VERMONT LABOR RELATIONS BOARD

APPEAL OF:	)	
	)	DOCKET NO. 99-62
GLORIA DANFORTH	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On September 30, 1999, Gloria Danforth ("Appellant") filed an appeal with the Labor Relations Board over her dismissal from employment as a Detective Sergeant with the Vermont Department of Public Safety ("Employer") through her attorney Kimberly Cheney. Appellant alleged that, in dismissing her, the Employer violated various provisions of the Employer's Rules and Regulations and the collective bargaining agreements between the State of Vermont and the Vermont State Employees Association ("VSEA") for the State Police Unit, effective July 1, 1997 – June 30, 1999 and July 1, 1999 – June 30, 2001 (collectively referred to as the "Contract").

Pursuant to a joint motion filed by the parties, this case has been bifurcated for hearing. In the first stage of the proceedings, the Board had hearings limited to whether Appellant committed violations of the Employer's Code of Conduct as charged. The Board issued a decision on that issue on July 22, 2003, concluding that Appellant did commit violations of the Code of Conduct. 26 VLRB 140.

The Board then conducted an additional hearing to address the remaining issues raised by Appellant in her appeal: 1) whether Appellant was discharged as a result of discrimination and retaliation against her for her grievance activities and suspected whistleblowing activities; and 2) whether just cause existed for Appellant's dismissal. This hearing was held on April 27, 2004, in the Labor Relations Board hearing room in

Montpelier before Labor Relations Board Members Edward Zuccaro, Acting Chairperson; Richard Park and Joan Wilson. Appellant represented herself. Attorneys Daniel Burchard and Elizabeth Novotny, Counsel for the Employer, represented the Employer. Appellant and the Employer filed briefs on May 18, 2004.

FINDINGS OF FACT

1. Findings of Fact Nos. 1 – 45 in the July 22, 2003, decision of the Labor Relations Board in this matter are incorporated herein by reference. 26 VLRB at 141-162.

2. 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, nor harass any employee because of . . . filing a complaint or grievance, or any other factor for which discrimination is prohibited by law.

. . .

ARTICLE 14
DISCIPLINARY AND CORRECTIVE ACTION

1. DEFINITIONS

(a) "Disciplinary Action" is any action taken by the Commissioner as a result of an employee's violation of the Code of Conduct. Forms of disciplinary action include written reprimand, transfer, reassignment, suspension without pay, forfeiture of pay and/or other rights, demotion, dismissal, or a combination thereof.

. . .

2. **DISCIPLINARY ACTION**

(a) No disciplinary action shall be taken without just cause.

. . .

(b) Disciplinary action will be applied with a view toward uniformity and consistency.

. . .

ARTICLE 53
WHISTLE BLOWER

1. A "WHISTLE BLOWER" is defined as a person covered by this Agreement who makes public allegations of inefficiency or impropriety in government. No provision of this Agreement shall be deemed to interfere with such an employee in the exercise of his or her constitutional rights of free speech, and such person shall not be discriminated against in this employment with regard thereto.

. . .

3. In the July 22, 2003, decision, the Board concluded that Appellant violated the following provisions of the Employer's Code of Conduct: 1) Part A, Section 14.1; 2) Part B, Section 11.1; and 3) Part B, Section 20.1. The Employer has Disciplinary Procedures which contain a table of Disciplinary Guidelines setting forth specific penalties for violations of each of the provisions of the Code of Conduct. Dismissal is the only prescribed sanction for a violation of Part A, Section 14.1. The prescribed penalty for a violation of Part B, Section 11.1, is 4 days suspension – dismissal for the first offense and 8 days suspension – dismissal for the subsequent offenses. The listed penalties for violations of Part B, Section 20.1 is 4 – 8 days suspension for the first offense and 4 days suspension – dismissal for subsequent offenses (Employer Exhibit 65).

4. Prior to being dismissed, Appellant had a *Loudermill* meeting with Employer Commissioner James Walton on August 25, 1999. During the meeting, Appellant raised specific points concerning the timing of events and her efforts to secure counsel in the internal affairs investigations in which charges were brought against her. Commissioner Walton agreed to check the evidence on these issues. During the meeting, Appellant also asked Commissioner Walton for an opportunity to submit additional documentation. Commissioner Walton agreed to her request.

5. After speaking to the internal affairs investigator and reviewing the evidence on the charges against Appellant, Commissioner Walton concluded that the evidence was not consistent with Appellant's recollection of events. Appellant did not submit additional documentation to Commissioner Walton despite her request for an opportunity to do so. Commissioner Walton alone made the decision to dismiss Appellant (Employer Exhibits 71 – 74).

6. In deciding to dismiss Appellant, Commissioner Walton concluded that Appellant's offenses were very serious. He believed that the obligation to be fully forthcoming with internal affairs investigators was among a trooper's most important responsibilities, that such obligation was widely known among troopers, and that the consequence of dismissal for violating such obligation was fully understood by all troopers. He considered that it is critical that troopers tell the truth when they testify in legal proceedings, and that a fundamental way for the Employer to preserve the core of integrity is through the internal affair process which is at the heart of the integrity of the organization. He concluded that Appellant's deception and refusal to cooperate in the internal affairs investigation irreparably compromised her credibility as a state police officer.

7. Commissioner Walton concluded that Appellant's misconduct was intentional and motivated by personal gain. He determined that Appellant was dishonest with internal affairs investigators about her efforts to secure legal representation for interviews they were trying to conduct with her, and that she did so to delay those interviews so they would not take place before the completion of hearings in a grievance of hers that was pending before the Labor Relations Board. Commissioner Walton

concluded that Appellant, by so acting, was unacceptably placing her own interests ahead of the trooper whose conduct was being investigated by the internal affairs investigator and the interests of the Employer in conducting the investigation.

8. Commissioner Walton also considered the consistency of the penalty of dismissal with penalties he had imposed on other employees for similar offenses. In prior instances of troopers being dishonest in internal affairs investigations, he had either dismissed the trooper or would have done so if the trooper had not resigned from employment. Commissioner Walton also was mindful of the Employer's Disciplinary Guidelines setting forth specific penalties for violations of each of the provisions of the Code of Conduct.

9. Commissioner Walton considered that Appellant had a good work record over 23 years of service. However, he concluded that Appellant's dishonesty and lack of cooperation destroyed her credibility and trustworthiness, undermining her ability to function in her job. He determined that her integrity was so damaged that she could not be rehabilitated. He likewise concluded that no sanction short of dismissal would be adequate or effective to deter Appellant or other troopers from refusing to cooperate with internal affairs investigations in the future. He determined that any penalty less than dismissal would make a mockery of the internal affairs investigation process.

OPINION

We first address Appellant's contention that the Employer violated Articles 5 and 53 of the Contract by dismissing her as a result of discrimination and retaliation against her due to her grievance activities and suspected whistleblowing activities. In cases where employees claim the employer took action against them for engaging in protected

activities, the Board employs the analysis used by the United States Supreme Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977): once the employee has demonstrated his or her conduct was protected, she or he must then show the conduct was a motivating factor in the decision to take action against him or her. Then the burden shifts to the employer to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct. Grievance of Sypher, 5 VLRB 102 (1982). Grievance of Roy, 6 VLRB 63 (1983). Grievance of Cronin, 6 VLRB 37 (1983). Grievance of Danforth, 22 VLRB 220 (1999).

Appellant engaged in the protected conduct of grievance activities, as well as gaining the protection of the whistleblowing provisions of the Contract because the Employer suspected her of whistleblowing activities. *See* Grievance of Danforth, 22 VLRB 220 (1999); *Affirmed*, 172 Vt. 530 (2001). Appellant must demonstrate that this protected conduct was a motivating factor in Commissioner Walton's decision to dismiss her.

The factors the Board reviews in determining whether protected conduct constituted a motivating factor in an employer's adverse action against an employee are: 1) whether the employer knew of the protected activities, 2) whether a climate of coercion existed, 3) whether the timing of the action was suspect, 4) whether the employer gave protected activity as a reason for the decision, 5) whether the employer interrogated the employee about protected activity, 6) whether the employer discriminated between employees engaged in protected activities and employees not so engaged, and 7) whether the employer warned the employee not to engage in such

activity. Ohland v. Dubay, 133 Vt. 300, 302-303 (1975). Horn of the Moon Workers Union v. Horn of the Moon Cafe, 12 VLRB 110, 126-27 (1988).

Commissioner Walton knew of Appellant's protected activities. However, Appellant has not demonstrated that this knowledge of Appellant's protected conduct constituted a motivating factor in the Commissioner's decision to dismiss her. Although the dismissal occurred during a period in which Appellant was pursuing a grievance at the Labor Relations Board, Grievant has not demonstrated that her grievance activities constituted a motivating factor in the dismissal decision. Instead, we are persuaded that the Commissioner's dismissal decision was entirely motivated by his belief in the seriousness of her misconduct. Thus, we dismiss Appellant's claims of discrimination and retaliation based on her grievance activities and suspected whistleblowing activities.

We next address whether Commissioner Walton had just cause to dismiss Appellant based on the proven charges against her. 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.

In the July 22, 2003, decision, the Board concluded that Appellant violated Section 14.1 of Part A of the Code of Conduct which provides that "upon the order or inquiry of a superior officer and/or during the course of an internal investigation, members shall fully and truthfully answer all questions asked of them which are specifically directed and narrowly related to . . . an allegation of misconduct or improper conduct being investigated". 26 VLRB at 163-169. The Board concluded that Appellant violated this section by failing to fully and truthfully answer questions that were specifically directed and narrowly related to allegations of misconduct or improper conduct being investigated, within the coverage of this section of the Code of Conduct, on the following occasions that were included in the preferral of charges on her:

a) when she had her attorney tell Lieutenant Bombardier on June 3 that she was not available until June 18 for an interview in an internal affairs investigation involving Sergeant Keefe which was then being conducted by Lieutenant Bombardier, when Lieutenant Bombardier needed to establish an earlier interview date and when in fact Appellant was available before that date;

b) when she misled Lieutenant Bombardier prior to June 8 by leading him to believe that VSEA attorneys possibly would represent her in the investigation of Sergeant Keefe, when Lieutenant Bombardier had earlier made inquiries of her concerning who was representing her and she knew by June 3 that she did not want VSEA to represent her;

c) when she informed Lieutenant Bombardier on June 8 that she was not sure whether Attorney David Putter would attend a June 8 interview, when she knew that he would not attend;

d) when she refused to give a statement on June 8 to Lieutenant Bombardier concerning the Keefe investigation after Bombardier had twice ordered her to do so; and

e) when she failed to answer questions of another internal affairs investigator, Lieutenant Pettengill, at the June 15 interview that were specifically directed and narrowly related to the allegations against her even though he ordered her to do so.

The Board further concluded that Appellant violated Part B, Section 11.1 of the Code of Conduct, which states: "A member shall promptly obey and execute each and every lawful order issued to him/her, whether verbal or written, by a superior or supervisor." 26 VLRB at 169-170. The Board concluded that Appellant violated this section by refusing Lieutenant Bombardier's orders to give him an interview concerning the investigation of Sergeant Keefe, and refusing Lieutenant Pettengill's order to answer questions concerning whether Sergeant Keefe had spoken to her about his alleged lying during a deposition.

The Board concluded that Appellant also had violated Part B, Section 20.1, of the Code of Conduct due to her Section 14.1 and Section 11.1 violations. 26 VLRB at 170.

Finally, the Board determined that the Employer did not prove its charge that Appellant violated Part A, Section 8.1 of the Code of Conduct, concerning making false reports, when giving interviews in internal affairs investigations to Lieutenants Pettengill and Bombardier. 26 VLRB at 162-63.

The fact that the Employer has not proven all of the charges against Appellant does not necessarily mean that her dismissal lacked just cause. Failure of an employer to prove by a preponderance of the evidence all the particulars of each charge contained in 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 Appellant's duties, including whether the offenses were intentional and committed for gain, 2) the employee's job level and type of employment, 3) the effect of the offenses upon supervisors' confidence in Appellant's ability to perform assigned duties, 4) the clarity with which Appellant was on notice of any rules that were violated in committing the offenses, 5) Appellant's past disciplinary record, 6) Appellant's past work record, 7) the impact of the offenses upon the reputation of the Employer, 8) mitigating circumstances surrounding the offenses, 9) consistency of the penalty with those imposed on other employees for the same or similar offenses, 10) consistency of the penalty with the department table of penalties, 11) the potential for Appellant's rehabilitation, and 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Appellant's offenses were very serious. She engaged in a pattern of deception, and otherwise failed to cooperate, in the Keefe investigation and the subsequent investigation of her own actions. She was deceptive about her efforts to obtain an attorney to represent her, as well as her availability to be interviewed, to delay being interviewed as part of the investigations. She exacerbated this misconduct by failing to respond to questions during investigative interviews despite orders to do so.

Dishonesty by employees is grounds for serious punishment, and dismissals for dishonesty have been upheld in several cases by the Board and the Vermont Supreme Court. Grievance of Westbrook, 25 VLRB 232 (2002). Grievances of Camley, et al, 24 VLRB 119 (2001). Grievance of Newton, 23 VLRB 172 (2000). Grievance of Corrow, 23 VLRB 101 (2000). Grievance of Pretty, 23 VLRB 260 (1999). Grievance of Coffin, 20 VLRB 143 (1997). Grievance of Graves, 7 VLRB 193 (1984); *Affirmed*, 147 Vt. 519 (1986). Grievance of Cruz, 6 VLRB 295 (1983). Grievance of Barre, 5 VLRB 10 (1982). Grievance of Carlson, 140 Vt. 555 (1982). The nature of a state police officer's duties requires accurate and truthful reporting of events, including providing testimony in various forums where credibility is crucial. Appellant acted contrary to these duties by her deception and misdirection during the internal affairs investigations.

Further, employees have a duty to cooperate in employer investigations whether to impose discipline. An employee's failure to cooperate constitutes serious misconduct contributing to a determination that just cause exists for dismissal. Newton, 23 VLRB at 195. Grievance of Pretty, 23 VLRB at 270. As a detective sergeant for the State Police, Appellant had the responsibility to cooperate in, and preserve the integrity of, the internal affairs investigation process. She intentionally and deceptively compromised the integrity

of this process through her actions. Commissioner Walton reasonably concluded that the obligation to be fully forthcoming with internal affairs investigators was among a trooper's most important responsibilities, and that Appellant knowingly failed to meet this obligation.

Further, Appellant's misconduct was intentional and motivated by misguided reasons of personal gain. The Employer had legitimate interests in conducting an expeditious investigation of Sergeant Keefe since his credibility was at issue. The Employer needed to protect the integrity of its work and ensure that Keefe was trustworthy. Nonetheless, Appellant sought to delay internal affairs interviews of her, and was dishonest with internal affairs investigators about her efforts to secure legal representation for the interviews, so the interviews would not take place before the completion of hearings in a grievance of hers that was pending before the Labor Relations Board. Appellant was concerned that the attorney for the Employer in that case would attempt to use information she provided to Lieutenant Bombardier in an interview to attack her credibility during the Board hearings. Appellant's concerns did not reflect a valid protection of her interests. If she had cooperated in the investigation and been forthcoming and forthright during the interview with Lieutenant Bombardier, it would not have been reasonable for her to fear an attack on her credibility. Commissioner Walton reasonably concluded that Appellant, by so acting, was unacceptably placing her own interests ahead of the trooper whose conduct was being investigated by the internal affairs investigator, as well as the interests of the Employer in conducting the investigation.

Appellant was on fair notice that her dishonesty and lack of cooperation during the internal affairs investigations could be a cause for dismissal. Honesty is an implicit duty of every employee, and Grievant knew that dishonest conduct was prohibited. Carlson, 140 Vt. at 560. Further, Appellant understood that she was required to fully and truthfully answer all questions asked of her when she was a witness during an internal affairs investigation, and that she could be disciplined if she did not do so.

Appellant's misconduct understandably resulted in Commissioner Walton losing confidence in her ability to perform her assigned duties. Appellant's refusal to cooperate in internal affairs investigations by disobeying superiors' orders to answer questions, and exhibiting dishonesty during the investigations, undermined her ability to function as a police officer and maintain the trust of her superiors. Further, her retention would have damaged the reputation of the Employer concerning the integrity of its workforce.

Mitigating circumstances do not support Appellant's retention. We recognize that her misconduct occurred during a period that Appellant experienced job tensions stemming from her pending grievance. Nonetheless, such tensions did not justify or explain the pattern of deception and lack of cooperation exhibited by Appellant.

We recognize that Appellant had a good work record over 23 years of service and previously had not received disciplinary action. However, the serious nature of her misconduct, taken together with lack of evidence indicating that Appellant was treated differently than other employees committing similar offenses or differently than the Employer's prescribed disciplinary guidelines, warranted bypassing progressive discipline and imposing dismissal. Commissioner Walton acted reasonably in concluding that Grievant was not a good candidate for rehabilitation and that a sanction less than

dismissal would not have been adequate. In sum, we conclude that just cause existed for Appellant's dismissal.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons; and in consideration of the Findings of Fact, Opinion and Order issued by the Labor Relations Board in this matter on July 22, 2003; it is ordered that the Appeal of Gloria Danforth is dismissed.

Dated this 16th day of June, 2004, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
Edward R. Zuccaro, Acting Chairperson

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Richard W. Park

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Joan B. Wilson