VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 14-52
MICHELE LEE	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

The Vermont State Employees' Association ("VSEA") filed a grievance on June 3, 2014, on behalf of Michele Lee ("Grievant"), contending that the Judicial Department of the State of Vermont ("Employer") violated the collective bargaining agreement between the Employer and VSEA, effective July 1, 2012, to June 30, 2014, by dismissing Grievant from employment as Docket Clerk B. Specifically, Grievant alleged that the Employer violated Article 13 of the Contract because: 1) the dismissal was not based in fact or supported by just cause, 2) the Employer improperly bypassed progressive discipline, 3) the Employer improperly bypassed progressive corrective action, and 4) the Employer failed to apply discipline with a view toward uniformity and consistency.

Hearings were held in the Labor Relations Board hearing room in Montpelier on March 27 and 30, 2015, before Board Members Gary Karnedy, Chairperson; Richard Park and Edward Clark, Jr. Assistant Attorney General Shayna Cavanaugh represented the Employer. VSEA General Counsel Timothy Belcher represented Grievant. The parties filed post-hearing briefs on April 20, 2015.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

. . .

Article 13
Code of Conduct and Disciplinary Action

. . .

2. Just Cause Standard –

An employee who has completed his/her original probationary period shall not be disciplined except for just cause. Four levels of disciplinary action are established. Disciplinary actions will generally be imposed in the order of progressive severity described below. However, there may be cases that warrant bypassing steps in the progressive disciplinary procedures or applying discipline in differing degrees so long as it is imposed for just cause.

. . .

3. Disciplinary Actions -

. . .

a) Oral Warning. This is the least severe of all disciplinary actions. . .
b) Written warning. A written warning is the next more severe disciplinary action. . .
c) Suspensions. . .
d) Dismissal. The Court Administrator, upon recommendation of a supervisor or program manager, may dismiss an employee for just cause.

. . .

4. Immediate Suspension/Discharge –

There are some work rule and regulation violations which are so serious that they may warrant the immediate discharge of the employee. The parties agree that there are appropriate cases that may warrant the Judiciary bypassing progressive discipline or corrective action; applying discipline or corrective action in different degrees or applying progressive discipline for an aggregate of dissimilar offenses, except that dissimilar offenses shall not necessarily result in automatic progression; as long as it is imposing discipline or corrective action for just cause. In deciding which disciplinary action to take, the Court Administrator, upon the recommendation of the supervisor or Human Resources manager should consider the factors for determining the appropriate level of discipline as determined by the Vermont Labor Relations Board.

Article 23
Sick Leave/Family Medical Leave

1. Sick Leave – It is the policy of the Judicial Branch to help protect the income of permanent employees when they cannot work due to illness, injury or incapacity for emergency periods when the employee must be absent from duty due to death or illness in his/her immediate family. Sick leave shall be administered in accordance with the following provisions:

. . .

(b) Use of Sick Leave

. . .

> vii. An employee who misrepresents a claim for sick leave or shows a pattern of abuse of the use of sick leave shall be subject to disciplinary action including dismissal.

. . .

(Grievant Exhibit 25, State Exhibit 2)

2. The Employer hired Grievant as a Docket Clerk B at the Addison County Courthouse in Middlebury in 2002, and she remained in that position until the Employer dismissed her in May of 2014. The Employer appointed Jo LaMarche as Superior Court Clerk in the Addison County Courthouse in September 2010. Shortly thereafter, LaMarche hired Maureen Mulligan as Operations Manager. Mulligan was Grievant's immediate supervisor. Mulligan reported directly to LaMarche.

3. During the period LaMarche and Mulligan supervised Grievant, Grievant, Grievant's mother, and Grievant's husband had serious medical conditions. This resulted in Grievant taking a significant amount of Family and Medical Leave Act leave, sick leave and other leave. Sometime in 2012, LaMarche and Mulligan requested that Grievant begin supplying doctor's notes for sick leave she took which was not related to family medical leave for a family member. Grievant's relationship with LaMarche and Mulligan deteriorated over time. Grievant believed her supervisors treated her differently than other employees due to their monitoring of her leave time (State Exhibit 14; Grievant Exhibits 22, 23, 27, 28).

4. Grievant's co-workers and supervisors supported her with respect to her husband's medical condition. They provided meals to her and her husband and raised money to help defray their traveling expenses for a trip to address her husband's medical condition.

5. On October 11, 2012, Grievant went to a restaurant to have dinner with friends. She was not on duty during the meal, but was in an "on-call" status carrying a pager with the

expectation that she would respond if a work-related call came in requiring a response. She consumed alcohol during her time in the restaurant. As she was leaving the restaurant, she received a page and returned the call. She spoke to a dispatcher who informed her that someone was inquiring whether a protective order had been issued that day. Grievant responded that she could not make that determination until the next day as she was unable to get into the courthouse until then. The call then ended.

6. The following day, Grievant was driving to a training session with Mulligan and another co-worker. Grievant mentioned that she had responded to a call the night before after consuming alcohol at the restaurant. On October 19, 2012, LaMarche issued Grievant an oral warning for "having been recently under the influence of alcohol when responding to an after hours relief from abuse call." LaMarche informed Grievant that she had violated Section VII, Section 3(c) of the Vermont Judicial Branch Personnel Policy, which provides: "No employee shall conduct himself or herself in any manner which shall reflect negatively on the Court. Such conduct shall include drinking alcoholic beverages or using illegal drugs while on duty or working under the influence of drugs or alcohol. A violation of this rule may result in immediate dismissal" (State Exhibit 16, Grievant Exhibit 15).

7. Grievant did not file a grievance concerning the October 19, 2012, oral warning. She did not subsequently receive discipline for a similar matter.

8. Grievant was assigned to work on the court's juvenile docket, and in that capacity reviewed juvenile files to provide information to the judge. When she was reviewing one file in October 2013, Grievant saw a reference to a teen dating site that allegedly had been used for "sexting". Grievant typed in the internet address for the dating site. There was no need for Grievant to access the teen dating site as part of her duties. The site showed photographs. A

photograph of a naked female appeared on the computer screen as Grievant scrolled through the site. Mulligan was present during this incident. Mulligan viewed the photograph of the naked female and directed Grievant to exit the website. Grievant immediately exited the website.

9. On October 10, 2013, LaMarche issued an oral warning to Grievant for her actions concerning viewing the teen dating site. LaMarche informed Grievant that she had violated Section 3(b)(1) of the Judiciary Code of Conduct and the Policy and Procedure Regarding Electronic Communication and Internet Use (Grievant Exhibit 14).

10. In issuing the October 10, 2013, oral reprimand, LaMarche cited Section 3(b)(1) of the Code of Conduct, which provided:

> The confidentiality of information that is legally confidential contained in judicial and administrative records must be protected. It is the duty of the employee to protect the confidentiality of manually and electronically stored information. Employees should safeguard confidential information, both written and oral, unless disclosure is authorized by the Court, refusing ever to use such information for personal advantage, and abstain at all times from public comment about strictly procedural matters. Breach of confidentiality of this information or falsifying records may result in immediate dismissal.
> (Grievant Exhibit 14)

11. In issuing the October 10, 2013, oral reprimand, LaMarche cited the following provisions of the Employer Policy and Procedure Regarding Electronic Communication and Internet Use:

> . . .
>
> Section II: Employees shall not use, or attempt to use Judicial personnel, property or equipment for their private use or for any use not required for the proper discharge of their official duties. . . .
>
> . . .
>
> Section IV(6): Use of Judiciary systems or printers for offensive or disruptive purposes is prohibited. This prohibition includes profanity, vulgarity, sexual content or character slurs. . .

. . .
(Grievant Exhibit 14, State Exhibit 1)

12. Grievant did not file a grievance concerning the October 10, 2013, oral warning. She did not subsequently receive discipline for a similar matter.

13. Grievant applied for a position at the federal court in Rutland in early 2014. She was offered an interview for the position. The interview was scheduled for Friday, February 28, 2014. She needed to take time off from work to attend the interview. Grievant decided not to ask for annual leave. Her supervisors had never previously denied her annual leave. Grievant instead requested FMLA leave for February 28 for the stated reason that she needed to take the day off to take her mother to a doctor's appointment. On February 25, LaMarche approved Grievant's request for FMLA leave for February 28 (State Exhibit 17).

14. Grievant did not take her mother to a doctor's appointment on February 28. She attended the interview in Rutland for the federal court position that day.

15. On Monday, March 3, 2014, LaMarche asked Grievant how things went with her mother on February 28. Grievant responded that when her sister arrived at the hospital, Grievant asked her how long she would be staying there, and that her sister asked her: "Why, do you want to go shopping?, and Grievant replied "yes". Grievant also mentioned to LaMarche that she went to lunch that day with several individuals and discussed with them a vacant federal judge position.

16. Grievant submitted her time sheet on March 10, 2014. She claimed 8 hours of FMLA leave for February 28. LaMarche asked Grievant on March 11 if she forgot to put on her time sheet the time she spent away from her mother's appointment to go shopping. Grievant told

LaMarche she ended up not going shopping that day; and that she only had gone to lunch. Grievant did not change her time sheet.

17. On Wednesday, March 12, LaMarche and Mulligan spoke about another individual who had applied for the federal court position. Mulligan indicated she would ask her husband, who worked in a security position at the federal court in Rutland, to check the sign-in sheet to see whether the other individual had been interviewed. Mulligan subsequently that day informed LaMarche that the other individual had been interviewed. Mulligan also reported to LaMarche that Grievant had interviewed for the position on February 28. LaMarche then realized that Grievant had claimed FMLA leave time for a day when she went to a job interview.

18. LaMarche sent a memorandum on March 17, 2014, to John McGlynn, Employer Human Resources Manager, reporting on the February 28 leave issue (Grievant Exhibits 3, State Exhibit 3).

19. LaMarche and McGlynn met with Grievant and VSEA Representative Brian Morse on April 2, 2014. Grievant admitted at this meeting that she did not take her mother to a doctor's appointment on February 28. She also stated that she went to a job interview in Rutland on February 28. Grievant indicated that she requested the FMLA leave because she was worried that a request for annual leave would be denied (Grievant Exhibits 4 – 8, State Exhibits 4 - 7).

20. LaMarche recommended in an April 10, 2014, memorandum to McGlynn that Grievant be terminated (Grievant Exhibit 7).

21. Patricia Gabel, State Court Administrator, sent a letter to Grievant dated April 30, 2014, which provided in pertinent part as follows:

> As a result of your unsatisfactory behavior described below, the Judiciary is contemplating issuing you serious disciplinary action up to and including dismissal from the position of Docket Clerk B. You have the right to respond to the specific allegations listed below, either orally or in writing, prior to a final decision being made. You have

the right to be represented by VSEA or private counsel, at no expense to the State, during any proceeding connected with this action.

This action is contemplated for the following reasons:

Misrepresentation of a claim for sick leave. Under Article 23 (1) (b) vii Judicial Department Collective Bargaining Agreement effective July 1, 2012 – June 30, 2014 – "An employee who misrepresents a claim for sick leave or shows a pattern of abuse of the use of sick leave shall be subject to disciplinary action including dismissal."

On April 2, 2014 you were represented by Brian Morse of the VSEA at a meeting with your supervisor Jo LaMarche-Superior Court Clerk and John McGlynn, Human Resources Manager, to investigate the coding of your time sheet for the work day of February 28, 2014. At that meeting you admitted that you had been dishonest by claiming a sick day on February 28 when in fact you were taking the day to attend an interview.

During the meeting you acknowledged that you lied to your manager when you claimed the sick day was to attend to a medical appointment for your mother. In doing so you removed the possibility of your supervisor exercising their managerial discretion in this matter. Attached is the report of the investigation. During the meeting, you acknowledged that you have received prior disciplinary actions. You received Oral Warnings from Jo LaMarche on October 19, 2012 and October 10, 2013.

You must notify John McGlynn . . . within twenty-four (24) hours after receiving this letter whether you wish to respond to the above allegations. . .

You are provided this opportunity to respond so that you can present points of disagreement with what the employer believes the facts to be; identify witnesses who may support your defense; identify any mitigating circumstances which should be considered and to offer any other argument you wish to make.
. . .
(State Exhibit 8, Grievant Exhibit 9).

22. A meeting was held on May 16, 2014, to allow Grievant to respond to the allegations against her set forth in the April 30 letter from Gabel. Attending the hearing were Matthew Riven, Chief of Finance and Administration for the Office of the Court Administrator, McGlynn, LaMarche, Grievant, VSEA attorney Rebecca McBroom, and VSEA Representative Brian Morse.

23. Riven sent a letter to Grievant dated May 19, 2014. It provided in pertinent part:

I am writing to notify you of my decision resulting from the hearing that was held on May 16, 1014 . . .

The facts surrounding the dismissal are documented in the Judiciary's correspondence and the testimony of the April 2 disciplinary meeting. The facts from that correspondence and April 2 hearing - in summary – include:

- You intentionally misrepresented your claim for sick leave, and continued to misrepresent your claim when asked for confirmation;
- You subsequently admitted to the misrepresentation and the Judiciary has access to witnesses to the misrepresentation; and
- You have been subject to two other oral warnings (for unrelated infractions) within the past 18 months.

. . . (T)he Agreement permits immediate dismissal without progressive discipline for misrepresenting a claim of sick leave, and the existence of the two other infractions further supports that decision.
. . .
At the hearing, you offered mitigating information based on all the "Colleran and Britt" factors; I will address only the two most relevant here:

- You noted that the two oral warnings were for conduct not related to misrepresentation of sick leave;
- You noted several letters of recommendation, including some that were part of your personnel file and some that were obtained as part of this process;
- You noted that the Judiciary's other examples of dismissal for this infraction could not be verified; and
- You noted that your mother's ongoing illness created personal tensions for you.

Upon review of the record and the material presented at the hearing, I find that there is just cause for a determination of termination under the contract and there are not sufficient mitigating factors presented to offset that determination. . . I therefore . . . recommend to the Court Administrator that your employment be terminated.

(State Exhibit 9, Grievant Exhibit 11)

24. McGlynn sent a memorandum to Gabel on May 19, 2014, in which he recommended termination of Grievant's employment. McGlynn stated that Grievant falsified her time sheet by claiming sick leave on the day she was interviewing for a job, and that this constituted theft of Judiciary resources. McGlynn further cited Grievant lying to her manager even though she was given the chance by her supervisor to retract her claim for sick time. In his memorandum, McGlynn engaged in an analysis of the twelve factors adopted by the Labor

Relations Board for deciding if a particular disciplinary action is legitimate. He concluded Grievant's offenses were serious as her dishonesty caused her manager to lose faith in Grievant's trustworthiness and judgment in performing her Docket Clerk duties. In commenting on Grievant's past disciplinary record, McGlynn noted that Grievant had three Code of Conduct violations in the past 18 months, and that this was comparable to the total number of violations by the other 340 Judiciary employees. McGlynn reported no problems with Grievant's past work record, as he indicated that she had been employed for 11 years with no reported issues with co-workers, had not received a written performance review during this time, and had received several letters of recommendations and compliments from customers. McGlynn concluded that Grievant's dishonesty and improper actions had placed the Judiciary's reputation for trustworthiness and professionalism at risk. McGlynn cited the provision of the Contract that an employee who misrepresents a claim for sick leave shall be subject to disciplinary action including dismissal to indicate that Grievant was on notice that her misconduct was a serious matter. McGlynn concluded that Grievant's potential for rehabilitation was not strong since she had not demonstrated the ability to learn from her mistakes. McGlynn stated as follows in analyzing the consistency of the penalty with those imposed upon other employees for the same or similar offenses:

> This recommendation to terminate Michele is consistent with Jo LaMarche's actions as Superior Court Clerk in the Addison Unit. Twice previously employees under her direction committed similar serious offenses and on both instances the employee left our employ. In July 2009 Jo terminated a county employee for a similar incident involving making a false claim on her time sheet. In December 2011 we secured a separation agreement with a union employee who we investigated and found to have lied about the completion of assigned work.
>
> It is difficult to compare employee offenses and the discipline imposed in other Units across the Judiciary. The discipline is determined by the particulars of the case. Over the last three years there have been three employees in other Units with similarly serious offenses. In two situations they agreed to a negotiated separation instead of risking

> termination. In the third case an employee was suspended for four days for a time sheet violation and then eventually terminated after progressive warnings on work deficiencies. (State Exhibit 10, Grievant Exhibit 26)

25. The employee under LaMarche's direction cited by McGlynn in his May 19, 2014, memorandum as having entered into a separation agreement resigned pursuant to an agreement which provided that the agreement would not be used as precedent.

26. The reference by McGlynn in his May 19, 2014, memorandum to an employee suspended for four days for a time sheet violation involved a situation where the employee claimed sick leave for December 10, 2012. McGlynn conducted an investigation on whether the employee had improperly claimed sick leave. McGlynn's investigative report provided in pertinent part as follows:

> (She) is a Courtroom Operator with a start date of 7/13/86. (She) had advance notice that she would have to be absent from work on 12/10/12 to appear in Franklin Superior Court. Early on 12/10/12 (she) left a message on her supervisor's voicemail informing that she was sick and would not report to work. She cannot substantiate claims that she was attempting to postpone or dismiss the arraignment set for 12/10/12 which is the reason given by (her) as to why she did not request leave prior to 12/10/12. (She) could not produce a doctor's note or receipt to substantiate her claim that she was sick from 12/6/12 to 12/10/12. (She) did not make a timely request to her supervisor for annual or personal leave on 12/10/12. (She) traveled to St. Albans for the 12/10/12 arraignment in Franklin Superior Court and signed her conditions of release. (She) has twice previously (in the last 4 years) been reprimanded for the abuse of sick leave and been required to provide doctors' notes for an extended period.
> (Grievant Exhibit 19)

27. Although McGlynn concluded that the employee had not proven that she was sick on December 12, 2012, McGlynn did not believe he had sufficient proof to conclude that the employee was not sick on that date.

28. The Court Administrator at the time, Robert Greemore, informed the employee by later dated January 14, 2013, that she was suspended for four days for violating the sick leave policy as outlined in the Judicial Personnel Policy and the 2012 – 2014 collective bargaining

agreement between VSEA and the Judiciary. In addition, the employee was required to submit an amended time sheet in which December 10, 2012, was changed from a sick day to another type of personal leave (Grievant Exhibit 19).

29. Gabel sent a letter to Grievant dated May 20, 2014, providing in pertinent part as follows:

> This is to notify you of your dismissal from the position of Docket Clerk B effective May 21, 2014. You will receive two weeks pay in lieu of notice. By letter dated April 30, 2014, I notified you that I was contemplating your dismissal and gave you the opportunity to respond to the charges of misconduct. On May 16, 2014, my representative Matt Riven met with you and your representatives . . . to hear your response. I am in receipt of his May 19, 2014 report. In making my final decision, I have considered all of the information brought to my attention.
>
> The reasons for this action are those listed in my letter of April 30, 2014, a copy of which is attached, and which is incorporated herein by reference.
>
> . . .
> (State Exhibit 11, Grievant Exhibit 12)

30. Gabel used the May 19, 2014, memorandum from McGlynn, in which he engaged in an analysis of the twelve factors adopted by the Labor Relations Board for deciding if a particular disciplinary action is legitimate, in deciding what action to take against Grievant. In dismissing Grievant, Gabel concluded that the misrepresentation on her time sheet and her dishonesty were serious offenses. Gabel concluded that this was contrary to Grievant's job duties which required her to have integrity. Gabel viewed it as important that Grievant had three Code of Conduct violations in eighteen months. In reviewing the consistency of the penalty received by Grievant compared to similar cases, Gabel was not aware of the details of the case where the Judiciary employee received a four day suspension for violating sick leave policies. Gabel was not aware of any performance issues of Grievant. Gabel concluded that Grievant had fair notice she could be disciplined for her misconduct because the Employer's Code of Conduct is one of

the most important things of which an employee should be aware. Gabel concluded that the standards of the Employer and the behavior engaged in by Grievant were mutually inconsistent with Grievant continuing employment.

OPINION

Grievant contends that the Employer violated Article 13 of the Contract because: 1) the dismissal was not based in fact or supported by just cause, 2) the Employer improperly bypassed progressive discipline, and 3) the Employer failed to apply discipline with a view toward uniformity and consistency.

Just cause for dismissal is some substantial shortcoming detrimental to the employer's interests which the law and a sound public opinion recognize as a good cause for dismissal. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). The ultimate criterion of just cause is whether an employer acted reasonably in discharging an employee for misconduct. Id. 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 just cause analysis centers upon the nature of the employee's misconduct. In re Morrissey, 149 Vt. 1, 13 (1987). Grievance of Merrill, 151 Vt. 270, 273 (1989). In determining whether there is just cause for dismissal, it is appropriate to determine the substantiality of the detriment to the employer's interests. Merrill, 151 Vt. at 273-274.

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. This is an objective standard. Grievance of Towle, 164 Vt. at 150. Grievance of Hurlburt, 175 Vt. 40, 50

(2003). 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. Grievance of Colleran and Britt, 6 VLRB 235, 265 (1983).

The Employer charged Grievant with misrepresenting a claim for sick leave and lying to her manager by claiming the sick day was to attend to a medical appointment for her mother. The Employer has established these dishonesty charges against Grievant. Grievant claimed FMLA leave for February 28, 2014, for the stated reason that she needed to take the day off to take her mother to a doctor's appointment. However, Grievant did not take her mother to a doctor's appointment on February 28. Instead, she attended an interview in Rutland that day for a federal court position. Grievant then subsequently lied to her manager on two occasions by holding to her false claim that she took her mother to a doctor's appointment on February 28.

The underlying facts having been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven charges. Colleran and Britt, 6 VLRB at 266. Grievance of Simpson, 12 VLRB 279, 295 (1989). If the employer establishes that management responsibly balanced the relevant factors in a particular case and struck a reasonable balance, its penalty decision will be upheld. Colleran and Britt, 6 VLRB at 235.

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 Grievant's duties, 2) Grievant's job level, 3) the clarity with which Grievant was on notice of any rules that were violated in committing the offenses, 4) the effect of the offenses upon supervisors' confidence in Grievant's ability to

perform assigned duties, 5) Grievant's past disciplinary record, 6) Grievant's past work record, 7) consistency of the penalty with those imposed upon other employees for the same or similar offenses, 8) mitigating circumstances, 9) the potential for Grievant's rehabilitation, and 10) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Grievant's offenses were serious in relation to her job duties. Grievant engaged in repeated dishonesty, a characteristic that constitutes a substantial shortcoming for an employee in a docket clerk position that requires maintaining the integrity of the judiciary. The collective bargaining agreement recognizes the seriousness of Grievant's offenses in providing that "an employee who misrepresents a claim for sick leave . . . shall be subject to disciplinary action up to and including dismissal."

Grievant had fair notice that her dishonest actions could be grounds for discharge. Honesty is an implicit duty of every employee and, at a minimum, an employee should know that dishonest conduct is prohibited. Grievance of Carlson, 140 Vt. 555, 560 (1982). Dishonesty by employees is grounds for serious punishment, and the Board and the Vermont Supreme Court have upheld dismissals for dishonesty in several cases. Id. Grievance of Turcotte, 30 VLRB 24 (2008). Grievance of Cray, 25 VLRB 194 (2002). Grievance of Newton, 23 VLRB 172 (2000). Grievance of Coffin, 20 VLRB 143 (1997). Grievance of Johnson, 9 VLRB 94 (1986); *Affirmed*, Sup.Ct. Docket No. 86-30 (1989. 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).

Grievant's offenses understandably had a detrimental effect on the Employer's confidence in Grievant's ability to perform assigned duties. The Employer reasonably concluded Grievant no longer could be relied on to effectively perform her duties given her dishonest actions.

Grievant's past disciplinary record is not entitled to great weight in determining whether just cause existed for her dismissal. She had two oral warnings within the preceding two years for offenses unrelated to the misuse of leave time and dishonesty. Oral warnings constitute only the first step in a four step progressive discipline system providing for progressively severe penalties culminating in dismissal. The absence of the more severe penalties of a written reprimand and suspension significantly lessens the adverse impact on Grievant of her disciplinary record.

Grievant's work record works in her favor. She was an 11 year employee with no reported issues with co-workers. There are no documented performance deficiencies. Further, she had received several letters of recommendations and compliments from those she dealt with in performing her duties.

The only other situation to examine in considering the consistency of the penalty of dismissal imposed on Grievant compared to other employees is the four day suspension received by another employee in December 2012 for a time sheet violation. The facts of the four-day suspension case are insufficiently clear to demonstrate that it constitutes similar misconduct to that engaged in by Grievant in this case. Although the investigator in the four-day suspension case concluded that the employee had not proven that she was sick on a day she claimed sick leave, the investigator did not believe he had sufficient proof to conclude that the employee was not sick on that date. This differs from the situation involving Grievant where it is clear she claimed FMLA leave for a false reason and was not entitled to it, and then exacerbated her dishonesty by subsequently lying to her manager on two occasions by holding to her false claim that she was entitled to such leave.

Grievant contends that mitigating circumstances exist supporting the overturning of Grievant's dismissal because she was being targeted by her supervisors for exercising her protected right to take periodic leave to care for her mother and husband. We conclude upon examination of the evidence that Grievant has not established that her dismissal resulted from an improper targeting of her by her supervisors for exercising her protected right to take leave.

Grievant also claims as a mitigating factor that the Employer improperly lied or hid information from VSEA prior to the pre-termination *Loudermill* meeting in this matter which may have affected the ultimate disciplinary action imposed by the Employer in this matter. The evidence does not support Grievant's claim in this regard.

The Employer reasonably concluded that Grievant's potential for rehabilitation was not strong where she falsely claimed FMLA leave and subsequently held to her false claim when she had an opportunity to correct it on two occasions in discussions with her manager. Grievant's dishonest actions constituted a substantial shortcoming detrimental to the Employer's interests comparable to other instances where the Board and the Supreme Court have upheld employee dismissals for dishonesty. The Employer acted reasonably in bypassing progressive discipline and concluding that alternative sanctions less than dismissal would not be effective to deter dishonest future conduct by Grievant. In sum, just cause existed for Grievant's dismissal.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of Michele Lee is dismissed.

Dated this 29th day of May, 2015, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Gary F. Karnedy

Gary F. Karnedy, Chairperson

/s/ Richard W. Park

Richard W. Park

/s/ Edward W. Clark, Jr.

Edward W. Clark, Jr.