VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 20-48
BRYANT SMITH	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On August 24, 2020, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Bryant Smith ("Grievant"), contending that the State of Vermont Department of Corrections ("Employer") violated Article 14 of the collective bargaining agreement by demoting Grievant from a Correctional Facility Shift Supervisor to a Correctional Officer I. Specifically, VSEA alleged that the Employer demoted Grievant without just cause, bypassed progressive discipline, and failed to apply discipline with a view toward uniformity and consistency.

The Labor Relations Board conducted video hearings through the Microsoft Teams platform on January 28, February 4, and February 11, 2021, before Board Members Robert Greemore, Acting Chairperson; Alan Willard and David Boulanger. Assistant Attorney General Jacob Humbert represented the Employer. VSEA Staff Attorney Kelly Everhart represented Grievant. The Employer and VSEA filed post-hearing briefs on March 17 and 18, 2021, respectively.

FINDINGS OF FACT

1. Article 14 of 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 or corrective action within a reasonable time of the offense;
    b. apply discipline or corrective action with a view toward uniformity and consistency;
    c. impose a procedure of progressive discipline or progressive corrective action;
    d. In misconduct cases, the order of progressive discipline shall be:
        (1) oral reprimand;
        (2) written reprimand;
        (3) suspension without pay;
        (4) dismissal.
        . . .
        (6) The parties agree that there are appropriate cases that may warrant the State:
            (i) bypassing progressive discipline or corrective action;
            (ii) applying discipline or corrective action in different degrees;
            . . .
        (7) The forms of discipline herein listed shall not preclude the parties from agreeing to utilize alternative forms of discipline, including demotion, or combination of forms of discipline in lieu of suspension or dismissal, or as a settlement of any of these actions. Nothing in this Agreement shall be construed to limit the State's authority or ability to demote an employee under section 1(d) and/or 1(e) of this section, for just cause resulting from misconduct or performance, but the State shall not be required to do so in any case. The VLRB may not impose demotion under this Article.

    . . .

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

. . .

Number 5.6 EMPLOYEE CONDUCT

REQUIRED CONDUCT

1.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.

. . .

Number 17.0 EMPLOYMENT RELATED INVESTIGATIONS

. . .

RESPONSIBILITIES

. . .

D. Employees shall:

- Cooperate with investigations, and provide truthful and complete information in accordance with State Personnel Policies and local Work Rules. Refusing to answer, answering incompletely, or answering untruthfully, questions related to work is considered misconduct for which an employee may be disciplined up to and including dismissal from their employment with the State.
- Refrain from taking any action which may undermine the integrity of the investigation, including but not limited to threatening, coercing or harassing witnesses, or disclosing confidential information.

. . .

(State's Exhibit 16)

3. DOC Work Rules provided in pertinent part as follows at all times relevant:

> 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.
>
> . . .
>
> 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.
>
> 5. Employees shall cooperate fully with any inquiry or investigation, whether formal or informal, conducted by the Department. This shall include answering fully and truthfully any questions related to their employment.
>
> 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 . . .
>
> . . .
>
> 9. No employee, whether on or off duty, shall comport him/herself in a manner that reflects discredit upon the Department.
>
> . . .
>
> (State's Exhibit 14)

4. Grievant has worked for the Employer for approximately 14 years at the Northeast Correctional Complex ("NECC"). He started as a temporary correctional officer, and

was hired as a permanent Correctional Officer I shortly thereafter. He progressed to a Correctional Officer II, then Acting Shift Supervisor, before being promoted to a Correctional Facility Shift Supervisor ("CFSS"). He remained CFSS until he was demoted to CO I in November 2019. Grievant was aware of the above-cited Personnel Policies and Procedures and Work Rules.

5. Grievant's duties as a CFSS included ensuring the safety and security of the facility on the third shift that he worked, maintaining the scheduling of staffing on his shift, conducting tours of the facility, holding staff accountable for completing their duties as required, completing performance evaluations of subordinates, and completing necessary paperwork or reports during his shift.

6. Male and female employees who were supervised by Grievant were complimentary of his abilities as a CFSS. They viewed him as attentive to the needs of staff, including checking in with them regularly. They found him reliable, trustworthy and someone they felt comfortable going to when they had concerns. Grievant has encouraged and supported male and female correctional officers in advancing their careers.

7. Grievant received annual performance evaluations rating his overall performance as "excellent" during rating periods of January 2014-January 2015, January 2015-January 2016, and January 2016-January 2017 when he was a Correctional Officer II. His overall performance was rated as "excellent during rating periods of January 2017-January 2018 and January 2018-January 2019 when he was a CFSS (VSEA Exhibit 5).

8. Prior to his demotion in November 2019, Grievant had not been disciplined during his employment.

9. John Buck, a CFSS at NECC, served as interim Chief of Security at NECC for a period of time. As interim Chief of Security, Buck was responsible for establishing a two-week roster setting post assignments within the facility in coordination with staff leave. The roster was then provided to the CFSSs, who reviewed it and addressed any errors. In the event there was an error on the roster resulting in a staff member who was on leave mistakenly scheduled to fill a post at the time, other staff would have to be assigned unexpected overtime to fill the post. Grievant and many other staff members used the phrase "you've been Bucked" to refer to a staff member called in for unexpected overtime due to errors made when Buck filled out the roster. Grievant did not discourage other staff from using the term.

10. Approximately three years ago, Correctional Officer I ("CO I") Mariah Almy was promoted from CO I to CFSS. Many NECC staff were concerned and upset by her promotion from CO I to CFSS since typically an employee is promoted to CFSS from holding a Correctional Officer II ("CO II") position, a higher-ranked position than CO I. Grievant and another CFSS, John Shanks, were among those critical of Almy being promoted to CFSS. Grievant and Shanks were friends who socialized outside of work.

11. Six CFSSs share an office at NECC. The door to the office is kept locked. Only CFSSs and higher-ranked supervisors and managers have keys to the office. Shortly after her promotion to CFSS, Almy had a problem with disappearance of disciplinary report packets and administrative segregation packets from a desk in the office she shared with one other CFSS.

12. Disciplinary report packets relate to a disciplinary process involving inmate misconduct in the facility. Almy, as a CFSS, received written disciplinary reports from staff related to inmate misconduct. She was responsible for assembling the packet to include the disciplinary report, a notice of hearing, and related paperwork. Almy was responsible for

ensuring the matter was set for investigation, after which a hearing officer was assigned to review the matter and determine whether discipline should be imposed. Administrative segregation packets involve situations in which inmates are placed in segregation, and similar to the disciplinary report process require staff investigation. If Almy had not completed the required disciplinary report packet or administration segregation packet on a matter before the end of her shift, she would place the incomplete packet on her desk and complete it when she returned for her next shift.

13. Several disciplinary and administrative packets of Almy disappeared over a period of a few weeks. Almy suspected that someone may be taking the packets. She started hiding the packets inside her desk drawer. Subsequently, no packets turned up missing.

14. During this time period, CO II Justin Lynaugh was present at a conversation between Shanks and Grievant in which Shanks made a comments about destroying Almy's disciplinary report packets and that the packets would not be seen again. Grievant expressed no criticism of these comments. Shortly thereafter, on March 6, 2019, Lynaugh told Almy that she should watch her back concerning her work products because Shanks and Grievant were out to get her. Lynaugh also told Almy that Shanks and Grievant referred to Almy as a "blond bitch" and a "cunt". Lynaugh did not inform his superiors during this time period about the conversation between Shanks and Grievant.

15. There were occasions in the presence of other staff where Grievant referred to Almy as a "bitch" and "dumb". Almy did not have first-hand knowledge of Grievant making derogatory comments about her. There were occasions when Shanks referred to Almy as a "cunt", Superintendent Nora Quinn as a "bitch", and Almy and Quinn as "gash", in conversations with Grievant in the presence of Lynaugh. Grievant did not attempt to stop or

discourage Shanks from making such comments. Almy referred to herself as "bitchy" at times in commenting on her supervisory style.

16. It is common for correctional staff to use profanity in their conversations with each other in the break room as a way of dealing with frustration.

17. Viktoria Whitman, a CO I at NECC between 2017 and 2019, had an interaction with Almy, when Almy was serving as her supervisor, in which Almy chastised her in the presence of inmates for not holding inmates accountable. Whitman was upset with Almy and reported the interaction to Grievant. In response, Grievant made a comment about Almy along the lines of "don't let that bitch push you out".

18. During this period, there was a Special Response Team ("SRT") training at the facility attended by at least 10 staff, including CO Is, CO IIs, and supervisors. At this training, Shanks and Grievant stated that new Superintendent Nora Quinn was not cut out to be a superintendent and was not going to make it.

19. Tara Fairbrother, a CO I supervised by Grievant, was present during an exchange between Grievant and correctional officer Matthew Pecor when Grievant told Pecor he was assigning him to a favorable "float" position. Pecor responded by telling Grievant word to the effect of "thanks man, I'll blow you for it later". Grievant replied "I know you will". Fairbrother was the only female present during the conversation and was upset by such an exchange. She confided in a co-worker to complain about it. The co-worker then spoke to Grievant about it. Grievant then spoke to Fairbrother and apologized for the conversation between him and Pecor and acknowledged that he needed to handle such conversations better in the future.

20. Grievant made a statement about Correctional Officer Katina Farnsworth to the effect that the facility would be better off with an open spot than with Farnsworth. When he

made this statement, Farnsworth had been on temporary relief from duty with pay for an extended period of time, and as a result staff were working more overtime to cover her absence because her position could not be filled. In making the statement, Grievant was expressing the preference that Farnworth either return to work, or the position be filled, to relieve the overtime situation. Grievant's statement was not intended as a negative reference to Farnsworth or her gender.

21. Alan Cormier was NECC Superintendent from 2011 to January 2019. During the period he was Superintendent, he used profanity in negatively referring to the actions of other staff in the presence of Grievant. On one occasion, Cormier called one staff member a "fucking monkey" in the presence of Grievant and another supervisor after the staff member did not handle an emergency well. During the period Nora Quinn was Assistant Superintendent before becoming Superintendent in early 2019, she referred to a staff member as a "little asshole" in the presence of Grievant. There is no evidence that Grievant or anyone else raised concerns about these comments to DOC management.

22. By letter dated March 12, 2019, Interim Superintendent Norah Quinn informed Grievant that he was temporarily relieved from duty with pay to permit the State to investigate allegations of misconduct against him. The letter contained various instructions, including the following:

> **Duties Regarding Investigation:** You are advised that under Personnel Policy 17.0, employees shall:
> . . .
> Refrain from taking any action which may undermine the integrity of the investigation, including but not limited to threatening, coercing or harassing witnesses, or disclosing confidential information.
>
> Maintaining the integrity of the investigation is also of paramount importance. Therefore, I must also instruct you not to take any action injurious to the integrity of the investigation, including but not limited to: (1) threatening or harassing any witness or

> complainant; (2) attempting to influence the recollection or testimony of any witness or complainant; (3) colluding with any individual to fabricate or misrepresent facts pertaining to the investigation; or (4) destroying or altering evidence pertaining to the investigation. Failure on your part to follow this directive may lead to disciplinary action being taken against you up to and including dismissal.
>
> Be advised if you choose to speak with other state employees or witnesses who are not VSEA representatives or Stewards about the facts or allegations concerning the matters under investigation, the State has the right to interview those individuals about those conversations and any information arising from those interviews could be considered by DOC in imposing discipline.
> . . .
> (State's Exhibit 4)

23. Peter Canales of the Department of Human Resources Investigations Unit was assigned to investigate allegations against Grievant and Shanks. Canales sent Grievant a letter dated April 4, 2019. The letter contained instructions that were the same in essence as those contained in Interim Superintendent Quinn's March 12, 2019, letter to Grievant (State's Exhibit 5).

24. Canales interviewed Almy, Fairbrother, Lynaugh, Shanks and Grievant. Canales did not interview other correctional officers who had pertinent information on the allegations against Grievant.

25. Canales interviewed Shanks and then Grievant on April 17, 2019. After Shanks was interviewed and prior to Grievant's interview, Shanks sent a text to Grievant wishing him "good luck". In response to the text, Grievant called Shanks to ask what the interview was about. Shanks responded "Almy". Grievant and Shanks did not have any further communications on the substance of the investigation. Grievant then had a conversation with VSEA Representative Vinnie O'Connor prior to meeting with Canales. O'Connor made Grievant aware of the substance of the investigation. Grievant then met with Canales for his interview. At the outset of the interview , Canales asked Grievant about the content of his communication with Shanks after

Shanks's interview and Grievant accurately reported his communication with Shanks (State Exhibit 1).

26. Shannon Marcoux, DOC Facility Operations Manager, sent Grievant a letter dated July 9, 2019, that provided 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 a Correctional Facility Shift Supervisor. You have the right to respond to the specific allegations listed below, either orally or in writing, before a final decision is made. . .
>
> **A. <u>Relevant Provisions of DOC Work Rules and Directives, Vermont Personnel Policies, and the Corrections Unit Collective Bargaining Agreement ("CBA")</u>**
>
> - Corrections CBA Article 14: Disciplinary Action
> - Vermont Personnel Policy 5.6: Employee Conduct
> - Vermont Personnel Policy 17: Employment Related Investigations
> - DOC Work Rules 1, 4, 5, 6 and 9
>
> **B. <u>Potential Violations of DOC Work Rules, Vermont Personnel Policies, and the CBA</u>**
>
> . . .
>
> On April 17, 2019, you met with Canales to discuss events that occurred at NECC that led to your investigation. . . Canales . . asked you the last time you spoke with CFSS John Shanks (Note: Shanks interview was prior to yours.) You advised that you spoke with Shanks after his interview, but before yours; but said that your conversation was non-specific. You then described that you received a text message from Shanks that said "good luck" after Shanks had completed his interview. This text prompted you to call Shanks to discuss what that meant. During that phone call, you said you asked what his interview was about and confirmed that he told you "Almy". These actions appear to be a violation of DOC Work Rule 4, 5 and Personnel Policy 17.0, as initially you do not appear to answer the question about your conversation with Shanks fully, and by discussing the investigation with another subject prior to your interview, you undermined the integrity of the investigation.
>
> During your interview you advised Canales that you have more than likely made inappropriate statements in the presence of staff. This admission appears to be a violation of DOC Work Rules 6, 9 and Personnel Policy 5.6. You also admitted that you have overheard your peers (and likely yourself) make disparaging, insensitive and demeaning statements about other staff (peers, subordinates, and superiors), and you did not report these statements or advise staff of the inappropriateness of their actions. As a supervisor, this appears to be a violation of Work Rule 9 and Personnel Policy 5.6 because you are expected to address inappropriate acts by staff, and not doing so brings discredit to the facility, your role as a Correctional Facility Shift Supervisor and the DOC.

Multiple reports from multiple different staff members are contradictory to your presentation in the interview. Many staff members report that you have made profane, demeaning, harassing and insulting comments about other staff at the facility and have harassed a co-worker that appear to constitute violations of Work Rules 6, 9 and Personnel Policy 5.6. Below are outlined the comments and actions:

- You have called Almy "cunty", "dumb" and "worthless"
- You told staff that the facility would be better with a vacant position over Farnsworth
- You admitted that "most everyone" at the facility has referred to Supt. Quinn as a "cunt", "bitch", or "gash"
- You have undermined Quinn to other staff by telling them she was unprepared for the job
- Almy reported that her paperwork went missing until she began to hide it out of site and in different locations. Multiple staff report hearing you speaking of destroying this paperwork on multiple occasions.
- You disrespected and harassed Buck by using, and allowing the use of the term "you've been Bucked"

By your admissions you brought discredit to coworkers and peers, and through testimony from other staff it appears that you attempted to bring discredit to your supervisors. This, along with your admission that you had specific ideas about how the facility management team and subordinate ranks should be constructed shows that you were using your position as a CFSS to elicit change in the facility for your personal gain.

It appears your conduct provides just cause for disciplinary action, up to and including dismissal from your position as a Corrections Facility Shift Supervisor at NECC. Your disciplinary history will be taken into consideration when making a decision.

. . .

(State Exhibit 11, VSEA Exhibit 2)

27. Alan Cormier was promoted from NECC Superintendent to Facilities Executive for the Employer in January 2019. On August 5, 2019, Cormier met with Grievant, VSEA Field Representative Vincent O'Connor and DHR Administrator Christopher Cadorette to hear Grievant's response to the allegations against him. Grievant acknowledged that he should not have called Almy a "bitch". He indicated that he had learned through the allegations against him to be more professional in use of language and to not use vulgarity.

28. On November 12, 2019, Cormier sent a letter to Grievant providing in pertinent part:

> This is to provide official notification of your disciplinary demotion to Correctional Officer I, Pay Grade 19, effective November 24, 2019, for your misconduct and violations of State Personnel Policies and DOC Work Rules.
>
> By letter dated July 9, 2019, you were notified that the Department of Corrections ("DOC") was contemplating a serious disciplinary action by to and including dismissal and were given an opportunity to respond to charges of misconduct. 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 July 9, 2019 . . and further described in the accompanying reports and attachments, which are incorporated herein by reference. Specifically, 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 Superintendent Quinn. 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.
>
> 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, this 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 13, VSEA Exhibit 3)

29. Cormier viewed Grievant's misconduct as serious in that he acted contrary to the positive behavior expected of supervisors by his vulgarity. It concerned Cormier that Grievant

engaged in the behavior as a third shift supervisor with no manager present. Cormier viewed Grievant as undermining Almy when he should have been supporting her. He expected that Grievant would have let Shanks know that disparaging comments about Almy were not appropriate. Cormier viewed Grievant's actions towards Quinn as grossly disrespectful. Cormier concluded Grievant undermined the investigation process by talking to Shanks after Shanks's interview with Canales. Cormier determined that Grievant had notice, and knew, that his behavior was wrong. He decided that he could not continue to be an effective supervisor given his misconduct. He demoted Grievant two levels to CO I, rather than one level to CO II, because he would have had some supervisory role as a CO II. Grievant's strong performance evaluations and lack of previous discipline contributed to Cormier's decision to demote Grievant, rather than dismiss him. Another factor contributing to Cormier's decision to not dismiss Grievant was that he had admitted he made mistakes and had learned from them.

OPINION

VSEA contends that the Employer violated Article 14 of the Contract by demoting Grievant from a Correctional Facility Shift Supervisor to a Correctional Officer I by demoting Grievant without just cause, bypassing progressive discipline, and failing to apply discipline with a view toward uniformity and consistency.

The Board has decided several cases involving disciplinary demotions of state correctional officers. In the 1983 case that established many of the just cause standards that continue to be applied to the present, the Board majority reduced the 5 day suspension and demotion imposed on a corrections supervisor to a written reprimand where the proven charge was limited to directing obscenities at an inmate. Grievance of Colleran and Britt, 6 VLRB 235.

The Board majority found that a correctional officer's misconduct in a 1997 case of overreacting to a foul odor on the unit, and consequently using poor judgment in not accepting a post assignment, was not serious enough to warrant a disciplinary demotion. Grievance of Nunes, 20 VLRB 282 (1997).

In three cases, the Board upheld disciplinary demotions of correctional officers. In one of the cases, the Board upheld suspensions and demotions imposed on two correctional officers for smoking marijuana on state property immediately prior to reporting to work. Grievances of Earley and Ibey, 6 VLRB 72 (1983). The Board upheld the disciplinary demotion imposed on a correctional officer in a 1999 decision for sending an anonymous email message from his home to all department employees containing insults and personal attacks on senior management and a call for a refusal to obey management directives. Grievance of Paolillo, 22 VLRB 200 (1999). Likewise, the Board upheld a disciplinary demotion of a correctional officer in a 2011 decision. The Board determined just cause existed for the demotion from his shift supervisor position to a correctional officer position for failing to ensure that a correctional officer working under him was conducting special observation checks on an offender who had a serious medical condition, allowing the officer to engage in excessive personal use of a work computer, and engaging in excessive personal use of the computer himself. Grievance of Glover, 31 VLRB 282 (2011); *Affirmed*, Sup.Ct.Doc.No. 2011-338 (2012).

In the most recent case involving demotion of correctional officers, the Board reduced a demotion and 30 day suspension imposed on a correctional facility shift supervisor to a three day suspension. The proven charges were that he: 1) failed to file a report concerning placing a female inmate in handcuffs and leaving her lying on the floor with her hands cuffed behind her back, and 2) used excessive force on the inmate when he restrained her with handcuffs and left

her lying prone and cuffed on the floor. The Board determined that the employer acted unreasonably in demoting the officer and suspending him for 30 days for these offenses when the proven charges were substantially less serious than the charges made against him, and when other employees engaged in comparable conduct received no discipline. Grievance of Patterson, 33 VLRB 205 (2015).

We keep these precedents in mind as we determine in this case whether just cause exists for the disciplinary demotion of Grievant. 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).

In carrying out our function to hear and make final determination on whether just cause exists for discipline, the 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 at 265. In large measure, this is an objective standard requiring review of the penalty imposed on the basis of facts actually found by the Board. Id. The burden of proof on all issues of fact required to establish just cause is on the employer, and that burden must be met by a preponderance of the evidence. Id.

Once the underlying facts have been so proved, the Board must determine whether just cause exists for the discipline imposed by the employer based on the proven facts. The Board determines whether the action taken by the employer was reasonable based on the proven

charges. Grievance of Simpson, 12 VLRB 279, 295 (1989). 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 235.

In determining whether the Employer has established by a preponderance of the evidence the facts to support its charges against Grievant, we make a few preliminary observations in this case where it was difficult to ascertain the pertinent facts and determine whether the Employer established facts by a preponderance of the evidence. The Employer made this task more difficult here. First, the investigation conducted by the Employer leading to the imposition of discipline was flawed in that the investigator interviewed correctional officers who had information unfavorable to Grievant, but did not interview other correctional officers who had pertinent information on the allegations against Grievant that cast Grievant in a more favorable light.

Second, the Employer presented a considerable amount of evidence on conduct of Grievant for which he was not specifically charged in the letters informing him of the disciplinary action. In reviewing a disciplinary action, the Board will not look beyond the reasons given by the employer in the disciplinary letter for the action taken. Grievance of Swainbank, 3 VLRB 34, 48 (1980); *Reversed on Other Grounds*, 140 Vt. 33 (1981). Grievance of Regan, 8 VLRB 340, 365-366 (1985). Grievance of Rosenberger, 28 VLRB 284, 296 (2006). In determining whether just cause existed for the demotion of Grievant, we focused on the specific reasons provided in the disciplinary letters for disciplining Grievant.

We turn to examining the specific charges against Grievant. The Employer first charges Grievant with violating DOC Work Rules 4 and 5 and Personnel Policy 17.0, based on his communication with CFSS John Shanks about Shanks's interview with investigator Peter

Canales which occurred prior to Grievant's interview with Canales. The Employer faults Grievant for initially not appearing to answer the question by Canales about his conversation with Shanks fully, and by undermining the integrity of the investigation by discussing the investigation with another subject of the investigation prior to his own interview.

We conclude that the Employer has not proven this charge by a preponderance of the evidence. The Employer did not establish that Grievant failed to fully answer Canales's question. At the outset of the interview, Canales asked Grievant about the content of his communication with Shanks after Shanks's interview and Grievant accurately reported his communication with Shanks. The Employer also has not established that Grievant undermined the integrity of the investigation by discussing the investigation with Shanks prior to his own interview. The paucity of the exchange between Grievant and Shanks did not indicate collusion or result in any unfair advantage to Grievant that interfered with the integrity of the investigation.

The Employer next charges Grievant with violating DOC Work Rules and Personnel Policy 5.6 by making demeaning, harassing and insulting comments about other staff. The Employer has established this charge to the extent of demonstrating that Grievant called CFSS Mariah Almy a "bitch" and "dumb" in the presence of other staff, and by using the term "you've been Bucked" on various occasions as a negative comment reflecting on Acting Chief of Security John Buck. These comments brought discredit to the Employer in violation of Personnel Policy 5.6 and DOC Work Rule 9 and were demeaning, harassing and insulting in violation of DOC Work Rule 6.

The Employer has not established this charge to the extent of demonstrating that Grievant engaged in misconduct by telling staff that the facility would be better with a vacant position than with CO I Katina Farnsworth. When he made this statement, Farnsworth had been on

temporary relief from duty with pay for an extended period of time, and as a result staff were working more overtime to cover her absence because her position could not be filled. In making the statement, Grievant was expressing the preference that Farnworth either return to work, or the position be filled, to relieve the overtime situation. The Employer has not established that Grievant's statement was intended as a negative reference to Farnsworth or her gender. The Employer has taken the statement of Grievant out of context and inappropriately attributed misconduct to Grievant when it did not exist.

The Employer also charges Grievant with violating DOC Work Rules and Personnel Policy when he overheard peers making disparaging, insensitive and demeaning comments about other staff, and he neither reported these statements nor advised staff of the inappropriateness of their actions. The Employer has established this charge to the extent of demonstrating that there were occasions when Shanks referred to Almy as a "cunt", Superintendent Nora Quinn as a "bitch", and Almy and Quinn as "gash", in conversations with Grievant in the presence of another staff person. Grievant did not attempt to stop or discourage Shanks from making such comments, and there is no evidence that he reported them. Also, during a conversation between Shanks and Grievant in the presence of another staff member, Shanks made comments about destroying Almy's disciplinary report packets and that the packets would not be seen again. Grievant expressed no criticism of these comments and there is no evidence that he reported them. His inaction when he was obligated as a supervisor to take action brought discredit to the Employer in violation of Personnel Policy 5.6 and DOC Work Rule 9 and were demeaning, harassing and insulting in violation of DOC Work Rule 6.

The Employer has not established this charge to the extent that Grievant engaged in misconduct by admitting that most staff at the facility has referred to Superintendent Quinn as a

"cunt", "bitch", or "gash". The Board determines *de novo* and finally the facts of a particular dispute through evidence presented at the hearing before the Board and the evidence presented by the Employer is insufficient to establish this charge by a preponderance of the evidence.

The Employer further charges Grievant with misconduct by undermining Superintendent Quinn to other staff by telling them she was unprepared for the job. The Employer has established the essence of this charge by a preponderance of the evidence. At a training session attended by at least 10 staff, Shanks and Grievant stated that the newly appointed Superintendent Quinn was not cut out to be a superintendent and was not going to make it. This undermined Superintendent Quinn's authority and brought discredit to the Employer in violation of Personnel Policy 5.6 and DOC Work Rule 9.

In sum, the Employer has established some of the charges against Grievant by a preponderance of the evidence but not all of them. The fact that all of the charges against Grievant have not been proven in their entirety does not necessarily mean that his disciplinary demotion was without just cause. Failure of the employer to prove by a preponderance of the evidence all the particulars of the discipline letter does not require reversal of a disciplinary action. Grievance of Regan, 8 VLRB 340, 366 (1985). In such cases, the Board must determine whether the remaining proven charges justify the penalty. Grievance of Colleran and Britt, supra.

We look to the factors articulated in Grievance of Colleran and Britt, 6 VLRB at 268-69, to determine whether the proven charges justify a disciplinary demotion. The pertinent factors here are: 1) the nature and seriousness of the offenses and their relation to Grievant's duties, 2) Grievant'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 work record, 5) Grievant's past disciplinary 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, 8) the potential for the employee's rehabilitation, and 9) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

We review the Employer's application of these factors to determine whether the Employer exercised its discretion within tolerable limits of reasonableness. Id. 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. Id.

We first consider the nature and seriousness of Grievant's offenses and their relation to Grievant's duties and position as a Correctional Facility Shift Supervisor ("CFSS"). The just cause analysis centers upon the nature of the employee's misconduct. In re Morrissey, 149 Vt. 1, 13 (1987). Grievance of Merrill, 151 Vt. 270, 273 (1989). We conclude that Grievant's misconduct was serious when the totality of his offenses is considered.

Grievant made demeaning, harassing and insulting comments about other staff through his vulgar and disparaging comments about a peer, a female CFSS, and negative comments reflecting on the Acting Chief of Security. He also inappropriately took no action when he was obligated as a supervisor to take action when he overheard another CFSS making disparaging, insensitive and demeaning comments about other staff - a female CFSS and the female Superintendent - and he neither reported these statements nor advised the CFSS of the inappropriateness of his actions. Further, Grievant undermined the new female Superintendent to other staff by telling them she was not cut out to be a superintendent and was not going to make it. His undermining and disrespect of a peer and senior staff violated his responsibilities as a

shift supervisor to engage in positive behavior supporting peers and senior staff, as well as contrary to expectations that he act as a role model for subordinate officers.

Grievant had fair notice as a supervisor that his conduct could result in discipline. His offenses violated work rules and personnel policies of which he was aware. He also was aware that he was responsible for enforcing and complying with the policies and work rules that were violated here. Further, he had implied notice as a supervisor that disparaging, undermining and disrespecting other supervisors and management was prohibited.

Grievant's past disciplinary record and work record at the time discipline was imposed operates in his favor. He had not been disciplined during his extensive period of employment. He had consistently received annual performance evaluations rating his overall performance as "excellent" during the previous several years he had been CO II and then CFSS.

Nonetheless, Grievant's serious offenses reasonably caused his supervisors to lose confidence in his ability to perform at a satisfactory level as a supervisor. His multiple instances of disparaging, undermining and disrespecting other supervisors and management, and taking no action when other staff engaged in such behavior, did not instill confidence that he would act as a constructive member of a supervisory team operating in a difficult environment. The Employer reasonably determined that Grievant's past disciplinary and work record contributed to a decision to not dismiss him, but it was likewise reasonable to conclude that this record did not shield him from a disciplinary demotion.

In examining the factor of the consistency of the penalty with those imposed on other employees for the same or similar offenses, the consistency of a penalty is pertinent when other employees have received dissimilar penalties for the same or similar offenses. Grievance of Frank, 35 VLRB 537, 564 (2020). In re Grievance of Jewett, 186 Vt. 160, 172 (2009). Grievance

of Alexander, 34 VLRB 33, 54 (2017). Grievant has failed to show that he was treated inconsistently to other supervisors committing similar offenses. He has not presented evidence of any other supervisors who were treated more leniently than he was for engaging in a similar range of offenses.

Grievant presented evidence on former NECC Superintendent Alan Cormier using profanity and vulgarity in negatively referring to the actions of other staff in the presence of Grievant, and on Nora Quinn when she was Assistant Superintendent referring to a staff member with a profanity. We conclude this evidence is not sufficient to demonstrate that Grievant was treated dissimilarly. Grievant's range of offenses are broader than those of Cormier and Quinn, and are not similar when considered in their entirety. Also, there is no evidence that Grievant or anyone else raised concerns about these comments to DOC management. This does not excuse the actions of Cormier and Quinn but they are distinguishable from Grievant's offenses.

Grievant has not demonstrated that he was a good candidate for rehabilitation as a supervisor at the time the Employer imposed a disciplinary demotion on him. Grievant contends that the Employer inappropriately bypassed progressive discipline. We disagree. The Employer reasonably determined at the time of deciding what disciplinary action to take against Grievant that he was not a good candidate for rehabilitation as a supervisor. His multiple instances of disparaging, undermining and disrespecting other supervisors and management, and taking no action when other staff engaged in such behavior, warranted a conclusion that he has compromised his ability to continue to serve as a supervisor. It was reasonable for the Employer to determine 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.

OPEN

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

Dated this 17th day of May, 2021, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Robert Greemore

_____

Robert Greemore, Acting Chairperson

/s/ Alan Willard

_____

Alan Willard

/s/ David R. Boulanger

_____

David R. Boulanger