

## Dismissals for Performance Reasons

In deciding whether just cause exists for a dismissal based on performance deficiencies, the Board applies the twelve factors, discussed above in Section X, relevant in determining the legitimacy of the dismissal.<sup>1</sup> The burden and quantum of proof standards, discussed above in Section XII, apply to dismissals for performance deficiencies, as well as dismissals for misconduct.<sup>2</sup>

In one case, the Court also indicated that progressive discipline should be applied where performance deficiencies exist, contrary to a VLRB ruling.<sup>3</sup> However, the Vermont State Employees' Association and the State have since contractually provided that performance deficiencies should be handled outside of the progressive discipline route by following a procedure of progressive corrective action.

Pursuant to the contract, oral notice of performance deficiency is the first step in progressive corrective action to be taken by the employer.<sup>4</sup> Such corrective action may only be imposed for just cause.<sup>5</sup> Under the contract language, a supervisor is required to give an employee clear indication of dissatisfaction with that employee's performance.<sup>6</sup> The contract provides that an employee be told when his/her performance is unacceptable so there will be no "surprises" at evaluation time.<sup>7</sup> The burden is on management to put an employee clearly on notice of deficiencies.<sup>8</sup> Given the difference in perceptions among people, it is imperative that management

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<sup>1</sup> Grievance of Merrill, 8 VLRB 259, 286 (1985); *Affirmed*, 151 Vt. 270, 274-275 (1988).

<sup>2</sup> Muzzy, 141 Vt. 463, 472 (1982).

<sup>3</sup> Id.

<sup>4</sup> Grievances of Choudhary, 15 VLRB 118, 155 (1992); *Affirmed*, (Unpublished Decision, Supreme Court Docket No. 92-317, February 4, 1994).

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Id. at 156.

indicate its dissatisfaction clearly and unequivocally so misconceptions are eliminated.<sup>9</sup>

The issuance of a special 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.<sup>10</sup> Such corrective action may only be imposed for just cause.<sup>11</sup>

Placement in a warning period of 30 days to three months is the contractually prescribed third step, before the final step of dismissal, in the State's corrective action efforts to address the substandard performance of an employee.<sup>12</sup> Such corrective action may be imposed only for just cause.<sup>13</sup>

Dismissal is the contractually prescribed fourth, and final, step in the State's corrective action efforts to address the unsatisfactory performance of an employee.<sup>14</sup> The Contract further provides that: "(i)n any case involving dismissal based on performance deficiencies, the Vermont Labor Relations Board shall sustain the State's action as being for just cause unless the grievant can meet the burden of proving that the State's action was arbitrary and capricious".<sup>15</sup> An "arbitrary" decision is one fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances or significance. "Capricious" is an action characterized by or subject to whim.<sup>16</sup>

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<sup>9</sup> Id.

<sup>10</sup> Id. at 163.

<sup>11</sup> Id.

<sup>12</sup> Id. at 167.

<sup>13</sup> Id.

<sup>14</sup> Id. at 170.

<sup>15</sup> Id.

<sup>16</sup> Id.

The Board concluded that the dismissal of a state employee was arbitrary and capricious in that it stemmed from absence of consideration of the contractual principles of proper notice of performance deficiencies during the applicable rating period, and bypassing progressive corrective action only in appropriate cases.<sup>17</sup> The Board noted that the contract gives State employees a vested property interest in continued employment, absent just cause for dismissal, and that procedural due process protections attached to this property interest.<sup>18</sup> The Board concluded that the employer violated the employee's due process rights by lack of proper notice of performance deficiencies and inappropriately bypassing progressive corrective action.<sup>19</sup>

In another case,<sup>20</sup> the employee had been dismissed at the conclusion of a warning period. Therein, the Court ruled that if the employee "was in reality dismissed for deficiencies which occurred prior to the warning period, then it was not a warning period at all, and notice might well be inadequate".<sup>21</sup> Similarly, deficiencies occurring prior to a warning period cannot be used to justify an extension of that warning period.<sup>22</sup>

An employee is placed in a warning period for a specified period of time. However, the employee is not guaranteed employment for the duration of the warning period.<sup>23</sup> An employer is free to terminate an employee at any point when just cause to do so could be demonstrated and the dismissal was clearly reasonable.<sup>24</sup>

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<sup>17</sup> Grievances of Schmitt, 15 VLRB 454, 499 (1992).

<sup>18</sup> Id., citing Muzzy, supra.

<sup>19</sup> Id.

<sup>20</sup> Muzzy, supra.

<sup>21</sup> Id. at 473.

<sup>22</sup> Grievance of Carosella, 8 VLRB 137, 154 (1985).

<sup>23</sup> Grievance of Gadreault, 152 Vt. 119, 123 (1989).

<sup>24</sup> Id.

Also, there are cases where it is appropriate for an employer to bypass a warning period. In one case, the Board concluded that it was appropriate for an employer to bypass a warning period and dismiss an employee at the conclusion of the prescriptive period of remediation. The employee's performance had deteriorated to the point where he failed to complete many assigned tasks, refused to accept his supervisors' legitimate attempts to supervise him and define his appropriate role and responsibilities, and the program for which he was responsible had nearly ground to a complete halt.<sup>25</sup>

In a recent decision, the Board held that an employer may not support an employee's dismissal in reliance on any substantive deficiencies of the employee noted in supervisory feedbacks that were not merged into a performance evaluation.<sup>26</sup> The Board concluded that the use an employee may make of the supervisory feedbacks issued to the employee is limited to providing notice to him of actions that may result in disciplinary action or an adverse performance evaluation.<sup>27</sup>

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<sup>25</sup> Grievances of Wilmerding, 21 VLRB 57 (1998).

<sup>26</sup> Grievance of Eroncig, 35 VLRB 430, 451 (2020).

<sup>27</sup> Id. Grievance of Paolillo, 22 VLRB 200, 215 (1999).