VERMONT LABOR RELATIONS BOARD

GRIEVANCES OF:	)	
	)	DOCKET NO. 90-34
MOHAMMAD CHOUDHARY	)	DOCKET NO. 90-53
	)	DOCKET NO. 91-26
	)	DOCKET NO. 91-27
	)	DOCKET NO. 91-29
	)	DOCKET NO. 91-30

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

These cases involve four grievances (i.e., Docket Nos. 90-34, 90-53, 91-26, 91-27) filed by the Vermont State Employees' Association ("VSEA") on behalf of Mohammad Choudhary ("Grievant"), and two grievances filed by Grievant on his own behalf (i.e., Docket Nos. 91-29, 91-30), alleging that the State of Vermont, Department of Public Service ("Employer") violated the Contracts between VSEA and the State of Vermont for the Non-Management Unit, effective for the periods July 1, 1988 to June 30, 1990 ("1988-90 Contract"), and July 1, 1990 to June 30, 1992 ("1990-92 Contract"). These six cases were consolidated for hearing by direction of the Board.

In Docket No. 90-34, filed on June 8, 1990, Grievant alleges that the Employer violated the 1988-90 Contract in issuing an oral notice of performance deficiency in that 1) the notice was incorrect because Grievant's performance was not deficient; 2) the notice constituted discrimination by reason of race or national origin or on factors unrelated to Grievant's job performance (i.e. his questioning concerning the classification of his position); 3) the notice was an unfounded first step in a plan to ultimately dismiss Grievant and 4) the notice was in

retaliation for his whistleblowing (i.e. reporting to the Governor). Grievant alleges that said notice violated Articles 5, 15, 17, 18 and 72 of the 1988-90 Contract.

In Docket No. 90-53, filed on September 5, 1990, Grievant alleges that the Employer violated the 1988-90 Contract in issuing Grievant an adverse special performance evaluation covering the period November 14, 1989 to February 14, 1990 for the following reasons: 1) the evaluation was based upon racial and/or national origin discrimination, or on factors unrelated to Grievant's job performance (i.e. his questioning concerning the classification of his position); 2) Grievant did not receive notice of deficiencies during the rating period, the evaluation does not accurately reflect Grievant's performance during the rating period and it lacks specificity concerning means of improvement; 3) the evaluation was an unfounded second step in a plan to ultimately dismiss Grievant; 4) the evaluation was in retaliation for his grievance activity and 5) the evaluation was in retaliation for his whistleblowing (i.e. reporting to the Governor). Grievant alleges that the evaluation violated Articles 5, 15, 17, 18 and 72 of the 1988-90 Contract.

In Docket No. 91-26, filed on March 29, 1991, Grievant alleges that the Employer violated the 1990-92 Contract in issuing Grievant an adverse performance evaluation covering the period May 7, 1990 to September 7, 1990, and placing Grievant in a warning period for the following reasons: 1) the evaluation was based upon racial and/or national origin discrimination, or on factors unrelated to Grievant's job performance (i.e. his "style"

as a regulator and his questioning concerning the classification of his position; 2) the evaluation does not accurately reflect Grievant's performance during the rating period; 3) the evaluation was an unfounded third step in a plan to ultimately dismiss Grievant; 4) the evaluation was in retaliation for his grievance activity and 5) the evaluation was in retaliation for his whistleblowing. Grievant alleges that the evaluation and warning period violated Articles 5, 12, 14, 15 and 73 of the 1990-92 Contract.

In Docket No. 91-27, filed on March 29, 1991, Grievant alleges that the Employer violated the 1990-92 Contract in dismissing Grievant by letter dated March 1, 1991 for the following reasons: 1) the dismissal was based upon racial and/or national origin discrimination, or on factors unrelated to Grievant's job performance (i.e. his "style" as a regulator and his questioning concerning the classification of his position; 2) there was no just cause for the dismissal and it was arbitrary and capricious; 3) the dismissal was in retaliation for his grievance activity and 4) the dismissal was in retaliation for his whistleblowing (i.e. reporting to the Governor). Grievant alleges that the dismissal violated Articles 5, 14, 15 and 73 of the 1990-1992 Contract.

On April 3, 1991, Grievant filed grievances in Docket Nos. 91-29 and 91-30 on his own behalf. Therein, Grievant raised many of the same issues raised in his four earlier grievances. The new allegations which he raised are discussed in the Opinion herein.

Hearings in Docket Nos. 90-34, 90-53, 91-26 and 91-27 were held before Board members Charles McHugh, Chairman; Louis Toepfer and Carroll Comstock on June 11, 13, 14, 19 and 21; July 29, 30 and 31; August 21 and 27; October 3 and November 7 and 8, 1991. Attorney Ronald Fox represented Grievant and Assistant Attorney General Michael Seibert represented the Employer.

The Employer filed a Motion to Dismiss and/or For Summary Judgment with respect to Docket Nos. 91-29 and 91-30, which motion was responded to by Grievant. An oral argument on the motion was held before the Board panel on January 29, 1992. Grievant appeared pro se, and his oral argument was treated by the Board as sworn testimony in lieu of an affidavit. Assistant Attorney General Michael Seibert represented the Employer.

FINDINGS OF FACT

Docket No. 90-34

1. Grievant was hired as an electrical engineer in the Engineering Department of the Department of Public Service ("DPS") effective on January 11, 1988. After earlier contacts by other employees at DPS, Grievant was hired by Richard Sedano, the Chief of the DPS Engineering Division, who became Grievant's immediate supervisor. Grievant was born and educated in Pakistan. Sedano was aware of that fact prior to hiring Grievant. Prior to Grievant accepting the position, Sedano provided descriptions and documents relating to pay and benefits to Grievant. Sedano agreed to support Grievant's request to be paid $30,000 per year, which was substantially above the minimum salary of a State electrical engineer, and involved hiring Grievant at Step 9 of 15 steps on his pay grade, rather than at

Step 1. Before Grievant accepted the position, Sedano gave Grievant the job description for the DPS Electrical Engineer position. When Grievant accepted the DPS job, he knew or should have known that his position would be Electrical Engineer, and not Deputy Chief Engineer (Grievant's Exhibit 3).

2. Sedano began State employment in November 1984, as the DPS Electrical Planning Engineer. He was promoted to Chief Engineer in July 1987. Sedano has a Bachelor of Science Degree in Engineering and a Master of Science Degree in Engineering Management. Sedano worked for the Philadelphia Electric Company in the area of power generating engineering from 1979 to 1984. Sedano, while an engineer, is not an electrical engineer.

3. The mission of DPS includes advocating on behalf of the public on issues which come before the Public Service Board ("PSB") as well as formulating policy in the same areas. The DPS represents the interests of the public in a number of ways, including utility applications to construct improvements which are brought before the PSB. Typically, in construction cases, the applicant, one of the utility companies operating within Vermont, files a petition with the PSB seeking permission to do a particular project. Thereafter, DPS and the utility engage in discovery, at the completion of which the DPS and the utility prefile testimony. Then, there is a hearing before the PSB.

4. Grievant's job duties consisted of technical, analytical and engineering work for the DPS involving all aspects of utility engineering, with particular emphasis upon electrical systems planning and procurement (Grievant's Exhibit 3, page 10).

5. Since English was not Grievant's primary language, Sedano wished to take steps to improve Grievant's English language skills. In February 1988, DPS, at Sedano's initiative, paid about $1,000 for Grievant to have 12 tutoring sessions with a speech instructor at Champlain College, which were held as half-day sessions over a four-week period.

6. Because Grievant was not a US citizen, it was necessary for Grievant to secure authorization under US Immigration regulations and laws to be employed at DPS. DPS assisted Grievant during the early course of Grievant's employment in his efforts to secure immigration authority to continue employment. DPS management was aware that Grievant was seeking asylum in the United States based upon religious persecution and mistreatment in Pakistan. Grievant belongs to the Ahmadiyya sect of Islam. In March, 1988, then DPS Commissioner Gerald Tarrant sought and successfully secured the assistance of the Office of US Senator Patrick Leahy on Grievant's behalf for Grievant to remain in the United States (Grievant's Exhibit 5).

7. Grievant served a six-month probationary period. During his probationary period, Grievant expressed concern to Sedano that medical insurance premiums he had to pay and his longer commute to Montpelier, from his home in Williston, resulted in an effective wage reduction from his previous job. Sedano indicated his willingness to provide a merit bonus for Grievant if he demonstrated superior performance. Sedano did not inform Grievant that he would receive a pay increase at the end of his probation.

8. Sedano prepared a draft of a performance evaluation at or about the time that Grievant concluded his probationary period which reflected observations on strengths and weaknesses of Grievant's performance, and which concluded that Grievant's overall performance consistently met job requirements and standards. However, Sedano never gave Grievant a copy, nor did he ever discuss the contents of the draft evaluation with Grievant. Thus, Grievant was never informed of Sedano's perception of Grievant's performance and reasonably assumed that it was satisfactory (Grievant's Exhibit 7).

9. Grievant did not receive a wage increase at the end of his probationary period. Grievant asked DPS management why there was no increase. He was told that the Department of Personnel practice was that employees hired at a step above the first step of a position would not receive an increase at the end of original probation. Grievant filed no grievance on this issue within the prescribed contractual time limits.

10. Some time during August or September, 1988, Grievant first expressed to Sedano "surprise" that he was not in the Deputy Chief Engineer Position. Grievant had become aware that the prior DPS electrical engineer had been in a Deputy Chief Engineer position. Shortly after Sedano was named the Chief Engineer, Sedano decided against having a Deputy Chief Engineer in the Division. Therefore, Sedano eliminated the position of Deputy Chief Engineer, prior to seeking applicants for the position of Electrical Engineer into which Grievant was hired.

11. In the Fall of 1988, DPS sought and obtained approval of a change in minimum qualifications and a market factor salary

adjustment for an Electrical Planning Engineer position, and then promoted a DPS employee into that position. Shortly before that action, the position occupied by the DPS Planning Econometrician was reclassified and went up three pay grades, which resulted in a salary increase for that employee (State's Exhibit 20; Grievant's Exhibit 197, 198).

12. Grievant was aware of these actions, and approached DPS management in October, 1988, concerning having his position reclassified so that he would receive a higher salary. Grievant requested that DPS management seek the classification review of his position but DPS management declined, believing that Grievant's position was properly classified. Carol Martin, DPS Principal Assistant, informed Grievant that he had the contractual right to initiate the classification review of his position on his own, and provided the appropriate forms to Sedano for Grievant to use. Knowing that fact, Grievant did not initiate such a review (Grievant's Exhibit 3, pages 7-19).

13. A substantial portion of the work of the DPS Electrical Engineer involves participation in cases which come before the PSB. It is the role of DPS to represent the interests of the Vermont public in proceedings where utility companies seek authority to construct new facilities or lines, or to raise their rates. Many such cases involve issues of electrical engineering which DPS must evaluate. The Electrical Engineer plays a role as an advisor to the DPS attorneys and management, and as an expert witness in support of the DPS position. The Electrical Engineer advises management of an initial assessment of filings, drafts

requests for production and interrogatories in the discovery process, drafts pre-filed testimony and testifies in PSB proceedings. DPS relies heavily on the judgment of the Electrical Engineer to formulate a position on issues.

14. In the Spring of 1989, Sedano decided to modify his supervisory style as it related to Grievant. Prior to then, Sedano had supervised Grievant as he did other engineers in his Division. Sedano made engineers aware of job assignments and essentially gave them freedom to go about their business. In light of what Sedano perceived as performance problems of Grievant in completing assignments, Sedano concluded there was a need for a different supervisory style. Sedano decided to make his assignments to Grievant in writing to make his expectations very clear. Grievant felt harassed by this style of management. Sedano did not give assignments to other engineers under his supervision in writing because he did not perceive that their performance warranted it. After making assignments in writing, Sedano generally continued to be dissatisfied with the quality and comprehensiveness of Grievant's work.

15. Late in the Spring of 1989, Sedano instituted a weekly reporting system for all Division engineers, requiring the engineers to briefly list their work activities for the preceding and upcoming weeks. Grievant's practice was to write that he was working on PSB cases, without giving the details Sedano wanted. In an exchange of memos, Grievant complained that the reporting requirement was also harassment. Sedano sought to dispel that notion, and also to make it clear that he wanted particulars in

Grievant's weekly report. Grievant provided few particulars in subsequent reports (Grievant's Exhibits 25, 27).

16. Prior to June 1989, Sedano had not required engineers to get advance approval before working overtime and accumulating compensatory time. In June 1989, Sedano became aware that Grievant had accumulated an unusually high amount of compensatory time. DPS thereafter instituted a system requiring all engineers to secure approval of overtime work and the accumulation of compensatory time.

17. In PSB Docket 5341, Central Vermont Public Service Corporation ("CVPS") sought approval of a construction project in Georgia, Vermont, which was intended to improve the reliability of power to an industrial park. DPS reassigned attorneys in the midst of its review of this proposal. The outgoing attorney summarized the potential and substantial criticisms of the DPS position by memorandum dated September 20, 1989. That memo and discussion which followed it made Sedano aware, for the first time, that there had been disagreements between Grievant and the attorney over discovery schedules, and that Grievant's position in opposition to the proposal, which DPS had adopted, was vulnerable to valid criticism. Sedano also learned that the DPS attorney on the case had spent an extraordinary number of hours revising Grievant's discovery drafts. Sedano became concerned that CVPS had the stronger position, and pressed Grievant to better support his pre-filed testimony. After hearings before the PSB had begun in the matter, in which DPS relied on Grievant's position, Grievant announced on October 10, 1989, that

he no longer contested the CVPS proposal. It was shortly after the DPS attorney pressed Grievant to fill the gaps in his position that he abandoned his earlier position. Sedano found fault with Grievant's work in Docket 5341. In addition to the foregoing, Sedano found fault with quality and completeness of Grievant's draft testimony, with the fact that Grievant had inappropriately interacted directly with CVPS rather than letting the attorney speak for DPS, and further that Grievant, without legitimate excuse, did not work within the established discovery schedule (State's Exhibits 4, 8; Grievant's Exhibit 40).

18. PSB Docket 5310 involved a CVPS proposal to construct a power line in the Killington area to improve the reliability of electrical services. Years of negotiations between DPS and CVPS preceded the filing of the proposal in December 1988, and that proposal reflected general acceptance by CVPS of the point of view advocated by DPS in the negotiations. While DPS management supported the concept of the proposal, Grievant was opposed to it. Sedano did not insist that Grievant support the proposal. Instead, Sedano entered into a contract with Dexter Merritt, the former Chief Engineer at DPS, to be an advisor to DPS on electrical engineering issues and, if necessary, to be its expert witness on the case. As the former Chief Engineer at DPS, Merritt had been instrumental in the negotiations which had resulted in the proposal in Docket 5310.

19. While Merritt's involvement meant that Grievant's role in Docket 5310 was reduced, Sedano sought to keep Grievant involved in the docket to identify weaknesses in the DPS position

and offer alternatives. However, Grievant resented Merritt's involvement, and sought his removal as consultant. He also alleged that Merritt had a conflict of interest as it related to CVPS. Grievant's proposed interrogatories led Sedano to believe that Grievant was pursuing interests other than those of DPS. At one point, in a conversation with the DPS case attorney on the case, Grievant threatened to go public with his opposition to the DPS position. In sum, while Sedano hoped Grievant would make a meaningful contribution in 5310 despite his opposition to the DPS position, he never did (State's Exhibits 15, 29).

20. Sedano asked Grievant to work on a project known as the Transmission and Distribution Survey ("T&D Survey"). The T&D Survey was intended to inventory existing utility facilities so that the DPS could have a base of information to be used to measure progress in achieving the goals set forth in the 20 Year Electric Plan. Work upon a questionnaire began in late 1988; and in Spring 1989 Grievant began compiling the information. Sedano was dissatisfied with the quality of Grievant's work in this regard.

21. At some point shortly after May 24, 1989, Grievant had an angry exchange with employees of VELCO, a Vermont utility, concerning obtaining information on load flow data. Grievant insisted that VELCO provide DPS with information which VELCO had already agreed to provide in another way. Shortly thereafter, a VELCO Vice President called Sedano and indicated he was disturbed by Grievant's conduct (State's Exhibit 17).

22. Grievant had a number of difficulties with DPS secretarial and support staff prior to November 14, 1989.

Difficulties arose when Grievant intended to send certain correspondence to a utility and was stopped from doing so after the secretary showed the correspondence to Sedano. Other difficulties arose when a secretary attempted to improve Grievant's grammar by changing his draft work. Grievant objected to both types of action by secretaries and was critical of them in conversations he had with them. Other difficulties arose when secretaries, following instructions from the DPS attorney, did not provide Grievant with his own complete copy of files in a case. Grievant was given full access to all files with which he was involved. However, because of the sheer bulk of the files, one copy had to be shared among the DPS staff. All other DPS employees were subject to the same restrictions, and they accepted the restrictions without incident. However, Grievant consistently objected to such policy and questioned the secretaries on its details and its application to other DPS staff even though the secretaries were simply following instructions.

23. *Prior to November 14, 1989, Grievant also had disputes* with DPS attorneys working with him on proposed interrogatories to utilities, requests to produce documents, and hearing preparation. Grievant considered himself the DPS expert as to electrical engineering issues, and objected to and resented changes to his methodology suggested by Sedano and the attorneys. Grievant's attitude in this regard contributed to tensions in his working relationships.

24. Grievant also had disputes with Sedano and the DPS attorneys, prior to November 14, 1989, concerning the scheduling

of various stages of the PSB litigation. Grievant objected that schedules had been set without consulting him, and to the deadlines which were thereby imposed on him. Grievant had more problems with schedules and meeting deadlines than any other DPS employee. The record does not establish any disparate treatment of Grievant as it relates to the setting and maintenance of litigation deadlines.

25. It was Sedano's practice, when applications were first filed with the PSB, to assign the involved expert the task of making a quick assessment of the case for DPS. Sedano's interest was in knowing what issues in the expert's field were raised by the case, and in getting the expert's first impression as to whether DPS should support the request. Other staff in the engineering division were able to provide Sedano with useful analysis of issues raised in such matters within a few days or weeks. However, Grievant objected to certain assignments in the period prior to November 14, 1989, expressing his opinion that such an assessment could only be made after months of evaluating information which would later be obtained through litigation discovery. When Sedano insisted on a work product under such circumstances, Grievant at times submitted work products which were not helpful.

26. Prior to November 14, 1989, in meetings with utilities representatives, there were occasions where Grievant was disruptive at meetings by raising issues unrelated to the issues being discussed.

27. Prior to November 14, 1989, Grievant alleged that a secretary had treated him in a discriminatory manner. When

Martin asked Grievant to provide specifics, Grievant failed to do so (Grievant's Exhibit 32).

28. Contrary to Grievant's assertions, no meeting occurred on or about September 6, 1989, among Carol Martin and two DPS attorneys in which they discussed "getting rid" of Grievant.

29. There was a sign on the door leading to the offices of two DPS attorneys which was a copy from the Wall Street Journal dated April 1, 1986, and said "Don't feed the animals". Added to the sign was the handwritten notation "it only encourages them". The sign, and its alteration, predated Grievant's tenure with DPS. The sign was placed on the door as a reference in jest to the attorneys at about the time it was in the Wall Street Journal. Contrary to Grievant's assertion, this sign was not intended to refer to Grievant (State's Exhibit 40).

30. DPS offices have for years housed an item from a wood industry promotional campaign. It is a three foot high, self-standing cardboard poster depicting a beaver, drawn as a cartoon character, dressed in overhauls and wearing a hard hat, and chewing on a tree. On the hard hat were printed the words, "Eeger Beever". In October, 1988, one of the two DPS employees who shared an office with Grievant wrote "MO" (which presumably referred to Grievant) on the hard hat of the beaver, and wrote "for" between "Eeger" and "Beever". Sedano first learned of the writings on the beaver poster, and Grievant's objection to them, at the time Grievant filed a Human Rights Commission complaint in 1990. Grievant had expressed no objection prior to that time.

31. Article 17, Section 1(e) of the 1988-90 Contract provides as follows:

e. In performance cases, the order of progressive corrective action shall be as follows:

i. oral notice of performance deficiency;

ii. written performance evaluation, special or annual, with a prescriptive period for remediation specified therein, normally 3 to 6 months.

iii. warning period of thirty (30) days to six (6) months, extendable for a period of up to six (6) months. Placement on warning status may take place during the prescriptive period if performance has not improved since the evaluation.

iv. dismissal.

32. On October 9, 1989, Sedano wrote a memorandum to Grievant scheduling a meeting for October 19, 1989, to discuss Grievant's job performance. That meeting was postponed at the request of Grievant (Grievant's Exhibit 36; State's Exhibits 11, 28A, 30).

33. Grievant wrote a letter dated October 10, 1989, to Governor Kunin, alleging generally that he had been the victim of discrimination by DPS. According to Grievant's returned receipt, the Governor's office received the letter on October 20, 1989. There is no evidence that the Governor's office discussed the letter with anyone from DPS at the time, or provided DPS with a copy of the letter. Neither Sedano nor Martin saw a copy of the letter until shortly before the Board hearings in these matters (Grievant's Exhibit 38).

34. Martin received a telephone call from "Marty" in the Governor's office at the end of October or early November, 1989. "Marty" informed Martin that it was not clear what Grievant's concerns were, but that he had alleged discrimination. "Marty" informed Martin that the Governor's office did not intend to intervene. After receiving that call, Martin briefly informed Sedano and DPS Commissioner George Sterzinger of her conversation with Marty.

35. On November 14, 1989, the date Sedano and Grievant ultimately met to discuss Grievant's work deficiencies, Sedano provided Grievant with oral notice that his performance was deficient in the areas of work quality, judgment, attitude and a lack of understanding on Grievant's part of the role of DPS in utility industry regulation in Vermont. Sedano explained instances of performance which supported his assessment, which generally are reflected in Findings of Fact #14-26 contained herein, what his expectations for Grievant's future performance would be, and offered various suggestions to help Grievant satisfy those expectations. Sedano stated that he would assess Grievant's performance three months later, by a written special performance evaluation, and use the contractual process for corrective action if it was warranted. By memorandum dated December 4, 1989, Sedano summarized the points he had made in the November 14, 1989 meeting with Grievant (State's Exhibit 37).

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36. On April 5, 1990, Sedano presented to Grievant a special performance evaluation, covering the period November 14, 1989 to February 14, 1990, which indicated that Grievant's overall performance was unsatisfactory and that Grievant would therefore be placed into a four-month period for remediation of his performance beginning on the date the performance review was discussed with Grievant (Grievant's Exhibit 100). The issuance of a special performance evaluation, coupled with a prescriptive period for remediation, is the contractually prescribed second progressive step (i.e., after oral notice of performance deficiency) in the State's corrective action efforts to address

the substandard performance of an employee. Article 17, Section 1(e)(ii). The following findings of fact in Docket No. 90-53 concern areas of Grievant's performance during the November 14, 1989, to February 14, 1990, rating period, which were relied upon by Sedano in determining that Grievant's performance was unsatisfactory.

37. Sedano rated Grievant either "1" ("unsatisfactory") or "2" ("inconsistently meets job requirements/standards") in all individual rating factors. Sedano rated Grievant a "1" in the following areas:

- Quality of work
- Planning and Organizing
- Judgment
- Personal Relationships
- Work Under Stress
- Effectiveness in Pursuing Tasks and Achieving Results

(Grievant's Exhibit 100)

38. Sedano rated Grievant a "2" in the following areas:

- Job Knowledge and Skills
- Work Habits
- Attitude, Interest and Initiative
- Learning Ability
- Quantity of Work
- Technical or Professional Knowledge and Ability

(Grievant's Exhibit 100)

39. Grievant's work on PSB Docket 5310 continued into this period. Although Grievant disagreed with the DPS position in

that matter, Sedano expected Grievant to help to assist in preparing Merritt, the expert in support of the DPS position, by constructively identifying criticism of the position and thus assisting DPS in strengthening its position. Grievant was not helpful in this regard. In discovery requests which Grievant prepared for this matter, Grievant focused on concerns the Department no longer had with the proposal. Grievant continued to be critical of Merritt's involvement on behalf of DPS in this matter. Grievant also asserted that he could not evaluate the work of Merritt, upon request of Sedano to do so, without exhaustive review of all of his work, even though Sedano had simply asked for a review based on what materials Merritt had provided (State's Exhibits D, Q, R).

40. In PSB Docket 5366, involving a proposed transmission line by Vermont Electrical Power Company ("VELCO"), a case which Grievant had been working on for a few months, Grievant waited until a week before pre-filed testimony was due to inform the DPS attorney for the first time that he opposed the utility's position because it was not the best solution. He also failed to identify alternatives to the utility proposal. Sedano, by memorandum of February 1, 1990, brought his concerns in these areas to Grievant's attention. Sedano determined that Grievant's listing of issues and draft testimony was poorly done and incomplete. In that same case, during a site visit to the utility, Grievant in the presence of utility representatives blamed the DPS lawyer, who was present, for the lawyer's lack of information (State's Exhibit JJJ, MMM).

41. In PSB Docket 5370/5372, which was a combined utility rate case, Sedano assigned Grievant to deal with electrical engineering issues. Grievant spent much time complaining about the discovery process employed by the DPS attorney working on the case. Grievant's concentration on perceived problems with the discovery process, rather than the tasks he was assigned, left him without adequate time to complete the tasks which he was assigned (State's Exhibits E, G. H, I, J, M, N, DD).

42. In PSB Docket 5179, involving the East Georgia Co-Generation Plant, Grievant demonstrated an unwillingness to accept Sedano's suggestions as to more efficiently completing his assignment, and asked Sedano for materials on the case which Grievant should have been able to locate himself in the case files (State's Exhibits AA, Z, BB).

43. In a Hardwick rate case, the Hardwick department had submitted a detailed two-year work plan. Six weeks after submission of the plan, Grievant complained to Sedano that he was unable to obtain information on the plan when, in fact, he had made minimal and untimely efforts to do so (State's Exhibits XX, CCC).

44. There were a number of occasions during the rating period where DPS employees remarked to Sedano that Grievant spent a fair amount of time wandering around the office and distracting other employees.

45. On several occasions, Grievant expressed a desire to attend PSB hearings for which he was not an active participant. Sedano denied many requests. Sedano then identified in writing

the conditions under which he would allow Grievant to attend PSB meetings (State's Exhibit DD).

46. Grievant made several requests to attend conferences during this period. Sedano denied each of the requests, providing one of the following reasons: 1) travel freeze, 2) tardy request, 3) unrelated to Grievant's work, or 4) the fact that Grievant was under an oral notice of performance deficiency (State's Exhibits QQ, RR, YY, ZZ and Grievant's Exhibit 62).

47. Grievant, on several occasions, complained to Sedano about having inadequate time to complete assignments.

48. Grievant instituted a practice of asking other DPS employees to sign a copy of written communications to confirm their receipt of that communication. Martin informed Grievant by memorandum that such practice was not "necessary or appropriate" (State's Exhibit F).

49. Grievant believed that it was inappropriate for Sedano to change discovery requests prepared by Grievant, which happened on several occasions during the rating period. Grievant also questioned the ability of DPS attorneys and Sedano to gain an understanding of technical issues with which he worked.

50. Grievant demonstrated a continuing confusion with PSB schedule changes, although it should have been relatively easy for him to keep abreast of the changes.

51. During the rating period, Sedano clearly outlined his expectations of Grievant, and informed Grievant of continued dissatisfaction with the specific aspects of Grievant's performance during the rating period which subsequently were

relied upon by Sedano in providing Grievant with an adverse performance evaluation (State's Exhibits T, GG).

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52. On September 28, 1990, Sedano completed a special performance evaluation which covered the period May 7, 1990 to September 7, 1990, and which gave Grievant an overall rating of "1" ("Unsatisfactory"), and thereby placed Grievant into a warning period for three months from the date of delivery to Grievant. Such evaluation made it clear that continued substandard performance would result in Grievant's dismissal. The issuance of a special performance evaluation, coupled with a warning period, is the contractually prescribed third and last progressive step, prior to dismissal, in the State's corrective action efforts to address the substandard performance of an employee. The following Findings of Fact in Docket No. 91-26 concern areas of Grievant's performance during the May 7, 1990, to September 7, 1990 rating period, which were relied on by Sedano in determining that Grievant's performance was unsatisfactory (Grievant's Exhibit 150; Article 14, Section 1(e)(iii), 1990-92 Contract).

53. Sedano rated Grievant either "1" ("unsatisfactory") or "2" ("inconsistently meets job requirements/standards") in all individual rating factors. Sedano rated Grievant a "1" in the following areas:

- Quality of Work
- Planning and Organizing
- Judgment

- Personal Relationships
- Effectiveness in Pursuing Tasks and Achieving Results

(Grievant's Exhibit 150)

54. Sedano rated Grievant a "2" in the following areas:

- Job Knowledge and Skills
- Work Habits
- Attitude, Interest and Initiative
- Learning Ability
- Technical and Professional Knowledge and Ability
- Quantity of Work
- Work Under Stress

(Grievant's Exhibit 150)

55. At the beginning of the rating period, because Sedano wanted to ensure that Grievant fully understood what was expected of him, Sedano initiated daily meetings between himself and Grievant. Sedano hoped that daily discussion with Grievant over his activities would both allow him to better direct and monitor Grievant's performance and also reduce the paper flow between them. During the first three weeks of the period, although Grievant accused Sedano of wasting time and harassing him by the meetings, there were meetings two to four times per week. Grievant had been quite reluctant to discuss his daily agenda and activities with Sedano, and this did not change significantly during the meetings. After a few weeks, even though Sedano continued to encourage Grievant to meet, the frequency of the meetings decreased. Sedano made it clear that he was offering

Grievant time every day to meet if Grievant wanted it, but that he was not going to require Grievant to meet unless Sedano had specific areas to discuss. The meetings then became very infrequent.

56. During the rating period, one of Grievant's major assignments was to evaluate and advise DPS on the reasonableness of the two-year Work Plan of the Washington Electric Cooperative ("WEC"). Grievant's performance was unsatisfactory to Sedano in three major ways. First, since such a review was handled informally, Grievant was allowed to seek necessary information directly from WEC. Grievant made numerous information requests to WEC. In the end, Grievant's questions were unnecessarily burdensome to the utility and some of his requests were irrelevant. Second, Grievant leveled unfounded criticism at Riley Allen, of the DPS Planning Division, relating to load forecasting for the WEC Plan. Despite his lack of expertise on load forecasting, Grievant caused DPS staff much unnecessary effort to convince him that load forecasting had been adequately addressed. Third, Grievant became suspicious that WEC inappropriately had been diverting approved construction funding for another purpose. He pursued that concern, and in one of his information requests and in direct communications with WEC representatives, accused WEC of diverting funds. His focus on this concern to the exclusion of other matters resulted in his not completing the assignment. The PSB hearing in the matter was imminent, and Grievant's assignment remained incomplete. Ultimately, Sedano and the DPS Director of Planning, William Steinhurst, had to intervene, discuss the matter with the utility

and formulate the DPS position Grievant had been assigned to produce. Steinhurst discovered that WEC had approval from the Federal government for the actions which Grievant believed to be wrongful. Steinhurst and Sedano attached some conditions to the DPS approval of the WEC two-year Plan. Grievant did not substantially contribute to formation of the DPS position and continued to harbor his concerns after having been informed that the WEC actions of which he was suspicious had been approved by the Federal government. Grievant also, and without any basis, accused his superiors of "rubber stamping" the WEC proposal (State's Exhibits 108, 93, 89, 65, 66, 64, 61, 55, 53, 54, 52, 50, 48, 47, 45, 38, 36, 35, 28, 32, 26, 27, 25, 18, 19, 17, 16, 15, 10, 6).

57. In PSB Docket 5444, which involved CVPS moving a power line in conjunction with the construction of an addition to a school, Grievant persistently objected to a proposal which the parties and the other involved employees of DPS found to be appropriate. Grievant favored a more expensive routing of the line further from the school and its recreation field. The school had to pay for the moving of the line. Grievant's concern was over the possible adverse health effects on school children which the power line's electro-magnetic field ("EMF") might cause. However, his position was not supported by scientific data, and was inconsistent with the "prudent avoidance" policy which DPS had been prepared to advocate. The policy of "prudent avoidance" holds that, based on current scientific data, utilities do not need to alter projects out of concern for EMF health effects unless the cost of doing so is insignificant. Even

after counseling from Sedano on the matter, Grievant maintained his original position and did not substantially contribute to the DPS resolution of the matter (State's Exhibits 31, 23, 8, 5).

58. In PSB Docket 5249, the Northern Loop case, Sedano assigned Grievant to review VELCO's suggestion for breaking a 15-year deadlock among utilities, to see whether the proposal was credible and provided the possible seeds to a solution, and to see if Grievant could achieve some advancement on the issue. Sedano was dissatisfied that Grievant did little to help resolve the matter, and did not keep Sedano informed. Grievant accused Sedano of setting him up to fail by charging him with resolving in short order a dispute that others could not settle in 15 years. In making this charge, Grievant inappropriately interpreted both the intent of Sedano and the nature of the assignment itself (State's Exhibit 109).

59. In the Jericho Water District matter, Sedano asked Grievant to determine whether the utility's arguments and cost figures related to an extension of water service were reasonable. Sedano viewed it as a minor project which could be accomplished mostly by review and without any site visits. However, Grievant misconstrued Sedano's assignment, made some unnecessary site visits, did not provide the requested assistance to the DPS financial analyst working on the matter, and ultimately produced a work product which contained no support for his conclusion in the case. Sedano expressed concern to Grievant that Grievant did not approach the matter consistent with Sedano's instructions and

left a DPS financial analyst without assistance from the Engineering Division (State's Exhibits 44, 43, 33, 29, 9).

60. In PSB Docket 5179, involving a co-generation project in East Georgia, some of Grievant's draft discovery questions were inappropriate, irrelevant or not structured properly (State's Exhibit 4).

61. In PSB Docket 5405, involving a Vermont Marble co-generation project, Sedano asked Grievant to evaluate the impact of the project on the electric system. Grievant inappropriately sought to delay acting on the project, intending to force the utility to apply profits to engineering improvements, which Sedano informed Grievant was not a proper method. Also, Grievant's pre-filed testimony was unclear, and required substantial revision by Sedano (State's Exhibits 104, 84, 74, 69, 42).

62. In PSB Docket No. 5395, the so-called "Bonneville Project" proposed by VELCO, Sedano assigned Grievant to determine the effects of the proposal. Grievant's written work products on this assignment were deficient in a number of categories: 1) irrelevant comments, 2) important omissions, and 3) providing conclusions without providing support by documentation or rationale. Also, Grievant prepared pre-filed testimony in this matter after Grievant and Sedano agreed that he would not prepare such testimony, thus performing unnecessary work (State's Exhibits 98, 95, 88, 40, 37, 32, 21, 14, 7).

63. In PSB Docket 5366, a modification of the utility proposal was anticipated, and Sedano advised Grievant to look for

that material since there would be a fast turnaround time for the DPS response. The materials came in on July 31, 1990, and DPS had an August 8, 1990 discovery deadline. Grievant was not prepared to meet the deadline, but the proposal was withdrawn by August 8, 1990 (State's Exhibit 77, 59, 46).

64. During this rating period, Grievant continued wandering around the office, interrupting conversations and appearing not to work on occasions. DPS employees complained to Sedano concerning these actions.

65. Sedano directed Grievant to attend a May 14 meeting of the Hydro-Quebec Operating Committee. Sedano instructed Grievant to "primarily observe the progress of the meeting and report back". Despite this instruction by Sedano, Grievant was confrontational at the meeting and asked inappropriate questions. Sedano expressed his dissatisfaction to Grievant concerning his conduct at the meeting (State's Exhibit 107).

66. In June 1990, Grievant, in a conversation with a VELCO engineer, insisted that he wanted to attend a private meeting of the NEPOOL Transmission Task Force, even though Sedano had previously told him he was not to attend such meetings (State's Exhibit 85).

67. During the rating period, there were occasions where Grievant demonstrated disrespect of fellow employees, inappropriately attributed improper motivations to actions of other DPS staff, and initiated loud disputes with clerical employees. Sedano spoke to Grievant of his dissatisfaction with Grievant's conduct in these areas during the warning period.

68. On June 15, 1990, at a meeting at CVPS, Grievant asked inappropriate and irrelevant questions of the CVPS engineering staff. Grievant insisted on pressing the questions even after CVPS staff told him that the questions were irrelevant.

69. There were occasions during the rating period where Grievant went to PSB hearings without clearing it with Sedano. On one occasion, Grievant made an unnecessary site visit concerning the CV-Allied merger case after the case had been closed.

70. Grievant continued to question the ability of DPS attorneys and Sedano to gain an understanding of technical issues with which he worked. There were occasions where Grievant failed to explain important elements of cases to attorneys.

71. Grievant attempted to have a secretary disregard the rules regarding reporting of compensatory time so that Grievant would not have to forfeit such time. Also, he attempted to refile a rejected expense claim with the secretary without obtaining Sedano's approval as is required. Martin subsequently instructed Grievant to deal with her, not the secretary, with respect to such matters.

72. Grievant tried to get DPS employee George Mathon to purchase a grammar checking computer program for Grievant's use without authorization from either Sedano or Martin to do so. When Mathon subsequently told Grievant that Grievant needed to obtain authorization from Sedano or Martin, Grievant said he did not need their approval. Sedano then spoke to Grievant concerning the issue. Sedano ultimately approved the purchase.

Once the software arrived in the office, there was a delay of several months before the software was installed due to Mathon failing to install it. Once Grievant brought this to Martin's attention, the software was installed (State's Exhibits 100, 101, 102).

73. In the Summer of 1990, there was a headline in the New York Times, with respect to a letter to the editor, which stated, "I won't discriminate against those who have supported me" (Grievant's Exhibit 443). Contrary to Grievant's assertion, Sedano did not have a copy of this headline posted on his door.

74. During the rating period, Sedano clearly outlined his expectations of Grievant and informed Grievant of continued dissatisfaction with those specific aspects of Grievant's performance during the rating period which Sedano subsequently relied on in providing Grievant with an adverse performance evaluation.

Docket No. 91-27

75. On February 7, 1991, Sedano completed a special performance evaluation which rated Grievant's performance during the October 1, 1990 to February 7, 1991, Warning Period as unsatisfactory. By letter of the same date from DPS Commissioner Louise McCarren, Grievant was given the opportunity to have a "Loudermill" pre-termination meeting. That meeting was held on February 25 and 26, 1991. Grievant was dismissed by letter dated March 1, 1991, as a result of continued unsatisfactory performance during the warning period. Dismissal is the final step in the contractually prescribed progressive steps in the

State's corrective action efforts to address performance deficiencies of an employee. The following Findings of Fact in Docket No. 91-27 concern areas of Grievant's performance during the October 7, 1990, to February 7, 1991, warning period, which were relied on by Sedano in determining that Grievant's performance was unsatisfactory (State's Exhibit 98; Article 14, Section 1(e)(iv)).

76. Sedano rated Grievant's performance as unsatisfactory in all areas of performance, specifically:

- Job Knowledge and Skills
- Quality of Work
- Work Habits
- Attitude, Interest and Initiative
- Judgment
- Personal Relationships
- Quantity of Work
- Understanding the Role of DPS
- Planning and Organizing

(State's Exhibit 98)

77. Sedano initially placed Grievant in a three-month warning period, which would have ended during early January, 1991. However, Sedano subsequently extended the end of the warning period to February 7, 1991, because of Grievant's absences for medical reasons. During the warning period, Grievant was absent from work for medical reasons on October 9-19 and 23-26, November 5-6, 8, and 13-18, and December 3, 1990 - January 4, 1991.

78. In PSB Docket 5199, involving the East Georgia Co-Generation Project, Grievant sought to use pre-filed testimony from another case which Sedano had rejected as inadequate. Grievant then prepared information requests to be served on East Georgia Co-Generation, which included some inappropriate and irrelevant questions. He also prepared pre-filed testimony which did not provide the necessary information for PSB to use in deciding the matter. Grievant failed to research prior cases which would have assisted him in this regard (State's Exhibits 12, 43).

79. In PSB Docket 4474, concerning the establishment of electric service territory boundary lines, Sedano directed Grievant to evaluate and provide suggestions. Grievant did not complete the assignment (State's Exhibit 11).

80. On November 27, 1990, Sedano directed Grievant to review and evaluate a VELCO proposal to upgrade its system, which was a $37 million project. Due to Grievant's failure to timely apply himself to the case, Grievant was unprepared for a meeting which he and Sedano had with VELCO. By the end of the warning period, Grievant had not made a meaningful assessment of the project or provided any useful information to DPS (State's Exhibit 51).

81. The Hardwick Electric Department applied to increase rates effective December 1, 1990, and submitted a two-year construction plan in support of the request. By memorandum of November 8, 1990, which was received by Grievant on November 9, 1990, Sedano directed Grievant to provide a quick assessment of the work plan by November 14, 1990. Grievant objected to the

assignment and did not provide an assessment. Grievant was absent from work on sick leave on November 13 and 14, 1990. Subsequently, Sedano asked Grievant to review the work plan. On January 15, 1991, Grievant informed Sedano he would be unable to complete the assignment until March. Sedano was dissatisfied that Grievant provided no assessment of the plan during the warning period as he had been requested to do (State's Exhibits 30, 37, 38, 46, 73).

82. Sedano directed Grievant to perform various tasks in relation to a proposal to move the Barnet substation. Grievant objected to not being consulted on the schedule for the case, although the schedule provided for more time than was typical. Grievant procrastinated on obtaining pertinent information from the Agency of Transportation, although he did ultimately obtain the information. Grievant missed a site visit meeting among the parties and DPS on this project which he should have attended. The interrogatories proposed by Grievant for the case were unsatisfactory, as they contained some inappropriate, irrelevant and poorly-constructed questions. Sedano expressed his dissatisfaction to Grievant with respect to the interrogatories. Subsequently, the petitioning utility proposed a stipulated settlement of the case. Sedano directed Grievant to review the proposed stipulation with respect to technical details, but not to concern himself with any other substantive details of the proposal which had been agreed upon by DPS. Nonetheless, Grievant recommended that any reference to a mobile substation be deleted from the stipulation even through DPS, with Grievant's knowledge, already had agreed to the mobile substation provision.

Grievant also edited from the stipulation any discussion of alternatives, although the PSB expects applicants to discuss those alternatives that were considered. Grievant made little meaningful contribution to the resolution of this case (State's Exhibits 15, 39, 41, 45, 68, 77, 80).

83. Sedano directed Grievant to attend a meeting concerning Hydro Re-licensing, which was a subject within Grievant's area of responsibility. Grievant questioned why Sedano wanted him to attend the meeting and suggested that Scudder Parker, a DPS employee with no responsibilities in the area, should go instead because a letter concerning the meeting had been addressed to Parker. Grievant did not attend the meeting (State's Exhibit 14, 23).

84. Sedano directed Grievant to formulate a plan to make his utility plant inspections worthwhile to DPS. Grievant never formulated such a plan and made no report to Sedano on his inspections.

85. Sedano assigned Grievant to review a proposed decision of the hearing officer in PSB Docket 5310. Grievant protested the assignment initially because DPS had hired a consultant for the cases and then failed to apply himself to the task by providing a brief, incomplete response (State's Exhibits 71, 74).

86. Sedano assigned Grievant to inquire about WEC line clearing practices. Grievant's response to Sedano was brief and not useful (State's Exhibit 84).

87. Sedano requested that Grievant begin evaluating a VELCO reliability study. Grievant commented that it would take a

year to evaluate the study. Sedano informed Grievant that it should take much less time to do a general review.

88. In PSB Docket No. 5249, the so-called Northern Loop case, Sedano suggested that Grievant speak with the involved parties to ascertain whether any progress could be made in resolving the case. Grievant did not follow through on this suggestion.

89. On one occasion, Grievant berated a DPS receptionist because Grievant thought she had not given Sedano a message that Grievant was sick. In fact, the receptionist had given Sedano the message.

90. During the period in December 1990 when Grievant was on medical leave, Grievant improperly told a DPS employee to have another employee bring a DPS personal computer to Grievant's home.

91. On several occasions on leave-related questions, Grievant received a decision from Sedano and then would approach Martin on the same issue as if he had never discussed it with Sedano.

92. Grievant demonstrated reluctance to discuss details of cases with Sedano and was defensive, and not forthcoming, in explaining his position on cases.

93. Grievant continued to object to Sedano editing the substance of questions or comments made by Grievant in preparing written materials on cases.

94. On one occasion during the rating period, Grievant asked Sedano if he could attend a seminar. Sedano reaffirmed his

previous statement to Grievant that Grievant's performance status precluded any trips to seminars.

95. Sedano required Grievant to submit to him a weekly report on his activities. The reports filed by Grievant were inadequate and were not useful for Sedano to understand Grievant's activities.

96. By memorandum dated January 8, 1991, Sedano discussed his impressions of Grievant's work in specific areas during the warning period, gave Grievant guidance towards improvement, and outlined his specific expectations for the remainder of the warning period. Sedano informed Grievant that his performance had not improved during the warning period (State's Exhibit 66).

97. In addition to this memorandum, Sedano otherwise clearly outlined his expectations of Grievant during the warning period and informed Grievant of continued dissatisfaction with specific aspects of Grievant's performance during the period which were subsequently relied on by Sedano to provide Grievant with a adverse performance evaluation.

98. The pre-termination meetings concerning Grievant, the Loudermill meetings, were conducted on February 25 and 26 by Louise McCarren, the DPS Commissioner. Commissioner McCarren had been appointed only several weeks before, and had little direct knowledge of Grievant's job history or corrective action efforts which preceded that step. In making herself familiar with the case prior to the pre-termination meeting, McCarren reviewed and read documentation of the prior corrective action steps and Grievant's performance during the warning period which Sedano had

provided, and did the same with material which was provided by Grievant. During the meetings, Grievant made little substantive comment on specific areas of his performance critiqued by Sedano. Grievant also failed to acknowledge any performance problems on his part.

99. By letter of March 1, 1991, received by Grievant on March 5, 1991, McCarren informed Grievant that he was dismissed. The letter provided in pertinent part as follows:

> After review of all relevant material and careful consideration of your presentation, I have determined that there is just cause for your dismissal from the position of Public Service Electrical Engineer, effective the date of this letter, and you will receive two weeks pay in lieu of notice. Your performance during the warning period was unsastisfactory, even though it was preceded by the contractually mandated oral notification of performance deficiencies and a prescriptive period for remediation. The attached Performance Evaluation Report, prepared at the conclusion of the warning period, outlines the basis for the unsatisfactory rating and the reasons for dismissal. I have carefully considered your claim that the actions of the Deparment were discriminatory and retaliatory, but have found no evidence of illegal motives in any of the actions at issue (State's Exhibit 98).

Docket Nos. 91-29 and 91-30

For purposes of deciding the Motion to Dismiss and/or for Summary Judgment filed by the Employer in Docket Nos. 91-29 and 91-30, the Board makes the following Findings of Fact:

100. Findings of Fact #1-99 in Docket Nos. 90-34, 90-53, 91-26 and 91-27 are incorporated herein by reference.

101. Shortly before Christmas, 1990, Charles Larkens, a DPS employee, placed a gift, a little ball, on Grievant's desk as a Christmas gift. Sedano took the ball from Grievant and told him that he could not have the gift because he was not a Christian.

OPINION

Each of the dockets involved herein will be discussed in turn.

Docket No. 90-34

Grievant alleges that the Employer violated the 1988-90 Contract in issuing an oral notice of performance deficiency in that: 1) the notice was incorrect because Grievant's performance was not deficient; 2) the notice constituted discrimination by reason of race or national origin or on factors unrelated to Grievant's job performance (i.e., his questioning concerning the classification of his position); 3) the notice was an unfounded first step in a plan to ultimately dismiss Grievant and 4) the notice was in retaliation for his whistleblowing (i.e. reporting to the Governor). Grievant alleges that said notice violated Articles 5, 15, 17, 18 and 72 of the 1988-90 Contract.

Pursuant to the 1988-90 Contract, oral notice of performance deficiency is the first step in progressive corrective action to be taken by the Employer. Article 17, Section 1(e)(i), 1988-90 Contract. Such corrective action may only be imposed for just cause. Article 17, Section 1(f).

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.

Grievant's supervisor, Richard Sedano, met these requirements. On November 14, 1989, Sedano provided Grievant with oral notice that his performance was deficient in the areas of work quality, judgment, attitude, and a lack of understanding on Grievant's part of the role of DPS in utility industry regulation in Vermont. Sedano explained instances of performance which supported his assessment, what his expectations for Grievant's future performance would be, and offered various suggestions to help Grievant satisfy those expectations. Sedano stated that he would assess Grievant's performance three months later by a written special performance evaluation, and use the contractual process for corrective action if it was warranted. By memorandum dated December 4, 1989, Sedano summarized the points he had made in the November 14, 1989 meeting with Grievant. Given these facts, we conclude that Sedano gave Grievant a clear indication of dissatisfaction with Grievant's performance and put him clearly on notice of performance deficiencies.

Nonetheless, Grievant contends that the notice constituted discrimination by reason of race or national origin in violation of Article 5 of the 1988-1990 Contract. In determining whether an employee was discriminated against on account of the prohibited

factors of race and national origin, the VLRB has adopted the analysis developed by the US Supreme Court. Gamez v. Brandon Training School, 12 VLRB 160 (1989).

In McDonnell Douglas Corp. v. Green, 411 US 792 (1973), the US Supreme Court set forth the basic allocations of burden and order of presentation in discrimination cases. The McDonnell Douglas analysis applies to all discrimination defined under Title VII, including discrimination based on race and national origin. Id at 802. Carino v. University of Oklahoma Board of Regents, 750 F.2d 815, 818 (10th Cir. 1984). The Supreme Court has further refined its McDonnell Douglas test by making it clear that the burden of proof remains at all times with the plaintiff. Burdine v. Texas Department of Community Affairs, 450 US 248, 253 (1981).

In a case alleging disparate treatment, the employee must first prove a prima facie case of discrimination by the preponderance of the evidence. A prima facie case of discrimination in the context of these cases before us consists of proving: 1) that Grievant belongs to a protected class, 2) that Grievant was qualified for the position, and 3) that despite such qualifications adverse action was taken against Grievant. McDonnell Douglas Corp., 411 U.S. at 802. Carino v. University of Oklahoma Board of Regents, 750 F.2d at 818. Gamez, 12 VLRB at 170. The employee's burden of establishing a prima facie case is "not onerous". Burdine, 450 US at 253.

Applying this standard to the facts of this case, the Board concludes that Grievant has established a prima facie case of discrimination based on race and national origin. First, Grievant is a member of a protected class. Grievant is

Pakistani, and Article 5 of the 1988-90 Contract protects against discrimination based on race and national origin. Second, Grievant is qualified for the position. The burden of demonstrating that Grievant is qualified for the Electrical Engineer position is limited to showing that he possesses the basic technical skills for such a position. c.f. Grievance of Smith and VSCFF, AFT Local 3180, AFL-CIO, 12 VLRB 44, 54 (1989). The Employer concedes that Grievant possesses such technical skills. Third, Grievant has shown that adverse action (i.e., the oral notice of performance deficiencies) was taken against him.

Grievant having succeeded in establishing a prima facie case, then the burden is shifted to the Employer to articulate a legitimate, non-discriminatory reason for the adverse action. Burdine, 450 US at 253. Smith, 12 VLRB at 53. The Employer need not persuade the Board that the proffered reason was the true motivation for the action. It must only raise a genuine issue of fact as to whether the Employer discriminated against the employee. Burdine, 450 US at 254. Finally, if the Employer carries this burden, Grievant must then prove by a preponderance of the evidence that the legitimate reason offered is not the true reason, but rather a pretext. A pretext is a statement that does not describe the actual reason for termination. Gamez, 12 VLRB at 172. The ultimate burden of persuading the trier of fact that the Employer intentionally discriminated against Grievant remains at all times with Grievant. Burdine, supra, 450 US at 253.

The Employer has articulated the legitimate, non-discriminatory reason of performance deficiencies as the basis for the oral notice to Grievant. The credible evidence before us leads us to conclude that Sedano, who took the adverse action, was motivated by an appropriate management objective to correct deficient performance. Grievant has not proven by a preponderance of the evidence that the Employer's reason is a pretext for discrimination based on race or national origin.

Grievant also contends that the oral notice of performance deficiencies was in retaliation for his whistleblowing (i.e., reporting to the Governor). In several previous grievances, where employees claimed management took action against them for engaging in protected activities, the Board has determined that it will employ the analysis used by the US Supreme Court. Once the employee has demonstrated his or her conduct was protected, she or he must then show the conduct was a motivating factor in the decision to take action against him or her. Then the burden shifts to the employer to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct. Mt. Healthy City School District Board of Education v. Doyle, 429 US 274 (1977). Grievance of Sypher, 5 VLRB 102 (1982). Among the protected activity grievance cases where the Board has employed the so-called Mt. Healthy analysis has been a case involving "whistleblowing". Grievance of Cronin, 6 VLRB 37, 58-59 (1983).

The first step in the analysis is to determine whether Grievant was engaged in "whistleblowing", which is a protected

activity pursuant to Article 72 of the 1988-90 Contract. Article 72 defines a "whistleblower" as a person who makes public allegations of inefficiency or impropriety in government", and provides that such person shall not be discriminated against in employment with regard to exercising such "whistleblower" rights. Grievant met this definition by contacting the Governor's office in October 1989 and alleging that he had been the victim of discrimination by DPS.

The second step in the analysis we employ here is that Grievant must show his protected conduct was a motivating factor in the decision to give him an oral notice of performance deficiencies. In Sypher, 5 VLRB at 131, the Board noted the guidelines it would follow in determining whether protected activity was a motivating factor in an employer's decision to take adverse action against an employee:

- whether the employer knew of the employee's protected activities;
- whether the timing of the adverse action was suspect;
- whether there was a climate of coercion;
- whether the employer gave as a reason for the decision a protected activity;
- whether an employer interrogated the employer about protected activities;
- whether the employer discriminated between employees engaged in protected activities and employees not so engaged; and
- whether the employer warned the employee not to engage in protected activities.

The Employer did know of Grievant contacting the Governor's office concerning allegations of discrimination prior to the time Sedano actually provided Grievant with the oral notice of performance deficiencies. However, such knowledge was received nearly two months after Sedano began keeping a journal to document Grievant's performance due to a concern that Grievant's performance was deficient, and three weeks after Sedano informed Grievant that he wished to schedule a meeting to discuss his job performance. Under the circumstances, we conclude that the timing of the notice was not suspect. Also, there was no interrogation of, or warning to, Grievant concerning his whistleblowing, Sedano did not give whistleblowing as a reason for the oral notice, and there did not otherwise exist a climate of coercion. Further, we find no discrimination against Grievant relative to other employees due to his whistleblowing. In sum, we conclude that Grievant has not shown his whistleblowing was a motivating factor in the decision to give him an oral notice of performance deficiencies.

We also reject Grievant's further claim that factors unrelated to his job performance (i.e., his questioning concerning the classification of his position) constituted a motivating factor for the oral notice. We conclude that the Employer legitimately believed that Grievant's position was properly classified, and appropriately under the Contract left it to Grievant to pursue the issue if he so desired. There is no indication that Sedano held Grievant's questioning of the classification of his position against him.

In sum, we conclude that Sedano had legitimate and substantial basis to conclude that Grievant had performance deficiencies, as set forth in detail in the Findings of Fact, and that such legitimate, non-discriminatory reasons provided the basis for his oral notice to Grievant. Our Findings of Fact indicate that just cause existed for Sedano providing Grievant with oral notice of deficiencies in the areas where Sedano was critical of Grievant. The notice was not an unfounded first step in progressive corrective action, and thus we conclude the grievance in Docket No. 90-34 should be dismissed.

Docket No. 90-53

In Docket No. 90-53, Grievant alleges that the Employer violated the 1988-90 Contract in issuing an adverse special performance evaluation covering the period November 14, 1989 to February 14, 1990 for the following reasons: 1) the evaluation was based upon racial and/or national origin discrimination, or on factors unrelated to Grievant's job performance (i.e., his questioning concerning the classification of his position); 2) Grievant did not receive notice of deficiencies during the rating period, the evaluation does not accurately reflect Grievant's performance during the rating period and it lacks specificity concerning means of improvement; 3) the evaluation was an unfounded second step in a plan to ultimately dismiss Grievant; 4) the evaluation was in retaliation for his grievance activity; and 5) the evaluation was in retaliation for his whistleblowing (i.e., reporting to the Governor). Grievant alleges that the evaluation violated Articles 5, 15, 17, 18 and 72 of the 1988-90 Contract.

Pursuant to the 1988-90 Contract, the issuance of a special performance evaluation, coupled with a prescriptive period of remediation, is the contractually prescribed second progressive step (i.e., after oral notice of performance deficiency) in the State's corrective action efforts to address the substandard performance of an employee. Article 17, Section 1(e)(ii), 1988-90 Contract. Such corrective action may only be imposed for just cause. Article 17, Section 1(f), 1988-90 Contract. At the outset of the discussion of Grievant's allegations of Contract violations, we conclude that there is no basis for Grievant's claim that he did not receive notice of deficiencies during the rating period, and that the special performance evaluation lacks specificity concerning means of improvement. During the rating period, Sedano clearly outlined his expectations of Grievant, and informed Grievant of continued dissatisfaction with specific aspects of Grievant's performance during the rating period. Also, a review of the nine-page, single spaced narrative performance evaluation leaves no doubt that Sedano set forth means of improvement for Grievant with abundant specificity.

Grievant further claims that the evaluation was based upon racial and/or national origin discrimination. For the reasons discussed earlier in Docket No. 90-34, Grievant has met his burden of establishing a prima facie case of discrimination. The Employer also has articulated the legitimate, non-discriminatory reason of performance deficiencies as the basis for the adverse special performance evaluation. This is reflected by rating Grievant's overall performance as unsatisfactory and Grievant's

performance as either "unsatisfactory" or "inconsistently meets job requirements/standards" in all individual rating factors:

- Quality of Work
- Planning and Organizing
- Judgment
- Personal Relationships
- Effectiveness in Pursuing Tasks and Achieving Results
- Job Knowledge and Skills
- Work Habits
- Attitude, Interest and Initiative
- Learning Ability
- Technical and Professional Knowledge and Ability
- Quantity of Work
- Work Under Stress.

We conclude that Grievant has not proved by a preponderance of the evidence that the Employer's articulated reasons of serious performance deficiencies in all areas constituted a pretext for discrimination based on race or national origin. The credible evidence before us leads us to conclude that Sedano was motivated by an appropriate management objective to correct deficient performance, and that discrimination against Grievant due to race or national origin played no part in the adverse performance evaluation.

Further, we reject Grievant's claim that the evaluation was in retaliation for his whistleblowing (i.e., reporting to the Governor). Grievant presented no evidence of any actions by the Employer in addition to what he relied on in Docket No. 90-34. Our conclusion there remains unchanged.

Grievant has included an additional claim of retaliation for protected activity in Docket No. 90-53 that was not included in the earlier Docket No. 90-34. He claims the evaluation was in

retaliation for his grievance activity. In a past case alleging such retaliation, the Board employed the same protected activity analysis as has been applied in "whistleblowing" cases. Cronin, 6 VLRB at 58-59.

Grievance activity is protected under the 1988-90 Contract, and Grievant was engaged in such a protected activity by pursuing his grievance in Docket No. 90-34. Article 5, Section 1, of the Contract provides that an employee shall not be discriminated against for "filing a... grievance". Article 18, Section 7, further provides that "every employee may freely institute... grievances without threat, reprisal, or harassment by the employer". However, Grievant has presented no evidence by which we can conclude that his grievance activities motivated in any way Sedano's decision to issue an adverse performance evaluation. None of the elements listed in Sypher, 5 VLRB at 131, other than knowledge of grievance activities, are present in this case. Mere knowledge, without more, is insufficient for us to conclude that his grievance activity played any motivating factor in the adverse action taken against Grievant.

Also, there is no evidentiary basis for Grievant's further claim that factors unrelated to his job performance (i.e., his questioning concerning the classification of his position) constituted a motivating factor for the adverse performance evaluation.

In sum, we conclude that Sedano had legitimate and substantial basis to conclude that Grievant had serious performance deficiencies, as set forth in detail in the

Findings of Fact. This warranted the adverse performance evaluation and placement in a prescriptive four-month period of remediation, and such legitimate non-discriminatory reasons provided the basis for Sedano's action. Just cause thus existed for the substandard ratings in all rating areas where Sedano was critical of Grievant. The evaluation and prescriptive period of remediation did not constitute an unfounded second step in progressive corrective action, and thus we conclude the grievance in Docket No. 90-53 should be dismissed.

Docket No. 91-26

In Docket No. 91-26, Grievant alleges that the Employer violated the 1990-92 Contract in issuing an adverse performance evaluation covering the period May 7, 1990 to September 7, 1990, and placing Grievant in a warning period for the following reasons: 1) the evaluation was based upon racial and/or national origin discrimination, or on factors unrelated to Grievant's job performance (i.e., his "style" as a regulator and his questioning concerning the classification of his position); 2) the evaluation does not accurately reflect Grievant's performance during the rating period; 3) the evaluation was an unfounded third step in a plan to ultimately dismiss Grievant; 4) the evaluation was in retaliation for his grievance activity; and 5) the evaluation was in retaliation for his whistleblowing. Grievant alleges that the evaluation and warning period violated Articles 5, 12, 14, 15 and 73 of the 1990-92 Contract.

Pursuant to the 1990-92 Contract, placement in a warning period of 30 days to six months is the contractually prescribed third step, before the final step of dismissal, in the State's corrective action efforts to address the substandard performance of an employee. Article 14, Section 1(e)(iii), 1990-92 Contract. Such corrective action may only be imposed for just cause. Article 14, Section 1(f), 1990-1992 Contract. Sedano placed Grievant in a three month warning period after giving him an overall rating of unsatisfactory for the four months Grievant was in a prescriptive period of remediation. As was the case in the previous evaluation Sedano issued Grievant, Sedano rated Grievant's performance as either "unsatisfactory" or "inconsistently meets job requirements/standards" in all individual rating factors.

We first address Grievant's claim that the evaluation and placement in a warning period was based upon racial and/or national origin discrimination. For the reasons discussed earlier in Docket No. 90-34, Grievant has met his burden of establishing a prima facie case of discrimination. The Employer also has articulated the legitimate, non-discriminatory reason of performance deficiencies as the basis for the adverse special performance evaluation. This is reflected by rating Grievant's overall performance as unsatisfactory and either "unsatisfactory" or "inconsistently meets job requirements/standards" in all individual rating factors.

We conclude that Grievant has not proved by a preponderance of the evidence that the Employer's articulated reasons of

serious performance deficiencies in all areas constituted a pretext for discrimination based on race or national origin. Just as we concluded in Docket Nos. 90-34 and 90-53, the credible evidence before us leads us to conclude that Sedano was motivated by an appropriate management objective to correct deficient performance, and that discrimination against Grievant due to race or national origin played no part in the adverse performance evaluation.

Further, Grievant has not proved by a preponderance of the evidence that his protected conduct of "whistleblowing" and grievance activities were a motivating factor in Sedano's decision to issue an adverse performance evaluation and place Grievant in a warning period. Again, none of the elements listed in Sypher, 5 VLRB at 131, other than knowledge of such activities, are present, and mere knowledge is insufficient for us to conclude that Grievant's activities played any motivating factor in the adverse actions taken against him.

Also, there is no evidentiary basis for Grievant's further claim that factors unrelated to his job performance (i.e., his questioning concerning the classification of his position) constituted a motivating factor for the adverse performance evaluation. Grievant makes an additional claim that his "style" as a regulator is a factor unrelated to job performance, and that Sedano's action was based on such an unrelated factor. We disagree that Grievant's style as a regulator is a factor unrelated to job performance. Grievant's style as a regulator is relevant in assessing his performance as an electrical engineer

in such areas as judgment, personal relationships with fellow employees and utilities representatives, planning and organizing, effectiveness in pursuing tasks and achieving results and job skills.

In sum, we conclude that Sedano had a legitimate and substantial basis to conclude that Grievant had serious performance deficiencies, as set forth in detail in the Findings of Fact, warranting the adverse performance evaluation and placement in a warning period, and such legitimate, non-discriminatory reasons provided the basis for Sedano's action. Just cause thus existed for Sedano providing Grievant with substandard ratings in all rating areas where Sedano was critical of Grievant. The evaluation and placement in a warning period did not constitute an unfounded third step in progressive corrective action, and thus we conclude that the grievance in Docket No. 91-26 should be dismissed.

Docket No. 91-27

In Docket No. 91-27, Grievant alleges that the Employer violated the 1990-92 Contract in dismissing Grievant by letter dated March 1, 1991 for the following reasons: 1) the dismissal was based upon racial and/or national origin discrimination, or on factors unrelated to Grievant's job performance (i.e., his "style" as a regulator and his questioning concerning the classification of his position); 2) there was no just cause for the dismissal and it was arbitrary and capricious; 3) the dismissal was in retaliation for his grievance activity, and 4) the dismissal was in retaliation for his whistleblowing (i.e., reporting to the Governor). Grievant alleges that his dismissal violated Articles 5, 14, 15 and 73 of the 1990-92 Contract.

Dismissal is the contractually prescribed fourth, and final, step in the State's corrective action efforts to address the unsatisfactory performance of an employee. Article 14, Section 1(e)(iv), 1990-92 Contract. Article 14, Section 11, of the 1990-92 Contract further provides that, "(i)n any case involving dismissal based on performance deficiencies, the Vermont Labor Relations Board shall sustain the State's action as being for just cause unless the grievant can meet the burden of proving that the State's action was arbitrary and capricious".

Just cause means some substantial shortcoming detrimental to the employer's interests which the law and sound public opinion recognize as a good cause for dismissal. In re Grievance of Muzzy, 141 Vt. 463, 468 (1982). A discharge may be upheld as one for "cause" only if it meets two criteria of reasonableness: one that it is reasonable to discharge an employee because of certain conduct, and the other, that the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. Id. at 468-69. An "arbitrary" decision is one fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances or significance. Lewandoski and the VSCFF v. Vermont State Colleges, 142 Vt. 446 (1983). "Capricious" is an action characterized by or subject to whim. Appeal of Degreenia and Lewis, 11 VLRB 227, 229 (1988).

Grievant has made several allegations which, if proven, would establish that just cause did not exist for his dismissal. We first address Grievant's claim that his dismissal was based

upon racial and/or national origin discrimination. For the reasons discussed earlier in Docket No. 90-34, Grievant has met his burden of establishing a prima facie case of discrimination. The Employer also has articulated the legitimate, non-discriminatory reason of performance deficiencies as the basis for the adverse special performance evaluation. This is reflected by rating Grievant's overall performance, and performance in all individual areas of performance (as listed in Finding of Fact #76), as unsatisfactory.

We conclude that Grievant has not proved by a preponderance of the evidence that the Employer's articulated reasons of serious performance deficiencies in all areas constituted a pretext for discrimination based on race or national origin. The credible evidence before us leads us to conclude that, in evaluating Grievant's performance as unsatisfactory and concluding that Grievant's dismissal was warranted, the Employer was motivated by an appropriate management objective of terminating Grievant due to Grievant's failure to correct unsatisfactory performance after sufficient opportunity to do so. We conclude that discrimination against Grievant due to race or national origin played no part in the dismissal decision.

Further, Grievant has not proved by a preponderance of the evidence that his protected conduct of whistleblowing and grievance activities were a motivating factor in the decision to dismiss Grievant. Again, none of the elements listed in Sypher, 5 VLRB at 131, other than knowledge of Grievant's protected activities, are present, and mere knowledge is insufficient for us to conclude that Grievant's activities played any motivating

factor in the adverse actions taken against him.. Also, there is no evidentiary basis that factors unrelated to his job performance (i.e., his style as a regulator and his questioning concerning the classification of his position) constituted a motivating factor for Grievant's dismissal.

Nonetheless, the disposition of these issues raised by Grievant does not end our inquiry. We still must determine whether Grievant's performance constituted some substantial shortcoming detrimental to the Employer's interests which the law and a sound public opinion recognize as a good cause for dismissal. Muzzy, 141 Vt. at 468. In deciding this issue, we have closely examined Grievant's performance during the warning period, mindful of the Supreme Court ruling that if the employee "was in reality dismissed for deficiencies which occurred prior to the warning period, then it was not a warning period at all, and notice might well be inadequate". Id. at 473.

In reviewing a dismissal based on performance deficiencies, as well as a dismissal based on misconduct, we look to the factors articulated in Grievance of Colleran and Britt, 6 VLRB 235, 268-269 (1983), in determining whether dismissal is for just cause. Grievance of Merrill, 8 VLRB 259, 286 (1985); Affirmed, 151 Vt. 270, 274-275 (1988). The pertinent factors here are: 1) the nature and seriousness of Grievant's performance deficiencies and their relation to his duties, position and responsibilities; 2) Grievant's past work record; 3) the effect of the deficiencies upon Grievant's ability to perform at a satisfactory level and

upon supervisors' confidence in Grievant's ability to perform assigned duties; 4) consistency of the action with any applicable table of corrective action, 5) the clarity with which Grievant was on notice or warned of the deficiencies, and 6) the adequacy and effectiveness of alternative sanctions.

We conclude that Sedano had legitimate and substantial basis to conclude that Grievant had serious performance deficiencies, as set forth in detail in the Finding of Fact, in all areas of performance during the warning period. The pervasive nature and serious nature of Grievant's deficiencies resulted in his overall performance being unsatisfactory, and caused Sedano reasonably to lack confidence in Grievant's ability to perform his duties.

This performance of Grievant during the warning period followed an oral notice of performance deficiencies, an adverse performance evaluation and resultant placement in a four-month period of prescriptive remediation, and an adverse performance evaluation resulting in placing him in the warning period. Thus, his seriously deficient performance during the warning period was a continuation of Grievant's past work record of seriously deficient performance.

In sum, both prior to and during the warning period, Grievant demonstrated seriously deficient performance. Grievant, in far too many instances when given an assignment by his supervisor, either disagreed with the methods, purposes or technical aspects of the assignment, and failed to achieve the desired and required end result by untimely work or work of poor quality. His attitude and work habits were disruptive and unproductive. Grievant compounded his problems by insisting that

neither his supervisor nor anyone else in the DPS were able to evaluate his performance as an electrical engineer because they were not qualified electrical engineers themselves. Such an attitude, by persisting, put DPS in an untenable position. Sedano, and others in the Department, had the ability through general engineering education and experience to review Grievant's professional work. It also should be noted that much of the valid criticism of Grievant's work involved factors other than the technical aspects of his electrical engineering work. His attitude, lack of cooperation and inability to work with other employees, inability to produce work on time, failure to complete assignments and disruptive behavior all contributed to seriously deficient performance on Grievant's part.

Grievant had clear notice that his deficient performance was unacceptable both before and during the warning period. Sedano consistently and clearly outlined his expectations of Grievant, and informed Grievant of continued dissatisfaction with specific aspects of Grievant's performance, for the period of more than a year preceding Grievant's dismissal, including during the warning period. Sedano provided Grievant with clear notice that continued performance deficiencies could lead to dismissal.

The progressive corrective action steps employed by the Employer to seek to correct Grievant's performance deficiencies were fully consistent with the Contract. We certainly can find no fault with the Employer following the contractually prescribed route, rather than some alternative approach, to addressing an employee's performance deficiencies.

We recognize that Grievant's medical absences during the warning period meant that he actually was on duty for closer to a

two-month warning period, rather than the originally established three-month warning period. However, this does not mean the Employer was prohibited from dismissing Grievant prior to his actually being on duty for three months. An employee is placed in a warning period for a specified period of time. However, the employee is not guaranteed employment for the warning period. Grievance of Gadreault, 152 Vt. 119, 123 (1989). An employer is free to terminate an employee at any point when just cause to do so could be demonstrated and the dismissal was clearly reasonable. Id.

Here, we conclude that, based on the allegations made in Docket No. 91-27, the dismissal of Grievant was clearly reasonable. Grievant has not sustained the burden of proving that the Employer's action was arbitrary and capricious, as the Contract requires. Article 14, Section 11, 1990-92 Contract. Thus, we conclude that the dismissal of Grievant was for just cause. The grievance in Docket No. 91-27 is dismissed.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is HEREBY ORDERED that the Grievances of Mohammad Choudhary in Docket Nos. 90-34, 90-53, 91-26 and 91-27 are DISMISSED.

Dated this 19th day of May, 1992, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Louis A. Toepfer

Carroll P. Comstock

Docket No. 91-29 and 91-30

Now, having decided the four earlier grievances, we turn to a consideration of Docket Nos. 91-29 and 91-30. The Employer has filed a Motion to Dismiss and/or for Summary Judgment with respect to these cases. The Employer first contends that these grievances are barred by the doctrines of res judicata and collateral estoppel because they arise out of the same employment situation, over the same period of time, and make the same factual and legal allegations of wrongdoing on the part of the same employer, as the grievances decided herein in Docket Nos. 90-34, 90-53, 91-26 and 91-27.

In Vermont, the rule barring subsequent litigation of claims arising out of a cause of action that was previously litigated is recognized under the doctrines of collateral estoppel and res judicata. Stratton v. Steele, 144 Vt. 31, 35 (1984). Under the doctrine of res judicata, a judgment bars a subsequent hearing only if the parties, subject matter and causes of action are identical or substantially identical. Hill v. Grandey, 132 Vt. 460, 463 (1974). For res judicata purposes, the cause of action is the same if the same evidence will support the action in both instances. Id. A party will be barred from subsequent litigation as to all issues which the party could have brought in the initial action. Id. The doctrine of collateral estoppel, which is a more limited concept than res judicata, estops a party from relitigating those issues necessarily and essentially determined in a prior action. Berisha v. Hardy, 144 Vt. 136, 138 (1984). Both doctrines have as their final goals the elimination of repetitive litigation and repose to litigants. Id.

We examine the allegations made by Grievant in Docket Nos. 91-29 and 91-30 in light of these doctrines. Grievant contends that he was subjected to continuous retaliatory action, discrimination, harassment and disparate treatment, resulting in all adverse actions taken against him (i.e., oral notice of performance deficiencies, adverse performance evaluation and placement in four month prescriptive period of remediation, adverse performance evaluation and placement in warning period, and final adverse performance evaluation and dismissal). Grievant alleges that the origin of the dispute began with the retitling of the deputy chief engineer position to electrical engineer and Grievant's discovery that other positions in the DPS of equal or higher rank required significantly less experience than that of Grievant, and that positions of marginal difference to his own were at a much higher rank. Grievant alleges that he was subjected to disparate treatment in the daily operation of the DPS, including excessive scrutiny of activity and work schedules, isolation or removal from most PSB cases and hearings, and restrictions on compensatory time, seminars, courses, conferences and beeper sharing.

Grievant alleges, in these two grievances, that these actions violated the following provisions of the 1990-1992 Contract:

- Article 5, in that they were based upon discrimination due to race and/or national origin, religion or other factors unrelated to Grievant's performance;
- Article 14, in that the purported performance deficiencies

are unfounded and represented a pre-designed scheme leading to his dismissal, layoff or denial of upward mobility;

- Article 15, in that the actions constituted retaliation for his grievance activity;

- Article 73, in that the actions constituted retaliation for his "whistleblowing";

- Article 11, manipulation of personal record;

- Article 12, in that the actions did not constitute an accurate reflection of Grievant's performance; and

- Article 17, rules and regulations.

Grievant's allegations of Contract violations in Docket Nos. 91-29 and 91-30 are identical or substantially identical to those which were made in Docket Nos. 90-34, 90-53, 91-26 and 91-27 in the following respects: discrimination due to national origin, race or other factors unrelated to job performance; purported performance deficiencies not existing; retaliation due to grievance activities; retaliation due to "whistleblowing;" and adverse performance evaluations not accurately reflecting his performance. Evidence was introduced by Grievant with respect to all of the actions taken against him by the Employer which he cites in support of these allegations of Contract violations. Thus, Grievant's allegations in these areas are barred by the doctrine of res judicata since the parties, subject matter and causes of action are identical or substantially identical to those which the Board has already resolved in the earlier grievances discussed herein. Hill v. Grandey, 132 Vt. at 463. The cause of action is the same since the same evidence will support the action in Docket Nos. 91-29 and 91-30 as the earlier dockets. Id.

Thus, the bulk of Grievant's allegations in Docket Nos. 91-29 and 91-30 may not be relitigated. However, Grievant has made allegations of Contract violations in three remaining areas in Docket Nos. 91-29 and 91-30 which, on the pleadings, are not identical or substantially identical to allegations made in the previous dockets: 1) discrimination due to religion in violation of Article 5, 2) manipulation of personal records in violation of Article 11, and 3) violation of Article 17, entitled Agency, Department, and Institution Work Rules. Under the circumstances, including the procedural posture of these cases at this point in time, we conclude that it would be inappropriate to dismiss these allegations pursuant to the doctrines of res judicata or collateral estoppel based on the pleadings.

Nonetheless, the Employer has filed a Motion for Summary Judgment with respect to these issues. The Employer contends that, on the basis of facts established in the earlier grievances in Docket Nos. 90-34, 90-53, 91-26 and 91-27, the Board should hold that there remain no issues of material facts in dispute and that the Employer is entitled to judgment as a matter of law with respect to these issues.

Summary judgment may be granted only if there exists "no genuine issue as to any material fact and . . any party is entitled to judgment as a matter of law". V.R.C.P. 56(c). The moving party has the burden of proving that there is no genuine issue as to any material fact, and the non-moving party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists.

Price v. Leland, 149 Vt. 518, 521 (1988). Once the moving party meets its initial burden of showing an absence of uncontroverted material fact, the burden shifts to the non-moving party, which non-moving party must go beyond the pleadings and set forth specific facts showing that there is a genuine issue for hearing. V.R.C.P. 56(e). Pierce v. Riggs, 149 Vt. 130 (1987). Kelly v. Town of Barnard, 155 Vt. 296, 299-300 (1990).

Before granting summary judgment, the Board must provide the party opposing the motion a reasonable opportunity to show the existence of a fact question. Kelly v. Town of Barnard, 155 Vt. at 306. The opposing party must be given notice of the motion and opportunity to demonstrate the existence of a fact question. Id. After such an opportunity, summary judgment is mandated where a party fails to make a showing essential to his or her case and on which he or she has the burden of proof at trial. Poplaski v. Lamphere, 152 Vt. 251, 254-55 (1989), citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). To defeat a motion for summary judgment, an issue of fact in dispute must be both genuine and material; that is, the evidence is such that a reasonable factfinder could return a verdict for the non-moving party. Anderson v. Liberty Lobby, 477 U.S. 242 (1986) [construing Fed. R. Civ. P. 56(c), which contains substantially identical language to V.R.C.P. 56(c)]. In deciding if there is a genuine issue of material fact, all of the allegations presented in opposition to summary judgment, if supported by affidavits or other evidentiary material, are regarded as true, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue exists. Messier v. Metropolitan Life Ins. Co., 154 Vt. 406, 409 (1990).

In applying these standards to the circumstances of Docket Nos. 91-29 and 91-30, we conclude that the Employer has met its initial burden of showing an absence of uncontroverted material fact by reliance on the facts established in the earlier grievances. We conclude that those facts as found by the Board, and an examination of the record as a whole in those earlier grievances, indicate that there is no evidentiary support for Grievant's remaining allegations. Thus, the burden shifts to Grievant to set forth specific facts showing that there is a genuine issue for hearing. We conclude that Grievant has failed to meet his burden with respect to all of his remaining allegations.

First, Grievant is required to set forth specific facts showing that a genuine issue of material fact exists with respect to his allegation that Article 17 of the Contract, entitled "Agency, Department and Institution Work Rules", was violated. Article 17 provides that "each agency, department or institution shall put into writing those rules of conduct and procedure it deems necessary for its efficient operation", and allows an employee to grieve the reasonableness of any such rule or grieve any action taken against the employee based on such a rule. Grievant's response to the Employer's Motion for Summary Judgment, which contained lengthy proposed findings of fact, designated no specific facts with respect to any such rule which was violated in his case and did not even reference Article 17. Thus, we conclude that Grievant has failed to meet his burden of showing any genuine issues of material fact in dispute. In fact,

he has failed to set forth any facts at all with respect to this allegation, and thus summary judgment should be granted as a matter of law with respect to this allegation.

Second, we similarly conclude that Grievant has failed in his burden of designating specific facts showing that a genuine issue of material fact exists with respect to his allegation that Article 11 of the Contract, entitled "Employee Personnel Records", was violated. This article relates to maintenance and access to personnel records. In his response to the Employer's motion, and at the January 29, 1991, oral argument in this matter, Grievant designated no relevant facts with respect to this article. Thus, summary judgment should be granted as a matter of law with respect to this allegation.

Finally, we address Grievant's remaining allegation in Docket Nos. 91-29 and 91-30 - that he was discriminated against due to his religion. The analysis to be employed in addressing Grievant's claim of disparate treatment based on religion is the same as we used in addressing Grievant's earlier claims of discrimination based on national origin or race. Stoller v. Marsh, 682 F.2d 971 (D.C. Cir. 1982).

Grievant has established a prima facie case of discrimination based on religion. First, Grievant is a member of a protected class since he belongs to a religious sect of Islam, and Article 5 of the 1990-92 Contract protects against discrimination based on religion. Second, as earlier established, Grievant was qualified for the position which he occupied. Third, it is obvious that adverse actions were taken against Grievant with respect to his performance.

The Employer also has articulated the legitimate, non-discriminatory reason of serious performance deficiencies as the basis for the adverse actions taken against Grievant. This is reflected by consistently rating Grievant's performance unsatisfactory. Thus, the burden shifts to Grievant in the context of this summary judgment motion to go beyond the pleadings and set forth specific facts showing that there is a genuine issue for hearing. In response to the Employer's motion for summary judgment, Grievant has set forth the following specific fact which we consider relevant to his religious discrimination claim: that Sedano took a little ball from Grievant, which Grievant had received from a DPS employee as a Christmas gift, and told Grievant that he could not have the gift because he was not a Christian. We accept this allegation of fact by Grievant as true for purposes of deciding this motion, and give Grievant all reasonable doubts and inferences in determining whether a genuine issue of material fact exists. Messier v. Metropolitan Life Ins. Co., 154 Vt. at 409.

However, we conclude that when this isolated fact is considered together with all the relevant facts we have found in the previous grievances, it is insufficient to defeat the summary judgment motion. Grievant simply has not established that the issue of fact in dispute is both genuine and material. He has not established that the evidence is such that we could find for him if this case proceeded to hearing. Anderson v. Liberty Lobby, 477 U.S. at 246. The contravening evidence is just too weighty for us to be able to conclude that the legitimate and

non-discriminatory reason of Grievant's serious performance deficiencies over a substantial period of time were a pretext for the Employer taking adverse actions against Grievant due to religious discrimination. Thus, Grievant has failed to make a showing essential to his case and on which he has the burden of proof at hearing, and thus we grant the Employer's motion for summary judgment. Poplaski v. Lamphere, 152 Vt. at 254-55.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is HEREBY ORDERED that the Motion to Dismiss and/or For Summary Judgment filed by the State of Vermont is GRANTED and the Grievances of Mohammad Choudhary in Docket Nos. 91-29 and 91-30 are DISMISSED.

Dated this 19th day of May, 1992, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Louis A. Toepfer

Carroll P. Comstock