VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 89-84
JOSEPH ROY	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case:

On December 15, 1989, the Vermont State Employees Association ("VSEA") filed a grievance on behalf of Joseph Roy ("Grievant"). The grievance alleges that the State of Vermont, Department of Social and Rehabilitative Services ("Employer") violated the collective bargaining agreement in effect between the State and VSEA for the Non-Management Unit for the period July 1, 1988 to June 30, 1990 ("Contract"), by the issuance of two written reprimands to Grievant. The grievance alleges that the letters of reprimand violated Article 17 of the Contract in that they constituted discipline which was not based on just cause, there was no neglect of duty, progressive discipline was bypassed without proper cause, discipline was inconsistently administered, the penalty was excessive, and the issue involves performance, not misconduct. Grievant also alleges that the letters of reprimand violated Article 18 of the Contract in that they constituted retaliation for prior grievance activity by Grievant.

At the hearing, Grievant moved to amend the grievance by adding a charge of sex discrimination to the above allegations. The charge of sex discrimination was included at Steps II and III of the grievance procedure, but was omitted in the Step IV grievance filed with the Board. At the hearing, the Board denied Grievant's motion to amend. The Board concluded that the motion was untimely.

The hearing was held on May 17, 1990 before Labor Relations Board members Charles McHugh, Chairman; Louis Toepfer and Leslie Seaver.

Michael Zimmerman, VSEA Staff Attorney, represented Grievant. Michael Seibert, Assistant Attorney General, represented the Employer. Memoranda of Law were filed by both parties on May 29, 1990.

FINDINGS OF FACT

1. The Contract provides in relevant part:

ARTICLE 17
DISCIPLINARY ACTION

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

. . .

b. apply discipline or corrective action with a view toward uniformity and consistency.

c. impose a procedure of progressive discipline or progressive corrective action in increasing order of severity.

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

i. oral reprimand;
ii. written reprimand;
iii. suspension without pay;
iv. dismissal.

e. In performance cases, the order of progressive corrective action shall be as follows:

i. oral notice of performance deficiency;
ii. written performance evaluation, special or annual, with a prescriptive period for remediation specified therein, normally 3 to 6 months.
iii. warning period of thirty (30) days to six (6) months, extendable for a period of up to six (6) months. Placement on warning status may take place during the prescriptive period if performance has not improved since the evaluation;
iv. dismissal.

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

i. bypassing progressive discipline or corrective action . .

ARTICLE 18
GRIEVANCE PROCEDURE

...Section 7.

The parties agree, subject to applicable law, that every employee may freely institute complaints and/or grievances without threats, reprisal or harassment by the employer.

(Grievant's Exhibit 1)

2. At all times relevant herein, the Rules and Regulations for Personnel Administration have provided, in pertinent part:

> 3.015 An employee shall not engage in any employment, activity or enterprise which has been or may be determined by the appointing authority to be inconsistent, incompatible, or in conflict with his duties as a classified employee or with the duties, functions, or responsibilities of the agency by which he is employed.

(Grievant's Exhibit 2)

3. Grievant has been employed by the State of Vermont in various capacities for the past thirteen years. From approximately 1977 to 1987, Grievant was employed by the Department of Employment and Training. For some time prior to 1987, Grievant and his wife served as foster parents for two children who were under the care of the Springfield Division of the Vermont Department of Social and Rehabilitative Services ("SRS"). During the time that Grievant served as a foster parent, he was also a member of the Springfield Foster Parents Association.

4. Since 1987, Grievant has been employed as a Social Worker B at the Springfield office of SRS. At the time Grievant became employed by SRS, he and his wife ceased to serve as foster parents because SRS regulations prohibited employees from being foster parents during the term of their employment.

5. As a Social Worker B at the Springfield SRS Office, and at all times relevant herein, Grievant was subject to the following chain of command: Grievant's immediate supervisor was Lynn Reid, Social Worker C; Reid reported to Jean MacEachern,, Supervisor; who in turn reported to Lynn Boyle, District Director of the Springfield Office. At the Central Office level, Linda Kapuscinki was Boyle's immediate supervisor; Kapuscinski reported to Fred Ober, Chief of Operations; who reported to

Stephen Dale, State Director of SRS. William Young was Commissioner of the Agency of Human Services, the parent agency under which SRS is established.

6. As of the date of hearing, Grievant was one of the most senior employees at the Springfield SRS office.

7. Grievant's primary responsibilities as Social Worker B involve the care of children placed in the custody of the State of Vermont. Grievant is assigned responsibility for a number of children; and for each of these children Grievant is responsible for evaluating and providing for their needs, for finding an appropriate placement for the child, and for supervising the child's care while in the custody of SRS. In fulfilling these responsibilities, Grievant is required to meet frequently with the natural parent or parents, the foster parents, and the child.

8. As an additional job function, Grievant shares "Intake Screening" duty with other social workers in the Springfield office. Intake screening is a regularly assigned duty, usually for one morning or afternoon per week, whereby the worker receives reports of alleged instances of child neglect or child abuse, or alternatively may be asked to provide information about various SRS programs.

9. The intake screening function is defined and regulated by various provisions of the SRS Casework Manual. Provisions of the Casework Manual; specifically CM 1010, CM 1210 and CM 1212; address the duties of a social worker performing the intake function and the duties of the supervisor.

In relevant part, CM 1010 provides:

<u>PROCEDURE</u>

Intake Worker:	1.	Clarifies purpose of contact and discusses nature of request.
	2.	Completes Face Sheet . . ., Intake Log . . ., Intake

Form . . ., and routes to Supervisor.

. . . .

NOTE: Worker should not verbally "accept" report or inform reporter that an investigation will "commence." This is a supervisory decision.

Supervisor:

8. Reviews material and:
- Accepts "report" of Abuse/Neglect or Unmanageable Youth . . .;

. . . .

9. If "accepted," Supervisor decides priority, commensurate with Division policy, assigns a worker, and routes through clerical.

NOTE: Child abuse/neglect reports must be investigated within seventy-two hours of a report sufficient to meet Casework Procedure 1210 criteria.

In relevant part, CM 1210 provides:

PROCEDURE

Each office will ensure that a worker is always available to receive intakes. . . .

. . . .

Any referral providing the Department with reason to believe that abuse or neglect may have occurred . . . will be accepted as a report of abuse or neglect, necessitating the commencement of an investigation within 72 hours . . .

In relevant part, CM 1212 provides:

Supervisor:

1. Determines that an intake is accepted as a report of abuse and neglect.

2. Determines the immediacy of response necessary and assigns the investigation to a caseworker.

(Grievant's Exhibit 9)

10. The established practice in reference to the intake screening function in the Springfield office generally was for the intake worker to take down as much information as possible from calls alleging child abuse or neglect, to then promptly fill out a written intake report, and to put the report in an intake basket. The supervisor would check the intake basket periodically throughout the day, and make determinations, based on the information on the intake report, as to whether an immediate

investigation or other action was warranted. Investigations are required within 72 hours of the time of receipt of the initial telephone call reporting child abuse/neglect. Prior to the incidents at question herein, it was Grievant's understanding that it was normal practice for the intake worker to make a judgment whether or not to write an immediate report if the worker is busy, there is no immediate threat to the child and the supervisor is not available.

11. As a Social Worker B, Grievant is normally scheduled for a 40 hour work week. However, it is a common occurrence for Grievant and other social workers to work evenings or weekends in addition to their 40 hours when needed by the SRS office or when contacted by the children to whom they are assigned, their foster parents or their natural parent(s).

12. During the times relevant herein, Grievant carried a greater than normal caseload. At some point during the first six months of 1989, when there were vacancies in the office, Grievant's caseload was approximately double the average caseload. During the Summer of 1989, Grievant continued to carry a higher than average caseload.

13. During the Spring of 1989, a foster parent in the Springfield area, previously known to Grievant through Grievant's prior activity in the Springfield Foster Parents' Association, was accused of child abuse.

14. Grievant believed that the accused foster parent was innocent of the charges, and believed that the accused could not afford legal counsel. Grievant offered to represent the accused at a Fair Hearing proceeding before the Human Services Board. Grievant was on six weeks annual leave from his SRS duties at the time of his offer to represent the accused.

15. On April 30, 1989, Grievant received a telephone call from an attorney for SRS. The attorney informed Grievant that Grievant was not permitted to represent a foster parent in a matter involving a child in the custody of SRS.

16. The following day, May 1, 1989, Grievant was called into the Springfield office by Lynn Boyle. When Grievant arrived, Boyle said that an order from Commissioner Young was en route, and that the order would instruct Grievant not to represent the accused, or to advocate his position in any way unless he was subpoenaed as a witness, as such activity would be a conflict of interest with Grievant's duties with SRS, and hence in violation of Section 3.015 of the Personnel Rules and Regulations.

17. On the following day, May 2, 1989, Grievant received a letter from Commissioner Young, which stated what Boyle had told Grievant verbally the day before (Grievant's Exhibit 3).

18. On May 4, 1989, Grievant wrote a letter of response to Commissioner Young. In the letter, Grievant stated that he would obey Young's order and cease from attempting to represent the accused foster parent, but that Grievant disagreed with the State's position and would file a grievance to resolve the matter (Grievant's Exhibit 4).

19. On May 8, 1989, four days after the date of Grievant's letter to Commissioner Young, Lynn Boyle completed and submitted a performance evaluation for Grievant, covering the period December 6, 1987 to December 5, 1988. Grievant did not receive the evaluation until approximately two months later (Grievant's Exhibit 22).

20. The performance evaluation was the first that Grievant had received in two years. The evaluation gave Grievant an overall rating of "3" (i.e., "consistently meets job requirements/standards"), and contained many positive comments about Grievant's work. The evaluation also contained some adverse comments about Grievant; among them that Grievant's "negative attitude towards bureaucracy sometimes gets in the way of [his] ability to write a good case plan . . ."; that Grievant "sometimes has

difficulty representing Division policy to the public when [he] does not agree with it . . ."; and that Grievant's "negative attitude about bureaucracy and systems has at times had a negative effect on co-workers" (Grievant's Exhibit 22).

21. On June 6, 1989, VSEA filed a Step II Grievance on behalf of Grievant, alleging that the order of Commissioner Young forbidding Grievant from participating in the Fair Hearing proceeding was an inconsistent application of Personnel Regulation 3.015, and that Grievant was not given sufficient reason for application of the Regulation (Grievant's Exhibit 6).

22. One of the children who was part of Grievant's caseload during the Summer of 1989 was a child who will be referred to herein as "Henry", a 12 year old who was formally classified as an "unmanageable child" (i.e., beyond his parents control).

23. At the time of the incidents at issue herein, Henry had been placed in a temporary foster home while undargoing evaluative testing. Henry had been placed in the foster home subsequent to sexually assaulting his older sister. While Henry was in the foster home, he was visited and otherwise contacted by his natural mother and grandmother.

24. In late July or early August, Henry's foster mother called Grievant to inform Grievant that she and the foster father would be going on vacation in two weeks. Henry's foster mother asked Grievant if Henry could stay with his natural grandmother during that time.

25. Subsequently, Grievant spoke with Henry's natural mother who expressed no objection to Henry staying with the grandmother while the foster parents were away. Grievant approved the request for Henry to stay with the grandmother, and so informed the foster parents, the natural

mother, and Henry. Grievant did not contact the grandmother to confirm the arrangement with her, as he assumed the foster parents or the natural mother had done so. Grievant did not make arrangements for transporting Henry to the home of the grandmother.

26. During the week of August 7, the week before Henry's foster parents were due to go on vacation, Henry called Grievant to ask if he could stay with a man named "Ed" instead of his grandmother while his foster parents were away. Grievant denied Henry permission to stay with Ed, and told Henry that he must stay with the grandmother as those were the plans that had been made. Grievant observed that Henry was very angry at being denied permission to stay with Ed.

27. Toward the end of the same week, Grievant again spoke with Henry's natural mother. Grievant and Henry's mother discussed that Henry would be going to stay with the grandmother.

28. On Friday, August 11, the day before Henry's foster parents were due to leave for vacation, Grievant spoke with the foster mother. The foster mother and Grievant discussed that Henry would be going to stay with the grandmother the following day.

29. On Saturday afternoon, August 12, Grievant received a telephone call at his home from Henry's natural mother. The mother told Grievant, "Henry pulled a fast one." The mother explained that she had just spoken to Henry, and learned that he was still at the foster parents' home. The foster parents had left for vacation, and Henry had not gone to the grandmother's home as planned.

30. Following Grievant's conversation with Henry's mother on Saturday, August 12, Grievant called the SRS Emergency Services staff and explained that Henry needed immediate temporary placement until the foster

parents returned from vacation. Grievant asked the Emergency Services staff if the on-duty social worker would make the necessary arrangements, but to have the on-duty worker call Grievant if he or she needed Grievant's assistance. "Emergency services" is a 24 hour service staffed by SRS personnel, which provides emergency assistance to the public and to the children in the care of SRS during times when their caseworker may be off-duty or otherwise unavailable.

31. That same afternoon, Grievant was called by the on-duty social worker, Jean MacEachern. MacEachern expressed dissatisfaction with Grievant, and said that Grievant should have personally contacted the grandmother to confirm the arrangements for Henry.

32. Another foster child in the care of Springfield SRS, who will be referred to as "Michael", had been placed in the same foster home with Henry prior to the incidents at issue herein. Michael was 16 years old, and was also classified as an "unmanageable child." Michael was under the supervision of Lynn LeBerto, another social worker in the Springfield office.

33. During the early part of August, LeBerto had made arrangements for Michael to stay with his uncle during the foster parent's vacation. LeBerto was on vacation during the week of August 7. During LeBerto's absence, Jean MacEachern assumed responsibility for the children under LeBerto's supervision. During the week of August 7, MacEachern spoke with Michael's foster mother who informed MacEachern that Michael was with his uncle and would stay there through the vacation period. On Friday, August 11, MacEachern checked with the uncle's landlord, who informed MacEachern that Michael was with his uncle. Neither LeBerto nor MacEachern spoke with the uncle personally.

34. On the afternoon of Saturday, August 14, 1989, when MacEachern picked Henry up to move him to a new foster home for the duration of his regular foster parent's vacation, MacEachern discovered that Michael was also present at the foster home with Henry, and without adult supervision. The only other person present in the foster home with Henry and Michael was a 20 year old son of the foster mother who had not gone on vacation with his family. When questioned by MacEachern, Michael said that he had been at his uncle's home, but had returned to the foster home and was later going back to the uncle's home.

35. No discipline was imposed on either LeBerto or MacEachern for the fact of Michael being alone in the foster home without adult supervision while the foster parents were on vacation.

36. On Monday, August 14, 1989, Lynn Boyle, Springfield District Director, learned of the incident with Henry that had occurred the previous weekend. Boyle commenced an immediate investigation into the reasons for Henry being left unsupervised in the foster home when the foster parents left for vacation. Initially, Boyle spoke with and questioned Henry, the natural mother, the foster mother, Jean MacEachern and Lynn Reid. Boyle then spoke with and questioned Grievant. Boyle told Grievant that he should have personally checked with the grandmother, and should not have assumed that Henry, the foster mother or the natural mother had done so.

37. On Monday, August 14, 1989, following a grievance meeting on July 28, 1989, Grievant's Step II grievance, concerning Commissioner Young's order that Grievant not represent the foster parent in the Fair Hearing proceeding, was denied by Sharon Wilson, Agency of Human Services Personnel Administrator (Grievant's Exhibit 7).

38. On Monday, August 21, 1989, VSEA filed a Step III grievance on behalf of Grievant, concerning the allegation that Grievant was wrongfully prohibited from representing a foster parent in a Fair Hearing proceeding.

39. On Monday afternoon, August 21, Grievant was not assigned to intake screening duty, but was performing his regular functions in connection with his caseload. Grievant received a telephone call from a day care center operator who wanted to report an instance of suspected child abuse. Normally the call would have gone to the intake screening worker, but the day care center operator had asked to speak with Grievant personally, believing Grievant to be handling the case of the child at issue.

40. The day care center operator told Grievant that a child enrolled in the day care center had come to the center that morning with what appeared to be two cigarette burn marks and a handprint mark, and that the child had told the day care staff that her mother "did them". The day care center operator also told Grievant that the child was due shortly to leave the center for the day and go home.

41. Prior to Grievant receiving the telephone call from the day care center operator, he had been told by his supervisor, Jean MacEachern, that she was going into a meeting for the rest of the afternoon and did not wish to be disturbed. Additionally, at the time of the telephone call, several people were waiting to speak to a social worker, and it was Grievant's responsibility to speak to them. Grievant did not speak to his supervisor about the telephone call and did not fill out a written intake report until the following morning, Tuesday, August 22. After writing the intake report, Grievant put the report in the intake basket. Grievant delayed in writing the report because he was busy, the child was shortly

leaving the day care center that day and would be unable to be interviewed that day, and his supervisor had said she did not wish to be disturbed that afternoon (Grievant's Exhibit 10).

42. The "Intake Form" used for writing intake reports contains a line in the heading labeled "DATE:". Grievant filled in this line with the date on which he wrote the intake report - - August 22 - - and not the date on which Grievant received the telephone call. Grievant did not intentionally put the wrong date on the intake report. It was an error on his part (Grievant's Exhibit 10).

43. Upon reviewing the intake report on Tuesday, August 22, the supervisor in charge decided that an investigation was warranted. SRS prefers not to question a child in front of the alleged perpetrator in instances of alleged abuse, and the supervisor discovered that the child in question was not scheduled to attend day care again until the next day, Wednesday, August 23. Thus, no investigation was commenced on August 22.

44. On Wednesday, August 23, 1989, a worker from the Springfield SRS office went to see the child at the day care center and investigate the allegation of abuse. At the time the child was seen, the handprint mark was no longer visible, the two marks resembling cigarette burns appeared to be bug bites, and the child refused to talk about any instance of abuse.

45. Lynn Boyle became aware that Grievant had received the telephone call on Monday, August 21, but had not written the intake report until Tuesday, August 22. Boyle told Grievant that he had violated standard procedure, and was wrong in not submitting the written intake report immediately.

46. Boyle concluded that Grievant should have known that writing the intake report is a first priority and must be done immediately. Boyle based her conclusion on the belief that writing intake reports immediately was standard practice in the office; and on the belief that Grievant should have known of the requirement for immediate writing of intake reports because of the fact that it is the supervisor who makes the decision concerning whether to investigate based on the intake report, and that in certain instances investigation is required by law within 72 hours of the initial telephone call reporting the alleged abuse. Additionally, Boyle believed that Grievant should have known that the allegations in this case required an immediate report because of the potential danger to the child, and because the evidence would be lost by the passage of time.

47. On Thursday, August 24, 1989, Boyle issued a written reprimand to Grievant for the incidents which resulted in Henry being left in the foster home after the foster parents had left on vacation. The reprimand charged Grievant with gross neglect of duty and conduct which placed Henry's life and/or health in jeopardy by not making the necessary arrangements to ensure that Henry went to the grandmother's home (Grievant's Exhibit 11).

48. On Tuesday, August 29, 1989, Boyle issued a written reprimand to Grievant, charging Grievant with "neglect of duty" for failure to fill out a written "intake report" on the August 21, 1989 telephone call reporting an instance of possible child abuse until the next day; for not verbally bringing the report to anyone's attention on August 21, and for writing an inaccurate date on the report (Grievant's Exhibit 12).

49. Prior to the issuance of the August 24 and August 29 letters of reprimand to Grievant, no letters of reprimand or other discipline had

been issued to any social workers of the Springfield office of SRS during Boyle's tenure as Division Director.

50. On November 17, 1989, Grievant's Step III grievance, concerning Commissioner Young's order that Grievant not represent a foster parent in a Fair Hearing proceeding, was denied by Thomas Ball, State Director of Employee Relations (Grievant's Exhibit 21).

OPINION

The central issue in this case is whether just cause existed for the discipline imposed on Grievant via the two written reprimands. Since the Contract language specifically distinguishes between sanctions for misconduct and sanctions for nonperformance, we are called upon to decide whether Grievant's actions constituted a matter of misconduct for which discipline is the appropriate sanction or, alternatively, a matter of performance for which corrective action is the appropriate sanction.

Grievant contends that there was no just cause for the letters of reprimand because there was no neglect of duty, progressive discipline was bypassed without proper cause, such discipline constituted inconsistent application of disciplinary standards, the penalty was excessive and the actions at issue herein constitute a matter of performance, not misconduct. The State contends (1) that there was more than sufficient cause for the letters of reprimand because, in each case, Grievant knew or should have known that his actions were inconsistent with SRS standards; and (2) that, accordingly, since just cause existed, it is within the discretion of management to decide whether Grievant's actions should be treated as an issue of misconduct or of nonperformance.

We disagree with both of the State's arguments, and conclude that the State's sequence of analysis is the reverse of that which needs to be applied for a determination consistent with the Contract. The proper analysis must first be to determine whether the employee's actions fall into the category of misconduct or performance, and then, if misconduct is at issue, to determine whether the sanction imposed comports with the Contract language and the rule for evaluating whether "just cause" existed.

There are two requisite elements which establish just cause for discipline: (1) it is reasonable to discipline an employee because of certain conduct, In re Grievance of Brooks, 135 Vt. 563 (1977), and (2) the employee had fair notice, express or implied, that such conduct would be ground for discharge or other discipline. In re Grievance of Yashko, 138 Vt. 364 (1980). Grievance of Colleran and Britt, 6 VLRB 235 (1983).

Article 17 of the Contract, entitled "Disciplinary Action", distinguishes between the progressive sanctions that are available in misconduct cases and the progressive sanctions that are available in performance cases. From the language of the Contract and the fact that the sanctions in misconduct cases differ from the sanctions in performance cases, it is clear that the parties intended a distinction between misconduct and nonperformance. Thus, consistent with this intent, and as a matter of logic, neither of the two requisite elements for just cause - - "reasonableness" and "fair notice" - - can be determined without first categorizing the employee's underlying actions as a question of misconduct or a question of performance.

I. The First Written Reprimand

Grievant was given his first letter of reprimand, dated August 24, 1989, as a result of the foster child, Henry, remaining in the foster home after the foster parents had left for their scheduled vacation. The Employer contends that Grievant erred by assuming that arrangements concerning Henry's placement in his grandmother's home during the vacation had been made by Henry's foster mother or his natural mother. The Employer contends that Grievant should have made the arrangements himself.

In hindsight, it is possible to fault Grievant for not personally speaking with the grandmother and not personally making the arrangements to transport the child to the grandmother's home. However, these are matters of judgment, and therefore of performance, rather than of misconduct. The Employer has not sustained its burden of proving by a preponderance of the evidence that Grievant knew, or should have known, that his actions in this matter could lead to discipline. The very nature of social workers' duties require them to make some judgments in the course of their duties, judgments which impact on the safety of the children for which they are responsibile, and for which precise guidelines do not exist. The circumstances of this case present such a situation. Under these circumstances, any deficiencies of Grievant should have been handled by the Employer through the corrective action route.

We note that Grievant's supervisor similarly relied on arrangements made for the care of another foster child during the same vacation period without personally speaking with the person with whom the child was to stay. Although there are differences in the circumstances of the two situations, although not necessarily inconsistent with each other, we believe that a comparison of the two situations underscores the element of discretionary judgment that is inherent in this case.

In short, we conclude that Grievant's actions underlying the first letter of reprimand constituted a performance issue, and thus the written reprimand which the Employer issued in response was outside the bounds of the Contract and hence lacked "just cause" for discipline.

II. The Second Written Reprimand

Grievant was given his second letter of reprimand, dated August 29, 1989, for the manner in which he handled a telephone call reporting an instance of possible child abuse. The State contends that Grievant should have filled out a written intake report immediately, or, at the very least, should have verbally told the supervisor on duty of the call on the afternoon that the call came in to SRS.

We note that the SRS Casework Manual does not state that a written intake report must be filled out and submitted immediately or within any specified time frame. The State contends that the requirement of an immediate written report should be reasonably inferred from the statutory mandate requiring the State to investigate certain allegations within 72 hours of the time SRS is first notified, and the provisions of the casework manual that the supervisor is to determine whether an investigation should commence and the immediacy of the response. We believe it is reasonable to infer from the statutory mandate and the manual provisions that prompt communication of the information to the supervisor is important. Yet the circumstances Grievant was faced with that afternoon - several persons waiting to speak to him, notification by his supervisor that she was going into a meeting for the remainder of the afternoon and was not to be disturbed, and knowledge that, at the time of the call, the child at issue was shortly due to be unavailable for interview - - demonstrates to us that some choice between competing

priorities had to be made by Grievant. Again, these seem to us to be matters of judgment, and therefore of performance, rather than instances of misconduct. Grievant lacked fair notice, express or implied, that his actions that day could lead to discipline.

As an additional basis for the second letter of reprimand, the Employer also contends that Grievant improperly dated the intake report with the date the report was filled out rather than with the date of the telephone call. Grievant did not intentionally misdate the report. This was an error on his part. Under the circumstances, even assuming this was misconduct on Grievant's part, this action of Grievant is not sufficient to sustain the sanction of a written letter of reprimand.

In sum, we conclude that there was no just cause for the two written reprimands issued to Grievant. Accordingly, the grievance is granted.

Grievant also alleges that the written reprimands constituted retaliation for his prior grievance activity, and additionally asks that we reconsider his request to amend the grievance to include a charge of sex discrimination. Due to our holding in this case, we need not reach these issues.

ORDER

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

1. The Grievance of Joseph Roy is SUSTAINED; and

2. The State of Vermont, Department of Social and Rehabilitative Services, shall rescind the August 24, 1989 and the August 29, 1989 letters of reprimand from Lynn M. Boyle to Grievant and forthwith remove such letters from Grievant's personnel file.

Dated this 23 day of July, 1990, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Louis A. Toepfer

Leslie G. Seaver