

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 18-29
DAWN TETRAULT	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

The Vermont State Employees' Association ("VSEA") filed a grievance on July 16, 2018, on behalf of Vermont Department of Health Access employee Dawn Tetrault ("Grievant"), contending that the State of Vermont Department of Health Access ("Employer") violated Articles 12 and 14 of the collective bargaining agreement between VSEA and the State of Vermont for the Non-Management Unit, effective July 1, 2016 to June 30, 2018 ("Contract"), by issuing Grievant an unsatisfactory performance evaluation and placing her in a prescriptive period of remediation.

A hearing was held on January 31, 2019, before Board Members Robert Greemore, Acting Chairperson; David Boulanger and Karen Saudek. VSEA Staff Attorney Kelly Everhart represented Grievant. Assistant Attorney General Laura Rowntree represented the Employer. The parties filed post-hearing briefs on March 8, 2019.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

...

**ARTICLE 12  
PERFORMANCE EVALUATION**

...

2. . . . Performance evaluations shall continue to be based exclusively on job duties, responsibilities, and other performance related factors. . .

. . . There shall be four (4) grades on an annual or special evaluation: Unsatisfactory (“U”), Satisfactory (“S”), Excellent (“E”) and Outstanding (“O”). An overall performance grade of “S” or better shall not be grievable. Adverse comments shall be grievable up through but not beyond Step II. An Unsatisfactory overall grade is fully grievable. The VLRB shall not have the authority to change such grade but may remand the rating to the employer for reconsideration consistent with the VLRB ruling on the merits.

. . .

4. . . During the rating year, the immediate supervisor shall call the employee’s attention to work deficiencies which may adversely affect a rating and, where appropriate, to possible areas of improvement. . .

. . .

#### **ARTICLE 14 DISCIPLINARY ACTION**

1. . . .

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

(1) feedback, oral or written (records of feedback are not to be placed in an employee’s personnel file except in compliance with the Performance Evaluation article);

(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 . . .

(4) dismissal.

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

. . .

(1) bypassing progressive . . corrective action;

. . .

(2) . . . as long as it is imposing . . . corrective action for just cause.

. . .

2. The Fair Hearing Unit (“FHU”) is a unit within the Department of Vermont Health Access that hears and processes appeals of eligibility determinations related to both Medicaid-covered services and qualified health plans under Vermont Health Connect. The FHU was created in late 2014. The FHU attempts to resolve healthcare appeal issues prior to sending appeals to the Human Services Board. Danielle Delong has been the HCAT Appeals Manager since 2016. Sarah Molino was supervisor of the FHU at all times pertinent to this matter. Delong was immediate supervisor of Molino. Molino was immediate supervisor of the six Fair Hearing

Specialists in the FHU. When Delong began managing FHU, the unit implemented new internal deadlines and tracking methods.

3. Employees working in the FHU had work spaces adjacent to each other at all times relevant so they could work together and ask questions. Molino's work space was on one end of the unit and Delong's work space was on the other end. This made them available to the Fair Hearing Specialists employed in the unit.

4. When the FHU receives a request for an appeal of a healthcare eligibility determination, a Fair Hearing Specialist is assigned and reviews the request to determine whether the appeal can be resolved. The Fair Hearing Specialist reaches out to the customer to determine the reason for the appeal, and reviews the case to see if there was a system or customer error that can be fixed. The Fair Hearing Specialist may be able to resolve the matter by correcting errors that led to an appealed eligibility determination, such as a customer inputting information incorrectly or missing a question. If the Fair Hearing Specialist is unable to resolve the matter, then the Fair Hearing Specialist prepares the case for review by the Human Services Board (State Exhibit 1, VSEA Exhibit 12).

5. The FHU procedures provide that the goal for the Fair Hearing Specialist is to complete the internal resolution process within 15 days and subsequently have management review it. If there is not an internal resolution, then FHU procedures provide that the Fair Hearing Specialist initiates a request for review on behalf of the customer by preparing an intake form and submitting that form to the Human Services Board within 30 business days following the appeal request. The procedures also provide that the Fair Hearing Specialist submits a related form to the Attorney General's Office on the same day as submitting the intake form to the Human Services Board (State Exhibit 2).

6. After the Human Services Board receives an intake form from the Fair Hearing Specialist, the Board schedules a hearing before a Board hearing officer. An Assistant Attorney General represents the State at the hearing. A Fair Hearing Specialist may serve as a witness for the State at the hearing. The customer who filed the appeal also participates in the hearing. After the hearing, the hearing officer issues a recommended decision to the Board. The Board then issues a decision on the appeal within 90 days of when the appeal was filed (State Exhibits 1, 2).

7. The Fair Hearing Specialist works with the Assistant Attorney General to prepare the case for hearing. The Fair Hearing Specialist conducts research and gathers documents, including applications and notices, for the Assistant Attorney General.

8. The FHU regularly uses two electronic programs in its work: the Seibel system that is used to process and manage eligibility requests, and SharePoint where the FHU internally tracks case progression. The Fair Hearing Specialist is expected to update the Seibel system and SharePoint throughout the appeals process. The Fair Hearing Specialist is responsible for updating SharePoint at each step in the appeals review process, such as by documenting initial outreach to a customer, contact with a customer, when an intake form has been sent to the Human Services Board, and when a related form has been sent to the Assistant Attorney General (State Exhibit 3).

9. Grievant has been a Fair Hearing Specialist in the FHU since mid-2015. She previously had been a Benefits Program Specialist in the Department of Vermont Health Access for about two years.

10. When Delong began managing the FHU in early 2016, she asked Molino to track case progression, in part to determine whether Fair Hearing Specialists were meeting goals and deadlines. Molino's tracking revealed that Grievant in some cases was not reviewing appeals

internally for early resolution within 15 days of being filed and was failing to transmit some unresolved appeals to the Human Services Board within 30 days. Also, early in 2016, Grievant was not consistently updating the SharePoint system on cases. Molino reminded Grievant in emails in April 2016 to update case statuses in SharePoint. Molino also informed Grievant in writing during this period that there was a pattern of her not responding to supervisors' communication attempts, and that she was expected to improve in this area (State Exhibits 4, 5, 6).

11. Grievant received an overall rating of "Satisfactory" on the annual performance evaluation she received for the period August 23, 2015, to August 23, 2016 (State Exhibit 6).

12. Molino discussed with Grievant at a biweekly check-in in November 2016 that she had a backlog of 13 cases that had not been resolved or submitted to the Human Services Board within 30 days. Molino discussed with Grievant at a biweekly check-in on December 14, 2016 that she had a backlog of 16 cases that had not been resolved or submitted to the Human Services Board within 30 days. Molino discussed with Grievant at a biweekly check-in on December 28, 2016 that she had a backlog of 19 cases that had not been resolved or submitted to the Human Services Board within 30 days. Molino also informed Grievant at that meeting that ten newly assigned cases to Grievant were reassigned to other team members. By January 27, 2017, Grievant had a backlog of 23 cases that had not been resolved or submitted to the Human Services Board within 30 days; Grievant had taken no action in 14 of these cases (State Exhibit 7).

13. Molino provided Grievant with written supervisory feedback on February 1, 2017. At that time, Grievant had a backlog of 33 cases that had not been resolved or submitted to the Human Services Board within 30 days; Grievant had taken no action in 10 of these cases. Molino

informed Grievant that her “lack of timeliness infringes on customer rights, causing [Vermont Health Connect] and the State of Vermont to be non-compliant with . . . federal regulations”.

Molino instructed Grievant in the supervisory feedback to contact customers at the beginning of the internal review process and to respond to emails particularly from her supervisor and manager (State Exhibit 7, VSEA Exhibit 1).

14. Molino offered Grievant noise canceling headphones on February 1, 2017, to address complaints made by Grievant that loud talking by a co-worker who had been hired in November 2016 was affecting her productivity. Grievant declined the headphones because she said it would affect her ability to hear the phone ring when customers called and to speak with customers on the phone. Molino and Delong approved Grievant working overtime to address her case backlog (State Exhibit 7).

15. Molino and Delong spoke to the employee who was the subject of Grievant’s complaints about avoiding conversations in close proximity to Grievant. Molino and Delong arranged their meetings with the employee to take place away from Grievant. Molino also told the employee to email her more often instead of coming over to meet with her. Molino emailed the employee on occasion to tell her to “keep it down” if she was talking too loudly.

16. In late 2016, Grievant had requested to move her work space away from the FHU to be removed from the noise level caused by the other employee. Molino denied Grievant’s request due to the importance of FHU staff working as a team in close proximity to each other. Grievant also asked Molino whether she could work at home; Molino denied this request. At one point, Grievant requested to be demoted to the position she had previously held before becoming a Fair Hearing Specialist. Grievant was not voluntarily demoted (VSEA Exhibit 16).

17. Molino advised Grievant at a February 8, 2017, check-in that there had been no change in the number of untouched cases or cases that had not been resolved within 30 days. Molino also informed Grievant then that she had failed a quality assurance for 15 days for lack of contact or note, and for 30 days for lack of customer contact or failure to send cases to the Human Services Board (State Exhibit 8).

18. VSEA Steward Meredith Ray filed a Step 1 grievance on February 10, 2017 with Molino on behalf of Grievant, contesting supervisors' various communications with Grievant of perceived issues with her work (VSEA Exhibit 17).

19. Molino provided Grievant with written supervisory feedback on February 15, 2017. At that time, 24 of the 33 cases in Grievant's backlog had been reassigned. Grievant had four cases that were over 30 days and on which she had taken no action. Molino reminded Grievant on the FHU procedure to conduct an internal review within 15 days and either resolve or refer the appeal to the Human Services Board within 30 days. Molino reminded Grievant to respond to customer calls by the next business day and to respond to emails from her supervisor and manager. Molino informed Grievant that she "expect[ed] to see substantial improvement performing . . . duties by March 1, 2017, and that Grievant "may receive a special unsatisfactory performance evaluation and be placed on a Prescriptive Period of Remediation" if she did not meet the expectations of her job (State Exhibit 8, VSEA Exhibit 2).

20. Molino sent Grievant a letter dated February 27, 2017, notifying her that her "unplanned, off-payroll absences from work, including arriving late and leaving early, are adversely impacting the Department's ability to successfully meet its business needs." Molino informed Grievant that the Employer would not authorize her to be off payroll for any reason unless required to do so by the Contract or state or federal law. She also indicated that no

unplanned use of leave would be approved, and that she was required to provide medical certification through August 22, 2017, to justify the use of sick leave (State Exhibit 9).

21. Molino provided Grievant with written supervisory feedback on March 1, 2017. Molino informed Grievant that, even though Grievant had 26 of her cases reassigned, 24 of which cases were outside of 30-day window, Grievant “continued to have new cases every week go past the 30 day timeline for resolution and forwarding to the HSB.” Molino also mentioned cases where Grievant’s supervisors had contacted her and requested specific responses and Grievant had not timely responded. The evidence indicates that Grievant had failed to timely respond in cases to her supervisors and that she had failed to review many cases in a timely fashion. Molino informed Grievant in the supervisory feedback that she was expected to meet the 15-day and 30-day timeframes for review and processing of cases, maintain and update SharePoint documentation, maintain note documentation, and seek supervisor/manager permission before making rules exceptions (State Exhibits 10, 11; VSEA Exhibit 3).

22. Molino provided Grievant with a written Notice of Performance Deficiency on March 15, 2017, because her “performance in critical areas of responsibility is not meeting the department’s standards or the expectations of a Fair Hearing Specialist.” The notice chronicled the oral and written supervisory feedback Grievant had received since November 2016. Molino also mentioned that Grievant continued to fall behind in processing cases within the 30 day timeframe even though she had cases reassigned from her. Molino further stated in response to Grievant reporting that it was still hard to concentrate with the noise from the co-worker who spoke loudly: “I reminded you of noise cancelling headphones, which you again refused.” Molino notified Grievant that she needed to keep her and Delong informed of her whereabouts, list of work projects, and a summary of notes. Molino included in the notice a table indicating



that Grievant lagged behind her co-workers in completion of cases assigned to her. Molino informed Grievant that, “if after a period of 45 days there is not a demonstrated record of improvement, it can result in a special or annual unsatisfactory performance evaluation” (State Exhibit 13, VSEA Exhibit 4).

23. Molino sent Grievant a letter dated April 26, 2017, informing her that the “formal Notice of Performance Deficiency” was extended for another 90 days. Molino informed Grievant: “Since the 3/15/2017 formal Notice of Performance Deficiency, SharePoint records show a marked improvement in the number of cases touched and worked on in 15 and 30 day timeframes, as well as an increase in the percentage of cases for which you are meeting daily deadlines of cases reviewed within 15 days and cases resolved or sent to the Human Services Board within 30 days.” However, Molino indicated that Grievant was still not reaching the level of performance they would like to see from her, and listed the following areas of concern: failing to send Molino a weekly report of work completed each week, not responding to a recent email request from Molino in a timely manner, not regularly updating SharePoint, and raising her voice and speaking in an intimidating manner to Molino. There is evidence to support each of these areas of concern mentioned by Molino. Molino stated in a concluding sentence in the letter that, “if after a period of 90 days there is not a demonstrated record of improvement in the percentage of cases touched (90 – 100%), and an increased percentage of cases resolved or sent to the board within 30 days (75 - 100%), it can result in a special or annual unsatisfactory performance evaluation” (State Exhibit 15, VSEA Exhibit 6).

24. By late April 2017, Grievant performed at a comparable level to other FHU Fair Hearing Specialists in meeting the 15 day and 30 day timelines for cases. This continued to be the case for the remainder of the performance evaluation rating period.

25. In late June 2017, Delong, Molino, Assistant Attorney General James Blum, and Grievant corresponded via email about one of Grievant's cases. In the email chain, Blum indicated how he had reached out to one of the Attorney General's Office "tax attorneys" for guidance on how the FHU should process the case. Based on the guidance, Molino and Delong asked Grievant to take certain actions. Instead of taking the actions, Grievant responded with her own perspective on the tax question. Delong reiterated the request that Grievant reach out to the customer through a telephone call, and informed Grievant: "If you are unwilling to make the phone call please let me know and I will reassign this case to another FHS." Grievant responded: "I have never said I was unwilling to make the call. I saw no reason to call . . .". Delong responded in a June 30, 2017, email: "I will assign this to another FHS. As your manager I was telling you what I needed from you in order for your AAG to be able to prepare for this fair hearing. I wasn't asking you if you saw a reason to call." (State Exhibit 17).

26. On July 26, 2017, Molino sent Grievant a letter informing her that the formal Notice of Performance Deficiency was extended for another 90-day period through October 26, 2017. Molino stated: "You are currently meeting performance goal percentages for daily deadlines, however there remains opportunity for you to improve as a Fair Hearing Specialist." Molino cited several performance deficiencies as areas of concern. She mentioned three examples, including the one cited in the Finding of Fact immediately above, in which Grievant had not accepted supervisor/manager directives. The examples cited by Molino accurately depicted performance deficiencies of Grievant. She cited one instance occurring between late May and early June in which Grievant was not prepared to discuss a case during a meeting to prepare for a Fair Hearing case. Molino cited this instance as a performance deficiency in the areas of not adequately delivering case information to the Assistant Attorney General in a

manner that was cohesive and easy to understand, and not adequately preparing for a Fair Hearing preparation meeting and a Fair Hearing. Finally, she cited three instances that occurred in June in which Grievant had “displayed inappropriate behavior” in interactions with co-workers. Molino did not specify the behavior that was inappropriate. Molino informed Grievant that, “if after a period of 90 days inappropriate behavior continues and there is not a demonstrated improvement in attitude, it can result in a special or annual unsatisfactory performance evaluation.” (State Exhibit 18, VSEA Exhibit 7)

27. In an August 3, 2017, email to Assistant Attorney General James Blum, Molino informed Blum that she was working on Grievant’s performance evaluation for the past year. She asked him if he “would like to provide some verbal or written feedback from a third party perspective working with” Grievant that she would “incorporate into” the evaluation. It is the practice of the FHU supervisor and manager to receive such feedback on Fair Hearing Specialists from the Assistant Attorney General who interacts with them. Blum provided written feedback in an August 8, 2017, email to Molino. Molino did not discuss the feedback from Blum with Grievant prior to preparing the performance evaluation and presenting it to Grievant. Molino cited some of the contents in the email in the performance evaluation as set forth in the following Finding of Fact (State Exhibit 19, VSEA Exhibit 8).

28. On September 15, 2017, Molino presented Grievant with a Performance Evaluation Report for the period from August 24, 2016, to August 23, 2017. Molino rated Grievant’s overall performance during the rating period as “Unsatisfactory”. The Evaluation Report contained the following Supervisor Comments from Molino:

Throughout the past year, you received supervisory feedback on several occasions regarding difficulties you experienced meeting the expectations of a Fair Hearing Specialist. You were presented with formal Notices of Performance Deficiency on March 15, 2017, April 27, 2017, and July 26, 2017. Performance deficiencies and expectations

were communicated to you verbally and in writing. You were also presented with a letter regarding having been off payroll, with specific requirements regarding your use of sick leave from 2/27/17 to 8/22/17.

While there has been improvement toward meeting expectations in specific areas (meeting Fair Hearing timelines), there are additional specific minimum expectations concerning workplace professionalism, communication, and teamwork you continue to fail to meet (See PPR for more specific information.)

Feedback from third party (AAG):

I find Dawn to be an honest, generally nice person with a good sense of humor. Having said that, my time working with Dawn has on a number of occasions left my expectations unmet. . . she sometimes seems either unwilling or unable to engage in the process of reviewing and prepping cases, perhaps viewing probing and deconstruction of her cases as a personal attack or criticism. . . When a Fair Hearing Specialist (who is to be DVHA's witness in the fair hearing) refuses to actively prep a case, that not only is an abdication of the Fair Hearing Specialist's job responsibilities but presents the potential for substantial liability to the State of Vermont. . .

Outreach and discovery production are vital parts of the work of a Fair Hearing Specialist. There are times when, for either logistical or strategic reasons, an attorney cannot or will not personally outreach a petitioner or third party or prepare additional discovery. Accordingly, the ability to delegate those tasks to a Fair Hearing Specialist is vital. On many occasions, I have asked Dawn to prepare spreadsheets or obtain additional discovery, and she has complied. Unfortunately, that is not always the case. . . there is substantial room for improvement with participation in case preparation and compliance with delegation.

...

**Expectations:**

Maintain the percentage of cases touched in 15 days (100%), and percentage of cases resolved or sent to the board within 30 days (95 – 100%).

Meet all other identified expectations identified in Performance Deficiencies at 95 – 100% compliance.

Demonstrate the elimination of inappropriate behavior.

Demonstrate improvement in attitude as a collaborative and effective team member.

(See PPR for next steps.)

...

(State Exhibit 20, VSEA Exhibit 9)

29. In addition to the Performance Evaluation Report Molino presented to Grievant on September 15, she also gave her a document entitled "Plan for Prescription Period for Remediation" that provided in pertinent part:

...

**PPR Period: 9/15/17 – 12/15/17**

This document serves as an official notice of performance deficiency. Unfortunately, your progress in the below areas has not improved to a satisfactory level after receiving supervisory feedback.

As a result of a Special Unsatisfactory Evaluation, . . . you have been placed on a Prescriptive Plan for Remediation for the next 3 months.

You must show immediate and sustained improvement in your performance in the areas listed below in order to raise your performance to at least a satisfactory level, while maintaining at least a satisfactory level of performance in all other job duties.

. . .

**Areas of Performance Deficiencies (where are they failing the expectations)**

Expectations were outlined in 2/1/17, 2/15/17, 3/1/17, 4/7/17, 6/7/17 Supervisory feedback, as well as 3/15/17, 4/27/17 and most recent 7/27/17 Notices of Performance Deficiency. We have been meeting weekly regarding meeting expected Fair Hearing timelines.

- Appropriate and professional workplace behavior at all times including when receiving feedback or when experiencing issues with coworkers.
- Collaborative and effective team member, modeling positive and supportive behavior.
- Acknowledging and responding to supervisor/manager emails in timely (end of day or by noon the following day if email was sent after noon.)
- Acknowledging and responding to Third Party (AAG) requests.
- Comply with reasonable and lawful supervisor/manager requests and suggestions for improvement in a timely manner.
- Exhibit strong, professional verbal and written communications with customers, coworkers and supervisors. You are expected to carry out requests from your superiors in a timely manner or as specified in request.
- Adequately deliver case information and state's position to the AAG in a manner that is cohesive and easy to understand.
- Adequately prepare for Fair Hearing prep meetings and Fair Hearings

**Needed Performance During Your Prescriptive Period for Remediation**

Maintain the percentage of cases touched in 15 days (100%), and percentage of cases resolved or sent to the board within 30 days (95 – 100%).

Meet all other identified expectations identified in Performance Deficiencies at 95 – 100% compliance.

Meet the standard expectation for use of leave time and notifying us of attendance issues. Demonstrate the elimination of inappropriate behavior.

Demonstrate effort and improvement in attitude as a collaborative and effective team member.

...

Failure to successfully address your performance deficiencies and raise your overall performance rating to at least a Satisfactory rating may result in your being placed in a Warning Period . .

(State Exhibit 21)

30. Grievant submitted a written rebuttal to the unsatisfactory performance rating that she received. Grievant stated in the rebuttal that the “excessively loud and disruptive” employee that had been hired into the FHU in November 2016 had affected her ability to do her work. Grievant asserted that her supervisors had done nothing about the employee’s loud and disruptive behavior (State Exhibit 20, VSEA Exhibit 10).

31. As a result of the unsatisfactory performance rating received by Grievant, she did not receive a step wage increase she would have received if she had received a satisfactory rating.

32. On December 15, 2017, the date the 90 day prescriptive period for remediation was set to expire, Molino sent Grievant a letter extending the remediation period for an additional three months. Ultimately, Grievant received an overall rating of satisfactory on her next performance evaluation and she was removed from the prescriptive period for remediation (State Exhibit 29).

33. Grievant was not the only Fair Hearing Specialist with performance issues during this period. One other Fair Hearing Specialist did not make it through her probationary period and was dismissed. Another Specialist with performance issues made it through the probationary period but resigned shortly thereafter.

## OPINION

VSEA contends that the Employer violated Articles 12 and 14 of the Contract by issuing Grievant an unsatisfactory performance evaluation and placing her in a prescriptive period of remediation. Specifically, VSEA contends: 1) the Employer failed to provide adequate notice that Grievant was not meeting the expectations of the position and failed to provide her with sufficient time to show improvement; 2) the Employer failed to base the performance evaluation exclusively on job duties, and included expectations that were unspecific and not measurable; and 3) the State did not have just cause to issue an unsatisfactory performance evaluation coupled with a prescriptive period of remediation.

We first address VSEA's contention that the Employer failed to provide adequate notice that Grievant was not meeting the expectations of the position and failed to provide her with sufficient time to show improvement. Pursuant to the State-VSEA Contract, oral notice of performance deficiency is the first step in progressive corrective action to be taken by the employer. The specific issue in this regard is whether the employer violated the following contract language: "During the rating year, the immediate supervisor shall call the employee's attention to work deficiencies which may adversely affect a rating, and, where appropriate, to possible areas of improvement."

Under this contract language, the Board determined that a supervisor was required to give an employee clear indication of dissatisfaction with that employee's performance. Grievance of Smith, 5 VLRB 272, 277 (1982). The contract provided that an employee be told when his or her performance is unacceptable so there would be no "surprises" at evaluation time. Grievance of Rathburn, 5 VLRB 286, 293 (1982). The burden was on management to put an employee clearly on notice of deficiencies. Grievance of Calderara, 9 VLRB 211, 221 (1986). Given the difference

in perceptions among people, it was imperative that management indicated its dissatisfaction clearly and unequivocally so misconceptions were eliminated. Id. Also, the Board held that a necessary inference to be drawn from this contract language was that, whenever possible, employees should be given timely notice of deficiencies to afford them an opportunity to improve their performance prior to the end of the rating period. Grievance of Barrett, 13 VLRB 310, 332 (1990).

We conclude that the Employer met the contractual obligation of providing Grievant with clear notice of dissatisfaction with performance in many of the areas of deficiency noted on the performance evaluation, but not in all areas. Grievant's supervisor, Sarah Molino, clearly indicated to Grievant in a timely manner on multiple occasions dissatisfaction with her performance with respect to meeting Fair Hearing timelines. Molino also timely indicated dissatisfaction with Grievant's off-payroll absences, informing her in a letter that the absences were adversely impacting the ability to meet the Employer's business needs and setting forth specific requirements regarding use of sick leave.

Molino and FHU manager Danielle Delong also provided clear notice of dissatisfaction to Grievant in a timely manner on multiple occasions with respect to her deficiencies in the following areas when interacting with her supervisors: appropriate and professional behavior when receiving feedback, being a collaborative and effective team member, acknowledging and responding to supervisor/manager emails in a timely manner, and complying with supervisor/manager requests in a timely manner. Molino also provided sufficient notice during the rating period of a deficiency in preparing for Fair Hearing preparation meetings and Fair Hearings by expressing dissatisfaction to Grievant during the rating period of an instance



occurring between late May and early June in which Grievant was not prepared to discuss a case during a meeting to prepare for a Fair Hearing case.

In other areas, the Employer failed to provide clear notice during the rating period of dissatisfaction with Grievant's performance. This is most evident with respect to the lengthy citation in the performance evaluation of feedback from the Assistant Attorney General who interacted with Grievant. Molino did not discuss this feedback with Grievant prior to preparing the performance evaluation and presenting it to Grievant. She did not put Grievant on notice of deficiencies contained in the feedback. Thus, she violated the requirement of the Contract to avoid surprises at evaluation time. This is the case with respect to not only the citation to the Assistant Attorney General feedback, but also concerning the following listed area of performance deficiency that followed from the feedback: acknowledging and responding to third party (Assistant Attorney General) requests.

In two other cited areas of deficiency – i.e., inappropriate behavior in interactions with co-workers, and unprofessional communications with co-workers – the notice provided to Grievant occurred through a letter from Molino sent less than a month prior to the end of the rating period citing three instances that occurred in June 2017 alleging that Grievant had “displayed inappropriate behavior” in interactions with co-workers. Molino did not specify the behavior that was inappropriate. We conclude this constituted insufficient notice of performance deficiencies because Grievant was not made aware specifically of the behavior that was deemed inappropriate for her to have an effective opportunity to improve in this area.

Further, the evidence does not support a conclusion that Grievant received clear notice during the rating period of the remaining cited area of deficiency of not providing case information and the State's position to the Assistant Attorney General in a manner that is

cohesive and easy to understand. We recognize that the July 26, 2017, letter from Molino to Grievant referenced this as an area of deficiency. However, the instance offered in the letter to support this alleged deficiency involved not being prepared to discuss the case rather than providing information that was not cohesive and not easy to understand.

We turn to addressing VSEA's allegations that the Employer failed to base the performance evaluation exclusively on job duties, and included expectations that were unspecific and not measurable. Article 12 of the Contract requires performance evaluations to be based exclusively on job duties, responsibilities and other performance-related factors. VSEA has failed to demonstrate that the performance evaluation at issue herein was not based exclusively on these factors.

The allegation that the performance evaluation included expectations that were unspecific and unmeasurable has been disposed of due to our conclusions set forth above with respect to whether proper notice was provided on performance deficiencies. Any expectations that were unspecific and unmeasurable have been found to be in violation of the contractual requirement of clear notice of dissatisfaction with Grievant's performance during the rating period. Any remaining expectations that do not violate the notice requirement are sufficiently specific and measurable.

We next discuss VSEA's remaining allegation that the Employer did not have just cause to issue an unsatisfactory performance evaluation and combine it with a prescriptive period of remediation. The issuance of a special or annual performance evaluation, coupled with a prescriptive period of remediation, is the contractually prescribed second progressive step (i.e., after oral notice of performance deficiency) in the State's corrective action efforts to address the

substandard performance of an employee. Such corrective action may only be imposed for just cause.

A determination by the Board whether just cause exists for the corrective action of an unsatisfactory performance evaluation, and placement in a prescriptive period of remediation, has been foreclosed by the Contract and our conclusion sustaining the grievance in part with respect to notice of performance deficiencies.

Article 12, Section 2, of the Contract provides that an unsatisfactory overall rating is “fully grievable”, and that the Board “shall not have the authority to change such grade but may remand the rating to the employer for reconsideration consistent with the VLRB ruling on the merits”. We have concluded that the Employer gave Grievant adequate notice of deficiencies pursuant to the Contract in certain cited areas, but not in other areas. In such instances, we do not have the authority to change any numerical rating, but can only remand to the Employer for reconsideration consistent with the merits. Grievance of Barrett, 13 VLRB at 334.

In remanding, we note that areas of deficiency contained in the unsatisfactory performance evaluation for which the Employer failed to provide contractually required notice must be stricken from the performance evaluation. Other areas of deficiency mentioned in the evaluation remain in the evaluation because they reflect areas of deficiency in which proper notice was given pursuant to the Contract and which are supported by the evidence. Id. at 335. Also, the Employer must reconsider placement of Grievant in a prescriptive period of remediation, since such action was in part based on purported performance deficiencies for which proper notice was not given pursuant to the Contract. Id.

In reconsidering on remand the overall rating and whether to place Grievant in a prescriptive period of remediation, the Employer is limited to considering those areas of

Grievant's performance which formed part of the initial performance evaluation and for which Grievant was given the contractually required notice of deficiencies. Id. Grievance of Calderara, 9 VLRB 211 (1986). It would be inappropriate to consider other incidents or facets of her performance that were not initially considered. Id.

### ORDER

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

1. The Grievance of Dawn Tetrault is sustained to the extent that the performance evaluation provided Grievant for the period August 24, 2016 to August 23, 2017, is remanded to the Vermont Department of Health Access for reconsideration forthwith of the overall rating given Grievant and the placement of her in a prescriptive period of remediation.
2. The grievance is sustained further to the extent that the following provisions of the evaluation shall be removed: a) the citation in the performance evaluation of feedback from the Assistant Attorney General, b) the provisions on performance deficiencies that followed from the feedback with respect to acknowledging and responding to third party (Assistant Attorney General) requests, c) the provisions on deficiencies in appropriate and professional workplace behavior when experiencing issues with co-workers, d) the provisions on deficiencies in exhibiting strong, professional verbal and written communications with customers and co-workers, and e) the provisions on deficiencies of not providing case information and the State's position in Fair Hearing cases to the Assistant Attorney General in a manner that is cohesive and easy to understand.
3. The grievance is denied to the extent that the following provisions of the performance evaluation shall be retained: a) the provisions on deficiencies with respect to

meeting Fair Hearing timelines; b) the provisions on deficiencies concerning off-payroll absences; c) provisions on deficiencies in the following areas when interacting with her supervisors: appropriate and professional behavior when receiving feedback, being a collaborative and effective team member, acknowledging and responding to supervisor/manager emails in a timely manner, and complying with supervisor/manager requests in a timely manner; and d) the provision on a deficiencies in preparing for Fair Hearing preparation meetings and Fair Hearings.

Dated this 26<sup>th</sup> day 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