VERMONT LABOR RELATIONS BOARD

Grievance of:	)	
	)	DOCKET NO. 80-2
PETER R. CARLSON	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On January 8, 1980, Peter R. Carlson, "Grievant," through his attorney, filed a grievance with the Vermont Labor Relations Board appealing his dismissal from State service. Grievant was employed as a Park Regional Supervisor with the State of Vermont Department of Forests and Parks, Agency of Environmental Conservation. As such, Grievant was a full-time permanent status employee under the Agreement between the State of Vermont and the Vermont State Employee's Association, Inc., for the Non-Management Unit, effective July 1, 1979. We hold here, and the parties have agreed, that absent any final determination of Grievant's status otherwise [See "Jurisdictional Note," Memorandum and Notice of Decision, Grievance of Robert L. DeForge, 3 VLRB 196, 200 (1980)], Grievant shall be considered a non-supervisory employee for the purposes of this proceeding.

Grievant claims the reasons given by the State for his dismissal do not constitute "just cause" under the contract (Article XV) and further, the State was required to impose an alternative penalty under the contractual progressive discipline policy (Article XV) for certain conduct admitted by Grievant as improper.

Assistant Attorney General Bennett E. Greene filed an answer for the State to Grievant's claim on January 31, 1980. It is the State's position

that Grievant's conduct as charged in his letter of dismissal does constitute cause for dismissal, even gross neglect of duty and gross misconduct. Thus, the State further maintains Grievant's case was an appropriate one in which to bypass progressive discipline steps.

Evidence was presented and prefiled testimony was admitted at two hearings held on June 4 and 5, 1980, at the Board hearing room in Montpelier. Board members Kimberly B. Cheney, William G. Kemsley, Sr., and Robert H. Brown were present at both hearings. Attorney Leighton C. Detora represented Grievant. Assistant Attorney General Bennett E. Greene represented the State.

Requests for findings of fact and memoranda were filed on June 20, 1980, by Attorneys Detora and Greene.

FINDINGS OF FACT

1. By letter dated December 11, 1979, (State's Exhibit #3) effective that same date, Grievant was dismissed from his position as Regional Park Supervisor, State of Vermont Department of Forests and Parks, Agency of Environmental Conservation. Grievant held that position for approximately five years.

2. At all times material to this grievance, Grievant was a permanent-status, full-time state employee, entitled to the rights and privileges under the Agreement between the State of Vermont and the Vermont State Employees' Association, Inc., for the Non-Management Unit.

3. State's Exhibit #3 states, among other things, that Grievant was dismissed for gross neglect of duty and gross misconduct and enumerates nine specific reasons for his dismissal. That letter is made a part of these findings.

4. At all times material to this grievance, Grievant's immediate supervisor was Robert L. DeForge, Park Operations Chief. Mr. DeForge, in turn, was directly responsible to Rodney Barber, Director of Parks, who was in turn directly supervised by Leo Laferriere, Commissioner of Forests and Parks. Grievant supervised, among others, Wilson Shields, Ronald Pilbin, Thomas Haney and Steven Richardson.

5. With respect to Paragraph #1 on State's #3, there is no credible evidence before the Board that Grievant personally ordered the construction and installation of bulkhead doors on the residence of Robert DeForge.

6. Mr. Shields, the State's witness in this regard, testified that the construction and installation of the bulkhead doors which was performed by him was ordered directly by Mr. DeForge, not by Grievant.

7. A garage door panel was brought to the maintenance shop at Groton State Forest by Mr. Robert DeForge just prior in time to Ronald Pilbin's retirement.

8. The door panel was not able to be located at the time when DeForge inquired of Grievant as to the location of the door panel and its condition.

9. Upon inquiry, Mr. Shields reported to Grievant that the door panel was missing and the only way to repair Mr. DeForge's garage door would be to get a new panel, the subject of charge #2 as reason for Grievant's dismissal.

10. Mr. Shields did not tell Grievant during that conversation or at any subsequent time, that he intended to do the work himself, or to do it on State time, or to charge any materials to the State of Vermont. Mr. Shields testified it was not his intention to have the State of Vermont pay for the materials.

11. Mr. Shields took it upon himself to order the door, bill it to the State of Vermont, and present Mr. DeForge with the bill. Mr. Shields did

present the bill for the door panel to Mr. DeForge, and told him what the bill was for and that Mr. DeForge should take care of it.

12. Shortly thereafter, Mr. DeForge instructed Grievant to countersign the bill which Wilson Shields had presented to him for the door panel. Mr. DeForge's signature authorized payment of the bill, but Department policy required a person in Grievant's position to direct it to a job or project account, in this case, Brighton.

13. Among the tools provided by the State of Vermont for use at the Groton Maintenance Shop was a 25- to 30-year old Delta Rockwell brand Table Saw, the subject of charge #3 as reason for Grievant's dismissal.

14. The table saw had been manufactured at a time when the Delta Company and the Rockwell Company had merged; a merger which has since been dissolved.

15. The saw had been repaired several times just prior to Mr. Pilbin's retirement, at a cost to the State of Vermont of approximately $90.00.

16. Notwithstanding the prior repairs, the table saw would not cut a straight line, had a motor which would burn and smoke when in operation, had no safety guide, had worn-out bearings, and did not comply with VOSHA Regulations.

17. Mr. Pilbin took the saw to the Barre Electric Company, and after conferring with people there, formed the opinion that the saw was not worth fixing, for to do so would be "throwing good money after bad" and a waste of the State's money. The table saw had a fair market value at that time of $60.00, given its age and condition.

18. Mr. Pilbin made an arrangement with Grievant whereby $60.00 was paid by Mr. Pilbin to Grievant for the shop fund or coffee fund, as it was referred to (hereinafter, "shop fund"); Mr. Pilbin then retained ownership of the table saw.

19. The saw was transported to Mr. Pilbin's home by Mr. Pilbin and Mr. Shields.

20. The shop fund was a fund kept and maintained by Mr. Pilbin and Grievant during the time Mr. Pilbin worked for the State of Vermont and after his retirement, solely by Grievant.

21. The shop fund consisted of money derived from contributions of employees, from the sale of State owned scrap materials to private parties by the employees, from the sale of the table saw, and from funds paid into it by persons who obtained some benefit from State employees or materials.

22. The shop fund had been in existence for some time prior to Grievant and Mr. Pilbin's employment, indeed, Clayton Johnson, who has been with the State of Vermont for many years, indicated that the same fund was in existence as far back as he can remember, and at that time was funded by the sale of scrap copper and other scrap metal, the copper being retrieved from discarded wire and batteries and other sources.

23. The fund was used for purposes which in the opinion of Mr. Pilbin and Grievant, were beneficial to the State and in the State's best interest. These purposes included the providing of coffee and doughnuts for various workshops and seminars held at the Groton State Park for state employees and management personnel; for providing coffee and doughnuts for various regional meetings required to be held by the State of Vermont when they were held in the District No. 5; for the purchase of flowers at the time of death or illness of fellow employees or a member of their families; and for the purchase of tools and equipment which employees needed quickly and were too impatient to procure through State purchasing.

24. As an example, Grievant testified that a check for $50.00 was forwarded to a Ranger by the name of Clayton Johnson when his residence on

Button Bay, burned down. At this time, the State was supplying him with beds and other items of furniture from State Supplies to aid him at a time of disaster. (Not the same Clayton Johnson referred to in finding 29 et seq.)

25. On another occasion, a donation to the Heart Fund was made payable out of the shop fund in memory of the death of a fellow Regional Park Supervisor for District #1, Larry Taylor.

26. On other occasions, tools and materials were purchased for the benefit of the State of Vermont or projects for the State of Vermont and paid for out of the shop fund. As examples of these, the State received a Salamander Portable Heater, for which $100.00 was paid out of the shop fund, which is still at the Groton Maintenance Shop, being used by the State.

27. On other occasions, various small handtools and materials were purchased.

28. From all of the evidence presented, it appears the fund was kept for and used for things considered by Grievant to be in the best interest of the State of Vermont, and was not used for purposes of personal profit or gain. Maintenance of the shop fund was not authorized by any law, rule, or regulation, but its existence was known of by Grievant's supervisors for many years and no order to terminate was issued until after this case arose.

29. Grievant made an arrangement, the subject of charge #3, with a Ranger named Clayton Johnson whereby Clayton Johnson would take a forge owned by the State of Vermont, and remove it to his retirement home in North Carolina. The forge was disassembled and inoperable when this arrangement was made.

30. In return for the forge taken by Mr. Johnson, Mr. Johnson agreed to leave a forge owned by him which is currently set up in the New Discovery Campground State Garage. Along with the forge, are forge tools and a supply of forge coal.

31. The value of the items to be left by Mr. Johnson is in excess of the value of the forge received by him.

32. Today, a forge is largely used by hobbyists, its purpose being to fuse metals or to heat metals to the point where they can be manipulated.

33. These things can be performed with electric arc welders and acetylene torches in far less time and at far less cost to the state than by a forge. During the time Mr. Johnson was there, he never observed the forge in use.

34. In Mr. Johnson's opinion, the State has gained as a result of the trade rather than lost.

35. In late September or early October of 1979, Clayton Johnson approached Grievant and requested that some work be done, the subject of charge #4, on Mr. Johnson's private vehicle by Mr. Haney, an accomplished body man. Mr. Johnson proposed that the work be done as compensation to him for overtime for which he was uncompensated and the use of his vehicle, for which he was uncompensated.

36. As to the value of the work done, Mr. Johnson offered to leave certain items for the benefit of the State, the value of which would be computed and the difference, if any, between the value of the items to be left and the value of the work done to Mr. Johnson's truck would be paid by him in cash into the shop fund.

37. Grievant authorized the work on the vehicle which was performed by Mr. Haney.

38. On or about the first day during which the vehicle was worked on, Mr. Robert DeForge, who was the Park Operations Chief and Grievant's immediate supervisor, and Rodney Barber, the State's Director of Parks and who

was the immediate supervisor of Mr. Robert DeForge, visited the Groton Maintenance Area and discussed the matter of Mr. Johnson's truck with Mr. Haney.

39. Mr. Haney, having discussed the matter with Grievant and wanting everything to be open and above board, told Mr. DeForge and Mr. Barber that the truck belonged to Clayton Johnson and some body work was being done on it. Mr. Haney was then told by Mr. DeForge to finish the job. At no time was he instructed by Mr. DeForge, Mr. Barber or anyone else to terminate it or work on it only on his own time.

40. Subsequent to that, the truck was completed and returned to Mr. Johnson.

41. Shortly after the completion of the truck, an investigation was begun by the Department of Public Safety at the request of Mr. Leo Laferriere. Prior to Grievant completing the list of items which the State was to receive and valuing them for purposes discussed between the Grievant and Mr. Johnson, Grievant's position was terminated, and the State never received any money from Mr. Johnson.

42. Sometime, shortly after Mr. Haney was hired to work for the State of Vermont, and at a time when he was under the supervision of Wilson Shields, Mr. Shields approached Grievant asking whether Mr. Haney could use a state-owned refrigerator at his private residence until such time as Mr. Haney procured one for himself.

43. Grievant agreed, since it would have allowed Mr. Haney to move to Groton sooner and begin work sooner, rather than wait until such time as he could afford to buy a new or used refrigerator. Additionally, the season was over, the State would have no use for the refrigerator during the winter. Therefore, Grievant told Mr. Shields to allow Mr. Haney to use the refrigerator (the subject of charge #5) and see that it was returned to the State.

44. Mr. Shields was thereby given the authority to allow Mr. Haney to use the refrigerator and responsibility was thereby delegated to Mr. Shields, to see that Mr. Haney, an employee under the supervision of Mr. Shields, returned the refrigerator.

45. Mr. Haney was instructed by both Mr. Shields and Grievant that the refrigerator was the property of the State of Vermont and would be returned.

46. Thereafter, Mr. Shields and Mr. Haney moved the refrigerator from the Groton area to Mr. Haney's residence in Groton.

47. Thereafter, the refrigerator which was taken from the State Park was replaced by another, Mr. Haney continued using the one which belonged to the State.

48. Neither Grievant nor Mr. Shields retrieved the refrigerator until the following December, 1979, at which time it was returned to the State of Vermont and there is no evidence that it was damaged or unusable.

49. There came a time when, because of the increased cost of energy, the Department, through Robert DeForge and Rod Barber, discussed the feasibility of heating to the extent possible with wood stoves.

50. Accordingly, the State purchased a number of wood stoves from Sears, Roebuck & Company.

51. Additionally, Mr. Pilbin, who is a skilled welder made a woodstove for the maintenance shop at Groton State Forest.

52. This stove was made from a peice of pennstock which was left over from the construction of an overshot waterwheel at the Seyon Trout Ranch and was intended for use in State facilities.

53. The pennstock had been scattered around the area behind the shop, and had been there for approximately one year.

54. One stove built by Mr. Pilbin was put in use in the Groton Maintenance Shop and worked effectively.

55. Mr. Pilbin was making two stoves at that time; the first priority in the opinion of Grievant was to install one in the second shop building at the Groton State Forest.

56. During casual conversation about wood heat and wood stoves between Grievant and Mr. Pilbin, Grievant mentioned to Mr. Pilbin that he (Grievant) would like to have a wood stove similar to the one Mr. Pilbin had made for the main Groton State Forest maintenance shop.

57. Mr. Pilbin completed a second pennstock stove which was originally intended for the second shop at Groton. However, that stove was not installed in the other shop but instead was offered to Grievant, who accepted it, which action became the subject of charge #6.

58. Mr. Pilbin and Mr. Shields delivered the stove to Grievant's home and they, with the assistance of Grievant, installed it in Grievant's basement.

59. To this day, the stove made by Mr. Pilbin and received by Grievant has not been used at all.

60. With regard to firewood, the subject of charge #7, the evidence is uncontroverted that the wood delivery request came directly from Mr. DeForge to Ron Pilbin, on several occasions and then directly from Mr. DeForge to Mr. Wilson Shields on other occasions.

61. At no time did Grievant order or request anybody in or out of State service, to make deliveries of firewood to the home of Mr. Robert DeForge.

62. Grievant was aware of the deliveries and took no steps to report Mr. DeForge's acquisition of firewood to anyone.

63. From time to time, Grievant would be advised by either Pilbin or Shields of the upcoming delivery, to be sure that the delivery contemplated by Pilbin or Shields would not interfere with any of the Department or State work.

64. Mr. Shields was directed by Grievant to accompany Mr. Pilbin to the bobbin mill where wood was obtained, on one occasion, for Mr. DeForge. This was so he (Mr. Shields) would know where the mill was located so he could pick up wood purchased by the State for use in the State Park Campgrounds.

65. With respect to charge #8 regarding the stove that was made by Mr. Pilbin for Mr. Buzzell, at all times, it was the intent of all parties, Pilbin, Buzzell, and Grievant, that the State be put to no expense. Should any expense be incurred, it was understood that the State would be compensated by Mr. Buzzell.

66. Mr. Buzzell and Grievant agreed that any money paid for work on State time would go into the shop fund, which Mr. Buzzell was told and understood, would be used for State purposes at the Groton shop.

67. With respect to charge #9 regarding a trailer in which an employee, Stephen Richardson, was allowed to live, the evidence is uncontroverted that Grievant did allow Mr. Richardson to live in the trailer, that Grievant did not collect any compensation from him for the use of trailer; that Grievant did have the authority to authorize such use of the trailer; that Grievant did have authority to waive the payment of the nominal fee; that Robert DeForge, the Grievant's immediate supervisor, was aware of the situation and approved it; that Bill Snow, the State Director of the Y.A.C.C. program

under which Mr. Richardson was employed, knew of the arrangement and approved it; and that Rodney Barber, Mr. DeForge's immediate supervisor, knew of the situation and had approved it.

68. Over the years, other Department employees living in State owned housing have been allowed waivers of a nominal $1.73 rental fee.

69. Prior to Grievant's dismissal, when the State Police investigation of Forests and Parks was in progress, Grievant was instructed by the State Police not to discuss the matter with anyone and he did not.

70. Grievant was the Chairman of the Committee for Preparation of the 1979 Park Progress Report, a document used for budgetary considerations, a copy of which is sent to each Senator and Representative.

71. The Park Progress Report delineates expenses, and up-dates of projects, among other things.

72. Grievant continued to work on this reprot for a period of one month after his dismissal, feeling it was his duty to do so.

73. The personnel evaluation reports as received in evidence, indicate that Grievant consistently exceeded his job requirements and standards, and was so noted by Rodney A. Barber, the Director of Parks.

74. Grievant's overall performance rating from 1977 through 1978 which is the last evaluation in the Grievant's file records that Grievant "frequently exceeds job requirements/standards."

75. The overall rating for 1976-1977 is the same.

76. In 1975, the Grievant's overall rating was "fully satisfactory" which is the next to highest possible rating.

77. In 1974-1975, and 1973-1974, Grievant received an "outstanding" rating, which is the highest overall rating.

78. In 1972 and 1973, Grievant was given an overall rating of "fully satisfactory."

79. There is no indication that to the extent this Board finds Grievant to have been involved in any of the activity listed in State's #3, that he was ever given any warning regarding that activity before his termination.

80. At the time of termination, Grievant was called to the Commissioner's office, told that he was being terminated, handed the letter which is State's #3, which was in an envelope, and there was very little discussion.

81. Grievant was not given two weeks notice of termination nor two weeks' pay in lieu of notice at the time of his termination.

82. The Rules and Regulations are on file with the Board and are incorporated as evidence in these findings.

83. There is no evidence that Grievant was, or was not, aware of the existence of the Rules and Regulations for Personnel Administration generally, or as they specifically related to the reasons for dismissal enumerated in State's Exhibit #3.

84. Commissioner Leo Laferriere was employed by the Department of Forests and Parks in that capacity in September, 1979.

85. There is no evidence to indicate improper practices such as those former employee DeForge and Grievant Carlson are charged with were ever reported to Commissioner Laferriere's predecessor even though they existed then.

86. Grievant testified without contradiction that the water system of former Commissioner of Forests and Parks Perry Merrill's camp is hooked up to the State's water system at Groton State Forest Park and is maintained by State employees. We find that Grievant believes that fact to be true.

87. Grievant also testified that when another former Commissioner of Forests and Parks, James Wilkinson retired, he was given a picnic table which at the time it was presented was described as having been made by State employees, on State time, with State materials and resources.

88. For many years, employees of the Department of Forest and Parks have received benefits through personal use of State property and work performed on State time. Grievant's supervisor, Robert DeForge, was dismissed by Commissioner Laferriere for such activities. [See Grievance of Robert DeForge, 3 VLRB 204 (1980)]. Former Forest and Park Commissioners had personally received benefits in the form of work done on property for their own use by State employees on State time. Actions of the top management of the Forest and Parks Department, prior to Mr. Laferriere's appointment, condoned minor usages of State material and employees' time for the personal benefit of State employees. Grievant was aware of this situation and regarded it as a normal part of the operation of the Department.

OPINION

We must determine here whether the substance of Grievant's offenses amounts to "just cause" for dismissal under the standard established in In re Grievance of Albert Brooks, 135 Vt. 563 (1977); and whether his procedural rights to notice of dismissable offenses were met under In re Grievance of Michael Yashko, ____ Vt. ____ (June, 1980). As we have tried to detail in the present findings, and as we have previously detailed in the Grievance of Robert DeForge, 3 VLRB 204 (1980), the record reveals a deplorable "wide-spread abuse and misappropriation of State resources and property over a long period of time" DeForge, supra at 215. The critical issue here, however, is whether this Grievant is chargeable with culpability either for individual misbehavior attributable to his own detrimental shortcomings, Brooks, supra, or with culpability for fostering the abuses which the record demonstrates, DeForge, supra. We conclude he is chargeable with some offenses but not all. Our reasoning follows.

Specifically, we find the State proved facts sufficient to establish six of the incidents given as reasons for Grievant's dismissal: 1) acquiescence to the improper billing of DeForge's garage panel door to Brighton State Park (charge #2, State's Exhibit #3); 2) the trade of forges to Mr. Johnson and sale of a State owned table saw to Mr. Pilbin and placement of the proceeds from the sale in the shop fund (charge #3); 3) allowing Mr. Haney to paint Mr. Johnson's truck on State time and with State owned or purchased materials (charge #4); 4) the authorization of Mr. Haney's use of a State owned refrigerator (charge #5); 5) the receipt of a stove made by Mr. Pilbin on State time from State owned scrap materials (charge #6); and 6) placing money received from Mr. Buzzell, intended for reimbursement to the State for Mr. Pilbin's construction of another "scrap" stove, in the Groton shop fund.

On the other hand, we cannot find from the credible evidence before us that the three remaining offenses were proved: ordering the construction of DeForge's bulkhead doors on his personal residence (charge #1); and ordering the delivering of wood to DeForge's personal residence for DeForge's personal use (charge #7). As to these two charges, while there may be evidence of Grievant's acquiescence in these acts, we cannot find that he "ordered" them. We think it significant, as we explain later, to draw a distinction between acquiescence to orders of a superior, and giving an order to do an improper act. Finally, the contravention of State policy in allowing Mr. Richardson to live in State owned housing rent free is also unsupported (charge #9). The evidence indicates that individual waivers of rental fees have been allowed in the past and are within the discretion of a supervisor (such as Grievant Carlson was) to grant.

When we analyze the proved offenses, we find only one from which Grievant could have obtained personal gain: requesting and accepting a wood stove made on State time with State materials. Taking State property of significant value is clearly cause for discipline under the Brooks standard and specifically prohibited by personnel rules so no procedural Yashko deficiencies exist. C.f. DeForge, supra. There are, however, mitigating circumstances in that Grievant never actually used the stove and asserts he took it into his house mainly to please Mr. Pilbin and was always ready to return it. In short, Grievant's motives, from the believable evidence before us, were not to permanently deprive the State of surplus property for his own personal gain. We think a supervisor who lacks the force of character to refuse a stove under these circumstances is guilty of serious detrimental behavior, but we do not think this particular Grievant was venal. Rather, we believe he was involved in a system which encouraged

extra-legal compensation and was not strong enough to confront and reform it. Accordingly, we do not find just cause for dismissal based on these acts, because we do not find a corrupt motive.

The incident involving Mr. Haney's use of the refrigerator, which was Grievant's sole responsibility, albeit in an atmosphere of condonation by his superiors, is also a shortcoming detrimental to the employer's interests, under Brooks, supra, because it fosters employee expectation of extra-legal compensation. Yet there was no personal gain to Grievant. Instead, this act on the part of a supervisor, could better be characterized as neglect of duty to insist on honesty, and contrary to a system of compensation to employees solely as authorized by the legislature and personnel rules.

These two acts, standing alone, we believe sustain a finding of just cause for severe punishment short of dismissal. Having reached this conclusion, we then feel it our task to determine whether the remaining sustained charges amount to instances of repeated or accumulated conduct sufficient to warrant dismissal. Brooks, supra, and Grievance of Paul Cook, 3 VLRB 105 (1980). We conclude they do not for the reasons which follow.

Yashko teaches that an employee must have fair notice of punishable conduct. The conduct sought to be punished here is of two kinds: failure to terminate improper practices such as maintenance of the "shop fund" and the system of abuses it entailed, which circumvented carefully drawn accounting rules for State property; and failure to report a superior's wrongdoing to a higher authority, which we characterize, as the parties have in their contract, as "whistle blowing." We analyze both separately.

Taking action to terminate improper practices condoned by superiors requires fortitude Grievant did not possess. But possession of character

traits required to reform pre-existing abuses condoned by superiors is not required by the personnel rules to avoid dismissal, although that deficit might be weighed when considering professional advancement. More importantly, we do not see how Yashko's fair notice requirement can be met, when from all the evidence we can only conclude that the complained of conduct was within the expectation of management. Ordinarily, we would find notice of dismissable conduct for such acts as selling State property to private persons to benefit a few employees by use of the "shop fund" implicit in a well managed department. But, until the advent of Mr. Laferriere, it was not well managed in this respect. Quite the reverse. The shop fund had been established long before Grievant's employment as Regional Park Supervisor. We see no reason why Grievant should suspect the continued maintenance of that fund by cashing in scrap copper and other materials was improper, let alone grounds for dismissal. The use of that fund with respect to informal sales, services and swaps to shop employees with the intent to benefit the State is on the same footing. The charge relating to the painting of Mr. Johnson's truck is also suspect. Supervisors higher in the chain of command above Grievant, Mr. DeForge and Mr. Barber, both were aware of the painting of Mr. Johnson's truck and were in a position either to stop it or allow its completion. They chose to allow it to continue, without redressing or disciplining Grievant or any others involved.

The evidence surrounding charge #3 relating to the trade off of forges with Mr. Johnson and the sale of an old table saw to Mr. Pilbin indicates the State was not significantly harmed, if at all, by the deal in both instances. Both transfers were the result of an informal transfer of two pieces of machinery of negligible value to the State. While it is true

Grievant allowed these transfers to take place outside of the normal procurement and liquidation policies, he did so at no real harm to the State and without motivation of personal gain.

As we see it, Yashko instructs us not to punish middle management level employees for being overwhelmed by complexities not of their own making where job performance, rather than venal or negligent conduct, is at issue. Yashko requires clear standards of conduct to be established by superiors. That element is missing here and we decline to discipline Grievant for these ommissions.

The State insists that Grievant's failure to report his superior's conduct in billing to the State a garage door for his personal use, and ordering State purchased fire wood for personal gain are dismissable offenses. The contract between the parties only attempts to prevent reprisals against "whistle blowers." It does not mandate affirmative conduct. Moreover, until the appointment of Commissioner Laferriere in September, 1979, it appears it may have been pointless to do so even if an employee in the Department of Forests and Parks was so inclined. Thus, Grievant's shortcomings are less than might otherwise be the case. Nor, we believe, do the personnel rules cited by the State, §3.011, 3.012, 3.013, or 3.014, direct an employee to report wrongdoing on the part of his superior or face dismissal. They clearly proscribe conduct leading to an employee's personal gain. Additionally, Rule 3.012 provides that an "employee shall not use his position to secure special privileges for others." We think the prohibition here is against actively assisting or conspiring with another for personal gain. If that rule is intended to require an employee to risk his own job and other reprisals by reporting a superior's wrongdoing, we think it is deficient under the Yashko standard. In short, however desirable such conduct may be, we find no rule or law, either in the contract or the Rules

and Regulations which requires an employee to "blow the whistle" on one's fellow employees, much less one's supervisor.

We have been more troubled by the decision of what penalty to impose than by any other aspect of the case. Believing as we do that the legislature intended this Board to attempt to set uniform punishments for State employees we are not content to uphold management's choice of discipline if any punishable fact is proved. Our analysis of the evidence, as we have said, shows that Grievant received personal gain by accepting a wood stove of substantial value. The example set by a man in his position is as culpable as the offense. C.f. Grievance of Robert DeForge, supra. And, while we do not intend to punish Grievant solely for lacking the fortitude of character and decisiveness to end improper practices, we cannot ignore them either. They manifest a neglect of duty albeit mitigated by his superiors' bad example. The contract requires progressive discipline. Disciplinary action next in severity is demotion, and next after that is suspension. We think a combination of both disciplines appropriate here. Grievant had an excellent record until the incidents here came to light. His contamination by superiors was not entirely his fault. We believe him to be a valuable State employee, who, with proper example from above, should be able to perform effectively.

ORDER

Now, therefore, for all the foregoing reasons, and based on the foregoing findings of fact, it is hereby ORDERED that the Grievance of Peter R. Carlson is upheld and that: 1) he be reinstated to a position in the Department of Forests and Parks, which position represents a demotion contained in the Personnel Rules and Regulations; and 2) his reinstatement to

State service shall include suspension without pay for a period of twenty working days.

Dated this 14th day of July, 1980, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

Robert H. Brown

Before SC

Reversed by SC