

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 21-34
VERMONT STATE EMPLOYEES'	)	
ASSOCIATION AND GRIEVANT <sup>1</sup>	)	

FINDINGS OF FACT, OPINION, AND ORDER

Grievant, a Nurse Case Manager working with the Vermont Department of Aging and Independent Living (“DAIL”), and the Vermont State Employees’ Association (“VSEA”), grieve Grievant’s termination for failing to perform work duties during his workday, and falsifying time sheets by claiming he worked hours he did not work. Grievant alleges the Employer violated Article 14 of the collective bargaining agreement between the State and VSEA for the Bargaining Unit by terminating him without just cause, 2) improperly bypassing progressive discipline in terminating him, and 3) failing to apply discipline with a view toward uniformity and consistency in terminating him from DAIL.

The Vermont Labor Relations Board held hearings on the grievance on March 10, March 31, and April 14, 2022, before Board members, Richard Park, Chair, Karen Saudek, and Roger Donegan. Grievant appeared and was represented by VSEA Attorney Kelly Everhart, the State was represented by General Counsel and Administrative Law Director, Jacob Humbert. The hearings were held on the Microsoft Teams Platform. The parties filed post-hearing briefs on July 28, 2022.

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<sup>1</sup> Pursuant to Section 19.3 of the Rules of Practice of the Vermont Labor Relations Board, the Vermont Labor Relations Board has redacted the name of the Grievant in the copy of the decision posted on its website. The Board has replaced any mention of the redacted name with “Grievant.”

## FINDINGS OF FACT

### Background

1. Grievant was hired by the State of Vermont in 2012, as a Nurse Case Manager with the Department of Aging and Independent Living (“DAIL”).
2. Grievant was initially hired to serve as a Money Follows the Person (“MFP”) transition coordinator. This program is a grant-based program embedded in the Medicaid Choices for Care program within DAIL. The MFM program assists persons leaving residential treatment to transition into a home setting. Grievant was responsible for assessing patient needs and challenges and helping identify services to support them in their home setting. After transition to the home, Grievant monitored their progress.
3. Grievant was also tasked with ensuring the MFM program remained compliant with federal funding guidelines.
4. Grievant was assigned to the Williston-Chittenden area.
5. Excluding the allegations precipitating his termination, during his tenure, Grievant maintained a positive employment history, with no disciplinary record, and received three excellent employment evaluations, and one satisfactory evaluation.
6. Around 2020, Grievant’s responsibilities expanded to include the Complex Care, Long-Term Care, and Adult High-Tech programs. Complex Care provides assistance to a population with greater needs that are often unable to leave a hospital or residential setting. Grievant worked with Nurse Case Managers to assess the needs of individuals and worked with the Area on Aging and other organizations for treatment and care.
7. For Long-Term Care, Grievant provided eligibility assessments for potential clients with nursing home level of care needs.

8. Adult High-Tech programs serve Medicaid recipients requiring high tech interventions, like ventilators, or feeding tubes. Nurse Case Managers assess patients for these services and benefits. The benefits received include skilled nursing services from home health agencies, like VNA.
9. Many of the programs Grievant serviced utilized the SAMS system or database. SAMS is used by DAIL staff in all divisions and contains materials and information about clients or customers, such as program applications, staff journal notes related to that client's history, review alerts to staff, care plans, medical records, program eligibility assessment documents, and notices of eligibility decisions with appeal rights.
10. SAMS alerts Nurse Case Managers of applications or reassessment reviews or other activities in their geographic area, through widget prompts.
11. All DAIL Nurse Case Managers and providers have access to the SAMS database.
12. As an MFP transition coordinator, Grievant was required to spend twenty-five percent of his time on MFP projects. During his tenure, Grievant was researching ways to improve transition processes to help the home health services organization take over care of the customer. This work did not require inputting information into SAMS.
13. Paula Brown is a supervisor of long-term care nurses, responsible for recruiting, hiring, orienting, and training new nurses. She works in the Choices for Care programs, provided feedback on Grievant's performance evaluations, although she did not directly supervise him. Ms. Brown trained Grievant on the use of SAMS in the Choices for Care Program.
14. According to Paula Brown, a Nurse Case Managers should access and use the SAMS database throughout the day. She also recommends that the best practice involves

reporting information on SAMS as soon as possible after the activity or event to ensure that users have real time data and information. Delay can result in negative impacts on providers not being able to bill for services or consumers not being able to receive services.

15. There is no written policy, rule, or guidance on when entries are required to be placed in the SAMS database. There are no documented standards for utilizing SAMS or the time required to complete tasks or entries in SAMS. Grievant accessed SAMS daily.

16. Grievant was expected to work an eight-hour day, from 7:45 a.m. to 4:30 p.m. Grievant was allotted a thirty (30) minute lunch, and a fifteen (15) minute break. The required amount of time expected to be expended on work each day was seven (7) hours. Time spent traveling to assignments, client meetings, and other work-related commitments is treated as time dedicated to work.

17. During his tenure, Grievant worked with several DAIL supervisors. Dr. Wilcox was Grievant's supervisor from the time Dr. Wilcox began state employment in August 2019 until Dr. Wilcox left state employment June 2021.

18. All of Grievant's supervisors, except Dr. Wilcox, provided positive evaluations and praised Grievant's ability to understand client goals and create effective transition plans for patients. Grievant was also applauded for taking on extra work duties. His last supervisor before Dr. Wilcox, rated Grievant's performance as excellent.

19. In addition to his duties in the Williston-Chittenden region, Grievant assumed more responsibilities when providing coverage for other staff who were on Family and Medical Leave in Middlebury. During that time, Grievant continued to perform his MFM and other responsibilities.

20. In addition to his other duties, in 2020, Grievant was asked to help the Franklin/Grand Isle Nurse Case Manager with duties in her region for the Choices for Care program. The Nurse Case Manager assigned to this region continued to work there while Grievant assisted her.
21. While assisting the assigned Franklin/Grand Isle Nurse Case Manager, Grievant was asked to attend the waiver team meetings for that county. The Franklin/Grand Isle nurse facilitated and attended the meetings.
22. Waiver team meetings provide a forum for the Choices for Care stakeholders and providers to exchange information and discuss relevant updates to the program.
23. Grievant did not attend one meeting and was late or needed to be reminded about a second meeting facilitated by the Franklin/Grand Isle Nurse Case Manager.
24. In April and May 2020, Dr. Wilcox identified some performance issues in Grievant. After consultation with Human Resources, Dr. Wilcox treated the issues as performance, rather than disciplinary problems or issues.
25. DAIL management did not treat Grievant's performance issues as misconduct warranting an investigation.
26. On May 11, 2020, Dr. Wilcox provided Grievant an official notice of performance deficiency ("Notice"). The Notice outlined the following:

**Areas of Performance Deficiency:**

- Follow through on CFC processes and communications with team members and/or providers
- Attending the Franklin County Waiver Team Meetings as scheduled

- Follow MFP enrollment processes
- Follow Through on Complex Care clients  
VSEA Exhibit 3.

27. The Notice provided the following Next Steps:

- I will be scheduling daily 1:1 meeting with you. During this time, we will discuss your case load and go over those clients you are working with in MFP, Complex Car, and LTCC. Client's [sic].
- All work hours need to be completed at either the St. Albans State Office (days you are not at Williston office) and Williston office (team B scheduled Days) when directive is received to return to state offices by DHR. You will need to call me from the office phone, not your cell, upon arriving at each office and upon leaving the office. Please call my cell for these calls, please leave a message if I am unable to answer the call. You will only work from home when specifically directed by myself or DAIL/ASD leadership.
- Please enter each client you are visiting on your calendar individually. Do not block time as "Client Visits". I will need you to enter the name of the client and the address in the subject line on your calendar. You must keep your calendar up to date in this way.
- You will continue to send me your MFP documentation, both for transitioning clients and you-[sic] follow up calls prior to entering them in SAMS for my review and feedback.
- You will attend all meetings you are required to attend including the Franklin County and Chittenden County Waiver Team meetings. If you are unable to attend you must discuss this with me prior to the meeting, not the day of.
- Please be advised that should your performance not improve you will be subject to the issuance of a special Unsatisfactory Performance Evaluation coupled with a Prescriptive Period of Remediation. This notice will remain in place over the next 90 days, to ensure you are able to consistently adhere to expectations.  
VSEA Exhibit 3.

28. At this time, Grievant was not working in proximity to Dr. Wilcox, due to the COVID-19 pandemic and the remote working directives for most state employees. Up until the Notice, Grievant worked two to three days at the Williston-Chittenden office and the other days at his home office.
29. After the Notice, Grievant met with Dr. Wilcox daily through remote means. Because Dr. Wilcox believed Grievant was not prepared for the meeting, Dr. Wilcox created a Daily Work Report form that he expected Grievant to populate or generate and to send to Dr. Wilcox before their daily meeting.
30. Dr. Wilcox required Grievant to track the work he performed in the Daily Work Report, including the time he started and completed a task for a client. Each Daily Work Report was intended to track the work for one day.
31. Grievant was expected to provide the Daily Work Reports to Dr. Wilcox at least thirty minutes before their daily meeting.
32. Grievant could not submit entries into SAMS without Dr. Wilcox first approving them. Grievant provided Dr. Wilcox with draft entries and had to wait for Dr. Wilcox's edits and approval before logging the entries in SAMS.
33. Because he was required to obtain Dr. Wilcox's approval for all SAMS entries, on some occasions Grievant did not receive approval or a revised SAMS entry from Dr. Wilcox on the same day he performed the work. As a result, Grievant recorded the work performed on the Daily Work Report on the same day the work was performed, but the SAMS entry would not appear until it was approved by Dr. Wilcox, sometimes days later.
34. Grievant dedicated up to thirty minutes a day preparing the drafts or narratives of his SAMS entries for Dr. Wilcox.

35. Because Dr. Wilcox requested that Grievant submit the materials for review thirty minutes ahead of their daily meeting, Grievant submitted the Daily Work Report and SAMS submissions for review between 2:30 and 3:00 p.m. each day.
36. According to Grievant, his meetings with Dr. Wilcox lasted between fifteen to thirty minutes. Dr. Wilcox estimated the meetings lasted about thirty minutes, but sometimes extended to forty-five minutes. After meeting with Dr. Wilcox, Grievant would return emails and set up meetings and phone calls. If Dr. Wilcox had approved a SAMS entry, Grievant would input that SAMS entry.
37. Grievant did not record in his Daily Work Report, the time required to attend the daily meeting, prepare the Daily Work Report, or any work performed after meeting with Dr. Wilcox.
38. It took Grievant time to revise the SAMS entries to incorporate Dr. Wilcox's edits or revisions. Grievant estimated it would take him a half hour to one and one-half hours to revise and input the SAMS entries after receiving Dr. Wilcox's revisions, depending on the number of SAMS entries.
39. At the daily meetings, Dr. Wilcox never questioned Grievant about the absence of work reported in the Daily Work Report at the end of the day. He never queried why there was a gap or whether Grievant performed additional work after he prepared or met with Dr. Wilcox to discuss the Daily Work Reports.
40. Grievant testified that Dr. Wilcox never instructed him to report in the Daily Work Report the work he performed after meeting with him.
41. Dr. Wilcox testified that he asked Grievant to send him the Daily Work Reports the next day and that he should amend his Daily Work Reports if Grievant performed more work



after the Daily Work Report was completed. Dr. Wilcox admits that this instruction was never memorialized in writing. He also acknowledged that it was possible that he asked Grievant to provide him the Daily work Report on the same day it was prepared.

42. On May 14, 2020, Dr. Wilcox emailed Alison Land and Angela McMann informing them that he had directed Grievant to submit a form detailing his daily work and that Grievant should prepare the form and send it to Wilcox no later than thirty minutes prior to their one-on-one call or meeting. VSEA Exhibit 8.

43. Dr. Wilcox directed Paula Brown and another nurse supervisor to audit Grievant's work. The evaluators were tasked with comparing the Daily Work Reports with the SAMS record for each day. The audit focused on the Choices for Care tasks or work identified on the Daily Work Reports. They compared the client names in the Daily Work Report and the work reported as performed with the entries in SAMS to ensure that work or information was submitted in SAMS and submitted correctly.

44. The audit revealed that at times Grievant missed steps needed in the care enrollment process like sending alerts to case management agencies as needed.

45. Ms. Brown reviewed the work related to two clients in the Choices for Care program reported in Grievant's Daily Work Report for May 18, 2020, and opined that the work related to the Choices for Care program for one client and inputting the information in SAMS would take only 15- 45 minutes.

46. Ms. Brown is not familiar with the MFP Program and could not opine on the work performed for that program or the amount of time needed to complete the work. Despite this limitation, she opined that the tasks Grievant listed for the second client on May 18, 2020, as MFM Monthly F/U Call would take less than thirty minutes.

47. Ms. Brown could not opine on the entries listed at the bottom of the Daily Work Report that did not involve SAMS entries, including ILA for professional counsel, email notes for professional counsel, and MFP.
48. Ms. Brown reported that based on the information she had available through her audit she could not determine or confirm the allegation that Grievant was not working the hours he claimed to be working.
49. Ms. Brown was unaware of any other employee required to complete Daily Work Reports, and therefore, could not compare Grievant's performance based on how others completed a Daily Work Report.
50. Neither Dr. Wilcox, nor Ms. Brown testified that they ever saw Grievant idling or not performing the duties to which he was assigned.
51. VSEA Exhibit 4 is a log of other work performed by Grievant outside of SAMS from 6/2/20-6/24/20. The State provided this information to VSEA through discovery.
52. VSEA 4 documents that Grievant viewed, created, or modified documents related to Care Enrollment, Consumer Journal, Consumer Assessment, and Consumer Assessment Plans. The Exhibit also reports the time each access to documents was made.
53. As reflected in VSEA Exhibit 4, on the dates the State has alleged Grievant failed to complete seven hours of work, he was viewing, creating, or modifying documents and conducting work after the last entry for work completed on his Daily Work Reports.
54. On June 17, 2020, Grievant attended the St. Albans/Grand Isle Waiver Team meeting.
55. Although the Notice indicated that if Grievant failed to improve, the next step would be an Unsatisfactory Performance Evaluation, Dr. Wilcox did not initiate such an evaluation

for Grievant. Grievant never received a Special Unsatisfactory Performance Evaluation nor was he placed on a Prescriptive Period of Remediation.

56. On June 19, 2020, Dr. Wilcox forwarded to his Program Manager Angela McMann an email summarizing his “Mis-conduct Concerns” about Grievant. The summary was forwarded to Human Resources for an investigation referral. State Exhibit 10.

57. The email summary contained concerns about the accuracy of the High Tech assessment of one client and whether Grievant was copying the assessment from the year before, discrepancies between his representations of work in the Daily Work Report as compared to entries in SAMS, the amount of time reported for tasks, scheduling assessments for clients in Outlook Calendar that did not occur, and Grievant’s minimal or inadequate participation in the discharge of a Complex Care Client on or before May 5, 2020.

58. Dr. Wilcox did not include Grievant as a recipient of his email outlining Grievant’s “mis-conduct concerns.”

59. While awaiting the outcome of their investigation referral, DAIL Program Manager, Angela McMann questioned Dr. Wilcox and Deputy Commissioner Tierney-Ward whether Grievant could continue to work during the investigation. DAIL Program Manager McMann expressed concern about the amount of support Grievant needed to complete his work.

60. Deputy Commissioner Tierney-Ward recommended that because of the need to support Grievant’s work deficiencies and the inability to train him in a new area during the investigation, it made sense to place Grievant on administrative leave “from the beginning of the investigation and if we continue to think of alternative work options for him, then we can reassign him later.” VSEA Exhibit 5.

61. On June 29, 2020, Grievant was placed on temporary relief from duty to facilitate the investigation of allegations of misconduct against him.
62. On July 8, 2020, DHR Investigator Peter Canales, notified Grievant that he had been assigned to investigate allegations that Grievant had engaged in misconduct, “by knowingly making false documents regarding the assessment and/or medical documents of a person requiring an appropriate medical assessment.” State Exhibit 2.
63. The letter reminded Grievant of his obligations under Personnel Policy 17.0 to provide truthful and complete information and the consequences for answering untruthfully.
64. Grievant was interviewed when he was on relief from duty. During that time, he did not have access to his work email, state calendar, SAMS or other work-related data or information systems that could be used to refresh his recollection about the work he performed or the days the State had alleged he was not working a full workday.
65. On January 11, 2021, Mr. Canales issued his report on Grievant. The report did not reference or provide any information regarding the allegation that Grievant had knowingly made false documents regarding the assessment and/or medical documents of a person requiring an appropriate medical assessment” or any issues or concerns regarding High Tech assessment misrepresentations.
66. On May 10, 2021, DAIL Interim Commissioner Monica White issued Grievant a Loudermill letter notifying him that DAIL is contemplating imposing serious disciplinary action against him, up to and including dismissal. 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

Vermont Personnel Policy 5.6: Employee Conduct

Policy 8.0: Disciplinary Action

Policy 9.1: Immediate Dismissal

Policy 11.10: Time Entry and Approval

State Exhibit 7.

67. The May 10, 2021, Loudermill letter alleged Grievant committed misconduct or gross misconduct or both “by failing to perform work during work hours and falsifying time sheets claiming hours that you did not work.”
68. The allegation that Grievant failed to perform work during work hours involved his Daily Work Report not equaling seven hours of work, and incongruity between his SAMS entries and when and how he represented SAMS entries in his Daily Work Report. The State also alleged the time needed or reported to complete tasks or entries in SAMS supported this misconduct allegation.
69. The State alleged the Daily Work Reports for the following dates did not include or detail seven hours of work performed: June 2, 3, 4, 8, 9, 15, 16, 17, 18, 19, 22, and June 24, 2020.
70. The falsifying time entries on timesheet allegation was based on Grievant entering eight hours worked on each of the June 2020 dates listed above but failing to detail or include seven hours of work or tasks completed in his Daily Work Report for these days.
71. Grievant testified that during his meetings with Dr. Wilcox, Dr. Wilcox never mentioned or raised concerns about his timesheet entries.

72. The Loudermill letter did not identify any issues or concerns regarding High Tech assessment misrepresentations.
73. On September 23, 2001, Deputy Commissioner Tierney-Ward notified Grievant of his dismissal from the position of Nurse Case Manager with DAIL, effective the close of business October 7, 2021.
74. The State supported the termination decision in its Twelve Factor Analysis Memorandum signed by Deputy Commissioner Tierney-Ward. The allegations of misconduct against Grievant included recording less than seven hours on twelve separate days on his Daily Work Report evidencing that he did not complete full workdays, and “[d]espite not completing full workdays, Grievant submitted timesheets for each day certifying that he completed 8 ‘hours worked’ each day. Based on the entries in his Daily [Work] Report, it appears that Grievant falsified his timesheets.” State Exhibit 8.
75. Deputy Commissioner Meghan Tierney-Ward stressed that she was less concerned about the time gaps at the end of the day that may be due to submitting the Daily Work Report and any misunderstanding about whether or when to submit this time. She was more concerned about the time he did document, that it was not in SAMS or took longer than needed to complete a task.

76. Deputy Commissioner Tierney-Ward acknowledged that it would take Grievant longer than it would Ms. Brown to complete tasks on SAMS, because Ms. Brown is more experienced in SAMS. She also acknowledged that because Grievant was being monitored his entries might take longer to complete.

### 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) (internal citations and quotations omitted). 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.

The Employer terminated Grievant because of the misconduct described in the Loudermill letter of May 10, 2021. In that letter, the State alleged Grievant engaged in the following misconduct which warrants just cause for termination: 1) failing to perform work during work hours; and 2) falsifying time sheets claiming he worked eight hours when he did not.

Regarding the first allegation, the State claims that the tasks Grievant performed as reflected in his Daily Work Report did not match the entries in the SAMS database, and therefore, Grievant did not perform the work he claimed he performed. The State also claims that Grievant's Daily Work Reports demonstrate that Grievant failed to work seven hours on twelve days in June 2020.

The State claims Grievant violated Personnel Policy 5.6, which provides in pertinent part:

1. It shall be the duty of employees to fulfill to the best of their ability the duties and responsibilities of their position. Employees shall pursue the common good in their official activities, and shall uphold the public interest, as opposed to personal or group interests.
  2. Employees shall devote their full time, attention, and effort to the duties and responsibilities of their positions during their scheduled work time, except when other activities are authorized by law, rule, or contractual agreement, or are approved by the appointing authority.
  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.
- State Exhibit 12.

The Employer claims Grievant failed to use his best efforts and failed to devote his full time, attention, and effort to the duties and responsibilities of his position as a Nurse Case Manager. The State relies primarily on the Daily Work Reports Grievant submitted in response to the directive from his supervisor Dr. Wilcox, and the SAMS entries.



The Daily Work Reports, the State claims, demonstrate that Grievant did not work seven hours on the dates identified in the Loudermill letter. On those dates, Grievant has not identified or documented in his Daily Work Report, tasks or work entries that extend until the end of his workday. Because Grievant did not demonstrate or document work on his Daily Work Report totaling seven hours, the State maintains Grievant did not work seven hours on these dates and therefore worked less than the required full day.

Grievant, however, testified that he prepared the Daily Work Reports thirty minutes prior to his daily meetings with Dr. Wilcox and that he met with Dr. Wilcox between 2:30 and 3:00 p.m. every day. Grievant testified that he met with Dr. Wilcox on the same day as the work reported on the Daily Work Report. Grievant also testified that he did not include on his Daily Work Report, his daily meeting with Dr. Wilcox, nor the time needed to prepare his Daily work Report. Grievant also stated that he worked through the end of the day but did not include any tasks or work on his Daily Work Report after submitting it to Dr. Wilcox. Grievant also testified that he was never asked to supplement his Daily Report after meeting with Dr. Wilcox.

Dr. Wilcox was uncertain whether he asked Grievant to send him his Daily Work Report thirty minutes before the meeting. Although he initially testified that he met with Grievant the day after the Daily Work Report was submitted, when confronted with his own email summarizing his direction to Grievant that he should submit his Daily Work Reports thirty minutes before their meeting, Dr. Wilcox relented. The Board finds more credible the testimony of Grievant on this issue. Grievant's testimony that he met with Dr. Wilcox thirty minutes after sending his Daily Report and on the same day as the work reported, is consistent with Dr. Wilcox's email summarizing his directive to Grievant, and the Daily Work Reports.

Grievant also testified that after meeting with Dr. Wilcox, he made the necessary recommended changes to his draft SAMS entries and placed them in the SAMS database. After making those changes, he checked and responded to emails, returned phone calls, and other work duties until the end of his workday. Although the Daily Work Reports indicated no work after early afternoon, Dr. Wilcox never corrected, or questioned Grievant about whether he continued to work beyond those times. He never asked Grievant why the time needed to prepare the Daily Work Report and attend their daily meeting were not included in the Daily Work Report. The Board finds the testimony of Grievant to be more credible and that he continued to perform work duties after preparing his Daily Work Report and meeting with Dr. Wilcox.

VSEA Exhibit 4 also documents that Grievant continued to work throughout the afternoon on the disputed dates. Grievant viewed, created, or modified documents related to Care Enrollment, Consumer Journal, Consumer Assessment, and Consumer Assessment Plans in the Choices for Care Program through the end of the day.

The allegations related to Grievant's activities on May 18, 2020, also fail to support the State's claim that Grievant failed to perform work during work hours. Grievant's Daily Work Report included his work for two clients in the Choices for Care program on that day. Although Ms. Brown estimates that the total amount of time needed to perform that work would not exceed 90 minutes, she also testified that she did not have enough documentation to conclude that Grievant did not work the hours he reported. Her audit was limited to the Choices for Care program, she did not review work Grievant performed for other programs, and she was not familiar with the MFP program. The Deputy Commissioner conceded that it would likely take Grievant longer to complete entries in SAMS than it would take Ms. Brown. Both Dr. Wilcox and Ms. Brown acknowledged that they never observed Grievant being idle.

The State also claims that the incongruity between the SAMS entries and the Daily Work Reports proves that Grievant did not dedicate his full time and attention to his work and that he did not perform the work or tasks represented in his Daily Work Report. Grievant, however, was prohibited from making contemporaneous SAMS entries. Dr. Wilcox directed Grievant to provide him with draft SAMS entries before entering them into SAMS. Grievant was required to delay making these entries until after Dr. Wilcox reviewed, edited, and approved the entries. The discrepancy or time delay between the work performed, and reported in the Daily Work Report, and when it was finally inputted into SAMS is reasonable and expected given the demands and direction by Dr. Wilcox to delay SAMS entries until approved by Dr. Wilcox.

The Board finds the State has failed to prove by a preponderance of the evidence that Grievant failed to work or dedicate his full time and attention to work during work hours.

Regarding the second allegation raised in the Loudermill letter, the State has failed to prove by a preponderance of the evidence that Grievant falsified time entries. State Personnel Policy and Procedure 11.0, provides in pertinent part:

All employees are expected to complete and submit accurate Timesheets in a timely manner in accordance with the State of Vermont payroll schedule. All employees have a duty to accurately report scheduled work hours, leave utilized, and any unpaid time not worked on their Timesheet. The State and its employees are accountable to the public and taxpayers, and the State does not compensate employees for time not worked, except as authorized under the State's leave policies. An employee who inaccurately reports time worked and/or leave unused may violate general standards of conduct and/or the law, which may result in disciplinary action up to and including dismissal from employment, and/or additional legal repercussions.

. . . .

Department shall ensure that employees submit accurate Timesheets. Once an employee submits a Timesheet, the Timesheet is subject to the supervisor's approval. The approval provides a record that the Department accepts the Timesheet as an accurate representation of the employee's Payable Time.

Approval by a supervisor does not negate, mitigate, or supersede any false entry by an employee. Supervisors shall be duly diligent in approving employee time.

State Exhibit 13.

The State relies on the Daily Work Reports as supporting its claim that Grievant falsified his timesheet. The State claims the time or hours Grievant reported working on his timesheet on the alleged dates in June 2020 was not consistent with his Daily Work Reports for the same period. The State argues this discrepancy proves that Grievant inaccurately reported his timesheet and violated State Personnel Policy and Procedure 11.0.

As outlined above, the Board finds that Grievant completed more work each day than he reported on his Daily Work Report. Dr. Wilcox required Grievant to submit the Daily Work Report at least thirty minutes before their meeting. Dr. Wilcox and Grievant met each day. The time needed to prepare the Daily Work Report and meet with Dr. Wilcox were not reported in the Daily Work Reports. Grievant dedicated up to thirty minutes each day preparing the Daily Work Reports and the meetings lasted approximately thirty minutes. After the daily meetings, Grievant continued to perform work, including inputting the corrected or approved entries into SAMS. This process would take one half to one and one-half hours to complete.

Although approval of the timesheet does not negate a false entry, Dr. Wilcox's review of Grievant's timesheet must be evaluated in conjunction with his daily oversight of Grievant's workday. Dr. Wilcox actively monitored Grievant's time daily, beginning with the requisite morning call each day to prove when Grievant arrived at work and ending with a meeting to review the Daily Work Report and the work performed during that day. No other employee was required to submit a Daily Work Report or meet each day with Dr. Wilcox to discuss the work completed that day. Dr. Wilcox imposed on Grievant additional measures to document Grievant's work hours. These additional measures informed Dr. Wilcox's understanding of

Grievant's work and the time dedicated to his work. Based on his knowledge of the time Grievant was working, Dr. Wilcox approved Grievant's timesheets.

The Board also finds unpersuasive the State's claim that Grievant overstated the amount of time dedicated to work tasks. The Board has found that Grievant would take longer than Ms. Brown to complete tasks in the SAMS database. There was also a delay in the work completed and the actual entry into SAMS as a result of Dr. Wilcox's direction that he must review all SAMS entries. Ms. Brown conceded that she could not conclude or opine whether Grievant was claiming more hours worked than he actually worked. Deputy Commissioner acknowledged that it was reasonable for Grievant to take longer than Ms. Brown to input data into SAMS. The difference in the amount of time it took Grievant to perform SAMS reporting and Ms. Brown to complete the same task is reasonable.

The State has failed to sustain its burden of proving Grievant failed to accurately report his time on his timesheet in violation of Personnel Policy 11.0.

#### High Tech Assessment

In addition to the two areas of misconduct alleged in the Loudermill letter, the State also relies on the alleged misrepresentation regarding the High-Tech assessment on June 8, 2022, as supporting its termination decision. The Loudermill letter did not notify Grievant that he was at risk of being disciplined or terminated for this High-Tech assessment. The Loudermill letter provided Grievant with notice and an opportunity to respond to those charges or allegations in the letter. "As explained in the May 10, 2021, letter and attachments you received, DAIL was contemplating your dismissal, and you were given an opportunity to respond to misconduct charges before I made a final decision." State Exhibit 9. A charge or claim related to his June 8, 2022, High Tech assessment was not included in the Loudermill letter. Instead, only the

allegation that his “Daily Report contains entries reporting work between 7:45 a.m., and 2:50 p.m. Such entries show less than seven hours of work performed on June 8, 2020.” State Exhibit 7. The Loudermill letter also identified the falsifying time sheet allegation.

In reviewing the termination decision, the Board will not look beyond the reasons provided by the Employer in its dismissal letter. See, e.g., Grievance of Rosenberger, 28 VLRB 284, 296 (2006); Grievance of Buckbee, 15 VLRB 34, 49 (1992). Employees have a property interest in their continued employment. This Board and the Vermont Supreme Court have consistently applied the due process requirements of notice and an opportunity to be heard announced in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546, 105 S. Ct. 1487, 1495 (1985). The employee is entitled to “notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story.” Id. at 546, 105 S. Ct. at 1495, cited in, In re Gregoire, 166 Vt. 66, 71–72 (1996). The charges identified in the Loudermill letter serve as the focus of the Loudermill hearing. “The purpose of a pretermination hearing is to determine whether reasonable grounds exist to believe that the charges against the employee are true and support the proposed actions.” In re Grievance of Towle, 164 Vt. 145, 153 (1995) (citing Loudermill, 470 U.S. at 546–47, 105 S. Ct. at 1495–96).

The Loudermill letter did not provide notice to Grievant that he may be dismissed or subject to discipline for High Tech assessment or evaluation errors. The Employer, therefore, cannot rely on this claim, not raised in the Loudermill letter to support its termination decision in the Grievance before the Board. See Rosenberger, 28 VLRB, at 284-85.

## ORDER

Based on the findings and reasoning stated above, it is ordered:

1. The Grievance of VSEA and Grievant is sustained;
2. Grievant shall be reinstated to his position with the Department of Aging and Independent Living (“DAIL”);
3. Grievant shall be awarded back pay and benefits 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 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 March 15, 2023, a proposed order indicating the specific amount of back pay and other benefits due Grievant; and if they are unable to agree on a proposed order, shall notify the Board in writing 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, and any proposed exhibits.
6. If the parties do not submit a proposed order, a hearing on disputed issues shall be scheduled via the Microsoft Teams platform; and

7. The Employer shall remove all references to Grievant's dismissal from his personnel file and other official records.

Dated this 21<sup>st</sup> day of February 2023, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

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Richard W. Park, Chairperson

/s/ Karen F. Saudek

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Karen F. Saudek

/s Roger Donegan

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Roger Donegan