

VERMONT LABOR RELATIONS BOARD

GRIEVANCES OF:)	
)	DOCKET NOS. 97-18, 97-22
JOHN WILMERDING)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 19, 1997, John Wilmerding ("Grievant") filed a grievance, Docket No. 97-18, contesting the unsatisfactory performance evaluation he received from the Vermont Department of Corrections ("Employer") for the period July 6, 1995 - July 1996. Grievant alleged that the Employer violated Articles 5, 12 and 14 of the collective bargaining agreement between the Vermont State Employees' Association ("VSEA") and the State of Vermont for the Corrections Bargaining Unit ("Contract") because: 1) Grievant was not put on timely notice by his immediate supervisor of all work deficiencies that would adversely affect his overall rating, 2) the unsatisfactory performance rating was not based in fact or supported by just cause, 3) the Employer improperly bypassed progressive corrective action, 4) the Employer harassed and intimidated him, and 5) Grievant inappropriately lost an annual step increase as a result of the unsatisfactory performance evaluation.

On April 28, 1997, Grievant filed a second grievance, Docket No. 97-22, over his dismissal. Grievant alleged that his dismissal violated Articles 5, 12 and 14 of the Contract because: 1) he was not put on timely notice by his immediate supervisor of all work deficiencies that would adversely affect his overall performance rating, 2) his dismissal was not based in fact or supported by just cause, 3) the Employer improperly bypassed progressive corrective action by not placing Grievant in a

warning period prior to dismissing him, 4) the Employer harassed and intimidated him, and 5) Grievant inappropriately lost an annual step increase as a result of his unsatisfactory performance evaluation.

Dockets Nos. 97-18 and 97-22 were consolidated for hearing. Hearings were held in the Labor Relations Board hearing room on November 20, 1997, December 15, 1997, December 16, 1997, and January 29, 1998, before Board Members Richard Park, Acting Chairperson; Leslie Seaver and Carroll Comstock. An additional hearing was scheduled for January 23, 1998, but Grievant failed to appear for the hearing, and the hearing was continued. Grievant represented himself. Assistant Attorney General David Herlihy represented the Employer. Grievant and the Employer filed post-hearing briefs on February 13, 1998.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

...

ARTICLE 5 NO DISCRIMINATION OR HARASSMENT; and AFFIRMATIVE ACTION

1. **NO DISCRIMINATION, INTIMIDATION OR HARASSMENT**

In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination, neither party shall discriminate against, intimidate, nor harass any employee because of race, color, religion, creed, ancestry, sex, marital status, age, national origin, handicap, membership or non-membership in the VSEA, filing a complaint or grievance, or any other factor for which discrimination is prohibited by law.

...

ARTICLE 12 PERFORMANCE EVALUATION

1. **Timing of Evaluations:** Annual performance evaluations shall normally take place near the anniversary date of completion of original probation . . .

An oral or written notice of performance deficiency (Step 1 in the order of progressive corrective action) shall not be grievable when issued, and, when issued, shall not require the presence of a union representative. However, once step 2 of progressive corrective action has been implemented (a special or annual evaluation coupled with a prescriptive period for remediation) such notice or a written record of such notice shall be placed in the employee's personnel file and shall be fully grievable.

2. The determination of performance evaluation standards and criteria is understood to be the exclusive prerogative of management, provided, however, the State will notify VSEA, forty-five (45) days prior to the date of implementation, of any proposed change in the form or of such standards and criteria as they appear on the form and give VSEA an opportunity to respond and suggest alternatives to the changed form prior to its implementation.

Performance evaluations shall continue to be based exclusively on job duties, responsibilities, and other performance related factors . . .

There shall be four grades on an annual or special evaluation: Unsatisfactory ("U"), Satisfactory ("S"), Excellent ("E") and Outstanding ("O") . . . An Unsatisfactory overall grade is fully grievable. The VLRB shall not have the authority to change any such grade but may remand the rating to the employer for reconsideration consistent with the VLRB ruling on the merits.

...

4. The immediate supervisor shall discuss the rating with the employee, calling attention to particular areas of performance and, when necessary, pointing out specific ways in which performance may be improved. During the rating year, the immediate supervisor shall call the employee's attention to work deficiencies which may adversely affect a rating, and, where appropriate, to possible areas of improvement. The immediate supervisor will accommodate a reasonable request by an employee for a meeting to discuss any such work deficiency, suggested improvement, or rating, or any performance evaluation standard or criterion that the employee considers unreasonable or unachievable.

...

**ARTICLE 14
DISCIPLINARY ACTION**

1. No permanent or limited status employee covered by this agreement shall be disciplined without just cause. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:

- (a) act promptly to impose discipline or corrective action within a reasonable time of the offense;
- (b) apply discipline or corrective action with a view toward uniformity and consistency;
- (c) impose a procedure of progressive discipline or progressive corrective action . . .
- (e) In performance cases, the order of progressive corrective action shall be as follows:

- (1) feedback, oral or written (Records of feedback are not to be placed in an employee's personnel file except in compliance with the Performance Evaluation Article);
- (2) written performance evaluation, special or annual, with a specified prescriptive period for remediation specified therein, normally 3 to 6 months;
- (3) warning period of thirty (30) days to three (3) 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;
- (4) dismissal.

(f) The parties agree that there are appropriate cases that may warrant the State:

- (1) bypassing progressive . . . corrective action . . . as long as it is imposing . . . corrective action for just cause.

2. The appointing authority or authorized representative . . . may dismiss an employee for just cause . . . In the written dismissal notice, the appointing authority shall state the reason(s) for dismissal . . .

11. In 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. It is understood that this paragraph does not bar a grievance alleging that progressive corrective action was bypassed.

2. Grievant was hired by the Employer in January, 1995, into an interim status position as a Reporative Programs Coordinator for Windham County. Grievant was one of several Reporative Programs Coordinators hired throughout the state to

implement a new restorative justice program established by the Employer. Restorative justice is a way of looking at the delivery of justice which differs from the traditional retributive system of government punishing the offender for crimes committed. Restorative justice also is a method of addressing the prison overcrowding problem. Restorative justice views crime as harming the fabric of community, and considers it essential that the involved parties meet to attempt to restore the victim and the criminal. A case referred to the reparative program results in sentencing of the offender before a reparative board composed of community volunteers. Sentencing involves completing tasks prescribed by a contract intended to help victims and deter recidivism by offenders.

3. The Reparative Programs Coordinator positions were funded for one year by a grant from the federal Bureau of Justice Administration. It was expected at the inception of the program that the Reparative Programs Coordinators would organize reparative boards and make them self-sustaining so they would continue after the Reparative Programs Coordinator positions ended.

4. Grievant was assigned to work as part of the Court and Reparative Services Unit in Brattleboro. His supervisor was Joseph Samsell, the Court and Reparative Services Supervisor. Samsell reported to Carl Roof, the Southeast Area Manager for the Employer. Roof's office is in White River Junction.

5. During Grievant's first six months of employment, he was responsible for establishing reparative boards, developing service providers, and educating the community and criminal justice players about restorative justice issues. Samsell and Roof generally were satisfied with Grievant's performance during this period. They

viewed Grievant as doing a good job soliciting volunteers, setting up a reparative board, and educating the community (State's Exhibit 111).

6. The Reparative Programs Coordinator positions did not terminate at the conclusion of the one-year grant period. The positions were converted to permanent positions in approximately July 1996. At the time the positions were slated to be converted to permanent positions, Roof viewed Grievant's performance as unsatisfactory and wished to initiate a competitive hiring process for Grievant's position. Roof told Grievant that there was going to be a competitive hiring process for Grievant's position so there would be a variety of persons to select from to fill the position. Roof ultimately discovered from the Department of Personnel that there would be no competitive hiring process, and that Grievant would be in the position on a permanent status basis (Grievant's Exhibit 2).

7. In August, 1996, Samsell and Roof presented Grievant with an annual performance evaluation covering the period July 6, 1995, to July 6, 1996, which indicated that Grievant's overall performance was unsatisfactory and that Grievant would be placed in a six month prescriptive remediation period. The specific areas in which Grievant was informed of inadequate performance were: a) inconsistent efforts in surveying Windham County services and providers and developing a menu of reparative activities; b) alienation of staff of the State's Attorney office and Department of Corrections staff, thereby hampering his educational and program marketing efforts; c) alienation of reparative board members through his interpersonal style and failing to follow through on his obligations to provide support for the board; d) inconsistent and often unacceptable performance in using and

supervising volunteers; e) poor organization and maintenance of case files and his office; f) developing contentious relationships with various staff members hampering his ability to work well as a team member; g) failure to complete assigned tasks while spending an inordinate amount of time on the Internet and corresponding on a national and international level with restorative justice professionals and scholars.

Samsell made the following summary comments on the evaluation:

Your skills in community organization are not equal to your knowledge of the subject. Your interactive style alienates a wide variety of people with whom you must interact to be successful. Your desire to be involved in the conceptual level of major criminal justice change precludes you from doing the tasks to accomplish implementation of the reparative program locally. You do not listen well, and do not follow feedback from me or from others. Your work area is a mess. You do not supervise volunteers as expected and you do not accomplish the administrative tasks as directed. You did establish the Windham board and have been key in creating several activities for the use of the board. Your input at the state level has been helpful.

As a result of your unsatisfactory performance during this rating period you will be placed in a period of prescriptive remediation for six months. During this time we will meet bi-weekly to review your performance. Failure to meet expectations will lead to your placement in a warning period. (State's Exhibit 13).

8. The evidence supports the conclusions of Grievant's supervisors that his performance during the period July 6, 1995, to July 6, 1996, was unsatisfactory in each of the areas mentioned in his performance evaluation. During the rating period, Samsell and Roof clearly outlined their expectations of Grievant, and informed Grievant of continued dissatisfaction with the aspects of Grievant's performance during the rating period which subsequently were relied upon by them in providing Grievant with an adverse performance evaluation (State's Exhibits 20, 21, 22, 68, 97, 112).

9. Grievant was placed in a prescriptive period for remediation for six months, from August 15, 1996, to February 15, 1997. Samsell met with Grievant regularly during this period and provided him with progress reports every other week on how Grievant was faring concerning goals set for him. In every progress report, Samsell provided Grievant with specific goals for the next two weeks. Most of the tasks assigned by Samsell could have been performed by Grievant within his regular work hours during the two week period if Grievant focused on those tasks. Grievant performed on a satisfactory basis in meeting assigned tasks only during the first two weeks of the prescriptive period for remediation; during the remainder of the prescriptive period he consistently failed to complete a majority of tasks assigned to him. Among the areas in which Grievant failed to complete assigned tasks by the conclusion of his prescriptive period were writing a discharge letter for a case in which the offender had not made satisfactory progress, completing victim/offender surveys on cases, completing the organizing and filing of office materials, completing statistical reports to the Governor on the reparative program, completing mission statements and program descriptions, completing volunteer reports, creating a file for all reparative agreements, and completing forms. Many of these tasks had been assigned early in the prescriptive period for remediation (State's Exhibits 31, 34, 95, 98 - 110).

10. Grievant had a fundamental difference with Samsell and Roof on how his job should be performed. Grievant viewed himself as involved in organizational development work to change the criminal justice system in Vermont and "globally". Grievant saw himself as an advocate for major change. Towards that end, Grievant

wrote lengthy memoranda on restorative justice issues, communicating through E-Mail and otherwise, on a statewide, national and international level with restorative justice participants and others. Grievant also was active in a United Nations organization involved in restorative justice issues. Grievant also became active in areas not assigned to him. Samsell and Roof viewed these activities of Grievant as taking an inordinate amount of time and detracting from Grievant performing the "nuts and bolts" of his job coordinating the restorative justice program in Windham County. Samsell and Roof determined Grievant was not balancing his desire to be a visionary advocate for major change with the need to perform specific, assigned tasks. Grievant communicated his different conception of his job, and his dissatisfaction with his supervisors, in memoranda to various individuals through the use of E-Mail (State's Exhibits 18, 29, 52, 57, 78; Grievant's Exhibit 6).

11. Grievant's use of E-Mail to transmit lengthy memoranda to a large number of individuals resulted in negative feedback. Several individuals requested that he discontinue sending E-Mail to them. Others were critical of him because he had appropriated others' mailing lists to transmit his memoranda to a large audience, and because he was sending E-Mail to persons who did not wish to receive it. On two separate occasions during the prescriptive period for remediation, Roof prohibited Grievant from using the Internet and E-Mail because Roof believed Grievant was abusing their use; including using E-Mail during working hours to send memoranda outside of his job duties and which transmitted inaccurate information (State's Exhibits 7, 8, 9, 19, 23, 25, 26, 30, 67, 69, 70, 72 78, 92, 93).

12. Grievant had a smaller reparative probation caseload than other reparative programs coordinators. Despite this, Grievant was unable to keep up with his caseload, and poorly maintained his case files, during the prescriptive period for remediation. Grievant was inefficient in completing tasks, and was verbose. For example, when Ann Fiedler, the volunteer supervisor, asked him to complete a one page job description for a volunteer, Grievant responded with a two page memorandum to Fiedler explaining why he was not going to complete the job description, rather than completing the job description (State's Exhibit 35).

13. Grievant, through memoranda and verbal communications with other staff of the Employer during the prescriptive period for remediation, was critical of the Employer's efforts in implementing the restorative justice program and critical of the way the Employer was treating him. The tone of his memoranda and his interpersonal style resulted in poor relations with some of his co-workers (State's Exhibits 53, 55, 62, 63).

14. Volunteers were recruited to assist Grievant. During the prescriptive period for remediation, Grievant did not prepare required job descriptions for volunteers, and failed to assign tasks to them or otherwise properly supervise them. One volunteer refused to continue working with Grievant (State's Exhibits 35, 109, 110).

15. There were occasions during the prescriptive period for remediation when Grievant failed to timely send case materials to reparative board members prior to board meetings. Grievant was responsible for the production of minutes of board meetings, but his production of minutes was sporadic. Reparative board members

complained to Samsell, Roof and Grievant during the prescriptive period of remediation about Grievant's performance. They indicated that Grievant failed to provide support such as copying the minutes of board meetings and delivering packets of information on cases to board members in a timely manner prior to board meetings. Some board members also complained about Grievant canceling board meetings and tending to dominate board meetings to further his own agenda. One board member resigned, citing problems in dealing with Grievant. Several board members found it discouraging and frustrating to deal with Grievant (State's Exhibits 37, 38, 39, 40, 41, 42, 43, 44, 47, 51, 109).

16. Grievant had continuing poor relations with Windham County State's Attorney Dan Davis and Davis' staff during the prescriptive period for remediation. The State's Attorney office referred a low number of cases to the Windham County reparative program. Davis was aware that Grievant's position was an interim position funded by a federal grant, and he expected that Grievant no longer would be in the position at the termination of the grant. When Davis discovered that Grievant was to continue in his position, he wrote a letter to Roof, dated September 3, 1996, stating:

I have been informed that John Wilmerding has been continued in his position with the Windham County Reparative Board. I was not pleased when I learned of the news. Members of my office refuse to speak with Mr. Wilmerding and I appreciate their position. (The last meeting I had with John was a most frustrating time for me.) I will not be forcing them to have contact with John.

In my opinion folks utilizing Department of Corrections services would have been willing to give the Reparative Program a closer look if John Wilmerding had not been involved in the program. Carl, I know I've expressed these concerns to you in the past, however, I was under the mistaken belief that John would be gone by 1 September 1996. I am dismayed that he is not. (State's Exhibit 45)

17. At a February 19, 1997, reparative board meeting attended by Roof and Grievant, there was discussion that Davis was considering imposing a moratorium on referring cases to the reparative program. On February 25, 1997, Grievant wrote a letter to the Editor of the daily newspaper *Brattleboro Reformer*. In the letter, Grievant, who identified himself as Reparative Programs Coordinator, was harshly critical of Davis' actions regarding the reparative program, including the moratorium on sending cases to the program, and attributed Davis' actions to inappropriate personal and political motivations. Grievant's letter was not published by the *Reformer*, but Davis became aware of it. Effective February 26, 1997, Davis ceased referral of cases to the reparative program, citing Grievant's actions as the reason for his decision (State's Exhibits 4, 96).

18. On February 26, 1997, Roof placed Grievant on temporary relief from duty with pay for up to 30 days to investigate allegations against Grievant that he: a) made statements through E-Mail and the Internet to a wide audience disparaging and demeaning Department of Corrections employees, b) composed an official letter over his work title that attacked the character of and demeaned Davis, and c) had recently engaged in bizarre, intimidating and angry behavior through his written communications (State's Exhibit 3).

19. On March 27, 1997, Samsell and Roof presented Grievant with a performance evaluation covering the period August 15, 1996, to February 15, 1997, which indicated that Grievant's overall performance was unsatisfactory. The specific areas in which Grievant was informed of inadequate performance in the performance evaluation, and in an accompanying letter from Roof, were: a) never completing the

requested research to develop a list of existing resources and recruit providers for a menu of reparative activities; b) failure to establish good working relations with the State's Attorney office, resulting in the near termination of the reparative program in Windham County; c) causing deteriorating relations with reparative board members; d) poor use and supervision of volunteers; e) failure to establish good working relationships with Department of Corrections staff; f) inadequate performing of direct case management for his assigned reparative program caseload, including poor maintenance of case files; g) excessive and inappropriate use of the Internet to the detriment of performing the tasks necessary to improve the local restorative justice program; and h) failing to accomplish the most basic requirements of the job such as submission of time reports, completion of required documentation and filing.

Samsell made the following summary comments on the performance evaluation:

Your failure to establish good working relationships with key players in the CJS, the reparative boards and our own staff has lead to the near extinction of the reparative program in Windham County. You have failed to accomplish the majority of assigned tasks during the (prescriptive period for remediation) and have actually taken a stance of ignoring and devaluing the requirements of improvement as described in the (prescriptive period for remediation) documentation. You show no improvement whatsoever in this past six months, and give no indication of moving off your stance that you are doing a job of a larger calling and context and that you should be recognized for that. This grandiose thinking gets in the way of any progress on your part. Due to the myriad of problems assigned above, I have decided to assign another staff person to the role of reparative coordinator for this office for the sake of reestablishing the program. (State's Exhibit 2)

20. In his letter accompanying the performance evaluation, Roof stated:

Your unsatisfactory performance rating during your prescriptive period for remediation warrants bypassing the warning period step and provides just cause for your dismissal. You have virtually refused to complete assigned tasks and have effectively refused to accept the Department of Corrections' attempts to supervise you and to define your

appropriate role and responsibilities. Your performance deficiencies reflect an unsatisfactory attitude which you have had ample opportunity to change. Also, imposing a warning period would neither be practical nor feasible, given the fact that the State's Attorney and Reparative Board have effectively refused to participate further in the program if you remain involved and your failure to perform has resulted in the loss of volunteers. As a direct result of your unsatisfactory performance, progress on establishing a viable reparative probation program in Windham County ground to a complete halt. (State's Exhibit 2)

21. Roof provided Grievant with an opportunity to meet with him before the final decision was made whether to dismiss Grievant. Roof met with Grievant and VSEA Representative Gary Hoadley on April 2, 1997. Ultimately, Roof decided not to place Grievant into a warning period but to dismiss him.

22. Roof notified Grievant by letter dated April 9, 1997, that he was dismissed from his Reparative Program Coordinator position. Roof referenced the reasons set forth in his March 27, 1997, letter to Grievant, accompanying the unsatisfactory performance evaluation, as the reasons for Grievant's dismissal (State's Exhibit 1).

OPINION

Grievant has presented two grievances for our consideration. The first grievance, Docket No. 97-18, contests the unsatisfactory annual performance evaluation which Grievant received for the July 6, 1995 - July 6, 1996, period. In the second grievance, Docket No. 97-22, Grievant challenges his dismissal from employment. We will discuss each grievance in turn.

Docket No. 97-18

We first consider the unsatisfactory performance evaluation which Grievant received for the July 1995 - July 1996 period. Grievant alleges that the Employer

violated Articles 5, 12 and 14 of the Contract because: 1) Grievant was not put on timely notice by his immediate supervisor of all work deficiencies that would adversely affect his overall rating, 2) the unsatisfactory performance rating was not based in fact or supported by just cause, 3) the Employer improperly bypassed progressive corrective action, 4) the Employer harassed and intimidated him, and 5) Grievant inappropriately lost an annual step increase as a result of the unsatisfactory performance evaluation.

Pursuant to Article 12, Section 1, and Article 14, Section 1(e)(1) of the Contract, oral or written feedback of performance deficiency is the first step in progressive corrective action to be taken by the Employer. The Contract provides that "(d)uring the rating year, the immediate supervisor shall call the employee's attention to work deficiencies which may adversely affect a rating and, where appropriate, to possible areas of improvement." Article 12, Section 4. Under this contract language, a supervisor is required to give an employee clear indication of dissatisfaction with that employee's performance during the rating period. Grievance of Smith, 5 VLRB 272, 277 (1982). Grievance of Calderara, 9 VLRB 211, 221 (1986).

We conclude that the Employer met this contractual requirement in this case. During the rating period, Grievant's supervisors clearly outlined their expectations of Grievant, and informed Grievant of continued dissatisfaction with the aspects of Grievant's performance during the rating period which subsequently were relied upon by them in providing Grievant with an adverse performance evaluation.

The issuance of a special or annual performance evaluation, coupled with a prescriptive period for remediation, is the contractually prescribed second

progressive step in the Employer's corrective action efforts to address the unsatisfactory performance of an employee. Article 14, Section 1(e)(2). Such corrective action may only be imposed for just cause. Article 14, Section 1(f).

We conclude that just cause existed for the unsatisfactory annual performance evaluation which Grievant received covering the period July 1995 - July 1996, and accompanying prescriptive period for remediation. The specific areas in which Grievant was informed of inadequate performance were: a) inconsistent efforts in surveying Windham County services and providers and developing a menu of reparative activities; b) alienation of staff of the State's Attorney office and Department of Corrections staff, thereby hampering his educational and program marketing efforts; c) alienation of reparative board members through his interpersonal style and failing to follow through on his obligations to provide support for the board; d) inconsistent and often unacceptable performance in using and supervising volunteers; e) poor organization and maintenance of case files and his office; f) developing contentious relationships with various staff members hampering his ability to work well as a team member; g) failure to complete assigned tasks while spending an inordinate amount of time on the Internet and corresponding on a global level with restorative justice participants. The evidence supports the conclusions of Grievant's supervisors that his performance during this rating period was unsatisfactory in each of the areas mentioned in his performance evaluation.

We disagree with Grievant that his supervisors harassed and intimidated him. The actions of Grievant's supervisors constituted appropriate exercise of management authority to seek to correct the unsatisfactory performance of an

employee. We further disagree with Grievant that he inappropriately lost an annual step wage increase as a result of the unsatisfactory performance evaluation. Article 51, Section 6, of the Contract provides that "movement to a higher step . . . is predicated on satisfactory performance, based on the annual performance evaluation." Since Grievant received an unsatisfactory annual performance evaluation, the Employer acted appropriately in not granting him a step increase.

Docket No. 97-22

Grievant contends that his dismissal violated Articles 5, 12 and 14 of the Contract because: 1) he was not put on timely notice by his immediate supervisor of all work deficiencies that would adversely affect his overall performance rating, 2) his dismissal was not based in fact or supported by just cause, 3) the Employer improperly bypassed progressive corrective action by not placing Grievant in a warning period prior to dismissing him, 4) the Employer harassed and intimidated him, and 5) Grievant inappropriately lost an annual step increase as a result of his unsatisfactory performance evaluation.

We conclude that, during the prescriptive period for remediation, Grievant was put on timely notice by his supervisors of all work deficiencies that would adversely affect his overall performance rating. During the rating period, Grievant's supervisors clearly outlined their expectations of Grievant, and informed Grievant regularly of continued dissatisfaction with the aspects of Grievant's performance during the rating period which subsequently were relied upon by them in providing Grievant with an adverse performance evaluation.

We further conclude that the unsatisfactory performance evaluation which Grievant received at the conclusion of the prescriptive period for remediation is supported by the evidence. The specific areas in which Grievant was informed of inadequate performance in the performance evaluation were: a) never completing the requested research to develop a list of existing resources and recruit providers for a menu of reparative activities; b) failure to establish good working relations with the State's Attorney office, resulting in the near termination of the reparative program in Windham County; c) causing deteriorating relations with reparative board members; d) poor use and supervision of volunteers; e) failure to establish good working relationships with Department of Corrections staff; f) inadequate performing of direct case management for his assigned reparative program caseload, including poor maintenance of case files; g) excessive and inappropriate use of the Internet to the detriment of performing the tasks necessary to improve the local restorative justice program; and h) failing to accomplish the most basic requirements of the job such as submission of time reports, completion of required documentation and filing. The evidence supports the conclusions of Grievant's supervisors that his performance during this rating period was unsatisfactory in each of the areas mentioned in his performance evaluation.

We next consider whether the Employer improperly bypassed progressive corrective action by not placing Grievant in a warning period prior to dismissing him. Placement in a warning period after a prescriptive period for remediation is the contractually prescribed third progressive step, before the final step of dismissal, in the Employer's corrective action efforts to address the unsatisfactory performance

of an employee. Article 14, Section 1(e)(3) and (4). However, the Contract permits the Employer to bypass progressive corrective action as long as the Employer is imposing corrective action for just cause. Article 14, Section 1(f). The 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". Article 14, Section 11.

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 just cause only if it meets two criteria for 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.

In reviewing the factors articulated in Grievance of Collieran and Britt, 6 VLRB 235, 268-69 (1983), to determine the legitimacy of dismissal, we conclude that just cause existed for the Employer to bypass the step of placing Grievant in a warning period, and to dismiss Grievant at the conclusion of the prescriptive period for remediation. Grievant's performance deficiencies were serious. During the prescriptive period, Grievant's performance had deteriorated to the point where he failed to complete a majority of assigned tasks and refused to accept his supervisors' legitimate attempts to supervise him and define his appropriate role and responsibilities. Further, Grievant had caused his relations with the major players in

the reparative probation program in Windham County - Reparative Board, State's Attorney, other Department of Corrections employees, volunteers - to reach such a low point that the reparative probation program had nearly ground to a complete halt at the end of his prescriptive period for remediation. Grievant's supervisors reasonably lost confidence in Grievant's ability to perform at a satisfactory level, particularly given the extended duration of Grievant's unsatisfactory performance. Grievant had ample notice of his supervisors' expectations of him, but he failed to meet those expectations.

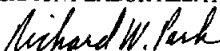
We have considered Grievant's contentions that inappropriate pressure from the State's Attorney played a substantial part in his dismissal and that the Employer harassed and intimidated him. We have ultimately concluded, however, that the extent of Grievant's performance deficiencies constituted substantial shortcomings detrimental to the Employer's interest providing the Employer with ample just cause to bypass a warning period and dismiss Grievant. Grievant had provided no indication that his performance was going to improve, and it was reasonable for the Employer to take the serious measure of dismissing Grievant to seek to create a viable reparative probation program in Windham County.

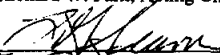
ORDER


NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievances of John Wilmerding are DISMISSED.

Dated this 17th day of April, 1998, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Richard W. Park, Acting Chairperson


Leslie G. Seaver


Carroll P. Comstock