VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 05-34
LAWRENCE ROSENBERGER	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

There are three motions before the Labor Relations Board in connection with this grievance of Lawrence Rosenberger ("Grievant") contesting his dismissal as a Game Warden with the State of Vermont Agency of Natural Resources, Department of Fish & Wildlife ("Employer"). The three motions are a Motion to Strike filed by Grievant, a Motion to Compel filed by the Employer, and a Second Motion to Exclude Evidence filed by Grievant.

On April 11, 2006, Grievant filed a motion to strike Charges #3, #4 and #5 as set forth in the Loudermill letter that he received; and which were incorporated into the letter dismissing him. On April 26, 2006, the Employer filed a memorandum in opposition to the motion to strike; and on May 8, 2006, Grievant filed a reply to the Employer's opposition to the motion.

On May 16, 2006, the Employer filed a motion to compel Grievant and VSEA Representative Gary Hoadley to give certain testimony at depositions and at the Labor Relations Board hearing on the merits. On May 22, 2006, Grievant filed a memorandum in opposition to the motion to compel. On May 16, 2006, Grievant filed a Second Motion to Exclude Evidence. The Employer filed a memorandum in opposition to the motion to exclude evidence on May 22, 2006.

The Board held a hearing on the three motions on May 25, 2006, before Board Members Edward Zuccaro, Chairperson; Carroll Comstock and Richard Park. Attorneys Scott Cameron and Michael Casey, VSEA Deputy Counsel, represented Grievant. Assistant Attorney General Julio Thompson represented the Employer. The parties presented evidence and arguments on the motions. The Findings of Fact herein are based on exhibits filed by the parties and evidence presented at the May 25 hearing.

FINDINGS OF FACT

1. Grievant met with his supervisor, Lieutenant Robert Lutz, on April 4, 2005. The meeting is discussed in detail in the March 30, 2006, decision of the Labor Relations Board. 28 VLRB 197. After the meeting, Lutz that day traveled to Employer headquarters in Waterbury. Lutz met with his superiors, Major David Lecours and Colonel Robert Rooks, and informed them of the details of his meeting with Grievant. This was the first knowledge that Rooks had of any alleged misconduct by Grievant. Rooks directed Lutz to conduct a supervisory inquiry and complete a misconduct complaint form on Grievant. On April 5, Lutz completed a misconduct complaint form on Grievant (Grievant's Exhibits 10).

2. On April 8, 2005, Colonel Rooks reviewed the misconduct complaint form completed by Lutz. Rooks met with Major Lecours and Commissioner Laroche to discuss what action to take. Rooks recommended opening an internal investigation on Grievant. Commissioner Laroche agreed with the recommendation. On April 8, Rooks assigned Lieutenant Kenneth Denton to conduct the internal investigation. This was Denton's first knowledge of, and involvement in, allegations of misconduct against Grievant (Grievant's Exhibits 10, 12 and 13).

3. Prior to the April 4 meeting between Grievant and Lutz, Grievant was not under investigation for any alleged misconduct. At the time Commissioner Laroche approved the investigation of Grievant, the information he had concerning allegations against Grievant had originated exclusively from Lutz. Laroche had no role in the investigation of Grievant. At the time Rooks assigned Denton to conduct the internal investigation, the information that Rooks and Denton had concerning allegations against Grievant had been provided exclusively by Lutz (Grievant's Exhibits 10 and 12).

4. During his investigation of Grievant, Denton reviewed callouts of Grievant other than the March 27, 2005, callout that had been reported to him by Lutz to seek to ascertain whether Grievant had improperly obtained callout compensation on occasions prior to March 27, 2005. During Denton's investigation, no one contacted Denton to inform him that Grievant was involved in misconduct of any sort (Grievant's Exhibit 12).

5. On June 8, 2005, Lieutenant Kenneth Denton issued a 14-page report (with 220 pages of attachments) of his investigation concerning allegations that Grievant violated Standard Operating Procedures ("SOP") of the Employer. Denton stated as follows in the section of the report entitled "Violations of SOP":

> 1) **SOP 3.24: Knowingly made false entry in official records.**
>
> On 3/27/05, Incident #05FW01566, Warden Rosenberger provided the dispatcher false information concerning an injured deer, when in fact the deer was not injured and made no attempt to correct the misinformation and also providing a false name, "Gil Gaudette" as the complainant where Warden Rosenberger states that he does not know this person or know why he provided same. This false information was entered into the CAD (Computer Aided Dispatch System) and a four hour callout entered on his time sheet. This false information was used to obtain financial compensation for four hours at the rate of time and one half. In Warden Rosenberger's case this would amount to approximately $137.22.

On 5/19/04, Incident #04FW02947, Warden Rosenberger provided false information to the dispatcher, listing Jeremy LaPierre as a fish and wildlife complainant to initiate a callout for overtime compensation for four hours at time and one half rates. This false information was entered into CAD and a four hour callout entered on his time sheet. Jeremy LaPierre never made the complaint or contacted Warden Rosenberger. Warden Rosenberger was not honest and forthright in his answers.

2) SOP 9.03; Self activated for "Callouts" that did not meet the criteria.

When officers respond to a callout they are compensated at a rate of four hours at time and one half. In Warden Rosenberger's case this would amount to approximately $137.22 per incident.

Warden Rosenberger could not provide any supporting documentation or provide a verbal account of how he received these complaints and from who.

The following incidents did not meet the criteria set out in SOP and Memo dated 11/12/96:

05/07/04	04FW02698	
05/15/05	04FW02880	
05/16/04	04FW02904	
05/19/04	04FW02947	Jeremy LaPierre never made complaint to initiate callout.
05/29/04	(no incident)	No documented call or action taken.
05/30/04	04FW03196	
05/31/04	04FW03235	
03/27/05	05FW01566	Deer was dead.

3) SOP 9.01: Failure to maintain Daily Log.

Warden Rosenberger was ordered to turn in his 2004 and 2005 Daily Logs upon being placed on administrative leave. This did not occur. Warden Rosenberger stated that he has not kept daily logs for the past few years and did not have said records. He advised that he knew it was required by SOP to keep same.

4) SOP 9.06: Investigation Reports, Failure to record witness/complainants

Warden Rosenberger failed to record witnesses/complainants in his investigation reports associated with the cases listed below:

04FW02880
04FW02904
04FW03235

Warden Rosenberger was also not able to verify the complainants through other documentation or testimony.

5) SOP 3.19: Wardens will accurately record actual hours they work on their time sheets, may not volunteer time, or not sign on with CAD.

Warden Rosenberger admitted to two occasions in 2004 where he went "Stalking" for fish violations, in uniform and not signed on and charged for a callout. If no violations were found he would not charge for a callout. Warden Rosenberger could not remember specific dates.

6) SOP 3.24: An officer will submit required reports within 14 days or as directed …

On 5/29/04, Warden Rosenberger failed to check and verify incident 04FW03147 and did not complete the required moose injury or moose mortality report card. These still have not been received as of the completion of this report.
(State's Exhibit 2, Grievant's Exhibit 4)

6. Article 14 of the collective bargaining agreement between the State of Vermont and the Vermont State Employees' Association ("VSEA") for the Non-Management Unit, effective July 1, 2003 – June 30, 2005 ("Contract"), provides in pertinent part:

> . . .
> 2. The appointing authority, or authorized representative, after complying with the provisions of paragraph 4 of this Article, may dismiss an employee for just cause with two weeks' notice or two weeks' pay in lieu of notice. Written notice of dismissal must be given to the employee within twenty-four (24) hours of verbal notification. In the written dismissal notice, the appointing authority shall state the reason(s) for dismissal and inform the employee of his or her right to appeal the dismissal at Step IV before the State Labor Relations Board within the time limit prescribed by the rules and regulations of the Board.
> . . .
> 4. Whenever an appointing authority contemplates dismissing an employee, the employee will be notified in writing of the reason(s) for

such action, and will be given an opportunity to respond either orally or in writing. The employee will normally be given 24 hrs. to notify the employer whether he or she wishes to respond in writing or to meet in person to discuss the contemplated dismissal. The employee's response, whether in writing or in a meeting, should be provided to the employer within four days of receipt of written notification of the contemplated dismissal. Deadlines may be extended at the request of either party, however if the extension is requested by the employee, the employee will not be carried on the payroll unless it is charged to appropriate accrued leave balances. At such meeting the employee will be given an opportunity to present points of disagreement with the facts, to identify supporting witnesses or mitigating circumstances, or to offer any other appropriate argument in his or her defense.
. . .

7. Section 8.1 of the Policies and Procedures issued by the Department of Human Resources, entitled "Due Process Requirements (Loudermill Process)", has provided at all times relevant in pertinent part as follows:

> PURPOSE AND POLICY STATEMENT
>
> State employees who are protected by the Agreements between the State . . . and the . . . VSEA . . . from dismissal except for just cause . . . are entitled to some kind of hearing prior to their dismissal. Appointing authorities contemplating the dismissal of such an employee must provide them with both notice of the specific allegations under consideration, and an opportunity to respond to the charges, prior to imposing the dismissal.
> . . .
> GENERAL GUIDELINES
>
> When a tentative decision to dismiss an employee has been reached, the appointing authority, or the person delegated thereby to make or recommend such action to the appointing authority, must give employees an opportunity to respond to the specific allegations of misconduct. . . .
>
> NOTIFICATION
>
> 1. The employer must notify the employee, in writing, that dismissal is contemplated as a result of certain specific charges, which must be outlined in the letter. Employees must also be told that they have a right to respond to the charges, either orally or in writing, . . . and before final action is taken. . .
> (Grievant's Exhibit 14)

8. Fish & Wildlife Commissioner Wayne Laroche sent Grievant a Loudermill letter dated July 20, 2005. The letter provided in pertinent part as follows:

> As a result of your behavior described below, the Department of Fish & Wildlife is contemplating your dismissal from the position of Game Warden III. . . . The following charges of misconduct are based upon an Investigation report prepared by Lt. Kenneth Denton, District Chief, dated June 8, 2005 (copy attached) which my(sic) be consulted for further information regarding the basis for the charges summarized below.
>
> The reasons for contemplating disciplinary action are as follows:
>
> 1) You fabricated a case (#05FW01566) in order to receive call-out compensation. This misconduct included your willfully making false entries in official records (including your time report, radio log, and Computer Aided Dispatch records), making false statements to a dispatcher, and providing your supervisor with misleading information. These actions are in violation of Fish and Wildlife SOP 3.24, 9.03, Article 24 of the Non-Management Unit Bargaining Unit Agreements, and Personnel Policy 5.6.
>
> 2) You failed to maintain daily logs in violation of Fish and Wildlife SOP 9.01.
>
> 3) You violated department policy by going off-duty, self-activating and charging for a callout in violation of Vermont Fish and Wildlife callout policy SOP9.03, 2.b., SOP 3.19, and Article 24 of the Non-Management Bargaining Unit Agreements.
>
> 4) You failed to submit required reports within 14 days, or as directed, in violation of Vermont Fish & Wildlife policy SOP 3.31.
>
> 5) You failed to submit a list of witnesses/complainants in an investigation in violation of Vermont Fish & Wildlife policy SOP 9.06.
>
> You must notify me within twenty-four (24) hours after receiving this letter whether you wish to respond to the above allegations. . . .
>
> If you wish to make your response orally, I will schedule a meeting with you and, if applicable, your representative . . .
>
> You are provided this opportunity to respond so that you can present points of disagreement with what the employer believes the facts to be; to identify witnesses who may support your defense; to identify any

> mitigating circumstances which should be considered; and to offer any other argument you wish to make.
>
> You may be represented by the VSEA or private counsel, in preparing or presenting your response, whether in writing or at a meeting. It is requested that you personally present your version of the facts. Your representative may then make arguments on your behalf.
>
> After having reviewed any new information, I will conduct further inquiry as is appropriate and then make a prompt final decision on this action. (Grievant's Exhibit 1, State's Exhibit 1)

9. The July 20, 2005, Loudermill letter was drafted by Gloria Abbiati, Human Resources Manager for the Employer. Commissioner Laroche asked Abbiati to draft the Loudermill letter. He did not discuss with Abbiati his intent as to the contents of the letter. In drafting the letter, Abbiati did not consult with Commissioner Laroche or any other representative of the Employer. She did discuss the draft with Kari Miner of the Department of Human Resources. Miner edited Abbiati's original draft. Abbiati then presented the revised draft to Commissioner Laroche. He signed the letter without making any revisions (State's Exhibits 1 and 6; Grievant's Exhibit 1).

10. Commissioner Laroche has the understanding that paragraph No. 4 of the Loudermill letter, concerning failure to file reports within 14 days, relates to paragraphs Nos. 3 or 5 of Denton's report. Paragraph No. 4 of the Loudermill letter actually relates to paragraph No. 6 of Denton's report. Denton erred in stating in his report that this allegation concerned a violation of SOP 3.24. The Loudermill letter corrected this error by Denton by stating that this allegation concerned a violation of SOP 3.31.

11. In response to the Loudermill letter, Grievant requested a Loudermill hearing with Commissioner Laroche. Prior to the Loudermill hearing, Abbiati provided

Grievant's VSEA Representative, Gary Hoadley, with Denton's June 8 investigation report and the attachments to the report (State's Exhibits 2, 3 and 6).

12. The Loudermill hearing was held on August 12, 2005. Present for the Employer were Commissioner Laroche, Abbiati, Major David Lecours and Lieutenant Robert Lutz. Grievant was accompanied by VSEA Representatives Hoadley and Jonathan Goddard (State's Exhibit 6).

13. The Loudermill hearing lasted approximately an hour. Hoadley did much of the speaking at the hearing. He spent a substantial amount of time criticizing Lieutenant Lutz questioning Grievant about the March 27 incident without providing him with the opportunity for VSEA representation, and criticizing Denton's subsequent investigation. At one point during the hearing, Grievant indicated that he would like to speak to an issue addressed in the Denton report concerning a callout involving a complainant named Jeremy LaPierre. Hoadley indicated to Employer representatives at the hearing that the callout involving LaPierre was not included in the allegations against Grievant contained in the Loudermill letter, and he did not consider it an issue in the case. Laroche, Abbiati, Lecours and Lutz did not inform Hoadley that the callout involving LaPierre was included in the allegations against Grievant and did not otherwise respond to this statement by Hoadley. When there was no response, Hoadley indicated that Grievant would not discuss the callout involving LaPierre because it was not an issue. Near the end of the hearing, Commissioner Laroche asked Grievant about a May 2004 incident involving a moose that had been addressed by Denton in his investigation report. Grievant responded by discussing what he remembered of the incident. Hoadley and Grievant also discussed a recent memorandum sent out by the Wildlife Biologist of the

Employer indicating that there were over one hundred moose reports that had not been filed by wardens (State's Exhibits 4, 5, 6, 7, 10 and 13; Grievant's Exhibits 7 and 8).

14. By letter dated August 22, 2005, Commissioner Laroche notified Grievant that he was dismissed. The letter provided in pertinent part:

> This is to notify you of your dismissal from the position of Game Warden III effective August 22, 2005. You will receive two weeks pay in lieu of two weeks notice. By letter dated July 20, 2005, I notified you that I was contemplating your dismissal, and gave you the opportunity to respond to charges of making false entries on official time sheet and radio log documents. On August 12, 2005, I met with you to hear your response. In making my final decision, I have considered all of the information that you brought to my attention.
>
> The reasons for this action are those listed in my letter of July 20, 2005, (attached hereto for), which are incorporated herein by reference.
> . . .
> (State's Exhibit 1)

15. On November 29, 2005, Grievant served a Request for Production of Documents on the Employer. In that request, Grievant requested that the Employer "produce a complete copy of each and every record, report, recording, note, correspondence, email, Rosenberger timesheet, and other document or recording that pertains to" each of the cases cited in paragraph Nos. 1 – 6 of the section of Denton's June 8, 2005, report entitled "Violations of SOP". In that request, Grievant also requested such production for other cases referenced in Denton's report which were not cited in paragraph Nos. 1 – 6 of this section of the report (State's Exhibit 9).

OPINION

Motion to Strike

We first address Grievant's motion to strike Charges #3, #4 and #5 set forth in the Loudermill letter, which were incorporated into the letter dismissing him. Grievant contends that these charges should be stricken because they are insufficient to put him on notice of the allegations against him. Grievant argues that the charges do not meet the degree of specificity required by the Contract, and are so vague that they offend basic concepts of fair play and due process.

The Employer contends that Grievant's motion to strike is fatally defective in two respects. First, the Employer argues that the motion is untimely because it raises two new legal claims – a violation of Article 14 and a violation of Grievant's due process rights due to alleged insufficient notice of the charges against Grievant – that were not raised in the grievance filed with the Board. Second, the Employer contends that Grievant was provided with far more notice about the nature of the charges than is required by the Contract or due process.

We next address the Employer's first claim that the motion is untimely because it raises new legal claims that were not raised in the grievance filed with the Board. The Board has declined to decide issues that were not raised in the grievance filed with the Board pursuant to Section 18.3 of the Board Rules of Practice, which requires that a grievance contain a concise statement of the nature of the grievance and specific references to the pertinent section of the collective bargaining agreement and/or rules and regulations. Grievance of Regan, 8 VLRB 340, 364 (1985). Grievance of Shockley and VSCFF, 5 VLRB 192, 202-203 (1982).

We disagree that Grievant is precluded on timeliness grounds from raising the issues included in the motion to strike. In his grievance filed with the Board, Grievant alleged that "his dismissal was not based in fact or supported by just cause, in violation of Article 14 of the Contract." Section 2 of Article 14 requires the employer to "state the reason(s) for dismissal" in the "written dismissal notice". A necessary component of determining whether just cause exists for dismissal is to examine the stated reasons for dismissal and conclude whether they are based in fact. Given these considerations, the alleged violation of Article 14 in the grievance, together with a claim that dismissal was not based in fact or supported by just cause, are sufficient under Board Rules of Practice to raise the issue of whether the stated reasons for dismissal were insufficient to put Grievant on notice of the charges against him. This is particularly so since Section 12.10 of Board Rules of Practice provides that "(a)ll pleadings shall be liberally construed."

Moreover, consideration of the consequences of agreeing with the Employer's timeliness argument points out the inadvisability of doing so. If we precluded Grievant from challenging the sufficiency of the specificity of the charges against him, and then we were unable to determine the specific charges the Employer made against Grievant, we would be hindered from adjudicating this case.

The Vermont Supreme Court has held that the employer, having given the reasons for dismissal in one letter, may not change and add to the reasons in a subsequent letter; that to permit such ad hoc amendment would effectively alter the terms of the parties' contract. In re Grievance of Warren, (Unpublished decision, August 22, 1986). This would result in unclear charges with no available method to clarify them. This would be an inequitable and unsatisfactory result in a case where a person's livelihood is at stake.

Thus, we turn to examining the merits of Grievant's claim that Charges #3, #4 and #5 set forth in the Loudermill letter, which were incorporated into the dismissal letter, should be stricken because they are insufficient to put him on notice of the allegations against him. In reviewing a disciplinary action, the Board will not look beyond the reasons given by the employer in the disciplinary letter for the action taken; Grievance of Swainbank, 3 VLRB 34, 48 (1980); Grievance of Regan, 8 VLRB 340, 365-66 (1985); but we will not turn disciplinary letters into dialectic exercises. Grievance of Erlanson, 5 VLRB 28, 39 (1982). Due process considerations require that a notice of dismissal be sufficiently specific to allow adequate preparation for the employee's defense. Grievance of Morrissey, 149 Vt. 1, 10 (1987). A letter which adequately puts an employee on notice of the misconduct will not be considered deficient. Erlanson, 5 VLRB at 39.

We discuss each charge separately. Charge #3 in the Loudermill letter notified Grievant as follows: "You violated department policy by going off-duty, self-activating and charging for a callout in violation of Vermont Fish and Wildlife callout policy SOP 9.03, 2.b., SOP 3.19, and Article 24 of the Non-Management Bargaining Unit Agreements." The Employer contends that this charge refers to eight incidents cited by Lieutenant Denton in his investigative report in which he concluded that Grievant had violated SOP 9.03 in self-activating for callouts. In support of this contention, the Employer relies on the sentence in the Loudermill letter preceding the charges of misconduct which provides: "The following charges of misconduct are based upon an Investigation report prepared by Lt. Kenneth Denton, District Chief, dated June 8, 2005 (copy attached) which may be consulted for further information regarding the basis for the charges summarized below."

We disagree with the Employer that this charge adequately put Grievant on notice of the misconduct for which he was charged. The citation to the Denton report was not sufficient to notify Grievant that he was being charged with the eight incidents cited in the Denton report. First, the charge itself is in the singular, referring to a "callout", whereas the Denton report cites multiple incidents.

Second, it is clear that the Denton report is not incorporated in its entirety into the dismissal letter. For example, Denton concluded that Grievant had knowingly made a false entry in official records in violation of SOP 3.24 by falsely informing a dispatcher that Jeremy LaPierre was a complainant in a May 19, 2004, incident. Yet, there was no charge in the dismissal letter of false entry in official records in violation of SOP 3.24 concerning the LaPierre incident. Thus, a general citation to the Denton report without more was insufficient to notify Grievant which of the eight callout incidents cited in the Denton report applied.

Third, the August 12, 2005, Loudermill hearing further weakens the Employer's contention that Grievant was put on notice that Charge #3 referred to the eight incidents cited in the Denton report. One of the incidents cited by Denton, concerning violation of SOP 9.03 in self-activating for callouts, was the May 19, 2004, incident allegedly involving Jeremy LaPierre. Yet, when Grievant's VSEA representative, Gary Hoadley, indicated to Employer representatives at the hearing that the callout involving LaPierre was not included in the allegations against Grievant contained in the Loudermill letter, the Employer representatives did not inform Hoadley that the callout involving LaPierre was in fact included in the allegations against Grievant and did not otherwise respond to

this statement by Hoadley. When there was no response, Hoadley indicated that Grievant would not discuss the callout involving LaPierre because it was not an issue.

Hoadley's assertions provided the Employer representatives with the opportunity to notify Grievant that Charge #3 referred to the LaPierre incident. Their silence bolsters Grievant's contention that he was not on notice that he was being charged with misconduct concerning this incident or the other seven incidents cited in the Denton report.

At a pre-dismissal hearing, the employee is entitled to oral or written notice of the charges against him or her, an explanation of the employer's evidence, and an opportunity to present his or her side of the story. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546 (1985). In re Towle, 164 Vt. 145, 153 (1995). Once Hoadley made his assertions, Grievant was entitled to a response from the Employer that Grievant was being charged with misconduct concerning the LaPierre incident, if he was being so charged with respect to this incident. This would have provided him with the opportunity to present his version of the incident.

Instead, the Employer's failure to respond provides evidence of lack of notice to Grievant that he was being charged concerning this incident, and a denial of an opportunity to respond prior to his dismissal. The Employer was not required to engage in argument with Hoadley on this or any other issue, but the Employer was obligated to respond to Hoadley that Grievant was being charged concerning the LaPierre incident if that was the case.

In sum, Charge #3 was insufficient to provide adequate notice to Grievant of the specific misconduct for which he was being charged. The result is that it is unclear what

alleged misconduct is at issue in this charge. The Employer has failed in its obligation to make a sufficiently specific charge to allow adequate preparation for Grievant's defense. Thus, we grant Grievant's motion to strike this charge from the letter of dismissal.

Charge #4 in the Loudermill letter notified Grievant as follows: "You failed to submit required reports within 14 days, or as directed, in violation of Vermont Fish & Wildlife policy SOP 3.31." The Employer contends that this charge refers to the incident cited by Denton in his report in which he concluded that Grievant had violated "SOP 3.24" requiring reports to be submitted within 14 days, or as directed, by not submitting a moose injury or mortality report. In support of this contention, the Employer again relies on the sentence in the Loudermill letter preceding the charges of misconduct which refers Grievant to the Denton report for the basis of the charges.

Grievant contends that this charge did not adequately put him on notice of the misconduct for which he was being charged because Denton referred to a violation of "SOP 3.24" when he discussed the failure to file a moose injury or mortality report, not "SOP 3.31" as cited in the Loudermill letter. Although it is true that Denton cited the incorrect SOP, his error was corrected in the Loudermill letter. A comparison between Charge #4 in the Loudermill letter and the Denton report should have made it clear to Grievant that he was being charged with the incident discussed by Denton in his report concerning Grievant's failure to file a moose injury or mortality report. This is because this incident is the only one discussed in the Denton report under the heading of "submit required reports within 14 days or as directed", which is identical to the subject of Charge #4.

Our conclusion in this regard is bolstered by the Loudermill hearing. During the hearing, Commissioner Laroche asked Grievant about the moose incident that had been addressed by Denton in his investigation report. Grievant responded by discussing what he remembered of the incident. Hoadley and Grievant also discussed at the hearing a recent memorandum sent out by the Employer's Wildlife Biologist indicating that there were over one hundred moose reports that had not been filed by wardens. The fact that these discussions occurred indicate that Grievant was on notice that he was being charged with failure to file a timely report concerning the moose incident addressed by Denton in his report. Otherwise, there would have been no need for the discussion.

We recognize that, at the hearing on the motions in this matter, Commissioner Laroche expressed an understanding that Charge #4 related to different portions of the Denton report than the moose incident. Nonetheless, his testimony at the hearing which evidenced a misunderstanding does not alter our conclusion that there was specific notice to Grievant in the Loudermill letter that Charge #4 referred to the moose incident addressed in the Denton report, a conclusion that was reinforced by the Loudermill hearing. Accordingly, we deny Grievant's motion to strike this charge from the dismissal letter.

Charge #5 in the Loudermill letter notified Grievant as follows: "You failed to submit a list of witnesses/complainants in an investigation in violation of Vermont Fish & Wildlife policy SOP 9.06." The Employer contends that this charge refers to three cases cited by Denton in his report in which he concluded that Grievant had violated SOP 9.06 by failing to record witnesses/complainants in his investigation reports. In support of this contention, the Employer again relies on the sentence in the Loudermill letter

preceding the charges of misconduct which refers Grievant to the Denton report for the basis of the charges.

We disagree with the Employer that this charge adequately put Grievant on notice of the misconduct for which he was charged. The citation to the Denton report was not sufficient to notify Grievant that he was being charged with the three incidents cited in the Denton report. First, the charge itself is in the singular, referring to an "investigation", whereas the Denton report cites multiple investigations. Second, as discussed above, it is clear that the Denton report is not incorporated in its entirety into the dismissal letter. Thus, a general citation to the Denton report without more was insufficient to notify Grievant which of the three incidents cited in the Denton report applied.

In sum, Charge #5 was insufficient to provide adequate notice to Grievant of the specific misconduct for which he was being charged. The result is that it is unclear what alleged misconduct is at issue in this charge, and the Employer is not allowed to now clarify its dismissal letter. We are left with an unclear charge with no available method to clarify it. The Employer has failed in its obligation to make a sufficiently specific charge to allow adequate preparation for Grievant's defense. Thus, we grant Grievant's motion to strike this charge from the letter of dismissal.

Motion to Compel and Motion to Exclude Evidence

Due to their interrelationship, we consider together the Employer's Motion to Compel and Grievant's Motion to Exclude Evidence. In the Motion to Compel, the Employer seeks an order from the Labor Relations Board compelling testimony at a deposition and before the Board from Grievant regarding:

a. Grievant's activities relating to his alleged callout in response to an injured deer complaint on the evening of March 27, 2005, and his subsequent request for overtime compensation for the alleged callout – matters reflected in Grievant's April 2, 2005 timesheet, a police dispatcher's Law Incident Report describing the callout, and a tape-recording of Grievant's communications with the dispatcher;

b. Grievant's statements and behavior during his April 4, 2005 meeting with Lieutenant Lutz prior to the moment in the interview when, according to the Board's March 30, 2006, decision, Lutz asked Grievant an improper question in violation of the Contract;

c. Charges 2-5 in the Loudermill letter, which were based on evidence independent of information conveyed to Lutz in his April 4, 2005 meeting with Grievant;

d. Matters referenced in voluntary statements made by Grievant and VSEA Representative Hoadley at the Loudermill hearing, including: (i) Hoadley's acknowledgement that Grievant had committed misconduct and deserved serious discipline; (ii) Hoadley's reiteration of Grievant's "mystery man" alibi regarding Grievant's activities on the evening of March 27, 2005; and (iii) Grievant's discussion of Charge 4 against him, which pertained to a May 2004 injured moose incident; and

e. Matters referenced in an affidavit Grievant voluntarily filed in which he discussed the so-called "LaPierre callout".

In the Motion to Compel, the Employer also seeks an order compelling testimony from Hoadley at a deposition and before the Board regarding the statements and admissions he made on Grievant's behalf at the Loudermill hearing. Such testimony would include asking Hoadley about matters he raised at the Loudermill hearing, such as Grievant's "mystery man" alibi and his acknowledgement that Grievant had done wrong and was subject to serious discipline.

The Employer indicates that the parties need a ruling on the motion to compel because Grievant's counsel have indicated that they have instructed Grievant and Hoadley not to answer any questions at their depositions relating to the foregoing matters, and have also objected to such questioning at the hearing before the Board on the ground that the testimony is inadmissible "fruit" of the improper question Lutz posed to Grievant on April 4, 2005.

The Employer contends that an order granting the motion to compel is justified on several grounds. The Employer submits that the requested testimony is admissible because it is highly probative of Grievant's culpability, directly relevant to the Board's Colleran and Britt analysis, and consistent with Board precedent admitting evidence obtained post-termination to support the Employer's stated reasons for dismissal. Contrary to Grievant's assertion that the testimony is inadmissible as "fruit of the poisonous tree", the Employer argues that the testimony is untainted and admissible. The Employer also contends that the testimony is admissible because it would have come to light even if the violation of the Contract by Lutz had not occurred. The Employer asserts that granting the motion to compel strikes the appropriate balance between the

employee's interest in enjoying contractual protections, and the employer's and public's interest in terminating dishonest employees.

In Grievant's Second Motion to Exclude Evidence, Grievant seeks an order prohibiting the Employer from introducing all evidence directly and/or indirectly obtained by it as a result of Lutz's April 4, 2005 interview of Grievant. Grievant indicates that this evidence includes, but is not limited to: a) all information directly and/or indirectly obtained by the Employer as a result of its April 4, 2005 questioning of Grievant; b) information obtained by the Employer in its internal investigation of Grievant relative to his dismissal; and/or c) information obtained by the Employer as a result of its April 4, 2005, questioning of Grievant which resulted in the Employer's decision to investigate and/or dismiss him from employment.

Grievant contends that it was Grievant's responses to Lutz's questions that prompted the Employer to discipline him, and to open a more in-depth investigation, which resulted in additional charges against him. Grievant maintains that there was not a single source of information gathered independently of Lutz which led the Employer to investigate Grievant. Grievant asserts that for the Employer to now say that it would have commenced disciplinary proceedings against Grievant even if his improper interview had never occurred is self-serving, purely speculative, and not supported by testimony from involved management officials. Grievant argues that there is no evidence that the Employer would have inevitably discovered his alleged misconduct had he not been interviewed by Lutz, and there were no independent reports of misconduct that would have led the Employer to investigate Grievant.

Grievant submits that all facts discovered by the Employer after the date of Lutz's improper questioning of Grievant are fruit of the Employer's contract violation. Grievant asserts that, because the information obtained by the Employer to discipline him stems directly from its improper interrogation of him on April 4, and the Employer's subsequent investigation was prompted by Grievant's responses to questions on that date, it must be excluded as evidence in support of his discipline.

In deciding these motions, we look to precedents of the Board and the Vermont Supreme Court to determine whether they are instructive in analyzing the two motions. The Employer contends that the Board decision in Grievance of Boucher, 9 VLRB 50 (1986), supports its motion to compel. In Boucher, 9 VLRB at 56-57, the Board discussed whether, in making a decision in a dismissal case, it would rely on post-dismissal evidence gathered by an employer. The Board stated:

> (W)ith regard to post-dismissal evidence supporting the stated reasons for disciplinary action, we believe the relevant consideration is really one of fairness and surprise. As a general rule, we believe an employer may investigate further to substantiate facts known to exist at the time of dismissal to support action already taken, as long as an entirely new charge is not added and the discharged employee is given an adequate opportunity to contest it.

The Employer contends that, since the Boucher decision indicates that an employer may introduce evidence obtained after termination to support its stated reasons for termination, there is no procedural bar to offering deposition or hearing testimony from Grievant or Hoadley regarding the charges against Grievant. We conclude that the general rule set forth in the Boucher decision is not applicable given the particular circumstances of this case once we take into account the relevant consideration of fairness recognized in the Boucher case.

Boucher, unlike this case, was not decided in the context of the Board having decided that the employer's decision to dismiss was affected by evidence that was wrongfully procured. If we were to adopt the Employer's contention concerning the applicability of the Boucher case, we would be allowing the Employer to do an end-run around our March 30 decision prohibiting the Employer from relying on evidence of admissions made by Grievant concerning the March 27 incident at, and subsequent to, the April 4 meeting with Lutz. Grievance of Rosenberger, 28 VLRB 197. This would be unfair to Grievant as we would be eviscerating the significance of his rights to obtain VSEA representation prior to being questioned about suspected misconduct. Id. at 218.

Instead, more appropriate guidance in deciding these motions is found in the line of cases concerning the Board's role in reviewing decisions by management to discipline an employee. In fulfilling its duty of deciding whether just cause exists for an employee's dismissal, the Board has power to police the exercise of discretion by the employer and to keep such action within legal limits. In re Goddard, 142 Vt. 437, 444-445 (1983). But the Board is not given, by the statute or by the agreement, any authority to substitute its own judgment for that of the employer, exercised within the limits of law or contract. Id. at 445. The ultimate criterion of just cause is whether the employer acted reasonably in discharging the employee because of misconduct. Id. at 443.

In carrying out our function as the independent administrative agency determining whether just cause exists for dismissal, our job is to determine de novo and finally the facts of a particular dispute, and whether the penalty imposed on the basis of those facts is within the law and the contract. Grievance of Colleran and Britt, 6 VLRB 235, 265 (1983). Once the underlying facts have been proved, the Board must determine whether

the discipline imposed by the employer is within the range of its discretion given the proven misconduct. Id. at 265-66. If the employer establishes that management responsibly balanced the relevant factors in a particular case, and struck a balance within tolerable limits of reasonableness, its penalty decision will be upheld. Id. at 266.

Appeal of Danforth, 23 VLRB 288 (2000) involved an issue of whether evidence of alleged inconsistent discipline was relevant to the Board review of Appellant's dismissal to the extent that it involved alleged improper conduct by other employees of which management was unaware at the time of Appellant's dismissal. After discussing the role of the Board in the dismissal process, the Board stated in Danforth:

> This review of our role in the dismissal process lends support to a conclusion that evidence of alleged inconsistent discipline is not relevant to our review of Appellant's dismissal to the extent that it involves alleged improper conduct by other employees of which management was unaware at the time of Appellant's dismissal. Since our duty is to police the exercise of discretion by the employer to ensure the employer considered the relevant factors in each particular case and took action within tolerable limits of reasonableness, the relevant focus is on management's actions and knowledge at the time the dismissal decision was made. This implies that evidence of inconsistent treatment is not relevant to the extent that it involves alleged improper conduct by other employees of which management was unaware at the time of the aggrieved employee's dismissal. . . . For us to rule otherwise would inappropriately shift the focus away from the employer's judgment at the time of dismissal and create uncertain standards and timeframes in dismissal cases. 23 VLRB 295-96.

Here too, the relevant focus is on the Employer's actions and knowledge at the time the decision was made to dismiss Grievant. Evidence is not relevant to the extent that it involves information that management was unaware of at the time of Grievant's dismissal. For us to rule otherwise, particularly under the circumstances of this case, would inappropriately shift the focus away from the Employer's judgment at the time of dismissal.

In deciding the motions before us given these considerations, we first reject Grievant's position that we should exclude all evidence obtained by the Employer after the improper questioning of Grievant by Lutz. Grievant's reasoning that such evidence should be excluded given the facts that Grievant was not being investigated for misconduct prior to Lutz questioning him on April 4, and Lutz was the sole source of information management had when deciding to further investigate Grievant, is too simplistic.

Such an argument inappropriately disregards the conclusion we reached in our March 30 decision that, prior to Lutz asking Grievant the improper question at the April 4 meeting without providing him the opportunity for VSEA representation, it was reasonable for Lutz to suspect that Grievant may have engaged in misconduct in seeking call-out compensation. This argument also disregards our further conclusion that Lutz in fact did have such suspicions. Since Lutz had reasonable suspicions, it does not follow that the Employer would not have further investigated Grievant but for Lutz's improper questioning of him. The Employer may not rely on any admissions made by Grievant concerning the March 27 incident after the improper questioning by Lutz. However, the Employer was not foreclosed from pursuing an investigation based on information on the March 27 incident that Lutz had at the April 4 meeting, causing him to reasonably suspect that Grievant may have engaged in misconduct in seeking call-out compensation, prior to asking Grievant the improper question.

If we were to hold otherwise, the Employer would be put in a worse position because of Lutz's improper question than if no contract violation had occurred. The interest of deterring violation of an employee's right to union representation, and the

interest in having all relevant evidence of employee misconduct considered, are properly balanced by putting the employer and employee in the same, not a worse, position than they would have been in if no contract violation had occurred. *Cf.* Nix v. Williams, 467 U.S. 431, 443 (1984) ("the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position than they would have been in if no police error of misconduct had occurred"). The appropriate inquiry in a case such as this where there was a contract violation of an employees' right to union representation is whether "the evidence to which . . . objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint" Wong Sun v. United States, 371 U.S. 471, 487-88 (1963). State v. Welch, 160 Vt. 70, 86 (1993).

In sum, we deny Grievant's motion that that we summarily exclude all evidence obtained by the Employer after the improper questioning of Grievant by Lutz. Instead, proffered evidence must be considered individually. In deciding whether the Employer may rely on such evidence in supporting Grievant's dismissal, we seek to place the Employer and Grievant in the same position that they would have been in if no contract violation had occurred. This requires examination of evidence to ascertain whether the evidence was obtained by means sufficiently distinguishable from the taint of the contract violation or by exploitation of the violation. We note that analysis of proffered evidence also has to be consistent with our decision on the motion to strike, as well as consistent with our conclusion that evidence is not relevant to the extent that it involves information of which management was unaware at the time of Grievant's dismissal.

We examine the various components of the Employer's motion to compel with these considerations in mind. The Employer first requests that we issue an order compelling Grievant's testimony relating to the alleged March 27 callout in response to an injured deer complaint and his subsequent request for overtime compensation for the alleged callout – matters reflected in Grievant's April 2, 2005 timesheet, a police dispatcher's Law Incident Report describing the callout, and a tape-recording of Grievant's communications with the dispatcher. It is appropriate to inquire of Grievant whether he submitted the timesheet and sought callout compensation for March 27, and to ask him to verify the contents of the tape-recording of his communications with the dispatcher. It also is appropriate to ask him about the dispatcher's law incident report to the extent of seeking to ascertain the content of his communications with the dispatcher. In each of the areas, questioning is relevant to the stated reasons for Grievant's dismissal without being impermissibly tainted by the contract violation by Lutz.

However, in questioning Grievant in these areas, it is not appropriate for the Employer to ask questions seeking to obtain harmful admissions from him concerning the March 27 incident like those he made during the April 4 meeting with Lutz and the subsequent investigation by Denton. Such questioning would be seeking to procure evidence that exploits and is tainted by the contract violation by Lutz. It would be contrary to our holding in our March 30 decision that the Employer should not benefit, and Grievant and VSEA should not be harmed, by the fruit of a contractually-prohibited interview. Such questioning meets neither the discovery test of being reasonably calculated to lead to the discovery of admissible evidence; V.R.C.P. 26(b)(1); nor the test for admissibility of evidence in Board hearings.

Further, given our holding that the Employer may not rely on evidence of harmful admissions by Grievant concerning the March 27 incident that he made during the April 4 meeting with Lutz and the subsequent investigation by Denton, we would be acting contrary to our role in reviewing dismissals in allowing inquiries by the Employer in this area. This is because such questioning would be seeking to procure information which was not properly before the Employer at the time of Grievant's dismissal. We would be moving away from the relevant focus on the Employer's actions and knowledge at the time the decision was made to dismiss Grievant

The Employer next seeks to compel Grievant's testimony concerning his statements and behavior during his April 4 meeting with Lutz prior to the moment in the interview when Lutz asked Grievant an improper question in violation of the Contract. This inquiry is appropriate. As discussed above, the Employer was not foreclosed from pursuing an investigation based on information on the March 27 incident that Lutz had at the April 4 meeting, causing him to reasonably suspect that Grievant may have engaged in misconduct in seeking call-out compensation, prior to asking Grievant the improper question. Accordingly, it is appropriate to question Grievant about his statements and behavior during the meeting prior to Lutz asking him the improper question.

The allowing of such questioning places the Employer and Grievant in the same position they would have been in if no contract violation had occurred. Such evidence is not tainted by the contract violation since it involves events occurring prior to it. It also involves information of which management was aware at the time of Grievant's dismissal, information that was properly considered in the decision whether to dismiss him.

The Employer next seeks to compel Grievant's testimony concerning Charges 2-5 in the Loudermill letter. Given our ruling on the motion to strike discussed above in which we concluded that Charges 3 and 5 should be struck from the dismissal letter, testimony concerning Charges 3 and 5 is not reasonably calculated to lead to the discovery of evidence that would be admissible at a Board hearing.

Testimony concerning Charges 2 and 4, relating to alleged failure of Grievant to maintain daily logs and file a moose injury or mortality report, requires more extended discussion. The Employer contends that such testimony should be compelled because these charges are based on evidence independent of information conveyed by Grievant to Lutz in the April 4 meeting and thus are not tainted by Lutz's contract violation during the meeting. Grievant contends that he should not be compelled to provide such testimony because these charges stem from information gathered during the Employer's investigation after the improper interrogation by Lutz that are fruit of the improper interrogation.

In our March 30 decision, we reserved judgment on the question whether the Employer may rely on evidence obtained as part of Denton's investigation separate and apart from the April 4 meeting, other than evidence of admissions made by Grievant concerning the March 27 incident. We stated:

> The full development of facts afforded by an evidentiary hearing on the merits is required before we can adequately address this issue. At the hearing, the parties should be prepared to address whether such evidence is independent from admissions made by Grievant during the contractually-prohibited interview. The parties also should be prepared to address whether the inevitable discovery doctrine applies to any of the evidence.

The evidence submitted by the parties concerning the motions before us has not changed our conclusion with respect to Charges 2 and 4 that the full development of facts afforded by an evidentiary hearing on the merits is required before we can adequately assess whether the Employer may properly rely on evidence obtained as part of Denton's investigation concerning Charges 2 and 4. This means that the Employer may inquire into these charges in deposing Grievant and at the hearing before the Board, and we will determine in deciding the case after hearing whether the Employer's reliance on such evidence in supporting discipline imposed on Grievant is valid.

The Employer next seeks to compel testimony from Grievant and Hoadley concerning matters referenced in statements made by them at the Loudermill hearing, including: a) Hoadley's acknowledgement that Grievant had committed misconduct and deserved serious discipline; b) Hoadley's discussion of Grievant's "mystery man" alibi regarding Grievant's activities on the evening of March 27, 2005; and c) Grievant's discussion of Charge #4 against him pertaining to the May 2004 moose incident.

We conclude that inquiry regarding any comments made at the Loudermill hearing by Grievant's representative concerning acknowledgement that Grievant had committed misconduct and deserved serious discipline is not reasonably calculated to lead to the discovery of evidence that would be admissible at a Board hearing. Any such statements occurred in the context of the Employer having notified Grievant that he faced imminent termination based on evidence that included admissions made by Grievant that had been wrongfully obtained as a result of not providing him the right to VSEA representation. It would be unfairly prejudicial to Grievant to allow the Employer to inquire into and rely on such evidence that followed, and was inextricably intertwined

with, the evidence wrongfully procured by the Employer. It also would defeat a worthy purpose of the Loudermill hearing to promote frank discussion of the possibility of a mutually acceptable resolution of the matter. Parties should not be prejudiced by engaging in creative and worthwhile discussions to resolve such important matters.

We likewise conclude that any discussion of Grievant's "mystery man" alibi is not reasonably calculated to lead to the discovery of evidence that would be admissible at a Board hearing. Any such statements occurred in responding to the charge against Grievant relating to the March 27 deer incident that relied on admissions by Grievant that had been wrongfully obtained as a result of not providing him the right to VSEA representation. Again, it would be unfairly prejudicial to Grievant to allow the Employer to inquire into and rely on such evidence that followed, and was inextricably intertwined with, the evidence wrongfully procured by the Employer. Such evidence would be tainted by the contract violation so as to constitute an exploitation of it.

We conclude differently with respect to testimony concerning Grievant's discussion of Charge #4 against him, which pertained to the May 2004 moose incident. As discussed above, the Employer may inquire into this charge in deposing Grievant and at the hearing before the Board, and we will determine in deciding the case after hearing whether the Employer's reliance on such evidence in supporting discipline imposed on Grievant is valid.

The Employer finally seeks to compel Grievant's testimony concerning matters referenced in an affidavit Grievant filed in this matter in which he discussed the so-called "LaPierre callout". Given our ruling on the motion to strike discussed above in which we concluded that any charges relating to the LaPierre incident should be struck from the

dismissal letter, testimony concerning this issue is neither reasonably calculated to lead to the discovery of admissible evidence nor admissible evidence in a Board hearing.

In sum, we grant the Employer's motion to compel to the extent indicated above and deny it all other respects. No further discussion is needed on Grievant's motion to exclude evidence except to indicate that the motion is granted to the extent that we have denied the Employer's motion to compel and is denied in all other respects.

ORDER

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

1. Grievant's Motion to Strike is granted to the extent that Charges #3 and #5 set forth in the Loudermill letter, which were incorporated into the letter dismissing him, are struck from the dismissal letter; and is denied to the extent that Charge #4 is not struck from the dismissal letter; and

2. The Employer's Motion to Compel, and Grievant's Second Motion to Exclude Evidence, are granted to the extent indicated in the Opinion and are denied in all other respects.

Dated this 16th day of June, 2006, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
Edward R. Zuccaro, Chairperson

_____
Carroll P. Comstock

_____
Richard W. Park