

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 21-14
GARY STEVENS)	

FINDINGS OF FACT, OPINION, AND ORDER

Gary Stevens, (“Mr. Stevens” “Grievant”), a Probation and Parole Officer II, employed with the Department of Corrections, grieves the decision of his employer, State of Vermont Department of Corrections (“State” “DOC” “Employer”) to terminate him for gross misconduct. Grievant alleges the Employer violated Article 14 of the collective bargaining agreement between the State and VSEA for the Corrections Bargaining Unit by terminating him without just cause, 2) improperly bypassing progressive discipline and progressive corrective action in terminating him, and 3) failing to apply discipline with a view toward uniformity and consistency in terminating him from the Department of Corrections. Grievant also claims the investigation was inadequate and the termination decision untimely.

The Vermont Labor Relations Board held hearings on the grievance on March 10, March 31, and April 14, 2022, before Board members, Robert Greemore, Acting Chairperson, Alan Willard, and Roger Donegan. Grievant appeared and was represented by Pietro Lynn, Esq. The State was represented by Assistant Attorneys General Laura Rowntree, and Alex Kraybill. The hearings were held on the Microsoft Teams Platform. The parties filed post-hearing briefs on May 9, 2022.

FINDINGS OF FACT

Background

1. Grievant Gary Stevens (“Grievant” “Mr. Stevens”) was employed by the State of Vermont from August 1996, until his termination on April 17, 2021. He worked as a Probation and Parole Officer (“P & P” or “PO”) at the Brattleboro Probation and Parole Office, part of the Vermont Department of Corrections (“DOC” “Department”).
2. Grievant graduated from Westfield State College with a bachelor’s degree in psychology and criminal justice. After college, he worked as a case manager for Orange County Mental Health, now known as the Clara Martin Center. He then worked for a few years in Boston as a social worker at the New England Medical Center.
3. The job duties and responsibilities of a PO include the supervision and monitoring of individuals under the supervision of the DOC. The amount of supervision Probation and Parole provides varies depending on the status of the individual. Supervision ranges from the strictest, which is incarceration, followed by furlough, then parole, and finally probation. Duties of the PO also include preparation of presentence reports, meeting individuals and their community contacts, and preparing intakes and transfers. As part of their work, POs frequently have contact with crime victims.
4. Grievant was most recently supervised by case manager supervisor, Beth McLean. Ms. McLean was promoted to that position in 2019. Grievant had also applied for the case manager supervisor position. Beth McLean reported to District Manager Lesa Trowt.
5. On June 20, 2017, the State of Vermont Department of Corrections issued an Interim Memo on Dispatch Services (“Interim Memo”). The Interim Memo provides, “[t]he

DOC provides dispatch services to staff performing out of office contacts with offenders in the field.” SOV 9.

6. The Interim Memo and dispatch procedures are intended for use when transporting, encountering, or meeting with offenders. It does not establish requirements for contacts with persons other than offenders.
7. Grievant’s Supervisor McLean and District Manager Trowt directed the Brattleboro Probation and Parole employees to adhere to the Interim Memo when leaving the office to conduct any kind of field work for Probation and Parole. Under this directive, staff must be accompanied by another staff member, use a state vehicle, and contact dispatch services when going out in the field.
8. Grievant received performance evaluations throughout his twenty-four years of service. He received the highest rating, Outstanding, once in his career. For all other evaluations he received an Excellent rating, by three different supervisors.
9. Grievant’s 2019 Performance Evaluation, for the period 2/26/18-2/26/19, was prepared by his previous supervisor Phillip Damone, and District Manager Trowt reviewed the evaluation. In the Major Job Duties/Performance Expectations section, his supervisor added “[a]lways contact dispatch services when conducting field work” to the job standards or expectations for the first enumerated job duty. SOV Exhibit 30. His supervisor highlighted the following expectation in the narrative of this section. “You go in the field as necessary and appropriate for your caseload. Utilization of dispatch services is an added expectation and is required in all instances of field contact.” SOV 30. Grievant signed the 2019 Performance Evaluation on March 25, 2019.

10. In August 2019, Grievant received feedback from his supervisor Beth McLean, and District Manager Trowt. The meeting was prompted by the Grievant leaving the office to drop off paperwork to an offender, and using his own vehicle, and unaccompanied by fellow staff. Grievant was notified of the following at the meeting:

It was reiterated AGAIN that he is NOT to leave the office on any sort of work business without being in a state vehicle, having called dispatch, and with another state employee with him. We reiterated that this isn't just for his safety but also for his protection against allegations etc if he's doing work in the field alone. Reminded him we are also not allowed to go to offenders' places of employment and he said that he didn't go inside and she met him outside on a break – told him that this is not permitted and it cannot happen again. He said that he understood.

SOV Exhibit 21.

11. In his March 17, 2020, Performance Evaluation, for the period “2/16/19-2/26/12” [sic] Grievant received an Excellent Evaluation. His supervisor at the time was Beth McLean, and the evaluation was reviewed by District Manager Trowt. In the Major Job Duties/Performance Expectations, “[a]lways contact dispatch services when conducting field contacts” was added to the third expectation.

3) Provide for occasional CCO/PO contact in the field only as needed to complete investigations or respond to violations. **Always contact dispatch services when conducting field contacts.**

SOV Exhibit 31(emphasis in original).

12. The additional narrative comments under this section of the Performance Evaluation provides the following:

Gary, you have had quite the year of transitions—moving to a high-risk caseload with a whole different set of standards and obligations. While it presented some challenges, you have been able to keep up with the contact standards and adjust to all the differences of the caseload. You have been preparing graduated sanctions when appropriate and using the grid to decide

what sanctions are appropriate. You have been putting in the incidents and paperwork and reporting on the documentation which is an important aspect of what we do. Good job on this. **You had some struggles remaining compliant with the dispatch services and using dispatch services for all field work. Following our conversation in August, I believe you have brought this back into compliance which as we discussed is important for your safety and compliance and well being as well.** You have done many of the updates I sent out for ORAS scores that were due etc. You worked hard to bring your caseload into audit compliance – very good job on this.

SOV Exhibit 41 (emphasis added).

13. Grievant was on notice of his supervisor’s directive regarding the dispatch requirements when going out in the field in any capacity for his work as a PO.
14. While working with Brattleboro Probation and Parole, Mr. Grievant supervised an individual referred to in this matter as “Offender.” Grievant initially supervised Offender from January 18, 2019, through July 5, 2019. Grievant supervised the Offender again from August 28, 2019, through March 5, 2020.
15. In January 2020, Grievant became aware that Offender was in a relationship with a woman referred to in these proceedings as “Complainant.”¹ In February 2020, the Brattleboro police investigated a noise complaint involving the Complainant and Offender. After being alerted to the police activity involving the Offender and Complainant, Grievant researched the Complainant and discovered she had a history of substance abuse and mental illness. She was also the victim of a domestic assault by another individual.

¹ The parties stipulated to, and the Board issued, a Protective Order to protect the identity of the Complainant and the Offender. The hearing exhibits redacted their names and replaced them with Offender and or Complainant as appropriate. The State refers to the partner of the Offender as “Victim.” The Grievant refers to this person as “Complainant.” The State’s witness, District Supervisor Lesa Trowt, however, refers to this person as “Alleged Victim.” The Board uses the term “Complainant” in its decision to refer to the companion/partner of the Offender.

16. Both the State and Grievant have represented that the Offender, although born a man, identifies as a woman. Because of this stated preference, the Board will use the feminine pronouns, “she,” “her,” and “hers,” when referring to the Offender.
17. Grievant started and maintained a file he labeled, “Victim Contact Notes” in which he reported information about or interactions with the Complainant. The Victim Contact Notes were stored on Grievant’s shared file on his Brattleboro Probation and Parole computer. This file could be accessed by any Brattleboro Probation and Parole employee.
18. Out of concern for the safety of the Complainant, Grievant invited the Offender and the Complainant to meet with him to discuss the noise complaints. On February 25, 2020, Grievant met with the Offender and the Complainant at the Brattleboro Probation and Parole Office. At this time the Offender was on furlough status. During that meeting, the Offender provided verbal permission or authorization for the disclosure of confidential information to Complainant. Grievant reported in his Victim Contact Notes that he obtained verbal permission because “he was having difficulties opening the new ROI [release of information form].” SOV 16.
19. According to Grievant’s supervisor Beth McLean, there is no policy against obtaining a verbal authorization or permission to disclose confidential information. Ms. McLean has never disciplined an employee for relying on verbal permission to disclose confidential information.
20. On February 28, 2020, Offender was arrested for domestic assault of Complainant and assault of another individual. As a result of the arrest, the Offender’s furlough status was

revoked, and she was placed in custody. New charges as a result of the domestic assault on the Complainant were also pending.

21. After the Offender's arrest, the Offender waived her furlough violation hearing and was incarcerated. The Offender was reassigned to a reentry Probation Officer, Brian Boylan on March 5, 2020. Offender was also assigned to a caseworker within the correctional facility for the purpose of co-case management.
22. District Manager Trowt could not remember whether she told Grievant that the Offender was reassigned to another PO. It is her practice, however, to notify a PO when the offender they supervised had been reassigned to another PO and they were no longer responsible for supervising the Offender.
23. The Offender Management System ("OMS") is a DOC system that records and manages information relative to offenders in the DOC. Grievant accessed the OMS for the Offender twice on March 5, 2022, once on March 13, 16, and 19, twice on March 20, and once on March 23, and March 25, 2020. SOV Exhibit 37
24. The OMS system lists the names of the offender's assigned Probation and Parole Officers on the front page. Having accessed the OMS system nine times from March 5- March 25, 2022, Grievant would have noticed that he was no longer assigned to supervise the Offender.
25. The Case Management Manual imposes minimum standards for contacting the partner of a domestic offender. Under the manual the PO should contact the partner at least once a month. The manual does not impose a limit or maximum number of contacts that a PO can have with a partner of a domestic offender.

26. Grievant maintained contact with the Complainant because he wanted to provide her with support to ensure that she did not recant her statement about the abuse she suffered from the Offender. Grievant was very concerned about Complainant's mental health. Grievant was aware of another victim of the Offender that had died recently from an overdose, and he was concerned about the vulnerability of the Complainant.
27. Grievant and Complainant engaged in phone text communications from February 25, 2020, until April 1, 2020. Grievant participated in the text exchange, did not discourage the communications, or set limits on the scope of topics in the text communications.
28. Grievant summarized the text messages as consisting of eighteen (18) conversations or events comprised of strings of topics. Approximately 647 text messages were exchanged between the Complainant and Grievant. Grievant initiated the first text on February 25, 2020, prior to the arrest of Offender arising out of the assault on Complainant. Grievant initiated text communications with Complainant two more times. The rest of the fifteen text communications were initiated by the Complainant. Grievant's Exhibit 13.
29. The Grievant does not dispute the content or accuracy of the text messages contained in State Exhibit 20.
30. On March 5, 2020, Grievant received a call from the Complainant asking him to meet her to discuss the events leading to the assault. The Complainant was tearful and the two then exchanged texts about meeting at Walmart or the Complainant's apartment.
31. On March 12, 2022, at the request of the Complainant, Grievant met the Complainant outside her apartment on Main Street in Brattleboro. Once outside the apartment building, the Complainant invited Grievant into her apartment. SOV Exhibit 16.

32. Grievant went with Complainant into her apartment. While in her apartment, the Complainant discussed the pattern of abuse she had begun to experience from Offender. Grievant advised the Complainant that she should use this time apart from the Offender to develop positive supports for herself and advised that the Victims' advocates had many positive resources for her. While at the apartment, he observed underwear scattered around the Complainant's apartment. The Complainant apologized for the underwear. Grievant responded that she would not have the problem of underwear being scattered about if she went commando.
33. The Complainant walked Grievant out of the apartment and the two went outside onto Main Street to have a cigarette. At some point, the Complainant gave Grievant a hug. Grievant was surprised by the hug and patted the Complainant on the back a few times in response. Grievant denied ever rubbing his body or penis against Grievant's back or backside.
34. After the meeting, the Complainant followed-up with a text apologizing for the condition of her apartment stating, "Omfg there was a vibrator on the trunk too." She then sent another text, "I gotta be more careful of free ballin men coming over lol thanks for the visit and the support you rock." SOV Exhibit 20.
35. The two continued the text exchange about the meeting and the contents of her apartment:
- Grievant: I saw it, I was chalking it up to a muscle massager lol.
- Grievant: And freeballin sounds like an awesome song name!
- Complainant: Well Jesus that[']s embarrassing. I[']m dying without her. It was so out of character for you to say you were commando I had to do a double take lol so funny. I am so grateful for your efforts in helping her. Her and I have something really special. I will wager everything to see her better and not just

cooped up month after month wondering where the help actually is for her. The doc is flawed in so many ways. It is not geared to her needs whatsoever. And it is really nice to be hugged thank you for that.

Grievant: I always like to end with something outlandish! I agree with you and we[']re going to come up with a good course of action to take. You[']re an amazing person to talk to, I honestly couldn[']t get enough . . . and when you have a revelation, that[']s the best? You[']ve been going through a rough patch and definitely needed some comforting. I[']ll be around whenever you want to talk! :)

Complainant: Thank you. What do you think that course of action will look like?

Grievant: Basically what we talked about starting with a psych evaluation

Complainant: [Offender] is an amazing person- she[']s made me a better person and I know that the angry man who hurt me isn[']t the woman I[']ve been with. It just wasn[']t her.

Complainant: Excellent. And to make sure her accommodations are met-she needs to shower privately because she could technically sue for that and you know that.

Complainant: Can you take care of that for me, please?

Complainant: How soon can we get an evaluation

Grievant: Slow your roll a sec

Complainant: Haha

Complainant: Thank you. Jesus you already know me so well

Complainant: I[']m infuriated about the shower and I forgot to talk to you about that

Grievant: I[']ll look into how facilities manage transgender and I[']ll contact her lawyer about the evaluation.

SOV Exhibit 20; Grievant's Exhibit 13.

36. On March 19, 2020, Grievant initiated another meeting with the Complainant. He texted her, "Im packed up and ready to head out. You want to meet up in a few minutes outside

for a cigarette?” Grievant’s Exhibit 13, Ex. 4. At 6:30 p.m. on March 19, 2020, Grievant met the Complainant on Main Street. SOV Exhibit 6.

37. When traveling to meet Complainant on March 12, and 19, 2020, Grievant used his own car, did not bring a partner, and did not call dispatch.

38. Grievant did not notify or request approval of his supervisor, Beth McLean, or District Manager Trowt prior to or when meeting Complainant.

39. During the second meeting, Grievant notified Complainant “about the offender’s recent disciplinary report where the offender assaulted another inmate. [Complainant] had not heard about this assault and her demeanor changed from being worried to being upset with the offender. Grievant told her how the offender was the aggressor, and how that should put her mind at ease.” SOV 16, at 92

40. The Complainant continued to reach out to the Grievant with questions about the Offender’s case, her treatment and quest for treatment, and the conditions at the correctional facility. The text communications also included personal and intimate details about Complainant. The text exchanges became very familiar, personal, and intimate.

41. Complainant often sent a number of texts to Grievant about several issues before Grievant responded. Grievant sent a text about the ups and downs of the Offender and that prompted nine angry texts from Complainant. Mid-way through her texts, Complainant sent Grievant the following:

Leave her alone if you[']re going to make things harder or worse. I know you out here and you may be a pervert but you[']r e human. And I[']m not a chump – I know who offender actually is – with me she could be herself and not have to defend herself or her self work [sic]. She needs wrap around mental health anger management and hormone therapy both physical and mental.

SOV Exhibit 20.

42. Complainant sent two more messages. Grievant responded with the following:

Grievant: I[']m not saying she[s] a sociopath, not after speaking with you and learning about her not taking the hormone medications. And she was doing well with you, that[']s when it seemed like she was making a change. I[']m just concerned about what she[']s been hiding. As I said, she looked like she was doing well with you but then we find out what was going on. True, that was the same time when she stopped the hormone medications so that would have been a culprit. I agree that she needs wrap around services, we just need to find one that would work best for her.

Grievant: And I[']m not a pervert. I joke around at times to pick up spirits, but certainly not a pervert :(

Complainant: I have no doubt in my mind that offender is disturbed. But it[']s correctable

Complainant: And I also played when I said pervert. Sorry. You were just super close up to my backside when I felt your . . . thing . . . on it because you moved up to it remember? Then said you were commando and that was probably why? Yah that lol. Help her. Please. You[']re her only hope.

Grievant: I don[']t believe she[']s disturbed, that doesn[']t sound good at all. I think she just needs to stay on a path with her medications and not make any changes with a doctor knowing and get into counseling to get to the root of the issues

Grievant: Omg, I[']m so totally sorry about that! I made the commando joke when you picked up your panties off the table, it was meant to be going commando as a means of not having to worry about laundry popping up unexpectedly. I[']m soooo sorry, I feel awful about that now.

Grievant: And my goal has been to always help her and will remain the same

SOV Exhibit 20, pages 141-43.

43. Grievant exchanged personal and intimate information with Complainant that strayed beyond issues dealing with the Offender, the case against her, or victim support. In these

exchanges, Grievant offered to help Complainant find a cleaning job, improve her apartment, find her a couch, and use Grievant's Netflix account. They discussed his love-handles, her menstrual cycle, upholstery, and how tight her clothing was. SOV 20, pages 236-37, 245-50, 276. He also offered to shop for her and pick up items for her at stores. Id. at 236, 251. The quantity and quality of text messages establishes that Grievant engaged in a relationship with Complainant that went beyond the professional.

44. The Complainant asked Grievant to delete the text messages exchanged between them.

The text messages indicate that he acquiesced to this request.

Complainant: Delete this all too plz.

Grievant: You got it, and again, what we talk about stays between us – I[']m not recording or doing anything like that so no need to worry.

. . . .

Grievant: I delete our text messages so I don[']t have the exact date, but I think you[']re right and it was the day she was arrested.

SOV Ex. 20 (text messages) at 194-195, and 296.

45. Grievant's text conversations with Complainant made Grievant suspect that she was having contact with the Offender in prison. At the time, there was a No Contact Order prohibiting the Offender from contacting the Complainant.

46. Grievant was concerned that if the Complainant were talking with the Offender, the Offender could manipulate Complainant or cause her to recant her statements or complaint against the Offender.

47. While exchanging text messages with Grievant, the Complainant was in frequent contact with the Offender through the Department of Corrections telephone calling system for inmates.

48. The Offender circumvented the No Contact Order by providing an alternative name or identity to correspond to the phone number used to contact Complainant.
49. The Complainant was aware of this subterfuge and alerted the Offender that Grievant was investigating the phone numbers provided by Offender.
50. During her calls with the Offender, the Complainant reassured the Offender that she was working to get the Offender out of prison. She indicated that she was “working out here” and that “I’m going to fix this.” Grievant Exhibit 29.
51. During the telephone conversations with the Offender, the Complainant relayed her contacts with Grievant and indicated “I could have his job in two seconds so trust me.” She shared that Grievant was inappropriate and “trust me, I’ll have a one-on-one conversation with him and record it; and I’ve got this, okay? I’ve got this.” . . . “I knew this was a chance, but I’m a very fucking clever girl and I’ve got this. That’s all you have to worry about. Okay?” Grievant Exhibit 29.
52. The Complainant read to the Offender some of the text exchanges with Grievant, including the text exchange about the commando reference, and the Complainant’s text alleging Grievant was “super close to my backside.” After reading the exchanges, Complainant told the Offender, “[b]aby, I got you; don’t you worry, okay? He’s not going to check into your phone shit, because if he does, he’s fucked. I’ll have his job in 2 seconds, okay? Love you. . . . When I said I’m doing work out here, I’m doing work.” Grievant Exhibit 29.

The investigation

53. On March 24, 2020, the Offender made a complaint to DOC authorities that the Grievant “was having an inappropriate relationship with” the Complainant. SOV Exhibit 36.

54. On April 7, 2020, the Complainant phoned District Manager Lesa Trowt and left a message on the phone mail system describing Grievant's alleged inappropriate conduct including sexual misconduct.
55. On April 7, 2020, District Manager Trowt spoke with Complainant on the telephone. Ms. Trowt did not question or interview the Complainant and stopped her from adding details about the encounter. She informed the Complainant that she would pass the information along to the investigator who would be contacting the Complainant. Ms. Trowt encouraged the Complainant to contact the police.
56. On April 7, 2020, District Manager Trowt emailed Investigator Morris to report the complaint. She also reported that the correctional institution had ended all phone communications between the Complainant and the Offender. District Manager Trowt informed Investigator Morris that the Complainant called her after the telephone communications between the Offender and Complainant were discovered and terminated. Ms. Trowt queried "[t]his could have been the push to come forward." SOV 36.
57. On April 9, 2020, Complainant called the Brattleboro Police Department. The Brattleboro Police Department attempted to contact Complainant to set up an interview. Complainant did not make herself available to the Brattleboro Police Department. The Brattleboro Police Department suspended the investigation because the Complainant was not willing to make herself available for an interview.
58. On April 17, 2020, Grievant was provided with a letter notifying him that the "Department of Human Resources Investigations Unit has been assigned to investigate allegations that you engaged in misconduct including, but not limited to DOC work rule violations, 1, 6, 9, 13, and state policy 5.6 in violation of State Personnel Policies." SOV

Exhibit 12. The letter alerted Grievant to his obligation to be truthful and forthcoming during the investigation as outlined in Personnel Policy 17.0.

59. On April 17, 2020, District Manager Trowt took possession of Grievant's state issued iPhone and provided it to Investigator Morris.

60. Investigator Morris reviewed Grievant's phone looking for text or phone messages from the Complainant. There were just a couple of text message exchanges on Grievant's phone and none of them were of a sexual nature.

61. Investigator Morris made several attempts to contact the Complainant so that he could interview her for the investigation. Although agreeing to be interviewed, the Complainant repeatedly failed to appear for the scheduled interview. The Complainant was never interviewed as part of the investigation.

62. The State did not interview any other witnesses to ascertain the truth or veracity of the Complainant's statements, or corroborate the statement made by the Complainant.

63. On May 28, 2020, Investigator Morris conducted an interview with the Grievant. Grievant was asked whether he knew why he was being investigated. In response, Grievant replied, "I don't know, no." SOV Exhibit 13, at page 9, lines 22-24.

64. The Investigator did not identify the reason or cause for the investigation. Instead, he immediately initiated the following exchange:

Investigator: Okay. Were your interactions with [Complainant] always professional?

Grievant: I would say they were always professional, yes.

SOV 13, page 9, line 25- page 10, lines 1-2.

65. The Investigator asked Grievant if he had engaged in text messaging with the Complainant, to which Grievant responded yes. The Investigator asked when the messages started, Grievant recalled sometime in February 2020.
66. The Investigator asked if Grievant had deleted any text messages, and Grievant explained how he deleted the messages as follows:

I've been maintaining a victim - - we are not supposed to put any victim contact notes into the OMS database, the Corrections database. So I've been maintaining victim contact notes with [Complainant] since the incident and I was typing in - - I would type in verbatim the text messages and I tried to - - I tried to simplify the process, but not successfully, where I tried to select all messages on a Samsung - - I'm used to using androids. In the top left corner is when you pull down the text messages, a button pops up that you can press, "select all" and all messaged will be highlighted. Apple, which I'm not a fan of Apple, when you do the same thing, press on all of the messaged and then hit the button on the top left-hand corner, that's a delete all button. That doesn't give you - - delete all messages. It's the - - so I was trying to cut and past the text messages into the document that I have.

SOV Exhibit 13, page 10, line 17-page 11, line 7.

67. Grievant disclosed to Investigator Morris that he met the Complainant outside her apartment on Main Street in Brattleboro and that she invited him to talk inside her apartment to show him where the assault took place.
68. Grievant disclosed that after the visit, Complainant texted apologizing about the condition of the apartment and having underwear scattered throughout the apartment. She also apologized that a vibrator was visible in the room in which they were talking. In response to the text, Grievant said he tried to make light of it and tried to downplay it and indicated he thought it was a muscle massager and she should not worry about the condition of the apartment.

69. When asked whether it was his role to meet with the victim of an offender, Grievant indicated that is something that Probation and Parole officers do.
70. When asked why the Complainant would report that Grievant touched her, Grievant disclosed that the Complainant “had given me a hug thanking me for listening and support and helping, trying to help. That was - - that would’ve been the contact, so there was contact. That would’ve been the contact.” SOV Exhibit
71. Grievant described what he could recall about the hug, indicating that he would have touched her on the back in response to the hug, at the top of her back or shoulder-blades, because the Complainant was shorter than Grievant.
72. Investigator Morris asked about the content of the text messages, and whether the text messages that had been deleted were inappropriate.

Investigator: Okay And so you had talked about some text messages that got deleted that were exchanged between both you and [Complainant]. And what you are telling me is that the messages on your phone that you deleted were not inappropriate in any way. There was no sexualized conversation between you and Complainant.

Grievant: No, there wasn’t. There was - - she made a comment about - - let’s see, she made a comment about being a what was it, a pervy PO and I said to her, I said it well, I apologize. I thought she was referring to the comment about the commando. I said I’m sorry about that, I was just trying to, you know, with what we were talking about, I was trying to alleviate the tension, or just you know, lighten the mood a little bit, you know, so kind of end on a little bit you know happier type of note. I believe it was in that same nexus when she said that, you know, well - - what did she say - - I believe she said something to the extent of - - what was it, she said? She said no, I was just joking around. It was when - it might’ve been when, something to the extent of when I hugged you and you mentioned that you go commando the that I felt you—I felt your thing press up against me, and that was - that, I didn’t know what she was referring to, you know, the only contact was a hug that was outside and it’s not - - so the commando part was about her (indiscernible) underwear it was just a joke trying to end things on a, you know, more humorous note, so - -

Investigator: Was that professional to say though I know what you’re telling me your intent is, but -

Grievant: Looking back on that, you know, I mean, I certainly would have rather ended on a different type of comment or attempt at humor, you know, than that, and it certainly wasn't intended to be sexualized. It was just with the number of times, and that was the third time that she pointed out, you know, I'm sorry about the underwear scattered all over the apartment. I mean, that where that came from. Which would've been --

SOV Exhibit 13, page 18, line 11- page 19, line 20.

73. Grievant disclosed he made a reference to "going commando" in the apartment, he also mentioned that in retrospect he would have ended the conversation on a different note.

He also denied ever rubbing his penis against Complainant's body.

74. Grievant was candid and forthcoming about the lurid or vulgar language used in the text messages.

75. On June 16, 2020, Investigator Morris issued his Investigative Report. SOV Exhibit 14.

DOC decided to continue the investigation and District Manager Trowt would contact the Complainant to retrieve the text messages between the Complainant and Grievant. A second meeting with the Grievant was also requested to discuss Complainant's allegation and Grievant's honesty during the first interview.

76. On July 2, 2020, District Manager Trowt received the text messages from Complainant, and she forwarded them to Investigator Morris.

77. On July 30, 2020, Investigator Morris conducted a second interview with Grievant.

During that interview, he again asked how Grievant accidentally deleted from his phone his texts with the Complainant.

78. Grievant gave a response consistent with his statements during the first interview, explaining that he was trying to cut and paste the messages from his phone. "It's not - - I always use Samsung. I don't like Apple products. And with Apple, what happened is that

where you would hit on a Samsung - - Samsung and Apple are almost backwards – where you would hit ‘select all’ on the Apple was a ‘delete all.’ And by the time I hit the button, they were gone, it deleted them.” SOV Exhibit 18.

79. Grievant shared he had a State issued iPhone for three or four years. SOV Exhibit 18, page 6.

80. Investigator Morris attempted to follow the steps described by Grievant on an iPhone and discovered that to delete a group of messages, the user needed to take two steps, with the final step or prompt asking the user “Delete Conversation.”

81. The Board finds the testimony of Investigator Morris to be more credible than that of the Grievant on this point. The Board finds that the deletion of the text messages by Grievant was not inadvertent or unintended.

82. When asked how often he communicated with Complainant, Grievant estimated that he “can’t recall off the top of my head, but at least five times a week.” SOV Exhibit 18, page 4, lines 3-11.

83. Grievant explained that his responses to Complainant’s more salacious messages were an attempt to ignore, downplay, or make a joke of them. When asked why he did not deny the text message “I felt your thing on my backside,” Grievant said he did not understand what the Complainant was talking about. He thought the comment was in reference to the commando reference and he was apologizing for that comment. He also vehemently denied to the Investigator that he touched her body with his penis. He also reiterated that there was no physical contact in the apartment, and the only contact was a hug on the street where he touched part of her upper back, not her backside.

84. Grievant stated he believed he was required to contact Dispatch Services for offender contacts only, and the requirement for traveling in pairs applied only to field visits with possible offender contact.
85. Grievant admitted he shared with Complainant information from Offender's Disciplinary Record in the prison.
86. On August 4, 2020, Investigator Morse prepared a second Investigative Report and submitted it to Interim DOC Commissioner James Baker.
87. On August 18, 2020, Grievant was notified that he was temporarily relieved from duty for a period of up to thirty work days to allow the State to complete its investigation. SOV 22.
88. On October 14, 2020, the Department of Corrections issued Grievant a Loudermill letter notifying him that "DOC is contemplating imposing serious disciplinary action, up to and including dismissal" SOV Exhibit 23. The letter identified the following relevant provisions of DOC Work Rules, Directives and Orders, Vermont Personnel Policies, and the Corrections Unit Collective Bargaining Agreement Sections:
- CBA Article 14: Disciplinary Action
 - State Personnel Policy 5.6: Employee Misconduct
 - State Personnel Policy 8.0: Disciplinary Action and Corrective Action
 - State Personnel Policy 9.1: Immediate Dismissal
 - State Personnel Policy 17.0: Employment Related Investigations
 - DOC Work Rules 1, 4, 5, 6 and 9
 - DOC Interim Memo: Dispatch Services, Effective June 6, 2017 (DOC Dispatch Rules)
 - DOC Directive 251.01 in connection with APA Rule 19-035, Offender/Inmate Records and Access to Information
- SOV Exhibit 23
89. The October 14, 2020, Loudermill letter alleged that Grievant committed "misconduct and/or gross misconduct" by engaging in the following 1) inappropriate conduct with the

Complainant and failure to maintain appropriate boundaries, 2) sexual misconduct, 3) misconduct during the investigative interview, 4) violation of DOC Dispatch Rules and Directives Issued to You, and 5) Disclosure of Confidential Information. SOV 23.

90. With respect to “Inappropriate Contact with Victim and Failure to Maintain Appropriate Boundaries,” the Loudermill letter provides in pertinent part:

You made at least two separate trips to the Victim’s house. You admitted that on those trips, you hugged the Victim, touched her lower back, commented on a sex toy observed in the house, and discussed her underwear. Over several weeks, you also exchanged 654 text messages with the victim. These text messages included offers to meet the Victim for coffee, meetups, discussion of a sex toy located in the Victim’s house, the Victim’s underwear, use of the phrase “free ballin men,” that you were commando while in the Victim’s house, and sexual innuendos. In those messages, the Victim describes you as a “pervert” and a “nasty PO” in response to a sexual inuendo you made. The messages also include a passage where the Victim asks you to delete all text message communications and you agree to do so and tell her that everything you talk about would stay between the two of you.

. . . .

By engaging in unprofessional misconduct both in person and over text communications, crossing clear professional boundaries, and engaging in behaviors toward the Victim that was harassing, demeaning, indecent, and vulgar, you have engaged in misconduct and/or gross misconduct in violation of State Personnel Policy 5.6, and DOC Work Rules 1, 6, and 9, and such actions constitute just cause for disciplinary action, up to and including immediate dismissal from your position with the DOC.

SOV Exhibit 23.

91. With respect to “Sexual Misconduct,” the Loudermill letter provides in pertinent part:

During one of your visits into the Victim’s home, you rubbed your penis against her. In text messages between you and the Victim, the Victim—in explaining why she had called you a pervert—stated that you were “super close up to [her] backside when [she] felt your . . . thing . . . on it because you moved up . . .” In response, you told the Victim that you were “totally sorry about that,” that you were making jokes about being commando when she picked her underwear up, and that you felt “awful about that now.”

....

By rubbing your penis against the Victim, you have engaged in misconduct and/or gross misconduct in violation of State Personnel Policy 5.6, and DOC Work Rules 1, 3, 6, and 9, and such actions constitute just cause for disciplinary action, up to and including immediate dismissal from your position with the DOC.

92. With respect to “Misconduct During Investigation Interview,” the Loudermill letter provides in pertinent part:

On May 20, 2020, you were interviewed by DHR Investigator Jim Morris. On July 30, 2020, Mr. Morris conducted a second interview with you. During both interviews you provided untruthful and/or incomplete information and failed to comply with your duties as a participant to an employee misconduct investigation.

Deletion of Text Messages

You were untruthful to DHR Investigator Morris concerning the deletion of text messages. During both interviews, you stated that you had accidentally deleted all text messages with the Victim from your work phone when trying to cut and paste the messages into your contact notes/victim case notes. Despite this claim, the evidence collected during the investigative interview demonstrates that you intentionally deleted the text messages. Although you deleted the messages, some of them were obtained from the Victim. In those text messages, the Victim clearly asks you to delete the text messages. In response you told her, “you got it.” Further, deletion of all messages from your work-issued iPhone is not as simple of a process as you claimed it to be. Rather, the iPhone requires that you go through multiple steps—including using a final delete prompt with red lettering—to delete the text messages. In fact, you would have been required to first select “delete all” and then again select “delete conversation” when prompted. You told the Victim that you would delete the messages, and you have been using the State-issued iPhone for 3 or 4 years.

Content of Text Messages

During your first interview, you stated that your interactions with the victim were always professional. However, the evidence collected during the investigation shows that statement was not entirely truthful. In the text messages obtained by DHR during its investigation, the evidence demonstrates multiple instances of unprofessional misconduct during your interactions with the Victim. The messages show conversations about

offers to meet the Victim for coffee, meetups, a sex toy possessed by the Victim, the Victim's underwear, use of the phrase "free ballin men," you being commando, and sexual innuendos. The messages also include a passage where the Victim asks you to delete all text message communications and you agree to do so and tell her that everything you talk about would stay between the two of you.

Sexual Misconduct

During your second interview, you were specifically asked by Investigator Morris about the allegation that you rubbed your penis against the backside of the Victim while in her home. You were dishonest with DHR Investigator Morris about this incident. You were untruthful when you denied that your body ever came into contact with the Victim's backside and maintained that the only physical contact you had with the victim was a hug. Notwithstanding this denial, the evidence collected during the State's investigation demonstrates that you did in fact make such contact with the Victim. Specifically, the Victim messaged you the following:

you were just super close up to my backside when I felt
your . . . thing . . . on it because you moved up to it
remember? Then said you were commando and that was
probably why?

In response, you stated that you were "so totally sorry about that" and that you felt "awful about that now."

....

SOV Exhibit 20.

93. With respect to "Violation of DOC Dispatch Rules and Directives to You," the

Loudermill letter provides in pertinent part:

During your second interview with DHR Investigator Morris, you admitted that when you visited the Victim's home on or about March 12, 2020, you took your personal car to her house, did not notify dispatch of where you were going, and did not go with a co-worker in violation of previous directives issued to you. Those directives were that you are not to leave the office on any sort of work business without being in a State vehicle, having called dispatch and with another employee with you. You also violated the DOC Dispatch Rules requiring you to notify the appropriate staff member of the identity of the other required staff member and your out-of-office field activity.

....

By visiting and entering the victim's residence—a person with whom you were purportedly offering services —without following proper dispatch procedures, you violated the DOC Dispatch Rules, directives issued to you, State Personnel Policy 5.6, and DOC Work Rule 1 and have engaged in misconduct and/or gross misconduct and such actions constitute just cause for disciplinary action, up to and including immediate dismissal from your position with the DOC.

SOV Exhibit 20.

94. With respect to “Disclosure of Confidential Information,” the Loudermill letter said in pertinent part:

- i. In the text messages obtained by the DOC during its investigation, the DOC identified at least one occasion in which you disclosed information about the inmate you supervise. That instance involved disclosing disciplinary information about the Offender to the Victim.
- ii. APA Rule 19-035, in connection with DOC Directive 251.01 and promulgated pursuant to 28 V.S.A. § 107(b), requires that you maintain the confidentiality of offender disciplinary information. The State Personnel Policies identify the expectations of State employees when it comes to the handling of confidential information. State Personnel Policy 5.6 prohibits employees from disclosing information which they receive or have access to by virtue of their official duties. By disclosing information obtained while supervising the inmate, you have violated State Personnel Policy 5.6 and DOC Directive 251.0/APA Rule 19-035, and have engaged in misconduct and/or gross misconduct and such actions constitute just cause for disciplinary action, up to and including immediate dismissal from your position with the DOC.

SOV Exhibit 20.

95. On November 25, 2020, Grievant requested and participated in a Loudermill meeting.

Grievant apologized and said he was embarrassed by and regretted his behavior. He felt he let down his colleagues and his family. He acknowledged that he did not follow his supervisor's directives about following dispatch rules when going out in the field. He became very upset when the Interim Commissioner asked how he should handle this.

Interim Commissioner suspended the meeting and referred Grievant to counseling services available for DOC staff.

96. Grievant did not request a continuation of the Loudermill meeting.

Appointing Authority Decision

97. On April 2, 2021, Interim Commissioner Baker wrote to Grievant notifying him of his dismissal from employment. The letter provides in part:

I am terminating your employment because I find that you committed misconduct as described in the October 14, 2020 letter, which is incorporated herein. Specifically, you engaged in inappropriate contact with a victim; failed to maintain appropriate boundaries; engaged in sexual misconduct with the victim; disclosed confidential information; took your personal car to her house without notifying dispatch of where you were going and without a co-worker, in violation of previous directives issued to you, and DOC Dispatch Rules requiring notification to an appropriate staff member of the identity of the other required staff member to the visit and the out-of-office field activity being engaged in; and engaged in misconduct during the investigatory interviews by providing untruthful and incomplete information to the investigator.

SOV Exhibit 27.

98. In deciding to terminate Grievant, Interim Commissioner Baker found that Grievant's conduct with the Complainant was totally inappropriate. Grievant had an obligation to set boundaries with the Complainant rather than allowing the bantering about sexualized or vulgar content. He considered the communication between the two to be sexualized and flirtatious and a violation of boundaries that were Grievant's responsibility to maintain. Mr. Baker did not find credible the Grievant's explanation about accidentally deleting the text messages in part because Grievant agreed to the Complainant's request to delete the messages. He found Grievant to be insubordinate in failing to adhere to the directive of his supervisor and District Manager Trowt.

99. Interim Commissioner Baker stated that Grievant “could not be trusted, based upon repeated behavior, to carry out the mission of the Department over whatever his personal interests or desires were.” He concluded that any employee that did not do what he was told and had serious boundary violations would not be able to stop that behavior in the future.

OPINION

Grievant alleges the Employer dismissed him without just cause, improperly bypassed progressive discipline and failed to discipline him with a view towards consistency and uniformity. Just cause for dismissal is some substantial shortcoming detrimental to the employer’s interests which the law and 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 carrying out our function to hear and make a 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.

As outlined in its Loudermill letter, the Employer has alleged Grievant engaged in the following misconduct which warrants just cause for termination: 1) inappropriate contact with the Complainant and failure to maintain appropriate boundaries; 2) sexual misconduct; 3) misconduct during investigative interview; 4) violation of the Dispatch rules and directives issued to him; and 5) disclosure of confidential information.

Regarding the first allegation in the Loudermill charge, the State has proven that Grievant engaged in unprofessional conduct with Complainant, that the text messages crossed clear professional boundaries and that the behavior towards her was demeaning, profane, and vulgar. The State has proven by a preponderance of the evidence that Grievant engaged in unprofessional conduct that could bring discredit or embarrassment to the State in violation of the Required Conduct in State Personnel Policy 5.6, ¶ 3. Grievant's comments to Complainant about "going commando" and his response to her "freeballin" comment were vulgar, profane, and reflect discredit upon DOC, in violation of DOC Work Rules 1, 6, and 9.

Grievant's supervision of the Offender ended on March 5, 2022. Complainant accessed the Offender Management System ("OMS") twice on March 5, 2022, and seven more times until March 25, 2020. With each access he would have seen the staff assigned to the Offender and that his name was no longer identified as the Offender's PO. The Management Manual is silent on whether Grievant's continued contact with Complainant was prohibited. The substance, frequency, and nature of the contact, however, blurred or overstepped the professional boundaries between Grievant and Complainant.

Review of the text messages demonstrates that Grievant engaged in in a relationship with Complainant that went beyond the professional. Grievant began texting Complainant on or around February 25, 2020, and it continued until April 1, 2020. The two exchanged 647 text

messages, with the Complainant initiating most of the text message conversations. In addition to the text exchanges, Grievant met the Complainant twice. The first meeting started outside Complainant's apartment on Main Street. Grievant then accepted Complainant's invitation into her apartment. Grievant and Complainant were alone in the apartment for sixty minutes. At the end of the meeting, Grievant responded to Complainant's comments about underwear lying around the apartment with what he considered a "joke" that if "you went commando, you wouldn't have to worry about underwear being all over the place." SOV Exhibit 13, page 69. The second meeting took place outside on Main Street in Brattleboro.

The in-person meetings and volume of text messages facilitated a blurring of the professional relationship that promoted flirtatious and at times vulgar or indecent exchanges. Grievant did not take steps to stop or redirect the sexual or flirtatious comments made by Complainant. His attempts at humor or to make light of the comments backfired and led to further inappropriate or vulgar comments. For example, his "commando" joke in response to Complainant highlighting and apologizing about the underwear strewn about the apartment, invited more comments by Complainant. "I gotta be more careful of free ballin men coming over lol thanks for the visit and support you rock[.]"

The decent into sexual topics continued when Complainant commented that a vibrator was visible. Grievant did not stop or redirect this exchange or reassert a professional tone for the communication. Instead, he joined in the banter and joked about the vibrator, "I saw it, I was chalking it up to a muscle massager lol[.]" He also added, "[a]nd free ballin sounds like an awesome song." Although he explained that he did not think the comment was sexual and he mentioned it only because the song "Freebird" had popped into his head, the comment exacerbated rather than minimized or ended the inappropriate communication. His comment "I

always like to end with something outlandish!” is a recognition, rather than an excuse, for the vulgar and indecent nature of the text exchange.

In addition to failing to stop the text exchanges imbued with sexual or flirtatious innuendo, Grievant also attempted to insert himself into the Complainant’s life. “You[’]re a fantastic person, truly wonderful on so many levels! Maybe we could talk more tomorrow.” After the March 12, 2020, meeting Grievant texted the Complainant, You[’]re an amazing person to talk to, I honestly couldn[’]t get enough . . . and when you have a revelation, that[’]s the best! You[’]ve been going through a rough patch and definitely needed some comforting. I’ll be around whenever you want to talk! :)” He also discussed personal details about Complainant that were not related to the Offender. The level of familiarity and intimacy between Grievant and Complainant obscured the boundaries of professionalism set up to protect them both.

The State also argues that Grievant’s familiar or inappropriate relationship falls within Paragraph 4, of the Prohibited Conduct enumerated in Personnel Policy 5.6, which provides in its entirety:

Employees shall not engage in any employment, activity, or enterprise which has been or may be determined by the appointing authority to be inconsistent, incompatible, or in conflict with their duties as a State employee or with the duties, functions or responsibilities of the agency by which they are employed. The mere appearance of impropriety may constitute a conflict of interest. Employees shall consult with their appointing authority prior to engaging in such employment, activity, or enterprise. Employees whose employment, activity or enterprise pre-dates this policy or their employment with the State shall promptly Consult with their appointing authority to resolve any issue of conflict of interest.

The rules of construction prohibit the Board from reading one sentence of this provision in isolation. See generally In re Grievance of VSEA on Behalf of “Phase Down” Employees, 139Vt. 63, 65 (1980). The Board must interpret and consider the sentence upon which the State relies together with the entire paragraph as part of a unified whole. See id. See also Brown v.

W.T. Martin Plumbing & Heating, Inc., 2013 VT 38, ¶ 20, 194 Vt. 12. The prohibition outlined in this paragraph relates to other employment, activities, or enterprises that are separate from an employees' position or job duties with the State and can create a conflict of interest with the employee's duties and role as an employee for the State.

The purpose of the conflict of interest paragraph is to avoid or prevent employees from having multiple jobs or endeavors that could conflict with the State or their roles and duties as employees for the State. That an employee can obtain a waiver or prior permission to engage in these other activities or enterprises supports this interpretation of the conflict of interest paragraph. This conflict of interest purpose is further explained in the last sentence which provides the process to resolve these conflicts. "Employees whose employment, activity or enterprise pre-dates this policy or their employment with the State shall promptly consult with their appointing authority to resolve any issue of conflict of interest." Id. Grievant was not engaged in a separate enterprise or employment when he texted the Complainant 647 times. The State did not terminate him because he was engaged in an outside enterprise, it terminated him because of his conduct while performing his duties as a PO. The misconduct relates to Grievant's actions while working for and during the course of his employment for the State, not a separate endeavor or enterprise for which he could request approval.

Regarding the second allegation in the Loudermill letter, the State has failed to prove that Grievant engaged in the physical sexual misconduct behavior alleged by the State. The only people who know whether the facts alleged by the State occurred are the Complainant and the Grievant. The Grievant testified at the hearing that he did not rub his body generally, or his penis specifically, against the Complainant, her back, or any part of her body. Grievant testified under oath that while inside the Complainant's apartment he was never behind or physically near

the Complainant. Grievant testified that after the meeting in the apartment, he walked out of the apartment with the Complainant, and the two each had a cigarette. At some point, the Complainant hugged Grievant. Grievant testified he was taken aback and concerned he would burn the Complainant with his cigarette. He recalled tapping her upper back in response. Complainant then released her embrace, and the hug was over.

The State relies on the taped message of the Complainant and the text messages of the Complainant to prove its claim of sexual misconduct. After making the allegation, the Complainant did not cooperate with the State investigator or make herself available for an interview. She also did not cooperate with the Brattleboro Police. The State did not produce the Complainant. The Board was without the ability to assess the credibility, motive, and veracity of her claims. Absent this testimony, the only testimony offered about the interactions and communications between the Complainant and the Grievant, was Grievant. The text messages provided by the Complainant do not establish that Grievant engaged in inappropriate physical contact with the Complainant. The State has failed to prove by a preponderance of the evidence the physical sexual misconduct claim against Grievant.

Next, the State alleges Grievant engaged in misconduct during the investigation when he provided untruthful or incomplete information and failed to comply with his duties as a participant in an employee misconduct investigation, in violation of Personnel Policy 17.0, and DOC Work Rules, 1, 4, and 5. Specifically, the State maintains Grievant provided untruthful information when he said he accidentally deleted his text messages, that his interactions with the Complainant were always professional, and when he denied that his body ever came into contact with the Complainant's backside and maintained that the only physical contact he had with her was a hug.

The State has proven by a preponderance of the evidence that Grievant was untruthful when he told investigators he inadvertently or accidentally deleted his text messages with the Complainant. In the text message exchange with Complainant, Grievant told Complainant that he would delete their text messages. Grievant does not dispute the content of the text messages. Although Grievant does not prefer Apple products, he has used a state iPhone for three or four years in his role as Probation and Parole officer. Investigator Morris explained the process for deleting text messages and demonstrated that it involves a two-step process, with a clear prompt asking the user if they want to delete the messages. The State has demonstrated by a preponderance of the evidence that Grievant's explanation for how he inadvertently or accidentally deleted the text messages is not truthful.

Turning to the next allegation, the State has not proven by a preponderance of the evidence that Grievant was untruthful when he said his interactions with the Complainant were professional. During the May 28, 2020, interview, Grievant was asked the following:

Investigator: Okay. Were your interactions with [Complainant] always professional?

Grievant: I would say they were always professional, yes.

SOV 13, page 9.

The question itself invites a subjective response. The burden is on the State to prove that he was not truthful. Grievant believed the interactions were professional. Grievant disclosed that he tried to boost Complainant's self-esteem and inserted humor or lightness to alleviate some of the heavier topics covered during their communications. The untruthful allegation is separate and distinct from the allegation that he engaged in unprofessional conduct. The State has alleged two separate allegations of misconduct, that Grievant was unprofessional in his dealings with

Complainant, and that Grievant lied or was untruthful when categorizing or evaluating his interactions with Complainant. A finding or conclusion that Grievant was unprofessional does not on its own sustain the State's burden of proving that Grievant was not truthful when he said he was professional. The State has not proven by a preponderance of the evidence that Grievant did not believe the relationship or text messages were unprofessional.

The State has not proven by a preponderance of the evidence that Grievant was untruthful when he denied rubbing his penis against the Complainant's backside while in her home. At the hearing, Grievant clearly and emphatically denied the allegation. The Grievant denied the allegation during the first and second interview. He volunteered that the Complainant hugged him, and he returned the hug with a tap or hug around her shoulders or upper back. The Complainant did not testify. The Complainant did not make herself available to the Investigator, repeatedly failing to appear for mutually agreed upon interview dates. The Board finds credible Grievant's testimony that his apology related to the "commando" reference, and that he did not know what Complainant was talking about when she mentioned "you were just super close up to my backside when I felt your . . . thing . . . on it." The State failed to present a witness to rebut the testimony of Grievant and the State failed to sustain its burden on what took place in the apartment or on the street outside her apartment. The State has not proven that Grievant was untruthful when he denied the sexual misconduct allegation.

The State next charges Grievant with violating DOC Dispatch Rules and supervisor directives issued to Grievant. The State contends, the June 2017 Interim Memo regarding use of dispatch services applies to staff performing any field work outside the Brattleboro office. The Interim Memo, however, does not impose requirements on P & P officers when meeting with people other than offenders. The Interim Memo also does not require P & P officers to travel

with a fellow officer when out in the field, use a state vehicle, or contact dispatch. As a result, the State has not proven by a preponderance of the evidence that Grievant violated DOC Dispatch Rules.

Although the June 2017 Interim Memo regarding application of the DOC Dispatch Rules did not apply to contacts with non-offenders, Grievant's supervisor McLean and District Manager Trowt directed the Brattleboro Probation and Parole Office, generally, and Grievant specifically to conform to the DOC Dispatch service requirements. Grievant was on notice of this requirement and expectation. In his 2019 Performance Evaluation for the period February 2018-February 2019, his prior supervisor added the requirement that he "[a]lways contact dispatch services when conducting field work." SOV Exhibit 20. The supervisor highlighted the expectation in the narrative: "You go in the field as necessary and appropriate for your caseload. Utilization of dispatch services is an added expectation and is required in all instances of field contact." SOV Exhibit 20.

In August 2019, Grievant had a meeting with his supervisor Beth McLean, and District Manager Trowt about his use of his personal vehicle and failure to travel with other staff when going out in the field. He was directed "AGAIN that he is NOT to leave the office on any sort of work business without being in a state vehicle, having called dispatch, and with another state employee with him." SOV Exhibit 21. Grievant's Personal Evaluation for 2020, evaluating his performance from February 2019-February 2020, again identified the need to contact dispatch services when going into the field. "Always contact dispatch services when conducting field contacts for any reason" was added to his job expectations. The State has proven that Grievant violated this supervisor directive issued to him when he met Complainant twice, once in her apartment, and once on Main Street.

Finally, the State has not proven by a preponderance of the evidence that Grievant violated the rules regarding Disclosure of Confidential Information. APA Rule 19-035, and DOC Directive, promulgated pursuant to 28 V.S.A. 107 (b), provide that offender records shall be kept confidential. The Rule authorizes the release of information to the Offender as a matter of course, including information about Inmate Discipline Process Documents. APA Rule 19-025, page 5 of 3; SOV Exhibit 11, at 43 and 45. Grievant's supervisor testified that there is no prohibition against obtaining a verbal release or authorization from an offender for release of their confidential information. Grievant testified, and his Victim's Notes confirm that when he met with Offender and Complainant together, the Offender authorized Grievant to release to Complainant his confidential information or records. The Board finds credible the un rebutted testimony of Grievant that he obtained the verbal authorization from Offender to release to Complainant his confidential information. Beth McLean testified that she had never disciplined an employee for obtaining a verbal authorization for release of information.

The State has not established that a written authorization was required for the release of offender information. Accordingly, the State has not proven by a preponderance of the evidence that Grievant violated rules regarding Disclosure of Confidential Information.

In sum, the Board finds the State has proven by a preponderance of the evidence the following charges:

Grievant failed to maintain appropriate boundaries with the Complainant, engaged in unprofessional conduct, inappropriate exchanges and behaviors that were vulgar and profane and could discredit the State and DOC, in violation of State Personnel Policy 5.6 (Required Conduct ¶ 3) and DOC Work Rules 1, 6, and 9.

Grievant was not truthful or provided incomplete testimony during the investigation when he reported he accidentally deleted the text messages between him and Complainant, in violation of State Personnel Policy 17.0, and DOC Work Rules 1, 4, and 5.

Grievant violated a supervisor's directive to him that he should contact DOC dispatch services and travel in a state vehicle, with another staff member when leaving the office to conduct field work, in violation of DOC Work Rule 1.

Reasonableness of termination decision

That not all of the charges have been proven, does not mean that the decision to discharge him was without cause. See Grievance of Regan, 8 VLRB 340, 366 (1985) (holding failure of employer to prove by a preponderance of the evidence all the particulars of the discipline letter does not require reversal of discipline). Where the proven charges, however, are less serious than the State has alleged, the Board can impose a different disciplinary sanction within those allowed by the Collective Bargaining Agreement. See Grievance of Brown, 177 Vt. 365, 371-72 (2004). The Board must therefore determine whether the termination of Grievant based on the proven charges was reasonable.

In determining whether the proven charges justify the termination decision, the Board applies the factors announced in Grievance of Colleran and Britt, 6 VLRB 268, 269 (1983). The factors include: 1) the nature and seriousness of the proven offenses, 2) the Grievant's job level, 3) the Grievant's past work record including length of service, performance on the job, and past disciplinary record, 4) 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, 5) the consistency of the penalty, 6) the clarity of notice, 7) the notoriety of the

offense or its impact upon the Employer's reputation, 8) the potential for Grievant's rehabilitation, 9) mitigating factors, and 10) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future and mitigating factors. See Id. at 268-69 (1983).

The Colleran factors provide a means of assessing the reasonableness of the employer's decision. The employer is not required to prove each factor to support the reasonableness of its decision, "only that 'on balance the relevant factors support management's judgment.'" In re Jewett, 2009 VT 67, ¶ 23, 186 Vt. 160, 170 (quoting In re Colleran, 6 VLRB at 269).

We first consider the nature and seriousness of Grievant's offenses and their relation to Grievant's duties and position. The just cause analysis centers upon the nature of the employee's misconduct. Grievance of Merrill, 151 Vt. 270, 273 (1989); In re Morrissey, 149 Vt. 1, 13 (1987). 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.

The Employer has not proven the most serious charges against Grievant, that he engaged in physical sexual misconduct with the Complainant, disclosed confidential information, and violated the Interim Memo on DOC Dispatch Rules. The termination memo outlining the State's justification for termination relies heavily on the State's erroneous conclusion that Grievant sexually assaulted the Complainant. The charges which the State has proven, that he lied during the investigation regarding deleting the text messages, failed to maintain appropriate boundaries, and failed to adhere to the directive from his supervisor regarding field visits, are less egregious than those alleged by DOC, and will form the basis of the Board's reasonableness analysis.

Nature of proven offense and type of employment

Grievant failed to maintain appropriate professional boundaries with the Complainant. He participated in and failed to stop vulgar and profane conversations with her, engaged in flirtatious and intimate banter, and enmeshed himself in her life. Grievant acted unprofessionally dedicating time and energy availing himself to her needs. Grievant's conduct runs afoul of the required conduct outlined in Personnel Policy 5.6., paragraph 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." Grievant also violated DOC Work Rules, 1, 6, and 9. Grievant visited Complainant on two occasions, and both times failed to take a state vehicle, another state employee, and failed to notify dispatch in violation of his supervisor's directive.

The Board has found that Grievant was not truthful when describing the deletion of messages and violated Personnel Policy 17, and DOC Work Rules 4 and 5. 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). Prior to the interview, Grievant was reminded of his duty to be truthful and forthcoming and that failure to adhere to this requirement could lead to dismissal. The Board and the Vermont Supreme Court have upheld dismissals for dishonesty. See e.g., Grievance of Graves, 147 Vt. 519 (1986) (affirming Board's upholding termination decision where employee's dishonesty, engaged in time and again at public expense, justifies dismissal as a reasonable discipline."); Grievance of Alexander, 31 VLRB 411 (2011) (affirming termination of community correctional officer for failing to comply with supervisor's directive to ride in pairs and engaging in time card fraud).

Grievant did not violate the Interim Memo on Dispatch Rules, although he did violate the specific directive from his supervisors regarding the procedure for conducting field visits. The purpose of the directive is to protect the public and the employee.

Probation and Parole officers work independently and serve as representatives of the DOC. See Grievance of Towle, 164 Vt. 145 149 (1995) (noting that parole officers have great independence when performing their work because they have little direct oversight). Grievant dedicated a great amount of time managing his text exchange with Complainant. Grievant's participation in intimate and at times lewd conversations with Complainant jeopardizes the trust the public places in the Department.

The State relies on cases with more egregious facts to support the reasonableness of its termination decision. Grievant did not engage in sexual assault and the conduct proven by the State was significantly less egregious than that alleged by the State or committed by the employees in Grievance of Towle, 164 Vt. 145, 149-50 (1995) (Court upholds termination where Grievant engaged in sexual assault of inmate); or Grievance of Corrow, 23 VLRB, 101, 127 (2000) (Board upheld termination where Grievant engaged in sexual/relationship with inmate and lied about it during deposition in criminal trial).

The seriousness of the proven offenses, however, is significant in relation to Grievant's position and would support the reasonableness of the termination decision if this were the only factor. The Board, however, must weigh this factor with the other relevant reasonableness factors.

Employee's past discipline, work record, and ability to perform the job

Grievant has never received any discipline during his twenty-four years of service. During that time, he has been able to conform his behavior to fulfill his responsibilities and adhere to the requirements and expectations of his supervisors and the DOC. Although his supervisors identified that he did not adhere to the directive for conducting field visits, they never issued him a reprimand, nor imposed a corrective action plan. This behavior was never identified as misconduct. The State has presented no evidence that prior to the current charges that led to his termination, Grievant demonstrated an inability to conform his behavior to DOC Rules.

Grievant had been employed for nearly twenty-five years when he was terminated. During that time, he received excellent performance evaluations. In one year, he received an Outstanding evaluation. Even in the two years he was informed, then reminded of the requirement to use dispatch services for all field work, he received excellent employment evaluations. His inability to adhere to this procedure, did not hamper or undermine his ability to perform his job and to frequently exceed standards established for his position. Throughout his tenure, his supervisors "recognized [his] consistent effectiveness and accomplishments which are above usual expectations." See Exhibit 30 (outlining performance evaluation standards).

The effect of the offense on supervisors' confidence in Grievant's ability to perform the job

Interim Commissioner Baker lost trust in Grievant and believes he is incapable of following his supervisor's directives and maintaining appropriate professional boundaries. The State has concluded "[b]ecause of Stevens' misconduct, supervisors have lost all confidence that he can be trusted to perform his duties as PPO II or duties and responsibilities of any position

within the Department.” The misconduct to which the State refers, however, includes the sexual assault and failing to maintain confidential records. The State did not prove these allegations and cannot rely on them when evaluating the termination factors.

The State did prove, however, that Grievant repeatedly failed to follow his supervisor’s directive, lied during the investigation, and failed to maintain appropriate boundaries and engaged in lewd and unprofessional conduct with the Complainant that reflects discredit on DOC. Interim Commissioner’s lack of trust in the ability of Grievant to perform his job was reasonable.

Consistency

The Board has upheld termination decisions where the employer has proven the grievant engaged in dishonest behavior. In most of these cases, however, the Grievant engaged in repeated acts of dishonesty, engaged in other serious misconduct, or the dishonesty impeded the investigation or impacted the public. See, e.g., In re Cray, 2003 WL 25744767 (affirming the Board’s upholding of termination decision where investigator for Office of Professional Responsibility engaged in repeated acts of dishonesty); Grievance of Graves, 147 Vt. 519, 523 (1986) (affirming Board decision dismissing grievance of field tax examiner with Department of Taxes where Grievant engaged in “repeated falsification of his expense claims for noon meals.”); Grievance of Lee, 33 VLRB 180 (2015) (affirming termination where Grievant engaged in repeated acts of dishonesty); Grievance of Richardson, 31 VLRB 359 (2011) (affirming termination of correctional officer with past disciplinary record, who engaged in an improper relationship with a DOC Supervision, and lied during the investigation); Grievance of Rosenberger, 31 VLRB 162 (2010) (affirming on remand dismissal of Game Warden who repeatedly lied to fabricate a case in order to receive call-out compensation); Grievance of Lucas

28 VLRB 238 (2006) (affirming termination where Grievant lied about conducting special confinement checks on inmates, failed to adequately conduct special observation checks, and had three disciplinary actions in the past three years); Appeal of Danforth, 27 VLRB 153 (2004) (Affirming termination where “Grievant engaged in a pattern of deception, and otherwise failed to cooperate” in the investigation of other employees and the investigation of her own actions); Grievance of Newton, 24 VLRB 172, 195 (2000) (upholding termination where Grievant engaged in repeated acts of dishonesty which impeded the resolution of workplace disputes).

The State has proven only one allegation of dishonesty. The dishonesty did not impede the investigation. Grievant was forthcoming about the number of times he visited the Complainant at her apartment, the commando comment and other details later revealed in the text messages. Grievant also shared with Investigator Morris that he had recovered the deleted texts.

Although only one allegation of dishonesty was proven, the State has also proven that Grievant failed to adhere to his supervisors’ directives regarding use of dispatch services and failed to maintain professional boundaries with Complainant. The Board has upheld termination decisions where the dishonesty was coupled with other misconduct. Grievance of Alexander, 31 VLRB 411 (2011) (affirming termination of community correctional officer for failing to comply with supervisor’s directive to ride in pairs and engaging in time card fraud); Grievance of Sileski, 28 VLRB 165 (2006) (affirming termination decision where Grievant engaged in insubordination that compromised important public safety needs and substantially exacerbated her serious misconduct by lying to her Captain and engaging in repeated dishonesty during the investigation).

Consistency weighs in favor of termination. Termination of Grievant for his dishonesty and insubordination in failing to adhere to his supervisor's directive about use of dispatch services and acting unprofessionally and in violation of DOC Work Rules and Policy 5.6 is reasonable.

Clarity of Notice

Grievant had express and clear notice of his responsibilities during the investigation.

Personnel Policy 17.0, notifies Employees that they 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 relating to work is considered misconduct for which an employee may be disciplined up to and including dismissal from their employment with the State.

SOV Exhibit 5

Grievant was provided with this admonition when he received his letter notifying him of the investigation. Grievant knew that answering untruthfully was prohibited conduct that could lead to termination. Grievant was also on notice that vulgar, profane, and indecent verbal behavior was not permitted by DOC employees "while on duty or engaged in an activity associated with the Department of Corrections." SOV Exhibit 6.

It was not clear, however, whether or what discipline Grievant would receive for violating the supervisor directive about using dispatch services when going out in the field. Prior to the current allegations, although Employer knew Grievant failed to adhere to the directive, it did not discipline him. Instead, after failing to adhere to the directive, Grievant was evaluated and continued to receive excellent performance evaluations. Even in March 2020, while the

conduct precipitating his termination was ongoing, he received an excellent performance evaluation.

The balance of this factor weighs in favor of the Employer and the reasonableness of its termination decision.

Notoriety

There is no notoriety of this offense. The Complainant filed a police report but did not provide a statement or otherwise follow-through with her complaint.

Rehabilitation and alternatives to termination

For nearly twenty-four years, Grievant was an excellent worker. Three different supervisors evaluated his performance and agreed that it was excellent. Grievant has worked for twenty-three years without any discipline. His poor judgment and interactions with Complainant were a deviation from his past performance. At the Loudermill hearing, Grievant acknowledged he was wrong and made a mistake in his interactions with the Complainant. He acknowledged it would be wrong if he engaged in similar behavior with his work colleagues. He “acknowledged his violation of the rules and directives, including directives issued to him by District Manager Trowt, concerning required protocols for out-of-office visits, and he expressed remorse for having disappointed District Manager Trowt, himself, colleagues and his family.” SOV Exhibit 26.

The State seeks to impose the severest form of punishment on Grievant because he did not acknowledge that he engaged in sexual misconduct. The Board found, however, that the State has failed to prove that Grievant engaged in sexual misconduct with the Complainant, or that he violated the confidentiality rules protecting offenders.

The State faults Grievant with not appreciating the gravity of his offense. Again, the offense upon which the State rests this assertion is the physical sexual misconduct allegation that the State failed to prove. The State also failed to prove that Grievant disclosed confidential information. Engaging in a flirtatious relationship with Complainant did violate personnel policy and rules, but that behavior and misconduct is significantly less grave than the sexual assault or misconduct the State failed to prove. The Board found the State had demonstrated but attempted to remedy his deletion of messages. He was able to retrieve the messages and made them available to the State.

The conduct that has been proven took place over six weeks. During that time, Grievant failed to adhere to professional boundaries, engaged in a voluminous and inappropriate texting relationship with the Complainant, and ignored the clear directives of his supervisors when meeting the Complainant twice outside the office, without a fellow PO, a state vehicle, or notifying dispatch. He also was not truthful during his interview about the deletion of the text messages.

Rehabilitation may weigh in favor of the employee, but when considered with the other factors does not undermine the reasonableness of the Employer's termination decision.

Mitigating factors

Although Grievant deleted the text messages he did retrieve them and provided the State with access or information on how to retrieve the text messages. The deletion of the text messages did not thwart the investigation. Grievant admitted he engaged in text messages with Complainant, made the commando reference, and that he visited her twice without accompanying staff, a state vehicle, or notifying dispatch.

Grievant argues Complainant's attempt to exploit her interactions with Grievant to gain favorable treatment for the Offender should be considered a mitigating factor. The Board disagrees. The Grievant is responsible for establishing and maintaining a professional relationship with clear boundaries with Complainant. Had Grievant maintained a professional relationship with clear boundaries and adhered to his supervisors' directive about field visits, there would have been no opportunity to exploit these interactions, because they would not have occurred.

Weighing the Colleran factors, the Board concludes that the Employer acted reasonably in discharging Grievant.

The investigation was timely and Grievant suffered no prejudice

The Board agrees with the State that the investigation was not unreasonably delayed and the Grievant has not demonstrated any prejudice as a result of any delay in the investigation. The pace of the investigation did not impede a review of the appropriateness of the disciplinary action. See generally Grievance of Simpson, 12 VLRB 279, 293 (1989).

Concurring Opinion

I write separately on the mitigation factor of the reasonableness analysis. Complainant's communications with the Offender and her attempt to manipulate her relationship with Grievant is a mitigating factor. Grievant was attempting to perform his role as probation officer and provide support to Complainant. The recorded recordings between Offender and Complainant demonstrate that Complainant was manipulating Grievant in an effort to receive favorable treatment, conditions, or ultimate outcome for the Offender.

/s/ Roger Donegan

Roger Donegan

ORDER

Based on the findings and reasoning stated above, it is ordered that the Grievance of Gary Stevens is DISMISSED:

Dated this 2nd day of November 2022, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Robert Greemore

Robert Greemore, Acting Chairperson

/s/ Alan Willard

Alan Willard

/s/ Roger Donegan

Roger Donegan