VERMONT LABOR RELATIONS BOARD

GRIEVANCES OF:	)	
	)	DOCKET NO. 91-57
GENE MCCORT	)	DOCKET NO. 92- 9
	)	DOCKET NO. 92-26
	)	

FINDINGS OF FACT, OPINION, AND ORDER

Statement of Case

Involved herein are three grievances consolidated for the purpose of hearing and decision concerning actions taken by the State of Vermont, Agency of Transportation ("Employer"), against Gene McCort ("Grievant"), culminating in Grievant's dismissal.

On September 10, 1991, Grievant filed a grievance, which was docketed as Docket No. 91-57. Therein, Grievant contended that the Employer violated various provisions of the collective bargaining agreement between the State and the Vermont State Employees Association ("VSEA") for the Non-management Unit, effective for the period July 1, 1990 to June 30, 1992 ("Contract"), by issuing Grievant a written reprimand on May 31, 1991, that: a) was inaccurate, b) was in retaliation for the reversal of a prior disciplinary action, c) was in retaliation for whistleblowing, and d) inappropriately bypassed progressive discipline. Grievant further contended that a step III Hearing Officer's decision was arbitrary and capricious. Finally, Grievant contended that he had been subjected to additional and continuing harassment, retaliatory practices and further unwarranted disciplinary action (i.e., a written reprimand and a suspension without pay) in retaliation for appealing a Step III decision.

On February 27, 1992, Grievant filed a second grievance, which was docketed as Docket No. 92-9. Therein, Grievant contended that the Employer violated various provisions of the Contract by imposing a number of disciplinary actions (i.e., two suspensions without pay, written reprimand), by placing Grievant in a prescriptive period of remediation and by improper supervisory conduct. Grievant contended that these actions violated the Contract in that they: a) were in retaliation for filing the grievance in Docket No. 91-57, b) were without just cause, c) inappropriately bypassed progressive discipline, d) denied Grievant legal representation, e) denied Grievant an opportunity to prepare grievances during work hours, f) were in reprisal and harassment for filing grievances, and g) were in retaliation for notifying the Secretary of Transportation of misconduct on the part of Agency management.

On May 28, 1992, Grievant filed a third grievance, which was docketed as Docket No. 92-26. Therein, Grievant contended that the Employer violated various provisions of the Contract by dismissing him. Grievant contended that the dismissal was without just cause, was in retaliation for his grievance activity, and, further, that the Employer's dismissal letter was deficient.

On April 10, 1992, Vermont Railway, Inc. filed a Motion for a Protective Order to prevent audit reports prepared by Grievant and all testimony relating thereto from becoming public records. On August 20, 1992, the Board ordered that all audit reports and drafts of such reports be sealed from public disclosure. The Board also ordered that Grievant submit for further inspection

any further audit documents that he intended to submit as evidence. Such material would also be sealed from public disclosure, pending any further ruling by the Board. 15 VLRB 287.

Hearings were held on August 20, 1992, September 14 and 24, 1992, and October 1 and 22, 1992, in the Board hearing room in Montpelier before Board Members Charles McHugh, Chairman; Louis Toepfer and Leslie Seaver. Assistant Attorney General Michael Seibert represented the Employer. Grievant represented himself.

On November 12, 1992, Grievant filed Requested Findings of Facts, Memorandum of Law, Concluding Arguments, and a request for Summary Judgment, and the Employer filed a Memorandum of Law.

FINDINGS OF FACT

1. At all time relevant herein, Grievant worked for the Employer as an Auditor. Grievant holds a Bachelor of Science degree in accounting and prior to his tenure with the Employer, had several years experience working as an auditor. This experience included approximately seven years working for local, state, and federal government.

2. Grievant first began working for the Employer on or about July 9, 1989, as an Auditor B, pay grade 19. Grievant completed his probationary period on or about January 4, 1990, with a satisfactory (i.e.,"Consistently meets job requirements/ standards") performance evaluation. Grievant also received satisfactory annual performance evaluations in January, 1991, and January, 1992 (State's Exhibits 10, 16; Grievant's Exhibits X-1, X-3, X-5).

3. During all relevant time periods herein, Grievant's supervisor was Chief of Audits Douglas Bessette. Bessette reported to Michael Pollica, Assistant Director of Administration for Financial Services. Pollica reported to William Conway, Director of Administration for Financial Services. Conway reported directly to Paul Philbrook, Secretary of Transportation, and Patrick Garahan, Philbrook's successor (State's Exhibit 20).

4. Elaine Ross Gilleo was hired as an Auditor C, pay grade 21, at approximately the same time as Grievant. Gilleo holds a Bachelor of Science degree. She had approximately seven years auditing experience in the private sector prior to her tenure with the Employer. Throughout Grievant's tenure, Bessette considered Grievant and Gilleo his most qualified auditors.

5. Grievant believed that his position would be upgraded to an Auditor C, pay grade 21, because of representations Bessette made to him at the time of his hire. He also believed that he and Gilleo performed the same auditing duties. During Grievant's first year with the Employer he became very dissatisfied that he remained two pay grades below Gilleo. He frequently complained about the pay grade differential and frequently requested an upgrade.

6. On or about September 9, 1990, Gilleo made a sexual harassment complaint against Grievant. This complaint resulted in a written reprimand against Grievant. Grievant grieved this action, alleging that the Employer violated various provisions of the Contract by conducting an investigation without receiving a written complaint, failing to provide him with an opportunity to

refute the specifics of the complaint, and bypassing progressive discipline. This grievance also became linked with Grievant's long-standing complaint concerning his difference in pay grade with Gilleo. As part of the relief sought, Grievant requested that he receive an immediate reclassification to Auditor C, pay grade 21, retroactive to his date of hire. The Step III Hearing Officer with respect to the grievance over the sexual harassment complaint, Mary McDonald, referenced Grievant's ongoing pay grade complaint in her decision issued November 5, 1990. She indicated that she had been advised on November 2, 1990, by Bessette that a desk audit had been sent to the Department of Personnel. Such Request for Classification Action was not signed or sent to the Department of Personnel until December 24, 1990. This request subsequently resulted in Grievant's upgrade to an Auditor C in January, 1991 (Grievant's Exhibits III, X-2).

7. McDonald further determined that the Employer had violated the Contract with respect to the sexual harassment complaint against Grievant and ordered the Employer to expunge any and all references to the sexual harassment complaint from Grievant's personnel file. McDonald remanded Gilleo's complaint and ordered that the Employer adhere to the Contract in the event that Gilleo should decide to pursue her complaint (Grievant's Exhibits III, X-2).

8. Grievant's position as an Auditor required that he review the records and invoices of companies which had existing contracts with the State to insure that they were in financial and contractual compliance with their contracts. Grievant often conducted field visits to review and obtain such documents. In

conducting an audit, Auditors frequently select random entries from a company's books for the purpose of "testing" the accuracy and validity of the system used by the company in recording and reporting its revenues.

9. At the completion of an audit, the Auditor writes a report. This report follows a general format. An "Introduction" describes the contract or lease being audited. A "Scope of Audit" describes the Auditor's review and refers to the auditing standards used. This section may also include an "Impairment of Scope" section which sets forth any problems the Auditor had in obtaining access to documents which impaired the Auditor's ability to perform his or her job. An "Opinion" section may include a disclaimer as to any opinion with respect to the accuracy of the report and may also recommend further investigation. The report lists its supporting "Findings" in the audit. Finally, the Auditor sets forth his or her "Recommendations", or the Auditor's suggested resolutions for bringing the audited company into compliance with the contract, if appropriate (Grievant's Exhibit R-5).

10. At the beginning of Grievant's tenure with the Employer, an Auditor would write a draft audit report and suggested resolution for Bessette's review. Bessette and the four Auditors under his supervision are considered "external auditors" in that they are not part of the administration of the Agency of Transportation. Bessette would review the draft report and suggested resolution, and then send it back to the Auditor with suggested changes or revisions. After the Auditor made such

revisions, Bessette would then send the audited company the audit and suggested resolution. The Employer's Policy and Procedures Manual, Section 3360 sets forth this procedure:

> ...Audit Reports - shall be issued by External Audit section upon completion of a final audit (Grievant's Exhibit R-5).

11. Under this procedure, if the audited company disagreed with the report and suggested resolution, it could request a meeting with Bessette's supervisors to address issues that the audit report raised. Such meeting may end in an "administrative review" issued by the Administration for Financial Services. This administrative review may request that the company recalculate certain items and submit these recalculations to the Employer. In such a situation, there would not be a final "administrative resolution" issued by the Administration for Financial Services, until the audited company responded to the request (Grievant's Exhibit BB, CC, DD, EE).

12. An audited company has the right to appeal the administrative resolution before a Hearing Officer appointed by the Secretary of Transportation. Appeals of administrative resolutions are infrequent; there were four during Grievant's two and a half year tenure with the Employer, all generated by audits in which Grievant was involved.

13. Bessette issued a report on an audit that Grievant had conducted and drafted in December, 1989, in the above-referenced manner. This audit included questioned costs of over $170,000. An issue Grievant raised in his audit report was the contractor's use of a rate schedule in its monthly billings to the State.

Grievant concluded that the contractor's actual costs were considerably less than that which it charged the State. The company disagreed with the audit report, resulting in an administrative review by the Administration for Financial Services. Assistant Director Pollica sent Director Conway a memorandum in February, 1990, with respect to this administrative review. This review was copied to several people, including two Federal Highway Administration ("FHWA") employees, who were involved because the contract involved federal funds. Conway initialed this memorandum, "OK WHC", indicating his approval. A final administrative resolution, dated April 4, 1990, sent by Pollica to the company superseded the earlier administrative review. Pollica reversed one finding and reduced Grievant's original questioned costs to zero. FHWA officials were not copied on this final administrative resolution (Grievant's Exhibits BB, DD, EE).

14. The Employer later changed its auditing procedures so that no audit reports and suggested resolutions were sent to the audited company without further review by the Administration for Financial Services. According to Assistant Director Pollica, the Employer changed this procedure to "assure that checks and balances were in place."

15. This new procedure was in effect by February, 1991, as indicated by a handwritten note from Pollica to Bessette on February 15, 1991, which stated, "No draft report to any auditee until reviewed by administration". (The Employer never issued a "draft" report; the reference is to the audit report and suggested resolution previously sent out by and under Bessette's

signature.) This new procedure was not formalized in the Employer's Policy and Procedures Manual until January 6, 1992. This new procedure states in pertinent part:

> ...
>
> The suggested resolution and audit report will be forwarded to the Assistant Director of Administration for Financial Services...
>
> The Director of Administration will review the audit report and administrative decision. If approved, it will then be signed. This position is the authorized position to confirm or deny questioned costs (Grievant's Exhibits O, Z-1).

16. Grievant believed that such a change in the Employer's procedures violated the Government Auditing Standards with respect to independence (as set forth in Grievant's Exhibit R-4, p. 10, 13-15, 19, 22), and he frequently voiced this opinion. Grievant also did not want Pollica reviewing his work at this stage because he believed the work Pollica forwarded to Conway was inaccurate and incorrect. Grievant's supervisors did not agree that the new procedure violated standards of independence.

17. During December, 1989, Bessette assigned Grievant an audit of an existing lease the State had with a private Vermont railroad, Vermont Railway ("VTR"). VTR had taken over a prior lease between the State and the Rutland Railroad. The Employer had not conducted a full audit of VTR's existing lease since January, 1964. Secretary Philbrook suspended the audit shortly after Grievant began reviewing the information available in the office.

18. The State executed a new lease with VTR in September, 1990 and Grievant was reassigned to audit the railroad lease in October, 1990. It is not uncommon at the beginning stages of an

audit for the Auditor and audited company to exchange letters with respect to the areas the Auditor planned to review. Grievant and VTR's President exchanged such letters. On or about November 29, 1990, the President refused Grievant access to certain records of revenue accounts identified in Grievant's initial request. Grievant consulted with Bessette and Assistant Attorney General John Dunleavy, who agreed that Grievant needed access to these records. Dunleavy wrote to the company, resulting in compliance with Grievant's request.

19. VTR refused access to documents on two other occasions during Grievant's audit. Grievant discovered in his audit that VTR had entered into third party agreements with other companies. He wanted an opportunity to review such leases. VTR objected to giving Grievant carte blanche access to its third party leases.

20. Based on sample testing, Grievant determined that such third party leases appeared to be very profitable for the company. Grievant estimated that profits from third party leases generated several millions of dollars each year. The company believed that its master contract with the State permitted it to enter into such third party agreements and to keep the money generated by these leases. Grievant disagreed because the same contract language existed in the State's earlier contract with the Rutland Railroad. Grievant's research indicated that the Rutland Railroad had collected money from third party leases but had turned it over to the State.

21. Grievant met with Pollica and Bessette on or about January 31, 1991, to discuss his findings and the various

difficulties he had encountered. Grievant gave them copies of the supporting documentation he had collected. During February, 1991, Pollica and Bessette met with VTR's President, but Grievant was not invited to this meeting.

22. Grievant discovered two companies related to VTR with the same officers, shareholders and managers, to which VTR transferred revenue and assets. VTR refused Grievant access to its books and records of related companies, and only provided Grievant with copies of journal vouchers.

23. Grievant searched records of at least one related company at the Shelburne town office. He found disparities of several thousand dollars between transfer documents found in the Shelburne town records and VTR's transfer of title documents. Grievant believed that the company was misclassifying operating revenue and was engaging in irregular conduct.

24. Grievant discussed his findings and the discrepancies he had discovered with Bessette and Dunleavy. He sought Dunleavy's assistance in issuing a subpoena to gain access to related company records. Bessette thought Grievant was spending too much time on this audit and told him not to continue to search other town office records and to get back to the contract agreement the company had with the State. Dunleavy refused Grievant's request for a subpoena. He recommended that Grievant limit his review and not spend time checking into related companies or property transfers.

25. Grievant recommended that he suspend his audit in April, 1991, because of VTR's denial of access to information.

He met with Conway on or about April 29, 1991, and expressed his concerns about the VTR audit. He encouraged Conway to issue a "management letter" to VTR which would advise VTR of the Auditor's findings and recommendations based on the information available, and would request the company to cooperate with the Auditor so that a complete audit could be conducted and an audit report executed. Conway disagreed and ordered Grievant to complete his VTR audit report with the information he had.

26. As requested, Grievant completed the report on or about May 3, 1991, and submitted it to Bessette for his approval. Grievant noted under "Impairment of Scope" the company's denial of access to supporting documents. He also noted:

> ...Agency management has interfered with the conduct of the audit by discussing the ongoing review with VTR management, above the objections of the Auditor, while the field work was being conducted. Subsequently, pressure has been put on the Auditor to modify or limit the scope of audit while the preliminary findings indicated that the scope of the audit should be expanded. The Auditor's concerns have virtually been ignored (Grievant's Exhibits J, H, subject to Protective Order).

27. Grievant also changed the format of the audit report by inserting "Suspected Irregular Conduct" in front of his "Findings". Grievant reported the Shelburne real estate transaction, noted above, and questioned the propriety of such transaction. He also stated in his report that he was denied access to the books and records of this related company (Grievant's Exhibits J,H, subject to Protective Order).

28. Grievant believed he had Bessette's support in this audit report. Under the Employer's operating procedures at that time, Bessette reviewed Grievant's report and sent it to Pollica

for his review. Bessette did not make any negative comments to Grievant about his report before sending it on to Pollica.

29. Pollica reviewed Grievant's report and thought that some of Grievant's findings were wrong and irrelevant. He showed Grievant's report to Dunleavy because of Grievant's allegations of irregular conduct. Pollica noted changes and revisions on the original audit report and ordered Grievant to make such changes and rewrite his report. Such revisions included deletion of "Suspected Irregular Conduct", the section in which Grievant alleged interference with the audit by management, and the finding with respect to the Shelburne transaction, as well as other changes (Grievant's Exhibit H, subject to Protective Order).

30. Grievant initially refused to rewrite his audit report. He later reluctantly agreed to rewrite the report, but did so only after Bessette warned him that he may lose his job if he refused. Grievant made the recommended changes noted on his original report. Grievant was directed to date the revised report back to May 3, 1991 (Grievant's Exhibit I, subject to Protective Order).

31. Also during the Spring, 1991, Grievant was asked to attend a meeting with officials from the Federal Highway Administration. He resisted attending this meeting. He thought it was a waste of time and would only be a "rehash" of previous meetings with FHWA. Grievant was on the telephone when the meeting started and Conway came looking for him. Conway ordered

him to attend the meeting. Grievant made sarcastic comments during this meeting and Bessette later told him that he had not acted professionally (Grievant's Exhibit AA).

32. Pollica remained dissatisfied with Grievant's revised VTR audit report. On May 23, 1991, he wrote a memorandum to Bessette in which he raised questions about each of Grievant's findings. Pollica also gave a copy of this memorandum to Conway. Pollica asked Bessette not to share his memorandum with Grievant. The memorandum stated in pertinent part:

> ..I will expect a written response to all of the questions on an expedited basis. I will ask you to read the audit material (SAS) about audit evidence so that you will have a refreshed idea of how to evaluate the validity, relevancy, and reliability of evidential matter. As a review person, I must feel an adequate audit has occurred. There is not adequate support over and over again; however, the detail files may contain it. If so, your goal is to draw it out (State's Exhibit 3, p. 4-5)

33. Grievant met with Bessette on Friday, May 24, 1991 to discuss a scheduled meeting for that afternoon with Robert Sinkewicz, a CPA that the Employer had contracted with to assist in company audits. Instead of discussing the scheduled meeting with Sinkewicz, Bessette immediately asked Grievant questions about his revised audit report, dated May 3, on VTR. It quickly became clear to Grievant that Bessette's questions were coming directly from a document on his desk, Pollica's memorandum. Grievant asked Bessette if he could have a copy of the document from which he was reading. Bessette told him he could not because it was "confidential". Grievant did not see a "confidential" stamp on the document, nor did it appear to Grievant to be confidential because Bessette was clearly reading

from it. Grievant grabbed the memorandum and made a copy for himself.

34. Grievant and Bessette met later that day with Sinkewicz, as previously scheduled. During this meeting Sinkewicz stated that a subcontractor, a Mr. Guldberg, had refused to have his company audited. Grievant commented that it had been his personal experience that Jews or Jewish businessmen are frequently reluctant to release proprietary and financial information. Bessette later told Grievant that he was unhappy with Grievant's comments about Jewish businessmen at the meeting.

35. At Grievant's request, Conway scheduled a meeting that same day with Grievant, Bessette, and Pollica to discuss VTR and the audit report. Conway had a copy of Pollica's May 23, 1991, memorandum in front of him. Conway was angry over the VTR situation and expressed his anger at Grievant. Grievant lost his temper because he felt Conway's reaction to the VTR audit report had been prejudiced by Pollica's memorandum. Conway removed Grievant from the audit and ordered Bessette to complete the audit with the information available. After the meeting Grievant offered to resign, but the Employer did not respond to this offer.

36. Bessette issued Grievant a written reprimand a week later on May 31, 1991, dated May 29, 1991. The written reprimand, as later corrected due to its reference to an incorrect date, stated:

> This is a written reprimand for your conduct on Friday May 24, 1991. I feel you did not act professional in the meeting with Rob Sinkewicz with your reference to Jews.
> Also your conduct in the meeting May 24, 1991 with Mr. Pollica, Mr. Conway, and myself was anything but

professional. Also your taking the memo that I told you was confidential and making a copy of it, was a violation of a direct order.

Any further violations of department policy will result in a suspension without pay (State's Exhibit 15, pages 9-10).

37. Bessette handed Grievant the letter of reprimand on May 31 as Grievant was leaving the office for the day. He did not discuss the reprimand, nor tell Grievant that he had the right to be represented by VSEA or counsel. Several days later, Bessette told Grievant that he expected him to be professional in dealing with people inside and outside the Agency (State's Exhibit 15).

38. Grievant grieved this written reprimand on June 20, 1991, and hand delivered his grievance to the Secretary's office. In such grievance, Grievant detailed the events leading to the disciplinary action, including his rewriting the May 3, 1991, audit report only under the threat of losing his job. A meeting was held among Grievant, Bessette, Pollica, and Hearing Officer Deputy Secretary Lloyd Robinson on July 17, 1992. Robinson denied the grievance (State's Exhibit 15).

39. Grievant appealed his grievance to the next step under the Contract, Step III. This grievance was denied on August 12, 1991. At some time on or before August 26, 1991, Grievant informed Bessette and Pollica that he intended to appeal this decision to the Vermont Labor Relations Board ("Board"), which he did on September 10, 1991 (State's Exhibit 15).

40. Grievant conducted an audit in New Jersey the week of August 19, 1991, returning to Montpelier on Friday evening, August 23, 1991. He went into his office on Saturday and noticed

that someone had gone through his mail and had taken files from his office. Such files consisted of audits which Grievant had completed and kept in his office to use as a quick reference guide. Bessette had the files removed from Grievant's office. Grievant searched for his files and found them in Bessette's unlocked office. He retrieved them and locked them in his car.

41. On Monday morning, August 26, 1991, Bessette called Grievant into his office for a meeting with him and Pollica. They questioned Grievant about the missing files and he admitted that he had taken his files from Bessette's office. Grievant believed that he was headed for disciplinary action and asked to be represented by counsel. His request was ignored and he was told to return the files to Bessette's office before 10:30 that morning. During this meeting, Bessette denied knowing that Grievant had kept reference files in his office.

42. After the meeting ended and Pollica left, Grievant asked Bessette if Grievant could have the opportunity to contact his attorney before Bessette took any action with respect to the returning of the files. Bessette agreed to allow Grievant to consult with an attorney. Grievant was unable to immediately get in touch with his attorney, and he decided to return the files and talk with his attorney later. Grievant returned the files at approximately 11:00 a.m. Bessette informed Grievant that afternoon that there would be a disciplinary meeting the next day and he had the right to have representation at the meeting.

43. Grievant and his attorney met with Bessette on August 27, 1991. Bessette handed Grievant a letter informing Grievant

that he was suspended for one day. The letter provided in pertinent part as follows:

> Because you failed to obey a direct order given at 9:50 a.m. on August 26, 1991, to return records by 10:30 a.m. that you removed from my office, you are suspended without pay for August 29th.
>
> This action...is necessary because of the seriousness of this misconduct and because you have a history of misconduct including entering my office without my knowledge after you have been asked not to (Grievant's Exhibit A-2; State's Exhibit 14, page 9).

44. During this meeting with Grievant and his attorney, Bessette claimed that the files in question were "confidential" and that Grievant was in violation of a state policy which was set forth in a memorandum from the Governor's office. Bessette did not immediately provide Grievant or his attorney with a copy of such memorandum. Bessette also stated that he had the files removed from Grievant's office because he was fearful that Grievant would leak information from these files to the news media. Bessette again denied any knowledge that Grievant had been keeping such files.

45. Grievant grieved this suspension and hand delivered his grievance on September 10, 1991, to the Secretary of Transportation's office. Four days later, Grievant submitted an additional document to the Secretary that he contended supported his belief that Bessette had always known of and approved of Grievant's keeping files in his office. This document consisted of a memorandum from Bessette, which indicated that a copy of a final audit report had been sent to Grievant, along with several other individuals (Grievant's Exhibits A-5, T,).

46. Subsequent to the August 27, 1991, meeting, Grievant's attorney requested in writing the basis for Bessette's position that audit reports Grievant used as a reference guide were confidential, as well as a copy of the Governor's memorandum referred to at the meeting. Dunleavy and Legal Counsel to the Governor, John Fitzhugh, responded to the requests. Fitzhugh's response included an October 9, 1991, memorandum from himself to all Secretaries, Commissioners, and Department heads which set forth a procedure for handing public requests under the Access to Public Records Act. Dunleavy's response clarified the Employer's policy with respect to audit reports; it was his opinion that those which had been completed and issued are confidential "vis-a-vis third parties" (Grievant's Exhibits S-1, S-2, S-3, S-4, S-5, S-6).

47. In late August, 1991, Bessette learned that Grievant allegedly had made an inappropriate remark to Phyllis Isley, during an audit of her company five months earlier. Grievant's last contact with Isley had been on or about March 28, 1991. Bessette called Isley and asked her to send a letter summarizing the incident. Her August 27, 1991 letter stated in part:

> Per our conversation, I did have a discussion with Mr. McCort in which he specifically stated that Vermonters are ignorant but Southerners are stupid.
>
> I assumed these statements were directed towards me since it is usually readily apparent that I have something of a Southern accent. I was very offended and subsequently turned over all dealing with Mr. McCort to other members of my staff (Grievant's Exhibit A of Exhibit B-2, State's Exhibit 13, page 7).

48. On or about September 6, 1991, Bessette issued Grievant a written reprimand based on this letter from Isley, and directed Grievant to write an apology to Isley. At no time prior to

imposing the letter of reprimand did Bessette discuss Isley's complaint with Grievant. Grievant did not believe he had made such a remark, but complied with Bessette's request on September 9, 1991, stating in pertinent part:

> . . . Frankly I do not recall ever saying what you have alleged; on the contrary, as I remember the conversation, you had humorously chided me for MY southern accent as I had informed you I had recently spent eight years in the Atlanta, Georgia area. I took no offense. I do not even recall you having a Southern accent.
>
> However, if I have said or done anything to which you have taken offense, I sincerely apologize . . . (Grievant's Exhibits B-1, B-3, B-4; State's Exhibit 13).

49. Bessette was displeased with Grievant's letter of apology, and requested him to rewrite it. Grievant refused and grieved this written reprimand on September 11, 1991 (Grievant's Exhibits B-1, B-5).

50. By September 10, 1991, Grievant had several grievances pending, including Docket No. 91-57, which he filed with the Labor Relations Board that day. Grievant asked Bessette if he could use some office time to work on his grievances. It was Grievant's understanding that Bessette was agreeable to his spending work time on his grievances.

51. Bessette contacted a staff member of the Human Resources section of the Employer to inquire as to the amount of time that Grievant could spend under the Contract on his grievances during work hours. Bessette was advised that one hour per day would be reasonable. Bessette wrote Grievant a memorandum on September 10, 1991, which stated:

> If you feel you need time during your regularly scheduled work day to prepare your grievances, please be advised that you must request permission in writing. You will be allowed no more than one (1) hour per workday (Grievant's Exhibit C-2; State's Exhibit 11).

52. Bessette handed Grievant this memorandum on September 10, 1991, as he was leaving for the day. He did not discuss the memorandum with Grievant. Grievant told Bessette that he objected to this restriction and felt it was not in conformity with the Contract and he planned to prepare a written response. Grievant subsequently filed a grievance over this restriction.

53. That same day, a receptionist in the division, Michele Laberge Zoti, had discovered that some information was missing on a computer that Grievant frequently used. This missing information involved Grievant. She sought assistance to place a lockout code on the computer.

54. Grievant was working on his grievances at the end of the work day on September 10, 1991, and temporarily left his computer, darkening the screen. Laberge Zoti inadvertently turned Grievant's machine off because the screen was dark. When Grievant returned to the computer, he was unable to re-access the computer because of the newly installed lockout code.

55. Grievant called Bessette, who explained that the code had been put on as a security measure. Bessette told Grievant he did not know the code. Grievant then called Laberge Zoti but was unable to reach her that evening. He left several messages on her answering machine.

56. The next morning, September 11, 1991, Laberge received a call at home from another employee who was seeking assistance in accessing the computer with the lockout code. This employee had been out the day the code had been installed. Grievant came on the line and questioned Laberge Zoti about the installation of

the code. He also accused her of intentionally shutting off his computer the previous night. He later apologized to her for his behavior (State's Exhibit 7).

57. Bessette did not work the next day, September 11, 1991, and Auditor Francis Miller was assigned Acting Chief of Audits that day. Bessette had not given Miller a copy of his September 10th memorandum, but Miller was aware that Bessette had restricted the amount of time that Grievant was to work on his grievances during the workday, and he brought this to Grievant's attention. Grievant informed Miller that, although he knew about Bessette's restrictions, he objected to Bessette's memorandum and had not had time to state his objections to these restrictions in writing. Grievant requested permission to use annual and personal leave to work on his grievances. It was Grievant's understanding that Miller believed that would probably cover the issue.

58. Although it was common knowledge that Grievant had been and was using a computer at work for various grievances, Miller later told Grievant that using state property for personal business was a violation of state policy. Grievant asked Miller to state his concerns in writing. Miller immediately issued Grievant a memorandum in which he cited the regulation. He also instructed Grievant to "vacate properties of the State" and that such notice was "in accordance with instructions from Michael Pollica." Grievant asked permission to print out what he had been working on, and Miller granted him permission. Grievant then left the office as instructed (State's Exhibit 11).

59. At some point that day, Grievant filled out leave slips for five hours on September 10 and one hour on September 11, 1991, which were signed by Bessette several days later (Grievant's Exhibit D-4).

60. Bessette was out of the office the next day, and Grievant was out sick the following day, Friday, September 13. Miller, by memorandum of September 11, had informed Bessette of his version of what had occurred on September 11 with respect to Grievant's use of the computer. Bessette called Grievant at home on Friday and told him that he had prepared a disciplinary action for his conduct on September 11, and that Grievant would have the right to have his attorney present when he issued the disciplinary action against Grievant. At no time prior to deciding to discipline Grievant did Bessette allow Grievant an opportunity to present his version of events.

61. On Monday morning, September 16, Grievant discovered that his attorney would not be available until Wednesday, September 18. He requested that Bessette wait until that time. Bessette told Grievant that he was going to issue the disciplinary action that afternoon by 3:30, with or without Grievant's attorney. At a meeting that afternoon, Bessette gave Grievant a letter informing him that he was suspended for five days. Miller also attended this meeting. Grievant did not have representation at the meeting. The letter of suspension provided in pertinent part as follows:

> On September 11, 1991 you were advised by Francis Miller ... that the Agency of Transportation Policy and Procedures Manual Section 1033 prohibits the use of State property for personal purposes. You continued to use the PC word processor for your personal report, disregarding this bulletin. You were then explicitly told by Mr. Miller to

> stop using the PC because you were on leave and you were doing personal work that was not allowed. Your failure to stop using the machine as ordered is a refusal to obey a direct order and serious misconduct.

(Grievant's Exhibit D-2).

62. Grievant grieved this five day suspension on September 20, 1991 (Grievant's Exhibit D-1).

63. Grievant had been involved in conducting an audit of a company located in the state of Maine ("Company # 2", the identity of which company was not otherwise revealed in this matter) during 1990 and early 1991. On or about September 25, 1991, Company # 2's President sent the Employer a three page summary of complaints with respect to Grievant's behavior. This letter was handed to Bessette at a meeting with Pollica and Conway. There is no cover letter available to explain why the President wrote this letter nearly a year after the fact; Bessette was told that the Chief of Contract Administration, George Spilak, had solicited this letter. The letter outlined five "events" in which the President believed Grievant displayed unprofessionalism during the course of his audit. The President did not have direct knowledge of Grievant making one of the comments, but was present when Grievant made other comments. The comments attributed to Grievant included offhand remarks such as "the President usually has his hand in the cookie jar", and remarks about an auditor being offered "bribes". The Vermont Attorney General's Office was notified of this complaint (State's Exhibit 5).

64. Bessette met with Grievant about this complaint. Grievant denied all allegations. Bessette did not subject

Grievant to disciplinary action because this letter detailed events nearly a year old. The Vermont Attorney General's office did not pursue this complaint, but neither Bessette nor Grievant learned of this until August, 1992.

65. By letter of October 11, 1991, Bessette placed Grievant in a prescriptive period of remediation for the stated reason that Grievant's overall performance was unsatisfactory during the period January 21, 1991, to September 30, 1991. Bessette accompanied the letter to Grievant with an "unsatisfactory" performance evaluation, which was signed for the Employer by Personnel Administrator Richard Boulanger (Grievant's Exhibits E-4, X-3; State's Exhibit 10). Bessette's letter informing Grievant of placement in a three month prescriptive period of remediation stated in pertinent part:

> ...During this time you will be expected to perform the following:
>
> 1) Refrain from making comments or remarks that might offend or upset others...
>
> 2) You need to make sure that any audit information you receive or remove from the audit file gets replaced...
>
> 3) You must maintain effective working relationships with FHWA, all Agency employees and the consultants that you come into contact with.
>
> 4) Perform all assigned work in a satisfactory manner.
>
> 5. You will meet with me at least once every two weeks to discuss your performance during the Prescriptive Period.
>
> You must perform all of the above in order to successfully complete this PPR. Failure to do so can lead to further corrective action.
>
> (State's Exhibit 10, p. 8; Grievant's Exhibit E-3).

66. Bessette's action of placing Grievant in a prescriptive period of remediation was not based on Grievant's performance

"per se", but was based on perceptions of misconduct. At no time previously had Bessette informed Grievant that his assigned work was unsatisfactory.

67. Bessette and Pollica decided that Grievant would not be permitted to perform any outside audits during his prescriptive period of remediation, although they did not specifically convey this to him.

68. Grievant grieved his adverse performance evaluation and placement in a prescriptive period of remediation (Grievant's Exhibits E-5, T; State's Exhibit 7).

69. During this period of remediation, Grievant remarked to the Executive Director of the Human Rights Commission, "Do you want a piece of candy little girl?" Bessette informed Grievant by letter of November 13, 1991, that he was suspended for one day for this "unprofessional and clearly inappropriate remark." Bessette further stated:

> As a result of the comments made by you . . . and the fact that you have been notified that such comments would result in discipline, and because you have previously received discipline for making unacceptable comments about a protected class, you are suspended for one day . . .
>
> Any further negative comments or actions by you relating to the above subject will result in progressive discipline as outlined in the State/VSEA contract. You are also required to again take the Agency provided Harassment training . . . (State Exhibit 8).

70. Grievant did not grieve this suspension.

71. Grievant's work was satisfactory during his prescriptive period of remediation, which ended on January 15, 1992. He received a "satisfactory" performance evaluation on or about January 31, 1992 (Grievant's Exhibits X-5).

72. On February 20, 1992, Charly Dickerson, Human Resources Director of the Vermont Department of Personnel, issued five Step III decisions in Grievant's five pending grievances. He denied three grievances; those concerning the written reprimand Grievant received with respect to the complaint made by Phyllis Isley, the placement in a prescriptive period of remediation, and Bessette's restriction of one hour per work day to work on grievances. Dickerson found misconduct concerning the August, 1991, incident when Grievant did not immediately return the files to Bessette, but reduced the one day suspension to a written reprimand. He found no evidence that the Employer had violated the Contract with respect to Miller's orders on September 11, 1991, but determined that there had been ambiguity regarding the specific nature of Miller's orders and ordered that the five day suspension be expunged. Dickerson stated that he believed that this incident "constitutes adequate notice that acts in the future contrary to the wishes of your supervisor is insubordinate behavior and subject to serious disciplinary action." (Grievant's Exhibits V, T; State's Exhibits 7, 10-11, 13).

73. On February 27, 1992, McManis wrote a memorandum to Secretary of Transportation Patrick Garahan entitled "McCort chronology", which detailed all the disciplinary actions and the adverse performance action taken against Grievant and all the grievances which McCort had filed. McManis' chronology included the Gilleo sexual harassment complaint which had been ordered expunged from Grievant's personnel file. In reference to the decision by Hearing Officer Mary McDonald to rescind the written reprimand against Grievant for this incident and have the record

expunged, McManis noted, "In my opinion this was a very bad decision which was inconsistent with case law and the State/VSEA Contract provisions". McManis' chronology noted that the five day suspension of Grievant in September, 1991, for failure to follow Miller's order was rescinded due to ambiguity concerning the specific nature of the order. He further stated with respect to this incident, "All other issues brought out management action was sustained". The evidence does not indicate the circumstances concerning McManis writing this chronology and sending it to Secretary Garahan. Grievant did not know of the existence of this memorandum until after his dismissal (Grievant's Exhibit T; State's Exhibit 7).

74. During March or April, 1991, Bessette assigned two auditors, Grievant and Gilleo, to conduct a complicated audit of a contractor that was reorganizing. The Employer had experienced difficulty in getting information from this contractor for three years. Grievant had never been involved in an audit of this company. During an initial meeting among Bessette, Grievant, and Gilleo, Bessette indicated to Grievant and Gilleo that there may be irregularities with this company and he wanted the Auditors to look at payroll records to see if any payments had been made to Agency employees.

75. After Bessette left, Grievant became excited about the prospect of uncovering bribes or kickbacks. Gilleo was uncomfortable about going out into the field with an Auditor with preconceived ideas. She complained to Bessette and Bessette took Grievant off the assignment. He did not provide Grievant with an

explanation for taking him off the audit, nor did he reprimand him for the comments made to Gilleo.

76. The report of the VTR audit from which Grievant had been removed the previous May was completed on or about January 6, 1992, when a proposed disposition of the audit was issued to the company. The company disagreed with the report and proposed disposition and requested a meeting to discuss the report with Secretary Garahan. Garahan informed VTR by letter of February 27, 1992, that the Employer's procedures required a hearing and that the appointed Hearing Officer, Deputy Secretary Lloyd Robinson, would make the arrangements for such hearing. Robinson and Dunleavy were provided with copies of the letter (Grievant's Exhibit H-1, subject to protective order; Grievant's Exhibit 2-1).

77. Robinson scheduled the hearing for April 28, 1992. Bessette, who had not been sent a copy of Secretary Garahan's letter, was later informed by telephone of the date and time for the hearing. He passed this information on to Grievant sometime during the first week of April, 1992, and told Grievant that he expected Grievant to attend. He did not discuss the VTR audit with Grievant.

78. Grievant did not realize initially that this was a hearing, and thought instead that it was a meeting. He had not had any involvement with this audit since the preceding May and was never given a copy of a final audit report. He had seen a copy of a draft audit report sometime in December, 1991, which was half typed and half written in unfamiliar handwriting. At no time did Bessette offer to give Grievant a copy of a final report, nor did Grievant ask to see one.

79. VTR filed a Motion for Protective order with the Board on April 10, 1992, to prevent audit reports prepared by Grievant and all testimony relating thereto from becoming public records. Grievant did not believe he could discuss any information with respect to this audit until the Board ruled on the motion. The Board had not ruled on the motion by the time of the hearing between the Employer and VTR, which ultimately took place on April 30, 1992, rather than April 28, as originally scheduled. Grievant mentioned his concerns with respect to his pending grievance at least one time to Bessette.

80. On April 16, 1992, Pollica issued a memorandum to all Financial Services employees. This memorandum stated:

> The State of Vermont Rules and Regulations for Personnel Administration...states...: "An employee shall not disclose confidential information gained by him by reason of his official position except as authorized or required by law, nor shall he otherwise use such information for his personal gain or benefit.
>
> With regard to audit reports and audit work papers, an employee shall not copy them for any use other than official department purpose with the express approval of the supervisor. All audit work papers and audit reports are the property of the State and are to be treated with confidentiality (Grievant's Exhibit P).

81. During the week that the VTR hearing was scheduled, Grievant frequently complained that he did not want to attend. He told Bessette at least two times that he would "rather be fishing". The morning of the hearing, April 30, 1992, Grievant told Gilleo that he had a grievance pending over this audit and he did not plan to be cooperative.

82. The hearing was attended by Grievant, Hearing Officer Robinson, Pollica, Bessette, Dunleavy, VTR's President, and VTR's attorney. After Grievant arrived at the Deputy Secretary's office, he knew he was attending a hearing, not a meeting.

83. Robinson indicated at the beginning of the hearing that the purpose of the hearing was to provide VTR with an opportunity to respond to the final audit report. Grievant stated that he had advised himself not to testify because of his pending grievance with the VLRB. At some point Bessette handed Grievant a copy of the final audit report. Grievant looked at the report and stated, "Anyone who reduced my 12 page report to two pages is a fool", or words to that effect. Grievant then proceeded to ask the company what their was position was, as if he were conducting the hearing. Robinson reminded Grievant that he was not in charge. Grievant told Robinson not to be "so arrogant". Robinson ordered Grievant out of the room.

84. Grievant returned to his office in what appeared to be a jovial mood. He told Gilleo that he had just told the Deputy Secretary that he was arrogant.

85. Bessette called Grievant that night and told him to stay at home the next day on administrative leave with pay.

86. Upon the recommendation of the Human Resources Department, Bessette, Pollica, Dunleavy, and Robinson each wrote a memorandum the next day, May 1, 1992, setting forth their recollection of Grievant's conduct during the April 30th hearing (Grievant's Exhibits W-1, W-2, W-3, W-4; State's Exhibit 2).

87. Bessette also wrote Grievant a letter on May 1, 1992, countersigned by Chief of Human Resources William McManis. It stated in pertinent part:

> You are temporarily relieved from duty with pay in accordance with Article 14, Section 9, of the current State/VSEA Agreement. The purpose of this is to permit the Agency to investigate allegations and charges made concerning your conduct during an audit hearing on April 30, 1992 (Grievant's Exhibit 26A; State's Exhibit 2).

88. McManis wrote Grievant a letter on May 11, 1992, corrected on May 13, 1992, informing him that the Employer was contemplating his dismissal. This letter set forth the reasons for the Employer's contemplated actions and provided Grievant with an opportunity to respond to these reasons, either in writing or orally. Such letter is called a Loudermill letter, based on a US Supreme Court decision of that name. 470 U.S.532 (1985). The letter provided in pertinent part as follows with respect to the reasons why dismissal was being contemplated:

> On April 30, 1992, a hearing was conducted on an audit you had done. It was your job to be the witness for the Agency. You had the most comprehensive knowledge in the Agency of the audit under review. Rather than cooperate with the process, you indicated that, because of your pending grievance on a personnel matter, you would decline to discuss the specifics of the audit report. You then made a comment that the report, which had been revised by your supervisors, could have only been written by a fool. You then told the other party to the hearing to begin its presentation. At that point, the Agency Deputy Secretary, who was the hearing officer, intervened and attempted to regain control of the hearing. You then described the Deputy Secretary's comments as another example of his arrogance. All of your actions were done in the presence of the appealing party's President, legal counsel, as well as legal counsel and representatives of the Agency. You were at that point directed to leave the hearing.
>
> Your actions were highly unprofessional, insubordinate, and disruptive of the hearing process. The Agency was required to present its case at a substantial disadvantage without your participation.
>
> There have been other circumstances in the past year that the Agency had addressed other unprofessional conduct on your part:
>
> 05/91 Unprofessional Conduct - Written reprimand
> 08/91 Failure to follow Supervisory Orders - Suspension, reduced to a written reprimand.
> 09/91 Failure to follow supervisory orders - Notice of adverse impact of insubordinate behavior.
> 11/91 Unprofessional Conduct - Suspension.
> 04/92 Unprofessional Conduct - resulting in this action, as stated above.

> Other incidents of unprofessional conduct have been discussed with you orally.
>
> As a result of the combined effect of your actions described above, and other actions as to which you have been counseled, there is just cause for your dismissal. Your actions have convinced the Agency that you cannot be trusted to conduct objective and unbiased audits on its behalf . . . (Grievant's Exhibits 26B, 26C; State's Exhibit 1, pages 3-4).

89. Both Laberge Zoti and Gilleo told Bessette about Grievant's behavior before and after the April 30, 1992, hearing. Three weeks later he requested them to put their statements in writing. Bessette gave McManis a copy of these memoranda. Grievant was never given copies of these memoranda, nor the four memoranda written by Dunleavy, Robinson, Pollica, and Bessette on May 1, 1992 (State's Exhibit 2).

90. Grievant responded to McManis' letter by a letter dated May 15, 1992. Grievant's written response included his own summary of the events of April 30, 1992, as well as his own account of the events that led up to the April 30, 1992, hearing (State's Exhibit 2).

91. McManis reviewed Grievant's letter and talked to Pollica, Bessette, and Conway. He also had Robinson's memorandum of May 1, 1992, as well as Laberge Zoti and Gilleo's statements. He concluded that there was no other job to which he could reassign Grievant and determined that termination was justified.

92. McManis sent Grievant a letter of dismissal on May 22, and stated as a basis for the dismissal the same reasons set forth in the Loudermill letter, quoted above at Finding #89. McManis informed Grievant that he was being provided two weeks pay in lieu of notice, and that his dismissal was effective immediately. (State's Exhibit 1, pages 1-2).

OPINION

At issue is whether the Board should uphold disciplinary actions, and an adverse performance action, taken against Grievant, culminating in his dismissal from employment. We will discuss the merits of the three grievances filed by Grievant in turn.

Docket No. 91-57.

Grievant contends that the Employer violated various provisions of the Contract by issuing him a written reprimand on May 31, 1991. He claims that the reprimand: a) was without just cause, b) was in retaliation for the reversal of a prior disciplinary action c) was in retaliation for whistleblowing, and d) inappropriately bypassed progressive discipline. Grievant further contends that the Step III hearing officer's decision on his grievance was arbitrary and capricious. Finally, Grievant contends he was subjected to additional and continuing harassment, retaliatory practices and further unwarranted disciplinary action in retaliation for appealing a Step III decision (i.e., a written reprimand and a suspension without pay) in retaliation for appealing a Step III decision. Grievant alleges violations of Article 14, Section 1(d), Article 15, Section 7, and Article 73 of the Contract.

Pursuant to the Contract, the Employer is to impose a procedure of progressive discipline for misconduct, such order of progressive discipline being: (i) oral reprimand, (ii) written reprimand, (iii) suspension without pay, and (iv) dismissal. Article 14 Section 1(c) and (d), Contract. There are appropriate

cases that may warrant the Employer bypassing progressive discipline. Article 14, Section 1(f)(i). Such disciplinary action may only be imposed for just cause. Article 14, Section 1.

To establish just cause for discipline, it is necessary for the Employer to show that disciplining an employee for certain conduct is reasonable, In re Grievance of Brooks, 135 Vt. 563 (1977); and that the employee had fair notice, express or implied, that such conduct would be grounds for discipline. In re Grievance of Yashko, 138 Vt. 364 (1980). Grievance of Colleran and Britt, 6 VLRB 235 (1983). Grievance of Roy, 13 VLRB 167, 182 (1990).

These requirements have been met with respect to all three incidents referenced in the written reprimand. Such reprimand was based on three incidents which occurred on May 24, 1991: 1) a meeting with a consultant, Robert Sinkewicz, in which Grievant commented that Jewish businessmen are reluctant to release proprietary or financial information; 2) Grievant's grabbing a memorandum which his supervisor was reading, after his supervisor told him the memorandum was confidential, and making a copy of it; and 3) a meeting with his superiors in which Grievant lost his temper.

Grievant's remark about Jewish businessmen, reflecting stereotypical notions, was inappropriate. The other two incidents referenced in the reprimand stemmed from an audit of VTR on which Grievant was working. Grievant contends that he was justified in taking the memorandum from his supervisor, Douglas Bessette, and

making a copy of it, because Bessette was reading from the memorandum and thus it was not confidential. Regardless of whether the document was, in fact, confidential, Grievant's actions were inappropriate in that he grabbed a document from his supervisor after being told he could not have a copy of it. If Grievant wished to challenge his supervisor's failure to turn over the document, he should have proceeded in a more professional way than the rude behavior which he demonstrated. Finally, Grievant contends that he was justified in losing his temper at the meeting with his superiors because he felt he was being unfairly judged. Again, Grievant demonstrated unprofessional behavior. Grievant had implied fair notice that his inappropriate comment and unprofessional behavior on May 24 would result in disciplinary action.

Nonetheless, Grievant contends that the written reprimand was in retaliation for whistleblowing and in retaliation for filing a successful grievance approximately six months earlier over a sexual harassment complaint made against Grievant which had resulted in the imposition of discipline.

In several previous grievances, where employees claimed management took action against them for engaging in protected activities, the Board has determined that it will employ the analysis used by the U.S. Supreme Court. Once the employee has demonstrated his or her conduct was protected, she or he must then show the conduct was a motivating factor in the decision to take action against him or her. Then the burden shifts to the

employer to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct. Mt.Healthy City School District Board of Education v. Doyle, 429 US 274 (1977). Grievance of Sypher, 5 VLRB 102 (1982). Among the protected activity cases where the Board has employed the so-called Mt. Healthy analysis have been cases involving "whistleblowing" and grievance activity. Grievance of Cronin, 6 VLRB 37 (1983). Affirmed, Unpublished Decision, Supreme Court Docket No. 83-210 (February 4, 1987).

The first step in the analysis is to determine whether Grievant actually was engaged in these protected activities. "Whistleblowing" is a protected activity pursuant to Article 73 of the Contract. Article 73 defines a "whistleblower" as a person who makes "public allegations of inefficiency or impropriety in government", and provides that such person shall not be discriminated against in employment with regard to exercising such "whistleblowing" rights. Grievant had engaged in no "whistleblowing" activities at the time he was issued the written reprimand. He had made claims in communications with his superiors that Agency of Transportation management was interfering in his conduct of the VTR audit. However, he had made no public allegations of inefficiency or impropriety by this time. Thus, he was not engaging in protected "whistleblowing" activity pursuant to the Contract.

Grievant next contends that he was engaging in protected grievance activities due to his filing a successful grievance approximately six months earlier over a sexual harassment

complaint made against Grievant which had resulted in the imposition of discipline. Discrimination against employees for their grievance activities is prohibited by Article 15, Section 7, of the Contract, which provides that "every employee may freely institute complaints and/or grievances without threats, reprisal or harassment by the employer." Grievant was protected by this provision at the time of this written reprimand by his earlier successful filing of a grievance. Thus, he fulfills the first step in the Mt. Healthy analysis.

The second step in the analysis is that Grievant must show his protected conduct was a motivating factor in the decision to give him a written reprimand. In Sypher, 5 VLRB at 131, the Board noted the guidelines it would follow in determining whether protected activity was a motivating factor in an an employer's decision to take adverse action against an employee:

- whether the employer knew of the employee's protected activities;
- whether the timing of the adverse action was suspect;
- whether there was a climate of coercion;
- whether the employer gave as a reason for the decision a protected activity;
- whether the employer interrogated the employee about the protected activity;
- whether the employer discriminated between employees engaged in protected activities and employees not so engaged; and
- whether the employer warned the employee not to engage in protected activities.

Grievant has presented insufficient evidence by which we can conclude that his grievance activities motivated the imposition of the written reprimand. None of the elements listed in Sypher, 5 VLRB at 131, other than knowledge of grievance activities, are present in this case. Mere knowledge, without more, is insufficient for us to conclude that grievance activity played any motivating factor in the imposition of the written reprimand. Grievances of Choudhary, 15 VLRB 118, 165 (1992).

Grievant also contends that a Step III Hearing Officer's decision was arbitrary and capricious. The parties to the Contract 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 III shall act fairly and without prejudice in determining the facts which affect the granting or denial of a grievance ... 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). Grievance of Schmitt, 15 VLRB 454, 486 (1992). Thus, we do not have jurisdiction over this alleged violation.

Grievant further contends that he was subjected to additional and continuing harassment, retaliatory practices and further unwarranted disciplinary action in retaliation for appealing the Step III decision of this grievance. Grievant makes identical allegations in Docket No. 92-9. We will address these allegations in our discussion of that grievance.

Grievant raises other claims in his post-hearing brief with respect to Docket No. 91-57. He contends that the written reprimand was not specific in detail and that the Employer violated due process rights to VSEA/counsel representation. We conclude that these claims were untimely raised by Grievant. Section 18.3 of the Board Rules of Practice requires that a grievance filed with the Board contain a concise statement of the nature of the grievance and specific references to the pertinent rule or regulation alleged to have been violated. The grievance filed here contained no reference to an alleged violation of the right to VSEA/counsel representation and contains no allegation that the written reprimand was not specific in detail. Grievant raised these specific issues for the first time in his post-hearing brief. Thus, Grievant raised these issues in an untimely manner. Grievance of Danforth, 16 VLRB 7, 29 (1992). Grievance of Hood and Mahar, 11 VLRB 64, 72 (1988). Grievance of Regan, 8 VLRB 340, 364 (1988).

In sum, we conclude that just cause existed for the written reprimand of Grievant for his actions on May 24, 1991; it was appropriate for the Employer to bypass the oral reprimand step of progressive discipline and impose a written reprimand on Grievant given his actions. Grievant has not met his burden of demonstrating that the written reprimand constituted discrimination against him for his protected activities. Thus, we conclude that the grievance in Docket No. 91-57 should be dismissed.

Docket No. 92-9

In Docket No. 92-9, Grievant alleges that the Employer violated various disciplinary provisions of the Contract by imposing a number of disciplinary actions (i.e., two suspensions without pay, written reprimand), by placing Grievant in a prescriptive period of remediation and by improper supervisory conduct. Grievant contends that these actions violated the Contract in that they: a) were in retaliation for filing the grievance in Docket No. 91-57 and constituted harassment and reprisal for filing other grievances, b) were without just cause, c) inappropriately bypassed progressive discipline, d) denied Grievant legal representation, e) denied Grievant an opportunity to prepare grievances during work hours, and f) were in retaliation for notifying the Secretary of Transportation of misconduct on the part of Agency management. Grievant alleges that such conduct violated Article 5, Section 1; Article 14, Sections 1, 1(d), and 7; and Article 15, Sections 6 and 7, and Article 73 of the Contract. Grievant raised other issues for the first time in his post-hearing brief. These issues have not been considered because they are untimely raised. Danforth, 16 VLRB at 29.

We first address Grievant's contentions that the Employer violated the "whistleblowing" provisions of the Contract by taking the various actions against him in retaliation for notifying the Secretary of Transportation of misconduct on the part of Agency management. Once again, we conclude that Grievant was not engaging in protected "whistleblowing" activities by

making complaints within the Agency. This does not constitute making public allegations of inefficiency or impropriety within the protection of the "whistleblowing" provisions of the Contract.

We next address Grievant's claim that the various actions taken against him constituted reprisal for filing a grievance in Docket No. 91-57, and constituted harassment and reprisal for filing other grievances. Clearly, Grievant was engaging in grievance activity. Thus, Grievant meets the first step of the Mount Healthy analysis for each of these adverse actions.

We move to the second step of the analysis to determine whether such protected conduct was a motivating factor in the adverse actions taken against Grievant. In considering the elements set forth in Sypher, 5 VLRB at 131, for determining whether grievance activity was a motivating factor in an an employer's decision to take adverse action against an employee, the following elements are relevant here in each of the adverse actions: 1) whether the employer knew of the employee's protected activities, 2) whether there was a climate of coercion, and 3) whether the timing of the adverse actions were suspect. Ohland v. Dubay, 133 Vt. 300, 302-03 (1975). Coercion exists when management takes actions compelling employees by pressure or threats to limit their protected activities. Horn of the Moon Workers Union v. Horn of the Moon Cafe, 12 VLRB 110, 127 (1989).

We conclude that the grievance activities of Grievant were a motivating factor in each of the adverse actions taken against him. The first element requires little discussion. It is clear

Grievant's superiors knew of his grievance activities. The remaining two elements require extended discussion.

Grievant filed a grievance over the May 29, 1991, written reprimand, which is the subject matter of Docket No. 91-57, in June, 1991. A Step III Hearing Officer denied this grievance on August 12, 1991, and Grievant made his intentions known to Bessette and Pollica on or before August 26, 1993, that he intended to appeal the grievance to the Board, which he did on September 10, 1991. Prior to Grievant filing his appeal, but after he informed his supervisors of his intention to appeal, two disciplinary actions were imposed on him: a one day suspension for failing to return files and a written reprimand over comments allegedly made six months earlier to Phyllis Isley.

We first address the one-day suspension Grievant received on August 27, 1991. We recognize that the Step III hearing officer reduced this suspension to a written reprimand. Nonetheless, we still need to determine whether a legitimate basis existed for any discipline for this incident. Also, in light of the claim of discrimination for grievance activity, the original disciplinary action imposed is relevant as evidence of motivation of the Employer. The stated reason for this suspension by the Employer was because Grievant failed to immediately return some closed files he had retrieved from Bessette's office after he discovered them missing from his own office.

The timing of this suspension imposed by Bessette, Grievant's immediate supervisor, was suspect, given that it occurred shortly after Grievant had informed Bessette and Pollica that he was appealing his May 29, 1991, written reprimand to the Board.

The circumstances surrounding the suspension also indicate a climate of coercion. First, Bessette's explanation for removing the closed files from Grievant's office is not supported by the evidence. Bessette claimed that the files were removed from Grievant's office because Bessette was fearful that Grievant would leak information from these confidential files to the news media. We are left to speculate why Bessette believed that Grievant was going to go to the news media with such files, since the Employer failed to put forth any evidence that would support this claim. Given Grievant's unrebutted testimony that he routinely kept copies of final audit reports in his office to use as reference for future audits, which is a credible explanation, we can find no legitimate reason, given the state of the evidence, for Bessette removing such files from Grievant's office.

Second, the stated reason for the suspension is not supported by the evidence. Grievant was suspended because he "failed to obey a direct order given at 9:50 a.m. on August 26, 1991, to return records by 10:30 a.m." The evidence indicates that, while Grievant was initially told in a meeting with Pollica and Bessette that the files had to be returned by 10:30 a.m., Bessette agreed to allow Grievant to consult with an attorney before Bessette took any action with respect to the returning of the files. Then, when Grievant was unable to quickly contact his attorney, he returned the files to Bessette's office by 11:00 a.m. Under the circumstances, Bessette reasonably could not have decided there was a legitimate, non-discriminatory reason to discipline Grievant for not returning the files by 10:30 a.m.

Given these considerations, we conclude that the Employer was responsible for a climate of coercion, thereby pressuring Grievant to refrain from his grievance activities. The clear message sent to Grievant was that management would be keeping a particularly close watch on his activities and that he could not rely on verbal representations made to him by his superiors. The timing of the suspension and the climate of coercion demonstrate that the grievance activities of Grievant were a motivating factor in the Employer's decision to suspend him for one day.

Thus, under the Mt. Healthy analysis, the burden is on the Employer to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. The Employer has failed to meet this burden since the evidence indicates no legitimate, non-discriminatory reason for suspending Grievant.

We next turn to the written reprimand Bessette issued to Grievant on September 6, 1991, for Grievant having allegedly made remarks to a contractor, Phyllis Isley, more than five months earlier when Grievant was auditing Isley's company. Again, the timing of this action is highly suspect, given that it occurred shortly after Grievant told Bessette he was appealing his earlier reprimand to the Board. The timing is further suspect given that Bessette solicited the complaint on an incident that occurred more than five months previously.

Also, a climate of coercion continued to exist. In addition to the fact that Bessette solicited the complaint, at no time prior to imposing discipline did Bessette discuss Isley's complaint with Grievant, to allow him an opportunity to present

his version of the incident, or inquire as to Isley's possible motivation for making such complaint against Grievant. Also, Bessette ordered Grievant to write an apology although Grievant denied the incident happened as Isley had reported. The clear message Bessette sent to Grievant by this action is that the Employer would solicit complaints about him on incidents that had occurred much earlier, and then discipline him without providing him an opportunity to present his version of events. We can think of few more coercive management tactics to pressure employees to "toe the line" and refrain from grieving management actions.

Thus, we conclude that Grievant has met his burden of demonstrating that his grievance activities were a motivating factor in the Employer's decision to issue a written reprimand. We further conclude that the Employer has not met its burden to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. Although the comments Grievant is alleged to have made to Isley were offensive and a proper subject of discipline, the Employer did not explain at the hearing under what circumstances Bessette suddenly discovered in August that Grievant had made this alleged comment to Isley. It is also revealing that Isley was not a witness in the hearing before the Board, leaving the Employer without evidence that the incident described in the letter from Isley had actually happened. Thus, given the state of the evidence, we are left with the conclusion that the Employer solicited the Isley complaint against Grievant due to his grievance activities, and would not have issued him a written reprimand in the absence of the protected conduct.

We next address the five day suspension Grievant received on September 13, 1991, for failing to follow a supervisor's orders on September 11, 1991, to discontinue using his personal computer for "personal work". We recognize that the Step III Hearing Officer ordered this suspension expunged. Nonetheless, in light of the claim of discrimination for grievance activity, the original disciplinary action imposed is relevant as evidence of motivation of the Employer, particularly as evidence of a continuing pattern of harassment and retaliation due to the grievance activity of Grievant. Also, we consider Grievant's claim that Bessette had unreasonably denied him time during working hours to submit grievances in connection with the five-day suspension, rather than as an independent claim. This is because the incidents are inextricably linked.

Again, the timing of this suspension was highly suspect, given that it occurred the day after Grievant actually filed his grievance in Docket No. 91-57 with the Board. Also, it is evident the climate of coercion continued. Once again, Grievant was disciplined without being provided an opportunity to present his version of events. Once again, the evidence indicates that the Employer had no reasonable basis by which to conclude that Grievant had refused to obey a direct order by a supervisor, as charged. Grievant did, in fact, stop using the computer once it was clear that this was what the supervisor was ordering him to do.

In sum, once again the message the Employer was sending to Grievant was that he was unable to rely on verbal representations made to him by his supervisors and that he would be disciplined without being able to present his version of events, which would

have been particularly important here given the recognized ambiguous nature of the events. Again, the coercive pressure this placed on him to refrain from grievance activities is evident. The fact that Grievant did not give into this coercive pressure is evidence of his perseverance, but in no way diminishes our conclusion that his grievance activities were a motivating factor in this five-day suspension.

We further conclude that the Employer has not met its burden to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. Again, the Employer has failed to meet this burden since the evidence indicates no legitimate, non-discriminatory reason for suspending Grievant.

Finally, we address the adverse performance evaluation, and accompanying placement into a prescriptive period of remediation, imposed on Grievant on October 11, 1991. Placement in a prescriptive period of remediation for three to six months is the contractually prescribed second 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.

Article 14 of the Contract 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, an employee's underlying actions must first be categorized as a question of misconduct or a question of performance. Grievance of Roy, 13 VLRB 167, 182 (1990).

Bessette, by his own admission, did not place Grievant into this remedial period for his performance "per se", but instead because he believed there had been too many incidents in which Grievant had not displayed professionalism in dealing with contractors, consultants, and officials from the FHWA. In support of these so-called performance deficiencies, the Employer relied on the various incidents for which Grievant had already received disciplinary action. We have previously determined that all but one of these actions were without just cause and improperly motivated. We cannot uphold an adverse performance action based on incidents which the Employer treated as misconduct, and imposed discipline, most of which disciplinary actions were unlawfully motivated.

Also, evidence of the Employer's improper motivation in issuing Grievant an adverse performance evaluation, and placing him in a prescriptive period of remediation, is indicated by management assignment of duties to Grievant during the prescriptive period of remediation. It is the implicit intent of the Article 14, Section 1(e), "progressive corrective action" provisions to put an employee on notice of performance deficiencies and to give that employee an opportunity to correct such deficiencies. After Bessette put Grievant into the prescriptive period of remediation, he prohibited him from

performing outside audits. In effect, Grievant was given no opportunity to "correct" the most important part of his performance. Yet, Bessette gave Grievant a "satisfactory" performance evaluation three months later, and his remedial period ended. We also note that Bessette imposed this disciplinary action on Grievant on the heels of a "complaint" that management had again solicited from a Maine contractor.

Given all the facts surrounding this improperly imposed prescriptive period of remediation, we conclude it had all the appearances of a sham. It is further evidence of management's continued harassment of Grievant, and retaliation against him , for exercising his protected rights to file grievances. Once again, the Employer has failed to show by a preponderance of the evidence that it would have reached the same decision in the absence of Grievant's protected conduct.

In sum, we do not sustain any of the adverse actions taken against Grievant in Docket No. 92-9. Grievant has established that his grievance activities were a motivating factor in each of the adverse actions taken against him, and the Employer has not shown by a preponderance of the evidence that it would have imposed any of the adverse actions in the absence of Grievant's protected conduct. Given our conclusions in this regard, it is obvious that no just cause existed for any of the adverse actions taken against Grievant and they all must be rescinded. Thus, it is unnecessary to discuss Grievant's other allegations with respect to each of these adverse actions. This grievance is sustained.

Docket No. 92-26

Grievant contends that the Employer violated various provisions of the Contract by dismissing him. Grievant argues that the dismissal was without just cause, and constituted harassment and retaliatory action against Grievant for his grievance activity. Grievant further contended that the Employer's dismissal letter was deficient. Grievant raised other issues for the first time in his post-hearing brief. These issues have not been considered because they are untimely raised. Danforth, 16 VLRB at 29.

Dismissal is the contractually prescribed fourth and final step that the Employer may take in progressive disciplinary steps to address an employee's misconduct. Article 14, Section 1(d)(iv), Contract. The Contract also provides that there may be appropriate cases that may warrant bypassing progressive discipline. Article 14, Section 1(f)(i). Such disciplinary action may only be imposed for just cause. Article 14, Section 1.

The ultimate criterion of just cause is whether an employer acted unreasonably in discharging an employee for misconduct. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). There are two requisite elements which establish just cause for dismissal: 1) that is is reasonable to discharge an employee because of certain conduct, Id., and 2) the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. Id. In re Grievance of Yashko, 138 Vt. 364 (1980). Grievance of Buckbee, 15 VLRB 34, 49 (1992).

In reviewing dismissals, our review does not go beyond the reasons given by the employer in the dismissal letter for the action taken. In re Grievance of Warren, (Unpublished Decision, Vt. Supreme Court Docket No. 83-640, August, 1986). Grievance of King, 13 VLRB 253, 282 (1990). Grievance of Buckbee, 15 VLRB at 50.

The dismissal letter provided to Grievant by William McManis, Agency Human Resources Chief, set forth five incidents of "unprofessional conduct" as the basis for Grievant's dismissal. The incidents cited were: 1) the May 24, 1991, incidents for which Grievant received a written reprimand; 2) the August, 1991, incident in which Grievant failed to return files for which he received a suspension, later reduced to a written reprimand at the Step III level of the grievance procedure; 3) the September, 1991, incident for which Grievant received a suspension, which was later ordered expunged from his record at the Step III level of the grievance procedure; 4) the November, 1991, incident involving an inappropriate comment which Grievant made to the Executive Director of the Human Rights Commission for which Grievant received a one-day suspension, and; 5) Grievant's conduct at the April 30, 1992, hearing with VTR. McManis informed Grievant in the dismissal letter that just cause existed for his dismissal "(a)s a result of the combined effect of (these) actions . . .and other actions as to which you have been counseled." McManis indicated that "your actions have convinced the Agency that you cannot be trusted to conduct objective and unbiased audits on its behalf."

Two of the five incidents of "unprofessional conduct" cited by McManis can provide no basis for Grievant's dismissal: the August, 1991, disciplinary action for which we concluded that no discipline was appropriate, and the September, 1991, five-day suspension which had been ordered expunged from Grievant's record at the Step III level of the grievance process. We note that it was inappropriate and inexcusable for McManis to cite this latter incident as an example of "unprofessional conduct" supporting Grievant's dismissal. This disciplinary action had been ordered expunged from Grievant's record during the grievance process, and McManis exhibited a disregard for the grievance process by citing the incident in the letter of dismissal.

Also, the reference to "other actions as to which (Grievant had) been counseled" in the dismissal letter is too vague to allow Grievant to defend against the charges. The remaining three incidents of "unprofessional conduct" cited by McManis in his dismissal letter have been established by a preponderance of the evidence.

The fact that some of the charges against Grievant have not been proven does not necessarily mean that his dismissal lacked just cause. Failure of an employer to prove by a preponderance of the evidence all the particulars of a dismissal letter does not require reversal of a dismissal action. King, 13 VLRB at 283. Grievance of Regan, 8 VLRB 340, 366 (1985). In such cases, the Board must determine whether the remaining proven charges justify the penalty. King, 13 VLRB at 283. Grievance of Colleran and Britt, 6 VLRB 235 (1983). Buckbee, 14 VLRB at 51.

We look to the factors articulated in Colleran and Britt, 6 VLRB at 268-269, to determine whether the proven charges justify dismissal. The pertinent factors here are: 1) the nature and seriousness of Grievant's offenses in relation to his duties, 2) Grievant's contact with the public and the impact of Grievant's offenses upon the reputation of the Employer, 3) the clarity with which Grievant was on notice of the prohibited conduct 4) Grievant's past disciplinary record, 5) Grievant's past work record, 6) the effect of the offenses on Grievant's ability to perform at a satisfactory level, 7) mitigating circumstances surrounding the offenses, particularly the bad faith and provocation on the part of others involved in the matter, 8) the potential for Grievant's rehabilitation, and 9) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

The proven incidents of unprofessional conduct by Grievant were serious, particularly when considered in their entirety as establishing a pattern of Grievant's propensity to demonstrate bad judgment and make inappropriate comments in his professional dealings. Grievant's behavior leading to his May, 1991, written reprimand, for which we concluded just cause existed, demonstrated inappropriate comments, rude behavior and failure to control himself in professional settings. The propensity to make inappropriate comments and act unprofessionally again exhibited itself in November, 1991, when Grievant made an inappropriate comment to the Executive Director of the Human Rights Commission. Grievant received a one day suspension for this conduct, which he did not grieve.

Grievant's conduct at the April 30, 1992, hearing, at which various management officials of the Employer and VTR representatives were present, clearly was inappropriate. Grievant's comment that the revised VTR audit report, done by his superiors, "could only have been written by a fool" was unprofessional in a public setting. So too was his comment that the Employer's Deputy Secretary was "arrogant" when he attempted to regain control of the hearing which Grievant was disrupting.

The severity of Grievant's actions are exacerbated by the fact that his conduct was premeditated since he had indicated prior to the meeting that he was going to be uncooperative. We recognize that Grievant had serious concerns of his superior's handling of the VTR audit. Nonetheless, his behavior at the April 30, 1992, hearing was an inappropriate way to act on such concerns.

In sum, Grievant's offenses in these incidents, over an approximate one year period, establish a pattern of Grievant's propensity to demonstrate bad judgment and make inappropriate comments in his professional dealings. These are serious offenses, particularly when the nature of Grievant's auditing duties required him to interact professionally with the public and other government officials on a regular basis. Grievant's offenses could not help but have an adverse impact on the reputation of the Employer.

Grievant had fair notice, both implicit and explicit, that he could be discharged for such conduct. Implicit notice existed because the very nature of an auditor's duties require

professional conduct. Explicit notice existed prior to dismissal since Grievant had been appropriately disciplined on two prior occasions for unprofessional conduct in his interaction with others.

Nonetheless, we cannot sustain the Employer's decision to dismiss Grievant for his offenses. In this regard, we first conclude by a preponderance of the evidence that Grievant has established that his grievance activities were a motivating factor in his dismissal, and the Employer has not shown by a preponderance of the evidence that it would have dismissed Grievant in the absence of Grievant's protected conduct.

We reach this conclusion based upon an examination of the totality of the Employer's conduct in these consolidated cases. The Employer's repeated imposition of improperly motivated adverse actions, discussed in Docket No. 92-9, were of such a severe nature as to cast substantial doubt that the dismissal was properly motivated.

However, we do not rest our decision on this ground alone. The fact that McManis cited in the dismissal letter a past disciplinary action taken against Grievant as evidence of "unprofessional conduct", which disciplinary action had been previously rescinded and ordered expunged from Grievant's record during the grievance process, is evidence that the Employer continued to hold Grievant's grievance activities against him. Further, McManis' February 27, 1992, memorandum to the Secretary of Transportation, detailing all the previous disciplinary actions and the adverse performance action taken against Grievant

and all the grievances which Grievant had filed, provides further evidence that the Employer continued to hold the grievance activities of Grievant against him. This is particularly indicated by McManis' reference in the memorandum that the November, 1990, Step II grievance hearing officer decision to rescind a disciplinary action against Grievant was a "very bad decision". It is further indicated by his notation, concerning the five-day suspension which had been rescinded at the Step III level of the grievance process, that "(a)ll other issues brought out management action was sustained."

The grievance procedure article of the Contract requires employees and supervisors to "make a sincere effort to reconcile their differences as quickly as possible at the lowest possible organizational level." Article 15, Section 1(a). McManis has demonstrated a disregard for this contractual requirement, and the further requirement of Article 15, Section 7, of the Contract that employees not be harassed or retaliated against for filing grievances, by his February 27, 1992, memorandum, and dismissal letter. These inappropriate and inexcusable actions of McManis, combined with the Employer's conduct exhibited in Docket No. 92-9, persuade us that the grievance activities of Grievant were a motivating factor in the Employer's decision to dismiss Grievant.

Further, we conclude that the Employer has not shown by a preponderance of the evidence that it would have dismissed Grievant in the absence of Grievant's protected conduct. We are persuaded that the Employer would have imposed a suspension on

Grievant for his conduct at the April 30, 1992, hearing, when considered in light of the previous disciplinary actions which had been properly imposed. However, we are not persuaded that the Employer would have imposed the ultimate sanction of dismissal in the absence of the grievance activities of Grievant. The pervasive and persistent nature of the Employer's conduct demonstrating discrimination against Grievant for his grievance activities leads us to conclude dismissal would not have been imposed for Grievant's offenses, even though they were serious.

In addition, the ultimate reason set forth by McManis supporting Grievant's dismissal, that Grievant could not be trusted to conduct objective and unbiased audits, is not supported by the evidence and thus is not a reasonable basis for dismissal. Once the improperly imposed October, 1991, adverse performance evaluation and placement in a prescriptive period of remediation is removed from consideration, as it must be, Grievant received all "satisfactory" performance evaluations during his tenure of employment. By all indications, he was a capable auditor. Thus, it is evident that Grievant could be trusted to conduct objective and unbiased audits. Although his propensity to make inappropriate comments and exercise bad judgment at times in his personal interactions is a serious cause for concern, dismissal was not a reasonable sanction for such offenses.

Given Grievant's overall work record, we conclude that he has potential for rehabilitation. A stiff suspension would have been an adequate and effective sanction to impose on Grievant to deter him and other employees in the future from engaging in the

misconduct demonstrated by his offenses. A lengthy suspension would have served notice to Grievant that such conduct in the future would have resulted in his dismissal. A lengthy suspension also would have served to preserve the Employer's reputation by demonstrating that the Employer viewed seriously inappropriate comments and behavior exhibited by its employees.

In sum, we conclude that the Employer would not have dismissed Grievant in the absence of his grievance activities, and that just cause did not exist for his dismissal. The maximum penalty short of dismissal permitted by the Contract - i.e., a 30 day suspension - would have been the appropriate penalty given Grievant's offenses.

ORDER

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

1. The grievance of Gene McCort ("Grievant") in Docket No. 91-57 is DISMISSED;

2. The grievance in Docket No. 92-9 is SUSTAINED; and

   a. The State of Vermont, Department of Transportation ("Employer") shall RESCIND the written reprimand imposed on Grievant on August 27, 1991; the written reprimand imposed on or about September 6, 1991; and the adverse performance evaluation and prescriptive period of remediation imposed on October 11, 1991; and

   b. The Employer shall remove all references to the disciplinary actions and adverse performance action at issue in Docket No. 92-9, including those disciplinary actions which had been rescinded at earlier steps of the grievance procedure, from Grievant's personnel file and other official records;

3. The grievance in Docket No. 92-26 is SUSTAINED; and

   a. Grievant shall be reinstated to this position as an Auditor C with the State of Vermont, Agency of Transportation;

b. Grievant shall be awarded back pay and benefits from the date commencing 30 working days from the date of his discharge until his reinstatement, minus any income (including unemployment compensation received and not paid back) received by Grievant in the interim;

c. 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 30 working days from Grievant's dismissal, and ending on the date of his reinstatement; such interest for each paycheck date shall be computed from the amount of each paycheck minus income (including unemployment compensation) received by Grievant during the payroll period;

d. The parties shall submit to the Board by March 19, 1993, a proposed order indicating the specific amount of backpay and other benefits due Grievant; and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Board; and

e. The Employer shall remove all references to Grievant's dismissal from Grievant's personnel file and other official records.

Dated this 8th day of March, 1993, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh

Louis A. Toepfer

Leslie G. Seaver