VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 84-44
DAVID REGAN	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On September 27, 1984, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of David Regan ("Grievant"). The grievance alleged the dismissal of Grievant from his position as Human Services Aide with the State of Vermont, Department of Social Welfare, violated Article 17 of the Contract between VSEA and the State, effective for the period July 1, 1984, to June 30, 1986 ("Contract"), in that there was no just cause for dismissal, the State failed to follow the progressive discipline requirements of the Contract and this was not an appropriate case for bypass, and the imposition of dismsssal was too severe a penalty.

Hearings were held before Board Members James S. Gilson, Acting Chairman, and William G. Kemsley, Sr., on April 11, 18 and 25, 1985; and June 3, 1985. Board Chairman Kimberly B. Cheney was present at the April 11, 1985, hearing, but was absent from the remaining days of hearing. He has reviewed the record and participated in the decision. Assistant Attorney General Michael Seibert represented the State. VSEA Staff Attorney Michael Zimmerman represented Grievant.

Grievant filed Requested Findings of Fact and a Memorandum of Law on July 29, 1985. The State filed a Memorandum of Law on July 29, 1985. The State and Grievant each filed Reply Briefs on August 5, 1985.

FINDINGS OF FACT

1. Grievant was continuously employed as a classified employee of the State from January 22, 1968, until his dismissal, which was effective on August 27, 1984 (Grievant's Exhibit 5, Page 1; Grievant's Exhibit 7).

2. From January 20, 1969, after serving one year as a Social Worker Trainee, until August 27, 1979, Grievant served as a Social Worker. On August 27, 1979, Grievant was involuntarily demoted to Human Services Aide (Pay Scale 11). This demotion was not for disciplinary reasons (See Board Docket No. 79-88S). Grievant held the position of Human Services Aide until his dismissal (Grievant's Exhibit 5, Pages 1-6, Grievant's Exhibit 7).

3. During the entire period of his service, Grievant, with two exceptions, received annual performance evaluations which rated his overall performance as at least satisfactory, including the last performance evaluation he received prior to his dismissal (i.e., the one covering the period July 1, 1982 to July 22, 1983). In two performance evaluations (i.e., covering the periods December 1, 1971, to April 1973 and December 8, 1981, to July 18, 1982), Grievant received less than satisfactory overall ratings. However, these evaluations were upgraded to satisfactory ratings through the grievance procedure (Grievant's Exhibit 6).

4. Prior to being dismissed on August 27, 1984, Grievant had never been suspended without pay, placed in a warning period or demoted for disciplinary reasons. He did receive two letters of reprimand sometime between 1979 and January, 1984. One reprimand was issued for Grievant's use of profanity. The second reprimand was for Grievant contacting VSEA without supervisory approval.

5. Early in his career, Grievant's duties involved determining clients' eligibility for financial assistance (e.g., food stamps), and providing services to the disabled, the elderly and the blind. From about 1974 to 1978, Grievant worked part-time in the WIN Program. Beginning in 1978, he worked full-time in the WIN Program.

6. Grievant's work was never primarily in the child protective services area, although he did investigate a few child abuse cases, the last one being in 1974. Grievant received no specific training concerning child abuse.

7. Throughout his service, Grievant was unaware of the specifics of the law concerning the reporting of child abuse. While he was aware one of the functions of the Department of Social and Rehabilitation Services ("SRS") was to investigate child abuse and neglect complaints, he was unaware of the law concerning who was required to report child abuse to SRS.

8. In 1984, the law concerning the reporting of suspected child abuse to SRS provided, in pertinent part, as follows:

> a) Any... social worker... who has reasonable cause to believe that any child has been abused... shall report or cause a report to be made...
>
> b) Any other concerned person not listed in subsection (a) who has reasonable cause to believe that any child has been abused... may report or cause a report to be made... (33 VSA §683).

9. As a Human Services Aide, Grievant had no mandatory duty under the law to report child abuse to SRS.

10. From January 22, 1968, until January 16, 1984, Grievant's duty station was the Social Welfare District Office, Newport, Vermont. On January 16, 1984, Grievant's position was transferred to the Burlington Social Welfare District Office (Grievant's Exhibit 5, Page 7).

11. Human Services Aides function chiefly as assistants to Social Workers to free social workers to spend their time performing difficult casework activities and addressing substantive problems of clients. Aides make clients aware of Human Services programs available to them and refer clients to service providers. Aides acquire information on the social and medical history of clients and prepare required forms. If a serious problem involving a client which requires counseling is brought to the attention of the Aide, the Aide is required to bring the problem to the attention of a Social Worker. Aides do not carry a caseload (Grievant's Exhibit 1-3, State's Exhibit 5).

12. From January 16, 1984, to Grievant's dismissal, the chain of command, from Grievant to the Commissioner of the Department of Social Welfare, was as follows:

a. Grievant;
b. Fred Koch, Casework Supervisor, Grievant's immediate supervisor;
c. Linda Knosp, District Director of the Burlington District Office, Koch's immediate supervisor, and the most senior Department employee in the Burlington Office;
d. Jane Kitchell, Chief of Field Operations for the Department, who worked in the Waterbury Central Office;
e. Vasili Bellini, Operations Chief, who worked in the Waterbury Central Office;
f. Paul Ohlson, Deputy Commissioner; and
g. James P. O'Rourke, Commissioner and appointing authority.

13. The purpose of the WIN Program was to get people off Welfare and into the work force. The means employed to realize that end is to combine agencies - Department of Employment and Training to handle employment aspects of a case (e.g., training, job referrals), and the Department of Social Welfare to identify client barriers to employment (e.g., drug addiction, educational shortcomings, etc.) and to assist in overcoming those barriers.

14. In the Burlington District Office, there were three teams in the WIN Unit. Each team had three members: a case manager employed by the Department of Employment and Training, a social worker and an aide.

15. While Grievant was working in the Burlington Office, he was assigned to Team 2. Other members of Team 2 were Marty Bissonette, case manager (an employee of the Department of Employment and Training); and Tom Zenaty, social worker. Team 1 was comprised of Julia Chase, case manager; Maxine Holmes, social worker; and Lynn Varney, aide. Team 3 was comprised of, in part, Bill Knaus, case manager; and Gail Fisk, aide.

16. Based on less than complimentary reports he received of Grievant's performance from persons who had worked with Grievant in Newport, Koch was not pleased when Grievant was sent to work in Burlington. Prior to Grievant arriving in Burlington, Koch told office staff Grievant had some problems in the Newport office and indicated he was not pleased Grievant was coming to work in Burlington.

17. In a February 4, 1980, memorandum to District Directors, the Department of Social Welfare Operations and Self-Support Services Division set forth what has come to be known as "the three contact rule". That memorandum provided, in pertinent part, as follows:

> Unless a contact is part of routine service, such as driving a client to a doctors (sic) appointment, the aide is to have no more than a maximum of three contacts with any one client without a social worker being present during such a contact. This...precludes the aide from getting involved in what can be described as professional counseling... (I)f the aide in screening the client... identifies the need for supportive counseling of some sort, the social worker has responsibility for following up on the assessment and the development of an on-going case plan...
>
> (State's Exhibit 5)

18. The purpose of the memorandum was to make certain Human Services aides did not work out of class and take responsibility for cases, thereby performing the work of social workers. The memorandum contained no definition of "contact".

19. When Grievant arrived in the Burlington office, Koch told Grievant about the three-contact rule and told him it was adhered to in that office.

20. Grievant was unclear as to specifically what constituted a "contact" under the three-contact rule.

21. When he first arrived in the Burlington office, Grievant and Bissonnette, the Department of Employment and Training employee on Grievant's WIN team, had difficulties working together. In an effort to overcome these difficulties and other problems Grievant was having understanding his role, Grievant and Koch had several meetings between January and June, 1984. During these meetings, Koch informed Grievant his major role was to serve as a service needs identifier and program orientator for clients and not to serve primarily as a client advocate. Koch informed Grievant this role often meant confronting a client's behavior and seeking to change it and that this function had to be balanced with having empathy for a client's position. Koch also cautioned Grievant against being critical of the WIN program in front of clients. Koch informed Grievant he was required to set aside his personal beliefs to perform the requirements of the job if they were contrary to the purpose of the WIN program. Koch further discussed the issue of client confidentiality with Grievant. Koch told Grievant he could not guarantee confidentiality to a client where a client: 1) was threatening damage to himself or herself or others; 2) was threatening to steal property, or

3) was lying about Welfare eligibility. Koch also told Grievant he needed to be more comprehensive and specific with social workers about what he was doing with clients. During these meetings, he further told Grievant he was directly accountable to him and to communicate problems to him (State's Exhibit 6).

22. At a June 7 meeting between Grievant and Koch, Grievant informed Koch he was not sure he wanted to continue meeting with him without a VSEA representative present. Koch told Grievant to let him know when he wanted a VSEA representative present and he would permit it.

23. On June 22, 1984, Koch addressed a memorandum to Grievant in response to Grievant's request to put in writing performance issues raised by Koch "over the last couple of weeks". Among the "concerns and expectations" noted by Koch in "judging the adequacy" of Grievant's work were the following: 1) a need to be more focused, timely and directly responsive when communicating, 2) a need to reduce isolating himself from staff, which isolation can lead to sabotage within the client-agency system and can be considered insubordination of Grievant's obligation to be accountable to Koch and Grievant's teammates about his activities with clients, 3) a need for Grievant to look at his personal philosophies such as no handshaking with staff or clients, not believing in giving and getting constructive feedback, having the conviction that his only role in the agency is that of client advocate and having the conviction that management systems are only out to take care of themselves or "slit the throats" of their staff. Koch stated these were the types of beliefs that could affect Grievant's working relationships and behavior in such a way as to also sabotage the client-agency system and his own level of

subordination to his job functions. Koch informed Grievant he was still uncertain about putting him in a warning period (State's Exhibit 3).

24. On Tuesday, July 31, 1984, Grievant was serving as a facilitator for a meeting of a group of Welfare applicants. The purpose of the meeting was to discuss vocational goals of applicants and job leads. Among the group of applicants was Ray G., whom Grievant had never met before. During the course of the meeting, Ray G., who was very talkative and dominating, said he was concerned he had the potential of killing his best friend, given the right circumstances. Grievant did not discuss this comment with any person in the office.

25. On Thursday, August 2, 1984, Grievant attended another applicant group meeting. Ray G. was present. That was Grievant's second encounter with Ray G. Group applicant meetings did not count as "contacts" under the three-contact rule. Thus, neither the July 31 nor the August 2 encounters with Ray G. counted as "contacts" under the three-contact rule.

26. Grievant's third encounter with Ray G. occurred on Monday, August 6, 1984, during another applicant group meeting. That meeting was co-facilitated by Grievant and Maxine Holmes, the social worker assigned to WIN Team 1. Holmes was not present during the entire meeting. While Holmes was present, Ray G. talked about subjects and used language that Holmes found to be inappropriate.

27. During either the August 2, 1984, meeting or the August 6, 1984, meeting, Ray G. first mentioned his son had been sexually abused by Ray G.'s brother. Whenever it was, Holmes was not present.

28. When Ray G. mentioned the sexual abuse of his son, the substance of his remarks to the group was that he had, in the past, considered killing his brother because his brother had sexually abused his son; that he had, on that occasion, waited, with a sawed-off shotgun, for his brother to return home, but he did not; and that the child was presently under constant supervision by Ray G. and his wife as a precaution against a recurrence of sexual abuse. Ray G. did not give the specifics of the nature of the sexual abuse, and did not give the date of the occurrence. Grievant formed the opinion it had occurred long enough in the past that Ray G. presented no immediate threat to his brother's life.

29. Immediately after the conclusion of the August 6 meeting, Grievant and Holmes had a brief private conversation, which took place in the conference room which had been used for the group meeting. Grievant told Holmes he would like her advice but he would not necessarily take it. Grievant asked Holmes what she would do if a client was talking about possibly murdering someone. Holmes asked Grievant to identify the person. Grievant indicated Ray G. was angry at his brother because of child molestation. Holmes asked Grievant how he would feel if Ray G. actually murdered his brother. Holmes told Grievant the best thing for him to do was to meet with Ray G. away from the group and seek to get more specific information. Grievant took Holmes' comments to mean she wanted him to explore that issue with Ray G. At that point, Ray G. opened the door, interrupting the conversation between Grievant and Holmes. Grievant, concerned that Holmes might have a point, determined he should speak to Ray G. to determine whether there was a present danger that Ray G. might take his brother's life. Grievant invited Holmes to stay while he and Ray G. talked, but Holmes declined, and left Grievant and Ray G.

alone in the room. Holmes did not ask Grievant to report the results of his conversation with Ray G. to her, but she assumed he would.

30. After Holmes left the room, Grievant and Ray G. had a private conversation which lasted about 30 minutes. This counted as the first "contact" under the three-contact rule. Grievant told Ray G. he had told Holmes about Ray G.'s homicidal thoughts about his brother because of the brother's sexual abuse of his son. Although Grievant offered to help Ray G. at any time, Ray G. did not ask that Grievant, or the WIN unit, do anything about the child abuse issue. Ray G. did not mention the specific sexual act, or when it occurred. He did express the desire to avoid public disclosure. From this conversation, Grievant concluded the life of Ray G.'s brother was not in immediate danger. Ray G. made no statements which indicated he was ready to take his own life.

31. After Grievant met with Ray G., Holmes asked Grievant that afternoon how the meeting had gone with Ray G. Grievant shrugged his shoulders. Holmes took that to mean "things were OK".

32. Subsequently that day, Ray G. came into Lynn Varney's cubicle where Holmes was also present. Varney was the aide assigned to WIN Team 1. Ray G. sat down, and started talking to Holmes and Varney about his previous employment in a pornographic bookstore. Holmes, who was disgusted, left the cubicle. She made no effort to question Ray G. about any subject.

33. On Thursday, August 9, 1984, Ray G. came into the Burlington office, and spoke with Varney. He was agitated, and asked to see Grievant. Grievant was not in the office, but Varney felt that Ray G., because of his agitation, needed to speak to someone, so she went to Holmes and told her that Ray G. wanted to speak with someone. Holmes and Varney

returned to Varney's cubicle, where Ray G. was waiting. Ray G. refused to talk with Holmes, saying he did not want to talk to a woman about it. Holmes left, and went into a morning applicant group meeting. Following the departure of Holmes, however, Ray G. told Varney about the sexual abuse of his son, specifically that his brother had fondled his son's genitals. He told Varney he needed someone to confide in, and he did not want the matter blown out of proportion, because his aim was to help his brother without hurting their father. Ray G. also told Varney about a previous sexual abuse incident concerning his brother, and that, in that incident, their father had "gotten him (the brother) off". Varney's advice to Ray G. was to go to Legal Aid for advice on how to keep the incident quiet. Varney did not report the incident to SRS, and did not advise Ray G. to report the incident to SRS.

34. Later that day, Varney and Holmes happened to meet in the washroom. Varney told Holmes Ray G.'s story about his brother's molestation of his child, and also told her she had referred Ray G. to Legal Aid. Holmes did not indicate to Varney that her actions had been incorrect, and considered the referral to Legal Aid as a correct action.

35. Also on August 9, 1984, Grievant had a chance meeting with Ray G. As Grievant was walking past Doughboy's, a Burlington restaurant, Ray G. hollered to him and asked to speak with him. Ray G. asked Grievant if his brother could be required to obtain counseling without going to court, and without publicity. Grievant told Ray G. he would look into it. Ray G. told Grievant he would contact him at some point to find out the results of Grievant's inquiry. This was Grievant's second contact with Ray G. under the three-contact rule.

36. On August 9, 1984, Grievant went to Tom Zenaty, the social worker on Grievant's WIN team, and asked if they could have an off-the-record conversation. Grievant asked Zenaty for assurances he would keep the matter confidential. Zenaty told Grievant he could not give him such assurances. Without mentioning any names, and phrasing his inquiry in terms of a hypothetical situation, Grievant asked Zenaty if child abuse were reported to SRS, whether the perpetrator's name could be withheld from the public. Zenaty explained the perpetrator's name would be publicized. Grievant did not identify the client and did not identify the team handling the case (i.e., Team 1). Zenaty asked Grievant if the case was a Team 2 case, but Grievant did not tell him. Grievant did not trust Zenaty, whom he viewed as a close ally of Koch. Zenaty told Grievant it was Grievant's responsibility to refer sexual abuse issues to the appropriate WIN social worker.

37. At some time between August 9, 1984, and August 14, 1984, Grievant approached Steve Ross, a social worker, for advice. Grievant asked Ross if he, Grievant, had an obligation under the law to report child abuse to SRS. Ross told Grievant he did not have a legal duty to report child abuse to SRS, but that he had a moral duty to do so.

38. On August 9, 1984, Grievant made an anonymous phone call to SRS to determine if that Agency were involved in a sexual abuse case, whether criminal prosecution was a prerequisite to mandatory counseling for the perpetrator. The person to whom Grievant spoke was not able to answer his question, and Grievant did not follow up on his inquiry with SRS. Between August 9, 1984 and August 14, 1984, Grievant also contacted Howard Mental Health to determine whether Ray G.'s brother

could be ordered to undergo counseling without going through criminal prosecution and its attendant publicity. Grievant spoke to a psychiatrist. The psychiatrist called SRS and reported back to Grievant that SRS could recommend that the State's Attorney not prosecute, but that the ultimate decision was the State's Attorney's. The psychiatrist also told Grievant the child-victim would probably need counseling. The psychiatrist suggested Grievant try and get Ray G. to contact Howard Mental Health.

39. Also during the period August 9, 1984, to August 14, 1984, Grievant contacted a private mental health counselor. That counselor told Grievant he could not work with the client without reporting the abuse to SRS.

40. The purpose of Grievant's contacts during the period August 9, 1984, to August 14, 1984, was to find out if the perpetrator of sexual abuse of a child could be required to undergo counseling without criminal prosecution and its attendant publicity. He sought that information as the result of Ray G.'s request during their meeting at the Doughboy Restaurant. During that period, he intentionally withheld information regarding Ray G. from SRS and he did not want Koch to know what he was doing concerning the case. Grievant feared that reporting the information up the chain of command in his office and to SRS would be detrimental to Ray G. and his family, and might make the situation worse.

41. On August 14, 1984, Ray G. came into the Burlington office for a "recipient group" meeting. Before the meeting began, Ray G. went to Varney's office to chat. During the course of the conversation, Ray G. said, "I might as well blow my brains out", or words to that effect. Varney thought that Ray G. might be serious and went to Holmes for advice. Holmes recommended to Varney that she refer Ray G. to a "crisis clinic", that she have Ray G. execute a "no suicide contract", and that she tell Ray G. that he was free to contact Varney at home during non-

working hours. Varney then went back to see Ray G. and followed Holmes' advice.

42. By this time, Holmes knew: 1) Ray G. had talked about murder; 2) Ray G. was angry at his brother because of child abuse; 3) Ray G.'s brother had fondled his son's genitals; 4) Varney had referred Ray G. to Legal Aid concerning the sexual abuse issue; and 5) Ray G. had threatened to commit suicide. Holmes did not know of Grievant's investigation on Ray G.'s behalf concerning whether the perpetrator of sexual abuse of a child could be required to undergo counseling without criminal prosecution and its attendant publicity. She also did not know that during the period Ray G. claimed he had considered killing his brother because his brother had sexually abused his son, he claimed he had waited with a sawed-off shotgun for his brother to return home.

43. After his dealings with Varney, Ray G. attended the recipient group meeting, which was co-facilitated by Holmes and Varney. During the meeting, Ray G. asked to meet with Grievant. Varney went to Grievant and told him Ray G. wanted to meet with him. She also told Grievant about Ray G.'s "suicide threat". That was the first knowledge Grievant had of such a threat.

44. Grievant then met with Ray G. Grievant brought up the subject of Ray G.'s "suicide threat", and told Ray G. he should contact Grievant before he did such a thing. Grievant also reported to Ray G. the results of his inquiries between August 9 and 14, and, in addition, gave Ray G. a piece of paper containing his notes concerning those inquiries. Grievant told Ray G. mandatory counseling for his brother could not be accomplished without going through the courts. Grievant's notes contained the name and telephone number of the psychiatrist at Howard Mental Health, an indication that Ray G.'s child would encounter problems if he did not undergo psychotherapy, and a notation to the effect that SRS could only

recommend to the State's Attorney that a perpetrator not be prosecuted, but that there was no guarantee the recommendation would be followed. This was the third contact Grievant had with Ray G. under the three-contact rule (State's Exhibit 1).

45. After she had completed the recipient group meeting and after Varney had shown her the "no suicide" contract signed by Ray G., Holmes went to Grievant to find out whether Grievant knew of Ray G.'s suicide threat. Holmes asked Grievant if he knew of Ray G.'s suicide threat. Grievant answered he did know of it. Holmes asked Grievant what he would do if he received a suicide threat. Grievant told Holmes he did not know if he would report such a threat without the client's consent. Holmes was upset with Grievant's response and concluded Grievant may not share such information concerning her clients with her. Holmes determined, in her own mind, she did not want Grievant to work with any of her clients.

46. Following her conversation with Grievant, Holmes was upset and met with Koch. Holmes told Koch she had concerns about Grievant's attitude; that she felt if a client talked about homicide or suicide, Grievant might not take appropriate action. She also told Koch she felt Grievant would not respond to her directions, and that Grievant would not share information with her on her cases. Holmes then told Koch about problems in Ray G.'s case and that she needed Koch's help on the case. Holmes told Koch Grievant had told her about the sexual abuse on August 6, 1984.

47. Holmes told Koch Varney had also done some work on Ray G.'s case. While meeting with Holmes, Koch asked Varney to join them to indicate what she knew about Ray G.'s case. Varney told Koch she knew about the homicide issue, the sexual abuse issue, and Ray G.'s suicide threat. With respect to the latter, Varney told Koch about her "no suicide contract" with Ray G. that day. Varney told Koch Ray G. had told her about the sexual abuse on August 9, 1984. Koch determined there were "missing pieces" and that he needed to speak

to Grievant about the case. Koch requested Grievant join them in Koch's cubicle.

48. When Grievant arrived in Koch's cubicle, Koch did not tell Grievant he had the right to have a VSEA representative present. Grievant did not request to have a VSEA representative present. Koch did not call Grievant into the meeting for the purpose of investigating whether Grievant should be disciplined.

49. Koch asked Grievant whether he knew about sexual abuse and suicide issues in Ray G.'s case. Grievant said he did know about such issues. Koch asked Grievant questions seeking to find out what contacts Grievant had made and what he had been doing about Ray G.'s case. Grievant responded he could not answer those questions due to client confidentiality. Koch told Grievant this was a supervisory issue and that he needed the information. Koch told Grievant client confidentiality was not violated by talking to him. Grievant told Koch he had done nothing on the case and had done no probing to get specifics on the abuse issue. Koch then asked Grievant if he had spoken to anyone else in the office about Ray G.'s case. Grievant responded he could not asnwer that question. Koch then told Grievant to "get the fuck out". Grievant left Koch's cubicle.

50. As a result of what he had been told by Holmes and Varney, Koch concluded a report of child abuse had to be filed with SRS. Immediately after Grievant's departure from the cubicle, Koch, Holmes and Varney discussed a plan of action to handle the sexual abuse issue in Ray G.'s case. Since SRS had indicated it preferred that affected parties in child abuse cases make reports themselves, they resolved to immediately contact Ray G. and inform him of the need to contact SRS in order to report the sexual abuse of Ray G.'s son. Neither Holmes nor Varney told Koch about their previous referral of Ray G. to Legal Aid.

51. Later that afternoon, Holmes and Varney drove to Ray G.'s residence. Holmes told Ray G. she, as a social worker, had a duty to report child abuse to SRS, but that she preferred that he report it to SRS. After some discussion, Ray G. did agree to report the abuse to SRS. Holmes tried to get Ray G. to make a telephone call to SRS then from a public pay phone in the campground at which he was staying, but Ray G. refused, saying he preferred to make the report in person. He told Holmes he would make a personal report to SRS on Friday, August 17, 1984. Holmes told Ray G. if he did not report the abuse to SRS on Friday, August 17, she would. She also told him she would confirm with him on Tuesday, August 21, 1984, that he had made the report on August 17.

52. Following the visit to Ray G., Holmes reported, by telephone to Koch. Holmes reported Ray G. had assured her he would report the sexual abuse to SRS on Friday, August 17, and she would confirm that on Tuesday, August 21. Koch approved of that plan of action.

53. On Wednesday, August 15, 1984, Koch told Grievant he was going to report Grievant's conduct to his superiors for a decision on discipline, and that Grievant's "shutting down" in a "life-threatening situation" was very serious.

54. Also, on August 15, Koch met with Operations Chief Bellini and Bonnie Vander Tuin, Personnel Officer for the Department of Social Welfare, in order to discuss possible disciplinary action against Grievant. During the course of that meeting, Bellini disapproved of the plan to have Ray G. verify reporting of child abuse by August 21. Bellini informed Koch such verification should be made prior to August 21. Also, during that meeting, it was decided Koch would conduct a further investigation into the facts before a final decision was made concerning disciplinary action.

55. On Friday, August 17, 1984, Koch personally reported the abuse of Ray G.'s son to SRS after having determined Ray G. had failed to do so.

56. In the course of his investigation into determining the imposition of disciplinary action against Grievant, Koch discovered Grievant had approached Zenaty and Ross for advice. Koch also decided he needed to obtain more information from Grievant about what he had done on Ray G.'s case. Accordingly, Koch arranged a meeting with Grievant.

57. The investigative meeting requested by Koch took place on August 22, 1984. Grievant was represented by VSEA Field Representative Anne Noonan. The purpose of the meeting was to discuss allegations of wrongdoing against Grievant concerning the Ray G. case. During the meeting, Grievant detailed when he had met with Ray G. and presented his version of what he had done on the case. By the conclusion of that meeting, Koch was aware of the actions Grievant had taken in the case but was not fully aware of all the actions Holmes had taken (see Finding #61). Koch also suspected at this point that Ray G. might be the perpetrator of sexual abuse and not Ray G.'s brother. Koch discussed those suspicions with Grievant at this meeting.

58. Also, on August 22, following the meeting with Grievant and Noonan, Koch met with Holmes in connection with the investigation and discussed the case with her.

59. Between August 22 and 27, 1984, Koch made an oral report of the facts as he understood them, to Kitchell, Knosp and Vander Tuin, and, at the same time, recommended to them that Grievant be dismissed.

60. Koch concluded Grievant had committed transgressions by failing to share information with Holmes, Zenaty and Ross; engaging in insubordination by failing to provide information to Koch; leading Holmes to believe she could not depend on him to adequately respond in serious situations; and circumventing office policies and SRS policies. Koch believed Grievant was on clear notice the offenses he committed could be grounds for dismissal and that Grievant's offenses indicated little potential for rehabilitation.

Koch considered Grievant's 17 years of service with the State in deciding whether to recommend dismissal.

61. At the time Koch recommended Grievant be dismissed, he was under the erroneous impression Varney and Holmes had discussed the sexual abuse issue for the first time on August 14, 1984, rather than August 9, 1984. Also, he did not know Varney had referred Ray G. to Legal Aid on August 9, and that Holmes had approved this referral.

62. At some point after Koch's presentation of the "facts" and recommendation to Kitchell and Knosp, Kitchell went to O'Rourke, Grievant's appointing authority, and orally presented the case, including Koch's recommendation for dismissal, to him. O'Rourke had no direct contact with Koch or Knosp, and never spoke personally to Grievant. His entire understanding of the facts of the case was based on the oral presentation by Kitchell, at one or two meetings lasting approximately 30 minutes, a review of Grievant's personnel file, and a review of the draft of the dismissal letter ultimately given to Grievant.

63. O'Rourke concluded Grievant's offense was serious because he avoided bringing important information to the attention of the right people and subsequently refused to provide the information when asked. O'Rourke considered this offense to adversely impact on the confidence of Grievant's supervisors in his ability to perform his assigned duties.

64. At the time he decided to dismiss Grievant, O'Rourke was under the following erroneous understandings: 1) that there was no doubt Grievant first learned of the sexual abuse of Ray G.'s son during the week of July 30, 1984 (In fact, he learned of it August 2 or August 6); 2) that Grievant on August 6, 1984, had failed to make any mention at all to Holmes of the sexual abuse of Ray G.'s son (In fact, Grievant told Holmes Ray G. was angry at his brother because of child molestation);

and 3) that Grievant had contacted a lawyer by August 14, 1984, to discuss the Ray G. case. Grievant did contact an attorney, but not until August 16. O'Rourke was also unaware Varney and Holmes had discussed the sexual abuse issue as early as August 9, 1984; and that Varney had referred Ray G. to Legal Aid on August 9 and Holmes had approved this referral. O'Rourke was unaware of any applicability of the three-contact rule to this case and was unaware of any accusation that Grievant's approach to his job was inconsistent with the WIN program.

65. By letter dated August 27, 1984, over O'Rourke's signature, Grievant was notified of his immediate dismissal. The letter provided, in pertinent part, as follows:

> This is to notify that you are dismissed from your position as Human Services Aide for the Burlington District of the Department of Social Welfare, effective upon receipt of this letter. Although not required by the contract, you will receive two weeks pay in lieu of notice. At your request, I will meet informally with you and your VSEA representative to discuss the circumstances surrounding your dismissal, provided such request is made within three work days after this action is effective.
>
> Your dismissal is warranted because of your actions and omissions described below, which we consider to be gross misconduct; gross neglect of duty; refusal to obey lawful and reasonable orders by supervisors; and conduct which placed in jeopardy the life or health of a person under your care. As such, we consider your conduct to warrant bypassing progressive discipline, and to justify your immediate dismissal.
>
> This action is based on the following reasons. During the week of July 30, 1984, during the WIN applicant job search group meeting, one of your clients (R.G.) disclosed that he was having homocidal thoughts toward his brother because he believed his brother had sexually abused his (R.G.'s) son. You failed to immediately bring this discussion of homicidal feelings, or the complaints of suspected sexual abuse, to the attention of the social worker responsible for R.G., despite the fact you knew, or reasonably should have known, that such information was relevant to the service needs of the client and should have been shared with the social worker.

On August 6, 1984, you approached Maxine Holmes, a social worker, with vague, non-specific questions relating to what her response would be if a client reported considering homicidal action. Although you identified R.G., one of Maxine's clients at the time, you failed to clearly disclose to her, as you should have, that possible sexual abuse of a child was also a key issue. In addition, later that day you told Maxine that you had met with R.G. and that the homicide threats were "no big deal".

On August 9, 1984, you spoke with Tom Zenaty about the general subject of referrals to SRS. Although you didn't specify why you were considering a referral, Tom made it very clear to you that it was your responsibility to make the client's WIN social worker aware of the client's circumstances. Tom asked you directly and repeatedly if you were concerned with a Team II or a WIN client's case, and you didn't answer him directly, saying only that "you just have to trust my judgment". It should have been quite clear to you that it was your responsibility to share the serious issues raised by R.G. with the appropriate WIN social worker.

On August 14, 1984, Maxine approached you to ask if you were aware of the threats of homicide and suicide voiced by R.G. You said you were aware of such threats. You misstated your own involvement by telling Maxine you had done nothing about R.G.'s case. In fact, you had by then contacted a lawyer, a psychiatrist, an SRS worker, and a private therapist concerning issues raised by R.G.'s case, and had counseled R.G. individually a number of times since your meeting with him on August 6, 1984. Moreover, when Maxine told you she needed to know what was happening with her clients, you told her you could not always share such information with her. You indicated, further, that, in the future, Maxine could expect you to share such information only if the client wanted you to.

Later, on August 14, 1984, Maxine reported your failure to share client information with Fred Koch, your supervisor. Fred called a conference and asked you to disclose your knowledge concerning R.G. and the issues of homicide, suicide and sexual abuse. You said you knew that R.G. had raised such issues but declined to discuss the specifics due to "client confidentiality". You also refused to tell Fred which two workers you had contacted concerning R.G.'s case, despite his demand for this information.

Your failure to disclose information about R.G.'s case to Tom, Maxine and Fred was a refusal to obey lawful and reasonable orders given by supervisors, gross neglect of duty, and also gross misconduct. Since R.G. had raised a suicide issue, it was also conduct which placed his life in jeopardy. In addition, since R.G. had raised issue with sexual abuse of his son, your failure to act placed R.G.'s son's life or health in jeopardy.

> ...There have been prior instances where your failure or stated unwillingness to share complete and accurate client information with team members and other co-workers created performance problems for you. Fred Koch addressed that problem and other performance problems in a memorandum dated June 22, 1984; and has counseled you in the past to be less secretive about your client involvement. In fact, it should have been clear from earlier supervisory sessions that a client's right to confidentiality does not preclude you from sharing information with WIN social workers and other supervisors.
>
> Moreover, it was explained to you that your job as a WIN case aide was primarily as a program orienter and a service identifier. It was not your job to personally attempt to deal with R.G.'s problems. In fact, you have been told to immediately inform the appropriate WIN social worker whenever you had identified anything beyond a simple service need for a client, and that such social worker would address more complex client needs...
>
> (Grievant's Exhibit 7)

66. Some of the particulars of the dismissal letter are not supported by the evidence. First, the dismissal letter alleges Ray G. disclosed information concerning possible homicide and sexual abuse to Grievant during the week of July 30, 1984, and Grievant failed to immediately bring this matter to the attention of the social worker responsible for Ray G. The evidence does not conclusively establish Grievant received this information during the week of July 30. Instead, he may have received it during that week, on August 2, but also may not have received it until the following week, on August 6. Second, the dismissal letter charges Grievant with failing to disclose to Maxine Holmes, the social worker responsible for Ray G., on August 6, 1984, that possible sexual abuse of a child was a key issue. The evidence indicates Grievant did tell Holmes on August 6 that Ray G. had indicated he was angry at his brother becaue of child molestation. Third, the dismissal letter charges Grievant with misstating his involvement in the Ray G. case to Holmes on August 14, 1984, by telling her he had done nothing about Ray G.'s case, when he had by then contacted

a lawyer, a psychiatrist, an SRS worker and a private therapist concerning the case. The evidence indicates Grievant did not tell Holmes specifically that day he had done nothing on the case, although later that day he did tell his supervisor, Fred Koch, he had done nothing on the case. Also, Grievant had not contacted a lawyer by that date. Fourth, the dismissal letter alleged Grievant's conduct "placed in jeopardy the life or health of a person under your care". While Ray G. was a client of Grievant's office, neither Ray G., Ray G.'s son or Ray G.'s brother could be considered under Grievant's "care", which we understand to involve custodial responsibility of a person.

67. Prior to his dismissal, Grievant was not given a hearing.

68. Following his receipt of the dismissal letter, Grievant, in accordance with the invitation extended to him by the letter, did request a meeting with O'Rourke to discuss the circumstances surrounding his termination (State's Exhibit 4).

69. O'Rourke appointed Deputy Commissioner Paul Ohlson to attend the post-termination meeting with Grievant. Ohlson had limited, if any, involvement in the decision to dismiss Grievant. O'Rourke gave Ohlson a copy of the dismissal letter so Ohlson would be familiar with the facts of the case at the meeting. The meeting was attended by Ohlson, John Peterson (Personnel Administrator for the Agency of Human Services), Grievant and Noonan. Noonan attempted to rebut the charges made in the dismissal letter. Following the meeting, Ohlson did not discuss the meeting with O'Rourke, except perhaps in passing.

70. At all times relevant herein, the contract provided, in pertinent part, as follows:

ARTICLE 17

DISCIPLINARY ACTION

1. No permanent... status employee covered by this agreement shall be disciplined without just cause. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:

a. act promptly to impose discipline... within a reasonable time of the offense;

b. apply discipline...with a view toward uniformity and consistency;

c. impose a procedure of progressive discipline... in increasing order of severity;

d. In misconduct cases, the order of progressive discipline shall be:

i. oral reprimand;

ii. letter of supervisory counseling (applicable to those agencies/departments which utilize this letter);

iii. written reprimand;

iv. suspension without pay;

v. dismissal.

... f. The parties agree that there are appropriate cases that may warrant the State:

i. bypassing progressive discipline...;

ii. applying discipline...in different degrees... as long as it is imposing discipline for just cause.

... 2. The appointing authority...may dismiss an employee for just cause with two weeks' notice or two weeks' pay in lieu of notice... In the dismissal notice, the appointing authority shall state the reason(s) for dismissal...

3. Notwithstanding the provisions of Paragraph 2 above, an employee may be dismissed immediately without prior notice or pay in lieu of notice for any of the following reasons:

a. gross neglect of duty;

b. gross misconduct;

c. refusal to obey lawful and reasonable orders given by supervisors...

e. conduct which places in jeopardy the life or health of a... person under the employee's care.

In any such case the employee will be carried on the payroll for not more than three workdays from the date he receives his verbal notice, within which time the appointing authority shall, upon request, meet informally with the employee and VSEA representative, if requested, to discuss the circumstances surrounding his dismissal.

> ... 6. Whenever an employee is called to a meeting with management where... the purpose of the meeting is to determine whether discipline shall be imposed, the employee shall be notified of his... right to request the presence of a VSEA representative and, upon such request, the VSEA shall have the right to accompany the employee to any such meeting...
>
> 9. In any case involving a... dismissal, should the Vermont Labor Relations Board find just cause for discipline, but determine that the penalty was inappropriate or excessive, the (Board) shall have the authority to impose a lesser form of discipline.
>
> (Grievant's Exhibit 4)

MAJORITY OPINION

Before determining whether just cause exists for Grievant's dismissal, we must discuss two preliminary matters.

Grievant contends that Supervisor Koch's failure to advise Grievant of his right to a VSEA representative's presence during his questioning of Grievant on August 14, 1984, constituted a violation of Grievant's contractual rights, and justify the Board in disregarding the charge he was insubordinate to Koch during that meeting.

The Employer claims the Board has no jurisdiction to hear this allegation because it was not timely raised. We agree. Section 23.3 of the Board's Rules of Practice requires that a grievance contain a concise statement of the nature of the grievance and specific references to the pertinent sections of the collective bargaining agreement. The grievance filed here contained no reference to the failure to give Grievant the opportunity to have a VSEA representative present at the August 14 meeting.

Even assuming the issue was timely raised, we find no contractual violation. Article 17, Section 6 provides an employee "shall be notified" of the right to request the presence of a VSEA representative whenever an employee is "called to a meeting with management where the purpose of

the meeting is to determine whether discipline shall be imposed". This places an affirmative duty on a supervisor to inform the employee of the right to VSEA representation at such a meeting. Grievance of Carosella, 8 VLRB 137, 155 (1985). However, we have concluded Koch did not call Grievant into the August 14 meeting for the purpose of investigating whether Grievant should be disciplined. Thus, he had no contractual duty to inform Grievant of a right to VSEA representation.

Second, Grievant contends the State's failure to afford him a pre-termination hearing violated his due process rights and, for that reason alone, the Board should order him reinstated as well as grant him other relief requested. Grievant relies on the recent US Supreme Court decision, Cleveland Board of Education v. Loudermill, ___ US ___, 53 L.W. 4306 (1985), to support this contention. Therein, the Court held that employees with a protected property interest in continued employment are entitled to a pre-termination hearing.

We conclude that, whatever procedures are required by Loudermill and whatever our jurisdiction is to decide such a Constitutional issue, Loudermill is not pertinent here because we do not believe it should be applied retroactively. Solomon v. Atlantis Development, 145 Vt. 70 (1984).

We turn now to the merits. Grievant alleges his dismissal violated Article 17 of the Contract in that no just cause existed for dismissal, progressive discipline was inappropriately bypassed and the imposition of dismissal was too severe a penalty.

Our scope of review in this case is guided by Section 9, Article 17 of the 1984-86 Contract, and our decision in Grievance of Sherman, 7 VLRB 380 (1984).

Our review does not go beyond the reasons given for its actions by the employer in the dismissal letter. Grievance of Patterson, 5 VLRB 376 (1982). Grievance of Swainbank, 3 VLRB 34 (1980). Failure of the Employer to prove by a preponderance of the evidence all the particulars of the dismissal letter (see Finding #66) does not require reversal of a dismissal action. See Grievance of Bishop, 5 VLRB 347 (1982). In such cases, the Board must determine whether the remaining proven charges justify the penalty. Grievance of Colleran and Britt, 6 VLRB 235 (1983).

We conclude the essence of the charge against Grievant has been established by a fair preponderance of the evidence, viz: he subverted the functions of his job by his behavior. He failed in his duty to report significant information disclosed to him by Ray G. to Maxine Holmes, the social worker assigned to the case, and then refused to disclose all he had done on Ray G.'s case to his supervisor when asked, inappropriately relying on client confidentiality.

Grievant told Holmes only part of the story of Ray G.'s homicidal feelings and complaints of sexual abuse. On August 6 he led Holmes to believe that the issues of homicide and sexual abuse raised by Ray G. were not serious by failing to tell her Ray G. said he had considered killing his brother who had sexually abused his son and had lain in wait with a sawed-off shotgun for his brother to return home. Grievant should have discussed such serious issues in more detail with Holmes. True, he had concluded Ray G.'s brother was not in immediate danger and that the child was being protected against further sexual abuse. However, as an aide, these were not Grievant's judgments to make. Moreover, the issue is not whether his assessment was accurate, but whether those responsible to act had necessary information.

Grievant's failure to report pertinent information continued after August 6. On August 9, Ray G. asked Grievant if his brother could be required to obtain counseling for sexual abuse without going to court, and without publicity. Obviously Ray G. was concerned, but Grievant made no reports to his superiors. He did raise the issue in a hypothetical way with Tom Zenaty, the social worker on his WIN team. Even when Zenaty clearly told Grievant his responsibility was to refer sexual abuse issues to the appropriate WIN social worker, he did not discuss the issue with Holmes.

Further, Grievant's failure to adequately report information is reflected by his comment to Holmes on August 14 that he did not know if he would report a suicide threat reported by a client without the client's consent. The comment understandably led Holmes to conclude Grievant may not share such vital information regarding her clients with her.

On August 14, Grievant refused to disclose all he knew concerning the case to his supervisor, Koch, despite a direct request to do so. He insisted on judging for himself what information his supervisor had a right to know. He demonstrated his unwillingness to fully divulge information pertinent to his employment.

We conclude these proven charges against Grievant constitute just cause for dismissal. A discharge may be upheld only if it meets two criteria of reasonableness: one, that the conduct constitutes a substantial shortcoming detrimental to the State's interests, and the other, that the employee had fair notice, express or fairly implied, that such conduct would be ground for discharge. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). We look to the factors enumerated in Colleran and Britt, supra, at 268-269, for guidance. The pertinent factors here are 1) the nature and seriousness of the offense, and its relation to his responsibilities; 2) the effect of his action upon supervisors' confidence in his ability to perform assigned duties; 3) whether Grievant was on fair notice his conduct could

be grounds for discharge; 4) the potential for rehabilitation; and 5) the adequacy and effectiveness of alternative sanctions.

Grievant's offense is serious. He was required to disclose accurately and fully to the social worker instead of playing cat and mouse with her; he did not. By so doing, he demonstrated an unwillingness to accept his job responsibilities and undermined his supervisor's confidence in him. He demonstrated a willingness to circumvent the State's intervention policies with respect to child abuse and exercised independent judgment concerning homicide and sexual abuse issues, all contrary to his job responsibilities.

Grievant's refusal to provide information on the Ray G. case to Koch, his supervisor, is clearly contrary to Article 17, Section 3(c) of the Contract ("refusal to obey lawful and reasonable orders given by supervisors") and in itself is a dismissable offense. We cannot accept Mr. Kemsley's view that personality conflicts excused Grievant's behavior. This action alone justifies bypassing progressive discipline.

Grievant seeks to downplay the seriousness of his conduct by pointing to two aspects of Holmes' behavior-her failure to immediately report the sexual abuse of Ray G.'s son to SRS and her failure to tell Koch everything she knew about Ray G.'s case. Grievant contends that if Holmes' conduct is a guide to propriety, then by that standard Grievant did nothing wrong. Holmes' actions are certainly no beacon light of propriety. She avoided Ray G. when she had enough knowledge to require action, and avoided her own responsibility to Ray G., whom she found distasteful. But whatever Holmes' deficiencies in this matter (and perhaps they would support disciplinary action), they do not excuse Grievant's behavior. Because her failings do not rise to the same level of insubordination and circumvention of office and SRS policies, they are not of the same magnitude as Grievant's deficiencies. Whatever else is true, Holmes

appears to accept the mission of the Agency and be willing to work in accordance with its methods, fundamental factors absent from Grievant's behavior.

Grievant had fair notice his derelictions could be grounds for dismissal. Through various meetings between Koch and Grievant from January to June, 1984 and a June 22, 1984, memorandum from Koch, Grievant had notice circumventing office and SRS policies and exercising independent judgment in addressing substantive problems of a client were beyond his job responsibilities. He also had notice a refusal to report sensitive information to co-workers and invoking client confidentiality when refusing to answer Koch's question were prohibited (See Findings #21 and #23).

The fact Grievant was an employee with 17 years service to the State is an important factor to consider in this case. However, we find his potential for rehabilitation in his job is slight since he appears to have a deeply ingrained attitude concerning the probity of those above him. Consequently, a sanction less than dismissal would not be effective.

In sum, we find on the proven facts Grievant's actions constituted just cause for dismissal. His dismissal was not inappropriate or excessive pursuant to Article 17, Section 9 of the Contract.

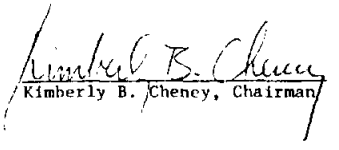
Kimberly B. Cheney, Chairman

James S. Gilson

SEPARATE STATEMENT OF THE CHAIRMAN

Although I have voted to uphold this dismissal, I want to state clearly I do not intend to vindicate management by doing so. Everyone involved in the chain of command above Grievant, until the case reached Mr. Bellini, was derelict in some way. Holmes knew of the child abuse allegations and did nothing. Koch was personally biased against Grievant and acted rudely. O'Rourke approved a dismissal without getting his facts straight.

On this record it is obvious there is considerable room for improvement in managerial practices.



Kimberly B. Cheney, Chairman

DISSENTING OPINION

I agree with the majority as to the facts of the underlying incident leading to dismissal, but disagree Grievant should have been dismissed based on those facts. I also concur with the majority's views on the preliminary matters raised in this grievance; that Supervisor Koch had no contractual duty to inform Grievant of a right to union representation at the August 14 meeting and that Grievant was not entitled to a pre-termination hearing. However, I would reverse on the merits because I believe the penalty of dismissal was "excessive" and "inappropriate" pursuant to Article 17, Section 9 of the Contract. I agree with Grievant that progressive discipline was inappropriately bypassed.

I note that at least three of the seven particulars set forth in the dismissal letter are not supported by the evidence (See Finding #66). While failure of the Employer to prove all charges does not require reversal of a dismissal action, Grievance of Bishop, 5 VLRB 347 (1982), in this case the remaining proven charges do not justify the penalty. Including unfounded particulars in a case such as this certainly raises interesting queations.

Clearly, Grievant committed derelictions of duty. He failed to fully disclose information revealed to him by a client concerning homicidal feelings and complaints of sexual abuse to Maxine Holmes, the social worker assigned to the case. He also did not disclose his knowledge of the client's suicide threats and sexual abuse to his supervisor, Fred Koch, when asked.

However, these derelictions did not warrant his dismissal when all the circumstances of the case are considered. While Grievant could have been more specific with Holmes, it is apparent Grievant's shortcomings did not prevent Holmes from taking action. My colleagues charge "Grievant

failed in his duty to report significant information disclosed to him by Ray G. to Maxine Holmes..." However, Grievant did tell Holmes on August 6 the general information that Ray G. had mentioned he was concerned he had the potential of murdering someone and was angry at his brother because of child molestation. Although having this information, Holmes did not pursue the matter directly with Ray G. despite Grievant's invitation to her the same day to join his meeting with Ray G. and subsequent contacts she had with Ray G.

Holmes made no mention of the need for Grievant to report the child molestation to SRS but told Grievant to meet with Ray G. away from the group and seek more specific information. At that point in the conversation, Ray G. joined them and Grievant invited Holmes to stay while he and Ray G. talked. This Holmes refused to do. Nor did Holmes ask Grievant to report the results of this conversation with Ray G. From Holmes' refusal to meet with Grievant and Ray G. and from her neglect in requesting Grievant to report back on the conversation Grievant would easily assume there was no need for him to report further nor was there any concern on Holmes' part. Holmes found Ray G. repugnant and it is evident her failure to act quickly in Ray G.'s case resulted at least partially from this attitude toward Ray G. and not primarily because of Grievant's failure to discuss the case more fully with her.

Also, on August 9 Ray G. told Lynn Varney his brother had sexually abused his son and that he wanted his brother helped without having the matter blown out of proportion, thus hurting his father. Although Varney suggested he go to Legal Aid, she never reported it to SRS. Neither did she tell Ray G. to do so. Later that day, Varney told Holmes about the conversation and about her suggestion to Ray G. Holmes considered these actions to be correct and no report was made to SRS.

Given these circumstances, Grievant's failure to be more specific with Holmes was no more serious an offense than that of Holmes, particularly

when the facts did not indicate any immediate danger of homicide or recurrence of sexual abuse.

Grievant's refusal to provide information on the case to Koch, upon request to do so, is a more serious offense. I cannot condone an employee ignoring the directives of his supervisor. However, Grievant's offense is mitigated by Koch's attitude toward Grievant. Koch openly indicated he was not pleased when Grievant was transferred to the Burlington Office. It is understandable Grievant would be less than open with a supervisor who had made it known Grievant was not an employee he wanted under his supervision. Koch was at least partially to blame for any lack of communication, and I fault his superiors for not anticipating this situation and making an effort to resolve it at an earlier stage.

A further mitigating factor is that Grievant was well-meaning, although misguided. He was clearly trying to help a client in a difficult, sensitive situation, while at no time was there any indication of a life-threatening situation.

I must stress the fact that Holmes was fully aware of Ray G.'s problems no later than August 6 and made no attempt to report it to either Fred Koch or to the SRS until her meeting with Koch on August 14. Also during that meeting which Koch called for the purpose of developing a plan of action to be taken with Ray G., neither Holmes nor Varney told Koch of their referral of Ray G. to Legal Aid.

Further, the plan developed by Koch, Holmes and Varney to handle the sexual abuse incident would not guarantee the reporting of the incident to SRS until August 21, a full 15 days <u>after</u> it became known to Holmes.

It was not until Koch met with Operations Chief Bellini for the express purpose of disciplining Grievant for not immediately reporting

child abuse that Koch reported the plan to Bellini. Bellini immediately vetoed the plan, ordering that SRS be notified earlier than August 21. This report was eventually made on August 17, eleven days after Holmes had been made aware of the situation.

While no disciplinary action seems to even have been considered regarding the errors and tardiness in reporting by Holmes, much effort seems to have been expended to build a case for the discharge of an employee the Casework Supervisor openly was unhappy to have assigned to his staff.

I cannot agree with a policy under which one employee who is personally disliked by his supervisor can be measured and discharged by one set of standards while another employee who is in violation of that same set of standards is not even disciplined. Such evidence of favoritism is destructive of the morale of all employees of the State.

Given these mitigating circumstances, I conclude dismissal was too severe a penalty. Like the Grievance of Sherman, 7 VLRB 380 (1984), this is another case where management has bypassed progressive discipline, although the Contract provides for a procedure of progressive discipline. Article 17, Section 1 (c) and (d). While I recognize the parties have contracted there are appropriate cases that may warrant the State bypassing progressive discipline; Article 17, Section 1(f); it is evident the parties intended bypass be the exception rather than the rule. It concerns me the Board is seeing more cases where progressive discipline is bypassed.

Here, bypass was inappropriate. I recognize reporting of homicide, suicide and sexual abuse issues is crucial. However, where the facts do not indicate Grievant placed anyone in immediate danger by his conduct and where Grievant's co-worker and supervisor were also partially at fault, Grievant's derelictions in this regard should not have resulted in his

dismissal. Given the nature of the offense and Grievant's length of satisfactory service to the State, a suspension would have been an appropriate penalty. This would have served sufficient notice on Grievant that his failure to abide by the chain of command and tendency to circumvent office policies would not be tolerated. No less is due an employee with nearly 18 years service to the State who never had serious disciplinary action imposed on him. Grievant's long years of satisfactory service indicate he has the potential for rehabilitation. A suspension would have been an adequate sanction to deter such conduct in the future or is so little value attached to length of service?

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 David Regan is DISMISSED.

Dated this 21st day of November, 1985, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney

Kimberly B. Cheney, Chairman

James S. Gilson

James S. Gilson