VERMONT LABOR RELATIONS BOARD

GRIEVANCES OF:	)	
	)	DOCKET NOS. 01-38
	)	01-61, 01-62
MERILL CRAY	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

At issue are three grievances filed by Merill Cray ("Grievant") contending that the Vermont Secretary of State ("Employer") violated the collective bargaining agreement between the State of Vermont and the Vermont State Employees' Association ("VSEA") through various actions, culminating in the dismissal of Grievant.

On June 26, 2001, VSEA filed a grievance on behalf of Grievant, Docket No. 01-38, alleging that the Employer violated Article 12 of the Contract by requiring Grievant to complete a self-evaluation of her performance. On August 20, 2001, VSEA filed a second grievance on behalf of Grievant, Docket No. 01-61, contending that the Employer violated Articles 5 and 15 of the Contract by issuing a memorandum to Grievant.

On August 20, 2001, VSEA filed a third grievance on behalf of Grievant, Docket No. 01-62, alleging that the Employer violated Articles 5, 14 and 15 of the Contract by dismissing Grievant. Specifically, Grievant alleges that the dismissal violated the non-discrimination provisions of Articles 5 and 15 of the Contract because it constituted the culmination of a campaign of harassment, intimidation, discrimination and retaliation against Grievant for engaging in protected complaint and grievance activities. Grievant contends that the Employer violated Article 14 of the Contract by dismissing her without just cause, inappropriately bypassing progressive discipline, and failing to impose discipline with a view towards uniformity and consistency.

These three grievances were consolidated for hearing and decision. Prior to the hearings, Attorney Vincent Illuzzi replaced VSEA Attorney David Stewart as the representative of Grievant. Hearings were held before Board Members Catherine Frank, Chairperson; Richard Park and John Zampieri on May 23, June 19 and 20, and July 10, 2002. Attorney Illuzzi represented Grievant. Assistant Attorney General Joseph Winn represented the Employer. The Employer and Grievant filed post-hearing briefs on July 31 and August 1, 2002, respectively.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

. . .

ARTICLE 5
NO DISCRIMINATION OR HARASSMENT;
and AFFIRMATIVE ACTION

1. **NO DISCRIMINATION, INTIMIDATION OR HARASSMENT**

In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination, neither party shall discriminate against, intimidate, nor harass any employee because of . . . filing a complaint or grievance . . .

. . .

ARTICLE 12
PERFORMANCE EVALUATION

1. **Timing of Evaluations:** Annual performance evaluations shall normally take place near the anniversary date of completion of original probation . . .

. . .

An oral or written notice of performance deficiency (Step 1 in the order of progressive corrective action) shall not be grievable when issued, and, when issued, shall not require the presence of a union representative. However, once Step 2 of progressive corrective action has been implemented (a special or annual evaluation coupled with a prescriptive period for remediation) such notice or a written record of such notice shall be placed in the employee's personnel file and shall be fully grievable.

. . .

6. An employee's self-evaluation of his or her performance will accompany the annual performance evaluation done by the rating supervisor, through the normal approval process, if such self-evaluation is submitted to the rating supervisor at

least three (3) weeks before the anniversary date of completion of original probation.

. . .

ARTICLE 14
DISCIPLINARY ACTION

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

. . .

(b) apply discipline . . with a view toward uniformity and consistency;
(c) impose a procedure of progressive discipline . . .
(d) In misconduct cases, the order of progressive discipline shall be:
(1) oral reprimand;
(2) written reprimand;
(3) suspension without pay;
(4) dismissal.

. . .

(f) The parties agree that there are appropriate cases that may warrant the State:
(1) bypassing progressive discipline . . .

. . .

ARTICLE 15
GRIEVANCE PROCEDURE

. . .

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

. . .

2. Grievant was a trooper with the Vermont State Police from 1990 to 1992. She resigned from that position in good standing to accept employment as Investigator with the Office of Professional Regulation ("OPR") at the Office of the Vermont Secretary of State. Grievant has been a certified law enforcement officer since 1990.

3. OPR regulates forty licensed professions. OPR employs investigators to investigate complaints against licensees in professions regulated by OPR. Investigators interview the complainant, licensee and other persons who have pertinent information on

a complaint. At the conclusion of their investigation, investigators prepare an investigation report. Decisions by licensing boards whether to take action against a licensee are based primarily on the work performed by investigators. The investigation is confidential unless the licensing board decides to bring charges against the licensee. At that point, the investigation becomes public.

4. In the first two performance evaluations received by Grievant after beginning employment with OPR, she received an overall rating of "satisfactory". In subsequent annual evaluations covering the period March 1993 through March 2000, Grievant received overall ratings of "outstanding" or "excellent". Grievant did not receive annual evaluations for two years of that period. In the last annual evaluation received by Grievant prior to her dismissal, covering the period March 6, 2000 to March 6, 2001, she received an overall "satisfactory" evaluation (Grievant's Evaluation Exhibits 1 – 7).

5. Ron West was appointed Chief Investigator in OPR in the Fall of 1998. As Chief Investigator, West became Grievant's immediate supervisor. He continued as Chief Investigator through the time Grievant was dismissed. Deborah Markowitz was elected Secretary of State in November 1998, and has continued in that position to the present. William Dalton became Deputy Secretary of State in January 2000, and has continued in that position to the present. Jessica Porter became OPR Director in the Fall of 2000, and has continued in that position to the present. Jane Woodruff was Business Manager and Personnel Officer for the Employer at all times relevant to this grievance.

6. When Secretary Markowitz assumed office in early 1999, she discovered that some employees were receiving excellent performance evaluations that in her

judgment were not warranted, and that in other cases evaluations were not given at all. She had a trainer brought in to discuss performance evaluation standards and criteria, and encouraged managers to issue performance evaluations that accurately measured performance. When Porter was hired, she took measures to provide regular and timely evaluation of employees, and measures designed to have performance evaluations accurately reflect employees' performance. As part of the effort to improve productivity, Porter asked West to start providing more specific verbal and written feedback to investigators on their investigation reports, and to meet with investigators to provide performance feedback prior to doing performance evaluations.

7. After West became Grievant's supervisor, Grievant and West initially had a good working relationship. In the Spring of 2000, Grievant became upset with West when he used her as a basis for reprimanding another employee for excessive absenteeism. Grievant asked West for an apology. West refused to apologize. Thereafter, the relationship between West and Grievant deteriorated and became progressively more strained.

8. On one occasion, West told Grievant that she could not inspect tattoo shops until she had received specific training on how to conduct these inspections. When training occurred on conducting such inspection, West did not inform Grievant of the training. On other occasions, West appointed other investigators as Acting Chief Investigator in his absence. West never appointed Grievant Acting Chief Investigator.

9. In June 2000, Grievant filed a Step II grievance alleging that the Employer had discriminated against her based on her gender by recently failing to appoint her Acting Chief Supervisor when West was going to be absent due to a vacation and through

other actions. At the Step II grievance meeting on July 13, 2000, West indicated that he was going to "rule with an iron hand" because of grievances filed by Grievant. The Employer and Grievant reached a settlement on this grievance in November 2000 at Step III of the grievance procedure. Among the provisions of the settlement were that Grievant's "work assignments will have an even and balanced mix of cases" comparable to those assigned other investigators, Porter would "develop a structure and process to ensure equitable case distribution" by May 2001, Grievant would not be retaliated against for her complaint and grievance activity, and West would provide written notice of "meetings, trainings, and other important information". The stipulation and agreement settling the grievance was signed by Grievant, VSEA Representative Tenaya Lafore, Markowtiz and Porter. The settlement provision concerning Grievant receiving an "even and balanced mix of cases" resulted from Grievant's desire to be assigned criminal cases. As part of settlement discussions, the Employer offered mediation to resolve differences between Grievant and West. Grievant declined the offer of mediation (Grievant's Exhibit 31, p. AG 0009).

10. The grievance brought to the attention of Markowitz that West's management style resulted in miscommunication in the investigators' unit. Markowitz had Porter work with West on his management style, and also brought in someone else to work with West and other managers to improve their effectiveness.

11. Before May 2001, Porter asked Grievant about her mix of cases, particularly criminal cases. Grievant indicated that she still was not getting sufficient criminal cases assigned to her. As a result of this conversation, Porter instructed West to assign all criminal cases to Grievant. West was upset about these instructions.

12. In addition to the offer of mediation at the time of the settlement discussions on the grievance, there were two other occasions where Secretary Markowitz offered Grievant mediation to resolve the differences between her and West. Grievant also declined those offers of mediation.

13. As part of an effort to revise the way the performance evaluation process was done, the Employer as part of the performance evaluation process required employees to complete a form entitled "Staff Evaluation Questions" in which they were to indicate how they thought they were performing in specific areas of their job. In January 2001, West requested that Grievant complete the form as part of her annual performance evaluation. Grievant requested advice from the VSEA whether she was required to fill out this form, and was told it was not required. West informed Grievant that it was required. Jane Woodruff, Personnel Officer for the Employer, told Grievant that she could be charged with insubordination if she did not complete the form. Grievant then completed the form. All the OPR investigators were required to complete the form as part of the performance evaluation process.

14. Grievant filed a grievance over the requirement that she complete the form. The grievance was denied at Steps II and III of the grievance procedure, and Grievant filed a grievance with the Board. Between the time Grievant filed the grievance with the Board and the Board hearing in this case, the Employer rescinded the requirement for employees to complete the form, and made completion of the form voluntary for employees.

15. On March 29, 2001, West sent a memorandum to all investigators announcing "(n)ew procedures" that "are effective immediately". One of the procedures

was that "(i)nvestigators will no longer be allowed to leave for appointments from home unless they receive prior approval from the Chief Investigator" (Grievant's Exhibit 9).

16. At 2:43 p.m. on March 29, West sent Grievant an e-mail informing her that he needed to discuss a case with her at 8:00 a.m. the following morning in West's office.

17. At 3:00 p.m. on March 29, Grievant sent West an e-mail indicating that she had just received his memorandum announcing new procedures (see Finding of Fact No. 15), and stated: "I have to be in Rutland early tomorrow and have no reason to stop by the office" (Grievant's Exhibit 28).

18. At 3:11 p.m. on March 29, Grievant sent West an e-mail in response to his e-mail sent at 2:43 p.m. (see Finding of Fact No. 16) informing him that she would not be in the office at 8 a.m. because of an "appointment in Rutland in the morning" (Grievant's Exhibit 27).

19. At 3:44 p.m. on March 29, West sent Grievant an e-mail in response to the e-mail Grievant had sent West at 3:00 p.m. indicating that she had just received his memorandum announcing new procedures. West stated in the e-mail:

> The rules are the rules. I want to know what time your appointment is for tomorrow. Also, if an investigator wants to request to leave from home for an early appointment, I expect that they get permission from me in person and not by e-mail. You have been by my office door several times this afternoon and you could have very easily mentioned to me about your appointment (Grievant's Exhibit 39).

20. Grievant left the office at 3:30 p.m. on March 29, at the normal end of her workday, and did not see this e-mail before her trip to Rutland the next day. Prior to leaving the office on March 29, Grievant wrote on an "outboard" in the office that she

would be in Rutland on March 30. She did not write the time of her appointments in Rutland. None of the investigators wrote the times of their appointments on the outboard.

21. On the morning of March 30, 2001, Grievant left her home in Middlesex before 7:00 a.m. to travel to Rutland for appointments she had there beginning at 10:00 a.m. Grievant did not report to the office before traveling to Rutland. She drove to Rutland in a snowstorm (Grievant's Exhibit 31, p. 0030).

22. In early April of 2001, Grievant filed a Step II grievance concerning a performance evaluation she received in March 2001.

23. On April 11, 2001, West gave Grievant an oral reprimand for disregarding his directive set forth in the March 29, 2001, memorandum by not asking permission to leave from home on March 30 to travel to Rutland and by not reporting to the office on March 30 before leaving for Rutland (Grievant's Exhibit 14).

24. On May 1, 2001, VSEA Field Representative Marty Raymond filed a Step II grievance on behalf of Grievant contesting the oral reprimand she received on April 11, 2001. The grievance alleged that the oral reprimand violated Article 14 of the Contract because it was without just cause, and violated Articles 5 and 15 of the Contract because it constituted discrimination against Grievant due to her complaint and grievance activities. The grievance also alleged that the March 29 memorandum of West constituted discrimination against Grievant due to her complaint and grievance activities and instituted an unreasonable work rule. In the grievance, it is stated that Grievant left a message on the outboard on March 27 informing her superiors that she had an appointment in Rutland on March 28 (Grievant's Exhibit 15).

25. On May 23, 2001, there was a Step II grievance meeting on the grievance filed by Grievant concerning the April 11, 2001, oral reprimand. Porter was present as the Step II hearing officer. Also present were Grievant, Raymond, West and Woodruff. During the meeting, in response to questioning from Porter about the time of her March 30 appointment in Rutland, Grievant stated that her appointment in Rutland was at 8:00 a.m. Porter viewed the time of the appointment as significant to the issue of whether it was reasonable for Grievant not to report to the office prior to going to Rutland, and hence whether the oral reprimand was reasonable. Porter indicated to the participants at the meeting that she was leaning towards converting the oral reprimand to supervisory feedback. Porter indicated at the meeting that a basis for her inclination to convert the reprimand to feedback was Grievant's representation that her meeting in Rutland was at 8:00 a.m. (Grievant's Exhibit 35).

26. Immediately after the Step II meeting was adjourned, West told Porter that he was disappointed that Porter was going to rescind the oral reprimand. West indicated he thought Grievant was being untruthful because he had seen on the outboard or Grievant's desk calendar that Grievant's appointment in Rutland was at 10:00 a.m. Porter asked West to research the time of Grievant's appointment and report back to her on his findings.

27. On or about May 25, 2001, West returned an investigation report to Grievant on a real estate case, and requested that she revise it. West gave Grievant a memorandum containing critical comments on Grievant's investigation and report, including that the report contained sentences that misled the reader and misspelled words,

the report lacked a listing agreement, and Grievant did not interview another prospective purchaser. He also met with Grievant on the report. When Grievant asked about the misspellings during the meeting, West pointed to Grievant's use of the word "sans" in the report. Grievant informed West that "sans" meant "without". West responded with words to the effect "I'm sorry. I didn't know that." At the meeting, West and Grievant also discussed additional areas of investigation that West believed needed to be explored. Grievant thought some of the areas identified by West were not necessary, but agreed with West's view that a listing agreement was needed as part of the report (State's Exhibits 1, 17).

28. Shortly after Grievant received the May 25, 2001, memorandum from West and met with him, Grievant had a discussion with Secretary Markowitz concerning the issue. Grievant told Markowitz that she thought West was nitpicking. Grievant discussed West's criticism of her concerning the use of the word "sans" in her investigation report. Grievant told Markowitz that she showed the report to friends of hers, some of who were attorneys, and they agreed with her use of "sans". Markowitz was not aware at the time of her discussion with Grievant that the report at issue was a confidential report. She later became aware that a confidential report was involved, and had Woodruff investigate Grievant's statement concerning her showing the report to friends.

29. On June 15, 2001, VSEA Representative Raymond filed a grievance on behalf of Grievant contending that the May 25, 2001, memorandum from West to Grievant violated Articles 5 and 15 of the Contract because it constituted continued

harassment, intimidation and the creation of a hostile work environment due to Grievant's complaint and grievance activities (Grievant's Exhibit 42).

30. By early June, Grievant's stress level due to work issues had increased, and she was having trouble sleeping. Grievant visited a doctor, and was prescribed medication to relieve her anxiety and help her sleep. Grievant missed a work meeting and several hours of work because she was ill.

31. On June 20, 2001, West requested that Grievant provide him with the file in the real estate case that was involved in the May 25 memorandum and meeting. Grievant gave West the case file, but the file did not contain Grievant's investigation report. On June 21, 2001, West asked Grievant for the investigation report. Grievant told West that her VSEA attorney had the report. West mentioned the confidentiality of the report. Grievant indicated that she had redacted the names. Grievant had not given the report, or a redacted version of the report, to a VSEA attorney at that time. Grievant was untruthful about the whereabouts of the report because she feared that West would somehow tamper with the report (Grievant's Exhibit 31, p. AG0036).

32. West informed Porter of Grievant's statement that a VSEA attorney had the report. Porter instructed West to tell Grievant to immediately return the investigation report to the office. After West so informed Grievant, Grievant spoke with Woodruff. Grievant told Woodruff that she had given the report to her VSEA attorney and that she was not sure she could get it back quickly. This was untrue, as Grievant had not given a report to a VSEA attorney at that time. Woodruff told Grievant to obtain the investigation report and return it immediately.

33. A few minutes after her conversation with Woodruff, Grievant returned with a sealed manila envelope, gave the envelope to Woodruff, and stated "see, it never left the building." Woodruff brought the envelope to Porter who opened it. The envelope contained the investigation report without redactions.

34. At some time between giving the investigation report to Woodruff and June 25, Grievant provided a redacted version of two pages of the report to VSEA General Counsel David Stewart. The redacted pages contained the word "sans" concerning which West had been critical in his May 25 memorandum to Grievant. The pages were redacted so that the identities of the involved parties in the real estate case could not be determined. Grievant provided the redacted report to VSEA because of her concern that she was being nitpicked by West on the use of words. VSEA attorneys and other representatives receive confidential materials at times to assist them in representing employees (State's Exhibit 1).

35. Subsequent to the May 23 Step II meeting on Grievant's oral reprimand grievance, West investigated the time of Grievant's March 30 appointment in Rutland. He identified the nursing home case Grievant was working on that day, interviewed the supervisors of the nursing home employees Grievant had met with that day, obtained affidavits of the supervisors, and examined the time cards of the nursing home employees. Through his investigation, West confirmed that the time of Grievant's appointment in Rutland was 10:00 a.m. (State's Exhibit 3, p. 0016, 0017, 0018).

36. Porter spoke with Markowitz and Woodruff about what action to take as a result of the time discrepancy on Grievant's March 30 appointment in Rutland. Woodruff spoke with the Department of Personnel. The Employer initially indicated that the Step II

grievance meeting was going to be reopened. After VSEA objected to this, however, the Employer decided to not reopen the Step II meeting. Instead, the Employer decided to have an investigative meeting on this issue. The meeting was scheduled for June 25, 2001. Raymond and VSEA Attorney Stewart requested information as to the specific conduct of Grievant that was at issue in the meeting. The Employer indicated that the meeting would concern Grievant's whereabouts and actions on March 30, 2001 (Grievant's Exhibit 16, 17, 18, 19, 20, 21, 22, 23).

37. Present at the June 25, 2001, meeting were Porter, Stewart, Raymond, Woodruff and Grievant. The first issue discussed at the meeting was Grievant's statements made at the May 23, 2001, Step II grievance meeting regarding the time of her appointment in Rutland on March 30, 2001. Porter asked Grievant why she had said her meeting in Rutland was at 8:00 a.m. Grievant first denied that she stated her appointment in Rutland was at 8:00 a.m. Later in the meeting, Grievant stated that she did not remember stating that her appointment was as 8:00 a.m., but if she did so state her statement would be wrong. Porter then stated that West had seen Grievant sign out on the outboard for a 10:00 a.m. meeting in Rutland for March 30. Grievant replied that she never used the outboard to indicate the time of an appointment, and that no one used the outboard for that purpose. Grievant indicated that she used the outboard to denote the location of an appointment. Porter and Woodruff misunderstood Grievant to indicate that she and other investigators never used the outboard.

38. The second issue addressed at the June 25 meeting concerned Grievant's statements on June 21 with respect to Grievant providing the investigation report to an VSEA attorney. Grievant admitted at the meeting that she had lied to West and Woodruff

concerning the whereabouts of the report. Grievant also stated that she had given redacted copies of two pages of the report to Stewart. Stewart confirmed receiving the two redacted pages from Grievant.

39. After the June 25 meeting, Markowitz, Deputy Secretary William Dalton and Porter met to discuss Grievant's statements and actions. They asked Woodruff to conduct an investigation of Grievant's statements at the May 23 Step II grievance meeting, Grievant's statements at the June 25 meeting, and her actions concerning the real estate investigation report. Woodruff completed her investigation and submitted an investigation report on July 9, 2001 (State's Exhibit 3).

40. On July 12, 2001, there was a Step III grievance meeting on the grievance filed by Grievant on the May 25, 2001, memorandum she had received from West. Present at the meeting were Grievant, Raymond, Woodruff and Step III hearing officer Kari Hutchins of the Department of Personnel. At the meeting, Grievant stated that West had not discussed the May 25 memorandum with her, had not apologized to her for criticizing her for the use of the word "sans", had returned all of Grievant's investigation reports, and had not returned the reports of other investigators.

41. After Grievant made these statements, Woodruff indicated that Grievant's statements conflicted with what West had told her and that the meeting could not continue in West's absence. Grievant then indicated that West had discussed certain items in the September 25 memorandum with her. Woodruff stated she would obtain a statement from West concerning whether he apologized to Grievant. Woodruff also indicated she would obtain documentation concerning West's return of investigation reports to Grievant and other investigators.

42. On July 13, 2001, West provided a statement indicating that, when Grievant told him the word "sans" meant "without", he told her "I'm sorry. I didn't know that". Woodruff obtained documentation from West indicating that since January 1, 2001, he had approved 23 of 37 investigation reports submitted by Grievant without changes, and that he had returned 14 to her for revisions. West also provided documentation to Woodruff indicating that, during that same time period, he had returned 12 investigation reports to other investigators for revisions. Woodruff provided West's statement and the documentation on return of investigation reports to Hutchins. Hutchins issued a decision on July 19, 2001, denying the Step III grievance filed by Grievant (State's Exhibits 4, 8, 9).

43. In July 2001, prior to July 16, VSEA President Robert Hooper and VSEA Director Anne Noonan met with Secretary Markowitz to discuss their concerns with respect to pending grievances of employees of the Employer. Grievant's pending grievances were discussed at this meeting.

44. On July 16, 2001, Markowitz sent Grievant a letter which provided in pertinent part as follows:

> As a result of your behavior described below, the Office of the Secretary of State is contemplating disciplinary action against you up to and including dismissal from the position of Licensing Board Investigator. You have the right to respond to the specific allegations listed below, either orally or in writing, before the final decision is made. You have the right to be represented by VSEA, if applicable, or private counsel during proceedings connected with this action.
>
> The action is contemplated for the following reasons, which are summarized in the attached Investigative Report:
>
> **1. Providing dishonest and intentionally misleading responses in a Step II grievance meeting re: your activities on March 30, 2001.**

On May 23, 2001, you made false representations in a Step II meeting when describing your March 30, 2001, schedule and activities. You had been given an oral reprimand for failing to get permission to go directly to a Rutland appointment rather than to first go to the office on March 30, 2001. Your regular workday begins at 7:00 a.m. You claimed you had appointments beginning at 8 AM in Rutland and therefore, did not come to the office first. You stated twice in that meeting that you had an 8 AM appointment in Rutland – once at the beginning of the meeting and later in response to a specific question from Jessica Porter. Ms. Porter indicated that she would likely reduce the oral reprimand to supervisor's feedback when she wrote her final decision because you insisted that you did not comply with Mr. West's directive solely because you did not have enough time to come into work before your 8:00 appointment in Rutland.

Our further inquiries established that your first appointment in Rutland on March 30, 2001, was at 10 AM. In the June 25, 2001, investigative interview you agreed that your first appointment was at 10 AM, but indicated you did not recall claiming at the Step II meeting that it was at 8 AM. There were three other employees of this office at the Step II meeting, and they all agree that you claimed to have an 8 AM appointment in Rutland.

2. Providing dishonest and intentionally misleading information to your employer re: the release of a final investigative report.

On May 25, 2001, Ron West gave you a memo and verbal feedback on a final investigative report. On June 20, 2001, he asked you to provide him with the investigative file on the same case. You left the file on his desk but it did not include the final report that was discussed on May 25, 2001.

On June 21, 2001, Ron West asked you for the final report. You told both Mr. West and Jane Woodruff that your attorney had the final report. When you were told to immediately return the report to your office you stated that you did not know how quickly you could reach your attorney and retrieve the document. When reminded that investigative reports were confidential you responded by saying that it was okay because the report was redacted.

At about 12:15 on June 21, 2001, approximately 15 minutes after speaking to Ms. Woodruff, you gave her a manila envelope and said, in substance, "[h]ere it is, see, it never left the building." The envelope contained the original of your final report with no redactions.

In a discussion with me on May 31, 2001, you stated that you had taken this Investigative report from this office and showed the report to a couple of attorneys who were friends of yours. This statement strongly suggests

that you were dishonest when you denied that the report left the office when you spoke with Ms. Woodruff on June 21, 2001, and in the June 25, 2001, investigative interview.

In the investigative meeting on June 25, 2001, you admitted that you lied to Mr. West. You stated that you always had the original final report and that you intentionally misled Mr. West because you were afraid the report would disappear and that it was evidence for your complaint. You, your VSEA attorney, Mr. Stewart, and Mr. Raymond, your VSEA representative, stated that you had only provided VSEA with two redacted pages from the report and they produced those pages during the meeting.

3. Providing dishonest, conflicting, and/or misleading, information in a Step II grievance and investigative meeting re: your use of the "out board."

You provided dishonest, conflicting, and/or misleading information during the June 25, 2001, investigative meeting discussed in section 1 above, by denying that you marked the "out board" to indicate your schedule on March 30, 2001, or that you or anyone else used the "out board."

In the discussion concerning your schedule for March 30, 2001, Ms. Porter indicated that Mr. West thought he saw an indication that you had a 10 AM Rutland appointment on that day. You responded by stating emphatically that you never use the "out board" and that no one else uses this board. When Ms. Porter noted that she has observed that the "out board" is, in fact, used by investigators, you again insisted that you never use it.

Your Step II grievance dated May 1, 2001, states "[o]n or about March 28, 2001 Grievant traveled directly from home to a work-related appointment in Middlebury, consistent with past practice at OPR. Grievant informed her superiors of her plans the previous day by leaving a message on the 'outboard', also consistent with past practice at OPR." [emphasis added]. Your statements during the investigative meeting are, therefore, in conflict with your own grievance claim as to the past practice of yourself and the office.

4. Breach of Confidentiality

As is noted in section 2 above, you, as well as your VSEA Representative and Attorney, stated in the June 25, 2001, investigative interview that you provided VSEA with two redacted pages of the final investigative report. Those pages have the identities of witnesses redacted but do provide confidential information regarding the investigation. Further, as noted above, you told me on May 31, 2001, that you showed the report to a couple of friends who are attorneys.

> 3 V.S.A. 131(d) states that, "[n]either the secretary nor the office shall make public any information regarding disciplinary complaints, proceedings or records except the information required to be released under this section." [emphasis added]. When you have made requests for copies of another investigator's investigative reports in the context of previous grievance proceedings, this office has informed you that investigative reports are strictly confidential and are not generally available to the VSEA.
>
> By providing the VSEA with two redacted pages of the final investigative report and, by your own admission, providing the report to friends of yours who are attorneys, you violated the office policy on confidentiality as well as 3 V.S.A. 131(d).
>
> Your dishonesty, by itself, provides just cause for bypassing progressive discipline and for imposing discipline up to and including dismissal from employment. This is compounded by the fact that as a law enforcement officer your dishonesty has irreparably compromised your ability to perform your duties and responsibilities.
>
> You must notify this office within twenty-four (24) hours after receiving this letter whether you wish to respond to the above allegations . . .
>
> You are provided with this opportunity to respond so that you can present points of disagreement with what the employer believes the facts to be; to identify witnesses who may support your defense; to identify any mitigating circumstances which should be considered; and to offer any other argument you wish to make.
> . . .
> (State's Exhibit 15)

45. At a July 19, 2001, meeting, VSEA Attorney Michael Casey presented a detailed response to this letter on behalf of Grievant. Dalton, Woodruff and Assistant Attorney General Joseph Winn were present for the Employer (Grievant's Exhibit 6).

46. When Woodruff made known to Porter the statements Grievant had made at the July 12, 2001, Step III grievance meeting, Porter asked Woodruff to conduct another investigation. Woodruff conducted an investigation and submitted a report dated July 26, 2001 (State's Exhibit 4).

47. On August 1, 2001, Markowitz sent Grievant a letter which provided in pertinent part as follows:

> Addendum to Loudermill Letter Dated July 16, 2001.
> . . .
> As a result of your behavior described below, the Office of the Secretary of State is contemplating a disciplinary action against you up to and including dismissal from the position of Licensing Board Field Investigator. You have the right to respond to the specific allegations listed below, either orally or in writing, before the final decision is made. You have the right to be represented by VSEA, if applicable, or private counsel during proceedings connected with this action.
>
> This action is contemplated for the following reasons, which are summarized in the attached investigative report:
>
> **5. Providing dishonest and intentionally misleading responses in a Step III grievance meeting re: your activities on July 12, 2001.**
>
> On July 12, 2001 you made false representations in a Step III meeting conducted by Karalene Hutchings(sic) in that you represented that: 1) Ron West never discussed his feedback memo with you; 2) Ron West never apologized to you for mistakenly including in the feedback memo that you had a typo (the supposed typo was a word he did not know – "sans"); 3) Ron West returns every one of your reports with comments – requiring you to do extra work; and 4) Ron West never returns reports to other investigators. You made these statements in the presence of your VSEA representative Marty Raymond, and Jane Woodruff, Business and Personnel Manager for the Office of the Secretary of State, as well as Ms. Hutchings(sic).
>
> Your dishonesty, by itself, provides just cause for bypassing progressive discipline and for imposing discipline up to and including dismissal from employment. This is compounded by the fact that as a law enforcement officer your dishonesty has irreparably compromised your ability to perform your duties and responsibilities.
> . . .
> (State's Exhibit 16)

48. As a result of this letter, there was a meeting shortly thereafter in which Grievant had an opportunity to respond to the additional allegations. Present at the meeting were Grievant, VSEA Chief Counsel David Stewart, Raymond, Dalton and Winn. At the meeting, Dalton asked Stewart about Grievant's potential for rehabilitation.

Stewart responded that rehabilitation was not necessary because Grievant had done nothing wrong.

49. By letter dated August 13, 2001, Secretary Markowitz dismissed Grievant.

50. In deciding to dismiss Grievant, Secretary Markowitz concluded that Grievant's offenses were serious. She considered that honesty is essential for investigators who may have to act as witnesses in cases they investigate, and there was repeated intentional dishonesty here. Markowitz considered Grievant's past work record and absence of previous discipline, but concluded these factors were outweighed by very serious instances of dishonesty. She concluded that Grievant could not perform duties with supervisory confidence that they could rely on her. She determined that the notoriety of the offense was significant given that Grievant could be impeached as a witness. Markowitz concluded that Grievant had notice she should not be dishonest and should not release confidential information. She considered Grievant's potential for rehabilitation was not strong given Grievant's position that she had done nothing wrong. Markowitz considered the mitigating circumstances of the problems between Grievant and West but determined that intentional falsehood, not a communication problem, was involved. The most important factor to Markowtiz was that Grievant lied in a position where lying was not acceptable. She determined that a suspension would not be an adequate alternative sanction because the Employer could not have an untruthful investigator.

MAJORITY OPINION

Docket No. 01-38

In Docket No. 01-38, Grievant alleges that the Employer violated Article 12 of the Contract by requiring Grievant to complete a self-evaluation of her performance. As part of the effort by the Employer to revise the way the performance evaluation process was done, the Employer required employees as part of the performance evaluation process to complete a form entitled “Staff Evaluation Questions” in which they were to indicate how they thought they were performing in specific areas of their job. In January 2001, the Employer required Grievant to complete the form as part of her annual performance evaluation.

There is a threshold issue of whether this grievance is moot because, between the time Grievant filed the grievance with the Board and the Board hearing in this case, the Employer rescinded the requirement for employees to complete the form, and made completion of the form voluntary for employees of the Employer. The jurisdiction of the Board in grievance proceedings is limited by the requirement that there be an "actual controversy" between the parties. In re Friel, 141 Vt. 505, 506 (1982). To satisfy the actual controversy requirement, there must be an injury in fact to a protected legal interest or the threat of an injury in fact. Id. Grievance of Boocock, 150 Vt. 422, 425 (1988). Where future harm is at issue, the existence of an actual controversy "turns on whether the plaintiff is suffering the threat of actual injury to a protected legal interest, or is merely speculating about the impact of some generalized grievance.” Id. at 424.

Grievant has demonstrated no injury in fact to a protected legal interest or the threat of an injury in fact. She has presented no evidence that the performance form she

was required to complete had any adverse impact on the Employer's evaluation of her performance or contributed to her dismissal. She also has not demonstrated that she was treated in a discriminatory manner by this requirement since all the OPR investigators were required to complete the form as part of the performance evaluation process.

Further, by rescinding the requirement for employees to complete the form at issue, the Employer has eliminated any actual controversy in this case. When an employer, prior to the Board hearing the case, has provided as a remedy the most that the Board would award as a remedy, the Board has determined that the "actual controversy" requirement has not been met. Grievance of Rennie, 16 VLRB 1 (1993) (no actual controversy where employer had removed adverse performance evaluation at issue from employee's personnel file, rescinded it and destroyed it, and that is the most the Board would have granted as a remedy). Grievance of Ray, 14 VLRB 67, 78-79 (1991) (no actual controversy where Step III grievance officer required the employer to reimburse employee for mileage traveled on the job, and the Board lacked authority to order any further remedy). Grievance of Sherbrook, 13 VLRB 359 (1990) (no actual controversy where employer rescinded letter of reprimand at issue, and the Board was without authority to order any further remedy). There must be more than an argument over whether the contract was violated to provide an adequate basis for the Board to have jurisdiction; there also must be a request for action that the Board is able to order. Rennie, 16 VLRB at 6. Sherbrook, 13 VLRB at 362-63.

The most that the Board would order as a remedy in this case is to order the Employer to cease and desist from requiring employees to complete the performance form. Since the Employer has already taken that action, the actual controversy

requirement has not been met. This is not a case where the employer continues with its practice on an ongoing basis, making it appropriate to decline to dismiss the case on mootness grounds. *c.f.*, Grievance of Nottingham, 25 VLRB 185, 189-90 (2002) (case not dismissed on mootness grounds where continuing practice was involved). Instead, the Employer action has been discontinued, and we conclude it is appropriate to dismiss this grievance on mootness grounds.

Docket No. 01-61

In Docket No. 01-61, Grievant contends that the Employer violated Articles 5 and 15 of the Contract when Grievant's supervisor, Ron West, issued her a May 25, 2001, memorandum critical of her investigation and report in a real estate case. Grievant alleges that the memorandum is evidence of continued harassment, intimidation, discrimination and retaliation against Grievant on the basis of her protected complaint and grievance activities.

The Employer contends that the Board is without jurisdiction to hear this grievance. The Employer contends that the May 25 memorandum is not grievable pursuant to the provision of Article 12, Section 1, of the Contract that "an oral or written notice of performance deficiency (Step 1 in the order of progressive corrective action) shall not be grievable when issued".

In considering this issue, we note that Grievant has alleged in Docket No. 01-62 that her dismissal constituted the culmination of a campaign of harassment, intimidation, discrimination and retaliation against Grievant for engaging in protected complaint and grievance activities. Given this contention by Grievant, we conclude that it is more appropriate to review the May 25, 2002, memorandum from West as whether it was part

of a pattern of continued discrimination against Grievant culminating in her dismissal then to analyze it as a separate grievance.

Docket No. 01-62

Grievant alleges in Docket No. 01-62 that her dismissal violated the non-discrimination provisions of Articles 5 and 15 of the Contract because it constituted the culmination of a campaign of harassment, intimidation, discrimination and retaliation against her for engaging in protected complaint and grievance activities. Grievant further contends that the Employer violated Article 14 of the Contract by dismissing her without just cause, inappropriately bypassing progressive discipline, and failing to impose discipline with a view towards uniformity and consistency.

We first consider Grievant's claim that her dismissal resulted from discrimination against her due to her protected complaint and grievance activities. Where employees claim management took action against them for engaging in protected activities, the Board has determined that it will employ the analysis used by the United States 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. If this is established, 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. Grievance of Sypher, 5 VLRB 102, 129 (1982). Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

Grievant was engaged in protected conduct through her complaint and grievance activities. In determining whether her protected conduct was a motivating factor in the Employer's decision to dismiss her, we examine the following factors set forth in Sypher,

5 VLRB at 131: 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 protected activities as a reason for the decision; whether the employer interrogated the employee about protected activities; 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 evidence indicating that her immediate supervisor, Ron West, exhibited some animus against Grievant due to her grievance activity. At a July 13, 2000, Step II meeting on a grievance filed by Grievant, West indicated that he was going to "rule with an iron hand" because of grievances filed by Grievant. It is reasonable to view such a comment as a warning to employees that there will be repercussions to them if they file grievances. Such behavior cannot be condoned.

Grievant further relies on a May 25, 2001, memorandum from West as evidence of his discrimination against her due to her grievance activities. In the memorandum, West was critical of the investigation and report Grievant had done in a real estate case and he required Grievant to revise her report. Grievant contends that the timing and content of the memorandum demonstrated discrimination. The timing of the memorandum is somewhat suspect since it was issued two days after a Step II grievance meeting on a grievance filed by Grievant. The questionable timing of the memorandum is diminished, however, by evidence indicating that there were many instances in the first half of 2001 where West returned reports to Grievant and other investigators for revisions.

Further, Grievant has not demonstrated that the content of the memorandum indicated discrimination by West. Grievant focuses on West informing Grievant that her report contained misspellings because she used the word "sans" in the report. Although West incorrectly criticized Grievant for using this word, the evidence does not support this criticism as indicating discrimination. West was not aware that the word meant "without"; he thought it was a misspelling.

Grievant has not presented sufficient evidence with respect to other criticisms West had with respect to her investigation and report to demonstrate they constituted unfounded nitpicking due to her grievance activities. Grievant may have viewed some of the criticism as unnecessary, but she has not demonstrated that the differences between her and West in this regard constituted anything other than professional differences of opinion. In sum, although West's comments at a July 2000 grievance meeting demonstrated some animus against Grievant due to her grievance activities, Grievant has not demonstrated that the memorandum West issued nearly a year later in May 2001 resulted from discrimination due to Grievant's grievance activities.

Further, and of much greater significance with respect to Grievant's discrimination claim, Grievant has not demonstrated that the management officials above West discriminated against Grievant due to her grievance activities. This is crucial because it was these management officials - Secretary of State Deborah Markowitz, Deputy Secretary William Dalton, and OPR Director Jessica Porter – who were the key players in determining that Grievant should be dismissed, not West.

Their actions do not demonstrate a hostility towards Grievant for her grievance activities. When Grievant filed a grievance in 2000 alleging that the Employer had

discriminated against her based on her gender through various actions, Markowitz and Porter entered into a settlement agreement with her providing that Grievant would have an even and balanced mix of cases comparable to those assigned other investigators, Porter would "develop a structure and process to ensure equitable case distribution" by May 2001, Grievant would not be retaliated against for her complaint and grievance activity, and West would provide written notice of "meetings, trainings, and other important information". The settlement provision concerning Grievant receiving an "even and balanced mix of cases" resulted from Grievant's desire to be assigned criminal cases. As part of settlement discussions, the Employer offered mediation to resolve differences between Grievant and West, which offer was declined by Grievant.

Also, Markowitz realized as a result of the grievance that West's management style resulted in miscommunication in the investigators' unit. Markowitz had Porter work with West on his management style, and also brought in someone else to work with West and other managers on their effectiveness. Further, before May 2001 arrived, the date Porter was to have ensured there was a process for equitable case distribution, Porter asked Grievant about her mix of cases, particularly criminal cases. Grievant indicated that she still was not getting sufficient criminal cases assigned to her. As a result of this conversation, Porter instructed West to assign all criminal cases to Grievant.

These actions by Markowitz and Porter reflect constructive management actions to respond to a grievance filed by an employee who was having a difficult working relationship with her supervisor. They ensured Grievant received a more equitable distribution of assignments, and they took various measures designed to improve the relationship between Grievant and West.

Also, in addition to the offer of mediation at this time, there were two other occasions where Markowitz offered Grievant mediation to resolve the differences between her and West. The fact Grievant declined these offers of mediation is unfortunate, but does not reflect adversely on positive efforts by the Employer to seek to turn around a difficult relationship.

We recognize that Grievant was dismissed during a period where she had a significant number of grievances. However, the timing of the dismissal and the Employer's knowledge of Grievant's grievance activities do not suffice to demonstrate that Grievant's grievance activities motivated the dismissal decision. Grievant has not demonstrated there was a climate of coercion and has not presented evidence on other factors demonstrating that her protected conduct was a motivating factor in the Employer's decision to dismiss her. A conclusion of lack of discriminatory motive by the Employer is supported by evidence indicating that Porter was prepared to rescind a disciplinary action at issue in one of the grievances until she discovered that Grievant was dishonest concerning a key factual matter in the grievance. Again, as in 2000, the Employer was poised to respond constructively to a grievance.

We ultimately conclude that Markowitz dismissed Grievant because she determined that Grievant's misconduct made her unfit to continue as an investigator, and that Grievant's grievance activities were not a motivating factor in this decision. Although the dismissal occurred during a period of significant grievance activity by Grievant, the timing of dismissal resulted from the conclusion of the Employer's investigation into alleged misconduct by Grievant, not from her grievance activities.

We turn to addressing whether just cause existed for Grievant's dismissal. The ultimate criterion of just cause is whether an employer acted reasonably 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) it is reasonable to discharge an employee because of certain conduct, 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).

The standard for implied notice is whether the employee should have known the conduct was prohibited. Grievance of Towle, 164 Vt. 145 (1995). Brooks, supra, 135 Vt. at 568. Knowledge that certain behavior is prohibited and subject to discipline is notice of the possibility of dismissal. Towle, supra. Grievance of Gorruso, 150 Vt. 139, 148 (1988).

The burden of proof on all issues of fact required to establish just cause is on the employer, and that burden must be met by a preponderance of the evidence. Colleran and Britt, 6 VLRB 235, 265 (1983). Once the underlying facts have been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven facts. Id. at 266.

The Employer charged Grievant with various acts of dishonesty: 1) providing dishonest and intentionally misleading responses in a Step II grievance meeting concerning her activities on March 30, 2001; 2) providing dishonest and intentionally misleading information to the Employer concerning the release of a final investigative report; 3) providing dishonest, conflicting, and/or misleading information during a June 25, 2001, investigative meeting concerning her use of the outboard; and 4) providing

dishonest and intentionally misleading responses in a Step III grievance meeting on July 12, 2001. In addition, the Employer charged Grievant with a breach of confidentiality by providing an investigation report to friends and the VSEA.

The Employer has established most of the dishonesty charges against Grievant. She provided dishonest responses in a May 23, 2001, Step II grievance meeting concerning the timing of her appointments in Rutland on March 30, 2001. She dishonestly stated that she had an appointment in Rutland at 8:00 a.m. that day, when in fact her appointment was at 10:00 a.m. Her dishonest response was significant in that it initially caused the Step II hearing officer to indicate she was leaning toward rescinding the oral reprimand Grievant had received that was at issue in the grievance.

Grievant was dishonest with Ron West and Jane Woodruff concerning her release of an investigative report. She told them on June 21, 2001, that she had given the report to her VSEA attorney, when she had not done so. Grievant also was dishonest during a Step III grievance meeting by stating: 1) West never apologized to her for his criticism of Grievant's use of the word "sans" in an investigation report; 2) West never discussed his May 25, 2001, memorandum with her; and 3) West returns all of her investigation reports for revisions, and had not returned the reports of other investigators. West apologized to Grievant, discussed his May 25 memorandum with her, did not return all of Grievant's reports for revisions, and did return some of the reports of other investigators.

The Employer has not established one of the charges of dishonesty by a preponderance of the evidence. The Employer charged Grievant with falsely denying at a June 25, 2001, investigative meeting that she or other investigators ever used the outboard to indicate their schedule. The preponderance of the evidence does not indicate

that Grievant denied use of the outboard. Grievant indicated at the meeting that she never used the outboard to indicate the time of an appointment, and that no one used the outboard for that purpose. Grievant indicated that she used the outboard to denote the location of an appointment. Porter and Woodruff, the Employer representatives at the meeting, misunderstood Grievant to indicate that she and other investigators never used the outboard.

The remaining charge against Grievant is that she committed a breach of confidentiality by providing VSEA with two redacted pages of an investigative report, and showing the report to friends of her who are attorneys. Section 131 of Title 3 discusses the confidentiality of Office of Professional Regulation investigations. It provides in pertinent part as follows:

> (a) It is the purpose of this section both to protect the reputation of licensees from public disclosure of unwarranted complaints against them, and to fulfill the public's right to know of any action taken against a licensee when that action is based on a determination of unprofessional conduct.
> . . .
> (c) The . . . office of professional regulation shall prepare and maintain a register of all complaints, which shall be a public record and which shall show:
>
> (1) with respect to all complaints, the following information:
>
> (A) the date and nature of the complaint, but not including the identity of the licensee; and
>
> (B) a summary of the completed investigation; and
>
> (2) only with respect to complaints resulting in a filing of disciplinary charges or stipulations or the taking of disciplinary action, the following additional information:
>
> (A) the name and business addresses of the licensee and complainant;
>
> (B) formal charges . .
>
> (C) the findings, conclusions and order of the board;
>
> (D) the transcript of the hearing, if one has been made, and exhibits admitted at the hearing;
>
> (E) stipulations filed with the board; and
>
> (F) final disposition of the matter by the appellate officer or the courts.

> (d) Neither the secretary nor the office shall make public any information regarding disciplinary complaints, proceedings or records except the information required to be released under this section.
> . . .

In considering the underlying purpose of this section, we conclude that Grievant committed no breach of confidentiality with respect to the two redacted pages of an investigative report she provided to VSEA. Section 131 has as its purpose the preservation of the confidentiality of licensees against whom complaints have been brought unless disciplinary charges have been brought, or disciplinary action taken, against them. Grievant did nothing to reveal the identity of the involved licensee in providing VSEA with a redacted excerpt of the investigation report. The names of individuals were redacted so that the identity of the licensee could not be determined.

Her admission to Secretary Markowitz that she showed the report to friends of hers who are attorneys is more problematic. Since Grievant denied during the hearing that she showed the report to friends of hers who are attorneys or told Markowitz that she had done so, and since the Employer has no evidence other than Grievant's statements to Markowitz on this issue, we have no specific details to determine the extent of Grievant's breach of confidentiality on this issue. We can only conclude that the Employer established its charge to the extent that Grievant told Markowitz that she showed the report to friends of hers who are attorneys.

Given the circumstances, the proven charge is more probative of Grievant's dishonesty than it is of a confidentiality breach by her. Due to her dishonest denial of making the statement to Markowitz, the Employer and the Board are unable to determine the extent of any confidentiality breach. This illustrates one negative consequence of an employee not being truthful in matters affecting their employment.

The fact that some of the charges against Grievant have not been proven does not necessarily mean that her 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. Grievance of McCort, 16 VLRB 70, 121 (1993). In such cases, the Board must determine whether the remaining proven charges justify the penalty. Id.

We look to the factors articulated in Colleran and Britt, 6 VLRB at 268-69, to determine whether the proven charges justify dismissal. The pertinent factors here are: 1) the nature and seriousness of the offenses and their relation to Grievant's duties, 2) Grievant's job level, 3) the effect of the offenses upon supervisors' confidence in Grievant's ability to perform assigned duties, 4) the clarity with which Grievant was on notice of any rules that were violated in committing the offenses, 5) Grievant's past disciplinary record, 6) Grievant's past work record, 7) notoriety of the offense or its impact upon the reputation of the agency, 8) mitigating circumstances surrounding the offenses, 9) the potential for Grievant's rehabilitation, and 10) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Grievant's offenses were serious. Grievant engaged in repeated acts of dishonesty, a characteristic that constitutes a substantial shortcoming for an investigator. Investigations performed by Grievant constituted the primary basis for licensing boards to determine whether to take action against a licensee, and Grievant was subject to being called as a witness in cases she investigated. These duties made it imperative that the Employer be able to rely on Grievant's veracity. The Employer reasonably concluded Grievant no longer could be relied on to effectively perform her duties given her repeated

dishonesty. The Employer also was understandably concerned that its effectiveness and reputation could be adversely affected given that Grievant could be impeached as a witness in cases she investigated.

Grievant had fair notice that her repeated dishonesty could be grounds for discharge. Honesty is an implicit duty of every employee and, at a minimum, an employee should know that dishonest conduct is prohibited. Grievance of Carlson, 140 Vt. 555, 560 (1982). Dishonesty by employees is grounds for serious punishment, and the Board and the Vermont Supreme Court have upheld dismissals for dishonesty in several cases. Id. Grievance of Newton, 23 VLRB 172 (2000). Grievance of Coffin, 20 VLRB 143 (1997). Grievance of Johnson, 9 VLRB 94 (1986); *Affirmed*, Sup.Ct. Docket No. 86-30 (1989. Grievance of Graves, 7 VLRB 193 (1984); *Affirmed*, 147 Vt. 519 (1986). Grievance of Cruz, 6 VLRB 295 (1983). Grievance of Barre, 5 VLRB 10 (1982).

The fact that some of Grievant's acts of dishonesty occurred during grievance proceedings does not lessen her misconduct. An employee has an obligation in all aspects of their job to deal honestly, and an employee is not insulated from telling the truth during the grievance process. Johnson, 9 VLRB at 113. The parties have contracted for fair dealing during grievance proceedings by providing in Article 15, Section 1: "It is expected that employees and supervisors will make a sincere effort to reconcile their differences as quickly as possible at the lowest possible organization level."

Grievant relies on mitigating circumstances, primarily stemming from her poor working relationship with West, to support her position that just cause did not exist for her dismissal. We recognize that Grievant had unusual job tensions, was under stress, and that her health may have been adversely affected as a result of her relationship with West.

However, she bears some responsibility for this state of affairs as she repeatedly resisted attempts by her and West's superiors to seek to improve the relationship through mediation. She also exacerbated the poor working relationship by taking unreasonable views of West's actions and motives. An example of this is her reaction to West's criticism of her for use of the word "sans" in an investigation report. Another example is justifying her lying to West on June 21 about the whereabouts of an investigation report because she feared West would somehow tamper with the report. In any event, mitigating circumstances stemming from Grievant's relationship with West do not excuse Grievant's repeated dishonesty.

Grievant's good past work record and absence of previous discipline are factors in her favor in determining whether just cause existed for her dismissal, but the Employer reasonably concluded these factors were outweighed by her repeated dishonesty. The Employer also reasonably concluded that Grievant's potential for rehabilitation was not strong. This conclusion is supported by Grievant's position that she had done nothing wrong despite her repeated dishonesty, and her demonstrated tendency to make statements that she believed to be helpful to her at the time she made them without regard to their truth. Given Grievant's repeated dishonesty and failure to take responsibility for her actions, the Employer acted reasonably in bypassing progressive discipline and concluding that alternative sanctions less than dismissal would not be effective to deter dishonest future conduct by Grievant. In sum, just cause existed for Grievant's dismissal.

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Catherine L. Frank, Chairperson

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Richard W. Park

CONCURRING OPINION

I agree with my colleagues' treatment of Docket Nos. 01-38 and 01-61, and concur with their conclusions in Docket No. 01-62 that Grievant was not discriminated against due to her complaint and grievance activities and that just cause existed for her dismissal. However, I am writing a separate opinion to express my views on the Employer's efforts concerning the working relationship between Grievant and her immediate supervisor, Ron West.

I agree with the majority opinion that management acted to attempt to improve the relationship by entering into the grievance settlement with Grievant in 2000, and also by offering Grievant mediation on three occasions to resolve differences between her and West. However, I believe these efforts were inadequate given the seriousness of the difficulties between Grievant and West.

Grievant was an experienced investigator with a good work record. Once it became apparent that the relationship between West and Grievant was deteriorating, more active management intervention would have been beneficial to effective functioning of the office and good employee working relationships. Such efforts may have paid dividends that would have altered the course of events. Grievant's repeated dishonesty cannot be excused and justified her dismissal, but I question whether such dishonesty would have surfaced had management confronted the problems between West and Grievant more aggressively.

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John J. Zampieri

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievances of Merill Cray in Docket Nos. 01-38, 01-61 and 01-62 are dismissed.

Dated this ____ day of October, 2002, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
Catherine L. Frank,Chairperson

_____
Richard W. Park

_____
John J. Zampieri