VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 91-47
JOHN TERREL	)	

FINDINGS OF FACT, OPINION, AND ORDER

Statement of Case

On July 31, 1991, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of John Terrel ("Grievant") with the Vermont Labor Relations Board against the State of Vermont Department of Motor Vehicles, Agency of Transportation ("Employer"). Therein, Grievant alleged that the Employer had violated Articles 6 and 14 of the collective bargaining agreement between the State and VSEA, for the Non-Management Unit, in effect for the period July 1, 1990 to June 30, 1992 ("Contract"), by: 1) failure to provide VSEA with information, 2) dismissal of Grievant without just cause, 2) failure to impose discipline within a reasonable time of the offense, 3) failure to apply discipline in a uniform and consistent manner, and 4) bypassing progressive discipline.

On November 1, 1991, and as amended on November 5, 1991, VSEA filed another grievance (i.e., Docket Number 91-66). Therein, VSEA alleged that the State violated Articles 6, 11, 14 and 15 of the Contract by its refusal to provide VSEA with materials relating to the investigation into the conduct of Grievant and other employees accused of misconduct at the Massachusetts Police Academy, and materials relating to subsequent disciplinary actions taken against employees. VSEA contended that it needed such materials to properly represent

Grievant in #91-47, which is the grievance from the dismissal of Grievant resulting from the investigation. On January 29, 1992, the Board issued a Memorandum and Order in Docket No. 91-66. Therein, the Board concluded that the State had violated Articles 6, 11 and 14 of the Contract by refusing to provide the requested information to VSEA. The Board ordered the Employer to provide Grievant the requested materials. 15 VLRB 13.

Grievant filed a Motion for Sanctions on February 24, 1992, due to the State's delay in complying with the Board's order of January 29, 1992. On March 5, 1992, the Employer filed a Response to Grievant's Motion for Sanctions and a Motion to Compel Production of a January 9, 1991, investigative tape in Grievant's possession.

Hearings were held on March 9 and April 6, 1992, before Board Members Louis A. Toepfer, Acting Chairman; Catherine L. Frank, and Carroll P. Comstock. Assistant Attorney General Michael Seibert represented the Employer. Jonathan Sokolow, VSEA Legal Counsel, represented Grievant.

At the March 9, 1992, hearing, the Board denied Grievant's Motion for Sanctions and decided that it was premature to rule on the Employer's Motion to Compel.

On March 13, 1992, Grievant filed a Motion for Summary Judgment. On April 1, 1992, Grievant filed an Answer to the Employer's Motion to Compel Production. At the April 6, 1992, hearing, the Board granted the Employer's Motion to Compel and declined to grant Grievant's Motion for Summary Judgment.

On April 20, 1992, the Employer filed a request to admit a transcript of the January 9, 1991, tape. On April 27, 1992,

Grievant filed a Response to the State's Motion to Admit the Tape Transcript. The Board hereby admits into evidence the transcript as State's Exhibit 10, upon being satisfied that Grievant has had an opportunity to verify the accuracy of the transcript and that the names of employees have been redacted as appropriate.

Both parties filed Proposed Findings of Fact and Conclusions of Law on May 4, 1992.

FINDINGS OF FACT

1. Grievant began employment with the Employer as a Highway Use Inspector on or about June 22, 1987, and remained in that position until his dismissal, effective July 5, 1991. Highway Use Inspectors are law enforcement officers whose primary responsibility is to inspect commercial trucks for regulatory violations. Grievant had previously worked in law enforcement and as a security guard. He had attended many law enforcement training courses in Vermont and New York, and is a member of the Vermont Army National Guard (Grievant's Exhibits 1, 2, 4).

2. As a Highway Use Inspector, Grievant received an overall rating of "consistently meets job requirements/standards" on each of his annual performance evaluations. Supervising Inspector Gerald McNamara, Grievant's supervisor during 1990 and 1991, regarded Grievant as one of his most productive employees (Grievant's Exhibit 1).

3. Highway Use Inspectors are required to periodically attend and pass training courses in such topics as hazardous materials, safety and drug interdiction to remain certified Inspectors. Some certification courses have been offered at the

Massachusetts State Police Academy. The Employer required Grievant to attend two such courses in 1990, a Drug Interdiction course and a Cargo Tank course.

4. Grievant attended the Cargo Tank course from September 24 - 28, 1990. Grievant attended the course with officers from his Department, the Vermont Department of Public Safety, and officers of various agencies from other states. Department employees who attended the Massachusetts State Police Academy in September, 1990 hereinafter are referred to as Employees #1, #2, #3, #4, #5, and #6.

5. The Cargo Tank course consisted of daily lectures, periodic written tests, hands on experience, and an open book final exam. The Drug Interdiction course which Grievant had previously attended had not required that participants pass written tests.

6. Employee #4 improperly obtained test answers prior to the tests while attending the Safety Review and Cargo Tank courses in September, 1990. Employee #4 obtained test answers for both courses and made these answers available to other employees. Grievant and some other attending employees used the answers in studying for tests and the final exams. Grievant specifically used the test answers for the Cargo Tank course.

7. During December, 1990, Employee #4 was allegedly involved in other incidents of misconduct, unrelated to his actions at the Massachusetts State Police Academy. His supervisor, Supervising Inspector Gerald McNamara, conducted an investigation of Employee #4's alleged activities. This

investigation included interviews with Employee #4's co-workers, specifically Employees #1, #3, #5, and #6.

8. Article 14, Section 7, of the Contract provides as follows:

> Whenever an employee is required, by his or her supervisor or management, to give oral or written statements on an issue involving the employee, which may lead to discipline against the employee, or whenever an employee is called to a meeting with management where discipline is to be imposed on the employee, he or she shall be notified of his or her right to request the presence of a VSEA representative and, upon such request, the VSEA representative shall have the right to accompany the employee to any such meeting. The notification requirement shall not apply to the informal inquiry of the employee by his or her supervisor without knowledge or reason to believe that discipline of the employee was a likely possibility. Subject in all cases to the consent of the employee involved, in those cases where VSEA is not representing the employee, the VSEA reserves the right to attend such meetings as a non-participating observer if in its judgment the ramifications of such meetings are likely to impact on the interests of VSEA members.

9. During McNamara's investigation of allegations of Employee #4's misconduct, Employee #3 told McNamara on December 15, 1990, that Employee #4 had surreptitiously obtained test answers during the Safety Review and Cargo Tank courses at the Massachusetts State Police Academy in September, 1990, and made them available to other employees. Employee #3 told McNamara that Employee #4 had handed him an answer sheet during the Cargo Tank course, and that he also believed that Employee #4 had given copies to other officers, including Employee #1. McNamara asked Employee #3 if he had used the answers to the tests, and Employee #3 said he had not used them. McNamara did not notify Employee #3 that he had the right to have a VSEA representative present before he answered this question (Grievant's Exhibit 9).

10. Subsequently, McNamara conducted interviews with Employees #1, #5 and #6 regarding the alleged cheating at the Massachusetts State Police Academy. McNamara questioned each of these employees to confirm the information given to him by Employee #3 and to determine if they had also participated in cheating. He did not notify any of these employees that they had a right to have a VSEA representative present during the interviews.

11. McNamara interviewed Employee #5 on December 17, 1990, Employee #1 on December 18, 1990, and Employee #6 on December 19, 1990. Employees #5 and #6 confirmed that Employee #4 had obtained test answers and had offered these answers to each of them, but that each of them had refused to use the answers. Employee #1 indicated that he had attended a Hazardous Materials course in June 1990 and the Cargo Tank course in September 1990 at the Massachusetts State Police Academy with Employee #4. In response to McNamara's question whether Employee #4 had ever offered him test answers, Employee #1 told McNamara that Employee #4 had never offered him answers to tests at either of the courses (Grievant's Exhibit 9).

12. McNamara verbally reported the cheating incidents at the Massachusetts State Police Academy to his supervisor, Chief Inspector Ronald Macie. On December 27, 1990, McNamara completed an investigation report for Macie concerning Employee #4. McNamara recommended Employee #4's termination in this report (Grievant's Exhibit 9).

13. McNamara's investigative report relative to information he had received from Employees #1 and #3 states in pertinent part:

> ...Employee #3 swears that although Employee #4 gave him copies of the answers, he never did use them because it wouldn't have felt right. He did say that he thought Employees #5 and #6 may also have been offered copies of the test answers by Employee #4 and believes he also gave copies to his "friends" from other agencies who attended the courses in question...
>
> ...Employee #1 said that Employee #4 never offered him answers to the test...although he overheard someone talking about it some time ago and thought they were joking (Grievant's Exhibit 9).

14. Subsequent to McNamara's investigation of Employee #4, Macie's supervisor, Director of Field Force Bonnie Rutledge, requested that Supervising Inspector Carol Kostelnik conduct a separate investigation of the alleged cheating by Department officers attending the Massachusetts State Police Academy. The only information Kostelnik was given was a schedule of courses and a list of the officers who attended, none of whom were officers that she supervised. Kostelnik did not have the December 27, 1990, report McNamara prepared for Macie. McNamara or Macie did verbally brief Kostelnik on McNamara's investigation, although Kostelnik was not aware that Employees #1 and #3 had informed McNamara they had not used the test answers at the Massachusetts State Police Academy.

15. Kostelnik separately interviewed each of the Department's employees who attended courses at the Massachusetts State Police Academy with Employee #4, as well as officials from the Massachusetts State Police Academy.

16. Prior to each of the interviews, Kostelnik informed the employees that she was investigating alleged improprieties of Department employees during training courses at the Massachusetts State Police Academy. Kostelnik informed each of the employees at the outset of the interview that they had a right to have a VSEA representative present. Kostelnik told each employee that they were required to tell the truth and that no criminal charges would result against them from their testimony.

17. Employee #5 informed Kostelnik that he had been offered the answers to a Safety Review test by Employee #4, but had refused them. Employee #5 did acknowledge looking at the answers after the test was over to compare his answers to the correct ones. Employee #6 also revealed that he had been offered answers to a Safety Review test by Employee #4, but he did not take them or look at them (State's Exhibit 1).

18. On January 9, 1991, Kostelnik interviewed Grievant. Richard Lednicky, VSEA Field Representative, represented Grievant at this interview. Grievant denied any participation in cheating at the Massachusetts State Police Academy. At the outset of the interview, Grievant indicated that he had not seen any answer sheets at the Massachusetts Police Academy. Later in the interview, Grievant admitted that he knew that the answers were in a drawer in Employee #4's room. Grievant then stated that he had looked at the answers at one point, but that he did not trust that they were the real answers and had not used them (State's Exhibits 1 and 10).

19. Employee #3 told Kostelnik that he had been given answers to two, possibly three, tests by Employee #4. Employee #3 indicated that he never referred to the answers during the test but that he did refer to the answers in preparing for the tests (State's Exhibit 1).

20. Employee #1 told Kostelnik that he had been given the answers to the quizzes and tests for both the Hazardous Materials and the Cargo Tank courses by Employee #4. Employee #1 admitted that he had used the answer sheets during the tests themselves, comparing his answers with those on the answer sheets and changing his answers in some cases to conform to the answer sheet (State's Exhibit 1).

21. Employee #2 told Kostelnik that he asked Employee #4 for, and was given, the answers to the final exam for the Safety Review course. Employee #2 indicated that he memorized some of the answers but did not refer to the answer sheet during the test (State's Exhibit 1).

22. Kostelnik conducted second interviews with all the officers, except Grievant, before completing her investigation and writing a report on the investigation for Macie. Grievant was not available for a second interview during the period the other second interviews were conducted because he was on vacation. Also, Kostelnik did not believe that Grievant had anything further to add to the investigation. The primary purpose of the second set of interviews was to follow through on contradictory information Kostelnik had received from Employee #4.

23. At the end of this second round of interviews, Kostelnik prepared a report for Macie, which summarized her

interviews with each of the employees. Kostelnik submitted her written report to Macie on February 22, 1991 (State's Exhibit 1).

24. Macie reviewed the report and concluded that Employee #4, who by this point had separated from state employment, had a great deal of adverse influence on the other employees. Although Macie was disappointed in the behavior of Employees #1, #2, and #3, he believed that he could trust each of these officers. Macie consulted with Rutledge and William McManis, Human Resources Chief for the Agency of Transportation, and imposed discipline on these employees based on Kostelnik's report and his personal knowledge of each of them.

25. By letter dated March 14, 1991, Macie gave Employee #1 a letter of reprimand which Macie indicated would remain in Employee #1's personnel file for nine months. Macie stated:

> Though you had no part in obtaining the answers illegally, you did review the answers, study the answers, or use them during the exam to check your answers. It is my opinion that this action is not what we expect from an officer sworn to uphold the law (State's Exhibit 8, page 1).

26. By letter dated March 14, 1991, Macie gave Employee #2 a letter of reprimand which Macie indicated would would remain in Employee #2"s personnel file for six months. Macie stated:

> Though you had no part in obtaining the answers illegally, you did review the answers and study the answers. It is my opinion that this is not what we expect from an officer sworn to uphold the law (State's Exhibit 8, page 2).

27. By letter dated March 25, 1991, Macie gave Employee #3 a letter of reprimand which Macie indicated would remain in Employee #3's personnel file for 30 days. Macie stated:

> Though you had no part in obtaining the answers illegally, you did receive the answers on at least two occasions and did read them. Although I've satisfied myself that you <u>did</u>

> not study the answers or use them in the classroom exam, you did read over them.. What seems more important to me though is that you accepted them the second time even after knowing what Employee #4 was handing out. It is my opinion that this action is not what we expect from an officer sworn to uphold the law (State's Exhibit 8, page 3).

28. Grievant and Employees #5 and #6 were not disciplined on the basis of Kostelnik's investigation report of February 22, 1991.

29. The employees who had admitted to Kostelnik that they had cheated, and then been disciplined by Macie, complained to Kostelnik because they knew they were not the only Department employees who had cheated. They told her it was unfair that they had told the truth and had been the only ones disciplined.

30. On or about April 1, 1991, Michael Griffes was appointed as Commissioner of Motor Vehicles. Griffes visited the Department prior to beginning his tenure, at which time the Acting Commissioner and Director Rutledge informed him of the Massachusetts State Police Academy cheating incident that had involved Department employees. Griffes later met with Kostelnik and she gave him a verbal status report of her investigation of the matter.

31. Griffes was disappointed to learn of the discipline that had been imposed on Employees #1, #2, and #3. He thought that the discipline imposed had been "short of the mark". Griffes was also disappointed that none of the officers had come forward about the cheating and was surprised to learn that the Department did not have a written code of ethics. Griffes decided that further investigation would have to be done to resolve any outstanding issues.

32. Kostelnik decided to interview Grievant for a second time because she thought that some of Grievant's answers had been inconsistent during the January 9, 1991, interview, and because of the complaints of the employees disciplined that other employees who had cheated had not been disciplined. Kostelnik arranged an interview with Grievant for April 16, 1991, and again informed Grievant of his right to have a VSEA representative present. Prior to the interview, Griffes told Grievant that he was concerned that there were still outstanding questions and that he hoped the interview would resolve them (State's Exhibit 2).

33. VSEA Representative Gail Rushford represented Grievant during the April 16, 1991, interview. At the outset of the interview, Kostelnik informed Grievant of his obligation to tell the truth. Grievant initially denied that he had cheated while enrolled in the Cargo Tank course. Grievant indicated that he knew that there were answer sheets in Employee #4's room, but that he only had glanced at one set of answers and had not studied the answers or taken a copy of them. However, under pressure from Kostelnik to tell the truth and after Kostelnik informed Grievant that other employees had told her that Grievant had the answer sheets, Grievant finally admitted that he had access to and did study answers to quizzes and the final exam prior to actually taking the tests (State's Exhibits 2 and 9).

34. Griffes received a verbal summary of Kostelnik's second interview with Grievant and immediately requested that Kostelnik prepare a written report. Kostelnik submitted a written report,

summarizing events leading up to the interview and the interview itself, on April 17, 1991 (State's Exhibit 2).

35. After reviewing Kostelnik's April 17, 1991, report, Griffes assigned Kostelnik to conduct a thorough review of the entire record to determine whether there were any other inconsistencies by other employees. Griffes also consulted with his counterparts at the Vermont Department of Public Safety and at the Massachusetts State Police Academy, and provided the Attorney General's Office with the record of the investigation.

36. Kostelnik reviewed her notes of interviews, tapes, and observations made during her four months of investigation. She wrote a comprehensive summary of her investigation for Griffes, dated May 9, 1991. Kostelnik did not include any information in this report with respect to McNamara's independent investigation and report of December, 1991. Kostelnik still had not seen McNamara's report. Kostelnik had attended a series of interviews conducted by Massachusetts officials with Employees #1, #2, and #3 on May 7, 1991, and she included information on those interviews in her May 9 report. Kostelnik indicated that Employee #2 had provided different information to her than he had given to the Massachusetts officials. Kostelnik's report with respect to Employee #2 states in pertinent part:

> The testimony provided by Emp #2 to the Massachusetts authorities differed from what he had previously reported to me...Employee #2 stated (to Kostelnik) he had been <u>given</u> the answer sheet to the Cargo Tank final exam by a Rhode Island Trooper who he thinks had taken the answer sheet from a book on Emp #4's desk or possibly from his pocket. He would not repeat the part of the trooper <u>"giving"</u> him the answer sheet even when specifically asked how he ended up with the answers. Emp #2 also told me me on numerous occasions that it was "obvious" everyone had the answers....At a later date

> after his second interview, Emp #2 told me that the Massachusetts officer who had received top honors in the class even had the answers to the final exam. None of this information was given to the Massachusetts investigators even when I mentioned our previous conversations. Emp #2 told these investigators he was not aware anybody else (other than Emp #4 and himself) had the answers, saw the answers, or was offered the answers. I don't know why he wouldn't repeat what he had said to me. I was told not to reinterview Emp #2 at this point. I can only assume he, too, had no first-hand knowledge, only suspicions based on his observations, the behavior of others, and the openness of Emp #4 about having the answers and making them available to anyone who wanted them (State's Exhibit 3).

37. In the May 9, 1991, report, Kostelnik summarized the consistency and completeness of Employee #2's statements as follows:

> No deviation concerning personal involvement at any point; offered conclusions as well as first-hand observations of involvement of others, especially after second interview. Interviewed by Massachusetts investigators; did not offer information concerning involvement of others (State's Exhibit 3, page 3).

38. Kostelnik's May 9, 1991, report to Griffes concluded that Employees #1, #3, #5, and #6 had not made inconsistent statements during the course of the investigation. She concluded that Employee #3 had provided her with somewhat different information than he had provided the Massachusetts authorities but that this did not indicate that he had made inconsistent statements. Kostelnik indicated that this was explained by the different questions that had been asked Employee #3 by Kostelnik and the Massachusetts authorities (State's Exhibit 3, page 2). Kostelnik's summary of Grievant's testimony states in pertinent part:

> Information concerning personal involvement changed drastically during first interview; did not admit personal involvement. During the second interview, his testimony changed again from beginning to end; not until the end of this second interview, did he admit his involvement in the cheating (State's Exhibit 3, page 3).

39. After Griffes reviewed Kostelnik's final May 9, 1991, report, and after he had completed all other inquiries he had made, Griffes assessed the appropriate disciplinary action for Grievant. There is no evidence that Griffes was aware of McNamara's December 1990 report, or that he was aware of any of the details of the investigation leading to that report, at the time Griffes was deciding the appropriate disciplinary action to take against Grievant. Griffes concluded that lying during an internal investigation process was a serious offense, that this compromised Grievant's ability to serve as a law enforcement officer where he was sworn to uphold the law. Griffes was aware that none of the other involved employees had stepped forward with respect to the cheating without prompting, and Griffes concluded that cheating violated any reasonable code of ethics. However, Griffes concluded that deceit during the internal investigation process was a much more serious offense. Griffes did not personally review all of Grievant's past performance evaluations, but was aware from Human Resources Chief McManis, who had reviewed all the evaluations, that Grievant had no past performance or disciplinary problems. Griffes thought that it would be difficult to rehabilitate Grievant given the nature of his offenses.

40. McManis wrote Grievant a letter on June 10, 1991, called a Loudermill letter, based on a US Supreme Court decision of that name, 470 US 532 (1985). McManis informed Grievant in this letter that Griffes was contemplating his dismissal, setting

forth two reasons:

> 1) During a course held 09/24-28/90 at the Mass State Police Academy you used a bootleg summary of test answers in preparation for one or more examinations which you had to pass in order to receive certification for the course.
>
> 2) During an official administrative investigation conducted on behalf of the Commissioner of Motor Vehicles you misrepresented both your knowledge of cheating on such exams and your own involvement in such cheating. You have since admitted (April 16, 1991) that you knew of cheating and reviewed the test answers prior to taking one or more test.

McManis informed Grievant in this letter that he had a right to respond to these charges, either orally or in writing, before a final decision was made (State's Exhibit 5).

41. In response to this letter, Grievant and VSEA representative Rushford met with Griffes and McManis on June 11, 1991. In response to a question by Rushford, McManis explained that cheating was not the problem, but rather his lying during the internal investigation.

42. By letter of June 11, 1991, Grievant informed McManis that Grievant's conduct was out of character, and that he would be grateful if McManis gave him another chance (Grievant's Exhibit 8).

43. By letter of July 2, 1991, McManis informed Grievant of his dismissal, effective July 5, 1991. The letter provided in pertinent part as follows:

> Based on the facts presented in the letter dated June 10, 1991 and consideration of our discussion June 11, 1991 . . . I find that your separation from employment is justified . . . You will be given two weeks pay in lieu of notice (State's Exhibit 6).

44. Griffes did not impose further discipline on Employees #1, #2, and #3.

45. Article 14 of the Contract, entitled Disciplinary Action, provides in pertinent part as follows:

> 1. No permanent . . . employee covered by this Agreement shall be disciplined without just cause. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:
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> a. act promptly to impose discipline . . . within a reasonable time of the offense;
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> b. apply discipline . . . with a view toward uniformity and consistency;
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> c. impose a procedure of progressive discipline . . .
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> d. In misconduct cases, the order of progressive discipline shall be:
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> i. oral reprimand;
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> ii. written reprimand;
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> iii. suspension without pay;
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> iv. dismissal.
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> . . .
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> f. The parties agree that there are appropriate cases that may warrant the State:
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> i. bypassing progressive discipline . . .
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> ii. applying discipline . . . in different degrees
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> . . .
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> 8. The appointing authority or authorized designee may suspend an employee without pay for reasons for a period not to exceed thirty (30) workdays . . .
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> 10. In any misconduct case involving a suspension or dismissal, should the Vermont Labor Relations Board find just cause for discipline, but determine that the penalty was unreasonable, the Vermont Labor Relations Board shall have the authority to impose a lesser form of discipline.

OPINION

Grievant contends that just cause does not exist for his dismissal pursuant to Article 14 of the Contract; that the Employer inappropriately bypassed progressive discipline. Grievant contends that the Employer violated the requirement of Article 14, Section 1(b), providing that "the State will . . . apply discipline . . . with a view toward uniformity and consistency", when Grievant's conduct and resulting discipline is compared with the conduct and resulting discipline of the other employees involved in improprieties at the Massachusetts State Police Academy. Grievant requests that the Board impose the lesser form of discipline of a written reprimand.

The State contends that the repeated acts of dishonesty by Grievant, a law enforcement officer, provided just cause for his dismissal. The State contends that the conduct of other employees engaged in improprieties at the State Police Academy can be distinguished from Grievant's conduct; that Grievant's offenses were far more serious. Thus, the State takes the position that there was no violation of the Contract provision on uniformity and consistency of discipline.

The Vermont Supreme Court has defined just cause for dismissal as some substantial shortcoming detrimental to the employer's interests which the law and a sound public opinion recognize as a good cause for dismissal. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). The ultimate criterion of just cause is whether the employer acted reasonably in discharging the employee because of misconduct. Id. A discharge may be upheld

only if it meets two criteria of reasonableness: one, that it is reasonable to discharge employees because of certain conduct and the other, that the employee had fair notice, express or implied, that such conduct would be ground for discharge. Id.

The Employer charges that Grievant engaged in misconduct by: 1) cheating on examinations given in connection with the Cargo Tank course at the Massachusetts State Police Academy, by using a summary of test answers improperly obtained in preparation for the examinations; and 2) misrepresenting both his knowledge of cheating on such exams and his own involvement in such cheating during an investigation conducted by the Employer concerning the improprieties at the Police Academy. The Employer has proven these charges.

The charges against Grievant having been established, we look to the specific factors articulated in Grievance of Colleran and Britt, 6 VLRB 235, 268-69 (1983), to determine the reasonableness of the disciplinary action imposed based on the proven charges. The pertinent factors here are the nature and seriousness of the offense and its relation to Grievant's duties, whether Grievant had fair notice that such conduct would be ground for discharge, the consistency of the penalty with those imposed upon other employees for similar offenses, the effect of the offense upon supervisors' confidence in Grievant's ability to perform assigned duties, Grievant's past disciplinary and work record, the potential for the employee's rehabilitation, and the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by Grievant and others.

Grievant's offenses were serious. Through his cheating in connection with the exams at the Massachusetts State Police Academy, and then denying that he had cheated during an investigation by the Employer of improprieties at the Police Academy, Grievant demonstrated repeated dishonesty. The Board and the Vermont Supreme Court have upheld management actions bypassing progressive discipline and dismissing state employees for misappropriation of funds or state equipment, falsification of expense claims, repeated dishonesty or other acts of dishonesty. Grievance of Graves, 7 VLRB 193 (1984); Affirmed, 147 Vt. 519 (1986). In re Grievance of Carlson, 140 Vt. 555 (1982). Grievance of Cruz, 6 VLRB 295 (1983). Grievance of Barre, 5 VLRB 10 (1982). Grievance of DeForge, 3 VLRB 196 (1980). Grievance of Newton, 1 VLRB 378 (1978). Dishonesty by employees is grounds for serious punishment regardless of the position they hold. Graves, 7 VLRB at 210-11.

The Board has specifically recognized that the duties of an employee working in law enforcement require that they be honest in their dealings with their employer, and upheld the dismissal of a correctional officer whom was dishonest during the grievance process. Grievance of Johnson, 9 VLRB 94 (1986). Affirmed, Unpublished Opinion, Sup. Ct. Docket No 86-300 (December 20, 1989). The Board stated:

> The nature of Grievant's duties required her to be a witness to actions involving inmates which she had to report accurately . Her acts could result in lawsuits being brought against the Department of Corrections. In essence, her job could require her to be a witness in many types of disputes . . . Given these duties, it is inherent in her job that Grievant's superiors have confidence in her credibility. Grievant cast

> substantial doubt on her credibility by lying to the Step II hearing officer . . . Further, the incident could lead to Grievant's impeachment in other aspects of her duties, and diminish her effectiveness. 9 VLRB at 114.

Grievant, like the employee in Johnson, was a law enforcement officer. It was his primary responsibility to inspect commercial trucks for regulatory violations. As such, the success of his enforcement activities depended upon his credibility in the accurate reporting of events. As in Johnson, it is inherent in Grievant's job that his superiors have confidence in his credibility. His cheating during law enforcement training and his lying during the internal investigation on the cheating incident reasonably led Grievant's superiors to question his ability to perform assigned duties and to call into question Grievant's credibility.

Also, Grievant had fair notice that his conduct was, or should have been, known to Grievant to be prohibited by the Employer. Honesty is an implicit duty of every employee and, at a minimum, an employee should know that dishonest conduct is prohibited. Carlson, 140 Vt. at 560.

However, we conclude that the Employer did not act in a uniform and consistent manner in imposing discipline by dismissing Grievant, in light of the written reprimands imposed on Employees #1, #2 and #3.

First, it is evident that Grievant's misconduct with respect to the cheating itself at the Massachusetts State Police Academy was similar to that of Employees #1, #2 and #3. In all cases, the employees were aware of cheating and either cheated in

preparation for examinations or during the examinations themselves.

Second, Employees #1, #2 and #3 lied during the course of interviews about their own involvement in the cheating or the involvement of other employees. During an investigation of alleged misconduct by Employee #4 concerning incidents unrelated to the improprieties at the Massachusetts State Police Academy, Employee #3 told the investigator, Supervising Inspector McNamara, that Employee #4 had improperly obtained test answers during the training course at the Police Academy and had made them available to other employees. Upon questioning by McNamara whether he had used answers to the tests, Employee #3 said he had not used them. This was not a truthful answer, since Employee #3 did use such answers in preparing for the tests, as he later admitted to Supervising Inspector Kostelnik during her investigation of the improprieties at the Police Academy.

Employee #1 also was untruthful to McNamara with respect to his involvement in the cheating. In response to McNamara's question whether Employee #4 had ever offered him test answers at courses at the Police Academy, Employee #1 denied that Employee #4 had offered him test answers. In fact, Employee #1 had been given the test answers by Employee #4 and had used them during the tests themselves, as he later admitted to Kostelnik during her investigation.

Nonetheless, the Employer contends that the discrepancy in the discipline imposed against Grievant, as compared to Employees #1 and #2, does not warrant a conclusion that the Employer was

imposing discipline in a manner that was not uniform and consistent. The Employer contends that McNamara violated Article 14, Section 7, of the Contract by requiring Employees #1 and #3 to make a statement, knowing that their responses could result in discipline against them, without having first notified them that they had a right to have VSEA representation in the interview. The Employer reasons that, since the Contract would not have allowed the Employer to take any disciplinary action against Officers #1 and #3 for dishonesty during an interview prohibited by the Contract, the Employer's failure to have done so cannot be reasonably viewed as evidence of inconsistent discipline for a similar offense.

The Employer is correct that McNamara violated Article 14, Section 7, of the Contract by not notifying Employees #1 and #3 of their right to have a VSEA representative present at the interviews before he asked them of their involvement in the cheating incident at the Police Academy. Article 14, Section 7, provides in pertinent part:

> Whenever an employee is required, by his or her supervisor or management, to give oral or written statements on an issue involving the employee, which may lead to discipline against the employee . . . he or she shall be notified of his or her right to request the presence of a VSEA representative and, upon such request, the VSEA representative shall have the right to accompany the employee to any such meeting.

By asking Employees #1 and #3 questions concerning their involvement in improper use of test answers at the Police Academy, McNamara was requiring Employees #1 and #3 to give oral statements on an issue involving them which could lead to

discipline against them. Yet, he did not notify them of their right to have a VSEA representative present before providing such statements, and thereby violated the Contract.

The Employer also is correct that the violation of the Contract by McNamara meant that the Employer could not take disciplinary action against Employees #1 and #3 due to their dishonest statements to McNamara during the contractually prohibited interview. When the right to union representation at an interview which may result in disciplinary action has not been granted to an employee, the Board has excluded as inadmissible evidence against the employee any harmful statements made by the employee at the interview. Grievance of Dustin, 9 VLRB 296, 301-02 (1986). Where those statements form the sole basis for the disciplinary action, the Board has rescinded the disciplinary action imposed. Id. cf., Grievance of VSEA and Tatro, 10 VLRB 78, 85-87 (1986).

However, we disagree with the Employer's reasoning that, since the Contract would not have allowed the Employer to take any disciplinary action against Officers #1 and #3 for dishonesty during an interview prohibited by the Contract, the Employer's failure to have done so cannot be reasonably viewed as evidence of inconsistent discipline for a similar offense. The Employer's reasoning is not consistent with the purpose of the rule set forth by the Board in the Dustin case. The stated rationale for the rule was that the employer should not benefit, and the interviewed employee and VSEA conversely should not be harmed, by

the fruits of a contractually prohibited interview. Dustin, 9 VLRB at 302. The Board concluded that the employee in Dustin was obviously harmed since the incriminating statements he made in the interview carried out in violation of the Contract resulted in his suspension. Id. at 301. The Board further concluded that VSEA was obviously harmed since the contract violation subverted the central institutional purpose of VSEA to represent employees. Id. at 301-02.

Here, the Employer is attempting to stand the rationale of the Dustin rule on its head by seeking to benefit from its own Contract violations with respect to Employees #1 and #3 to support the disciplinary action against Grievant, who would be obviously harmed if the Board did not consider as evidence of inconsistent discipline the untruthful statements of Employees #1 and #3. The result of accepting the Employer's argument would be that Grievant would lose his job due to cheating and being dishonest with the Employer with respect to his cheating in the Employer's investigation, whereas other employees who also cheated and were dishonest with the Employer with respect to their involvement in the cheating only received written reprimands, because the Employer mishandled the investigation with respect to the other employees. Such a result would be an unreasonable application of discipline to Grievant, and we conclude that the statements of Employees #1 and #3 to McNamara must be considered as relevant evidence of inconsistent discipline and should have been considered by the Employer when considering the discipline to be imposed on Grievant.

This does not mean that we conclude that Grievant's dishonesty and that of Employees #1 and #3 were of equal degrees. Grievant was dishonest throughout one full interview, and a good part of a subsequent interview with the Employer's investigator, when he knew at the outset of such interviews that the focal point of the interviews would be his knowledge of, and involvement in, improprieties at the Massachusetts State Police Academy. On the other hand, in each of the cases of Employees #1 and #3, the dishonesty occurred at one interview during an investigation in which the focal point was alleged misconduct by Employee #4 in instances beyond the incidents at the Police Academy. These distinctions lead to our conclusion that Grievant's dishonesty was of a more serious degree than those of Employees #1 and #3. However, Grievant's offenses, in comparison with those of Employees #1 and #3, were not of such a greater degree to result in his dismissal being reasonable under circumstances where Employees #1 and #3 received written reprimands for their offenses.

We also note that the fact that neither Supervising Inspector Kostelnik nor Commissioner Griffes were aware of Employee #1 and #3's dishonest statements to Supervising Inspector McNamara at the time the disciplinary action was imposed on Grievant does not absolve the Employer of responsibility for discipline not being applied in a uniform and consistent manner to Grievant. McNamara's statements revealing the dishonesty of Employees #1 and #3 were contained in a report he provided to his supervisor, Chief Inspector Macie, prior to

Macie imposing discipline on Employees #1 and #3. The failure of this information to be known to Kostelnik and Griffes was a serious flaw in the Employer's own internal communications during the investigation, and the Employer must take responsibility for the implications of such a flaw with respect to applying discipline in an uniform and consistent manner.

Also, the conduct of Employee #2 with respect to dishonesty, and the resulting discipline imposed on him, as compared to Grievant is relevant evidence contributing to our conclusion that discipline was not applied to Grievant in an uniform and consistent manner. It is evident that Employee #2 misled Massachusetts authorities about his knowledge of the involvement of employees of states other than Vermont in the cheating at the Police Academy, and contradicted his earlier statements to Kostelnik about the involvement of these employees. Despite this, the Employer did not conduct further interviews with Employee #2 to explain the contradictions and took no further disciplinary action against him as a result of this dishonesty.

It is true that Grievant's dishonesty, occurring in two separate interviews conducted by his employer with respect to his own involvement in the incidents, was more serious than that of Employee #2, whose dishonesty was in one interview not conducted by the Employer and was with respect to the involvement of other employees. Nonetheless, no disciplinary action was taken against Employee #2 for work related dishonesty, whereas Grievant was dismissed. The striking difference in treatment contributes to our conclusion that discipline was not applied to Grievant in an uniform and consistent manner.

In sum, we conclude that the Employer did not apply discipline in an uniform and consistent manner to Grievant when his misconduct and resulting discipline is compared to that of Employees #1, #2 and #3. It is apparent to us that Grievant received a disproportionately severe penalty due to a seriously flawed investigation by the Employer, and due to a new Commissioner being appointed after the other employees were disciplined but before Grievant was disciplined. The Commissioner viewed the misconduct by employees at the Massachusetts State Police Academy in a more serious light than did the predecessor administration, and believed the discipline imposed on Employees #1, #2 and #3 fell "short of the mark". Although it is equally apparent to us that the Commissioner acted with the good intention of seeking to remedy a situation which had done much to damage the credibility and integrity of his Department, it was unreasonable under all the circumstances for the Employer to subject Grievant to dismissal in light of the discipline imposed on the other employees.

Also, although of less significance to our ultimate conclusion, Grievant's past work record and disciplinary record during his four years of employment indicate that he does have the potential for rehabilitation. Prior to the incidents in question herein, Grievant was not disciplined. He was considered by his superiors to be a trustworthy and productive employee.

Under the circumstances, we conclude that, while Grievant's repeated dishonesty had an adverse effect upon supervisors' confidence in Grievant's ability to perform his duties, the

Employer acted unreasonably in completely bypassing progressive discipline. Clearly, Grievant's behavior warrants serious discipline. However, dismissal is unwarranted when other employees also engaged in dishonesty received such disproportionately lighter penalties.

Under the circumstances, a stiff suspension constitutes an adequate and effective alternative sanction to impose on Grievant to deter such conduct by him or others in the future. We will impose the maximum penalty short of dismissal allowed by the Contract - a 30 day suspension. While a 30 day suspension might not seem adequate given Grievant's serious offenses of repeated dishonesty, we believe a summary dismissal is unreasonable and in violation of the Contract's directive that discipline be applied with a view toward uniformity and consistency.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of John Terrel is SUSTAINED; and

1. Grievant shall be reinstated to his position as a Highway Use Inspector with the Vermont Department of Motor Vehicles, Agency of Transportation;

2. Grievant shall be awarded back pay and benefits from the date commencing 30 working days from the date of his discharge until his reinstatement for all hours of his regularly assigned shift, minus any income (including unemployment compensation received and not paid back) received by Grievant in the interim;

3. The interest due Grievant on back pay shall be computed on gross pay and shall be at the rate of 12 percent per annum and shall run from the date each paycheck was due during the period commencing 30 working days from Grievant's dismissal, and ending on the date of his reinstatement; such interest for each paycheck date shall be computed from the amount of each

paycheck minus unemployment compensation received by Grievant during the payroll period; and

4. The parties shall submit to the Board by September 16, 1992, a proposed order indicating the specific amount of back pay and other benefits due Grievant; and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Board. Any evidentiary hearing necessary on these issues shall be held on October 1, 1992, at 9:30 a.m., in the Labor Relations Board hearing room, 13 Baldwin Street, Montpelier, Vermont.

Dated this 27th day of August, 1992, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Louis A. Toepfer
Acting Chairman

Catherine L. Frank

Carroll P. Comstock