VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 90-20
FREDERICK BARRETT	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 2, 1990, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Frederick Barrett ("Grievant"), alleging that the State of Vermont, Department of Banking, Insurance and Securities ("Employer") violated Articles 5 and 15 of the collective bargaining agreement between the State and VSEA, effective for the period July 1, 1988 to June 30, 1990 ("Contract"). Specifically, the grievance alleges that Grievant was given a performance evaluation covering the period from May 30, 1988 to May 30, 1989, which stated deficiencies that had not been properly brought to Grievant's attention during the rating period, which did not accurately reflect Grievant's performance, and which was based on factors unrelated to Grievant's performance; to wit, Grievant's criticism of his supervisor.

On August 9, August 23, and September 14, 1990, hearings were held before Vermont Labor Relations Board Members Charles McHugh, Chairman; Louis Toepfer; and Leslie Seaver. Michael Seibert, Assistant Attorney General, represented the Employer. Michael Zimmerman, VSEA Staff Attorney, represented Grievant. Memoranda of Law were filed by the State and VSEA on September 24, 1990.

FINDINGS OF FACT

1. Article 5 of the Contract provides in pertinent part:

> 1. NO DISCRIMINATION, INTIMIDATION OR HARASSMENT: In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination,

intimidation or harassment, neither party shall discriminate against nor harass any employee because of race, color, religion, creed, ancestry, sex, marital status, age, national origin, handicap, membership or non-membership in the VSEA, filing a complaint or grievance, or any other factor for which discrimination is prohibited by law.

. . . .

2. Article 15 of the Contract provides in pertinent part:

PERFORMANCE EVALUATION

. . . .

4. ... During the rating year, the immediate supervisor shall call the employee's attention to work deficiencies which may adversely affect a rating, and, where appropriate, to possible areas of improvement. . . .

7. A "3", "4" or "5" overall performance evaluation ("Consistently meets job requirements/standards", "Frequently exceeds job requirements/standards", "Consistently and substantially exceeds job requirements/standards") shall be grievable up to, but not beyond, Step III of the grievance procedure, provided, however, that adverse comments and any subfactor ratings of less than "3" on any evaluation are fully grievable. The Vermont Labor Relations Board shall not have the authority to change any numerical rating, but may remand the rating to the employer for reconsideration consistent with the VLRB ruling on the merits.

3. At all times relevant herein, Grievant has been employed as a Principal Insurance Rate and Form Analyst, pay grade 20, with the Department of Banking, Insurance and Securities.

4. At all times relevant herein, Grievant's immediate supervisor was Thomas Prindiville, Insurance Analysis Chief. Prindiville reported to Jeffrey Johnson, Deputy Commissioner, who reported to Gretchen Babcock, Commissioner of Banking, Insurance and Securities.

5. One of Grievant's key job responsibilities involves the analysis of life insurance policies and forms filed with the Department of Banking, Insurance and Securities by insurance companies doing business in Vermont. Specifically, Grievant is responsible for the review and analysis of such life insurance filings to determine their compliance with Vermont

statutory and regulatory requirements. Subsequent to the review of each filing, Grievant is required to issue a written report and/or other communications which include reasons and, in the case of non-compliance, recommendations (Grievant's Exhibit 1).

6. In addition to his responsibilities for the review and analysis of filings, Grievant also prepares material for and attends and testifies at legislative and Department hearings on questions involving life insurance regulation in Vermont; provides technical assistance and expertise to his superiors and other Department staff; and assists Department staff and the public generally in the processing of insurance-related consumer complaints (Grievant's Exhibit 1).

7. The Department of Banking, Insurance and Securities receives an approximate average of 2,400 life insurance filings per year. Such life insurance filings are of different types; for example, term life, group life, variable life, credit life. There is no standard form for these filings. The majority of filings range in length from 3 to 100 pages, with the average length being approximately 15 pages. Credit life insurance filings, which number approximately 70 per year, are on the average much longer and more complex than other filings (Board's Exhibits 1-4).

8. Grievant is the only employee in the Department who reviews life insurance filings. The number of filings which Grievant is assigned to review is greater than the number of filings assigned to any other analyst employed by the Department.

9. Grievant's supervisor, Thomas Prindiville, estimates that an experienced life insurance analyst should be able to review an average of ten filings per day. Prindiville arrived at this number by dividing the

average number of life insurance filings per year (2,400) by the approximate number of work days in a year (240). Prindiville believes that Grievant's predecessor was able to process an average of ten filings per day.

10. At the time Grievant began employment with the Department, Grievant was not considered to be an experienced analyst and was not expected to achieve this quota.

11. At the time Grievant began employment on November 30, 1987, there was a backlog of filings awaiting analysis and review. This was caused largely by the fact that there was a seven and one-half month time period between Grievant's predecessor leaving the position and Grievant beginning work.

12. During approximately four of the first six months of Grievant's employment, a substantial part of Grievant's time was spent assisting the Attorney General's office in connection with hearings on a credit life insurance rate review issue. These duties took away from the time Grievant was able to spend reviewing filings. With regard to priorities, Prindiville told Grievant the hearings were more important; and that, with respect to review of the filings, Grievant should do the best he could.

13. As a result of legislation, a large number of life insurance companies were required to refile insurance policies and forms that had previously been approved. Grievant was the employee who was responsible for review of the refiled policies and forms. These refilings created a further addition to Grievant's workload during the performance rating period in question (i.e. May 30, 1988 - May 30, 1989).

14. Following his first six months of employment, Grievant received a performance evaluation for his probationary period, November 30, 1987 to

May 30, 1988. In eight of the nine applicable individual rating categories, Grievant received a rating of "3" ("Consistently meets job requirements/standards"). In one of the applicable rating categories, "Attitude, Interest and Initiative", Grievant received a rating of "4" ("Frequently exceeds job requirements/ standards"). On the evaluation, Deputy Commissioner Jeffrey Johnson noted that ". . . . [Grievant] should strive to develop efficiencies wherever possible because of the size of his workload. . . . [Grievant] should [also] improve his writing skills" (Grievant's Exhibit 3).

15. Grievant did not receive an increase in pay at the end of his probationary period. Based on conversations he had with Prindiville when he was hired for the position, Grievant believed that it was probable he would receive such an increase.

16. During the period between the end of Grievant's probationary period and November 10, 1988, several meetings occurred between Prindiville and Grievant in which the manner of resolving the backlog was discussed. Both Grievant and Prindiville were concerned with the number of filings awaiting review. During these meetings, Prindiville did not clearly indicate to Grievant that he was dissatisfied with Grievant's productivity in completing the filings.

17. On or about November 2, 1988, the filing section of the Department, of which Grievant was a member, met to discuss the handling of consumer complaints and the interaction of the insurance analysts with the employees of the consumer complaints division. It was the practice of insurance analysts to provide telephone coverage for consumer complaints when employees in the consumer complaints division were unavailable, and for the analysts to provide assistance to consumer complaints employees in the processing of complaints that required special expertise. At this

meeting, there was an expressed concern by Prindiville and the analysts that consumer complaints were requiring too much of the analysts' time. Prindiville instructed the analysts to refer such calls to the consumer section or send consumers a form, whenever possible, but Prindiville was sympathetic to the analysts' problems in this area. Prindiville did not expressly criticize Grievant, or the other analysts, for spending too much time on consumer complaints.

18. On November 10, 1988, Prindiville wrote Grievant a memorandum addressing a prior request of Grievant that Prindiville assist him in getting a merit salary increase. In relevant part, that memorandum states:

> I will consider recommending a merit increase in salary for you in January of 1989. However, I need you to complete a few projects before I can fully affirm that such an increase is warranted.
>
> I would like to see the following completed by 1/31/89:
>
> A) an acceptable review check off list for all classes of life insurance (when I think of life insurance classes, I imagine them as being broadly defined, individual life, group life, etc. . .);
>
> B) an acceptable and operating life insurance selective review plan;
>
> C) an inventory of filings where the oldest pending filing is 30 days old.
>
> . . . . Today we cannot promise anyone yearly merit increases. When we do consider someone for an increase it is because they are outstanding. . . (State's Exhibit 1, p. 5).

19. Prindiville did not intend that the memorandum be interpreted as a criticism of Grievant's performance, but rather that it identify the criteria by which Prindiville would recommend a merit increase in pay for Grievant. Grievant did not interpret the memorandum as a criticism of his performance.

20. On November 14, 1988, Grievant responded to Prindiville's memorandum regarding the criteria for a merit pay raise. Grievant noted

that the majority of the criteria listed in Items (A) and (B) had already been completed and had been approved by Prindiville. With regard to Item (C), Grievant explained that he disagreed with Prindiville in that (C) was not achievable. Grievant believed that processing all existing and future filings within 30 days of their receipt was impossible (Grievant's Exhibit 4, p.3-5).

21. On November 30, 1988, Grievant and Prindiville had a meeting in which the subject of Grievant's raise was again discussed. Grievant contended that a raise following his probationary period had been tentatively promised in his pre-employment interview, and that his performance justified a merit increase. During the meeting, Grievant became angry and raised his voice to Prindiville. Later that day, Grievant apologized to Prindiville for raising his voice.

22. On or about November 30, 1988, Grievant and Prindiville also met and discussed the amount of time Grievant spent dealing with consumer complaints. The discussion was initiated by Grievant. Grievant gave Prindiville the notes from three recent conversations relating to consumer complaints so that Prindiville would have data concerning the amount of Grievant's time that was taken up by the consumer complaint function. At the time, Prindiville and other management personnel were in process of searching for a more efficient solution to the handling of consumer complaints. Prindiville suggested several alternative methods of handling the calls which would have required less of Grievant's time. Prindiville did not directly criticize Grievant during this discussion for spending too much time on consumer complaints.

23. In early to mid-December, 1988, as part of an ongoing process of resolving morale problems within the Department, a meeting of Grievant's

filing section was called. Such meetings were held periodically with employees of the various sections, and were known within the Department as "focus sessions". These sessions were conducted by a consultant whom the Department had hired to identify the cause of the morale problems within the Department and to assist in resolving those problems. At this session, both Grievant and Prindiville were present. The consultant assured Grievant and other section employees that Commissioner Babcock indicated there would be no reprisals by management for any comments made by employees at the "focus" sessions. Grievant stated that he felt a series of promises had been broken by the Department and/or by his supervisor. Grievant also identified several other problems within the Department with which he was concerned, one such problem being a lack of adequate communication.

24. On December 21, 1988, a meeting of all employees of the Department was scheduled at the Steakhouse Restaurant. The meeting was intended to present a wrap-up of the focus sessions in that recurrent problems would be identified and solutions proposed. Grievant, Prindiville and Deputy Commissioner Johnson were among those in attendance.

25. At the meeting, the consultant instructed the employees to divide themselves up into assigned groups and develop among themselves a series of proposed resolutions to the problems. At this instruction, the employees became very uncomfortable, and verbal dissension against the consultant, the process and the Department ensued. During the period of general dissension, Grievant was one of those speaking out against the process by which the problems were resolved. The meeting came to be known as the "Steakhouse massacre".

26. On or about December 27, 1988, Prindiville called a meeting of the filing section. At that meeting, Prindiville said that he was upset at the section employees and offended by the events of the Steakhouse meeting because it was not made clear by the employees that the filing section did have adequate communications. A number of employees, including Grievant, then spoke in disagreement, stating that they felt the filing section did not have adequate communications. The employees also discussed other problems of the filing section. Prindiville concluded the meeting by instructing the employees to list all of their complaints in the form of a written memorandum.

27. Grievant and Prindiville were among the last employees to leave the meeting. On the way out, Prindiville told Grievant that in the future Grievant should submit all his written communications to Prindiville for approval prior to such communications being sent out. Prindiville said that Grievant's probationary performance evaluation had noted that Grievant's writing was poor, and Prindiville wanted to see if Grievant's writing was now acceptable. Immediately following the December 27, 1988 meeting, Prindiville also informed Grievant that Grievant should avoid helping other employees with their computer problems until Grievant had succeeded in cleaning up the backlog of pending filings. Prindiville had not previously asked to review all of Grievant's communications or told Grievant not to help other employees. Between May 30, 1988, and December 27, 1988, Prindiville had not criticized Grievant for his writing (Grievant's Exhibit 6, page 1, State's Exhibit 1, page 8).

28. Prindiville did not personally have a problem with Grievant's writing style or grammar. Prindiville was acting on concerns that had been communicated to him by Deputy Commissioner Johnson concerning

Grievant's writing at various times prior to December 27, 1988. There is no evidence to indicate that Johnson spoke to Prindiville about Grievant's writing shortly before or on December 27, 1988, so as to prompt Prindiville raising the issues at the December 27 meeting.

29. On or about December 29, 1988, Larry Wilke, one of the members of the filing section, submitted a memorandum to all employees of the filing section, listing the complaints that had been raised by the members of that section. Prindiville interpreted these complaints as a criticism of his management style (Grievant's Exhibit 5, p.1-5).

30. On December 30, 1988, Prindiville sent Grievant a memorandum. That memorandum provides in part:

> Your last performance evaluation indicated some weaknesses in the area of written communication. In an effort to improve your performance and to evaluate the extent of that weakness, I want to review all your written communications (State's Exhibit 1, p.8).

31. On January 3, 1989, Prindiville wrote Grievant a memorandum asking that Grievant submit to Prindiville all credit life insurance filings awaiting Grievant's review but which had not yet been approved. (Grievant's Exhibit 7, p.1).

32. By early 1989, Prindiville instructed Grievant to come up with a selective review plan, wherein Grievant would concentrate on reviewing filings of insurance companies with large market shares while not reviewing filings of some companies with small market shares, and deeming the filings of the companies with small market shares approved. Prindiville did not inform Grievant that the need for the selective review plan was because Grievant's performance was inadequate. Grievant developed such a selective review plan.

33. On January 19, 1989, Grievant met with Commissioner Babcock concerning three matters: Grievant's requested merit increase, Grievant's

request for a set of guidelines and expectations relevant to his position, and Grievant's request for a definition of priorities relative to his various responsibilities. At the conclusion of the meeting, it was agreed by Grievant and Commissioner Babcock that a further meeting with Prindiville and Johnson should be scheduled on or about February 23 to pursue these three matters.

34. On February 9, 1989, Grievant and Prindiville met to discuss a large ongoing insurance filing from a company with whom Grievant had been corresponding over the past year. Prindiville was critical of Grievant's writing style in written communications with the insurance company. At some point during the meeting, Grievant lost his temper and began yelling at Prindiville. Prindiville gave Grievant an oral warning for losing his temper and yelling at Prindiville. Subsequent to the meeting, Grievant apologized to Prindiville for having raised his voice.

35. On February 14, 1989, Prindiville wrote a memorandum to Johnson relaying Grievant's understanding that a merit increase was still a possibility and reminding Johnson that Grievant had been promised a meeting with Prindiville, Johnson and Commissioner Babcock to discuss priorities regarding Grievant's various work functions (State's Exhibit 1, p.10).

36. On the bottom of the memorandum from Prindiville, Johnson noted his response. That notation states:

> I've reconsidered the idea of another meeting w/ G[retchen] B[abcock] and [Grievant]. I think we need to work on [Grievant's] performance weaknesses. I think you should work on a plan w/ [Grievant] - including the writing course and let me review it. Whether he gets a merit increase still depends on superior performance over a period of time (State's Exhibit 1, p.10).

37. No meeting occurred on February 23, 1989. On February 28, 1989, Grievant wrote a memorandum to Commissioner Babcock noting that the

meeting planned for approximately February 23 with Prindiville, Johnson and Commissioner Babcock had not been scheduled. In lieu of the meeting, in the memorandum, Grievant listed his accomplishments which he believed supported his request for the merit increase (Grievant's Exhibit 10).

38. On March 29, 1989, Grievant submitted a memorandum to Prindiville and Johnson requesting certain vacation days. In pertinent part, Grievant's memorandum stated:

> Please be advised that I am requesting the following days off as vacation: . . . .
>
> I will advise which of the two weeks in July will be used; as soon as we can confirm reservations.
>
> Unless you advise me of a major conflict, I will consider my request as approved.

At the bottom of Grievant's memorandum, Johnson wrote in a note to Prindiville, "Tom, I <u>had</u> to correct [Grievant's] memo. . . .". Johnson corrected the wording of Grievant's memorandum by removing the word "as" in the two places it appeared, placing the word "for" in lieu of the first "as", changing the words "am requesting" to "requested", and removing the semicolon after the word "used". Johnson's corrections to Grievant's March 29, 1989 memorandum were typical of the stylistic concerns Johnson had with Grievant's writing (Grievant's Exhibit 12).

39. On April 10, 1989, Prindiville met with Grievant to discuss Prindiville's intended ratings for Grievant's performance evaluation for the period May 30, 1988 to May 30, 1989. It was Prindiville's practice to have a preliminary meeting with the employee before the end of the evaluation period. Based on the employee's feedback, Prindiville might revise the evaluation prior to submitting it to Prindiville's superiors for their evaluation. At the meeting, Prindiville gave Grievant a handwritten draft of Grievant's preliminary evaluation and Prindiville and Grievant discussed the reasons for each rating.

40. On the April 10 draft, Prindiville gave Grievant an overall "2" rating and the following individual ratings:

Category		Rating *		
A.1	Job Knowledge and Skills	2		
A.2	Quality of Work	2		
A.3	Work Habits		3	
A.4	Attitude, Interest and Initiative	2		
A.5	Learning Ability		3	
A.6	Judgment	2		
A.7	Personal Relationships		3	
A.8	Quantity of Work	2		
A.9	Work under Stress		3	
B.1	Technical or Professional Knowledge		3	
B.2	Planning and Organization			4
B.3	Development . . . and Motivation of Subordinates			4
B.4	Effectiveness in Pursuing Tasks		3	

(Grievant's Exhibit 13)

* A rating of "2" indicates that an employee inconsistently meets job requirements/standards; a rating of "3" indicates that an employee consistently meets job requirements/standards; a rating of "4" indicates that an employee frequently exceeds job requirements/standards; a rating of "5" indicates that an employee consistently and substantially exceeds job requirements/standards.

41. During discussion of the April 10 draft, Prindiville gave Grievant the following reasons for the ratings:

Regarding the category A.1, "Job Knowledge and Skills", Prindiville gave Grievant a "2" rating because of Grievant's need to improve his writing ability.

Regarding the category A.4, "Attitude, Interest and Initiative", Prindiville gave Grievant a "2" rating because Grievant had problems accepting criticisms.

Regarding the category A.6, "Judgment", Prindiville gave Grievant a "2" rating because Grievant was too picky at times and because Prindiville found it difficult to give Grievant guidance.

Regarding the category A.8, "Quantity of Work", Prindiville gave Grievant a "2" rating because, although Grievant had made some

improvement in productivity, Grievant should target a production average of three filings per day.

Additionally, during the meeting Prindiville told Grievant that he thought Grievant's workload was excessive, that he believed that Grievant had some problems because he was rushing to meet self-imposed deadlines, and that Grievant took on jobs helping others which Grievant should not do under the circumstances (Grievant's Exhibit 13).

42. Between May 30, 1988, and the period prior to April 10, 1989, Prindiville had not indicated to Grievant that he was deficient in accepting criticism or guidance. April 10, 1989, was the first time during the rating period that Prindiville clearly indicated to Grievant that the number of filings he was doing was unsatisfactory.

43. Immediately following the meeting on April 10, 1989, Prindiville gave Grievant a memorandum confirming that Grievant was to review an average of three filings per day . Prindiville instructed Grievant to review two specific filings first, and then to proceed with the credit life insurance filings. Prindiville also confirmed in the memorandum that Grievant was not to assist other employees or receive any consumer complaints without first checking with Prindiville (State's Exhibit 1, p.12).

44. On or about April 25, 1989, Prindiville arranged for a writing instructor at the Community College of Vermont to review and critique sample writings of all the Department's analysts. Prindiville was acting pursuant to instructions from Johnson. Subsequent to Grievant's rating period in question, the instructor completed the project and concluded that all of the analysts, including Grievant, had little or no substantive problems and were writing at or above a college level. The instructor

made suggestions by which each analyst could improve his or her writing style (Grievant's Exhibit 15).

45. On or about May 4, 1989, Grievant and a secretarial employee of the filing section were involved in an altercation. Grievant brought a letter for the secretary to type, and she told him that she was leaving for the day. Unbeknownst to Grievant, the employee had received permission to leave from a supervisor acting in Prindiville's absence. Grievant confronted the secretary in the lobby and questioned her in front of another employee as to why she had not let Grievant know she was leaving. Grievant made an unfavorable reference comparing the secretary to another employee with whom the Department had problems. Grievant later apologized to the secretary for criticizing her in front of another employee and for the unfavorable comparison.

46. On May 5, 1989, Johnson wrote a memorandum to both the secretary and Grievant. In the memorandum, Johnson told Grievant that he should not have confronted the secretary in the manner in which he did, and that he should not have compared the secretary unfavorably to another employee (Grievant's Exhibit 16).

47. On May 16, 1989, Prindiville wrote a memorandum to Grievant. Therein, Prindiville noted that Grievant had reviewed an average of 1.16 filings per day for the month of April compared with the April 9, 1989 memorandum directing Grievant to review an average of three per day (State's Exhibit 1, p.15).

48. On or about June 23, 1989, Grievant received his final performance evaluation for the period May 30, 1988 to May 30, 1989. The evaluation was done by Prindiville and generally concurred in by Johnson. The evaluation was signed on April 12, 1989, by Prindiville and on June 16, 1989, by Johnson. Compared to the April 9, 1989 handwritten draft

originally given to Grievant, the following rating changes had been made. In Category A.9, "Work under Stress", Grievant's rating had been reduced from "3" to "2". In Category B.2, "Planning and Organizing", Grievant's rating was reduced from "4" to "3", and the comment "Doesn't plan to meet division goals, (h)e does well on his own priorities," was added. In Category B.3, "Developing, Selecting & Motivating Subordinates", Grievant's prior rating of "4" was removed and no new rating was giving. In Category B.4, "Effectiveness in Pursuing Tasks & Achieving Results", Grievant's rating was reduced from "3" to "2". Grievant was given an overall rating of "2" (Joint Exhibit 3).

49. A series of comments were attached to the evaluation by reference. The comments were made by Prindiville, with the exception of "Comments of Rater's Immediate Superior", which were made by Johnson. These comments state, in sum:

> C: Summary Comments:
>
> 1) Rick's performance deteriorated significantly from the last evaluation. This at least in part is due to a dispute concerning an alleged promise of a salary increase after one year of employment. He informed the Deputy Commissioner that he lost his will to perform well as a result of this dispute.
>
> 2) He lost his temper on more than one occasion and had to be corrected. One of these incidents involved two co-workers in the reception area of the office.
>
> 3) Rick seems to selectively hear instructions and conversation. He retains what is beneficial to him and ignores the remainder. He frequently does not follow verbal instructions and it is necessary to give him written instructions.
>
> 4) Since Rick is inexperienced, he has been unable to distinguish between what is important and what is not important. As a result he over emphasizes the importance of minor functions. A new analyst is not expected to have this skill but an analyst who has been employed for over a year should be able to distinguish between important and unimportant functions. Rick should be able to review at least three filings a day. This should ultimately be increased to six filings per day for a life analyst performing his job at an acceptable level.
>
> 5) Rich cannot accept constructive criticism. This makes giving him instructions difficult in the best of situations and on some occasions impossible.
>
> 6) Rick has occasionally displayed poor writing skills.

7) Rick has been observed on many occasions in lengthy conversations with fellow employees and conversations with the public. This is not a good use of time.

...

E. Strengths: Rick is well organized and his work area is neat.

F: Areas for Improvement: Writing skills, listening to instructions, accepting criticism, following instructions, concentrating on the important tasks first, making productive use of time in the office by not getting involved in lengthy conversations with other employees, and making productive use of the telephone by not getting involved in lengthy conversations.

G. Recommended Developmental Activities

Writing Skills Classes

COMMENTS OF RATER'S IMMEDIATE SUPERVISOR

I generally agree with Tom's comments. However, I feel that Rick could be an effective employee if he follows the suggestions contained in the evaluation. Most importantly Rick needs to follow instructions given by Tom. An organization cannot function unless subordinates accept guidance from superiors. In this case Tom has established a job priority - quality review of three filings per day and then moving to six per day as more experience is acquired - which is reasonable. On the positive side of the ledger I want to note Rick's concern for the interest of consumers (Joint Exhibit 3).

50. At the time Grievant received his final evaluation, he was also notified by memorandum dated June 22, 1989, from Prindiville, that he had been placed in a period of prescriptive remediation (Joint Exhibit 4).

51. Prindiville gave Grievant a "2" rating in "Job Knowledge and Skills" because he determined that Grievant's written communication skills inconsistently met job requirements, because of Grievant's engaging in lengthy phone conversations, and because of Grievant's low productivity. He gave Grievant a "2" rating in "Quality of Work" because he thought Grievant was too "picky" at times; that he did not differentiate between what was important and not important. Grievant received a "2" rating in "Attitude, Interest and Initiative" because Prindiville decided that Grievant demonstrated a lack of respect for the chain of command and that

Grievant was disruptive in letting everyone know he was unhappy about not receiving a salary increase. Grievant received a "2" rating in "Judgment" for not concentrating on what was important, losing his temper twice and the May, 1989, incident with the secretary. Prindiville gave Grievant a "2" rating in "Quantity of Work" because Grievant was not completing enough filings a day. Grievant received a "2" rating in "Work Under Stress" because of his loss of temper and not being able to produce adequately under heavy volume and tight deadlines. Prindiville gave Grievant a "2" rating in "Effectiveness in Pursuing Tasks and Achieving Results" because he believed Grievant selectively heard instructions; that Grievant would not complete work oftentimes until he received a memorandum from Prindiville containing deadlines.

52. The leading concern Prindiville had with Grievant's performance during the rating period was the quantity of his work. Grievant's loss of temper and not adequately prioritizing his work were other major areas of concern.

53. During the rating period, Prindiville did not inform Grievant that he thought his performance had deteriorated significantly during the rating period and did not clearly indicate to Grievant that he was dissatisfied with Grievant's inability to differentiate between what was important and not important. Prindiville did not communicate Department goals to Grievant, and did not tell Grievant he thought Grievant was not meeting divisional goals. Prindiville further did not inform Grievant that he demonstrated a lack of respect for the chain of command, or that Grievant was disruptive in the office. Also, Prindiville did not criticize Grievant during the rating period for selectively hearing instructions. Prindiville did not clearly indicate to Grievant that he

viewed the amount of time Grievant spent on phone conversations on consumer complaints as unsatisfactory performance. Prindiville did indicate to Grievant on a number of occasions his dissatisfaction with the amount of time Grievant spent in conversations with fellow employees.

MAJORITY OPINION

Grievant contends that the Employer violated Articles 5 and 15 of the Contract in giving Grievant an adverse performance evaluation covering the period May 30, 1988 to May 30, 1989.

Grievant's allegation concerning Article 5 is that the evaluation he received constituted retaliation by his supervisor, Thomas Prindiville, for Grievant having criticized Prindiville during the "focus" sessions.

Article 5 provides, in pertinent part, that "neither party shall discriminate against... any employee because of... any... factor for which discrimination is prohibited by law". We conclude we have jurisdiction over Grievant's allegation pursuant to this Contract article because, under the circumstances, Grievant had a protected right under the State Employees Labor Relations Act, 3 VSA §901, et seq. ("SELRA"), to not be retaliated against for criticizing his supervisors during the "focus" sessions. Under SELRA, "employees... have the right... to engage in concerted activities for the purpose of... mutual aid or protection". 3 VSA §903(a). Also, employers are obligated to "exert every reasonable effort... to settle all disputes... growing out of any dispute between the employer and employees thereof". 3 VSA §903(c). The "focus" sessions fall within activities protected by these provisions of SELRA, since they were designed as a group effort to resolve morale problems and the employees were assured the Employer would not retaliate against them for

any comments they made during these sessions. Any retaliation against Grievant for criticizing his supervisor during these sessions constituted a "factor for which discrimination is prohibited by law" and, thus, violated Article 5 of the Contract.

Our review of the evidence leads us to conclude that adverse ratings and comments which Grievant received on his performance evaluation concerning criticism of his written communications constituted retaliation against him for criticizing his supervisor during the "focus" sessions. We so conclude, due to the suspicious timing of the beginning of criticism of Grievant's writing, taken together with the fact that Grievant's writing appears as a deficiency on the performance evaluation even though Prindiville did not personally have a problem with Grievant's writing. The first time during the rating period Grievant was so criticized was by Prindiville immediately following a post-"focus" meeting of his section, at which Prindiville indicated he was upset at employees in the section for mentioning lack of communication as a problem. The evidence indicates nothing that would have prompted Prindiville to select that particular moment for criticizing Grievant's writing other than that he was upset because Grievant had been critical of him during the "focus" sessions. Prindiville's supervisor, Deputy Commissioner Jeffrey Johnson, had mentioned several times to Prindiville previously that he should work with Grievant on his writing. However, there is no evidence that he had done so anywhere near the time of this post-"focus" section meeting, and certainly no evidence exists that Prindiville suddenly became dissatisfied with Grievant's writing. We conclude by a preponderance of the evidence that any criticisms made of Grievant

concerning his writing, which were then used to support his adverse performance evaluation, constituted retaliation against Grievant for criticizing Prindiville during the "focus" sessions. Accordingly, Article 5 of the Contract was violated in this respect, and any criticism of Grievant's writing should be removed from his performance evaluation.

We conclude that adverse ratings or comments in other areas do not result from discrimination against Grievant for criticizing Prindiville during the "focus" sessions.

Grievant contends that the adverse performance evaluation he received violated Article 15 of the Contract by virtue of the absence of notice to Grievant during the rating period of performance deficiencies and because the evaluation was an inaccurate characterization of Grievant's performance. In reviewing this alleged Contract violation, we cover those areas, other than Grievant's written communications, in which Grievant received a rating of less than "3" and/or adverse comments.

At issue is whether the Employer violated the following Contract language:

> During the rating year, the immediate supervisor shall call the employee's attention to work deficiencies which may adversely affect a rating, and, where appropriate, to possible areas of improvement.

Under the Contract language, a supervisor is required to give an employee clear indication of dissatisfaction with that employee's performance. Grievance of Smith, 5 VLRB 272, 277 (1982). The Contract provides that an employee be told when his/her performance is unacceptable so there will be no "surprises" at evaluation time.

Grievance of Claude Rathburn, 5 VLRB 286, 293 (1982). The burden is on management to put an employee clearly on notice of deficiencies. Grievance of Calderara, 9 VLRB 211, 221 (1986). Given the difference in perceptions among people, it is imperative that management indicate its dissatisfaction clearly and unequivocally so misconceptions are eliminated. Id.

We conclude that the Employer met the contractual obligation of providing Grievant with clear notice of dissatisfaction with performance in some of the areas of deficiency noted on the performance evaluation, but did not in most areas.

Prindiville clearly indicated to Grievant in a timely manner that he was dissatisfied that Grievant had lost his temper on two separate occasions in conversations with him. Prindiville also clearly indicated to Grievant that he was dissatisfied that Grievant was engaging in lengthy conversations with co-workers. Deputy Commissioner Johnson provided Grievant with clear notice of dissatisfaction with his performance concerning the incident in May, 1989, where Grievant criticized a secretary in front of another employee and made an unfavorable comparison between the secretary and another employee.

However, in all other areas which played a part in Grievant's adverse performance evaluation, the Employer did not provide Grievant with clear notice of dissatisfaction with performance as required by the Contract. In many areas, at no time during the rating period did Prindiville clearly express dissatisfaction with aspects of Grievant's performance which resulted in adverse ratings and/or comments. This is true with respect to performance deteriorating significantly since

the last performance evaluation, ability to differentiate between what was important and not important, not planning to meet divisional goals, failure to respect the chain of command, disrupting the office, selectively hearing instructions, and excessive time spent on phone conversations on consumer complaints. Prindiville simply did not put Grievant on notice of deficiencies in these areas. Thus, he violated the requirement of the Contract to avoid surprises at evaluation time.

In other areas, Prindiville technically expressed dissatisfaction with Grievant's performance during the rating period, but did it too late to actually provide notice to Grievant of deficiencies which "may adversely affect a rating" pursuant to Article 15 of the Contract. This is true with respect to those areas discussed at the meeting of April 10 which Prindiville previously had not clearly expressed dissatisfaction to Grievant. These areas are problems accepting criticism, being too "picky", difficulty in accepting guidance, and unsatisfactory productivity with respect to reviewing insurance filings.

We conclude that the April 10 meeting, and accompanying "draft" evaluation which Prindiville provided Grievant, constituted insufficient notice of performance deficiencies because, essentially, there was no notice at all. A necessary inference to be drawn from the Contract language that "during the rating year, the immediate supervisor shall call the employee's attention to work deficiencies which may adversely affect a rating" is that, whenever possible, employees should be given timely notice of deficiencies to afford them an opportunity to improve their performance prior to the end of the rating period. In this case, Prindiville discussed areas of

deficiency on April 10, 1989, and he signed the final evaluation two days later, on April 12, 1989. The final evaluation was very similar to the draft evaluation. Grievant thus had no effective opportunity to improve in the deficient areas, which could have been discussed with Grievant earlier in the rating period. The effect on Grievant with respect to the areas discussed at the April 10 meeting was not substantially different than the effect on an employee who first becomes aware of supervisory dissatisfaction when adverse ratings and comments appear on an evaluation. In both cases, contractually prohibited "surprise" occurs at the actual evaluation time, and the employee has no effective notice of deficiencies which could have been brought to his attention much sooner. Rathburn, supra.

We would like to expand on one area where Grievant received insufficient notice - productivity of reviewing insurance filings - because the Employer indicated that this was the leading performance concern. It is evident that, prior to April 10, 1989, Grievant and Prindiville had discussions wherein concern was expressed as to the backlog of the insurance review filings in Grievant's caseload. However, prior to April 10, Prindiville never expressed clearly to Grievant that he considered his performance in this area to be unsatisfactory. At times, the discourse between Grievant and Prindiville in this area occurred in the context of whether Grievant was going to be awarded a merit salary increase. In these discussions, Grievant clearly should have understood that Prindiville considered that his performance in reviewing case filings did not warrant a merit increase, and thus was not outstanding. However, there is a large gap between "outstanding" and "inconsistently meets job

requirements/standards". Other discussions between Prindiville and Grievant occurred against a background of Grievant having inherited a large backlog and a sharp increase in case filings due to statutory changes. Given such a context, Prindiville was required to clearly indicate to Grievant that his dissatisfaction was with Grievant's performance in this area, separate from the inherited backlog and statutory burdens. Prindiville failed to do this until April 10. By that point, it was too late to abide by the contractual requirement of notice of performance deficiencies.

We recognize that the area of productivity of insurance review filings was one which Prindiville continued to monitor between the time he signed the evaluation on April 12, 1989, and the actual end of the rating period on May 30, 1989. On May 16, 1989, he sent Grievant a memorandum indicating that, in April, 1989, Grievant had completed review on an insufficient number of filings. However, the fact that Prindiville had already signed Grievant's evaluation for the rating period a month earlier, and given Grievant a "2" rating in quantity of work, leads us to conclude that there was no real opportunity for Grievant to have any improvement upon this deficiency reflected in his rating. Moreover, the one month time period to show improvement was insufficient, particularly when Prindiville had instructed Grievant in April to work on the credit filings first, which took much longer to review than other filings.

In sum, we conclude that Grievant's supervisors gave him adequate notice of deficiencies pursuant to the Contract in certain cited areas, but not in the bulk of areas. In such instances, we do not have the authority to change any numerical rating, but can only remand to the Employer for reconsideration consistent with our ruling on the merits.

In remanding, we note that in five individual rating factors in which Grievant received unsatisfactory ratings - "Job Knowledge and Skills", "Quality of Work", "Attitude, Interest and Initiative", "Quantity of Work" and "Effectiveness in Pursuing Tasks and Achieving Results" - areas of deficiency cited to support the ratings lacked contractually required notice and, thus, no evidence remains to support an unsatisfactory rating.

In the two remaining factors - "Judgment" and "Works Under Stress" - some areas of deficiency cited met contractual obligations (i.e. losing his temper twice; May, 1989, incident with secretary), while other areas of deficiency cited did not meet contractual requirements (i.e. not concentrating on what was important, being unable to produce adequately under heavy volume and tight deadlines). The Employer must reconsider whether unsatisfactory ratings are still justified.

Many of the adverse comments contained on Grievant's performance evaluation must be stricken for failure to provide notice to Grievant during the rating period. These comments involve areas we have previously discussed, and the specific comments to be stricken are contained in our Order. There are adverse comments on the evaluation which may remain because they reflect areas of deficiency in which proper notice was given pursuant to the Contract. These comments also involve areas which we have previously discussed, and the specific comments to remain are contained in our Order.

Also, the Employer must reconsider placement of Grievant in a prescriptive period of remediation, since such action was based in part on ratings and adverse comments for which proper notice was not given pursuant to the Contract.

In reconsidering individual ratings and the overall rating on remand, the Employer is limited to considering those areas of Grievant's performance which formed part of the initial performance evaluation; Grievance of Calderara, 9 VLRB 211 (1986); and for which Grievant was given the contractually required notice of deficiencies. It would be inappropriate to consider other incidents or facets of his performance which were not initially considered. Id.

Parenthetically, we make note of the objections in the minority opinion with respect to the remedy set forth in our order. We join with the reservations of our colleague and could easily be persuaded to support his suggestion. However laudatory the idea, we are precluded by the specific language of the Contract and our precedents from doing other than remanding in accordance with our order.

Charles H. McHugh

Leslie G. Seaver

MINORITY OPINION

Performance evaluations are likely to be difficult for the parties involved and when grieved for those who must review the grievance. This results from the awkwardness of evaluation procedures plus the ambiguities and euphemisms in the evaluation forms. Standard forms and procedures leave too little allowance for the wide variety of circumstances in the workplace. In this case, for example, we have a small office where well-educated and intelligent individuals working in a close relationship deal with arcane and technical regulatory

materials. This is a working environment somewhat different from, for example, an Agency of Transportation garage. Yet for both settings, the evaluation procedures, forms and Contract language are the same, although some individual rating factors may differ. A system which will fairly measure the performance of a mechanic may not work as well when assessing the strengths and weaknesses of a Principal Insurance Rater and Form Analyst. I suspect whatever fault exists in this case lies more with the evaluation system than with the parties.

I agree that Grievant's evaluation was flawed by the failure of the Employer to meet the requirements of Article 15 of the Contract as the Board interprets the clause stating "the immediate supervisor shall call the employee's attention to work deficiencies which may adversely affect a rating..." Our cases require a clear notice of dissatisfaction with performance, and this was not given to Grievant.

I do not agree that Article 5 of the Contract was violated. My colleagues conclude that adverse ratings and comments which Grievant received on his performance evaluation concerning poor writing skills constitute discrimination against him for criticizing his supervisor during the "focus" sessions held months before the performance review. I do not believe the evidence supports this conclusion. Furthermore, I note that poor writing skills were mentioned in an earlier evaluation made before the "focus" sessions.

The Order of the Board set forth in the Majority Opinion seems to me ill advised. It requires the Employer to make a new evaluation for the Grievant's work for a period from 30 to 18 months ago. A more recent and presumably non-grieved evaluation should already be in Grievant's file. I see little to be gained in an attempt to

reconstruct the past. The Order also requires the Employer to remove a series of adverse comments from the grieved evaluation. I think it would be better to order the entire evaluation removed and to let Grievant's file stand with no evaluation for the period from May 30, 1988 to May 30, 1989. I do not see how the language of Contract precludes us from issuing such an order.

Louis A. Toepfer

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

> 1. The Grievance of Frederick Barrett is SUSTAINED to the extent that the performance evaluation given Grievant for the period May 30, 1988 to May 30, 1989, is REMANDED to the Department of Banking, Insurance and Securities, State of Vermont, for reconsideration forthwith of placement of Grievant in a prescriptive period of remediation, the overall rating given Grievant and the ratings given him in the following individual rating factors - Job Knowledge and Skills; Quality of Work; Attitude, Interest and Initiative; Judgment; Quantity of Work; Work Under Stress and Effectiveness of Pursuing Tasks and Achieving Results - consistent with the Findings of Fact, Opinion and Order issued herein; and is SUSTAINED further to the extent that the following adverse comments on his performance evaluation shall be removed:
>
> B. 2. Planning and Organization
>
> Doesn't plan to meet divisional goals.
>
> C. Summary Comments
>
> 1) Rick's performance deteriorated significantly from the last evaluation. This at least in part is due to a dispute concerning an alleged promise of a salary increase after one year of employment. He informed the Deputy Commissioner that he lost his will to perform well as a result of this dispute.
>
> ...

3) Rick seems to selectively hear instructions and conversation. He retains what is beneficial to him and ignores the remainder. He frequently does not follow verbal instructions and it is necessary to give him written instructions.

4) Since Rick is inexperienced, he has been unable to distinguish between what is important and what is not important. As a result, he over emphasizes the importance of minor functions. A new analyst is not expected to have this skill but an analyst who has been employed for over a year should be able to distinguish between important and unimportant functions. Rick should be able to review at least three filings a day. This should ultimately be increased to six filings per day for a life analyst performing his job at an acceptable level.

5) Rick cannot accept constructive criticism. This makes giving him instructions difficult in the best of situations and on some occasions impossible.

6) Rick has occasionally displayed poor writing skills.

7) Rick has been observed on many occasions in lengthy conversations with the public. This is not a good use of time.

F. Areas for Improvement

Writing skills, listening to instructions, accepting criticism, following instructions, concentrating on the important tasks first... and making productive use of the telephone by not getting involved in lengthy conversations.

G. Recommend Developmental Activities

Writing Skills Classes

Comments of Rater's Immediate Supervisor

I generally agree with Tom's comments. However, I feel that Rick could be an effective employee if he follows the suggestions contained in the evaluation. Most importantly Rick needs to follow instructions given by Tom. An organization cannot function unless subordinates accept guidance from superiors. In this case Tom has established a job priority - quality review of three filings per day and then moving to six per day as more experience is acquired - which is reasonable.

2. The Grievance is DENIED to the extent that the following adverse comments on the performance evaluation shall be retained:

C. Summary Comments

He lost his temper on more than one occasion and had to be corrected. One of these incidents involved two co-workers in the reception area of the office.

...

Rick has been observed on many occasions in lengthy conversations with other employees. This is not a good use of time.

F. Areas for Improvement

Making productive use of time in the office by not getting involved in lengthy conversations with other employees.

Dated this 10th day of December, 1990, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Leslie G. Seaver