VERMONT LABOR RELATIONS BOARD

Grievance of:	)	DOCKET NO. 79-98S
	)	
ROBERT L. DeFORGE	)	Re: Dismissal from State Service

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On December 28, 1979 (and as amended January 3, 1980), Robert L. DeForge, "Grievant," through his attorney, filed a grievance with the Vermont Labor Relations Board appealing his dismissal from State service. Grievant was employed as Park Operations Chief with the State of Vermont Department of Forests and Parks, Agency of Environmental Conservation. As such, Grievant was a full-time permanent employee under the Agreement between the State of Vermont and the Vermont State Employees' Association, Inc. for the Non-management unit effective July 1, 1979, Grievant's status not having been "finally determined" otherwise [See "Jurisdictional Note," Memorandum and Notice of Decision, Grievance of Robert L. DeForge, 3 VLRB 196, 200, (1980).].

Grievant claims the reasons given by the State for his dismissal do not constitute "just cause" under the contract and that the State was required to impose an alternative penalty in Grievant's case pursuant to the contractual progressive discipline policy.

Answers filed by the State on January 3 and 7, 1980, maintained Grievant's actions did constitute just cause for dismissal, and that in his case, bypassing progressive discipline steps was appropriate.

Counsel for the Board, Peter J. Monte, conducted prehearing conferences between the parties on February 22 and April 3, 1980, for the purpose of determining those factual and procedural matters to which the parties could stipulate so that the hearing of this matter would proceed most expeditiously.

Evidence was presented and prefiled testimony was admitted in three separate hearings held on April 10, 11, and 25, 1980, in the Board hearing room at Montpelier, Vermont. Board members Kimberly B. Cheney, William G. Kemsley, Sr., and Robert H. Brown were present at all three hearings. Attorney Gary D. McQuesten represented Grievant. Assistant Attorney General Bennett E. Greene represented the State.

Requests for findings of fact and memoranda were filed by Grievant's counsel and the State on May 12, 1980. On May 19, 1980, a Memorandum and Notice of Decision, supra, upholding the dismissal was issued by the Board pursuant to Grievant's motion.

FINDINGS OF FACT

1. Effective December 11, 1979, Grievant was dismissed from his position as Park Operations Chief with the State of Vermont Department of Forests and Parks (the "Department"), Agency of Environmental Conservation.

2. At the time of his dismissal, Grievant was a permanent status full-time State employee under the Agreement between the State of Vermont and the Vermont State Employees' Association, Inc., effective July 1, 1979, for the Non-management unit (the "Contract").

3. Grievant was initially employed as Park Operations Chief in April, 1967.

4. At the time material to this grievance, Grievant's immediate supervisor was Rodney Barber, Director of Parks. Rodney Barber was, in

turn, directly supervised by Leo Laferriere, Commissioner of Forests and Parks.

5. The class specification for the position of Park Operations Chief as described in State's Exhibit #5 is made a part of these findings.

6. The position description for Park Operations Chief as described in State's Exhibit #6 is made a part of these findings.

7. At any one time, only one person held the position of Park Operations Chief.

8. Grievant directly supervised about five or six Park Regional Supervisors, and they in turn each supervised several Departmental workers in their respective districts.

9. Grievant's position as Chief gave him jurisdiction over the operations in all of the State parks in Vermont.

10. Among other duties, tasks and activities, Grievant performed the following as Park Operations Chief:

(a) fiscal accounting;
(b) administration of personnel matters, including writing and approving performance evaluations;
(c) requisitioning of supplies and equipment; and
(d) inventory control.

11. By letter dated December 11, 1979, from Commissioner Laferriere, admitted as State's Exhibit #7 and made a part of these findings, Grievant was cited for "gross neglect of duty and gross misconduct" and was given the following reasons for his dismissal.

> 1. In the past several years you have had delivered to your home numerous truck loads of wood which were paid for by, or were the property of, the State of Vermont.
>
> 2. In the fall of 1978 you had installed on your personal residence bulkhead doors, constructed and installed by State employees on State time and utilizing State materials.

3. On or about November 30, 1978, you had an overhead door panel, paid for by the State of Vermont, installed on your personal residence by State employees on State time. Furthermore, the bill for the door panel ($69.30) was, with your knowledge, improperly billed to Brighton State Park.

4. You were advised by a Departmental employee of the inappropriate use of State facilities, equipment and personnel for personal gain and failed to act accordingly. This is a violations of #3.01, 3.011, 3.012, and 3.013 of the Rules and Regulations for Personnel Administration.

12. The dismissal letter stated, among other things, "Any of these reasons separately, or some or all of these reasons together, are sufficient to dismiss you as aforesaid."

CHARGE #1, RE: DELIVERY OF FIREWOOD

13. Charge #1 read: "In the past several years you have had delivered to your home numerous truckloads of wood which were paid for by, or were the property of, the State of Vermont."

14. State's Witness Ronald Pilbin, employed by the Department from September, 1965, to October, 1978, gave uncontested testimony regarding Charge #1.

15. Ronald Pilbin worked for the Department of Forests and Parks for about twelve years until retiring sometime in 1978.

16. Pilbin's supervisor in 1976, 1977 and 1978 was Peter Carlson, who in turn was supervised by Grievant.

17. In the fall of 1976, Grievant asked Pilbin to bring him a load of wood from a bobbin mill in Richford, Vermont.

18. Pilbin did not own a truck.

19. Using a State-owned truck, at least a one-half ton truck, Pilbin drove to the bobbin mill accompanied by Grievant's son.

20. Pilbin and Grievant's son took on a load of scrap wood at the bobbin mill and then delivered it to Grievant's home.

21. Pilbin spent an entire working day, on State time, driving to the mill, loading the wood, and delivering it to Grievant's home.

22. Grievant never paid anyone or offered to pay anyone for that wood, the use of the State-owned truck and fuel, or the use of Pilbin on his work time.

23. A second time in 1976 Grievant asked Pilbin to bring him wood from the bobbin mill.

24. On that occasion, he again used a State-owned truck and took a work day on State time to go to the mill, take a load, and deliver it to Grievant's home.

25. Grievant never paid or offered to pay anyone on that occasion for that wood, the use of the State-owned truck and fuel, or the use of Pilbin on his work time.

26. On three other occasions, all in 1977, Pilbin delivered wood from the bobbin mill to Grievant's home, all under the same circumstances and conditions as indicated in findings 18 - 25 above. In each case, Grievant asked that the delivery be made for which he never made any payment.

27. In 1977, Pilbin also drove two truckloads of State-owned wood from the Groton State Forest, again using State trucks, but not on State time, to Grievant's home.

28. At least one of those deliveries was requested directly by Grievant, and the other was requested for him in his presence.

29. Grievant never paid or offered to pay for the State-owned wood, use of the State-owned truck, or the fuel.

30. In the late summer of 1979, Grievant also requested that Wilson Shields, a maintenance mechanic employed by Department of Forests and Parks, deliver some wood to his (Grievant's) home.

31. Thereafter, Shields personally delivered three loads of wood to Grievant's home from Groton State Forest, using State trucks.

32. Some of the time spent by Shields delivering the wood was time he ordinarily would have been working for the State.

33. On each of those three occasions, the firewood delivered had been felled by Shields and stocked by Shields and another employee for use at Forest and Parks campgrounds.

34. In addition to the three loads of wood delivered by Shields, two other loads of that State-owned wood were delivered to Grievant's home by Grievant's nephew who was employed as a seasonal employee at that time in Groton State Forest.

35. When Shields delivered the last load of wood to Grievant's home, Grievant was present and saw the delivery being made in a State-owned truck.

36. At that time, Grievant approached Shields and told him that enough wood had been delivered, and not to deliver any more.

37. At no time did Grievant ask Shields where the wood had come from. Nor did Grievant question Shields about the use of the State truck to deliver firewood to his (Grievant's) home. Nor did Grievant ask about payment, offer payment, or make payment for the wood, use of the vehicle, or the truck fuel. Neither did Grievant offer to return the wood, reprimand Shields for delivering it, or inform Shields he should not have delivered it.

CHARGE #2, RE: CONSTRUCTION AND INSTALLATION OF BULKHEAD DOORS

38. In the fall of 1978, Grievant asked Shields to help him build some bulkhead doors for a new bulkhead entrance to the cellar on Grievant's personal residence.

39. Shields built the bulkhead doors, including one trip from Groton to the East Montpelier residence of Grievant to measure the doors, using State-owned materials, and during State time (his working hours).

40. With the assistance of Grievant's son on a Saturday, Shields installed and painted the bulkhead doors onto Grievant's home in Grievant's presence.

41. At no time did Grievant inquire of Shields where he obtained the materials to construct or paint the doors, or offer to pay Shields or the State for time and materials expended in the construction and installation of the door.

CHARGE #3, RE: GARAGE DOOR PANEL REPAIR

42. Sometime before the fall of 1978, Grievant brought a section of an overhead garage panel door from his personal residence into the Groton State park shop, expecting that needed repairs to the rotted wooden section would be made at some time by Groton State Park employees.

43. It was Grievant's belief that in order to repair the section of garage door he brought into the Groton State Park shop, a six foot by four inch grooved rail would need to be replaced.

44. Upon the direction of Peter Carlson, Regional Park Supervisor, Shields undertook this task. Shields, however, independently determined that the repair to Grievant's garage door required a replacement panel in

addition to a botton support rail. Thereafter, he ordered a new door panel from an overhead door company in St. Johnsbury, which he (Shields) billed to the State.

45. In the fall of 1978, Shields and former Department employee Thomas Haney, a maintenance mechanic at Groton State Park assigned to work with Shields, traveled to Grievant's personal residence in East Montpelier from Groton State Park to install the new garage door panel and rail. Shields and Haney did so in a State vehicle during working hours.

46. Grievant received in excess of one hundred invoices weekly requiring his signature of approval. Several Park sites throughout the State have overhead garage doors of the type sold by St. Johnsbury Overhead Door Company and at Grievant's personal residence.

47. Grievant has signed invoices on several occasions for such doors or parts of doors from that company.

48. Grievant was not aware that the invoice he signed (Board's Exhibit #2) for $69.30 represented materials used in the repair of the garage door panel on his personal residence.

49. Employees Shields and Haney did install on Grievant's personal residence a new garage door panel with new hardware, and then proceeded to paint the new panel with a white primer paint (See Grievant's Exhibit #2). Grievant's other garage door remained all one color, as the newly "repaired" garage door had appeared before Haney and Shields worked on it.

50. Grievant was aware State employees had repaired his garage door in some manner on State time, using State materials.

51. Grievant made no attempt, once he was aware his garage door had been repaired, to reimburse or compensate the State or any employees for expenses incurred in the repair of his garage door.

CHARGE #4 RE: PAINTING OF PRIVATELY-OWNED VEHICLE IN STATE PARK SHOP

52. In the fall of 1979, the employees at the maintenance shop at Groton State Park decided to repaint the personal truck of Clayton Johnson, at that time an employee of the State of Vermont who was soon to retire. Employees working on the paint job viewed it as a sort of retirement present to Johnson and a way of compensating him for some appliances he donated previously to the shop. The majority of the work was performed by Haney.

53. State materials were used in the painting of Johnson's truck.

54. While some of the time spent working on the truck of Clayton Johnson was Haney's personal time, Haney also worked on it on State time.

55. During the painting operation, Grievant visited the shop, noted that a personal vehicle was being worked on, and inquired of Haney as to whose truck it was. Haney advised Grievant, and Grievant indicated to Haney's supervisor, Peter Carlson, to finish the job and get it out of here, or words to that effect.

56. Thereafter, Grievant did not reprimand any employee for the use of State materials, personnel, facilities or equipment in the painting of Johnson's private vehicle.

57. The Rules and Regulations for Personnel Administration, are on file with the Board and are admitted in evidence here. Rules 3.01, 3.011, 3.012, and 3.013 relating to "Employee Conduct," provide:

> 3.01 Employee Conduct: Every employee shall fulfill to the best of his ability the duties and responsibilities of his position. In his official activities, the classified employee shall pursue the common good and shall uphold the public interest as opposed to personal or group interests.
>
> > 3.011 Every employee shall during his hours of duty and subject to such other laws, rules, and regulations as pertain thereto, devote his full time, attention, and efforts to his office or employment.

3.012 An employee shall not use his position to secure special privileges or exemptions for himself or others.

3.013 An employee shall not use State property or equipment for his private use or for any use other than that which serves the public interest.

58. Admitted in evidence as Grievant's Exhibit #8 were Grievant's annual Performance Evaluation Reports for the following evaluation periods: April, 1967 - November, 1968; December, 1970 - November, 1971; July, 1974 - June, 1975; July 1975 - June, 1976; and July, 1977 - June, 1978. For those years, Grievant received the following overall ratings which were accompanied by generally positive comments from his evaluating supervisors:

a. 1967 - 1968, (2 reports)
April, 1967 - October, 1968, "Fully Satisfactory," a numerical rating of 3 on a 4 point scale.
November, 1967 - November, 1968, "Fully Satisfactory," a numerical rating of 4 on a 5 point scale [form evidently was revised];

b. 1970 - 1971, "Fully Satisfactory," a numerical rating of 4 on a 5 point scale.
Comments: "... thoroughly dependable ...," "... does a good job supervising and co-ordinating the efforts of a very complex division ... evidenced by the smooth operation of parks ..."

c. 1974 - 1975, "Outstanding," highest possible rating.
Comments: "Sensitive to the needs of people, and has the judgment and ability to work with them."

d. 1975 - 1976, "Frequently exceeds job requirements/ standards," [new scale] comparable to "Fully Satisfactory" rating of 4 on 5 point scale.
Comments: "dedicat[ed] to his work, ... [shows] empathy towards subordinates and public."

e. 1977 - 1978, "Frequently exceeds job requirements/ standards."
Comments: "very effective in supervising the broad scale state wide park operations program."

59. Letters to Grievant from fellow workers and citizens written soon after his dismissal, admitted in evidence as Grievant's Exhibit #9, expressed sentiments of praise and support on Grievant's behalf.

60. We conclude the Performance Evaluation Reports described in finding #58, infra, accurately reflect Grievant's record of prior good service, representing overall ratings that exceed "Satisfactory" performance levels.

OPINION

Once again, we are required to assess a State employee's conduct and resultant dismissal within the context of a personnel system "premised on dismissal for cause," In re: Maher, ___ Vt. ___, 326 A.2d 142, 144 (1974). In re: Brooks, ___ Vt. ___, 382 A.2d 204, 207 (1977), defines "just cause" in this context as:

> "... some substantial shortcoming detrimental to the employer's interests, which the law and a sound public opinion recognize as a good cause for his dismissal ...
> The ultimate criterion of just cause is whether the employer acted reasonably in discharging the employee because of misconduct ..."
> (cites omitted)

In imposing disciplinary action of any kind, the contract controling here expressly provides for a policy of progressive discipline aimed at deterrence and correction. It provides in Article XV:

> "1. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:
>
> (a) ...
> (b) ...
> (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 differing degrees so long as it is imposing discipline for just cause."

We understand the contract to require "cause" when imposing any disciplinary action enumerated above, short of dismissal (reprimands, suspension and demotion). A dismissal, however, requires grounds of a more serious nature than that sort of employee conduct which precipitates disciplinary actions one through four. In order for the State to impose this most extreme penalty, termination of employment, it must have more than "cause" for that action, it must have "just cause" under the Brooks "substantial shortcoming" standard.

The last phrase of Article XV, section one, contains two requisite conditions under which bypassing lesser disciplinary actions is allowable. First, the State must be "imposing discipline for just cause"; and second, the case at hand must be an "appropriate case" which warrants bypassing progressive discipline.

As we indicated in the following passage of our Memorandum and Notice of Decision, 3 VLRB 196, 197-199, (1980), previously issued in this case, we feel the State has satisfied the burden of establishing just cause for Grievant's dismissal. Essentially, we found as facts those incidents listed in the dismissal letter (State's Exhibit #7) as reasons for his dismissal (see finding #11 infra).

> "Grievant admitted charge #1. It is uncontroverted that he did in fact, over several years, receive several loads of firewood for his personal use, all of which were transported by State trucks, in some instances over a substantial distance. With respect to charge #4, while Grievant may have disapproved of the painting of an employee's personal vehicle at a park shop, it is uncontroverted that he failed to terminate immediately this inappropriate use of State personnel, facilities, materials, and equipment. These incidents are clear evidence of the State's position that Grievant knowingly engaged in, approved and/or encouraged his subordinates in wide-spread abuse and misappropriation of State resources and property over a long period of time.

> At the close of extensive hearings in this case, only two facts were seriously disputed. With respect to charge #3 there is a question whether Grievant knew that the bill for $69.30 he initialled (and thus approved) for a door panel was the bill for the one that was replaced on the garage door of his personal residence. The Department has installed and maintains several garage doors of this type at many park sites throughout the State. It is plausible that Grievant may not have been aware at the time he signed Board's Exhibit #2 that it represented an invoice for his garage door in particular. Nonetheless, Grievant was aware that State materials, time, transportation, and personnel were used to repair the door.
>
> Similarly, with respect to charge #2, Grievant maintains the bulkhead doors were installed at his home on a Saturday. Still, he was fully aware that State time, personnel, and transportation had been utilized before the doors were eventually installed. Grievant had previously brought repair work for his personal residence to a park shop, fully expecting his subordinates to do such work with State materials and on State time. Accordingly, we are persuaded Grievant was aware State materials were used in the construction of the bulkhead doors. In any event, he made no attempt to ensure they were not, and did not offer to reimburse the State or his employee, Wilson Shields, for any expenses related to their construction and installation."

When all the evidence is considered, it is clear that Grievant, holding a high level supervisory position in State government, directly or indirectly used his access to State resources for personal gain. These resources at one time or another included: State personnel, materials, equipment, and facilities. While Grievant denied in part the particular charges made against him as reasons for his dismissal, he admitted the ongoing existance of such practices in general. We conclude the pattern of conduct in evidence here constitutes just cause for dismissal under Brooks.

We also conclude this case is an "appropriate case" for bypassing the progressive discipline system. Repeated instances of conduct which could be considered criminal have been established. Whether or not Grievant's

conduct is actually criminal, it is certainly a substantial misappropriation for personal use of State materials and use of equipment and personnel to a degree which is not trivial.

In short, the seriousness of the offenses in Grievant's case distinguish it from the Grievance of Paul Cook, 3 VLRB 105 (1980). Considered singularly or aggregately, the charges sustained against grievant Cook failed to amount to grounds for dismissal. In the Cook case, we were required to determine under the Brooks standard, when "molehills" of misconduct become "mountains" of cause sufficient to sustain dismissal. There we found:

> "... 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."

An additional fact warranting bypassing of progressive discipline is that Grievant was a supervisor whose example might influence the rest of the employees in his department. An act of misuse of State property by one in authority may be taken as condonation of similar acts by subordinates. An employee in a low paygrade without subordinates who takes State property injures the employer only to the extent of the property taken. A person in Grievant's position who does what he did, however, undermines the entire honesty and ethical standards of those he supervises.

Grievant urges us to modify the penalty imposed (dismissal) on account of his record of prior good service. In determining the appropriateness of one type of disciplinary action over another, and thus whether or not this Board shall order a lesser penalty than the one imposed, we must consider the seriousness of the offense(s) and the consequences to the employer of alternative disciplinary action.

Ample evidence of Grievant's prior good service reflects his personal contributions to the State throughout his career with the Department. A crowd of twenty to thirty Department employees who presumably took leave to attend the hearings in this proceeding, while not on the record, manifests the fact that Grievant was held in high esteem by many of his associates. Notwithstanding the sense of humanity and undoubted affection demonstrated by this supportive following, combined with the evidence of official and personal recognition of Grievant's dedicated service, we still feel his dismissal was warranted and appropriate. The State as the employer and a public institution retains the right, in fact the obligation, to run an honest and efficient operation. Grievant's prior good service does not redeem him from the nature of his offenses and thus the severity of his punishment. Contra, Grievance of Paul Cook, supra, where the offenses did not constitute just cause for dismissal. There, the less serious nature of grievant Cook's offenses (typified by a "short-cut" managerial style) combined with his prior record of good service, lead this Board to modify the dismissal to a suspension. Here, however, to restore Grievant to work, even in a reduced capacity by demotion, would necessarily imply that this Board was condoning the misconduct. Furthermore, the "ripple effect" of Grievant's involvement of his subordinates in his improprieties leads us to

conclude that no action short of his dismissal would best ensure the termination of those improprieties. Once dismissal is justified, we would need extraordinary factors not in evidence here to substitute a less serious disciplinary action on the progressive discipline scale.

The only issue remaining is whether Grievant's actions and inactions given as reasons for his dismissal constitute (in addition to just cause for dismissal) "gross neglect of duty." If so, the contractual conditions for dismissal without two weeks notice or pay in lieu of notice would be met. We refer to Article XV, section 3, which states:

> ... [A]n employee may be dismissed immediately without prior notice or pay in lieu of notice for any of the following reasons:
>
> (a) gross neglect of duty;
> (b) refusal to obey lawful and reasonable orders given by superiors;
> (c) conviction of a felony;
> (d) conduct which places in jeopardy the life or health of a co-worker or of a person under the employee's care.

In agreeing to the foregoing language, the parties negotiated a system of discipline in which serious offenses will, in turn, be dealt with seriously. "Negligence" means both a failure to act as well as an affirmative act taken which is reckless and adversely affects life or property. Certainly, there are degrees of negligence or neglect of duty. If the record of Grievant's misconduct consisted of one isolated incident, for example, the acquiescence to the painting of Mr. Clayton's personal vehicle, we could not find him culpable for gross neglect of duty. While we would hold him responsible for neglect of his duty as a supervisor to redress and eliminate such practices, such conduct standing alone would not rise to the level of gross neglect. But, when we add to that incident the additional

evidence of Grievant's misuse of State property and personnel, a pattern of neglect of duty emerges which we find constitutes gross neglect of duty. The improriety of these isolated incidents of a similar nature increases substantially when considered aggregately. The practices and policies in force under Grievant's supervision and direction evidence a reckless disregard for State property, and consequently, the property of the taxpayers of Vermont. We concur with the State's assessment of Grievant's case as one evidencing gross neglect of duty. Therefore, he is not entitled to notice or pay in lieu of notice.

ORDER

Now, therefore, based on the foregoing findings of fact and for all the foregoing reasons, the grievance of Robert L. DeForge is ordered DISMISSED and is DISMISSED.

Dated this 29th day of May, 1980, at Montpelier, Vermont.

See page 200

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

Robert H. Brown