VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 15-30
JOHN LEPORE	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On August 11, 2015, the Vermont State Employees' Association ("VSEA") filed a grievance with the Vermont Labor Relations Board on behalf of John Lepore ("Grievant"), contending that the State of Vermont Agency of Transportation ("Employer") violated the collective bargaining agreement between the State and the VSEA for the Non-Management Bargaining Unit effective July 1, 2014 to June 30, 2016 ("Contract") by dismissing him. Specifically, Grievant alleged that the Employer violated Article 14 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 progressive corrective action, 3) the Employer failed to apply discipline with a view toward uniformity and consistency, and 4) the Employer failed to impose discipline within a reasonable time of the alleged offenses.

A hearing was held in the Labor Relations Board hearing room in Montpelier on December 10, 2015, before Board Members Richard Park, Acting Chairperson; James Kiehle and Alan Willard. Assistant Attorney General Kassandra Diederich represented the Employer. VSEA Staff Attorney Justin St. James represented Grievant. The Employer and Grievant filed post-hearing briefs on January 5, 2016.

FINDINGS OF FACT

1. The Contract provides in pertinent part:

. . .

ARTICLE 14
DISCIPLINARY ACTION

1. No permanent or limited status employee covered by this Agreement shall be disciplined without just cause. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:
   a. act promptly to impose discipline or corrective action within a reasonable time of the offense;
   b. apply discipline or corrective action with a view toward uniformity and consistency;
   c. impose a procedure of progressive discipline or progressive corrective action;
   d. In misconduct cases, the order of progressive discipline shall be:
      (1) oral reprimand;
      (2) written reprimand;
      (3) suspension without pay;
      (4) dismissal.
   . . .
   f. The parties agree that there are appropriate cases that may warrant the State:
      (1) bypassing progressive discipline or progressive corrective action; . . .
   g. . . . Nothing in this Agreement shall be construed to limit the State's authority or ability to demote an employee under Section 1(d) and/or 1(e) of this Article, for just cause resulting from misconduct or performance, but the State shall not be required to do so in any case. . .
   . . .
2. The appointing authority or designated representative . . . may dismiss an employee with just cause with two (2) weeks' notice or two (2) weeks' pay in lieu of notice. . .
3. Notwithstanding the provisions of paragraph 2 above, the appointing authority or authorized representative . . . may dismiss an employee immediately without two (2) weeks' notice or two weeks' pay in lieu of notice for any of the following reasons:
   . . .
   (b) gross misconduct;
   . . .

8. The appointing authority or authorized designee may suspend an employee without pay for reasons for a period not to exceed thirty (30) workdays. . .

9. An appointing authority may relieve employees from duty temporarily with pay for a period of up to thirty (30) workdays:
   (a) to permit the appointing authority to investigate or make inquiries into charges and allegations made by or concerning the employee; or
   (b) if in the judgment of the appointing authority the employee's continued presence at work during the period of investigation is detrimental to the best

interests of the State, the public, the ability of the office to perform its work in the most efficient manner possible, or well being or morale of persons under the State's care. The period of temporary relief from duty may be extended by the appointing authority, with the concurrence of the Commissioner of Human Resources. . .

10. In any misconduct case involving a suspension or dismissal, should the Vermont Labor Relations Board find just cause for discipline, but determine that the penalty was unreasonable, the Vermont Labor Relations Board shall have the authority to impose a lesser form of discipline.

. . .

(Joint Exhibit 24)

2. Vermont Personnel Policies and Procedures provide in pertinent part as follows:

. . .

EMPLOYEE CONDUCT
Number 5.6

. . .

REQUIRED CONDUCT

. . .

4. Employees shall conduct themselves in a manner that will not bring discredit or embarrassment to the State of Vermont, whether on or off duty.

. . .

TIME ENTRY AND APPROVAL
Number 11.10

. . .

PURPOSE AND POLICY STATEMENT

It is the purpose of this policy to establish guidelines for employees to timely and accurately report their time.

Timesheets document an employee's time worked, leave used, unpaid time not worked, and accounting codes, which provide the basis for the State to complete payroll and benefits transactions.

All employees are expected to complete and submit accurate timesheets in a timely manner in accordance with the State of Vermont payroll schedule. All employees have a duty to accurately report scheduled work hours, leave utilized, and any unpaid time not worked on their Timesheet. The State and its employees are accountable to the public and taxpayers, and the State does not compensate employees for time not worked, except as authorized under the State's leave policies. An employee who inaccurately reports time worked and/or leave used may violate general standards of conduct and/or the law, which may result in disciplinary action up to and including dismissal from employment, and/or additional legal repercussions.

If an employee mistakenly misreports his or her time worked or leave used, he or she shall correct the time reported in the manner described in the Time Entry and Approval Deadlines section of this policy.

Departments shall ensure that employees submit accurate Timesheets. Once an employee submits a Timesheet, the Timesheet is subject to the supervisor's approval. The approval provides a record that the Department accepts the Timesheet as an accurate representation of the employee's Payable Time. Approval by a supervisor does not negate, mitigate, or supersede any false entry by an employee. Supervisors shall be duly diligent in approving employee time.

. ..

CERTIFICATION

All employees shall certify under the pains and penalties of perjury that the reported time information is accurate and complete to the best of their knowledge . . .

. ..

COURT AND JURY DUTY/WITNESS FEES
Number 14.6

. . .

GENERAL GUIDELINES

. . .

The contract allows employees to use accrued leave time for jury duty, however, it is not necessary as employees who serve on jury duty will continue to receive their State wages. State employees serving on jury duty will not receive jury pay from the court.

. . .

(Joint Exhibits 16, 17, 18)

3. Grievant was employed by the Employer as an Environmental Biologist from 1992 until his dismissal in July 2015. He assessed all forms of transportation projects at a professional level for their potential impact on the natural environment. He reviewed about 100 projects annually. Much of the work involved the evaluation of the potential impact of proposed transportation projects upon wetlands, watercourses, fish and wildlife habitat, endangered species, natural communities and habitats, floodplains, and agricultural soils. He conducted site visits throughout the state. He created reports and coordinated with others to apply for, and prepare, required environmental permits. He had interactions with the U.S. Army Corps of Engineers, project managers and District Transportation Administrators for the Employer, the Vermont Fish & Wildlife Department, the U.S. Environmental Protection Agency, and the U.S. Fish & Wildlife Service. He was responsible for obtaining environmental permits for projects

which could not proceed unless the permits were approved. It was important in performing his job duties that he gain and keep the trust and respect of peers and regulators to develop meaningful professional working relationships. Grievant also conducted trainings. It was included in his job duties to possibly testify at public hearings, but he did not do so in his 23 years of employment (Joint Exhibit 1).

4. There was one other Environmental Biologist for the Employer. The two Environmental Biologists reported to the Environmental Service Engineer (AOT Manager 4) (Joint Exhibit 1).

5. Evidence was introduced on annual performance evaluations received by Grievant covering the period December 2003 through November 2014. Grievant received overall performance ratings of "satisfactory" on each of the evaluations. There were comments in some of the evaluations about Grievant needing to improve his behavior with co-workers and other persons with whom he came in contact (Joint Exhibit 25).

6. On February 19, 2015, Grievant had a meeting with Kenneth Robie, Project Delivery Bureau Director in the Highway Division, in which Robie gave feedback to Grievant on an incident involving another Agency of Transportation employee. Robie and Grievant discussed the importance of Grievant conducting himself in an appropriate, non-threatening manner regardless of provocation or emotions (Joint Exhibit 10).

7. In 2005, Grievant was a juror in the federal criminal trial of Donald Fell in Burlington, Vermont. Fell was charged with: 1) car-jacking resulting in the death of Teresca King in 2000; 2) kidnapping resulting in Ms. King's death; 3) brandishing a firearm in furtherance of crimes of violence; and 4) being a fugitive who transported a firearm in interstate

commerce. The first two counts were capital offenses. The federal government sought the death penalty for the offenses (Joint Exhibit 7).

8. During the trial, Judge William Sessions instructed Grievant and the other jurors about what they were expected to do and not do during the trial in terms of serving fairly and impartially. Judge Sessions provided the following specific instructions:

> From their first contact with the Court, prospective jurors and those who were seated for the trial were advised and repeatedly reminded that they must serve "fairly and impartially," meaning that their verdict must be based "on the evidence presented in this courtroom and not on anything that you may have heard or read or experienced outside the courtroom." . . They were further advised and reminded not to discuss the case with others or among themselves because "a jury's verdict must be free from outside influence. So, I am ordering each and every one of you not to discuss this case with family, friends or any other persons from this point on until I either excuse you, or if you are selected as a juror, until the case concludes." . .
>
> At the beginning of each day of trial, jurors were asked if they had spoken to anyone or learned anything about the case from outside the courtroom. . . At the end of each day of trial, the Court reminded the jurors not to discuss the case with anyone or learn about the case from outside the courtroom. . . The Court instructed jurors that if they did learn anything from outside the courtroom, "you need to tell me." . . The Court also specifically advised the jurors not to conduct their own investigations. (Joint Exhibit 7, p. 208-09)

9. Grievant was in a relationship and living with Kaulene Kelsey during June, July and August of 2005.

10. Grievant and Kelsey traveled to Rutland during the trial while he was serving on the jury to view the crime scene as well as the home and neighborhood where Donald Fell's mother lived. Grievant told his fellow jurors during jury deliberations about his observations during his trip to Rutland. There is no evidence that a juror ever reported Grievant for sharing information about his Rutland trip during deliberations.

11. The guilt phase of the trial commenced on June 20, 2005. On June 24, 2005, the jury returned a guilty verdict on all four counts. The penalty phase of the trial began on June 28,

2005, and lasted for nine days. On July 14, 2005, the jury unanimously found that Fell should receive a sentence of death on the two capital counts (Joint Exhibit 7).

12. Grievant was paid his regular wages by the Employer on all the days he served on jury duty during the guilt and penalty phases of the Fell trial in June and July of 2005. He coded his time reports as serving on jury duty these days (Joint Exhibit 2).

13. Article 42 of the July 1, 2003 – June 30, 2005, and July 1, 2005 to June 30, 2007, collective bargaining agreements between the State and VSEA for the Non-Management Unit provided in pertinent part:

COURT AND JURY DUTY

1. It shall be the policy of the State to encourage employees to recognize and perform their civic responsibilities.
2. A classified employee summoned for court or jury duty shall be excused from work for the time necessary to perform such duty when he or she furnishes timely notice of subpoena or summons to his or her supervisor. . .
3. The State expects its employees to serve when summoned for jury duty and will not request that an employee be excused from serving except in unusual circumstances which jeopardize service to the public.
4. A classified employee who is unable to perform his or her job because of court or jury duty shall be entitled to receive total wages not to exceed his or her normal base salary prorated for the day, days, or part of a day involved by combining jury duty pay or witness fee and state wage.

. . .

(Joint Exhibit 22)

14. On December 18, 2010, two of Fell's post-conviction attorneys arrived unannounced at Grievant's home in Northfield, and interviewed him. Grievant let the attorneys into his house, and talked to them for an extended period of time about his experience serving as a juror in the Fell murder trial. The attorneys made arrangements with Grievant to return the following day. They arrived with a draft of a sworn statement for Grievant to sign. Grievant signed a sworn statement on December 19, 2010, in the attorneys' presence which provided in part:

> 1. I, John Lepore, . . was a juror in the Donald Fell case. The trial occurred in Burlington, Vermont in 2005.
> . . .
> 5. In making our decision, we were like racehorses, 18 conversations going at once. We were going at each other and then we just sorted it out and it was clear, like that. There was not a lot of disagreement about the guilt, there was no doubt that he did it. We discussed the evidence, like the rock, the shotgun, the photos of Mrs. King, and the trip to Rutland during the trial when I looked at the mother's house on Robbins Street and the Price Chopper. The mother's neighborhood wasn't great, but it was okay. The house was decent. She was just trying to live her life. I told them about the Stewart's dumpster next to Price Chopper where I think Fell threw the knife into the dumpster in the parking lot. After the trial I drove to New York on my motorcycle. I recognized the spot from the photos and I felt a really negative energy while I was there. The lighting at the Price Chopper in Rutland was weak. At the time I worked at the Price Chopper in Barre-Berlin and the parking lot was also unsafe because it was poorly lit. It isn't expensive to get better lighting. They should do that.
> . . .
> 12. I have had the opportunity to review and correct the foregoing, and it is true and accurate to the best of my knowledge.
> 13. It bothered me that there were two more murders that never went to trial and that the victims were forgotten.
> (Joint Exhibit 3)

15. Prior to signing the sworn statement, Grievant had the opportunity to review it. He initialed each paragraph as he read them. He was allowed to make corrections before signing the statement, and he did in fact make changes and additions to the draft statement before signing it. He added the above-cited paragraph 13 in the statement (Joint Exhibits 3, 7).

16. On March 21, 2011, Fell filed a motion for writ of habeas corpus. The motion included, among other things, allegations of juror misconduct. These included allegations that Grievant surreptitiously traveled to Rutland in the midst of the trial and viewed the crime scenes, spoke with a third party about the facts of the case, shared his observations with the rest of the jury panel, and lied to the Court by failing to reveal these extra-record activities. Fell contended that Grievant's actions prejudiced the defense's case, and his dishonesty warranted a new trial on the basis of juror bias (Joint Exhibit 7).

17. On August 15, 2013, Grievant provided sworn testimony before Federal District Court Judge Sessions. The following exchange occurred between Judge Sessions and Grievant:

> JUSTICE SESSIONS: . . . I am going to ask you some just general questions about statements that you made to – during – during interviews later on and things that may have happened during the course of the trial that you disclosed during those interviews. . . I . . ask that you try to be as candid as possible. I know, also, it was a long time ago, and if you don't remember anything, then – then you don't remember. If you don't remember specific things or remember some other things, that's also fine. But I just ask that you try to be as thorough as possible, and, again, if you don't quite recall, that's fine. All right? You were interviewed by investigators for Mr. Fell just a little while – well, 2011, right? 2010 or 2011. Do you remember that?
>
> GRIEVANT: I remember a couple people showing up, yes.
>
> JUSTICE SESSIONS: Okay. All right. And there's a statement that you made, and it raised a couple of questions that I had. The first is, you indicated that at some point during the trial, you went to Rutland, and did you do that?
>
> GRIEVANT: No, that was a misunderstanding.
>
> JUSTICE SESSIONS: Okay. So tell me what that misunderstanding was.
>
> GRIEVANT: I am very familiar with Rutland, and during the trial, when you showed aerial photos and that kind of stuff, in my head I was in that spot. I'm very familiar with that whole downtown area because I work and I cover the whole state. I eat at the Sandwich Shop right there on, what is it, Merchants Row, so it's right in that area. But, no, I went to – when I did, I guess you'd call it the trial tour, I did it on my motorcycle in the fall of 2010, I believe. It wasn't during the trial.
>
> JUSTICE SESSIONS: Okay. Well, there's – in the statement that you made to an investigator, my memory is that you made a statement that it was during the trial and that you shared your observations of the house and the trip to the Price Chopper and passing a dumpster.
>
> GRIEVANT: Right. No, I did not go – during the trial I did not go anywhere.
>
> JUSTICE SESSIONS: Okay. Well, did you – did you share your observations with jurors? Not again what their responses are, but did you say things about that scene?
>
> GRIEVANT: The only – the only thing that I mentioned was I didn't recall ever hearing about the knife being found, and through the testimony he had mentioned Stewart's, and every – and I am thinking to myself that every dumpster – every convenience store has a dumpster. That's where I figured they had found it.
> . . .

JUSTICE SESSIONS: What did you tell these individuals that came to interview you?

GRIEVANT: I believe that's what I told 'em. And that statement wasn't my writing. It was their interpretation of it. And I believe they grossly simplified, contorted, and actually left out a lot of what we actually discussed. I actually thought they were Jehovah Witnesses when they showed up, but when they show – when they told me their name and they mentioned Donald Fell and court, I was like, "err?" And I had, you know, a few beers in me, and –

JUSTICE SESSIONS: You thought they were Jehovah's Witnesses?

GRIEVANT: Yeah, when they showed up. I knew they didn't know me because they came to my front door, and nobody comes to my front door.

JUSTICE SESSIONS: Okay, So you told them that the trip that you took to Rutland occurred after the trial?

GRIEVANT: Yes.
. . .
(Joint Exhibit 4, p. 0061 0064).

18. Grievant reported his time to appear in federal court and testify before Judge Sessions on August 15, 2013, as sick leave on his time report. He had told his supervisor, John Naworski, prior to August 15 that he would not be into work that day because he had to testify in federal court. Grievant felt ill on the day he testified in federal court. After being present at the courthouse for a few hours to testify, Grievant traveled from the courthouse to his home and went to bed. He did not receive any medical treatment that day. Naworski signed Grievant's time report in which he claimed sick leave for August 15. Grievant was never questioned by the Employer about his use of sick leave on August 15 (Joint Exhibit 5).

19. Article 31 of the July 1, 2012 to June 30, 2014, collective bargaining agreement between the State and VSEA for the Non-Management Unit provided in pertinent part:

SICK LEAVE

. . .
1. **POLICY**
. . .
(b) Use of sick leave

(1) The use of earned sick leave credits shall be authorized by an appointing authority or his or her delegated representative for an employee who is absent from work and unable to perform his or her duties because of illness, injury, or quarantine for contagious disease. The use of such credits shall also be authorized for employee medical and dental appointments which cannot reasonably be made outside the employee's normal working hours.

. . .

(7) An employee who misrepresents his or her claim for sick leave may be subject to disciplinary action up to and including dismissal.

. . .

2. **RESPONSIBILITIES**

. . .

(b) The appointing authority, or delegated representative, shall:

. . .

(3) Ensure that sick leave is not misused, and if necessary, require submission of evidence as to necessity for the leave.

(4) Ensure that the provisions of this Article are observed in his or her department or agency.

(5) Report use of sick leave in accordance with the provisions of this Article and the instructions on the payroll time report.

. . .

20. Judge Sessions issued an Opinion and Order on July 24, 2014, on Donald Fell's claim that juror misconduct deprived him of his Fifth, Sixth, and Eighth Amendment rights to an impartial jury. Grievant is identified as "Juror 143" in the Opinion and Order. The Opinion and Order provided in pertinent part:

I. Factual and Procedural Background

. . .

B. Jury Selection

. . .

. . .

III. Findings of Fact and Conclusions of Law

B. Juror 143

Juror 143 is alleged to have engaged in a broad range of misconduct, including: traveling to Rutland to view the crime scenes during trial; informing other jurors of his extra-record observations; . . . lying about his actions when serving as a juror; . . . and again lying to the Court in this post-conviction proceeding.

1. Exposure to Extra-Record Information

. . .

Based upon the testimony of . . several witnesses, the Court finds that Juror 143's denial of his mid-trial investigation was not credible. . . . Ms. Kelsey and Ms. DeGoosh each testified that Juror 143 viewed the crime scenes in Rutland during trial in 2005. While Ms. Kelsey's account was countered in some respects by Agent Delpha's testimony, her testimony about the fact of the trip, and Juror 143's intent to view the crime scenes, was uncontroverted. Ms. DeGoosh confirmed that Juror 143 planned to visit the crime scenes during trial for the purpose of investigation. Ms. Kelsey's testimony about Juror 143's observations was also uncontested, and was consistent with the juror's sworn declaration.

The Court also finds that Juror 143's statements in his sworn declaration with respect to his trip to Rutland, and his subsequent disclosures to other jurors, were truthful. The evidence suggests that, through no wrongdoing by the Cleary Gottlieb attorneys, Juror 143 may have misunderstood with whom he was speaking at the time of the interview, and was thus willing to speak truthfully. Moreover, the declaration was not only signed and sworn, but the juror independently initialed each paragraph as read. Attorney Zloczower testified that she accurately recorded his statements, and that when Juror 143 read through and signed the declaration, there was no evidence of alcohol or other impairment. Furthermore, the sworn declaration conforms generally with Ms. Kelsey's testimony about the juror's reactions when he toured both the Robbins Street neighborhood and the Price Chopper. The Court therefore finds that Juror 143 was not credible when he denied his 2005 trip to Rutland, that the juror did, in fact, conduct his own investigation during trial, and the extra record information gained from that investigation was, in the view of this juror, not consistent with the evidence introduced at trial.

. . .

Juror 143's investigation exposed him to information about the physical environment in which Debra Fell was living and the crime scenes generally. By traveling between Robbins Street and the Price Chopper, Juror 143 also viewed the area where Fell and Lee walked prior to abducting Mrs. King. As discussed below, that precise route was highlighted by the government as indicative of Fell's deliberateness and state of mind. The evidence before the Court indicates that what Juror 143 saw in Rutland was in several respects inconsistent with the evidence presented at trial, and in all respects favorable to the government's case.

. . .

Furthermore, Juror 143 made observations of the lighting at the Price Chopper where Teresca King was kidnapped. . . Juror 143's personal observations of the lighting were harmful to the defense's theory of the case . . .

. . .

Juror 143 endeavored to view the neighborhood (where Debra Fell lived) himself, and saw that Robbins Street was not consistent with the evidence presented at trial. Specifically, the juror noted that Robbins Street was a middle class neighborhood, and not the sort of squalor depicted by the defense's

preparation. Juror 143 also linked what he saw at Robbins Street to Donald Fell's family history. . .

. . . Fell's attorneys focused heavily upon his upbringing, the neglect by his parents, and the related physical characteristics of his childhood home. Juror 143's observations caused him to dismiss some of those arguments as overstated, and he may have shared his conclusions with the jury. . .

. . .

The prejudice from Juror 143's misconduct may have carried not just to one hypothetical juror, but perhaps to the whole panel, as Juror 143 reportedly shared his observations during deliberations. . .

. . .

Here, Juror 143 violated the "fundamental integrity" of Fell's trial by undertaking his own investigation. For Fell, the integrity of his trial was a matter of life and death. . . The Court . . needs to ensure that the verdict against Fell, as to both guilt and his ultimate penalty, was reliable and issued by an impartial jury. The Court must also ensure that mitigating factors were fairly and appropriately considered . . . Given the revelations about Juror 143's exposure to extra-record information, the relevance of that exposure to the aggravating and mitigating factors presented by the parties, and the Court's conclusions as to both presumed and actual harm, the Court finds that Fell did not receive a fair and reliable trial.

2. Juror Bias

The Court's analysis regarding Juror 143 does not end there, however. The juror's misconduct also compels relief on an additional ground: the bias implicit in his intentional efforts to seek out extra-record information, his defiance of the Court's instructions, and his repeated false statements to the Court. Indeed, Juror 143's brazen disobedience, dishonesty, and unwillingness to decide the case based upon the evidence presented at trial demonstrate a partiality that would have resulted in his eviction from the panel during trial, and now invalidates Fell's conviction.

. . . (A) party moving for a new trial based on juror non-disclosure must satisfy a two-part test; first, the party must show that "a juror failed to answer honestly a material question" and second, that "a correct response would have provided a valid basis for a challenge for cause." . . . Here, the Court has found that Juror 143 did in fact visit the crime scene during trial, in direct contravention of the Court's explicit orders. It follows that he was thereafter dishonest with the Court, as the Court asked the jurors each day of trial whether they had been exposed to any extra-record information. The Court thus finds that Juror 143 failed to answer honestly a material question . . .

The Court must then determine whether, if the juror had provided honest answers at the time, this would have provided justification for dismissal from jury service. In other words, the Court must determine whether the information Juror 143 failed to disclose and the reasons behind his non-disclosure demonstrate bias. . .

Juror 143's mid-trial investigation and subsequent non-disclosures are both profound indicators of actual bias, or "bias in fact." . . .

Juror 143's dishonesty itself is also a "powerful indicator of bias." . . . Juror 143 knew his actions were not allowed, and that he risked dismissal from the jury if he revealed his conduct to the Court. Thereafter, Juror 143 lied to the Court specifically in order to stay on the jury, thereby evidencing . . partiality . .

This does not mean that every time a juror breaks his or oath, that juror is necessarily biased. The Court concludes that bias is established here, however, due to the extent of Juror 143's misconduct and the context in which it occurred. Juror 143's disobedience was not only prolonged and significant, but it occurred under uniquely serious circumstances. This juror disregarded the Court's instructions, obtained extra-record evidence, and shared his findings with his fellow jurors. His misconduct was clear, deliberate, and in plain violation of his juror oath. Furthermore, the jury in this case was tasked with deciding whether Fell would live or die. . . The Court was thus especially sensitive to eliminating bias from Fell's jury; indeed, the Court gave repeated instructions and sat four alternate jurors for this very reason. The Court necessarily concludes that only a truly biased juror would engage in such deliberate misconduct under these circumstances.

. . . (I)t is well established that due process requires a new trial where actual juror bias has been shown. . . While such cases are decidedly rare, Juror 143's extraordinary defiance of the Court's instructions, his subsequent failure to disclose his misbehavior, and his continued dishonesty before the Court render this such a case. The motion for habeas corpus relief on the basis of Juror 143's collection of extra-record information and related misconduct is therefore GRANTED.

. . .

IV. Conclusion

The United States Constitution provides that every defendant is entitled to a fair trial before an impartial jury. A fair trial requires a jury that is "capable and willing to decide the case solely on the evidence before it." . . . The right to a fair trial also guarantees a jury free of bias. . .

Juror 143 violated the fundamental integrity of Fell's trial by deliberately undertaking an independent investigation. This is definitively established by Juror 143's sworn declaration, the testimony of his domestic partner who traveled with him to the crime scene, and a later partner with whom he shared his plans. The juror traveled over two hours to view the crime scenes in knowing violation of the Court's orders. While there, he viewed extra-record information that was highly relevant to the aggravating and mitigating factors presented at trial. After breaching his oath as a juror, he returned to the courtroom where he purposely neglected to inform the Court of his transgressions. And years later, during a post-trial proceeding convened specifically to assess the fairness of Fell's trial, Juror 143 openly lied to the Court about whether he had committed these acts.

. . . (T)here is no question that Juror 143 was exposed to prejudicial information that was never introduced at trial nor subjected to the judicial

> safeguards of cross-examination, confrontation, and counsel. This information implicated the aggravating and mitigating factors that were central to the jury's death penalty determination, and thus would have impacted a hypothetical juror's sentencing deliberations. Juror 143's extraordinary and continuous defiance of the Court's directives also evidences a partiality that tainted the integrity of Fell's trial and violated his constitutional right to an unbiased jury.
>
> Because of Juror 143's deliberate misconduct, Fell had a jury that was not capable, nor willing, to decide his case solely on the evidence before it. He was therefore denied a fair trial, and his conviction and sentence must be vacated. While the Court is reluctant to turn back the clock on a matter that has required such significant resources in terms of time, effort, and, for some, emotion, it sees no alternative given Juror 143's actions. . .
>
> (Joint Exhibit 7)

21. An August 3, 2014, article in the *Burlington Free Press* entitled "How a rogue juror turned Fell case upside down" identified Grievant by name as the juror responsible for Fell's conviction being overturned. Grievant was referred to as a "state Transportation Agency environmental biologist". The article quoted the statement by Judge Sessions in his decision providing: "(Grievant's) brazen disobedience, dishonesty, and unwillingness to decide the case based upon the evidence presented at trial . . . now invalidates Fell's conviction". The article discussed at length the findings and conclusions of Judge Sessions concerning Grievant's juror misconduct (Joint Exhibit 8).

22. Management officials for the Employer became aware of the *Burlington Free Press* article by August 4, 2014. John Harvey, an investigator with the State Department of Human Resources, was assigned by his supervisor, Earl Fechter, in the second week of August, 2014, to investigate Grievant's actions as a juror in the Fell case. Harvey's job duties involved investigating allegations of state employee misconduct (Joint Exhibit 9).

23. Harvey's investigation included reviewing the 93-page decision by Judge Sessions, gathering documents regarding Grievant's timesheet submissions, contacting the U.S. Attorney's office to receive a copy of Grievant's testimony before Judge Sessions and reviewing

the transcript of that testimony, and collecting media reports involving the Fell trial and Grievant's role in it.

24. There was a September 22, 2014, *Burlington Free Press* article reporting that the U.S. Attorney for Vermont would appeal the decision of Judge Sessions to order a new trial in the Fell case. Grievant was identified by name and referred to as "a longtime Vermont state employee" who had committed juror misconduct resulting in the overturning of Fell's conviction and death sentence (Joint Exhibit 8).

25. A December 23, 2014, *Burlington Free Press* article reported that federal prosecutors had withdrawn the appeal of the decision of Justice Sessions and that it was possible that an agreement would be reached to remove the death penalty as a sentence in the Fell case. Grievant was identified by name and referred to as "a longtime Vermont state employee" who had committed juror misconduct resulting in the overturning of Fell's conviction and death sentence (Joint Exhibit 8).

26. Another *Burlington Free Press* article on March 8, 2015, announcing an upcoming April 10, 2015, pre-trial hearing on the retrial of the Fell case, contained detailed discussion on the history of the case, including the juror misconduct by Grievant. Grievant was identified by name and referred to as a "state Transportation Agency environmental biologist" (Joint Exhibit 8).

27. At the time Harvey was assigned to investigate Grievant's case, he had 14 other cases that he was investigating. During the timeframe that he worked on Grievant's case, he was working on 26 other active investigations. This constituted an unusually high number of investigations for Harvey. Harvey did not interview Grievant or anyone else during his

investigation of Grievant's action as a juror. Grievant's supervisor directed him to not interview Grievant.

28. Harvey issued his investigation report on March 23, 2015. In addition to his report on Grievant's actions as a juror in the Fell case, Harvey also included this statement in his report: "When (Grievant) filled out and submitted his time report with the State to account for the day he was out of work testifying before the Court on August 15, 2013, he entered eight hours of sick leave used." (Joint Exhibit 11).

29. Andrea Wright, a 15-year employee with the Employer, began supervising Grievant on March 23, 2015, when she assumed the position of Environmental Services Manager. Some employees expressed concerns to Wright related to Grievant's misconduct as a juror. The concerns were his judgment and disregard of protocol, and what that may lead to in the workplace. Wright had similar concerns. During the period she supervised Grievant, from March 23, 2015, until his dismissal, Wright did not limit Grievant's job duties in any way. The Employer did not place any limitations on Grievant's job duties between the August 3, 2014, *Burlington Free Press* article and his dismissal.

30. In April 2015, a new species of a long-eared bat became federally designated as a threatened species. Grievant and another biologist of the Employer were assigned to develop regulations providing for projects of the Employer to be in compliance with the designation.

31. On April 30, 2015, Richard Tetreault, Director of Highways for the Employer and in Grievant's chain of command, sent Grievant a letter which provided in pertinent part:

> As a result of your behavior described below, the Agency of Transportation ("AOT") is contemplating imposing serious disciplinary action up to and including dismissal from your position as an AOT Environmental Biologist. You have the right to respond to the specific allegations listed below, either orally or in writing, before the final decision is made. You have the right to be represented by Vermont State Employees' Association,

Inc., or private counsel at your own expense, during proceedings connected with this action.

The below disciplinary charges are based on your conduct, which is summarized in an Investigative Report prepared by Investigator John Harvey dated March 23, 2015, and related attachments. . . .

A. Relevant Provisions of the Non-Management Unit Collective Bargaining Agreement ("CBA") and State Personnel Policies ("PP")

- CBA Article 35, Sick Leave
- CBA Article 14, Immediate Dismissal
- PP 5.6, Employee Conduct
- PP 8.0, Disciplinary Action
- PP 9.1, Immediate Dismissal
- PP 11.0, Employee Workweek/Location/Shift
- PP 11.10, Time Entry and Approval
- PP 14.1, Sick Leave
- PP 17.0, Employment Investigations

B. Potential Violations of the Contractual Agreement and Personnel Policies

You are currently employed as an Environmental Biologist at AOT. The State received information that you committed juror misconduct when you served on a federal jury in a capital murder case in 2005 by violating the Judge's order not to conduct an independent investigation. Your actions contributed to the guilty verdict in the case being vacated. You were paid by the State for this jury service. Additionally, when you were summoned to federal court in the summer of 2013 to answer questions under oath related to the allegations of juror misconduct, it seems you were dishonest with the federal judge about the misconduct you committed. In fact, the judge concluded that you lied under oath regarding your inappropriate action as a juror. Your apparent willingness to lie under oath and commit perjury in federal court causes AOT to question your judgment, honesty, and fitness to serve as a state employee. This is particularly concerning because your position requires you to, at times, make sound decisions regarding budgets and to testify in court.

Additionally, according to your timesheet, you coded 8 hours of sick leave on August 15, 2013, the day that you attended court to testify to the judge. You are required to accurately and honestly report your time as a State employee. However, it appears you falsified your timesheet on August 15, 2013.

Your actions have caused the State of Vermont and the AOT to potentially lose confidence in your ability to carry out your duties as an Environmental Biologist and be a respectable, trustworthy public servant. The Vermont Personnel Policies provide employees direction on how to conduct themselves in order to fulfill their duties as public servants. Specifically, you are to conduct yourself in a manner that will not bring discredit or embarrassment to AOT and/or the State of Vermont. Furthermore, you are required to be honest and truthful in all representations to your employer. However, it

> seems your described conduct may constitute misconduct and/or gross misconduct, and violate all the above policies and provisions.
>
> Accordingly, it appears your conduct may provide just cause for disciplinary action up to and including dismissal from your position with AOT.
>
> **C. Process**
>
> You must notify HR Manager Heidi Dimick . . . within twenty-four (24) hours after receiving this letter whether you wish to respond to the above allegations.
> . . .
> (Joint Exhibit 12)

32. Grievant did not realize he was under investigation for alleged misconduct until the day he received this letter. Grievant was not placed on temporary relief from duty with pay pursuant to Article 14, Section 9, of the Contract during the investigation.

33. On June 10, 2015, Tetreault, Sara Jewett of the Department of Human Resources, Andrea Wright, and Ken Robie met with VSEA Representative Gretchen Naylor to hear a response to these allegations. Grievant did not attend this meeting.

34. On July 22, 2015, Tetreault sent a letter to Grievant which provided in pertinent part:

> I am notifying you of my decision to dismiss you from your position . . . effective at the close of business Wednesday, July 22, 2015.
>
> As explained in the April 30, 2015 letter and attachments, AOT was contemplating your dismissal, and you were provided an opportunity to respond to misconduct charges before I made a final decision.
> . . .
> I am terminating you because I find that you committed misconduct and gross misconduct as described in the above-reference Loudermill letter. Specifically, you falsified a State document when you coded sick leave for attending your jury duty responsibilities; and lied to a federal judge while under oath, and your dishonest behavior, actions and conduct while serving on a jury caused a mistrial. The U.S. District Court in Burlington, Vermont found your actions violated the "fundamental integrity" of the *Fell* trial, and the Court found that you performed "brazen disobedience, and dishonesty" as a juror.

> My trust in you and your ability to perform as a State employee has been destroyed and cannot be repaired. The State of Vermont and AOT has to maintain the public trust, as well as meet all State and federal regulations in carrying out its mission, and your conduct has caused me to question your integrity. Therefore, I find that no lesser penalty than dismissal is sufficient to address your misconduct.
> . . .
> (Joint Exhibit 14).

35. In deciding to dismiss Grievant, Tetreault engaged in an analysis of the twelve factors adopted by Labor Relations Board for deciding if a particular disciplinary action is legitimate. Tetreault concluded that Grievant's offenses of dishonesty and unethical behavior were unacceptable and intolerable, and constituted serious misconduct. He was concerned about Grievant's credibility in performing his job duties interacting with other Agency of Transportation employees, State Agency of Natural Resources employees, Federal Highway Administration employees, and the United States Army Corps of Engineers. He considered that there was no record of discipline in Grievant's personnel file. In examining Grievant's work record, Tetreault viewed Grievant as a satisfactory employee although he noted that Grievant had a history of needing to correct his behavior with co-workers. He determined that Grievant's misconduct undermined the trust his co-workers and supervisors had in him, and that the severity of his actions and dishonesty resulted in there being no available option to rebuild any level of confidence in him. Tetreault concluded that the penalty of dismissal was consistent with that imposed on other employees who had committed such serious dishonesty. In considering the notoriety of Grievant's offenses, Tetreault considered that Grievant's offenses resulting from his jury service were reported in the media and were well known across the Agency of Transportation and by other state and federal agencies which interacted with the Employer. He determined that Grievant's behavior exposed the State to serious potential liability, and that the reputation of the Employer could be severely undermined if the Employer did not dismiss

Grievant. He concluded that Grievant was on fair notice that he should not engage in dishonest and unethical behavior. Tetreault determined that the potential for Grievant's rehabilitation was not good given the pattern of his behavior. He did not find any mitigating circumstances diminishing the seriousness of Grievant's misconduct. He concluded that dismissal was the only acceptable action given the seriousness of the misconduct which Grievant committed (Joint Exhibit 13).

MAJORITY OPINION

Grievant alleges that the Employer violated Article 14 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 progressive corrective action, 3) the Employer failed to apply discipline with a view toward uniformity and consistency, and 4) the Employer failed to impose discipline within a reasonable time of the alleged offenses.

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).

We first address the issue of whether the Employer violated the requirement of Article 14 of the Contract that the State "will act promptly to impose discipline . . . within a reasonable time of the offense". Grievant contends that the discipline imposed on him was untimely because he

was dismissed 353 days after the Employer became aware of the alleged misconduct which resulted in his dismissal.

This issue presents the potential tension that exists in dismissal cases between due process considerations and examination of the alleged misconduct underlying an employee's dismissal. The question which arises in such cases is whether due process violations exist which are sufficient to reduce or eliminate the imposed discipline. This is the question the Board needs to decide in this grievance.

We examine our precedents, and also look to arbitration decisions for guidance, in determining whether the Employer violated this procedural due process protection the parties have afforded employees. The Board concluded that this provision was violated in one case when management charged an employee with an offense that was brought to management's attention three years earlier. Grievance of Gorruso, 9 VLRB 14, 34 (1986), *Reversed on Other Grounds*, 150 Vt. 139 (1988). The Board decided the contract language was violated in another case when an employee was not charged with an offense until five and one-half months after an incident requiring a simple investigation. Appeal of Wells, 16 VLRB 52 (1993). In both cases, the Board concluded that management was precluded from disciplining the employees for the alleged offenses.

There have been several other cases where the Board has concluded this contract language was not violated. The Board determined that an employer acted reasonably in completing an investigation in five months into alleged misconduct by three correctional officers where the employer's investigation was complicated because criminal charges were brought against the employees. Grievances of Charnley, Camley and Leclair, 24 VLRB 119, 141-142 (2001). Similarly, the Board determined in another case that imposition of discipline on an

employee was not unreasonably delayed where dismissal occurred four and one-half months after criminal charges were brought against an employee and the employer commenced an investigation of his alleged misconduct. Grievance of Brown, 24 VLRB 159, 174 (2001). The Board determined in a further case that the dismissal of a correctional officer occurred within a reasonable time of the offense, even though the conduct engaged in by the officer leading to her dismissal occurred six and one-half months prior to her dismissal, because a significant part of the delay was caused by the employee's union representative and a disagreement of the parties which had to be resolved through the grievance procedure. Grievance of Kerr, 28 VLRB 264, 277 (2006).

The Board held in another case that a delay of four months after receiving the investigator's report did not provide a reasonable basis to rescind the dismissal of a correctional officer where the delay was substantially caused by unforeseen complications and the dismissed officer's claimed lack of memory. Grievance of Abel, 31 VLRB 256 (2011). Elsewhere, the Board concluded that a six and one-half month period before discipline was imposed was reasonable where there were a number of allegations against the employee which resulted in an extensive investigation, including allegations on two issues which did not surface until the investigation of other allegations was well underway. Grievance of Richardson, 31 VLRB 359, 383 (2011).

Also, the Board had indicated in several cases that, absent demonstrated prejudice by the disciplined employee, it was not prepared to conclude that the time it took the employer to impose disciplinary action on the employee affected the validity of the disciplinary action. In these cases, employees were on temporary relief from duty with pay status during the investigation and did not demonstrate that they were prejudiced by the timing of the disciplinary

action. Id. Grievance of Abel, 31 VLRB at 274. Grievance of Sileski, 28 VLRB 165, 191 (2006). Grievance of Scott, 22 VLRB 286, 301-02 (1999).

We have researched grievance arbitration decisions to examine how arbitrators have handled similar questions in discipline cases. Arbitrators are divided over the impact of failure of an employer to follow procedures set forth in collective bargaining agreements before dismissing or otherwise disciplining an employee.

In one line of cases, arbitrators have concluded that failure by the employer to follow a contractual procedure in disciplinary cases causes an ineffective disciplinary action and requires reversal of it. Some of these arbitrators have stressed the importance the parties to the applicable collective bargaining agreements have placed on procedural due process when a person's livelihood is at stake, and the requirement to strictly enforce procedural due process provisions in discipline cases for constructive labor relations. Armco Steel Corp., 43 LA 977 (1964). Harry Davies Molding Co., 82 LA 1024, 1026 (1984). Other arbitrators have reversed dismissals and lesser disciplinary actions due to lengthy delays in imposing discipline on grounds that it demonstrated lack of management concern for the misconduct, made it more difficult to establish the truth in the case, was not fair to the affected employee, and was contrary to sound labor relations practices.. Inland Tool & Mfg., Inc., 65 LA 1203, 1206-07 (1975). City of Flint, Mich., 69 LA 574, 577-579 (1977). V.A. Medical Center, 91 LA 588 (1988).

Other arbitrators have differed from the approaches taken in the above cases, and have concluded that procedural errors did not warrant reversing the dismissal of employees. In support of this approach, Arbitrator R.W. Fleming states in his book *The Labor Arbitration Process* (University of Illinois Press, 1965): "The procedural irregularity may not have been prejudicial in any sense of the word, the emphasis upon technicalities would be inconsistent with

the informal atmosphere of the arbitration process, and the end result could on many occasions be quite ludicrous."

Often, arbitrators taking this position focus on the lack of prejudice to the employee. Amax Coal Co., 85 LA 225, 228 (1985). Hyatt Hotels Palo Alto, 85 LA 11 (1985) Thompson Bros. Boat Manufacturing Co., 56 LA 973 (1971). Mead Corp., 53 LA 342 (1969). Cameron Iron Works, 73 LA 878 (1979). Sometimes arbitrators concluding that procedural errors do not result in reversing the dismissal of employees rely on lack of effect on the preservation of facts or to the implementation of grievance proceedings. Frito-Lay, 52 LA 1213, 1216-17 (1969).

We are guided by these arbitration decisions, and consider our own precedents, as we turn to examining the facts of the case before us. The Employer became aware of the bulk of Grievant's alleged misconduct which ultimately resulted in his dismissal when Grievant was identified in an August 3, 2014, *Burlington Free Press* article as the juror whose alleged actions led to the vacating Donald Fell's death penalty verdict. A Department of Human Resources investigator was assigned to investigate the matter in the second week of August, 2014. The investigator discovered at some point in the investigation that Grievant had used sick leave for the date he testified in federal court about his actions as a juror. Despite the Employer's knowledge of alleged misconduct by Grievant in August 2014, and even though no witnesses were interviewed during the investigation, an investigation report was not completed until March 23, 2015. Grievant did not realize he was under investigation for alleged misconduct until the day in late April, 2015, that he received a letter notifying him that the Employer was contemplating dismissing him. Further, Grievant was not dismissed until July 22, 2015, an additional four months after the investigation report was completed.

The Employer attempts to justify this inordinate delay in imposing discipline on: 1) the heavy workload of the investigator at the time he conducted the investigation on Grievant, and 2) a review by the investigator's supervisor to determine whether Grievant should be interviewed as a part of the investigation. Further, the Employer contends that the Board should not conclude that the Employer violated the timeliness provision of the Contract because Grievant failed to provide any evidence of being prejudiced by the length of time the Employer took to impose discipline.

We conclude that the Employer has violated the requirement of the Contract to "act promptly to impose discipline . . . within a reasonable time of the offense". The circumstances involved in other cases of a pending criminal investigation, a complex investigation, or other significant complications where we have found no contract violation are wholly absent in this case. The information relied on by the Employer to determine whether to discipline Grievant was readily available shortly after the outset of the investigation. This is so particularly given that no one was interviewed during the investigation and the primary information relied on in the investigation was a court decision publicly accessible when the investigation commenced.

The Employer cannot credibly rely on the heavy workload of the investigator or a review by the investigator's supervisor to justify disregarding the important procedural due process protection negotiated by the parties in the Contract. In agreeing to such contract language, the State needs to be prepared to adhere to its requirements when a person's livelihood and constructive labor relations are at stake.

We further conclude that there is some inherent prejudice to Grievant when nearly nine months transpired between the Employer's knowledge of his alleged misconduct and any notification to him that discipline may be imposed against him. An employee is entitled to act in

reliance on an employer's inaction to impose discipline once a period of time elapses as is involved in this case, and it is unfair and prejudicial for an employee to have to defend against a stale charge of misconduct well outside the bounds of the timeframes agreed upon in the collective bargaining agreement. Also, there is obvious prejudice to the collective bargaining relationship between the State and VSEA when the significant procedural due process protection involved herein is so flagrantly violated. If we were to conclude that the Employer did not violate the Contract under these circumstances, it would be difficult to envision a situation where it would be determined an employer did violate this contract provision.

Our conclusion that the Employer has violated the Contract by failing to act promptly to impose discipline within a reasonable time of the offense does not necessarily result in a determination that Grievant's dismissal must be reversed. The tension that exists in dismissal cases between due process considerations and examination of the alleged misconduct underlying an employee's dismissal under the circumstances of this troubling case requires examination of the specific charges against Grievant and the factors relevant in determining the legitimacy of his dismissal to determine whether the due process violations are sufficient to reduce or eliminate the imposed dismissal.

The Employer charges Grievant with: 1) committing juror misconduct when he served on a federal jury in a capital murder case in 2005 by violating Judge Sessions's order not to conduct an independent investigation, and his actions contributed to a guilty verdict and the death penalty sentence in the case being vacated; 2) lying under oath when he testified in federal court in the summer of 2013 by being dishonest about his inappropriate actions as a juror; and 3) falsifying his timesheet by claiming 8 hours of sick leave on August 15, 2013, the day that he testified in federal court.

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). Once the underlying facts have been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven facts. Id. at 266.

The Employer has not established by a preponderance of the evidence that Grievant falsified his timesheet on the day that he testified in federal court. Grievant told his supervisor, John Naworski, prior to testifying in federal court on August 15, 2013, that he would not be into work that day because he had to testify in federal court. Grievant felt ill on the day he testified in federal court, and after testifying he traveled from the courthouse to his home and went to bed. Naworski then signed Grievant's time report in which he claimed sick leave for August 15. The Employer never questioned Grievant about his use of sick leave on August 15, either at the time he claimed it or during the investigation of his alleged misconduct. Given Grievant's advance notification to his supervisor, and the Employer's failure to ever discuss with him his use of sick leave on this day, the Employer falls well short of establishing the charge that he falsified his timesheet made long after the day in question.

The Employer has established by a preponderance of the evidence the other charges against Grievant. He violated Judge Sessions's order not to conduct an independent investigation and to consider only the evidence presented at the Donald Fell trial, as he traveled to Rutland during the trial while he was serving on the jury to view the crime scene as well as the home and neighborhood where Donald Fell's mother lived. Grievant then told his fellow jurors during jury deliberations about his observations during his trip to Rutland. Among the consequences of this juror misconduct were that the guilty verdict and death penalty sentence in the trial were vacated.

The Employer further established that Grievant lied under oath when he testified in federal court in the summer of 2013 by being dishonest about his inappropriate actions as a juror. He dishonestly denied that he traveled to Rutland during the trial to view the crime scene and the neighborhood where Fell's mother lived.

In sum, the Employer has established the majority, but not all, of the charges against Grievant. The fact that all of the charges against Grievant have not been proven in their entirety does not necessarily mean that his dismissal was without just cause. Failure of an employer to prove by a preponderance of the evidence all the particulars of a dismissal letter does not require reversal of a dismissal action. Grievance of McCort, 16 VLRB 70, 121 (1993). In such cases, the Board must determine whether the proven charges justify the penalty. Colleran and Britt, 6 VLRB at 268-69.

Grievant contends that no just cause for any discipline exists because of a lack of nexus between Grievant's job and his off duty conduct. In cases where the employer is considering disciplining an employee for off duty conduct, there must be a nexus between the off duty conduct and employment for an employer to be justified in taking any disciplinary action against an employee for such conduct. Grievance of Hurlburt, 24 VLRB 14, 30 (2001); *Affirmed*, 175 Vt. 40 (2003). Grievance of Soucier, 21 VLRB 292 (1998). Grievance of Petty, 20 VLRB 44, 56 (1997). Grievance of Boyde, 13 VLRB 209, 227 (1990).

Grievant's off duty offenses demonstrated a disregard for the integrity of legal processes and disrespect for, and dishonesty to, legal authorities for the Employer to reasonably draw a connection between the off duty conduct and Grievant's duties contributing to the enforcement of transportation and environmental laws and regulations. His actions demonstrated poor judgment and dishonesty related to his fitness for state employment. Also, State Personnel

Policies and Procedures provide that "(e)mployees shall conduct themselves in a manner that will not bring discredit or embarrassment to the State of Vermont, whether on or off duty." Grievant's juror misconduct and dishonesty in a high profile criminal trial received media attention in which Grievant was identified as a state employee. This brought discredit to the State.

The nexus between Grievant's off duty offenses and his employment having been established, 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 and type of employment, 3) whether Grievant had fair notice the conduct was prohibited, 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) the notoriety of the offense or its impact upon the reputation of the agency, 8) the potential for Grievant's rehabilitation, and 9) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

In examining these factors, the Board must determine whether the discipline imposed by the Employer is within the range of its discretion given the proven misconduct. Colleran and Britt, 6 VLRB at 266. The Board has the power to police the exercise of discretion by the employer and to keep such actions within legal limits. Grievance of Goddard, 142 Vt. 437, 444-45 (1983). However, the Board is not given by the statute or the collective bargaining agreement any authority to substitute its own judgement for that of the employer, exercised within the limits of law or the contract. Id. at 445. It is the Board's function only to ensure the employer considered the relevant Colleran and Britt factors in each particular case and exercised its

discretion within tolerable limits of reasonableness, i.e. within the limits of law or the contract. Colleran and Britt, 6 VLRB at 266. Appeal of Danforth, 23 VLRB 288, 294-97 (2000). *Affirmed*, 174 Vt. 231 (2002).

Since it is the duty of the Board to police the exercise of the 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. Danforth, 23 VLRB at 294-97. 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 first look to the nature and seriousness of Grievant's offenses and their relation to Grievant's duties. 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.

Grievant's off duty offenses were serious. They demonstrated a disregard for the integrity of legal processes and disrespect for, and dishonesty to, legal authorities which adversely impacted Grievant's duties contributing to the enforcement of transportation and environmental laws and regulations. His actions demonstrated poor judgment and dishonesty adversely affecting his fitness for state employment.

Nonetheless, the Employer's actions raise substantial doubts as to whether the Employer viewed Grievant's offenses as a substantial detriment to its interests. Although the Employer dismissed Grievant for the stated reason of gross misconduct, a reason which the Contract

provides as a basis for immediate dismissal, the Employer proceeded as if it did not view the allegations against him as rising to that level. The Employer delayed nearly a year in dismissing Grievant for misconduct, even though no one was interviewed during the investigation. Also, the Employer did not place Grievant on relief from duty with pay pending the investigation, took no duties away from him, and did not restrict with whom he worked. These facts demonstrate that the Employer did not view Grievant's conduct to be particularly egregious. Grievance of Ackerson, 17 VLRB 105, 125 (1994) (delay by employer of more than two months to discipline an employee over an incident which needed no further investigation demonstrated that the employer did not view the employee's conduct to be particularly egregious). The way the Employer proceeded belies its claim of a strong nexus between Grievant's off duty offenses and his employment.

We next address whether Grievant had fair notice that his conduct was prohibited. Knowledge that certain behavior is prohibited and subject to discipline is notice of the possibility of dismissal. Grievance of Towle, 164 Vt. 145, 150 Grievance of Gorruso, 150 Vt. 139, 148 (1988). Further, an employee has implied fair notice if he or she should have known the conduct was prohibited. Grievance of Towle, supra. Grievance of Brooks, supra.

Grievant should have known as a long-time government employee that disregard of the integrity of legal processes and the disregard of, and disrespect for, legal authority which he demonstrated in connection with his service as a juror were prohibited. Grievant also had fair notice that his 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).

An element of the Employer's justification for bypassing progressive discipline and dismissing Grievant was that his dishonesty undermined supervisors' faith in his credibility. However, the above-cited cases where the Board and the Vermont Supreme Court have upheld dismissals for dishonesty all involve employees who were dishonest to the State in its capacity as employer, and none of the cases extend this obligation of honesty beyond the employment relationship.

This is not to say that the Employer was prohibited from considering Grievant's off duty dishonesty in deciding what disciplinary action to take against him. However, it does not necessarily follow that off duty dishonesty translates into lack of credibility while on duty. Grievance of Boyde, 13 VLRB 209, 230 (1990). An examination can be made of an employee's track record while on duty for any indication that the employee's off duty dishonesty destroys his or her on duty credibility. Id. at 230-31. Here, the Employer has presented no evidence to indicate that Grievant has exhibited dishonesty while on duty.

Further, and more importantly, the Employer's claim that Grievant's dishonesty undermined supervisors' faith in his credibility is belied by the evidence indicating that the Employer left him on duty for nearly a year after allegations were made against him with no changes in job duties or with whom we worked. This does not indicate a distrusted employee. We conclude that the Employer has not demonstrated that Grievant's on duty credibility was

destroyed. Similarly, the Employer's general claim that supervisors lost confidence in Grievant's ability to perform assigned duties is not persuasive given that he was left on the job for nearly a year pending investigation performing his job duties without change.

Grievant's past disciplinary record and work record during his lengthy 23-year tenure weigh in favor of his retaining his job. Prior to the incidents at question herein, Grievant was not disciplined. His overall performance was always rated satisfactory. Further, there is no evidence that his off duty misconduct affected his performance on the job. While his misconduct adversely impacted somewhat his relations with co-workers and supervisors, it is apparent that the offenses have not completely compromised his ability to adequately perform his job.

The notoriety of Grievant's offenses and their impact on the reputation of the Employer are pertinent here. Grievant's off duty offenses in connection with his jury service in the high profile Donald Fell trial received significant media attention. He was identified as an employee of the Employer which adversely affected the Employer's reputation. Nonetheless, the significance of this factor diminished over time as the media coverage of Grievant's offenses receded and Grievant continued to remain employed. If notoriety and impact on the reputation of the Employer was a significant factor in the Employer's judgment, the Employer would have proceeded much differently than it did here. The Employer would have placed Grievant on temporary relief from duty with pay pending investigation or limited his interactions with other agencies, and would have moved more quickly than it did here to discipline Grievant.

The potential for Grievant's rehabilitation is a pertinent factor given his demonstrated dishonesty and poor judgment in connection with his service as a juror. Nonetheless, once again the Employer's own actions have demonstrated less concern in this area since he was left on the

job for nearly a year without changes in job or with whom he interacted, and there is no evidence that his off duty offenses affected his job performance.

In sum, we conclude that the Employer did not exercise its discretion within tolerable limits of reasonableness in taking action to dismiss Grievant. The unreasonable delay in its investigation of Grievant's alleged offenses, and leaving him on the job for nearly a year after his alleged misconduct came to light with no changes in job duties or with whom he interacted, substantially weaken the strength of the Employer's stated reasons as a justification for Grievant's dismissal. The way the Employer proceeded between the time the alleged misconduct surfaced and Grievant was dismissed precludes a determination that the Employer demonstrated that Grievant's offenses constituted a substantial detriment to the Employer's interests.

In short, the Employer's violations of important due process protections, and the inconsistency between the Employer's words and actions with respect to the application of the factors relevant in determining the legitimacy of discipline, demonstrate lack of just cause for Grievant's dismissal. The maximum penalty short of dismissal permitted by the Contract short of dismissal – 30-day suspension - would have been an adequate and effective alternative sanction to impose on Grievant to deter such conduct by him or others in the future. Such a lengthy suspension would have served effective notice to Grievant that similar off duty conduct in the future would have resulted in his dismissal. A lengthy suspension also would have improved the negative media coverage for the Employer generated by Grievant's off duty derelictions, and would have demonstrated that the Employer did not condone his offenses.

/s/ Richard W. Park

_____

Richard W. Park, Acting Chairperson

/s/ James C. Kiehle

_____

James C. Kiehle

DISSENTING OPINION

I respectfully dissent from the decision of my colleagues reversing the dismissal of Grievant and reinstating him. I conclude that the Employer had just cause to dismiss him.

I concur with the majority opinion with respect to its conclusion concerning whether the Employer has proven its various charges against Grievant. I also agree with the majority conclusion that the Employer violated the provision of the Contract that the State "will act promptly to impose discipline . . . within a reasonable time of the offense". However, I do not concur with the degree of significance which the majority opinion accords this violation in ultimately concluding that Grievant's dismissal should be overturned.

This was a significant due process violation by the Employer which cannot be condoned, but I conclude that it should not override in importance the misconduct underlying Grievant's dismissal. This is particularly so since Grievant has demonstrated no prejudice as a result of the due process violation. He continued working during the pendency of the investigation, and thus did not suffer any monetary loss as a result of it. Grievant also does not allege any effect on preservation of facts or testimony, or any other adverse effect on him in preparing to refute the charges against him.

The Board had indicated in several cases that, absent demonstrated prejudice by the disciplined employee, it was not prepared to conclude that the time it took the employer to impose disciplinary action on the employee affected the validity of the disciplinary action. Grievance of Richardson, 31 VLRB 359, 383 (2011). Grievance of Abel, 31 VLRB 256, 274. Grievance of Sileski, 28 VLRB 165, 191 (2006). Grievance of Scott, 22 VLRB 286, 301-02 (1999). Grievant has failed to demonstrate prejudice here, and the Board likewise should hold

that the time it took the Employer to impose disciplinary action should not affect the validity of the dismissal decision.

I turn to addressing the substance of Grievant's misconduct. I conclude as a threshold matter that a nexus exists between his off duty offense and his employment. As recognized by the majority opinion, Grievant's offenses demonstrated a disregard for the integrity of legal processes and disrespect for, and dishonesty to, legal authorities to reasonably draw a connection between the off duty conduct and Grievant's duties contributing to the enforcement of transportation and environmental laws and regulations. His actions demonstrated extremely poor judgment and dishonesty related to his fitness for state employment. Also, Grievant's juror misconduct and dishonesty in a high profile criminal trial received media attention in which Grievant was identified as a state employee. This brought discredit to the State in violation of State Personnel Policies and Procedures.

In examining the Colleran and Britt factors relevant in determining the legitimacy of Grievant's dismissal, I conclude that the Employer has exercised its discretion reasonably in dismissing Grievant. Grievant's proven offenses in connection with his jury service were very serious. Grievant engaged in egregious, deliberate and repeated juror misconduct, which had the grave consequences of the guilty conviction and death sentence in a federal murder trial being vacated. Further, Grievant lied under oath before a federal judge about his juror misconduct. As cited in the majority opinion, the Board has upheld dismissals for dishonesty in many cases.

The requirement for honesty is closely related to Grievant's job duties. He was responsible for evaluating the potential impact of proposed transportation projects upon the environment to ensure they complied with natural resource regulations. He created reports and coordinated with others to apply for, and prepare, required environmental permits. He had

interactions with employees of federal and state agencies, and it was important in performing his job duties that he gain and keep the trust and respect of peers and regulators to develop meaningful professional working relationships. These duties indicate the importance of his credibility.

Grievant had fair notice that his misconduct was prohibited. Grievant should have known as a long-time government employee that disregard of the integrity of legal processes and the disregard of, and disrespect for, legal authority which he demonstrated in connection with his service as a juror were prohibited. Grievant also had fair notice that his 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).

Grievant's past disciplinary record and work record operate in his favor in weighing whether just cause existed for his dismissal. During his lengthy employment, Grievant was not disciplined and his overall performance was always rated satisfactory. Nonetheless, Grievant's misconduct was of such a severe nature that it outweighed these factors, and understandably had an adverse effect on supervisor' confidence in Grievant's ability to perform assigned duties. It was reasonable for supervisors to question whether Grievant would perform honestly and exercise sound judgment in performing his job duties given his repeated dishonesty and poor judgment in connection with his juror responsibilities. The severity of his misconduct engaged in over a period of time in connection with his civic responsibilities as a juror cast serious doubt on his credibility, thus causing supervisors to reasonably question his fitness to continue in his job.

The notoriety of Grievant's offenses adversely impacted the reputation of the Employer and exacerbated the seriousness of his offenses. There were a multitude of media reports over a

period of time which broadcast Grievant's misconduct and identified him as an employee of the Employer. The media coverage kept before the public the reality that an employee of the Employer had committed juror misconduct which set into motion the vacating of a murder conviction and death penalty sentence.

It was reasonable for the Employer to conclude that his repeated dishonesty over a long period of time made him a poor candidate for rehabilitation. Grievant has not taken responsibility for his actions and admit his wrongdoing. This indicates that he does not have promising potential for refraining from dishonest conduct in the future.

I recognize that significant problems were not identified with respect to Grievant's job performance for nearly a year after his alleged misconduct came to light and he remained in his position with no changes in job duties or with whom he interacted. However, Grievant's credibility and integrity remain suspect given his repeated dishonesty over an extended period of time and his continuing failure to take responsibility for his actions.

The Employer acted reasonably in bypassing progressive discipline and concluding that alternative sanctions less than dismissal would not be effective to deter Grievant from misconduct in the future. In sum, I conclude that just cause existed for Grievant's dismissal.

/s/ Alan Willard
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Alan Willard

ORDER

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

1. The Grievance of John Lepore is sustained in part. The dismissal of Grievant is reversed and is replaced by a 30-day suspension;

2. Grievant shall be reinstated to his position as Environmental Biologist with the Vermont Agency of Transportation;

3. Grievant shall be awarded back pay and benefits from the date commencing 30 working days from the effective date of his dismissal until his reinstatement, for all regularly assigned hours, minus any income (including unemployment compensation received and not paid back) received by Grievant in the interim;

4. The interest due Grievant on back pay shall be computed on gross pay and shall be at the legal rate of 12 percent per annum and shall run from the date each paycheck was due during the period commencing 30 working days from Grievant's dismissal, and ending on the date of his reinstatement; such interest for each paycheck date shall be computed from the amount of each paycheck minus income (including unemployment compensation) received by Grievant during the payroll period;

5. The parties shall file with the Labor Relations Board by March 10, 2016, a proposed order indicating the specific amount of back pay and other benefits due Grievant; and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific facts agreed to by the parties, specific areas of factual disagreement, and a statement of issues which need to be decided by the Board. A hearing on disputed issues, if any, shall be held on March 17, 2016, at 9:00 a.m., in the Labor Relations Board hearing room; and

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

Dated this 22nd day of February, 2016, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

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Richard W. Park, Acting Chairperson

/s/ James C. Kiehle

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James C. Kiehle