VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 18-19
KEVIN HARRIS	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 5, 2018, Kevin Harris ("Grievant") filed a grievance contesting his dismissal as a Food Service Worker with the Vermont Psychiatric Care Hospital, Vermont Department of Mental Health ("Employer"). On November 16, 2018, Grievant filed an amended grievance. Grievant contends in the grievance as amended that the Employer violated Articles 5, 14, 15, 30, 31, 33, 65 and 66 of the collective bargaining agreement between the State of Vermont and the Vermont State Employees' Association ("VSEA"), effective July 1, 2016 to June 30, 2018 ("Contract"), and Sections 5.6, 8.0, 9.1, 11.1, 14.0, 14.1 and 17.0 of Personnel Policies and Procedures by: 1) dismissing Grievant without just cause, 2) improperly bypassing progressive discipline and progressive corrective action, 3) failing to apply discipline with a view towards uniformity and consistency, 4) failing to impose discipline within a reasonable time of the offense, 5) discriminating against him due to complaint and grievance activity, 6) discriminating against Grievant due to age, disability and use of family and medical leave, 7) discriminating against Grievant for whistleblowing activity, 8) engaging in workplace antagonism of Grievant, and 9) not offering Grievant reduction in force rights.

The hearing in this matter originally was scheduled for December 6. 2018. It was continued upon motion of Grievant. Hearings were held on January 8 and 9, 2020, in the Labor Relations Board hearing room in Montpelier before Labor Relations Board Members Robert

Greemore, Acting Chairperson; Karen Saudek and Roger Donegan. Assistant Attorney Generals William Reynolds and Laura Rowntree represented the Employer. Grievant represented himself.

Grievant and the Employer filed various motions before and during the hearings. The motions are addressed in the Opinion portion of this decision. Grievant and the Employer filed post-hearing briefs on the motions and on the merits of the grievance on February 10 and 28, 2020, respectively.

FINDINGS OF FACT

1. The Contract provides in part:

. . .

ARTICLE 5
NO DISCRIMINATION OR HARASSMENT;
and AFFIRMATIVE ACTION

1. NO DISCRIMINATION, INTIMIDATION OR HARASSMENT
In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination, neither party shall discriminate against, intimidate, nor harass any employee because of . . age . . disability . . filing a complaint or grievance, or any other factor for which discrimination is prohibited by law. . .

. . .

ARTICLE 14
DISCIPLINARY ACTION

1. No permanent or limited status employee covered by this Agreement shall be disciplined without just cause. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:
    a. act promptly to impose discipline . . . within a reasonable time of the offense;
    b. apply discipline . . . 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 (2) weeks' pay in lieu of notice. . .
3. Notwithstanding the provisions of paragraph 2 above, the appointing authority or authorized representative . . . may dismiss an employee immediately without two (2) weeks' notice or two (2) weeks' pay in lieu of notice for any of the following reasons:

. . .

(b) gross misconduct;

. . .

8. The appointing authority or authorized designee may suspend an employee without pay for reasons for a period not to exceed thirty (30) workdays. . .

. .

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

. . .

Number 5.6 EMPLOYEE CONDUCT

…

1.It shall be the duty of employees to fulfill to the best of their ability the duties and responsibilities of their position.

. . .

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

. . .

Number 8.1 – DUE PROCESS REQUIREMENTS (LOUDERMILL PROCESS)

. . .

NOTIFICATION

> 1. The employer must notify the employee, in writing, that dismissal is contemplated as a result of certain specific charges, which must be outlined in the letter. Employees must also be told that they have the right to respond to the charges, either orally or in writing . . . before final action is taken. This notice should inform employees of their right to be represented by the VSEA or private counsel, if applicable, in preparing and/or delivering such response. . . **This letter must be forwarded to the Department of Personnel legal counsel for review prior to mailing.** (emphasis in original)

. . .

Number 11.1 – LUNCH AND BREAK PERIODS

. . .

Lunch Periods

. . .

The length of an employee's lunch break will be determined by the schedule that is worked, with approval of the supervisor. . .

Breaks

Breaks are a privilege that management extends to employees, and not a right that they have to take them. . . (I)ndividual agencies and departments are encouraged to set their own policy regarding work breaks for their employees. Break policies should address: the amount of time allowed for the break; the number of breaks allowed in a work day; and the times of day that breaks should be taken. . . All break policies must be approved by the Employee Relations Division of the Department of Personnel prior to implementation.

A break is defined as a short period of less than twenty (20) minutes. The break is not considered meal time and, therefore, is considered to be compensable work time under the Fair Labor Standards Act.

Unused breaks cannot be accrued to be used at a later time.

. . .

Number 11.10 TIME ENTRY AND APPROVAL

. . .

All employees are expected to complete and submit accurate Timesheets in a timely manner in accordance with the State of Vermont payroll schedule. All employees have a duty to accurately report scheduled work hours, leave utilized, and any unpaid time not worked on their Timesheet. . . An employee who inaccurately reports time worked and/or leave used may violate general standards of conduct and/or the law, which may result in disciplinary action up to and including dismissal from employment . . .

If an employee mistakenly misreports his or her time worked or leave used, he or she shall correct the time reported in the manner described in the Time Entry and Approval Deadlines section of this policy.

Departments shall ensure that employees submit accurate Timesheets. Once an employee submits a Timesheet, the Timesheet is subject to the supervisor's approval. The approval provides a record that the Department accepts the Timesheet as an accurate representation of the employee's Payable Time. Approval by a supervisor does not negate, mitigate, or supersede any false entry by an employee. . .

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 8, 15; Grievant's Exhibit 9)

3. Grievant was first employed by the State in 2001 for the Department of Buildings and General Services. He resigned in 2004. He was rehired by the State in 2005 to work at the Vermont State Hospital of the Department of Mental Health in Waterbury. In 2012, Grievant was laid off due to the closure of the State Hospital. In 2013, Grievant was reemployed through the Reduction in Force ("RIF") reemployment process with the Agency of Transportation as a Maintenance Worker. Grievant did not meet the expectations of this position in his working test period, and he was dismissed in early 2014. In May 2014, Grievant was reemployed through the RIF reemployment process by the Department of Mental Health to work at the Vermont Psychiatric Hospital ("VPCH") as a Food Service Worker. Grievant remained in this position until his dismissal effective March 12, 2018.

4. Adena Weidman of the Vermont State Hospital ("VSH") sent Grievant a letter dated February 13, 2009, providing in pertinent part:

> This is to provide official notification of your disciplinary suspension for 30 workdays. In accordance with a settlement agreement executed by you and VSH, you will be deemed to have already satisfied the terms of this suspension.
>
> The suspension is imposed for the conduct previously described in my letter you dated April 24, 2008. The categories of misconduct were: (1) multiple unexcused absences in March 2008; (2) falsely reporting that you were sick or unable to work on these dates; and two instances in March 2008 of "no-call, no-show" (i.e., instances in which you failed to report to work and did not provide any notice to VSH). You have acknowledged you worked at the Barre Post Office on these missed work days.
>
> **"Last Chance" Provision.** The above-referenced settlement agreement contains a "last chance" provision that provides as follows:
>
> > 9. Harris acknowledges that the misconduct described in the letter of suspension was serious and further acknowledges that honesty is a fundamental obligation of all VSH employees. Accordingly, Harris agrees that any future instances in which

> he knowingly provides false or misleading information to VSH (including, but not limited to, false or misleading information regarding his ability to work, need to take leave, etc.) will establish just cause for imposing discipline on him up to and including dismissal. Harris hereby waives any right to contest whether such conduct establishes just cause for the discipline imposed. However he reserves the right to dispute whether, as a threshold matter, he engaged in the misconduct.
>
> . . .
>
> (State Exhibit 23)

5. Grievant received a 3 day suspension in 2003 when he was working for the Department of Buildings and General Services. The nature of the offense resulting in the suspension is unknown (State Exhibit 11, page 76).

6. Since 2013, State employees have completed their time sheets using an electronic portal known as VTHR. Although the method of submitting time reports transitioned to electronic submission during that time, the information input by employees reporting their time is the same as it was in the prior system, including codes to reflect time worked or use of leave. When an employee submits an electronic timesheet, VTHR displays a prompt that provides:

> We the undersigned do hereby certify under the pains and penalties of perjury that the reported information is accurate to the best of our knowledge and that all requests for services and expenses were incurred while performing work for the State of Vermont. The time reported herein is complete for this pay period and in accordance with state policy.

Employees must then click on a prompt that says "Yes" to certify their agreement with the prompt's content. Grievant was familiar with this prompt (State Exhibit 13).

7. VPCH began operations at the time Grievant was employed in 2014 as a Food Service Worker. Since VPCH opened, its kitchen staff has consisted of seven employees: a supervising chef, three Cook C's, and three Food Service Workers. Chuck Hoffert has been Supervising Chef, and was Grievant's supervisor, at all times relevant. The three Cook C's and three Food Service Workers all reported to Hoffert. They rotated so that the kitchen was staffed seven days a week with a morning shift from 5 a.m. to 2 p.m., and an afternoon shift from 10

a,m. to 6:30 p.m. Hoffert generally did not work on Fridays, and he finished his shift at 2 p.m. or shortly thereafter. Grievant worked five days a week from 10 a.m. to 6:30 p.m. Cook C's directed the work of Food Service Workers in Hoffert's absence. Cook C's did not have authority to approve leave for Food Service Workers.

8. By letter dated August 13, 2014, Hoffert extended Grievant's working test period as Food Service Worker for failing to meet performance expectations. Grievant ultimately successfully completed his working test period (State Exhibit 23, page 158).

9. Grievant received an overall rating of "satisfactory" on his performance evaluation report for the period May 27, 2014, to November 27, 2014 (State Exhibit 21).

10. Hoffert provided Grievant with supervisory feedback on February 17, 2015, for hostile and angry behavior and for leaving the kitchen without notifying Hoffert of his absence. He notified Grievant that he was "allowed a 30 minute break each day for your lunch and other short breaks when there is time available and you coordinate and notify your supervisor you are leaving for a break" (State Exhibit 23, page 159).

11. Hoffert had a meeting with kitchen staff, including Grievant, in January of 2016 due to hostility among staff and staff not attending to their duties. Hoffert discussed the need for professionalism and accurate time reporting during the meeting. He distributed a document to staff that included these points, including the statement: "If you leave early or arrive late for your shift, ensure your timecard reflects this. You may use personal time or comp time for these hours." (State Exhibit 17).

12. Hoffert provided Grievant with supervisory feedback on four separate occasions in 2016. The reasons cited were failure to communicate absences on four dates, hostile behavior on one occasion, friction with Cook C GC on two occasions, and failure to maintain a clean and

sanitary workplace on two occasions. Hoffert mentioned in two of the feedbacks that the Cook C is in charge when Hoffert is not present in the kitchen and that Grievant must comply with the Cook C's instructions (State Exhibit 23, pages 160 - 166).

13. The Employer implemented an updated Staff Attendance Policy for the VPCH kitchen staff in February 2017. Grievant received notification of the policy. The policy provided in pertinent part:

> . . .
> **Timesheets:** Staff must accurately complete their timesheets on line. . . Please use the "Nutrition Services Sign In and Out Sheet" when arriving and leaving for work. The timesheet is placed on the wall in the loading dock by the keyless door badge reader and fire control box. Use the clock on the fire control box to precisely note when you arrive and leave for work each day. . . If you leave early from your 8 hour shift you must annotate comp time or personal time taken to cover the absence.
> . . .
> **Breaks:** Each employee is guaranteed a 30-minute lunch break during their shift. 2 each 15 minute breaks are also authorized if all kitchen tasks are completed and authorized by the shift supervisor. Lunch and short breaks will be taken in accordance with the morning and afternoon kitchen timelines posted on the dishroom white board. Additional breaks outside the 30 minute lunch and 2ea 15 minute are not authorized without the permission of the kitchen supervisor. If additional breaks are taken, comp or personal time will be used to cover these absences.
> (State Exhibit 16)

14. On January 16, 2017, Grievant applied for intermittent family and medical leave after his wife fractured her knee. His wife's doctor indicated Grievant's wife would be incapacitated and in need of assistance for her treatment and recovery from approximately January 5, 2017, to March 5, 2017 (Grievant Exhibit 22).

15. Hoffert approved time sheets at all times relevant for the six kitchen workers who reported to him. Beginning in 2016, a practice was instituted in the kitchen in which employees used a sign-in sheet located next to the VPCH entrance off of the loading dock to record the actual time they came in and departed during the day. There was a clock above the sign-in sheet.

Hoffert used these sign-in sheets to verify the electronic time sheets that employees submitted via VTHR (State Exhibit 24).

16. On March 24, 2017, GC had yelled at Grievant for not helping in the kitchen after Grievant arrived late for work, had thrown pots around, and had told Grievant to go home if he was not going to work. Hoffert was not working that day. Shortly before 12:25 p.m., Grievant went to the office of VPCH Operations Chief Heidi Gee to complain about the actions of GC that day. Gee was out getting lunch and was not in the office. Grievant then sent an email to Gee at 12:25 p.m., shortly before he left work for the day, that provided:

> Heidi: Can you please talk to (GC) as he was throwing pans around and yelling at me in an unprofessional manner. He seems to think that he can do whatever he pleases because he is in charge when chuck is not in the kitchen. I do not appreciate his commando attitude and I think this is grounds for some form of correction. I told you before that the kitchen is out of control and now that Robbie is leaving it probably will get worse before it gets better. The constant yelling commands at me makes me angry and I do not look forward to working with him when he is like this.
> (Grievant Exhibit 22)

17. When Gee returned to the office, she viewed the email from Grievant. She was preparing to go to the kitchen to see what she could do when GC came into her office and informed Gee that Grievant had arrived at work an hour late that day and had just left work early. GC told Gee that Grievant gave inadequate notice that he would be late that day, came in later than promised, and then spent time on a computer rather than assisting other kitchen staff. GC told Gee that he was angry and frustrated with Grievant and that he used a loud voice with him. GC reported that, when Hoffert is not in the kitchen, Grievant is often late and then leaves to go home to takes an hour for lunch (State Exhibit 1, page 5; Grievant Exhibit 22).

18. Gee spoke with another kitchen worker, Robbie Plunkett, who confirmed that Grievant was an hour late for work that morning and then went straight to the computer instead of the kitchen. Plunkett told Gee that GC was loud, annoyed and frustrated when he spoke with

Grievant that day. Plunkett also indicated that Grievant often comes into work late and takes excessive lunch breaks when Hoffert is not in the kitchen (State Exhibit 1, page 5).

19. Gee then sent an email message that day to Human Resources Administrator Tammie Ellison and Human Resources Manager Kate Minall seeking guidance on how to proceed. At Ellison's request, on or about March 29, 2017, Gee started reviewing the video footage from the security camera that showed arrivals and departures of kitchen staff using the doorway by the loading dock that was used by the kitchen workers to enter and exit the building (State Exhibit 1).

20. After reviewing the video, Gee forwarded to Ellison the dates and times of Grievant's arrivals and departures. The video footage at VPCH showed the following arrival and departure times for Grievant:

> March 2, 2017 – Grievant arrived at 9:56 a.m., departed at 2 p.m. for lunch, returned at 2:55 p.m., and departed for the day at 6 p.m.
>
> March 3, 2017 – Grievant arrived at 10:09 a.m., left at 2 p.m. for lunch, returned at 2:44 p.m., and departed for the day at 6:15 p.m.
>
> March 7, 2017 – Grievant arrived at 9:56 a.m., left at 2:01 p.m. for lunch, returned at 2:50 p.m., and departed for the day at 6:12 p.m.
>
> March 9, 2017 – Grievant arrived at 9:59 a.m., left at 2 p.m. for lunch, returned at 2:58 p.m., and departed for the day at 6:06 p.m.
>
> March 24, 2017 – Grievant arrived at 10:58 a.m., and departed for the day at 12:43 p.m. (State Exhibit 1, p.4; State Exhibit 4)

21. Ellison compared these dates and times to Grievant's electronic time sheets submitted for these dates. Ellison found that Grievant's reported times on the electronic time sheets differed from times reflected in the video footage on five different days. Specifically, Grievant entered on his electronic time sheets 8 hours worked on March 2, 3, 7 and 9,2017. These electronic time entries were consistent with Grievant's handwritten notations on the sign-

in sheet for the corresponding dates, on which he noted an arrival time of 10 a.m. and a departure time of 6:30 p.m. for these dates. Also, Grievant coded 7 hours worked and 1 hour of family medical leave for March 24, 2017. He entered an arrival time of 11 a.m., and made no entry for a departure time, on the sign-in sheet for March 24 (State Exhibit 1, page 1 – 12).

22. On April 10, 2017, Ellison sent a referral to the Agency of Human Services Investigation Unit ("AHSIU") with the information she had gathered concerning Grievant's time sheet submissions. The case was assigned to AHSIU Investigator Peter Canales. Ellison advised Canales that she was awaiting a decision from legal counsel for the Department of Mental Health on whether Grievant's case would be referred to law enforcement for criminal prosecution.

23. In reviewing the video footage, Gee noticed that there were other kitchen staff leaving work early. An investigation was conducted on two employees. One of these employees resigned at the conclusion of the investigation. The other employee and the State negotiated an agreement resolving the matter.

24. Hoffert provided Grievant with supervisory feedback on three separate occasions in 2017. The reasons cited were failure to maintain a clean and sanitary workplace, late arrival for shifts on March 16, 17 and 18, and for calling out in violation of Time and Attendance Protocols on June 14 and 17 (State Exhibit 23, pages 167-168, 170).

25. On May 3, 2017, Grievant emailed Al Gobielle, Agency of Human Services Secretary, to report that he was "being harassed in the kitchen" at VPCH. Grievant forwarded this email to Minall. Minall, who works in Burlington, drove to VPCH in Berlin to meet with Grievant to get more information from him. Minall then forwarded the complaint through the Agency of Human Services, an investigation was conducted, and GC and Grievant received supervisory feedback on professional conduct and behavior (Grievant Exhibit 22).

26. On May 5, 2017, Hoffert issued Grievant an oral reprimand for failure to submit a completed time report as instructed on April 14, failure to report for work and not calling out on April 15, and not calling out on April 27, in violation of the VPCH Time and Attendance Protocol (State Exhibit 23, page 169).

27. In June 2017, the State received a note from Grievant's physician indicating that Grievant had medical impairments that may impact his ability to successfully perform the essential functions of a Food Service Worker. The Employer treated this information as a request for reasonable accommodation under the Americans with Disabilities Act and initiated the process for assessing whether Grievant would be qualified for reasonable and appropriate accommodations to perform his job. Grievant met with Hoffert, Gee and Ellison as part of the assessment. The assessment resulted in Grievant receiving the accommodation of being placed on a reduced work schedule (Grievant Exhibit 20).

28. Hoffert issued Grievant an oral reprimand on June 27, 2017, for calling out on two dates in violation of the VPCH Time and Attendance Protocol (State Exhibit 23, page 171).

29. On July 4, 2017, Grievant emailed the Human Rights Commission to report that he was "constantly harassed by my coworkers and my supervisor in the workplace". He sent a copy of his email to Gee. Gee forwarded it to the Department of Mental Health Commissioner and General Counsel, Ellison and Minall (Grievant Exhibit 22).

30. On July 18, 2017, Hoffert provided Grievant with an oral reprimand for arriving late for his scheduled shift on three separate occasions in violation of the VPCH Time and Attendance Protocol (State Exhibit 23, page 172).

31. On or about July 11, 2017, Department of Mental Health management and legal counsel decided that the matter of Grievant's time sheet submissions for the dates in March 2017

would not be referred to law enforcement. Ellison notified Canales that he could proceed with the investigation of Grievant (State Exhibit 7).

32. Investigator Peter Canales conducted an investigative interview of Grievant on August 2, 2017. Grievant was represented by VSEA Representative Nikolas Stein. Among the exchanges between Canales and Grievant during the interview are the following:

. . .

Canales: Is it the expectation that you show up to work for the times when you're scheduled?

Grievant: Yes

Canales: Okay. If you don't show up to work for the times that you are scheduled, you need permission?

Grievant: Right. I usually - - I always call in.

. . .

Canales: . . . you recognize that you have an obligation to submit a true and accurate time report, is that correct?

Grievant: Yes.

Canales: Okay. And be knowingly submitting a false time report, you know that's not proper, correct?

Grievant: Right.

. . .

Canales: . . . has there ever been an occasion when you have not submitted an accurate time report?

Grievant: Yes.

Canales: Intentionally?

Grievant: No.

. . .

Grievant: . . . My wife's . . . health isn't good and I'm responsible for her, so that's why I . . don't take a lunch break until, like, 2 o'clock in the afternoon . . . so I can go home . . . and check on her and make sure she's all right.

Canales: Where's home?

Grievant: Four miles away in Barre Town.

Canales: Okay. Who knows that you're doing that?

Grievant: My boss knows it.

Grievant: Who's your boss?

Grievant: Chuck knows it and so does (GC), he's a cook.

Canales: Okay. I have a list of dates that go back into March and April. And on several of these dates, you know, you leave somewhere around 2 o'clock, you show up an hour later. Is that accurate?

Grievant: Usually a half an hour, forty-five minutes. I mean, if you take a break in the morning before your lunch hour and your fifteen-minute break in the afternoon after your lunch hour, I mean, that could be an hour. Sometimes it's half an hour, sometimes it's forty-five minutes.

. . .

Canales: . . . And you say Chuck knows that you're going home to tend to family needs?

Grievant: Yes.

Canales: Okay. When did you have that conversation with Chuck to let him know that's what you're doing?

Grievant: I have no – I can't remember, sir.

Canales: Okay.

Grievant: I've always informed him, though, that's where I go.

. . .

Canales: . . . Well, let me ask you this: for the times in the midafternoon time period, you know, the dates, we've got a bunch of them, where you're leaving around the 2 o'clock mark and you're returning around the 3 o'clock mark, it is my

understanding that, for all of those events, you're going home to take care of family obligations?

Grievant: Yes.

Canales: Okay. How do you make up for the times that you're away? You get thirty minutes for lunch break.

Grievant: Right.

Canales: And if you're gone, on average, just over fifty-two minutes, that's twenty-plus minutes every day.

Grievant: Yup, I've been taking FMLA because I got it – I got it on the form saying that I could take care of my wife, her daily living tasks, and also to take her to physical therapy or hospital or anything like that.

Canales: Okay. So you're putting in for FMLA for that extra twenty or thirty minutes every day for lunch?

Grievant: Yes, sir.

Canales: That's not being reflected on your time reports. As an example, March 2, 2017, you were away for an added twenty – almost twenty-six minutes. Nothing's reflected in your time report. Same thing for March 3rd. You're away for an extended period of time. You arrived late in the morning, you took a long lunch and you work until what time?

Grievant: 6:30.

Canales: You left at 6:15.

Grievant: Well, sometimes –

Canales: The day before, you left at 6 o'clock. The next day you left at 6:12.

. . .

Grievant: Sometimes Chuck lets us leave earlier or the cook lets us leave early if we get all our work done.

Canales: Well, what I'm saying is, in all of these occasions, you've put in for eight hours worked. You left thirty minutes early at the end of the day, you took twenty-six minutes off during lunch, above and beyond your thirty minute lunch break.

Grievant: Well, I can't –

Canales: So that's just about an hour.

Grievant: I can't say from memory. I'd have to go home and look at my notes.

Canales: Okay. Well, let me ask you this: the camera that's at the loading dock –

Grievant: Right.

Canales: Would you agree that's accurate?

Grievant: Yes.

Canales: Okay. That's where I'm getting this information. It can watch you come and go.

Grievant: Right.

Canales: And I'm going to ask you again, why are you not putting these times down or getting permission?

Grievant: What do you mean getting permission?

Canales: To use leave time of some sort. You're not taking any leave whether it's the FML, accrued leave, sick leave, vacation, comp – whatever.

Grievant: I go where my cook goes, okay? So whatever he does, I do. So if he leaves early, I leave early with him.

. . .

Canales: . . . we're looking at many hours that you're not physically there, performing the duties of your job, but you're getting paid as if you were.

Grievant: And I just told you –

Canales: That's fraud.

Grievant: I just told you my boss said it's okay, like at 6:15 or 6:10 he says, okay, we can leave.

Canales: Does he do that for everyone or just you?

Grievant: Well, it's just me and him there, so whoever's working, yeah, the other guys do it. I mean, the other cook and the other food service worker do it.

Canales: Okay.

Grievant: So if they're done at 6 o'clock, they're out the door.

Canales: And how do you know when you're done? Because Chuck tells you?

Grievant: Yeah, either Chuck will say it or (GC) will say it.

. . .
State Exhibit 8)

33. Stein requested a copy of the tape of the investigative interview from Canales. Canales provided Stein with a copy on August 2 (State Exhibit 7).

34. Grievant never advised Hoffert that he was leaving the kitchen to take an extended lunch break to go home to take care of his wife. Hoffert did not give Grievant permission to do so. Hoffert never gave Grievant or any other kitchen employee permission to aggregate their two 15-minute breaks with lunch breaks. The expectation that Hoffert communicated to employees was if they came late, left early, or took a lunch break in excess of 30 minutes within the regularly scheduled workday, they would have to use compensatory time or annual leave so that they would only be paid for hours worked.

35. During the summer of 2017, Gee became aware that GC, with whom Grievant had a longstanding contentious relationship, had threatened to put a bullet in Grievant. GC was immediately escorted out of the building and placed on temporary relief from duty. He ultimately was dismissed.

36. Canales submitted his investigative report to Department of Mental Health management on September 11, 2017. A staffing meeting was convened to discuss the report involving DMH management, human resources and legal counsel to discuss the report. The staffing group decided to issue Grievant a *Loudermill* letter (State Exhibit 8).

37. Minall drafted the *Loudermill* letter. The letter was not identical to the form letter appended to Policy and Procedure 8.1 because the form letter contains a sentence that refers to employees who are on Temporary Relief from Duty with Pay. This sentence was not included in Grievant's letter because he was not on temporary relief from duty at the time he was sent the *Loudermill* letter.

38. Mourning Fox, Deputy Commissioner of the Department of Health, sent Grievant a letter dated November 13, 2017, providing in pertinent part:

> As a result of your behavior described below, DMH is contemplating serious disciplinary action, up to and including dismissal from your position as a Food Service Worker. You have the right to respond to the specific allegations listed below, either orally or in writing, before a final decision is made. You have the right to be represented by . . . VSEA . . .during proceedings connected with this action.
>
> The below charges are based on your conduct, which is summarized in an Investigation Report . . . prepared by AHS Investigations Unit Investigator Peter Canales. These reports 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 Non-Management Unit Collective Bargaining Agreement ("CBA"), State Personnel Policies ("PP"), and Department of Mental Health ("DMH") Training (that) you are charged with violating**
>
> - CBA Article 14, Immediate Dismissal
> - CBA Article 30, Annual Leave
> - CBA Article 31, Sick Leave
> - PP 5.6, Employee Conduct
> - PP 8.0, Disciplinary Action
> - PP 9.1, Immediate Dismissal
> - PP 11.1, Time Entry and Approval
> - PP 14.0, Annual Leave
> - PP 14.1, Sick Leave
> - PP 17.0, Employment Related Investigations
>
> **B. Potential Violations of Vermont Personnel Policies and the Collective Bargaining Agreement**
>
> You are currently employed as a Food Service Worker at DMH's Vermont Psychiatric Care Hospital (VPCH). You are a full-time employee and your work hours are 10:00 am – 6:30 pm with a 30-minute unpaid lunch break. The State became aware that you may

have engaged in misconduct when it was reported that you submitted time reports which did not accurately reflect the hours you were present for and actually worked. Instead, your timesheet reflected hours worked for periods of time where you were either not working and taking a break, on an extended break without authorization, or you left work without the authorization of your supervisor or designee in his absence. A review of video footage from VPCH revealed that the hours reported on your timesheet did not coincide with times you were seen arriving and leaving work.

Specifically, on the following dates, you failed to report your time accurately by coding the identified time as worked when, in fact, you did not do so:

March 2, 2017:
Hours coded: 8 Hours worked
Hours actually worked: 7 hours and 9 minutes

March 3, 2017:
Hours coded: 8 Hours worked
Hours actually worked: 7 hours and 22 minutes

March 7, 2017
Hours coded: 8 Hours worked
Hours actually worked: 7 hours and 27 minutes

March 9, 2017
Hours coded: 8 Hours worked
Hours actually worked: 7 hours and 9 minutes

March 24, 2017
Hours coded: 7 Hours worked, 1 hour of FMLA – Compensatory time.
Hours actually worked: 1 hour and 45 minutes.

When interviewed about these allegations you acknowledged that you had an obligation to submit an accurate time report, however, you also said that it was your supervisor's responsibility to check the accuracy. You have been employed by DMH for over three years, which is ample time to competently learn and understand the time reporting system and your obligations with regard to accurate time reporting. Every time you submit your time report online, you click a button agreeing: "We the undersigned do hereby certify under the pains and penalties of perjury that the reported information is accurate to the best of our knowledge and that all requests for services and expenses were incurred while performing work for the state of Vermont. The time reported herein is complete for this pay period and in accordance with state policy." On each of the dates specified above, it seems you failed to account for time not worked during your shift. Therefore, it appears you falsified your timesheet on multiple occasions, resulting in you being paid for hours that you knew or reasonably should have known you did not work, in violation of the above policies and provisions.

> Furthermore, you stated that you took longer lunch breaks, on occasion, to take care of a family member. However, according to your supervisor, you have never made a request for an alternate work schedule with a longer lunch break from your allotted 30-minute unpaid break period and you did not inform him that you needed longer lunch breaks to care for a family member. You claimed that your supervisor was aware of your extended lunch breaks and you leaving before the end of your shift, however credible statements by your supervisor contradict these claims. Therefore, it appears you were also dishonest with your employer during the investigation.
>
> The Vermont Personnel Policies provide employees direction on how to conduct themselves in order to fulfill their duties as public servants. Specifically, it is the duty of all employees to fulfill to the best of your ability the duties and responsibilities of your position, conduct yourself in a manner that will not bring discredit or embarrassment to DMH and/or the State of Vermont, and to be truthful with your employer. Your described conduct may constitute misconduct and/or gross misconduct, violate the above policies and provisions, and may provide just cause for disciplinary action, up to and including dismissal from your position with DMH.
> . . .
> You must notify **HR Manager, Kate Minall** . . . whether you wish to respond to the above allegations. . .
> (State Exhibit 8)

39. A *Loudermill* meeting was originally scheduled for January 12, 2018. That meeting was postponed at Grievant's request due to his being out of work on medical leave from January 11 to 25, 2018. Upon Grievant's return to work, he was placed on a modified work schedule until February 3, 2018 (Grievant Exhibit 22, State Exhibit 18).

40. A *Loudermill* meeting occurred on January 31, 2018. Grievant, VSEA Representative Nikolas Stein, Deputy Commissioner Fox, DMH General Counsel Karen Barber, and DMH Human Resource Manager Kate Minall were present at the meeting. The transcript for the *Loudermill* meeting provides in part:

> Fox: . . . when you go home to take care of your wife, that's lunch or lunch break?
>
> Grievant: Right. . . Lunch is thirty minutes and plus you have two guaranteed fifteen-minute breaks, so that's an hour right there.
>
> Fox: . . . what's your schedule look like?

Grievant: 10 to 6:30 p.m.

Fox: So 10 to 6:30. So your thinking on that would be is, if you can kind of bank all that time together –

Grievant: Correct.

Fox: -- you could work 10 to 5:30. Or 10 and then take an hour lunch and then till 6:30 – that kind of stuff?

Grievant: Right. And even if you got the okay from your boss, which is the cook, when Chuck's not there, and we all got our work done, that we could take off and it'd be all right. That's why both of us left like 6:15, 6:20, 6:12 – whatever – that'd be okay from the cook and him and I both left. Otherwise, I wouldn't have left.

Minall: Could leave and not account for the time? Is that what –

Grievant: I specifically asked him. I said, is this going to be a problem? And he said no. I mean, we could have just sat there looking at the timeclock waiting, but the cook is my boss.

Fox And that's – and the cook is (GC) or –

Grievant: (GC) was the cook. Robbie was the cook. . .

Fox: And is anyone of them in particular or all of them that would, basically, say –

Grievant: Robbie – (GC) mostly. (GC) and Robbie. Robbie doesn't' work there anymore.

. . .

Minall: Was Chuck working on these days?

Grievant: I don't believe so. He leaves at 2 – 2 to 3, is when he usually leaves.

Minall: Okay. So just to talk it through, it still seems like there's time unaccounted. So even if you said that, say, you had permission to use your thirty-minute –

Grievant: Right.

Minall: -- lunch break and your two fifteen-minute breaks, you had permission to do that –

Grievant: Yes.

Minall: -- It looks like there's still time missing.

Grievant: And I – the rest of the time I was on FMLA, because I was taking care of my wife. She couldn't drive or anything.

Fox: And I think I also heard Kevin saying that, if the cook said it's all right, you can leave, and it's ten after 6 and it's not 6:30, Kevin's already used his hour. You know, if it was a fifty-five minute lunch kind of thing, to go to things with his wife, and then if, at ten after 6, Robbie or (GC) says, ah, we're all good, go home –

Grievant: Right

Fox: -- you'd go home so now, actually, you would have - - according to our records, it would look like an hour and twenty minutes that you weren't onsite.

Grievant: Correct.

Fox: So that's how you get over that – that hour. . .

. . .

Fox: Can either of you just help refresh – go back to March 24th.

Grievant: Yeah, that was - - that was the day that (GC) kind of blew up at me. I come in and check my email every morning. . . he came in and he started venting and he told me, he says, well, if you're not going to do anything, Kevin, you might as well just go the F home. And I said, (GC) - - and I said, okay, I'm going to go down and talk to Heidi; she wasn't available. I talked to Cheryl for a little bit and then I walked around for about fifteen minutes and then I went back to the kitchen. And I said, okay, well, you told me to go home, so I guess I'm going to go home.

Minall: Did you follow up with Heidi to figure out whether or not that was okay and whether or not you could code that as work time?

Grievant: It's always been the practice.

Minall: Even though you left, like, six hours early?

Grievant: Yup, he was my boss; he told me to go home, that's the practice.

Fox: For me, I think it would be reasonable to think, oh, five minutes early, ten minutes early, boss says go home; go home. Five hours early, we kind of - -

Grievant: Well, that's why I came down to talk to Heidi. . . before I left

Fox: And then you finally couldn't find her, chit-chatted with Cheryl for a little bit - -

Grievant: Yup

Fox: - - went back, said, well, I guess it's okay to go.

Grievant: And I told her specifically, I said, if Heidi needs to find out what happened, she can call me. And then I told both cooks before I left, I said, I imagine Heidi will be down here, I said, so, you know, if she wants to talk with me, she's got my number.

Minall: So you believed it was her responsibility, not yours?

Grievant: Well, yeah, basically. I mean, he gave me a direct order, told me to go the F home, so that's what I did.

. . .
(State Exhibit 10)

41. In early February 2018, the Employer received a note from Express Care Clinic, dated February 1, 2018, indicating that Grievant had medical impairments that may impact his ability to successfully perform the essential functions of a food service worker. The Employer treated this information as a request for reasonable accommodation under the Americans with Disabilities Act and initiated the process for assessing whether Grievant would be qualified for reasonable and appropriate accommodations to perform his job. Grievant's modified duty assignment, which previously had been approved in relation to a pending worker's compensation claim, was authorized to continue through February 17, 2020 (Grievant Exhibits 20, 22).

42. On February 20, 2018, the Employer placed Grievant on temporary relief from duty with pay (Grievant Exhibit 6).

43. Beginning on February 20 and continuing until March 9, 2018, Minall and Grievant's VSEA representative, Nikolas Stein, engaged in discussions to explore possibly entering into a stipulated agreement to resolve the employment situation of Grievant. During the discussions, March 3, 2018, was discussed by Stein and Minall as the last day of Grievant's employment. March 3, 2018, was the last day of a pay period. On March 9, Stein notified Minall that Grievant was not interested in entering into a stipulated agreement (State Exhibit 20).

44. Deputy Commissioner Fox sent Grievant a letter dated March 12, 2018, providing in pertinent part:

> This is to notify you of your dismissal from the position of Food Service Worker, effective the close of business on March 3, 2018, for gross misconduct.
>
> By letter dated November 3, 2017, you were notified that the Department of Mental Health was contemplating your dismissal, and you were given an opportunity to respond to charges of misconduct. I met with you and representative on January 31, 2018 to hear your response to the November 13, 2017 letter.
>
> The reasons for your dismissal are all those outlined in the above-referenced letter of November 13, 2017 with supporting attachments, which are fully incorporated by reference. I did not find . . you to be honest and truthful and take responsibility for your behavior. You failed to acknowledge the seriousness of your behavior or the value of integrity.
> . . .
> (State Exhibit 12)

45. In deciding to dismiss Grievant, Fox determined that his offenses were serious. He concluded that Grievant's dishonesty resulted in Fox no longer having trust in him. He found the repeated nature of the offenses significant. Grievant's past disciplinary record and poor work record were significant to Fox. Fox viewed the penalty of dismissal as consistent with how other employees were treated because he had dismissed other employees who engaged in dishonesty. Fox considered mitigating circumstances of Grievant's contentious relationship with GC and the medical issues of Grievant's wife, but concluded that these did not affect the misrepresentation

of time engaged in by Grievant. When Fox decided to dismiss Grievant, he was not aware that Grievant's brother had died in late February when he was struck by a vehicle while walking home and was not aware that Grievant's father had died the previous fall. Fox determined that the potential for Grievant's rehabilitation was not good and that alternative sanctions less than dismissal were not adequate.

OPINION

There are threshold issues that need to be addressed arising from motions filed by Grievant and the Employer. We first address the issues raised in Grievant's Motion to Quash Dismissal Letter. The first issue raised by Grievant in the motion that was filed on January 7, 2020, the day before the hearings before the Labor Relations Board were held in this matter, is that the State violated the provisions of the Contract providing that "written notice of dismissal must be given to the employee within 24 hours of verbal notification." The State contends that this claim by Grievant is untimely filed because it was not included in either the original or amended grievance.

The Board will resolve an issue on the merits if possible unless the collective bargaining agreement requires it to be dismissed on procedural grounds. Grievance of Brewster, 23 VLRB 96, 98 (2000). Grievance of Kimble, 7 VLRB 96, 108 (1984). Grievance of Amidon, 6 VLRB 83, 85 (1983). The Board has declined to resolve issues that were not raised in the grievance filed with the Board pursuant to the Board Rules of Practice, which requires that a grievance contain a concise statement of the nature of the grievance and specific references to the pertinent section of the collective bargaining agreement and/or rules and regulations. Grievance of Regan, 8 VLRB 340, 364 (1985).

We conclude that Grievant's claim that he was not provided with the dismissal letter within the timeframe set forth in the Contract is untimely filed. He not only failed to raise such claim in his original grievance but it also was not part of his amended grievance filed seven months later. Grievant has provided no justification for not raising this claim until the day before the hearing on the merits in this matter. It would be prejudicial to the State and detrimental to the processing of cases by the Board to allow such a last minute raising of an issue.

Grievant also contends in his motion that the failure of the State to file an amended answer to the amended grievance should be deemed to constitute an admission of the material facts alleged in the amended grievance. This issue is diminished in significance by the reality that Grievant's original grievance sets forth the most prominent alleged facts in deciding this grievance, and the State filed a timely answer to the original grievance.

In any event, the Employer is required to file an answer within 20 days after service of the grievance, unless the Board extends the time within which the answer needs to be filed. Section 18.4, Board Rules of Practice. Failure to file a timely answer may have significant implications, as such failure may be deemed by the Board under Board Rules to constitute an admission of the material facts alleged in the grievance and a waiver by the party of an evidentiary hearing, leaving a question or questions of law, alleged contract violation(s), or alleged violation(s) of a rule or regulation to be determined by the Board. Section 18.6, Board Rules of Practice.

In two cases, the Board invoked this provision of the Rules to deem that the employer's failure to file a timely answer constituted an admission of the material facts alleged in the grievance, and the waiver of an evidentiary hearing. The circumstances were that the grievant demonstrated prejudice, and the processing of cases by the Board was adversely affected,

because of the employer's untimely answer. Grievance of Liese, 24 VLRB 67, 68 (2001). Grievance of VSEA (Re: Refusal to Provide Information), 15 VLRB 13, 16-18 (1992).

Here, the Employer failed to file an answer to the amended grievance until January 8, 2020, the first day of the hearing and more than a year after the amended grievance was filed. We conclude under these circumstances that the State's failure constituted an admission of the material facts alleged in the amended grievance that were in addition to those alleged in the original grievance. There was prejudice to Grievant in that he did not have the benefit of the Employer's response to some of his factual claims in preparing for the hearing before the Board. There also was an adverse effect on case processing by the Board as it resulted in the need for the parties and the Board to unnecessarily take time on an issue that could have been avoided.

Nonetheless, the practical effect of this holding is limited. The only facts alleged in the amended grievance that are in addition to the facts alleged in the original grievance constitute general background information that is not in dispute or facts that ultimately are not material to the validity of Grievant's dismissal. The remainder of the amended grievance consists of conclusory statements, allegations of contract or rules violations, and argument; they are not material facts covered by our holding.

Grievant further contends in his motion to quash the dismissal letter that the State violated the contract by failing to impose discipline within a reasonable time of the offense. The Board has had many cases addressing this issue but it has never been presented as whether it should be used to quash a dismissal letter. Instead, it has always been handled as an issue that the Board has decided after an evidentiary hearing accompanying the central issue whether just cause exists for dismissal. Here too, that is the appropriate way to address this issue Accordingly, we discuss this issue later in the Opinion.

Grievant also contends in his motion to quash the dismissal letter that the State violated Personnel Policy and Procedure 8.1 by issuing him a *Loudermill* letter that differed from the form *Loudermill* letter set forth in 8.1. Grievant's contention is not supported by the evidence. The letter was not identical to the form letter appended to Policy and Procedure 8.1 because the form letter contains a sentence that refers to employees who are on Temporary Relief from Duty with Pay. This sentence was not included in Grievant's letter because he was not on temporary relief from duty when he was sent the *Loudermill* letter.

Grievant also asserts in the motion to quash the dismissal letter that the Employer was at fault for failing to provide him with copies of witness statements at the *Loudermill* meeting and failing to promptly provide him with a copy of the tape of the investigative interview of him. The evidence does not support these assertions of Grievant. The investigator provided Grievant's VSEA representative with a copy of the tape of the investigative interview on the same day as the interview. Also, attached to the *Loudermill* letter provided to Grievant was the Investigation Report which contained descriptions of statements of the only two investigation witnesses – Grievant and Grievant's supervisor, Chuck Hoffert.

The final issue raised by Grievant in the motion to quash the dismissal letter is that the Employer violated his due process rights by issuing a dismissal letter dated March 12, 2018, but stating that he was dismissed March 3, 2018. The Employer contends that this issue was untimely raised by Grievant because it was not included in either the original or amended grievance. The Employer is incorrect. Grievant did raise this issue in his amended grievance, contending that the "dismissal letter was improperly dated and written as it dated 3/12/18 and said I was dismissed 3/3/18".

Nonetheless, the Employer further asserts that Grievant's claim is unfounded because Grievant's VSEA representative agreed to the March 3 dismissal date. We disagree there was any agreement. Grievant's VSEA representative and the Employer engaged in discussions to explore possibly entering into a stipulated agreement to resolve the employment situation of Grievant. During these discussions, March 3, 2018, was discussed as the last day of Grievant's employment. However, a stipulated agreement was never reached. Given these circumstances, we cannot conclude there ever was an agreement to the March 3 dismissal date.

The due process claim raised by Grievant is valid. There is nothing in the Contract that justifies a retroactive dismissal. It provides either for dismissal "with two weeks' notice or two weeks' pay in lieu of notice" or for dismissal "immediately without two weeks' notice or two weeks' pay in lieu of notice" for specified reasons. Article 14, Sections 2 and 3. There is no provision for retroactive dismissal. Grievant should have received pay until March 12, 2018.

The final threshold issue before the Board is whether to grant the Employer's motion to uphold Grievant's dismissal as *per se* just due to the 30 day "last chance" suspension received by Grievant in 2009. The Labor Relations Board has never ruled specifically on a "last chance" provision. However, the Board does have general precedents relevant to the issue.

The VLRB has rejected contentions made by employers that some dismissals are *per se* just. Grievance of Sherman, 7 VLRB 380, 405 (1984). Grievance of Carosella, 8 VLRB 137, 161 (1985). The Board stated in one case:

> We refuse to hold that some dismissals are *per se* just. The language of the provision at issue expressly provides that the Board's authority of review extends to "any case involving a . . . dismissal", and the facts indicate there was no discussion during bargaining about excluding certain offenses from consideration under that provision. Moreover, each case involves a question of degree and we must look to all the circumstances of a case to determine whether a dismissal is just. Grievance of Sherman, 7 VLRB at 405.

In another case, the Board expressed the view that an employer must select an appropriate disciplinary sanction based on the specific facts of the particular case before it; it may not automatically impose a fixed penalty for a specific category of misconduct regardless of individual factors. Grievance of Hurlburt, 9 VLRB 174, 188-89 (1986).

Given these precedents, we decline to hold that Grievant's dismissal was *per se* just without examining all the circumstances of the case to determine whether just cause existed for his dismissal. This does not mean that the "last chance" provision is without effect. It provided clear notice to Grievant that future dishonesty was prohibited and could be met with the ultimate sanction of dismissal. The significance of the "last chance" provision is further enhanced in that Grievant received the most severe penalty permitted by the Contract short of a dismissal – a 30 day suspension. It is accorded substantial weight when determining whether just cause existed for Grievant's dismissal.

The threshold issues being addressed, we turn to discussing the various contentions made by Grievant in his amended grievance. Grievant contends that the Employer violated Article 5 of the Contract by dismissing him as a result of discrimination and retaliation against him due to his grievance activities. In cases where employees claim the employer took action against them for engaging in protected activities, the Board employs the analysis used by the United States Supreme Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977): once the employee has demonstrated his or her conduct was protected, she or he must then show the conduct was a motivating factor in the decision to take action against him or her. Then the burden shifts to the employer to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct. Grievance of Sypher, 5

VLRB 102 (1982). Grievance of Roy, 6 VLRB 63 (1983). Grievance of Cronin, 6 VLRB 37 (1983). Grievance of Danforth, 22 VLRB 220 (1999).

Grievant engaged in the protected conduct of grievance activities. Grievant must demonstrate that this protected conduct was a motivating factor in the Employer's decision to dismiss him. The factors the Board reviews in determining whether protected conduct constituted a motivating factor in an employer's adverse action against an employee are: 1) whether the employer knew of the protected activities, 2) whether a climate of coercion existed, 3) whether the timing of the action was suspect, 4) whether the employer gave protected activity as a reason for the decision, 5) whether the employer interrogated the employee about protected activity, 6) whether the employer discriminated between employees engaged in protected activities and employees not so engaged, and 7) whether the employer warned the employee not to engage in such activity. Ohland v. Dubay, 133 Vt. 300, 302-303 (1975). Horn of the Moon Workers Union v. Horn of the Moon Cafe, 12 VLRB 110, 126-27 (1988).

Although the dismissal occurred following grievances filed by Grievant, Grievant has not demonstrated that his grievance activities constituted a motivating factor in the dismissal decision. The Employer knew of Grievant's protected grievance activities. However, Grievant has not demonstrated that this knowledge resulted in the protected conduct motivating the Employer's decision to dismiss him. Knowledge alone is not sufficient to demonstrate protected conduct motivated an adverse action. Grievant has not demonstrated that any of the other factors discussed above providing evidence of animus for protected conduct existed here. Instead, we are persuaded that the Employer was motivated entirely by a belief in the seriousness of Grievant's misconduct. Thus, we dismiss Grievant's claims of discrimination and retaliation based on his grievance activities.

We next address Grievant's contention that the Employer violated Article 5 of the Contract and disability discrimination statutes by discriminating against Grievant based on physical and mental disabilities, his use of family and medical leave, and pursuing a workers compensation claim. Grievant has not demonstrated that physical and mental disabilities, his use of family and medical leave, or pursuing a workers compensation claim played any role in the Employer's decision to dismiss him. Again, the evidence indicates the Employer dismissed Grievant based on a belief in the seriousness of his misconduct. Thus, we dismiss these discrimination claims of Grievant.

We conclude similarly with respect to Grievant's contention that the Employer violated Article 33 of the Contract by suspending him on February 20, 2018, while he was pursuing an injury on the job claim, instead of granting him RIF reemployment rights. First, Grievant has not demonstrated that he was suspended on February 20, 2018. Instead, he was placed on relief from duty with pay on that date. Moreover, Grievant has not presented evidence indicating he was entitled to RIF reemployment rights pursuant to Article 33 based on "a job-related or not job-related injury" instead of being placed on temporary relief from duty status. The evidence indicates that the Employer motivation for placing him in such status was due to a belief in the seriousness of Grievant's misconduct rather than taking the action against him due to his injury claim.

Grievant also alleged in his grievance that the Employer violated Articles 65 and 66 of the Contract in dismissing him due to complaints he made to outside entities alleging harassment against him in the workplace. Article 65 provides that employees shall not be discriminated against due to making public allegations of inefficiency or impropriety in government. Article 66 protects employees from another employee's antagonistic, belligerent and/or malicious acts.

Once again, we conclude that Grievant has not demonstrated that his complaints about harassment in the workplace were a motivating factor in the dismissal decision; the Employer took the decision based on a belief in the seriousness of Grievant's misconduct.

Grievant further contends that he was discriminated against due his age. In grievances alleging that adverse actions were taken against employees because of a characteristic such as age, the VLRB also has indicated it will employ the analysis developed by the U.S. Supreme Court in such cases. Grievance of Day, 14 VLRB 229 (1991). The central focus of inquiry in a disparate treatment case is always whether the employer is treating some people less favorably than others because of a characteristic such as age. Id. at 286. To establish a disparate treatment claim, "it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981). The complainant carries the initial burden of establishing by a preponderance of the evidence a *prima facie* case of discrimination. Id. The complainant must prove by a preponderance of the evidence that he or she was subject to an adverse employment action under circumstances that give rise to an inference of discrimination. Id. Grievant has not made out a *prima facie* case of discrimination based on age as he has not established that there is an inference of discrimination based on his age. Instead, the evidence indicates that the Employer dismissed Grievant based on a belief in the seriousness of his misconduct.

Grievant's remaining claims involve alleged violations of Article 14 of the Contract. He asserts the Employer violated Article 14 by: 1) dismissing Grievant without just cause, 2) improperly bypassing progressive discipline and progressive corrective action in dismissing him, 3) failing to apply discipline with a view toward uniformity and consistency in dismissing him; and 4) failing to promptly impose discipline within a reasonable time of the offense.

We first address Grievant's contention that the Employer violated the requirement of the Contract that "the State will act promptly to impose . . . discipline within a reasonable time of the offense." This is a contract provision that the Board has previously interpreted on many occasions.

The Board concluded that this provision was violated in one case when management charged an employee with an offense that was brought to management's attention three years earlier. Grievance of Gorruso, 9 VLRB 14, 34 (1986), *Reversed on Other Grounds,* 150 Vt. 139 (1988). The Board decided the contract language was violated in another case when an employee was not charged with an offense until five and one-half months after an incident requiring a simple investigation. Appeal of Wells, 16 VLRB 52 (1993).

In a 2016 decision concerning a dismissed state employee, the Board majority determined this contract provision was violated when the employer did not notify the employee for nearly nine months after the employer had knowledge of the alleged misconduct, and dismissed the employee nearly a year after such knowledge, under circumstances where no witnesses were interviewed during the employer's investigation. Grievance of Lepore, 33 VLRB 290; *Reversed on Other Grounds,* 2016 VT 129. In a more recent decision, the Board determined this contract provision was violated when the employer imposed the disciplinary action nearly nine months after learning of the alleged misconduct, and the employer offered no reasonable explanation of why it took such a long period of time to impose discipline. Grievance of Gibson, 35 VLRB 182 (2019).

There have been several other cases where the Board has concluded this contract language was not violated. The Board determined that an employer acted reasonably in completing an investigation in five months into alleged misconduct by three correctional officers where the employer's investigation was complicated because criminal charges were brought

against the employees. Grievances of Charnley, Camley and Leclair, 24 VLRB 119, 141-142 (2001). Similarly, the Board determined in another case that imposition of discipline on an employee was not unreasonably delayed where dismissal occurred four and one-half months after criminal charges were brought against an employee and the employer commenced an investigation of his alleged misconduct. Grievance of Brown, 24 VLRB 159, 174 (2001).

The Board determined in a further case that the dismissal of a correctional officer occurred within a reasonable time of the offense, even though the conduct engaged in by the officer leading to her dismissal occurred six and one-half months prior to her dismissal, because a significant part of the delay was caused by the employee's union representative and a disagreement of the parties which had to be resolved through the grievance procedure. Grievance of Kerr, 28 VLRB 264, 277 (2006).

The Board held in another case that a delay of four months after receiving the investigator's report did not provide a reasonable basis to rescind the dismissal of a correctional officer where the delays were substantially caused by unforeseen complications and the dismissed officer's claimed lack of memory. Grievance of Abel, 31 VLRB 256 (2011). Elsewhere, the Board concluded that a six and one-half month period before discipline was imposed was reasonable where there were a number of allegations against the employee which resulted in an extensive investigation, including allegations on two issues which did not surface until the investigation of other allegations was well underway. Grievance of Richardson, 31 VLRB 359, 383 (2011).

In applying these precedents here, we conclude that the Employer has violated the requirement of the Contract to "act promptly to impose discipline . . . within a reasonable time of the offense". The Employer imposed the disciplinary action of dismissal on Grievant

approximately 11 months after learning of Grievant's alleged misconduct. The Employer offered no reasonable explanation why it took such a long period of time to impose discipline.

The Employer seeks to justify the length of time based on delay occasioned by a consideration whether to refer the matter to law enforcement for possible criminal action against Grievant. The Employer did not proceed in a timely manner in this regard by taking approximately three months to ultimately decide to not refer the matter for possible criminal action The Employer offers no reasonable explanation why such consideration took three months.

The Employer also seeks to excuse the delay based on the request by Grievant's VSEA representative for information relating to consistency of discipline, Grievant's absence from work for two weeks, and a week and a half delay caused by attempting to settle the case. The brief delays caused by these factors, along with consideration of whether to refer the matter for possible criminal action, are far short of justifying an 11 month period of time to impose discipline. The circumstances involved in other cases of a pending criminal investigation, a complex investigation, or other significant complications where we have found no contract violation are absent in this case. Grievance of Lepore, 33 VLRB at 315. Grievance of Gibson, 35 VLRB at 195.

Once again, like Lepore and Gibson, the State has flagrantly violated the important procedural due process protections negotiated by the parties of timely taking disciplinary action. Lepore, 33 VLRB at 315-316. Gibson, 35 VLRB at 195. The State blatantly disregarded its obligations to adhere to these provisions that are of crucial importance to a person's livelihood and constructive labor relations. Id.

In determining the appropriate remedy for this significant contract violation, it is necessary to at least issue a cease and desist order to the State. Grievance of Gibson, 35 VLRB at 195. Grievance of VSEA, et al (re: Tropical Storm Irene), 32 VLRB 274, 324 (2013). The State is required in the future to adhere to these important procedural due process protections negotiated with VSEA.

In considering whether to grant the further remedy requested by Grievant of reversing the disciplinary action of dismissal imposed on Grievant, we are bound by the precedent established by the Vermont Supreme Court in Grievance of Lepore, 2016 VT 129. The Court held there that a delay of nearly a year in imposing discipline did not preclude an employer from dismissing an employee absent a showing of prejudice and actual harm to the employee. The Court determined that the evidence did not establish prejudice to the employee since he continued to work and receive his salary during the investigation, thereby suffering no monetary loss; and there was no discernable effect on the preservation of facts or testimony or any other adverse effect on the employee's ability to defend against the charges. Id. at ¶ 25. The Court further found no showing of prejudice where there was no evidence that the employer either sought to, or did, obtain any unfair advantage over the employee through the delay in disciplining him. Id. at ¶ 26.

Here, Grievant did not suffer monetary loss due to the inordinate delay. He remained working during the period of delay, thereby receiving his regular pay. Also, Grievant did not establish any discernable effect on the preservation of facts or testimony or any other adverse effect on Grievant's ability to defend against the charges. Further, there was no showing of prejudice where there was no evidence that the State either sought to, or did, obtain any unfair advantage over Grievant through the delay in disciplining him.

In sum, our conclusion that the State has violated the Contract by failing to act promptly to impose discipline within a reasonable time of the offense does not result in a determination that Grievant's discipline must be reversed. This should not be interpreted as minimizing the obvious and persistent disregard of an important contract provision by the State. Gibson, 35 VLRB at 197.

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

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

The Employer charged Grievant with falsifying his time reports on five different dates in March 2017, resulting in him being paid for hours that he knew or reasonably should have known he did not work in violation of time entry and approval policies. We conclude that the Employer has proven this charge by a preponderance of the evidence.

Grievant knew how to fill out and submit an electronic time sheet. He knew how to enter leave codes for sick, annual and FMLA leave. He was aware of the State's policies and procedures requiring him to submit an accurate time sheet accounting for time worked and not worked. He received direction from his supervisor, Chuck Hoffert, to accurately account for time worked and not worked on his time sheet. Hoffert had distributed to kitchen staff, including Grievant, in 2016 a document providing that, if an employee left early or arrived late for a shift, the employee would have to use compensatory time or personal time for this time. In February 2017, the Employer implemented a policy reiterating this requirement and also specifying that employees were provided a 30 minute lunch break during their shift as well as two 15 minute breaks if authorized by a supervisor.

Despite these clear requirements, Grievant took lunch breaks extending well beyond 30 minutes on four occasions in March 2017 without putting in for leave time for the time in excess of 30 minutes, Also, he left work well before the 6:30 p.m. end of his shift on five occasions in March without putting in for leave time for this non-working time.

Grievant has sought to justify these time reporting deficiencies by making various claims at different times: 1) Hoffert approved him going home during his lunch break to care for his wife and using a combined lunch break and break time for this time; 2) he made a mistake on some of his time entries and it was Hoffert's responsibility to correct his mistakes 3) he used

family and medical leave time for this time; and 4) Hoffert and the Cook C let him leave early near the end of the shift if their work was done.

We find none of these explanations persuasive. Grievant never advised Hoffert that he was leaving the kitchen to take an extended lunch break to go home to take care of his wife. Hoffert did not give Grievant permission to do so. Hoffert never gave Grievant or any other kitchen employee permission to aggregate their two 15-minute breaks with lunch breaks. The expectation that Hoffert communicated to employees was if they came late, left early, or took a lunch break in excess of 30 minutes within the regularly scheduled workday, they would have to use compensatory time or annual leave so that they would only be paid for hours worked.

Also, it was not Hoffert's responsibility to correct the time entries at issue. Hoffert would not have known there were errors since he was not working at the times in question and would not have known the entered times were inaccurate.

Grievant's statement during the investigative interview that he used family and medical leave for some of these times was not accurate. Grievant did not claim family and medical leave time for any of the time entries at issue.

We address in more detail Grievant's claimed justification for some of the time entries that Hoffert and the Cook C let him leave early near the end of the shift if their work was done. Hoffert never gave him such permission. Even assuming that the Cook C granted such approval to Grievant, this does not exonerate Grievant from wrongdoing. The Cook C had no authority to grant such permission that directly contradicted Hoffert's expectation communicated to Grievant and other employees that, if they left work early, they would have to use compensatory time or annual leave so that they would only be paid for hours worked. Grievant shared any wrongdoing in such instances. Moreover, dishonesty engaged in by a supervisor is not a credible mitigating

circumstances minimizing conduct by an employee's dishonesty at public expense. In re Carlson, 140 Vt. 555, 559 (1982).

We also discuss in more detail the circumstances of the March 24, 2017, time reporting by Grievant in which Grievant entered 5 hours and 15 minutes of work time in excess of what he actually worked that day. Grievant asserts that the Cook C, who was in the midst of a conflict with Grievant at the time, told him to go home if he was not going to do any work. Grievant then coded this as work time. Grievant justifies this on the grounds that he tried unsuccessfully to contact the VPCH Operations Chief to discuss the incident before he went home and she was unavailable, and by claiming worktime he was just following the practice that if an supervisor tells you to go home during the work day you get paid for the rest of the day as if you were working. This claimed justification is without merit. Grievant has presented no evidence to establish the asserted practice. Moreover, a failed initial attempt to contact a superior does not justify claiming worktime for time not spent working absent a further attempt to contact the superior to obtain direction on how to code the time.

In sum, the Employer has proven by a preponderance of the evidence the charge that Grievant falsified his time reports on five different dates in March 2017, resulting in him being paid for hours that he knew or reasonably should have known he did not work in violation of time entry and approval policies. The Employer further charges Grievant with being dishonest with the Employer during the investigation by stating that he took longer lunch breaks on occasion to take care of a family member and that Hoffert was aware of his extended lunch break and leaving before the end of his shift.

The Employer has proven by a preponderance of the evidence that Grievant made these statements during the investigation and that these statements were dishonest. As discussed above,

Grievant never advised Hoffert that he was leaving the kitchen to take an extended lunch break to go home to take care of his wife. Hoffert did not give Grievant permission to do so. Hoffert never gave Grievant permission to aggregate his two 15-minute breaks with lunch breaks. The expectation that Hoffert communicated to Grievant and other employees was if they came late, left early, or took a lunch break in excess of 30 minutes within the regularly scheduled workday, they would have to use compensatory time or annual leave so that they would only be paid for hours worked.

The underlying charges having been established, 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, 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, 7) mitigating circumstances, 8) the

potential for Grievant's rehabilitation, and 9) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

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

Grievant's offenses were serious. He was dishonest on multiple occasions and failed to take responsibility for his actions. 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).

Grievant had fair notice that his dishonesty could be grounds for discharge. 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). Moreover, Grievant had explicit notice of the

requirement of accurate time reporting and had received a 30-day suspension accompanied by a "last chance provision" for, among other things, dishonesty.

Grievant's offenses understandably had a detrimental effect on the Employer's confidence in his ability to perform assigned duties. Despite his supervisor's extensive efforts to have kitchen workers accurately report the time they worked, Grievant engaged in multiple acts of time sheet fraud and then failed to take responsibility for his actions during the Employer's investigation. Grievant has irreparably damaged his supervisor's confidence in his credibility and ability to perform his job.

Grievant's past disciplinary record and work record do not aid him in retaining employment. His disciplinary record includes reprimands and suspensions, including the above-mentioned 30-day suspension accompanied by a "last chance provision" that included dishonesty. His work record is replete with performance problems marked by numerous supervisory feedbacks for performance deficiencies

Grievant has failed to show that he was treated inconsistently with other employees committing similar offenses. Grievant's dismissal is consistent with the discipline imposed by the Employer upon other employees who recently have been terminated for dishonesty, including one dismissal that was upheld by the Board. Grievance of Richardson, 35 VLRB 135 (2019).

Grievant offers various mitigating circumstances to diminish his culpability. He indicates that he takes medication for depression with anxiety and they affect his concentration, memory and judgment. We are not persuaded that this caused Grievant's repeated time reporting deficiencies and failure to take responsibility for his actions. Grievant also relies on his contentious relationship with GC and the medical issues of his wife as mitigating circumstances.

The Employer considered these matters but reasonably concluded that they did not affect the misrepresentation of time worked engaged in by Grievant.

Grievant further relies on the effect on him of his brother dying in late February 2017 when he was struck by a vehicle and his father dying the previous fall as mitigating circumstances. However, Deputy Commissioner Fox, who took the action to dismiss Grievant, was not aware of these matters when he decided to dismiss Grievant. Since our duty is to police the exercise of discretion by the employer to ensure the employer considered the relevant factors in each particular case and took action within tolerable limits of reasonableness, the relevant focus is on management's actions and knowledge at the time the dismissal decision was made. Appeal of Danforth, 23 VLRB 288, 295 (2000); *Affirmed*, 174 Vt. 231, 243-45 (2002). Accordingly, it is not appropriate to consider as mitigating circumstances matters of which management was unaware when the decision was made to dismiss Grievant.

We next consider the factor of potential for rehabilitation. Grievant's dishonesty and failure to take responsibility for his actions reasonably resulted in the Employer viewing his potential for rehabilitation as weak. He failed to acknowledge the seriousness of his behavior or the value of integrity. These failings understandably led the Employer to view his continuing employment as unpromising.

We conclude in consideration of all these factors that the Employer acted reasonably in concluding that alternative sanctions less than dismissal would not be effective. The Employer reasonably determined that Grievant's offenses constituted gross misconduct, and substantial shortcomings detrimental to the Employer's interests, and that just cause existed for his dismissal.

ORDER

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

1. This grievance is sustained to the extent that the State of Vermont violated Article 14, Section 1(a) of the Contract by failing to promptly impose discipline on Grievant within a reasonable time of the offense, and the State shall cease and desist from failing to impose discipline on employees within a reasonable time of the offense;
2. This grievance is further sustained to the extent that the Employer shall provide Grievant with back pay and benefits from the stated date of his dismissal of March 3, 2017, through March 12, 2017, including interest at the legal rate of interest of 12 percent; and
3. This grievance is dismissed in all other respects.

Dated this 10th day of April, 2020, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Robert Greemore

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Robert Greemore, Acting Chairperson

/s/ Karen F. Saudek

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Karen F. Saudek

/s/ Roger P. Donegan

_____

Roger P. Donegan