VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 16-59
BEAU ALEXANDER	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On December 8, 2016, the Vermont State Employees' Association ("VSEA") filed a grievance with the Vermont Labor Relations Board on behalf of Beau Alexander ("Grievant"), contending that the State of Vermont Department of Corrections ("Employer") violated the collective bargaining agreement between the State and the VSEA for the Corrections Bargaining Unit effective July 1, 2016 to June 30, 2018 ("Contract") by dismissing him. Specifically, Grievant alleged that the Employer violated Article 14 of the Contract because: 1) the dismissal was not based in fact or supported by just cause, 2) the Employer improperly bypassed progressive discipline, 3) the Employer improperly bypassed progressive corrective action, and 4) the Employer failed to apply discipline with a view toward uniformity and consistency.

A hearing was held in the Labor Relations Board hearing room in Montpelier on April 20, 2017, before Board Members Gary Karnedy, Chairperson; James Kiehle and Robert Greemore. Assistant Attorney General Melanie Kehne represented the Employer. VSEA Staff Attorney Kelly Everhart represented Grievant. The Employer and Grievant filed post-hearing briefs on May 11, 2017.

FINDINGS OF FACT

1. The Contract provides in pertinent part:

. . .

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, special or annual, with a specified prescriptive period for remediation specified therein, normally three (3) To six (6) months;
        (3) warning period of thirty (30) days to three (3) months, extendable for a period of up to six (6) months. Placement on warning status may take place during the prescriptive period if performance has not improved since the evaluation;
        (4) dismissal.
    f. The parties agree that there are appropriate cases that may warrant the State:
        (1) bypassing progressive discipline or progressive corrective action; . . .
    g. . . . Nothing in this Agreement shall be construed to limit the State's authority or ability to demote an employee under Section 1(d) and/or 1(e) of this Article, for just cause resulting from misconduct or performance, but the State shall not be required to do so in any case. The VLRB may not impose demotion under this Article.

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. . .
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 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.

. . .

(VSEA Exhibit 11)

2. State Personnel Policies and Procedures provide in pertinent part as follows:

. . .

Number 5.6 – EMPLOYEE CONDUCT

. . .

REQUIRED CONDUCT

. . .

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 . . .

. . .

Number 17.0 – EMPLOYMENT RELATED INVESTIGATIONS

. . .

EMPLOYEE COOPERATION WITH EMPLOYMENT INVESTIGATIONS

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 related to work is a misconduct offense for which an employee may be disciplined up to and including dismissal.

. . .

(State Exhibits A, D)

3. Department of Corrections Work Rules provide in pertinent part as follows:

1. No employee shall violate any provision of the collective bargaining agreement or a State or Department work rule, policy, procedure, directive, local work rule or post order.

. . .

4. Employees shall be honest and complete in their descriptions, whether given orally or in writing to the employer of events occurring in the work place and in all other circumstances related to their employment.

. . .

9. No employee, whether on or off duty, shall comport himself or herself in a manner that reflects discredit upon the Department.

. . .

(Exhibit F)

4. Department of Corrections Administrative Directive #254.04, Case Documentation-Electronic, provides in pertinent part:

PURPOSE

The purpose of this administrative directive is to establish guidelines for defining, recording, and maintaining electronic case management documentation for inmates in correctional facilities and offenders under supervision in the community by correctional staff and other authorized persons. This includes narratives in case notes, victim case notes, parole summaries, graduated sanction reports, incident reports, case summaries, violations, revocations, and other associated case information.

. . .

DEFINITIONS

. . .

Case Documentation – A form of correctional documentation that contains both narrative and associated case information, and documents case activity. Examples of case documentation include, but are not limited to, case notes . . .

Case Note: An electronic note pertaining to an offender's case written by Caseworkers, Probation Officers, supervising staff, or other staff with relevant information, which documents activity relating to that offender. Examples include, but are not limited to, details about a meeting with an offender, notes on a phone call with a victim or another staff person . . . results of an alco-sensor, results of a case staffing, or pertinent information which may influence case planning or case status.

. . .

PROCEDURAL GUIDELINES

The purpose of case documentation is to record pertinent information about offender case management, behavior, and attitudes which in custody or under supervision; compliance with conditions; and participation in risk-reducing activities as relevant. . .

1. The Purpose of Electronic Case Notes

There are several reasons to write and maintain case notes.

a. Documentation: Staff will document risk-related or other pertinent information in a timely and chronological manner, about offenders and/or victims as a record to ensure personal and institutional memory. . .
b. Communication: Case notes provide information to authorized internal and external parties to enhance collaborative supervision.
c. Supervision: Supervisors monitor case notes to ensure that casework staff are following all case note documentation standards, and to support them in their roles.

d. Systems Evaluation: Electronic case notes allow for an analysis of associated case information, process and outcome evaluation, and continuous improvement.

. . .

(State Exhibit E)

5. Grievant began working for the Department of Corrections as a temporary employee in the summer of 2009. He certified that he read and fully understood the Department of Corrections Work Rules on August 8, 2009. He became a permanent status state employee in February of 2010. On May 5, 2011, while employed as a Correctional Officer I at the Chittenden Community Correctional Center, Grievant was suspended for one day for not submitting a certificate from a physician to justify his request for sick leave as ordered by the Assistant Superintendent of the Correctional Center (VSEA Exhibit 7).

6. Grievant was employed as a Community Correctional Officer ("CCO") at the Burlington Probation and Parole Office from October 2011 to December 2012. Grievant received an overall rating of satisfactory on an annual performance evaluation which he received while working in the Burlington Probation and Parole Office. When Grievant worked in the Burlington Office, CCOs were authorized to interact with offenders alone without being accompanied by another CCO (VSEA Exhibit 7, p.67 - 74).

7. Grievant was a CCO at the Bennington Probation and Parole office from December 2012 until his dismissal on November 28, 2016. Grievant's immediate supervisor was Dan Charron (State Exhibit F; VSEA Exhibits 3 and 7).

8. CCO's provide risk control and risk management services as part of a team in a Community Correctional Services Center or a correctional facility. Duties involve supervision and monitoring of an assigned caseload of high risk offenders in the following situations: pre-approved furlough, supervised community sentence, probation, parole, or furlough reintegration.

Work is performed under the supervision of a Casework Supervisor or a correctional facility Superintendent (VSEA Exhibit 8).

9. Grievant and one other CCO in the Bennington office were regularly assigned to work the second shift, 3:30 p.m. to midnight. Their supervisor, Dan Charron, worked Monday through Friday, during the first shift, and ended his work day at 4:30 p.m. There was no supervisor present for the remainder of the second shift. Second shift CCO's have a great deal of autonomy on the job. This requires a high degree of trustworthiness.

10. Grievant and Charron did not have a good relationship. Grievant kept contacts with Charron to a minimum. Grievant often left the office at the beginning of his shift and worked by himself. Sometimes he performed vehicle maintenance during this time, although much of the required maintenance work was performed by first shift CCO's.

11. Charron completed an annual performance evaluation on Grievant for the period August 24, 2014, to August 28, 2015. Charron rated Grievant's overall performance as "satisfactory". Charron made the following comment concerning timely entry of case notes: "A majority of the time you complete case note entry in a timely manner. It is vitally important when working with offenders that present many issues to them and to the public safety, that we complete case notes so that information can be disseminated to the appropriate DOC staff." Charron further stated: "You have not been signing into the office log book, this is essential in determining your beginning and end of your shift and all the things that happened when you were on duty" (VSEA Exhibit 7, p.52-56).

12. In 2015, the Department of Corrections central office required that all Community Correctional Officers in the state ride in pairs. The purpose of this requirement was safety of the officers. Charron communicated this requirement to CCO's multiple times verbally. Charron also

sent an email on September 29, 2015, to Community Correctional Officers in the Bennington office, including Grievant, and their supervisors which provided in pertinent part: “Reminder that CCO’s have to pair up/ride together, this is now an edict from Central Office to enhance officer safety. . .” (State Exhibit O).

13. There was a meeting on November 25, 2015, among the Community Correctional Officers in the Bennington office and their supervisors. Present were supervisor David Jankowski, Charron, Stefan Strohmaier, Larry Baker, Abby Dickie and Grievant. Supervisors provided a reminder to Community Correctional Officers that they “must pair up when out on the street, and told them that this was a “mandate” from the Department Central Office (State Exhibit N).

14. On Friday, January 29, 2016, Grievant and CCO Abby Dickie were assigned to work the second shift. Shortly before 7:40 p.m., at which time Grievant was not in the office, a man, AM Jr., called the office and spoke to Dickie. He told Dickie that his girlfriend, BT, an offender under the supervision of the Bennington Probation and Parole Office, had disappeared from their home and that personal property of his was missing. Dickie advised AM Jr. to contact the Bennington Police Department. Dickie attempted to call Grievant on his cellphone to let him know about the call in the event they had to go to AM Jr.’s home to investigate. She was unable to reach him.

15. At approximately 7:40 p.m., Officer Amanda Thomson of the Bennington Police Department called the Bennington Probation and Parole Office and spoke with Dickie. Thomson informed Dickie that AM Jr. had told the Bennington Police about BT having disappeared and his missing personal property. Thomson told Dickie that she was going to AM Jr.’s home to investigate. Dickie agreed to meet her there. Dickie immediately attempted to call Grievant at his

work cellphone and personal cellphone. She did not reach him. Dickie then drove to meet Thomson at AM Jr.'s home. Thomson was surprised that Dickie arrived at AM Jr.'s home without a partner. Dickie told Thomson she had been unable to reach Grievant.

16. Dickie sent Grievant a text at 8:13 p.m. which provided: "Hey can you call the truck phone when you have a min". Grievant responded to this text at 9:05 p.m., stating: "I just did call me when you can" (State Exhibit K, p. 6 – 7; VSEA Exhibit 9).

17. Dickie went to the Bennington Police Department between the time she sent the text at 8:13 p.m. and received the text from Grievant at 9:05 p.m. Dickie had called BT and arranged to meet her at the police department. Dickie and Thomson met at the police department with BT. BT arrived with a male who told Thomson and Dickie that AM Jr. had made up the story about BT taking his personal property and was trying to get BT arrested. The male indicated that AM Jr. had told him he was going to make a false report about BT taking his gun although AM Jr's father, AM Sr., actually had taken it. After Dickie received the text at 9:05 p.m. from Grievant, she called Grievant and informed him what had been reported at the police department. Grievant did not tell Dickie during this phone conversation where he had been when Dickie was trying to contact him.

18. BT told Thomson and Dickie at the police department on the evening of January 29 that AM Jr. had physically and sexually abused her. Dickie helped BT develop a safety plan if AM Jr. appeared where she was residing that evening. Thomson asked BT to return to the station the following day at 4 p.m. to make a sworn statement. Dickie then drove BT to BT's home.

19. Grievant phoned Dickie around the time Dickie was transporting BT home. He told her that he had called another offender, JM, to come to the office, and that he was waiting for Dickie to help transport the offender to the Marble Valley Correctional Facility in Rutland.

Dickie returned to the office, and she and Grievant transported JM to the correctional facility. This was an approximate 2 ¼ to 2 1/2 hour roundtrip.

20. Dickie was frustrated with Grievant for not having been available when she called, and for not telling her where he had been. She did not confront him about it.

21. Grievant did not document any case activities for his January 29 shift other than the transport of JM to the correctional facility. Grievant has not provided any details on or since January 29, 2016, regarding his activities on that evening other than meeting with JM at the office and transporting him to the correctional facility.

22. Grievant's personal cell phone records for January 29, 2016, show the following personal calls and texts during his January 29 shift: a) a 17-minute call to Comcast at 5 p.m., b) a 21-minute call to Comcast at 6:15 p.m., and c) multiple calls and texts to and from his ex-girlfriend at 5:45, 5:58, 5:59, 6:15, 6:16, 6:35, 6:45, 6:46, 6:47, 6:48, 6:49, 6:50, 6:52, 6:53, 6:54, 6:56, 7:30, and 7:31 (State Exhibit K).

23. On Saturday, January 30, 2016, Grievant and Dickie were again assigned to work the second shift together. They both started work at the office at approximately 3:30 p.m. Dickie told Grievant that she was going to meet BT and Thomson at the Bennington Police Department at 4 p.m. She did not ask Grievant to go with her.

24. Dickie went to the police department as planned and met with BT and Thomson. BT provided a statement to Thomson and signed an affidavit to request an Emergency Relief from Abuse Order. BT discussed AM Jr.'s father, AM Sr., having a firearm. AM Sr. had recently been released from prison, and was on furlough under the supervision of the Bennington Probation and Parole Office. AM Sr. was not allowed to possess a firearm because he was a

convicted felon on furlough. The Bennington Police Department planned to take AM Jr. and AM Sr. into custody.

25. Dickie sent Grievant the following text from the police department at 6:38 p.m.: "Are you at the office?" Grievant responded: "No, I came home for chow" (State Exhibit K, VSEA Exhibit 10).

26. Grievant and Dickie subsequently exchanged several text messages in which Dickie indicated that the police were looking to locate AM Jr. who was believed to be at the house of his father, AM Sr. Dickie sent Grievant a text stating as follows concerning the actions the police planned to take concerning AM Sr.: "Once they grab him (Thomson) wants to go up to his house to see if he has the guns. He just made parole so I don't know if he has search conditions." Dickie subsequently sent a text to Grievant, stating: "Can you meet rob and Keith at Srs house now", and she provided the address – 308 Silver Street in Bennington. "Rob" and "Keith" were Bennington police officers. Dickie told the Bennington police that Grievant could point out AM Sr.'s residence to allow the police to determine whether AM Jr. was there. The Bennington police officers did not know specifically the living unit in which AM Sr. resided and did not know him by appearance. These text exchanges between Grievant and Dickie occurred between 7:35 p.m. and 7:43 p.m. (State Exhibit K, VSEA Exhibit 10).

27. Dickie reached Grievant on the telephone. Dickie told Grievant to meet the police at AM Sr.'s residence. Grievant indicated he would leave directly and meet the police at the residence. Dickie indicated to the police that Grievant was traveling from Pownal. The police waited a few minutes to allow Grievant time to get to the residence from Pownal, and then went to the 308 Silver Street address. They waited there approximately 7 to 10 minutes for Grievant to appear but Grievant did not show up. The police waited a sufficient time for Grievant to arrive

from Pownal. The Bennington police decided the situation was dangerous, and they left the scene to return to the police department. Thomson was upset with Grievant.

28. Grievant subsequently sent a text to Dickie, stating: "Well I'm in Bennington I went by 307 and no one's there if they need me call me". Dickie responded by asking Grievant to come to the police department. Grievant indicated that he was in north Bennington, and agreed to come to the police department. These text exchanges between Grievant and Dickie occurred between 8:05 and 8:16 p.m. Grievant drove to the police department. Grievant and Dickie then assisted the Bennington police in their attempt to locate AM Jr. and AM Sr. The police ultimately located them and took them into custody (State Exhibit K, VSEA Exhibit 10).

29. Later that evening, Grievant and Dickie transported AM Sr. from Bennington to the Marble Valley Correctional Facility.

30. Grievant did not document any case activities for his January 30 shift. It is unknown, and he cannot account for, what work activities he performed during the shift prior to his text communications with Dickie approximately halfway through the shift concerning collaborating with the Bennington Police Department to locate AM Jr. and AM Sr.

31. Grievant was temporarily removed from duty with pay on June 7, 2016, due to allegations of misconduct against him. He remained on temporary relief from duty with pay status until he was dismissed on November 28, 2016 (VSEA Exhibits 3; 7, p. 38-42).

32. Bennington Probation and Parole District Director David Miner sent Grievant a letter dated September 1, 2016, providing in pertinent part:

> As a result of your behavior described below, the Department of Corrections ("DOC") is contemplating imposing serious disciplinary action up to and including dismissal from your position as a Community Correctional Officer. . .
>
> . . .
>
> **A. Relevant Provisions of the Corrections Unit Collective Bargaining Agreement ("CBA"), Vermont Personnel Policies, and DOC Rules and Directives**

- CBA Article 14, Disciplinary Action
- Personnel Policy, 5.6, Employee Conduct
- Personnel Policy 8.0, Disciplinary Action
- Personnel Policy 9.1, Immediate Dismissal
- Personnel Policy 17.0, Employment Investigations
- DOC Administrative Directive 254.04 – Case Documentation – Electronic
- DOC Work Rules 1, 4, 6 and 9

B. Potential Violations of the Contractual Agreement, Personnel Policies, DOC Work Rules, DOC Policy, and DOC Directives

You are currently employed as a Community Correctional Officer at Bennington Probation and Parole in the Department of Corrections. The Department became aware of allegations that you may have coded Hours worked on your timesheet for time that you did not, in fact, spend working on State business, when your whereabouts were unknown during your scheduled shift time on January 29 and 30, 2016.

A basic expectation of the CCO position is that you must be reachable at all times while on duty. However, it seems multiple attempts to contact you during your shifts on 1/29/16 and 1/30/16 went unanswered. After the start of your shift on 1/29/16 you told CCO Dickie to call if she needed you, and then drove away from the office in your personal vehicle. During your scheduled work time, Bennington Police (BPD) subsequently contacted FSU asking for assistance with a domestic disturbance involving an offender on field supervision. CCO Dickie and the BPD required your assistance with the situation, and Dickie repeatedly attempted to contact you on your cell phone and over the radio throughout their dealing with this offender. However, her calls to you went unanswered for a long time, and your whereabouts were unknown. You eventually made contact with CCO Dickie during the evening, but failed to report to assist her and BPD. Rather, it seems you told Dickie again to call if she needed you, then you sat in the FSU office with an offender for several hours waiting to return from the police station.

The following day, 1/30/16, you again left the office alone while on shift and told CCO Dickie to call you if she needed anything. CCO Dickie again received a call from the BPD requesting assistance dealing with the same offender from the night before. CCO Dickie again tried contacting you by phone and radio and received no response. CCO Dickie had no option but to respond to BPD alone. When CCO Dickie was finally able to speak with you, she informed you your presence was required at an offender's residence and you were to meet BPD there immediately. The BPD waited for you at the residence, but you never arrived to provide the necessary assistance. The police were forced to retreat and pursue a different strategy, and your conduct jeopardized officer safety.

There is a current DOC Directive that all CCOs drive with a partner when out in the community, and notify someone when you leave the office. It seems you repeatedly failed to follow these directives. There is also a clear expectation that all actions you take as a CCO are documented in case files. All contacts with offenders are to be documented in the log book noting date, time, and location of the offender interaction. The same

information is documented in the offender's case note. You acknowledged during your investigative interview that you write down your field checks either in a log book or a piece of scrap paper, and then record them in the offender case notes. Despite this, you made no entries in the log book or case files to reflect any offender interaction on 1/29/16 and 1/30/16, and were unable to produce any such records documenting your time and activities on those days. However, you coded eight (8) Hours Worked on your timesheet for 1/29/16 and 1/30/16. If you were working, offender checks should be clearly documented. Most troubling is that, when questioned, you were unable to fill in the gaps of this unaccounted work time. Thus it appears that you cannot account for what tasks and job duties you were doing for two entire work days, during which time you were mostly unable to be reached by co-workers. Therefore, it seems more likely than not that you did not perform eight (8) hours of work on 1/29/16 and 1/30/16, as you claimed on your timesheet.

Every time you submit your time report online, you click a button agreeing: "We the undersigned do hereby certify under the pains and penalties of perjury that the reported information is accurate 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 time reporting herein is complete for this pay period and in accordance with state policy." However, it appears you reported, and were subsequently paid for, hours that you did not work, which your reasonably knew, or reasonably should have known was false.

It also appears that you were not entirely truthful and forthcoming during your investigative interview. During the investigation, you stated you typically immediately go out in the field after reporting to your shift, and service the FSU vehicle, drive around town, and make FSU's presence known to the community. You have a radio, work cell phones, and a personal cell phone with you, and claimed you can be contacted at all times if needed. You suggested you may have been out of cell and radio range while traveling about the communities doing work activities during the times your presence was unaccounted for. However, you were unable to provide any documentation of work performed on 1/29/16 and 1/30/16, and you were unable to provide any legitimate explanation of how your work time was used on those days.

Vermont Personnel Policies provide employees direction on how to conduct themselves in order to fulfill their duties as public servants. Specifically, you are to devote your full time and attention to the duties and responsibilities of your position, and conduct yourself in a manner that will not bring discredit or embarrassment to DOC and/or the State of Vermont, whether on or off duty. Also, all employees are expected and required to be honest and accurate in all dealings with their employer. By seemingly falsifying your time reports you have potentially committed perjury and gross misconduct, and acted in a way that brings discredit and embarrassment to DOC and the State of Vermont. Additionally, it seems you were untruthful to your employer and answered questions inaccurately during the investigative process, in violation of Personnel Policy 17.0 Accordingly, your conduct appears to constitute misconduct and/or gross misconduct and violate all of the above policies and provisions, and provides just cause for disciplinary action up to and including dismissal from your position with the DOC.

> . . .
> You must notify me within twenty-four (24) hours after receiving this letter whether you wish to respond to the above allegations. . .
> . . .
> (VSEA Exhibit 4)

33. Grievant and VSEA Representative Rachael Fields met with Dale Crook, DOC Director of Field Services; Matt Nault, DOC Field Services Manager; Miner and Human Resources staff on October 7, 2016, in a meeting to allow Grievant to respond to the allegations (VSEA Exhibit 2).

34. DOC Deputy Commissioner Cheryl Elovirta sent Grievant a letter dated November 28, 2016, which provided in pertinent part:

> This is to notify you of your dismissal from the position of Community Correctional Officer . . .
>
> I am terminating you because I find that you committed misconduct and gross misconduct of time card fraud as described in the above-referenced September 1, 2016 letter, which is incorporated herein. Specifically, you submitted hours worked on your time sheet for time that you did not spend working on state business on January 29 and 30, 2016. Additionally, all CCOs must travel in pairs and be reachable at all times while on duty, but you were repeatedly and intentionally unreachable via phone and radio during your shifts on January 29 and 30, 2016. This willful disregard of duty is unacceptable, particularly because of . . the nature of the CCO work, where potential violence or threatening behavior are constant risks.
>
> The Department of Corrections has lost confidence in your ability to safely, honestly, and satisfactorily perform your job duties. The State of Vermont and DOC must maintain the public trust in carrying out its mission, and your actions lack professional integrity, and undermine directives and policies that are in place to keep staff and local law enforcement safe. Therefore, I find that no lesser penalty than dismissal is sufficient to address your misconduct.
> . . .
> (VSEA Exhibit 2)

35. The Employer considered Grievant's misconduct serious in that he disregarded notice he had received about riding in pairs, hampered a co-worker in her ability to do her job and adversely affected officer safety by being unreachable during his shift, and was unable to

demonstrate that he was engaged in work during parts of his shifts on January 29 and 30, 2016. The Employer did not view Grievant's past disciplinary record of a one-day suspension as significant in deciding to dismiss him. The Employer concluded that Grievant violated the trust placed in him to perform duties without a supervisor present on his shift by not following supervisory directives, not being available to his partner during shifts on two days, and not being able to account for his time. This adversely affected supervisory confidence in Grievant performing his duties at a satisfactory level. The Employer determined that Grievant damaged the reputation of the Bennington Probation and Parole Office with the Bennington Police Department. The Employer determined Grievant was on fair notice that he should not submit false time reports and that he could be disciplined for violating supervisory directives. In considering consistency of the discipline imposed on Grievant compared to other employees, the Employer was unaware of other employees engaged in similar misconduct. The Employer determined that Grievant's misconduct and failure to accept responsibility for his actions did not make him a good candidate for rehabilitation. The Employer did not find any mitigating circumstances affecting Grievant's misconduct. The Employer ultimately determined that alternative sanctions short of dismissal were not adequate given his offenses (VSEA Exhibit 3).

OPINION

Grievant contends that the Employer violated Article 14 of the Contract because: 1) the dismissal was not based in fact or supported by just cause, 2) the Employer improperly bypassed progressive discipline, 3) the Employer improperly bypassed progressive corrective action, and 4) the Employer failed to apply discipline with a view toward uniformity and consistency.

Just cause for dismissal is some substantial shortcoming detrimental to the employer's interests which the law and a sound public opinion recognize as a good cause for dismissal. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). The ultimate criterion of just cause is whether an employer acted reasonably in discharging an employee for misconduct. Id. 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 just cause analysis centers upon the nature of the employee's misconduct. In re Morrissey, 149 Vt. 1, 13 (1987). Grievance of Merrill, 151 Vt. 270, 273 (1989). In determining whether there is just cause for dismissal, it is appropriate to determine the substantiality of the detriment to the employer's interests. Merrill, 151 Vt. at 273-274.

Fair notice exists when the employee knew or should have known the conduct was prohibited. Grievance of Towle, 164 Vt. 145, 150 (1995). Brooks, supra, 135 Vt. at 568. This is an objective standard. Grievance of Towle, 164 Vt. at 150. Grievance of Hurlburt, 175 Vt. 40, 50 (2003).

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).

The Employer charged Grievant with: 1) committing the gross misconduct of time card fraud by submitting hours worked on his time sheet for time he did not spend working on state business on January 29 and 30, 2016; and 2) engaging in the misconduct of willful disregard of duty by disobeying supervisory directives to travel in pairs and be reachable at all times while on

duty due to being repeatedly and intentionally unreachable via phone and radio during his shifts on January 29 and 30, 2016.

In determining whether the Employer has established that Grievant engaged in time card fraud by submitting hours worked on his time sheet for time he did not spend working on state business on January 29 and 30, we consider that a charge of falsification implies intent to misrepresent and deceive. Grievance of Jacobs, 31 VLRB 204, 229-230 (2011). Grievant was required to document any offender interaction. Grievant did not document any case activities for January 29 other than transporting JM to the correctional facility, an activity that took approximately two and one-half hours. Grievant has not provided any details on or since January 29 of his activities that evening other than meeting with JM in the office and then transporting him to the correctional facility.

Similarly, on January 30, Grievant documented no case activities and he cannot account for his activities during the first half of his shift that evening. It is unknown what activities he performed during the shift prior to his text communications with his partner approximately halfway through the shift concerning collaborating with the Bennington Police Department to locate a father (possibly armed) and son the police were seeking to locate to take into custody.

The lack of documentation by Grievant, his failure to account for substantial blocks of time during the January 29 and 30 shifts, and the lack of credible testimony by Grievant concerning his activities on these dates combine to establish by a preponderance of the evidence the Employer's charge that Grievant engaged in time card fraud. The Employer has established that Grievant's deficiencies were not a performance issue indicating untimely and incomplete recording of activities, but instead constituted an intent to mispresent and deceive the Employer with respect to time spent working on state business. *Cf.* Grievance of Jacobs, 31 VLRB at 229-

230 (employer did not demonstrate by a preponderance of the evidence that employee intended to misrepresent his work or mislead the employer through his recording of time worked).

We further conclude that the Employer has established by a preponderance of the evidence that Grievant engaged in misconduct by disregarding supervisory directives to travel in pairs and be reachable at all times while on duty because he was unreachable via phone and radio for a substantial period during his shift on January 29. On this date, his partner Abby Dickie was unable to reach him for a period of over one hour when she was attempting to have Grievant accompany her to investigate a situation involving one of the offenders under the supervision of the Bennington Probation and Parole Office. As a result of Grievant's disregard of a known duty, Dickie was placed in the position of having to proceed alone to handle a situation where she should have had a partner.

The Employer charged Grievant with being unreachable by Dickie the following evening, January 30, resulting in Dickie having to respond to the Bennington Police Department alone. The Employer has not established this charge by a preponderance of the evidence since Dickie saw Grievant at the beginning of the shift and did not ask him to accompany her to the police department to be present at the interview of an offender under the custody of the Probation and Parole Office. Thus, Dickie did not have to respond to the police department alone as a result of Grievant being unavailable.

The Employer made this further charge against Grievant concerning January 30: "(Dickie) informed you your presence was required at an offender's residence and you were to meet (Bennington Police Department) there immediately. The (Bennington Police Department) waited for you at the residence, but you never arrived to provide the necessary assistance. The

police were forced to retreat and pursue a different strategy, and your conduct jeopardized officer safety."

The Employer has established the substance of this charge by a preponderance of the evidence. Grievant indicated to Dickie that he was in Pownal and would travel directly to meet police at the residence that evening to assist them in locating the offender. The police arrived at the site and waited a sufficient time for Grievant to arrive from Pownal but he did not show up. The police decided the situation was dangerous without Grievant's assistance and they left the scene to return to the police station. We are not prepared to call into question the conclusion of a law enforcement agency that the situation was dangerous, and we conclude that the Employer has established by a preponderance of the evidence that Grievant's failure to timely arrive at the scene jeopardized officers' safety.

The bulk of the underlying charges having been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven charges. Colleran and Britt, 6 VLRB at 266. Grievance of Simpson, 12 VLRB 279, 295 (1989). If the employer establishes that management responsibly balanced the relevant factors in a particular case and struck a reasonable balance, its penalty decision will be upheld. Colleran and Britt, 6 VLRB at 235. Failure of the Employer to prove by a preponderance of the evidence all the particulars of the dismissal letter does not require reversal of a dismissal action. Grievance of Regan, 8 VLRB 340, 366 (1985). In such cases, the Board must determine whether the remaining proven charges justify the penalty. Grievance of Colleran and Britt, supra.

We look to the factors articulated in Colleran and Britt, 6 VLRB at 268-69, to determine whether the proven charges justify dismissal. The pertinent factors here are: 1) the nature and seriousness of the offenses and their relation to Grievant's duties, 2) Grievant's job level, 3) the

clarity with which Grievant was on notice of any rules that were violated in committing the offenses, 4) the effect of the offenses upon supervisors' confidence in Grievant's ability to perform assigned duties, 5) Grievant's past disciplinary record, 6) Grievant's past work record, 7) the consistency of the penalty with those imposed upon other employees for the same or similar offenses, 8) the impact of the offenses upon the reputation of the Probation and Parole Office, 9) mitigating circumstances, 10) the potential for Grievant's rehabilitation, and 11) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Grievant's offenses were serious in relation to his job duties. He disregarded supervisory directives he had received requiring Community Correctional Officers to ride in pairs and failed to meet expectations that he be reachable during his shift. This was contrary to the officer safety concerns behind the riding in pairs policy and hampered the ability of his partner to do her job. His failure to provide timely assistance to the Bennington Police Department jeopardized police officer safety and thwarted their strategy to deal with a situation. His submitting of hours worked on his time sheet for time he did not spend working on state business demonstrated untrustworthiness in attending to work tasks in the absence of close supervision. Grievant's misconduct demonstrated the serious deficiencies of unreliability, unwillingness to comply with supervisory directives, and lack of trustworthiness

Grievant had clear notice that he was expected to ride as a pair with his partner and to be reachable while on duty. This constituted fair notice that his failure to meet these expectations was prohibited and could lead to discipline against him. He also had fair notice that his dishonest actions could be grounds for discharge. Honesty is an implicit duty of every employee and, at a minimum, an employee should know that dishonest conduct is prohibited. Grievance of Carlson, 140 Vt. 555, 560 (1982). Dishonesty by employees is grounds for serious punishment,

and the Board and the Vermont Supreme Court have upheld dismissals for dishonesty in several cases. Id. Grievance of Turcotte, 30 VLRB 24 (2008). Grievance of Cray, 25 VLRB 194 (2002). Grievance of Newton, 23 VLRB 172 (2000). Grievance of Coffin, 20 VLRB 143 (1997). Grievance of Johnson, 9 VLRB 94 (1986); *Affirmed*, Sup.Ct. Docket No. 86-30 (1989. Grievance of Graves, 7 VLRB 193 (1984); *Affirmed*, 147 Vt. 519 (1986). Grievance of Cruz, 6 VLRB 295 (1983). Grievance of Barre, 5 VLRB 10 (1982).

Grievant's offenses understandably had a detrimental effect on the Employer's confidence in Grievant's ability to perform assigned duties. Grievant's duties required dealing with high risk offenders whom presented a degree of danger. This required working closely with his partner to ensure their safety and working collaboratively with law enforcement agencies. He had a great deal of autonomy and performed much of his shift with no supervisor on duty. This required a high degree of trustworthiness. Grievant's misconduct in this case demonstrated unreliability, unwillingness to comply with supervisory directives, and lack of trustworthiness. The Employer reasonably concluded Grievant no longer could be relied on to effectively perform his duties given these demonstrated deficiencies.

Grievant's actions had an adverse effect on the reputation of the Probation and Parole Office. His failure to timely respond to the Bennington Police Department's request for assistance on January 30 placed the police in a potentially dangerous situation. This damaged the Probation and Parole Office's reputation for reliability with the police department.

Grievant's past disciplinary record and work record operate in his favor in determining whether just cause existed for his dismissal. He had one previous disciplinary action in approximately seven years of employment, a one day suspension. This lone prior discipline does not have a significant adverse impact on Grievant in deciding whether dismissal was appropriate.

Also, Grievant was a seven-year employee with satisfactory performance evaluations. We note that his most recent evaluation has relevance to the issues presented in this case as he was given notice of the importance of timely entry of case notes and logging activities he performed while on duty.

The consistency of the penalty of dismissal imposed on Grievant compared to disciplinary action taken against other employees would be a significant factor if evidence exists of other employees engaging in similar misconduct. Grievant asserts that Dickie engaged in similar behavior as him concerning acting without a partner when she drove offender BT home without another officer present after meeting with her at the police department on the evening of January 29. Grievant's contention in this regard omits the fact that it was Grievant's failure to be available to Dickie that evening that triggered the chain of events leading to Dickie driving BT home without another officer.

Grievant also points to Dickie leaving the office without Grievant at the beginning of the shift on January 30 to go to the Bennington Police Department to meet offender BT and a Bennington police officer as further evidence of engaging in similar behavior to Grievant. We do not find this an apt comparison. Dickie was meeting with BT in the presence of a police officer, resulting in an absence of the safety concerns and deficient collaboration presented by Grievant's actions.

Grievant contends that mitigating circumstances exist supporting the overturning of his dismissal because he felt as though he was racially discriminated against, generally harassed, and not supported by his supervisors when he raised concerns about the mistreatment. We conclude that the evidence in this regard does not support a conclusion either that Grievant's misconduct was lessened or that the Employer's decision to dismiss him was inappropriate.

The Employer reasonably concluded that Grievant's potential for rehabilitation was not strong. His misconduct in this case demonstrated unreliability, unwillingness to comply with supervisory directives, and lack of trustworthiness. He also has not accepted responsibility for his actions. These characteristics are not conducive to demonstrating that Grievant is likely to learn from his experience and improve his conduct.

We conclude on balance in consideration of all these factors that the Employer acted reasonably in bypassing progressive discipline and concluding that alternative sanctions less than dismissal would not be effective. In sum, Grievant's actions constituted substantial shortcomings detrimental to the Employer's interests and just cause existed for his dismissal.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of Beau Alexander is dismissed.

Dated this 13th day of June, 2017, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Gary F. Karnedy

Gary F. Karnedy, Chairperson

/s/ James C. Kiehle

James C. Kiehle

/s/ Robert Greemore

Robert Greemore