

VERMONT LABOR RELATIONS BOARD

GRIEVANCES OF:)	
)	DOCKET NOS. 91-52
FRANK SCHMITT)	91-61
)	91-72
)	91-78

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

Involved herein are four grievances consolidated for the purpose of hearing and decision concerning actions taken by the State of Vermont, Agency of Human Services, Department of Social Welfare ("Employer"), against Frank Schmitt ("Grievant"), culminating in Grievant's dismissal.

On August 15, 1991, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Grievant, Docket No. 91-52. Therein, Grievant contended that the Employer violated various provisions of the collective bargaining agreement between the State and VSEA for the Supervisory Unit, effective for the period July 1, 1990 to June 30, 1992 ("Contract"), by giving Grievant an adverse special performance evaluation, placing him in a prescriptive period for remediation, and subsequently providing Grievant with three status of performance memoranda. Grievant further contended that the Employer violated the Contract by refusing to provide Grievant with all materials to be used in grievance hearings.

On October 2, 1991, VSEA filed a second grievance on behalf of Grievant, Docket No. 91-61. Therein, Grievant contended the Employer violated various provisions of the Contract by giving

Grievant an adverse performance evaluation and placing him in a warning period. Grievant further contended that the Employer violated the Contract by refusing to provide Grievant with all materials to be used in grievance hearings.

VSEA filed a third grievance on behalf of Grievant on November 22, 1991, Docket No. 91-72. Therein, Grievant contended that the Employer violated various provisions of the Contract by dismissing Grievant for performance reasons. Grievant further contended that the Employer violated the Contract by refusing to provide Grievant with all materials to be used in grievance hearings.

On December 24, 1991, VSEA filed a fourth grievance on behalf of Grievant, Docket No. 91-78. Therein, Grievant contended that the Employer placed him on administrative leave prior to his dismissal in violation of provisions of the Contract.

Hearings were held on May 14 and 21, June 4 and 8, and July 6, 1992, in the Board hearing room in Montpelier before Board Members Charles H. McHugh, Chairman; Leslie G. Seaver and Carroll P. Comstock. Assistant Attorney General Michael Seibert represented the Employer. Jonathan Sokolow, VSEA Legal Counsel, represented Grievant. At the May 14 hearing, the Employer indicated that it did "not intend to litigate" the administrative leave grievance in Docket No. 91-78.

The parties filed Proposed Findings of Fact and Memoranda of Law on August 12, 1992.

FINDINGS OF FACT

1. On January 22, 1968, Grievant was hired as a Social Worker Trainee with the Department of Social Welfare, and continued as an employee of the Department for more than 23 years until he was dismissed on November 1, 1991. At the time of his dismissal, Grievant was an Income Maintenance Supervisor in the Burlington District Office of the Department (Grievant's Exhibits 1, 2; State's Exhibit 15).

2. Grievant was a Social Worker Trainee with the Department from January 22, 1968 until January 20, 1969, when he was promoted to Social Worker A. On July 21, 1969, Grievant was promoted to Social Worker B. Grievant remained a Social Worker until July 22, 1973, when he was promoted to the position of Social Welfare Quality Control Reviewer. On September 2, 1974, Grievant was promoted once again, this time to the position of Income Maintenance Supervisor in the Morrisville District Office. From August 1978 until February 1979, Grievant was Acting Director of the Morrisville Office, after which he resumed his position as a supervisor in that office. In May, 1979, Grievant was transferred to the Burlington office, where he remained a supervisor for 12 years (Grievant's Exhibits 1, 4).

3. The district offices of the Department handle various benefit programs, including Aid to Needy Families with Children ("ANFC"), Food Stamps and Medicaid. In addition, the offices handle cash payment programs for food, shelter and fuel. The mission of the district office is to receive and process applications, gather information and determine eligibility,

in accordance with applicable regulations. This process is accomplished in part through the use of a computer system, known as ACCESS, which helps to determine eligibility.

4. The workload of the Burlington office, which covers Chittenden County, is high. There is an active caseload of 6,000 cases, which primarily are handled by 27 eligibility specialists and four supervisors. The declining economy during the past several years has resulted in a substantial increase in the caseload and in the volume of work without a corresponding increase in staffing. Also, the applicable regulations became much more complex during this period, making the work of supervisors more difficult.

5. During the first 22 years of Grievant's employment, through August 9, 1990, all of his annual performance evaluations rated his overall performance as satisfactory or better (Grievant's Exhibits 1, 17, 18).

6. In addition to rating overall performance, performance evaluations, through August 9, 1990, rated employees in 13 different areas or "factors". These are: 1) job knowledge and skills; 2) quality of work; 3) work habits; 4) attitude, interest and initiative; 5) learning ability; 6) judgment; 7) personal relationships; 8) quantity of work; 9) work under stress; 10) technical or professional knowledge and ability; 11) planning and organizing; 12) developing, selecting and motivating subordinates; and 13) effectiveness in pursuing tasks and achieving results (Grievant's Exhibit 1, State's Exhibit 1).

7. Through July 1989, Grievant received ratings of satisfactory or better in each rating factor for each evaluation since being hired by the Department in 1968 (Grievant's Exhibits 1, 17, 18).

8. On August 9, 1990, Grievant received an annual performance evaluation covering the period from July 23, 1989 to July 22, 1990. In the evaluation, written by then-district director Linda Knosp, Grievant's overall performance was rated satisfactory. In addition, Grievant was given a satisfactory rating in 11 of the 13 rating factors (State's Exhibit 1).

9. In the August, 1990 annual performance evaluation, Knosp rated Grievant's performance as less than satisfactory in two of the 13 rating areas: quantity of work and effectiveness in pursuing tasks and achieving results. The evaluation noted that certain performance deficiencies in those two areas had been discussed with Grievant during the rating period, but that Grievant had failed to meet expectations for improvement. As a result, Knosp set seven guidelines of performance which Grievant would have to meet "during the upcoming year" in order "to continue to receive a " 'consistently meets job requirements/standards' rating". These seven guidelines were as follows:

- 1) process committed children applications in a timely fashion;

- 2) bring policy and procedure manuals up-to-date as new materials come in;

3) complete supervisory case reviews in a timely fashion;

4) stay current with policy changes;

5) avoid giving fast, easy answers to workers' questions;

6) use the potential problems and premonitions report to identify workers who may be having trouble keeping up with the workload;

7) flag problem areas to his supervisor.

(State's Exhibit 1)

10. The committed children applications mentioned in the August 1990, evaluation as a problem area for Grievant involve children committed to the care of the Department who are not receiving medical benefits. Applications must be processed so that the children can receive medicaid cards. Each supervisor in the Burlington office carries a caseload of approximately 45 such cases. This is the only caseload carried personally by the supervisor. Each supervisor receives a daily report on the status of these cases and must do any work indicated by that report. In addition, each case must be reviewed once every 12 months.

11. The supervisory case reviews mentioned in the August 1990 evaluation as a problem area for Grievant are a useful supervisory tool to monitor the work of eligibility specialists to help ensure that they complete cases correctly and in a timely manner. These reviews consist of a form which a supervisor uses to check benefit determinations and levels. This checklist is

completed by using case information contained in the ACCESS computer. The reviews were instituted in the early 1980's to demonstrate to the Federal government that there was a mechanism in place to reduce error rates, and thus avoid the threat of Federal sanctions. The threat of sanctions decreased in the late 1980's. A supervisor was required to review 30 cases within a 60-day period, or approximately 15 per month, to meet performance standards.

12. The potential problems and premonitions report, referenced in the August 1990 performance evaluation of Grievant as a problem area, is another supervisory tool for monitoring the work of eligibility specialists. This is a document produced by the ACCESS computer system which lists, on a worker-by-worker basis, the tasks which must be taken care of as soon as possible. The key areas of the report list applications which have been pending over 30 days, or changes in information which have not been entered into the system within ten days. The report also alerts the supervisor to problems which may develop in various cases.

13. Grievant's 1990 annual evaluation was given to him on August 9, 1990. Shortly thereafter, Knosp went on a planned six month leave and was replaced on an interim basis by Judy Higgins. Higgins had worked for the Department for approximately ten years, first as a worker in the Food Stamps and ANFC programs, and thereafter as an Intake Specialist. Prior to assuming the position of District Director on an interim basis, Higgins had spent four years as an Income Maintenance Supervisor, like

Grievant, in the Burlington office. During the period that she was supervisor, Higgins viewed Grievant as the "weak link" in the supervisory staff. Higgins told Knosp during this period that she did not think that Grievant was a competent supervisor.

14. During the summer of 1990, shortly before Higgins became interim District Director, a staff meeting to review policy took place in the Burlington District office. Eligibility Specialists and their supervisors were present at this meeting. Knosp was not present. During the course of the meeting, Higgins told the eligibility workers that they were "behaving like children". In response, one of the eligibility specialists told Higgins that if she did not "treat us like children, we would not act like children". Neither Grievant nor either of the other two supervisors said anything in defense of Higgins. Subsequently, Higgins spoke with Knosp and told her that she was not pleased with what was said at the staff meeting. Thereafter, Grievant and Higgins met with Knosp in her office. Higgins said that she was upset that no one had backed her up when the worker made the comment to her. Grievant said that he did not approve of the way Higgins was treating the eligibility specialists. Higgins was angry at Grievant as a result of this incident.

15. In August, 1990, Higgins met with Knosp to discuss issues related to Higgins becoming interim District Director. Knosp brought Grievant's August annual evaluation to Higgins' attention. Knosp went over the list of areas in which Grievant was expected to improve to maintain a satisfactory rating.

16. A couple of weeks after becoming interim District Director, Higgins told Grievant that she expected him to follow through on the list of guidelines contained in Knosp's August 1990 annual evaluation. Between the time she assumed the position of interim District Director and October 17, 1990, Higgins was not aware of any problems with Grievant's performance, nor did she tell him that his performance was deficient in any respect.

17. On October 18, 1990, while Grievant was out on sick leave as a result of his father's illness, Higgins went into Grievant's office. Higgins noticed items on a shelf, including bulletins which had not been filed in manuals and items concerning cases which had not been sent out. Specifically, Higgins discovered the following materials:

- a) committed child applications which had not been completed in a timely manner;

- b) bulletins and interpretive memoranda which had not been filed;

- c) supervisory case reviews for the past two months which had not been completed and which required attention quickly to avoid being delinquent;

- d) two months of potential problems and premonitions reports which had not been reviewed by Grievant;

- e) completed, but unsubmitted, housing verification forms, potentially affecting clients' continued eligibility for housing subsidies; and

- f) overdue fair hearing reports, which reports are generated after a client who has been denied benefits disagrees with the decision and asks for a hearing (State's Exhibit 2, page 5-8).

18. Based on her discoveries in Grievant's office on October 18, 1990, Higgins concluded that Grievant had not complied with many of the guidelines set forth in the August 1990 evaluation. Higgins did not contact Grievant to apprise him of the performance deficiencies. Higgins contacted both her supervisor, Cynthia Price, Department Operations Chief, and John Murphy, Personnel Administrator for the Department, for direction on handling the situation. Higgins inquired whether she should "let the issues slide" concerning what she had discovered in Grievant's office. After Higgins explained to Price and Murphy the various discoveries which she had made, Price and Murphy told Higgins to proceed with issuing a special performance evaluation. Murphy told Higgins that proper notice of performance deficiencies had been given to Grievant by Knosp's August evaluation, and that it was appropriate to proceed with the special evaluation.

19. On November 28, 1990, Higgins gave Grievant a special performance evaluation, which covered the period July 23, 1990 to November 2, 1990. Higgins rated Grievant's overall performance as unsatisfactory and placed him in a prescriptive period for remediation of up to six months. Specifically, Higgins concluded that Grievant had failed to meet most of the specific guidelines established by Knosp in the August 1990 evaluation. In addition to requiring that Grievant comply with the prior seven guidelines established in his last annual evaluation, Higgins set forth in the special evaluation six additional guidelines for Grievant's performance:

- 1) process medical bills within 30 days of receipt;

2) complete housing and social security verification forms within ten days;

3) submit fair hearing reports at least one week before the hearing;

4) give timely and complete answers regarding items to his supervisor;

5) produce accurate and thorough work;

6) attend weekly conferences with his supervisor.

(State's Exhibit 2, Grievant's Exhibit 17)

20. During the rating period covered by the special performance evaluation, ending on November 2, 1990, Higgins did not bring to Grievant's attention any performance deficiencies.

21. During the rating period covered by the special performance evaluation, Grievant did not work on 27 of the 72 work days, 38 percent of the time. Grievant was on annual leave, personal leave or sick leave for those days. Some of Grievant's leave was due to the serious illness of his father, who was hospitalized in October, 1990, due to congestive heart failure (State's Exhibit 3).

22. In addition to placing Grievant in a prescriptive period of remediation, Higgins informed Grievant by memorandum of November 5, 1990, that his flex-time schedule was being cancelled because it made Grievant "unavailable at vital times and places a burden on the other supervisors". Higgins reiterated in the special performance evaluation which she gave Grievant on November 27, 1990, that a flex-time schedule would not be considered (Grievant's Exhibit 7, State's Exhibit 2)

23. Grievant had requested flex-time schedules periodically over the six to eight-year period prior to 1990. Generally, this schedule allowed Grievant to come into the office one hour late on one or more days per week and to make up the hour at the end of the day. This allowed quiet, uninterrupted time at the end of the day to use the computer. Computer access time is quicker at this time of day and work proceeds more rapidly. Among other things, computer time is essential to complete supervisory case reviews. At no time had a district director prior to Higgins refused Grievant's requests for a flex-time schedule. At the time Higgins cancelled Grievant's flex schedule, she was allowing supervisors R.B and M.W. to work on a modified flex schedule (taking a short lunch and leaving earlier than the normal quitting time). Also, a majority of non-supervisory staff in the office had flex-time schedules.

24. Upon cancellation of his flex-time schedule, Grievant offered to work after hours, with no pay, to complete his work. Higgins refused this request, because it was her understanding that it was prohibited by the Contract. Although Higgins had stated in the special performance evaluation that she expected Grievant to "accomplish meeting . . . expectations within the normal 40 hour work week", Higgins did indicate that she would consider overtime requests of Grievant if he stated what he would accomplish during such overtime. Higgins made an offer of up to four hours per pay period to assist Grievant in reducing his backlog of work. Grievant, believing that his use of overtime

would be used against him, decided not to request overtime but to continue to request a flex-time schedule (State's Exhibit 2, page 8).

25. Higgins provided all supervisors in the Burlington office, including Grievant, four hours a week of uninterrupted time in which they could perform work without being disturbed.

26. Higgins directed Grievant to devise a plan which would enable him to catch up on his work. On December 16, 1990, Grievant submitted his plan to Higgins. In that plan, Grievant once again requested a flex-time schedule. Under the schedule proposed by Grievant, he would be in the office during regular office hours 95 percent of the time in January and 97.5 percent of the time in February and March. As with Grievant's previous requests, Higgins denied this requested flex-time schedule (Grievant's Exhibit 8).

27. During the prescriptive period of remediation, Higgins had weekly conferences with Grievant to discuss his performance. During these conferences, Higgins and Grievant would discuss specific cases with which Grievant was involved and Grievant's progress on the deficiencies cited in the special performance evaluation. Higgins also issued three "status of performance" memoranda to Grievant, on January 3, February 13 and April 29, 1991. These memoranda tracked Grievant's performance during the prescriptive period of remediation. In March, 1991, Higgins became permanent District Director upon Knosp not returning from her leave.

28. During the six-month prescriptive period of remediation, Grievant set priorities among the various required performance standards to overcome being seriously behind in the

different areas of performance deficiencies. Grievant believed that the primary obligation of the Department is to get benefits to those who are eligible and, where they are not eligible, to give a decision within a reasonable period of time. Grievant set his priorities accordingly.

29. Grievant fully complied with the guideline regarding the processing of committed children applications by the February 13, 1991 status of performance memorandum. Grievant continued to handle this area in a satisfactory manner throughout the prescriptive period of remediation as well as the warning period. It was not a problem at the time of his dismissal.

30. One of the performance deficiencies noted on the special performance evaluation was Grievant's failure to timely process medical bills within 30 days of receiving them. Processing of these bills involves determining whether the recipient is eligible to have such bills covered. If so, the provider must be paid in a timely fashion. Failure to do so could result in the denial of services to the recipient in the future. By the time Higgins issued her February 13, 1991 status memorandum, Grievant was up-to-date with his medical bills. He continued to comply with this guideline throughout the rest of his prescriptive period for remediation as well as throughout the warning period. It was not a problem at the time of his dismissal (Grievant's Exhibit 17; State's Exhibit 14).

31. Grievant was criticized on the special performance evaluation for not maintaining his Policy and Procedure Manual for each of the programs handled by the Department. This

involves reviewing new policies as well as interpretive memoranda issued by the Department. It is important that supervisors keep their manuals up-to-date so that they can respond to workers' questions by providing accurate information. By the time Higgins issued her February 13, 1991 status memorandum, Grievant had fully updated his manuals. He continued to keep his manuals up-to-date throughout the balance of the prescriptive period for remediation as well as the warning period. Grievant likewise was successful in becoming current with Department policy. This is done primarily through review of materials which then are placed in the policy manuals. As with the manuals, being current with policy changes was not a problem at any time after February 13, 1991 (Grievant's Exhibit 17; State's Exhibit 14).

32. Grievant also placed priority on avoiding the cited performance deficiency of giving fast, easy answers to his workers. Among other things, this requires up-to-date manuals and commitment on the part of the supervisor to spend the time necessary to properly research the question prior to giving an answer. This was not a problem during the prescriptive period for remediation or the warning period. At the time he was dismissed, Grievant remained in compliance with this guideline (Grievant's Exhibit 17; State's Exhibit 14).

33. Grievant placed priority on correcting the cited failure to flag potential problems to his supervisor. The most important of these problems involve emergency temporary housing needs. A decision must be made which will make the difference between whether a person has shelter or spends the night on the

street. In addition, complex policy questions arise which must be addressed by the District Director. Problems also arise on a daily basis when workers are absent. Each of these areas must be addressed through discussions with the District Director and further actions by the supervisor. By the time Higgins issued her April 29, 1991 status memorandum, Grievant was performing satisfactorily in this area. Grievant continued to do so throughout the balance of the prescriptive period as well as the warning period. At the time he was dismissed, flagging problems to his supervisor was not a problem (Grievant's Exhibit 17, States Exhibit 14).

34. Grievant placed priority on correcting the cited failure to complete housing and social security verification forms in a timely manner. Timely completion of housing verification forms is essential for determining eligibility for subsidized housing. Delays in this area can result in a client losing a housing opportunity. Failure to properly determine how much rent will be covered can affect the amount of funds available to clients. Social security verification forms let the Social Security Administration know what level of benefits the client is receiving. If these forms are not timely completed, it may affect how much the client receives in social security benefits or cause delay in the processing of such benefits. By the time Higgins issued her first status of performance memorandum in January, 1991, Grievant was in compliance with the guideline regarding housing and social security verification forms. He remained in compliance throughout the prescriptive

period and the warning period, and was in compliance at the time he was dismissed (Grievant's Exhibit 17; State's Exhibit 14).

35. Grievant placed priority on correcting the cited failure to keep current on the potential and premonitions report to determine problems workers are having. By the time Higgins issued her February 13, 1991 status memorandum, Grievant was in compliance with the guideline regarding use of this report. He remained in compliance throughout the prescriptive period and at the time he was placed in the warning period (Grievant's Exhibit 17).

36. Grievant did not place priority on completing supervisory case reviews during the prescriptive period of remediation. He completed only a few supervisory case reviews during that period. Higgins informed Grievant during the rating period that his performance was deficient in this regard. Grievant told Higgins that he did not have time to fit the reviews into his workload (State's Exhibits 5, 7).

37. During the prescriptive period of remediation, Grievant's performance with respect to timely and accurately completing fair hearing reports was inconsistent. Higgins brought this deficiency to Grievant's attention during the rating period (State's Exhibits 4, 5, 7).

38. Higgins informed Grievant during the prescriptive period of remediation that his leadership abilities were deficient. The basis for Higgins' concerns in this regard was the work of B.S., an employee under Grievant's supervision. Higgins expressed concern with Grievant's inability to guide

B.S. in achieving adequate results in managing her caseload. Also, Higgins expressed dissatisfaction with Grievant allowing B.S. to respond directly to a client's complaints about B.S., rather than Grievant responding to the client (Grievant's Exhibits 5, 7).

39. During the prescriptive period for remediation, Higgins was critical of Grievant for procrastination in completing his assignments and in making his subordinates aware of assignments. This resulted at times in a need to extend the deadline for completing assignments (State's Exhibits 5, 7).

40. In her February 13, 1991, status of performance memorandum, Higgins was critical of Grievant's attitude, stating that he had "shown an unwillingness to accept guidance" from Higgins. By the April 29, 1991, status memorandum, Higgins was able to inform Grievant that "(y)ou have decided to face your deficiencies and are now working with, rather than against me" (State's Exhibit 5, 7).

41. Higgins was critical of Grievant during the rating period of Grievant being deficient in the area of job knowledge. Higgins told Grievant that, because of this, Grievant relied too heavily on Higgins' guidance (State's Exhibit 7).

42. On April 29, 1991, Legal Aid brought a class action suit, on behalf of several clients of the Employer, against the Employer for not meeting mandated timeframes for processing welfare benefits. Two of the three clients named in the suit were clients of worker B.S. Price told Higgins that she had to get the problem under control. Higgins directed Grievant to insure the quality and timeliness of the work of B.S. Higgins

told Grievant that she would be monitoring his work in this regard. This lawsuit was subsequently dismissed.

43. Shortly before the conclusion of the prescriptive period for remediation, Grievant asked Higgins to be removed from supervision of B.S. Grievant told Higgins that he was unable to deal with the problems of B.S. in an unbiased manner because of what he was going through in the corrective action process. Higgins decided to reassign B.S. to another supervisor, but informed Grievant that this was an indication that he was unable to meet the requirement of a supervisor to correct staff problems.

44. On June 19, 1991, Higgins issued a performance evaluation of Grievant covering the period of prescriptive remediation (i.e., November 29, 1990 - May 28, 1991). Higgins assessed Grievant's performance as unsatisfactory and placed him in a three-month warning period. Higgins assessed Grievant's performance as satisfactory in nine of the 13 guidelines for performance previously established for him. These included six of the seven guidelines set forth in Knosp's last annual evaluation of Grievant (i.e. committed children applications, manuals, policy changes, fast answers to workers, potential problems and premonitions report and flagging problems to his supervisor). The only one of Knosp's guidelines which Grievant had not complied with was the supervisory case reviews. Higgins determined that Grievant had complied with three of Higgins' additional six guidelines (i.e. medical bills, housing and social security verification forms and weekly conferences). Higgins

determined that Grievant had failed to comply with the guidelines concerning fair hearing reports, giving timely answers and producing accurate work (Grievant's Exhibit 17, State's Exhibit 8).

45. In addition to assessing Grievant's performance with respect to the guidelines set for him at the beginning of the prescriptive period for remediation, the performance evaluation also set forth as follows with respect to other areas:

Job Knowledge - It has become apparent that gaps exist in your knowledge of policy and procedure. This results in you leaning heavily on me to tell you what to look for, what information is needed and how to proceed: beyond what should be necessary. Recently, you were asked to look over new applications of one of your staff to find any problems and to route them to me for inspection. In several cases, you missed important factors. Seeing more completed supervisory case reviews would enable me to offer you more help in this area although I continue to discuss these cases with you as they come to my attention. If you do not know the policy and procedures, you are unable to explain them to your staff.

Workload Management - You have trouble juggling the variety of tasks required of you. I believe this is partly because you are often unclear on the proper procedure which slows down your ability to resolve situations. Your methods of dealing with certain issues prolong reaching their conclusion and deadlines given to your staff are often longer than appropriate. The secretarial unit states you are unavailable for calls much more than the other supervisors. You have trouble managing your own workload and in overseeing the workload of your staff members who need assistance.

Leadership Ability/Developing and Motivating Staff - Your willingness to work with issues among your staff has been inconsistent during the last six months. You have been willing to work on specific case problems but have a very difficult time dealing with issues more specific to the person. It is hard for you to set expectations for your staff and to follow through on the expectations you do set. Recently, you asked to be removed from supervision of a difficult person in your unit after I made it clear to you that we were going to have to deal with her problems as a personnel issue and give her work extra scrutiny. You said you were unable to deal with her problems in an unbiased

manner because of what you were going through yourself. Although I have decided to reassign this person, it was discussed with you that this was an indication that you were unable to meet an important requirement of supervision which is correcting staff problems or taking appropriate personnel action.

Judgment and Attitude have also been inconsistent during your prescriptive period. I recently had asked you to review the pending applications of one of your staff and then route them to me before granting benefits. Because of this request, you failed to allow benefits to be given out to a client on a day that I was on annual leave. Although the client claimed to have an emergency need, you told her she couldn't have her benefits until I had reviewed the case. I would expect you to realize that this would warrant an exception to my request. Also, when you requested to have your problem employee removed from your unit, you said that even though you knew she had problems, you would be biased in her favor as opposed to management. This made it impossible for me to leave her under your supervision. Your willingness to work with me to improve your performance improved greatly in March, but recently it is apparent you are struggling again with feelings that this is my problem rather than yours.

Although I acknowledge that you have made an effort to meet Department standards during your prescriptive period, your performance still does not meet those standards. Therefore, effective with the date this evaluation is signed, I am placing you in a warning period of three months per Article 14 of the Contract. Failure to satisfactorily meet Department standards by the end of this warning period may result in dismissal.

(State's Exhibit 8, pgs. 5-6).

46. During the warning period, Grievant and Higgins continued to have conferences in which Grievant's performance was discussed. These conferences were not held on a weekly basis, due to vacations.

47. During the warning period, Grievant completed only a few supervisory case reviews. This meant that between September, 1990 and September, 1991, Grievant completed only six supervisory case reviews. This was well below the Department standard of completing a minimum of 180 reviews per year.

48. Two of the other three supervisors in the Burlington office exceeded performance standards in completing supervisory case reviews during this period. The remaining supervisor, C.C., told Higgins that she had completed the required number of supervisory case reviews but had not entered them into the computer. Failure to enter completed supervisory case reviews into the computer does not comply with Department standards. Higgins took no corrective action against this supervisor for failing to enter the reviews into the computer (Grievant's Exhibit 14).

49. During the warning period, Grievant's unit inconsistently completed fair hearing reports on time. However, the performance of the unit in this regard during the warning period was an improvement over the prescriptive period for remediation.

50. During the warning period, Grievant inconsistently used the problems and premonitions report.

51. During the warning period, there were two cases, involving an absent parent and the "Dr. Dinosaur" program, where Grievant did not keep abreast of the status of the cases and did not ensure that they were resolved in a timely manner.

52. During the warning period, Higgins asked Grievant to discuss performance issues with his subordinates. Grievant delayed in discussing the issues with the employees.

53. On September 24, 1991, Higgins issued a performance evaluation covering the warning period from June 20, 1991, to September 19, 1991. Therein, Higgins assessed Grievant's performance as unsatisfactory during the three-month warning

period, and informed Grievant that she was "moving for dismissal". The evaluation mentioned performance deficiencies with respect to three of the 13 guidelines set for Grievant's performance at the beginning of the prescriptive period of remediation (i.e., fair hearing reports, supervisory case reviews, and potential problems and premonition report). The evaluation did not specifically mention deficiencies with respect to the remaining 10 guidelines. The evaluation provided in pertinent part as follows:

The following areas of your performance fail to meet the Departmental standards of performance:

Workload Management - You are unable to complete the tasks required of a supervisor in the appropriate time frames. Fair hearing reports from your unit have been inconsistently received on time. You have completed approximately six case reviews since 9/90 which is far below the standard of 30 in a 60 day period or 180 per year. Most supervisors complete the total SCR sample of 30-35 per month or about 360 per year. Repeated statements on your part that you would begin to include these in your workload have not been met. In following up on case issues, you still use methods which prolong resolution. The secretarial unit still states that you seem to be available less than the rest of the supervisors. You seem to be unsure of how to proceed on cases which slows your ability to complete them. The problems and premonitions report that you had begun using regularly, was again inconsistently used during the warning period.

Leadership Ability/Developing and Motivating Staff - You still seem unwilling or unable to discuss performance issues with your staff. Recently you were asked to discuss a coverage issue with one of your staff members. Although I made it clear that you should review expectations with her and not accept excuses, you at first procrastinated and then failed to do either of the things I asked you to do; although this was not the first time coverage had been an issue with this staff member. You have great trouble giving your staff feedback which would help them improve their performance and most often don't do it at all. In looking at case problems, you fail to look for the cause without being asked to do so specifically which means you do not provide instruction and clarification to the worker.

Job Knowledge - In working with you during this warning period, it is obvious that there continue to be gaps in your knowledge of policy and in your knowledge of how to proceed on cases. You do not follow up on cases beyond specific instructions given because you don't know what the next step should be. You continue to lean on me to tell you how to proceed. Recently, a client waited well beyond the appropriate time frame for Medicaid coverage because you failed to be aware of a policy that had been reviewed with the entire staff as well as with you personally. A supervisor is expected to have knowledge beyond that of a worker and be able to advise them. You are unable to do so effectively. You often require repeated explanations of tasks which others easily understand.

Judgment and Attitude have not improved since the last evaluation. Your unwillingness to accept and change many of your methods of dealing with cases and staff, or to try to positively effect change have made it impossible for me to help you improve your overall performance. Although you have not openly refused to work with me during this warning period, you have also not taken the initiative to make a significant difference in your areas of performance deficiency.

The areas discussed above are all attributes which are extremely important to the effectiveness of a supervisor, and without them, you cannot and do not meet the standards of performance for your position as set by the Department. I am therefore moving for dismissal per Article 14 of the Agreements between the Vt. State Employees Association and the State of Vt.

(State's Exhibit 14)

54. Higgins gave Grievant the end of warning period evaluation on September 24, 1991, at a meeting between Higgins, Grievant and VSEA Representative Richard Lednický. Lednický read the evaluation and asked, on a point by point basis, for any documentation which would support the allegations. In particular, Lednický asked for examples and documentation of the methods of work utilized by Grievant that prolonged resolution of cases, examples of gaps in Grievant's job knowledge and examples of where his judgment and attitude were faulty. Higgins said that she would take the request under advisement. At this meeting,

Higgins also gave Grievant a letter indicating that she was placing Grievant on administrative leave with pay. Higgins also gave Grievant a "Loudermill" letter, signed by Higgins, indicating that she was contemplating Grievant's dismissal (State's Exhibit 12).

55. The letter placing Grievant on administrative leave did not set forth the reasons for such leave. The letter also did not advise Grievant of his right to be represented by VSEA or private counsel (Grievance in Docket No. 91-78).

56. On October 1, 1991 a "Loudermill" hearing was held in which Higgins acted as hearing officer with personnel administrator John Murphy, Grievant and Lednicky present. After this meeting, Lednicky requested Higgins' supervisory notes concerning Grievant's performance. Lednicky's request was denied.

57. Due to Lednicky questioning whether Higgins had the authority to conduct the October 1 "Loudermill" hearing, a second hearing was scheduled for October 10 with Jane Kitchel, Deputy Commissioner for the Department. Prior to this meeting, Lednicky wrote to Kitchel, requesting that Kitchel intervene to have Higgins provide "any material, document, note or other tangible item that Ms. Higgins says she has as well as specify for us the details which support the charges as discussed above before our meeting on October 10, 1991 so we can review it and adequately prepare for that meeting". By letter dated October 7, 1991, Kitchel informed Lednicky that she was "unaware of any additional

materials that can be made available to you or Mr. Schmitt" (State's Exhibit 13; Grievant's Exhibits 12, 13).

58. By letter of October 29, 1991, Kitchel informed Grievant that he was dismissed. The letter provided in pertinent part as follows:

This is to officially notify you that you are being separated from your position as Social Welfare Income Maintenance Supervisor for failure to improve your performance to a satisfactory level by the end of the corrective, progressive period which began on 11/29/90 and included the following performance evaluations:

- Special evaluation covering period 7/23/90-11/ 2/90
- Warning evaluation covering period 11/29/90- 5/28/91
- End of warning period evaluation covering period 6/20/91-9/19/91
- and other related documents.

Your separation will be effective on November 1, 1991. You will receive two weeks' pay in lieu of notice . . .

(State's Exhibit 15)

59. During the course of the corrective action process, Higgins and Grievant met to discuss various performance issues. Higgins took notes at these meetings. She used these notes to prepare the various evaluations and status of performance memoranda.

60. During grievance hearings, at the lower levels of the grievance procedure, on the various performance evaluations and corrective action steps herein, Lednický requested copies of Higgins' supervisory notes. These requests were consistently denied, as were requests by Lednický for other documentation supporting the performance evaluations.

61. At Step II grievance hearings in these matters, Personnel Administrator John Murphy, who was assigned to the Department, was the hearing officer. At no time during the hearings, or at any time prior or subsequent thereto, did Murphy disclose that he had advised Higgins with respect to issuance of the evaluations.

62. Welfare advocates often must speak to eligibility workers and their supervisors to resolve various problems which arise. Among these problems are denial of emergency fuel requests or other emergency aid applications and interpretative issues regarding Department policy. Welfare advocates found Grievant to be very concerned and responsive with respect to these issues, and more so than his fellow workers.

63. At all times relevant, Grievant had good relations with clients, their representatives and with his co-workers.

At issue is whether the Board should uphold adverse actions taken against Grievant based on his performance, culminating in his dismissal from employment. We first will address preliminary procedural issues which have been raised. Then, we will discuss the merits of each of the grievances filed by Grievant in turn.

Failure to Disclose Information During Grievance Procedure

The first preliminary procedural issue is that Grievant contends that the Employer violated Article 11, Section 3, of the Contract by failing to disclose information to Grievant during the grievance procedure, forcing him to proceed without information and documentation which had been used by the Employer to issue performance evaluations on Grievant and to prepare for grievance hearings on that evaluation. During grievance hearings at the lower levels of the grievance procedure, on the various performance evaluations and corrective action steps at issue herein, Grievant's representative requested copies of Higgins' supervisory notes concerning Grievant's performance. These requests were consistently denied, as were requests for other documentation supporting the performance evaluations.

Article 11, Section 3, of the Contract requires the Employer to provide to the involved employee "(a)ny material, document, note or other tangible item which is to be entered or used in any grievance hearing." Grievant acknowledges that the materials which he sought were not entered into evidence or put forth by the Employer during the grievance hearings. However, Grievant contends that a supervisor "uses" materials in a hearing

when the supervisor refers to them for the purpose of refreshing his or her recollection prior to the hearing, and that Grievant's supervisor, Judy Higgins, so used the requested materials. Grievant contends that the failure of the Employer to provide these materials to him, in violation of the Contract, violated Grievant's due process rights and interfered with his right to present a defense, both at the grievance hearings at the lower steps and before the Board.

We disagree with Grievant, and conclude that to accept his argument would be contrary to standards of contract construction. A contract will be interpreted by the common meaning of its words where the language is clear. In re Stacey, 138 Vt. 68, 71 (1980). Terms should not be read into a contract unless they arise by necessary implication. Id. The law will presume that the parties meant, and intended to be bound by, the plain and express language of their undertakings; it is the duty of the Board to construe contracts; not to make or remake them for the parties, or ignore their provisions. Vermont State Colleges Faculty Federation v. Vermont State Colleges, 141 Vt. 138, 144 (1982).

The common meaning of the contractual provision requiring disclosure of items "used in" a grievance hearing is to refer to items which are actually present and put forth during the hearing itself. To accept Grievant's argument would be to accept that the term "used in" really means "used in preparation for" grievance hearings. This would result in reading terms into a contract which do not arise by necessary implication. The manifest intention of the parties, as indicated by the language

negotiated, was employee entitlement to copies of any tangible item which management directly put to use during grievance hearings, but not to all items which management used in preparation for such hearings. Thus, we conclude that the Employer did not violate Article 11, Section 3, of the Contract by failing to provide Grievant with the requested materials.

Finally, on this issue, we note that we disagree with Grievant's contention that the Employer's failure to disclose information to him interfered with his right to present a defense at the Board. Section 12.1 of the Rules of Practice of the Board has incorporated the discovery provisions of the Vermont Rules of Civil Procedure. Thus, Grievant had the opportunity to seek to obtain the information through conducting discovery.

Failure to Disclose Information During Loudermill Process

Grievant similarly contends that the failure of the Employer to provide Grievant with copies of Higgins' supervisory notes and other materials which supported the specific claims against him, during the Loudermill process, violated Article 6, Section 5, and Article 11, Section 3, of the Contract. The Loudermill process, based on a U.S. Supreme Court decision of that name, 470 U.S. 532 (1985), is invoked whenever the Employer contemplates dismissing an employee. Article 14, Section 4, Contract. The Employer is required to notify the employee in writing of the reasons for such contemplated action, and give the employee an opportunity to respond either at a meeting or in writing before any dismissal action is taken by the Employer. Id.

We disagree with Grievant that Article 11, Section 3, of the Contract is applicable to Loudermill proceedings. That provision extends only to items to be entered or used "in any grievance hearing." The Loudermill process does not involve a "grievance hearing". The grievance procedure, including grievance hearings, comes into play only when management actually has taken some adverse action against an employee. In Loudermill situations, management has taken no action, but is contemplating taking action. Management may decide, as a result of the Loudermill process, not to take the contemplated action. There is nothing to grieve unless management finally decides, after the Loudermill hearing, to take adverse action against the employee. Thus, the Loudermill process does not involve a "grievance hearing" within the meaning of Article 11, Section 3.

Further, we conclude that Grievant's alleged violation of Article 6, Section 5, of the Contract is not properly before us for decision. Article 6, Section 5 provides in pertinent part:

The State will also provide such additional information as is reasonably necessary to serve the needs of VSEA as exclusive bargaining agent and which is neither confidential nor privileged under law. Access to such additional information shall not be unreasonably denied. Failure to provide information as required under this Article may be grieved through the grievance procedure to the Vermont Labor Relations Board . . .

The Board recently relied on this contract provision to require the State to provide to VSEA materials relating to the investigation into the conduct of a discharged employee. Grievance of VSEA, 15 VLRB 13 (1992). However, we did so only after VSEA had exhausted the grievance procedure on the issue at lower steps before filing the grievance with the Board. Id., 15

VLRB at 19-20. Here, Grievant did not file a grievance at the lower steps of the grievance procedure with respect to the failure to provide the information. Instead, he proceeded directly to the Board. This is contrary to the requirement of Article 6 that any alleged violation of that article be "grieved through the grievance procedure" before grieving the issue with the Board. This has denied the parties an adequate opportunity under the contractual grievance procedure to "make a sincere effort to reconcile their differences as quickly as possible at the lowest possible organizational level". Article 15, Section 1(a), Contract. Thus, we conclude that the alleged violation of Article 6, Section 5, of the Contract is not properly before us.

Failure to Disclose Hearing Officer's Involvement

The final preliminary procedural issue is Grievant's contention that the Employer violated Article 15, Section 4(d) of the Contract because the Step II grievance hearing officer, John Murphy, did not disclose to Grievant his involvement in the adverse performance evaluations, and accompanying corrective action steps, imposed on Grievant.

The parties have contracted that we have no jurisdiction to resolve this claim. Article 15, Section 4(d), referring to the conduct of hearing officers, provides in pertinent part:

The management representative at Step II . . . shall act fairly and without prejudice in determining the facts which affect the granting or denial of a grievance. If the management representative participated in . . . the preparation or writing of a performance evaluation in progressive corrective action cases, subject to the grievance (s)he shall disclose that fact, but shall not be disqualified thereby . . . Complaints concerning the conduct of the management representative shall be grievable directly to, but not beyond, Step III . . .

Through this language, the parties clearly expressed their intent that the Board not review the conduct of hearing officers. Grievance of Johnson, 9 VLRB 94, 110-11 (1986). Thus, we do not have jurisdiction over the alleged violation of Article 15, Section 4(d).

Docket No. 91-52

We turn to discussing the merits of the four grievances filed by Grievant. We will discuss each grievance in turn, and begin with Docket No. 91-52. Grievant contends that the Employer violated the Contract in issuing the special performance evaluation covering the period July 23, 1990 to November 2, 1990, and placing Grievant in a prescriptive period for remediation. Specifically, Grievant alleges that the Employer failed to provide proper notice of performance deficiencies and there was no just cause for the evaluation.

Pursuant to the Contract, oral or written notice of performance deficiency is the first step in progressive corrective action to be taken by the Employer. Article 14, Section 1(e)(i), Contract. The issuance of a special or annual performance evaluation, coupled with a prescriptive period for remediation, is the contractually prescribed second progressive step in the Employer's corrective action efforts to address the substandard performance of an employee. Article 14, Section 1(e)(ii). Such corrective action may only be imposed for just cause. Article 14, Section 1(f), Contract.

We conclude that just cause does not exist for the special evaluation, and accompanying prescriptive period for remediation,

imposed on Grievant. The Employer did not provide Grievant with the contractually required notice of performance deficiencies during the rating period covered by the evaluation.

Article 12, Section 4, of the Contract, which applies to special performance evaluations issued pursuant to Article 14 progressive corrective action provisions, provides that "(d)uring the rating year, the immediate supervisor shall call the employee's attention to work deficiencies which may adversely affect a rating, and, where appropriate, to possible areas of improvement." Under this contract language, a supervisor is required to give an employee clear indication of dissatisfaction with that employee's performance during the rating period. Grievance of Smith, 5 VLRB 272, 277 (1982). The Contract provides that an employee be told during the rating period when his/her performance is unacceptable so there will be no "surprises" at evaluation time. Grievance of Rathburn, 5 VLRB 286, 293 (1982). A necessary inference to be drawn from the contract language is that, whenever possible, employees should be given timely notice of deficiencies to afford them an opportunity to improve their performance prior to the end of the rating period. Grievance of Barrett, 13 VLRB 310, 332 (1990).

The burden is on management to put an employee clearly on notice of deficiencies during the rating period. Grievance of Calderara, 9 VLRB 211, 221 (1986). Given the difference in perceptions among people, it is imperative that management indicate its dissatisfaction clearly and unequivocally so misconceptions are eliminated. Id. Management must clearly and unequivocally indicate to an employee that the dissatisfaction with performance is during the present rating period, rather than

the past rating period. Id., 9 VLRB at 221-22.

It is clear by the evidence that Grievant was not provided with this contractually required notice of performance deficiencies during the rating period covered by the special performance evaluation, ending on November 2, 1990. Higgins did not bring to Grievant's attention any performance deficiencies on his part during the rating period. Early in the rating period, Higgins told Grievant that she expected him to follow through on the list of guidelines contained in Linda Knosp's August 1990 annual evaluation. However, this was not an expression of dissatisfaction with Grievant's performance during the rating period.

Higgins was not aware of any problems with Grievant's performance during the rating period until October 18, 1990, when she discovered in Grievant's office many items which indicated that he had not timely pursued various issues. At this point, the Contract required Higgins to apprise him of his performance deficiencies, and clearly and unequivocally indicate her dissatisfaction with Grievant's performance. However, Higgins did not discuss with Grievant his performance deficiencies prior to the end of the rating period. Instead, she proceeded to issue the special performance evaluation, rating his performance unsatisfactory and placing him in a prescriptive period for remediation. Thus, Grievant was afforded no opportunity to improve his performance prior to the end of the rating period.

Nonetheless, the Employer contends that proper notice had been given to Grievant by Knosp's August 1990 performance

evaluation, setting forth performance deficiencies in various areas, and thus it was appropriate for Higgins to proceed with the special evaluation. We disagree. The Employer's position is in direct contravention of the Contract language and our prior cases that management must make an employee aware of performance deficiencies during the rating period prior to issuing an adverse evaluation with respect to those deficiencies. Dissatisfaction with performance expressed by management during the preceding rating period does not fulfill the contractual obligation to call an employee's attention to work deficiencies "during the rating year". Smith, 5 VLRB at 278.

Moreover, even assuming arguendo that Knosp's evaluation could be considered as proper notice during the special evaluation rating period with respect to deficiencies of Grievant mentioned in Knosp's evaluation, this still would not result in Grievant receiving sufficient notice for the special evaluation. Knosp's evaluation had assessed Grievant's performance as deficient with respect to quantity of work and effectiveness in pursuing tasks and achieving results. As a result, she set seven guidelines of performance which Grievant would have to meet during the coming year for satisfactory performance. In the special performance evaluation, Higgins concluded that Grievant had failed to meet most of the specific guidelines established by Knosp, but did not rest the evaluation on those grounds alone. In addition, Higgins concluded that Grievant's performance was deficient in various other areas, thus resulting in her setting forth six additional guidelines for Grievant's performance.

Grievant had no notice of any kind of these additional performance deficiencies. Thus, Grievant had no notice of a substantial portion of cited deficiencies on the evaluation, which provides a sufficient independent basis to rescind the evaluation for lack of proper notice.

Also, the basis for the contractual requirement that notice of deficiencies be given during the relevant rating period is made clear by the context of this case. Grievant, an employee with 22 years of satisfactory or better performance, was informed by his supervisor, Linda Knosp, in August 1990 that his overall performance was satisfactory, but that he would have to improve his performance "during the upcoming year" in certain areas to continue to have his overall performance rated satisfactory. Less than three months later, the new supervisor of Grievant, Judy Higgins, discovered that Grievant's performance had been deficient in certain areas. Meanwhile, Grievant, with the approval of Higgins, had been on leave for more than one-third of the rating period, some of which leave was due to the serious illness of his father. Higgins apparently was not that concerned about the pressing need to address Grievant's performance deficiencies since she inquired of her superior whether she should "let the issues slide". Nonetheless, despite these circumstances, Higgins was advised to, and did, issue the special performance evaluation without apprising Grievant of his performance deficiencies.

This clearly was an unreasonable action under the circumstances. Grievant was entitled to notice of the

deficiencies and an opportunity to work on improving them before being issued an unsatisfactory evaluation, and being placed in a prescriptive period for remediation. To place an employee with long years of satisfactory performance, who was quite obviously going through a trying period, into the situation which Higgins thrust Grievant without notice and an opportunity to improve, was an unreasonable management action.

In sum, we conclude that just cause did not exist for the special evaluation, and accompanying prescriptive period for remediation, imposed on Grievant. The Employer did not provide Grievant with the contractually required notice of performance deficiencies during the rating period covered by the evaluation. Thus, the action taken by the Employer should be rescinded.

Docket No. 91-61

Grievant contends that the Employer violated the Contract by issuing Grievant an adverse performance evaluation at the conclusion of the prescriptive period for remediation on May 28, 1991, and placing him in a warning period. Specifically, Grievant alleges that the Employer inappropriately bypassed progressive corrective action and there was no just cause for the evaluation and placement in a warning period.

Placement in a warning period of 30 days to six months is the contractually prescribed third step, before the final step of dismissal, in the Employer's corrective action efforts to address the substandard performance of an employee. Article 14, Section 1(e)(iii), Contract. Such corrective action may only be imposed for just cause. Article 14, Section 1(f), Contract.

Grievant's contention with respect to progressive discipline is premised on the proposition that inherent in the concept of progressive corrective action is the principle that the Employer cannot proceed to the next step in the corrective process unless it has properly followed the preceding step. Since the special performance evaluation and prescriptive period for remediation were imposed in violation of the Contract, Grievant contends that the subsequent evaluation, placing Grievant in a warning period, violated the contractual guarantee of progressive corrective action. Thus, Grievant contends that the grievance over the evaluation and placement in a warning period should be granted.

We disagree with Grievant that the rescinding of the special evaluation, and accompanying prescriptive period of evaluation, results in an automatic granting of the grievance over the subsequent evaluation and placement in a warning period. The Contract does provide for progressive corrective action, but recognizes that "there are appropriate cases that may warrant the State . . . bypassing progressive . . . corrective action". Article 14, Section 1(f)(1). In the procedural posture which this case now rests, we believe the appropriate analysis at this point is to determine whether the Employer appropriately bypassed progressive corrective action in placing Grievant in a warning period.

We conclude that bypassing progressive corrective action was inappropriate, and that just cause did not exist for imposition of the adverse performance evaluation and placement of Grievant in the warning period.

At the outset of the applicable rating period, Higgins established thirteen guidelines for Grievant's performance. Grievant proceeded to set priorities among the various guidelines to overcome being seriously behind in the different areas of cited performance deficiencies. By the end of the rating period, Higgins assessed Grievant's performance as satisfactory with respect to nine of the guidelines: timely processing of committed children applications, bringing policy and procedure manuals up to date, staying current with policy changes, avoiding giving fast, easy answers to workers' questions, consistent use of the problems and premonitions report, flagging problems to his supervisor, timely processing of medical bills, timely completion of housing and social security verification forms, and attending weekly conferences with Higgins.

By the end of the rating period, Grievant continued to be deficient in the remaining four guidelines in that he completed only a few supervisory case reviews, was inconsistent in timely and accurately completing fair hearing reports, was inconsistent in producing accurate and thorough work, and at times did not give timely and complete answers to Higgins. During the rating period, Higgins also brought performance deficiencies to Grievant's attention in the following areas, in which Higgins had reason to conclude that Grievant had some continuing problems by the end of the rating period: leadership abilities, procrastination in completing assignments and job knowledge.

Given this performance record of Grievant, the bypassing of progressive corrective action and placing Grievant in a warning

period, where he had only three months to raise his performance to a satisfactory level, was inappropriate. At the beginning of the rating period, Grievant was seriously behind in various areas of his work. It is evident during the six month rating period that he made substantial improvement in his performance, given that he was able to meet two-thirds of the performance guidelines set for him at the beginning of the rating period.

Grievant's serious efforts to improve were recognized by Higgins in the performance evaluation, in which she acknowledged that Grievant had "made an effort to meet Department standards during your prescriptive period". Also, it is evident that Grievant's deficiencies in other areas brought to Grievant's attention at various points during the rating period were areas in which he needed work, but did not indicate deficiencies warranting bypassing progressive corrective action.

In sum, bypassing progressive corrective action was inappropriate given Grievant's serious efforts to improve and given the substantial improvements which he did make in his performance. Thus, just cause did not exist for the adverse evaluation placing Grievant in a warning period. This action taken by the Employer should be rescinded.

Docket No. 91-72

Grievant contends that the Employer violated the Contract by dismissing him effective November 1, 1991. Specifically, Grievant alleges that the Employer failed to provide proper notice of performance deficiencies, the Employer inappropriately bypassed progressive corrective action and there was no just cause for his dismissal.

Dismissal is the contractually prescribed fourth, and final, step in the Employer's corrective action efforts to address the unsatisfactory performance of an employee. Article 14, Section 1(e)(iv), Contract. Article 14, Section 11, of the Contract further provides that, "(i)n any case involving dismissal based on performance deficiencies, the Vermont Labor Relations Board shall sustain the State's action as being for just cause unless the grievant can meet the burden of proving that the State's action was arbitrary and capricious". This latter provision does not bar a grievance alleging that progressive corrective action was bypassed. Article 14, Section 11, Contract.

Just cause means some substantial shortcoming detrimental to the employer's interests which the law and sound public opinion recognize as a good cause for dismissal. In re Grievance of Muzzy, 141 Vt. 463, 468 (1982). A discharge may be upheld as one for "cause" only if it meets two criteria of reasonableness: one that it is reasonable to discharge an employee because of certain conduct, and the other, that the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. Id. at 468-69. An "arbitrary" decision is one fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances or significance. Lewandoski and VSCFF v. Vermont State Colleges, 142 Vt. 446 (1983). "Capricious" is an action characterized by or subject to whim. Appeal of Degreenia and Lewis, 11 VLRB 227, 229 (1988).

In reviewing a dismissal based on performance deficiencies, as well as a dismissal based on misconduct, we look to the factors articulated in Grievance of Colleran and Britt, 6 VLRB

235, 268-69 (1983), in determining whether dismissal is for just cause. Grievance of Merrill, 8 VLRB 259, 286 (1985); Affirmed, 151 Vt. 270, 274-75 (1988). The pertinent factors here, adapted to a dismissal for performance reasons, are: 1) the nature and seriousness of Grievant's performance deficiencies, and their relation to Grievant's duties, position and responsibilities; 2) the effect of the deficiencies on Grievant's ability to perform at a satisfactory level; 3) Grievant's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; 4) consistency of the action taken with the progressive corrective action provisions of the Contract; 5) the clarity of the notice given to Grievant; 6) potential for Grievant's rehabilitation; 7) mitigating circumstances; and 8) the adequacy and effectiveness of alternative sanctions.

In reviewing the nature and seriousness of Grievant's performance deficiencies, the issue is whether the deficiencies, in total, constitute a substantial shortcoming detrimental to the Employer's interests. Muzzy, supra. Merrill, 8 VLRB at 286. It is evident that Grievant's most serious performance deficiency was with respect to completing supervisory case reviews. During his last year of employment, he completed only six reviews, compared to the Department standard of 180 reviews per year. These reviews are a useful supervisory tool to monitor the work of eligibility specialists to help ensure that they complete cases correctly and in a timely manner. Although other supervisory tools exist to achieve the same ends (e.g., problems and premonition report,

active interaction with workers on cases, responding to workers' questions on cases), supervisory case reviews are an effective tool. Nonetheless, the failure of Grievant in this regard does not, by itself, rise to the level of a substantial shortcoming warranting his dismissal. Another supervisor in the Burlington office failed to enter completed supervisory case reviews into the computer in violation of Department standards, yet no corrective action was taken by Higgins against the supervisor. This is an indication that the proper completion of supervisory case reviews was not given the importance which the Employer now wishes us to attach to them.

Thus, the issue becomes whether other deficiencies of Grievant, when considered with the supervisory case reviews, rose to the requisite level of substantial shortcomings. Grievant demonstrated inconsistent use of the problems and premonitions report and inconsistent timely completion of fair hearing reports. There were also some cases where Grievant did not keep abreast of the status of cases and did not ensure they were timely resolved. There were occasions where Grievant delayed in discussing issues with employees. It is evident that Grievant had some deficiencies in job knowledge. However, the evidence presented by the Employer in these areas was insufficient, both in specificity and substance, for us to conclude that taken together, along with supervisory case reviews, they demonstrate substantial shortcomings detrimental to the Employer's interests. It is evident that Grievant had performance deficiencies which needed to be addressed, but they did not rise to the level warranting his dismissal.

Our conclusion that Grievant had not reached the point of being unfit to continue performing his duties is bolstered by his past work record and mitigating circumstances. Prior to his performance problems, he had 22 consecutive years where his performance was evaluated as satisfactory or better. At all times, Grievant had good relations with his clients and co-workers. His performance problems during his last year of employment appear to have been caused by an increasingly heavier and more difficult workload, combined with absences from work resulting, in some part, from the serious illness of his father. These mitigating circumstances are relevant in ascertaining Grievant's ability to perform at a satisfactory level. In light of Grievant's past work record and these mitigating circumstances, the Employer was obligated to follow the progressive corrective action steps of the Contract, without bypass, to seek to improve Grievant's performance to a satisfactory level. The Employer owed no less effort to seek to retain an employee who had shown his value over 22 years.

This the Employer failed to do. Instead, the Employer provided Grievant with an adverse special performance evaluation and placed him in a prescriptive period of remediation, without providing notice to him of his deficiencies and an opportunity to improve during the rating period. This violated the Contract and set into course a chain of corrective action steps in which progressive corrective action was inappropriately bypassed.

Adequate and effective alternative sanctions clearly were available to the Employer. If the Employer had abided by the Contract, and provided the proper notice and opportunity to

improve to Grievant before issuing the special performance evaluation, Grievant's performance difficulties could have been addressed more productively. Grievant and Higgins could have worked constructively on Grievant's deficiencies without improperly imposed progressive corrective action steps clouding the atmosphere. If Grievant still had not improved, Higgins then could have properly proceeded with the prescriptive period of remediation.

In any event, it is evident that Grievant had potential for rehabilitation. This is demonstrated not only by his prior 22 years of satisfactory or better performance, but by his serious efforts to improve and the substantial improvements which he, in fact, made after being apprised of his deficiencies.

In sum, we conclude that the dismissal of Grievant for performance deficiencies was without just cause. The dismissal of Grievant was arbitrary and capricious in that it stemmed from absence of consideration of the contractual principles of: 1) proper notice of performance deficiencies during the applicable rating period, and 2) bypassing progressive corrective action only in appropriate cases. The Contract gives State employees a vested property interest in continued employment, absent just cause for dismissal. Muzzy, 141 Vt. at 472. Procedural due process protections attach to this property interest. Id. The Employer violated Grievant's due process rights by lack of proper notice of performance deficiencies and inappropriately bypassing progressive corrective action. The appropriate remedy for the Employer's arbitrary and capricious action is the reinstatement of Grievant with full back pay.

Grievant contends that the Employer violated Article 14 and 39 of the Contract by placing him on administrative leave with pay effective September 24, 1991. The Employer failed to file an answer to this grievance and, at the hearing before the Board, the Employer indicated that it did not intend to litigate this grievance.

We agree with Grievant that the Employer violated the Contract. The Contract allows for administrative leave in two situations. Article 39 allows for an administrative leave of absence in certain situations at the request of the employee. No such request was made in this case.

Article 14, Section 9, permits management to place an employee on leave with pay to allow time for investigation of charges against the employee or where the employee's continued presence at work is detrimental to the interests of the State. In such cases, the leave must be limited to 30 days, unless thereafter extended, and the employee so relieved must be given written notice of the specific reasons for the leave and advised of the right to representation by VSEA or private counsel.

The letter placing Grievant on administrative leave did not set forth the reasons for such leave. The letter also did not advise Grievant of his right to be represented by VSEA or private counsel. Thus, the Employer violated the provisions of Article 14 with respect to placing an employee on leave with pay, and its action should be rescinded.

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievances of Frank Schmitt ("Grievant") in Docket Nos. 91-52, 91-61, 91-72 and 91-78 are SUSTAINED; and

1. The State of Vermont, Agency of Human Services, Department of Social Welfare ("Employer") shall rescind the special performance evaluation, and placement in a prescriptive period for remediation, imposed on Grievant at issue in Docket No. 91-52;

2. The Employer shall rescind the performance evaluation, and placement in a warning period, imposed on Grievant at issue in Docket No. 91-61;

3. The Employer shall rescind the end of warning period performance evaluation at issue in Docket No. 91-72, and shall reinstate Grievant to his position as Income Maintenance Supervisor, in the Employer's Burlington District Office;

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

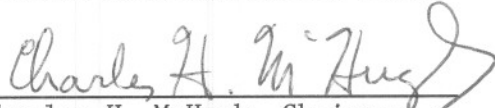
5. The interest due Grievant on back pay shall be computed on gross pay and shall be at the rate of 12 percent per annum and shall run from the date each paycheck was due during the period commencing with Grievant's discharge, and ending on the date of his reinstatement; such interest for each paycheck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

6. The parties shall submit to the Board by December 3, 1992, a proposed order indicating the specific amount of back pay and other benefits due Grievant; and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific areas of factual disagreement and a statement of issues which need to be decided by the Board. Any evidentiary hearing on these issues shall be held on December 10, 1992, at 9:30 a.m. in the Labor Relations Board hearing room, 13 Baldwin Street, Montpelier, Vermont; and

7. The Employer shall rescind the administrative leave with pay at issue in Docket No. 91-78.

Dated this 20th day of November, 1992, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Leslie G. Seaver


Carroll P. Comstock