

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 08-40
VICTOR DWIRE)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On September 3, 2008, Victor Dwire (“Grievant”) filed a grievance through Attorney Kerry DeWolfe, contending that the State of Vermont Agency of Transportation (“Employer”) violated Article 14 of the collective bargaining contract between the State and the Vermont State Employees’ Association for the Non-Management Bargaining Unit effective July 1, 2008 – June 30, 2010 (“Contract”) by dismissing Grievant without just cause from his Resident Engineer position with the Employer.

The Labor Relations Board conducted hearings in the Board hearing room in Montpelier on March 5, May 6 and May 7, 2009, before Board Members Edward Zuccaro, Chairperson; Leonard Berliner and James Kiehle. Attorney Kerry DeWolfe represented Grievant. Assistant Attorney General Toni Clithero represented the Employer. The Employer and Grievant filed post-hearing briefs on June 4, 2009.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

...

**ARTICLE 14
DISCIPLINARY ACTION**

1. No permanent or limited status employee covered by this Agreement shall be disciplined without just cause. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:
...
 - b. apply discipline . . . with a view toward uniformity and consistency;
 - c. impose a procedure of progressive discipline . . .

d. In misconduct cases, the order of progressive discipline shall be:

- (1) oral reprimand;
- (2) written reprimand;
- (3) suspension without pay;
- (4) dismissal.

...

f. The parties agree that there are appropriate cases that may warrant the State:

- (1) bypassing progressive discipline . . .

...

2. The appointing authority or authorized representative . . . may dismiss an employee for just cause with two (2) weeks' notice or two (2) weeks' pay in lieu of notice. . .

...

3. Notwithstanding the provisions of paragraph 2 above, the appointing authority or authorized representative . . . may dismiss an employee immediately without two (2) weeks' notice or two (2) weeks' pay in lieu of notice for any of the following reasons:

...

(b) gross misconduct;

...

...

8. The appointing authority or authorized designee may suspend an employee without pay for reasons for a period not to exceed thirty (30) workdays.

...

10. In any misconduct case involving a suspension or dismissal, should the Vermont Labor Relations Board find just cause for discipline, but determine that the penalty was unreasonable, the Vermont Labor Relations Board shall have the authority to impose a lesser form of discipline.

...

2. Grievant began working for the Employer in June of 1968. He remained employed by the Employer for 40 years. He always worked in the Construction Division. He was Resident Engineer from approximately 1982 until his dismissal in 2008.

3. Grievant received no discipline during his 40 years of employment until he was dismissed. He always received performance ratings of at least satisfactory on his annual performance evaluations. During the last several years, his performance has been

rated outstanding. His supervisor, Regional Engineer Al Campo, considered Grievant to be one of his best Resident Engineers.

4. Resident Engineers are the Employer's representatives on projects and are primarily responsible for ensuring the carrying out of construction contracts. They have responsibility for all aspects of the construction projects to which they are assigned. Beginning in approximately 2000, this included the supervision of inspectors who are employed by independent consulting companies. Consultant inspectors assist the Employer in supervising the work performed by the construction contractors to ensure that the contractors follow the Employer's plans and specifications.

5. Generally, Campo consulted with Grievant concerning inspectors that were needed on a project and then a determination was made as to who was available to fill those positions. Campo ultimately had the responsibility to hire and remove the inspectors. Inspectors were removed from a project when their services were no longer needed or when it turned out that they were not suited for the job.

6. Greenman Pederson, Inc. ("GPI") had a contract with the Employer to provide consultant inspectors on construction projects. Grievant played no role in the contracting process. GPI employed Nick Farina as a construction supervisor. Farina visited projects where GPI consultant inspectors were working to ensure that matters were going smoothly from the Employer's and inspectors' perspectives. Farina ensured that GPI inspectors had whatever equipment they needed to perform their work. Farina had retired from his career as an engineer for the New York State Department of Transportation and worked seasonally for GPI. Vermont was added to his territory in

2005. Farina and Grievant met for the first time near the end of the 2005 construction season.

7. Grievant was responsible for overseeing three projects during the 2006 construction season: a) the replacement of the Langdon Street Bridge in Montpelier, b) a repaving project in Waitsfield on Route 100, and c) a bridge project in Duxbury. Through much of the season, Grievant supervised two GPI inspectors: Jay McKee on the Route 100 paving project, and Loren Taylor on the Langdon Street Bridge project. Ken Atkins, a consultant from the consulting firm Peters Construction Consultants, assisted Taylor on the Langdon Street Bridge project.

8. There was a firm deadline of November 3, 2006, for the completion of the Langdon Street Bridge project, which required the closing of a commercial street in Montpelier. Chris Williams of the Structures Division became concerned by mid-September of 2006 that Loren Taylor was not competent to handle the project. Williams expressed his concerns to David Hoyne, Construction Engineer for the Employer and Campo's supervisor. Hoyne discussed these concerns with Grievant. Grievant informed Hoyne that Taylor was not one of the better inspectors with which he had worked, but that he thought he could successfully complete the project with Taylor continuing to work on it. Hoyne also discussed these concerns with Campo, and Campo discussed them with Grievant.

9. Shortly thereafter, Campo discovered from Ronald Gray, Northeast Regional Constructional Engineer for the Employer, that Bert Fissette, a consultant inspector with the consulting firm Peters Construction Consultants, may soon become available after his work on a project he was working on with Gray ended. Fissette had

worked for the Employer for a long time before becoming a consultant inspector. Campo considered Fissette well-trained and very knowledgeable concerning bridge construction.

10. Campo discussed with Grievant whether he wanted Fissette to replace Taylor and finish the Langdon Street Bridge project. Campo and Grievant discussed the situation and together decided at some point prior to October 5 that Fissette would replace Taylor on the project when he became available. They also decided then that Fissette's presence on the project would mean that Atkins also no longer would be needed on the project. Atkins worked for the same consulting firm as Fissette.

11. Farina visited Grievant's projects every one to two weeks during the 2006 construction season. Farina typically asked Grievant questions during visits such as, "what can I get you?" or "what do you need?" Farina's questions made Grievant uncomfortable. On one occasion, Grievant asked Farina what he meant by his questions. Farina replied that Charlie (Farina's boss) wanted to make Grievant happy. Grievant responded: "I am happy". Prior to October 5, 2006, Grievant developed a suspicion that Farina may be "on the take". There is insufficient evidence to establish that Grievant informed Campo prior to October 5 that he thought Farina may be "on the take".

12. On October 4, 2006, Farina told Grievant during a phone conversation that he was going to visit Grievant the following morning. On the morning of Thursday, October 5, 2006, Farina approached Grievant on the Route 100 project where he was sitting in his truck. Farina proposed that they have breakfast together. Grievant agreed and they went to a nearby restaurant.

13. Grievant and Farina discussed personal and business matters while they were in the restaurant. Farina asked Grievant how long he expected McKee and Taylor to

be on their respective Route 100 paving project and Langdon Street Bridge project. Grievant indicated that they probably would be on the projects until the end of October. Grievant did not mention to Farina that there was a plan for Fissette to replace Taylor on the Langdon Street Bridge project. Farina paid for his and Grievant's meals at the conclusion of breakfast. Farina paid for Grievant's meal because he had invited him to have breakfast.

14. After exiting the restaurant, Farina and Grievant continued their conversation in the restaurant parking lot. Farina asked Grievant if he had any plans for the upcoming Columbus Day holiday weekend. Grievant responded that he was working on the Langdon Street Bridge project, but that it would be a nice time to go bow hunting as it was the opening of bow hunting season. Grievant indicated that he had not gone bow hunting recently. He said that his bow needed some parts but the manufacturer was out of business, and that he was considering getting a new bow. In the course of the conversation, Grievant told Farina that a bow could be obtained at Datillio's Sunoco Station on Shelburne Road in Williston. Grievant asked Farina if he knew where Datillio's was located. Farina indicated that he had passed Datillio's while traveling. Farina asked Grievant how much a new bow would cost. Grievant responded that it would cost around \$500-600, and that he would have to be specially fitted for the bow. Farina assumed that Grievant was asking him to buy him a bow. Grievant did not ask Farina to buy him a bow.

15. Farina then said he would check with his supervisor, Charles Edson, about whether GPI would get a bow for Grievant and would get back to him. Grievant was surprised by this statement from Farina and thought that maybe GPI really was "on the

take”. Grievant did not say anything in response to this statement by Farina. Grievant decided to wait to see what action GPI would take concerning buying him a bow.

16. Grievant did not inform Campo of his October 5 conversation with Farina at any time before or on October 10. Campo was on vacation on Thursday, October 5, and Friday, October 6. Campo did not work on Saturday, October 7, or Sunday, October 8. He also did not work on Monday, October 9, which was observed as the Columbus Day holiday.

17. Farina informed his supervisor, Charles Edson, on October 5 that Grievant had asked him for a hunting bow. Edson told Farina that GPI would not provide a hunting bow to Grievant. Edson instructed Farina to so inform Grievant.

18. At some point prior to October 9, Campo and Grievant discovered that Fissette was available to replace Taylor on the Langdon Street Bridge project. According to the plan developed together earlier by Campo and Grievant, this also would result in Atkins being removed from the project. Gray, the Employer’s Regional Engineer for the Northeast Region who had been overseeing Fissette on his now-finished project, in a telephone discussion prior to October 9, told Grievant that Fissette and Atkins worked for the same consulting firm and that Fissette was uncomfortable displacing Atkins. Grievant discussed the situation with Campo prior to October 9, and they decided as an accommodation to Fissette’s discomfort that Atkins would be moved to the Route 100 paving project to replace Jay McKee.

19. Fissette began working on the Langdon Street Bridge project on Monday, October 9, and continued to work full-time on the project until it was completed on

November 3. Atkins worked 9 hours on this project on October 8, 9 hours on October 9, and 6 hours on October 10 (Grievant's Exhibits 1, 2, 3, 4).

20. By October 10, Grievant spoke with Campo about the removal of Taylor and McKee from the projects. Campo confirmed that they should be removed from the projects by October 13.

21. On October 10, Farina visited Grievant on the Route 100 project. Grievant was in the construction trailer with a temporary employee. Grievant asked the employee to leave the trailer so that he could have a private conversation with Farina. After the employee left, Farina told Grievant that Edson said GPI would not buy Grievant a bow. Grievant responded by stating "Nick that's the right answer, I wouldn't have taken it"; or words to that effect.

22. At some time shortly after his October 10 conversation with Farina, Grievant had a telephone conversation with Campo in which he expressed concerns that Farina may be "on the take". Campo asked Grievant whether he was "kidding", and stated "don't even go there" and "you didn't take anything, did you?" Grievant responded that he did not take anything, and then told Campo of his conversations with Farina regarding the bow. Campo asked Grievant if he wanted it "elevated up". Grievant said "no", that he didn't think there was anything to it".

23. Grievant told Taylor and McKee on Wednesday, October 11 that Friday, October 13, would be their last day on the projects. Taylor told Grievant that he had expected to be removed from the Langdon Street Bridge project. McKee was upset about being removed from the Route 100 paving project and being given such short notice. Grievant told McKee he had not done anything wrong, and that he could leave the project

on the following day if he wished. On the following day, McKee asked Grievant why he was being removed from the project. Grievant told him that GPI consultant inspectors would not be working on his projects after October 13. Taylor and McKee worked on their respective projects until October 13.

24. Atkins worked 3 hours on the Route 100 paving project on October 10 and 4 hours on October 13. Atkins worked 32 hours the following week on the Route 100 paving project. His last day of work on the project was October 20. When Atkins left the project, there no longer was need for his services and he was not replaced (Grievant's Exhibits 5, 6).

25. On October 11, Charles Edson called David Hoyne, Construction Engineer for the Employer and Campo's supervisor, and asked to meet with him. Edson and Hoyne met on October 13, and Edson informed Hoyne that Grievant had solicited a hunting bow from GPI. Hoyne asked Edson if GPI would be willing to cooperate in any investigation of the incident. Edson indicated that GPI would so cooperate. Hoyne asked Edson to provide written statements on the alleged solicitation.

26. Farina wrote a memorandum to Edson dated October 16, 2006. The memorandum provided in pertinent part:

On October 4, 2006 Mr. Vic Dwyer called me on my cell phone and asked me when I was going to stop to see him. I told him I was planning on stopping on Thursday October 5, 2006.

On . . . (October 5) . . . I spoke to Mr. Dwyer and he said he would meet me at the intersection of Rte 17 & Rte 100. When he arrived, I asked him if he was available for breakfast . . . he said there was a café about ½ mile down on Rte 100 on the left side of the road. We went there.

. . . We talked for a while about our families and other work related matters. When we finished our breakfast I paid the check and Mr. Dwyer was waiting for me in the parking lot. When I leave a jobsite I always ask our Inspectors "if there is anything I can do, or if there is anything they need." I also said this to Mr. Dwyer.

Mr. Dwyer said to me in the parking lot that he would keep our (2) inspectors Loren Taylor and Jay McKee on the projects until the end of the month. Then Mr. Dwyer asked me if I knew where the Sunoco Station and Hunting Supply was on Route 7 in Shelburne Vt near Interstate I89. I said I saw the store in my travels. He said he was looking to buy a new Hunting Bow in that shop and the price was about (6 bills). But you have to go to the store and get it fitted to your frame. Because his bow was falling apart and they cannot get parts to repair it. It was obvious he wanted me to purchase it for him.

I told Mr. Dwyer I had no authority to do anything until I talked it over with Mr. C. Edson and Mr. K. Giles. When I told my Bosses they replied that we do not buy any personal gifts. If it was anything pertaining to work related matters we would more than welcome the purchase of any equipment.

So on Tuesday Oct 10, 2006 I went to Mr. Dwyer's field office in Duxbury, Vt. When I arrived at the field office, Mr. Dwyer told his Inspector (Nick) to go down and see if anyone from the . . .

After the Inspector left the field office I told Mr. Dwyer that G.P.I. doesn't provide any personal gifts. When I left the field office to continue my tour, Mr. Dwyer said to keep this request confidential, sh sh.

On Wednesday Oct 11, 2006, Mr. Loren Taylor who is an Inspector for G.P.I. working for Mr. Dwyer on a Bridge project in Montpelier Vt. called me and asked if I knew that Friday Oct. 13, 2006 was his last day of work. I said that Mr. Dwyer told me he would be there until the end of the month. Mr. Taylor said Mr. Dwyer told him Friday was the last day, but he could go right now if he wanted. Mr. Dwyer brought in 2 new inspectors from the (Peters Group) to do his work. Then Mr. Jay McKee called me and asked if I knew that Friday Oct. 13, 2006 was his last day on the project. I knew nothing of these changes. Mr. McKee said to me that Mr. Dwyer said he could go right now it wouldn't bother him. The next day Mr. Dwyer told Mr. McKee he should be looking for work with another firm. (State's Exhibit 1, p.5-7)

27. Jay McKee wrote a memorandum to Edson dated October 16, 2006. The memorandum provided:

On Wednesday October 11 at 3:00 PM Vic told me that Friday October 13 would be my last day, but I could leave earlier if I wanted to. He said that I hadn't done anything wrong, it was just my last day. Vic mentioned that Loren got his notice, too.

On Thursday October 12 Vic told me that he could have had me leave Thursday instead of Friday, but he gave me a free day. He told me that after Friday the 13th there wouldn't be any more GPI personnel on any of his jobs – maybe I should consider working for another firm. He did not respond when I asked him why. (State's Exhibit 1, p.4)

28. Edson sent Hoyne the October 16 memoranda from Farina and McKee. Hoyne received them on October 18. Hoyne referred the matter to the Criminal Division of the State Office of the Attorney General for investigation. Investigator Thomas Howell of the Criminal Division was assigned to conduct a criminal investigation. The Employer did not conduct its own investigation due to the criminal investigation.

29. On November 7, 2006, Howell conducted an interview of Grievant at the construction trailer of the Route 100 paving project. Grievant was not given any advance notice of the investigation or the interview. When Howell arrived, Grievant initially was unclear about who Howell was and why he was there. Prior to Grievant knowing Howell's identity, Grievant denied having a conversation with Farina on October 5 about a bow. Howell indicated that he was a detective with the Attorney General's Office and that he was there to talk to him about a conversation Grievant had with Farina. Howell and Grievant had a conversation which was not recorded followed immediately by a recorded interview covering the same material. During the unrecorded discussion, Grievant initially was vague in his responses to Howell's questions. Howell then informed Grievant that his conversation with Farina had been recorded and that Howell knew what had been said during the conversation. This was false; the conversation had not been recorded. After Howell so informed Grievant, Grievant told Howell that he had spoken to Farina about a bow.

30. The following exchanges occurred between Howell and Grievant during the recorded interview:

...
Howell: Do you recall a conversation you had with Nick Farina from GPI?
Grievant: I recall it now that we talked about it earlier.
...

Howell: . . .during that conversation, what - - what did he say to you?

Grievant: As I said to you before - - I mean, he asked me if I needed anything. . . I asked him what that meant . . he said, you know, anything . . .

Howell: Right. So during the course of that conversation when he asked you if you needed anything, was there any conversation about any particular item that you brought up?

Grievant: As you mentioned, there was mention about a bow.

Howell: Okay. And you mentioned a bow, a hunting bow, you mean a compound bow?

Grievant: Yeah. . . I wasn't specific. I think just the word bow.

Howell: Okay. And did you mention to Mr. Farina where he might find a bow like that?

Grievant: . . . the place of D'Attilio's was mentioned.

Howell: Okay. What is D'Attilio's again?

Grievant: It's a gas station, and a sporting goods station, and a fishing - - I guess you can book fishing trips there.

. . .

Howell: Okay. So you mentioned to him about D'Attilio's Would they be the ones that would have this kind of bow that you're talking about?

Grievant: They have bows. . . I didn't have any particular one - I didn't have anything particular - nothing particular mentioned.

Howell: What was - what was the conversation as far as - the content of the conversation? He asked you what you need and you say to him what?

Grievant: Bow.

Howell: A bow?

Grievant: Yeah

Howell: Okay. And did you tell him why you needed a bow?

Grievant: There was some mention - I had mentioned previously that - you know, about my bow being bad and stuff.

Howell: Okay. And so you were maybe looking -

Grievant: Yeah.

Howell: Your inference to him was that you needed a bow to replace the one you had, that sound right?

Grievant: He could have taken it that way, yeah. Yeah.

Howell: Okay. And did you mention how much the bow would cost?

Grievant: I think the - yeah, it was like 5 or 600 bucks.

Howell: \$600 sound right to you?

Grievant: Yeah. Somewhere in there. Yeah.

Howell: And what was Mr. Farina's response?

Grievant: Something about - he didn't - he didn't know anything about it but that he would - I think he said something about check with Charlie.

Howell: And who's Charlie?

Grievant: I think Charlie is his boss.

...

Howell: ... And did you see Nick Farina again at any time after that conversation?

Grievant: Yeah. He stopped in here maybe a week later.

Howell: And what was the content of that conversation?

Grievant: He said something about not – that – he mentioned it to Charlie or something, and he didn't – Charlie wasn't in favor of that. And I said, well, that's good, because I'm not either.

...

Grievant: ... I said, I don't – I wouldn't want – I wouldn't do it anyways and – and he told me – like I said, he went like that.

Howell: Okay. Motioning to his mouth –

Grievant: Yeah.

Howell: To his lips?

Grievant: Yeah. Yeah.

Howell: But the initial conversation, there was conversation by you and Nick about a bow at D'Attilio's, correct?

Grievant: Yeah. Yeah.

Howell: And that you needed one?

Grievant: I could – I didn't say I needed one. I said I could, you know –

Howell: Could use one ... would that be fair to say?

Grievant: Yeah.

Howell: I mean, I don't want to put words in your mouth but –

Grievant: Yeah. Yeah. Yeah. Roughly, yeah.

...

Howell: What was – what's (Nick Farina's) job? I mean what does he do? . . . Does he have people that work with you, is that what it is?

Grievant: He represents GPI, yeah.

Howell: GPI, they're a –

Grievant: Consulting outfit.

Howell: Okay. And do they have people on site with you guys?

Grievant: Yeah. Yeah.

...

Howell: Okay. How does that work as far as how they get – who – who puts them here and how do they get done or – do you know what I mean? Who decides why they're here, I guess?

Grievant: Al Campo, my regional engineer.

Howell: Okay. So he decides who's where?

Grievant: Yeah. Yeah.

Howell: And then who decides when they're not here, when they're done?

Grievant: He does.

Howell: Okay.

Grievant: ... he asked me, he said, do you need them? ... we had another guy get freed up that – that – on Langdon Street that was – that I

guess was felt could handle the job better than the guy that was in – the guy from GPI. . . They kind of replaced him.

. . .

Grievant: And the other guy down here, we got done doing the inspection – that portion that that guy was watching down there.

Howell: Okay.

Grievant: So Al told me to cut him loose. . . So we gave him – we gave him the rest of the week and – and told him that . . . that at the end of the week they'd be done.

. . .

Grievant: Its kind of like – you know, when somebody – you know, it's kind of like, talk with Al, and Al says whether they – they cut him loose or –

Howell: So Al makes the decision on that?

Grievant: Yeah.

. . .

Howell: . . . Let me ask you this question. If Nick shows up with a compound bow, what are you thinking?

Grievant: Well, I'm not – what am I thinking?

Howell: Yeah. What if he showed up with a compound bow that second meeting?

Grievant: No. I mean, I don't even want his t-shirts and his stuff he got. . . And I didn't then and, you know, he just kind of leaves them.

Howell: Okay. All right. We'll end –

Grievant: I'm –

Howell: I'm sorry. Go ahead.

Grievant: Yeah. I think I did mention to – I have mentioned that to Al. I just haven't . . . I'm pretty sure . . . really wasn't thought of as a big deal.

. . .

(State's Exhibit 1, p.9-22)

31. On January 16, 2007, the Vermont Attorney General filed a criminal charge against Grievant. The charge alleged that Grievant “corruptly solicited for himself a benefit of \$500.00 or more from a person who renders service or labor under such contract, to wit; while employed as resident engineer by the State of Vermont, solicited an employee of GPI to provide two hunting bows valued at more than \$500 in exchange for continuing the work of GPI inspectors through the end of October, in violation of 13 V.S.A. §1106”. The charge was supported by an affidavit filed by Howell asserting that

he had probable cause to believe that Grievant committed the offense of “kickbacks” in violation of 13 V.S.A. §1106 (State’s Exhibit 1, p.30-34).

32. On January 19, 2007, the daily newspaper *The Burlington Free Press* published an article about the criminal charges that had been filed against Grievant (State’s Exhibit 2).

33. Richard Tetreault, Employer Director of Program Development, sent Grievant a letter on January 26, 2007, informing him that he was temporarily relieved from duty with pay “to permit the appointing authority to investigate alleged misconduct to include an allegation that you corruptly solicited a benefit” (State’s Exhibit 1, p.35).

34. In February 2007, the Federal Highway Administration, U.S. Department of Transportation, suspended Grievant from working on projects that received federal funds based on the criminal charge and supporting affidavit (State’s Exhibit 1, p.36-41).

35. On May 6, 2008, Grievant provided the following written statement to the Employer:

Vic Dwire is supplementing his original statement to Thomas Howell primarily because it is incomplete.

By way of background, Vic has worked for many of his 40 years as a state employee with a variety of independent contractors. During the 2005 and 2006 construction season, he met Nick Farina, an employee of GPI. Farina’s duties were not clear to Vic. However, over the course of these two seasons, Farina came at least weekly to see him. On each visit he would repeatedly ask Vic, “can I get you anything?” “Do you need anything?” He also lobbied for GPI employees to be placed at job sites even though Vic did not make those decisions. Farina’s conduct made Vic uncomfortable. In September of 2006, Vic told his immediate supervisor, Al Campo, that Farina made him uncomfortable and that he thought he was “on the take”.

In August of 2006, Vic was the resident engineer for the Langdon Street Bridge replacement job in Montpelier. A GPI employee, Loren Taylor was on the job. Questions had been raised by others in the agency about Taylor’s competence. Vic was made aware of those concerns and took steps to oversee Taylor’s performance. At some point during the project, Al Campo mentioned that a well respected, very experienced independent contractor, Bert Fissette,

might become available to replace Taylor. Jay McKee, another GPI employee, was working at another of Vic's jobs, a repaving project on Route 100 in Waitsfield.

In October of 2006, Farina came once again to see Vic. He insisted that they have breakfast. Vic agreed. During their conversation, they talked about the work for the remainder of the season. They also engaged in casual conversation about their families and life outside of work. As they left the restaurant, Farina asked Vic about his plans for the weekend. Vic said he planned to work. He then said that it was the opening of bow season and he had thought about going out, but was not sure he really wanted to hunt; nonetheless, he would like a new bow. The comment was not intended to solicit any response. It was part of an ongoing debate he had been having with himself about whether he should get a new bow and whether he was really interested in killing a deer. Farina responded by asking where he would buy a bow and what it would cost. Vic answered his questions and Farina said he would talk to Charlie Edson, his supervisor, about whether they could get him a bow. Vic was surprised by that comment, although it appeared to confirm his concerns about Farina. He decided to do nothing and see how Edson responded. Vic intended to call Al Campo and report the matter if Farina came back and said that Edson would buy him a bow.

The next week, Farina returned and while in the office said that Edson had said that they could not buy him a bow. To which Vic replied, "that's the right answer, I wouldn't have taken it." They stepped outside the construction office and Farina said, don't say anything about this to anyone and put his finger against his lips. Vic said, "I won't."

About the same time, Bert Fissette finally became available to work on the Langdon Street Bridge job and Al Campo decided to use him and terminate Taylor. Mr. Campo believed Fissette was capable of doing the work of both Taylor and another contractor, Ken Atkins. Fissette was a friend of Atkins and did not want to be the cause of him losing work. Accordingly, Al Campo sent Atkins down to Waitsfield to finish the paving job and told Vic to send Jay McKee home. Atkins lived locally and as a result was considerably less expensive than McKee who lived out of town and was paid expenses. Al Campo's personnel decisions were not dictated by Vic Dwire.

I, Vic Dwire, state that this is true and accurate to the best of my knowledge and belief.
(State's Exhibit 1, p.50-52)

36. Richard Tetreault, Employer Director of Program Development, sent a letter dated July 17, 2008, to Grievant which provided in pertinent part:

The Vermont Agency of Transportation is contemplating a serious disciplinary action up to and including your dismissal from employment for gross misconduct. . . This action is contemplated for the following reasons:

...

I. Applicable State Policies and Procedures:

A. State Policy No. 2.3, “Rules and Regulations for Personnel Administration”, Sections 3.01 through 3.014 states in pertinent part:

CHAPTER 3 – STATEMENT OF POLICY

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 interest.

3.011 Every employee shall during his hours of duty and subject to such other laws, rules, and regulations as pertain hereto, devote his full time, attention, and efforts to his office of employment.

3.012 An employee shall not use his position to secure 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.

3.014 An employee shall not directly solicit, receive or agree to receive any compensation, gift, reward or gratuity from any source except the State of Vermont for any matter or proceeding connected with or related to the duties of such employee, unless otherwise provided for by law. . . .

B. State Policy No. 5.6, “Employee Conduct” states in pertinent part:
REQUIRED CONDUCT

1. It shall be the duty of employees to fulfill to the best of their ability the duties and responsibilities of their position. Employees shall pursue the common good in their official activities, and shall uphold the public interest, as opposed to personal or group interests.

2. Employees shall devote their full time, attention, and effort to the duties and responsibilities of their positions during their scheduled work time, except when other activities are authorized by law, rule, or contractual agreement, or are approved by the appointing authority.

3. Employees shall conduct themselves in a manner that will not bring discredit or embarrassment to the State of Vermont, whether on or off duty.

. . . .

PROHIBITED CONDUCT

1. Employees shall not use, or attempt to use, their positions to obtain special privileges or exemptions for themselves or others.

2. Employees shall not use, or attempt to use, State personnel, property, or equipment for their private use or for any use not required for the proper discharge of their official duties.

3. Employees are not permitted to solicit or accept any form of compensation from anyone except their employer for activities which are related to their position, unless it is provided for by law or approved by the employer. Prohibited compensation shall include any gift, reward, loan,

gratuity or other valuable consideration, including free meals, provided to employees, their immediate family, or business associate(s). . .

4. Employees shall not engage in any employment, activity, or enterprise which has been or may be determined by the appointing authority to be inconsistent, incompatible, or in conflict with their duties as a State employee or with the duties, functions or responsibilities of the agency by which they are employed. The mere appearance of impropriety may constitute a conflict of interest. Employees shall consult with their appointing authority prior to engaging in such employment, activity, or enterprise. Employees whose employment, activity or enterprise pre-dates this policy or their employment with the State shall promptly consult with their appointing authority to resolve any issue of conflict of interest.

...

6. Employees shall not disclose, directly or indirectly, information which they receive or have access to by virtue of their official duties, either for the private gain or benefit of themselves or others, except as authorized by their superiors or by law.

C. State Policy No. 17.0, “Employment Related Investigations” states in pertinent part:

State employees have an obligation to cooperate with their employer regarding employment investigations. It is part of the responsibility of an employee to answer truthfully and fully the work-related inquiries of the State. Refusing to answer, answering incompletely, or answering untruthfully, questions relating to work is a misconduct offense for which an employee may be disciplined up to and including dismissal.

II. Criminal Investigation, Felony Offense of “Kickbacks”

In your position as a resident engineer for AOT, you are responsible for the day-to-day oversight of various AOT construction projects, to include the onsite supervision of the consulting engineer Inspectors. You have the authority to manage all aspects of a construction project, to include removing consulting personnel from a project. At the time of the criminal investigation, you were assigned to a pavement management job in Waitsfield and Fayston as well as a bridge replacement project in Montpelier.

In order to meet certain requirements for federal funding the state must have fulltime engineers on each project. These projects are predominantly federally funded and it is rare to have a fully state-funded construction project. Due to staffing shortages, AOT regularly retains additional consulting engineer Inspectors for specific projects. The consulting engineer firm of Greenman Pederson, Inc. (GPI) regularly provides consulting engineer Inspectors for Agency construction projects.

On October 18, 2006, the Criminal Justice Division of the Office of the Attorney General received allegations that you had attempted to receive an illegal Kickback. The criminal investigation commenced after a complaint from Charlie

Edson, Vice President of GPI was made to David Hoyne, Construction Engineer with AOT.

On or about October 11, 2006 Edson received information and allegations from one of GPI's regional managers, Nicholas Farina, that you had solicited Farina for a bribe in exchange for keeping the GPI Inspectors on the job. Edson advised AOT that, according to Farina, on October 5, 2006 you asked Farina to purchase you a hunting bow in exchange for keeping the GPI Inspectors on their assignments for approximately three more weeks. Farina also alleged that on October 10, 2006 he informed you that GPI does not purchase personal gifts for state employees, and on the very next day, October 11, 2006 you retaliated by removing two GPI Inspectors from two of your projects.

...

Investigator Thomas Howell from the Criminal Justice Division of the Office of the Attorney General was assigned to investigate the criminal activity allegations.

..

III. Factual Background

Thursday, October 5, 2006: Farina met you for breakfast in Waitsfield, Vermont. Farina stated to Inspector Howell that in his role as a regional manager for GPI, he customarily asks the GPI consulting engineer Inspectors and the client's resident engineers if there was anything that they needed, directing his inquiry to the needs of the job at hand.

According to Farina, he paid the breakfast bill for both of your meals while you waited outside the restaurant. When Farina joined you, he asked if there was anything that he "could do, or if there was anything that (you) needed". You replied that you would keep two GPI consulting engineer Inspectors, Loren Taylor and Jay McKee, on their projects until the end of the month. According to Farina's written statement:

"Then Mr. Dwyer asked me if I knew where the Sunoco Station and Hunting Supply was on Route 7 in Shelburne, Vt. near Interstate 89 . . . I said I saw the store in my travels. (Dwyer) said he was looking to buy a new hunting bow in that shop and the price was about 6-bills. But you have to go the store and get it fitted to your frame. Because his bow was falling apart and they cannot get parts to repair it. It was obvious he wanted me to purchase it (the bow) for him."

Farina later discussed your request for a hunting bow with his supervisor, Charlie Edson, who replied that GPI does not purchase any personal gifts.

Tuesday, October 10, 2006: Farina met with you again, this time at the AOT field office in Duxbury. He informed you that GPI does not provide personal gifts to anyone. You responded to Farina by saying "maybe that was a dumb request . . . this is confidential...sshhh...sshhh".

Wednesday, October 11, 2006: You informed two GPI consultant engineer Inspectors (Taylor and McKee) that their services were no longer required effective Friday, October 13, 2006. You gave them no reasons for this decision and the projects they were assigned to were not completed. Also, you informed them that they could leave immediately and still be paid for having

worked on October 12 and 13. You informed the GPI engineers that there would be no more GPI inspectors on your jobs.

You took this action to terminate the GPI engineering consulting services 1) just six days after you had informed Farina that the GPI inspectors would be retained until the end of October; 2) the very next day after Farina informed you that GPI would not buy you a hunting bow and you replied that Farina should keep your request confidential and that you had made a “dumb request”; and 3) your action to remove GPI consulting engineers was apparently not based on any concerns about their job performance.

November 7, 2006: Inspector Howell went to the AOT Duxbury work trailers to find you. You voluntarily agreed to speak with Howell and this preliminary conversation was not tape recorded though Howell later obtained your permission to tape record your statements. . .

On November 7, 2006, Investigator Howell initially found you to be evasive in response to his questions:

- When Howell asked you if you recalled a conversation you had with Farina at some point in the last few weeks, you indicated that though you recalled some of a conversation you had with Farina while out at breakfast one day, you did not recall talking about a hunting bow with Farina; and
- When Investigator Howell asked if you were a hunter, you replied that you were not and then you said “well, I have not been for a while...”, and
- When Investigator Howell pressed you for details on what you did recall about the conversation with Farina, you seemed unable to give him an answer.

It was not until Investigator Howell used a ruse by telling you that your conversation with Farina had been recorded that you voluntarily started to divulge your version of events to the criminal investigator:

- You informed Investigator Howell that Farina had asked you if you “needed anything.”
- When Investigator Howell asked you if you responded to this inquiry from Farina with a remark about a “new bow”, you hesitated but and(sic) then stated “Well, I told him I had an old bow and needed a new one.”
- When Investigator Howell asked if you told Farina about where Farina could get a new bow, you stated that you had mentioned D’Attilio’s store on Shelburne Road and that a new bow would cost between \$500.00 and \$600.00.
- You denied that you told Farina about any special fittings that would be required if he bought a bow for you;
- You admitted that Farina told you that “he didn’t know if they (GPI) could do that and he would have to talk to ‘Chuck’, his boss”;

- You told Inspector Howell that the next time you saw Farina, he informed you that GPI “do not do that” (i.e. buy bows) and that Farina brought a finger to his mouth and made a “shhhh” sound.”

Howell the obtained your voluntary consent to have your statements tape recorded and you repeated those statements under oath. . . .

- At no time during your entire conversation with Investigator Howell on November 7, 2006 did you inform Investigator Howell that you had previously suspected that Farina was “on the take”;
- At no time during your entire conversation with Investigator Howell on November 7, 2006 did you inform Investigator Howell that you had informed any of your supervisors at AOT that you had suspected that Farina was “on the take”; and
- At no time during your entire conversation with Investigator Howell on November 7, 2006 did you inform Investigator Howell that you were attempting to entrap Farina by telling him that you needed a new hunting bow and by telling Farina where to buy one for you.

. . . Investigator Howell ultimately concluded in the Affidavit of Probable Cause . . . that there was probable cause to believe that you committed the felony offense of “Kickbacks”:

“...in conclusion, this investigation revealed that there was a conversation on October 5, 2006 at which Victor Dwire gave assurance to Nick Farina of GPI, that he would retain GPI inspectors on his jobs until the end of the month. Further, in this same conversation, Dwire asked Farina to provide him a new hunting bow and provided details as to where and such hunting bow could be found as well as the cost. Farina responded that he needed to speak with Chuck Edson, his supervisor at GPI. Dwire met with Farina again five days later on October 10, 2006. At that time, Farina told Dwire that GPI does not provide personal gifts to anyone. By the next workday, Dwire terminated GPI inspectors from all jobs on which he was the resident engineer.”

January 12, 2007: The Vermont Attorney General charged you in Vermont District Court with the felony offense of:

“corruptly soliciting for yourself the benefit of \$500.00 or more from a person who renders service or labor under such contract, to wit; while employed with a resident engineer by the State of Vermont (you) solicited an employee of GPI to provide two hunting bows valued at more than \$500 in exchange for continuing the work of GPI inspectors through the end of October (2006), in violation of 13 V.S.A. Section 1106...”

January 19, 2007: The Burlington Free Press published an article about the allegations and included the article in the “Top Stories” category. Your alleged criminal activity and alleged workplace misconduct was widely published in other media outlets around the State of Vermont.

January 26, 2007: You were placed on paid temporary relief from duty pending an investigation into allegations that you had committed misconduct and

criminal acts while performing your official job duties. You have since remained out of the workplace on paid temporary relief from duty.

February 2, 2007: The U.S. Department of Transportation, Federal Highway Administration, suspended you from working on any Agency federally funded projects in any capacity pending resolution of the criminal proceedings.

May 6, 2008: After formally providing you with a *Garrity Notice*, the Agency provided you with an opportunity to clarify or amend or supplement the previous statements that you provided in November 2006 to Investigator Howell . . . On May 5, 2008 . . . you submitted the following statements in writing and under oath:

- You testified that “. . . in September of 2006, Vic told his immediate supervisor, Al Campo, that Farina made him uncomfortable and that he thought (Farina) was ‘on the take’ . . .”,
- You testified that your comment to Farina that you “would like a new bow . . . was not intended to solicit any response”;
- You testified that Farina asked YOU where HE could buy a bow;
- You testified that when Farina told you that GPI was not going to buy you a bow, you responded to Farina that “that’s the right answer, I wouldn’t have taken it”; and
- You testified that Farina told YOU “not to say anything about this to anyone and (Farina) put his fingers against his lips.”

IV. Specific Charges of Misconduct

As *briefly* outlined and described above and as *fully* described in the attached documentation, it would appear that you engaged in criminal conduct in violation of 13 V.S.A. §1106 and workplace misconduct in violation of State Personnel Policies and Procedures Nos. 2.3, 5.6 and 17.0. Specifically:

1. On October 5, 2006, you allowed a consultant to purchase at least one meal (breakfast), in violation of State Personnel Policy and Procedure Nos. 2.3, Sections 3.01, 3.011 and 3.014 and in violation of State Personnel Policy and Procedure 5.6, REQUIRED CONDUCT, paragraphs 1 and 2 and PROHIBITED CONDUCT, paragraphs 1 and 3;

2. On October 5, 2006, you offered continued employment to GPI Inspectors in exchange for a bribe or kickback, in violation of 13 V.S.A. §1106 and in violation of State Personnel Policy and Procedure No. 2.3, Sections 3.01, 3.012, 3.013 and 3.014, and in violation of State Personnel Policy and Procedure No. 5.6, REQUIRED CONDUCT, paragraphs 1, 2, 3 and PROHIBITED CONDUCT, paragraphs 1,2,3,4 and 6;

3. On October 5, 2006, you criminally and corruptly solicited a bribe and/or kickback from a consultant for your personal benefit, in violation of 13 V.S.A. §1106 and in violation of State Personnel Policy and Procedure No. 2.3, Sections 3.01, 3.012, 3.013 and 3.014, and in violation of State Personnel Policy and Procedure No. 5.6, REQUIRED CONDUCT, paragraphs 1,2,3 and PROHIBITED CONDUCT, paragraphs 1, 2, 3, 4 and 6;

4. On October 11, 2006, after the GPI representative refused to agree to your scheme, you retaliated against GPI by immediately causing to

have two GPI employees removed from jobs that you were supervising, in violation of State Personnel Policy and Procedure No. 2.3, Sections 3.01 and 3.013, and in violation of State Personnel Policy and Procedure No. 5.6, REQUIRED CONDUCT, paragraphs 1, 2, 3 and PROHIBITED CONDUCT, paragraphs 2 and 4;

5. On Wednesday, October 11, 2006, after you informed the GPI Inspectors that their employment with the Agency was immediately terminated, you indicated that they should bill the Agency for two more additional full days of work they would not in fact perform, in violation of State Personnel Policy and Procedure No. 2.3, Sections 3.01, 3.012 and 3.013 and in violation of State Personnel Policy and Procedure No. 5.6, REQUIRED CONDUCT, paragraphs 1, 2, 3 and PROHIBITED CONDUCT, paragraphs 1, 2, 4 and 6;

6. The above conduct as described led to the Federal Highway Administration's decision to suspend you indefinitely from working on any Agency projects that receive any federal funds. Your FHWA suspension will be in effect until such time as there is resolution of the felony criminal Kickback charges. Your FHWA suspension effectively bans you from performing the essential functions of your position with the Agency and has brought discredit and embarrassment to the State of Vermont, in violation of State Personnel Policy and Procedure No. 5.6, REQUIRED CONDUCT, paragraph 3;

7. Your misconduct has been widely published in the Vermont news media to the citizens of the State of Vermont and is widely known to members of the Vermont construction industry as a whole. As a result, you have permanently and irrevocably damaged your credibility with the Agency, the Federal Highway Administration and with our partners in the construction industry, in violation of State Personnel Policy and Procedure No. 5.6, REQUIRED CONDUCT, paragraph 3; and

8. The May 5, 2008 written and sworn statement that you provided to the Agency contains several dishonest statements which lack credibility and are unsupported by your earlier statements to the Criminal Investigator:

a) You knowingly and dishonestly attempted to create a false impression that you had previous concerns that Farina was "on the take", when in fact you never mentioned that concern during your first interview with the Criminal Investigator;

b) You knowingly and dishonestly asserted that your comment to Farina that you "would like a new bow . . . was not intended to solicit any response", when in fact it was your intent to induce Farina to buy you a new hunting bow;

c) You knowingly and dishonestly asserted that Farina asked you where HE could buy a bow; when in fact you told Farina where he could purchase a new hunting bow for YOU;

d) You knowingly and dishonestly asserted that when Farina told you that GPI was not going to buy you a bow, you responded to Farina that "that's the right answer, I wouldn't have taken it," when in fact you

responded to Farina by saying “maybe that was a dumb request . . . this is confidential . . . sshhh . . . sshhh.”.

e) You knowingly and dishonestly asserted that Farina told YOU “not to say anything about this to anyone and (Farina) put his fingers against his lips” when in fact you said “maybe that was a dumb request . . . this is confidential . . . sshhh . . . sshhh”.

Your assertions in your written sworn statement dated May 5, 2008 lack significant corroboration and in fact directly contradict your earlier statements to the Criminal Investigator. You have engaged in numerous acts of dishonesty, not only in violation of State Personnel Policy and Procedure No. 17.0 “Employment Related Investigations” which expressly requires that all employees answer “truthfully and fully the work-related inquiries of the State”, but also in violation of the inherent duty that all employees have to be honest with their employer in all matters related to their employment

V. Conclusion

Your misconduct is an embarrassment and disgrace to the Agency and to the State of Vermont and it appears that you have engaged in gross misconduct. As such, it appears that there is just cause for bypassing progressive discipline and for imposing serious discipline up to and including dismissal from employment for gross misconduct.

VI. Response Opportunity

You must notify me within 24 hours after receiving this letter whether you wish to respond to the above allegations. . .

(State’s Exhibit 2, Emphasis by bold, caps or italics is in the original)

37. By letter dated August 4, 2008, Tetreault informed Grievant that he was dismissed immediately, without two weeks notice and without two weeks pay in lieu of notice, for gross misconduct. Tetreault indicated that the reasons for the dismissal were those outlined in the July 17, 2008, *Loudermill* letter that he sent Grievant (State’s Exhibit 4).

38. In deciding to dismiss Grievant, Tetreault concluded that his offenses were serious. He determined that Grievant engaged in felony criminal activity and gross misconduct while conducting state business, and that Grievant’s offenses were intentional and committed for his personal gain. Tetreault further concluded that Grievant engaged in

numerous acts of dishonesty which were intentional and frequently repeated. Tetreault determined that the degree and notoriety of Grievant's criminal activities undermined his ability to interact with the construction industry at a satisfactory level. Tetreault considered that Grievant had received no previous discipline over 40 years of State service, and that his performance evaluations had always been satisfactory or better. Nonetheless, Tetreault determined that Grievant's criminal activity and gross misconduct had permanently damaged his ability to perform duties at a satisfactory level, and had permanently destroyed the Employer's confidence in Grievant's ability to perform his assigned duties honestly and satisfactorily.

39. Tetreault viewed the penalty of dismissal as consistent with the discipline imposed on other employees because the Employer has consistently imposed the penalty of immediate dismissal in past instances in which employees had engaged in gross misconduct and/or felony criminal acts. Tetreault determined that Grievant had brought discredit and embarrassment to the Employer given that the felony Kickback charge brought against him was widely published in the Vermont news media and was widely known to members of the Vermont construction industry. Tetreault concluded that Grievant had fair notice that he would be dismissed for his offenses. He determined that there was no potential for Grievant's rehabilitation because Grievant had not accepted any responsibility for his actions and had permanently damaged his personal and professional reputations. Tetreault concluded that no other sanction short of dismissal would have been adequate or effective to deter such egregious conduct in the future by Grievant or other employees (State's Exhibit 3).

40. On November 12, 2008, Vermont District Court Judge Patricia Zimmerman dismissed the criminal charge against Grievant. Grievant was charged with violating 13 V.S.A. §1106, which in pertinent part provides that an “officer or agent of, or person employed by the state . . . who, being authorized to . . . employ service or labor, shall not corruptly, directly or indirectly, ask, demand, exact, solicit, seek, accept, receive or agree to receive for himself or herself or for another, any benefit from . . . a person who renders service or labor under (a) contract”. Judge Zimmerman stated in the court decision: “The court must conclude that when taking the evidence in the light most favorable to the State and excluding modifying evidence, the State has not produced evidence fairly and reasonably tending to show defendant guilty beyond a reasonable doubt of the element of ‘employing service or labor’” (Attachment to Grievant’s Motion in Limine: Collateral Estoppel).

OPINION

Grievant alleges that the Employer violated Article 14 of the Contract by dismissing him without just cause. The ultimate criterion of just cause is whether an employer acted reasonably in discharging an employee for misconduct. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). There are two requisite elements which establish just cause for dismissal: 1) it is reasonable to discharge an employee because of certain conduct, and 2) the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. Id. In re Grievance of Yashko, 138 Vt. 364 (1980).

The burden of proof on all issues of fact required to establish just cause is on the employer, and that burden must be met by a preponderance of the evidence. Grievance of

Colleran and Britt, 6 VLRB 235, 265 (1983). Once the underlying facts have been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven facts. Id. at 266.

The Employer has made various charges against Grievant, as detailed in Finding of Fact No. 36. The Employer first charges Grievant with misconduct in violation of State Personnel Policies and Procedures Nos. 2.3 and 5.6 by allowing GPI supervisor Nicholas Farina to pay for his breakfast when they met on October 5, 2006. The Employer has established that Farina did pay for Grievant's breakfast on October 5, and that this violated the provisions of Personnel Policies and Procedures Nos. 2.3 and 5.6 prohibiting employees from using their positions to pursue personal interests, secure privileges for themselves or accept gifts or compensation.

The Employer next charges Grievant with offering continued employment to GPI inspectors Loren Taylor and Jay McKee in the October 5 meeting with Farina in exchange for a bribe or kickback in violation of 13 V.S.A. §1106 and Personnel Policies and Procedures Nos. 2.3 and 5.6. As we ruled at the hearing, the decision by Vermont District Court Judge Patricia Zimmerman dismissing the criminal charge against Grievant that he violated 13 V.S.A. §1106 precludes the Employer from relitigating before us the issue of whether Grievant engaged in criminal conduct in violation of §1106.

Also, the Employer has not established by the preponderance of the evidence that Grievant violated the cited Personnel Policies and Procedures by offering continued employment to GPI inspectors in exchange for a bribe or kickback. The Employer contends that the continuing employment was in exchange for Grievant soliciting a hunting bow from GPI. In response to a question Farina asked Grievant at the meeting

concerning how long he expected McKee and Taylor to be on their respective projects, Grievant indicated that they probably would be on the projects until the end of October. However, there was no explicit or implicit linking of this probable continuing employment with Grievant soliciting a hunting bow from Farina. The discussion on McKee's and Taylor's continuing employment occurred while Grievant and Farina were discussing business matters in the restaurant during breakfast, separate from their discussion about a hunting bow which took place after breakfast in the restaurant parking lot.

The Employer further charges Grievant with criminally and corruptly soliciting a bribe and/or a kickback from Farina for his personal benefit on October 5 in violation of 13 V.S.A. §1106 and Personnel Policies and Procedures Nos. 2.3 and 5.6. As we discussed above and as we ruled at the hearing, the decision by Judge Zimmerman dismissing the criminal charge against Grievant that he violated 13 V.S.A. §1106 precludes the Employer from relitigating before us the issue of whether Grievant engaged in criminal conduct in violation of §1106.

This leaves the question whether Grievant violated Personnel Policies and Procedures Nos. 2.3 and 5.6 by corruptly soliciting a bribe and/or kickback from Farina for his personal benefit. We conclude that the Employer has not established by a preponderance of the evidence that Grievant corruptly solicited a bribe and/or kickback from Farina for his personal benefit. Farina made an assumption based on his October 5 conversation with Grievant that Grievant was asking GPI to buy him a bow. However, Grievant did not ask Farina that GPI purchase a bow for him and we conclude that the

Employer has not established that Grievant was implicitly requesting that GPI buy him a bow.

Although Grievant did not respond to the statement by Farina during the conversation that he would check with his supervisor about whether GPI would get a bow for Grievant and would get back to him, this silence was not tantamount to requesting the purchase of the bow. Instead, it is apparent that Grievant was testing his suspicion that GPI was “on the take” and he was going to wait to see what action GPI would take concerning buying him a bow. We do not believe that he intended to allow GPI to purchase him a bow if GPI so offered, but that he would have reported such offer to his supervisor Al Campo as affirmation of his suspicion that GPI was corrupt.

This does not mean that Grievant did not commit misconduct concerning the bow incident. His actions created the appearance of agreeing to receive a bow from GPI if it was so offered, and he permitted Farina to proceed on that basis. Among the provisions of the State Personnel Policies and Procedures which Grievant was charged with violating was a section of Policy 5.6 which states that “(e)mloyees shall conduct themselves in a manner that will not bring discredit or embarrassment to the State of Vermont”. Grievant acted contrary to this provision by bringing discredit and embarrassment to the State through creating the appearance to a State contractor that he would inappropriately receive a gift from the contractor if it was offered, and allowing the contractor to proceed under that assumption. We consider these actions by Grievant to constitute a lesser included offense within the greater offense of corruptly soliciting a bribe and/or kickback.

In sum, the Employer has not established its charge that Grievant corruptly soliciting a bribe and/or kickback from Farina for his personal benefit. The Employer has proven its charge only to the extent of establishing by a preponderance of the evidence that Grievant committed misconduct by creating the appearance of agreeing to receive a bow from GPI if it was so offered, and permitting Farina to proceed on that basis.

The Employer next charges Grievant with retaliating against GPI by immediately causing GPI inspectors Taylor and McKee to be removed from projects that he was supervising after Farina told him on October 10 that GPI would not purchase a bow for him. The Employer has not proven this charge by a preponderance of the evidence. The removal of Taylor and McKee from the projects did not result from retaliation by Grievant.

Instead, Campo and Grievant decided together prior to October 10 that Taylor would be replaced on the project by another inspector, Bert Fissette, whom they considered more capable of completing the project. A domino effect of that decision was that Ken Atkins, an employee of the same consulting firm as Fissette was going to be displaced from the project along with Taylor. Due to the displacement of Atkins giving Fissette discomfort, Campo and Grievant decided as an accommodation to Fissette's discomfort that Atkins would replace McKee on the project he was working on under Grievant's supervision. The fact that Grievant notified Taylor and McKee of their removal from the projects on October 11 resulted from the timing of Fissette's availability to replace Taylor, rather than Grievant's October 10 discussion with Farina.

The Employer further alleges that Grievant violated Personnel Policies and Procedures Nos. 2.3 and 5.6 by informing Taylor and McKee, after informing them of

their removal from their respective projects, that they should bill the Employer for two additional days of work they would not perform. This charge can be summarily dismissed. The Employer has not established that Grievant informed Taylor and McKee that they should bill the Employer for two additional days of work they would not perform.

The Employer also lists under charges of misconduct Grievant that the alleged misconduct discussed above: a) resulted in a decision by the Federal Highway Administration to suspend him from working on any projects that receive federal funds, and b) was widely published in the media and widely known to members of the Vermont construction industry. These are more properly characterized as consequences of Grievant's alleged misconduct that may affect the penalty to be imposed against Grievant, rather than serving as actual charges of misconduct against him.

The final charges by the Employer against Grievant are that the May 6, 2008 written statement that he provided to the Employer contained several dishonest statements. The Employer contends one dishonest statement is that Grievant attempted to create a false impression that he had previous concerns that Farina was "on the take". The Employer has not established that this constituted a dishonest statement. As discussed in the Findings of Fact, Grievant did have prior concerns that Farina was "on the take".

Similarly, the Employer contends another dishonest statement is Grievant's assertion that when Farina told him that GPI was not going to buy him a bow, Grievant responded "that's the right answer, I wouldn't have taken it". Again, as discussed in the Findings of Fact, Grievant did make such a response. Thus, the Employer has not established that this statement of Grievant was dishonest.

The Employer contends that Grievant dishonestly asserted in the May 5 statement that his comment to Farina that “he would like a new bow . . . was not intended to solicit any response”, when in fact it was Grievant’s intent to induce Farina to buy him a new hunting bow. As discussed above, the Employer has not established that it was Grievant’s intent to induce Farina to buy him a new bow. Thus, the Employer has not established that this was a dishonest assertion by Grievant.

The Employer further charges: “You knowingly and dishonestly asserted that Farina asked you where HE could buy a bow; when in fact you told Farina where he could purchase a new hunting bow for YOU” (emphasis in original). This charge appears to misinterpret Grievant’s May 6 statement. We read the statement as Grievant asserting that Farina asked Grievant where Grievant would buy a bow, rather than Farina asking Grievant where Farina would buy a bow.

The remaining contention by the Employer concerning alleged dishonesty by Grievant in the May 6 written statement is: “You knowingly and dishonestly asserted that Farina told YOU ‘not to say anything about this to anyone and (Farina) put his finger against his lips’ when in fact you said ‘maybe this was a dumb request . . . this is confidential . . . sshhh . . . sshhh’” (emphasis in original). The evidence presented in this regard is not sufficiently clear for us to make findings of fact as to what occurred. Under these circumstances, we conclude that the Employer has not demonstrated by a preponderance of the evidence that this was a dishonest assertion by Grievant. Thus, the Employer has not demonstrated that the May 6, 2008 written statement that Grievant provided to the Employer contained any dishonest statements.

In sum, the Employer has established only some of the charges against Grievant . The fact that all of the charges against Grievant have not been proven in their entirety does not necessarily mean that his dismissal was without just cause. Failure of an employer to prove by a preponderance of the evidence all the particulars of a dismissal letter does not require reversal of a dismissal action. Grievance of McCort, 16 VLRB 70, 121 (1993). In such cases, the Board must determine whether the proven charges justify the penalty. Id.

We look to the factors articulated in Colleran and Britt to determine whether the Employer exercised its discretion within tolerable limits of reasonableness. 6 VLRB at 268-69. The pertinent factors here are: 1) the nature and seriousness of the offenses and their relation to Grievant's duties and position, 2) the clarity with which Grievant was on notice of any rules that were violated in committing the offenses, 3) the effect of the offenses upon Grievant's ability to perform at a satisfactory level and their effect on supervisors' confidence in Grievant's ability to perform assigned duties, 4) Grievant's past disciplinary record, 5) Grievant's past work record including length of service and performance on the job, 6) the consistency of the penalty with those imposed upon other employees for the same or similar offenses, 7) the notoriety of the offense or its impact upon the reputation of the agency, 8) the potential for Grievant's rehabilitation, and 9) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

We first consider the nature and seriousness of Grievant's offenses and their relation to Grievant's duties and positions. The most serious of the charges the Employer made against Grievant were that he criminally and corruptly solicited a bribe and/or kickback from a consulting firm for his personal benefit, that he retaliated against the

consulting firm by immediately causing two employees of the firm to be removed from projects that he was supervising, and that he engaged in numerous acts of dishonesty that were frequently repeated. We have concluded that the Employer has not established these charges by a preponderance of the evidence.

Nonetheless, although we have concluded that Grievant's offenses were not as serious as alleged by the Employer, his proven offenses were serious. Grievant brought discredit and embarrassment to the State through creating the appearance to a State contractor that he would inappropriately receive a gift from the contractor if it was offered, and allowing the contractor to proceed under that assumption. This constituted a serious lack of good judgment on Grievant's part to the detriment of the Employer. Grievant also demonstrated a lack of good judgment by allowing a state contractor to pay for his breakfast.

Grievant had fair notice that his offenses could result in his dismissal. Fair notice exists when the employee knew or should have known that the conduct was prohibited. Grievance of Towle, 164 Vt. 145, 150 (1995). Grievance of Brooks, 135 Vt. at 568. Grievant should have known that his actions creating the appearance to a State contractor that he would inappropriately receive a gift from the contractor if it was offered, and allowing the contractor to proceed under that assumption, were prohibited. Grievant also should have known that allowing a contractor, who competes with other contractors to obtain work from the State, to purchase breakfast for him violated policies and procedures prohibiting employees from accepting gifts.

Further, his demonstrated lack of judgment had an adverse effect on his ability to perform at a satisfactory level and on supervisors' confidence in his ability to perform

assigned duties. It would be understandable for supervisors to be concerned about Grievant's exercise of judgment in other matters subsequent to his proven offenses. Also, there is an adverse effect on Grievant's ability to perform at a satisfactory level with respect to interactions with consultants who perform work for the Employer given the misconduct he displayed in this case.

However, Grievant's past work record and disciplinary record weigh heavily in his favor. He worked 40 years for the Employer without any previous discipline. His performance always had been rated at least satisfactory, and in recent years he consistently received outstanding ratings.

The Employer considered imposition of the penalty of dismissal on Grievant as consistent with the discipline imposed on other employees because the Employer has consistently imposed the penalty of immediate dismissal in past instances in which employees had engaged in gross misconduct and/or felony criminal acts. However, the Employer has not proven that Grievant engaged in felony criminal acts and Grievant's proven offenses do not rise to the level of constituting gross misconduct. We have not been presented with evidence on how employees with similar offenses to Grievant's proven offenses have been treated. Under these circumstances, the consistency of the penalty imposed on Grievant compared to other employees is not a factor that can be relied upon to support Grievant's dismissal.

Similarly, the notoriety of Grievant's offenses and their impact upon the reputation of the Employer are not significant factors supporting Grievant's dismissal. The criminal charges brought against Grievant gained notoriety and adversely impacted the Employer's reputation. However, the criminal charges against Grievant were not

proven, and thus should not be held against Grievant in weighing whether just cause existed for his dismissal.

In weighing all of the relevant factors and examining all the circumstances, we ultimately conclude that just cause did not exist for Grievant's dismissal. Grievant's misconduct cannot be condoned, and the Employer was justified in bypassing progressive discipline to the extent of imposing a significant degree of discipline on Grievant.

However, the Employer did not act reasonably in concluding he was not a good candidate for rehabilitation and that a lesser sanction than dismissal would not be effective or adequate. It is notable in this regard that Grievant's proven offenses are much less severe than charged by the Employer. When this is considered together with Grievant's lengthy service and good work record, we conclude that it was not appropriate for the Employer to completely bypass progressive discipline and dismiss Grievant.

The maximum penalty short of dismissal permitted by the Contract is a 30-day suspension. A suspension of this length is an adequate and effective alternative sanction. This should suffice to deter poor judgment by Grievant in the future. It also should suffice to send the message to other employees that the misconduct displayed here was serious and will not be condoned.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered:

1. The Grievance of Victor Dwire is sustained in part and his dismissal is reduced to a 30 day suspension;
2. Grievant shall be reinstated to his position as Resident Engineer with the State of Vermont Agency of Transportation;
3. Grievant shall be awarded back pay and benefits from the date commencing 30 working days from the effective date of his dismissal until his reinstatement, for all hours of his regularly assigned shift plus the amount of overtime Grievant would have worked, minus any income (including unemployment compensation received and not paid back) received by Grievant in the interim;
4. The interest due Grievant on back pay shall be computed on gross pay and shall be at the legal rate of 12 percent per annum and shall run from the date each paycheck was due during the period commencing 30 working days from Grievant's dismissal, and ending on the date of his reinstatement; such interest for each paycheck date shall be computed from the amount of each paycheck minus income (including unemployment compensation) received by Grievant during the payroll period;
5. The parties shall file with the Labor Relations Board by October 8, 2009, a proposed order indicating the specific amount of back pay and other

benefits due Grievant; and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Board. A hearing on disputed issues, if necessary, shall be held on October 22, 2009, at 9:00 a.m., in the Board hearing room; and

6. The Employer shall remove all references to Grievant's dismissal from his personnel file and other official records and replace it with a reference to a 30 day suspension consistent with this decision.

Dated this 16th day of September, 2009, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Edward R. Zuccaro

Edward R. Zuccaro, Chairperson

/s/ Leonard J. Berliner

Leonard J. Berliner

/s/ James C. Kiehle

James C. Kiehle