VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 83-43
CHARLES MORRISSEY	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On June 23, 1983, Attorneys Richard Unger and David Putter filed a grievance with the Vermont Labor Relations Board on behalf of Charles Morrissey ("Grievant"), alleging the dismissal of Grievant from his position as Editor-in-Chief, Vermont Life magazine, was in violation of his statutory, contractual and constitutional rights. The grievance alleges 1) the dismissal letter failed to state with requisite specificity the factual and legal basis upon which Grievant's dismissal was predicated; 2) the dismissal was without just cause; and 3) the dismissal was an impermissible retaliation for Grievant's exercise of his right of free speech.

Hearings were held before the Board on November 2, 3, 4 and 7, 1983; and December 14 and 15, 1983. Board Chairman Kimberly B. Cheney and Member James Gilson were present for all the hearings. Board member William Kemsley was absent from the November 2, 3, 4 and 7 hearings, and was present December 14 and 15. At the December 14, 1983, hearing, the Board decided and so informed the parties that Member Kemsley would participate in the decision and would review that portion of the record which he missed. Attorneys Putter and Unger represented Grievant at the hearings. The State was represented by Assistant Attorneys General Marilyn Skoglund and Zander Rubin.

Requested Findings of Fact and Memoranda of Law were filed by Grievant and the State on January 18, 1984. Reply briefs were filed by Grievant and the State on January 27, 1984.

FINDINGS OF FACT

1. Grievant began his employment on October 1, 1981, as Acting Editor, Vermont Life. Vermont Life, which employs eleven people, is a division of the Department of Development of the Agency of Development and Community Affairs ("Agency"). Grievant became Editor of Vermont Life on January 4, 1982, completing original probation on July 4, 1982.

2. Grievant was classified as a managerial employee, and as such he was not covered under any contract between the State and the Vermont State Employees' Association.

3. A July 25, 1981, letter from Department of Personnel Commissioner Jacquel-Anne Chouinard to managers set forth the rights extended to managers, in addition to any rights granted by statute. The letter was in full force and effect during Grievant's entire tenure as Editor of Vermont Life magazine, and provides managers can only be dismissed for cause (State's Exhibit 39).

4. Grievant's duties as Editor-in-Chief are set forth in his Class Specification (State's Exhibit 7). The Class Specification is dated September 1981 and specifies that the Editor-in-Chief has overall responsibility for planning, coordinating and directing all phases of the Vermont Life program, including editorial, financial, product development and program management.

5. At no time prior to his dismissal was Grievant's class specification ever altered, modified or revised.

6. Agency Secretary Milton Eaton dismissed Grievant on May 25, 1983, by letter which is quoted in part in Finding #132.

7. The dismissal letter was general in nature. The oral reasons given by Eaton for Grievant's dismissal were, first and foremost, that he refused to cooperate as a "loyal manager" in accepting the policy established by the Agency of the organization for Vermont Life and its reporting system as a policy, he refused to cooperate with the person that was selected as the Publisher, he was insubordinate to Eaton, he conducted things behind Eaton's back which led to putting the Agency's policies in the public realm, he mistreated, in a totally unprofessional manner, someone else in the Agency, and did not do a good job of managing.

8. Specifically, Eaton makes the following charges to support the general reasons given in Grievant's dismissal letter:

a. From the beginning of Eaton's tenure and throughout, Grievant knew that a decision had been made to establish a Publisher position equal in authority to that of the Editor, and he would not accept this decision. Specific actions of Grievant offered to support this charge include preparing questions relative to the co-equal concept for a legislator to ask Eaton before his appearance before a legislative committee hearing, testifying before the legislative committee in attempts to subvert the co-equal concept, and giving interviews to news reporters, indicating that the co-equal concept was a bad idea and unworkable.

b. Grievant demonstrated unwillingness to accept and cooperate with Leslie Parr, the person selected to fill the

Publisher's position by doing nothing to prepare the staff to receive the Publisher in a warm and cooperative atmosphere and working actively to engender in the staff a feeling of hostility toward Parr. This was done, Eaton charges, through May 10 and 11, 1983, meetings at which Grievant, Parr and members of Vermont Life staff were present and through discussions Grievant had with staff members. Specific actions of Grievant offered to support this charge include attempting to humiliate and degrade the Publisher by critical comments he made about her in front of subordinate staff members and at staff meetings, suggesting at a staff meeting that she resign and return to New York, making himself unavailable to the Publisher, failing to orientate Parr to Vermont Life operations, and publicly accusing Parr of incompetence by giving his views on the matter in a newspaper interview.

c. Grievant failed to communicate with Eaton and other Agency personnel as to problems at Vermont Life as they arose. Specific facts offered supporting this charge consist of Grievant's failure to communicate with Eaton regarding the co-equal concept and instead communicating without Eaton's knowledge with legislators and newspaper reporters; Grievant's failure to communicate with Eaton regarding problems he perceived with the new Publisher; and Grievant's failure to communicate with Eaton as to Grievant's alleged exclusion from participating in the hiring process for the new Publisher, although Grievant discussed this with a newpaper reporter.

d. Through many of the above-charged facts, Grievant failed to act in a professional manner in resolving differences that arose at Vermont Life.

e. Grievant was insubordinate to Eaton through failure to accept the Agency's decision on the co-equal position of the Editor and Publisher and going behind Eaton's back to try to subvert the concept by private communications with the Legislature, newspaper reporters and other Vermont Life staff; publicly accusing Eaton of lying; publicly accusing the Publisher of incompetence; and discussing Vermont Life matters with the press without first discussing them with appropriate Agency personnel.

f. Grievant detrimentally affected working relationships within the Agency and negatively affected the efficient operation of Vermont Life magazine by giving newspaper interviews to discuss in a public forum Vermont Life matters without having discussed the issue previously with Eaton. The charge covers Grievant's public statements which resulted in newspaper articles that the Publisher was incompetent and should resign and return to New York, that Eaton reneged on his commitment to Grievant that he would be involved in the hiring process for the Publisher, and Grievant's statements attacking the co-equal concept and discussing morale and personnel problems at Vermont Life.

9. The head of Grievant's department is either the Commissioner of Development or Secretary of the Agency (State's Exhibit 7). Grievant's only superior was the Agency Secretary. Grievant understood that he reported to the Secretary and that the Secretary was his boss.

10. The Senior Board of Editors is an advisory body, created in 1946, to advise the Editor and the Agency in matters concerning Vermont

Life. Its principal function is a political buffer between the Governor and the Editor. The Senior Editors also advise the Editor on magazine content. The Senior Editors attempt to prevent use of the public-funded magazine as a propaganda organ of an incumbent governor through political activities.

11. Vermont Life Editors, since the magazine's inception, had a history of editorial independence which included free and open communication between the Editor and Senior Board of Editors. However, there is no evidence that previous Editors used this communication to bolster attempts to reverse Agency policy.

12. In the past, the Editor generated "news" stories on his own initiative and when he deemed it necessary to protect editorial content of the magazine from political views of an administration with which he disagreed. This activity has not previously been punished. There is no evidence such stories included criticism of management policies of the Agency Secretary.

13. The operations of Vermont Life are matters of "public concern". The magazine is an official publication of the State of Vermont with distribution of 130,000 copies. It is intended to present an image of Vermont to readers in other states so they will come here on visits and vacations. Many of those who first come as tourists later become permanent residents, vote and participate in political life. The magazine helps portray values the Editor deems desirable for immigrants and which will lure tourists. The magazine also fosters an image for residents of themselves.

14. In the Fall of 1982, Arthur Kreizel, then Secretary of the Agency, made plans to create a new position at Vermont Life to handle marketing and promotion. This position was called Publisher (State's Exhibit 35-38). The magazine itself ran an operating deficit of $227,000 from July 1, 1982, to March 31, 1983, but the Vermont Life Division breaks even by sales of calendars and other materials (State's Exhibit 24). The "Publisher" was envisioned as a person who could increase subscriptions (fulfillment) and so reduce magazine operating losses.

15. Grievant had welcomed the creation of a Publisher's position to assist in the marketing and promotion of the magazine, so long as the Publisher was subordinate to the Editor (State's Exhibit 32).

16. Members of the Senior Board of Editors expressed concern to Kreizel about new reporting relationships at Vermont Life, and the effect of this new position upon the Editor's longstanding status as head of the Vermont Life Division.

17. The Chairman of the Senior Board of Editors, Ralph Nading Hill, wrote Kreizel to express the Board's concerns on September 13, 1982 (State's Exhibit 37). Hill is an author of several books about Vermont.

18. Kreizel stated in response to this letter on September 20, 1982, that "Morrissey will be the Director of the Vermont Life Division" and that "the Publisher, which is probably a misnomer, is essentially a marketing/business job" (State's Exhibit 38).

19. The co-equal concept, which calls for the Editor and Publisher to be equal in authority and for both to report directly to the Secretary

of the Agency, was decided upon by Kreizel by the time he left office at the end of 1982. Grievant was aware of this, and was opposed to the co-equal concept.

20. The Senior Board of Editors believed the Agency's plan for a dual-headed Vermont-Life Division was not a wise decision, and fought against the concept of co-equality from the start. They feared loss of control over the editorial content of the magazine if the "business" aspects of it were not subordinate to the Editor.

21. The Senior Board of Editors' views regarding this concept of co-equality were their own, and were not dictated by Grievant.

22. In late fall of 1982, the Department of Personnel and the Agency advertised for the position of Publisher.

23. Prior to soliciting in state and out of state, the Department of Personnel produced a Career Opportunities Bulletin, drawn from the class specification which set forth the minimum eligibility requirements for the job of Publisher.

24. Douglas Bernardini, Agency Director of Administrative Services, is the designated personnel officer for the Agency. He is designated as the person with responsibility for personnel matters within the Agency and at Vermont Life.

25. Bernardini had worked at Vermont Life from 1960 to 1964, and again from 1968 to 1969. He was considered to be the liaison between Vermont Life and the Agency.

26. Bernardini was aware of Vermont Life staff anxiety over the creation of the position of Publisher, a change in existing relationships, and plans for creation of a dual-headed Vermont Life Division.

27. Milton Eaton became Agency Secretary in January, 1983. Prior to that, he had been an official of Mobil Oil Co. responsible for a substantial segment of that firm's business in Europe. He was, and is, an experienced manager familiar with principles of how to get an organization of persons to work towards a goal defined by top management.

28. Shortly before February 8, 1983, Grievant spoke to Senator Sallie Soule, a member of the Senate Appropriations Committee, and prepared certain questions for her use at a February 8, 1983, meeting of the Senate Appropriations Committee. The questions concerned the Publisher's position at Vermont Life magazine. Grievant did not inform Eaton of his discussions with Senator Soule or that he had prepared any questions for her. We infer the questions were intended by Grievant to be put to Eaton to establish a public record of commitment by him of dominance of the Editor over Vermont Life.

29. On February 8, 1983, Eaton, Grievant and other staff members appeared before the Senate Appropriations Committee. It was Eaton's first appearance before the Committee. Immediately prior to the appearance Eaton held a staff meeting, at which Grievant was present, and asked his staff to brief him on matters which might be brought up at the Committee hearing. Grievant did not mention the questions that he had prepared for Senator Soule, nor did Grievant give Eaton any other preparation or guidance on matters that might be covered at the hearing other than to tell Eaton that he may get some questions regarding the Publisher.

30. At the Senate Appropriations Committee hearing, Senator Soule, referring to the list of questions Grievant prepared for her, asked various questions of Grievant concerning the Publisher's position. Grievant testified "...my job description reads that the Editor-in-Chief of Vermont Life is in charge of the Vermont Life Division. I have no

reason to assume any change in that arrangement" (Grievant's Exhibit 16).

31. At the hearing, Soule asked Eaton only one single question, "but the Senior Editors' role will not be usurped by the Publisher?" Eaton answered, "No" (Grievant's Exhibit 16).

32. Immediately after the hearing, Eaton reprimanded Grievant for his performance at the hearing. Eaton was very angry. He told Grievant he was not being a "team player" and that Grievant knew full well that the co-equal status had been established. Grievant did not deny this. He admitted his preparation of a list of questions for Senator Soule. Eaton told Grievant that the co-equal concept was to be implemented, and that he would not tolerate this type of behavior in the future.

33. After the Senate Appropriations Committee hearing, Eaton wrote letters to Senator Robert Gannett and Representative Glendon King to "clear up any questions which may still exist relative to the anticipated reporting alignments at Vermont Life". Eaton stated that the Publisher, in conjunction with the Editor, would report directly to him, but that this was being done "not to redirect editorial content, but rather to improve the marketing and business management of the magazine" (State's Exhibits 1, 49).

34. Shortly after becoming Agency Secretary and after the February 8, 1983, legislative committee hearing, Eaton discussed Grievant's personality with Jay Shak, Commissioner of Housing and Community Affairs, in whom he had confidence and who knew of Grievant's performance during Kreizel's tenure. Shak told Eaton his opinion of Grievant was that he was manipulative, devious and vicious. At this time or shortly thereafter, Eaton told Shak he wished Kreizel had never approved of Grievant ending his probation period and allowing him to become a full-time permanent employee. Such employees may only be dismissed for cause. We infer

Eaton wished Grievant was an "at will" employee so he could fire him without a reason.

35. As late as February 1983, and after the February 8 Senate Appropriations Committee hearing, the Senior Board of Editors believed that the co-equal determination had not been finalized to the point of being "made in stone".

36. Grievant did not instigate or control what was the uniform feeling of the Senior Board of Editors that co-equality between Publisher and Editor would not be in the best interest of Vermont Life. The Board of Editors saw co-equality as a threat to the independence of the magazine. Grievant did, however, encourage the Board in this view and supply argument to Board members to use with Governor Snelling in an attempt to reverse the policy.

37. On February 23, 1983, Eaton met with the Board of Senior Editors of Vermont Life magazine for the first time, and Grievant was present at that meeting. At the meeting, various Board members gave Eaton their opinion that the co-equal concept was not appropriate. Eaton listened to their opinion, but, at the end of the meeting, Eaton again clearly expressed his position that the co-equal concept was his final decision and it would be implemented. Grievant clearly understood Eaton to state this position.

38. Subsequent to the hearing at the Senate Appropriations Committee, a round of interviews was planned for selection of the Publisher.

39. Eight or nine candidates for the Publisher's position were interviewed on February 24, 1983, and February 25, 1983. Grievant asked to be part of the interviewing panel. Eaton told him that he did not think that would be appropriate. Eaton did tell Grievant that he wanted his advice on the candidates for the Publisher's position.

40. Members of the interviewing panel consisted of Ralph Nading Hill, Chairman of the Board of Senior Editors; Bill Blair, Publisher of Country Journal; Peter Sykas, a management executive at Yankee Magazine; Eaton, and Bernardini.

41. After the initial round of interviews, three finalists were selected by the interviewing panel, with Leslie Parr being the unanimous first choice of all members of the panel.

42. Subsequent to February 25, 1983, Eaton never authorized any review of the qualifications of any other candidate for the job of Publisher but Leslie Parr.

43. Eaton had the applications and resumes of the three finalists given to Grievant on February 28, 1983, with the request that Grievant provide his input to Eaton on the finalists.

44. Subsequently, Eaton was accurately quoted in a news article dated March 6, 1983 (State's Exhibit 47) stating that Grievant "has been advised by me and I've so advised the Legislature that Charlie will be involved in the final decision" to hire a Publisher.

45. That news article also quoted two legislators who indicated that when the Legislature authorized the position of Publisher, the expectation of the lawmakers was that the Editor would remain in charge (State's Exhibit 47).

46. When Eaton had not heard from Grievant regarding the three finalists, he had several telephone calls placed to Grievant. When he received no reply, he asked Bernardini to contact Grievant to get his input. Bernardini placed two or three additional telephone calls to the Vermont Life office in attempts to reach Grievant but was unsuccessful in reaching him.

47. Leslie Parr was hired on March 18, 1983. By that time, Grievant had not returned any of these telephone calls, and thus Eaton received no input from Grievant as to the three finalists for the position.

48. The salary payable for the new Publisher's position was not high enough to attract people with substantial experience. Eaton expected the new person would require some on-the-job learning. Parr was a bright, able person with sufficient prior experience to suggest she would competently fill her responsibilities after a reasonable period of on-the-job learning.

49. The Department of Personnel does not investigate the background of job applicants. Misrepresentation by a job applicant of experience or credentials would not be detected by the Department of Personnel.

50. Grievant met Parr for the first time on March 18, 1983, after she had been hired. On March 19, 1983, Grievant sent a memo to the Senior Editors (State's Exhibit 12), in which he indicated, "I hope Ralph will dissent, but I'm afraid, sad to say, that the wrong person has been hired". At that time Grievant had not spoken to Eaton regarding any questions he had concerning Parr.

51. Eaton made no plans to bring the Editor and Publisher together to see if they got along, or orient them to the new structure. People in the Department of Personnel and the Agency were aware of the difficulties that such a transition would create. No plan was devised to ease the transition from a single-headed to a two-headed organization.

52. At Grievant's request, on April 1, 1983 (State's Exhibit 25), Bernardini was invited to meet with Vermont Life employees before the Publisher's first day to explain chain-of-command relationships and the like, and to provide "guidance about the new staff structure". A meeting took place on April 8, 1983 (See Finding 55).

53. The Board of Senior Editors requested a meeting with Governor Snelling to discuss Vermont Life matters. A meeting was held among the Board, Governor Snelling, and Eaton on April 7, 1983. Initially the Board asked Governor Snelling to exclude Eaton from the meeting but the Governor insisted that Eaton be present.

54. On the morning of April 7, 1983, just prior to the Senior Editors' meeting with the Governor, Grievant prepared a memorandum for the Senior Editors (State's Exhibit 11). In that memorandum Grievant wrote:

> "The situation at Vermont Life is explosive. The success of the magazine and the entire Vermont Life operation is being jeopardized by administrative decisions we think are unwise, misconceived, absurd, ludicrous, incomprehensive, damaging - choose your adjectives.
>
> ...Why does the Governor seem to have it in for (Grievant)? Is it because Kreizel's opinion of (Grievant) is Snelling's perception too? Because (Grievant) is an independent person (curiously like Snelling - both made it on their own in the private sector)? Because (Grievant) has written a book - and the Governor is obsessed with the desire also to write a book but can't carry it off? Because (Grievant) is a Democrat? Because (Grievant's) wife works for the State Employees' union?

The memorandum criticized the co-equal concept and the hiring of a Publisher without input from the Editor. Grievant did not send Eaton a copy of that memorandum and had not discussed any of the concerns cited in that memorandum with Eaton.

55. On April 8, 1983, the Friday prior to Parr's first day of work on Monday, April 11, 1983, Eaton and Bernardini went to the Vermont Life offices as Grievant had requested April 1.

56. The meeting lasted about one-half hour. It was the only effort made by the Agency to brief or provide guidance to the staff of Vermont Life concerning the co-equal concept.

57. At the April 8 meeting, Eaton handed to Vermont Life staff a one-page organizational chart which had been drawn up by the Agency on February 15, 1983 (State's Exhibit 2). The chart indicated the Production Specialist and Typist would report directly to the Editor-in-Chief, and that the employees in the business, sales and accounting functions would report to the Publisher. The Editor-in-Chief and Publisher reported directly to the Agency Secretary.

58. No attempt was made by Eaton, other than one meeting with Vermont Life staff described in Finding 57, to do or cause to be done any of the following:

a. clarify for Vermont Life staff members changes in job descriptions, duties, responsibilities and chains-of-command;

b. define the respective domains, prerogatives and duties of Publisher and Editor;

c. define the respective nature of what functions would be considered editorial and what would be considered publishing.

59. Eaton found that no physical preparations had been made for the arrival of Leslie Parr and that Grievant had intended that Parr work in a cubicle outside his office. Eaton requested that a separate office be prepared for Parr. There were very few questions asked by staff members and Grievant asked no questions. Eaton encouraged the staff to cooperate with Parr when she arrived and asked the staff to work to ease the transition.

60. Eaton promised during the meeting that Parr would explain her background to the staff soon after she was on board, and did not answer questions by the staff concerning Parr's background.

61. When asked during the meeting about the reason why a two-headed organization was necessary, Eaton responded that the Legislature had mandated it.

62. The evidence establishes the co-equal structure was created by Kreizel and continued by Eaton and was not mandated by the Legislature.

63. After Eaton and Bernardini left, on April 8, 1983, which was the last work day prior to Parr's arrival, the Vermont Life staff, with the approval of Grievant, held what Grievant called a "wake", to mark the end of 37 years of editorial control of Vermont Life magazine. The "wake" was not a happy affair and the mood of the staff and Grievant was dismal at the "wake".

64. Parr started work as the Publisher of Vermont Life magazine on April 11, 1983. At Eaton's suggestion she kept a work diary, as Eaton indicated there were items she might notice when she was new on the job which she would not recall after being there for a period of time. Parr expected the diary would be a private record of her own personal observati and impressions, and, at the time she started it she did not expect to share it with anyone or make it public. It is possible, but we do not find by a preponderance of the evidence, that Eaton expected to have the diary available for disciplinary proceedings against Grievant.

65. On Parr's first day of work, she sat in a cubicle outside of Grievant's office as an office had not been prepared for her.

66. Parr's diary (State's Exhibit 14), while containing many subjective comments, is generally a reliable and accurate depiction of events at Vermont Life magazine from April 11, 1983, through May 25, 1983.

67. Starting on Parr's first day of work, and continuing throughout the remainder of Grievant's tenure, Grievant was under pressure to get the summer issue of the magazine, the 1984 Vermont Life calendar, and the 1984 Vermont Life appointment book out on time. Publishing deadlines were one reason why he could not meet with Parr when she wanted to meet with him. Another reason was reluctance to do so.

68. From her first day on the job, and continuing throughout Grievant's tenure, Parr wanted to meet privately with Grievant to discuss the roles of Editor and Publisher; to discuss cooperation between them and to establish the basis for a good working relationship between them. Grievant never, from Parr's arrival on April 11, 1983, until his dismissal on May 25, 1983, met privately with Parr to discuss these fundamental issues although Parr suggested such meetings.

69. Parr met with Eaton on April 15, 1983, and described in general terms her experience of her first week. She mentioned that Grievant had not been particularly helpful to her that week but did not dwell on complaints as she felt it would be best to attempt to work things out on her own with him.

70. On April 22, 1983, Parr sent a memorandum to Grievant suggesting establishing regular staff meetings (State's Exhibit 22). He never responded.

71. During Parr's first weeks of work, the subordinate staff formed the opinion Parr lacked magazine experience. Incidents giving rise to this opinion were noted, including a perceived lack of experience with terminology and job descriptions, lack of direct mail experience, and lack of knowledge of wholesale distribution and fulfillment. We make no finding these opinions were based in fact. We only find staff members held this opinion.

72. From April 8, 1983, to May 25, 1983, Bernardini and Eaton never visited the offices of Vermont Life nor inquired of staff members other than Parr as to how things were going.

73. From Parr's date of hire, Eaton, Shak and Bernardini knew or should have known that implementation of the co-equal concept would cause hostility toward the Agency among Vermont Life staff members who did not want to change the status quo. For many years they had offices in a separate building than the Agency Secretary and operated autonomously under the direction of the Editor. The change did cause anxiety among these people who had become comfortable with reporting and duty assignments over a long period of time. A person with Eaton's managerial experience would have known the change would cause anxiety which would impair routine functioning of job duties until these employees had become accustomed to the new structure.

74. Eaton left on a business trip to the Far East on April 28, 1983, and returned May 23, 1983. Prior to his departure, Eaton sent a memorandum to all department heads, which included Grievant, instructing them that in his absence all routine questions should be directed to Bernardini or Barry Driscoll. Specific extraordinary occurrences requiring immediate administrative action were to be directed to Shak (State's Exhibit 44).

75. Neither Shak nor Bernardini, despite their awareness of problems at Vermont Life, were authorized by Eaton to resolve or investigate problems. Eaton directed Shak to take no unilateral action regarding any department unless the department head requested it. Eaton was to retain sole responsibility to take any initiative.

76. Eaton's contact in his absence was restricted to phone conversations with Bernardini and Shak.

77. Grievant was as aware as Eaton of serious problems at Vermont Life magazine prior to Eaton's departure for the Far East. He made no effort to bring such matters to the attention of Eaton.

78. During Eaton's absence from the country, starting on April 28, 1983, and up until his dismissal, Grievant did not attempt to discuss any managerial problems of any kind regarding Vermont Life with Shak to whom he was specifically directed by Eaton to bring such problems.

79. Grievant left for Nevada for a job interview on Sunday, May 1, 1983, and returned to the Vermont Life office on Thursday, May 5, 1983. He did not tell Parr that he was going to be away from the office.

80. Parr wrote another memorandum to Grievant on May 2, 1983, again suggesting regular staff meetings (State's Exhibit 20). She never received a reply to that memorandum.

81. During this period, Parr met with Bernardini on May 5, 1983, to discuss her problems at Vermont Life (State's Exhibit 41).

82. Shak was also aware of problems at Vermont Life through Bernardini with whom he conversed frequently.

83. On May 5, 1983, Parr wrote another memorandum to Grievant requesting a meeting on "matters to discuss together" including cooperation between Editor and Publisher (State's Exhibit 16). She suggested that they meet either May 6, 1983, or May 9, 1983. When she had not received any reply from Grievant by the evening of May 9, 1983, she asked Grievant if he was planning on meeting with her. He said they could meet on May 10, 1983.

84. On May 10, 1983, Grievant asked Parr to come into his office for a meeting. When Parr entered, Linda Paradee, Production Specialist

of Vermont Life (i.e., position assisting Grievant in editorial work), was also there. Although Parr had wanted to meet privately with Grievant, she decided to go ahead with the meeting. She believed, and we find, that certain key topics, such as cooperation between Editor and Publisher, were inappropriate to discuss in the threesome.

85. The meeting started out with a discussion about various routine business matters. Paradee grew increasingly emotional and hostile and described her great anxiety about the recent course of events.

86. At this point, Grievant stated there was another agenda. He told Parr that he had been promised an interview with her but had never gotten it. He then proceeded to interview Parr. Grievant questioned Parr about her experience and background, and asked whether she really felt qualified for her position. He asked Parr if she realized that her position had nearly been abolished by the Legislature. He asked Parr if she realized that she had no job security. At this point, Grievant brought out Parr's job application and resume, and questioned her about it. Grievant then asked Parr to describe View magazine, a publishing venture with which she had been associated and which she counted as a credential on her resume. Parr became angry at the question. Then, Paradee accused Parr of being a "spy" for the Agency.

87. Grievant's manner and voice was hostile and confrontational at this meeting. Parr was stunned by the meeting and the statements made, and was offended by Grievant's actions. Prior to this meeting, Grievant had never discussed any of these matters in private with Parr.

88. The following day, on May 11, 1983, Grievant asked Parr to attend a meeting in his office. The following Vermont Life employees

were already assembled in Grievant's office: Fred Sullivan (business manager), Richard Swazey (accountant-sales representative), Patricia Smith (Administrative Assistant A), and Paradee.

89. Smith was angry and asked Parr about her intention to make some changes in the fulfillment department. Swazey expressed anger at Parr because she had not permitted him to hire a part-time worker. Sullivan stated that he did not think that he had time to teach Parr about the magazine business. Paradee became highly emotional; she was trembling with rage and again charged Parr with being an "agent" for the Agency.

90. At this point, Grievant again attempted to interview Parr for her position, and asked Parr questions about her background and experience and asked if she felt she was equal to the job. Parr responded by stating that she would not be interviewed by Grievant. Grievant then repeated his question about View magazine and Parr responded by describing View magazine and her role in it. Grievant again used Parr's application and resume to question her. Grievant asked Parr if she was planning to go back to New York City. There was a silence after Grievant posed that question and the meeting ended.

91. At the meeting, Grievant did nothing to control the other staff members when they questioned Parr, and did nothing to end the meeting. Grievant could have controlled the course of the meeting. His attitude and voice tone toward Parr was hostile and confrontational. Participants in the meeting attacked Parr's qualifications. Grievant

never tried to discuss any of his concerns in private with Parr, or with Eaton before bringing them up at this meeting.

92. Prior to the May 11, 1983, meeting in Grievant's office, Parr had scheduled an afternoon appointment on May 11 to meet Commissioner Chouinard of the Department of Personnel. On the way to that meeting she ran into Shak and told him of the "inquisition" she had just been through. Commissioner Shak offered to accompany Parr to the meeting with Commissioner Chouinard and suggested that Parr describe the matter to Commissioner Chouinard.

93. On May 11, 1983, Parr met with Shak, Nancy Knox, Governor Snelling's assistant (who was only present for part of the meeting); Scott Cameron, Attorney with the Department of Personnel; and Commissioner Chouinard to describe events at Vermont Life that had, in Parr's view, indicated that Grievant had orchestrated staff discontent against her at the meeting held earlier that day.

94. Parr described this meeting in Grievant's office as an effort to "show me that they considered me 'unqualified for the job'" (State's Exhibit 41).

95. Parr asked if this would be grounds for Grievant's dismissal. Chouinard responded that if true, it could be.

96. At this meeting Parr described her experience at the May 11 meeting at Vermont Life. Parr did not ask that any disciplinary action be taken against Grievant.

97. After the meeting at Chouinard's office, Chouinard, Cameron and Shak decided that Cameron should conduct an investigation. Cameron interviewed Parr, Grievant and Paradee at length.

98. On May 12, 1983, Parr wrote another memorandum to Grievant in which she commented on the inappropriateness of the May 11, 1983, meeting, stating: "you have undermined relationships I have sought to develop and have placed distrust toward me in the minds of my colleagues. It would be hard to damage morale here more than you have already". Parr expressed hope that "we can overcome this division and begin to work together now" (State's Exhibit 14).

99. Parr, in an attempt to gain cooperation, also sent a memorandum on May 11, 1983 (before the May 11 staff meeting) to all the staff members who attended the May 11, 1983, meeting (Grievant, Paradee, Sullivan, Smith, Swazey) encouraging them to attend the Regional Publishers' Association meeting in New Hampshire and offering to give a ride to those who wished to attend (State's Exhibit 15). She received no reply to that memorandum.

100. Although Grievant never, at any time, spoke in private with Parr or Eaton regarding any concerns he may have had about Parr's qualifications, Grievant did tell other Vermont Life employees, such as Fred Sullivan, that it was his opinion that Parr was not qualified.

101. On or about May 13, 1983, Eaton called the Agency from the Far East and was told of the May 10 and 11, 1983, meetings at Vermont Life. Eaton requested an investigation into the events at Vermont Life. Eaton was informed by Shak that Cameron was looking into the situation.

102. Within a day or two after May 11, 1983, Sullivan telephoned Bernardini to request job transfer forms. Sullivan intended the request to be a signal to Bernardini that there were morale problems at Vermont Life. Bernardini sent the forms to Sullivan without comment or inquiry.

103. Shak concluded the request for transfer forms was a "gambit" by Grievant to strengthen his position that Parr was the principal source of conflict at the magazine.

104. Grievant is a "public figure". He has written items on Vermont history, conducted a bi-weekly radio program, written an op-ed column which appeared regularly in the Barre-Montpelier Times-Argus, and made frequent public addresses as a guest speaker.

105. Grievant's public communications and journalistic standing were acknowledged by the Agency, considered appropriate and were neither prohibited nor restricted.

106. During such appearances, columns and talk shows, Grievant expressed his personal opinions on matters of public interest and he had done so without interference since he commenced his employment for the State. No previous public expressions commented on reporting relationships at Vermont Life.

107. On May 18, 1983, Grievant solicited an interview with Neil Davis, a reporter for the Burlington Free Press. He invited Davis to his home for lunch and spent between 60 and 90 minutes speaking to him about Vermont Life issues. Grievant knew Davis would be writing an article based on the interview. The article was published the following day on Page 1 of the Burlington Free Press and is shown as State's Exhibit 24.

108. Grievant discussed Parr's qualifications with Davis.

109. Grievant told Davis that he was considering resigning.

110. Grievant gave Davis access to Parr's May 12, 1983, memorandum to Grievant (State's Exhibit 14), the substance of which appeared in the article the following day.

111. Grievant told Davis that morale was damaged, or words to that effect.

112. Grievant told Davis that he had suggested to Parr that she consider trying to salvage the situation by returning to New York City.

113. Grievant told Davis that Parr's lack of direct experience with magazines had become apparent.

114. Grievant told Davis that he had been developing job options due to the co-equal policy because he felt the policy might cause managerial problems and he told Davis that his fears had been realized.

115. Grievant told Davis that Eaton had promised him input into the selection of a Publisher and that Eaton had not acted on this assurance. Although Grievant did not use the word "reneged", he conveyed that meaning to Davis when he stated that Eaton's assurance had not come to fruition.

116. Grievant's statements concerning Parr's ability and experience for the job were not frivolous and were opinions not wholly without truth.

117. After the Free Press article (State's Exhibit 24) was published on May 19, 1983, Grievant talked to Bill Porter of the Times-Argus who was writing another article which appeared in the Times-Argus on May 19, 1983 (State's Exhibit 13). He told Porter: a) that the situation at Vermont Life was a crisis; b) that his own idea for resolving the conflict was for Parr to return to New York City (or words to that effect); c) that Vermont Life already had a Publisher (the State of Vermont) and that the imposition of another Publisher had made the situation more difficult.

118. The substance of Findings 108-115 and 117 were contained in the newspaper articles in the Free Press and Times-Argus on May 19, 1983.

119. Grievant believed his discussion with Davis would result in public disclosure of impropriety and inefficiency in State government and would foster the best long-term interests of the magazine by creating political pressure to reverse Eaton's decision to implement the co-equal concept.

120. A specific allegation made by Eaton as a factual basis for dismissal was that Grievant's interview with Davis led to a public accusation that Eaton lied to Grievant with respect to his promise to include Grievant in the selection process of the Publisher (State's Exhibits 3, 6).

121. We find that Grievant in the Davis article did, in substance, accuse Eaton of lying (State's Exhibits 13, 24); and, second, that Grievant's belief he was not actively solicited to participate in the selection process of the Publisher was reasonable (State's Exhibit 47). We also find Eaton's perception that he tried to keep his promise to consult Grievant concerning the Publisher was reasonable. In short, we find this incident resulted from poor communication between the two and neither was deliberately untruthful; but Grievant's statement to Davis accused Eaton of lying and Eaton did not lie.

122. The functioning of Vermont Life was a public issue that had

already been aired in the press (see State's Exhibit 47).

123. Prior to talking to Davis or Porter, Grievant had not discussed any of these issues with Eaton or anyone else at the Agency or the Vermont Department of Personnel, nor had he discussed any of his concerns in private with Parr.

124. On May 19, 1983, when Parr read the two articles, State's Exhibits 24 and 13, she was appalled, disgusted, and embarrassed to read the statements concerning her that were attributed to Grievant. She felt these probably ended any possibility of her being able to work with Grievant. Parr felt that the articles made it more difficult for her to gain the respect and control needed over her subordinates. We find Parr's feelings to have a basis in fact, and that under all the circumstances the news articles would have the effect in her employment relationships she anticipated they would.

125. As part of the Agency and Department of Personnel fact-finding, Cameron spoke to Grievant for approximately two hours on May 20, 1983. They discussed the May 10 and May 11 meetings, the newspaper articles, the Vermont Life situation in general, and Grievant's complaints. Grievant told Cameron that the co-equal policy was a poor decision but that he was trying to work within that system. Grievant told Cameron that Parr was incompetent and that he could not work with her.

126. The Department of Personnel did not make available any counseling or mediative services to help resolve the differences between Grievant

and Parr, nor did anyone at the Agency request those services. Eaton never asked Cameron to get people working together.

127. Eaton arrived back at his office from his trip to the Far East on May 25, 1983. That morning he held a meeting in his office with Cameron, Shak and Bernardini. Knox was in and out of this meeting. Cameron told Eaton of his fact-finding and particularly his interviews with Grievant, Paradee and Parr. Cameron told Eaton that Grievant said he could not work with Parr or the co-equal arrangement. Eaton reviewed Parr's diary (State's Exhibit 41), Parr's memorandum to Grievant (State's Exhibit 14) and the two newspaper articles (State's Exhibits 24, 13). Eaton decided that he wanted to meet with Grievant to give him an opportunity to state new information or insights into the matter. Eaton was very concerned about these developments and various options were discussed, including Grievant's dismissal. A letter of dismissal was drafted in case Eaton decided to fire Grievant. Additionally, a checklist was prepared covering items that Eaton should discuss (State's Exhibit 3). Eaton requested that Grievant come over and meet with him that afternoon.

128. Before he met with Grievant, Eaton had decided Grievant should be removed from his job unless he could show mitigating circumstances for his actions.

129. The afternoon meeting between Eaton and Grievant started at approximately 3:00 p.m. Shak was present and taking notes, which he later typed up as State's Exhibit 6. State's Exhibit 6 is an accurate summary of the contents of the meeting and is incorporated by reference.

130. Eaton opened the meeting by referring to the newspaper articles and stated that sending the Publisher back to New York City was not the solution for the problems at Vermont Life magazine. Eaton asked Grievant to present facts or information that would shed light on the situation. Grievant told Eaton he made the mistake of venting his frustration to Neil Davis and the newspapers. He stated that Parr was incompetent and that with the co-equal concept, you cannot have two people in the huddle giving signals, one of whom is incompetent. When Eaton asked Grievant if he had cooperated with Parr, Grievant stated that he initially wanted to cooperate, but Parr could not hack it. Grievant also restated his other points concerning the co-equal policy. Grievant did not deny making any of the statements attributed to him in the newspaper. When Grievant told Eaton he had not been given an opportunity to have input into the hiring of a Publisher, Eaton explained that he had tried to reach Grievant to get his input on the hiring of the Publisher but that Grievant had not gotten back to him. At this meeting, Grievant did not attempt to make any amends with Eaton, nor did he offer to Eaton any other suggestions on how to resolve the problem but simply "stuck to his guns" on all his positions. Eaton stated that Grievant had been guilty of insubordination and non-professional conduct and that he was not a team player. Secretary Eaton then requested Grievant's resignation.

131. Grievant asked for time to take the request under advisement and Eaton said that was unacceptable and he either wanted Grievant's resignation by the end of the day or he would be dismissed. Grievant asked for time to consult with legal counsel and this was granted. This occurred at approximately 3:45 p.m. at which time the meeting adjourned.

Grievant left the room and placed telephone calls in private to legal counsel and other advisors (State's Exhibit 61).

132. When Grievant returned to the meeting at approximately 4:40 p.m., Grievant told Eaton that he chose not to resign, and at that point Eaton signed the dismissal letter and gave it to Grievant (State's Exhibit 26). The dismissal letter stated in pertinent part:

> The situation as it currently exists threatens the effective operations at Vermont Life. Your unwillingness to accept and cooperate with the person duly selected to fill the Publisher's position has seriously jeopardized the stable operation of the organization. While I do not quarrel with your right to disagree with actions taken by the Legislature or the Agency, as Editor of Vermont Life you nevertheless have an obligation to labor conscientiously for the success of the organization after decisions are made. This you have failed to do.
>
> In addition, your failure to work towards resolving our philosophical differences in a professional manner lead me to the conclusion that your dismissal is warranted.

133. On the following day, Grievant was informed by a letter from Bernardini that he had a right to appeal his dismissal to the Labor Relations Board (State's Exhibit 40).

134. Eaton characterized the publication of the two newspaper articles on May 19, 1983, as the "straw that broke the back" in his decision to fire Grievant. If the articles had not appeared, Eaton would not have fired Grievant on May 25, and might not have fired him at all. The courses of action considered by Eaton would have been wider and "might have included keeping Grievant on" if Grievant had not gone to the press.

135. The preponderance of the evidence in this case warrants a finding that Eaton would not have dismissed Grievant when he did in the absence of the publication of the two newspaper articles.

136. Grievant's job was already in jeopardy because of his prior conduct. Eaton's decision to fire him was affected by the publication of these two articles because he wanted the firing to occur on May 25, 1983, at the end of the meeting, rather than several days later. He feared further press commentary would exacerbate the situation, and would lead to further deterioration of working relationships at Vermont Life.

137. The items in the two newspaper articles (State's 24 and 13) that disturbed Eaton were: a) Grievant's statements that Parr consider returning to New York City; b) Grievant's statements that Parr's lack of direct experience had become apparent; c) Grievant's leaking of Parr's memorandum (State's Exhibit 14) to the press; d) Grievant's statement that he had been assured by Eaton that he would have an opportunity to participate in the final choice of a Publisher but that Eaton "reneged"; and e) Grievant's statements attacking the co-equal policy.

138. Grievant's decision to air these matters in public, without ever having discussed any of them with Eaton, or with Parr, in private 1) undermined Eaton's working relationship with Grievant, 2) eliminated the ability of Eaton to have faith in Grievant as a subordinate employee, 3) further impaired Parr's working relationship with Grievant and prevented Parr from working in the future with Grievant, and 4) undermined Parr's ability to work with and control her subordinate employees.

139. Grievant acknowledged he had a duty to cooperate with the Publisher, that he had a duty to work conscientiously for the success of Vermont Life even if he disagreed with Agency policy, that he had a duty to not be insubordinate to Eaton, and that he had a duty to keep Eaton

informed of the essentials of Vermont Life matters. We find he did have these duties.

140. At no time prior to his dismissal did Grievant ever receive a written warning or reprimand as to any deficiency in performance or notice of any disciplinary action; nor does Grievant's personnel file contain any evidence of disciplinary action against him. The only disciplinary action imposed against Grievant prior to his dismissal was the verbal reprimand from Eaton following the February 8, 1983, Senate Committee meeting.

141. Eaton adopted a deliberate "hands off" policy as to any leadership initiative to integrate Parr's and Grievant's duties and personal interaction. His stated reason was to allow time "to let things work themselves out", to let Grievant and Parr work to improve their communication. We find, in light of the totality of circumstances, that Eaton's policy, given his knowledge about Parr's experience, his knowledge of management principles, his knowledge of staff anxiety, and his knowledge of Grievant's personality, was intended to place full responsibility on Grievant.

142. In Eaton's opinion, the only managerial mistake he made in this case was a failure to record earlier and more completely acts of Grievant which he considered insubordinate so that he could establish cause for discharge easier and sooner.

MAJORITY OPINION

The bucolic image of Vermont fostered by Vermont Life is not supported by what happened in the operation of it. Instead of pastoral simplicity the magazine's new publisher found a byzantine struggle for control over its destiny. The outcome of that struggle was that Charles Morrissey, its Editor, was fired, and a policy establishing the Editor and Publisher as co-equals was firmly established. We must determine whether there was "cause" for Morrissey's dismissal, or whether his guarantees of free speech require his reinstatement.

As a manager, Grievant is not covered by the terms of the collective bargaining agreement providing employees can be dismissed only for "just cause". However, there is no substantive difference between a "cause" standard for discipline and a "just cause" standard. Grievance of Caroline Russell, 7 VLRB 60, 81 (1984). Thus, the analysis we employ here is the same we apply when reviewing disciplinary actions against State employees covered by the contractual "just cause" standard. This analysis is described in Grievance of Colleran and Britt, 6 VLRB 235 (1983).

Grievant contends his dismissal cannot be upheld because: 1) the State has not met its burden of proof as to the facts which it claimed constituted grounds for dismissal; 2) the State failed to give Grievant fair notice that his conduct would be grounds for discharge; and 3) Grievant was dismissed in retaliation for his exercise of the protected right of free speech.

I. State's Grounds for Dismissal

The substance of the State's charges against Grievant can be divided into four areas: 1) failure to accept the Agency's decision to establish a Publisher position equal in authority to that of the Editor; 2) refusal to cooperate with the person selected as the Publisher; 3) insubordinatio to Agency Secretary Eaton; and 4) detrimentally affecting working relationships within the Agency and the efficient operation of Vermont Life. For the following reasons we conclude the State has proved all of these charges by a preponderance of the evidence.

Consideration of the record as a whole leads us to conclude that Grievant deliberately embarked on a course of conduct calculated to subvert an Agency policy which would have diluted his control over Vermont Life. The Agency had established a policy to create a Publisher position at Vermont Life with authority equal to the Editor's position held by Grievant. We are not concerned with the wisdom of that policy, only the dispute growing out of its implementation. Grievant chose not to work within the chain of command, but rather to create a situation contrary to management's purposes which would, if he succeeded, substitute his objectives for management's. In the course of this effort, he committed each of the acts which the State relies upon as the basis for its charges.

Grievant's first overt misconduct relevant to these proceedings was his performance in connection with the Senate Appropriations Committee hearing on February 8, 1983. He prepared questions for a Senator to use in her questioning of Eaton at the hearing. Also, in Grievant's own testimony at the hearing he stated that there was no reason to believe

there would be any change in the status of the Editor as the person in charge of Vermont Life.

These actions were gravely insubordinate. Grievant concealed from Eaton that he had prepared questions for a Senator even though Eaton had specifically requested a briefing on matters which might arise in the hearings. In essence, Grievant "set up" his immediate superior in hopes that Eaton would publicly state that the Editor would remain the sole charge of Vermont Life even though Grievant knew the co-equal status of Editor and Publisher had been firmly established by former Secretary Kreizel as Agency policy.

Eaton reprimanded Grievant for these actions after the hearing. He told Grievant he would not tolerate this type of behavior in the future. Eaton stressed to Grievant that the co-equal concept was to be implemented. Eaton showed restraint by not taking more severe action against Grievant for his actions at the Senate committee hearing. He did, though, place Grievant on clear notice that similar conduct would not be tolerated in the future.

Grievant's subsequent actions demonstrate he failed to heed Eaton's directions and continued to subvert the co-equal concept. He failed to cooperate with the new publisher, Leslie Parr, who started work on April 11, 1983, from the day she began work to the day Grievant was fired. Despite requests by Parr to do so, Grievant never met privately with Parr to discuss the fundamental issues of the roles of Editor and Publisher, cooperation between Editor and Publisher, and development of a good working relationship between Grievant and Parr. Parr had much difficulty in getting Grievant to meet with her at all, whether privately or in

staff meetings. While publishing deadlines were one reason Grievant could not meet with Parr when she wanted, another reason was his reluctance to do so.

By making himself unavailable to Parr, failing to orientate her to the Vermont Life operation, and by his actions at meetings of May 10 and 11, 1983, Grievant exhibited a failure to work in good faith to implement the co-equal status of Editor and Publisher. His actions contributed to the lack of acceptance by Vermont Life staff of Parr and the co-equal concept.

Eaton also contributed to lack of smooth implementation of the co-equal concept at Vermont Life. Eaton knew or should have known that implementation of the co-equal concept would cause anxiety among Vermont Life staff members because it would impair routine functioning of job duties until those employees had become accustomed to the new structure. Yet, other than one short meeting with Vermont Life staff, Eaton did nothing to clarify for Vermont Life staff changes in job duties and chains of command or to define the respective duties of Publisher and Editor under the co-equal concept. Neither did Eaton attempt to meet jointly with Grievant and Parr even though he was informed they were having problems. Instead, Eaton adopted a "hands off" policy, refraining from any leadership initiative to ease the transition and integrate Parr into the workings of Vermont Life. In normal circumstances, the delegation of a problem to senior managers to work out themselves could be a constructive management technique. That does not appear to be the case here, however. Eaton no doubt recognized that his "hands off" policy created a significant risk that implementation of the co-equal management arrangement would be tempestuous. Apparently, Eaton intended that his recalcitrant Editor be placed in a position where he would either submit to authority or leave Vermont Life.

We have carefully considered whether Eaton's "hands off" policy amounts to a constructive discharge of Grievant. We think Eaton arranged events so the primary burden of implementing the co-equal policy fell on Grievant who was senior in tenure and experience to Parr. Eaton knew Grievant was opposed to the co-equal policy and had reason to believe Grievant wanted it to fail. He gave Grievant the rope with which to hang himself. However, in spite of his expressed regret that Kreizel did not fire Grievant, he did not take purposeful action (or inaction) directed at Grievant's termination of employment. See In re Bushey, 142 Vt. 290 (1982). Rather, Eaton insisted that Grievant submit to his authority. Eaton's "hands off" policy played a significant role in the deterioration of the situation at Vermont Life. In the final analysis, although Eaton did nothing to make Grievant's job easier, he was legally entitled to delegate responsibility to Grievant to take affirmative action to implement settled Agency policy.

The final actions of Grievant which provide grounds for his dismissal were his interviews with reporters from the Burlington Free Press and Times-Argus which resulted in the publication of two newspaper articles. Apart from Grievant's free speech claim, which is discussed below, Grievant demonstrated a continued failure to accept the co-equal concept by telling reporters the co-equal concept was not working. Also, Grievant was insubordinate to Secretary Eaton and detrimentally affected working relationships by publicly accusing Eaton of lying in the press interviews and accusing the person hired by Eaton as Publisher of incompetence without ever discussing these matters with Eaton. Obviously such public statements had a serious detrimental effect on working relationships.

II. Appropriateness of Penalty

We turn now to determine whether the penalty imposed on the basis of the proven facts is within the limits of law. Grievance of Colleran and Britt, supra. We decide this separately from Grievant's free speech claim, which will be discussed below.

We look to the specific factors enunciated in Colleran and Britt to determine the reasonableness of the disciplinary action. The pertinent factors here are the seriousness of the offense, the employee's job level, the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties, the notoriety of the offense or its impact upon the reputation of the Agency, and the clarity with which the employee was on notice that such conduct would be grounds for dismissal.

An application of these factors to this case confirm the reasonableness of the State's disciplinary action against Grievant. Grievant's proven offenses were extremely serious; particularly given his responsibilities as a manager of Vermont Life. His insubordination to Secretary Eaton and his lack of cooperation with co-manager Parr developed to the point where it would have been extremely difficult, if not impossible, for Grievant, Parr and Eaton to work in the same organization. Grievant demonstrated he was a disloyal manager whom Eaton could not trust to implement the Agency's policy of the co-equal status of Editor and Publisher. Grievant's actions towards Parr, culminating in the May 10 and 11 meetings and the May 19 newspaper articles, probably ended any possibility of Parr being able to work with Grievant and made it more

difficult for her to gain the needed respect and cooperation of her subordinates.

Grievant's public statements adversely impacted on the reputation of Vermont Life. However, as we note below, some of Grievant's criticism was not wholly without truth. The co-equal concept was worthy of criticsm and it was possible that Parr was not fully experienced. Therefore, we do not give this factor decisive weight.

Grievant alleges he did not have fair notice his conduct would be grounds for discharge. We disagree. Grievant knew he had a duty to cooperate with the Publisher, to work conscientiously for the success of Vermont Life, to inform Eaton of the essentials concerning Vermont Life, and to be loyal to Agency policies and superiors. The proven offenses of Grievant, in substance, constituted violations of these duties. Accordingly, Grievant was on notice his conduct would be grounds for discharge.

In essence, Grievant and Eaton created a situation where either Grievant submitted to a policy he disagreed with; Parr quit; or Grievant left; ultimately it was Grievant who left. He engaged in a power struggle with Eaton which he eventually lost. He was dismissed because he engaged in repeated acts of misconduct demonstrating his refusal to accept Eaton's authority over him, his refusal to accept the co-equal policy adopted by the Agency, and his refusal to accept the person selected as a manager co-equal to him in authority. Eaton acted within proper legal limits in dismissing Grievant for these repeated acts of misconduct.

III. Retaliation for Grievant's Exercise of Free Speech Rights

Grievant asserts his dismissal was an impermissible retaliation for his exercise of the right of free speech guaranteed by the Vermont Constitution, the United States Constitution and by the State's collective bargaining agreement. Grievant asserts that his communications with the Legislature in February 1983, the news media in May 1983, and the Senior Board of Editors are protected under Chapter 1, Article 13 of the Vermont Constitution and the First and Fourteenth Amendments to the United States Constitution. Grievant further alleges that his speech is protected under Article 49 of the Agreement in effect between the State of Vermont and the Vermont State Employees' Association.[1]

We consider first Grievant's rights under the collective bargaining agreement. The State contends Grievant is not covered by Article 49 of the Agreement. We agree. As a manager, Grievant is excluded from membership in a bargaining unit. As such, he is not covered by the terms of the Agreement, except where certain terms of employment contained therein have been extended to him by actions of the Secretary of Administration. The State produced evidence that a 1981 letter from the Personnel Commissioner did not extend the provisions of Article 49 to Grievant.

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[1] In his memorandum of law, Grievant alleges Article 7, Chapter 1 of the Vermont Constitution also protects his free speech rights. However, in the grievance filed with the Board, Grievant did not allege a violation of Article 7, Chapter 1, and did not seek to amend the grievance at any time to allege a violation of that article. Accordingly, such claim is before us in an untimely manner and the applicability of that Article will not be considered by the Board.

Nonetheless, Grievant contends that the failure of the State to extend the provisions of Article 49 to him are in violation of his Constitutional rights. We know of no authority which supports the proposition that articles of a collective bargaining agreement must be extended to employees not covered by the agreement. Moreover, Grievant is not prejudiced since he has all the Constitutional rights conferred on him by the United States Constitution and Vermont Constitution.

We question whether we have jurisdiction to decide and provide remedies for cases involving Constitutional questions. It is appropriate for us to look to Constitutional law where language in a collective bargaining agreement imports a Constitutional standard and we must interpret that portion of the Agreement. Grievance of William Sypher and the Vermont State Colleges Faculty Federation, Local 3180, AFL-CIO, 5 VLRB 102, 125 (1982). Grievance of Gary Cronin, 6 VLRB 37 (1983). Grievance of Joe Roy, 6 VLRB 163 (1983). However, we have recently ruled that, absent that circumstance, the term "grievance" is not so infinitely expandable as to include every Constitutional right. Grievance of Caroline Russell, 7 VLRB 60, 80-81 (1984).

Here, Grievant is not covered by any provision of the collective bargaining agreement between VSEA and the State relating to free speech rights (see State's Exhibit 39). However, Grievant is covered by the merit system principles which guide State service. One of the principles is "assuring fair treatment of... employees in all aspects of personnel administration... with proper regard for their... constitutional rights as citizens". 3 VSA 312(b)(5). Given this provision, we believe a constitutional challenge to the

State's actions can be addressed by the Board. The Board has jurisdiction to determine whether there was "cause" for dismissal, and an assertion is made that cause does not exist because of Constitutional violations. The Legislature intended we would make final determination on grievances, 3 VSA §926, and to look to Constitutional law in this case will provide a meaningful remedy to an employee who may have been unfairly disciplined for exercising his free speech rights.

We also believe Bush v. Lucas, 103 S. Ct. 2404, at 2412-2416 (1983), compels us to adjudicate this claim. Otherwise, we would be surrendering the field entirely to the Federal courts, a result we do not believe the Legislature intended. 3 VSA §926. In Bush v. Lucas, the United States Supreme Court held monetary damages should not be awarded to a Federal employee who was demoted in violation of First Amendment rights, but had been reinstated to his former position with back-pay by the Civil Service Commission. The Court held that an adequate remedy, other than monetary damages, had been provided by Congress, and that the Civil Service Commission fairly adjudicated such claims. The Court relied on an empirical study to prove a meaningful remedy for the employee's First Amendment claims existed.[2] It concluded it would be inappropriate to permit damages actions in

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[2]Footnote 29 of Bush v. Lucas provides: Petitioner received retroactive reinstatement and $30,000 in back pay. An empirical study found that approximately one quarter of the adverse actions in the Federal civil service were contested. Merrill, Procedures for Adverse Actions Against Federal Employees, 59 Va. L. Rev. 196, 198-199 (1973). In 1970, agency appeals succeeded in 20% of removal cases and 24% of demotion cases. Before the Civil Service Commission, 47% of those employees who appealed demotions and 24% of those who contested removal were successful. Id., at 204 n. 35.

Federal courts where a comprehensive scheme existed which supplied meaningful remedies. Grievant's right to grieve to the Board provides at least as meaningful a remedy for First Amendment claims as does the Federal system. This is especially true where there is a right to appeal to the Vermont Supreme Court which can oversee and correct any errors which are present. While it may well be appropriate to award monetary damages in some cases, this is not one of them, and we need not consider that issue. c.f. Note, The Non-Partisan Freedom of Expression of Public Employees, 76 Mich. L. R. 65 (1977).

As to the Constitutional issues raised by Grievant, we reject Grievant's contention that the breadth of relevant protections accorded by the Vermont Constitution is materially different from those under the Federal Constitution. Although the language of the applicable Constitutional provisions is different,[3] the essential protections are the same.

The Vermont Supreme Court consistently applies precedent under the First Amendment to interpret and apply the free speech provisions of the Vermont Constitution. See, e.g., Napro Development Corp. v. Town of Berlin, 135 Vt. 353 (1977); Blouin v. Anton, 139 Vt. 618 (1981). Because the Vermont Supreme Court has never interpreted the Vermont Constitution in the context of free speech claims of public employees, we will look to Federal precedent for guidance.

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[3]The First Amendment to the United States Constitution provides: "Congress shall make no law... abridging the freedom of speech..." Chapter 1, Article 13 of the Vermont Constitution provides: "That the people have a right to freedom of speech and of writing and publishing their sentiments, concerning the transactions of government, and therefore the freedom of the press ought not to be restrained."

In numerous decisions, the United States Supreme Court has recognized the right of a public employee to speak about transactions of government. Connick v. Myers, 103 St. Ct. 1684 (1983). Givhan v. Western Line Consolidated School District, 439 US 410 (1979). Mt. Healthy City School District v. Doyle, 429 US 274 (1977). Pickering v. Board of Education of Township High School District, 391 US 563 (1968). In Mt. Healthy City School District v. Doyle, supra, the Court developed a three-part analysis to determine whether the termination of a governmenta employee constitutes an unlawful retaliation for the exercise of First Amendment rights. The initial burden is on the employee to establish that his or her speech is Constitutionally protected. Once the employee has demonstrated that the speech in issue is protected, the employee must then show that the exercise of protected speech rights was a motivating factor in the employee's dismissal. 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 Constitutionally-protected conduct.

Grievant asserts he was dismissed in retaliation for the exercise of his Constitutionally-protected actions of granting interviews to the press and communicating to the Legislature and the Vermont Life Senior Board of Editors. The evidence at the hearing, as distinguished from pre-trial assertions, does not indicate Grievant's communications with the Senior Board of Editors influenced Eaton. Apparently, Eaton was not aware of specific communications Grievant had with the Board at the time he dismissed him. Accordingly, we consider only Grievant's press interviews

and communications with the Legislature.[4] Moreover, we would still regard the communications with the Senior Editors in the same light we regard his other free speech claims.

In determining whether Grievant's speech was Constitutionally-protected, we look for guidance to standards established in the United States Supreme Court's two leading cases in that area, Pickering v. Board of Education, supra, and Connick v. Myers, supra.

In Pickering, which involved a teacher dismissed for writing and publishing in a newspaper a letter critical of his employing school board, the Court emphasized that a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment, but also recognized the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. Id., at 568.

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[4]The State asserts that Grievant's free speech arguments must be limited to his statements to the newspapers because, in answers to the State's Interrogatories, Grievant limited his free speech argument to those statements attributed to him in the newspapers and Grievant never amended or supplemented his answer to that interrogatory. However, Grievant answered the State's Interrogatory prior to the State amending its answer to the grievance to specify as a grounds for Grievant's dismissal his "actions in the General Assembly". In a memorandum filed with the Board prior to the hearing on this matter, Grievant objected to the State's amendment of its answer and noticed the State that reliance on his communications with the legislature as a partial basis for discharge was in violation of the First Amendment. (See Grievant's Reply Memorandum re his Motion in Limine, filed with the Board on October 19, 1983, Page 5). Accordingly, the State cannot claim lack of notice prior to the hearing that Grievant's free speech claim encompasses his communication with the Legislature.

The Court in Pickering determined the dismissal of the teacher because of his critical letter violated the teacher's First Amendment rights, concluding the statements made in the letter "are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operations of the school generally". Id., at 572-573. Czurlanis v. Albanese, ___ F.2d ___ (3rd Cir., November 9, 1983) also illustrates the principle that when an employee's critical public statements of superiors do not undermine close working relationships and do not interfere with the employees' performance of daily duties, the employee's speech is more likely to be Constitutionally protected. In Czurlanis, the Third Circuit held that an auto mechanic's criticism of his superiors on issues such as waste, inefficiency, poor recordkeeping and misappropriation of vehicle parts, which criticism resulted in the employee being twice suspended, was Constitutionally-protected speech since the mechanic was not normally in contact with the superiors he criticized and he could still properly perform his job duties despite his critical statements.

The close superior-subordinate relationship absent in Pickering and Czurlanis was present in Connick v. Myer, supra. In Connick, an assistant district attorney was dismissed for insubordination for preparing and circulating within her office a questionnaire addressing matters of office concern including policies regarding employee transfers, office morale, pressures to work in political campaigns and other matters. The dismissed employee had distributed the questionnaire shortly after her superior, the district attorney, had proposed her transfer, an action to which she was strongly opposed.

In employing the Pickering balancing test to determine whether the assistant district attorney's distribution of the questionnaire involved matters of "public concern" under the First Amendment, the Supreme Court stated:

> (w)hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.... Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record. In this case, with but one exception, the questions posed by Myers to her coworkers do not fall under the rubric of matters of "public concern". We view the questions pertaining to the confidence and trust that Myer's coworkers possess in various supervisors, the level of office morale, and the need for a grievance committee as a mere extension of Myers' dispute over her transfer.... These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celèbre.... The First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs. Id., at 1690-1691.

However, the Court did find that one item in the questionnaire touched upon a matter of public concern: the question concerning whether employees felt pressured to work in political campaigns. The Court concluded that her exercise of free speech was, therefore, not wholly without First Amendment protections. The conclusion that a matter of public concern is involved does not end the Pickering balancing test. In Connick the Court went on to further balance the competing interests to determine whether the employee's dismissal violated Constitutional protections. It held:

> The Pickering balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public.... When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to

> allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.... The context in which the dispute arose is also significant.... When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office.... Myers' questionnaire... is most accurately characterized as an employee grievance concerning internal office policy. The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority and destroy close working relationships. Myers' discharge, therefore, did not offend the First Amendment. Id., at 1692-1694.

In applying the Pickering balancing test, courts have drawn a distinction with regard to First Amendment protection between high-level employees like Grievant who are engaged in the formulation and implementat of government policies and lower-level employees. Courts generally have imposed a higher duty of loyalty on those employees who hold high, sensitive positions than on lower-level employees because the speech of high-level employees is more likely to disrupt the operations of government and undermine working relationships than is the speech of lower-level employees. Accordingly, the Constitutional balance has weighed more heavily in favor of the governmental interest in protecting top elected and appointed governmental officials from even meritorious critical public statements which obstruct the implementation of their goals and policies. Sprague v. Fitzpatrick, 412 F. Supp. 910 (E.D, Pa. 1976), aff'd 546 F2d 560 (3rd Cir., 1976), cert. denied, 431 U.S. 937 (1977). (Assistant prosecutor who correctly stated his boss, the District Attorney, rather than himself recommended probation for a convicted felon in a controversial case dismissed, and dismissal upheld.) Muir v. County Council, 393 F. Supp. 915 (Dist. Del. 1975). Gould v.

Walker, 356 F. Supp. 421 (N.D. Ill. 1973). Leslie v. Philadelphia 1976 Bicentennial Corp., 343 F. Supp. 768 (E.D. Pa. 1972), aff'd, 478 F2d 1398 (3rd Cir. 1973). Johnson v. Jefferson County Board of Health, 662 P2d 463 (Colo., 1983).

Bennett v. Thompson, 116 N. H. 453, 363 A.2d 187 (1976), appeal dismissed for want of substantial Federal question, 429 US 1082 (1977), is instructive to illustrate the dilemma in any case in which a high-level employee publicly speaks out. There, a state director of economic development was dismissed for public remarks critical of the proposed location of a pulp mill in New Hampshire which was supported by the State Administration. The New Hampshire Supreme Court split 3-2 on whether the dismissal violated his First Amendment rights, the majority affirming the dismissal. It is noteworthy that Bennett's speech was elicited by public questions, and it preceded a public vote on the issue. Thus, the position of a high-level employee in certain circumstances might work in favor of the protection accorded the employee's speech. (Bennett, Dissenting Opinion). Courts have recognized that statements of public employees with informed opinions are of special value to public debate, and that employees in high-level positions are particularly likely to be reliably informed on those matters of public interest that come up within their area of employment. Pickering, supra, Hostrop v. Board of Junior College District No. 515, et al. 471 F2d 488 (7th Cir., 1972), cert. denied, 411 U.S. 967 (1973). See generally Coven, The First Amendment Rights of Policymaking Public Employees, 12 Harv. C. R. C.L.L. Rev. 559 (1977); Note, the Nonpartisan Freedom of Expression of Public Employees, supra. (Noting "Catch-22"

aspect of analysis - The more truthful and important the criticism is, and the more helpful the information is to the public, the more disruptive it is of working relationships. Monetary damages recommended as a remedy).

We now turn to applying the principles enunciated in Pickering, Connick and Bennett to the facts of this case to determine whether Grievant's speech was Constitutionally protected.

We first discuss his granting of interviews to newspaper reporters, which resulted in May 19, 1983, newspaper articles. A partial basis for Grievant's dismissal was Eaton's concern over these newspaper articles. The statements of Grievant contained in the newspaper articles which disturbed Eaton were: a) that Parr consider returning to New York City; b) that Parr's lack of direct experience had become apparent; c) that he had been assured by Eaton that he would have an opportunity to participate in the final choice of a Publisher but that Eaton "reneged"; and d) statements attacking the co-equal policy. Eaton was also disturbed that Grievant leaked Parr's internal office memorandum to the press.

In weighing the Pickering balance, we first must determine whether these press accounts involved matters of public concern. We view Grievant' statement that Eaton had reneged on his assurance to Grievant that he would be involved in the final choice of a Publisher and his leaking of Parr's memorandum to the press as matters of "personal interest" which do not "fall within the rubric of matters of public concern". Connick, supra, at 1690-1691. Parr's memorandum to Grievant in which she accuses him of damaging office morale is a manifestation of an internal problem between two managers, and does not involve an issue of public concern.

Grievant's statement accusing Eaton of reneging on a promise to him also concerns his private complaint over internal office affairs that is not a matter of public concern. Just as the First Amendment does not require a public office to be seen as a roundtable for employee complaints over internal office affairs, Connick, supra, at 1691, neither does it require that the newspapers be such a roundtable. By publicizing these matters, it is evident Grievant was acting out of self-interest in a power struggle with Eaton over control of Vermont Life and cannot be characterized as a public employee speaking "as a citizen upon matters of public concern". Connick, supra, at 1690.

However, Grievant's statements attacking the co-equal policy and claiming that Parr lacked experience to serve as Publisher and should return to New York are properly characterized as matters of public concern. We find Grievant's statements in this regard were not reckless and were "not wholly without truth". c.f. Bush v. Lucas, supra, at 103 S. Ct. 2407. Whether the implementation of the co-equal concept and the Publisher's qualifications harmed the operations of Vermont Life are matters of public concern beyond Grievant's personal interests. Accordingly, because Grievant's press interviews contain statements entitled to a measure of Constitutional protection, we must further balance the State's and Grievant's competing interests to determine whether the State exceeded permissible Constitutional limits by dismissing him, in part, because he made those statements.

In viewing the publication of these statements as a whole in context with other acts of Grievant, we conclude that the State did not violate Constitutional requirements by dismissing Grievant. In Connick, the

Supreme Court recognized that the Constitutional balance weighs in favor of the public employer when close working relationships are essential to fulfilling public responsibilities and the employer reasonably believes the employee's speech has resulted in disruption of the office and destruction of working relationships. Grievant's action of airing these matters in public before discussing them with Eaton or Parr seriously undermined his working relationships with them.

Grievant's statements attacking the co-equal policy further undermined Eaton's faith in Grievant as a subordinate employee willing to implement that policy. Grievant's public attack on a management policy that had been firmly established indicates he was unlikely to work in good faith to implement it. Grievant's statements that Parr's lack of experience had become apparent and that she should return to New York also contributed to destroying irreparably his working relationship with Eaton. By going to the press on this issue without first raising Parr's perceived lack of qualifications with Eaton, Grievant demonstrated he was willing to engage in a public power struggle with Eaton rather than attempt to work out problems internally.

Obviously, these statements also impaired his working relationship with Parr. Parr was disgusted and embarrassed to read Grievant's statements about her. Grievant's statement about Parr's lack of experience and related statement that she should return to New York, taken together with his actions towards her witnessed by Vermont Life staff, probably ended any possibility of Grievant being able to work with Parr. His public statements severely disrupted the office by making it more difficult for Parr to gain the respect and cooperation she needed to work with her subordinates.

The Court in Connick and Bennett also recognized the significance of the context in which the protected speech arose. In the present case, the context in which Grievant's speech arose weighs against him. Grievant's statements of "public concern" arose from an employment dispute concerning the application of the co-equal policy to him. Because Grievant's speech concerning office policy arises from an employment dispute concerning the very application of that policy to him, additional weight must be given to the State's view that Grievant threatened the authority of the Agency to run the office. cf. Connick, supra, at 1693. Furthermore, Grievant's press comments occurred while Eaton was in the Far East. Grievant's superior was not present to quell any ensuing uproar, resolve problems and mitigate harm. The timing of Grievant's action accents his effort to wrest control of Vermont Life from Eaton.

The timing of Grievant's press statements has further significance. When Grievant spoke to reporters, the co-equal policy was well established as a fact. The Agency decision to implement the policy was firmly in place. The Legislature was informed about the decision and had not acted to change it. The Governor had been consulted by the Senior Board of Editors and declined to reverse the policy. Grievant, therefore, was not airing his views during policy formulation. See Generally Note: Freedom of Expression of Public Employees, supra. Instead, he was venting his dissatisfaction with a decision made by his superiors within their area of responsibility and discretion. cf. Bennett, supra (high official's claim of First Amendment protection for criticism of superiors' planned pulp mill before Town referendum on acceptance of it split New Hampshire Supreme Court 3-2).

The First Amendment interest involved here does not require that Eaton "tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships". Connick at 1694. Accordingly, Eaton's partial reliance on Grievant's communications with the press did not violate the First Amendment.

We also do not believe Eaton's partial reliance on Grievant's communication with the Legislature as a factor leading to Grievant's dismissal violated Grievant's First Amendment rights. We can think of few actions more destructive to close working relationships between a subordinate and superior than Grievant's actions at the Legislature. First, Grievant secretly fed a Legislator questions designed to compromise Eaton and the Agency's policies and to promote Grievant's contrary views. Second, he testified he expected to remain in charge of Vermont Life even though he knew the co-equal concept had been adopted. These acts can only fairly be characterized as insubordinate actions which justifiably led Eaton to question Grievant's loyalty as a manager. They were the first in a series of actions by Grievant which severely undermined his working relationship with Eaton. In balancing the competing interests in the First Amendment test, we conclude Eaton justifiably used these actions of Grievant as a partial basis for dismissal.

We do not hold that any public criticism which harms working relations in government justifies the dismissal of the outspoken public employee. We would not adopt a view which would so effectively stifle a valuable source of informed criticism of government operations. Any criticism bothers its target; the more effective is the criticism the more bothersome it is likely to be. One price society must pay for democratic self-

government is the disruption to supervisor's feelings which follows a subordinate's whistle blowing. To condition Constitutional protections upon the absence of disrupted working relationships would confine Constitutional protections to mundane and inoffensive speech. Bennett, supra, and Sprague v. Fitzpatrick, supra, may have been wrongly decided, but are very different factually from this case.

Grievant's public statements cannot be viewed in a vacuum; they must be viewed in context. So viewed, the public statements are merely a part of a deliberate and calculated pattern of insubordination. The insubordination which is at the root of his dismissal exists independently of his public comments. Taken as a whole, Grievant's insubordinate conduct amply justifies his discharge. He is not insulated from the consequences of his insubordination because a part of his conduct was manifested in behavior entitled to a measure of Constitutional protection. While it determined the timing of Eaton's decision, Grievant's protected conduct was not an independent grounds for his dismissal. It was merely evidence of the extent of his insubordination and the final blow to working relationships he had already strained to the breaking point. Unlike the dismissed employee in Bennett, supra, Grievant was not dismissed for honestly expressing his views contrary to administration policy while he conscientiously carried out his duties to implement those policies.

Because Grievant's conduct leading to his dismissal contains elements of protected speech, the burden of proof shifts to the State to establish that Grievant would have been dismissed even in the absence of these elements. Mt. Healthy, supra. From the record as a whole, we conclude that the State has met its burden.

We address one final issue raised by Grievant. Grievant asserts he was discriminated against because he was punished for speaking to the press, but Bernadini and Parr, who also spoke to the press, were not punished. Grievant contends Eaton's selective punishment of Grievant was impermissible because it is based on the content of his speech. Grievant cites Oyler v. Boles, 368 U.S. 448 (1962) for the proposition that while selective enforcement of punishment is not always a Federal Constitutional violation, if selective enforcement is based on an unjustifi standard or an arbitrary classification, equal protection under law and an employee's due process rights have been denied under the Fourteenth Amendment to the U.S. Constitution. Eaton's punishment of Grievant was not based on an "unjustifiable standard or an arbitrary classification" because Parr and Bernardini spoke to the press only in response to Grievant's public statements and nothing they said undermined working relationships or disrupted the operation of Vermont Life. Their public statements, unlike Grievant's, were not part of a larger plan of insubordination.

Kimberly B. Cheney

James S. Gilson

CONCURRING OPINION

I concur with the majority that the State has proven its charges against Grievant and that his dismissal is justified. However, I would like to stress more strongly than did my colleagues the major role Secretary Eaton played in the deterioration of the situation at Vermont Life which ultimately resulted in Grievant's dismissal. What is troubling to me is the method Eaton used to set up Grievant for his discharge which, while legal, is the antithesis of decent and fair labor relations. Relations between people are better governed by charity and understanding rather than attempting to crush rivals.

From the time of the hiring of a Publisher until the time Grievant was dismissed, Eaton's actions or lack thereof did much to ensure the transition period during which the Agency policy of the co-equal status of Publisher and Editor was being implemented would be stormy. He first demonstrated a lack of good faith when, after telling Grievant he would have input on the hiring of a Publisher, he attempted to consult Grievant only after he had basically decided to hire Leslie Parr for the position.

After Parr was hired, Eaton adopted a deliberate "hands off" policy instead of demonstrating strong leadership. This action injured Parr by putting her through unnecessary turmoil and uncertainty, as well as ultimately enabling Eaton to fire Grievant. A person with Eaton's managerial experience knew the change would cause hostility among Vermont Life staff and create difficulties until employees became accustomed to the new structure. In order to work out the co-equal concept, a series of management initiatives would have been necessary which would include direct leadership by Eaton concerning how reporting relationships were

to work and how job functions were to be coordinated. Yet, Eaton provided no such leadership. Also, it was Eaton's responsibility to bring Parr and Grievant together to see how they got along and to orient them to the new structure. He did nothing to bring them together. In addition, when he left for a trip to the Far East, he assigned no one to resolve or investigate Vermont Life problems in his absence even though he was aware serious problems existed.

Through this "hands off" policy, as the majority opinion points out, Eaton gave Grievant "the rope to hang himself". In essence, Eaton evaluated Grievant's weaknesses and lured him into a trap where he refused to cooperate with Parr. As it was being sprung, Parr as well as Grievant were injured. Eaton's approach to this problem was ill-advised, to say the least. Eaton need not have given Grievant the rope but could have attempted to work out problems by making an effort to change Grievant's resistance through employing good personnel management techniques. If Eaton had done this, perhaps Parr could have been spared the suffering and humiliation she encountered, and Grievant's undoubted talents as an Editor been utilized.

After doing much to contribute to deterioration of working relationsh Eaton acted in a very sanctimonious manner by attempting to lay the entire blame on Grievant. Eaton should have recognized the problems that existed and dealt with them. For the State to condone Eaton's actions in this matter does not bode well for good labor relations. While both Grievant and Eaton employed poor managerial techniques, Grievant was dismissed while Eaton's actions were condoned. To condone such actions is tantamount to applauding them. After becoming aware of

Eaton's actions, the Personnel Department should have stepped in and attempted to counsel Eaton on properly resolving the existing problems at Vermont Life.

Despite Eaton's actions, he was legally justified in dismissing Grievant. This is not a case like Grievance of Royal Bushey, 4 VLRB 285 (1981), where we concluded that the employer had deliberately made a correctional employee's working conditions so intolerable that the employee was involuntarily forced to resign. Unlike Bushey, who did not have the means to protect himself and could not control his own destiny, Grievant had the means to protect himself from actions of Eaton. In his managerial position, Grievant had much control over his working conditions and it is evident he would have remained Editor of Vermont Life if he accepted Eaton's authority over him and accepted the Agency policy on the co-equal status of Editor and Publisher. Instead, he chose to engage in a power struggle with Eaton. In so doing, Grievant refused to accept Eaton's authority over him, refused to accept the co-equal policy adopted by the Agency, and refused to accept the person selected as a manager co-equal to him in authority. By these actions, Grievant placed himself in a position where there was cause for his dismissal.

Grievant's central mistake was using all the rope Eaton gave him. But Eaton is not entirely blameless in furnishing the rope. I would expect better morals from a top State manager. In the final analysis, what occurred here was a disguised invitation to a lynching.

/s/ William G. Kemsley, Sr.
William G. Kemsley, Sr.

ORDER

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

The Grievance of Charles T. Morrissey is DISMISSED.

Dated this __ day of April, 1984, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson