VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 79-87S
PAUL A. COOK, JR.	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On December 4, 1979, the Vermont State Employees' Association, on behalf of Grievant, Paul A. Cook, Jr., filed a petition with the Vermont Labor Relations Board appealing Grievant's dismissal from the Department of Forests, Parks and Recreation. The State's answer to the petition was filed on December 27, 1979, by Assistant Attorney General Bennett E. Greene.

A hearing on this matter was held on February 7, 1980, before members William G. Kemsley, Sr., and Robert H. Brown; member Brown presided as chairman. Member Cheney was absent. At the hearing, Grievant was represented by Michael R. Zimmerman, counsel for VSEA. Special Assistant Attorney General Samuel E. Johnson represented the State.

Requests for findings of fact and memoranda were filed by Attorneys Zimmerman and Johnson on February 21 and 22, 1980, respectively.

On March 7, 1980, based on the following findings of fact and reasons, Board members Kemsley and Brown issued a Memorandum and Notice of Decision reinstating Grievant and imposing a sixty-day suspension as a corrective disciplinary action.

FINDINGS OF FACT

1. At all times relevant herein, Grievant was a permanent status employee, and, as such, was covered by the Agreement between the State of Vermont and the Vermont State Employees' Association, Inc. for the Non-Management Unit, effective for the period July 1, 1979 to June 30, 1981 (hereinafter, "the contract").

2. In 1967, Grievant began state service as an employee of the Department of Forests, Parks and Recreation (hereinafter, "the Department"). His position from 1967 to approximately 1974 was Park Construction and Maintenance Superintendent, a pay scale 14 position (Grievant's Exhibits 21 to 27). From July 1974 to June 1975, Grievant held the position of Park Regional Supervisor (Grievant's Exhibit 20). In 1975, Grievant, in the aftermath of a heart attack, took a voluntary demotion to the position of Park Ranger D, a pay scale 9 position, which he held until November 13, 1979 (Grievant's 16-19; Grievant's 9). During Grievant's tenure with the State, he received "satisfactory" and "outstanding" annual performance ratings. (Grievant's Exhibits 16-27)

3. As Park Ranger D, Grievant was assigned to take charge of Lake Carmi State Park. As part of Grievant's compensation for his duties at Lake Carmi, the State provided a year-round residence for Grievant and his family, which residence was located within the confines of Lake Carmi State Park.

4. Lake Carmi State Park is located about 6 miles from the Canadian border, and is the largest of all of Vermont's State Parks, being comprised of about 482 acres. The facilities at Lake Carmi include boat launching areas, a swimming beach, a bathhouse, 6 toilet buildings, picnic areas, and two camping areas with a total of 177 campsites (Grievant's Exhibits 1

and 12). It is open to the public from May to mid-October of each year. The peak period of park use by the public lasts from July until sometime between the first and second weeks of August.

5. As Park Ranger D, Grievant's immediate supervisor within the department was Bruce Amsden, whose position title was Park Regional Supervisor. Mr. Amsden's immediate supervisor was Robert L. DeForge, Park Operations Officer. Mr. DeForge's immediate supervisor was Rodney Barber, Director of Parks. The Commissioner of the Department was Leo C. LaFerriere.

6. As Park Ranger D Grievant was not subject to close, direct, daily supervision by Mr. Amsden. Grievant's responsibilities were of a wide variety, and the manner in which he accomplished them was left to his discretion, subject only to broad departmental guidelines set forth in the "Vermont State Park Manual" (Grievant's Exhibits 2, 3, 10, 13, 14, 15; State's Exhibits 10, 11, 12, 13, 19-25).

7. As Park Ranger D Grievant's responsibilities included maintenance of the park facilities, collecting and accounting for money receipts, hiring and supervision of seasonal park employees, and the scheduling of working hours for seasonal employees (Grievant's Exhibit 2 and 3). During the summer of 1979, Grievant was responsible for the supervision of approximately 10 seasonal employees of the Department of Forests, Parks and Recreation, 1 CETA employee, and approximately 8 Youth Work Experience employees.

8. At some point before the onset of the winter of 1977-1978, Grievant had submitted to the Department a proposal for a snow-plowing contract. The contractor whose services Grievant proposed to use was Merril Corey. The contract proposal submitted by Grievant was approved by the Department, and Mr. Corey did perform the contracted services during the winter of 1977-1978.

9. During the fall of 1978, Robert L. DeForge, Park Operations Officer, visited Lake Carmi State Park. During that visit, Grievant discussed with Mr. DeForge the fact that Grievant wished to employ the services of Mr. Corey again during the ensuing winter months. Mr. DeForge told Grievant that there would be "no problem" with that proposal, and instructed Grievant to submit the proposal.

10. Thereafter, pursuant to Mr. DeForge's instructions, Grievant submitted the Corey proposal to the Department. Shortly after the proposal was submitted, Mr. Bruce Amsden, Park Regional Supervisor, visited Lake Carmi State Park. During that visit, Grievant and Mr. Amsden discussed the recently submitted Corey proposal. Mr. Amsden expressed doubt that Mr. Corey's services for snow-plowing were necessary, since Grievant could use the park tractor for purposes of plowing snow. Grievant, however, pointed out to Mr. Amsden that the tractor could not be used for that purpose, inasmuch as it was not equipped with chains. The subject of the snow-plowing contract was not pursued further. Mr. Amsden did not tell Grievant that the proposal would be disapproved; neither did he tell Grievant that it would be approved.

11. During the first snows of the winter of 1978-1979, Mr. Corey did, in fact, perform snow-plowing at Lake Carmi State Park. His bills for services were submitted to Grievant, who signed them and forwarded them to the Department for payment (Grievant's Exhibit 5, page 1).

12. On September 6, 1979, Grievant received by mail, a written reprimand, dated August 26, 1979 (Grievant's Exhibit 4), and signed by Bruce G. Amsden, Park Regional Supervisor. Among the incidents cited as the basis for the reprimand, "Incident A" recited as follows: "Contrary to my instructions, Mr. Corey was used for snow plowing at Carmi after his proposal for

rental of equipment was rejected." The reprimand represented the first indication to Grievant that the Corey proposal had not been approved by the Department (Grievant's Exhibit 5, page 1).

13. During years prior to 1978, the State of Vermont provided Grievant with several vehicles for use within Lake Carmi State Park. By 1978, however, all but 1 State vehicle had been removed from the park. Grievant testified that during the busy season, he found it necessary, on occasion, to use his own private vehicle within the park in the performance of his duties. During 1978, Grievant submitted several mileage reimbursement requests to the department, which requests were paid.

14. In May of 1979, after the opening of Lake Carmi State Park, Grievant again found it necessary on occasion to use his own private vehicle within the park to conduct State business. Grievant submitted his first mileage reimbursement claim at some point after May 13, 1979. That first claim bore the date May 13, 1979. Thereafter, Grievant received a memorandum, dated May 28, 1979, from Robert L. DeForge, Park Operations Chief, which provided, in pertinent part, as follows: "Your personal expense account dated May 13, 1979 has been forwarded to me for approval. It is Division policy that mileage for personal vehicles will not be granted for park use as long as a state vehicle is assigned to that park. I will approve this mileage as submitted but will not approve future mileage for use of your personal vehicle" (Grievant's Exhibit 4, page 9). Grievant submitted two more mileage requests, one dated May 27, 1979 (Grievant's Exhibit 4, page 7), and the other dated June 10, 1979 (Grievant's Exhibit 4, page 8), neither of which was approved. The purpose of submitting the requests was to document the State's changed mileage reimbursement policy at the counsel of a VSEA representative in preparing a grievance on that matter.

15. Among the incidents cited as a basis for the reprimand Grievant received on September 6, 1979 (Finding 12, above), "Incident B" recites as follows: "Expense account submitted after a memo from Robert DeForge, Park Operations Chief, revoking authorization for mileage reimbursement for use of a personal vehicle at park." Until he received that reprimand, Grievant had not been advised by anyone within the Department either that he was forbidden to submit requests for mileage reimbursement, or that submission of such requests would carry any penalty other than refusal to pay the claim for mileage.

16. On June 15, 1979, Shane Libbey, a seasonal employee at Lake Carmi State Park, stepped on a rusty nail during duty hours. When Mr. Libbey reported the incident to Grievant, Grievant instructed him to go immediately to a physician. Grievant forgot, however, to send an Employer's First Report of Injury until after the physician's bill (Grievant's Exhibit 4, page 11) had been sent to the Department for payment. Part of Grievant's responsibilities was to see that this report was prepared at the time of injury. When the absence of such report was brought to his attention, Grievant did file one.

17. Among the incidents cited as a basis for the reprimand Grievant received on September 6, 1979 (Finding 12, above), "Incident C" recites as follows: "Failure to submit an Employee Accident Report on Shane Libbey" (Grievant's Exhibit 4, page 2).

18. Under departmental policy promulgated in January of 1979, Grievant was authorized to spend to $25.00 for the purchase of items not procurable through the Department (Grievant's Exhibit 4, pages 14-16).

19. Under State law and departmental rules (Grievant's Exhibit 14, next to last paragraph), State-owned vehicles had to be inspected, just as

privately owned vehicles, at authorized inspection stations. In order to comply with the law and departmental requirements, Grievant, on July 10, 1979, asked Michael H. Mudgett, a CETA employee, to drive the State-owned vehicle to an inspection station in Enosburg Falls, Vermont, for the purpose of having it inspected. Prior to the actual delivery of the vehicle, Grievant had telephoned the inspection station in order to schedule the inspection. At the time of that call, Grievant knew that the vehicle's tailpipe had fallen off, and that the tailpipe would have to be reconnected in order for the vehicle to pass inspection, but anticipated that the cost of the inspection, including the reconnecting of the tailpipe, would be well within his purchasing limits. Grievant was not aware, either before or at the time that vehicle was delivered, that it was in need of a new muffler or a new tailpipe. Grievant did not, either at the time he made the inspection arrangements by telephone, or at any time before the work was performed on the vehicle, authorize the installation of a new muffler or a new tailpipe. Neither did he advise anyone not to do work over the authorized limit.

20. The total cost of the inspection, and the work done on the vehicle, was $85.95 (Grievant's Exhibit 4, page 13).

21. The bill for the inspection services was not sent directly to Grievant, but, rather, to the Department of Forests, Parks and Recreation. Thereafter, on a date between July 10, 1979 and August 26, 1979, Bruce G. Amsden, Park Regional Supervisor, visited Lake Carmi State Park. On that occasion, Grievant became aware of the fact that a new muffler and new tailpipe had been installed on the park vehicle. Mr. Amsden instructed Grievant to sign the bill, and Grievant complied with that instruction.

22. Among the incidents cited as a basis for the reprimand Grievant received on September 6, 1979 (Finding 12, above), "Incident D" recites as follows: "Purchase of items available under contract" (Grievant's Exhibit 4, page 2). The attachments to the reprimand make it clear that "Incident D" refers to the muffler and tailpipe installed on the State-owned vehicle (Grievant's Exhibit 14).

23. Mufflers and tailpipes are not among those items listed which can be procured from the Department as an item available under contract (Grievant's Exhibit 4, Page 15; Grievant's Exhibit 14). Grievant was aware repair work costing in excess of twenty-five dollars was supposed to be done at a State garage in Essex Junction, Vermont.

24. After he received the written reprimand, (Finding 12, above), Grievant, on September 7, 1979, drafted and sent to Mr. Amsden a written response to the reprimand (Grievant's Exhibit 5). In addition, Grievant, through VSEA, brought a Step I grievance concerning that reprimand. That grievance resulted in a meeting on October 4, 1979, among Mr. Amsden and Grievant and his VSEA representative. As a result of that meeting, Mr. Amsden agreed, if Grievant encountered "no similar problems," to remove the reprimand from Grievant's personnel file by December 31, 1980 as opposed to the normal 2 year period written reprimands are maintained in employees' files (Grievant's Exhibit 6).

25. Departmental policy provided that, where possible during the months State Parks were open to the public, Park Rangers were to have one day per week off, provided there was seven day per week coverage for each park (Grievant's Exhibit 10). During the summer of 1979, Grievant normally took Wednesday off. There was no departmental policy which required that Park Rangers notify anyone in the chain of command of a change in days off. However, State's witness Rodney Barber, Director of Parks, testified that

it was "understood" by Park Rangers that they were to be on duty during peak periods, peak periods being holidays and weekends. While there was no written rule requiring Park Rangers to be on duty during weekends, Mr. Barber testified that any Park Ranger intending to be away during those periods should notify his superior.

26. Several weeks prior to Saturday, August 4, 1979, Grievant received an invitation to a social function which was scheduled for Saturday, August 4, 1979. Grievant wished to attend the upcoming function, so he asked Michael H. Mudgett, whose normal day-off was Saturday, whether he (Mr. Mudgett) would exchange days off with Grievant. Mr. Mudgett agreed to this arrangement (ie., Grievant would work Wednesday, August 1, 1979, his normal day-off, and Mr. Mudgett would work Saturday, August 4, 1979, his normal day-off).

27. There was nothing unusual, or prohibited, in the exchange of days off, even if the arrangement was between a Park Ranger D and a subordinate employee. However, when first approached by Mr. Amsden in October, 1979, regarding his absence on August 4, 1979, Grievant momentarily denied being off duty.

28. During the summer of 1979, Michael Mudgett worked at Lake Carmi State Park as a CETA employee, and his job title was Maintenance Mechanic. Mr. Mudgett had worked at the park the previous three summers (1976-1978) in various capacities. During the summers of 1976 and 1977, Mr. Mudgett's position title was Park Attendant. During the summer of 1978, Mr. Mudgett's title was Assistant Park Ranger (State's Exhibit 18). From his past experience with Mr. Mudgett, Grievant felt Mr. Mudgett was a completely capable and reliable employee. Even though his position title during the summer of 1979 was Maintenance Mechanic, Grievant still looked upon Mr. Mudgett as a de facto Assistant Park Ranger.

29. Even though Grievant had made the day-off arrangement with Mr. Mudgett, he also scheduled the Assistant Park Ranger, Shane Libbey, to work on Saturday, August 4, 1979.

30. On Saturday, August 4, 1979, Mr. Mudgett worked the entire day at Lake Carmi State Park. Grievant was present at the park until about 1 p.m. Mr. Libbey, Assistant Park Ranger, came on duty at about 1 p.m.

31. Because of the unusual hours worked by Park Rangers, the Department of Forests, Parks and Recreation instituted a policy whereby Park Rangers (including Park Ranger D's) were paid, each payday, an allowance of 18.75% of their base salary. This allowance was designated to compensate Park Rangers for overtime (Grievant's Exhibit 10, 1st paragraph). As a result of that policy, which was in force during 1979, Park Rangers were not required to submit requests for overtime compensation as overtime was worked.

32. Grievant was required, every two weeks, to submit to Mr. Amsden an "Activity Report" (Grievant's Exhibit 11; State's Exhibit 9). The report reflected the number of hours Grievant worked each day, and also reflected the day off Grievant took each week. Even though the Activity Report was required, it was not used in computing pay or other benefits to which Grievant was entitled, since Grievant's compensation for overtime was covered by the 18.75% allowance (Finding 31).

33. Grievant submitted an Activity Report covering the period July 22, 1979 to August 4, 1979 (Grievant's Exhibit 11; State's Exhibit 9). The report was sent to Mr. Amsden's office. The report erroneously indicated that Grievant worked on Saturday, August 4, 1979, and that he took a day off on Wednesday, August 1, 1979.

34. The campsites at Lake Carmi State Park are all located within what are called "Camping Areas" (Grievant's Exhibit 1; State's Exhibit 3). There

are two "Camping Areas" in Lake Carmi State Park "Camping Area 'A'" and "Camping Area 'B'." Within "Camping Area 'A'" there is a smaller area containing 37 campsites and one toilet building. This smaller area was commonly called the "back loop," so designated because it was the area furthest from the waterfront.

35. At Lake Carmi State Park, Grievant's experience had been that the most popular campsites were those closest to the water. The "back loop," being away from the waterfront, was the least popular camping area.

36. Among his responsibilities as Park Ranger D, Grievant was to perform all maintenance, including painting of the toilet buildings. Since Grievant's employees were seasonal, and no longer worked at the park after it was closed to the public, Grievant performed all of the maintenance work himself during the period the park was closed (ie., from October to May of each year). Because of the size of the park, the fact that Grievant's maintenance season was shortened by winter weather, and the fact that Grievant performed the maintenance work alone, it was Grievant's practice to get a head start on maintenance work by closing down the "back loop" after the peak period of park use. He did so in order to perform necessary maintenance on the toilet building located in that "back loop."

37. At some time prior to July 29, 1979, Grievant instructed the appropriate employees at the park not to accept reservations for the "back loop" during the period August 10, 1979 to August 18, 1979. He gave those instructions because of his intention to paint the floor of the toilet building in the "back loop" during that period.

38. On July 29, 1979, an employee (whose identity is not known) accepted a reservation from a Mr. Ronson, who had requested campsite number 69 for the period August 10, 1979 to August 18, 1979. Campsite 69 was located in the "back loop."

39. After she discovered that Mr. Ronson's reservation for campsite number 69 had been accepted for August 10, 1979 to August 18, 1979, Grievant's wife (who was also a park employee), on August 2, 1979, wrote to Mr. Ronson informing him that, because of the closing of the "back loop," Mr. Ronson's reservation would be changed to campsite number 10 (Grievant's Exhibit 8, page 3). Campsite 10 is not in the "back loop."

40. By letter dated August 9, 1979 and addressed to Rodney Barber, Director of Parks, Mr. Ronson requested a refund of the amount he had sent with his reservation, indicating that a campsite in other than the "back loop" would be unsatisfactory (Grievant's Exhibit 8, page 4).

41. While it is unclear exactly when Mr. Ronson's letter was received by Mr. Barber, it is clear that it was received sometime between August 9, 1979 (the date of Mr. Ronson's letter) and August 20, 1979 (the date of a memorandum from Mr. DeForge to Grievant asking for an explanation of the "back loop" closing (Grievant's Exhibit 8, page 5).

42. During the period August 10, 1979 and August 18, 1979, Grievant did scrape and paint the floor of the toilet building in the "back loop." During that period, there were no campers in the "back loop."

43. There are 177 campsites at Lake Carmi State Park. Of that number, 37 are in the "back loop."

44. From park records, Grievant determined that during the period August 10, 1979 to August 18, 1979, of the 140 campsites left after the closing the of "back loop," the statistics show the following number of campsites used and the number not used:

	Sites used	Sites unused	Total
August 10, 1979	99	41	140
August 11, 1979	133	27	140
August 12, 1979	47	93	140
August 13, 1979	41	99	140
August 14, 1979	40	100	140
August 15, 1979	33	107	140
August 16, 1979	40	100	140
August 17, 1979	74	66	140
August 18, 1979	80	60	140

45. Grievant did not request permission from any of his superiors before he closed the "back loop," nor did he inform his superiors that he had done so, either in 1979 or in prior years.

46. On October 5, 1979, Bruce Amsden, Park Regional Supervisor, and Robert DeForge, Chief of Park Operations, visited Lake Carmi State Park. On that occasion, they discussed the closing of the "back loop" with Grievant. At the end of that discussion, Mr. DeForge told Grievant that "no one at the field level has the authority to close any portion of the park unless an emergency situation arises and even then, in the case that a park ranger makes such a determination, the Park Regional Supervisor and Montpelier Office should be notified immediately" (State's Exhibit 7).

47. On October 15, 1979, Bruce Amsden, Park Regional Supervisor, by memorandum to Rodney Barber, Director of Parks, recommended that Grievant be suspended without pay. The basis for that recommendation was as follows: "Denial of public access to any portion of a park campground during the peak operating season without emergency cause or notification of higher levels of park administration is neglect of duty" (Grievant's Exhibit 8, page 2).

48. During the summer of 1979, Grievant had three lifeguards available for duty at Lake Carmi State, James Marshia, Josie Pothier and Donna Betts. Grievant was charged with the responsibility of scheduling the lifeguards' (who were seasonal employees) work schedules. There were no

departmental guidelines concerning the number of lifeguards on duty at beaches with Vermont State Parks (Grievant's Exhibit 15).

49. Grievant had scheduled all three lifeguards to be on duty on Saturday, August 4, 1979. Prior to his departure from the park on that date, however, one of the lifeguards, Josie Pothier, asked Grievant whether she could have the day off, and Grievant approved that request. He did so knowing that James Marshia and Donna Betts would remain on duty that day.

50. After Grievant had left the park on August 4, 1979 (Finding 30), James Marshia approached Mr. Mudgett, who was acting as Assistant Park Ranger at the time (Finding 28), and requested that he (Mr. Marshia) be allowed to leave the park in order to play in a softball game. Mr. Mudgett denied that request. Notwithstanding Mr. Mudgett's denial of his request, Mr. Marshia did, unbeknownst to Mr. Mudgett, leave the park for a period of time on August 4, 1979, and returned some hours later. During the time Mr. Marshia was gone from the park, there was only one lifeguard on duty (Donna Betts).

51. During the period that Mr. Marshia was gone from the park, Ann Coley, Lifeguard Supervisor for the Department, visited Lake Carmi State Park, and noted that only one lifeguard was on duty. As a result of her visit on that date, Ann Coley prepared a report of her visit, which report was submitted, on a date unknown, to Mr. Amsden (State's Exhibit 8).

52. On August 4, 1979, Donna Betts reported to Mr. Mudgett that James Marshia had left the park. Mr. Mudgett, however, knowing that Mr. Marshia's seasonal employment at the park was to end on August 11, 1979, did not feel it necessary to report to Grievant that Mr. Marshia had left the park in spite of instructions not to do so. Grievant did not, therefore, know of

Mr. Marshia's departure from the park until just before the hearing before this Board (on February 7, 1980).

53. On October 15, 1979, Mr. Amsden, Park Regional Supervisor, by memorandum to Rodney Barber, Director of Parks, recommended that Grievant be dismissed from his employment. In that memorandum, Mr. Amsden cited the report of Ann Coley (Finding 51 and State's Exhibit 8), Grievant's activity report for the period July 22, 1979 to August 4, 1979 (Findings 25-33; Grievant's Exhibit 11), and a report of October 12, 1979 by Mr. Amsden (Grievant's Exhibit 7). That memorandum concludes with the following recommendation: "... I must recommend Paul A. Cook, Jr., be dismissed from State service due to the contents of these reports. The documents verify Paul Cook falsified an Agency report and was absent without leave on August 4, 1979. The activity of Paul Cook in regards to this incident constitutes gross neglect of duty and violation of the public trust connected with the position of park ranger at Lake Carmi State Park" (Grievant's Exhibit 7). That same date, Mr. Amsden had written a memorandum recommending that Grievant be suspended (Grievant's Exhibit 8).

54. On November 13, 1979, Grievant was personally served with a letter, dated November 8, 1979, from Leo C. LaFerriere, Commissioner of the Department of Forests, Parks and Recreation, wherein Grievant was informed of his dismissal from State service for "gross neglect of duty." The letter listed the following grounds for dismissal:

> "1. You falsified official Departmental records and were absent without prior leave approval on August 4, 1979.
>
> 2. You closed down camping loop 'A' at Lake Carmi State Park without sufficient reason, prior approval, or appropriate notice on August 10, 1979 through August 18, 1979.
>
> 3. Contrary to specific instructions, you contracted for use of private snow removal equipment.

4. Contrary to specific instructions, you submitted a request for unauthorized mileage reimbursement for use of your personal vehicle.

5. Failure to submit an Employee Accident Report as required by departmental written policy.

6. You purchased items in violation of departmental policy, which were available through normal purchasing channels.

7. You granted time off to an employee under your supervision on August 4, 1979, leaving only one lifeguard on duty on a busy day" (Grievant's Exhibit 9).

The letter of dismissal specified that Grievant's dismissal was effective on November 13, 1979, and allowed Grievant 30 days from that date to remove himself and his family from State-provided housing. Reasons 3-6 for Grievant's dismissal were the same reasons for Grievant's reprimand of August 26, 1979 (Findings 8-24).

55. Article XV of the contract, Disciplinary Action, provides in pertinent part:

> The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:
>
> (a) act promptly to impose discipline within a reasonable time of the offense;
>
> (b) apply discipline with a view toward uniformity and consistency; and
>
> (c) impose a procedure of progressive discipline, in increasing order of severity:
>
> 1. oral reprimand;
> 2. written reprimand;
> 3. suspension without pay;
> 4. demotion;
> 5. dismissal.
>
> The parties agree that there are appropriate cases that may warrant the State bypassing progressive discipline or applying discipline in different degrees so long as it is imposing discipline for just cause.

OPINION

In this grievance, we are required to determine if there was just cause for Grievant's dismissal. The leading case in Vermont on this issue is In re Grievance of Albert Brooks, 135 Vt. 563, 568 (1977). In that case, our Supreme Court held:

> The objective of a just cause clause in a collective bargaining agreement is to remove from the employer the right to fire arbitrarily his employees. Just cause means some substantial shortcoming detrimental to the employer's interests, [cites omitted] which the law and a sound public opinion recognize as a good cause for his dismissal. Colaw v. University Civil Service Merit Board, 37 Ill. App. 3d 857, 865, 341 N.E.2d 719, 726 (1975). Instances of repeated conduct insufficient of themselves may accumulate so as to provide just cause for dismissal. Id. at 869, 341 N.E.2d at 728 (Barry, J., dissenting).

The test of just cause set forth in Brooks requires that the State's action must meet two criteria of reasonableness:

> ... that it is reasonable to discharge employees because of certain conduct and ... that the employee had fair notice, express or fairly implied, that such conduct would be ground for discharge. Ibid

As we indicated in our Memorandum and Notice of Decision, we find dismissal in this case is not warranted because the criteria capable of sustaining a just cause dismissal were not met. First, the charges against Grievant were not sufficient to constitute substantial shortcomings detrimental to the State, nor were they evidence of a recurring problem. Second, several of the charges are either erroneous or were made without fair notice to Grievant that such conduct would be grounds for dismissal. And third, while we recognize that the use of progressive discipline is not inherent in the concept of just cause without express agreement or normal practice by the parties (see In re Brooks, supra, 567-569), we conclude that progressive

discipline must be considered pursuant to the requirements of the collective bargaining agreement in evidence here (Finding #55).

BURDEN OF PROOF

Before discussing these points further, we are obliged to address the issue of the burden of proof in this case. At the close of the hearing on this matter, the Acting Chairman invited counsel for both parties to treat this issue in their briefs. After analyzing the arguments set forth by the parties and researching the issue independently as well, we conclude that the burden of proof in discharge cases is generally on the employer.

> Discharge is recognized to be the extreme industrial penalty since the employee's job, his seniority and other contractual benefits, and his reputation are at stake. Because of the seriousness of this penalty, the burden generally is held to be on the employer to prove guilt of wrongdoing, and probably always so where the agreement requires "just cause" for discharge. Elkouri and Elkouri, How Arbitration Works, BNA 3rd Edition, p. 621.

MERITS - JUST CAUSE

We must then make an actual determination as to whether there was just cause for Grievant's dismissal.

We find five of the seven charges made against Grievant as reasons for his dismissal do warrant some measure of disciplinary action. Those charges as we view them are Grievant's: 1) erroneous reporting of his hours worked on August 4, 1979, and absenting himself during a normal peak period of park use without first notifying his superior and obtaining prior approval; 2) failure to advise his superiors prior to closing down a portion of the park; 3) indirect responsibility for non-compliance with Departmental procurement policy; 4) apparent disregard of a superior's qualifying "comments"

to Grievant's intent to contract for snow removal; and 5) failure to timely file an Employee Accident Report with the Department.

We regard charge #1, Grievant's August 4 absence without prior approval, as the most grievous. The State's position here is not unreasonable. Although testimony revealed that it is not a written requirement that park rangers seek prior approval to be absent during peak periods, the nature of the work and level of responsibility assumed in that position would seem to necessitate prior consultation with a superior in the Department. We consider this charge in particular to be serious. Grievant apparently placed his own interests above that of the State and the public served by the park. However, a mitigating factor is that we do not find any intent to defy his superiors, or deliberately violate clearly established policy. Grievant, in this case, merely wanted a particular Saturday off, and took it upon himself to switch days off with a member of his staff.

The remaining charges against Grievant, although reasons for discipline, are not sufficient reasons for his dismissal.

The charge regarding Grievant's contracting for snow removal for the winter of 1978-1979, charge #4 read:

> "Contrary to specific instructions, you contracted for use of private snow removal equipment." (Grievant's Exhibit #9, page 1)

We find Grievant was without specific instructions in this matter, despite his efforts to seek his superiors' disposition of a contract similar to one approved the year before, and the undisputed fact there was inadequate Department equipment available to do the job himself. A factor which mitigates the seriousness of this incident is the degree to which management personnel responsible directly or indirectly for the supervision of Grievant

may have contributed to Grievant's very independent manner. Supervisory guidance to Grievant on snow removal was inconsistent and inconclusive. Mr. DeForge's initial verbal approval of the 1978-1979 snow removal contract was later met with a negative but yet indefinite response from Mr. Amsden. We suspect Grievant's independence in some instances, albeit excessive, was due to minimal supervision at the time material to this grievance, as well as Grievant's prior level of supervisory status. (Finding #2) Evidence of these factors was Grievant's adamant defense to the charges of closing down the loop and switching days off, that he had always done it that way.

Nor does the charge related to the unauthorized purchase of a muffler, charge #3, entail any willful misconduct in view of the facts. The park manual sections in evidence which itemize equipment and supplies available through State contracts do not refer to mufflers, specifically, which in and of itself may not preclude a finding of Grievant's breaking a procurement rule here. However, it appears that Grievant did not send the truck to the inspection station for a muffler replacement but instructed Mr. Mudgett to have it repaired in order to pass inspection. Grievant did not authorize the replacement and only became aware of the instance after the fact. Perhaps Grievant was remiss in waiting until the last minute to have the park vehicle inspected (as Grievant's testimony suggested), or in failing to inform Mr. Mudgett and the garage of a twenty-five dollar limit, but his actions at the time were not totally unreasonable and certainly not sufficient cause for dismissal.

The closing of the back loop camping area, charge #2, also did not seem unreasonable, where Grievant had done so in prior years, based on his experience of that section's general disuse at that time of the season. Again, a less severe disciplinary action by the State would have served to

advise Grievant that this practice was inappropriate and to put Grievant on notice that similar actions in the future would not be tolerated.

The charge regarding Grievant's failure to timely file an Employee Accident Report, charge #5, while not disputed by Grievant, is not of a serious nature. Grievant's written response to a reprimand which included that offense (Finding #17) ultimately resulted in an agreement by his superior, Mr. Amsden, for early removal of the reprimand from Grievant's personnel file if Grievant encountered "no similar problems" (Finding #24). Where the record does not reveal repeated instances of Grievant's failure to file such reports (or any of the other charges subject to the September 6, 1979, reprimand) from the time Grievant received the reprimand (September 6, 1979) to the date of his dismissal (November 13, 1979), we do not feel this charge is proper cause for dismissal.

The remaining two charges given as reasons for Grievant's dismissal, in our view, are not supported by facts sufficient to sustain any disciplinary action, let alone dismissal. The charge regarding Grievant's request for mileage reimbursement is not supported by the facts. Grievant was not given specific instructions not to submit any further requests, although he was told no more such reimbursement would be allowable. True, it may seem pointless to submit similar reimbursement requests in view of his superior's position of May 28, 1979, (See Grievant's Exhibit #4), but that reimbursement policy as it related to Grievant's experience had been changed. We find Grievant's assertion that his requests subsequent to May 19, 1979, were submitted in preparation for a grievance on that matter credible.

Finally, the charge relating to Grievant's scheduling of lifeguards on August 4, 1979, is not supported by the facts. While Grievant admitted being absent from work August 4, 1979, the record indicates Grievant did

everything in his power to assure adequate staff coverage of the park for that day. At the time of Grievant's departure on August 4, 1979, two lifeguards were scheduled to work.

In summary, we do not find the reasons given by the State in this case, considered singularly or aggregately, constitute just cause for Grievant's dismissal. While Grievant's actions are capable of warranting some measure of discipline, Grievant's actions do not meet the tests of just cause as some substantial shortcomings detrimental to the employer's interests as set forth in In re Brooks, supra. The record in Brooks revealed a pattern of serious misconduct, drinking and fighting on the job, at times conduct sufficient to constitute criminal behavior. Certainly an assault on a fellow employee, as was the case in Brooks, is recognized by law to be a substantial shortcoming to the State's interest and thus capable of sustaining just cause for dismissal.

We compare Grievant's cumulative derelictions with the facts of a key case where aggregated conduct was found to be just cause for dismissal. Colaw v. University Civil Service Board (cited in Brooks, supra). In Colaw, the majority held that:

> Instances of repeated conduct insufficient of themselves may accumulate so as to provide just cause for dismissal. (Infra at p. 121)

Justice Barry, in his dissent in that case, wrestled with the question of when do "molehills" of misconduct become "mountains" sufficient to constitute grounds for dismissal.

The facts of Colaw involved a college television station employee who refused to report to work on two separate occasions in protest of a distant assignment without employer provided transportation, a matter which was the subject of a pending grievance at the time. As a result of his failure to

report to his assigned duty station, the transmitter "warm-up" procedures prior to beginning the broadcast day were not able to be followed, apparently at some risk to the equipment. Alternatively, the college station would have lost broadcast time. In Colaw, a majority of the Court recognized repetition of the same offense, after a warning, as cause for dismissal. The employee defiantly refused to report to work as directed. In doing so, he tried to circumvent the recognized grievance mechanism by repeating his action in an effort to coerce compliance with his demands.

In this grievance, we find no criminal conduct, no repeated instances of misconduct, no refusal to obey a direct order, and no major interruption in the State's business. These factors are intended to be an illustrative list of reasons for discharge rather than an exhaustive one. Nevertheless, for purposes of this case, no other matter of extreme seriousness has been suggested, nor does the record reveal a singular event of misconduct for which the contract allows summary discharge (Article XV, section 3). In short, neither in the aggregate or alone does any act of Grievant raise to the level of substantial prejudice to the employer's interests so as to warrant his dismissal. Using the metaphor employed by the dissenting Justice in Colaw, Grievant's actions do not equate to a "substantial mountain" of cause warranting discharge, because no real harm to the State occurred.

Grievant, however, is not blameless in the majority of the charges subject to this grievance. The most serious offense sustained here was Grievant's misrepresentation of hours worked on August 4, 1979, perhaps in order to avoid going through his superiors for a Saturday off. While the other offenses are of a less serious nature, they too evidence a dangerously cavalier attitude towards his superiors and departmental policy. For that reason, we feel a rather stiff penalty, short of dismissal, is called for.

Statutory authority to make final determinations on State employee grievances pursuant to 3 V.S.A. §926, combined with the progressive discipline clause applicable here, combine to give the Board the authority to find the State's dismissal action excessive and to impose a penalty commensurate with the seriousness of Grievant's offenses. (C.f. In re Brooks, supra, where the absence of a progressive discipline policy by express contractual agreement, aimed at correction and rehabilitation, caused our Supreme Court to reverse the reinstatement order of this Board.)

One authority has expressed a view of this process we find sensible.

> It is ordinarily the function of an Arbitrator in interpreting a contract provision which requires "sufficient cause" as a condition precedent to discharge not only to determine whether the employee involved is guilty of wrongdoing and, if so, to confirm the employer's right to discipline where its exercise is essential to the objective of efficiency, but also to safeguard the interests of the discharged employee by making reasonably sure that the causes for discharge were just and equitable and such as would appeal to reasonable and fair-minded persons as warranting discharge. To be sure, no standards exist to aid an arbitrator in finding a conclusive answer to such a question and, therefore, perhaps the best he can do is to decide what [a] reasonable man, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community, ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just. Arbitrator Harry H. Platt, Riley Stoker Corp., 7 LA 764, at 767 (1947).

By providing five possible disciplinary actions under the contract, ranging from an oral reprimand to dismissal (Finding #55), the parties have somewhat structured the penalties available to the Board in vacating the State's discipline as excessive. The disciplinary action immediately preceding dismissal in severity is demotion. We have considered that penalty and find it, as well, is too severe in view of the nature of the offenses

and Grievant's good past record and length of service with the State. In In re Brooks, supra, the grievant's past record of offenses served to aggravate the seriousness of the actual offense giving rise to dismissal in a "last straw" fashion. Here Grievant's past record of exemplary employment over many years is to his favor in mitigating the severity of the instant punishment. Accordingly, we find the just penalty in Grievant's case would be suspension, the next level of disciplinary action in descending order of severity. We are sufficiently convinced that Grievant demonstrated substantial indifference to his superiors and departmental rules and regulations in a manner potentially detrimental to the interests of the State and public. We suspect Grievant's attitude may be attributed to the fact that Grievant once held a higher position in the Department. Perhaps unwittingly, Grievant feels superior still to those persons in positions he once supervised. Whatever motivation is behind Grievant's actions, we feel a sixty-day suspension without pay is warranted. In so doing, we are aware of and have considered the contract's ten day limit on the appointing authority for suspension without pay (Article XV, section 7). However, we feel that portion of section 7, which states:

> ... The provisions of this paragraph shall not preclude the settlement of dismissal cases with respect to suspensions in excess of 10 work days.

allows this Board, as final adjuster of grievances, to exceed that ten day limit. Additional contractual language found in section 1 of Article XV would also seem to support that conclusion, where:

> The parties agree that there are appropriate cases that may warrant the State bypassing progressive discipline or applying discipline in differing degrees so long as it is imposing discipline for just cause. (emphasis added)

ORDER

Now, therefore, for all the foregoing reasons, it is hereby ORDERED that Paul A. Cook, Jr., be reinstated to his former position as Park Ranger D with full pay and privileges, minus that amount of pay which would have accrued if not for a sixty-day suspension without pay, which suspension shall be considered to have commenced upon the first day of Grievant's unemployment from State service.

Deducted from the amount the State owes Grievant by this order shall be any income earned or unemployment or welfare benefits received by Grievant commencing sixty days after his separation from employment.

Dated this 10th day of April, 1980, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

William G. Kemsley, Jr.

Robert H. Brown

Petition to be withdrawn and case settled in Step 1 7/30/80