VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NOS. 82-9, 82-22, 82-26
GARY CRONIN	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

This case is a combination of three grievances filed with the Board by the Vermont State Employees' Association ("VSEA") on behalf of Gary Cronin ("Grievant") on February 17, 1982 (#82-9), April 9, 1982 (#82-22), and April 30, 1982 (#82-26). #82-9 is a grievance over invasion of privacy and refusal to grant a leave of absence with pay. #82-22 concerns a grievance over a one-day suspension. #82-26 is a grievance from various disciplinary actions: one-day suspension, three-day suspension, warning letter, and Grievant's dismissal. The collective bargaining agreement relevant to all these grievances is the Agreement between the State of Vermont and the Vermont State Employees' Association effective for the period July 1, 1981, to June 30, 1982 ("Contract").

Hearings were held before the full Board on these grievances October 21, 1982, October 28, 1982, and November 18, 1982. Grievant was represented by Michael R. Zimmerman, counsel for VSEA. Assistant Attorney General Scott Cameron represented the State. Chairman Kimberly Cheney missed a portion of the October 28, 1982, hearing and the parties stipulated he could participate in the decision by reviewing the tape. A final hearing was held before Board members William G. Kemsley, Sr. and James S. Gilson on December 2, 1982, in the absence of Chairman Cheney. The parties stipulated Cheney could participate in the decision by reviewing the tape.

The VSEA filed Requested Findings of Fact on February 2, 1983, and a Memorandum of Law on February 17, 1983. The State filed Requested Findings of Fact and Memorandum of Law on February 17, 1983, and a Reply Memorandum to VSEA's Memorandum of Law on February 24, 1983. VSEA filed a Reply to the State's Reply Memorandum on March 10, 1983.

FINDINGS OF FACT

1. Grievant was continuously employed as a permanent classified employee of the State of Vermont, Department of Social Welfare ("DSW"), from February 2, 1976, until his dismissal on March 31, 1982. He worked the entire period in the St. Albans District Office, and held the following positions: 1) Income Maintenance Specialist (Pay Scale 10) from February 1976 to March 1981, and 2) Income Maintenance Specialist/ANFC (Pay Scale 11) from March 1981 until his dismissal.

2. Throughout his employment, Grievant was habitually tardy. Nevertheless, he received overall 3's ("consistently meets job requirements/standards") on his annual performance evaluations, although he was continually reminded to improve his punctuality (Grievant's Exhibit 5). There is no specific evidence as to the degree of Grievant's tardiness until late November, 1981.

In 1980, Grievant received a merit bonus of 3 percent of his annual salary for the "astounding balance, poise and control" he exhibited in maintaining his own caseload and the caseloads of workers on leave (Grievant's Exhibit 6).

3. From the time Grievant began working until November 4, 1981, employees at the St. Albans office who were late arriving at work were allowed to charge the amount of time late to their accumulated annual

leave, and were not considered as absent without authority for that time.

4. In early 1981, an opening for Income Maintenance Specialist/ANFC (Pay Scale 11) occurred in the St. Albans office. Grievant applied for the position. In March, 1981, Grievant was interviewed for the position by Edwin Thornton, District Director of the St. Albans office, Betty Machia, Income Maintenance Supervisor at the St. Albans office, and the other Income Maintenance Supervisor in the St. Albans office. Grievant's tardiness problem was discussed with him and Grievant was told punctuality was important in the position. Grievant agreed he would make efforts to improve his tardiness problem.

5. Grievant was promoted to the position. After the promotion, Grievant improved his tardiness record for a while, but then lapsed into his old habits.

6. In July, 1981, Grievant and his wife amicably decided to separate, on a trial basis, in order to "work things out".

7. Article 26 of the Contract provides, in pertinent part:

> Section 2(o): ...Leave must be requested in advance by the employee and is subject to approval by the appointing authority...
>
> Section 2(q): ...Annual leave may not be deducted in increments of less than one-half hour".

8. In the summer of 1981 (probably during June or July), there was a a meeting of all DSW District Directors with Vasili Bellini, Income Maintenance Division Director, wherein District Office tardiness policies were discussed. As a result of that meeting, Bellini told the District Directors to implement uniform policies for controlling tardiness and end the practice of allowing employees to take annual leave if they were late for work.

9. Because Grievant did not consistently report to work on time after his promotion, Thornton, Jane Kitchell, DSW Chief of Field Operations (whose duties involve supervision of seven of 12 DSW District Offices, including the one in St. Albans), and Gary Vassar, DSW Personnel Administrator, met in Waterbury in late July - early August, 1981, to discuss Grievant's tardiness. At the meeting, a letter was drafted to be given to Grievant. The letter stated Grievant's tardiness was "excessive", and he would no longer be able to take annual leave for tardiness. It provided: "If you are late, you will not be paid. If you are late more than a cumulative total of one hour during this 30-day period, further disciplinary action may be taken" (Grievant's Exhibit 45).

10. Thornton did not give this draft letter to Grievant because he understood that Machia and Grievant had corrected the tardiness problem.

11. On August 20, 1981, Grievant's brother-in-law, David Kenyon, spoke to Jacquel-Ann Chouinard, Commissioner of the Department of Personnel, and told her he was concerned with the marital and work problems of his brother-in-law who was a "social worker". Chouinard referred Kenyon to Lee Marasco, a Personnel Officer, for the Department of Social and Rehabilitation Services which normally employed social workers. Marasco was not, however, the personnel officer for the Agency employing Grievant. Marasco was active in the Employee Assistance Program, a program designed to help employees whose personal problems may affect their work.

12. Kenyon called Marasco that day and identified himself as Grievant's brother-in-law. He told Marasco he was concerned Grievant was going to lose his job; that he was habitually tardy, had abused sick

leave, and had an alcohol problem. Marasco told Kenyon he would get back to him. Marasco assumed Kenyon was trying to help Grievant. The evidence is not clear exactly what Kenyon's motives were, but Grievant believed Kenyon's motives were not to help his work performance or his marriage. Rather, Grievant believed Kenyon had a personal animus against him and wanted to destroy both his marriage and his work-life.

13. On September 10, 1981, Marasco called Kitchell and relayed the "concerns" mentioned by Kenyon. Marasco asked Kitchell if Grievant was on the verge of being fired; she responded "no" and said that Grievant's only performance problem was tardiness and that was being addressed. She told Marasco it was rumored that Grievant was having an affair with a co-worker. Kitchell viewed her conversation with Marasco as confidential, and did not think it would be discussed elsewhere.

14. Marasco called Kenyon that day and told him the DSW was dealing with Grievant's work problems in a constructive way. Marasco also told Kenyon that Grievant was "carrying on" with a co-worker in the office. Marasco did not tell Kenyon that Grievant was going to be disciplined.

15. At all times relevant, Section 3.016 of the Rules and Regulations for Personnel Administration provided:

> An employee shall not disclose confidential information gained by him by reason of his official position except as authorized or required by law...

16. Subsequent to her conversation with Marasco, Kitchell spoke to Machia on September 10 to discuss the concerns raised by Marasco. Kitchell told Machia it was "very important that we act" and to "give Gary letter". This referred to the August letter that had been drafted

concerning tardiness. Kitchell so advised Machia because Marasco's call sharpened her perception that Grievant had a tardiness problem and she decided it was important to take steps to correct the problem. Machia's notes of this conversation are before the Board as Grievant's Exhibit 12, Page 2. Grievant was still not given the draft letter as a result of this conversation because Machia and Thornton decided to use the flex-time policy to address Grievant's tardiness problem.

17. On September 11, 1981, Kenyon called Grievant's wife, Judy Cronin, and told her Marasco had told him that supervisors knew of Grievant's problems and were going to resolve them in a few days, and that the problems were complicated because Grievant was carrying on "hot and heavy" with a female co-worker. Grievant's wife became upset as a result of this conversation, and did not know whether to believe Kenyon.

18. Grievant's wife then called Grievant and relayed what Kenyon had told her. She told Grievant his bosses were going to fire him and she thought it possibly had something to do with absenteeism. Grievant told his wife he was unaware of pending disciplinary action and the rumors of an office affair were untrue.

19. The conversation between Kenyon and Grievant's wife has had a negative effect on Grievant's and his wife's reconciliation, and to date they have not been able to reconcile their differences.

20. Between September 11 and September 14, 1981, Grievant spoke to Kitchell, Marasco, Kenyon, Machia, Thornton, and Chouinard, and by September 14, 1981, Grievant knew the substance of the Marasco/Kenyon and Marasco/Kitchell phone conversations. He also had been truthfully assured by his supervisors (ie. Machia, Thornton and Kitchell) that

outside of his tardiness problem, there was no problem with his performance and no disciplinary action was pending against him.

21. On September 23, 1981, Marasco told Grievant's VSEA representative, Anne Noonan, that Grievant's supervisors were concerned about an "unspecified problem" which had more serious consequences than tardiness. Noonan relayed the substance of this conversation to Grievant.

22. On September 24, 1981, Grievant went into Machia's desk after office hours when no one was in the office and found and made a copy of Grievant's Exhibit 12, Page 2; Machia's notes of her September 10, 1981, conversation with Kitchell.

23. On September 25, 1981, Grievant requested that he be temporarily relieved from duty with pay for the period October 5, 1981, to October 30, 1981, to "permit an investigation into the exact nature of, and the person or persons responsible for the recent serious breach of confidentiality regarding my job performance and personal conduct..."

Grievant cited Article 15, Section 8, of the Contract as authority for granting his request. Article 15, Section 8, provides:

> 8. An appointing authority may relieve employees from duty temporarily with pay for a period of up to 30 workdays to permit the appointing authority to investigate or make inquiries into charges and allegations concerning the employee, or 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, and ability of the office to perform its work in the most efficient manner possible, or well being or morale of persons under his care. The period of temporary relief from duty may be extended by the appointing authority, with the concurrence of the Commissioner of Personnel. Employees temporarily relieved from duty shall be notified in writing within 24 hours with specific reasons given as to the nature of the investigation, charges and allegations.
>
> Grievant's Exhibit 7, Page 1

24. On September 28, 1981, Thornton, after discussion with Bellini denied Grievant's request because in his view Article 15, Section 8, applied when the employer was taking disciplinary action against the employee, and the employer "has not and is not considering disciplinary action..." (Grievant's Exhibit 7, Page 2).

25. In an effort to reduce Grievant's tardiness problem, Machia and Thornton agreed in late September to allow Grievant to go on flex-time, which changed his starting time from 7:45 a.m. to 8:15 a.m. However, because Grievant was on a leave of absence until mid-November, 1981, he did not actually begin his flex-time schedule until then.

26. On October 1 and 2, 1981, Grievant sought to have Bellini grant him a leave of absence with pay and to investigate the alleged invasion of privacy incident. Bellini agreed to investigate the incident but said he could not do it right away because Kitchell was involved and she was on vacation, and unreachable, until the end of October. Bellini further told Grievant there was no provision in the contract for a leave of absence with pay, but he would grant him time off payroll.

27. Subsequently, Grievant submitted a request to Machia for leave without pay for the period October 5, 1981 - October 30, 1981 (Grievant's Exhibit 7, Page 3). The request was granted (Grievant's Exhibit 8, Page 1), and Grievant was off payroll for that period.

28. On October 28, 1981, Bellini told Grievant he had talked to Kitchell and concluded no breach of confidentiality had occurred. Bellini assured Grievant no disciplinary action was pending although tardiness was going to be monitored. Grievant requested an extension of

his off-payroll status until a complete report of investigation was placed in his personnel file.

29. On October 29, 1981, Bellini denied Grievant's request, and told him to return to work November 2, 1981, unless he was to submit evidence of medical or emotional illness. Bellini informed Grievant "your job is not in jeopardy...(Machia and Thornton) are satisfied with your work performance and want you to return to work" (Grievant's Exhibit 8, Page 2).

30. On October 30, 1981, Grievant wrote Thornton, requesting an additional six months leave of absence. Grievant criticized Bellini's investigation; calling his efforts "either apathy or willful reluctance to uncover the truth" (Grievant's Exhibit 8, Pages 3-5).

31. On October 31, 1981, Grievant went into Thornton's desk after office hours when no one was in the office and found a copy of the August draft letter, before the Board as Grievant's Exhibit 45.

32. Grievant did not return to work on November 2, 1981. For the week of November 2-6, he provided medical substantiation for absence due to depression, and used an accumulated sick leave balance. For the week of November 9-13, he used various methods of administrative leave.

33. On November 4, 1981, Thornton, in a memorandum to office staff, changed the previous office policy concerning tardiness. The new policy provided that if tardiness did not fall within the provisions of the Contract, "lost time will be charged as absence without pay" (Grievant' Exhibit 9). Grievant received a copy of this memorandum. The change in policy resulted from the District Directors' summer meeting and a recent visit to the St. Albans office by Kitchell. When Kitchell realized the

Contract was not being complied with, she advised the office to conform to the Contract.

34. At the time of the November 4 policy change in St. Albans, the Brattleboro, Bennington, Burlington, and Hartford office employees were not docked pay for tardiness, and were permitted various options (i.e. staying late, reducing lunch time, using compensatory time or personal leave, using sick or annual leave) to make up for tardiness (Grievant's Exhibit 46).

35. These varying policies existed contrary to specific central office instructions to follow the uniform policy instituted at the district directors' summer meeting (see Finding #8). The intent of the DSW was to have uniform implementation of the policy; however, the vigor of enforcement varied throughout the State.

36. On November 5, 1981, Bellini denied Grievant's October 30 request for an additional six month leave of absence, reiterating the points he raised in his October 29 letter. He informed Grievant the only job performance area of concern was tardiness, and he understood that was being resolved (Grievant's Exhibit 8, pages 6-7).

37. On November 17, 1981, Thornton sent Grievant a letter by certified mail informing him his accumulated leave balance was exhausted and he had been absent without authorization since November 13. Grievant was told further off-payroll absences would not be tolerated and he would be separated unless he reported back to work immediately or submitted a request for leave of absence due to disability. Thornton informed Grievant he "expected" him back to work by November 22, 1981 (Grievant's Exhibit 10). Grievant did not pick up the letter at the

post office and did not receive a copy of it until he was handed one by Thornton on November 23, 1981. By that time, he had returned to work, returning on or about November 19.

38. On November 20, 1981, Grievant filed a Step II grievance over the "breach of confidentiality" and failure to grant his September 25, 1981, leave of absence with pay (Grievant's Exhibit 11).

39. Grievant started his flex-time schedule upon his return to work in November. On November 23, 1981, Grievant met with Machia and Thornton to discuss his tardiness problem and the use of flex-time to help deal with that problem. Grievant stated he would try to improve his tardiness record (Grievant's Exhibit 14, Page 1).

40. After Grievant returned to work in November, he spent work-time writing memoranda regarding his "breach" grievance. Machia told Grievant not to spend office time doing personal business. Grievant was permitted time off to work on his grievance with his VSEA representative but not otherwise.

41. Grievant's Step II hearing on his grievance was held December 9, 1981. Prior to the hearing, Grievant asked Thornton to have Machia at the hearing and to ensure that Kitchell and Marasco were there also. Bellini told Marasco and Kitchell it was "not necessary" they attend; and they did not attend. John Peterson, Chief of Personnel for Agency of Human Services and Marasco's supervisor, told Marasco his attendance was not necessary, and Marasco did not attend either. The Step II hearing officer was Peter Profera, Agency of Human Services Director of Administrative Services. At the hearing, Grievant attempted to get Machia's notes of her September 10, 1981, conversation with Kitchell

introduced. When they could not be identified, Profera would not admit them into evidence.

42. In his decision, rendered December 10, 1981, Profera found no breach of confidentiality by the State, but found Marasco's divulging of information to Kenyon to be "poor judgment" and instructed Peterson to meet with Marasco and issue whatever disciplinary action he deemed appropriate (Grievant's Exhibit 13).

43. Subsequently, Peterson met with Marasco. He did not discipline him, but told him he had perhaps used poor judgment and should be more cautious in the future.

44. On December 10, 1981, Grievant showed Machia a copy of her notes of her September 10, 1981, conversation with Kitchell (Grievant's Exhibit 12, Page 2), and asked her if she had made the notes. She responded that she had.

45. When Grievant received Profera's Step II decision, he viewed it as a recommendation and believed DSW Commissioner David Wilson would be making the ultimate Step II decision. As a result, Grievant wished to take Machia's September 10, 1981, notes to Wilson before he made his decision. On December 14, 1981, at approximately 9:30 a.m., he asked Machia for administrative leave to leave the office by 11:00 a.m. to take the notes to Wilson. At that time, Grievant told Machia he would not take care of a client because he wasn't working that day. Machia left the office at 11:00 a.m. to put gas in her car for a trip to Waterbury without telling Grievant whether the leave was approved. Grievant, assuming Machia had left for her Waterbury meeting without responding to his request, left the office.

46. On the morning of December 15, 1982, Grievant called Machia and said he would not be at work because he was working on his grievance. Machia told Grievant his absence was unauthorized. Grievant then said he was sick. He did not report for work that day. In the afternoon, Machia told Grievant that if he wished to be placed on sick leave, he would have to produce a doctor's certificate. Grievant never submitted a doctor's certificate. Grievant had a doctor's appointment scheduled for December 16, 1982, but did not keep the appointment because of a death in his family.

47. On December 15, 1982, Bellini told Grievant Profera had full authority to render a Step II decision, and Wilson would not personally make a decision.

48. On December 21, 1981, Grievant received a letter of reprimand from Thornton. The letter provided in pertinent part as follows:

> The afternoon of 11/23/81 we discussed with you the problem of lateness, and the use of flex-time to help deal with that problem. We made adjustments to your flex-time as requested. Since agreeing to this solution and stating you would make an effort to comply, there has been no improvement.
>
> Since that time you have been late as follows: (reporting time - 8:15 a.m.)
>
> 11/24/81 - 40 minutes - 8:55 a.m.
> 11/25/81 - 15 minutes - 8:30 a.m.
> 11/30/81 - 20 minutes - 8:35 a.m.
> 12/ 1/81 - 40 minutes - 8:55 a.m.; 15 minutes - 1:30 p.m.
> 12/ 2/81 - 35 minutes - 8:50 a.m.
> 12/ 3/81 - 20 minutes - 8:35 a.m.
> 12/ 4/81 - 30 minutes - 8:45 a.m.
> 12/ 7/81 - 10 minutes - 8:25 a.m.
> 12/ 8/81 - 25 minutes - 8:40 a.m.
> 12/10/81 - 20 minutes - 1:35 p.m.

> In view of this continued problem of lateness, you are advised that further continuance of late behavior will cause disciplinary action up to and possibly dismissal.
>
> Grievant's Exhibit 14

49. On December 21, 1981, Grievant was given a one-day suspension. Grievant was suspended for one day without pay, December 22, 1981, "due to unauthorized absence on December 15, 1981, which followed unauthorized leave December 14, 1981". Grievant was warned that "further unauthorized leave, or tardiness will result in more severe disciplinary action up to and including dismissal" (Grievant's Exhibit 15).

50. On December 21, 1981, Grievant filed his "breach of confidentiality" grievance at Step III with the Department of Personnel (Grievant's Exhibit 16).

51. The Step III hearing was held January 13, 1982. Employee Relations Director Tom Ball was the hearing officer. Prior to the hearing, Grievant requested of Ball that Kitchell, Machia and Marasco be at the hearing. Peterson and Bellini jointly decided it was not necessary Kitchell, Machia and Marasco be at the Step III hearing, and they did not attend (Grievant's Exhibit 27). Ball denied the Step III grievance on January 18, 1982 (Grievant's Exhibit 18).

52. On January 19, 1982, VSEA, as Grievant's representative, filed a Step II grievance over Grievant's one-day suspension of December 22, 1981, and the failure of the State to place certain material regarding the "breach" in his personnel file. This grievance was denied at all steps of the grievance procedure and the one-day suspension is currently before the Board as Docket No. 82-22 (Grievant's Exhibits 19, 23, 26 and 29).

53. In a January 27, 1982, letter to Ball, Grievant stated Ball's Step III decision on the "breach" grievance was "an affront to any reasonable human concern for right and wrong" and that Ball had "blatantly consorted in this continuing 'cover-up' of the facts." Grievant requested that Ball reconsider his decision (Grievant's Exhibit 22).

54. On February 5, 1982, Grievant was 15 minutes late for work, and was 17 minutes late on February 8, 1982. No valid reason for Grievant's tardiness on those days was given.

55. On February 8, 1982, Grievant was suspended for one day, February 9, 1982, for his tardiness on February 5 and 8, 1982 (Grievant's Exhibit 25).

56. On February 26, 1982, Ball denied Grievant's request to reconsider his Step III decision on the "breach" grievance (Grievant's Exhibit 33, Page 3).

57. On March 1, 1982, VSEA, as Grievant's representative, filed a Step II grievance concerning Grievant's one-day suspension without pay on February 9, 1982. The grievance was denied at all steps of the grievance procedure and is currently before the Board as part of Docket No. 82-26 (Grievant's Exhibits 28, 31, 35 and 43).

58. On both March 4 and 5, 1982, Grievant was 12 minutes late for work. No valid reason for Grievant's tardiness on those days was given.

59. On March 8, 1982, Grievant was suspended without pay for three days (March 9-11) because of his tardiness on March 4 and 5 (Grievant's Exhibit 30).

60. Grievant informed Machia on March 22, 1982, he could no longer work in the St. Albans office; stating "the acts of you, and my superiors

above you have been grossly damaging to me, my family and...yourselves." He asked that the Secretary and the Commissioner take exclusive control over the matter (Grievant's Exhibit 32).

61. On March 22, 1982, Grievant filed a Step III grievance against Ball with Chouinard. Grievant complained of Ball's handling of his Step III grievance. He requested that Ball be fired, and that a new Step III hearing be held with a new Step III hearing officer (Grievant's Exhibit 33).

62. On March 23, 1982, Grievant filed a Step I grievance over his March 9-11 suspension. This suspension was not resolved through the grievance procedure prior to Grievant's dismissal and has been combined with Docket No. 82-26 (Grievant's Exhibit 34, 39).

63. Grievant was 5, 9 and 7 minutes late on March 25, 26 and 30 respectively (Grievant's Exhibit 42). No valid reason for Grievant's tardiness on those days was given.

64. In a March 27, 1982, letter to Wilson, Grievant accused the Commissioner of illegal acts against his privacy, and requested he step down as DSW head. He further alleged that Bellini had "orchestrated a 'cover-up' of illegal and improper acts by certain State officials since October, 1981." Grievant requested immediate relief from duty with pay pending reassignment (Grievant's Exhibit 36).

65. On March 30, 1982, Thornton, citing Grievant's tardiness of March 25, 26 and 30, issued a warning letter to Grievant. Thornton stated that, normally, the next disciplinary action would be a 10-day suspension, but "we are not taking this action because of the hardships it would impose on the families you serve". Thornton warned Grievant

"another incident of unauthorized absence would result in your immediate dismissal" (Grievant's Exhibit 37). Thornton handed Grievant this letter the afternoon of March 30.

66. Chouinard denied Grievant's March 22, 1983, grievance against Ball on March 30, 1982 (Grievant's Exhibit 38).

67. On March 31, 1982, Grievant overslept and was six minutes late for work. No valid reason existed for his tardiness.

68. Grievant was dismissed on March 31, 1982. He was orally advised of his dismissal by Thornton at 11:00 a.m. and was sent a dismissal letter that day, by DSW Deputy Commissioner James O'Rourke. The letter provided in pertinent part:

> ...You have been repeatedly counseled by your supervisor as to the importance of reporting to work on time and not being absent from work without authorized leave. In addition, you have been suspended on three occasions; twice for tardiness and once for unauthorized leave. In letters of November 17, December 15, December 21, 1981, February 8, and March 8, 1982, you were warned that your continued tardiness or unauthorized absence from work could result in disciplinary action up to and including dismissal. On March 30, 1982, you were specifically instructed that one further incident of tardiness or unauthorized absence would result in your immediate dismissal. On March 31, 1982, you were tardy in reporting to work. This incident of tardiness on March 31, 1982, combined with your past history of tardiness and unauthorized absence, is considered sufficient cause for your dismissal.
>
> Grievant's Exhibit 41

69. In various discussions and correspondence with DSW Supervisors and Department of Personnel officials during the period November 1981 - March 31, 1982, Grievant was vehement in pursuing his "breach of confidentiality" grievance, and critical of State officials regarding the "breach" issue and its investigation. At times, Grievant's superiors became upset with Grievant because of his criticisms and intense personal manner.

70. The November 4, 1981, policy on tardiness at St. Albans was applied uniformly to all employees and was not enforced in a discriminatory matter toward Grievant.

71. At the hearing, Commissioner Chouinard interpreted Section 3.016 of the Personnel Rules to find the information divulged by Marasco to Kenyon on September 10, 1981, was "confidential" within the meaning of that section.

OPINION

There are three grievances before us and we will discuss each in turn.

#82-9, Invasion of Privacy and Refusal to Grant Leave of Absence with Pay

Grievant alleges that the State violated his reasonable expectation of privacy when Personnel Officer Lee Marasco disclosed to Grievant's brother-in-law, David Kenyon, information concerning Grievant's work performance and rumors that Grievant, a married man, was having an "affair" with a co-worker.

At the hearing, Personnel Commissioner Jacquel-Ann Chouinard testified that the information disclosed by Marasco was confidential within the meaning of Section 3.016 of the Rules and Regulations for Personnel Administration, and that Marasco had possibly committed a violation of Section 3.016. Section 3.016 provides: "an employee shall not disclose confidential information gained by him by reason of his official position except as authorized or required by law".

Given this construction of the term "confidential" by the chief administrator of the Personnel Rules, and given the nature of the information divulged by Marasco, we believe Section 3.016 was violated.

Kenyon had no right to be apprised by a State official of Grievant's work performance or rumors concerning Grievant's personal life; information which undoubtedly falls in the "confidential" area.

The wisdom of the prohibition on divulging such information is manifest in this case. Whatever else is true, one result of Marasco's actions was to complicate and further upset Grievant's relationship with his wife.

Grievant's second contention under #82-9 is that the State's refusal to grant his September 25, 1981, request to be temporarily relieved from duty with pay pending an investigation into the "breach of confidentiality" violated Article 15, Section 8, of the Contract.

There was no Contract violation by the State here. We think Article 15, Section 8, only applies where an employee is the target of an investigation. But if we are incorrect about that, Article 15, Section 8, provides the appointing authority "may" remove employees from duty temporarily with pay. The use of "may" gives the State the absolute discretion to deny requests for leave with pay. In re Stacy, 138 Vt. 68 (1980). Grievance of Janes, 4 VLRB 319 (1981). Thus, we find a breach of the Personnel Rules occurred, but not Article 15 of the Contract. However, as we point out later, we believe this issue was not properly raised and conclude we cannot order monetary damages be awarded.

Grievant also contends the breach of confidentiality violated Articles 5 and 8 of the Contract. We have reviewed those articles and believe they have no reference to a breach of confidentiality.

Grievant further alleges the breach violated 3 VSA §312(b)(5). §312(b)(5) provides that one of the merit system principles is a "proper regard for (employees') privacy and constitutional rights as citizens." Section 3.016 of the Personnel Rules evidently implements this statutory provision, and we believe it unnecessary to consider whether the statute

gives any independent right to relief. Since the definition of grievance, 3 VSA §902(14), requires a contractual violation, and we find Section 3.016 of the Personnel Rules to be a part of the Contract, points which will be discussed later, the violation of that section would be the only basis for relief.

#82-22, #82-26, Disciplinary Actions

Five separate disciplinary actions, in the following chronological order, are at issue in these grievances:

1. December 21, 1981, one-day suspension,
2. February 8, 1982, one-day suspension,
3. March 8, 1982, 3-day suspension,
4. March 30, 1982, warning letter,
5. March 31, 1982, dismissal.

Grievant claims just cause did not exist for any of these disciplinary actions; that they were taken in retaliation for his filing of grievances and for his reporting of governmental impropriety (i.e. the divulging by Marasco of confidential information concerning Grievant to Kenyon). The State, on the other hand, contends Grievant was disciplined for tardiness and unauthorized absences.

In a similar case, where an employee claimed management took action against him for engaging in protected activity, we employed the analysis used by the US Supreme Court in Mt. Healthy City School District Board of Education v. Doyle, 429 US 274 (1977): Once the employee has demonstrated his conduct was protected, he must then show the conduct was a motivating factor in the decision to take disciplinary action (or not rehire the employee). Then the burden shifts to the employer to show by a preponderance of the evidence it would have reached the same decision even in the absence of the protected conduct. Grievance of Sypher, 5 VLRB 102 (1982).

Grievant contends that the Board should not use the Mt. Healthy test here; that the Vermont Supreme Court has adopted the "any part" test in a recent decision, Kelly v. Day Care Center, 141 Vt. 608 (1982). The "any part" test proposed by Grievant is that if retaliatory motive played any part in the discipline, it will be held illegal.

We do not agree the Court adopted the "any part" test as opposed to the Mt. Healthy test. The Court did not explicitly state what test they were applying, and our analysis of that decision and prior Court cases leads us to conclude that the Court has not rejected the Mt. Healthy test.

First, in Kelly, supra, the Court stated, "our review of the record... discloses ample support for the challenged findings" of the Board. A review of the Board decision indicates the Board made no findings which indicated the employer had a legitimate business motive to discharge the plaintiff, Kathleen Kelly. In fact, the Board expressly found Kelly was a "highly regarded teacher", that employees with job difficulties were historically "evaluated and given an opportunity for training prior to dismissal", and Kelly was "never warned about any professional or other deficiencies by her employer prior to her discharge". In addition, the Board found the Center director "admitted...that, his stated reasons aside, he would have dismissed Kelly for her role in the labor dispute". Kelly v. Day Care Center, 1 VLRB 347 (1978).

As a result, the Court never had to reach the balancing test required in the Mt. Healthy analysis; the balancing of the competing interests of management and the employee. As we stated in Sypher, supra, at 134:

> ...In such dual-motive cases, where the employment decision involves two factors - a legitimate business reason and an illegitimate employer reaction to its employees engaging in protected activities, we will weigh the interests of the employees in engaging in protected activity and the interests of management in promoting the efficiency of the public services it performs through its employees and strike a balance between the competing interests. Mt. Healthy, supra, at 284. Wright Line, supra, at 1174.

The Court, in Kelly, supra, never had to apply this test because the employment decision did not involve a "legitimate business reason" but only the "illegitimate employer reaction to its employees engaging in protected activities".

Second, in similar cases involving alleged employer discrimination against employees because of their protected activities, the Court has looked to Federal decisions for guidance. Ohland v. Dubay, 133 Vt. 300 (1975). In re Southwestern Vermont Education Association and Mount Anthony Union High School Board of School Directors, 136 Vt. 490 (1978). We have no reason to believe they have abandoned that practice, and, accordingly, believe they would not reject the analysis employed by the US Supreme Court in Mt. Healthy. Thus, we believe it appropriate to employ that analysis in this case.

The first step in this analysis is to determine whether the employee was engaging in protected activity. Grievant was engaging in two such activities: grievance activity and "whistleblowing". Article 49 of the Contract defines a whistleblower as "a person covered by the Agreement who makes public allegations of inefficiency or impropriety in government". Grievant met this definition through his strident criticisms of State government officials' involvement in the breach of confidentiality and its investigation. Article 49 prohibits discrimination against an

employee for whistleblowing. Discrimination against employees for their grievance activities is prohibited by Article 16, Section 7, which provides: "every employee may freely institute complaints and/or grievances without threats, reprisal, or harassment by the employer".

The second step in the analysis we employ here is Grievant must show his protected conduct was a motivating factor in the decision to discipline him.

In Sypher, supra, at 131, we noted the guidelines we would follow in such a determination:

> Guidelines for determining whether protected activities engaged in by an employee were a motivating factor in the employer's decision to terminate the employee include whether the employer knew of the employee's protected activities, whether there was a climate of coercion, whether the timing of the discharge was suspect, Ohland v. Dubay, 133 Vt. 300 (1975); whether the employer gave as a reason for his decision a protected activity, Mt Healthy, supra; Givhan v. Western Line Consolidated School District, 439 US 410 (1979); Pickering v. Board of Education, supra; whether an employer interrogated an employee about protected activity, NLRB v. Fixtures Manufacturing Corp., supra; whether the employer discriminated between employees engaged in protected activities and employees not so engaged, National Labor Relations Board v. Great Dane Trailers, Inc., 388 US 26 (1967); or whether the employer warned the employee not to engage in protected activity, Fry Roofing Co., 99 LRRM 1544 (1978).

Grievant contends four of these elements exist here to demonstrate retaliatory motive: 1) employer knowledge of Grievant's whistleblowing and grievance activity, 2) November 4 office policy change on tardiness which was aimed specifically at Grievant, 3) suspicious timing of discipline and 4) climate of coercion.

The first element requires little discussion. It is clear Grievant's superiors knew of his grievance and whistleblowing activities through his aggressive approach in pursuing them.

However, we do not find the November 4 policy change was aimed specifically at Grievant. While it is true that other DSW offices in the State did not implement a tardiness policy like the one in St. Albans whereby tardy employees' pay was docked, the evidence indicates it was the intent of the DSW top management to have a uniform, state-wide policy like the one in St. Albans; an intent made known at the DSW District Directors' meeting approximately four months prior to the implementation of the policy at St. Albans. Our belief that the November 4 policy was not aimed specifically at Grievant is bolstered by the fact that he was treated no differently than other employees at St. Albans in the enforcement of the policy.

We also do not find the timing of discipline suspicious. While it is true that the various disciplinary actions were imposed shortly after Grievant had either filed a grievance or expressed criticism of some State official, that would have been difficult to avoid given the large number and varied timings of Grievant's criticism and various filings of grievances at different steps. Rather, it is apparent that once the November 4 policy was in place and Grievant was informed unauthorized absences would not be tolerated, management was consistent in enforcing these policies in a timely manner.

The remaining element to be examined is whether a climate of coercion existed. Grievant charges a cover-up existed which prevented Grievant from finding out what had occurred in the Marasco/Kenyon and Marasco/Kitchell phone calls. We do not believe a cover-up existed in the sense that management conspired against Grievant to conceal the substance of the phone calls, since, by September 16, 1981, Grievant

knew the substance of these conversations. Grievant further argues management used the tardiness issue to manufacture a case against him because of his grievance and whistleblowing activities. We disagree; Grievant's tardiness was a chronic and continuing problem with management long before these activities. This is indicated by his performance evaluations, March 1981, promotion interview, and the August, 1981, meeting on his tardiness problem. In weighing all the evidence, we cannot find a climate of coercion existed.

However, this is not to say managment was free from fault. We are of the opinion that management is at least partially to blame for the developments leading to Grievant's dismissal; that their failure to deal effectively with the breach of confidentiality contributed to Grievant's work and domestic problems which led to his dismissal.

Marasco's irresponsible exchange of gossip and rumors regarding an office affair of Grievant with Kenyon obviously violated Grievant's confidentiality; and caused Grievant a great deal of emotional turmoil and had a negative effect on a reconciliation with his wife. Yet, despite this, management took the following actions which, while not violating any provisions of the Contract, demonstrated a great lack of understanding and concern as to Grievant's welfare, and poor labor relations:

- continued refusal to conduct an indepth investigation of Marasco's actions;

- refusal of Grievant's request for specific witnesses to attend the Steps II and III grievance hearings;

- continued insistence that Marasco had not violated Grievant's confidentiality, even though the confidentiality breach was obvious and the Commissioner of Personnel testified at the hearing that Marasco had divulged confidential information; and

- denial by Thornton and Bellini of Grievant's request for a leave with pay on the basis that the Contract prevented management from granting Grievant's request, even though Article 5 of the Contract, Management Rights, appears to grant management that power in giving the employer "the right to utilize personnel, methods and means in the most appropriate manner possible..."

The failure of management to cope with the breach of confidentiality steadily increased the stress and tension under which Grievant was living, and contributed to his work problems which led to his dismissal. It is apparent that with a little compassion and understanding on management's part, the situation would not have progressed to the point that Grievant lost his job.

Our analysis requires us to determine whether the protected activities engaged in by Grievant played some part in the disciplinary actions imposed on Grievant. We believe they did. The intense personal manner displayed by Grievant and his strident criticism of State officials in pursuing his grievance angered State officials and was inevitably on the minds of those making the disciplinary decisions here. An indicator that Grievant's protected activities influenced their action is the State's refusal to grant Grievant's request that key witnesses in the "breach of confidentiality" grievance attend his Step II and III grievances. This action demonstrates their disapproval of Grievant pursuing his grievance,

and leads us to believe his grievance activities played some part in their disciplinary actions.

The burden now is on the employer to show by a preponderance of the evidence it would have reached the same decision even in the absence of the protected conduct. In the context of this case, that means the State must demonstrate "just cause" for Grievant's disciplinary actions.

We start with Grievant's first suspension, the one-day suspension of December 21, 1981. Article 15 of the Contract requires that discipline be imposed for just cause. The Contract does not define just cause, but we recognize the misconduct required to be demonstrated in order for a suspension to be upheld is less serious than that required to uphold a dismissal. Grievance of Erlanson, 5 VLRB 28 (1982).

Grievant was suspended "due to unauthorized absence on December 15, 1981, which followed unauthorized leave on December 14, 1981". Certainly unauthorized leave or absence is a just cause for a suspension. If employees were able to select when they would work without management oversight, chaos would reign in State government.

Just cause for the suspension existed here. Grievant's leave was unauthorized on the 14th since he told his supervisor, Betty Machia, he was not working that day even though he was in the office and refused to see a client before she was able to act on his leave request. He then left the office later that morning even though no decision was made by Machia concerning his leave. His absence was also unauthorized on the 15th since he was told by Machia his leave was unauthorized after he told her he was home working on a grievance, and he never submitted a doctor's certificate to justify sick leave. While his excuse for not

submitting a doctor's certificate quickly (a death in the family) would typically be valid, we do not find that to be the case here where Grievant claimed he was sick only after Machia said the leave was unauthorized. Grievant was on fair notice that such conduct would be grounds for discipline since warning letters of November 17, 1981, and December 15, 1981, informed him unauthorized absences and tardiness would not be tolerated and would result in disciplinary action.

The next three disciplinary actions taken against Grievant; a one-day suspension, three-day suspension, and warning letter, were for tardiness. The State is certainly justified in requiring employees to be on time. Otherwise recipients of State services may not have access to those services at the time they expect them; a morale problem may develop between punctual and tardy employees; and coordination of office functions may be hindered. Accordingly, management is justified in disciplining employees if they are not on time. Just cause for the February 8 and March 8, 1982, suspensions, and the March 30, 1982, warning letter, all imposed for tardiness, existed. Grievant was tardy on the days charged without good reason and he had been amply warned tardiness would be grounds for discipline.

We also conclude the ultimate March 31, 1982, dismissal was for just cause. Grievant was dismissed for his tardiness of March 31, 1982, and his "past history of tardiness and unauthorized absences". Just cause for dismissal means "some substantial shortcoming detrimental to the employer's interests which the law and a sound public opinion recognize as a good cause for his dismissal..." In re Grievance of Brooks, 135 Vt. 563 (1977). A history of tardiness and unauthorized

absences constitutes such a "substantial shortcoming" for the reasons previously given. Grievant's inexcusable tardiness of March 31, combined with his past history and management's use of progressive discipline, justified dismissal.

Grievant had fair notice he would be discharged for tardiness and unauthorized absence. In previous disciplinary letters, Grievant was warned continued tardiness or unauthorized absence could result in dismissal. On March 30, the day before he was dismissed, he was told another incident of tardiness or unauthorized absence would result in his dismissal.

Progressive discipline having been used throughout this case, we need not analyze whether this was an appropriate case to bypass progressive discipline. Article 15, Section 1, Contract. Cf. In re Grievance of Goddard, ___ Vt. ___ (February 7, 1983). Muzzy, supra. In re Carlson, 140 Vt. 555 (1982).

We conclude management's actions in this case were neither arbitrary nor capricious but reasonable. Goddard, supra, Douglas, et al. (US Merit Systems Protection Board, Docket No. AT075299006, April 10, 1981).

We would like to comment on Grievant's inability to separate the breach of confidentiality issue from his tardiness problem. We understand Grievant's concern to get a "fair hearing" on his "breach" grievance. However, that did not justify his disregard of a properly-instituted tardiness policy. By not separating concerns over his grievance and his work performance he has violated a central tenet of grievance processing: "work now, grieve later". Admittedly, the grievance procedure may be lengthy, but it is the price to be paid for the objective resolution of

the issue by a neutral third party (See How Arbitration Works, Pages 5-8, Elkouri-Elkouri, BNA 3rd Edition, 1973). Unfortunately, through his failure to let the grievance procedure "play itself out" and his misguided view of the facts, Grievant has lost his job.

Remedy

We have determined all the disciplinary actions taken against Grievant are proper, but the issue of what remedy is due Grievant because of the violation of the Personnel Rules remains to be decided. Grievant argues some form of monetary relief is in order; that such an award would further public policy by encouraging the State to be more scrupulous in the future in the passing of information to outsiders. The State contends Grievant is not entitled to monetary damages because Grievant has not asked for such relief at the lower steps of the grievance procedure and, in any event, there are no damages provided by law for a breach of personnel regulations. The State points out that the Supreme Court has told us in In re Grievance of Harrison, 141 Vt. 215 (1982) that "the remedy...for...a contractual breach is governed by contract law, not the Board's views on appropriate principles of social behavior".

In the past, we have awarded monetary damages under certain circumstances. Vermont State Colleges Faculty Federation and Peck v. Vermont State Colleges, 4 VLRB 334 (1981). Grievance of Sypher, 5 VLRB 102 (1982). This appears to have the sanction of the Supreme Court which has recognized our authority to "invoke any...remedies which may be appropriate" pursuant to our obligation under 3 VSA §982(g) to "enforce

compliance with all provisions of a collective bargaining agreement upon complaint of either party". Vermont State Colleges Faculty Federation and Peck v. Vermont State Colleges, 139 Vt. 329 (1981).

Here, we recognize that a specific provision of the collective bargaining agreement has not been violated; but the Personnel Rules were. For the reasons that follow, we believe the Personnel Rules are a past practice implicitly embedded in the Contract unless explicitly altered by the Contract.

We have recognized that day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are long standing and not at variance with contract provisions. Grievance of Beyor, 5 VLRB 222 (1982). Arbitrators have held past practice in essence to be part of the parties' whole agreement (See Elkouri and Elkouri, How Arbitration Works, 3rd Ed. (1979), BNA, Chapter 12, "Custom and Past Practice"). While we recognize we are not bound by arbitration precedent, we look to those decisions for guidance as to how similar issues to the ones before us have been handled elsewhere.

3 VSA §902(14) and Article 16, Section 2b, of the Contract define grievance as:

> ...an employee's, group of employees' or the employees' collective bargaining representative's expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under a collective bargaining agreement or the discriminatory application of a rule or regulation which has not been resolved to a satisfactory result through informal discussion with immediate supervisors.

Under definitions of grievance similar to the one here, arbitrators have found grievances filed over past practices to be arbitrable grievances under the applicable contracts. In Union Asbestos and Rubber Co. 39 LA 72 (1962), Marlin Volz found a grievance over elimination of past practice to be arbitrable where grievance was defined as "any dispute or difference... involving the meaning and/or application of the terms of this agreement". A change in past practice was found arbitrable by Arbitrator Clair Duff in Chesapeake and Potomac Telephone Co., 50 LA 417 (1968) where the contract permitted arbitration over the "interpretation or application of any of the terms of this Agreement not specifically excluded from arbitration", and provided the arbitrator "shall have no power to add to, subtract from, modify or disregard any of the provisions of this Agreement".

As recognized by the US Supreme Court in United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 US 574 (1960), the contractual relationship between the parties in labor relations normally consists of more than the specific contact provisions and encompasses existing practices; that there are "too many people, too many problems, too many unforseeable contingencies to make the words of the contract the exclusive source of rights and duties".

It is our belief the Vermont legislature did not intend to deviate from this common body of labor law when it defined "grievance", and we believe past practices are encompassed within the statutory definition.

This is not to say that every past practice, no matter how minor or incidental, is binding on the parties. If contractual effect is to be granted to a past practice, that practice must be of sufficient import

to the parties that they can be presumed to have bargained in reference to it and reached a mutual agreement or understanding. Elkouri, How Arbitration Works, supra, at 393-399.

In our experience, the Personnel Rules have been uniformly recognized as applicable by the parties unless explicitly altered by contract provisions. As such, they are an established past practice. We recognize "rules and regulations for personnel administration" are bargainable, 3 VSA §904(a), and here the parties have not explicitly bargained the established Personnel Rules. However, where, as here, the parties have bargained with the knowledge the Personnel Rules are applicable, the Personnel Rules are a past practice implicitly embedded in the Contract unless explicitly altered by the Contract. Grievance of Allen, 5 VLRB 411 (1982).

No contract provision deals with divulging of confidential information concerning an employee to the public, so we find Section 3.016 of the Personnel Rules a part of the Contract. Accordingly, barring deficiencies in citing that section of the Personnel Rules and raising the issue of monetary damages, we would find 3 VSA §982(g) applicable here, and determine the remedy governed by law for a contractual breach. Harrison, supra.

We recognize the Supreme Court's decision In re Grievance of Muzzy, ___Vt.___ (July 15, 1982) can be construed as inconsistent with this analysis. In Muzzy, the Court expressed dismay at the Board's resort to the Personnel Rules, which were unilaterally promulgated by the employer, to justify its holding that the State was not required to apply progressive discipline where the contract clearly addressed administration of discipline, including providing for progressive discipline. We believe Muzzy is

limited to that proposition; that is, the Personnel Rules do not apply where a contract provision addresses the same issue that is covered by the Personnel Rules. Muzzy is inapplicable here where no contract provision addresses the content of Section 3.016 of the Personnel Rules. Collective bargaining can change the effect of the Personnel Rules; if it has not, we presume the applicable section of the Rules remains in effect.

The evident purpose of Section 3.016 of the Personnel Rules is to protect an employee in the work environment; and to free an employee from the necessity to cope with personal turmoil, embarrassment or upset of personal relationships. Since it is forseeable that a breach of confidentiality in violation of Section 3.016 could necessitate an employee spending time on personal matters rather than work matters, we think that in an appropriate case, monetary damages for that breach could be established.

In this case, however, Grievant has not established his legal right to an award for monetary damages. There is no specific evidence before us as to the amount of damages necessary to repair destabilized relationships or other elements that may make proof of damages sufficiently precise so they may be awarded. Grievance of Murphy, 5 VLRB 263 (1982). Cf. Vermont State Colleges Faculty Federation and Peck v. Vermont State Colleges, 4 VLRB 334 (1981). Even if that had been done, there are procedural problems that bar the claim of monetary damages in any event. Article 16 of the Contract, Grievance Procedure , states that a "grievance shall contain... a statement of the specific remedial action sought..." and "specific references to pertinent sections" of the contract or rules

violated (emphasis added). A review of the grievance filed with us as well as at the earlier steps indicates there were no such specific requests. Accordingly, the State was not on sufficient notice monetary damages would be an issue in the grievance or the basis for the claim. Therefore, there has not been an adequate opportunity to "reconcile differences as quickly as possible at the lowest possible organizational level." Article 16, Section 1. Grievant is precluded from raising it now. Grievance of Faivre, 4 VLRB 60 (1981).

ORDER

Now, therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

1. The Grievances of Gary Cronin in #82-9, #82-22 and #82-26 are DENIED.

Dated this 1st day of April, 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson