VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 10-20
DAVID JACOBS	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On May 19, 2010, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of David Jacobs ("Grievant"), contending that Grievant's dismissal from the State of Vermont Department of Liquor Control ("Employer") violated Articles 5, 14, 15 and 17 of the collective bargaining agreement between the State and the VSEA for the Non-Management Unit, effective July 1, 2008 – June 30, 2010 ("Contract").

Grievant contended that his dismissal violated Articles 5 and 15 of the Contract because it constituted discrimination against him based on his complaint and grievance activities. He contended that Article 14 of the Contract was violated because: a) the dismissal was not based in fact or supported by just cause; b) the Employer improperly bypassed progressive discipline; c) the Employer improperly bypassed progressive corrective action; d) the Employer failed to apply discipline with a view toward uniformity and consistency; and e) the Employer failed to impose discipline within a reasonable time of the alleged offense. Grievant alleged that Article 15, Section 2, of the Contract was violated because his dismissal constituted discriminatory application of rules and regulations. Finally, Grievant asserted that the Employer's application of work rules to him was unreasonable, in violation of Article 17 of the Contract.

Prior to hearings on the merits, the Labor Relations Board issued a Memorandum and Order on November 12, 2010, on a Motion to Compel Discovery filed by Grievant and a Motion For Protective Order filed by the Employer. 31 VLRB 152.

Hearings on the merits were held in the Labor Relations Board hearing room in Montpelier on December 16 and 17, 2010, before Board Members Linda McIntire, Acting Chairperson; Leonard Berliner and James Kiehle. Abigail Winters, VSEA Associate General Counsel, represented Grievant. Assistant Attorney Generals Henry Koltys and David Cassetty represented the Employer.

On December 22, 2010, the Employer filed a Motion to Reopen Evidence Or For New Hearing. Grievant filed a memorandum in opposition to the Employer's motion on January 3, 2011. On January 6, 2011, the Board required the Employer to file an affidavit providing information pertinent to the Employer's motion. The Employer filed an affidavit on January 13, 2011. Grievant filed a subsequent letter that day concerning the affidavit filed by the Employer. The Board issued an order on January 14, 2011, denying the Employer's motion. Therein, the Board stated that the "reasons for this order will be set forth in our decision on the merits in this matter".

Grievant and the Employer filed post-hearing briefs on January 28, 2011.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

ARTICLE 5
NO DISCRIMINATION OR HARASSMENT; and AFFIRMATIVE ACTION

> 1. In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination, neither party shall discriminate against, intimidate, nor harass any employees because of . . . filing a complaint or grievance . . .

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:

a. act promptly to impose discipline or corrective action within a reasonable time of the offense;

b. apply discipline or corrective action with a view toward uniformity and consistency;

c. impose a procedure of progressive discipline or progressive corrective action;

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

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

e. In performance cases, the order of progressive corrective action shall be as follows:

(1) feedback, oral or written . . .
(2) written performance evaluation . . . with a specified prescriptive period for remediation specified therein . . .
(3) warning period . . .
(4) dismissal.

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

(1) bypassing progressive discipline or corrective action;

. . .

2. The appointing authority or designated representative . . . may dismiss an employee with just cause with two (2) weeks notice or two (2) weeks pay in lieu of notice. . . In the written dismissal notice, the appointing authority shall state the reason(s) for dismissal . . .

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.

. . .

ARTICLE 15
GRIEVANCE PROCEDURE

. . .

2. DEFINITION

. . .

(b) "Grievance" is an employee's, group of employees' or the employee's collective bargaining representative's expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under a collective bargaining agreement or the discriminatory application of a rule or regulation. . . .

ARTICLE 17
AGENCY, DEPARTMENT AND INSTITUTION WORK RULES

. . .
3. REASONABLENESS AND APPLICATION OF RULES
(a) An employee or VSEA . . . may grieve any action taken against an employee based upon any . . . rule. . . (T)he grievance may include a claim that the rule is unreasonable in its application to the employee . . .

2. Grievant became a Liquor Control Investigator for the State of Vermont Department of Liquor Control in December of 1999. He remained in this position until his dismissal in April of 2010. Grievant's duties as a Liquor Control Investigator primarily were performed in the field with limited supervision.

3. Investigators are assigned to a specific geographic area in which they are responsible for various aspects of liquor license regulation and enforcement. Grievant's territory during his employment was the Northeast Kingdom. When he was hired, his immediate supervisor was Chief Investigator William Goggins. When Goggins was promoted to Director of Education, Licensing & Enforcement in 2002, Daniel Boyce became Chief Investigator and Grievant's immediate supervisor. Lieutenant Andre Thibault became Grievant's immediate supervisor in 2005. Thibault and Grievant had been friends since they met in 2000. Thibault remained Grievant's supervisor until Grievant's dismissal. Thibault reported to Goggins, who has been Director of Education, Licensing & Enforcement since 2002. Goggins reported directly to the Commissioner of the Department of Liquor Control. Michael Hogan was Commissioner during the entire period of Grievant's employment.

4. Grievant received overall performance ratings of “excellent” in annual evaluations he received from the beginning of his employment through June 2006. On December 27, 2006, Grievant received an unsatisfactory special evaluation, which did not specify an evaluation period, for lack of progress on pending cases. Subsequently, Grievant received an “excellent” overall performance evaluation for the period June 2006 to June 2007, a period which included the unsatisfactory special evaluation. Grievant received an overall performance rating of “excellent” for the June 2007 to June 2008 evaluation period (Grievant’s Exhibit 1, p.1 – 46).

5. On September 14, 2009, Grievant received a special performance evaluation in which his overall performance was rated “satisfactory”. The evaluation period is stated as “September 14, 2009”. Grievant met with Thibault that day to discuss the evaluation. At the meeting, Grievant told Thibault that he was having a difficult time in his personal life due to a separation from his wife. Grievant and his wife have three children. Grievant and Thibault discussed changing the geographic area covered by Grievant. Grievant’s area was changed subsequent to the meeting to include the Stowe and Morrisville area. Thibault noted an improvement in Grievant’s performance following this change. On December 23, 2009, Grievant received a satisfactory performance evaluation covering the period from September 14, 2009 to December 23, 2009 (Grievant’s Exhibit 1, p.47 – 58).

6. Prior to being dismissed, Grievant had not been disciplined during his employment by the Employer. Grievant received many commendations from members of the law enforcement community on his work efforts during his employment (Grievant’s Exhibit 2, p.59 – 70).

7. Standard shifts for Investigators are 9.25 hours. They work either day or night shifts depending on the activities they will be engaged in on the shift. They often work night shifts to conduct inspections in establishments which serve liquor.

8. Investigators receive a $12.85 meal allowance to reimburse them for meals when they work at least 2 hours past 6 p.m. Investigators are not required to submit a receipt to receive a meal allowance.

9. Investigators complete a weekly itinerary outlining their general plans for the upcoming week. Investigators e-mail the weekly itineraries to their supervisors. By the beginning of 2010, the Employer had initiated the use of a Microsoft Outlook calendar system for Investigators.

10. Investigators complete a daily report for each shift they worked. Daily reports are created using a form on the computer. Daily reports are generated using 15-minute increments for time. There is a dropdown menu to report activities engaged in during increments of time. Possible activities include desk duty, tobacco compliance checks, patrol observations, 1st Class-Inspections, Investigations-Ongoing. In completing the form, Investigators are not able to create a gap in time on the daily report. There is no option on the dropdown menu for a break or a meal. Investigators are required to submit their daily reports to their supervisors. The purposes of daily reports are to inform supervisors of Investigators' activities and to provide accountability for Investigators performing the work they set forth on the reports (State's Exhibit 2, p. 8 to 10).

11. Investigators complete a time report form at the end of each two-week pay period listing the number of hours worked each shift. The form provides: "We the undersigned do hereby certify under the pains & penalties of perjury that the above

information is reported accurately to the best of our knowledge and that all requests for services and expenses were incurred while performing work for the State of Vermont." The employee signs the completed time report form, and the employee's supervisor signs the completed form indicating his or her approval. Investigators also fill out by hand each pay period a "white sheet" which contains much of the same information as the time report (State's Exhibit 2, p.4 and 6).

12. Investigators also complete an expense reimbursement form requesting reimbursement for meals, among other things. The form provides: "We the undersigned certify under the penalties of perjury that the information given on this form represents the actual expenses to which this employee is legally entitled." The employee and the employee's supervisor sign the form (State's Exhibit 2, p.5).

13. When Grievant was first hired in December 1999, William Goggins, the training officer for Investigators, trained Grievant. Albert Elwell, Enforcement & Licensing Director for the Employer at the time, informed Grievant that, if he worked short periods of unscheduled time over the standard 9.25 hour shift, it was appropriate to apply the extra time toward another shift elsewhere in the week rather than requesting overtime.

14. Andre Thibault became supervisor of the Investigators in the northern part of Vermont, including Grievant, in 2005. Shortly thereafter, Thibault trained newly hired Investigator Gerry Cote to follow the practice of applying extra time worked on one day of the week to another shift later that week rather than requesting overtime. There have been occasions where Cote has worked extra time beyond his schedule, such as 30 - 45 minutes, and then taken the same amount of time off elsewhere that week without making

any changes in the 9.25 hours of work recorded on his time reports for these days. Thibault did not advise Cote that this practice had changed by the time Grievant was dismissed. There were a number of occasions Thibault approved Grievant's time reports where Grievant worked time beyond his scheduled hours on one day and Thibault allowed him to credit that time to another day. Thibault authorized Grievant to engage in the practice as recently as 2009.

15. Goggins sent a memorandum to all Liquor Control Investigators with an effective date of February 27, 2008. The memorandum provided as follows:

> Effective immediately:
>
> - Your weekly itinerary must be submitted to your supervisor and to the office no later than the Friday before the start of the workweek (which begins on Sunday)
> - Any changes to your weekly itinerary must be requested in advance and require supervisory approval
> - Except in extraordinary circumstances, requests for same-day changes to your weekly itinerary will not be approved
> - Daily reports are to be completed daily as part of your work shift and forwarded to your supervisor no later than the close of your next work shift
> - Time reports must accurately reflect the hours actually worked and any approved changes in your schedule. Changes to time reports after they have been received at the office must include supportive documentation
> - Time reports are subject to supervisory review and approval and must arrive at the Montpelier office no later than 10:00 a.m. on the Monday of the week payroll is submitted. On weeks with Monday holidays, time reports must arrive at the Montpelier office the previous Friday. Changes to time reports are subject to supervisory approval.
>
> Please be advised that effective immediately these procedures will be strictly enforced. Please be further advised that failure to abide by these reporting procedures may result in appropriate disciplinary action, up to and including dismissal from State service.
> (State's Exhibit 7)

16. Thibault did not strictly enforce the second bulleted requirement that any changes to weekly itineraries must be requested in advance and required supervisory approval. He was flexible in this regard. He also did not enforce the requirement that daily reports had to be completed daily as part of a work shift and forwarded to him no later than the close of the next work shift. Prior to Grievant's dismissal, it was not uncommon for Investigators to turn in their daily reports every two or three weeks. Thibault also did not strictly enforce the requirement that time reports must accurately reflect the hours actually worked. There were a number of times that Thibault approved time sheets for Grievant that did not accurately reflect the specific time worked.

17. In the special performance evaluation of Grievant on September 14, 2009, Thibault stated:

> . . .
> Dave, I have told this to you in the past, but now it is in writing if you are going to change your schedule, you must call me and e-mail me in advance. I do not want to find out later that you worked extra and decided to cut out early the next day. Failure to follow this directive could result in discipline, up to and including dismissal.
> . . .
> (State's Exhibit 9, p.57, 61; Grievant's Exhibit 1, p.47, 51)

18. There was a severe snowstorm in Vermont on Wednesday, February 24, 2010. Grievant was scheduled to work from 5 p.m. on the evening of February 24 to 2:15 a.m. on February 25. Grievant and Cote had made plans to work together that evening. Prior to the beginning of Grievant's shift, Cote and Grievant spoke by telephone. Cote told Grievant that he was scheduled to return to Vermont that day from an out-of-state vacation, but that he may not make it back to Vermont in time due to delays in his air travel because of bad weather. Grievant and Cote postponed their plans to work together until the following day. Cote informed Thibault that he was changing his itinerary that

day. Thibault was working 8 a.m. to 5:15 p.m. on February 24. He performed desk duty that day due to the snowstorm. Thibault reviewed the Outlook calendar which contained the Investigators' itineraries and noticed that Cote was scheduled to work with Grievant that evening. Grievant did not speak with Thibault about the change of plans with Cote. Prior to February 24, 2010, Thibault considered Grievant to be the best investigator about notifying Thibault of changes in his schedule.

19. Grievant was living with Jennifer Harlow at Harlow's residence in Derby as of February 24, 2010. Grievant did not perform field work on February 24. Instead, he performed work at his residence that evening. Among the duties performed by Grievant were to review documents and write notes in preparation for completing a report at the conclusion of the investigation on an incident which occurred at Rimrocks Tavern in Stowe. The Rimrocks investigation was not complete as of February 24. The television was on in the living room while Grievant was working on the Rimrocks case.

20. At some time prior to 8 p.m. on the evening of February 24, 2010, Thibault contacted Goggins and asked him to go to Grievant's residence and check if Grievant's state vehicle was in the driveway of the residence. Goggins lived three to four miles from Grievant's residence. Goggins drove to Grievant's residence. He observed that Grievant's vehicle was covered in a large amount of snow, and that there were no other vehicles in the driveway. Goggins contacted Thibault by telephone at 8 p.m. and told him that Grievant's vehicle was in the driveway covered with snow. Later that evening, at 9:55 p.m., Goggins went back to Grievant's residence. He observed that Grievant's vehicle was still in the driveway covered in snow. Goggins sent an e-mail message to Thibault informing him that Grievant's vehicle was still in the driveway

under snow. Goggins did not observe any other vehicle in the driveway. Thibault and Goggins conferred, and decided they would wait to see what Grievant reported for time he worked on February 24 (State's Exhibit 4).

21. Grievant signed a time report on February 27, 2010, for the period February 14 – February 27, 2010, indicating that he had worked 9.25 hours on February 24, 2010. Thibault approved the time report by his signature. Grievant also submitted "white sheets" indicating that he had worked 9.25 hours on February 24 (State's Exhibit 2, p.4, 6 and 7).

22. Grievant signed a Reimbursement of Travel Expense form on February 27, 2010, requesting reimbursement of $12.85 for a meal he had in Derby on February 24, 2010. Thibault signed the form on March 1, 2010 (State's Exhibit 2, p.5).

23. On March 3, 2010, Grievant turned in daily reports to Thibault which included the dates February 23, February 24, February 25 and February 26. Grievant indicated on the daily report for February 23 that he had performed tobacco compliance checks for 8 hours. His daily report for February 25 provided that he had performed 9.25 hours of tobacco compliance checks in Jerry Cote's area. His daily report for February 24 provided as follows:

Start	**End**	**Activities**	**Total Hours**	**Comments**	**Establishment**	**Town**
17.00	18.00	Desk Duty	1.00	paper work and phone calls		
18.00	19.25	Patrol Observations	1.25	To Stowe		
19.25	23.00	Investigations-Ongoing/Cont.	3.75	Rim Rocks case interview		
23.00	24.00	1st Class-Inspections	1.00	Routine Inspection	Ladies Invited	Stowe
0	0.25	1st Class-Inspections	0.25	Routine Inspection	Back Yard	Stowe

0.25	0.50	Patrol Observations	0.25	To Morrisville		
0.50	0.75	1st Class-Inspections	0.25	Routine Inspection	Corner Pocket	Morrisville
0.75	1.00	1st Class-Inspections	0.25	Routine Inspection	Knotty Pine	Morrisville
1.00	2.25	Patrol Observations	1.25	Back Home		

(State's Exhibit 2, p.8 – 10)

24. Grievant used a "black book" calendar to help him keep track of his work activities. He made entries in the black book reflecting either work activities he had done, work he was then performing, or work activities he planned to do. He did not have a systematic approach in his use of the black book or in otherwise keeping track of his planned and completed work. In completing daily reports, Grievant looked to several sources, including his black book, his weekly itinerary, his Outlook calendar, and notes he may have made on sticky notes or other paper in his work vehicle.

25. Grievant's black book entries for February 24, 2010, include: "1700 Rim Rock Case Inspect". Also, there is a list of licensed establishments, including Ladies Invited, Backyard Tavern, and Knotty Pine. Grievant's weekly itinerary for the week which included February 24 indicates that Grievant was planning to work on the Rimrocks investigation, and conduct routine inspections in Stowe and Morrisville, on February 24 (Grievant's Exhibit 4, p.88).

26. It is possible that Grievant's daily report entries for February 24 actually were the activities engaged in by Grievant on February 26. However, this is unknown. Grievant's "black book" entries for February 26 consist of "paper work storm" and a listing of various towns, including Stowe, Barton and Derby (with a line through Stowe and Barton). The meaning of these entries and cross-outs is unclear. The daily report Grievant submitted for February 26 is not available to provide any guidance as to

Grievant's activities on February 26 or February 24. The Employer was unable to produce the February 26 daily report upon request by Grievant to do so (Grievant's Exhibit 4, p.90).

27. Once Thibault received Grievant's daily report for February 24, he concluded that Grievant was lying about his work activities that evening since he believed that Grievant had not left home that evening. On March 10, 2010, Thibault obtained statements from employees at the licensed establishments listed on Grievant's daily report for February 24. The Corner Pocket employee indicated that the establishment was not open on February 24 because of the severe snowstorm. The employees at two other establishments indicated that they did not see Grievant in their establishments on February 24 (State's Exhibit 3).

28. The Employer required Grievant to attend an investigatory interview on March 11, 2010. The notice the Employer provided Grievant for the investigatory interview indicated there was a problem for the pay period February 14 – February 27, 2010. Grievant had no notice that there was a specific problem with February 24, or that there was an issue with a daily report submitted by him. Prior to the investigative interview, Thibault told Grievant that this was the most serious issue he had dealt with as a supervisor, and that Grievant should have a VSEA representative with him at the interview.

29. Kathy O'Hara, Human Resources Administrator for the Employer; Goggins; Thibault; Grievant; and Grievant's VSEA Representative, Marty Raymond; were present at the March 11 investigatory interview. Thibault, sitting side by side with Grievant, ran the meeting. At the beginning of the meeting, Thibault put the following

documents in front of Grievant: his time report for the February 14 – February 27, 2010, period; his "white sheet" for the same pay period; Grievant's expense reimbursement form for the period including February 24, 2010; and his daily reports for February 23, 24 and 25, 2010.

30. Thibault, Goggins and O'Hara all asked Grievant questions during the interview. At the beginning of the interview, Thibault asked Grievant about his activities on February 23, 24 and 25, and where he ate on these evenings. When Thibault first discussed with Grievant his work activities for February 24, he did not mention that there was a snowstorm that day. Thibault and Grievant went over Grievant's daily report for that day line by line. Grievant indicated that the activities listed on the February 24 daily report were what he did that day. Thibault informed Grievant that William Goggins had gone by his residence a couple of times that evening during a snowstorm and that Grievant had not left his residence. Thibault also told Grievant that he had visited the establishments listed on the February 24 daily report and had been told that Grievant had not visited the establishments that evening. Subsequent to Thibault providing Grievant with this information, Grievant indicated that he wanted to check his "black book". A break occurred in the interview for Grievant to check his black book which was in his vehicle. Grievant's review of his black book did not clear things up because the February 24 black book entries showed him doing activities that were listed on his daily report.

31. When the interview resumed, Grievant told Thibault and the other Employer representatives at the interview that he performed desk duty on February 24 due to the snowstorm. He indicated that he went to either Hoagies or Substation for dinner early in his shift, and then worked on the Rimrocks case at his residence and

performed other duties. Goggins told Grievant that it looked to him that Grievant was just sitting there in the living room watching television. Grievant indicated that his housemate, Jennifer Harlow, was working on the evening of February 24 and that her son was with his grandparents. It was typical that Harlow worked on Wednesday evenings and that her son stayed with his grandparents on those evenings.

32. Jennifer Harlow actually was not working on February 24. She took a leave day on February 24 and was home that evening. Harlow's son also was in the residence that evening. The Employer was not aware of these facts until after Grievant's dismissal and prior to the Board hearing in this matter.

33. Subsequent to the investigative meeting, an investigative report was prepared and presented to Commissioner Hogan. There was a taped recording of the March 11 investigative interview. Commissioner Hogan did not listen to the taped recording. His only source of information about what occurred at the March 11 investigative interview was the investigative report. The investigative report and the taped recording of the March 11 investigative interview were not entered into evidence in this matter.

34. Commissioner Hogan sent a *Loudermill* letter to Grievant informing him that the Employer was considering dismissing him and that Grievant had the right to attend a *Loudermill* meeting before the Employer decided what action to take. The *Loudermill* letter was not admitted into evidence in this matter because it was not filed as an exhibit before the hearing in a timely manner and the Employer did not show good cause why it was not pre-filed as required by Section 12.13 of Board *Rules of Practice*.

35. Grievant appeared at the *Loudermill* meeting with his VSEA Representative Gary Hoadley. They met with Commissioner Hogan. Grievant brought to the meeting in a large manila envelope the documents he had reviewed, and the notes he had created, on February 24 relating to the Rimrocks case. Grievant was upset and emotional at the *Loudermill* meeting. At the close of the meeting, Grievant left with the envelope of Rimrock materials, forgetting to give it to the Commissioner.

36. Later that day, Hoadley sent an e-mail message to Commissioner Hogan informing him that Grievant had forgotten to give him the Rimrock materials, and that he wanted to get the materials to him. Commissioner Hogan did not respond. Two weeks later, Hoadley followed up with the Commissioner and said he would send the sealed envelope of materials to him. Hogan indicated to Hoadley that he was not interested in reviewing the materials.

37. Commissioner Hogan was the sole decision-maker on what action to take against Grievant. He did not seek guidance from anyone on his decision. His secretary completed a document on the application of the 12 factors to consider in deciding what disciplinary action to take. The analysis completed by his secretary was not entered into evidence in this matter.

38. Commissioner Hogan decided to dismiss Grievant. He sent Grievant a letter setting forth the reasons for the dismissal. The dismissal letter was not admitted into evidence in this matter because it was not filed as an exhibit before the hearing in a timely manner and the Employer did not show good cause why it was not pre-filed as required by Section 12.13 of Board *Rules of Practice*. Although the dismissal letter was not admitted into evidence, the Board ruled that this did not preclude the parties from

inquiring as to the charged reasons for dismissal. Commissioner Hogan dismissed Grievant for the following reasons: a) Grievant misrepresented his time recording; specifically that the times he put in for work on February 24 were inaccurate and misleading; b) falsification of time records; c) falsification of expense reimbursement; d) falsification of daily report; and e) dishonesty during the investigation.

39. Commissioner Hogan concluded that Grievant's misconduct was egregious due to lying and providing misinformation. He viewed Grievant's actions as particularly serious because he was a law enforcement officer held to a strict standard of integrity; that it was very important for an officer to be truthful. He thought that it would send the wrong message to condone Grievant's behavior. The Commissioner determined that Grievant had created too much distrust to remain employed with the Employer with respect to regulating liquor licensees and being a viable witness in cases coming before the Liquor Control Board.

40. There was an instance prior to Grievant's dismissal where Thibault became aware that another Investigator had engaged in the personal business of looking for a recreational vehicle while on duty. Thibault provided verbal feedback to the Investigator concerning this issue. The Employer did not discipline the Investigator. Thibault approved the time report of the Investigator which included the time he spent looking for the recreational vehicle. There was another instance where an Investigator who reported working on a time report subsequently admitted not working during that time. The Investigator resigned from employment.

41. In 2001, a Liquor Control Investigator indicated on his itinerary that he was working during times when he actually was in Connecticut not working. The

Investigator had worked extra time beyond his scheduled hours on other occasions, and then used this extra work as credit for the time he actually was in Connecticut. When Goggins discovered this, he prohibited the Investigator from continuing this practice. The Investigator was not dismissed.

OPINION

Employer's Motion to Reopen Evidence Or For New Hearing

On December 22, 2010, following the December 17 closing of the hearings in this matter, the Employer filed a motion to reopen evidence, or for a new hearing, based on newly discovered evidence which the Employer alleges demonstrates that Grievant misled the Board at the hearing. The Employer sought to introduce evidence that the United States Department of Homeland Security recorded Grievant crossing into Vermont from Canada on the evening of February 24, 2010, during the time Grievant testified that he was home working.

Grievant filed a memorandum on January 3, 2011, in opposition to the Employer's motion. On January 6, 2011, the Board Executive Director sent a letter to the attorneys for the Employer in this case, Henry Koltys and David Cassetty, providing in pertinent part:

> Upon review of the motion to reopen evidence filed by the Employer in this matter, the Labor Relations Board is requiring you to file an affidavit with the Board no later than January 13, 2011, providing the following information pertinent to the due diligence standard applicable in considering this motion: 1) what specific information was requested from the Department of Homeland Security, 2) who requested the information, 3) when the information was requested, 4) by what method the information was requested, 5) specify all efforts made to seek information and the dates of such efforts, and 6) specify all communications received from the Department of Homeland Security, oral and written; the identity of the person(s) from the Department of Homeland Security communicating information; and the date(s) such communications were received.

> In addition to filing this affidavit with the Board, the Board also requires that you provide a written explanation by January 13 why you did not inform the Board prior to the close of the hearings in this matter that you were awaiting a response from the Department of Homeland Security.

On January 13, 2011, Attorney Koltys filed an affidavit. Therein, he indicated that he had made a Freedom of Information Act ("FOIA") request to U.S. Customs and Border Protection ("CBP") on December 14, 2010, following the December 9, 2010, deposition testimony of Jennifer Harlow that she was with Grievant at her house on the evening of February 24, 2010. Koltys indicated that his FOIA request sought records for border crossings at the Derby Line border station on February 24, 2010, for the vehicle owned by Harlow.

Koltys stated in his affidavit that the Board was not provided with the border crossing information from CBP during the December 16 and 17 hearings because "the Attorney General did not receive the requested information and approval from the CBP until Friday, December 17, 2010, after the close of business." Koltys further stated: "The State did not alert the Board at the close of the evidence that it was waiting for information from CBP because we did not know what information would be provided by CBP or when CBP would provide it." Koltys indicated that the border crossing information was received on Monday, December 20, 2010.

Koltys asserted in the affidavit that the Employer "diligently prosecuted this case because any delays were due to my personal health issues". The closing paragraph in the affidavit provides: "The State respectfully objects to providing copies of and information regarding all correspondence and contacts with the Department of Homeland Security. This information represents attorney work product which is not appropriate for disclosure

to opposing counsel or to the Board." Grievant filed a letter in response to the affidavit on January 13, 2011.

The closing of a hearing in a case does not necessarily mean the parties are foreclosed in all circumstances from presenting further evidence. The Board Rules of Practice provides that "motions for leave to reopen a hearing because of newly discovered evidence shall be timely made", and that the "Board may, in its discretion . . . reopen a hearing and take further testimony at any time".[1]

In applying the provisions of this section, the Board has not granted motions to reopen in the absence of new information coming to light since the hearing which was not known at the time of the hearing.[2] The Board has indicated it would be prejudicial to the other party, and disruptive to the orderly processing of cases before the Board, to allow the moving party to present evidence on an issue which should have been fully explored at the hearing.[3] The Board also has indicated that it would not grant a motion to reopen on the basis of newly discovered evidence if, in preparing its case, the moving party had not acted with due diligence with respect to obtaining information that it now sought to admit into evidence through its motion to reopen.[4] Board precedents concerning the due diligence standard are most applicable to this case.

We deny the Employer's motion to reopen the evidence, or for a new hearing. The Employer did not act with due diligence with respect to obtaining information that it now seeks to admit into evidence through its motion. Due diligence is the measure of

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[1] Sections 12.17, 22.17, 32.17 and 52.17, Board Rules of Practice.
[2] Grievance of Gregoire, 18 VLRB 205, 207-208 (1995). Hartford Career Fire Fighters Association and City of South Burlington, 6 VLRB 337, 338 (1983). Chittenden South Supervisory Teachers' Association v. Chittenden South Supervisory School District Board of School Directors, 5 VLRB 332 (1982).
[3] Burlington Police Officers Association v. City of Burlington, 22 VLRB 5, 12 (1999).
[4] Grievance of Lilly, 23 VLRB 129, 136 (2000).

prudence, activity, or careful attention to be properly expected from, and ordinarily exercised by, a reasonable and prudent person under the particular circumstances of a case.[5] The Employer did not meet this standard by waiting until the fifth day after receiving information in a deposition, which itself was scheduled only a week before the Board hearings, to request the information it now seeks to admit into evidence.

The Employer provides no justification for waiting until two days before the Board hearing to request the information. Given that the deposition itself was scheduled so close to the hearing dates, it would have been reasonable and prudent to expeditiously seek the information either the day or the following day that the need for it surfaced during the deposition. Through the failure to exercise due diligence, the Employer set into motion the events which precluded having the information available during the hearings.

The Employer's reliance on the personal health issues of one of its attorneys does not justify the need to file a post-hearing motion to reopen evidence. This case originally was scheduled for hearing on November 18, 2010, through a notice of hearing issued on September 17, 2010. The hearing was rescheduled at the request of the Employer, and the parties agreed to December 16 and 17, 2010, as the rescheduled hearing dates. Subsequently, the Employer did not indicate to the Board prior to the rescheduled hearing dates that the attorney's health issues were hindering it in preparing for the hearings.

The Employer thus was required to conduct discovery and otherwise prepare for the hearing in such a way to allow the hearings to proceed and conclude as scheduled. This was necessary for the orderly processing of Board cases and the avoidance of prejudice to Grievant. Moreover, the Employer has provided no basis to support a

[5] Black's Law Dictionary, 6th Edition, West Publishing Co., 1990.

conclusion that the attorney's health issues had any impact on waiting until the fifth day after the deposition of Jennifer Harlow to request information from the U.S. Custom and Border Patrol.

The Employer has not aided its motion to reopen the evidence in this matter by failing to adequately respond to the requirement of the Board set forth in the January 6, 2011, letter from the Board Executive Director to provide certain information pertinent to the due diligence standard applicable in considering this motion. The Employer objected to providing copies of, and information regarding, all correspondence and contacts with the Department of Homeland Security on the grounds that this information represents attorney work product which is not appropriate for disclosure to opposing counsel or to the Board.

The information sought by the Board related to a Freedom of Information Act request made by the Employer. The Employer has not indicated how requests to a public agency for public records, and the responses received by the public agency concerning public records, are protected by the attorney work product privilege. Absent compelling reasons provided by the Employer, we cannot conclude the attorney work product privilege excuses the Employer from providing the information sought by the Board.

The Employer was seeking to reopen the hearing to admit evidence provided through a public records request, and was required to show due diligence in making the request. The communications between the Employer and the Department of Homeland Security concerning the request were integral in establishing whether due diligence was exercised. The Employer's broad assertion of an attorney work product privilege under these circumstances obstructed the work of the Board in justly resolving cases.

Further, we conclude that the Employer did not provide a sufficient explanation for failing to inform the Board prior to the close of the hearings that the Employer was awaiting a response from the Department of Homeland Security on its Freedom of Information Act request. The Employer had a pending information request which it believed could provide pertinent information concerning the validity of Grievant's dismissal. Nonetheless, the Employer did not make the Board and Grievant aware of this pending request, and instead closed its case and agreed to a schedule for filing briefs. In so doing, the Employer disregarded the importance of orderly and appropriate processing of cases and acted in a way that was prejudicial to Grievant.

Merits

Grievant contends that his dismissal violated Article 14 of the Contract because: a) the dismissal was not based in fact or supported by just cause; b) the Employer improperly bypassed progressive discipline; c) the Employer improperly bypassed progressive corrective action; d) the Employer failed to apply discipline with a view toward uniformity and consistency; and e) the Employer failed to impose discipline within a reasonable time of the alleged offense. Grievant also contended in the grievance filed with the Board that the dismissal violated: a) Articles 5 and 15 of the Contract because it constituted discrimination against him based on his complaint and grievance activities; b) Article 15, Section 2, of the Contract because it constituted the discriminatory application of rules and regulations; and c) Article 17 of the Contract because the Employer's application of work rules to him was unreasonable. Grievant did not discuss the allegations of Articles 5, 15 and 17 violations in his post-hearing brief,

and we deem Grievant to have waived consideration of these alleged violations. Thus, our discussion is limited to whether the Employer violated Article 14 of the Contract.

In determining whether just cause existed for the dismissal of Grievant, the Board is faced with the task of weighing the significant responsibility of the Employer to ensure that its law enforcement officers have a high degree of honesty and integrity versus the degree of evidence required to justify the dismissal of a long-term employee with a good work record.[6] The ultimate criterion of just cause is whether an employer acted reasonably in discharging an employee for misconduct.[7] 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.[8]

In carrying out our function to hear and make final determination on whether just cause exists for dismissal, the Board determines *de novo* the facts of a particular case, and whether the penalty imposed on the basis of these facts is within the law and the contract.[9] In large measure, this is an objective standard requiring review of the penalty imposed on the basis of facts actually found by the Board.[10] 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.[11] The Board determines whether the action taken by the employer was reasonable based on the proven charges.[12]

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[6] Appeal of Davidson, 29 VLRB 105, 137 (2007).
[7] In re Grievance of Brooks, 135 Vt. 563, 568 (1977).
[8] Id. In re Grievance of Yashko, 138 Vt. 364 (1980).
[9] Grievance of Colleran and Britt, 6 VLRB 235, 265 (1983).
[10] Id.
[11] Id.
[12] Grievance of Simpson, 12 VLRB 279, 295 (1989).

We note as a preliminary matter in considering whether just cause exists for Grievant's dismissal that the Employer did not present evidence that typically is part of the record in dismissal cases. The Employer did not enter into evidence the following exhibits which commonly would be introduced by an employer to support an employee's dismissal: 1) the taped recording of the March 11, 2010, investigative interview of Grievant; 2) the investigative report reviewed by Commissioner Hogan in deciding whether to dismiss Grievant; 3) the *Loudermill* letter the Commissioner presented to Grievant; and 4) the dismissal letter.

The taped recording of the investigative interview was excluded from evidence because the Employer did not offer its admission in a timely manner. The Employer never sought to admit the investigative report. The Board did not admit into evidence the *Loudermill* letter and the dismissal letter because they were not pre-filed as exhibits before the hearing in a timely manner and the Employer did not show good cause why they were not pre-filed as required by Section 12.13 of Board *Rules of Practice*. Although the *Loudermill* letter and dismissal letter were not admitted into evidence, the Board ruled that this did not preclude the parties from inquiring as to the charged reasons for dismissal.

The Employer makes the following charges against Grievant to support his dismissal: a) Grievant misrepresented his time recording; specifically that the times he put in for work on February 24 were inaccurate and misleading; b) falsification of time records and daily report; c) falsification of expense reimbursement; ; and d) dishonesty during the investigation.

We first determine whether the Employer established the charge that Grievant misrepresented his time recording by putting in times for work on February 24 that were inaccurate or misleading. In alleging that Grievant misrepresented his time and submitted times for work that were misleading, the Employer is alleging that Grievant engaged in misconduct.

The Contract distinguishes between the progressive sanctions that are available in misconduct cases and the progressive sanctions that are available in performance cases. This has led the Board to conclude that the parties intended a distinction between misconduct and nonperformance. The Board stated that "consistent with this intent, and as a matter of logic, neither of the two requisite elements of just cause – 'reasonableness' and 'fair notice' – can be determined without first categorizing the employee's underlying actions as a question of misconduct or a question of performance."[13]

We conclude that the Employer has not demonstrated by a preponderance of the evidence that Grievant engaged in misconduct by his recording of time for February 24. Grievant certainly displayed deficiencies in his recording of time for February 24. He changed his scheduled activities for the day, but did not inform his supervisor that his itinerary had changed contrary to procedures and his own prior practices. Also, the daily report which he submitted for that day, which he completed and submitted a week following February 24, did not accurately reflect the activities he engaged in that day. Grievant displayed sloppy and incomplete time recording procedures with substantial room for improvement.

Nonetheless, the Employer has not demonstrated by a preponderance of the evidence that Grievant intended to misrepresent his work that day or mislead the

[13] Grievance of Roy, 13 VLRB 167, 182 (1990).

Employer through his deficiencies. Also, as discussed more fully below, the Employer has not established by a preponderance of the evidence that Grievant misrepresented the amount of time he worked on February 24. Under these circumstances, the Employer has not demonstrated the validity of addressing Grievant's deficiencies as a question of misconduct. Instead, the Employer would have acted appropriately by dealing with Grievant's failings in this regard as a question of performance and applying progressive corrective action. Thus, the Employer has not established the first charge against Grievant.

The next charge against Grievant is that he falsified his time records and daily report. As discussed above, Grievant's record of time worked on February 24 was inaccurate to the extent that his daily report for that day did not accurately reflect his activities. However, a charge of falsification implies intent to misrepresent and deceive, and the Employer has not established such falsification by a preponderance of the evidence.

The Employer also has not demonstrated by a preponderance of the evidence that Grievant falsified his time report by certifying that he worked a full shift of 9.25 hours on February 24. The Employer has not established that Grievant did not work desk duty in his residence that evening for his entire shift. We emphasize that we are not concluding by a preponderance of the evidence that Grievant performed such duties for the entire shift. However, it is not Grievant's burden to so prove. Instead, the burden of proof is on the Employer to prove its charges by a preponderance of the evidence. The Employer has failed in its burden on this charge.

The Employer's holding of Grievant to a strict standard on time reporting and imposing a severe penalty for a violation of the strict standard were inconsistent with how the Employer historically has handled such issues. There have been occasions where Grievant and another Investigator worked extra time beyond their schedules, such as 30 - 45 minutes, and then have been allowed by their supervisor to take the same amount of time off elsewhere that week without making any changes in the 9.25 hours of work recorded on their time reports for these days. Although the Employer issued a memorandum in 2008 holding Investigators to stricter time reporting standards and Grievant's supervisor informed him in a September 2009 special evaluation that he must receive advance approval of schedule changes, the evidence indicates that Grievant's supervisor did not strictly enforce the requirement that time reports must accurately reflect the hours actually worked. The Employer at best sent mixed messages to Grievant on strict reporting of time, and the severe penalty imposed on Grievant for time reporting deficiencies was inconsistent with its actual practices.

We also conclude that the Employer has not established its next charge against Grievant, that he falsified his expense reimbursement claim when he claimed reimbursement of $12.85 for a meal on February 24. The Employer has not established by a preponderance of the evidence that Grievant did not have a meal in a local restaurant early in his shift, well before William Goggins observed Grievant's vehicle in the driveway of his residence covered in snow. Again, we are not concluding by a preponderance of the evidence that Grievant submitted a valid meal claim. However, it is not Grievant's burden to so prove. Instead, the burden of proof is on the Employer. We

conclude that the Employer has presented insufficient evidence to establish by a preponderance of the evidence that this was a false claim.

The final charge by the Employer is that Grievant engaged in dishonesty during the Employer's investigation. During the March 11, 2010, investigative interview of Grievant conducted by the Employer, Grievant provided two different versions of his work activities on February 24. Early in the interview, Grievant indicated that the activities listed on the daily report which he completed for February 24 were what he did that day. Later in the meeting, Grievant told the representatives of the Employer that he performed desk duty on February 24 due to the snowstorm. Grievant indicated that he worked on the Rimrocks case that evening and performed other duties.

Nonetheless, the context in which Grievant provided different versions of his February 24 activities needs to be examined to determine whether the Employer established by a preponderance of the evidence that Grievant was dishonest during the investigative interview. The interview occurred two weeks after the February 24 date in question. Grievant did not know going into the investigative interview that there was a specific problem with February 24, or that there was an issue with the daily report submitted by him for that date. When Grievant's supervisor, Andre Thibault, first discussed with Grievant at the beginning of the investigative interview his work activities for February 24, Thibault did not mention that there was a snowstorm that day. Thibault and Grievant went over Grievant's daily report for that day line by line. It was in this context that Grievant indicated that the activities listed on the February 24 daily report were what he did that day.

Grievant was wrong in so indicating since his daily report for the day was not an accurate reflection of the work he performed. However, the passage of time between the date in question and the investigative interview, the lack of knowledge by Grievant going into the interview that his work activities on February 24 were going to be questioned, the specific focusing on Grievant's daily report for that day, the lack of discussion of the major snowstorm that day, and Grievant's deficiencies in record-keeping all are factors which may have contributed to a lack of accurate reflection on Grievant's part as to the events of that day.

After Grievant provided an inaccurate account of his February 24 work activities during the investigative interview, Thibault provided additional information to Grievant.. Thibault informed Grievant that William Goggins had gone by his residence a couple of times that evening during a snowstorm and that Grievant had not left his residence. Thibault also told Grievant that he had visited the establishments listed on the February 24 daily report and had been told that Grievant had not visited the establishments that evening. Subsequent to Thibault providing Grievant with this information, Grievant told Thibault and the other Employer representatives at the interview that he performed desk duty on February 24 due to the snowstorm. This information provided by Thibault may have served to improve Grievant's recollection of his February 24 work activities

In examining the context in which Grievant provided information during the investigative interview, and in considering the evidence in its entirety, we conclude that the Employer has not demonstrated by a preponderance of the evidence the charge that Grievant was dishonest during the investigative interview.

We note that Grievant provided other inaccurate information during the March 11 investigative interview. He indicated that his housemate, Jennifer Harlow, was working on the evening of February 24 and that her son was with his grandparents. Harlow actually was not working on February 24, and was home that evening. Harlow's son also was in the residence that evening. However, this discrepancy provided no basis for the Employer's charge in dismissing Grievant that he was dishonest during the investigation. The Employer was not aware of these facts until after Grievant's dismissal and prior to the Board hearing in this matter. The Board's review does not go beyond the reasons given by the Employer in dismissing Grievant, and thus we have not considered this evidence as an element of the Employer's charge of dishonesty during the investigation.[14] We have considered the evidence only to the extent that it relates to Grievant's credibility and an understanding of the occurrence of events on February 24, 2010.

We thus conclude that the Employer has not established any of the charges made against Grievant by a preponderance of the evidence. The evidence presented by the Employer is insufficient to demonstrate that Grievant acted dishonestly as charged. In sum, we conclude that the Employer has not established that any discipline should have been imposed on Grievant. Accordingly, Grievant should be reinstated with back pay.

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[14] Grievance of Westbrook, 25 VLRB 130, 134 (2002). Appeal of Danforth, 23 VLRB 288, 294-97 (2000); *Affirmed*, 174 Vt. 231, 244-45 (2002). Grievance of Newton, 172, 197 (2000).

ORDER

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

1. The Grievance of David Jacobs is sustained;
2. Grievant shall be reinstated to his position as Liquor Control Investigator with the State of Vermont Department of Liquor Control;
3. Grievant shall be awarded back pay and benefits 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 shall be computed on gross pay, shall be at the legal rate of 12 percent per annum and shall run from the date each paycheck was due during the period beginning with Grievant's dismissal, and ending on his reinstatement; interest 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 Board by May 12, 2011, 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 by 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

any, shall be held on May 26, 2011, at 9:00 a.m., in the Labor Relations Board hearing room; and

6. The Employer shall remove all references to Grievant's dismissal from his personnel file and other official records.

Dated this 12th day of April, 2011, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Linda P. McIntire

Linda P. McIntire, Acting Chairperson

/s/ Leonard J. Berliner

Leonard J. Berliner

/s/ James C. Kiehle

James C. Kiehle