

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 00-67
LESLIE BROWN)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On October 17, 2000, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Leslie Brown ("Grievant"), alleging that the dismissal of Grievant from his position as an Area Maintenance Supervisor with the State Agency of Transportation ("Employer") violated Article 14 of the collective bargaining agreement between the State of Vermont and the VSEA for the Supervisory Bargaining Unit, effective July 1, 1999 – June 30, 2001 ("Contract"). Specifically, Grievant alleges that: 1) his dismissal was not based in fact or supported by just cause, 2) the Employer improperly bypassed progressive discipline, 3) the Employer failed to apply discipline with a view toward uniformity and consistency, and 4) the Employer failed to act promptly to impose discipline within a reasonable time of the alleged offenses.

Hearings were held on June 21 and July 12, 2001, in the Labor Relations Board hearing room before Board Members Catherine Frank, Chairperson; Carroll Comstock and John Zampieri. Assistant Attorney General William Reynolds represented the Employer. Michael Casey, VSEA Deputy Counsel, represented Grievant. The parties filed post-hearing briefs on August 9, 2001.

FINDINGS OF FACT

1. Article 14 of the Contract 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:

- (a) act promptly to impose discipline . . . within a reasonable time of the offense;
- (b) apply discipline . . . with a view toward uniformity and consistency;
- (c) impose a procedure of progressive discipline . . .
- (d) In misconduct cases, the order of progressive discipline shall be:
 - (1) oral reprimand;
 - (2) written reprimand;
 - (3) suspension without pay;
 - (4) dismissal.
- . . .
- (6) The parties agree that there are appropriate cases that may warrant the State:
 - (i) bypassing progressive discipline . . .

2. The appointing authority or authorized representative . . . may dismiss an employee for just cause with two weeks' notice or two weeks' pay in lieu of notice . . .

3 . . . (T)he appointing authority or authorized representative . . . may dismiss an employee immediately without 2 weeks' notice or 2 weeks' pay in lieu of notice for any of the following reasons:

- . . .
- (b) gross misconduct;
- (c) refusal to obey lawful and reasonable orders given by supervisors
- . . .

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.

. . .

2. Grievant was employed by the Employer in Transportation District 9 in the northeastern part of the state from 1968 until he was dismissed in September of 2000. He began working as a temporary highway maintenance worker during the summers of 1968, 1969, 1970 and 1971. In the Spring of 1972, the Employer hired Grievant into a permanent position as an highway maintenance worker. Grievant was a Highway or Transportation Worker A until 1981. In performance evaluations covering the period

1972 through June 1975, Grievant received overall performance evaluations of “fully satisfactory”. In evaluations covering July 1975 through November 1980, Grievant’s overall ratings were “consistently meets job requirements/standards” (Grievant’s Exhibit 1, pages 12-28, 115-126).

3. In April 1981, Grievant was promoted from a Transportation Maintenance Worker A to a Transportation Maintenance Worker B. Grievant remained in that position until the summer of 1984. In a performance evaluation covering the period April 1981 to October 1981, Grievant received an overall rating of “consistently meets job requirements/standards”. In an evaluation covering October 1981 to October 1982, Grievant received an overall rating of “frequently exceeds job requirements/standards”. In an evaluation covering October 1982 to October 1983, Grievant received the highest possible overall rating – “consistently and substantially exceeds job requirements / standards”(Grievant’s Exhibit 1, pages 29-34, 127).

4. During the summer of 1984, the Employer promoted Grievant to Transportation Senior Maintenance Worker. In evaluations covering the period November 1983 to November 1985, Grievant received overall ratings of “consistently and substantially exceeds job requirements/standards”. In evaluations covering November 1985 to November 1987, Grievant’s overall ratings were “frequently exceeds job requirements/standards” (Grievant’s Exhibit 1, pages 35-44).

5. Grievant was in the position of Bridge Maintenance Mechanic from 1988 until October 1992. In evaluations covering November 1987 to November 1989, Grievant’s overall ratings were “frequently exceeds job requirements/standards”. In an evaluation covering November 1989 to March 1990, Grievant received an overall rating

of “consistently and substantially exceeds job requirements/standards”. In 1990, the Employer gave Grievant the Employee of the Year Award in the Maintenance Category. That same year, he was awarded a one-step meritorious pay increase by the Director of Maintenance. In subsequent performance evaluations received by Grievant while he was Bridge Maintenance Mechanic, he received overall “satisfactory” ratings (Grievant’s Exhibit 1, pages 1-7, 45-50, 53-60).

6. The Employer promoted Grievant to the position of Transportation Area Maintenance Supervisor in October 1992. He remained in that position until his dismissal. Transportation Area Maintenance Supervisors generally are assigned to supervise employees working out of a garage to maintain roads in an area of a Transportation Maintenance District. However, the Employer assigned Grievant from October 1992 to the fall of 1999 to be leader of the Bridge Crew in Derby, the District 9 headquarters. As a Transportation Area Maintenance Supervisor, Grievant was assigned a State pickup truck for his use at work. He was authorized to drive the truck to and from home in case an emergency arose during non-working hours.

7. The Bridge Crew at all times relevant has been responsible for maintaining and constructing bridges and buildings throughout District 9. During the winter, work on bridges lessens considerably and the members of the bridge crew perform highway maintenance work.

8. In performance evaluations received by Grievant covering October 1992 to November 1993, Grievant received overall ratings of “satisfactory”. He received overall ratings of “excellent” for the period November 1994 to November 1996. In

evaluations covering November 1997 to November 1999, Grievant's overall ratings were "satisfactory" (Grievant's Exhibit 1, pages 61-88).

9. State Transportation Maintenance Districts are headed by a District Transportation Administrator. Dale Perron has been District Transportation Administrator in District 9 since the fall of 1995. Jerry Waterman, the General Maintenance Supervisor in District 9, reports directly to Perron and oversees the work of Transportation Area Maintenance Supervisors. In 1994, Grievant had applied for the position of General Maintenance Supervisor along with Jerry Waterman. He was disappointed he was not selected. This caused friction between Grievant and Waterman.

10. Since March 1998, Section 4 of the AOT Maintenance Division Work Rules has provided in pertinent part:

...

- B. Employees shall not use State owned or rented vehicles, motorized equipment, or tools for any purpose other than for State-related work.
- C. Employees shall not use State owned materials for their own use, except as expressly authorized by the District Transportation Administrator.
- D. Employees may use State buildings to perform minor maintenance work and car washing on personal vehicles when the employee is off duty and the building is not being used for State operations, and when authorized by a supervisor and the District Transportation Administrator.

...

(State's Exhibit 17)

11. On October 27, 1998, Perron gave Grievant a verbal reprimand for bringing his car into the state airport garage and doing body and paint work on it. Grievant told Perron that generally he worked on the car during evenings and weekends, and worked on it during the day only if he was on leave. Perron had no evidence to the contrary, but told Grievant that employees were not to work on private vehicles during

working hours even if they were on leave as it gave the wrong impression to the public. Perron told Grievant that private vehicles should be kept out of the garage during the day (State's Exhibit 18).

12. The provision of the Maintenance Division Work Rules providing that employees shall not use State equipment or tools for any purpose other than for State-related work was not followed in District 9. Throughout Grievant's career with the Employer, it was common and accepted practice for District 9 employees to borrow State tools and equipment for personal use. Generally, employees asked their Transportation Area Maintenance Supervisor for permission to use tools and equipment, and permission was generally given if the tools and equipment were not needed on the job. Typically, employees borrowed tools overnight or for a weekend, although there were occasions where employees borrowed tools for months. Transportation Area Maintenance Supervisors were allowed to borrow State tools and equipment for their personal use. Prior to the spring of 1999, Grievant did not understand that he needed to request permission from Waterman or Perron prior to borrowing tools or equipment.

13. Transportation Area Maintenance Supervisors had authority to deem something as junk and move it to a junk pile. They were allowed to dispose of anything in a garage's scrap pile without permission from a superior.

14. In May and June of 1999, Grievant took two months off from work, using accrued leave, to build a new house and garage for him and his family. During that time, he borrowed a State tamper to compress the ground in his basement. On May 12, 1999, District 9 employees were performing work on a culvert that required use of the tamper. One of the employees, Patrick Donovan, was sent to Grievant's home to get the tamper.

When Donovan arrived at Grievant's home, he told Grievant that the tamper was needed on the job. Grievant told Donovan that he was using the tamper and the State should go rent one. Grievant spoke with Waterman by radio and suggested that the State rent a tamper. Waterman told Grievant that, if the State rented a tamper, Grievant would pay for the rental. Grievant then gave the State's tamper to Donovan (State's Exhibit 8).

15. On July 12, 1999, after Grievant had returned from leave, Perron and Waterman met with Grievant. Perron told Grievant that he needed to ask permission of Waterman or him before borrowing State tools and equipment like a tamper or generator, and that the State should not be in a position of having to track down equipment. Perron told Grievant that it probably would not be a problem if Grievant asked permission.

16. Shortly thereafter, Grievant took State tools and equipment home to use on his house and garage. Perron and Waterman became aware of this and, in August or September 1999, they again met with Grievant. They told Grievant that he had to stop borrowing tools and equipment without the permission of his supervisors. Grievant indicated that he thought that, if the tools were under his supervision, he did not have to seek permission to use them. Perron told Grievant that this was not the case and he needed to ask permission before taking tools. Perron told Grievant that he had been spoken to before about this, and that it would be handled differently the next time.

17. In September 1999, Perron and Waterman met with Grievant and told him that he no longer would be supervising the bridge crew, and that he would be taking over supervision of the Irasburg garage. Grievant took over supervision of the Irasburg garage in the fall of 1999.

18. In the fall of 1999, Grievant was continuing construction of his new garage. Grievant borrowed from the State a Hilti nail gun, a chop saw and a ladder to complete work on his home and garage. Grievant did not ask permission of Waterman or Perron before taking these items home. Grievant informed members of the bridge crew that he had these items and would return them if they needed them. No member of the bridge crew asked Grievant to return the items during the winter. The bridge crew does not use the tools Grievant had during the winter months. These items remained in Grievant's garage until May 2000. Grievant did little work on his garage during the winter due to working a substantial amount of overtime to maintain the roads during the winter (State's Exhibits 9, 10, 12).

19. In late fall of 1999, Grievant took two doors that had been used in the State's Coventry rest area, and were being stored by the State, and installed them in his garage. He installed the doors as a temporary measure because of the onset of winter and to secure the garage. After the winter was over, Grievant intended to take these doors off, replace them with permanent doors, and place the rest area doors in a State junk pile. Given his experience in construction, Grievant determined the rest area doors could not be used by the State. Grievant did not ask permission of Waterman or Perron before taking the doors home (State's Exhibit 15).

20. The rest area doors had been removed from the Coventry rest area when the rest area had been torn down in the mid-1990's. At that time, Perron or Waterman instructed Grievant to go into the rest area with his crew and determine what should be salvaged. Among other items, Brown salvaged the rest area doors and moved them to the Derby garage. He decided the doors were salvageable if someone needed them for a

hunting camp, but that they could not be used by the State because they did not meet safety requirements. During the summer of 1997, a fire occurred in the Derby facility. The rest area doors were damaged in the fire. After the fire, the doors were placed in an area with other damaged items and were examined for insurance recovery purposes. Since their removal from the Coventry rest area in 1995, the State has not used the rest area doors.

21. In the 1980's, the District Transportation Administrator at that time issued Grievant a set of torch heads to use for his work. When Grievant supervised the bridge crew, he used the torch heads and kept them in the State truck assigned to him. When Grievant was assigned to supervise the Irasburg garage in the fall of 1999, he took the torch heads with him and kept them in his State truck. Subsequently, in a conversation with Aime Cloutier, who had taken over supervision of the bridge mechanics, Grievant told Cloutier that if he was looking for the torch heads, "they have found a new home". Cloutier understood this to mean that Grievant intended to keep the torch heads for his personal use. Grievant took the torch heads out of his State truck, and kept them in his residence, in anticipation of receiving a new State truck in May of 2000. He intended to place the torch heads in his new State truck and have them with him when working in his job in the Irasburg garage (State's Exhibit 11).

22. In the spring of 2000, Grievant took home a damaged air compressor that was being stored in the Irasburg garage after having been used in the Derby garage. The compressor had been damaged in the 1997 fire at the Derby garage. As a result of the fire, the compressor engine had seized, all its gauges had broken, and it was unusable. Like the rest area doors, this had been placed in an area with other damaged items and

was examined for insurance recovery purposes. At a meeting with supervisors, Perron indicated that the insurance company had provided a sum to the State to replace items damaged in the fire. At an April 2000 meeting, Perron told Grievant that he did not want him to waste State time on trying to fix the compressor and a drill press also damaged in the Derby fire. Grievant spent personal time on the drill press and was able to repair so that it could be used again by the State. Grievant took the compressor home to try to repair it. Grievant did not ask permission of Waterman or Perron before taking the compressor home. He did not need a compressor for his personal use as he already had one. The State has not used the compressor since the 1997 Derby fire (State's Exhibit 13).

23. Also, in the spring of 2000, Grievant took home from the State shed in Coventry a malfunctioning wood furnace. The furnace had been used in the old Westmore garage from at least the early 1970's until the garage was replaced in the mid-1990's. Grievant and his crew had attempted to reinstall the old furnace in the new garage, but its firebox smoked. Grievant and his crew had tried to repair the furnace by welding it, but it continued to smoke and separate at the seams. Instead, a new furnace was installed in the new Westmore garage. The old furnace was placed in the Coventry garage, and parts were taken from it. During a supervisors' meeting in April 2000, Grievant was told to clean out the Coventry garage. He took the old furnace home to see if he could repair it for possible use by someone in a camp. Grievant did not ask permission of Waterman or Perron before taking the furnace home. The State has not used the old furnace since it was removed from the Westmore garage (State's Exhibit 14).

24. Throughout his employment, Grievant had borrowed State tools and equipment. Grievant always returned the tools and equipment.

25. During the week of April 10, 2000, Waterman investigated a report he had received that Grievant had State tools and equipment at his home. Waterman learned that the following items of State property were missing: one set of torch heads, one large air compressor, one aluminum step ladder, one chop saw, one nail gun, two rest area doors, one welder, one wood furnace, and one small air compressor.

26. On April 26, 2000, Waterman and Perron went to the Vermont State Police Derby barracks to make a theft complaint against Grievant. State Trooper James Mitchell was assigned to investigate the complaint. Mitchell met with Perron and Waterman on April 26, and they provided him with a written statement. On April 27, Cloutier provided Mitchell with a written statement. On May 2, 2000, Dean Birchard, the District 9 Store Keeper, gave Mitchell a written statement. Birchard provided Mitchell with the following list of missing equipment and their values:

1 Set of Torch Heads	\$ 250
1 Large Air Compressor	\$ 900
1 Step Ladder	\$ 75
1 Nail Gun	\$ 200
2 Glass Entry Doors	\$ 300 each
1 Chop Saw	\$ 350
1 Welder	\$1600
1 Wood Furnace	\$1600
1 Small Air Compressor	\$ 900

Total Value	\$6475
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(State's Exhibit 3)

27. The value of the items provided by Birchard represented the estimated replacement value of the missing items, not the actual value of the items.

28. On May 3, 2000, Mitchell went to Grievant's residence in Troy. He immediately noticed the rest area doors installed on Grievant's garage. Mitchell informed Grievant of the complaint he received from Perron and Waterman, and asked Grievant if he knew anything about the missing items. Grievant told Mitchell that he could not believe that Perron and Waterman thought that Grievant was stealing the missing items. Mitchell told Grievant the items that were reported missing. Grievant then showed Mitchell the following items that he had at his residence: large air compressor, step ladder, chop saw, nail gun, wood furnace, torch heads and the two glass entry doors from the rest area building. Grievant told Mitchell that he did not have the small air compressor or the welder. Grievant told Mitchell that he would bring the items to the Derby garage the following day and then go to the Derby State Police Barracks (State's Exhibit 3).

29. On May 4, 2000, Grievant returned all the missing items in his possession to the Derby garage. He then went to the State Police Barracks where he was charged with Grand Larceny and released (State's Exhibit 3).

30. Thomas Trahant, Personnel Administrator for the Employer, was assigned to investigate the allegations against Grievant. Trahant subsequently submitted an investigation report to David Dill, Director of Maintenance and Aviation; Pamela Gandin Ankuda, Human Resources Chief for the Employer; and Perron. Therein, Trahant concluded that Grievant's actions constituted "gross misconduct, and rises to the level justifying that serious discipline or dismissal action are considered by the Agency" (State's Exhibit 4).

31. On June 29, 2000, Ankuda sent Grievant a *Loudermill* letter which provided in pertinent part as follows:

As a result of your behavior described below, the Agency of Transportation is contemplating serious discipline or dismissal from the position of Transportation Area Maintenance Supervisor in Maintenance District 9 assigned to the Irasburg Garage . . .

The reason(s) dismissal is contemplated is as follows:

You misappropriated state owned property for your personal use. In mid April of this year the District Transportation Administrator in District 9, Dale Perron was advised that numerous items (tools, equipment, material) belonging to the State of Vermont were missing from state property where they were stored. The items missing were a Hilti Nail gun, Makita Combination Compound, (LS1011 10”), One Set of L-Tech Torches, One Six Foot Fiberglass Stepladder (model FT 306T), One 8HP 80 gal. Air Compressor, one Wood Furnace and Two Steel Doors with Glass. On May 3, 2000 the Vermont State Police exercising a search warrant discovered all but two of the items on the list at your residence.

In late July of 1999 and again in the early fall of 1999 you were directed by General Foreman Jerry Waterman and DTA Dale Perron to return any items, tools, material or equipment in your possession and instructed by them not to take or borrow any property owned by the state without asking permission from your supervisor. By your own admission you “re-borrowed” items for your own personal use without asking permission and by your own admission you intended to retain possession of the wood furnace and the compressor as you had “Deemed them to be junk”. You removed a set of steel doors from District property without first obtaining permission and installed them in a garage you were building on your property. Items that you state were borrowed by you were kept in your possession for four to five months.

On at least two separate occasions you refused to follow direct and lawful instructions given to you by Mr. Waterman and Mr. Perron and removed tools, equipment and material from state property with the purpose and intent to retain these items in your possession for your personal use.

Your actions constitute gross misconduct and, I believe, justify your removal from State employment.

You must notify me within twenty-four (24) hours after receiving this letter whether you wish to respond to the above allegations . . . (State’s Exhibit 1).

32. On July 10, 2000, Grievant and his representative, VSEA Field Representative Gary Hoadley, had a *Loudermill* meeting with Ankuda. Subsequent to the meeting, Ankuda met with Trahan and Dill to decide what discipline would be appropriate in Grievant's case. It was decided to dismiss Grievant.

33. On September 18, 2000, Ankuda sent Grievant a letter informing him of his dismissal. The letter provided in pertinent part as follows:

. . . This letter is to notify you that you are terminated from your employment with the State of Vermont, for the reasons specified below and as outlined in my June 29, 2000, letter, and will be effective at the close of business on September 21, 2000. This action is taken after considering all aspects of your employment and taking into account factors including the nature of the job and the potential impact your continued presence can have on the State, public and your co-workers. It also takes into account your seniority with the State and the fact that you had full and clear knowledge of the seriousness of your misconduct. In my opinion, there is sufficient cause to warrant your dismissal. I have also considered the information which both you and VSEA Representative Gary Hoadley presented at our meeting held on July 10, 2000. You will be paid two weeks' pay in lieu of notice.

. . . I must clarify that of all the items listed in my June 29, 2000 letter, were found at your house, as we discussed at our July 10, 2000, meeting and as you admitted at that meeting. The reference in my letter of June 29, 2000, to two items that were not found was to two items not listed in my letter. In taking this action, I have not concluded that you committed misconduct with regard to these two items.

. . .

No action was forthcoming during our meeting of July 10, 2000, that altered my understanding of the facts of this case, and nothing discovered that would mitigate the egregious nature of your actions. Your actions constitute gross misconduct and, I believe, justify your removal from State government.

. . .

(State's Exhibit 2)

34. In deciding that Grievant should be dismissed, Ankuda concluded that Grievant committed serious offenses by misappropriation of State property for personal use. Contributing to Ankuda's conclusion that the offenses were serious were that Grievant was a supervisor, and his offenses were intentional and for personal gain.

Ankuda considered Grievant's past disciplinary record, and determined that the verbal reprimand he received in 1998 weighed in favor of harsher discipline. Ankuda concluded that Grievant's lengthy service and past performance record weighed in his favor. She determined that supervisory confidence in Grievant was a significant factor due to a concern whether he could effectively supervise others. In considering the consistency of Grievant's penalty with those imposed on other employees for similar offenses, Ankuda did not find any similar cases in the Agency of Transportation. She concluded that Grievant had fair notice his conduct was prohibited because on more than one occasion he had been warned not to borrow State property without permission. She determined that Grievant did not have potential for rehabilitation, and that alternative sanctions less than dismissal were inadequate.

35. In the mid-1990's, Perron asked employee Thomas Lessard if he could have an old oil drum for his personal use as a burn barrel. Lessard cut off the top of the drum and loaded it in Perron's truck. Other employees in District 9 have taken old oil drums for their personal use as burn barrels. It is common practice in the district to typically discard oil drums unless they are to be used as burn barrels or garbage barrels.

36. Also, in approximately 1996, Lessard informed Waterman that the garage had a number of new and used International Harvester mower parts that were not to be used because the parts were for a mower no longer used by the State. Waterman was interested in the parts for his personal use because he owned a mower that could use the parts. Waterman spoke with various persons in the Agency of Transportation who informed him that the parts were old, would not be used by the Employer, and would end up on the scrap pile. Waterman had the impression from these conversations that he could

take the parts. Waterman did not make any inquiries into possibly having these parts sold on the secondary market. Lessard loaded the mower parts into Waterman's truck. Waterman took the parts home and used some of them on his mower.

OPINION

Grievant contends that the Employer violated Article 14 of the Contract by dismissing him without just cause, improperly bypassing progressive discipline, failing to apply discipline with a view toward uniformity and consistency, and failing to impose discipline within a reasonable time of the offense.

We first address the issue of whether the Employer violated the requirement of Article 14 of the Contract that "the State will act promptly to impose discipline within a reasonable time of the offense". We conclude that discipline was imposed within a reasonable time of the offense. Grievant has not demonstrated that imposition of discipline on him was unreasonably delayed under circumstances where dismissal occurred approximately four and one-half months after criminal charges were made against Grievant and the Employer commenced an investigation of his alleged misconduct.

We turn to discussing the merits. The ultimate criterion of just cause is whether an employer acted reasonably in discharging an employee for misconduct. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). There are two requisite elements which establish just cause for dismissal: 1) it is reasonable to discharge an employee because of certain conduct, and 2) the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. Id. In re Grievance of Yashko, 138 Vt. 364 (1980).

The standard for implied notice is whether the employee should have known the conduct was prohibited. Grievance of Towle, 164 Vt. 145 (1995). Brooks, supra, 135 Vt. at 568. Knowledge that certain behavior is prohibited and subject to discipline is notice of the possibility of dismissal. Towle, supra. Grievance of Gorruso, 150 Vt. 139, 148 (1988).

The burden of proof on all issues of fact required to establish just cause is on the employer, and that burden must be met by a preponderance of the evidence. Colleran and Britt, 6 VLRB 235, 265 (1983). Once the underlying facts have been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven facts. Id. at 266.

The Employer charged Grievant with not following direct and lawful instructions given to him by his supervisors to not take or borrow any State property without asking permission from them. The Employer contended that Grievant violated these instructions by removing tools, equipment and material belonging to the State, without supervisory permission and with the purpose and intent to retain these items in his possession for his personal use.

We conclude that the Employer established this charge to the extent of demonstrating that Grievant disregarded lawful instructions given him by his supervisors, Dale Perron and Jerry Waterman, to not take or borrow any State property without asking permission from them. On two occasions in the summer of 1999, Perron and Waterman confronted Grievant about borrowing State tools and equipment without asking permission, and told Grievant he had to stop borrowing tools and equipment without the permission of his supervisors. Despite these instructions, Grievant took the following

State property to his home without asking permission: one nail gun, one chop saw, one stepladder, one air compressor, one wood furnace and two doors.

In this regard, the Employer also charged Grievant with taking a set of torch heads home without asking permission. We conclude that, even though the torch heads were found in Grievant's home, they are not appropriately considered as being there absent permission. This set of torch heads normally was carried by Grievant in the State truck assigned to him, and Grievant had taken them out of the truck only in anticipation of soon receiving a new State truck. He intended to place the torch heads in his new State truck and have them with him when working in his job in the Irasburg garage. The Employer contends that Grievant should not have been in possession of the torch heads because they were the bridge crew's torch heads, and Grievant had been removed from supervision of the bridge crew the previous fall when he had been assigned to supervise the Irasburg garage. Grievant maintains that the set of torch heads had been assigned to him in the 1980's and that it was appropriate to bring them with him when he transferred to Irasburg. Grievant's understanding was not unreasonable absent any specific previous direction by his supervisors to leave the torch heads with the bridge crew. Given this, and absent evidence indicating that there was any personal use of the torch heads by Grievant, it would be inappropriate to conclude that he had the torch heads in his possession absent permission.

Further, we conclude that the Employer has not proven its charges against Grievant to the extent of alleging that Grievant took items of State property with the purpose and intent of retaining them in his possession for his personal use. It is true, as charged by the Employer, that Grievant kept the State-owned nail gun, chop saw,

stepladder and doors in his possession for four to five months for his personal use. Nonetheless, the Employer has not proven by a preponderance of the evidence that Grievant intended to retain these items in his possession for his personal use. We are persuaded that Grievant borrowed these items with the intent of returning them to the State, rather than intending to retain them for his personal use.

Grievant, like other District 9 employees, had borrowed State tools and equipment in the past and had always returned them. When he took the chop saw, ladder and nail gun home, he informed members of the bridge crew that he had these items and would return them if they needed them. This evidence leads us to conclude that he intended to return these items to the State.

We also are persuaded that he placed the former State rest area doors on his garage as a temporary measure, because of the onset of winter and to secure the garage, pending installation of permanent doors on the garage during the spring. Again, we conclude that Grievant intended on returning these significantly damaged doors to the State once his temporary use of them ended.

The air compressor and wood furnace differ from the other State items Grievant took home because they were not intended for his personal use. The air compressor had been rendered unusable by a fire in the Derby garage. Grievant took the compressor home to try to repair it. If he succeeded, the evidence does not demonstrate that he would have kept the compressor for his personal use since he did not need a compressor for his personal use as he already had one. The wood furnace was malfunctioning, and Grievant took it home to repair it for possible use by someone in a camp. Given this evidence, we

conclude that the Employer has not established its charge that Grievant took these items for his personal use.

The fact that some of the charges against Grievant have not been proven does not necessarily mean that his dismissal lacked just cause. Failure of an employer to prove by a preponderance of the evidence all the particulars of a dismissal letter does not require reversal of a dismissal action. Grievance of McCort, 16 VLRB 70, 121 (1993). In such cases, the Board must determine whether the remaining proven charges justify the penalty. Id.

We look to the factors articulated in Colleran and Britt, 6 VLRB at 268-69, to determine whether the proven charges justify dismissal. The pertinent factors here are: 1) the nature and seriousness of the offenses and their relation to the grievant's duties and position, 2) the grievant's job level, including supervisory role, 3) the effect of the offenses upon supervisors' confidence in the grievant's ability to perform assigned duties, 4) the clarity with which the grievant was on notice of any rules that were violated in committing the offenses, 5) the grievant's past disciplinary record, 6) the grievant's past work record, 7) the consistency of the penalty with those imposed upon other employees for the same or similar offenses, 8) mitigating circumstances surrounding the offenses, 9) the potential for the grievant's rehabilitation, and 10) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Grievant's misconduct was serious. Most significantly, Grievant showed a disrespect for supervisory authority by disregarding instructions given him on more than one occasion by his supervisors, Dale Perron and Jerry Waterman, to not take or borrow any State property without asking permission from them.

The actual personal possession of some of the property by Grievant for personal use is not as serious. This was not a case of theft, as Grievant did not intend to permanently keep the property. In fact, he told his coworkers he was borrowing the items in most cases. Also, borrowing State tools and equipment by the employees for personal use was a common practice in the district. Further, other employees did not inform Grievant that any of the items he had at home were needed for State work even though he had informed them he had them at his home and would return them if they needed them. This is not to say there was not some degree of fault by Grievant in the actual possession of the property, as the length of time he borrowed some items was unreasonably long.

In this regard, distinctions must be made with respect to various items in Grievant's possession. Some of the items Grievant took home – the chop saw, nail gun and stepladder – were used in State work and kept by Grievant for personal use for several months. Another item - the former rest room doors - were kept by Grievant for personal use for several months, but could not be used by the State because they were significantly damaged and did not meet safety requirements. The remaining items in his home - the compressor and wood furnace - were in Grievant's home for only a short time, were not to be personally used by him, and were so damaged as to be useless to the State. His misconduct concerning the chop saw, nail gun and stepladder extends both to disregarding supervisory instructions and, to a lesser degree, actual possession of property used by the State. He can be primarily faulted for possession of the doors, compressor and furnace because he disregarded supervisory instructions by taking them without obtaining possession. However, his actual possession of these items were of little

import to the State since their state of disrepair was such that they could not be used by the State.

In sum, disregarding supervisory authority was his most serious offense, and the actual possession of the property of lesser significance, particularly since there was a long history of District employees borrowing equipment for their personal use. The seriousness of his misconduct is exacerbated by the fact that Grievant himself was a supervisor. He certainly should have been aware of the importance of being able to rely on subordinates following instructions. He also should have realized that keeping State tools and equipment in his home for several months was not a good example to set for employees whom he supervised.

Grievant's disregarding of supervisory instructions had an adverse effect on his supervisors' confidence that Grievant would perform duties assigned by them. Also, he had fair notice that his conduct was prohibited and subject to discipline. His supervisors had specifically told him on two previous occasions that he needed to obtain supervisory permission before borrowing State tools and equipment. On the second occasion, Perron told him that he had been spoken to before about this, and that it would be handled differently the next time. Grievant should have been aware that discipline could follow a subsequent borrowing of State-owned items without permission.

Grievant's past work record weighs significantly in favor of his retaining his job. He worked 28 years for the Employer and had a consistently good performance record. His overall performance evaluations were always at least satisfactory, and many times exceeded satisfactory ratings. His accomplishments included receiving an Employee of the Year Award for maintenance employees and a merit pay increase. His lengthy and

commendable employment history was marred by only one minor disciplinary action of a verbal reprimand in 1998 for working on his personal vehicle on State property.

Further, when the proven charges against Grievant are considered along with the practices in District 9 concerning employees taking or borrowing of State property for personal use, the dismissal of Grievant strikes us as inconsistent with prevailing standards in District 9. Grievant worked in an environment in District 9 where employees generally received permission to borrow State tools and equipment for personal use if they were not needed on the job. Also, Grievant's supervisor, Jerry Waterman, took mower parts from the State garage for personal use in his own mower upon receiving information that the State was not going to use the parts. In this environment, it appears inconsistent that a central underpinning of Grievant's dismissal was based on proven actions amounting to borrowing some State property of value for personal use for a lengthy period of time, and having temporary possession of other State property that could not be used by the State.

In weighing all of the relevant factors and examining all the circumstances, we ultimately conclude that the Employer inappropriately bypassed progressive discipline and just cause did not exist for Grievant's dismissal. The Contract provides for progressive discipline with the proviso that "there are appropriate cases that may warrant the State bypassing progressive discipline". This is not such an appropriate case.

Prior to the offenses leading to his dismissal, his supervisors had instructed Grievant that he needed to ask permission before taking or borrowing State tools and equipment, but he had not been disciplined for violating these instructions. His previous discipline was limited to a verbal reprimand for working on his personal vehicle on State property. Grievant's repeated violation of these instructions cannot be condoned, and the

Employer was justified in bypassing progressive discipline to the extent of imposing a significant degree of discipline on Grievant.

However, the Employer acted unreasonably in imposing the maximum sanction of dismissal. Unlike In re Carlson, 140 Vt. 555 (1982); and Grievance of Graves, 147 Vt. 519 (1986); cases relied on by the Employer to justify bypassing of progressive discipline, this is not a case where the Employer has demonstrated repeated dishonesty and a pattern of fraud by an employee. Grievant did not try to hide what he did, and what he did would have been allowed had he asked permission first.

The Employer has not demonstrated that Grievant was not a good candidate for rehabilitation and that a lesser sanction than dismissal would be inadequate or ineffective. Grievant was an employee with 28 years of service with a good prior work record. It was unreasonable for the Employer to discount his lengthy service and good performance and summarily dismiss him. A suspension without pay would have sent a strong message to Grievant that the Employer viewed seriously the requirement to obtain supervisory permission before taking or borrowing State property. It also would have made it clear to him that further disregarding of supervisory instructions in this regard could result in further disciplinary action up to dismissal.

In sum, we conclude that the Employer inappropriately bypassed progressive discipline in dismissing Grievant. An adequate and effective sanction other than dismissal is the maximum penalty short of dismissal permitted by the Contract, a 30-day suspension. This should suffice to deter such conduct by Grievant in the future given his knowledge that the next disciplinary step in the Contract for similar misconduct is

dismissal. It also should suffice to send the message to other employees that the misconduct displayed here was serious and will not be condoned.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered:

1. The grievance of Leslie Brown ("Grievant") is sustained in part;
2. Grievant shall be reinstated to his position as Transportation Area Maintenance Supervisor in the Irasburg Garage in District 9 of the State of Vermont Agency of Transportation;
3. Grievant shall be awarded back pay and benefits from the date commencing 30 working days from the effective date of his dismissal 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;
4. The interest due Grievant on back pay shall be computed on gross pay and shall be at the legal 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 income (including unemployment compensation) received by Grievant during the payroll period;
5. The parties shall file with the Board by November 16, 2001, 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. A hearing on disputed issues, if any, shall be held November 29, 2001, at 9:00 a.m., in the Labor Relations Board hearing room; and

6. The Employer shall remove all references to Grievant's dismissal from his personnel file and other official records and replace it with a reference to a 30 day suspension consistent with this decision.

Dated this 24th day of October, 2001, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Catherine L. Frank, Chairperson

Carroll P. Comstock

John J. Zampieri