VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 94-17
CYNTHIA GREGOIRE	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 13, 1994, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Cynthia Gregoire ("Grievant"). The grievance alleged that the State of Vermont, Department of Employment and Training ("Employer"), violated Article 14 of the collective bargaining agreement between the State and the VSEA for the Non-Management Unit, effective for the period July 1, 1992, to June 30, 1994 ("Contract"). Specifically, Grievant alleged that Article 14 was violated because there was no just cause for her dismissal, progressive discipline was inappropriately bypassed, and the Employer dismissed Grievant without informing her that dismissal was being contemplated and without providing her with a pre-termination meeting.

Hearings were held before Labor Relations Board Members Charles McHugh, Chairman; Leslie Seaver and Carroll Comstock on October 6 and 14, 1994. Samuel Palmisano, VSEA Legal Counsel, represented Grievant. Michael Seibert, Assistant Attorney General, represented the Employer. The parties filed post-hearing briefs on October 28, 1994.

FINDINGS OF FACT

1. Article 14 of the Contract, entitled Disciplinary Action, provides in pertinent part:

> 1. No permanent or limited status employee covered by this Agreement shall be disciplined without just cause. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:
>
> . . .
>
> c. impose a procedure of progressive discipline . . .
>
> d. In misconduct cases, the order of progressive discipline shall be:
>
> i. oral reprimand;
> ii. written reprimand;
> iii. suspension without pay;
> iv. dismissal
>
> . . .
>
> f. The parties agree that there are appropriate cases that may warrant the State:
> i. bypassing progressive discipline . . .
>
> 2. The appointing authority or authorized representative, after complying with the provisions of paragraph 4 of this Article, may dismiss an employee for just cause with two weeks' notice or two weeks pay in lieu of notice . . .
>
> 3. Notwithstanding the provisions of paragraph 2 above, the appointing authority or authorized representative, after complying with the provisions of paragraph 4 of this Article, may dismiss an employee immediately without 2 weeks' notice or two weeks' pay in lieu of notice for any of the following reasons:
>
> . . .
>
> b. gross misconduct . . .
>
> 4. Whenever an appointing authority contemplates dismissing an employee, the employee will be notified in writing of the reason(s) for such action, and will be given an opportunity to respond either orally or in writing. The employee will normally be given 24 hrs. to notify the employer whether he or she wishes to respond in writing or meet in person to discuss the contemplated dismissal. The employee's response, whether in writing

> or in a meeting, should be provided to the employer within four days of receipt of written notification of the contemplated dismissal. Deadlines may be extended at the request of either party, however if the extension is requested by the employee, the employee will not be carried on the payroll unless it is charged to appropriate accrued leave balances. At such meeting the employee will be given an opportunity to present points of disagreement with the facts, to identify supporting witnesses or mitigating circumstances, or to offer any other appropriate argument in his or her defense.
>
> . . .
>
> 8. The appointing authority or authorized designee may suspend an employee without pay for reasons for a period not to exceed thirty (30) workdays . . .
>
> 10. In any misconduct case involving a suspension or dismissal, should the Vermont Labor Relations Board find just cause for discipline, but determine that the penalty was unreasonable, the Vermont Labor Relations Board shall have the authority to impose a lesser form of discipline . . .

2. Grievant was employed in a permanent status position by the State of Vermont from 1981 until her dismissal in March, 1994. Grievant was hired in 1981 as a Stenographer/Typist for the State Water Resources Department. In 1985, Grievant transferred to the Department of Employment and Training to accept a position as a Word Processing Operator. She was promoted to Secretary C in 1988. In 1990, Grievant was promoted to the position of Administrative Assistant to the Chief of Contributions. Grievant's job title changed from Administrative Assistant to Delinquent Tax Compliance Officer in 1992. Grievant's duties did not change with the change in job title.

3. Grievant received satisfactory or above performance evaluations during her thirteen years of employment with the State. She received three merit pay increases or bonuses during her

employment. Prior to her dismissal, Grievant had never been disciplined (Grievant's Exhibits 1 - 4, 12, 13, 15).

4. The immediate supervisor of the Tax Compliance Officers was Maria Beede, Assistant Chief of Contributions. Beede reported to David Tucker, Chief of Contributions. Tucker reported to Thomas Douse, Employment and Training Programs Director. Douse reported to Susan Auld, the Commissioner of the Department of Employment and Training.

5. The primary responsibility of Delinquent Tax Compliance Officers is to collect delinquent employer contributions, interest and penalties. This is done by contacting employers, by mail and/or telephone, to notify them of their indebtedness; initiating a variety of collection activities, including possibly liens and assessments; and negotiating payment agreements with employers setting forth a schedule for employers to pay their debt. If employers do not follow arrangements set up by Delinquent Tax Compliance Officers, then Field Auditors may become involved to assist in the collection process.

6. Besides Grievant, there were two other Delinquent Tax Compliance Officers - Jane Grinde and Donna Holden. The Delinquent Tax Compliance Officers are assigned employers based on the employers' Standard Industrial Code number, which identified the nature of the employer's business activity. Each Delinquent Tax Compliance Officer was assigned one-third of the Standard Industrial Code numbers as an attempt to balance respective workloads. Each Compliance Officer had between 1000-1500 delinquent accounts at any one time. Grievant was assigned Code numbers 42 - 64.

7. Delinquent Tax Compliance Officers are provided a printout at about the middle of each month listing those employers assigned to them with delinquent accounts. Employers are required to make unemployment insurance contributions on a quarterly basis, and employer accounts appear on delinquent lists if the required contributions are not made within approximately six weeks of the end of the quarter. Generally, Delinquent Tax Compliance Officers are expected to work their way through the entire list, and pursue some action on each account, within a month, and generally are able to do so. Compliance Officers were assisted in their efforts to make it through their lists due to an automatic referral process instituted by the Department in early 1993. The process was designed to send automatic letters to employers who did not file a quarterly report on income and unemployment compensation contributions. As a result of this automation, Compliance Officers were directed not to follow up on missing reports for the first twenty days after receiving their monthly list. Also, account clerks were involved with following up on missing reports; this reduced Compliance Officers' workloads. As a result, Compliance Officers only had to handle approximately one-half of their accounts for the first twenty days after receiving their monthly reports.

8. The Employer Internal Security Policy provided in pertinent part at all times relevant:

> . . .
>
> 8. In order to avoid any possible conflict of interest, cases involving a close friend or relative should be reassigned to another staff member. If this is not possible due to location, time, etc., then supervisory approval is to be granted before starting the assignment and

> reviewed by the supervisor after completion. A relative is considered to be related to the employee by blood, marriage or adoption.
>
> . . .
>
> (Grievant's Exhibit 8)

9. On January 14, 1988, Grievant certified by her signature that she had "read and understood the above statements regarding employee conduct" (Grievant's Exhibit 8).

10. In the first few months of 1993, Grievant's husband, Glenn Gregoire, and Donna Holden's husband considered jointly opening an auto body repair shop in Barre, Vermont. Grievant, Grievant's husband, and Holden discussed these plans in the Department of Employment and Training office. By March of 1993, David Tucker became aware of these discussions. He called Grievant and Holden into his office. Tucker indicated that Grievant and Holden should be careful about their involvement in the business venture. Turner also informed Grievant and Holden that they should not discuss the potential opening of their husbands' business during work time. Turner handed Grievant and Holden a copy of the Department's Conflict of Interest policy.

11. The Conflicts of Interest Policy which Turner handed Grievant and Holden provided in pertinent part:

> It shall be the policy of the Department of Employment and Training that an employee of the Department shall not use his/her position to secure special privileges or exemptions for himself/herself or others.
>
> An employee shall not engage in any employment, activity or enterprise which has been or may be determined by the Appointing Authority to be inconsistent, incompatible, or in conflict with his\her duties as an employee or with the duties, functions, or

responsibilities of the Department of Employment and Training.

This policy shall include but not be limited to the following:

. . .

3a. An employee shall not process or otherwise handle any transaction (e.g., claims processing, employer contributions, on the job training contracts, adjudication) between the Department and his/her relatives* or business entities in which he/she and/or his/her relatives have a pecuniary interest. (*Relatives shall include spouse, parents, grandparents, children and siblings both natural and legal).

. . .

5. No employee shall engage in any employment which may be inconsistent, incompatible, or in conflict with his or her duties as an employee of the Department and State.

If an employee is unsure as to whether or not a particular situation does indeed represent a conflict of interest, he/she should submit the facts, in writing, to the division Director who will render a written decision on the matter after consultation with legal staff.

(Grievant's Exhibit 7)

12. At some point after the March, 1993, meeting, Tucker informed Grievant that he did not want Grievant's husband to visit the office. Tucker took this action upon concluding that Glenn Gregoire was spending an inordinate amount of time in the office during work hours.

13. Glenn Gregoire's plans to jointly open an auto body repair shop with Holden's husband fell through. The Holdens loaned approximately $6000 to the business venture, but then withdrew from the business. Glenn Gregoire pursued the business on his own, and opened a shop by June 1993. The shop was located on Gable Place in Barre, and was opened under the tradename of "Downtown Auto". A

corporation called GFG, Inc., was formed in June 1993. Glenn Gregoire was listed as President of the corporation. Grievant was listed as the corporation's Secretary. Grievant had minimal involvement in the operations of the business.

14. Donna Holden informed Tucker by some point in June of 1993 that she thought that Glenn Gregoire was paying employees "under the table". Tucker then called Field Auditor Dennis Florio into his office, and directed Florio to thoroughly investigate Downtown Auto and determine whether there was any liability for unemployment insurance contributions. Employers are required to make such contributions if they pay $1500 or more in wages in a quarter or if an individual is employed at least part of the week for at least 20 weeks. It was not standard practice within the Contributions Section for Tucker to make direct assignments to Field Auditors. Field Auditors generally were assigned work by Gerald Newton, Chief Field Auditor. Tucker has directly assigned a Field Auditor to conduct an investigation on only a few occasions. Tucker made a direct assignment with respect to Downtown Auto due to the sensitivity of the fact that Grievant's husband operated the business.

15. In June 1993, Florio conducted surveillance of Downtown Auto several times by driving by the property in his car to see if an employee was working there. At some point in June 1993, Florio identified himself to Glenn Gregoire, and informed him that he was attempting to determine whether Downtown Auto would be liable for unemployment insurance contributions. Gregoire informed Florio that he had paid one individual in cash for work performed, but indicated

that the wages paid were too little to incur liability for unemployment insurance contributions.

16. On July 6, 1993, Florio, accompanied by Gerald Newton, visited Downtown Auto. Florio completed a status report on Downtown Auto, at that time, based on information provided to him by Glenn Gregoire. Grievant was present in Downtown Auto at that time, and spoke with Newton while Florio was completing the report. The report stated that the "principal activity" of the business was "auto sales (wholesale)", and that "sales" constituted "100%" of business. Florio reviewed the status report with Glenn Gregoire. Gregoire signed the report under the statement: "I certify that the foregoing report is correct to the best of my knowledge and belief". Florio sent Glenn Gregoire a copy of the completed status report shortly after it was prepared (Grievant's Exhibit 5).

17. At the time the status report was prepared, Downtown Auto was primarily an auto body repair shop and was involved in only limited car sales activity.

18. Based on the status report, Downtown Auto was assigned the Standard Industrial Code number for an auto sales business, which was 45. The Standard Industrial Code number for an auto body repair business was 75. Grievant was responsible for handling auto sales businesses, but not auto body repair businesses. Downtown Auto's designation as an auto sales business was not corrected and changed to an auto body designation until September 1994 pursuant to a request by Glenn Gregoire that such change be made (State's Exhibit 15).

19. After his July 6, 1993, meeting with Glenn Gregoire, Florio determined that Downtown Auto was not liable for unemployment insurance contributions at that time because the business had not paid enough in wages to create liability. Florio reported the results of his investigation directly to Tucker.

20. On November 1, 1993, Grievant prepared, and submitted, the Department of Employment and Training C-101 form for Downtown Auto for the third quarter ending September 30, 1993. The completed form indicated that Downtown Auto had paid $6207 in wages to employees that quarter, and had incurred $148.99 in unemployment insurance contributions that quarter. Downtown Auto did not timely pay the $148.99 owed in contributions. Grievant noted on the completed form on November 1, 1993, that there were "no $$" to pay the contribution due for that quarter (State's Exhibit 14, pages 1-2).

21. The failure of Downtown Auto to pay its unemployment insurance contributions for the third quarter of 1993 in a timely manner meant that its account became delinquent in November 1993. This delinquent account appeared on Grievant's delinquency list printed on approximately November 18, 1993. The Downtown Auto account was approximately 10 pages from the end of Grievant's delinquency list of approximately 200 pages.

22. Between November 1993, and February 1994, Grievant missed 144 hours of work due to January, 1994, knee surgery and related physical therapy. Grievant had physical therapy both before and after the surgery. Also, there were 6 or 7 holidays during this time.

23. Although there is conflicting evidence on the issue, we conclude by a preponderance of the evidence that Grievant became aware by mid-December, 1993, that the delinquent Downtown Auto account had appeared on her delinquency list (State's Exhibits 1 - 9).

24. Once Grievant became aware that Downtown Auto was on her delinquency list, she did not inform her supervisors that the business had been assigned to her for collection purposes. She spoke to her husband about the delinquency, and he informed her that he was not able to pay the delinquent contributions at that time, and would be able to make payment within a few months.

25. During the middle to later part of December, 1993, Maria Beede became aware that the Downtown Auto account was delinquent, and that Grievant had been assigned the account. Beede immediately reported this to Tucker. Tucker spoke with his superior, Thomas Douse, about his concerns that there was a conflict of interest problem. Douse told Tucker to investigate the situation.

26. Tucker completed his investigation in early February, 1994. During the course of the investigation, Tucker did not inform Grievant that there was an investigation, and did not reassign the Downtown Auto account to one of the other Delinquent Tax Compliance Officers.

27. The delinquent Downtown Auto account appeared on Grievant's delinquency lists in December, 1993, and January, 1994.

28. On January 31, 1994, Grievant prepared, and submitted, a Department of Employment and Training C-101 form for Downtown Auto for the fourth quarter of 1993, ending December 31, 1993. The

completed form indicated that Downtown Auto had paid $5651.38 in wages to employees that quarter, and had incurred $135.64 in unemployment insurance contributions for that quarter. Downtown Auto did not timely pay the $135.64 in contributions for that quarter, and that amount was added to the existing $148.99 delinquency of Downtown Auto. Grievant noted on the completed form that there were "no $$" to pay the contribution due for that quarter (State's Exhibit 14, page 3).

29. On February 18, 1994, Turner sent a memorandum to Grievant, entitled "Investigatory Meeting", which provided in pertinent part as follows:

> As a result of your action described below, I am contemplating disciplinary action in accordance with Article 14 of the agreements between the State of Vermont and the Vermont State Employees' Association, Inc. You have the right to be represented by VSEA during proceedings connected with this action.
>
> The reason disciplinary action is contemplated follows.
>
> . . .
>
> On June 30, 1993, a corporation called GFG, Inc., was registered with the Department listing Glenn Gregoire as President and yourself as Secretary. On November 3, 1993, that account became delinquent. Because the Standard Industrial Code for an automobile dealer falls within your range of accounts, you were assigned that delinquency through standard department reports following the end of the third quarter of 1993. To date, the delinquency has not been resolved, and you have taken no action to notify your supervisor of this apparent conflict of interest, even though you are aware of the policy requirements and have had ample time to do so.
>
> . . .
>
> An investigatory meeting is scheduled on Wednesday, February 23, at 11:00 a.m. to discuss the allegations outlined above. If you so choose, you may respond in writing not later than February 25, 1994. Please advise me by 10:00 a.m. on Wednesday, February 23, 1994 whether

you intend to be heard in person or choose to respond in writing.

If you do not participate in this investigation, a decision will be finalized based on the information available.

You are provided this opportunity to respond so that you can present points of disagreement with what appears as facts such as why and when did you plan to deal with the case, and why you didn't turn this case over to your supervisor as Department policy and rules require. During this meeting, you may want to identify any circumstances the Department should consider or arguments you wish to offer. In other words, you may present your side of the issue. We want to take all of the facts into consideration before deciding what appropriate actions should be taken.

You are entitled to be represented by VSEA, or private counsel at this meeting. It is more helpful and therefore requested that you personally present your own version of the facts. Your representative may then make a presentation on your behalf.

After reviewing any new information, I will conduct further inquiry as is appropriate, and then contact you.

(Grievant's Exhibit 9)

30. Commissioner Auld was aware that Tucker's February 18, 1994, memorandum was going to be sent to Grievant before it was issued. The Commissioner authorized Tucker to send the memorandum and hold the meeting. She did not communicate this authorization to Tucker directly, and did not speak with Tucker directly about the issue. She informed Ernest Tomasi, Director of Administrative Services for the Department, of her authorization. Tucker was aware that the Commissioner had authorized the memorandum to be sent.

31. Grievant showed Richard Lednicky, VSEA Field Representative, a copy of Tucker's February 18, 1994, memorandum. Lednicky did not view the memorandum as a written notification of contemplated dismissal pursuant to Article 14, Section 4, of the

Contract because: 1) the letter referred to the scheduled February 23 meeting as an "investigatory" meeting, rather than a pre-termination meeting; and 2) the letter was different from previous contemplated dismissal letters in Lednicky's experience; those letters typically had been written by the appointing authority and had stated that dismissal or serious disciplinary action was being contemplated. If Lednicky had viewed the letter as written notification of contemplated dismissal, he would have requested more information from the Employer on the charges against Grievant prior to the meeting, would have prepared differently for the meeting, and would have presented more information on Grievant's behalf to seek to preserve her employment.

32. The scheduled February 23 meeting referenced by Tucker in his memorandum actually occurred on February 28, 1994. The meeting was tape-recorded, and a transcript of the meeting was completed prior to Grievant's dismissal. Grievant, Lednicky, Tomasi, Tucker and Beede were present at the meeting. Lednicky did not object to the meeting being tape-recorded because he did not view the meeting as a pre-termination meeting. If Lednicky had viewed the meeting as a pre-termination meeting, he would have objected to the meeting being taped. Grievant stated at the meeting that the Downtown Auto account should not have been assigned to her; that it had been given the wrong Standard Industrial Code designation by the Department. Grievant stated that she did not know that the Downtown Auto delinquency was on her delinquency list until late January, 1994. When asked why she did not bring the fact that the Downtown Auto account appeared on her list to someone's attention, Grievant

replied: "I didn't even give it a thought." None of the Employer representatives indicated at the meeting that the dismissal of Grievant was being contemplated (State's Exhibit 10).

33. Grievant was not aware prior to the February 28 meeting, during the February 28 meeting, or prior to her dismissal that the Employer was contemplating dismissing her.

34. Glenn Gregoire paid the Holdens back the $6000 they had loaned the business. Several payments were made, the first in the Summer of 1993, and the last payment paying off the loan was made in March 1994.

35. By memorandum of March 8, 1994, Tucker notified Grievant that "the account for GFG, Inc. has been reassigned to Jane Grinde", and that Grinde "will have sole responsibility to collect this delinquency". Tucker informed Grinde that, since the delinquent amount exceeded $200, the account possibly was subject to an assessment lien. $200 is the minimum delinquency amount before the Department may seek to have a lien imposed on an employer. The Department does not seek imposition of a lien in every instance where the delinquent amount reaches $200. Tucker did not direct Grinde to seek imposition of a lien against Downtown Auto; he mentioned it as an option Grinde could consider (Grievant's Exhibit 10).

36. After the February 28, 1994, meeting, Tucker, Tomasi and Brooke Pearson, Department Counsel, met to discuss disciplinary action to impose on Grievant. It was determined that Grievant's handling of the Downtown Auto account for a few months without notifying her superiors was a very serious offense as a violation of

the Department's conflict of interest policy. They took into consideration Grievant's good past performance, as well as no past disciplinary action, but decided that Grievant could no longer be trusted to perform her duties. They decided to recommend to Commissioner Auld that Grievant be dismissed. In deciding whether to dismiss Grievant, Commissioner Auld had a transcript of the February 28, 1994, meeting. Tomasi and Douse kept Commissioner Auld apprised of the investigation of Grievant's conduct.

37. On March 14, 1994, Commissioner Auld sent a letter to Grievant notifying Grievant of her dismissal. The letter provided in pertinent part:

> . . .
>
> I find your actions in the handling of the delinquent account of GFG, Inc. to constitute gross misconduct. I find that in shielding this account from the normal procedural collection path, based upon your personal connection to the business, and knowledge of its ability to pay, you intentionally violated both the Internal Security Policy and the Conflict of Interest Policy of DET. Both Policies were known to you, and the Conflict of Interest Policy was discussed with you as recently as March 1993. These actions constitute gross misconduct sufficient to warrant immediate dismissal from your position of Delinquent Tax Compliance Officer effective at close of business Monday, March 14, 1994.
>
> (Grievant's Exhibit 11)

38. On March 23, 1994, Glenn Gregoire and Jane Grinde reached an agreement whereby Gregoire agreed to pay the $298.73 balance due on his delinquent account, which included interest, in monthly installment payments of $50.00. Gregoire paid the monthly installments as agreed upon, and the Downtown Account is no longer delinquent (State's Exhibit 17).

MAJORITY OPINION

Pre-Termination Notification and Meeting

The threshold issue before us is to address Grievant's contention that the Employer dismissed her without first informing her that it was contemplating dismissing her, and without providing her with an opportunity for a pre-termination meeting, in violation of Article 14 of the Contract.

The Employer contends that there was no violation of Article 14 in this regard. The Employer contends that the notification by the Employer to Grievant that the Employer was "contemplating disciplinary action in accordance with Article 14" was sufficient to inform Grievant that dismissal was being contemplated because dismissal is a form of disciplinary action. Also, the Employer contends that the February 28 meeting met the contractual requirements of a pre-termination meeting since the meeting served the essential functions of such a meeting - i.e., notice of charges to Grievant, an explanation of the evidence, and a chance to respond to the charges.

The provisions of Article 14 concerning notification of contemplated dismissal and a pre-termination meeting had their genesis in the U.S. Supreme Court decision, Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). Therein, the Court held that employees with a protected property right in continued employment could not be deprived of their employment without due process. Id. at 538. The Court concluded that an essential principle of due process is that a deprivation of continued employment must be preceded by notice and opportunity for hearing. Id. at 542. The

Court stated that the need for some form of pre-termination hearing is evident due to the "severity of depriving a person of the means of livelihood", and because "some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision". Id. at 542-43.

The Court held that "something less" than a full evidentiary hearing is sufficient. Id. at 545. The Court stated:

> (T)he "pretermination hearing need not definitely resolve the propriety of the discharge. It should be an initial check against mistaken decisions - essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action . . .
>
> The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement . . . The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. Id. at 545-46.

The Court's statements that the pretermination hearing should be an initial check that the "proposed action" not be mistaken, and that the employee needs to be given an opportunity to present reasons "why proposed action should not be taken" implies that there is required notice to the employee that the specific "proposed action" of dismissal is being contemplated. An employee would be unable to present reasons why a proposed action should not be taken if the employee did not know what proposed action was being contemplated.

Decisions of federal circuit courts of appeals applying Loudermill support this conclusion. The Tenth Circuit Court of Appeals has held that "implicit in the notice and opportunity to be

heard elements is the requirement that the employee be made aware that his employment is in jeopardy of termination." Calhoun v. Gaines, 982 F.2d 1470, 1476, n.6 (1992). The Eighth Circuit Court of Appeals has determined that, although an employer is not specifically required to tell the employee that the hearing is a pretermination hearing, the employee needed to know that his or her job "was in jeopardy". Post v. Harper, 980 F.2d 491, 494 (1992). These decisions support the conclusion that constitutionally adequate notice to an employee must be at least sufficient so that the employee is specifically aware that his or her employment is in jeopardy of termination.

Nonetheless, we need not rely on the Loudermill decision and its progeny to determine whether the notice to Grievant was sufficient in this case. The provisions of Article 14 of the Contract extend the Loudermill requirements, and are clear as to what notice is required.

Article 14, Section 4, provides that whenever an appointing authority "contemplates dismissing an employee, the employee will be notified in writing of the reason(s) for such action, and will be given an opportunity to respond". An employee may respond either orally or in writing to "the contemplated dismissal". The employee's response needs to be filed within four days of "receipt of written notification of the contemplated dismissal".

A contract will be interpreted by the common meaning of its words where the language is clear. In re Stacey, 138 Vt. 68, 72 (1980). If clear and unambiguous, the provisions of a contract must be given force and effect and be taken in their plain, ordinary and

popular sense. Swett v. Vermont State Colleges, 141 Vt. 275 (1982). The language of Article 14, Section 4, is clear and unambiguous. Its provisions make it clear that the Employer needs to notify the employee in writing that dismissal is being contemplated. Notification simply that "disciplinary action" is being contemplated is not sufficient under the plain meaning of the words used in Article 14, Section 4. These Contract provisions reflect an apparent recognition that the "severity of depriving a person of the means of livelihood"; Loudermill, 470 U.S. at 532; should be preceded by explicit notification to the employee that their employment is in jeopardy. There obviously is a substantial difference between a reprimand or suspension compared to a dismissal with respect to the impact on an employee. If the most severe penalty is being contemplated by the employer, the employer is required by the Contract to explicitly let the employee know of that potential.

If an employee is not provided with explicit notice that dismissal is being contemplated, it necessarily follows that the meeting held prior to dismissal is contractually deficient. An employee must be notified that dismissal is being contemplated in order to be able to respond to "such action" and present "appropriate argument in his or her defense" pursuant to Article 14, Section 4.

In applying the provisions of Article 14, Section 4, to this case, we conclude that the Employer violated the Contract. The notification to Grievant that "disciplinary action" was being contemplated was insufficient notice to meet the provisions of the Contract that Grievant be notified that dismissal was being

contemplated. Grievant was never made aware, either before or during the February 28 meeting, that dismissal was being contemplated. The Employer did not put Grievant on sufficient notice that her employment was in jeopardy. This conclusion is fortified by the uncontradicted testimony of Grievant and her VSEA representative, Richard Lednicky, that they were not aware dismissal was being contemplated, and Lednicky's testimony that he would have undertaken a different course of defense.

We turn to deciding whether this due process violation results in Grievant's resultant dismissal being invalid. In Loudermill, the Court held that an employer "could not deprive" an employee of the "property right in continued employment . . . without due process". 470 U.S. at 538. It follows from such a statement that a dismissal subsequent to due process violations during the pre-termination process is an improper deprivation of the property right of continued employment. In cases where due process violations occur during the pre-termination process, reinstatement with back pay is often appropriate relief where the property deprived was a right to continued employment. Petrella v. Siegel, 843 F.2d 87, 89 (2nd Cir. 1988).

The language of the Contract supports the invalidity of Grievant's dismissal. Article 14, Section 2, provides that the "appointing authority . . ., after complying with the provisions of paragraph 4 of this Article, may dismiss an employee for just cause". The "paragraph 4" referred to here contains the provisions on notification to an employee of a contemplated dismissal, and the pre-termination meeting, which are at the heart of Grievant's due

process claim. Since the Contract provides that an employee may be dismissed after an employer complies with these notice and meeting provisions, it follows that a dismissal is invalid if such provisions are violated. Thus, Grievant's dismissal was invalid, and we conclude that she should be reinstated.

Just Cause for Lesser Form of Discipline

Our conclusion that Grievant's dismissal was invalid, and that she should be reinstated, does not end our inquiry. As previously discussed, we note that reinstatement with back pay is often appropriate relief where the property deprived was a right to continued employment. Petrella, 843 F.2d at 89. Nonetheless, our conclusion that Grievant must be reinstated due to her invalid dismissal does not necessarily mean, pursuant to our interpretation of the Contract, that Grievant escapes the imposition of any disciplinary action against her.

Article 14, Section 10, provides that if the Board determines that the penalty of dismissal in a misconduct case is "unreasonable", then the Board "shall have the authority to impose a lesser form of discipline" should the Board "find just cause for discipline". The due process violations during the pre-termination process resulted in Grievant's subsequent dismissal being invalid and, by logical extension, "unreasonable".

However, such violations do not result necessarily in any form of discipline being invalid. Prior notice and a pre-discipline meeting are not required under the Contract to impose a disciplinary penalty less than the most severe sanction of dismissal. The essential requirements of due process attaching to dismissal, which

were violated in this case, do not attach to lesser forms of discipline. Under these circumstances, we conclude that we have the authority to impose a lesser form of discipline should we find just cause for discipline.

Thus, we need to determine whether just cause for discipline exists. Just cause for discipline exists if disciplining employees for certain conduct is reasonable; and the employee had fair notice, express or implied, that such conduct would be grounds for discipline. In re Brooks, 135 Vt. 563, 568 (1977). Grievance of Scott, 17 VLRB 46, 69 (1993). Grievance of McCort, 16 VLRB 70, 104 (1993). On the issue of fair notice, the ultimate question is whether the conduct was or should have been known to the employee to be prohibited by the employer. Brooks, 135 Vt. at 568.

In determining whether just cause for imposition of some form of discipline exists, we examine whether the Employer has established the charge against Grievant. The Employer charges that Grievant intentionally violated the Employer's Internal Security Policy and the Conflict of Interest Policy by shielding the delinquent account of Downtown Auto from the normal procedural collection path.

We conclude that the Employer has established this charge. The Internal Security Policy provides that, in order to avoid any possible conflict of interest, cases involving a close friend or relative should be reassigned to another staff member. The Conflict of Interest Policy provides that an employee shall not process or otherwise handle any transaction between the Employer and her relatives or business entities in which she or her relatives have a

pecuniary interest. Grievant was provided with copies of these policies, and it should have been clear to her that violations of their terms were prohibited by the Employer. Any reasonable person, particularly one like Grievant serving in a fiduciary capacity, should have been aware that she could have been disciplined for violating the terms of these policies.

Grievant violated the terms of these policies by handling the delinquent account of Downtown Auto, a business primarily operated by her husband and in which she had some involvement, for a period of at least two and one-half months without any notification to her supervisors that she was handling the account. During that period, no payments were made by Downtown Auto on the unemployment insurance contributions owed by the business. Grievant's actions clearly violated the express terms of the policies that cases involving a relative be assigned to another staff member, and that an employee not handle any transaction between the Employer and a relative of the employee.

In establishing the charge against Grievant, the Employer has demonstrated misconduct by Grievant establishing just cause for imposing some form of discipline on her. That being established, we look to the specific factors articulated in Grievance of Colleran and Britt, 6 VLRB 235, 268-69 (1983), to determine the reasonableness of a particular disciplinary action based on the proven charges. The pertinent factors here are: 1) the nature and seriousness of the offense, and its relation to the employee's duties; 2) the effect of the offense upon supervisors' confidence in the employee's ability to perform assigned duties; 3) the clarity

with which the employee was on notice of any rules that were violated in committing the offense; 4) the employee's past disciplinary and performance record, and length of service; 5) the potential for the employee's rehabilitation; 6) mitigating circumstances surrounding the offense; and 7) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Grievant's offense of shielding the Downtown Auto account from the normal procedural collection process, which in this case should not have involved her, was serious. Her responsibilities as a Delinquent Tax Compliance Officer required her to collect unemployment taxes from employers. This was a position with a high degree of trust given the large amounts of monies that she was responsible for collecting, and she was required to demonstrate a high degree of integrity in carrying out her duties. Her act of handling the delinquent account of a business in which she and her husband were involved, in clear violation of conflict of interest policies which were known to her, compromised her integrity and the trust placed in her.

This offense understandably had a substantial adverse effect on supervisors' confidence in Grievant responsibly performing her duties. It should have been obvious to Grievant that she should not have handled the Downtown Auto account. The fact that she did so for approximately two and one-half months without notifying her supervisors results in the need for a strong message to be sent to Grievant that such actions cannot be tolerated.

Also, Grievant had fair notice that such conduct could result in dismissal. Grievant was provided with copies of the Employer's conflict of interest policies, and the terms of such policies were clear and unambiguous in prohibiting the conduct engaged in by Grievant in handling Downtown Auto's accounts. Further, Grievant, along with Donna Holden, had been specifically warned by their supervisor in March 1993 to review the Conflict of Interest policy due to the potential problems that could arise from the Downtown Auto business.

The seriousness of Grievant's offense, the breach of trust she committed given her position, and the clear notice she had that such conduct could result in discipline, weigh heavily towards the imposition of a severe disciplinary penalty. Grievant's offense is mitigated to some extent by her work record. She had a good performance record over 13 years of employment, and had not been disciplined previously. Her strong prior work record leads us to conclude that she is a good candidate for rehabilitation, once a strong message is sent to her that future misconduct similar to that engaged in here will not be tolerated.

We note that we are somewhat bothered by the Employer's actions in this case, in that two months lapsed between the time the Employer became aware that Grievant was handling the delinquent account and when Grievant was notified that her actions were being questioned. This lapse in time, in essence, provided Grievant with more rope in which to hang herself. It would seem the Employer should be more interested in resolving a troublesome situation then allowing an employee to prolong her misconduct. Nonetheless, the

Employer's delay does not excuse Grievant's misconduct since her misdeeds were voluntary and not coerced.

In sum, we conclude that the most severe disciplinary penalty short of dismissal permitted by the Contract, a thirty day suspension, is an appropriate penalty in this case. Such a severe suspension is an adequate and effective sanction to impose on Grievant to deter her and other employees in the future from engaging in the misconduct demonstrated by her serious offense.

Charles H. McHugh, Chairman

Carroll P. Comstock

DISSENTING OPINION

I disagree with my colleagues' conclusions that the Employer committed due process violations prior to terminating Grievant which resulted in her dismissal being invalid. The majority opinion concludes that the Employer violated Article 14, Section 4, of the Contract by dismissing Grievant without first informing her that it was contemplating dismissing her, and without providing her with an opportunity for a pre-termination meeting.

To the contrary, I conclude that the Employer committed no violation of Article 14 in this regard. The Employer notification to Grievant that the Employer was "contemplating disciplinary action in accordance with Article 14" was sufficient to inform Grievant that dismissal was being contemplated. First, dismissal is a form of disciplinary action, and the only one that requires the so-called Loudermill letter. Second, the contents of the memorandum notifying

Grievant that disciplinary action was being contemplated should have made it clear to Grievant's representative, Richard Lednicky, that dismissal was a possibility. I seriously doubt that the type of memorandum sent in this case has been sent by managers in state government who are contemplating a form of disciplinary action less than dismissal. I do not find credible Lednicky's representations to the Board that he viewed the notification in this case as one indicating that the Employer was not contemplating Grievant's dismissal, and I thus disagree with the Findings of Fact to the extent that view is accepted. I believe that the majority opinion has taken an overly technical view of the applicable contract language in this case, and conclude that the Employer's notification to Grievant met the applicable contractual standards.

I further conclude that the February 28 meeting met the contractual requirements of a pre-termination meeting since the meeting served the essential functions of such a meeting - i.e., notice of charges to Grievant, an explanation of the evidence, and a chance to respond to the charges. In sum, I conclude that the Employer engaged in no violations of the provisions of Article 14, Section 4, of the Contract warranting invalidating Grievant's dismissal on due process grounds.

Thus, unlike the majority opinion, I consider the merits of Grievant's dismissal on substantive grounds, rather than invalidating the dismissal on due process grounds. In so reviewing Grievant's dismissal, I conclude that much of the analysis engaged in by the majority to impose a 30 suspension on Grievant also can be applied to upholding Grievant's dismissal.

Grievant's actions of handling the delinquent unemployment tax account of the business primarily operated by her husband, and in which she had some involvement, clearly violated the express terms of the Employer's internal security and conflict of interest policies that cases involving a relative be assigned to another staff member, and that an employee not handle any transaction between the Employer and a relative of the employee.

This offense of shielding the account from the normal procedural collection process, which in this case should not have involved her, was serious. Her act of handling the delinquent account compromised her integrity and the trust placed in her to an unsalvageable degree. This offense understandably destroyed supervisors' confidence in Grievant responsibly performing her fiduciary duties as a Delinquent Tax Compliance Officer.

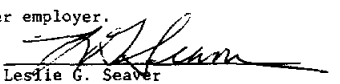
Also, as the majority opinion indicates, Grievant had ample fair notice that such conduct could result in dismissal. I am mindful of Grievant's prior good work record over 13 years of employment. Nonetheless, I do not concur with the majority opinion that her prior record makes her a good candidate for rehabilitation. By her offense, Grievant violated the trust placed in her to such a degree that her supervisors could no longer trust her in the future to perform her duties with the integrity required for a fiduciary position handling large sums of monies.

I note that Grievant further called into question her integrity by not being truthful with the Employer in responding to the charges against her at the pre-termination meeting. I believe that the Employer may not have dismissed Grievant if she had

admitted to knowing that the Downtown Auto account was on her delinquency list for months, and that she had made a serious error in judgment. To continue the deceit at that point, as she did, appeared to be her downfall.

The seriousness of Grievant's offense, the irreparable breach of trust she committed given her position, and the clear notice she had that such conduct could result in discipline, result in my conclusion that just cause existed for Grievant's dismissal.

Finally, I would like to comment on the observation of my colleagues that they were bothered by the Employer's actions in this case because two months lapsed between the time the Employer became aware that Grievant was handling the delinquent account and when Grievant was notified that her actions were being questioned. Contrary to my colleagues, I do not believe that this demonstrated Grievant's supervisors were providing Grievant with more rope in which to hang herself by allowing Grievant to prolong her misconduct. Instead, my view is that the lapse was the result of a careful, thorough investigation to determine whether Grievant had engaged in misconduct. If that resulted in her hanging herself, she must bear the responsibility, not her employer.



Leslie G. Seaver

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Cynthia Gregoire ("Grievant") is SUSTAINED; and

1. The State of Vermont Department of Employment of Training ("Employer") shall rescind the dismissal of Grievant and replace such action with a thirty day suspension without pay;

2. Grievant shall be reinstated to her position as a Delinquent Tax Compliance Officer with the Employer;

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

4. 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 her 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;

5. The parties shall submit to the Board by February 7, 1995, 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 areas of factual disagreement and a statement of issues which need to be decided by the Board. Any evidentiary hearing on these issues shall be held on February 9, 1995, at 9:30 a.m., in the Board hearing room, 13 Baldwin Street, Montpelier, Vermont; and

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

Dated this 27th day of January, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Carroll P. Comstock