegations. . .
(State's Exhibit 12)

31. On November 21, 2019, Superintendent Hale and Christopher Cadorette of DHR met with Grievant and VSEA in a *Loudermill* meeting to allow Grievant to respond to the October 4 letter. At the meeting, Grievant read the following statement:

Dear Sirs and/or Ma'ams: I come to you in all sincerity and good faith to be able to put forth a deeply heartfelt act of contrition. I am aware of why we are here, and my intent was not to put it forth for public consumption. My understanding at that time was that only my friends and family would see it. As I am now aware, this was not the case. I do not now, nor have I ever had an issue working with any staff, inmate, or client of any ilk, ilk meaning persuasion. Unfortunately, in my post that night, in an inebriated and altered state, let my dark side rule the moment in a private setting. For this, I am deeply apologetic and sincerely regretful.

My words cannot fully express the remorse and sadness I feel for having placed the Department, the administration, fellow brothers and sisters, and finally myself, into this quagmire of a position. This was a case, as I now comprehend, where the impact was way beyond the intent. I fully recognize the weight of this phrase now that I had not grasped beforehand. While selfishly seeking to vent, blow off steam, and validate my own inebriated darkness, I hurt others and belittled their own inner self issues, and perhaps, demons. Inadvertently, I projected my own inner darkness outward through that

which I directly serve and never intended to hurt, offend, or damage anyone directly or indirectly through me. As mentioned before, though, my intent was outweighed by the possible impact. For any possible hurting, offending, or damaging of anyone, my heart, soul, and conscience are, and have been, heavy with sorrow, regret, and apologies . . I accept full ownership and responsibility . .

As such, although permitted to know and have full disclosure regarding this case, I forgo such personally speaking as I alone bear the responsibility for being here. However, I do reserve right for my representation to be privy to any and all information or discovery and adjudication of the situation. In the time I've been at home reflecting and refraining, I have come to realize that the hell I have experienced is more than likely the very same of those whom I lashed out at, and although admittedly I cannot fully understand and comprehend why or how one does feel, believe, or know such to be true in their own hearts, at least that door has been opened to me and the light has begun to just shone through. And once that light acknowledged has gifted unto someone, it can and will only grow. And with such understanding and knowledge, I am to reconcile my thoughts and beliefs as such. With a re-found sense of self and purpose, I have, with my wife, children, my God, and my sober self, resolved to follow the light of knowledge and self-awareness; the intent being to return to the course of our mission and its purpose.

I thank you for your time and consideration. I hope to be able to return to service of humanity and stand at and with my brothers' and sisters' sides . . I am aware that I may have to serve a sentence of my own on and for the record and fully accept and understand such. Know that this will never occur again, ever. I look forward to sharing what I have learned and grown from this experience enduring, and can and will be a positive for the Department going forward. The Department will not have to worry about anything negative in any way from this officer, only looking forward to the positive influence and input I can offer. Once again, thank you.

32. Grievant had pneumonia for six to eight weeks during October and November 2019 that would have kept him out of work for six to eight weeks had he been working during that time.

33. There was a lengthy delay between the *Loudermill* meeting and the imposition of discipline on Grievant. The delay occurred in a context of upheaval in DOC. DOC Commissioner Michael Touchette left his position on December 17, 2019, following articles in the publication *Seven Days* containing allegations of DOC mishandling of allegations and complaints of employee sexual misconduct towards female inmates and employee drug use. The DOC Deputy Commissioner was reassigned. NWSCF Superintendent Hale was reassigned to the Northern State Correctional Facility in December and January because the Superintendent and

Assistant Superintendent there had been relieved from duty. DOC and DHR Staff realized a substantial increase in workload for weeks resulting in the wake of the fallout from the *Seven Days* articles (State's Exhibit 20).

34. James Baker was hired as Interim Commissioner of DOC on January 6, 2020. He found an organization in "complete disarray". He was responsible over the next few months to get DOC "settled down", help steer the DOC budget and other bills affecting DOC through the legislature, and prepare a report on the culture and organization of DOC. Then, beginning in the middle of February, the onset of COVID-19 consumed a great deal of Commissioner Baker's time in putting practices and protocols in place to keep correctional facilities safe. Due to these pressing responsibilities, Commissioner Baker did not review Grievant's case until late February or early March.

35. Commissioner Baker sent a letter dated March 24, 2020, to Grievant which provided in pertinent part:

This is to notify you of your dismissal from the position of Correctional Officer I with DOC effective at the close of business Tuesday, March 24, 2020. As explained in the October 4, 2019 letter and attachments you received, DOC was contemplating your dismissal, and you were given an opportunity to respond to misconduct charges before I made a final decision. On November 21, 2019, NWSCF Superintendent Greg Hale and Human Resources staff met with you and your representative, Mike O'Day, to hear your response to the October 4, 2019 letter. In making my decision, I considered all the information and arguments you and your representative raised at this meeting but did not find it overcame the seriousness of your misconduct.

I am terminating your employment because I find that you committed misconduct as described in the above-referenced letters, which are incorporated herein. Specifically, you publicly posted after identifying yourself as a DOC employee, comments that were derogatory, insensitive, and sexist pertaining to an inmate under the care and custody of the DOC based upon the inmate's gender identity/sex. By doing so, you brought discredit to the DOC and the State of Vermont, and served to seed public doubt about the Department's ability to fulfill one of the most critical aspects of its mission – to adequately protect the vulnerable population in its custody.

The Department of Corrections has lost confidence in your ability to safely, professionally, and satisfactorily perform your job duties. The State of Vermont and DOC must maintain the public trust in carrying out DOC's mission, and your actions have negatively impacted the ability to do so. Therefore, I find that no lesser penalty than dismissal is sufficient to address your misconduct.

...
(State's Exhibit 15)

36. In deciding to dismiss Grievant, Commissioner Baker took Grievant's work history of satisfactory performance into account, but decided that this did not overcome the seriousness of his egregious, discriminatory and disgusting statement. He determined that Grievant's statement had an adverse impact on the core function of DOC to maintain the safety and welfare of the individuals in their custody. He also concluded that Grievant's post had a very serious impact on DOC's ability to maintain the trust of the various stakeholders that scrutinize DOC, including the families of inmates and the general community that rely on DOC to protect inmates. He viewed Grievant's post as exposing DOC to litigation. The DOC has many lawsuits filed against it. He was concerned how this case would be viewed if it received media coverage. Commissioner Baker determined that Grievant's statement impacted the safety of the facility because inmates depend on correctional officers to protect them. He had no confidence that Grievant's bias would not impact his performing of duties when interacting with transgender inmates. He concluded that there was no lesser sanction than dismissal that would be adequate or effective because he was in a position of power and directed his statement at an individual inmate that took away his dignity; he determined that Grievant "just can't walk back from a statement like" he made in the Facebook post.

37. Grievant was paid from the time he was placed on temporary relief from duty on July 9, 2019, until his dismissal on March 4, 2020 (State's Exhibit 8).

38. In a letter dated November 12, 2019, DOC Facilities Executive Director Alan Cormier demoted a Correctional Facility Shift Supervisor to a Correctional Officer I for misconduct. The letter provided in pertinent part:

The reasons for your demotion are . . . (s)pecifically, you referred to a female coworker in a derogatory manner, and you undermined the facility Superintendent by telling other staff members she was unprepared for the job. Further, you failed to hold staff members accountable when you heard them using derogatory terms when referring to (the) Superintendent . . . Your conduct violated your duty as a Correctional Facility Shift Supervisor (CFSS) 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 CFSS. Based upon the totality of the evidence, I find that demotion is the lowest level of discipline that would appropriately address your misconduct.

...

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, this corrective action will be effective and assist you to perform satisfactorily. 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. . .
(VSEA Exhibit 16)

OPINION

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

We first address Grievant'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 has concluded in several cases that this provision has been violated. Grievance of Gorruso, 9 VLRB 14, 34 (1986), *Reversed on Other Grounds*, 150 Vt. 139 (1988). Appeal of Wells, 16 VLRB 52 (1993). Grievance of Lepore, 33 VLRB 290; *Reversed on Other Grounds*, 2016 VT 129. Grievance of Gibson, 35 VLRB 182 (2019). Grievance of Harris, 35 VLRB 344 (2020). There have been several other cases where the Board has concluded this contract language was not violated. Grievances of Charnley, Camley and Leclair, 24 VLRB 119, 141-142 (2001). Grievance of Brown, 24 VLRB 159, 174 (2001). Grievance of Kerr, 28 VLRB 264, 277 (2006). Grievance of Abel, 31 VLRB 256 (2011). Grievance of Richardson, 31 VLRB 359, 383 (2011).

In applying these precedents here, there was not an unreasonable delay between Grievant's alleged misconduct in early July 2019 and the *Loudermill* meeting on November 21, 2019. There were more complex legal issues involved with respect to Grievant's case than typical due to off-duty social media use and potential First Amendment implications. The passage of approximately four and one-half months under such circumstances is warranted.

There was a lengthy delay between the November *Loudermill* meeting and the imposition of discipline on Grievant in March 2020 that would be considered unreasonable under normal circumstances. However, circumstances were far from normal. The delay occurred in a context of upheaval in the DOC in which there was extensive media coverage of allegations of DOC mishandling of reports and complaints of employee sexual misconduct towards female inmates and employee drug use. Subsequently, there was turnover and reassignment of top DOC management, and DOC and Department of Human Resources staff realized a substantial increase in workload for weeks resulting in the wake of the fallout from the media coverage. The

upheaval caused an absence of DOC management to determine what action to take in Grievant's case.

The hiring of James Baker as Interim Commissioner of DOC in early January 2020 was a significant step in filling the management void. However, he was met with many other pressing matters. He was responsible over the next few months for addressing the disarray of DOC, helping steer the DOC budget and other bills affecting DOC through the legislature, and preparing a report on the culture and organization of DOC. Then, beginning in the middle of February, the onset of COVID-19 consumed a great deal of his time in putting practices and protocols in place to keep correctional facilities safe. Due to these pressing responsibilities, Commissioner Baker did not review Grievant's case until late February or early March.

Given these highly unusual circumstances, we conclude that the Employer has not violated the requirement of the Contract to "act promptly to impose discipline . . . within a reasonable time of the offense". Even assuming for the sake of argument that the Employer did violate the Contract's timeliness provisions, this would not result in granting the remedy requested by Grievant of reversing the disciplinary action of dismissal imposed on him.

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 delay. He was on temporary relief from duty with pay during the period of delay, thereby receiving his regular pay. Grievant further has not presented any evidence concerning overtime he would have received during this period. Also, Grievant did not establish any 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.

We address one other preliminary issue. VSEA asserted in the grievance filed with the Board that Grievant's action were protected by the First Amendment. Grievant has not briefed this issue, and it is unclear whether this claim is still being pursued. This is particularly so since Grievant's VSEA attorney, although questioning the appropriateness of the severity of the penalty of dismissal imposed on Grievant, states in the post-hearing brief that the Employer was required to take some action once it learned of Grievant's post.

In any event, we find the First Amendment free speech claim without merit. In several grievances in which employees have claimed violation of free speech rights, the Board has determined that claims concerning free speech rights were properly encompassed within the definition of a "grievance". In these cases, the Board has applied precedents from U.S. Supreme Court cases interpreting the First Amendment of the U.S. Constitution. Grievance of Morrissey, 7 VLRB 129 (1984); *Affirmed*, 149 Vt. 1 (1987). Grievance of Robins, 21 VLRB 12 (1998); *Affirmed*, 169 Vt. 377 (1999). Grievance of Moye and VSCFF, 25 VLRB 106 (2002). The problem in any case is to arrive at a balance between the interests of the employee, as a citizen,

in commenting upon matters of public concern and the interests of the employer in promoting the efficiency of the public services it performs through its employees. Morrissey, 149 Vt. at 14; *citing* Pickering v. Board of Education, 391 U.S. 563 (1968). Grievance of Robins, 21 VLRB at 22. Grievance of Moye and VSCFF, 25 VLRB at 124-25.

The threshold inquiry in free speech cases is whether the employee's speech conduct can be "fairly characterized as constituting speech on a matter of public concern". Morrissey, 149 Vt. at 15-16; *citing* Connick v. Myers, 461 U.S. 138 (1983). Robins, 21 VLRB at 22-23; 169 Vt. at 383. When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of a personal interest, the inquiry ends absent the most unusual circumstances. Id. Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement. Id. If the employee's speech touches upon matters of public concern, then the employee's interest in the speech activity must be balanced against the government's interest in maintaining efficiency and discipline. Morrissey, 149 Vt. at 16; *citing* Connick v. Myers, 461 U.S. at 150.

In applying these standards here, we conclude that Grievant was speaking as an employee upon a matter of personal interest. An examination of the content, form and context of the Facebook post makes it evident that Grievant was frustrated at being called in to work overtime on the July 4th holiday to ensure the safety and security of a transgender inmate against whom Grievant expressed a strong personal prejudice. He was not making any statement as a citizen on a matter of public concern but was irate about the personal effect on him of having to work overtime for a purpose that he found personally objectionable.

The remaining and central issue in this case is whether just cause exists for the dismissal of Grievant. Just cause for dismissal is some substantial shortcoming detrimental to the

employer's interests which the law and a sound public opinion recognize as a 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 our 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.

The Employer charged Grievant with making a Facebook post, representing himself as a DOC employee required to report for duty, that included comments which were insensitive, intolerant, disparaging, offensive, threatening, and reasonably likely to be perceived as offensive or disparaging of others on the basis of gender, sexual orientation, and/or gender identity. The Employer asserted that this brought discredit upon DOC and the State of Vermont, and called into serious question his willingness to fulfill the responsibility of his position to intervene in a dangerous situation such as inmate self-harm to protect the safety of inmates and staff at risk. The Employer alleged that Grievant violated DOC Work Rules 1, 6, and 9, and Vermont Personnel Policy 5.6 and 11.7 by his actions.

The Employer has established these charges. Although Grievant wrote the post off-duty, he represented himself as a DOC employee required to report for duty to watch an inmate. The insulting, disparaging, and offensive nature of the post on the basis of gender, sexual orientation and/or gender identity is amply demonstrated by Grievant referring to the transgender inmate in the post as “he she”, “it”, and “p-ssy”. Such egregious statements about an individual under the care and custody of DOC whom Grievant was assigned to watch brought potential discredit upon the DOC and the State as charged. Further, the following statement in the post establishes the charge that Grievant’s statement was threatening and there was a serious question of Grievant’s willingness to fulfill the responsibility of his position to intervene in a serious situation of inmate self-harm to protect the safety of an inmate and staff at risk:

I say if it was serious about doing it it would eat a f’in gun, get it over with, and leave the rest of the world alone. Hope they move me somewhere else, rather than watch it, coz, I’ll tell it the truth.

This statement raises a serious question whether Grievant would be able to set his personal prejudices aside and satisfactorily perform his crucial responsibility to intervene in the event of the transgender inmate attempting to commit self-harm. It was threatening in suggesting that it may be better for the inmate to engage in self-harm. It also was threatening potential harm to the psychological stability of a suicidal inmate by Grievant stating he would relay to the inmate his version of the “truth”.

Grievant’s misconduct violated the provisions of the DOC Work Rules and State Personnel Policies cited by the Employer to support the charges against Grievant. DOC Work Rules 1, 6 and 9 were violated by treating an inmate in a demeaning manner with no legitimate rehabilitative justification, and comporting himself in a manner while off duty that reflected discredit on the DOC. He violated Vermont Personnel Policy 5.6 by not fulfilling the duties and

responsibilities of his position and bringing potential discredit to the State. He violated Personnel Policy 11.7 by engaging in off-duty electronic communications in which he represented himself as a state employee and made a statement that was reasonably likely to be perceived as offensive or disparaging of others on the basis of gender, sexual orientation and gender identity.

The underlying charges having been established, we must determine whether the disciplinary action of dismissal imposed by the Employer is reasonable given the proven charges. Colleran and Britt, 6 VLRB at 266. Grievance of Simpson, 12 VLRB 279, 295 (1989). 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) Grievant's job role and type of employment, 3) the clarity with which Grievant was on notice of any rules that were violated in committing the offense, 4) the effect of the offense upon Grievant's ability to perform at a satisfactory level and the effect on supervisors' confidence in Grievant's ability to perform assigned duties, 5) Grievant's past disciplinary record, 6) Grievant's past work record including length of service and performance on the job, 7) the consistency of the penalty with those imposed on other employees for similar offenses, 8) the notoriety of the offense or its impact upon the reputation of the agency, 9) mitigating circumstances, 10) the potential for Grievant's rehabilitation, and 11) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

The Board has indicated that not all these factors will be pertinent in every case, and that they will not be uniform in the weight which they will be given or consistent in the direction they lead. Grievance of Colleran and Britt, 6 VLRB at 269. The Board reviews the employer's application of these factors in a particular case. If the employer establishes that management

responsibly balanced the relevant factors in a particular case and struck a reasonable balance, its penalty decision will be upheld. Colleran and Britt, 6 VLRB at 266.

Although not all of these factors are pertinent in every case, it should be noted that the nature and seriousness of the offense is always significant in discipline cases. The Vermont Supreme Court has indicated that just cause analysis should “center upon the nature of the employee’s misconduct.” In re Morrissey, 149 Vt. at 13. Grievance of Merrill, 151 Vt. 270, 273 (1989). Also, in deciding whether there is just cause for dismissal, it is appropriate for the VLRB to determine the substantiality of the detriment to the employer’s interests. Merrill, 151 Vt. at 273-274.

Grievant here was dismissed for conduct engaged in while he was off duty. In cases where an employer disciplines an employee for off duty conduct, there must be a nexus between the off duty conduct and employment for the employer to be justified in taking disciplinary action against the employee for such conduct. Grievance of Lepore, *supra*. Grievance of Soucier, 21 VLRB 292 (1998). Grievance of Ackerson, 16 VLRB 262, 272 (1993). Grievance of Boyde, 13 VLRB 209, 227(1990).

Grievant’s offense was serious. Although Grievant wrote the Facebook post off-duty, he represented himself as a DOC employee required to report for duty to watch an inmate. The post was insulting, disparaging and offensive on the basis of gender, sexual orientation and/or gender identity. His statements about an individual under the care and custody of DOC whom Grievant was assigned to watch were egregious. Further, Grievant’s statements in the post were threatening and there was a serious question of Grievant’s willingness to fulfill the responsibility of his position to intervene in a serious situation of inmate self-harm to protect the safety of an inmate. DOC Commissioner Baker reasonably concluded that Grievant “just can’t walk back

from a statement like” he made in the Facebook post, and that the statement had an adverse impact on a core function of DOC to maintain the safety and welfare of the individuals in their custody. Grievant’s statement impacted the safety of the facility because inmates depend on correctional officers to protect them.

Grievant’s statements were diametrically opposed to his role as a correctional officer to protect the welfare and safety of inmates under his custody. Grievant was in a position of power over inmates and the post showed real potential for abuse of this power. He acted contrary to a core responsibility of a correctional officer to protect the well-being of inmates and to seek to ensure they are safe.

Grievant had express and implied notice that his insulting, disparaging, offensive, discriminatory and threatening statements towards a person under his care were prohibited. The DOC Work Rules and the State Personnel Policies cited by the Employer to support his dismissal expressly prohibited the nature of his statements. Grievant received the Work Rules during his employment, and the Work Rules referred to the State Personnel Policies. Also, Grievant had implied notice that his egregious statements directed to a transgender inmate were prohibited. Further, Grievant’s Facebook post itself reflected a recognition on his part that his statements were prohibited by stating “with any luck they fire me” at the end of the post.

Grievant’s minimal disciplinary record and satisfactory performance record, including consistently receiving positive comments on the performance evaluations for his interactions with inmates and his care and treatment of them, weigh in his favor in evaluating the appropriateness of his dismissal. However, in consideration of all the relevant factors in determining whether dismissal was warranted, it was reasonable for the Employer to conclude that this did not overcome the seriousness of his statements.

Also, the Employer understandably lost confidence in Grievant's ability to satisfactorily perform his duties towards inmates under the care and custody of DOC. The nature of a correctional officer's duties requires the officer to independently supervise inmates in a fair and evenhanded manner. Grievance of Corrow, 23 VLRB 101, 126 (2000). Dismissal is justified where a correctional officer's actions seriously undermined supervisors' confidence that he or she would fairly supervise inmates. Id. It was reasonable for the Employer to seriously question whether Grievant would be able to set his personal prejudices aside and satisfactorily perform his crucial responsibilities to intervene in the event of an inmate attempting to commit self-harm. Commissioner Baker reasonably determined that Grievant's statements impacted the safety of the facility because inmates depend on correctional officers to protect them. He understandably lost confidence that Grievant's bias would not impact his performing of duties when interacting with transgender inmates.

The notoriety of Grievant's offense and its impact upon the reputation of the agency is the next factor to be considered. This is a more significant factor here than in many dismissal cases that come before the Board. Approximately 600 persons could see Grievant's post on Facebook, including approximately 100 hundred current or former DOC employees. The post's reach potentially extended beyond these Facebook friends of Grievant because any of them could take a screenshot of the post and forward it to others. At least 35 persons left Facebook comments on the post. The public distribution of the post by Grievant reasonably led Grievant's superiors to conclude it could lead to a lack of confidence in DOC and its staff keeping inmates safe.

Moreover, some of Grievant's co-workers who saw the post discussed it the next day when they were working at the facility. Grievant's superiors reasonably concluded that the post

may have affected the confidence of the co-workers in Grievant carrying out his responsibility to keep inmates safe.

The potential impact of Grievant's post extended even further. If Grievant continued to have regular interaction with inmates, it could have had a serious impact on DOC's ability to maintain the trust of the various stakeholders that scrutinize DOC, including the families of inmates and the general community that rely on DOC to protect inmates. The post also could have exposed DOC to litigation if harm came to an inmate supervised by Grievant. It further was reasonable for Commissioner Baker to be concerned how this case would be viewed if it received media coverage. In sum, the notoriety of Grievant's offense and its impact upon the reputation of DOC was a significant factor contributing to reasonableness of Grievant's dismissal.

Grievant contends that the penalty of dismissal he received was not consistent with the imposition of a demotion, rather than a dismissal, on a correctional supervisor several months earlier. The supervisor was demoted for referring to a female coworker in a derogatory manner, undermining the facility Superintendent by telling other staff members she was unprepared for the job, and failing to hold staff members accountable when hearing them use derogatory terms when referring to the Superintendent. The consistency of a penalty is pertinent when other employees have received dissimilar penalties for the same or similar offenses. In re Grievance of Jewett, 186 Vt. 160, 172 (2009). Grievance of Alexander, 34 VLRB 33, 54 (2017). We do not find the two cases as similar. A supervisor disciplined for treatment of other employees and failing to hold subordinate employees accountable is not similar to Grievant's misconduct with respect to an inmate. Consistency of penalty is not pertinent given the absence of a case that provides an apt comparison.

Grievant contends mitigating circumstances existed supporting the overturning of his dismissal because Grievant was deeply upset at losing the opportunity to spend a few hours with his family on the Fourth of July, and then became intoxicated at home and vented his frustration by sending the Facebook post. These do not present sufficient mitigating circumstances to justify lessening the discipline imposed on Grievant. Grievant could have expressed his frustration in myriad ways much less damaging than his egregious statements targeting a suicidal transgender inmate.

Grievant contends that he is a good candidate for rehabilitation due to his long-term employment in which he never committed similar misconduct and showed compassion and empathy towards inmates throughout his career. Further, Grievant asserts that his rehabilitation potential is evident due to the statement he made at his *Loudermill* meeting affirming that he empathized with the pain of the inmate at whom he lashed out, and affirming that he would never do anything of the sort again. We recognize there can be differing plausible views with respect to Grievant's potential for rehabilitation. However, we will uphold management's decision to dismiss an employee if management exercised its discretion within tolerable limits of reasonableness, and it was reasonable for DOC Commissioner Baker to conclude that Grievant "just can't walk back from a statement like" he made in the Facebook post.

We conclude in consideration of all these factors that the Employer acted reasonably in bypassing progressive discipline and determining that alternative sanctions less than dismissal would not be effective. The Employer reasonably concluded that Grievant's misconduct constituted substantial shortcomings detrimental to the Employer's interests and just cause existed for his dismissal.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of James Frank is dismissed.

Dated this 11th day of December 2020, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ Alan Willard

Alan Willard

/s/ Roger P. Donegan

Roger P. Donegan