

Academy and general office space. Grievant was responsible for ensuring that all State buildings within the district were maintained and functioning properly, and that all custodians and maintenance workers employed by BGS fulfilled their duties. He interacted regularly with employees and coordinated with vendors engaged in building repairs and renovations.

3. Grievant operated with a significant amount of independence. Although he attended monthly meetings with BGS upper management – i.e., Commissioner, Deputy Commissioner, and the Director of Operations and Maintenance – he did not have regular daily contact with BGS leadership based in Montpelier. Grievant was the highest-ranking employee in the Southwest District and functioned with a high degree of daily autonomy.

4. Employees supervised by Grievant were covered by the collective bargaining agreements between the State and the Vermont State Employees Association. The agreements contained the following pertinent provisions:

...

**ARTICLE 12
PERFORMANCE EVALUATION**

...

Deadline for Evaluation Meetings: A meeting to discuss an evaluation shall be held within forty-five (45) days after the applicable anniversary date, or after the end of any prescriptive period for remediation (“PPR”) or warning period. This deadline may be extended to accommodate the employee’s illness or injury. Where the deadline is not satisfied, the employee shall be granted an annual overall presumptive rating equal to his or her last annual overall rating, but not less than a Satisfactory (“S”) rating. . .

An oral or written notice of performance deficiency (Step 1 in the order of progressive corrective action) shall not be grievable when issued . . . However, once Step 2 of progressive corrective action has been implemented (a special or annual evaluation coupled with a PPR) such notice or a written notice or a written record of such notice shall be placed in the employee’s personnel file and shall be fully grievable.

...

**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 . . .

(State Exhibit 4)

5. Grievant attended Supervising in State Government training in 2016 conducted by the State Department of Human Resources. The training was held in Rutland over four days. It covered a variety of topics, including discussions on completing performance evaluations on employees. The training reviewed how to complete a performance evaluation, when to hold an evaluation review conference with the employee, and when to obtain the employee's signature. The training included discussion about timing requirements in the performance review process and the impact of deadlines not being met (State Exhibits 24, 25, 26).

6. Grievant was not absent from the 2016 Supervising in State Government Training for any significant period of time. If he had been absent for a significant period, a notation to that effect would have been made on the training roster and no such notation was made (State Exhibit 24).

7. Courtney O'Brien, Human Resources Administrator for the Department of Human Resources, sent Grievant an email on June 29, 2016, providing:

Good Morning Bill.

Below is the complete list of anniversary dates for your reports. Please note that annual evaluations must be completed within 45 days of the anniversary date, and employees in original probation must have their evaluation completed by end of business on the last day of the probation period. As a reminder, timely annual performance evaluations are required by our collective bargaining agreements for all employees. . .

Please note that evaluations that are not completed within 45 days of the anniversary date are considered late and cannot be placed in the personnel file. Late evaluations will be returned to the supervisor and will be considered feedback.

. . .

(State Exhibit 11)

8. O'Brien sent Grievant an email on October 10, 2016, that was essentially identical to the statement contained in the June 29, 2016 email (State Exhibit 11).

9. O'Brien sent Grievant and other BGS managers an email dated May 23, 2017, providing in pertinent part:

It's that time of year to refresh your annual evaluation calendars. . .
As a reminder, evaluations for end of probation are due on or before the last day of probation – there is not a 45-day window for end of probation evals. All other annual evaluations are due between the employee's anniversary date and the 45 calendar days following.

. . .
(State Exhibit 11)

10. BGS Deputy Commissioner Jennifer Fitch sent an email to BGS managers, including Grievant, on June 8, 2017, providing:

The Commissioner's Office is committed to employee development and regular feedback. Annual evaluations provide an opportunity to assist employees with career development, clarify their roles and identify training needs, establish goals for the following year, and recognize employees for their achievements over the past rating period . . .

Effective immediately, it is an expectation and performance measure that annual evaluations be completed for all employees in BGS including classified employees, managers, and exempt positions. . .

Please complete all evaluations by the due date or within 35 days of the 45 day grad period. This provides a minimum of 2 weeks for review and approval by the other signing authorities.

. . .
(State Exhibit 10, emphasis in original)

11. Fitch sent an email to BGS managers, including Grievant on December 15, 2017, informing them that "(s)uccessful completion of evaluations for all BGS employees is an expectation of the (Commissioner's) office)" (State Exhibit 10).

12. During his employment, Grievant was provided written supervisory feedback on three occasions. The written feedback was not contained in Grievant's official personnel file that

was maintained by the State Department of Human Resources. Instead, they were maintained in the supervisory files of the BGS Director of Operations and Maintenance.

13. The first instance of supervisory feedback occurred in 2013. Grievant's supervisor at the time, Director of Operations and Maintenance David Burley, issued the supervisory feedback after Grievant violated building access protocols at the Mahady Courthouse in Middlebury when he brought his son into the building through an unsecured rear entrance despite a requirement that members of the public enter through the main front entrance staffed by court security. As a result of the violation of protocols, Grievant lost access to, and job responsibilities over, the Courthouse for a period of time. Burley notified Grievant by memorandum dated December 12, 2013, that he was reinstating his access to, and job responsibilities over, the Mahady Courthouse. Burley set forth a number of expectations for Grievant to meet, including adhering to building access protocols (State Exhibit 27).

14. On September 4, 2018, at which point John Hebert had succeeded Burley as Director of Operations and Maintenance, Hebert issued Grievant written supervisory feedback for failing to notify him of his intent to take time off work the previous Friday prior to doing so. Hebert informed Grievant that he needed to notify him of any time off that he was requesting in advance because Hebert needed to know when Grievant was planning to be away from work. Hebert informed Grievant that future instances of this nature may lead to disciplinary action up to and including dismissal (State Exhibit 28).

15. In October, 2018, Hebert provided Grievant with supervisory feedback for hiring a temporary employee a week earlier than it was approved by human resources staff. Hebert informed Grievant that future actions of this nature may lead to disciplinary action up to and including dismissal (State Exhibit 29).

16. During the period of his employment as District Facilities Manager, Grievant received three performance evaluations, all with an Excellent rating. He received these evaluations in 2010, 2011 and 2017 (State Exhibits 14, 16, 17, 18).

17. On August 22, 2018, Deputy Commissioner Fitch sent an email to BGS managers, including Grievant, stating: "This is a friendly reminder that timely completion of probationary and annual evaluations are a mandatory requirement" (State Exhibit 10).

18. On or about April 2, 2019, Hebert received a call from Jonathan Boynton, an electrician for BGS in the Southwest District. Boynton expressed concerns about Grievant directing Boynton about a week or so earlier to back-date his performance evaluation. Boynton relayed the following account of the incident to Hebert, which account accurately reflects what occurred: In mid to late March 2019, Grievant met with Boynton to review the performance evaluation completed on Boynton. When Boynton was about to sign the evaluation, Grievant asked him to back-date his signature to January 18, 2019, which was the same date that Grievant had completed and signed the evaluation. Boynton was uncomfortable and, prior to signing the evaluation, asked Grievant if it was okay to back-date the evaluation. Grievant replied yes. Boynton then back-dated the evaluation to January 18, 2019. Boynton did so because he viewed it as a direct order from his supervisor (State Exhibits 3, 5, 6).

19. Prior to this discussion with Boynton, Hebert in his sixteen years as a BGS supervisor and manager had not heard of back-dating of signatures on performance evaluations.

20. The January 18, 2019, date that Grievant signed the performance evaluation for Boynton was 36 days after his anniversary date and 9 days before the end of the 45 grace period for completing the evaluation process. Hebert signed the evaluation four days later, on January 22, 2019. Deputy Commissioner Fitch signed the evaluation on February 10, 2019, fourteen days

after the end of the 45 day grace period (State Exhibit 6).

21. It was not surprising to Boynton that Grievant had asked him to back-date the evaluation because other employees in the District had jokingly discussed Grievant directing back-dating of evaluations in the past.

22. David Gradziel, a BGS maintenance mechanic working in the Southwest District, was supervised by Grievant during the entire period Grievant served as District Facilities Manager. In January 2019, Grievant presented Gradziel with an evaluation that Grievant had untimely completed and suggested that Gradziel back-date it. Gradziel complied because Grievant was his supervisor.

23. Brenda House served as a Custodial Supervisor in the Southwest District under Grievant for several years. House was responsible for providing custodial services as well as supervising other custodians. Several years ago, Grievant directed House to back-date the performance evaluation that Grievant had completed on her. Grievant did not ask House for her consent but simply directed her to back-date the evaluation. On two other occasions, Grievant directed House to ensure employees under her supervision back-dated evaluations. House has heard fellow employees snicker about late evaluations from Grievant (State Exhibit 8).

24. Tyler Dunigan, Investigator with the Department of Human Resources Investigations Unit, investigated whether Grievant instructed subordinates to falsify dates made on performance evaluations. The following exchange occurred between Grievant and Dunigan during an April 23, 2019, investigative interview Grievant had with Dunigan:

Grievant: It was explained to me by my former director, Dave Burley. We never had any formal training regarding the evaluation process. The only question I had was there was a 45 day timeline and how to evaluate that. I write the evaluation and normally would give several weeks for that evaluation to go to Montpelier for signatures. Sometimes I'd get it back in a timely fashion and other times I would not get it back in a timely fashion, meaning beyond the 45 days. I checked with Mr. Burley about that and he

told me the important thing in the evaluation is my evaluation. People in Montpelier just comment on what I've said in the evaluation and instructed me to whenever my direct report signed off on give them to sign off so that it is below the 45 days, meaning that you had written the evaluation and they're acknowledging that my evaluation was completed within that 45 day timeline. . . (Burley) said if it wasn't done within that 45 days then that particular evaluation is void, and it goes back to the last evaluation, so he thought it least its fair with the employee that they get a present evaluation even though it's been delayed in the process in getting it back from Montpelier.

...

Dunigan: If its past the 45 day mark, have you had employees date it previous?

Grievant: Yes.

Dunigan: How many times do you think that's occurred?

Grievant: I've done this for probably nine years since I started with the State.

Dunigan: For the year and a half after Dave left, has John been in that role?

Grievant: Yes.

Dunigan: Have you had any conversations with him about the evaluation process, expectations, timelines, things like that?

Grievant: No.

...

Dunigan: Have you ever had Jonathan Boynton backdate an evaluation?

Grievant: Yes.

...

Dunigan: Have you asked David Gradziel to backdate?

Grievant: Yes.

Dunigan: Now when you talk to your supervisors, because you have people under you who have their direct reports, what's been your instructions to them?

Grievant: The same as I've been instructed.

Dunigan: Instructed by Dave?

Grievant: Yes.

...

Dunigan: Who are the supervisors under you?
Grievant: Rob Gallipo, Brenda House, and Kevin Dunigan . . .
Dunigan: Does John Hebert know employees are currently backdating?
Grievant: I have no idea. I don't know.
...
(State's Exhibit 1)

25. Dunigan sent an Investigative Report to BGS Deputy Commissioner Jennifer Fitch on April 23, 2019. Dunigan sent Fitch an Addendum to his Investigative Report on May 1, 2019 (State Exhibits 2, 9).

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

...
Number 2.3 – RULES AND REGULATIONS FOR PERSONEL ADMINISTRATION

...
(T)he Personnel Rules apply . . . to managers . . .

...
12.01 Tenure of Employment: An employee shall not be subject to dismissal or suspension except for cause stated in writing to the employee.

...
Number 5.4 – PERSONNEL RECORDS

The Official Personnel File

An employee's official personnel file (OPF) contains basic information about an employee. It consists of categories of documents . . which are maintained by (the Department of Human Resources . . .The OPF consists of the following information:

- ...
3. Performance evaluations.
4. Disciplinary actions including any reprimands, suspensions, demotions, or dismissal . .

Supervisory Files

Supervisors may maintain informal files on individual employees for operational reasons. Items contained in these are often transitory in nature and are not part of the OPF unless merged into formal actions contained therein.

...
Number 5.6 – EMPLOYEE CONDUCT

...

REQUIRED CONDUCT

- ...
2. 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

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

...

PERFORMANCE MANAGEMENT

Number 7.0

...

Applicable to: All designated supervisors of classified employees within the Executive Branch of the State of Vermont

...

Pursuant to Vermont law, 3 V.S.A. § 322, all officers and employees of the State who act in a supervisory capacity shall at least annually complete performance evaluations for each classified employee under their immediate supervision.

...

It is important for managers and supervisors to provide ongoing feedback to employees on their performance and when necessary to point out specific ways in which performance that has been deficient may be improved. Continuous feedback results in improved communication between employees and supervisors.

...

A meeting to discuss an evaluation shall be held within forty-five (45) days after the applicable anniversary date, or after the end of any prescriptive period for remediation (“PPR”) or warning period. Where the meeting deadline is not satisfied, the employee shall be granted an annual overall presumptive rating equal to his or her last annual overall rating, but not less than a Satisfactory rating.

...

Number 9.1 – IMMEDIATE DISMISSAL

...

PURPOSE AND POLICY STATEMENT

... (C)ircumstances may warrant dismissing an employee immediately without two (2) weeks’ notice or two (2) weeks’ pay in lieu of notice.

...

GENERAL GUIDELINES

...

An employee may be immediately dismissed for any of the following reasons: . . . gross misconduct . . .

EXAMPLES OF ACTIONS THAT MAY WARRANT IMMEDIATE DISMISSAL

Following are some examples of gross misconduct that **may** warrant immediate dismissal of a State employee:

...

- (d)efiance of authority, refusal to obey reasonable and lawful orders, or wanton disregard of directives

...

- Falsification of records . . .

...

(State Exhibits 19, 20, 21)

27. By letter dated June 17, 2019, BGS Commissioner Christopher Cole memorialized an oral reprimand that he was issuing to Grievant for misconduct by violating State personnel policies and procedures. Specifically, Commissioner Cole concluded that Grievant failed to fulfill his manager responsibilities when he approved a subordinate employee’s purchase of holiday decorations – i.e., a Christmas tree – using a State purchasing card. He stated: “I expect you to follow State of Vermont Personnel Policies and Procedures and Buildings and General Services protocol for the job duties associated with your position”, and “(a)ny further instances of violating State of Vermont Personnel Policies and Procedures, or any other type of misconduct, may result in disciplinary action, up to and including dismissal” (State Exhibit 30).

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

29. BGS Deputy Commissioner Fitch sent a letter dated June 25, 2019, to Grievant that provided in pertinent part:

As a result of your behavior described below, BGS is contemplating imposing serious disciplinary action up to and including dismissal from your position as District Facilities Manager. You have the right to respond to specific allegations listed below, either orally or in writing, before the final decision is made. . .

The below disciplinary charges are based on your conduct, which is summarized in an Investigative Report prepared by Department of Human Resources (DHR) Investigator Tyler Dunigan dated April 23, 2019 and related attachments. All of these documents are attached to this letter, fully incorporated herein by reference, and may be consulted for

further information regarding the charges summarized below.

A. Relevant Provisions of the State Personnel Policies (“PP”) and State of Vermont Statutes

- PP 5.6, Employee Conduct
- PP 7.0, Performance Management
- PP 8.0, Disciplinary Action
- PP 9.1, Immediate Dismissal
- PP 17.0, Employment Investigations
- 3 V.S.A. § 322, Rating Service Forms Completion and Disposition

B. Potential Violations of the Contractual Agreement and Personnel Policies

You are currently employed as a District Facilities Manager at BGS. In late March 2019, the State became aware of allegations that you directed subordinates within your Division to backdate signatures on performance evaluations in order to create the appearance that the performance evaluations were completed by the due date. The State became aware of this allegation when a subordinate reached out to express concerns about allegedly being directed by you to backdate his performance evaluation signature with an inaccurate date.

During your April 23, 2019 interview with DHR Investigator Dunigan, you admitted to asking your direct reports to falsify the signature dates on their performance evaluations. You also admitted to directing your three supervisors to instruct their respective direct reports to back date their performance evaluations if they were past the due date of the performance evaluation. Additionally, you advised that you directed an unknown number of individuals to falsify signature dates on performance evaluations for “probably nine years, since [you] started with the State.”

Also, during your interview with DHR Investigator Dunigan, you stated that you were not “formally instructed” on the performance evaluation process. However, the investigation revealed, several emails you received from the BGS Commissioner’s Office and DHR outlining the Performance Evaluation procedure and due date. Additionally, you stated, “If [the performance evaluation] does get delayed from Montpelier, should the employee suffer the consequences by not having an evaluation within the 45-day timeframe?” This statement suggests that you possessed an understanding of the 45-day policy and the impact that missing the 45-day due date had on the employee. It also suggests that your actions were not the result of ignorance of the policy but were instead an explicit intent to circumvent the policy.

Under Personnel Policy 7.0 Performance Management, “a fundamental management responsibility is the planning, observation, evaluation, and development of employee job performance.” As a District Facilities Manager at BGS, you direct the work of more than twenty-five (25) State of Vermont employees. Accordingly, you are expected to serve as a role model; adhering to policies and acting ethically and with integrity. It appears that by asking your subordinates to falsify the date when they signed their respective performance evaluations, you demonstrated as a leader you have little regard for the

importance of adhering to established State policy.

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 bring discredit or embarrassment to BGS and/or the State of Vermont, whether on or off duty. However, your described conduct appears to constitute misconduct and/or gross misconduct, and gross neglect of duty, and violate some of the above policies, and provisions. Accordingly, your actions have caused the State of Vermont and BGS to potentially lose confidence in your ability to carry out your duties as a District Facilities Manager and to be a respectable, trustworthy employee. It appears your conduct provides just cause for disciplinary action up to and including dismissal from your position with BGS.

C. Process

You must notify me . . . 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 Exhibit 12)

30. Grievant made the following statements during the August 31, 2019, *Loudermill* meeting:

The backdating (of evaluations), this all started when Dave Burley was our director. The problem we had at that particular time was when evaluations went to Montpelier it took a long time to get these evaluations back, sometimes even beyond the date that the evaluations should have been brought back. I asked Mr. Burley: “Dave, what can we do to get these evaluations back because they’re not getting back to us in time.” He said as long as you’re not changing their evaluation . . . just go ahead and back-date them based on two weeks from the date that I had particularly submitted as the evaluation. So not all the evaluations have been back-dated. . . The only thing we’re trying to achieve with back-dating is to at least have HR personnel send them back. They would just keep a copy. It had nothing to do with any change in any evaluation or anything we decided to do with the employee. . . The only thing I wanted was to at least have HR keep them on file. There was no other benefit to me. There was no other benefit to the employee. . . (State Exhibit 13)

31. Deputy Commissioner Fitch sent a letter dated October 18, 2019, to Grievant that provided in pertinent part:

This is to notify you of your dismissal from the position of District Facilities Manager . . . effective the close of business October 18, 2019. As explained in the June 25, 2019 letter and attachments you received, BGS was contemplating your dismissal, and you were given an opportunity to respond to misconduct charges before BS made a final decision. I

met with you to hear your response on July 18, 2019. In making my decision, I considered all the information and arguments you raised at the meeting but did not find they overcome the seriousness of your misconduct.

I am terminating you because I find that you committed gross misconduct as described in the above-referenced June 25, 2019 letter, and further described in the accompanying report and attachments, which are fully incorporated by reference. Specifically, after carefully evaluating all the evidence presented, I determined that you directed numerous subordinates to falsify personnel documents, despite repeated directives about the proper protocol. I believe you understood that you were expected to follow State policies and procedures and that your actions were dishonest and a deliberate effort to evade State policy. Additionally, in June 2019, you received an Oral Reprimand for misconduct for failing to follow State policies and procedures. In that Oral Reprimand, you were reminded that you were previously provided with supervisory feedback for failing to follow policies and procedures on two separate occasions in 2018. You will not receive two weeks' pay in lieu of notice.

Your conduct was significant and intentional, and cannot be tolerated in State government. The State of Vermont and BGS must maintain the public trust in carrying out its mission, and your offense could damage the perception of the integrity of BGS and the State Performance Evaluation process. As a District Facilities Manager, you are in a position of authority where adhering to State policies and procedures is paramount. Your repeated instances of failing to adhere to policies and procedures make it impossible for BGS to have confidence in your ability to perform the job duties to a satisfactory level. Additionally, your repeated misconduct demonstrates a serious lack of professional judgment that has diminished BGS' trust that you will reliably act in a professional and responsible manner in the future. Therefore, I find that no lesser penalty than dismissal is sufficient to address your gross misconduct.

...
(State Exhibit 15)

32. In deciding to dismiss Grievant, Fitch determined that Grievant's actions of directing individuals to falsify personnel documents constituted serious misconduct, and were dishonest and a deliberate effort to evade State policy. She found that he had express notice that his actions were prohibited. She concluded it was most concerning that Grievant failed to acknowledge and accept responsibility for his actions. Fitch relied on the supervisory feedbacks received by Grievant, as well as the oral reprimand he received, in considering whether to dismiss him. Fitch determined that Grievant's repeated instances of failing to adhere to policies and procedures made it impossible for BGS to have confidence in his ability to perform his job

duties to a satisfactory level. Fitch was aware of no cases within BGS where a manager engaged in similar misconduct. She concluded that Grievant's actions were widely known in the Southwest District and that Grievant's continued employment would cast an unfavorable light on BGS and impact its reputation. She determined that Grievant did not have any rehabilitative potential given the nature and frequency of his misconduct and his continued failure to accept responsibility for his actions. Fitch ultimately concluded that there were no alternative sanctions short of dismissal that would adequately address the seriousness of Grievant's misconduct (State Exhibit 14).

OPINION

As a manager in the state classified service, Grievant may only be dismissed for cause. The Board has held that there is no substantive difference between a "cause" standard for discipline and a "just cause" standard. The analysis the Board employs when "cause" is the operative standard is the same the Board applies when reviewing disciplinary actions against state employees covered by the "just cause" standard. Grievance of Morrissey, 7 VLRB 129, 161 (1984). Grievance of Russell, 7 VLRB 60, 81 (1984). Grievance of Colleran and Britt, 6 VLRB 235 (1983). Grievance of Merrill, 8 VLRB 259, 283 (1985); *Affirmed*, 151 Vt. 270 (1989).

The Vermont Supreme Court has defined just cause for dismissal as:

...some substantial shortcoming detrimental to the employer's interests which the law and a sound public opinion recognize as a good cause for dismissal... The ultimate criterion of just cause is whether the employer acted reasonably in discharging the employee because of misconduct... a discharge may be upheld as one for cause' only if it meets two criteria of reasonableness: one, that it is reasonable to discharge employees because of certain conduct and the other, that the employee had fair notice, express or implied, that such conduct would be ground for discharge. In re Grievance of Brooks, 135 Vt. 563, 568 (1977).

The Court has indicated that just cause analysis should “center upon the nature of the employee’s misconduct.” In re Morrissey, 149 Vt. 1, 13 (1987). Grievance of Merrill, 151 Vt. at 270. In deciding whether there is just cause for dismissal, it is appropriate for the VLRB to determine the substantiality of the detriment to the employer’s interests. Merrill, 151 Vt. at 273-274.

The standard for implied notice is whether the employee should have known the conduct was prohibited. Grievance of Towle, 164 Vt. 145 (1995). Grievance of Brooks, 135 Vt. 563, 568 (1977). This is an objective standard. Grievance of Towle, 164 Vt. at 150. Grievance of Hurlburt, 175 Vt. 40, 50 (2003). Knowledge that certain behavior is prohibited and subject to discipline is notice of the possibility of dismissal. Grievance of Towle, 164 Vt. at 150. Grievance of Gorruso, 150 Vt. 139, 148 (1988).

In carrying out its function to hear and make final determination on whether just cause exists for discipline, the VLRB 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 at 265. In large measure, this is an objective standard requiring review of the penalty imposed on the basis of facts actually found by the Board. Id. 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 so proved, the Board must determine whether just cause exists for the discipline imposed by the employer based on the proven facts. The Board determines whether the action taken by the employer was reasonable based on the proven charges. 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 266.

The Employer charged Grievant with directing numerous subordinates to falsify personnel documents by backdating performance evaluations despite repeated directives about the proper protocols. The Employer has established this charge by a preponderance of the evidence.

Grievant was provided training and directives about the proper protocols in timely completing evaluations. He attended supervisory training conducted by the Department of Human Resources in 2016 that included how to complete a performance evaluation, when to hold an evaluation review conference with the employee, and when to obtain the employee's signature. The training included discussion about timing requirements in the performance review process and the impact of deadlines not being met. A human resources administrator also informed Grievant in writing on two occasions in 2016 that timely annual performance evaluations were required by the collective bargaining agreement for all employees and that, if evaluations were not completed within 45 days of the anniversary date, the evaluations were considered late and could not be placed in the employee's personnel file. Grievant received subsequent written communications from the BGS deputy commissioner stressing the importance of completing performance evaluations in a timely manner.

Despite these directives, we have specific evidence concerning three employees who reported directly to Grievant that he directed them to backdate their performance evaluations which created the appearance that they had been completed by the due date set forth in the collective bargaining agreement. He also directed one of these employees, who had employees reporting directly to her, on two occasions to ensure that employees under her supervision backdated evaluations. Grievant admitted to asking direct reports to backdate signature dates on their

performance evaluations, and further admitted to directing three supervisors under his direction to instruct their respective direct reports to backdate their performance evaluations if they were past the due date of the evaluation, and directing subordinates to backdate evaluations since he began his employment with the State nine years earlier.

In sum, the Employer has proven the charge against Grievant, and has established that Grievant directed numerous subordinates to falsify personnel documents by backdating performance evaluations despite directives about the proper protocols. The underlying charge 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 and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; 2) the employee's job level and type of employment including supervisory role; 3) the clarity of the notice to Grievant that his actions were prohibited; 4) Grievant's past disciplinary record; 5) Grievant's past work record, including length of service and performance on the job; 6) the effect of the offense upon supervisors' confidence in Grievant's ability to perform assigned duties; 7) the impact of Grievant's offenses upon the reputation of the Employer; 8) the potential for Grievant's rehabilitation; and 9) the adequacy and effectiveness of alternative sanctions to deter

such conduct in the future by Grievant or others. Douglas, et al., 5 MSPB 313 (1981). Grievance of Colleran and Britt, 6 VLRB at 268-269.

We first consider the nature and seriousness of Grievant's offenses and their relation to Grievant's duties and position. This is always significant in discipline cases. The just cause analysis "centers upon the nature of the employee's misconduct." In re Morrissey, 149 Vt. at 13. Grievance of Merrill, 151 Vt. at 273. In deciding whether there is just cause for dismissal, the VLRB determines the substantiality of the detriment to the employer's interests. Merrill, 151 Vt. at 273-274.

Grievant's offenses were serious. He exhibited repeated dishonesty through directing the backdating of performance evaluations on numerous occasions contrary to State policy. 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 Richardson, 35 VLRB 135 (2019). 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).

The seriousness of Grievant's offenses is exacerbated by his managerial position. He had approximately 25 employees subordinate to him, including ten who reported directly to him. A manager exhibiting repeated dishonesty and disregard of State policies seriously compromises a leadership role and increases the chances that subordinates will engage in acts of dishonesty and disregard of State policies.

Grievant had fair notice that his dishonesty could be grounds for discharge. He knew that his actions were contrary to State policy. 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 contends that the seriousness of his actions is diminished because his previous supervisor had told him that, if an evaluation was not completed within the 45 day deadline due to a delay in obtaining upper management signatures in the BGS central office, the signature of the evaluated employee on the evaluation could be back-dated in fairness to the employee. We disagree that any such communication diminished the seriousness of his actions. A reasonably clear directive from the employer supersedes prior actions from a previous manager of the same employer. The Employer had provided recent training and directives on the proper protocols to follow in evaluation cases so that it should have been clear to Grievant that signature dates on performance evaluations should not be backdated to create the appearance they were timely completed. Yet, he continued with his backdating practices right up to the time the investigation was launched that resulted in his dismissal.

Grievant further asserts that the seriousness of his actions is decreased because it was unfair to the employee receiving a positive evaluation that their achievement is not recognized due to upper management not timely approving the evaluations. It is unfortunate that an employee is deprived of a positive evaluation being included as part of their official record through no fault of their own. Nonetheless, the ends do not justify the means of falsifying a

document creating a result that directly contravenes a specific provision of the collective bargaining agreements.

We next consider the factors of Grievant's past disciplinary record and work record during his nine plus years of employment. The three performance evaluations that Grievant received during his tenure rated his overall performance as excellent. Grievant's disciplinary record was limited to one oral reprimand he received shortly before his dismissal for violating State personnel policies and procedures when he approved as subordinate employee's purchase of holiday decorations. This strong performance record and limited disciplinary record operate in Grievant's favor in considering whether dismissal of Grievant was warranted.

The Employer also has relied on supervisory feedbacks issued to Grievant to support his dismissal. There is a question whether it is appropriate for the Employer to rely on supervisory feedbacks in the dismissal decision. The written supervisory feedbacks were not contained in Grievant's official personnel file; instead they were included in the supervisory files of the BGS Director of Operations and Maintenance. The distinction is significant. Section 5.4 of Personnel Policies and Procedures provides that items contained in supervisory files "are often transitory in nature and are not part of the (official personnel file) unless merged into formal actions contained therein".

The transitory and informal nature of supervisory files leads us to conclude that an employer may not rely on a substantive deficiency of an employee noted in a supervisory feedback that was not merged into a performance evaluation to support an employee's dismissal unless the employer can point to human resources policies and procedures providing for such resort. The Employer has failed to do so here. This is not surprising given the purpose of supervisory feedback to promote the free flow of communication between a supervisor and

employee to improve employee performance before deficiencies result in an adverse performance evaluation. Appeal of Penka, 19 VLRB 26, 36-37 (1996). As stated in Section 7.0 of State Personnel Policies and Procedures: “It is important for managers and supervisors to provide ongoing feedback to employees on their performance and when necessary to point out specific ways in which performance that has been deficient may be improved. Continuous feedback results in improved communication between employees and supervisors.”

The Board has held that an employee may not grieve written performance feedback unless and until it appears on an adverse performance evaluation, Penka, 19 VLRB at 35-38. Just as an employee may not grieve supervisory feedback unless and until it supports an adverse performance evaluation, the Employer may not support Grievant’s dismissal in reliance on any substantive deficiencies of Grievant noted in supervisory feedbacks that were not merged into a performance evaluation.

The use the Employer may make of the supervisory feedbacks issued to Grievant is limited to providing notice to him of actions that may result in disciplinary action or an adverse performance evaluation. Grievance of Paolillo, 22 VLRB 200, 215 (1999). Here, the pertinent notice was the expectation that he follow protocols and procedures.

The next factor we consider is the effect of the offenses upon supervisors' confidence in Grievant's ability to perform assigned duties. Grievant’s offenses of repeated dishonesty and disregard of State policies understandably had a detrimental effect on the Employer’s confidence in his ability to perform assigned duties. The Employer reasonably was concerned in this regard that Grievant failed to acknowledge and accept responsibility for his actions.

Grievant’s offenses had an adverse effect on the reputation of the Employer to the extent that his actions were widely known among BGS employees in the Southwest District and

discussed by them. The pattern of dishonesty and failure to adhere to policies that he exhibited would have the natural effect of harming the Employer's reputation among its own employees.

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. Grievant's dishonesty and continuing failure to accept responsibility for his actions reasonably resulted in the Employer viewing his potential for rehabilitation as weak. The Employer reasonably determined that Grievant's offenses constituted substantial shortcomings detrimental to the Employer's interests. The falsification of records particularly constituted gross misconduct and warranted immediate dismissal under State Personnel Policies and Procedures. The Employer demonstrated that cause existed for Grievant's dismissal.

ORDER

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

Dated this 1st of September, 2020, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ Alan Willard

Alan Willard

/s/ Roger P. Donegan

Roger P. Donegan