

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 18-15
SARAI RICHARDSON	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 23, 2018, the Vermont State Employees’ Association (“VSEA”) filed a grievance on behalf of Sarai Richardson (“Grievant”), an employee of the Vermont Department of Mental Health. VSEA alleged that the State of Vermont Department of Mental Health (“Employer”) violated Article 14 of the collective bargaining agreement between the State of Vermont and VSEA for the Non-Management Bargaining Unit, effective July 1, 2016, to June 30, 2018 (“Contract”), by: 1) dismissing Grievant without just cause, 2) improperly bypassing progressive discipline, and 3) failing to apply discipline with a view toward uniformity and consistency. VSEA also alleged that in dismissing Grievant, and in the continuing pattern of discrimination and harassment leading up to her dismissal, the Employer violated Article 5, No Discrimination or Harassment, and Article 35, Parental Leave/Family Leave, of the Contract, based on Grievant exercising her rights under the Contract, the federal Family Medical Leave Act and the Vermont Parental and Family Leave Act.

Hearings were held on December 18, 2018, and January 22, 2019, in the Labor Relations Board hearing room in Montpelier before Labor Relations Board Members Robert Greemore, Acting Chairperson; David Boulanger and Karen Saudek. VSEA Staff Attorney Kelly Everhart represented Grievant. Alison Powers, Assistant Attorney General, represented the Employer. VSEA filed a post-hearing brief on February 15, 2019. The State filed a post-hearing brief after the deadline for filing briefs, and it has not been considered by the Board.

## FINDINGS OF FACT

1. The Contract provides in pertinent part:

### **ARTICLE 5 NO DISCRIMINATION OR HARASSMENT; and AFFIRMATIVE ACTION**

#### **1. NO DISCRIMINATION, INTIMIDATION OR HARASSMENT**

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 employee because of . . . parental and family leave . . . or any factor for which discrimination is prohibited by law. . .

...

### **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 . . . within a reasonable time of the offense;
  - b. apply discipline . . . with a view toward uniformity and consistency;
  - c. impose a procedure of progressive discipline . . .;
  - d. In misconduct cases, the order of progressive discipline shall be:
    - (1) oral reprimand;
    - (2) written reprimand;
    - (3) suspension without pay;
    - (4) dismissal.

...

- f. The parties agree that there are appropriate cases that may warrant the State:
  - (1) bypassing progressive discipline . . .

...

(State Exhibit 1, VSEA Exhibit 2)

2. State of Vermont Personnel Policies and Procedures have provided as follows in pertinent part at all times relevant:

...

## **Number 5.6 – EMPLOYEE CONDUCT**

### **... REQUIRED CONDUCT**

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

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

### **... PROHIBITED CONDUCT**

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

...

## **Number 17.0 EMPLOYMENT RELATED INVESTIGATIONS**

### **... RESPONSIBILITIES**

#### **... D. Employees shall:**

- Cooperate with investigations, and provide truthful and complete information in accordance with State Personnel Policies and local Work Rules. Refusing to answer, answering incompletely, or answering untruthfully, questions related to work is considered misconduct for which an employee may be disciplined up to and including dismissal from their employment with the State.

...  
(State Exhibit 2)

3. Grievant was hired as a Mental Health Specialist at the Vermont Psychiatric Care Hospital as a permanent status employee in April 2014 after being employed for more than a year as a temporary employee. She provided safekeeping services and therapeutic care for persons under the Hospital's care. She remained in that position until her dismissal in February 2018. Grievant worked the third shift from 10:45 p.m. to 6:45 a.m.

4. The Department of Mental Health implemented a Time and Attendance Protocol effective July 16, 2015. Grievant was aware of the Protocol at all relevant times. The Protocol provided in pertinent part as follows at all times relevant:

It is the obligation of the Department of Mental Health (DMH) to maintain proper levels of staffing in . . . the Vermont Psychiatric Care Hospital (VPCH) . . . It is the Department's expectation that every employee will comply with this obligation by maintaining a good attendance record. Excessive absenteeism and tardiness interfere with the mission of the Department and offences will be taken seriously and managed through the progressive disciplinary process.

#### Management of Time and Attendance

For VPCH, the Associate Director of Nursing (ADON) will manage this process. In the absence of the ADON, the Director of Nursing (DON) or VPCH CEO will manage the process. . .

...

#### **Unauthorized Off-Payroll**

Any Unauthorized Off-Payroll (UOFF) absence:

The First Occurrence:

. . . The respective shift Nursing Supervisor will have a conversation with the employee regarding the absences. . .

The Second Occurrence of off payroll during the following 12 consecutive pay periods

. . . The respective shift Nursing Supervisor will provide written feedback to employee . . .

For subsequent occurrences where the employee is unauthorized off payroll during the following 12 consecutive pay periods, the ADON . . will follow the process below and progressive discipline will be issued according to the number of occurrences:

...

The employee will be issued a discipline in the following order:

3<sup>rd</sup> Occurrence: Oral Reprimand

4<sup>th</sup> Occurrence: Written Reprimand

5<sup>th</sup> Occurrence: 3 day disciplinary suspension

6<sup>th</sup> Occurrence: 10 day disciplinary suspension

7<sup>th</sup> Occurrence: 30 day disciplinary suspension

8<sup>th</sup> Occurrence: Dismissal

(State Exhibit 3)

5. Grievant was in a car accident in April of 2016. Shortly after this accident,

Grievant began to suffer from severe migraines which were often accompanied by vertigo. When

a migraine triggered vertigo, Grievant experienced dizziness, at times extreme; loss of balance; and nausea. She took medication due to the vertigo.

6. Grievant applied for, and received, leave under the Family and Medical Leave Act for a block period of time from July 6, 2016, through July 24, 2016. Once approved to return to work, Grievant took intermittent leave due to her medical condition that made her unable to perform work on certain days and sometimes for days in a row. When the block period expired, Grievant did not apply to continue to receive FMLA leave.

7. Kathy Bushey, Associate Director of Nursing, issued Grievant an oral reprimand on September 7, 2016, for calling out late on three dates in August 2016 (State Exhibit 4).

8. Tammie Ellison, Human Resource Administrator for the Vermont Department of Human Resources, sent Grievant a letter dated October 12, 2016, providing in pertinent part:

You had been absent from work intermittently from July 6, 2016 due to a serious health condition that made you unable to perform your job. Your approved period of leave ended July 24, 2016. You must submit a completed Certification of Health Care Provider (a copy of which is attached for your convenience) to me no later than close of business on October 28, 2016. Failure to provide the requested certification by the date indicated may result in the denial of your request for leave. You would then be considered off-payroll without authorization and subject to appropriate disciplinary action, up to and including dismissal from employment.

Once the appropriate medical certification is received, this absence from work will be counted against your Family and Medical Leave entitlement under the Federal Family and Medical Leave Act . . . and the Vermont Parental and Family Leave Act . . . (State Exhibit 5, VSEA Exhibit 6)

9. Grievant most often coded her own timesheets. She continued to code her timesheets as FMLA leave on certain dates she was absent between July 25, 2016, and October 12, 2016, even though her approved period of FMLA leave had expired on July 24, 2016, and she had not completed a certification of Health Care Provider form. The Employer did not consider Grievant off payroll without authorization for the dates she coded as FMLA leave.

10. Grievant did not provide the required Certification of Health Care Provider response to Ellison's October 12, 2016, letter. Grievant continued to code her timesheets as FMLA leave on certain dates she was absent between October 13, 2016, and February 16, 2017, even though her approved period of FMLA leave had expired on July 24, 2016, and she had not completed a certification of Health Care Provider form. The Employer did not consider Grievant off payroll without authorization for the dates she coded as FMLA leave.

11. Ellison sent a letter to Grievant dated February 16, 2017, informing her that "if the attached Certification of Health Care Provider is not completed and returned to me no later than the close of business on March 3, 2017, any time coded FMLA as of July 24, 2016, will be corrected to unplanned, off-payroll absences from work, including arriving late and leaving early". She further stated: "please be advised the . . . Vermont Psychiatric Care Hospital will not authorize you to be off-payroll for any reason unless required to do so in accordance with the collective bargaining agreement, state or federal law." (State Exhibit 7, VSEA Exhibit 6)

12. Beverly Croteau, Nursing Supervisor, issued Grievant an oral reprimand on February 22, 2017, for authorized off payroll time on December 15 and 18, 2016, and January 10, 2017, as a violation of the Vermont Psychiatric Care Hospital's Time and Attendance Protocol. In a February 22, 2017, memorandum memorializing the oral reprimand, Croteau stated: "It is expected that going forward, you will comply with the Time and Attendance Requirements of the Vermont Psychiatric Care Hospital. Further occurrences of unauthorized off payroll may result in additional disciplinary action up to and including dismissal." (State's Exhibit 4, VSEA Exhibit 10).

13. Grievant did not file a grievance over the oral reprimand.

14. Grievant provided the required Certification of Health Care Provider form on February 24, 2017. Ellison sent Grievant a letter dated March 8, 2017, acknowledging the receipt of the completed form, and stating:

Please be advised that our records indicate that as of February 28, 2017, you have exhausted your Family and Medical Leave entitlement under the Federal Family and Medical Leave Act . . . and the Vermont Parental and Family Leave Act . . .

Our records also indicate that you have 0 hours of Sick Leave, 0 hours of Annual Leave and .03 hours of Compensatory Time available for use. Once your accrued leave is exhausted you will be placed in an off-payroll status and may be considered absent without leave. Additionally, you may request an unpaid medical leave of absence in accordance with Article 34 of the Collective Bargaining Agreement.

. . .  
(State Exhibit 9, VSEA Exhibit 6)

15. Ellison's notification to Grievant that she had exhausted her Family and Medical Leave entitlement meant that Grievant had used the maximum of 480 hours that an employee can take within a year in the previous approximate eight month period. The result was that Grievant had to wait until June 2017 before she again could seek to use family and medical leave.

16. During the period of Grievant's employment, there was divisiveness among VPCH employees with respect to employees taking family and medical leave. Some employees complained about short-staffing and being mandated to work overtime due to employees on family and medical leave. Other employees who were on family and medical leave believed they were being discriminated against because they were on such leave. Some VPCH employees were openly critical of other VPCH employees who were taking family and medical leave. These included statements that employees on family and medical leave were lazy, had a bad work ethic, and there were plans to get rid of individuals who used family and medical leave. Grievant expressed concerns about such statements to her supervisors. Also, concerns regarding these

critical statements were expressed to VPCH management at labor-management committee meetings.

17. Croteau sent Grievant a memorandum on March 17, 2017, providing in pertinent part:

. . . I am issuing a written reprimand . . . for your unauthorized off payroll. Your unauthorized off payroll time on January 24, January 30<sup>th</sup>, January 31<sup>st</sup>, February 1<sup>st</sup>, February 3<sup>rd</sup>, February 4<sup>th</sup>, February 6<sup>th</sup>, February 7<sup>th</sup>, February 8<sup>th</sup>, February 9<sup>th</sup>, February 12<sup>th</sup>, February 13<sup>th</sup>, February 14<sup>th</sup>, February 15<sup>th</sup>, and February 17<sup>th</sup>, 2017, is in continued violation of the Vermont Psychiatric Hospital's Time and Attendance Protocol.

It is expected that going forward you will comply with the Time and Attendance Requirements of the Vermont Psychiatric Care Hospital. Further occurrences of unauthorized off payroll may result in additional disciplinary action up to and including dismissal.

(State Exhibit 4, VSEA Exhibit 11)

18. Grievant did not file a grievance concerning the written reprimand.

19. Grievant left a voicemail message for Ellison on April 20, 2017, regarding her unauthorized off-payroll absences and FMLA. Grievant did not leave a phone number for Ellison to reach her, so Ellison responded by email on April 24, 2017. She summarized her March 8, 2017, letter to Grievant and further stated:

Regarding your accrual of leave time, any time an employee is off payroll for 20 or more hours per pay period, they will not accrue leave time for that period, this includes employees on FMLA. The majority of your FMLA starting September 8, 2016 is FMLA off payroll. I attached a report of the FMLA hours you have used as of July 6, 2016 and I colored the pay periods that you had 20 or more off payroll hours used in a pay period. For the colored pay periods you didn't accrue leave time.

The unauthorized off payroll absences are not related to the exhaustion of your FMLA, they appear to be stemming from your having called out/late for reasons such as lack of daycare several times, your needing to take an ill friend to the ER, not having gas, having car trouble, etc. As you are aware, if an employee doesn't have accrued leave time to cover such absences, it is considered to be unauthorized off payroll.

. . .

(State Exhibit 10, VSEA Exhibit 8).



20. If a VPOCH employee is not going to come into work on a scheduled shift, they have been required at all times relevant to call the VPOCH Staffing Office 2 hours prior to the shift to report, and indicate the reason for, the absence. There is someone in the Staffing Office 24 hours a day. The Staffing Office employee notes the reason for the absence given by the employee on a spreadsheet, and these notes are recorded on a callout log. If an employee reports he or she is taking "FMLA leave", the Staffing Office employee notes "FMLA" as the reason for the absence. If an employee reports he or she is "sick", the Staffing Office employee notes "sick" as the reason for the absence. Ellison informs employees who are taking FMLA leave that they have to inform whomever answers the phone in the Staffing Office that they are out for FMLA reasons. Grievant understood this requirement.

21. On May 24, 2017, at 7:28 a.m., VPOCH Office Staffing employee Donna Despault sent an email to Nicole Pellerin stating:

At 7:23 am Shari(sic) Richardson called and said she was very sorry she did not call last night. She became super sick and took her meds for Vertigo. She stated she was so sick she probably should have gone to the hospital, but had no one to help her. She went to bed and never came to until around 5 a.m. She is sorry.  
(State Exhibit 15, VSEA Exhibit 12).

22. Prior to July 24, 2017, Grievant and VSEA Field Representative Rachael Fields contacted Ellison questioning why Grievant had not accrued annual leave or sick leave since the beginning of 2017. On July 24, 2017, Ellison sent Fields an email informing her that Grievant had not accrued annual leave or sick leave since the beginning of 2017 because she had coded 20 hours or more off payroll for the past 13 consecutive pay periods, and that an employee does not accrue leave time if the employee codes 20 hours or more off payroll in a pay period. Ellison attached a report to the email detailing Grievant's daily hours from her timesheets starting January 8, 2017. The report indicated among other things that Grievant was in an Unpaid

Unauthorized Off Payroll status on the following dates in 2017: January 10, January 24, January 30, January 31, February 1, February 3, February 4, February 6, February 7, February 8, February 9, February 12, February 13, February 14, February 15, and February 17. All of these dates beginning with January 24 and running through February 17 constituted the 15 dates that formed the basis for Grievant receiving a written reprimand on March 17, 2017. The remaining date listed above, January 10, was one of the three dates that formed the basis for Grievant receiving an oral reprimand on February 22, 2017. The other two dates for which Grievant received an oral reprimand – December 15 and 18, 2016 – were outside the time period covered in the report (State Exhibit 11).

23. A VPCH callout log including all of the above dates indicates that on December 15 and 16, 2016, Grievant's absence was coded as "Unauthorized Off Payroll". The reason given to the Staffing Office for being absent on both dates was indicated as "sick". For the above dates beginning with January 24 and running through February 17, Grievant's absences also were coded as "Unauthorized Off Payroll". The reason given to the Staffing Office for being absent on these dates was indicated as "sick" except for January 24 and February 12. The reason given for being absent on January 24 was "dog was sick at home". The reason given for February 24 was "bad roads"(VSEA Exhibit 9).

24. Melissa Bailey, Department of Mental Health Commissioner, sent Grievant a letter dated September 20, 2017, that provided in pertinent part:

As a result of your behavior described below, the Department of Mental Health ("DMH") is contemplating issuing you serious disciplinary action up to and including suspension from your position as a Mental Health Specialist. You have the right to respond to the specific allegations listed below, either orally or in writing, prior to a final decision being made. You have the right to be represented by VSEA . . . during any proceeding connected with this action.

The below disciplinary charges are based on your attendance as reported on your timesheet in VTHR. . . . While some of the charges are characterized as definitive, the appointing authority will not decide the facts until you are afforded all pertinent protections, and will only determine your conduct after providing you an opportunity to be heard.

A. Relevant Provisions of the Non-Management Unit Collective Bargaining Agreement (“CBA”), State Personnel Policies (“PP”), and DMH Policies

- CBA Article 30, Annual Leave
- CBA Article 31, Sick Leave
- CBA Article 34, Off Payroll
- PP 5.6, Employee Conduct
- PP 11.0, Employee Workweek/Location/Shift
- PP 14.0, Annual Leave
- PP 14.1, Sick Leave
- VPCH Time and Attendance Protocol

B. Potential Violations of Contractual Agreement, State and DMH Policies

You recently received both an oral reprimand on 2/22/17 and a written reprimand on 3/17/17 for multiple occurrences of unauthorized off payroll . . . and you are on clear notice of the sick leave policies and protocols. Despite this, it seems that on the dates listed below you coded unpaid unauthorized off payroll status on your timesheet.<sup>1</sup>

. . .

Between the dates of March 17, 2017 and August 28, 2017 it appears you were absent from work for 328.85 hours without authorization.

According to Personnel Policies and the CBA, when you are absent from duty during any portion of a workday and do not have authorization for such absence, it is considered “absent without leave”. Any such absence shall be without pay, and, in addition, may be grounds for disciplinary action. Furthermore, when off payroll time can be anticipated in advance, you must request such leave as soon as possible and include the reason for the absence. Any such absence is without pay, and may be grounds for disciplinary action.

Unplanned, unapproved absences have an adverse effect on the hospital’s ability to maintain appropriate staffing levels to care for patients and meet its operating needs. Such absences affect other staff members as it can result in mandated overtime if staffing levels are not met. It is the duty of all state employees to fulfill to the best of their ability the duties and responsibilities of their position. During your scheduled work time, you are required to devote your full time, attention, and effort to the duties and responsibilities of your position. Your repeated unauthorized off payroll absences appear to have violated the above policies, procedures, and protocol, and may constitute misconduct and/or gross

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<sup>1</sup> A listing follows this sentence of 44 dates between March 17, 2017, and August 28, 2017, coded as “unpaid unauthorized off payroll” for the following varied reasons: car trouble, sick, personal, late, no sitter, sick child, out of sick leave. On one of the dates – May 30, 2017 - the following was stated under the category stating the reason for the absence: “NCNS”. NCNS stands for “No Call No Show”.

misconduct and provide just cause for disciplinary action up to and including suspension from your position with DMH.

C. Process

You must notify HRManager Kate Minall . . . whether you wish to respond to the above allegations. You must also then indicate whether you wish to respond in writing or orally in a meeting. . .

You are provided this opportunity to respond so that you can present points of disagreement with what the employer believes the facts to be; identify witnesses who may support your defense; identify any mitigating circumstances which should be considered and to offer any other argument you wish to make.

You may be represented by VSEA . . . It is requested, but not required, that you personally present your version of the facts. Your representative may then make arguments on your behalf.

...

(State Exhibit 12, VSEA Exhibit 4)

25. There was a *Loudermill* meeting on September 27, 2017, at which Grievant was provided an opportunity to respond to the allegations sets forth in the September 20, 2017, letter. Grievant attended the meeting with VSEA Representative Rachael Fields. Kate Minall, Human Resources Manager for the Department of Mental Health, and Deputy Commissioner of Mental Health Mourning Fox were present for the Employer. The following exchanges occurred during the meeting:

...

FIELDS: . . . There's one time on here on May 30<sup>th</sup> where she's written as a no call, no show when she was actually at work that day.

GRIEVANT Never had a no call, no show. . . (M)y name is written on that assignment sheet, and all my assignments that I did that night would all be written on that assignment sheet because I was here.

MINALL: Which day?

FOX: May 30<sup>th</sup>.

FIELDS: This one is May 30<sup>th</sup>.

...

FIELDS: May 30<sup>th</sup> was the no call, no show.

GRIEVANT: Yes, and that was not true. I was here on that day on May 30<sup>th</sup>. I have never had a no call, no show. Even if I'm gonna be five minutes late, I've called them, and it's actually bit me in the butt too because I've had them dock me time when I was about five minutes late. . . The other issue is that the two main letters that are being provided in supposed evidence here . . .

FIELDS: She's talking about the reprimands.

GRIEVANT: The reprimands, all of the time that's in these letters was covered by my FMLA. I even talked with Tammy about this because I said, "Tammy, I just got reprimanded for these two items and what about my FMLA?" And Tammy said, "No, no, the FMLA was correct. There was an issue in the paperwork.". The first time that I spent in the FMLA, they told me in October. So a few months later they said, "Oh, there's a problem. Can you get it resubmitted?" And when I talked with Tammy about this, she said, "You shouldn't need to worry about this because it's been approved and it will cover back this time." Now here it is and it's still I guess sitting in my file and being used against me, even though it was supposed to be covered and removed."

...

(State Exhibits 13, 14)

26. Deputy Commissioner Fox sent Grievant a letter dated December 27, 2017, that provided in pertinent part:

As a result of your behavior described below, the Department of Mental Health ("DMH") is contemplating issuing you serious disciplinary action up to and including dismissal from your position as a Mental Health Specialist. You have the right to respond to the specific allegations listed below, either orally or in writing, before the final decision is made. You have the right to be represented by Vermont State Employees' Association . . during any proceeding connected with this action.

The below charges are based on statements you made during a recent Loudermill hearing on September 27, 2017. . . .

A. Relevant Provisions of the Non-Management Unit Collective Bargaining Agreement ("CBA"), State Personnel Policies ("PP"), and DMH Policies

- CBA Article 14, Immediate Dismissal
- PP 5.6, Employee Conduct
- PP 8.0, Disciplinary Action
- PP 8.1, Due Process Requirements (Loudermill Process)

- PP 9.1, Immediate Dismissal
- PP 17.0, Employment Investigations

B. Potential Violations of Vermont Personnel Policies and the Collective Bargaining Agreement

. . . In a letter you received dated September 20, 2017 . . . you were advised that the Department of Mental Health was contemplating discipline against you up to and including suspension . . . In the same letter, you were advised that you had the opportunity to respond to the allegations and may present points of disagreement with the facts; identify witnesses who may support your defense; identify any mitigating circumstances which should be considered; and offer any other appropriate argument in support of your defense. As such, you requested to meet with me in person, with your VSEA representative present at the meeting. . . (I)n the September 20, 2017 letter you were presented with the evidence against you which, in this case, were the dates of your unauthorized off payroll absences. For one of those dates, May 30, 2017, the evidence stated that you had eight (8) hours of unauthorized off payroll and that you failed to notify your employer of your absence prior to being absent. In the meeting, you denied being absent from work that day and denied ever failing to follow proper callout procedures. However, evidence does not support your statements and instead, points to the contrary, that you were not at work that day. The Staffing Office documentation shows that you called in after your scheduled shift had already ended at 7:23 a.m. on May 31, 2017. The Staffing Officer who took your call and documented the conversation both on the Staffing Grid (Attachment #2) and in an email to the Staffing Office Supervisor (Attachment #3). On May 31, 2017 at 7:28 a.m. the Staffing Officer wrote the following:

“At 7:23 am Shari(sic) Richardson called and said she was very sorry she did not call last night. She became super sick and took her meds for Vertigo. She stated she was so sick she probably should have gone to the hospital, but had no one to help her. She went to bed and never came to to until Around 5:00 am. She is sorry”

Additionally, a review was done of the shift sign-in sheet (Attachment #4). You did not sign in for your shift as is the protocol for all employees at the beginning of their shift. Lastly, a review of VTHR shows that you did not enter hours worked for May 30, 2017 (Attachment #5). On June 6, 2017, you signed into VTHR and entered 8 hours worked for the date of May 31, 2017 but didn't enter any hours for May 30, 2017. The Staffing Office entered 8 Unauthorized Off Payroll on June 10, 2017 at 2:07 am and you accessed your timesheet at 7:14 am on the same day and did not change that time to hours worked. It would seem that if you had, in fact, worked on that date, you would have reported those hours on your timesheet or made a correction to the Staffing Office's entry. It would seem that you failed to verify your time entry but that is unlikely as it seems you were careful to enter other hours worked and accessed your timesheet several times during that pay period.

Also of concern is another statement that you made in the same meeting. You received two reprimands for unauthorized off payroll. You received an oral reprimand on February

22, 2017 which was for unauthorized off payroll on December 15, 2016, December 18, 2016 and January 10, 2017 (Attachment #6). You subsequently received the next step in progressive discipline, a written reprimand on March 17, 2017. The written reprimand was for unauthorized off payroll on January 24, 2017, January 30, 2017 January 31, 2017, February 1, 2017, February 3, 2017, February 4, 2017, February 6, 2017, February 7, 2017, February 8, 2017, February 9, 2017, February 12, 2017, February 13, 2017, February 14, 2017, February 15, 2017 and February 17, 2017 (Attachment #7). In the meeting, you told me that those dates were actually designated as FMLA and that the DMH HR Administrator told you so. However, that does not seem to be true as the HR Administrator emailed you on April 24, 2017 (Attachment #8) and notified you that your unauthorized off payroll time was not considered FMLA as it was for various reasons unrelated to your FMLA designation . . .

It seems you were made aware that this leave was not considered FMLA and was unauthorized off payroll and you were dishonest with me when you said it was FMLA and that the HR Administrator told you that.

The Loudermill meeting is an opportunity for employees to outline their version of the facts, and respond to any questions the appointing authority may have. This will ensure that the decision-maker will have a fair opportunity to evaluate the employee's version of events. The purpose of this process is to serve as an initial check against mistaken decisions and to determine whether there are reasonable grounds to believe that the charges against employees are true and support the contemplated action. As a State employee, it is expected that you be truthful and provide your employer with honest, accurate information during the Loudermill process. Answering untruthfully is considered misconduct, and it seems you were untruthful toward your employer.

The Vermont Personnel Policies provide employees direction on how to conduct themselves in order to fulfill their duties as public servants. Specifically, you are required to fulfill to the best of your ability the duties and responsibilities of your position, conduct yourself in a manner that will not bring discredit or embarrassment to DMH and/or the State of Vermont, and to be honest in all interactions with your employer. However, your described actions show a lack of good judgment, lack of honesty toward your employer, and have the potential to cause DMH to lose confidence in your ability to responsibly and credibly carry out your duties as Mental Health Specialist.

. . .

You must notify HRManager Kate Minall . . . whether you wish to respond to the above allegations. You must also indicate whether you wish to respond in writing or orally in a meeting. . .

You are provided this opportunity to respond so that you can present points of disagreement with the facts; identify witnesses who may support your defense; identify any mitigating circumstances which should be considered; and offer any other appropriate argument in support of your defense.

You may be represented by VSEA . . . It is requested that you personally present your version of the facts. Your representative may then make arguments on your behalf.

. . .  
(State Exhibit 15, VSEA Exhibit 5).

27. There was a *Loudermill* meeting on January 25, 2018, at which Grievant was provided an opportunity to respond to the allegations sets forth in the December 27, 2017, letter. Grievant attended the meeting with VSEA Representative Rachael Fields. Kate Minall, Human Resources Manager for the Department of Mental Health, Deputy Commissioner Fox, Department of Mental Health General Counsel Karen Barber, and Human Resources Administrator Kelly McCloskey were present for the Employer. The following exchanges occurred during the meeting:

FIELDS: . . . I just want to start by saying part of what got us here today is that I think that Sarai has - - she's been very anxious and nervous as one would be when receiving these letters and answering to these allegations. So I think she was trying to explain a whole lot of series of events that were happening, and it kind of got jumbled.

So if we talk about May 30<sup>th</sup> of 2017 where she was reported to have been a no call, no show, Sarai was talking during that period about an incident that happened sometime around September where she had called out – and you need to be more specific about this – where she had called out –

GRIEVANT: There was a time – so what I got confused about a lot is that there's so many dates being thrown at me, and one of my main concerns is – because we had been talking about my timesheet being changed and altered after I had submitted it, and recently right when we had that last *Loudermill* meeting, I had had that happen again, where a night that I know that I had worked was changed to unauthorized off payroll, and I was trying to figure out why. Like I was there, and that was something that had brought up. That's what I was trying to discuss, and I don't know how it got mixed up to be –

FIELDS: So to be clear, she was talking about a time close to September when she had been at work and she had been taken off payroll on the time she had been changed, that she wasn't at work, and she was not talking about the May 30<sup>th</sup> date. She was giving an example of the frustrating circumstances surrounding how she's been trying to deal with figuring out – finding information and finding out what's going on with the timesheets. She



didn't recall being no call, no show. She does have medication that makes her extremely drowsy and unable to work. . .

. . .

FIELDS: When talking about reprimands that she received for the dates at the end of January and February . . . They appear to be stemming from having called out. She wrote that in March – or April 24<sup>th</sup> of 2017. She had submitted her FMLA paperwork. It would have covered January and February. She thought she only had to do it once a year. She submitted it. There was a time when she was asked to get it corrected because there was a mistake on it, and then it was covered. Tammy said in her email that it was covered until February 23<sup>rd</sup>. So all these dates that she would have been given the reprimands for what would have been covered, and it was her understanding from Tammy that she was going to be covered for those under the FMLA . . .

GRIEVANT: So I submitted the FMLA, and then on February 16<sup>th</sup> I got the letter from Tammy that said that it needs to be corrected, that it was not complete. So I went back to my doctors and it was refilled out and resubmitted, and then I got word on February 23<sup>rd</sup> that Tammy had received it and it was received and it was accepted. . . Then I verbalized to Tammy, “Does that mean the time that was changed in your February 16<sup>th</sup> letter to unauthorized off payroll is gonna go back to FMLA?” She said yes. So that was the reason why I believed – “Why would those reprimands for something covered under FMLA be in there?” . .

. . .

MINALL: What's in question here is in the last meeting we had with you said that those were all due to FMLA even though you had the form right in front of you that we were looking at. You said, “Those are all FMLA and Tammy Ellison told me that.”

FIELDS: So that's where I think the confusion is coming from.

MINALL: Sure. I'd like to hear about that.

FIELDS: And I'll try to be more clear. What she was saying for FMLA were the February and January instances where she received a written reprimand and that Tammy had said that once the FMLA was approved – even though it would be exhausted on February 28<sup>th</sup> – that it would have been covered for those February dates.

MINALL: The off payroll absences are not related to the exhaustion of your FMLA. They appear to be stemming from your having called out – late for reasons

such as lack of daycare, having to run to the ER. . . Those are considered to be unauthorized off payroll.

GRIEVANT: Can I say one thing, though? That started in March and later. That wasn't in January.

FIELDS: What Tammy's talking about are the March dates. What Sarai was talking about in the Loudermill meeting were the February dates from the written reprimands, not from the potential suspension. That's where I think the confusion has come in.

...

MINALL: I think if you – I mean, Tammy said she's stated the dates in the Loudermill cover letter that I found. I was clear in my email what reprimands were for and that they were not part of her FMLA. I think Tammy was clear that she said they are not part of her FMLA.

...

FOX: Yep. So these three days, with the letter saying – your understanding is that they were saying – your understanding is that they were saying once the correct FMLA paperwork got done – that these dates and then also basically these – the ones in January and February from the written reprimand would be resolved because these dates were all related to your FMLA.

GRIEVANT: Correct . . .

FOX: Just so we're all clear though, the three dates on the oral reprimand and the 15 days on the written reprimand, all these days you're saying are FMLA-related?

GRIEVANT: Yep, including me being in the hospital from falling down the stairs because of the vertigo.

...

(State Exhibits 16, 17)

28. Deputy Commissioner Fox sent Grievant a letter dated February 23, 2018, that provided in pertinent part:

This is to notify you of your dismissal from the position of Mental Health Specialist, effective the close of business on March 3, 2018, for gross misconduct.

By letter dated December 27, 2017 you were notified that the Department of Mental Health was contemplating your dismissal, and you were given the opportunity to respond

to charges of misconduct. I met with you and your representative on January 25, 2018, to hear your response to the December 27, 2017 letter.

The reasons for your dismissal are all those outlined in the above-referenced letter of December 27, 2017 with supporting attachments, which are fully incorporated by reference. I did not find you to be honest and truthful and take responsibility for your behavior. You failed to acknowledge the seriousness of your behavior, its impact on facility operations, nor the value of integrity.

...

(State Exhibit 19, VSEA Exhibit 3)

29. In deciding to dismiss Grievant, Fox concluded that Grievant had committed serious misconduct in being untruthful during the *Loudermill* process and failing to take personal responsibility for her actions. He was concerned that Grievant may be untruthful about other aspects of her employment such as whether the patient checks that she documented were accurate. He lost confidence in Grievant's ability to reliably care for the vulnerable Vermonters at VPCH due to her lack of honesty and trustworthiness. He considered that her work record had deficiencies given the large number of unauthorized off payroll time. He concluded that Grievant had fair notice that her conduct was prohibited since she knew it was unethical to be dishonest. He did not view Grievant as a good candidate for rehabilitation due to her false statements and failure to take responsibility for her actions.

30. At the time Grievant was dismissed, there was one other recent case involving dishonesty by a Department of Mental Health employee. That employee was dismissed from employment.

### OPINION

VSEA contends that the Employer violated Article 14 of the Contract by dismissing Grievant without just cause, 2) improperly bypassing progressive discipline, and 3) failing to apply discipline with a view toward uniformity and consistency. VSEA also alleges that in

dismissing Grievant, and in the continuing pattern of discrimination and harassment leading up to her dismissal, the Employer violated Article 5, No Discrimination or Harassment, and Article 35, Parental Leave/Family Leave, of the Contract based on Grievant exercising her rights under the Contract, the federal Family Medical Leave Act, and the Vermont Parental and Family Leave Act.

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).

In carrying out its function to hear and make final determination on whether just cause exists, the Labor Relations Board determines *de novo* and finally the facts of a particular dispute, and whether the penalty imposed on the basis of those facts is within the law and the contract. Grievance of Colleran and Britt, 6 VLRB 235, 265 (1983). 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. Id. Once the underlying facts have been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven facts. Id. at 266.

The Employer charged Grievant with untruthfulness during the September 20, 2017, *Loudermill* meeting convened to allow Grievant to respond to contemplated discipline against

her. Specifically, the Employer charges Grievant with untruthfulness by: 1) denying being absent from work on May 30, 2017, and asserting that she had never violated callout procedures by failing to call in when she was not going to report to work; and 2) asserting that Tammie Ellison, Human Resources Administrator, had told her that the dates for which she had received two reprimands for being in an unauthorized off payroll status actually were designated as FMLA leave. The Employer contends that these actions of Grievant violated Personnel Policies 5.6 and 17.0 requiring employees to fulfill their duties to the best of their ability, conduct themselves in a manner that will not bring discredit or embarrassment to the State, and provide truthful and complete information during investigations.

We conclude that the Employer has proven these charges by a preponderance of the evidence. The Employer notified Grievant in writing a week prior to the *Loudermill* meeting that the Employer considered her on unauthorized off payroll status for May 30, 2017, among other dates. She falsely stated during the meeting that she was at work that day even though the evidence indicates she did not work. She had the opportunity prior to the meeting to seek to determine whether she worked that day, and she acted with reckless disregard for the truth by claiming she did work that day.

This is sufficient to establish by a preponderance of the evidence the charge of untruthfulness. Grievant later asserted at the second *Loudermill* meeting on January 25, 2018, that she was confused, rather than untruthful, when she asserted at the September 27 meeting that she did work on May 30. We conclude that her explanation of the confusion of dates is not credible.

The Employer also has demonstrated that Grievant was untruthful in stating during the meeting that she had never violated callout procedures by failing to call in when she was not

going to report to work. She failed to call in on May 30, 2017, when she did not report for work. She acted with reckless disregard for the truth by claiming she had never failed to call in when she was not going to report to work given her failure to do so on May 30. This establishes by a preponderance of the evidence Grievant's untruthfulness in this regard.

The Employer further has established Grievant was untruthful in stating during the September 20, 2017, *Loudermill* meeting that Human Resources Administrator Tammie Ellison had told her that dates for which she had received two reprimands for being in an unauthorized off payroll status actually were designated as FMLA leave. The evidence does not indicate that Ellison so informed Grievant. Instead, Ellison told Grievant in an April 24, 2017, email that the unauthorized off payroll absences were not related to her FMLA leave but instead stemmed from Grievant having called out or reported late due to other reasons.

Ellison's April 24 email was reinforced by a report that Ellison sent to Grievant's VSEA representative on July 24, 2017, indicating that Grievant was in an unpaid unauthorized status on the dates which formed the basis for Grievant receiving reprimands. This should have removed any question by Grievant and her VSEA representative concerning whether Ellison was representing to Grievant that the dates for which she had received two reprimands for being in an unauthorized off payroll status actually were designated as FMLA leave. The report made it clear the dates were considered as unauthorized off payroll.

In sum, the Employer has proven the charges against Grievant, and has established that she violated Personnel Policies 5.6 and 17.0 requiring employees to fulfill their duties to the best of their ability, conduct themselves in a manner that will not bring discredit to the State, and provide truthful information during investigations.

The underlying charges having been proven, we must determine whether the disciplinary action of dismissal 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.

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

We first consider the nature and seriousness of Grievant's offenses and their relation to Grievant's duties and positions. The 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 deciding whether there is just cause for dismissal, the Board determines the substantiality of the detriment to the employers' interests. Merrill, 151 Vt. at 273-74.

Grievant's offenses were serious. She was dishonest on multiple occasions during the *Loudermill* process and failed to take responsibility for her actions. The Employer was reasonably concerned under the circumstances that Grievant may be untruthful about other aspects of her employment such as whether the patient checks that she documented were accurate. Dishonesty by employees is grounds for serious punishment, and the Board and the Vermont Supreme Court have upheld dismissals for dishonesty in several cases. Grievance of Alexander, 34 VLRB 33, 52-53 ((2017). 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 had fair notice that her dishonesty during the *Loudermill* process could be grounds for discharge. Fair notice exists when the employee knew or should have known that the conduct was prohibited and subject to discipline. Grievance of Towle, 164 Vt. 145, 150 (1995). Grievance of Gorruso, 150 Vt. 139, 148 (1988). Grievance of Brooks, 135 Vt. at 568. 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).

Grievant's past disciplinary record and work record for her relatively brief tenure of employment of nearly four years do not aid her in retaining employment. She received a verbal reprimand and a written reprimand for numerous unauthorized off payroll absences between December 2016 and February 2017. These were deficiencies in her reliability in providing services to VPCH patients and placed burdens on other employees to ensure appropriate staffing of the hospital to meet its operating needs.



Grievant's offenses understandably had a detrimental effect on the Employer's confidence in her ability to perform assigned duties. Her superiors reasonably lost confidence in Grievant's ability to reliably care for the vulnerable Vermonters at VPCH due to her lack of honesty and trustworthiness and her failure to take responsibility for her actions.

Grievant has failed to show that she was treated inconsistently with other employees committing similar offenses. At the time Grievant was dismissed, there was one other recent case involving dishonesty by a Department of Mental Health employee. That employee was dismissed from employment.

Grievant's dishonesty and failure to take responsibility for her actions also reasonably resulted in the Employer viewing her potential for rehabilitation as weak. She failed to acknowledge the seriousness of her behavior, its impact on facility operations, or the value of integrity. These failings understandably led the Employer to view her continuing employment as unpromising.

We conclude 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. The Employer reasonably determined that Grievant's offenses constituted substantial shortcomings detrimental to the Employer's interests and just cause existed for her dismissal.

We reject VSEA's remaining contention that in dismissing Grievant, and in the continuing pattern of discrimination and harassment leading up to her dismissal, the Employer violated Article 5, No Discrimination or Harassment, and Article 35, Parental Leave/Family Leave, of the Contract, based on Grievant exercising her rights under the Contract, the federal Family Medical Leave Act and the Vermont Parental and Family Leave Act. Although there was

divisiveness among employees with respect to employees taking family and medical leave, the evidence does not support a holding that the Employer engaged in a continuing pattern of discrimination and harassment leading up to Grievant's dismissal and in dismissing her. The Employer had legitimate, non-discriminatory reasons for the actions taken against Grievant, and VSEA has not demonstrated that impermissible discrimination and harassment of Grievant motivated the Employer.

### ORDER

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

Dated this 19th of April, 2019, at Montpelier, Vermont.

#### VERMONT LABOR RELATIONS BOARD

/s/ Robert Greemore

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Robert Greemore, Acting Chairperson

/s/ David R. Boulanger

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David R. Boulanger

/s/ Karen F. Saudek

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Karen F. Saudek