

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 17-54
SANDRA VITZTHUM)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On November 27, 2017, Sandra Vitzthum (“Grievant”) filed a grievance with the Labor Relations Board, contending that the State of Vermont Department of Buildings and General Services (“Employer” or “BGS”) violated Article 14 of the collective bargaining agreement between the State of Vermont and the Vermont State Employees’ Association (“VSEA”) for the Non-Management Unit, effective July 1, 2016 to June 30, 2018 (“Contract”), by dismissing Grievant from her position as a Buildings Engineer II . Specifically, Grievant asserts that the Employer violated Article 14 because: 1) the dismissal was not based in fact or supported by just cause, 2) the Employer improperly bypassed progressive discipline, and 3) the Employer failed to apply discipline with a view towards uniformity and consistency.

Hearings were held in the Labor Relations Board hearing room in Montpelier on November 29, December 10 and 20, 2018, before Board Members Robert Greemore, Acting Chairperson; David Boulanger and Karen Saudek. Assistant Attorney General Jacob Humbert represented the Employer. Attorney Patricia Turley represented Grievant. Grievant and the Employer filed post-hearing briefs on January 16, 2019.

FINDINGS OF FACT

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

**ARTICLE 14
DISCIPLINARY ACTION**

1. No permanent or limited status employee covered by this Agreement shall be disciplined without just cause. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:
 - a. act promptly to impose discipline . . . within a reasonable time of the offense;
 - b. apply discipline or corrective action with a view toward uniformity and consistency;
 - c. impose a procedure of progressive discipline . . . ;
 - d. In misconduct cases, the order of progressive discipline shall be:
 - (1) oral reprimand;
 - (2) written reprimand;
 - (3) suspension without pay;
 - (4) dismissal.
 - ...
 - f. The parties agree that there are appropriate cases that may warrant the State:
 - (1) bypassing progressive discipline . . . ; . . .
2. The appointing authority or designated representative . . . may dismiss an employee with just cause with two (2) weeks' notice or two weeks' pay in lieu of notice. . .
3. Notwithstanding the provisions of paragraph 2 above, the appointing authority or authorized representative . . . may dismiss an employee immediately without two (2) weeks' notice or two (2) weeks' pay in lieu of notice for any of the following reasons:
 - ...
 - (b) gross misconduct;
 - (c) refusal to obey lawful and reasonable orders given by supervisors;
 - ..
 2. The BGS Conflict of Interest Policy, of which Grievant was aware during her

employment, has provided in pertinent part as follows at all times relevant:

. . . It is essential to the proper operation of BGS that decisions are made fairly and impartially, and that the public have confidence in the integrity of BGS employees and BGS as an organization. . .

Definitions:

As used in this policy:

- A. "Appearance of a conflict of interest" means the impression a reasonable person might have, after full disclosure of the facts, that an employee's judgment might be significantly influenced by outside interests, even though there is no actual conflict of interest.
- B. "Conflict of interest" means a significant interest of an employee in the outcome of any particular matter pending before the employee. "Conflict of interest" also includes a significant interest of an employee's family or household member or business associate in the outcome of any particular matter pending before the employee, when that interest is known to the employee. . . .

Policy Statement: BGS employees shall take all reasonable steps to avoid any action that might result in taking any action on the basis of unfair considerations, giving preferential treatment to any private entity on the basis of unfair considerations, or using their employment with BGS for the advancement of personal interests.

BGS employees shall not take any action, or be directly involved in any action, in which they have a conflict of interest or the appearance of a conflict of interest unless authorized to do so by their immediate supervisor.

What to do if you think you have a conflict of interest: Whenever a *possible* conflict of interest arises, BGS employees are expected to consult with their immediate supervisor regarding whether the situation does nor may present a conflict of interest.

What to do if you have a conflict of interest: If a conflict of interest, or the appearance of a conflict of interest, is *known* or discovered by an employee, the employee is expected to disclose the conflict to his or her supervisor. The supervisor shall discuss with the employee how best to address the situation and what measures, if any, should be taken to avoid or resolve the conflict.

...
(State Exhibit 10, Grievant Exhibit C)

3. State of Vermont Agency of Administration Bulletin No. 3.5, Procurement and Contracting Procedures, of which Grievant was aware during her employment, has provided in pertinent part as follows at all times relevant:

I. AUTHORITY

... (T)his bulletin establishes the general policy and minimum standards for soliciting, awarding, processing, executing and overseeing contracts ...

II. PURPOSE AND POLICY

This Bulletin applies to the procurement of all goods and services and the required documentation of such procurements, regardless of dollar amounts, for all agencies ... of the State of Vermont.

This Bulletin provides guidelines for conducting procurements and contracting and establishes minimum benchmarks and protocols to ensure the solicitation and awarding of contracts for services are completed with sufficient competition. The State process is designed to: ensure fair and open competition, guard against favoritism, improvidence, extravagance, fraud and corruption; ensure the results meet Agency/department needs; provide for checks and balances and oversee Agency procurement activities; and protect the interest of the State and its taxpayers.

Agencies and departments may develop individual processes and procedures applicable to their needs, in addition to the minimum stated requirements of this Bulletin.

III. DEFINITIONS

...

Conflict of Interest: a pecuniary interest of an employee or a Vendor, or the appearance thereof, in the award or performance of a Contract, or such an interest, known to an employee, by a member of his/her current or former family or household, or a business associate.

...

VIII. THE BIDDING PROCESS

...

8. Contractor Selection, Documentation and Apparent Conflict of Interest

...

c. *Apparent Conflict of Interest:* If a reasonable person might conclude a contractor was selected for improper reasons, the Appointing Authority should disclose this fact in writing to the (Attorney General's Office) and the Secretary (of Administration) and document the reasons why selecting the desired contractor is still in the best interests of the State.

...

C. Pre-Qualifying Vendors for Statewide or Retainer Contracts

To streamline procurement for work routinely bid out, an Agency may employ prequalification procedures as a means of predetermining eligible Vendors from which an Agency may accept bids and proposals. . .

Pre-qualified vendors must be identified through a standard solicitation process through which the Agency publicly solicits Vendors seeking the opportunity to be pre-qualified. This may take the form of placement on a prequalified list or award of a retainer-type contract, customarily with a maximum dollar amount, set duration, and providing no guaranteed assignment of work for the contract term. . .

...

XI. CONTRACT EXECUTION AND CONTRACT FILE

...

C. Conflict of Interest

Employees with a conflict of interest or appearance thereof, shall not participate in, control or influence the bidding process, the awarding of contracts, or the approval of payments against said contracts. Department of Human Resources *Employee Policy 5.6* and the Executive Code of Ethics . . set standards that shall be used as the primary guide. Additionally, every effort shall be made to avoid even the appearance of a conflict of interest in the contracting process (see Section III for definitions). Further, every Contractor shall be required to disclose in writing any actual or potential conflict of interest.

...

(State Exhibit 11)

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

...

Number 5.6 – EMPLOYEE CONDUCT

...

REQUIRED CONDUCT

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

...

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

...

PROHIBITED CONDUCT

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

...

Number 17.0 EMPLOYMENT RELATED INVESTIGATIONS

...

RESPONSIBILITIES

...

D. Employees shall:

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

...

(State Exhibits 13, 14)

5. Grievant received a Bachelor degree in Architecture from Princeton University in 1986. She received a Master degree in Architecture from the University of Virginia in 1989. She had her own architectural practice in Montpelier from 1994 until she began state employment in 2014. During that period, Grievant also had a teaching position at Norwich University in Northfield, Vermont, followed by a professor position at the University of Notre Dame.

6. Grievant and Chris Temple began a relationship in 2010 or 2011 when they started walking their dogs together on occasion. Temple was a structural engineer who at the time was a Vice President at DeWolfe Engineering, a civil and structural engineering company based in Berlin, Vermont. As of the Fall of 2012, Grievant's relationship with Temple evolved into a romantic relationship. From January through November of 2013, while still romantically involved, Grievant and Temple lived together in Grievant's home in Montpelier.

7. Grievant began employment with the Department of Buildings and General Services in January 2014 as a Project Manager II. Grievant held that position until early 2017 when she was promoted to a Buildings Engineer II. Grievant served as Buildings Engineer II until she was dismissed on November 2, 2017.

8. In both positions as a Project Manager II and Buildings Engineer II, Grievant was responsible for project management, development and oversight at a professional level involving the planning, design, development and timely completion of the Employer's capital projects. This included securing services from private sector entities such as engineering firms. Grievant exercised a high degree of independence when managing projects with limited direct oversight. During her employment with the Employer, Grievant participated in numerous formal bid and simplified bid processes consistent with Agency of Administration Bulletin 3.5. Grievant was authorized to secure services from private sector firms for work valued at \$5,000 or less without a contract.

9. Shortly after Grievant began employment, she had a conversation on January 28, 2014, with Julie O'Toole Gutsell, a senior BGS manager, about questions of conflicts of interest. Following the discussion, Grievant sent a memorandum to Gutsell that day which provided in pertinent part:

...

The other larger question (of conflicts of interest) is my boyfriend. Chris is a principal at DeWolfe Engineers, and his company is a frequent consultant with BGS. For the most part he works with other project managers, and I hear only peripherally about the overlap from either end. There could be a conflict of interest if I were to hire him directly for a consultation or if his firm were to bid on one of my projects. I believe you and I agreed that it is appropriate for me to hire DeWolfe as long as Chris is not directly involved in the project. Please let me know if this is not correct (Grievant Exhibit S).

10. DeWolfe Engineering performed work on a few projects in which Grievant was a project manager in the first few years of her employment with the State.

11. The romantic relationship between Grievant and Temple continued uninterrupted until January of 2016 when Temple broke up with Grievant. Grievant at that time informed her immediate supervisor, Robert Rea, that Temple had broken up with her. Rea knew that Grievant and Temple had been in a romantic relationship. Once Grievant and Temple no longer had a romantic relationship, Rea considered that there were no longer conflict of interest considerations in Grievant's dealings with DeWolfe Engineering. Grievant and Rea had several conversations during the period Rea supervised her concerning conflict of interest considerations due to the relationship between Grievant and Temple.

12. Rea completed an annual performance evaluation report on Grievant covering the period July 21, 2015, to June 21, 2016. Rea rated her overall performance as "excellent" for the period. In the evaluation, Rea stated: "Sandy is taking Bulletin 3.5 very seriously and is seeking to learn the State's contracting process so that compliance is not an issue." (Grievant Exhibit A).

13. In the Fall of 2016, Temple discontinued a relationship with another woman, at which point Grievant and Temple renewed their friendship. By this time, Temple was the owner of DeWolfe Engineering. Grievant and Temple were physically intimate a few times after their friendship started up again in the Fall of 2016. Grievant considered their relationship to be friends with benefits.

14. On September 16, 2016, at 4:47 p.m., Grievant started an e-mail chain with

Temple, stating in part:

I have been looking forward to seeing you tomorrow. May I come over super early and jump into your bed? (promising not to jump on you?) I would love to wake up with you and have breakfast together. That way we could get our talk finished and have more of the morning to work!!!!!!

Temple responded at 4:51 p.m.:

Sure.

Like I said I was thinking a movie tonight and was going to invite you over to spend the night but you can come over in the morning if you would rather. I understand the need for some relax time.

At 4:53 p.m., Grievant responded:

I was thinking relax time at 14 L. However, might you prefer to sleep alone tomorrow night? I know you golf early Sunday, and you might want a good sleep beforehand. If that is the case, I should get my warm & cozy night tonight!!!

Temple responded at 4:56 p.m.:

Golf Sunday starts at 9:10 due to expected fog. I suggest we stick with our plan. You get relax time at 14 loomis. I stay here and work until I can't work anymore then go home and sleep.

I will leave the door unlocked so that if you get up early and want to join me in the morning you can. How does that sound?

Finally, at 4:58 p.m., Grievant responded:

Yay! Very excited. THANKS! :)

Good luck with work. Can't wait to hear about golf tomorrow. Hope your past couple days went well. I promise not to jump on you while you are sleeping!!
(State Exhibit 4, BGS 34-36).

15. In the period from January 2017 to May 2017, Grievant and Temple were close friends. They went out together on dates such as having dinner or going to the movies. They also spent time together with Temple's parents.

16. By February of 2017, Grievant was managing a project relating to a potential move of the Green Mountain Care Board to 144 State Street in Montpelier. There were concerns about the structural integrity of damaged trusses in the building. Grievant had some preliminary discussions with her supervisor, Bob Rea, about this project in February 2017.

17. Christopher Cole became Commissioner of the Department of Buildings and General Services in early 2017. On February 21, 2017, Cole announced a reorganization of the Department. As a result of the reorganization, Grievant was reassigned from being supervised by Rea, Director of the new Design and Construction Division, to being supervised by Bill Laferriere, the Director of the new Division of Policy, Planning and Use. There was a period of transition before the new reorganization fully went into effect. During the transition, Grievant continued to report to Rea on certain ongoing projects for a period of time. One of these projects was 144 State Street (Grievant Exhibits J, K).

18. Grievant sent an email to Rea on March 16, 2017, concerning the hiring of an engineer to investigate whether the trusses at 144 State Street were able to take additional snow load from a more insulated roof. Grievant asked in the email: "May I hire DeWolfe? If so, do I need to get an estimate first?" (Grievant Exhibit K, p.3)

19. Upon review of the email, Rea asked Grievant to meet with him to discuss the 144 State Street project. They met on March 17, 2017. The result of this discussion was that Rea gave his approval to the hiring of DeWolfe for the project. Rea believed that any work DeWolfe performed on 144 State Street would be minor, resulting in an invoice in the hundreds of dollars, well under the more than \$5,000 cost that would require a project manager such as Grievant to place a project out to bid and solicit proposals. At the time of this discussion, Rea thought that Grievant and Temple no longer had a romantic relationship.

20. During the period both before and after this meeting, Rea was experiencing a serious medical condition and had significant absences from work. He was on leave from work more often than he was working.

21. On March 28, 2017, Grievant sent an email to Laferriere and Rea, among other persons, stating:

We had a good look at the roof/trusses of 144 today. At least 3 trusses have been cut and will need repair. There are a total of three mid-span columns that I would like to reduce down to one, adding a deeper beam below the trusses. . . .
DeWolfe is writing up a proposal for not-to-exceed for analysis, plus adding a range of cost to do remediation design. At this point I'm still hoping to do a sole source contract. . . . (Grievant Exhibit U).

22. As a result, Grievant solicited a proposal from DeWolfe to perform the necessary work. Chris Temple of DeWolfe submitted a proposal on or about March 31, 2017. The cost of the proposal potentially exceeded \$5,000. Since the DeWolfe proposal exceeded \$5,000, Grievant was required to conduct a bid process for the structural work on the 144 State Street project (State Exhibit 4, p.BGS 41-43; Grievant Exhibits K, p.6, and U).

23. On April 3, 2017, Grievant and Commissioner Cole travelled together on a site visit to the Vermont Historical Society in Barre. During the trip, Grievant discussed with Cole concerns regarding the project she was managing which was designed to potentially move the Department of Libraries into the Historical Society building. Grievant expressed two primary concerns: one that the parking lot did not work for access to the disabled, and the other that she did not know whether the structure could carry the load of the Department of Libraries books. Cole asked Grievant how she could address these concerns. Grievant indicated that the concerns raised both civil and structural engineering issues, and that there were a few engineering firms that could address both. Grievant stated that her boyfriend's firm was such a firm. Grievant did not mention her boyfriend's firm by name.

24. Commissioner Cole told Grievant either during this April 3 conversation, or at some point by April 10, 2017, that she could not hire her boyfriend's firm for work on the Historical Society building because it would be a conflict of interest.

25. On April 3, 2017, during their travel together to and from the Historical Society in Barre, or at some other point by April 5, 2017, Grievant informed Commissioner Cole of her concerns that needing to bid out work for the 144 State Street project would significantly delay the project. Cole suggested a retainer contract as a possibility to avoid putting the process out to bid, and informed Grievant that he would talk to a contact at the State Agency of Transportation ("VTrans"), where Cole formerly was Secretary, to see if VTrans had a retainer contract that they may be able to use for the 144 State Street project.

26. On April 5, 2017, at 4:31 p.m., Grievant sent an email to Temple, asking "do you have a retainer contract with VTRANS?". Temple responded at 5:47 p.m.: "Yes we have an agreement. Not finalized yet but letter of intent." Grievant did not inquire of any other structural engineering firm whether they had a VTrans retainer contract in place (Grievant Exhibit K, p.7).

27. Grievant sent Commissioner Cole an email on April 7, 2017, at 11:54 a.m., asking: "Did you get a contact person at VTrans for me to work with on using their retainer contracts for BGS work?" Cole then reached out to VTrans, ultimately connecting Grievant with Brad McAvoy (Grievant Exhibit K, p.8-11).

28. McAvoy indicated that VTrans had two retainer contracts for structural engineering that were to be executed on April 15, one with DeWolfe Engineering and the other with Civil Engineering Associates. McAvoy stated in an April 7, 2017, email at 2:26 p.m.: "DeWolfe is right here in Berlin and I'm sure would be happy to review." Grievant sent an email to McAvoy on April 7 at 3:17 p.m., stating: "Happily I already had DeWolfe look at the

building, so I have their proposal in hand. I need to move forward with Phase I of this proposal (not to exceed \$2,500). There would be a second contract needed for Phase II unless you want to combine them in a contract not to exceed \$10,000. We can easily wait until April 15. You are saving me about 3 months' time in procurement!" At 3:21 p.m., McAvoy responded by email: "Their contract with me is hourly based . . . up to \$7,500 I believe we will be fine dollar wise" (Grievant Exhibit K, p.8-11).

29. Grievant sent Temple an email on April 7, 2017, at 3:29 p.m., stating: "It looks like I am going to be able to use your VTrans contract after April 15 even though the funding source is from BGS. Let's check in on this soon after 4/15" (Grievant Exhibit V).

30. Meanwhile, Grievant had sent an email on April 3, 2017, to Chad Phillips, the Senior Project Manager for the firm that previously had done the structural engineering work on the Historical Society, and requested calculations his firm had on the load that could be handled in the Historical Society building. Grievant did not hear back from Phillips until the morning of April 10, 2017, at which point Phillips told Grievant that his firm could not locate the calculations (Grievant Exhibit L, p.5).

31. Grievant then sent an email to Laferriere and Commissioner Cole, at 12:13 p.m. on April 10, stating:

I just got word that the structural engineers for the 2001 renovation of the old Barre school for VHS have lost their calculations. In other words, we have no demonstration that the original structure can hold up anything more than its dead weight.

I am going to move forward with one public bid for both structural design and site/parking design that will include a conceptual-level cost estimate. Luckily we have completed programming and I can supply a conceptual architectural design.

This process is going to take about 4 months to get the consultant started then about 2 months to design/estimate.
(Grievant Exhibit L, p.7).

32. Ultimately, the structural engineering services that were needed due to the need for calculations were contracted for by the Vermont Historical Society, rather than the Department of Buildings and General Services (Grievant Exhibit L, p.8).

33. On April 11, 2017, at 10:36 a.m., Grievant started an email chain with Temple, stating:

I just heard from my deputy commissioner. He took my request for those 110 hours to the new commissioner, and he took it to HR's new commissioner. Both agreed I more than deserved the credit of time!!!! No argument or defense of my position whatsoever! Now I just have to find 2 ½ weeks to relax and enjoy it!
:)

Temple responded at 11:05 a.m.:

Congrats!

Grievant responded at 11:09 a.m.:

Just thought: Maybe we could both take 2 weeks and put a concentrated effort into the cabin? I bet I could get Carl to come up for something like that. Maybe spend one or 2 days at a beach??

(State Exhibit 4, p. BGS 38)

34. The "cabin" referred to by Grievant in this email was at a camp owned by Temple's family and it only had a foundation. The "concentrated effort" mentioned by Grievant referred to work to construct walls and a roof for the cabin. "Carl" is Grievant's son.

35. On April 21, 2017, at 9:34 a.m., Grievant sent McAvoy an email stating: "I need to go ahead with this use of DeWolfe for structural analysis asap. What do I need to (do) before they can start work? Hopefully nothing??? Can they just do the work and I submit their invoice to you?" McAvoy responded at 9:41 a.m., stating: "You are free to start and have them invoice me directly." (Grievant Exhibit K, p.8)

36. Commissioner Cole was not aware at the time DeWolfe was selected to perform the 144 State Street engineering services that DeWolfe was the firm Grievant referred to as her boyfriend's firm during their earlier conversation. McAvoy was not aware at this time of Grievant's relationship with Temple.

37. DeWolfe performed engineering services on the 144 State Street project from April 24, 2017 through May 12, 2017. The total cost of those services was \$2,770 (State Exhibit 4, p.BGS 49-50).

38. On May 10, 2017, Laferriere informed Commissioner Cole that he thought Grievant may have entered into a contract with her boyfriend. Cole then discussed this with Rea. Rea informed him that Grievant previously had a romantic relationship with Temple but that the relationship had ended. Cole told Rea that the relationship had started up again. Rea told Cole he had allowed Grievant to use DeWolfe Engineering on the 144 State Street project.

39. Commissioner Cole sent Grievant an email on May 10 providing: "A contracting issue has been brought to my attention that bears investigating. I'm directing you to cease participating in any contracting or purchasing decisions until told otherwise." (Grievant Exhibit F).

40. Department of Human Resources Investigator Raymond Bouchard was assigned to conduct an investigation into Grievant's conduct. He conducted an investigative interview of Grievant on May 25, 2017. During that investigative interview, Grievant told Bouchard that she "call(s)" Temple "my boyfriend" and that "I guess my feelings would be kind of hurt" if Temple dates someone else. Grievant also informed Bouchard during the May 25 interview that Bob Rea had directed her in February 2017 to use DeWolfe Engineering to perform the engineering work

on the 144 State Street project. Grievant stated during the interview that she did not mention her boyfriend's firm to Cole during the April 3 visit to the Historical Society (State Exhibits 2; 3).

41. Commissioner Cole sent Bouchard an email on June 15, 2017, concerning the investigation of Grievant, stating:

Sandy and I toured the Historical Society, along with Deputy Secretary Ferland and two gentlemen from the Department of Libraries on April 3rd. The comment about hiring her boyfriend's engineering firm occurred either that day or either right before or right after that date. She did not refer to the firm by name but just mentioned my boyfriend's firm. I indicated that wouldn't be appropriate and she concurred, stating something like, "Yes, I guess you're right." That was the end of it as far as I was concerned, she understood why I indicated it wouldn't be appropriate.

(Grievant Exhibit L, p.18)

42. Bouchard issued his investigative report on Grievant's conduct on June 30, 2017 (State Exhibit 4, Grievant Exhibit G).

43. BGS Commissioner Christopher Cole sent a letter to Grievant dated July 24, 2017, which provided:

As a result of your behavior described below, BGS is contemplating imposing serious disciplinary action up to and including dismissal from your position as the Buildings Engineer II. . .

The below disciplinary charges are based on a June 30, 2017 Investigative Report, and attachments, prepared by Investigator Raymond Bouchard of the Department of Human Resources. . .

A. Relevant Provisions of State Personnel Policies ("PP"), AOA Bulletins, BGS Policies, the Non-Management Unit Collective Bargaining Agreement ("CBA") and Vermont Law

- PP 5.6, Employee Conduct
- PP 8.0, Disciplinary Action
- PP 9.1, Immediate Dismissal
- PP 17.0, Employment Investigations
- CBA Article 14, Disciplinary Action
- AOA Bulletin 3.5, Procurement and Contracting Procedures, Conflict of Interest
- BGS Conflict of Interest Policy

B. Potential Violations of Personnel Policies

. . . BGS has become aware of allegations that you may have violated the State's and/or BGS conflict of interest policies and may have been insubordinate and/or failed to follow a lawful directive by your supervisor. I became aware of your alleged misconduct on or about May 12, 2017 when a BGS employee expressed concerns to me about this potential conflict of interest. Furthermore, it also appears you may have been untruthful during the investigation into these allegations.

On or about April 3, 2017, I directed you that it would not be ethical for you to award a contract to your boyfriend's firm for structural engineering services to evaluate the Vermont Historical Society building as it would be a conflict of interest. However, it appears after receiving this clear, unambiguous directive, you continued to proactively hire DeWolfe Engineering Associates (DeWolfe) to perform work for the Department of Buildings and General Services. Specifically, on April 5, 2017, just a day or two after my directive, you emailed Temple directly and asked if he had a retainer contract with VTrans. On April 7, 2017, you emailed me asking for a contact person at VTrans to see about "using their retainer contracts for BGS work." You were put in touch with Brad McAvoy with VTrans who provided the names of two companies, one of which was DeWolfe. On April 21, 2017, you awarded DeWolfe the retainer contract for 144 State Street project and informed Temple he could proceed with the job. Therefore, it appears you disregarded the reasonable and lawful directive from me to not involve yourself in awarding any contracts or jobs to your boyfriend's firm.

It seems that you may have participated in, controlled, or influenced the awarding of a contract and/or the approval of payments against a contract for which you had a conflict of interest or the appearance of a conflict of interest. This appears to be a violation of State and/or BGS policy regarding conflicts of interest.

During your investigative interview, you admitted to having a personal relationship with Chris Temple, owner of DeWolfe. You acknowledged receiving and understanding the directive from me issued on or about April 3, 2017, and it seems you were unable to offer any legitimate reasons for violating the directive and continuing to hire DeWolfe. While you claimed that you were directed by BGS Facilities Director Bob Rea to hire DeWolfe, in an email dated March 16, 2017 you specifically asked Rea "May I hire DeWolfe?" Furthermore, your version of the events regarding the hiring of DeWolfe are inconsistent with credible statements provided by other BGS employees during the investigation. Therefore, it seems that you may have been untruthful in your responses during the investigative interview.

The Vermont Personnel Policies provide employees direction on how to conduct themselves in order to fulfill their duties as public servants. You are required to adhere to the lawful directives of your employer, be honest with your employer, and conduct yourself in a manner that will not bring discredit or embarrassment to BGS and/or the State of Vermont. In a position where you control the awarding of contracts, it is

expected that you will demonstrate integrity and be cognizant of conflicts of interest and the appearance of conflicts of interest when awarding contracts on behalf of BGS.

Additionally, it appears that your answers during the investigative process may have been incomplete, evasive and/or not entirely truthful, in violation of Policy 17.0. Your actions have caused the State of Vermont and BGS to potentially lose confidence in your ability to carry out your duties as a Buildings Engineer II and to be a respectable, trustworthy employee. Your described conduct appears to constitute misconduct, gross misconduct, and/or gross neglect, and violates all the above policies and law. Accordingly, it appears your conduct provides just cause for disciplinary action up to and including dismissal from your position with BGS.

Based on this information, going forward you are hereby restricted from participating in the contracting process with the exception of the development of scopes of work. These scopes of work are required to be reviewed and approved by your manager prior to contract development.

C. Process

You must notify HR Manager Don Robbins . . . 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 5)

44. There was a meeting on August 31, 2017, for Grievant to respond to the above allegations. BGS Deputy Commissioner Jennifer Fitch, Department of Human Resources Attorney Matthew DiBella, Human Resources Administrator Margaret Loftus, Grievant, and VSEA Field Representative Bob South were present at the meeting. During the meeting, Grievant stated that she did not mention her boyfriend's firm to Cole during the April 3 visit to the Historical Society (State Exhibits 6, 7).

45. In August 2017, Temple moved in with another woman and his relationship with Grievant ended. Since that time, Grievant has maintained no personal relationship with Temple.

46. BGS Deputy Commissioner Jennifer Fitch sent Grievant a letter dated November 2, 2017, which provided in pertinent part:

This is to notify you of your dismissal from the position of Buildings Engineer II with BGS effective at the close of business November 3, 2017 . . I met with you and your representatives to hear your response on August 31, 2017. In making our decision, Commissioner Cole and I considered all the information and arguments you and your representatives raised at this meeting, but did not find they overcome the seriousness of your misconduct.

I am terminating you because I find that you committed misconduct and gross misconduct as stated in the above-referenced July 24, 2017, letter . . . Specifically, after carefully evaluating all the evidence presented, I determined that you had a conflict of interest, disregarded a direct order given to you by your Commissioner, lied during the investigation, failed to take responsibility for your actions and decisions, and attempted to place blame on others for your own behavior. 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 actions undermine directives and policies that are in place to do so. Your pattern of misconduct has caused BGS to lose confidence in your ability to carry out your duties in a satisfactory and trustworthy manner, to act as a responsible State employee, and to follow directions and maintain a level of professionalism and honesty appropriate to the workplace. Your misconduct undermines the dignity and reputation of our workplace, and demonstrates a lack of judgment that has diminished BGS' trust that you will reliably be able to act in an honest, 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 9, Grievant Exhibit I)

47. In deciding to dismiss Grievant, the Employer concluded that Grievant's conflict of interest, insubordination and dishonesty were serious offenses. The Employer determined that these offenses, and not taking ownership of her actions, resulted in the Employer no longer trusting Grievant to perform her duties. The Employer determined that this was unworkable given the independent nature of her duties. In examining the consistency of the penalty to impose on Grievant compared to other employees, the Employer viewed Grievant's offenses as more egregious than another BGS employee who had received a substantial paygrade demotion for not telling the BGS Commissioner for two weeks about a vendor providing a space to the employee's husband. The Employer determined that Grievant had notice that her conduct was

prohibited due to familiarity with contracting and conflict of interest policies. The Employer did not view Grievant as having a strong potential for rehabilitation due to a lack of trust in her ability to perform her duties. The Employer ultimately concluded that an alternative sanction to dismissal was not adequate or effective in that she had a great degree of independence and responsibility and could not be trusted by the Employer to perform her duties without discrediting the Employer.

48. The demotion of another employee referenced in the preceding Finding of Fact was the subject of a Superior Court proceeding. The Superior Court judge issued an order reinstating the employee to the position held before the demotion. Subsequently, the employee and the State entered into a mediated settlement of the case.

OPINION

Grievant contends that the Employer violated Article 14 of the Contract in dismissing her because: 1) the dismissal was not based in fact or supported by just cause, 2) the Employer improperly bypassed progressive discipline, and 3) the Employer failed to apply discipline with a view towards uniformity and consistency.

Just cause is some substantial shortcoming detrimental to the employer's interests which is recognized as constituting good cause for dismissal. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). The ultimate criterion of just cause is whether an employer acted reasonably in discharging an employee for misconduct. Id. There are two requisite elements which establish just cause for dismissal: 1) it is reasonable to discharge an employee because of certain conduct, and 2) the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. Id. In re Grievance of Yashko, 138 Vt. 364 (1980).

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

The Employer charges Grievant with misconduct and gross misconduct based on violation of conflict of interest policies, disregarding a direct order given her by Commissioner Cole, lying during the investigation, failing to take responsibility for her actions and decisions, and attempting to place blame on others for her behavior.

The Employer has proven the conflict of interest charge against Grievant. The Employer specifically charges Grievant with violating State and/or BGS policies regarding conflicts of interest because she “participated in, controlled, or influenced the awarding of a contract and/or the approval of payments against a contract for which (she) had a conflict of interest or the appearance of a conflict of interest.”

The BGS Conflict of Interest Policy defines “(a)ppearance of a conflict of interest” as “the impression a reasonable person might have, after full disclosure of the facts, that an employee’s judgment might be significantly influenced by outside interests, even though there is no actual conflict of interest.” Similarly, Agency of Administration Bulletin 3.5 provides that an “apparent conflict of interest” may exist if a “reasonable person might conclude a contractor was selected for improper reasons”, and that employees with an appearance of a conflict of interest

“shall not participate in . . . or influence . . . the awarding of contracts, or the approval of payments against said contracts.”

We conclude that Grievant participated in and influenced the approval of payments to DeWolfe Engineering for engineering work on the 144 State Street project against the retainer contract for which she had an appearance of a conflict of interest. A reasonable person may have the impression that Grievant’s judgment may be significantly influenced by the interests of DeWolfe Engineering, and may conclude DeWolfe was selected for improper reasons, given that she referred to the owner of that firm as her boyfriend to Commissioner Cole in an earlier conversation concerning another project in which Grievant revealed neither the name of the firm nor the name of her boyfriend. Despite this appearance of a conflict of interest, Grievant inappropriately participated in, and influenced, the use of a retainer contract the State Agency of Transportation had entered into with DeWolfe Engineering for engineering work on the BGS 144 State Street project.

Despite the appearance of a conflict of interest, Grievant never mentioned to Commissioner Cole that her boyfriend, Chris Temple, owned DeWolfe Engineering even though it was the Commissioner who had suggested the use of an Agency of Transportation retainer contract for the 144 State Street work and had put Grievant in contact with the Agency of Transportation employee who handled the applicable retainer contract. Grievant also did not mention this to the Agency of Transportation employee.

Grievant offers as a defense to the conflict of interest charge that her immediate supervisor, Bob Rea, had approved use of DeWolfe Engineering for the 144 State Street project and he knew of the relationship between Grievant and Temple. However, although Rea knew that Grievant and Temple had been in a romantic relationship, Grievant had informed Rea in

January 2016, over a year prior to the 144 State Street project, that Temple had broken up with her. At the time Rea gave his approval to the hiring of DeWolfe for the project in March of 2017, he thought that Grievant and Temple no longer had a romantic relationship.

The evidence indicates that Rea was not privy to a full disclosure of facts from Grievant as to her relationship with Temple at the time he approved use of DeWolfe for the 144 State Street project. The BGS Conflict of Interest Policy provides that, whenever a possible conflict of interest arises, employees are expected to consult with their immediate supervisor regarding whether the situation does or may present a conflict of interest. The lack of evidence that Grievant disclosed to Rea the extent of her relationship with Temple at the time of the 144 State Street project, and allow him to adequately assess conflict of interest considerations, adversely impacts her defense to the conflict of interest charge.

Also, the scope of the 144 State Street project for which DeWolfe was hired had significantly expanded since Rea had given his approval to use the firm owned by Temple. The cost of the work expanding from hundreds of dollars to thousands of dollars, resulting in the need to enter into a written contract for the work, meant the earlier approval by Rea no longer sufficed without additional consideration. In sum, the approval by Rea to the use of DeWolfe does not provide a valid defense to the conflict of interest charge.

We next examine the Employer's charge that Grievant disregarded a direct order of Commissioner Cole to not award a contract to her boyfriend's firm for structural engineering services because it would be a conflict of interest. As indicated in the Findings of Fact, we have not concluded by a preponderance of the evidence that the Employer established that the Commissioner gave Grievant such a direct order on or about April 3, 2017. We find instead that Commissioner Cole told Grievant either on April 3, or at some point by April 10, 2017, that she

could not hire her boyfriend's firm for work on the Historical Society building because it would be a conflict of interest.

Nonetheless, we conclude that the Employer has established the essence of the charge that Grievant disregarded a direct order of Commissioner Cole to not award a contract to her boyfriend's firm for structural engineering services. Whether Commissioner Cole had this conversation on April 3, April 10, or some other time in between these two dates, it remains the case that Grievant participated in, and influenced, the awarding of work to DeWolfe well after the time the Commissioner directed her not to do so. Grievant did not give DeWolfe the notice to proceed with the work until April 21. There was ample time for Grievant to adhere to the Commissioner's direction to not participate in the awarding of work to DeWolfe before the awarding of work became final.

Also, we hold that the directive of Commissioner Cole constituted a direct order. A "direct order" implies a command authoritatively given. Grievance of Dowling, 24 VLRB 85, 98 (2001). The Commissioner's directive to not award a contract to her boyfriend's firm for structural engineering services constituted such a command that was authoritatively given. It should have been clear to Grievant that Commissioner Cole viewed Grievant as having a conflict of interest prohibiting her participation in the awarding of any contract to her boyfriend's firm.

Further, the fact that Commissioner Cole's order to Grievant to not award a contract to her boyfriend's firm for structural engineering services occurred in the context of discussion of possible work on the Historical Society building in Barre, rather than the 144 State Street project, does not diminish its effect with respect to the 144 State Street project. The intent of the order should have been clear that it applied to any case of Grievant being involved in awarding a contract to her boyfriend's firm for structural engineering services wherever it occurred. The

Commissioner indicated that he viewed such involvement as a conflict of interest. The conflict depended on the nature of Grievant's expressed relationship with the owner of DeWolfe Engineering, not on the specific project that was at hand.

We next examine the charge of the Employer that Grievant lied during the investigation. The Employer bases this charge on Grievant's claim during the investigation that she was directed by Rea to hire DeWolfe, and that her version of events regarding the hiring of DeWolfe was inconsistent with credible statements provided by other employees during the investigation.

We conclude that the Employer has not established the charge of lying by a preponderance of the evidence. A charge of lying implies intent to misrepresent and deceive. Grievance of Jacobs, 31 VLRB 204, 229-230 (2011). Grievance of Alexander, 34 VLRB 33, 49-50 (2017). The evidence indicates that the version of events offered by Grievant during the investigation with respect to the hiring of DeWolfe was incomplete and self-serving, but the evidence does not indicate it rose to the level of outright deception and misrepresentation.

The investigator of the allegations against Grievant demonstrated confusion about the course of events and incidents. This significantly contributed to the difficulty of determining dishonest intent on the part of Grievant. Grievant at times during the investigative interview stated that Rea directed her to hire DeWolfe. Rea himself indicated during the investigation, and at the Board hearing, that he approved of Grievant hiring DeWolfe. Absent a clearer investigative record, we are not inclined to view Grievant's use of the word "directed" to constitute lying given that her supervisor did indicate approval of the hiring.

We can discuss more summarily the Employer's remaining charges that Grievant failed to take responsibility for her actions and decisions, and attempted to place blame on others for her behavior. These are general conclusory charges dependent on the main charges previously

addressed. We conclude that the Employer established that Grievant failed to take responsibility for her actions and decisions by not admitting she erred in not adhering to conflict of interest policies and not following the Commissioner's directive to not award a contract to her boyfriend's firm. We further conclude that the Employer established that Grievant attempted to place blame on others for her behavior by justifying the hiring of DeWolfe Engineering based on her supervisor, Bob Rea, directing her to hire DeWolfe.

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

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

rehabilitation, and 7) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

We first consider the nature and seriousness of Grievant's offenses and their relation to Grievant's duties and positions. The just cause analysis centers upon the nature of the employee's misconduct. In re Morrissey, 149 Vt. 1, 13 (1987). Grievance of Merrill, 151 Vt. 270, 273 (1989). In deciding whether there is just cause for dismissal, the Board determines the substantiality of the detriment to the employers' interests. Merrill, 151 Vt. at 273-74.

Grievant's offenses were serious. Grievant's participation in the selection of DeWolfe Engineering for the 144 State Street project raised significant appearance of conflict of interest concerns. This had the potential to adversely affect public confidence whether contractors were being selected for appropriate reasons. Also, and of even greater significance, her participation was in disregard of Commissioner Cole's direct order to not award work to her boyfriend's firm. The Contract allows employers to immediately dismiss employees for refusal to obey lawful and reasonable orders of supervisors. This is a recognition by the parties to the Contract of the substantial detriment to the Employer's interests when offenses like Grievant's occur of disregarding a direct order of a manager.

The seriousness of Grievant's offenses are heightened when they are examined in relation to her duties and position. Her duties are professional in nature, and Grievant exercised them with a high degree of independence with limited direct oversight. This required a high degree of trustworthiness. The disregarding of management directives and lack of adherence to conflict of interest considerations are particularly problematic given such a responsible and independent position.

Grievant had fair notice that her offenses could result in her dismissal. Fair notice exists when the employee knew or should have known that the conduct was prohibited and subject to discipline. Grievance of Towle, 164 Vt. 145, 150 (1995). Grievance of Gorruso, 150 Vt. 139, 148 (1988). Grievance of Brooks, 135 Vt. at 568. All employees have implied notice they should not engage in conduct which undermines the authority of supervisors and/or indicates disrespect for them. Grievance of Downing, 24 VLRB 85, 97 (2001). Grievance of King, 13 VLRB 253, 284 (1990).

Grievant should have known that disregarding a direct order of the Commissioner undermined the authority of management and was prohibited conduct subject to discipline. She also had fair notice through the BGS Conflict of Interest Policy and Agency of Administration Bulletin 3.5 that conflict of interest considerations were significant and that violating conflict of interest policies was prohibited.

Further, her misconduct had an adverse effect on her ability to perform at a satisfactory level and on supervisors' confidence in her ability to perform assigned duties. Given the professional and independent nature of her work in procuring work and contracting with vendors, the Employer needed to have a high degree of trust that Grievant would follow procedures and directives related to contracting and conflicts of interests. Grievant's offenses understandably caused the Employer to lose confidence in her ability to perform assigned duties satisfactorily and in a trustworthy manner.

Grievant's past work record and disciplinary record are factors in her favor in determining the legitimacy of the disciplinary action taken against her. She received an overall rating of "excellent" in the one performance evaluation report contained in the record. She received no discipline during her employment prior to her dismissal. Nonetheless, the

significance of these factors is diminished given her relatively brief tenure of state employment of less than four years.

The consistency of the penalty of dismissal imposed on Grievant compared to disciplinary action taken against other employees would be a significant factor if evidence existed of other employees engaging in similar misconduct. However, the record is devoid of other instances of BGS employees engaging in a combination of offenses similar to Grievant.

The potential for Grievant's rehabilitation does not weigh in her favor. The Employer reasonably concluded that Grievant's potential for rehabilitation was not strong. Her misconduct in this case demonstrated disregard of direct orders of management, violation of conflict of interest policies, poor judgment and lack of trustworthiness. She also has not accepted responsibility for her actions. These characteristics are not conducive to demonstrating that Grievant is a good candidate for rehabilitation.

We conclude on balance 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 proven misconduct constituted gross misconduct. In sum, Grievant's actions constituted substantial shortcomings detrimental to the Employer's interests and just cause existed for her immediate dismissal.

ORDER

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

Dated this 28th day of February, 2019, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Robert Greemore

Robert Greemore, Acting Chairperson

/s/ David R. Boulanger

David R. Boulanger

/s/ Karen F. Saudek

Karen F. Saudek