

VERMONT LABOR RELATIONS BOARD

GRIEVANCES OF:	)	
	)	DOCKET NOS. 84-45, 84-46
DARWIN MERRILL	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

This matter involves two separate grievances. On October 1, 1984, Attorney Norman Blais filed a grievance on behalf of Darwin Merrill ("Grievant"), CRASH Program Chief in the Alcohol and Drug Abuse Division of the Agency of Human Services, State of Vermont. The grievance alleged an unsatisfactory annual performance evaluation received by Grievant on May 1, 1984, was the result of personality disagreements and acrimony between Grievant and his supervisor, and not the result of unsuitable or inappropriate job performance by Grievant. In the grievance and in an amendment to the grievance filed on November 29, 1984, Grievant cited the 1982-84 Contract between the State of Vermont and Vermont State Employees' Association and Rule 13.021 of the Rules and Regulations for Personnel Administration as the controlling provisions for filing the grievance.

On October 11, 1984, and by amendment of November 9, 1984, Grievant filed a second grievance over his dismissal from State employment. The grievance alleged the dismissal was without just cause and, in addition, was a discriminatory action against Grievant for his engaging in the protected activity of grieving the earlier annual performance evaluation. Grievant alleged the dismissal violated Articles 15 and 16, Section 7, of the VSEA-State Contract, Section 12.01 of the Rules and Regulations for Personnel Administration and 3 VSA §1001(b).

Hearings were held before Board Members James S. Gilson, Acting Chairman, and William G. Kemsley, Sr., on June 3, 4 and 12, 1985. Chairman Kimberly B. Cheney disqualified himself from participation in the case. Attorney Blais represented Grievant. Special Assistant Attorney General George Brooks represented the State. Requested Findings of Fact and Memoranda of Law were filed by the State on June 26, 1985, and by Grievant on June 27, 1985. The State filed a Reply Brief on July 3, 1985. Grievant filed no Reply Brief.

#### FINDINGS OF FACT

1. At all times relevant to this grievance, Grievant was a permanent-status managerial employee of the State of Vermont, employed as the Program Director of Project CRASH. "CRASH" is an acronym for Countermeasures Related to Alcohol and Safety on the Highways. Grievant was initially hired to direct Project CRASH in 1970.

2. Prior to July, 1978, Project CRASH was a component of the Department of Mental Health, a department within the Agency of Human Services. In July, 1978, Project CRASH was made a component of the Alcohol and Drug Abuse Division ("ADAD") of the Agency of Social and Rehabilitation Services.

3. At the point Grievant became a part of ADAD, and for the next two years, Richard Powell II and Grievant held co-equal positions within ADAD. Grievant held the position of Chief of Community Services and Powell held that of Chief of Treatment. Both were directly supervised by ADAD Director, James Leddy.

4. In November, 1980, John Burchard, Commissioner of Social and Rehabilitation Services, promoted Powell to the position of Acting

Director of ADAD, and in June, 1981 made him permanent ADAD Director. This made Powell Grievant's immediate supervisor. Grievant thought Powell was not a good choice for the position.

5. During 1981, Powell reorganized ADAD. In the reorganized ADAD office, there were four director-type positions, each of which reported directly to the ADAD Director. Leslie Dowling was Chief of Treatment Services; Steve Gold was Chief of Prevention and Intervention; Grievant was Chief of Project CRASH; and Tim Mailly was Operations Analyst.

6. The reorganization represented a significant reduction in Grievant's responsibilities and in the staff that worked for him. Prior to the reorganization, Grievant had been responsible for two programs in addition to CRASH, these being the Employee Assistance Program and Prevention. He had a staff of approximately eight. After the reorganization, his only program was CRASH, and he had a staff of one, his secretary. Grievant's position was downgraded in pay scale one grade, from Pay Scale 19 to Pay Scale 18, by the Vermont Department of Personnel. Powell did not initiate this reduction and sought to prevent the Department of Personnel from reducing the pay scale (State's Exhibit 39).

7. After the reorganization, Grievant's duties as Project CRASH Director involved administrative and coordinative work involving the operation of the CRASH program, which is designed to enforce laws concerning driving while intoxicated as well as to offer services to those apprehended for driving under the influence. Among Grievant's duties were supervising and managing CRASH schools which assist drivers in overcoming driving while intoxicated; cooperating with

law enforcement officers in the enforcement of driving-while-intoxicated laws; serving as an instructor at the Vermont Police Academy; administering, scheduling and evaluating weekend CRASH patrols; maintaining and supervising breath testing equipment; coordinating and managing public information and education relating to driving while intoxicated, and serving as a liaison to the Vermont Legislature (State's Exhibits 37, 39).

8. Prior to becoming a supervisee of Powell, Grievant was supervised by a number of different individuals. In annual evaluations prepared by supervisors covering the period July 1, 1972-June 30, 1975, Grievant's overall performance was rated either "fully satisfactory" or "outstanding" (Grievant's Exhibits O, N, L, M). For the period July 1, 1975-June 30, 1977, Grievant received two annual overall ratings of "Frequently exceeds job requirements/standards" (Grievant's Exhibits J, K). For the period ending May 1, 1979, Grievant received an overall rating of "consistently meets job requirements/standards" (State's Exhibit 1). For the period April 12, 1979-April 12, 1980, ADAD Director James Leddy gave Grievant an overall performance rating of "frequently exceeds job requirements/standards" (State's Exhibit 2).

9. Grievant's supervisors prior to Powell engaged in minimal direct supervision of Grievant's work. Powell deviated from this supervisory style in that he wanted a great deal of feedback from Grievant as to what he was doing and wanted to maintain the right of prior approval on substantive issues. Grievant opposed this management style.

10. On July 24, 1981, Powell issued his first written evaluation of Grievant, a performance evaluation covering the period June 21, 1980 to July 4, 1981 (State's Exhibit 3). Powell gave Grievant ratings of "3" (consistently meets job requirements/standards) on five out of the nine specific professional and management skills rated on the evaluation;

gave Grievant a rating of "4" (frequently exceeds job requirements/standards) regarding his use of the tools needed for his job and a rating of "5" (consistently and substantially exceeds job requirements/standards), the highest possible rating, regarding his understanding of the technical aspects of his job. Powell rated Grievant's job performance a "2" (inconsistently meets job requirements/standards) in two of the management skill areas rated on the evaluation. The first concerned working with others and the second was "makes timely decisions based on sound reasoning". In the section provided for the rating official's summary comments, Powell stated:

Darwin is technically proficient and is exceptionally capable. His major weakness is in communication. He prefers to operate as an independent agent.

Powell gave Grievant an overall rating of "3" (consistently meets job requirements/standards)(State's Exhibit 3, Pages 1-2).

11. Grievant signed the evaluation on November 10, 1981, noting his disagreement with the evaluation and appending a statement to the evaluation which indicated he "strongly disagreed with the 2's given" in the evaluation (State's Exhibit 3, Page 3).

12. On May 5, 1982, Powell issued his second written evaluation of Grievant's performance, a performance evaluation covering the period April 13, 1981 to April 13, 1982. Powell again rated Grievant's job performance a "3" overall, and gave him "3" ratings in six of nine individual rating areas. Grievant was given a "4" rating in two individual areas - i.e., understanding the technical aspects of the job and effectively using the tools needed for the job. Grievant received

one "2" rating, in the rating factor concerning working with others. Powell's summary comments were similar to those on his previous evaluation of Grievant:

Darwin - highly skilled and a technical expert in his field. Major problem as previously documented is lack of communication and strong tendency to act as a lone ranger.

As part of management objectives for the upcoming rating year, Powell assigned Grievant the task of implementing regular, formal monitoring of CRASH schools (State's Exhibit 4, Pages 1-2).

13. Powell attached an addendum to the evaluation highlighting his concern that Grievant "resists working as a team member or communicating with me". Powell stated his expectation that Grievant would communicate and cooperate more fully with him in the future (State's Exhibit 4, Page 3).

14. In late 1982, Grievant held a drinking demonstration for the Chittenden County Bar Association at Burlington, Vermont. Mark Keller, then State's Attorney for Chittenden County, collected both cash and checks from members of the Bar Association for the purchase of liquor. The checks were made payable to CRASH. Keller turned both the checks and cash over to Grievant, with the understanding Grievant would use them to purchase liquor for the drinking demonstration. Grievant had the checks marked "payable to Darwin Merrill" and deposited them into his personal checking account with the Merchants Bank. He then drew a check payable to "cash" to obtain funds with which to purchase liquor.

15. When Powell became aware Grievant had used his personal account in connection with the drinking demonstration, he asked Grievant for an explanation. Grievant's explanation was he had no time to get funds

from State government to purchase the liquor and did not wish to advance his own money and then seek reimbursement from the State. Grievant then produced receipts and supplies totaling a little more than \$80 and stated the balance had come out of his own pocket.

16. Subsequently, Keller informed Powell he had turned over to Grievant about \$60 in cash and about \$80 in checks made out to CRASH. After receiving this information, Powell spoke with Raymond Kirk, Deputy Commissioner of Social and Rehabilitation Services. Kirk instructed Powell to immediately order Grievant not to hold any further drinking demonstrations until a firm policy on them was in place. Powell so instructed Grievant (State's Exhibit 7A).

17. On November 12, 1982, a meeting was held among Burchard, Powell and Grievant concerning the Chittenden County Bar Association drinking demonstration. Powell informed Grievant Keller had said he had given Grievant cash in addition to checks. Grievant's response was that Keller had given him \$20 in cash. Powell then said Keller had told him he had given Grievant \$60 in cash in addition to the checks. Grievant then said it was \$60 in cash. Burchard and Powell thereupon asked Grievant to produce all his documentation on the matter and turn it over to Powell.

18. On November 15, 1982, Grievant placed an envelope on Powell's desk when Powell was not in his office. The envelope contained an accounting of funds collected and disbursed in connection with the drinking demonstration, plus approximately \$20 in cash. The cash, according to the accounting, represented the difference between what Grievant had collected and what he had spent.

19. In the course of an investigation conducted by the Vermont Attorney General's Office into Grievant's handling of funds in connection with the Chittenden County Bar Association drinking demonstration, it was discovered Grievant had been paid twice for expenses incurred on a business trip, once by the Federal government and once by the Vermont State government. Grievant had traveled to Detroit, Michigan, to attend a national seminar on drinking and driving in connection with his job as CRASH program chief. The conference was sponsored by the Federal government, through its National Safety Council. Grievant requested and received a travel advance from the Vermont State Treasurer. At the time he requested this advance, he knew a large portion of his expenses would ultimately be reimbursed by the Federal government.

20. Upon his return from Detroit, Grievant filed an expense voucher on which he accounted for his disbursement of the monies advanced to him by the State Treasurer and claimed them as expenses. He attached a note to his voucher which stated he expected the State of Vermont would be reimbursed by the Federal government for a portion of his expenses of attending the conference. Grievant expected reimbursement would come through in the form of a check made payable to the State of Vermont.

21. When reimbursement from the Federal government did come through, it was in the form of a check for \$510.10 made out to Grievant personally. He deposited this check into his personal account, and made no move to reimburse the State of Vermont or to communicate to anyone the fact he had received reimbursement. After the foregoing facts came into light, Grievant was ordered to repay the sum of \$510.10, and did so.



22. For a period of time until late 1982 or early 1983, Grievant stored liquor purchased with State funds in the basement of his residence without keeping records or using any accounting procedures.

23. On April 28, 1983, Powell issued his third written evaluation of Grievant, covering the period from April 13, 1982 to April 12, 1983 (State's Exhibit 5). Powell gave Grievant an overall rating of "2" and placed him in a six-month special evaluation period. Powell gave Grievant ratings of "4" in the two areas of learning ability and technical and professional knowledge and ability, and rated his job knowledge and skills a "5". However, Powell assigned ratings of "2" in the two categories of quantity of work and communication and cooperation. Grievant received the lowest possible rating of "1" (unsatisfactory) in judgment for the annual rating period (State's Exhibit 5).

24. With respect to quantity of work, Powell was critical of Grievant because he had not completed the requirement of monitoring each of the CRASH schools once during the rating period; that to date not one monitoring report had been completed (State's Exhibit 5, Page 3).

25. Powell faulted Grievant in the area of communication and cooperation because he had no discussions with other staff regarding rate of pay of police officers in developing the CRASH contract, copies of reports emanating from CRASH to other State agencies were not provided to Powell; and the CRASH DWI enforcement plan was prepared without input from the State Police or the Governor's Highway Safety program (State's Exhibit 5, Page 4).

26. Powell made the following statement on the evaluation concerning Grievant's judgment:

Darwin has shown very poor judgment at times but on at least two occasions serious misjudgments have occurred:

a. Darwin performed drinking demonstrations to demonstrate levels of intoxication related to Blood Alcohol Content. Liquor was purchased with State funds for some of these events and leftovers were stored in his home with no accounting procedure and without the knowledge of the Director.

b. In one case Darwin collected money for liquor from a group and deposited checks in his personal checking account. This was discovered by the Merchants Bank and subsequently Darwin provided three separate stories as to the amount collected and spent for the demonstration prior to a fourth written account which was accompanied by an amount of money, in cash, to "balance the account". This is clearly inappropriate and inconsistent with State procedures with which Darwin is familiar.

(State's Exhibit 5, Page 3)

27. Powell made the following summary comments, in part, on the evaluation:

Two major points are evident in discussing Darwin's work performance. First, he is an expert in matters related to DWI. He is knowledgeable and lucid. Secondly, Darwin makes little attempt to act as a team member at ADAD and communicates as little information as possible. This has been a serious issue for the past rating period with a deterioration in performance and judgment.

(State's Exhibit 5, Page 2)

28. Among the expectations Powell had of Grievant, as stated on the evaluation, were submitting all reports emanating from Project CRASH to the ADAD Director for review, submitting materials developed by Project CRASH, such as the CRASH Manual, to the ADAD Director for review; and increased cooperation (State's Exhibit 5, Pages 4 and 5).

29. Grievant did not grieve this performance evaluation.

30. On November 22, 1983, Powell issued Grievant a written reprimand for his mishandling of funds in connection with the Chittenden County Bar Association drinking demonstration and giving conflicting accounts of the facts; his retention of double reimbursement of expenses in connection with his business trip to Detroit; and his storing of alcohol belonging to the State of Vermont in his home without accounting or records (State's Exhibit 7). Grievant did not grieve this reprimand.

31. On November 30, 1983, Powell issued the special evaluation called for in Grievant's previous evaluation. The evaluation noted improvements in Grievant's level of cooperation with ADAD staff, and raised his overall rating from a "2" to a "3". Grievant received "3" ratings in seven individual areas. In addition, Powell gave Grievant "5" ratings in the two areas of job knowledge and skills and technical or professional knowledge and ability. Grievant received "4" ratings in the two areas of learning ability and quality of work. Grievant received "2" ratings in the two areas of work habits and judgment (State's Exhibit 6).

32. In the evaluation, Powell stressed the need for Grievant to comply more strictly with organizational requirements, such as the timely submission of assignments. Powell singled out two assignments for particular comment, stating:

1. There has been no progress on my request to develop new APA rules for therapy requirements.
2. No progress on my request for CRASH presentation to be developed for the Special Cabinet.

(State's Exhibit 6, Page 2)

33. Powell attached a special addendum to the evaluation setting out four specific tasks for Grievant, together with deadlines for each, as follows:

<u>TASK</u>	<u>DEADLINE</u>
1. Develop DWI and Vermont Drunk Driver Program Presentation for the Special Cabinet	December 16, 1983
2. Develop a comprehensive list of work tasks performed in two categories 1) CRASH schools and 2) enforcement related activities. Each list should be prioritized and assigned a percent of time spent.	January 1, 1984
3. Develop new therapy requirements for license reinstatement under the rules of the APA for each DWI offense, first, second, etc. Submit to Leslie Dowling and me for review.	February 13, 1984
4. Complete a CRASH school study group to look at the design and content of the schools as well as the evaluation of pilots such as the significant other rebate program and the Fifth night for repeat offenders.	April 30, 1984

(State's Exhibit 6, Page 2 and 3)

34. Grievant satisfactorily completed the first task assigned on the special evaluation concerning the presentation for the special Cabinet (State's Exhibits 16 and 17).

35. The second assignment on Grievant's special evaluation was to develop a comprehensive list of work tasks by January 1, 1984, with each task to be prioritized and assigned a percentage of time spent. Grievant submitted a list in a timely fashion, but the activities were not prioritized, and no attempt had been made to assign percentages

of time spent. Powell returned the list to Grievant with instructions to complete the assignment. Grievant subsequently resubmitted the list, this time with percentage of time assigned. Grievant had still not prioritized the activities and has never done so. Grievant informed Powell it was the supervisor's responsibility to prioritize Grievant's activities, not Grievant's (State's Exhibits 18 and 19).

36. The third assignment on Grievant's special evaluation was to develop new therapy requirements for license reinstatement under the Administrative Procedures Act. Grievant hesitated to do the assignment due to the likelihood of legislation affecting the assignment being passed by the Legislature in 1984. Nonetheless, Powell wished Grievant to complete the assignment. Grievant did not complete this assignment in a timely manner and never completed it in a manner satisfactory to Powell (State's Exhibits 17, 18, 19).

37. The fourth assignment on the special evaluation was the completion of a CRASH school study group. Grievant understood this assignment to mean the report of the study group was due by the established April 30, 1984, deadline. Pursuant to Grievant's request, Powell changed the deadline for completion of this assignment from April 30, 1984 to June 1, 1984.

38. On November 23, 1983, Powell issued a written reprimand to Grievant concerning Grievant's unapproved absence from work for portions of the days of November 16 and 21, 1983. Powell informed Grievant that any further breach of ADAD or State policy or regulations would result in further disciplinary action up to and including dismissal (State's Exhibit 8).

39. On or about February 27, 1984, Powell issued a document entitled "ADAD Operating Policies and Procedures". The policies and procedures set forth included the following:

All material prepared by ADAD staff for outside distribution or submission to the SRS Commissioner or AHS Secretary must be reviewed by the ADAD Director prior to submission.

Requests to use Annual Leave or Compensatory Time must be submitted to the ADAD Supervisor for prior approval. When away from the work station and part of one day is taken off the request may be made by phone. In cases where prior approval is not possible, it should be submitted as soon as possible on the next work day. Although this policy is flexible, employees are subject to disciplinary action for an unapproved absence from work.

(State's Exhibit 15)

40. The requirement for prior submission of material to the ADAD Director was a confirmation of existing policy. Powell implemented the policy concerning absence from work to clear up confusion which existed within ADAD as to the policy. Grievant received a copy of these policies and procedures when they were issued.

41. On May 1, 1984, Powell issued an annual performance evaluation of Grievant. Therein, Powell rated Grievant's overall performance a "2" and placed him in a six-month warning period (State's Exhibit 9).

42. Therein, Powell gave Grievant "3" ratings in six of the 13 individual areas. Grievant received "4" ratings in three areas - i.e., job knowledge and skills, learning ability, technical or professional knowledge and ability. Grievant received "2" ratings in three areas - attitude, interest and initiative; quantity of work, effectiveness in pursuing tasks and achieving results. Grievant received a "1" rating in judgment (State's Exhibit 9).

43. In comments contained in the evaluation, Powell was critical of Grievant in the following specific areas: failure to complete assignments in a timely or satisfactory manner, with specific reference to failure to complete the assigned tasks on APA training requirements and failure to satisfactorily prioritize his work tasks; strong resistance to looking at ways to improve the CRASH schools; failure to show Powell materials developed prior to circulation; use of poor judgment in often personally driving the CRASH van; and acting negatively in group settings (State's Exhibit 9).

44. We conclude Powell had an adequate basis for faulting Grievant in these areas.

45. As a result of the evaluation, Powell placed Grievant in a six-month warning period to end on October 5, 1984. Grievant informed Grievant his "performance will be completely satisfactory or the warning period may be extended, he may be demoted, or dismissed" (State's Exhibit 9, Page 8).

46. Powell assigned Grievant a number of specific tasks for completion during the warning period and informed Grievant "the assignments ...must be fully completed... to complete this warning period with a satisfactory rating". Included among the specific tasks assigned to Grievant were completing the APA therapy requirement, assisting in the development of an alcohol screening assessment protocol and completing the report of the CRASH school study group (State's Exhibit 9, Pages 8 and 9).

47. In addition, Powell imposed a number of more general requirements, including the following:

Complete assignments on time as assigned. When problems arise they are to be brought to the attention of the Director immediately.

Eliminate negative attitude and resistance to assignments and requests.

Keep the Director fully informed of all CRASH related activities and initiatives.

(State's Exhibit 9, Page 8)

48. Grievant filed a grievance over the warning evaluation, and the grievance is before the Board for resolution.

49. In response to Grievant's suggestion and Powell's agreement, Michael Chater, a Personnel Administrator in the Agency of Human Services, participated in periodic performance appraisal meetings between Grievant and Powell during the warning period to assist in resolving communications problems between Powell and Grievant.

50. It was Grievant's responsibility to make application for so-called Section 402 Highway Safety Grants. On April 24, 1984, prior to receiving the aforementioned warning evaluation, Grievant submitted a grant request to the Governor's Highway Safety Program without having submitted the application to Powell for his prior review (State's Exhibit 48). Although Powell later criticized Grievant for not conforming to grant guidelines when submitting the grant requests, whatever deficiencies there may have been on the application did not affect the consideration of the grant proposal.

51. On May 18, 1984, Powell issued a written reprimand to Grievant for submitting the grant request without prior submission to Powell. Powell charged Grievant with not following ADAD policies and procedures issued February 27, 1984, and informed him:

...your continued unwillingness to follow Division policy will not be tolerated. Failure to adhere to Division policy in the performance of your duties in



the future, may result in further disciplinary action, up to and including dismissal.

(State's Exhibit 10)

52. Grievant was required to complete the report of the CRASH school study group by June 1, 1984. By memorandum of May 29, 1984, Grievant informed Powell the CRASH school study group had met two times and at least three more meetings would be needed to complete its assignment (State's Exhibit 20).

53. On June 11, 1984, Powell informed Grievant he was extending the deadline for submission of the CRASH school study group recommendations to September 21, 1984 (State's Exhibit 22).

54. On August 24, 1984, Grievant informed Powell the CRASH school study group project would not be completed until the next year.

55. On June 7, 1984, Grievant informed Powell by memorandum he was in the process of ordering CRASH school manuals and would be making changes in the cover to reflect that ADAD would be changing its name and would no longer be a part of the Department of Social and Rehabilitation Services (State's Exhibit 21). The CRASH school manual is a 107-page publication which is used in the CRASH schools for instructional purposes.

56. In July 1984, Grievant issued a revision of the CRASH manual. Grievant did not submit the revised manual to Powell for his prior review. The revisions made to the manual were generally not substantive - i.e., cover change, changes in telephone numbers. A few changes were made in substantive areas - i.e., change in economic cost associated with alcohol misuse, change in percentage of alcoholics whom are on "akid row", and a specification of the number of drinks causing a person to know if he or she is safe to drive. These changes were minor and insignificant (Grievant's Exhibits P, Q).

57. During the warning period, Grievant was asked by Barbara Mayo, an Assistant to Agency of Human Services Secretary Lloyd Novick, to submit a position paper to Novick concerning the wisdom of maintaining the enforcement component of CRASH within ADAD. Powell had previously submitted his views regarding this issue to Novick and Novick was seeking Grievant's views on the issue. Grievant, who had earlier made his views on the issue known to Powell, sent his reply to Mayo and a copy of the reply to Powell. Grievant did not submit the reply to Powell for his review prior to sending it to Mayo.

58. As part of his regular duties, Grievant was required to monitor each of the 11 CRASH schools in the State at least once each fiscal year, which runs from July to June. Monitoring consisted of a site visit, followed by completion of a monitoring report. On August 2, 1984, Powell asked Grievant to submit his monitoring reports for the fiscal year just ended by August 13, 1984 (State's Exhibit 41).

59. Grievant visited only seven of the 11 schools that year and submitted his monitoring reports on the schools to Powell (State's Exhibit 42). While Grievant did not monitor all the schools, he did have frequent contact with all the CRASH school contractors.

60. Leslie Dowling, the Director of Treatment within ADAD, had two full-time monitors working for her and had offered to Grievant to have the monitors assist in the monitoring of the CRASH schools. Grievant neglected to pursue these offers.

61. Grievant's warning evaluation called for the production of a alcohol screening assessment protocol to be completed by June 30, 1984. Grievant failed to timely submit the protocol as required. At a meeting

between Grievant and Powell on August 13, 1984, the entire assignment was renegotiated. First, the deadline was extended to August 20, 1984, a date chosen by Grievant. Second, the assignment was changed from the submission of an alcohol screening assessment protocol to the submission of a memorandum describing how Grievant was going to develop one.

62. On August 17, a Friday, Grievant had a memorandum on the alcohol screening assessment protocol handwritten and on his secretary's desk. His secretary was on annual leave that day. On Monday, August 20, both Grievant and Powell were out of the office. When Grievant called the office, he was informed his secretary was out that day. On the next day, his secretary came to work and typed the report. She then placed the report on Grievant's desk. Grievant signed it on Thursday, August 23, the day he returned to the office. That day he delivered it to Powell.

63 The memorandum submitted by Grievant to Powell did not describe how Grievant was going to develop an alcohol screening assessment protocol. The memorandum listed a number of questions that "remain to be answered" by the committee examining the issue and set forth Grievant's determination "that an alcohol assessment screening protocol be developed in conjunction with the alcohol screening planned in the CRASH schools" (State's Exhibit 27).

64. On August 28, 1984, Powell issued a written reprimand to Grievant for submitting the alcohol screening assessment protocol memorandum late (State's Exhibit 11).

65. On September 4, 1984, Grievant took four hours of annual leave without prior approval.

66. On September 12, 1984, Powell issued a memorandum to Grievant concerning Grievant's performance during the warning period. Powell was critical of Grievant in the following areas: 1) submitting the Section 402 grant request without Powell's review and contrary to requirements of the application process, 2) submitting the position paper to the Secretary of Human Services without Powell's review, 3) failure to monitor all the CRASH schools during FY84, 4) revising the CRASH manual without Powell's review, 5) submitting the alcohol screening assessment protocol assignment late and not describing the process for developing a protocol as required, 6) notifying Powell the report of the CRASH school study group would be completed well after the established deadline, and 7) taking four hours of annual leave on September 4, 1984, without prior approval (State's Exhibit 31).

67. Grievant was dismissed on October 5, 1984, at the end of his warning period. He was given a letter of dismissal and a separation performance evaluation (State's Exhibits 12, 13).

68. The dismissal letter, signed by Powell, cited Grievant's past unsatisfactory performance evaluations and provided in pertinent part:

This letter is to inform you that your performance during your most recent warning period (April 5, 1984 through October 5, 1984) has not met established performance standards or expectations, despite repeated discussions, warnings and reprimands. In view of this fact and after consideration of your attitude, past conduct and performance ratings, you are hereby being dismissed from your position as CRASH program chief with the office of Alcohol and Drug Abuse Programs, effective immediately. You will receive two weeks pay in lieu of notice.

...During the warning period you received a written reprimand on May 18, 1984, for failure to follow procedures for review of materials sent from your office and a subsequent oral reprimand for a similar reoccurrence. Furthermore, you received a written reprimand on August 28, 1984, concerning the unsatisfactory

completion of a project you had been given. In September, 1984, you were also orally reprimanded for failure to follow established leave time procedures. These oral and written reprimands all concerned specific deficiencies cited in your prior performance evaluations.

A major reason for this action concerns your failure to complete several assignments which I considered crucial to establish accountability for CRASH programs. In my view, these failures had little or nothing to do with a lack of ability; you had the skills, knowledge, time and resources to complete these tasks successfully. Your lack of success is due to your inability to accept the fact that you, and the program you administer, are accountable to anyone. You are accountable to me as the Office Director. Because you have failed to satisfy my expectations of you and because I have not perceived any effort or desire on your part to address either your attitudinal problems or the resulting performance shortcomings during the warning period, I feel this action is my only recourse.

Considering your capacity as a manager, and the importance of the CRASH programs to the goals of this office, your utter failure to cooperate and communicate with me as your supervisor cannot be excused or tolerated.

(State's Exhibit 13)

69. On the separation performance evaluation accompanying the dismissal letter, Powell rated Grievant's overall performance a "2". He gave Grievant "1" ratings in three individual areas - Attitude, Interest and Initiative; Judgment; and Effectiveness in Pursuing Tasks and Achieving Results. Grievant received "2" ratings in six areas - Quality of Work; Work habits; Planning and Organizing; Personal Relationships; Quantity of Work; Work Under Stress (State's Exhibit 12).

70. Powell was critical of Grievant in the following areas on the separation performance evaluation to support the individual ratings and overall rating given Grievant:

- a) Resistance to revision of the CRASH schools;
- b) Submission of the grant request to the Governor's Highway Safety Program without prior submission to Powell and not conforming to grant guidelines when submitting the grant request;

- c) Failure to monitor all the CRASH schools;
- d) Submitting the Alcohol Assessment Screening Protocol assignment late and without adequately completing the assignment;
- e) Failure to follow official policy on leave time;
- f) Showing little initiative in looking for ways to revitalize CRASH enforcement patrols;
- g) Failure to accept or cooperate with his supervisor;
- h. Continuing to miss deadlines for assignments (i.e., Alcohol Screening Assessment Protocol assignment, CRASH school study group project);
- i) Sending the position paper to the Human Services Secretary without Powell's review; and
- j) Revising the CRASH manual without Powell's review.

(State's Exhibit 12)

71. Powell noted on the evaluation that Grievant performed well in public information and media activities and legislative liaison work. Also, Grievant's performance with respect to those aspects of his employment not cited in the separation evaluation or dismissal letter was satisfactory and would not have provided grounds for any disciplinary action against Grievant (State's Exhibit 12).

72. Powell believed dismissal was the appropriate action because Grievant had demonstrated an unwillingness to change his behavior; that he had been warned on several occasions if his behavior did not change he could be dismissed and he failed to heed those warnings.

73. Powell's decision to discharge Grievant was approved by the then-Secretary of Human Services, John O'Donnell. O'Donnell concluded Grievant had exhibited a failure to cooperate with Powell and a failure to develop information necessary for CRASH to make policy decisions. O'Donnell concluded suspension was not an appropriate penalty because Grievant was on clear, prior notice that his job was in jeopardy.

74. In deciding to dismiss Grievant, neither Powell nor O'Donnell consulted with individuals in law enforcement, the CRASH schools, public information or education or the Vermont Legislature who came into contact with Grievant in the regular course of his job.

75. With respect to Powell's criticism of Grievant on the separation performance evaluation for showing little initiative in looking for ways to revitalize CRASH enforcement patrols, the evidence does not indicate Grievant was at fault in this regard. It is evident the difficulty with the operation of CRASH patrols stemmed from the lower pay budgeted for law enforcement officers working with CRASH than they would have received for competing patrols. Grievant cannot be faulted for these budgetary problems which were beyond his capacity to control (State's Exhibits 34 and 35).

76. Powell reprimanded subordinates other than Grievant for breaches of his leave slip and prior submission policies and for late submission of reports. None of these employees exhibited problems in these areas to the extent did Grievant.

#### OPINION

##### Grievance concerning Unsatisfactory Performance Evaluation and Placement in Warning Period

The first issue raised by Grievant is the validity of his May 1, 1984, performance evaluation and simultaneous placement in a warning period. Grievant contends the unsatisfactory annual performance evaluation he received was the result of personality disagreements and acrimony between Grievant and his supervisor; and not the result of unsuitable or inappropriate job performance by Grievant. Grievant cites the 1982-84 Contract between the State of Vermont and the Vermont State Employees' Association and Rule 13.016 of the Rules and Regulations for Personnel Administration as the controlling provisions for filing the grievance.

Grievant is not covered by the VSEA-State Contract for purposes of grieving his performance evaluation and placement in a warning period. Grievant is a manager pursuant to 3 VSA §902(16) and §906 and is, therefore, excluded from membership in a bargaining unit. As such, Grievant is not covered by the terms of the Agreement, except where certain terms of employment contained therein have been extended to him by action of the Secretary of Administration. Grievance of Russell, 7 VLRB 60, 80 (1983). Grievant has produced no evidence to show the Contract provisions related to performance evaluations and placement in a warning period have been extended to him.

Grievant is covered by the Personnel Rules. Section 13.016 of the Rules provides "an employee who disagrees with a performance evaluation report... may seek redress through the grievance procedure". In the context of this case, where the evaluation and placement in a warning period played a part in the Employer's ultimate dismissal of Grievant,



we believe we have jurisdiction under Rule 13.016 to determine whether the evaluation and placement in warning period has basis in fact; and if not, to order they be rescinded. Grievance of Carosella, 8 VLRB 137, 153-154.

Grievant's supervisor, Richard Powell, was critical of Grievant in the performance evaluation in the areas of failing to complete assignments in a timely or satisfactory manner, exhibiting a resistance to looking at ways to improve the CRASH schools, failing to show Powell materials developed prior to circulation, using poor judgment in often personally driving the CRASH van and acting negatively in group settings. We have concluded Powell had adequate basis for faulting Grievant in these areas.

These deficiencies on Grievant's part supported his unsatisfactory performance evaluation and placement in a warning period. Section 13.025 of the Personnel Rules provides "performance evaluation reports shall be used... in determining when a warning period is to be used to improve employee performance". Powell was justified in placing Grievant in a warning period in an effort to improve his performance.

#### Dismissal

As a manager, Grievant can only be dismissed for cause. The analysis we employ is the same we have applied when reviewing disciplinary actions against State employees covered by the contractual "just cause standard", as described in Grievance of Collieran and Britt, 6 VLRB 235 (1983). Grievance of Morrissey, 7 VLRB 129 (1984). Grievance of Russell, supra.

We note that the latest collective bargaining contract between VSEA and the State, effective for the period July 1, 1984 to June 30, 1986, changes the Board's duty of review in dismissal cases to some extent and

provides for different duties of review depending on whether the dismissal was for performance reasons or for misconduct. Article 17, Section 9 and 10. Grievance of Sherman, 7 VLRB 380 (1984). However, these provisions do not apply to Grievant, a manager. Morrissey, supra. Russell, supra. The appropriateness of his dismissal must be tested according to the standard of review set forth in the case law preceding the latest contract; namely that established in Colleran and Britt, supra.

There are two requisite elements which establish cause for dismissal:

1) it is reasonable to discharge or otherwise discipline an employee because of certain conduct and 2) the employee had fair notice, express or fairly implied, that such conduct would be ground for discharge. Colleran and Britt, supra, at 265. It is reasonable to dismiss an employee if his conduct constituted some substantial shortcoming detrimental to the employer's interests which the law and sound public opinion recognize as a good cause for dismissal. In re Muzzy, 141 Vt. 463, 468 (1982). The Board will only alter the penalty selected by the employer if the employer imposes a penalty so severe, given the proven facts, that its choice amounts to an abuse of discretion. Colleran and Britt, supra.

In determining whether management properly exercised its discretion here and had cause to dismiss Grievant, the issue as we see it is when do "molehills" of performance deficiencies become "mountains" sufficient to constitute grounds for dismissal. Instances of repeated conduct insufficient of themselves may accumulate so as to provide just cause for dismissal as long as the employee is on fair notice the conduct could result in dismissal. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). Grievance of Cadreault, 8 VLRB 87, 130 (1985). Grievance of Cook, 3 VLRB 105, 126-127 (1980).

In reviewing the stated reasons for Grievant's dismissal, it is difficult to categorize precisely what management views as constituting cause for dismissal but the gist of the charge appears to concern Grievant's alleged "utter failure to cooperate and communicate" with Powell, his supervisor.

At the outset, we conclude some of the reasons cited in support of dismissal are not sustained by the evidence. Specifically, we conclude Grievant was not at fault for sending a position paper to the Human Services Secretary without Powell's review and for failing to revitalize CRASH patrols.

Powell had implemented a policy providing that all material prepared by staff for outside distribution or submission to the SRS Commissioner or Human Services Secretary must be reviewed by him prior to submission. It was reasonable for Grievant to assume the position paper fell outside this provision. The position paper was requested by Human Services Secretary Novick, seeking Grievant's views on the issue of maintaining the enforcement component of CRASH within ADAD. Powell had previously submitted his views regarding this issue to Novick and Novick was specifically seeking Grievant's views. Under such circumstances, prior submission to Powell would have served no purpose since it would have been inappropriate for him to revise any of Grievant's expressed views. Grievant did keep Powell informed of his actions by providing Powell with a copy of the position paper.

Grievant was not at fault for showing little initiative in looking for ways to revitalize CRASH enforcement patrols. Management introduced no evidence to show Grievant could have revitalized the patrols. The difficulty with operating CRASH patrols stemmed from the relatively low pay offered to law enforcement officers for CRASH, a matter which Grievant did not control.

The fact all charges against Grievant have not been sustained does not mean management's dismissal action must be reversed. See Grievance of Bishop, 5 VLRB 347 (1982). If any of the charges relied on by management when it imposed the penalty are not supported by the evidence, we will determine whether the remaining proven charges justify the penalty. Grievance of Colleran and Britt, supra.

The evidence did sustain management's charges against Grievant in the areas of submitting a grant request to the Governor's Highway Safety Program without prior submission to Powell and without conforming to grant request guidelines, revising the CRASH manual without Powell's review, missing a few deadlines for and inadequately completing a few assignments, failing to monitor all the CRASH schools and failing in one instance to follow official policy on leave time.

Grievant was on fair notice all these deficiencies could be grounds for discipline. The issue is whether the deficiencies, in total, constitute a substantial shortcoming detrimental to the the State's interests. Muzzy, supra. In determining whether these various "molehill" incidents constituted a "mountain" sufficient to sustain Grievant's discharge, we look to the Colleran and Britt factors. In addition to notice, the pertinent factors here are the nature and seriousness of the offenses and their relation to the employee's duties, position and responsibilities; the employee's job level; the employee's past work record; the effect of the offenses upon the employee's ability to perform at a satisfactory level; and their effect upon supervisors' confidence and the employee's ability to perform assigned duties.

In weighing these factors, we conclude Grievant's deficiencies cited in dismissing him did not amount to constituting a substantial shortcoming detrimental to the State's interests, and the State abused its discretion by dismissing him. In looking at substantiality in the context of this case, the proven charges must either indicate deficiencies significantly affecting the operation of the CRASH program or indicate Grievant was unwilling to accept Powell's supervisory authority over him.

We conclude the Employer did not establish by a preponderance of the evidence Grievant's deficiencies were serious enough to adversely affect the operation of the CRASH program and warrant Grievant's dismissal. For instance, Grievant submitting a grant request without Powell's review and without conforming to grant request guidelines did not adversely affect the consideration of the grant proposal. Likewise, while Grievant did not monitor all the CRASH schools as required by Powell, he did have frequent contact with all the CRASH school contractors. The State did not establish Grievant's actions in this regard or any other actions with regard to the CRASH schools adversely affected the schools' operation. With respect to the CRASH manual, the revisions made by Grievant were generally not substantive; and those changes made in substantive areas were minor and insignificant. While Grievant may have violated the letter of the prior submission requirement here, the evidence does not indicate the violation affected the content of the CRASH manual in any significant way.

The evidence established Grievant missed deadlines for a few assignments and inadequately completed an assignment (i.e., Alcohol Screening Assessment Protocol assignment, CRASH school study group

project). While a supervisor obviously has a right to expect an employee to complete assignments adequately and in a timely manner, the State failed to establish Grievant's failure in this regard substantially impacted on the effective operation of the CRASH program. Finally, the State did not establish Grievant's taking of annual leave without prior approval was a conscious attempt to violate a policy or that it was a detriment to the Employer's operations.

We also conclude the employer did not establish Grievant was unwilling to accept Powell's supervisory authority over him. At the heart of this case is an apparent personality clash between Grievant and Powell, his supervisor. We are concerned management did not see the obvious potential for this occurring when Powell was appointed to supervise Grievant and made no effort to counsel both persons as good labor relations practice requires. While Grievant did not carry out all duties assigned by Powell as required, his actions did not rise to "an utter failure to cooperate and communicate with Powell", as charged in the dismissal letter. The problems between Grievant and Powell are not entirely Grievant's fault, and those problems attributable to Grievant do not rise to the level that he should be discharged. Unlike the employee in Grievance of Gadreault, supra, Grievant's offenses did not rise to the level where his supervisor could no longer be confident Grievant would perform his assigned duties.

Grievant's length of service and past work record indicate he is extremely well qualified and able to perform his job duties satisfactorily. The proven deficiencies cited as reasons for dismissal are not significant enough to override Grievant's strengths. We are convinced by the evidence *Grievant satisfactorily performed his duties for the most part.*

Grievant's performance with respect to those aspects of employment not cited as bases for dismissal was satisfactory, and it is evident those areas constituted the bulk of his duties. As the coordinator of the State's efforts against the effects of drunk driving, he was recognized as an expert in the field and had satisfactory relations with law enforcement officials and the Legislature. He performed well in public information and media activities. He coordinated the CRASH schools, which by all indications operated well.

One aspect of this case which disturbs us relates to Grievant's past work record. The evidence indicates that during the period of late 1982 to early 1983, Grievant committed several extremely serious infractions. He mishandled funds in connection with a drinking demonstration and then gave conflicting accounts of funds collected; he received double reimbursement for expenses incurred on a business trip and improperly made no move to reimburse the State for the expenses; and he stored alcohol belonging to the State in his home without accounting or records. Despite these serious offenses, management took the relatively minor action of issuing him a written reprimand and giving him an unsatisfactory rating in the area of judgment on his annual performance evaluation. It is apparent to us a more severe response by management was warranted, but the discipline levied was obviously adequate in management's opinion.

This aspect of the case has disturbed us to the extent we have considered whether it should play a significant role in determining whether Grievant's dismissal should be upheld. However, in reviewing the dismissal of a State employee, we must not look beyond the reasons given by the employer in the dismissal letter for the actions taken. Grievance of

Patterson, 5 VLRB 376 (1982). Grievance of Swainbank, 3 VLRB 34 (1980). Here, Powell cited past performance problems by Grievant but did not specifically cite the above incidents. While Grievant's past work record is a relevant factor to consider in determining the legitimacy of a disciplinary action, Colleran and Britt, supra, it is evident Powell did not place great weight on these incidents in deciding to dismiss Grievant.

Further, the Supreme Court has ruled that if an employee dismissed at the conclusion of a warning period "was in reality dismissed for deficiencies which occurred prior to the warning period, then it was not a warning period at all, and notice might well be inadequate". Muzzy, supra, at 437 (1982). The above offenses occurred well before the warning period.

At the time the offenses occurred, management took action which it deemed appropriate. While, by all indications, that action was too lenient, we cannot now in essence increase the discipline imposed then by weighing the offenses heavily in our decision. However, we place Grievant on clear notice we would look with extreme disfavor on any similar offenses committed in the future.

Before addressing what remedy to apply in this case, we note Grievant has claimed his dismissal was an effort to dismantle his position and was a discriminatory action against him for grieving the earlier performance evaluation and placement in a warning period. Grievant introduced no specific evidence to support these claims and, upon reviewing the record as a whole, we cannot conclude these reasons played any part in the dismissal decision.



#### Remedy

We turn now to determining what remedy to apply in this case. We have concluded cause did not exist for Grievant's dismissal. However, we have also concluded Grievant demonstrated some performance deficiencies during the warning period in areas for which he was placed in a warning period. At the time Grievant was dismissed, he had reached the end of his warning period. Instead of dismissing Grievant, Powell could have extended Grievant's warning period. Under such circumstances, we believe an appropriate remedy is to reinstate Grievant with full backpay, but allow management, if it chooses, to extend Grievant's warning period for a specified period. The basis for extension of the period shall be consistent with and limited to deficiencies cited in this decision.

#### ORDER

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

- 1) The Grievance of Darwin Merrill in Docket No. 84-45, concerning an unsatisfactory performance evaluation Grievant received on May 1, 1984, is DENIED;
- 2) The Grievance of Darwin Merrill in Docket No. 84-46, concerning his dismissal from State employment, is SUSTAINED; and
  - a) Grievant shall be reinstated to his position as CRASH Program Chief;
  - b) The Employer, if it so chooses, may extend the warning period Grievant was in at the time of his dismissal for a specified period terminating no later than 90 days from the date of this order; the basis for such a warning period shall be consistent

with and limited to deficiencies cited in this decision.

The Employer shall notify the Board within 30 days of this Order whether it intends to so extend Grievant's warning period;

c) Grievant shall be awarded back pay and benefits from the effective date of his discharge until his reinstatement for all hours of his regularly-assigned shift, minus any income (including unemployment compensation received and not paid back) received by Grievant in the interim;

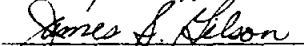
d) The interest due Grievant on back pay shall be at the rate of 12 percent per annum and shall run from the date each paycheck was due during the period commencing with Grievant's dismissal, and ending on the date of his reinstatement; such interest for each paycheck date shall be computed from the amount of each paycheck minus unemployment compensation received by Grievant during the payroll period; and

e) The parties shall submit to the Board by October 15, 1985, a proposed order indicating the specific amount of back pay and other benefits due Grievant; and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Board.

Dated this 3rd day of October, 1985, at Montpelier, Vermont

VERMONT LABOR RELATIONS BOARD

  
William G. Kemsley, Sr.

  
James S. Gilson