

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 20-32
PATRICK RYAN)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On June 25, 2020, as amended on June 26, 2020, Attorney Pietro Lynn filed a grievance on behalf of Patrick Ryan (“Grievant”), Family Services District Director with the State of Vermont Department for Children and Families (“Employer” or “DCF”). Grievant alleged that the Employer violated State of Vermont Personnel Policies and Procedures 8.0, 9.1, and 17.0 by: 1) dismissing Grievant without cause, 2) improperly bypassing progressive discipline and progressive corrective action, and 3) failing to conduct an adequate investigation.

The Labor Relations Board conducted video hearings through the Microsoft Teams platform on January 14 and 25, 2021, before Board Members Robert Greemore, Acting Chairperson; Karen Saudek and Roger Donegan. Assistant Attorney General Alison Powers represented the Employer. Attorney Pietro Lynn represented Grievant. Grievant and the Employer filed post-hearing briefs on February 16, 2021.

FINDINGS OF FACT

1. In dismissing Grievant, the Employer cited as applicable Article 14 of the collective bargaining agreement between the State and the Vermont State Employees’ Association (“VSEA”) for the Supervisory Unit. It provides in pertinent part:

...

**ARTICLE 14
DISCIPLINARY ACTION**

1. No permanent or limited status employee covered by this Agreement shall be disciplined without just cause. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:
 - a. act promptly to impose discipline or corrective action within a reasonable time of the offense;
 - b. apply discipline or corrective action with a view toward uniformity and consistency;
 - c. impose a procedure of progressive discipline or progressive corrective action;
 - d. In misconduct cases, the order of progressive discipline shall be:
 - (1) oral reprimand;
 - (2) written reprimand;
 - (3) suspension without pay;
 - (4) dismissal.
 - (5) In performance cases, the order of progressive corrective action shall be as follows:
 - (i) feedback, oral or written . . .
 - (ii) written performance evaluation, special or annual, with a specified prescriptive period for remediation specified therein, normally three (3) to six (6) months.
 - (iii) warning period of thirty (30) days to three (3) months, extendable for a period of up to six (6) months. Placement on warning status may take place during the prescriptive period if performance has not improved since the evaluation;
 - (iv) dismissal.
 - (6) The parties agree that there are appropriate cases that may warrant the State:
 - (i) bypassing progressive discipline or corrective action;
 - (ii) applying discipline or corrective action in different degrees;
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. . .

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

...
Number 3.1 SEXUAL HARASSMENT

PURPOSE AND POLICY STATEMENT

The State of Vermont prohibits sexual harassment. Sexual harassment violates an individual's basic civil rights, undermines the integrity of the workplace, and adversely affects workers or clients whether or not they are direct subjects of harassment. Sexual

harassment is a form of discrimination on the basis of sex and/or gender identity and is, therefore, prohibited in the work place . . . by both state and federal law as well as the collective bargaining agreements . . .

All employees, including but not limited to, staff, supervisors, managers, and appointing authorities, are expected to comply with this policy and take appropriate measures to ensure that sexual harassment does not occur, and are encouraged to report it when it does. Disciplinary action, up to and including dismissal, will be taken against an employee who engages in sexual harassment or who otherwise violates this policy.

In addition, every manager and supervisor within the State of Vermont is responsible for providing a work place free from sexual harassment. . .

DEFINITION OF SEXUAL HARASSMENT

The prohibition of sexual harassment is found in the Vermont Statutes at Title 21 § 495h. Sexual harassment is a form of discrimination based on sex (and/or gender identity), and is defined in Title 21 § 495d(13). Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when:

- a) Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or
- b) submission to or rejection of such conduct by an individual is used as a component of the basis for employment decisions affecting that individual; or
- c) the conduct has the purpose or effect of unreasonably interfering with an individual's work performance or of creating an intimidating, hostile, or offensive work environment.

Sexual harassment can be verbal, physical, auditory, and/or visual. It can be either subtle or overt. Sexual harassment refers to behavior that is not only unwelcome, but can also be personally offensive, fails to respect the rights of others, lowers morale and interferes with work effectiveness, or violates a person's sense of well-being.

. . .

Managers, supervisors, and employees with the appearance of authority shall not threaten or insinuate, either explicitly or implicitly, that an employee's submission to or rejection of sexual harassment will in any way affect the employee's employment, evaluations, wages, advancement, assigned duties, shifts, or any other condition of employment or career development. . . Persons found to have engaged in such behaviors may be subject to disciplinary action up to and including dismissal.

Employees should be aware of the growing role of social media as a platform for illegal and offensive behavior, including the compiling or sharing of images or words via computer or cell phone . . .

REPORTING AND RESOLUTION OF COMPLAINTS

The State strives to take quick and effective actions to ensure that sexual harassment does not occur or persist. However, the fulfillment of that commitment will in large part depend on the willingness of employees to report prohibited behavior. . . (A)ll employees are encouraged to report any incidents of sexual harassment they experience, witness, or know of. Employees may identify objectionable actions to those responsible for them and to try to resolve issues informally, but they are not required to do so.

...

Number 5.6 EMPLOYEE CONDUCT

REQUIRED 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, whether on or off duty.

...

PROHIBITED CONDUCT

...

3. Employees shall not use State property or equipment for their private use or for any use not required for the proper discharge of their official duties.

...

7. Employees shall not intimidate or harass any employee because of sex or any other factor for which discrimination is prohibited by law.

...

Number 11.7 ELECTRONIC COMMUNICATIONS AND INTERNET USE

...

Authorized Limited Personal Use

. . . Personnel Policies and Procedures, Number 5.6, entitled “Employee Conduct”, has been interpreted to allow a limited degree of personal use of State telephones for private calls when such use meets certain guidelines. Similar allowances will be applied to Internet, electronic and wireless communication devices and services, and email capabilities where personal use meets all of the following tests. No such use will be allowed where any of the following is not met:

...

- The use must not interfere with an employee’s performance of job duties.

...

- The use must not otherwise violate this policy . . . The fact that the use occurs in a private setting or outside of scheduled work hours does not affect this prohibition.

RULES FOR USE OF SYSTEMS OR INTERNET SERVICES

...
9. Use of agency systems . . . for offensive or disruptive purposes is prohibited. This prohibition includes . . . sexual content . . . Any inappropriate reference . . . that is reasonably likely to be perceived as offensive or disparaging of others on the basis of . . . gender . . . is also prohibited.
...

Number 17.0 EMPLOYMENT RELATED INVESTIGATIONS

... RESPONSIBILITIES

...
B. Investigators shall:

- Impartially gather relevant facts using legal methods deemed suitable for the circumstances . . .

...
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's Exhibit 8, Grievant Exhibit 7)

3. Grievant was hired in 2004 as a Social Worker in the DCF Family Services Division ("FSD") office in Newport. Grievant was promoted in 2012 to Social Services Supervisor.

4. While he was a supervisor, Grievant served on a committee of community entities working together to provide funding for families in need with Employee A, an employee of Northeast Kingdom Community Action. The committee met once or more a month. Grievant and Employee A had professional communications via text messaging, email, and telephone calls. Employee A's office was next door to the FSD office. Employee A and Grievant did not have a social relationship outside of work.

5. Beginning in the summer of 2013, Grievant and Employee A exchanged some text messages that were not work-related and were flirtatious. Grievant sent Employee A text

messages on his State-issued cell phone complimenting her on some aspect of her appearance or clothing, such as “nice hair” or “nice boots”. Some of Grievant’s text messages were sent while Grievant watched Employee A through the FSD office window. Employee A is unable to describe or recall the specific details of the text messages she received from Grievant. Employee A viewed the text messages between her and Grievant as awkward because she was married.

6. In March 2015, Grievant was promoted to District Director of the FSD Newport office. As District Director, Grievant participated in hiring decisions, evaluated staff performance, and was responsible for addressing various personnel matters.

7. In August 2015, Employee A was hired as a Social Worker in the DCF FSD office. Grievant participated in interviewing Employee A and hiring her for the position. Grievant called Employee A and offered her the DCF position. Grievant did not disclose his non-work-related communications with Employee A to his DCF superiors during the hiring process. Grievant was in Employee A’s chain of command. Employee A reported directly to a supervisor who reported directly to Grievant.

8. After Employee A was hired, the flirtatious text messages continued between Grievant and Employee A. Employee A said to Grievant during casual conversations words to the effect of “I’m not sure this should be happening anymore”.

9. Employee A became pregnant a few months after she was hired. Prior to going on maternity leave due to the pregnancy, Employee A initiated a conversation with Grievant in which she told him that she was more sexually aroused during her pregnancy, that her breasts were getting larger and were sore. Grievant asked her if her breasts hurt when they were touched, and Employee A responded that they did not hurt.

10. Shortly thereafter, just before Employee A went on maternity leave, Employee A told Grievant that a co-worker had asked her if she was sleeping with Grievant. She told Grievant that the text messages had to stop because she wanted her career with FSD to be judged on her abilities, and not on her relationship with Grievant. Grievant agreed. Subsequently, there were no more flirtatious communications between Grievant and Employee A. The evidence does not indicate that Grievant retaliated against Employee A due to her request to discontinue the flirtatious communications.

11. Grievant received an overall “excellent” rating for the annual performance evaluation he received in May 2015. Grievant was a supervisor in the office for the first ten months of the rating period. He was promoted to Director of the office two months before the end of the rating period (Grievant Exhibit 1).

12. Grievant received an overall “satisfactory” performance evaluation for the period April 4, 2015, to April 4, 2016. His supervisor, Sheila Duranleau, Policy and Operations Manager, stated as follows in the evaluation:

...

It became obvious to me when I reminded staff of this opportunity to provide feedback into your evaluation that many of them are struggling under your leadership and were conflicted about whether to respond to my outreach out of fear of retaliation. It is clear that they care about you and their colleagues and they want to do the best work possible but they report that the office morale and culture is suffering under your leadership.

While most staff share that you are extremely knowledgeable about policy and that you show good leadership in the community, they expressed serious concerns regarding your mood, temperament and treatment of staff. They report you as being unapproachable, defensive, authoritative, demeaning, mean and rude. They shared several examples that illustrate the use of foul language, demeaning behavior, unpredictable and unsupportive responses to their questions and needs.

Patrick, as we have discussed, we value you and the skills and knowledge you bring to the Newport office and to the Division. However, I am taking the feedback received by your staff very seriously, so please be advised that if there is not significant improvement in the behaviors described above I will have no choice but to initiate a formal notice of

performance deficiency. I am hopeful that you will reflect on our discussions and make every effort to create a safe and positive working environment for staff at the NDO.

...
(Grievant Exhibit 2)

13. Grievant received an overall “satisfactory” performance evaluation for the period April 2016 to April 2017. His supervisor, Sheila Duranleau, stated as follows in the evaluation:

...
Patrick, most of this evaluation cycle was focused on making improvements in the district’s office culture. Input for your 2016 evaluation reflected that staff did not feel safe or supported in the workplace. Staff reported that the Newport Leadership Team demonstrated disrespectful behaviors that impacted their overall internal and external safety as these behaviors created mistrust and a breakdown in communication that led to low staff morale. I will admit that this feedback came as a surprise to me and we immediately began planning.

Your part of planning began with self-reflection. We had some challenging conversations and you spent a good amount of time reflecting on the feedback and what your contribution to this morale issue might be. You immediately owned your behavior and, at the same time, pondered about specific events that felt different to you than to how staff were reporting them.

In the end, you realized that their perception is what matters. How they experience you shapes how they feel about the workplace and as director it is your responsibility to set a safe and supportive tone for them and your leadership team to follow.

We met with your Leadership Team to articulate the expectations that *all* leaders in the office have a responsibility to set an example of safe and supportive behavior. . .

Next, you planned for staff to have a discussion with Charlie McCrae to discuss what a safe and supportive learning culture would look like and how they would know it. He talked a lot about “creating the change you want to see” and helped staff to understand that they have responsibility for creating the culture they want, it’s not just the responsibility of the leadership team.

In July, we worked with the Leadership Team . . . to develop a staff retreat that focused on solutions to move forward. . .

Patrick, I am impressed with the self-reflection you did during this period and the leadership you took to help staff understand that everyone contributes to the work place environment so everyone has a responsibility to make it what they want it to be. . .

The information gathered in the November survey showed things moving in the right direction. . . people reported seeing more smiles in the office . . . feeling more connected

to people in the office . . . that staff are crying less . . . that their interactions with others in the office were less stressful . . . they can give feedback to people in the office . . . that feedback was received in a respectful way . . . the office was a friendly place to be . . .

EXPECTATIONS FOR GOALS FOR THE NEXT EVALUATION PERIOD

- Continue to contribute to and lead a safe and supportive learning environment in the NDO and positively address any future concerns raised by staff related to office environment and your leadership.

...
(Grievant Exhibit 25)

14. Grievant received an overall “satisfactory” rating on the annual evaluation he received covering the period April 2017 to April 2018. His supervisor, Linda James, Policy and Operations Manager, stated with respect to Grievant’s performance on “leadership”: “Patrick rose to the occasion and did what was needed to support his staff in their day to day work as well as manage the hiring action to bring on a new supervisor. I heard from several staff during this time that Patrick was accessible and supportive of their needs”. Staff comments on the evaluation concerning Grievant’s performance noted areas of strength of being a strong leader, making strides in how he relates to and interacts with staff, offering great ideas and advice, being knowledgeable about policy and work, being very good at bringing information to the staff from central office, and being motivated to get work done. Staff noted various concerns about Grievant such as needing to show staff he has power, dislike of being challenged, getting snappy or barking orders when he is stressed, talking down to people, not advocating for his staff, and not trusting leadership staff to do the right thing when he is away (Grievant Exhibit 3).

15. Grievant received an overall “satisfactory” rating on the annual evaluation he received covering the period April 2018 to April 2019. His supervisor, Ruth Houtte, Policy and Operations Manager, stated:

You have worked on your communication and leadership style. You are practicing to be more patient and a better listener especially when you feel stressed or pressured for time. You have recognized that being short or impatient with people is not an effective

leadership style. You continue to work on hearing everyone's perspective and allowing for differences of opinion. This is an area that you continue to need to pay attention to in order to build a positive work culture.

16. The Newport FSD office experienced an increase in caseload in 2019. Also, one of the supervisors had an above average number of absences during this time. There were occasions during this period that Grievant when Grievant acted in an agitated manner with some employees, raised his voice, interrupted employees, and diminished what employees were saying. Grievant, who is tall, at times leaned over employees resulting in them feeling intimidated. Grievant and Employee A particularly had contentious discussions at times when Employee A would question particular policies or methods of dealing with cases. There were other employees in the FSD office who had consistently positive interactions with Grievant and valued his strong leadership. All employees in the office viewed Grievant as very knowledgeable of DCF policies and the work engaged in by FSD.

17. In the fall of 2019, DCF management became concerned about why so few employees from the FSD Newport office participated in a survey seeking feedback about the culture and climate of the Newport office. Sheila Duranleau, Senior Policy and Operations Manager, and Alison Land of the Department of Human Resources interviewed staff of the FSD office in September 2019. During the interviews, several staff expressed various concerns about Grievant.

18. Subsequently, Department of Human Resources ("DHR") Investigator Peter Canales was assigned to conduct an investigation of Grievant. Canales met with some of the employees in the Newport FSD office, including Employee A on November 6, 2019. The investigative report submitted by Canales at the conclusion of his investigation provided in part on his interview with Employee A:

...

Employee A described original interactions with Ryan as “cordial and friendly.” This was prior to her employment with the State. Employee A said, approximately one year before she was hired by the State, and was working for a community partner, and interacting with Ryan on a professional level, “things got a little different.” She said, “I started getting text messages from him (Ryan) that were kind of lewd.” She said that while Ryan was sending these text messages, he asked her if she was going to apply for the open position in the office. He also sent text messages she described as “flirtatious” and “the low end of lewd and lascivious.” She said the text messages were, in part, about the way she looked. Employee A’s response was to write something like “haha, you’re funny.” As an example of what she recalled him sending, Ryan sent text messages similar to “How would you like if I did this to you” and then go into detail about what it was he wanted to do. Examples given were, “What if I had kissed you” and questions of a sexualized nature. At that time, Employee A had not yet been hired by the State . . .

Employee A said the sexualized comments were primarily through text messages. The only time there were in-person conversations like this is when she told Ryan, “This can’t happen” and “It has to stop.” She described an event when she was with a co-worker who asked her if she was “sleeping with Patrick (Ryan)”. She said it was after that question that she told Ryan he had to stop text messaging her. She said she felt “mortified” when a co-worker asked her if she was sleeping with Ryan.

When questioned about being a “willing participant” in the sexualized text messages, Employee A said there were times when “possibly” she participated, but there were multiple occasions when she told Ryan “we can’t be doing this.” She told me, after telling Ryan to stop, he continued to send her text messages. Employee A said she told Ryan “a dozen times over the first two years I was here” to stop sending her sexualized text messages. When she told him to stop sending text messages, she used language like, “This really shouldn’t be happening, you can’t be doing this because you’re the director, I’m a peon in this group, I’m the low man on the totem pole, I don’t want to get in trouble, I don’t want to have anything to do with this.” Ryan responded with something like, “It’s fine if you’re ok with it.” She said she had to repeat this with him because the behavior didn’t stop. Employee A stated, despite telling Ryan to “stop” sending her sexualized and/or flirtatious text messages, he continued.

...

After Employee A was hired by the State, the sexualized text messages continued.

. . . Although there was no physical contact, she believes some of Ryan’s comments could be “taken” as suggestions for physical contact. Examples of this were text messages Ryan sent where “He would suggest things, you know, if he could kiss me or if we could do that. . .

Employee A did not save any of the text messages Ryan sent her.

Employee A does not recall if there was any “bullying” or “retaliatory” behavior when she asked Ryan to stop sending text messages. She added, “What I’ll say is, Patrick is not the nicest person in the world, and I am definitely targeted for that.” . . .

. . .

Employee A described Ryan’s physical appearance. She described Ryan as a “big guy” and for that reason, along with his words, volume and tone, is intimidating. . . . She said when Ryan wants something done, he has the attitude of “You’re doing this and you’re going to do it now.” Employee A described Ryan’s tone as “harsh”, clipped.” “short,” “raised,” “condescending” and “rude.” She said Ryan stands and leans forward while speaking to her as described above.

. . . Employee A became emotional (crying) while describing the way Ryan addresses her when he is upset. . .

(State’s Exhibit 3)

19. Canales met with Grievant on November 26, 2019. The following exchange occurred during the interview:

. . .

Canales: Do you know why you’re here?

Grievant: I have no idea, Peter. I couldn’t tell you. I’ve been trying to think about it for thirty days.

Canales: No idea?

Grievant: No idea. . . .I haven’t been told anything. I can’t think about a specific incident.

. . .

Canales: What . . about your relationship with Employee A? . . .

Grievant: . . . we had a jokey relationship in the beginning, and when she came and applied and worked with – start working there, you know, we’ve had to have a couple conversations about making sure that, you know, we can’t joke like that anymore, and you know, it undermines my authority and embarrasses, you know, everybody.

Canales: A jokey relationship. . . Would it be proper to describe it as flirtatious and sexualized to a point?

Grievant: No. I mean, not when I hired her. Before that, there was a lot of flirting going on, but not when I hired her.

...

Canales: While you were director, while she was working in the community, you sent back and forth electronic communications, texts, of a sexualized nature, correct?

Grievant: It was flirty, yes.

...

Canales: Is it proper to be on the hiring committee of someone you've engaged in that type of relationship with? Or did you disclose that to anyone?

Grievant: ... no, I didn't disclose that to anyone

Canales: Okay. That continued after she was hired by the State when you hired her, those text messages, correct?

Grievant: A little bit, and then we stopped. We had a conversation about our boundaries, and then we like, you know, we can't continue to do that. She's married, I'm married ... we weren't interested in having any kind of relationship, and we talked about her career ... I think that that's in both our best interests, so we stopped doing that.

Canales: Tell me more about that conversation because that's not what I'm hearing ...

Grievant: Yeah, we had a conversation about --

Canales: -- that that has to stop.

Grievant: Yeah.

Canales: When did that take place?

Grievant: Oh, I don't know exactly when.

Canales: How long after you hired her?

Grievant: I don't think it was very long.

Canales: Within the first year?

Grievant: Yeah, probably. Well within the first year.

Canales: Okay. But that didn't stop all the texts.

Grievant: I don't know what the timeframe is. I don't recall. It was long ago . . .

. . .

Canales: In the last year, any of your communications with Employee A, have they been flirtatious?

Grievant: I don't believe so. I wouldn't characterize anything as that.

. . .

Canales: All right. What prompted this conversation with Employee A? You said it was probably . . . within the first year . . . of her hiring on with the State.

Grievant: I think what happened was is like, you know, we are flirting, and then you know, we had a conversation about how, you know, her career and how she wants to move forward and doesn't want that to be misperceived by anybody.

Canales: Okay.

Grievant: So we decided to stop.

Canales: Stop the flirtatious behaviors?

Grievant: Yeah.

Canales: Okay. Who brought that up at that conversation?

Grievant: She initially brought it up to me, yes.

Canales: Okay. And she told you what? She wanted it to stop?

Grievant: Yeah, basically. I don't know the exact details. It was, you know, four and a half years ago or whatever.

Canales: And there's been nothing since then?

Grievant: Not that I recall.

. . .

Canales: The texts that you had sent to Employee A, I think we've both agreed that they would qualify as flirtatious, sexualized.

Grievant: Flirtatious, I would say.

Canales: Flirtatious.

Grievant: I wouldn't say they were all sexualized.

Canales: You would concede to that. No, not all of them.

Grievant: Okay.

Canales: I'm not suggesting all of your communications with Employee A were sexualized. Some of them were, correct?

Grievant: I – maybe. I don't recall the exact – I mean, it was a long time ago. I don't – I deal with a lot of information. I don't recall the exact wording of every text message I had.

...

Canales: While you were a district director and while Employee A was under your employ, were all of the texts that you sent her appropriate? . . .

Grievant: Everybody likes to use that word of "appropriate", but I don't know what that means. . .

Canales: You're a district director -- working for the State of Vermont.

Grievant: If you're – talking about whether it was sexualized or not, like I said, I don't recall if it was sexualized because I don't recall if the – what the text messages were.

...

Canales: And you're saying you can't answer that because you don't know –

Grievant: Well, it depends on what you mean by –

Canales: -- what "appropriate" is.

Grievant: Right. I mean what do you define as appropriate or not appropriate. If you're thinking sexualized behavior is inappropriate, yeah. But I'm saying that I don't recall if it was sexualized. It was flirty.

...

Canales: . . . (E)veryone but I think one in the office referred to you as somewhat of a bully. You've got a big physical appearance. You're not a slight guy by any means. But you raise your voice. You stand in close proximity in an intimidating manner. What's your view on that?

Grievant: I totally disagree with that. I've . . . never heard anybody call me a bully. I've asked people. . . I have a lot of good insight into my behavior and I'm very aware of my stature. And when I'm talking to people, I try to lean in sitting. I never try to hover over anybody because of my size . . . because they interpret me as being the boss, and I don't want to intimidate people. So I'm very aware of my size and my proximity. You know, I have a – I'm well aware of non-verbal cues, so I try to sit, I try to actively listen. But . . . I don't yell. I don't scream. I don't call my workers names or demean them. I talk – I am sometimes firm with people, but I don't – I don't yell and I don't – I try not to raise my voice.

Canales: Some of the quotes: Barking, yelling, demanding, it's my way or the highway type personality.

Grievant: Over the years, since I became – when I was a supervisor, that was probably more so, but I've definitely have made a lot of progress when it's come to my attention.

Canales: Won't disagree with that. People have said you have made a conscious effort.

Grievant: Yeah.

Canales: And they can see it. Geez, he's better today or better about this, but then it goes out the window when you get frustrated. You'll go to your office depending on who's there that you're addressing. Others can hear it.

Grievant: I don't know what that means.

Canales: They can hear you scolding, I guess.

. . .

Grievant: Scolding who?

Canales: Oh I don't know particularly right off the top of my head who.

Grievant: Scolding a worker or having a conversation between two people about an interaction or about work or what's going on?

Canales: No, it's scolding an employee. It's making them feel bad about themselves. . .

Grievant: I don't reprimand. I don't do that. I don't reprimand people like that.

...

Grievant: Well, you know, I try to be very conscious, like I said, and aware of my behavior. Over the years, it's been not very thoughtful or kind to workers or other people even in the community. But since it's been brought to my attention, I've made significant progress, and then two years into my being district director, I worked with my supervisor, Sheila, at the time, around those sort of complaints. And I was given a timeframe to try to work on those and improve, and I did that in that timeframe. She said there was a lot of success and a lot of improvement and to keep it up. So I did. But I haven't had any feedback in the last couple years.

...

(State's Exhibit 2)

20. Christine Johnson, Deputy Commissioner of the Family Services Division of DCF, sent a *Loudermill* letter dated January 29, 2020, to Grievant that provided in pertinent part:

As a result of the alleged behavior described below, DCF is contemplating imposing serious disciplinary action, up to and including dismissal from your position as a Family Services District Director I with the Family Services Division ("FSD"). You have the right to respond to specific allegations listed below, either orally or in writing, before the final decision is made. . .

The below disciplinary charges are based on the January 4, 2020 Investigative Report prepared by the Department of Human Resources Investigation Unit Investigator Peter Canales. The report and exhibits are attached, fully incorporated herein by reference, and may be consulted for further information regarding the charges summarized below.

Relevant Provisions of the Supervisory Unit Collective Bargaining Agreement ("CBA") and State Personnel Policies

- CBA Article 14, Disciplinary Action
- Personnel Policy 3.1, Sexual Harassment
- Personnel Policy 5.6, Employee Conduct
- Personnel Policy 11.11, Workplace Safety and Security
- Personnel Policy 17.0, Employment Related Investigations

A. Potential Violations of the Contractual Agreement, State Personnel Policies, and Departmental Rules and Directives

. . . In the fall months of 2019, the State became aware of allegations that you may have been engaging with subordinate staff in an unprofessional and intimidating manner as well as engaging in sexualized behavior with a subordinate female Family Services Worker.

Specifically, FSD Senior Policy and Operations Director Sheila Duranleau observed that there was little or no response from Newport FSD staff after the most recent Employee Engagement Survey results were reviewed. Given past performance and behavioral concerns Duranleau had regarding your leadership as Newport's District Director, she and HR Business Partner Allison Land decided to commence an Appreciative Inquiry with Newport District staff.

Duranleau and Land met with multiple staff, including your direct reports and consistently, staff described you as moody, difficult, bullying, using a raised voice towards subordinates and at times, unapproachable.

Furthermore, Family Services Supervisor Tracey Lamoureux reported to Duranleau that Family Services Worker Employee A told him that she had information which could cause you to be fired. Land followed up directly with Employee A about this statement and Employee A disclosed that you had texted/sexted her on your work-issued cell phone before she was a Vermont state employee, but while she was employed by a community partner. Employee A reported that these communications continued after you hired her as a Family Services Worker. Employee A also alleged that you did not stop these texts even after she asked you to multiple times, reminding you that she was then your subordinate. Employee A further described subsequent retaliatory, bullying behaviors from you.

Formal investigative interviews of Newport district staff were commenced because of the information gleaned through the Appreciative Inquiry. Of significant and serious concern as reflected in the investigative report includes the following staff statements:

- Family Services Supervisor Tracey Lamoureux described the office environment as hostile since your promotion to District Director. Lamoureux described you as “mean” and “intimidating”. He reported that you berate staff even after getting your point across. He also likened your behaviors to the cycle of domestic violence, describing that cycle as including explosive behavior, followed by an apology and ultimately a repeat of the explosive behavior.
- Family Services Supervisor Meghan Gyles described you as challenging to interact with when she disagrees with you or does something different than expected. Gyles stated she avoids you if you are not in a good mood, and that she is part of a handful of staff in your “target zone”, because she “speaks up” about issues of concern. Gyles stated that you do not listen to differing opinions and your tone toward staff can be demeaning.
- Family Services Worker (now interim supervisor) Jason Wilkie described having been on the receiving end of your “conduct unbecoming a district director”, indicating that your behaviors bordered on “bullying”. Wilkie also stated he

believed that as a result of your behaviors in some situations, the proper or correct decisions weren't always made.

- Family Services Worker Tara Shatney stated she was never on the receiving end of your "attacks", but reported that she has observed occasions in which you spoke to staff in a belittling or very short manner, and included specific examples of your behavior to include an event where you appeared "frustrated" by the actions of a former staff member, who had allowed a mother to come to the office to say goodbye to her children after they were taken into DCF custody. Shatney described you as saying something like "if this happened a few years ago, I would have been a real fucking asshole and when I say something, I mean it". Apparently, the former staff member was not aware that such a practice was not common. Shatney went on to state that she wasn't certain if you had used the word "fucking" but said she felt uncomfortable by your actions. Shatney also recalled Employee A telling her about Employee A's "text message relationship" with you and how it bothered Employee A. Based on her conversation with Employee A, Shatney believed the text messages were "inappropriate" and sexualized in nature. She described the texts you sent to Employee A as including telling Employee A how good she looks and describing the things you want to happen between them.
- Family Services Worker Employee A described knowing you on a professional level for the past ten years, and that things changed about a year before you hired her in August 2015. She described getting "kind of lewd" text messages which also included you asking her if she was going to apply for the open position in Newport. Employee A further described your texts to her as sexualized in nature and coming from your work-issued cell phone. Employee A stated that these texts continued after you hired her into a position subordinate to you and that she told you many times over a two-year period that these texts needed to stop. She further stated that you said it was "fine" to send such texts as long as she was OK with it. Employee A described you as "not the nicest person in the world" and added that she is "definitely targeted" for having asked you to stop sending her inappropriate texts. She further described your tone as condescending and rude among other descriptors. Employee A began crying in her interview while describing how you treat her when you are upset and related that it is unfair that she is reduced to tears multiple times each week. Employee A also stated that she has witnessed you address other female staff in similar ways and is unaware of any like interactions with male staff.

In your investigative meeting, you stated you have an obligation to treat all subordinate staff similarly and that all interactions must be professional in nature. You defined professional treatment of subordinate staff as being respectful, considerate and kind and keeping appropriate boundaries in and out of work. You denied that you bullied staff, yelled, screamed, call workers names, or demeaned them. You characterized your behavior as having to sometimes "be firm" with people. You further noted that you are not permitted to use your work-issued cell phone for anything other than state business.

You suggested that you have made “a lot of progress” to improve your interactions with staff and acknowledged problems with your behaviors in the past, noting that you had worked with Sheila Duranleau to improve these behaviors. You claimed that you have since “curbed” your behaviors.

When the investigator asked about your relationship with Employee A . . . you stated that you and she were “kinda” friends and that you had recruited her to work in your district office. You described your relationship with Employee A as “jokey” but that after she was hired in the Newport district office, you and she had a “couple of conversations” about making sure that “we can’t joke like that anymore” (in reference to the texts you both exchanged with each other) and that your “authority embarrasses everybody”. You further stated that prior to hiring her, you engaged in “flirty” text messages with her. As part of the hiring panel, you did not disclose your “flirty” communications with anyone.

While you had initially stated that “flirty” communications ceased after she was hired, you later acknowledged that you did continue to text her. You continued to characterize that you both agreed that boundaries needed to be in place. You then clarified that it was Employee A who initiated the conversation as she did not want it to be perceived that any advancement in her career was as a result of your relationship with her. You also initially guessed that your mutual agreement to cease personal texting happened during Employee A’s first year in the Newport district office. When the investigator told you that you continued to send inappropriate and unprofessional text messages to Employee A beyond her first year working in the Newport office, you stated that you did not “recall” when your conversation with Employee A took place or when you stopped sending Employee A “flirtatious” texts.

Though initially, you stated that you would not categorize any of the texts you send to Employee A as anything more than “flirtatious”, when questioned further, you admitted that some of the text messages could be characterized as “sexualized”. Further, you related to the investigator that you did not, in your role as district director, know what “appropriate” means as to related texts one would send to a subordinate using one’s work issued cell phone.

Based on all of the foregoing, it appears that you may have willfully ignored and violated the cited policies and previous work directives issued to you by management. You deny treating subordinate staff unprofessionally yet, multiple staff have asserted that your hostile behaviors persist in violation of Personnel Policy 11.11, Workplace Safety and Security. This policy specifically defines threats to security: *Threats to security include any direct, conditional or implied threat of violence, physical assault, damage to personal or state property or **other conduct which is accomplished with the intent to cause fear, hostility, intimidation, or harm to the target person(s) or witnesses.***

You deny or do not recall sending sexualized texts to a subordinate staff member on your work issued cell phone, yet this staff member, with corroboration from work colleagues, states that you did, and that you persisted after a number of pleas that you cease and

desist, in violation of Personnel Policy 3.1, Sexual Harassment and Personnel Policy 5.6, Employee Conduct. Further, as a leader of the district, you stated that you cannot define what is “appropriate” in text messages one would send to subordinate staff that are not work related and even “flirtatious” and/or “sexualized”. Therefore, FSD Leadership has grave concerns regarding your ability to not only respect but adhere to State policies and directives set forth by FSD leadership.

Your conduct appears to be an egregious violation of these policies and work directives. Specifically, it is the duty of all employees to fulfill to the best of their ability the duties and responsibilities of their position, and to conduct themselves in a manner that will not bring discredit or embarrassment to DCF and/or the State of Vermont. You are also required to be honest in all dealing with your employer, however it appears that some of your answers during the investigative process may not have been entirely truthful, in violation of Policy 17.0. Your described behavior appears to violate all of the above policies and directives and may constitute misconduct and/or gross misconduct. Your actions have caused the State of Vermont and DCF to lose confidence in your ability to responsibly carry out your duties as a Family Services District Director I, in an appropriate and trustworthy manner. Accordingly, it appears your conduct provides just cause for disciplinary action, up to and including dismissal from your position with DCF. Your past disciplinary history will be considered.

B. Process

You must notify Allison Land, HR Business Partner . . . if you wish to respond to the above allegations. . .

You are provided this opportunity to respond so that you may present points of disagreement with the facts; identify witnesses who may support your defense; identify any mitigating circumstances which should be considered; and offer any other appropriate argument in support of your defense.

...

(State’s Exhibit 4, Grievant Exhibit 24)

21. Pursuant to this January 29, 2020, letter, Deputy Commissioner Johnson, Allison Land, and FSD Director of Operations Brenda Gooley met with Grievant and his attorney Bernard Lambek on February 21, 2020. The following exchange occurred during the meeting:

..

Lambek: Can you describe how you got to know (Employee A) and what her behavior was like?

Grievant: Sure. Employee A worked for Northeast Kingdom Community Action as an emergency outreach worker. . . she would come to the office once in a while . . . sometimes with her co-worker . . . she would come in . . . her

and (the co-worker) would be picking on me. . . she had taken some of my things and hid them either in the office or out of the office, and later described as we were having conversations about that is this was her way of – she was flirting with me at the time.

Lambek: She was describing it that way?

Grievant: Yes. . . she didn't think I liked her was part of the conversation, and I said, of course I like you, you're a nice person . . . I said I didn't like those kinds of things going on, and she said well, I did that because I like you and I was flirting with you. That's kind of how that started shortly after that that the text messages started.

Lambek: Did she describe you using words like "bad boy" at one point in this – at this time?

Grievant: Yeah, she said there was that attraction to me about my "bad boy kind of attitude"?

Lambek: . . . was this after she started working in –

Grievant: No, no. This was before.

...

Lambek: Go ahead.

Grievant: This wasn't – our text messages weren't every day, every week, every other week. They were like very infrequent. It was not one of those – not to say that changes that they were inappropriate, but that they weren't very frequent. Neither one of us were vested in, like, leaving our spouses or doing anything physical with each other. It was just flirtatious and nothing, I didn't think, was overly – crude until – I don't know where she got that from. But either way, I had checked in with her at one point. I would – if I saw her out the window walking to her office for example, I would say, you know, something like "nice boots" or "nice hair", or you know, something about her physical appearance. . . So I had checked in with her at one point because I was like I didn't want to make her feel like this was over the top and if this was something that she wasn't okay with, then I would stop. So I checked in with her about the text messages and if they were over the top, and she said, no, you're fine; you're a pussycat compared to the guys at DOC.

...

Lambek: So did you feel – at the time you're talking about now, that this was – that your comments to her about nice boots and so on and a bit of playful flirtation was welcome by her?

Grievant: She didn't respond that it wasn't. She had never asked me to stop.

...

Lambek: Did she initiate any text messages with you?

Grievant: There was – off and on, but I don't recall all of them. I only recall there was a group of text messages that was sent after – so this was after she was employed. So like it was after she was hired and a few months before she was sent out on maternity leave.

Lambek: 2015, right?

Grievant: Correct. . . . after she got hired, she learned that she was pregnant like after a couple months. So a few months later, and a few months before . . . she went out on maternity leave . . . she had sent me a text message about feeling – how pregnant, you know, being pregnant kind of sucks, she's tired. And then but she said the upside of it is kind of like she started – she was more aroused. She was more sexually aroused because she was pregnant, and how I could benefit. She said, specifically, how I could benefit from that.

...

Lambek: Was she responding to you, or was it just her talking about her pregnancy and how it made her aroused and how you could benefit –

Grievant: No, I didn't start that text, that string of text messages. She began talking about that. . . . It was shortly after that that she told me – so we were sitting in the office, her office, when she told me that somebody had approached her asking if we were sleeping together, and that's when she said to me that we need to stop this flirtatious behavior because she was basing this solely on the fact that she was going to have a long career with Family Services, and did not want to be judged on the fact that she had some sort of relationship with me and she wanted to do it, go far, based on her own abilities. Which I totally got and I understood, and I totally agreed it would – And I said to her, I had agreed, and I said, you know, this could hurt our career. Your career, my career, our marriages, no matter, you know, it it's innocent or not, and it's not appropriate now that especially now that you're working here and, you know, you are a subordinate. . . .

Lambek: Was that conversation before she left on maternity leave?

Grievant: It was just before. It was like a couple months before she left on maternity leave.

Lambek: . . . (W)as there ever a text that she initiated to you that referred to breasts?

Grievant: Well, yeah. . . During that same conversation when she was talking about being aroused more now that she was pregnant, she had started talking about how her breasts are getting bigger, how they're sore because now she's pregnant.

Lambek: And this was because you asked her about her breasts?

Grievant: No, I didn't – I didn't ask about her breasts. After that, I said to her something about does it hurt if they're touched, and she said no.

Lambek: . . . You were talking about a conversation where she was saying it's not appropriate for us to continue.—this kind of behavior and you agreed with that.

Grievant: Right. And then so that was the only time that Employee A had told me to stop doing anything. . . I didn't want to get in any level of trouble, so I had stopped completely. I did not do another – have any other kind of text messages with her.

. . .

Lambek: And after that conversation, did you send her any flirtatious text –

Grievant: No.

Lambek: -- messages –

Grievant: Not at all.

Lambek: -- or other communications of any kind that were sexualized or flirtatious?

Grievant: No.

. . .

Grievant: When she had talked about her breasts hurting and then I said that, yeah. That's sexualized.

. . .

Lambek: Having to consider the allegations and had time to think about this, do you feel that the text exchanges were appropriate?

Grievant: No, obviously, they weren't for several reasons. You know, I think, even in the beginning, you know could be construed as being a community partner, as inappropriate, but especially as when she was hired, it definitely was inappropriate and a lapse in judgment on my part. I didn't make a good decision, obviously.

Lambek: Was it appropriate to use the State phone for these purposes?

Grievant: No, it definitely wasn't. I think when you have one for a long time, you get lazy, you get comfortable with it, you just start using it for all your use.

...

Lambek: Is there anything else you want to say?

Grievant: Well, I just want to make sure that, you know, when I own that it's inappropriate, I also want to say that, you know, I do apologize for my behaviors and I worked very hard not to put the State in any kind of harm's way and I misused – I made some bad judgment calls and did that, and I feel very bad about that and I do apologize to everybody here.

...

Land: ... (Y)ou acknowledge today that the text messages that you exchanged with Employee A were not appropriate. Could you shed some light as to when you may have come to that conclusion that those text messages were not appropriate to send?

Grievant: Well, probably before, you know, before we had our conversation about ending all flirtatious text messages. I knew then.

...

(State's Exhibit 5)

22. Deputy Commissioner Johnson sent Grievant a letter dated June 5, 2000, that provided:

This is to notify you of your dismissal ... effective as of the close of business June 19, 2020. . .

I am terminating your employment because I find that you committed misconduct as described in the above-referenced documents (January 29, 2020, letter and attachments), which are incorporated herein. Specifically, you engaged in inappropriate sexualized personal communications by text message, utilizing your state issued cell phone, with a subordinate. You also created a work environment at the Newport District Office that was negative, counter-productive and hostile, by your mistreatment, intimidation, bullying, short-temperedness, demeaning and condescending behaviors in interactions with staff.

By engaging in these behaviors, you have destroyed our confidence in your ability to provide practice and cultural leadership to the Newport District office, as well as your

ability to conduct business in a manner which reflects the level of integrity and professionalism required of all DCF staff. Therefore, I find that no lesser penalty than dismissal is sufficient to address your misconduct.

...

(State's Exhibit 7, Grievant Exhibit 20)

23. In deciding to dismiss Grievant, Deputy Commissioner Johnson determined that Grievant engaged in serious misconduct by engaging in inappropriate sexualized text messages with Employee A, and creating a work environment that was negative, counterproductive, and hostile due to his treatment of staff. Johnson viewed the sexualized text messages as the most important misconduct, and she would not have dismissed Grievant but for these communications. She concluded his misconduct was at odds with his responsibility to provide leadership and be a role model. Johnson noted that Grievant had a satisfactory performance record and no previous discipline, but concluded that his actions had destroyed the confidence of DCF management in his ability to continue effectively in the Director position. Johnson did not examine the annual performance evaluations conducted on Grievant before deciding to dismiss him. Johnson did not find similar offenses committed by other DCF employees. She viewed the notoriety of Grievant's offenses and their impact on the reputation of DSC as minimal. Johnson concluded that Grievant had fair notice of the state policies that he violated in committing his offenses, and that he was warned repeatedly through his annual performance evaluations with respect to his behavior towards staff. She saw no potential for rehabilitation, and determined there were no adequate alternative sanctions to dismissal (State's Exhibit 6).

OPINION

Grievant alleges that the Employer dismissed him without just cause and improperly bypassed progressive discipline and progressive corrective action. Just cause is some substantial shortcoming detrimental to the employer's interest which is recognized as constituting good cause for dismissal. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). The ultimate criterion of just cause is whether an employer acted reasonably in discharging an employee for misconduct. Id. There are two requisite elements which establish just cause for dismissal: 1) it is reasonable to discharge an employee because of certain conduct, and 2) the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. Id. In re Grievance of Yashko, 138 Vt. 364 (1980).

In carrying out its function to hear and make final determination on whether just cause exists, the Labor Relations Board determines *de novo* and finally the facts of a particular dispute, and whether the penalty imposed on the basis of those facts is within the law and the contract. Grievance of 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 charges Grievant with misconduct by: 1) engaging in inappropriate sexualized personal communications by text message, utilizing his state issued cell phone, with a subordinate; 2) providing answers during the investigative process that may not have been entirely truthful, and 3) creating a work environment that was negative, counter-productive and

hostile, by his mistreatment, intimidation, bullying, short-temperedness, demeaning and condescending behaviors in interactions with staff.

The charge of Grievant engaging in inappropriate sexualized personal communications by text message with subordinate employee Employee A are hampered by none of the alleged inappropriate sexualized text messages being admitted into evidence as they were not saved by either Grievant or Employee A. Also, neither Employee A nor Grievant had recollection of the specific content of the text messages that would have been exchanged several years earlier. The only specific evidence before us of communications that can be characterized as “sexualized” is Grievant asking a pregnant Employee A if her breasts hurt to be touched after Employee A initiated a conversation with Grievant in which she told him that she was more sexually aroused during her pregnancy, and that her breasts were getting larger and were sore.

The other evidence before us constitutes more general characterizations of some text messages between Grievant and Employee A as flirtatious. The seriousness of Grievant’s misconduct in this regard is somewhat tempered by the State not establishing that these text messages were unwelcome to Employee A. It is evident that they were unwelcome only when Employee A told Grievant that the text messages had to stop, and Grievant thereafter sent no such text messages.

The Employer contends that Grievant’s text messages with Employee A violated the State sexual harassment policy, the relevant portions of which are set forth in Finding of Fact No. 2. One category of sexual harassment under the policy involves unwanted sexual advances or other verbal or physical conduct of a sexual nature when submission to such conduct is made a condition of employment, used as a component of the basis for employment decisions affecting the individual, or the conduct has the purpose or effect of unreasonably interfering with an

individual's work performance, or of creating an intimidating, hostile, or offensive work environment.

These sexual harassment cases involve allegations that employees have been subjected to hostile or abusive environments. A hostile work environment exists when conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. Grievance of Butler, 17 VLRB 247, 314 (1994); *Affirmed*, 166 Vt. 423 (1997); *citing Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 65-67 (1986); Carrero v. New York City Housing Authority, 890 F.2d 569, 577 (2nd Cir. 1989); Hall v. Gus Construction Co., 842 F.2d 1010, 1013 (1988). This occurs "when the workplace is permeated with discriminatory intimidation, ridicule, and insult" that "is sufficiently severe or pervasive to alter the conditions of the victim's employment". Butler, 17 VLRB at 315; *citing Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367, 370 (1993). Allen v. Dept. of Employment and Training, 159 Vt. 286, 289-90 (1992).

If a worker is subjected to unwelcome sexual advances, such harassment is actionable even though no tangible job benefit is implicated, such as termination, demotion or loss of promotion in retaliation for refusing to submit to the unwelcome advances. Allen v. Department of Employment and Training, 159 Vt. 286, 290 (1992). The predicate acts underlying a sexual harassment claim need not take the form of sexual advances or of other incidents of clearly sexual overtones to be actionable. Butler, 17 VLRB at 315; *citing Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990); Hall, 842 F.2d at 1014; McKinney v. Dole, 765 F.2d 1129, 1138-39. To demonstrate a hostile environment the conduct need not be of an explicitly sexual nature so long as it is directed against women because of their sex. Butler, 166 Vt. at 429. Any harassment of an employee that would not have occurred but for the sex of the

employee may, if sufficiently patterned or pervasive, constitute actionable sexual harassment. Butler, 17 VLRB at 315; *citing McKinney*, 765 F.2d at 1138.

The Employer has not demonstrated under these standards that Grievant's actions fell within this category of actionable sexual harassment. The lack of specificity concerning the text messages between Grievant and Employee A contributes to this determination as well as the State not establishing that these text messages were unwelcome to Employee A.

Another category of sexual harassment under the policy is behavior that is "personally offensive, fails to respect the rights of others, lowers morale and interferes with work effectiveness, and violates a person's sense of well-being." We conclude that Grievant's conduct falls in this category. As a supervisor, it was inappropriate for him to engage in flirtatious messages with a subordinate employee in his chain of command. A perception of favoritism very well may result from such a relationship. Also, the involved subordinate employee may not be evaluated on the merits of work performance. Further, the inherent power a supervisor has over a subordinate employee looms over such interactions. His behavior failed to respect the rights of others, would tend to lower morale, and could interfere with work effectiveness. Further, Grievant's inquiry as to whether Employee A's breasts hurt when touched was clearly beyond the bounds of appropriate supervisor-subordinate dialogue and was offensive.

Grievant's misconduct in this regard also violated Personnel Number 5.6 by using the State property of a cell-phone for inappropriate private use, and conducting himself in a manner that brought discredit or embarrassment on the State.

The Employer also charges Grievant with violating State Personnel Policy 17.0 by providing answers during the investigative process that may not have been entirely truthful. Policy 17.0 requires employees to cooperate with investigations and "provide truthful and

complete information”. The Employer apparently contends that some of Grievant’s answers to the State’s investigator with respect to the nature and content of his text messages with Employee A were incomplete and evasive.

We conclude that the Employer has not established this charge by the preponderance of the evidence. Grievant indicated at the outset of the investigative interview that he had no idea why he was being investigated. He then was asked questions about text messages that had been exchanged years earlier for which there were no records. Under these circumstances, it is not surprising that his answers may be general and vague with respect to the nature and content of the messages. The State has not established that he was being dishonest in this regard instead of having difficulty recollecting distant communications that he did not know he would be questioned about.

We turn to addressing the remaining charge against Grievant that he created a work environment that was negative, counter-productive and hostile, by his mistreatment, intimidation, bullying, short-temperedness, demeaning and condescending behaviors in interactions with staff. A significant question is whether Grievant’s alleged deficiencies with respect to this charge should have been treated as questions of misconduct or performance.

Grievant was charged in the *Loudermill* letter, which was incorporated into the dismissal letter, with violating Article 14 of the collective bargaining contract between the State and VSEA for the Supervisory Unit. Article 14 of the collective bargaining contract distinguishes between the progressive sanctions that are available in misconduct cases and the progressive sanctions that are available in performance cases, leading the Board to conclude that the parties intended a distinction between misconduct and nonperformance. The Board stated that “consistent with this intent, and as a matter of logic, neither of the two requisite elements of just cause –

‘reasonableness’ and ‘fair notice’ – can be determined without first categorizing the employee’s underlying actions as a question of misconduct or a question of performance.” Grievance of Roy, 13 VLRB 167, 182 (1990).

In determining whether this charge involves questions of performance rather than misconduct, we are guided by how the Employer dealt with similar issues in the past. Approximately four years before the Employer decided to use the staff feedback as a partial basis for dismissing Grievant, the Employer had received similar feedback from staff about Grievant. Staff expressed concerns regarding Grievant’s mood, temperament and treatment of staff. They reported him as being defensive, authoritative, mean and rude. Grievant’s supervisor provided notice to Grievant in the annual performance evaluation of him that year that she was taking the staff feedback very seriously and advised him that “if there is not a significant improvement in the behaviors described above, I will have no choice but to initiate a formal notice of performance deficiency”.

In the next annual evaluation, Grievant’s supervisor noted efforts that had been made by Grievant and others in the office to make improvements in the office culture. In the two subsequent annual evaluations, Grievant’s rating supervisor commented on Grievant’s strengths, challenges, and progress in his communication and leadership style.

Despite the Employer’s consistent resort to the performance evaluation route to address feedback from staff on Grievant’s communication and leadership style, the Employer opted to act otherwise here. As detailed in the Findings of Fact, there were mixed reports presented at the hearing of Grievant’s interactions with staff. There were occasions when Grievant acted in an agitated manner with some employees, raised his voice, interrupted employees, diminished what employees were saying, and caused some employees to feel intimidated. On the other hand, there

were other employees in the FSD office who had consistently positive interactions with Grievant and valued his strong leadership. All employees in the office viewed Grievant as very knowledgeable of DCF policies and the work engaged in by FSD.

These were areas that previously had been handled as questions of performance addressed through the performance evaluation process, and the Employer has set forth no adequate justification why it did not so proceed in this case. We conclude that the staff feedback leading to this charge against Grievant should have been treated as questions of performance rather than misconduct.

This presents the question of what effect this has on the ultimate question of whether just cause existed for Grievant dismissal. In a recent dismissal case in which the Board reduced the dismissal of a state employee to a 30 day suspension, the Board stated as follows in this regard:

It is evident by the record that the Employer took into account issues with Grievant's performance in deciding to dismiss Grievant and viewed Grievant as a poor candidate for rehabilitation in part at least due to not improving his performance over time. The Employer did not exercise its discretion within tolerable limits of reasonableness by placing such weight on Grievant's performance. We so conclude because the Employer had taken no progressive corrective action steps to address performance deficiencies of Grievant prior to dismissing him. The Contract specifies progressive corrective action steps to address performance issues and allows bypass of such steps only in appropriate cases. The record is devoid of evidence justifying bypass of corrective action with respect to Grievant. Grievance of Farley, 35 VLRB 43, 63 (2019).

Similarly here, the Employer did not exercise its discretion within tolerable limits of reasonableness by taking no progressive action steps to address performance deficiencies of Grievant reflected in the staff feedback prior to dismissing him in part due to these deficiencies. Grievant was not on notice that he could be summarily dismissed for these matters. Instead, he was on notice that any deficiencies he had in this regard would be addressed through the performance evaluation and corrective action process. The State has not provided evidence justifying bypass of corrective action with respect to these issues.

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

We look to the factors articulated in Colleran and Britt to determine whether the Employer exercised its discretion within tolerable limits of reasonableness. 6 VLRB at 268-69. The pertinent factors here are: 1) the nature and seriousness of the proven offenses and their relation to Grievant's duties and positions, 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 potential for Grievant's rehabilitation, and 7) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

We first consider the nature and seriousness of Grievant's offenses and their relation to Grievant's duties and position. 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. It was inappropriate for him to engage in flirtatious messages with a subordinate employee in his chain of command given favoritism perceptions that may result, the inherent power a supervisor has over a subordinate employee, and the potential for the involved subordinate employee not being evaluated on the merits of work performance. Further, Grievant's inquiry as to whether Employee A's breasts hurt when touched was clearly beyond the bounds of appropriate supervisor-subordinate dialogue and was offensive. Grievant had a responsibility as district director to participate in hiring decisions, evaluate staff performance, and address various other personnel matters. He acted inconsistent with the requirement to carry out these duties responsibly with good judgment by his inappropriate behavior.

While we conclude that Grievant's actions were serious, we reiterate as detailed above that the proven charges against him were not as serious as alleged by the Employer in the letter dismissing him. As noted above, the level of proven misconduct was blunted by the lack of specificity concerning the text messages between Grievant and Employee A as well as the State not establishing that these text messages were unwelcome to Employee A. Also, the Employer did not prove by a preponderance of the evidence that the answers provided by Grievant during the investigative process may not have been entirely truthful. Further, the remaining charge against Grievant with respect to staff interactions were questions of performance rather than misconduct that were appropriately addressed through the performance evaluation and corrective action process.

Our conclusions in this regard do not necessarily result in a holding that just cause did not exist for Grievant's dismissal. Our inquiry continues to determine whether the seriousness of

Grievant's offenses, considered along with the other pertinent Colleran and Britt factors, constitute just cause for Grievant's offenses.

Grievant had fair notice that his inappropriate text messages with Employee A could result in his dismissal. Fair notice exists when the employee knew or should have known that the conduct was prohibited and subject to discipline. Grievance of Towle, 164 Vt. 145, 150 (1995). Grievance of Gorruso, 150 Vt. 139, 148 (1988). Grievance of Brooks, 135 Vt. at 568. Grievant was on fair notice through the State sexual harassment policies and other personnel policies, and through his district director responsibilities, that his conduct was prohibited and subject to discipline. The fair notice to Grievant was evident during his statements in the pre-dismissal *Loudermill* meeting that the text exchanges were inappropriate and constituted a lapse of judgment on his part.

As discussed above, Grievant did not have fair notice that he could be disciplined for his performance deficiencies reflected in the staff feedback. Instead, he was on notice that any deficiencies he had in this regard would be addressed through the performance evaluation and corrective action process.

Grievant's misconduct had an adverse effect on his ability to perform at a satisfactory level and on supervisors' confidence in his ability to perform assigned duties. Grievant had a high degree of autonomy as district director overseeing child protection and other family services. Grievant's superiors needed to have a high degree of trust in him exercising these duties with integrity and good judgment. His inappropriate text messages with Employee A adversely affected the trust his superiors had in him. That being said, the adverse effect of his actions is mitigated somewhat by the fact his misconduct occurred several years earlier and had stopped once it was clear they were unwelcome by Employee A.

Grievant's past work record and disciplinary record weigh in his favor. He had received no previous discipline. His overall performance had been rated at least satisfactory in his previous annual performance evaluations.

In weighing all of the relevant factors and examining all the circumstances, we ultimately conclude that just cause did not exist for Grievant's dismissal. Grievant's misconduct cannot be condoned, and the Employer was justified in bypassing progressive discipline to the extent of imposing a significant degree of discipline on Grievant. However, the Employer did not act reasonably in concluding he was not a good candidate for rehabilitation and that a lesser sanction than dismissal would not be effective or adequate. It is notable in this regard that Grievant's proven offenses are less severe than charged by the Employer, and the Employer inappropriately relied on performance issues. It also is significant that his misconduct occurred several years earlier and had stopped once it was clear they were unwelcome by Employee A.

We conclude that it was not appropriate for the Employer to completely bypass progressive discipline and dismiss Grievant. An adequate and effective sanction other than dismissal is a 15 day suspension. This significant level of discipline should suffice to deter such conduct by Grievant in the future. It also should suffice to send the message to other employees that the misconduct displayed here was serious and will not be condoned.

ORDER

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

1. The Grievance of Patrick Ryan is sustained in part and his dismissal is reduced to a 15 day suspension;
2. Grievant shall be reinstated to his position as District Director of the Newport office of the Family Services Division, Department for Children and Families;
3. Grievant shall be awarded back pay and benefits from the date commencing 15 working days from the effective date of his dismissal until his reinstatement, for all hours of his regularly assigned shift plus the amount of overtime Grievant would have worked, minus any income (including unemployment compensation received and not paid back) received by Grievant in the interim;
4. The interest due Grievant on back pay shall be computed on gross pay and shall be at the legal rate of 12 percent per annum and shall run from the date each paycheck was due during the period commencing 15 working days from Grievant's dismissal, and ending on the date of his reinstatement; such interest for each paycheck date shall be computed from the amount of each paycheck minus income (including unemployment compensation) received by Grievant during the payroll period;
5. The parties shall file with the Labor Relations Board by April 30, 2021, a proposed order indicating the specific amount of back pay and other benefits due Grievant; and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the

Board. A hearing on disputed issues, if necessary, shall be held on May 13, 2021, at 9:00 a.m., via the Microsoft Teams platform; and

6. The Employer shall remove all references to Grievant's dismissal from his personnel file and other official records and replace it with a reference to a 15 day suspension consistent with this decision.

Dated this 14th day of April, 2021, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Robert Greemore

Robert Greemore, Acting Chairperson

/s/ Karen F. Saudek

Karen F. Saudek

/s/ Roger P. Donegan

Roger P. Donegan