

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 18-06
ROBERT FARLEY	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 16, 2018, Attorney Norman Blais filed a grievance on behalf of Robert Farley (“Grievant”), contending that the State of Vermont Department of Environmental Conservation (“Employer”) violated Article 14 of the collective bargaining agreement between the State of Vermont and the Vermont State Employees’ Association, effective July 1, 2016 to June 30, 2018, by dismissing Grievant from his position as an Environmental Analyst V. Specifically, Grievant asserts that the Employer violated Article 14 because: 1) the dismissal was not based in fact or supported by just cause, 2) the Employer improperly bypassed progressive discipline and progressive corrective action, 3) the Employer failed to apply discipline with a view towards uniformity and consistency, and 4) the Employer improperly retaliated against him for filing and pursuing a grievance concerning not being promoted.

Hearings were held in the Labor Relations Board hearing room in Montpelier on December 4 and 10, 2018, before Board Members Robert Greemore, Acting Chairperson; David Boulanger and Karen Saudek. Assistant Attorney General Alison Powers represented the Employer. Attorney Blais represented Grievant. Grievant and the Employer filed post-hearing briefs on January 3 and 4, 2019, respectively.

FINDINGS OF FACT

1. The Contract provides in pertinent part:  
...

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

...

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 race, color, religion, creed, ancestry, sex, marital status, age, national origin, disability, sexual orientation, gender identity, workers' compensation, nursing mothers (breastfeeding), credit history, flexible work arrangements, parental and family leave, membership or non-membership in the VSEA, filing a complaint or grievance, or any other 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 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 corrective action; . . .
2. The appointing authority or designated representative . . . may dismiss an employee with just cause with two (2) weeks' notice or two weeks' pay in lieu of notice. . .

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

## ARTICLE 66 WORKPLACE ANTAGONISM

1. The State of Vermont endeavors to provide the highest quality public service to its citizens. The State and Union agree that this can best be achieved by a work environment in which all employees are treated with respect and dignity by each other. Employees are expected to act in a manner which does not unreasonably interfere with another employee's ability to perform their work.

If an employee believes that he or she cannot perform his or her work because of unreasonable interference caused by another employee's antagonistic, belligerent, and/or malicious acts, the impacted employee is encouraged to communicate directly, either verbally or in writing, with the other employee in an effort to resolve the situation. . .

(State's Exhibit 1)

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

. . .

### **Number 5.6 – EMPLOYEE CONDUCT**

. . .

#### **REQUIRED CONDUCT**

. . .

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.

. . .

3. Grievant worked for 20 years with the State of Vermont Department of Environmental Conservation ("DEC"). He worked as an Environmental Analyst in the

Drinking Water Protection Division from 2003 until his dismissal in January 2018. He conducted inspections of public water systems, prepared reports following these inspections, and monitored compliance of laws and regulations by water system operators.

4. Grievant received no disciplinary action during his employment with DEC prior to his dismissal.

5. Grievant's position required him to have interactions with members of the public on a weekly basis. There is no evidence that Grievant engaged in any inappropriate behavior during these interactions such as acting in a threatening manner, engaging in assaultive behavior, raising his voice or using obscenities. Grievant never heard of any complaints from the public on his interactions with them.

6. Timothy Raymond was Operations Section Supervisor of the Drinking Water Protection Division from 2003 to 2013. He was Grievant's immediate supervisor during this period and prepared performance evaluation reports on Grievant. In the first performance evaluation report Raymond prepared on Grievant, covering the period November 2003 to October 2005, he gave Grievant an overall evaluation of "excellent". This meant that Raymond assessed that Grievant's "overall performance in all areas frequently exceeds the performance standards established for the position". Raymond stated that Grievant "is effective at performing a comprehensive sanitary inspection of a Public water system, . . . experienced in evaluating these facilities, . . . and consistently demonstrates his knowledge and effectiveness in working with water systems and communicating with their operators". He further stated: "Rob is an energetic and cooperative team member. Though he does get frustrated with process-oriented details,

decisions (*communicates his concerns openly with his superiors*), he accepts responsibility well and strives to provide for a better work environment for himself and his co-workers.” (Grievant Exhibit A, emphasis in original)

7. The next performance evaluation report that Raymond performed on Grievant covered the period October 2007 to October 2008. Raymond again assessed Grievant’s overall performance as “excellent”. Raymond noted that Grievant’s “overall effectiveness and accuracy in completing the primary functions of his position, sanitary survey inspections and preparing permits, was observed to be consistent and completed in a timely manner.” He stated that Grievant “has been working tirelessly to better improve himself and assists other employees to meet the objectives in the drinking water program” (Grievant Exhibit B).

8. Raymond also rated Grievant’s overall performance as “excellent” in the next performance evaluation of him, covering the period October 2008 to October 2009. He indicated that Grievant “succeeded in managing and completing his work assignments, consistently, within assigned deadlines.” Raymond found Grievant to be a “conscientious and thoughtful employee who enjoys working with people” and concluded that he “works well with division staff members”. Raymond noted that Grievant needed to improve his written communications with public water systems to provide more precise, accurate and complete work products (Grievant Exhibit C).

9. In the next performance evaluation covering the period October 2009 to October 2010, Raymond again assessed Grievant’s overall performance as “excellent”. Raymond complimented Grievant on his efforts providing training to a co-worker, bringing inaccuracies in division documents to Raymond’s attention, and providing good

technical assistance to public water systems. He stated that Grievant's "attention to detail" in writing accurate, complete and grammatically correct letters "has improved over the last several years, but continuous effort and attention to detail is required" (Grievant Exhibit D).

10. Raymond again provided Grievant with an "excellent" overall performance rating for the period October 2010 to October 2011. Raymond determined that Grievant was helpful, professional, supportive of co-workers, conscientious, reliable, and completed his work assignments on time. He indicated that Grievant prepared timely reports, permits and response letters to water systems. Raymond expressed appreciation for Grievant's efforts following Tropical Storm Irene. He stated that Grievant "does . . . need to continue to closely review all of his work for completeness prior to placing his letters in the mail". He informed Grievant that, "(a)s a supervisor, I thank you for the honesty that you share with me regarding your opinion." (Grievant Exhibit E)

11. The final performance evaluation Raymond prepared on Grievant covered the period October 2011 to October 2012. Raymond again rated Grievant's overall performance as "excellent". Raymond commented: "The work products produced which are principally sanitary survey inspection reports and operating permits, which are consistent and reliably produced to meet . . . assignment deadlines. Within this evaluation period, Rob has continued to focus on being technically accurate and on-time regarding his work assignments. . . It is my observation that Rob is taking the extra time necessary to review (double-check) his work products to assure that his letters and permits are well-organized and written well." Raymond stated that Grievant "is friendly and helpful to the

regulated community and his co-workers”, and that he “maintains a professional attitude with regard to his work with public water systems” (Grievant Exhibit F).

12. Grievant and Raymond had a good working relationship throughout the period Raymond was Grievant’s immediate supervisor. Their interactions included many candid discussions. They had disagreements that did not rise to the level of arguments. Grievant at times exhibited frustration in Raymond’s presence but generally would calm down. Raymond provided significant edits to Grievant’s written work. Grievant expressed appreciation for these edits.

13. Thomas Brown succeeded Raymond as Operations Section Supervisor in early 2014, and became Grievant’s immediate supervisor. Grievant had applied for the position for which Brown was selected. Brown and Grievant had been co-workers for the previous ten years. Raymond became Chief of the Operations Engineering Program, and was Brown’s immediate supervisor. Grievant filed a grievance over not being selected for the position. Grievant expressed more frustration and dissatisfaction in the workplace after not being promoted into the Operations Section Supervisor position. He raised his voice more often, his body language more often showed dissatisfaction and frustration, and he was less friendly and more withdrawn in the workplace.

14. Brown completed the annual performance evaluation on Grievant covering the period October 2013 to October 2014. He rated Grievant’s overall performance as “excellent” Brown and Raymond discussed Grievant’s performance for the rating period. Raymond had an impact on the evaluation, recommending a change in the overall rating from “satisfactory” to “excellent”. Brown recognized Grievant in the evaluation report as “a key member of the team”. He expressed appreciation for “his ability to take on some

of the more complex assignments and provided technical advice to our less tenured surveyors”. Brown indicated that Grievant had a high level of production with a heavy workload, completed his work in a timely manner, and provided excellent operational technical assistance to water systems. Brown noted that there was a significant amount of grammatical errors in Grievant’s written work. Brown also stated that Grievant “has not been accepting of constructive criticism and has had multiple unprofessional and explosive communications with me as his supervisor”, although he noted that “(i)n the last four months of this evaluation period I have seen a marked improvement in Rob’s attitude and professionalism with his coworkers, myself included” (Grievant Exhibit G).

15. Patrick Smart replaced Brown as the Operations Section Supervisor of the Drinking Water Protection Division in November 2015. Smart had not previously worked in state government. Grievant again had applied for the position, and was discouraged that he was not selected. Smart became Grievant’s immediate supervisor. Smart reported to Raymond.

16. Smart provided Grievant with written supervisory feedback on March 4, 2016, due to an email Grievant had sent Smart in response to edits Smart provided on a letter drafted by Grievant. In the email, Grievant referred to Smart as a “grammar Nazi” and informed him: “If you are going to do your own review, then please approve it yourself, so I can move on to other tasks.” In the supervisory feedback, Smart stated: “The tone and language you used are unprofessional and are inappropriate for written communications in the workplace. Through these emails you are demonstrating a negative attitude, an uncooperative demeanor, and unprofessional behavior.” (State Exhibit 4, p.26).



17. Smart issued three other memoranda of written supervisory feedback to Grievant over the subsequent few months. One was for Grievant not inviting Smart to attend a meeting. Another was to formalize a conversation between Smart and Grievant regarding his overall performance during the preceding three months. The third supervisory feedback was for Grievant issuing a sanitary survey letter before Smart had completed his review of the letter (State Exhibit 4, p. 27-29).

18. Subsequent to receiving these written supervisory feedbacks, Grievant met with Division Director Brian Redmond and Smart four to six times over the next several months in an attempt to improve his written work product and have a “restart” of his relationship with Smart. These efforts were eventually abandoned after Grievant received the annual performance evaluation on Grievant discussed in the next Finding of Fact. It was mutually agreed that further meetings would not be productive.

19. Smart completed a performance evaluation on Grievant covering the period October 2015 to October 2016. Smart rated Grievant’s overall performance as “satisfactory”. This meant that Smart had assessed that Grievant’s “overall performance consistently meets the performance standards established for the position and regularly achieves expected results.” Smart concluded that Grievant’s performance was satisfactory in the areas of providing technical assistance externally and internally, responding to and investigating a contamination complaint, and consistently and reliably adhering to his alternative work schedule. Smart determined that Grievant’s written work product during the rating period was of unsatisfactory quality, stating: “The sanitary survey reports and draft permits to operate prepared by Rob consistently contained factual, technical, and grammatical errors; his written report often required iterative reviews to obtain a

satisfactory work product. The amount of time and effort required to review, edit, and, in some cases, re-write Rob's work was significant" (State Exhibit 3).

20. Emily Boedecker was appointed Commissioner of the Department of Environmental Conservation in March 2017. She had not previously been employed in state government. Boedecker's office as Commissioner was in an open area of the office. She had a "standing desk". Her office was located in the same general work area as the employees of the Drinking Water Protection Division. She was able to observe the work areas of Raymond, Smart and Grievant from her standing desk.

21. One day in April 2017, Grievant and Raymond attended a meeting at which Grievant concluded that Raymond was no longer being supportive of Grievant's work efforts. After the meeting, Grievant followed Raymond into the room in the office which housed the copier. Grievant expressed his concerns to Raymond in the copier room, stating words to the effect of "What is happening with you?", and "What is in your heart?". While making the comments, Grievant pointed his index finger in Raymond's chest, poking him three times. Raymond felt uncomfortable during the incident.

22. Raymond quickly relayed this incident to his direct superior. Raymond suggested that a big deal not be made of the incident. He did not want to escalate disharmony in the workplace. Neither Raymond nor any other manager spoke to Grievant about this incident.

23. On Wednesday, June 21, 2017, at 8 a.m., Grievant sent an email to Smart. Grievant expressed his understanding that an upcoming survey of the Milton water system that was scheduled for that Friday, June 23, was to be a Class II survey. Grievant set forth the approach he was intending to follow in completing the survey, and then

stated in bold print in the email: **“If this is not acceptable for a Class II inspection under your supervision, then please let me know today, so I can reschedule this inspection to a future date, so a Class II inspection that meets your standards, can be prepared.”** (State Exhibit 5, p.38).

24. Smart did not respond to this email on either June 21 or June 22. June 22 was a Thursday, a day Grievant did not work under his alternative work schedule. On the morning of June 23, 2017, Grievant was in the office early in the morning before leaving to complete the Milton inspection. Grievant sent an email to Raymond at 7:54 a.m. in which he included a copy of the June 21 email he had sent to Smart, and informed Raymond that he did not get a response from Smart. Grievant stated he “will make the assumption that the strategy I proposed below is acceptable to management for the Class II inspection I am conducting today.” Grievant then left the office to travel to Milton (State Exhibit 5, p. 41-43).

25. Immediately after Grievant left the office, Raymond sent an email to Smart at 8:21 a.m., informing him with respect to the Milton inspection that a “Class I, comprehensive inspection, should be completed until you and Rob agree otherwise. Please give Rob a telephone call as he just left the office.” Smart responded at 8:25 a.m., informing Raymond: “I just left rob a voicemail explaining my expectation that he perform a Class I Survey for this system, and that he perform an additional site visit, if necessary.” (State Exhibit 5, p.40)

26. Grievant completed a Class II survey in Milton consistent with the approach he had set forth in his June 21 email to Smart. He did not listen to the voicemail

from Smart until that afternoon when he arrived back at the National Life campus in Montpelier, where his office was located, and accessed his cellphone.

27. Grievant was angry and frustrated after hearing the voicemail message directing him to complete a Class I survey. Upon entering the office, Grievant viewed on his computer the email messages exchanged between Raymond and Smart earlier that morning. Grievant immediately told Smart he wished to speak with him. Grievant motioned to a focus room in the office and stated words to the effect of “get in here right now”. Grievant and Smart met in the focus room. Grievant was agitated; his voice was raised and his arms were moving around as he spoke to Smart. Smart’s voice also was raised. Raymond was in the office at the time and he could see into the focus room through the room’s glass walls. Raymond opened the focus room door and suggested to Grievant and Smart that they should reschedule their meeting to the following Monday. Smart indicated agreement, but Grievant said words to the effect of “great, why don’t you come in here too and you both can gang up on me”. At this point, Smart left the room. As he was leaving, Grievant said to Smart and Raymond words to the effect of “you get out of here, and you come in here”. Grievant indicated to Raymond that he wanted to meet with him. Raymond told Grievant that, if he wanted a meeting, he would meet with him the following Monday. Grievant responded with a profanity. Raymond told Grievant not to swear at him.

28. Raymond left the focus room and began walking back to his desk. Grievant followed Raymond and said to him words to the effect of “Is this what you want, is this what you’ve become?”. In an effort to get Raymond’s attention, Grievant attempted to get hold of Raymond’s shirt by using his finger and thumb to pinch the back

of Raymond's shirt. When Raymond continued to walk away, Grievant placed a hand on Raymond's upper arm to have Raymond turn to face him. Raymond said to Grievant words to the effect of "take your hands off me" and removed Grievant's hand on his arm by brushing it aside. Grievant's hand was on Raymond for a few seconds and did not cause Raymond pain. Grievant apologized to Raymond for placing his hand on him. During this incident, Grievant used some profanities.

29. Following this incident, Grievant walked by the workstation occupied by co-worker Heather Collins. Grievant asked Collins if he could talk with her about whether her work was getting scrutinized by Smart. Collins told Grievant that she did not have problems with Smart and had to leave for an appointment. Grievant then ended the conversation and left Collins's work area.

30. Immediately after this encounter with Grievant, Collins sent an email to Smart at 3:55 p.m., stating:

I don't know what that was all about, but Rob tried to get me to go talk with him and I told him I didn't want to be involved and I had to leave for an appointment. Sorry I bailed without talking to you. Rob made me feel very uncomfortable.  
(State Exhibit 6, p.44)

31. Collins left the office after sending this email. Grievant worked to the end of his regular work day.

32. Commissioner Boedecker was in the office on June 23, 2017, but was away from her desk when the above incident occurred. She did not observe the incident.

33. Commissioner Boedecker sent Grievant a letter dated November 6, 2017, providing in pertinent part:

As a result of your behavior described below, the Department of Environmental Conservation ("DEC") is contemplating imposing serious disciplinary action up to and including dismissal from your position as an Environmental Analyst V. You have the

right to respond to the specific allegations listed below, either orally or in writing, before the final decision is made. . .

The below disciplinary charges are based on your conduct . . .

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

- CBA Article 5, No Discrimination or Harassment
- CBA Article 14, Immediate Dismissal
- CBA Article 66, Workplace Antagonism
- PP 5.6, Employee Conduct
- PP 8.0, Disciplinary Action
- PP 9.1, Immediate Dismissal
- PP 17.0, Employment Investigations

**B. Potential Violations of the Contractual Agreement and Personnel Policies**

You are currently employed as an Environmental Analyst V at DEC. On June 23, 2017 the State became aware of allegations you engaged in an altercation with a division manager, Tim Raymond. It was alleged you forcefully grabbed Raymond by the shoulder and upper arm after he repeatedly told you not to touch him. In addition, it was alleged that you used profanity during the altercation and caused bystanders to feel concerned for their safety.

During the course of the investigation, additional allegations were made that this is not the first time you have angrily physically touched Raymond. It was alleged that approximately two months prior to the June incident you cornered him in a copy room and repeatedly poked him in the chest as you berated him. Raymond described feeling trapped in the room during that incident.

These allegations are very serious and such behavior cannot be tolerated in the workplace. Multiple witnesses stated they saw you forcefully put your hands on Raymond and heard you use profanity during the altercation. One witness reported she left the office because she felt threatened by your behavior and did not want to interact with you.

You reported during the investigation you felt frustrated during a meeting with your supervisor, Patrick Smart, just prior to the altercation with Raymond. You admitted that you were angry and speaking in a sarcastic manner with Smart, which is when Raymond suggested you end the meeting. You further admitted you used profanity during your altercation with Raymond and you touched his shirt. However, you denied grabbing Raymond forcefully. It seems you may not be taking responsibility for your actions, which is concerning to me.

The Vermont Personnel Policies provide employees direction on how to conduct themselves in order to fulfill their duties as public servants. Specifically, you are to conduct yourself in a manner that will not cause others to fear for their safety. However, your described conduct appears to constitute misconduct and/or gross misconduct, and violate all of the above policies, and provisions. Accordingly, it appears your conduct provides just cause for disciplinary action up to and including dismissal from your position with DEC.

...

You must notify Laurie Bouyea-Dumont . . . 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. . .  
(State's Exhibit 7)

34. Commissioner Boedecker sent Grievant a letter dated January 19, 2018, providing in pertinent part:

This is to notify you of your dismissal from employment . . . due to misconduct.

. . .

The reasons for your dismissal are all those outlined in the . . . letter of November 6, which is fully incorporated by reference.

. . .

(State's Exhibit 10)

35. In deciding to dismiss Grievant, Commissioner Boedecker viewed the June 23, 2017, incident as a serious offense by Grievant given the level of threat to others and the unprofessionalism he demonstrated. She further took into account that there were issues with Grievant's performance in that he that he had deficiencies in performing the technical regulatory responsibilities of his position. She determined that Grievant was not a good candidate for rehabilitation because he had not improved his performance during the past two and one-half years. She also was not confident that Grievant would not present a threat to the safety of the entire Drinking Water Protection Division team. She concluded that there were not adequate alternative sanctions to dismissal because the June 23 incident crossed a line of professional conduct. It is possible that she would not have dismissed Grievant due to the June 23 incident if he had an impeccable work record. She viewed this as an appropriate case to bypass progressive discipline due to Grievant having crossed a line of professional conduct on June 23, the impact of the June 23 impact on staff, and Grievant's inadequate response to the coaching he had received on his performance.

## OPINION

Grievant alleges 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 and progressive corrective action, and 3) the Employer failed to apply discipline with a view towards uniformity and consistency.<sup>1</sup>

Just cause is some substantial shortcoming detrimental to the employer's interest which is recognized as constituting 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.

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<sup>1</sup> Grievant also asserted in the grievance filed with the Board that the Employer improperly retaliated against him for filing and pursuing a grievance concerning not being promoted. However, Grievant did not present evidence in support of this issue and has not addressed it in the post-hearing brief which he filed. Accordingly, we understand that Grievant is not pursuing this issue and we do not address it in this decision.



The Employer charges Grievant with misconduct based on a June 23, 2017, altercation with Drinking Water Protection Division manager Timothy Raymond. The Employer alleges in the dismissal letter that Grievant “forcibly grabbed Raymond by the shoulder and upper arm after he repeatedly told (Grievant) not to touch him”, that he “used profanity during the altercation” that was heard by “multiple witnesses”, that he “caused bystanders to feel concerned for their safety” including one co-worker who “left the office because she felt threatened by (Grievant’s) behavior”.

The severity of these charges was not borne out by evidence presented at the hearing before the Labor Relations Board. The evidence does not establish that the physical contact by Grievant occurred after Raymond repeatably told Grievant not to touch him. Instead, Grievant made physical contact with Raymond before Raymond told him once to take his hands off him. Also, the charge that Grievant “forcibly grabbed” Raymond is misleading. Grievant placed a hand on Raymond’s upper arm to get his attention and have Raymond turn to face him. The fact that Raymond was able to remove Grievant’s hand on his arm by brushing it aside counters the claim that Grievant forcibly grabbed Raymond.

Further, no evidence was presented demonstrating that multiple witnesses heard Grievant use profanity during the altercation. Also, evidence was lacking that bystanders felt concerned for their safety and that a co-worker left the office because she felt threatened by Grievant. A co-worker sent an email, immediately after Grievant spoke to her after the incident, stating that Grievant made her “very uncomfortable”. The co-worker at no point indicated that Grievant made her feel unsafe or threatened.

The Employer has proven its charges with respect to the July 23 incident only to the extent of establishing by a preponderance of the evidence that Grievant committed misconduct

by placing his hand on Raymond's upper arm in an attempt to get his attention and have Raymond turn to face him, and by using profanity during the incident. It was inappropriate for Grievant to physically touch a superior in this manner and unprofessional for him to use profanity in the workplace to express his anger and frustration.

The Employer also alleges that Grievant had "angrily physically touched" Raymond approximately two months earlier when he poked him in the chest in the copier room. We conclude that it is inappropriate for the Employer to rely on this allegation to bolster the case for dismissing Grievant. Article 14 of the Contract requires the State to "act promptly to impose discipline . . . within a reasonable time of the offense". Raymond had quickly reported the copier room incident to his superior and suggested that a big deal not be made of it. No one in management spoke to Grievant about the incident and no disciplinary action was taken. Since management knew of Grievant's actions, and took no action at the time, it is inappropriate for the Employer to use it as a basis for discipline at a later time. Grievance of Gorruso, 9 VLRB 14, 34 (1986); *Reversed on Other Grounds*, 150 Vt. 139 (1988).

In sum, the Employer has established only some of the charges against Grievant . The fact that all of the charges against Grievant have not been proven in their entirety does not necessarily mean that his dismissal was without just cause. Failure of an employer to prove by a preponderance of the evidence all the particulars of a dismissal letter does not require reversal of a dismissal action. Grievance of Dwire, 30 VLRB 240, 272 (2009). Grievance of McCort, 16 VLRB 70, 121 (1993). In such cases, the Board must determine whether the proven charges justify the penalty. Id.

We look to the factors articulated in Colleran and Britt to determine whether the Employer exercised its discretion within tolerable limits of reasonableness. 6 VLRB at 268-69.

The pertinent factors here are: 1) the nature and seriousness of the offenses and their relation to Grievant's duties and position, 2) the clarity with which Grievant was on notice of any rules that were violated in committing the offenses, 3) the effect of the offenses upon Grievant's ability to perform at a satisfactory level and their effect on supervisors' confidence in Grievant's ability to perform assigned duties, 4) Grievant's past disciplinary record, 5) Grievant's past work record including length of service and performance on the job, 6) the 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 employer's interests. Merrill, 151 Vt. at 273-74.

Grievant's offenses were serious. In directing the workforce, management is entitled to employees treating them with respect and professional courtesy and not engaging in inappropriate physical actions. Grievant engaged in an inappropriate physical action by placing his hand on Raymond's upper arm in an attempt to get his attention and have Raymond turn to face him. He engaged in unprofessional behavior by using profanity during the incident. Grievant's actions of undermining supervisory authority and indicating disrespect for his superior were serious workplace violations and cannot be condoned.

While we conclude that Grievant's actions were serious, we reiterate as detailed above that his misconduct was not as serious as alleged by the Employer in the letter dismissing him. His physical actions were not as forcible as charged by the Employer. He did not engage in the

physical actions after being repeatedly told by Raymond not to touch him as charged. The charge by the Employer that his profanity was heard by multiple witnesses was not established. The Employer charge that co-workers were concerned for their safety and/or felt threatened by Grievant's actions likewise were not established.

Our conclusions in this regard do not necessarily result in a holding that just cause did not exist for Grievant's dismissal. Our inquiry continues to determine whether the seriousness of Grievant's offenses, considered along with the other pertinent Colleran and Britt factors, constitute just cause for Grievant's dismissal under the Contract.

Grievant had fair notice that his offenses could result in his dismissal. Fair notice exists when the employee knew or should have known that the conduct was prohibited 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. All employees have implied notice they should not engage in conduct which undermines the authority of supervisors and/or indicates disrespect for them. Grievance of Downing, 24 VLRB 85, 97 (2001). Grievance of King, 13 VLRB 253, 284 (1990). Grievant should have known that his physical action towards Raymond and his use of profanity during the incident were prohibited and subject to discipline because it undermined supervisory authority and indicated disrespect for his superior.

Further, his misconduct had an adverse effect on his ability to perform at a satisfactory level and on supervisors' confidence in his ability to perform assigned duties. His actions adversely affected his ability to work cooperatively and productively with his superiors and co-workers in the Drinking Water Protection Division. It would be understandable for supervisors to be concerned about his ability to perform assigned duties given his inappropriate behavior.

However, Grievant's past work record and disciplinary record weigh heavily in his favor. He worked 20 years for the Employer without any previous discipline. His overall performance most often had been rated excellent. Although the Employer raised issues with Grievant's performance, the lowest overall performance rating ever received by Grievant was satisfactory.

It is evident by the record that the Employer took into account issues with Grievant's performance in deciding to dismiss Grievant and viewed Grievant as a poor candidate for rehabilitation in part at least due to not improving his performance over time. The Employer did not exercise its discretion within tolerable limits of reasonableness by placing such weight on Grievant's performance. We so conclude because the Employer had taken no progressive corrective action steps to address performance deficiencies of Grievant prior to dismissing him. The Contract specifies progressive corrective action steps to address performance issues and allows bypass of such steps only in appropriate cases. The record is devoid of evidence justifying bypass of progressive corrective action with respect to Grievant.

In weighing all of the relevant factors and examining all the circumstances, we ultimately conclude that just cause did not exist for Grievant's dismissal. Grievant's misconduct cannot be condoned, and the Employer was justified in bypassing progressive discipline to the extent of imposing a significant degree of discipline on Grievant. However, the Employer did not act reasonably in concluding he was not a good candidate for rehabilitation and that a lesser sanction than dismissal would not be effective or adequate. It is notable in this regard that Grievant's proven offenses are less severe than charged by the Employer and that the Employer inappropriately relied on performance issues. When this is considered together with Grievant's lengthy service and good work record, we conclude that it was not appropriate for the Employer to completely bypass progressive discipline and dismiss Grievant.

An adequate and effective sanction other than dismissal is a 30-day suspension, the maximum penalty short of dismissal permitted by the Contract.. This should suffice to deter such conduct by Grievant in the future given his knowledge that the next disciplinary step in the Contract for similar misconduct is dismissal. It also should suffice to send the message to other employees that the misconduct displayed here was serious and will not be condoned.

### ORDER

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

1. The Grievance of Robert Farley is sustained in part and his dismissal is reduced to a 30 day suspension;
2. Grievant shall be reinstated to his position as Environmental Analyst V with the State of Vermont Department of Environmental Conservation;
3. Grievant shall be awarded back pay and benefits from the date commencing 30 working days from the effective date of his dismissal until his reinstatement, for all hours of his regularly assigned shift plus the amount of overtime Grievant would have worked, minus any income (including unemployment compensation received and not paid back) received by Grievant in the interim;
4. The interest due Grievant on back pay shall be computed on gross pay and shall be at the legal rate of 12 percent per annum and shall run from the date each paycheck was due during the period commencing 30 working days from Grievant's dismissal, and ending on the date of his reinstatement; such interest for each paycheck date shall be computed from the amount of each paycheck minus

income (including unemployment compensation) received by Grievant during the payroll period;

5. The parties shall file with the Labor Relations Board by March 18, 2019, a proposed order indicating the specific amount of back pay and other benefits due Grievant; and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Board. A hearing on disputed issues, if necessary, shall be held on April 11, 2019, at 9:00 a.m., in the Board hearing room; and
6. The Employer shall remove all references to Grievant's dismissal from his personnel file and other official records and replace it with a reference to a 30 day suspension consistent with this decision.

Dated this 27th day of February, 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