Dealing With Discipline

And Other Difficult Issues

In Administering Contracts

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CONTENTS

I. GRIEVANCES IN GENERAL

1.1 Definition of Grievance

The Vermont Labor Relations Board has jurisdiction to resolve employee grievances under the State Employees Labor Relations Act. The Board has exclusive jurisdiction to "hear and make final determination on the grievances" of State employees, State Colleges employees and University of Vermont employees.[1] In deciding grievances the VLRB is limited by the statutory definition of grievance, which provides:

> "Grievance" means an employee's, group of employees', or the employee's collective bargaining representative's expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under collective agreement or the discriminatory application of a rule or regulation, which has not been resolved to a satisfactory result through informal discussion with immediate supervisors.[2]

In cases where grievants claim a "discriminatory application of a rule or regulation", the VLRB has followed the Vermont Supreme Court guidance that discrimination in this instance simply means unequal treatment of individuals in the same circumstances under the applicable rule.[3] Failure of an employer to apply a binding rule is sufficient to require a finding of discrimination.[4] Employer regulations governing procedures, or guidelines mandating procedures, for management constitute binding rules or regulations.[5]

In deciding grievances, the VLRB has concluded that past practices are encompassed within the statutory definition of grievance. The Board has recognized that

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[1] 3 V.S.A. §926.

[2] 3 V.S.A. §902(14).

[3] Nzomo v. Vermont State Colleges, 136 Vt. 97, 102 (1978). Grievance of Imburgio, 11 VLRB 168 (1988).

[4] Id. Grievance of Gobin, 158 Vt. 432, 434 (1992). Grievance of Roll, 2 VLRB 228, 233 (1979).

[5] Grievance of Gobin, 158 Vt. at 435. Grievance of Cochran, 24 VLRB 54, 62 (2001).

day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are significant, long-standing and not at variance with contract provisions.[6] If contractual effect is to be granted a past practice, that practice must be of sufficient import to the parties that they can be presumed to have bargained in reference to it and reached a mutual agreement or understanding.[7]

Also, in deciding grievances, the Board has deemed it appropriate to look to Constitutional law where language in a collective bargaining agreement imports a Constitutional standard and the Board must interpret that portion of the agreement.[8] However, absent that circumstance, the term "grievance" is not so infinitely expandable as to include every Constitutional right.[9] In one case involving the dismissal of a State manager not covered by a contract, the VLRB cited the merit system principle which "assure(s) fair treatment of . . . employees in all aspects of personnel administration . . . with proper regard for their . . . Constitutional rights as citizens"; to decide a Constitutional claim concerning free speech rights.[10]

Also, statutory provisions are not encompassed within the definition of "grievance" unless they are incorporated into a collective bargaining agreement, rule or regulation.[11]

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[6] Grievance of Hanifin, 11 VLRB 18, 27 (1988). Grievance of Cronin, 6 VLRB 37, 67-69 (1983). Grievance of Allen, 5 VLRB 411, 417 (1982). Grievance of Beyor, 5 VLRB 222, 238-239 (1982).

[7] Cronin, 6 VLRB at 68-69.

[8] Grievance of Sypher and the Vermont State Colleges Faculty Federation, Local 3180, AFL-CIO, 5 VLRB 102, 125 (1982). Cronin, supra. Grievance of Roy, 6 VLRB 163 (1983).

[9] Grievance of Russell, 7 VLRB 60, 80-81 (1984).

[10] 3 V.S.A. §312(b)(5). Grievance of Morrissey, 7 VLRB 129, 169-171 (1984); *Affirmed*, 149 Vt. 1 (1987).

[11] Boynton v. Snelling, 147 Vt. 564 (1987). In re McMahon, 136 Vt. 512 (1978). Grievance of UE Local 267 and Bruley, 22 VLRB 167 (1999). Grievance of VSCSF and Laflin, 16 VLRB 276 (1993).

1.2 "Actual Controversy" Requirement

The jurisdiction of the Board in grievance proceedings is limited by the requirement that there be an "actual controversy" between the parties.[12] When the employer, through the grievance procedure, has provided as a remedy the most that the Board could award as a remedy, the Board has determined that the "actual controversy" requirement has not been met, and has dismissed the grievance, even though the employer had not admitted to any contract violations.[13] The Board reasoned that, to provide an adequate basis to assert jurisdiction, a grievance must be more that an argument over contract interpretation.[14] It also must be a request for action which the Board has the authority to order.[15]

To satisfy the "actual controversy" requirement[16], there must be an injury in fact to a protected legal interest or the threat of an injury in fact.[17] Where future harm is at issue, the existence of an actual controversy "turns on whether the plaintiff is suffering the threat of actual injury to a protected legal interest, or is merely speculating about the impact of some generalized grievance.[18]

The Vermont Supreme Court has applied these standards in two cases in which employees have had grievances pending at the time they resigned from employment. In one case, the Board and the Supreme Court dismissed a resigned state police officer's grievance contesting his last performance evaluation.[19] The Board and the Court reasoned

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[12] In re Friel, 141 Vt. 505, 506 (1982).

[13] Grievance of Rennie, 16 VLRB 1, 5-6 (1993). Grievance of Ray, 14 VLRB 67, 78-79 (1991). Grievance of Sherbrook, 13 VLRB 359, 362-63 (1990).

[14] Id.

[15] Id.

[16] Friel, supra.

[17] Id. Grievance of Boocock, 150 Vt. 422, 425 (1988).

[18] Boocock, 150 at 424.

[19] Grievance of Boocock, 7 VLRB 265 (1984); *Affirmed*, 150 Vt. 422 (1988).

that the potential harm to the employee that may have been caused by an adverse performance evaluation had been eliminated since the employee had obtained satisfactory employment in the Federal service. The Court stated:

> By failing . . to continue his grievance action within the context of a specific job pursuit, (footnote omitted) grievant essentially asked the Board to speculate about what the performance evaluation's general effect might be. The Board correctly declined to do so since there was a lack of an actual controversy under these circumstances. There was no threat of actual injury to grievant's legal interests.[20]

In the second case, the Court dismissed the appeal by a former state police lieutenant, who had resigned to take other employment, from a Board decision that the lieutenant had failed to prove that his transfer was disciplinary rather than administrative.[21] The police officer argued before the Court that his future employment prospects were hindered because any prospective employer given access to his personnel file would conclude that the transfer was disciplinary; he also indicated that he might seek reemployment with the State Police.[22] The Court was not persuaded and concluded that there remained no actual controversy:

> The mere possibility that one might seek reemployment is not . . sufficient to transform a nonjusticiable controversy into a justiciable one . . . Moriarty concedes that he does not have any legal right to reemployment. Moreover, he has failed to explain why his application for reemployment would be treated more favorably by the State Police if he should succeed with his appeal. In these circumstances, Moriarty is merely "speculating about the impact of some generalized grievance."[23]

In two other grievances involving an employee who had resigned, but unlike the employees in the other two cases had not obtained full-time employment elsewhere pending the resolution of their grievances at the time their grievances were dismissed, the

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[20] 150 Vt. at 425-26.

[21] Grievance of Moriarty, 156 Vt. 160 (1991).

[22] Id. at 163-164.

[23] Id. at 164.

Board concluded that the employees' circumstances were sufficiently analogous to the other employees to warrant dismissal of their cases. In one of the cases, the employee grieved alleged harassment and placement of a disciplinary letter in her personnel file. The Board determined that the employee essentially was asking the Board to speculate about what the general effects may be of the alleged harassment and placement of a disciplinary letter in her personnel file on her ability to obtain full-time employment, which the Board concluded was insufficient to present a threat of actual injury to the employee's legal interests.[24] Moreover, the Board reasoned that any potential effect of the disciplinary letter appeared diminished since the employee's personnel file was deemed confidential and a prospective employer would not have access to it.[25]

In the other case, involving a correctional officer who had retired pending resolution of two grievances he had filed contesting written reprimands, the Board similarly concluded that the officer was asking the Board to speculate about what the general effects may be of placement of disciplinary letters in his personnel file on his ability to obtain other employment, and any potential effect of the disciplinary letters appeared diminished since they would not be released to a prospective or subsequent employer without the officer's permission.[26]

When the employer, through the grievance procedure, has provided as a remedy the most that the Board could award as a remedy, the Board has determined that the "actual controversy" requirement has not been met, and has dismissed the grievance, even though the employer has not admitted to any contract violations. The Board reasoned that, to provide an adequate basis to assert jurisdiction, a grievance must be more than an argument over contract interpretation. It also must be a request for action that the Board has the authority to order.[27]

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[24] Roddy v. CCV, 20 VLRB 186, 189 (1997).

[25] Id. at 189-190.

[26] Grievance of Riopel, 25 VLRB 175 (2002).

[27] Grievances of Cray, 25 VLRB 194, 216-217 (2002). Grievance of Rennie, 16 VLRB

1.3 Former Employee Filing Grievance

Another issue which has arisen in interpreting the statutory definition of "grievance" is whether a former employee may file a grievance. In one case, the Board expressed the view that an employee does not forfeit any monetary rights which accrued under a collective bargaining agreement; such as insurance claims, back-pay for improper suspension, overtime pay or severance pay; because the employee voluntarily has quit his or her employment. The Board concluded that an individual in such circumstances meets the definition of "employee" and the Board had jurisdiction to decide a grievance brought by the individual.[28]

In a subsequent case, the Board concluded that a union has standing to grieve, on its own behalf and on behalf of a retiree, an alleged contractual violation of entitlement to health insurance coverage accrued by the retiree during the period of the retiree's employment.[29] This allows the union to protect the fruits of their bargain and to enforce a contractual right accrued by a retiree during employment, through the contractual mechanism agreed upon by the employer and union to resolve contractual disputes.[30] In reaching this conclusion, the Board did not make a judgment with respect to the ability of a retiree to grieve on his or her own behalf.[31]

1.4 Class Action Grievances

In two leading cases, the Board considered whether class action grievances may be filed. In the first case, a named grievant brought an action on behalf of himself and "other

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1, 5-6 (1993). Grievance of Sherbrook, 13 VLRB 359, 362-63 (1990).

[28] Grievance of Boocock, 7 VLRB 265, 267-69 (1984); *Affirmed On Other Grounds*, 150 Vt. 422 (1988).

[29] Grievance of Kelly and the Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO, 19 VLRB 100, 105-106 (1996).

[30] Id.

[31] Id.

similarly situated employees".[32] The Board agreed to grant a remedy to the named grievant, but not to the "other similarly situated employees". In reference to the statutory provision which provides in pertinent part that "(a)ny number of employees who are aggrieved by the same action of the employer may join in an appeal with the consent of the board"[33]; the Board stated:

> We think this statute prevents us from including similarly-situated employees in the grievance absent actual appeals by named and identified employees. The statute appears designed to avoid the complexities of class actions, allowing the Board to act only when specific employees are aggrieved by the same action of the employer.[34]

However, in a subsequent case, the Board, in a split decision, noted that the statutory definition of grievance expressly contemplates representative grievances being brought by the employees' collective bargaining representative, and concluded that there are circumstances where it is appropriate for a collective bargaining representative to pursue a grievance which seeks a remedy on behalf of a class of employees whom are not specifically identified.[35] One such instance was a case where existing circumstances were that affected individuals were a potentially large number of employees scattered throughout the State, whose identity could not be easily ascertained by the union within the time allowed to grieve, and whom were affected by a common question of contract interpretation.[36]

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[32] Grievance of Beyor, 5 VLRB 222 (1982).

[33] 3 V.S.A. §1002(c).

[34] Id., at 232.

[35] Grievance of VSEA (re: Compensatory Time Credit), 11 VLRB 300 (1988).

[36] Id. at 307.

1.5 Timeliness Requirements

The Board will resolve an issue on the merits if at all possible unless the collective bargaining agreement requires it to be dismissed on procedural grounds.[37] The leading area where the Board has dismissed grievances on procedural grounds has been if grievances were not timely filed, or issues were not raised or were untimely raised, at earlier steps of the grievance procedure or in the grievance filed with the Board.

Under contracts providing that grievances must be filed within specified times at earlier steps of the grievance procedure, and must include a concise statement of relevant facts and the provision(s) of the contract alleged to be violated, the Board, with the approval of the Vermont Supreme Court, has refused to consider grievances which were untimely filed, or issues which were not raised or were untimely raised, at earlier steps of the grievance procedure.[38] Generally, there must be specific and timely raising of issues at earlier steps of the grievance procedure or the right to raise the issue is waived.[39] The Board also has dismissed a grievance in a case where the employee bypassed an earlier step of the grievance procedure.[40]

Similarly, the Board has declined to resolve issues which were not raised in the grievance filed with the Board pursuant to the Board Rules of Practice, which requires that a grievance contain a concise statement of the nature of the grievance and specific references to the pertinent section of collective bargaining agreement and/or rules and

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[37] Grievance of Brewster, 23 VLRB 96, 98 (2000). Grievance of Kimble, 7 VLRB 96, 108 (1984). Grievance of Amidon, 6 VLRB 83, 85 (1983).

[38] Grievance of Adams, 23 VLRB 92 (2000). Grievance of Boyde, 18 VLRB 518 (1995); *Affirmed*, 165 Vt. 624 (1996). Grievance of D'Aleo and VSCFF, 4 VLRB 192, 193 (1981); *Affirmed*, 141 Vt. 534, 540 (1982). Grievance of Peck and VSCFF, 139 Vt. 329, 331-332 (1981). Grievance of Ulrich, 12 VLRB 230, 239 (1989); *Affirmed*, 157 Vt. 290 (1991).

[39] Ulrich, 12 VLRB at 239, 157 Vt. at 293-95. Grievance of Bagley, et al, 16 VLRB 448, 464 (1993).

[40] Grievance of McCort, 19 VLRB 319 (1996); *Affirmed*, (Vermont Supreme Court, Unpublished Decision, Docket No. 95-563, 1997).

regulations.[41] The Board will not reach the merits of an issue not raised in the grievance filed with the Board even if it was raised at earlier steps of the grievance procedure.[42]

Also, the Board has dismissed grievances as untimely filed if they did not meet the requirement of the Board Rules of Practice of being "filed within 30 days after receipt of notice of final decision of the employer."[43] In one case, the Board permitted an exception to this general rule where an employee sent a grievance to the Board by certified mail five days before the deadline, but it was not received by the Board until the day after the deadline.[44]

The Board has accepted the validity of a continuing grievance in cases where pay practices were involved and employees initially did not grieve the alleged violations within contractual time limitations, but grieved the alleged violations during the period they were still occurring. The Board held that grievants were permitted to institute grievances over the matter at any time during the period in which the alleged violations were occurring, since there was a new occurrence of the alleged violation every time a paycheck was issued, with the restriction that the grievants waived their right to back pay for all periods prior to the pay period immediately preceding the filing of the grievances.[45] However, continuing grievances are not recognized when completed acts are involved such as termination through discharge or resignation, a job transfer, or discontinuance of a particular job assignment.[46]

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[41] Grievance of Regan, 8 VLRB 340, 364 (1985).

[42] Grievance of Shockley and VSCFF, 5 VLRB 192, 202-203 (1982).

[43] Grievance of Monti, 10 VLRB 246, 249-250 (1987). Grievance of Roy, 147 Vt. 403 (1986).

[44] Grievance of Mason, 15 VLRB 428 (1992).

[45] Grievance of Cole and Cross, 28 VLRB 345, 367-369 (2006). Grievance of Reed, 12 VLRB 135, 143-44 (1989). Grievance of Cole, 6 VLRB 204, 209-210 (1983).

[46] Grievance of Boyde, 165 Vt. 624 (1996).

1.6 Contract Construction

In interpreting the provisions of collective bargaining agreements in resolving grievances, the VLRB follows the rules of contract construction developed by the Vermont Supreme Court. A contract must be construed, if possible, so as to give effect to every part, and from the parts to form a harmonious whole.[47] The contract provisions must be viewed in their entirety and read together.[48]

A contract will be interpreted by the common meaning of its words where the language is clear.[49] If clear and unambiguous, the provisions of a contract must be given force and effect and be taken in their plain, ordinary and popular sense.[50] Extrinsic evidence under such circumstances is inadmissible as it would alter the understanding of the parties embodied in the language they chose to best express their intent.[51]

The Board will not read terms into a contract unless they arise by necessary implication.[52] The law will presume that the parties meant, and intended to be bound by, the plain and express language of their undertakings; it is the duty of the Board to construe contracts; not to make or remake them for the parties, or ignore their provisions.[53]

However, resort to extraneous circumstances such as custom or usage to explain or interpret the meaning of contractual language is appropriate if sufficient ambiguity exists in

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[47] In re Grievance of VSEA on Behalf of "Phase Down" Employees, 139 Vt. 63, 65 (1980).

[48] In re Stacey, 138 Vt. 68, 72 (1980).

[49] Id. at 71.

[50] Swett v. Vermont State Colleges, 141 Vt. 275 (1982).

[51] Hackel v. Vermont State Colleges, 140 Vt. 446, 452 (1981).

[52] In re Stacey, 138 Vt. at 71.

[53] Vermont State Colleges Faculty Federation v. Vermont State Colleges, 141 Vt. 138, 144 (1982).

the contract.[54] Where the disputed language is sufficiently ambiguous, it is the duty of judicial or quasi-judicial bodies to construe a contract so as to ascertain the true intention of the parties.[55] In such circumstances, it is appropriate to look to the extrinsic evidence of past practice and bargaining history to ascertain whether such evidence provides any guidance in interpreting the meaning of the contract.[56] Interpretation of an agreement may involve interpolating from a written text solutions not expressly spelled out in the text.[57] This may require blending textual interpretations and the "contracts implied in fact" in the form of established past practices.[58]

Further, if the intent of the parties is in doubt, the meaning of contract provisions may be ascertained by considering the result contemplated by the parties when they executed the contract and the practical construction of the contract's provision by the parties.[59]

The Board and the Vermont Supreme Court have indicated that they will not recognize an individual contract inconsistent with the collectively bargained agreement, since "(t)he very purpose of a collective bargaining agreement is to supersede individual contracts with terms which reflect the strength and bargaining power and serve the welfare of the group."[60]

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[54] Nzomo, et al. v. Vermont State Colleges, 136 Vt. 97, 101-102 (1978).

[55] Grievance of Gorruso, 150 Vt. 139, 143 (1988).

[56] Grievance of Majors, 11 VLRB 30, 35 (1988).

[57] Burlington Area Public Employees Union, Local 1343, AFSCME, AFL-CIO v. Champlain Water District, 156 Vt. 516, 520 (1991).

[58] Id. at 521.

[59] In re Cronan, 151 Vt. 576, 579 (1989). In re Gorruso, 150 Vt. 139, at 143, 145 (1988). Grievance of Cole and Cross, 28 VLRB 345, 371-372 (2006).

[60] Morton v. Essex Town School District, 140 Vt. 345 (1982). Grievance of McFarland, 10 VLRB 220, 227 (1987).

Also, employment rules and regulations promulgated by the employer concerning a particular condition of employment are superseded by the collective bargaining agreement where the agreement addresses the same issue that is covered by the employer policy.[61] However, the Board has concluded that personnel rules and regulations unilaterally promulgated by the employer were a past practice implicitly embedded in the contract, where the parties bargained with the knowledge the personnel rules were applicable and no contract provision addressed the applicable personnel rule.[62]

A mistaken interpretation by an employer of a provision of the collective bargaining contract for many years does not justify denying employees rights to which they are entitled under a correct interpretation of the contract. A contractual provision which is incorrectly interpreted for a period of time does not render the provision invalid.[63] By the same logic, a mistaken interpretation by the employer of a provision of a contract does not justify granting employees rights to which they are not entitled by a correction interpretation of the contract.[64]

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[61] Grievance of Graves, 147 Vt. 519, 522-523 (1986). In re Muzzy, 141 Vt. 463, 476 (1982). Grievance of Nottingham, 25 VLRB 185, 192 (2002).

[62] Grievance of Cronin, 6 VLRB 37, 69-70 (1983). Grievance of Cole and Cross, 28 VLRB 345, 370-71 (2006).

[63] Grievance of VSEA (Re: Compensatory Time Credit), 11 VLRB 300, 306 (1988). Grievance of Nottingham, 25 VLRB 185, 192 (2002).

[64] Grievance of Brown, et al, 20 VLRB 169, 183 (1997). Grievance of Cronan, et al, 6 VLRB 347, 355 (1983); *Reversed on other grounds*, 151 Vt. 576 (1989).

II. DISMISSALS AND OTHER DISCIPLINARY ACTIONS

The Vermont Labor Relations Board and Vermont Supreme Court have resolved many grievances of employees of the State, State Colleges and the University of Vermont, contesting dismissals and lesser disciplinary actions. In the great majority of cases, employees have been represented by a union and covered by a collective bargaining contract; in other cases, employees have not been represented by a union and may or may not be covered by a contract. In both types of cases, the standard typically applied where employees have a vested property interest in continued employment is whether just cause exists for dismissal or other disciplinary action.

In this section, decisions of the Board and the Supreme Court relating to management obligations before imposing disciplinary action under such circumstances are discussed. Due process considerations are addressed, as well as substantive just cause standards. This is not intended to be an exhaustive treatment of disciplinary cases, but is designed to provide an overview of significant areas where the Board and the Court have substantially developed principles and standards.

2.1 Right to Union Representation at Meeting Which May Lead to Discipline

An employee's right to engage in "concerted activities for . . . mutual aid or protection" includes the right to union representation at a meeting which may lead to discipline against the employee.[65] In its Weingarten[66] decision, the U.S. Supreme Court held that an employee has the right to have a union representative present at an investigatory interview, when the employee reasonably believes the interview will result in disciplinary action and requests representation. The Vermont Labor Relations Board has concluded that Weingarten rights apply under the statutes which the Board administers.[67]

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[65] Vermont State Colleges Staff Federation, AFT Local 4023, AFL-CIO v. Vermont State Colleges, 16 VLRB 255 (1993).

[66] 420 U.S. 251 (1975).

[67] Vermont State Colleges, 16 VLRB at 259.

In Weingarten, the Court recognized that the employee's right was subject to certain limitations. First, the right arises only in situations where the employee requests representation. Second, the employee's right to request representation as a condition to participation in the interview "is limited to situations where the employee reasonably believes the investigation will result in disciplinary action". Reasonable belief is "measured . . . by objective standards under all the circumstances of the case", rather than by the subjective reaction of the employee. Third, the employer may carry on its inquiry without interviewing the employee, thus leaving the employee "the choice between having an interview unaccompanied by (his or her) representative, or having no interview and foregoing any benefits that might be derived from one". Fourth, the employer has no duty to bargain with any union representative who attends the investigatory interview.[68]

The Vermont State Employees' Association and the State of Vermont have expanded on this right in their contracts, providing that supervisors have an affirmative duty to inform the employee of the right to union representation at such a meeting. The opportunity for VSEA representation is required whenever a supervisor, manager or investigator of the employer is requiring an employee to give oral or written statements on an issue involving the employee, and it is reasonable for the supervisor, manager or investigator to suspect that the statements may lead to discipline against the employee.[69]

If that right is not granted, the VLRB has excluded as inadmissible evidence of any harmful statements made by the employee at a meeting. Where those statements form the sole basis for disciplinary action, the VLRB has rescinded the disciplinary action imposed.[70] However, evidence relied on by the employer gathered outside of, and independent from, admissions made by an employee during a contractually-prohibited interview is properly before the Board in determining the validity of the disciplinary action. In deciding whether an employer may rely on evidence to support discipline taken against

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[68] Id. at 259-60.

[69] Grievance of Rosenberger, 28 VLRB 197, 212-214 (2006).

[70] Grievance of Dustin, 9 VLRB 296, 302 (1986).

an employee, it must be determined whether evidence was obtained by means sufficiently distinguishable from the taint of the contract violation or by exploitation of the violation.[71]

The Board elaborated on the extent of Weingarten rights in 2004 decisions. The Board addressed the notice that must be provided to an employee under investigation concerning the nature of the investigation, an employee's right to consult with a union representative prior to an investigative interview, and the role of the union representative at the investigative interview. The notice to employees of the nature of an investigative interview, prior consultation between the employee and union representative, and the role of the union representative at the investigative interview are intertwined and necessarily dependent on each other. The extent of notice to an employee and the employee's ability to meaningfully consult with a union representative prior to an investigative interview significantly affect the extent of necessary involvement by the union representative at the interview to adequately represent the employee's interests.[72]

The investigator needs to provide the employee with notice of the general nature of the potential misconduct being investigated to ensure meaningful prior consultation between the employee and union representative. The investigated employee has the right during an investigative interview to be assisted by a knowledgeable union representative through the providing of effective representation. The Board's views in this regard do not result in turning investigative interviews into adversarial contests contrary to the Weingarten decision. The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist on only being interested at that time in hearing the employee's own account of the matter under investigation. The employer remains in command of the time, place and manner of the interview, and can concentrate on hearing

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[71] Grievance of VSEA and Tatro, 10 VLRB 78, 86-87 (1987). Grievance of Rosenberger, 28 VLRB 197, 216 (2006). Grievance of Rosenberger, 28 VLRB 284, 309 (2006).

[72] Grievance of VSEA, 27 VLRB 1, 28 (2004); *Affirmed*, ___ Vt. ___ (December 27, 2005).

the employee's account with no duty to bargain with the union representative at the interview.[73]

In deciding whether to permit a break during an investigative interview, an investigator needs a reasonable basis to deny a break and does not have a right to prohibit reasonable consultation. It is unreasonable to deny a break if the scope of the investigation is expanded and the employee and union representative have not had the opportunity to consult on the subject matter of the expanded scope of the investigation.[74]

2.2 Right to Pre-Termination Hearing

In its Loudermill[75] decision, applicable to public employees, which the VLRB has held applicable to state employees,[76] the U.S. Supreme Court held that employees with a protected property interest in continued employment are entitled to a pre-termination hearing.

Requisite elements identified by the Court in such a hearing are:

- "something less" than a full evidentiary hearing is sufficient;

- the hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions; essentially a determination whether there are reasonable grounds to believe the charges against the employee are true and support the proposed action; and

- the employee is entitled to oral or written notice of the charges against him or her, an explanation of the employer's evidence and an opportunity to present his or her side of the story.

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[73] Id. at 29-30. Grievance of VSEA and Dargie, 27 VLRB 32, 62 (2004); *Affirmed*, ___ Vt. ___ (December 23, 2005).

[74] Grievance of VSEA, 27 VLRB at 29-30.

[75] 470 U.S. 532 (1985).

[76] Grievance of Johnson, 9 VLRB 94 (1986).

An employer acts in compliance with the constitutional requirements of a pre-termination hearing only by keeping an open mind and allowing the possibility of not dismissing an employee if the employee presents convincing points of disagreement with the facts or persuasive argument at the pre-termination meeting.[77]

Employees must be provided sufficient notice that their job is in jeopardy so that they may respond in writing or meet in person to discuss the contemplated dismissal.[78] This notice may be adequately provided by means other than a specific reference that dismissal is being contemplated in a letter or memorandum informing employees of the Loudermill meeting.[79]

The Board concluded that an employee's Loudermill due process rights were sufficiently protected in a case even though the employee was not told dismissal was being contemplated prior to a meeting on a particular issue, and that issue provided a basis for his subsequent dismissal. The circumstances were that the employee subsequently was told dismissal was being contemplated with respect to another issue, a meeting was held on this issue, the employee could have raised the first issue at that meeting as well as offering reasons why he should not be dismissed, and the employee ultimately was dismissed as a result of his misconduct with respect to both issues.[80]

2.3 Use of Admissions during Management Investigations in Criminal Proceedings

The question whether admissions made by an employee during management disciplinary investigations can be used against the employee in subsequent criminal proceedings has been addressed by the U.S. Supreme Court. In Garrity v. New Jersey[81], a

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[77] Grievance of Taylor, 15 VLRB 275, 280 (1992).

[78] Grievance of Gregoire, 166 Vt. 66 (1996).

[79] Id.

[80] Grievance of Griswold, 18 VLRB 593 (1995).

[81] 385 U.S. 493 (1967).

police officer, who faced dismissal if he refused to answer questions in an internal investigation hearing, was convicted in a criminal proceeding based on evidence that included the testimony he gave in the administrative investigation. The Supreme Court held the statements in the investigation were coerced because of the threat of dismissal and were inadmissible in the criminal proceeding because there was no effective waiver of the police officer's self-incrimination rights.[82]

In subsequent cases, the Supreme Court held that public employees could not be fired for refusing to waive their self-incrimination rights in an administrative investigation of their misconduct.[83] The Court also has indicated that a public employee can be required to answer incriminating questions, and be fired for refusal to answer, if offered immunity against use of the answer in future criminal proceedings.[84] The Court stated: "(I)f answers are to be required in such circumstances States must offer to the witness whatever immunity is required to supplant the privilege and may not insist that the employee or contractor waive such immunity."[85] The U.S. Supreme Court has never defined *how* the state must offer immunity to the employee, and the answer to that question remains unresolved in Vermont.[86]

2.4 Searches by Government Employers

The Vermont Labor Relations Board has never ruled on the propriety of public employers' searches of employees' premises or property. Some arbitrators in public sector disciplinary cases have analogized discharges to the treatment of suspected criminal

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[82] 385 U.S. at 500.

[83] Gardner v. Broderick, 392 U.S. 273 (1968). Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968).

[84] Gardner, 392 U.S. at 278. Lefkowitz v. Turley, 414 U.S. 70 (1973).

[85] Lefkowitz, 414 U.S. at 85.

[86] Burlington Police Officers Association v. City of Burlington, 166 Vt. 581 (1996).

activity, and have applied the Fourth Amendment's prohibition on unreasonable searches and seizures.[87]

2.5 Suspension without Pay pending Investigation

The fact that allegations are made against an employee does not warrant suspending an employee without pay absent a determination by management that the allegations are substantiated.[88] An employer must determine misconduct has been committed, not just alleged, before disciplining an employee.[89] Management may impose a disciplinary penalty based only on the facts of the underlying incident as determined by management, and may not impose discipline based on allegations which management has yet to conclude are substantiated.[90] A minimal essential of due process under applicable precedents is that management makes a determination that misconduct has actually been committed by the employee before disciplinary action is imposed.[91]

2.6 Sufficiency of Management Investigation

The Board has indicated an unwillingness to call into question the sufficiency of the employer's investigation in the absence of any specific contract provision giving the Board such authority or in the absence of any violation of an established due process right; particularly where the employee has the opportunity before the Board for a complete, impartial review of the appropriateness of the disciplinary action taken.[92]

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[87] Labor and Employment Arbitration, Bornstein, Gosline & Greenbaum, Second Edition (Matthew Bender, 2002).

[88] Grievances of Ackerson, 17 VLRB 105, 126 (1994).

[89] Id.

[90] Id.

[91] Id. at 127-28.

[92] Grievance of Simpson, 12 VLRB 279, 293 (1989). Grievance of Thurber, 11 VLRB 312, 323 (1988). Grievance of Munsell, 11 VLRB 135, 145 (1988).

2.7 Double Jeopardy

"Double jeopardy" involves receiving a double penalty for the same offense. The Board has indicated that, if an employee was suspended and then subsequently dismissed for the same offense, the Board would conclude that the employee received an improper increase in punishment.[93]

2.8 Job Nexus

In cases where the employer is considering disciplining an employee for off duty conduct, there must be a nexus between the off duty conduct and employment for an employer to be justified in taking any disciplinary action against an employee for such conduct.[94]

2.9 Timeliness of Discipline

Under contract language requiring the employer to "act promptly to impose discipline . . . within a reasonable time of the offense", the Board has concluded that this provision was violated in one case when management charged an employee with an offense that was brought to management's attention three years earlier[95]; and was violated in another case when an employee was not charged with an offense until five and one-half months after an incident requiring a simple investigation.[96] In both cases, the Board concluded that management was precluded from disciplining the employees for the alleged offenses.

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[93] Grievance of Johnson, 9 VLRB 94, 111 (1986).

[94] Grievance of Soucier, 21 VLRB 202 (1998). Grievance of Ackerson, 16 VLRB 262, 272 (1993). Grievance of Boyde, 13 VLRB 209, 227 (1990). Grievance of Jamison, 10 VLRB 239, 243-44 (1990).

[95] Grievance of Gorruso, 9 VLRB 14, 34 (1986), *Reversed on Other Grounds*, 150 Vt. 139 (1988).

[96] Appeal of Wells, 16 VLRB 52 (1993).

2.10 Specific Notice of Disciplinary Action

In reviewing a disciplinary suspension or dismissal, the Board will not look beyond the reasons given by the employer in the disciplinary letter for the action taken,[97] but will not turn disciplinary letters into dialectic exercises.[98] A letter which adequately puts an employee on notice of the misconduct will not be considered deficient.[99]

The Vermont Supreme Court has indicated that, having given the reasons for dismissal in one letter, the State may not change and add to the reasons in a subsequent letter; that to permit such ad hoc amendment would effectively alter the terms of the parties' contract.[100] Similarly, it is inappropriate for management to gather evidence after a discharge to add an entirely new offense against the discharged employee.[101]

The notice requirements for disciplinary actions less than suspension may be less stringent. The VLRB has decided that, although the contract did not explicitly require that "reasons" be given for a written reprimand, due process considerations require that a notice of reprimand be sufficiently specific to allow adequate preparation for an employee's defense.[102] Contemporaneous oral notification may combine with the disciplinary letter to provide adequate specificity.

2.11 Just Cause Standard Generally

If the employer decides to discipline an employee, and the employee grieves the resultant disciplinary action, then the standard employed in reviewing disciplinary actions becomes crucial. Thus, it is important for management to be familiar with the applicable

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[97] Grievance of Swainbank, 3 VLRB 34, 48 (1980).

[98] Grievance of Erlanson, 5 VLRB 28 (1982).

[99] Id. at 39. Grievance of Rosenberger, 28 VLRB 284, 296 (2006).

[100] In re Grievance of Warren, (Unpublished decision, August 22, 1986).

[101] Grievance of Boucher, 9 VLRB 50, 57 (1986).

[102] King, 13 VLRB at 280.

review standards before taking disciplinary action. The collective bargaining contracts between the State and VSEA, and between the State Colleges and VSEA/Staff Federation, provide that no employee shall be discharged or otherwise disciplined except for just cause. In application, the meaning of this short, simple clause is not easily ascertained. The Vermont Supreme Court has defined just cause for dismissal as:

> . . . some substantial shortcoming detrimental to the employer's interests which the law and a sound public opinion recognize as a good cause for dismissal . . . The ultimate criterion of just cause is whether the employer acted reasonably in discharging the employee because of misconduct . . . a discharge may be upheld as one for 'cause' only if it meets two criteria of reasonableness: one, that it is reasonable to discharge employees because of certain conduct and the other, that the employee had fair notice, express or implied, that such conduct would be ground for discharge.[103]

The standard for implied notice is whether the employee should have known the conduct was prohibited.[104] Knowledge that certain behavior is prohibited and subject to discipline is notice of the possibility of dismissal.[105]

Failure of the employer to prove by a preponderance of the evidence all the particulars of the dismissal letter does not require reversal of a dismissal action.[106] In such cases, the VLRB must determine whether the remaining proven charges justify the penalty.[107]

In determining whether just cause exists for suspension, the VLRB recognizes that the misconduct required to be demonstrated for a suspension to be upheld is less serious than that required to uphold a dismissal.[108] The conduct must be sufficiently egregious to

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[103] In re Grievance of Brooks, 135 Vt. 563, 568 (1977).

[104] Grievance of Towle, 164 Vt. 145 (1995). Grievance of Brooks, 135 Vt. 563, 568 (1977).

[105] Grievance of Towle, supra. Grievance of Gorruso, 150 Vt. 139, 148 (1988).

[106] Grievance of Regan, 8 VLRB 340, 366 (1985).

[107] Grievance of Colleran and Britt, 6 VLRB 235 (1983).

[108] Earley and Ibey, 6 VLRB 72, 82 (1983).

justify discipline, and the employee must be on fair notice that his or her conduct could be grounds for the discipline imposed.[109] The ultimate criterion of just cause is whether the employer acted reasonably in disciplining the employee because of the misconduct.[110]

Case law on disciplinary actions less than suspension is noticeably sparse. In determining whether just cause exists for a written reprimand, the VLRB may be called upon to determine whether the progressive discipline step of oral reprimand was appropriately bypassed.[111] In reprimand cases where progressive discipline has been followed, the Board determines whether the action taken was reasonable and an appropriate measured response to the proven charges.[112]

2.12 Factors Relevant in Determining Whether Just Cause Exists

The U.S. Merit Systems Protection Board, which decides disciplinary grievances of Federal employees, has identified, and the VLRB has adopted, the following 12 factors, some of which may not be pertinent in every case, as relevant in determining the legitimacy of a particular disciplinary action:

> 1) the nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
>
> 2) the employee's job level and type of employment including supervisory or fiduciary role, contacts with the public and prominence in the position;
>
> 3) the employee's past disciplinary record;

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[109] Griswold and VSCSF, (Vermont Supreme Court, Unpublished Decision, Docket No. 89-602, 1991).

[110] Id.

[111] Id. at 281. Grievance of Jamison, 10 VLRB 239 (1987). Grievance of Porwitzky, 18 VLRB 530 (1995).

[112] Grievances of MacDonald, 28 VLRB 55, 67-70 (2005).

4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;

6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;

7) consistency of the penalty with any applicable agency table of penalties;

8) the notoriety of the offense or its impact upon the reputation of the agency;

9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

10) potential for employee's rehabilitation;

11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in this matter; and

12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.[113]

In 2000, the Board ruled on the relevant time period for evidence of alleged inconsistent discipline. The Board concluded that evidence of alleged inconsistent discipline is not relevant to the Board's review of an employee's dismissal to the extent that it involves alleged improper conduct by other employees of which management was unaware at the time of the officer's dismissal. The Board stated: "Since our duty is to police the exercise of discretion by the employer to ensure the employer considered the relevant factors in each particular case and took action within tolerable limits of reasonableness, the relevant focus is on management's actions and knowledge at the time

[113] Douglas, et al., 5 MSPB 313 (1981). Grievance of Colleran and Britt, 6 VLRB 235, 268-269 (1983).

the dismissal decision was made". The Board subsequently relied on the rationale of this decision to generally conclude in another case that evidence was not relevant to the Board's review of an employee's dismissal to the extent that it involved information of which management was unaware at the time of the dismissal.[114]

2.13 Progressive Discipline Considerations

The role of progressive discipline and when it may be bypassed are issues often facing the VLRB in a just cause case. The Vermont Supreme Court has held that progressive discipline is not inherent in the concept of just cause, and in the absence of a contract requiring it, is not binding on the employer. Where there was no such contractual requirement and progressive discipline was not applied, the Court upheld dismissal under the following circumstances:

- repeated conflicts with co-workers, including heated arguments, use of abusive language and use of force.[115]
- excessive absenteeism and failure to return to work at end of leave of absence without supervisor's approval.[116]
- insubordination and lack of cooperation by magazine editor.[117]

Where a contract provides for progressive discipline, and it was not followed in a particular case, the issue becomes whether it was appropriate to bypass it. The difficulty arises in determining which cases are so appropriate. The following cases in which employees were dismissed are illustrative of which cases have been found appropriate for

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[114] Appeal of Danforth, 23 VLRB 288, 294-97 (2000); *Affirmed*, 174 Vt. 231 (2002). Grievance of Rosenberger, 28 VLRB 284, 305-307 (2006).

[115] Brooks, supra.

[116] In re Grievance of Gage, 137 Vt. 16 (1979).

[117] Grievance of Morrissey, 7 VLRB 129 (1984), *Affirmed*, 149 Vt. 1 (1987).

bypass, under contracts providing for progressive discipline, by either the VLRB or the Vermont Supreme Court:

- correctional officers assaulting inmate and being dishonest during the employer's investigation of the charges.[118]
- deliberate striking of mentally or physically disabled resident.[119]
- misappropriation of funds, falsification of expense claims or other acts of dishonesty.[120]
- correctional employee's actions creating the appearance of an improper relationship with an inmate, improperly providing services to the inmate, and being dishonest about the relationship.[121]
- refusal to obey a lawful and reasonable order of a supervisor.[122]
- correctional facility cook engaging in sexual misconduct towards an inmate, and being uncooperative and dishonest during the employer's investigation of the charges against him.[123]
- security worker not following fire plan when fire alarm went off, not reporting to the fire scene, silencing the alarm before determining its cause and failing to direct fire department to the fire scene.[124]

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[118] Grievances of Charnley and Leclair, 24 VLRB 119 (2001). Grievance of Kerr, 28 VLRB 264 (2006).

[119] Grievance of Sherman, 7 VLRB 380 (1984); Grievance of Bishop, 5 VLRB 347 (1982); *Affirmed*, 147 Vt. 280 (1986).

[120] In re Grievance of Carlson, 140 Vt. 555 (1982); Grievance of Newton, 1 VLRB 378 (1978); Grievance of Deforge, 3 VLRB 196 (1980); Grievance of Barre, 5 VLRB 10 (1982); Grievance of Cruz, 6 VLRB 295 (1983); Grievance of Graves, 7 VLRB 193 (1984); *Affirmed*, 147 Vt. 519 (1986).

[121] Grievance of Corrow, 23 VLRB 101 (2000).

[122] Grievance of Levesque, 3 VLRB 95 (1980); Grievance of Regan, 8 VLRB 340 (1985); *Affirmed*, 153 Vt. 333 (1989). Grievance of Sileski, 28 VLRB 165 (2006).

[123] Grievance of Pretty, 22 VLRB 260 (1999).

[124] Grievance of Thurber, 11 VLRB 312 (1988), 12 VLRB 208 (1989); *Affirmed*,

- correctional officer attempting to induce an employee to write a false statement, having a handgun on correctional facility property, making comments of a sexual nature to an employee, making derogatory and disparaging comments about employees, falsely denying allegations made against him, and making false claims during an investigation.[125]

- Department of Motor Vehicles employee issuing a false identification card to a person under age 21 allowing the person to illegally consume alcohol.[126]

The VLRB has found summary discharge and bypass of progressive discipline inappropriate in the following instances:

- transportation worker hanging up telephone on supervisor, tearing up letter received from supervisor, refusing to talk to supervisor and forcibly removing supervisor from building; where employee had good work record for 32 years, supervisor had provoked the employee to some extent, and management had not addressed employee's expressed concerns of problems he had with the supervisor.[127]

- correctional officer striking an inmate because he thought the inmate was going to spit on him, where officer's use of force was not as serious as charged by the employer, employer had not proven its charge that the officer was dishonest about his actions, and officer had strong work record.[128]

- several instances of verbal abuse of mentally and physically disabled patient.[129]

- unavailability to drive for 98 days due to two license suspensions, where employee was required to drive an average of once a week as part of job duties.[130]

(Unpublished decision, 1991).

[125] Grievance of Newton, 23 VLRB 172 (2000).

[126] Grievance of Coffin, 20 VLRB 143 (1997).

[127] Grievance of Downing, 24 VLRB 85 (2001).

[128] Grievance of Camley, 24 VLRB 119 (2001).

[129] Grievance of Carosella, 8 VLRB 137 (1985).

- off-duty offenses of correctional officer of careless and negligent motorcycle driving, attempting to elude police officers and giving false statements to police.[131]

- verbal abuse of supervisors and insubordinate action of striking brim of supervisor's hat so it came off his head, following an earlier less egregious act of insubordination for which the employee received a written reprimand.[132]

- employer did not prove charge that correctional officer interfered with an employer investigation, and employer proved some of its charges against the officer stemming from an attempted suicide by an inmate.[133]

- cheating by highway use inspector during a training exam, and then denying the cheating during an investigation by the employer, under circumstances where other employees engaged in dishonesty and had received disproportionately lighter penalties.[134]

Progressive discipline also must be considered when disciplinary action less than dismissal is at issue, where progressive discipline is provided for in the contract. In determining whether just cause exists for a suspension, the Board will determine whether the progressive discipline steps of oral reprimand and written reprimand were inappropriately bypassed.[135] Similarly, in determining whether just cause exists for a written reprimand, the Board will determine whether the progressive discipline step of oral reprimand was appropriately bypassed.[136]

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[130] Grievance of Hurlburt, 9 VLRB 174 (1986).

[131] Grievance of Boyde, 13 VLRB 228 (1990).

[132] Grievance of King, 13 VLRB 253 (1990).

[133] Grievance of Lilly, 23 VLRB 25 (2000)

[134] Grievance of Terrel, 15 VLRB 342 (1992).

[135] e.g., Grievance of Colleran and Britt, 6 VLRB 235 (1983). Grievance of Earley and Ibey, 6 VLRB 72 (1983).

[136] Grievance of King, 13 VLRB 253, 280 (1990). Grievance of Jamison, 10 VLRB

2.14 Constitutional Rights

As discussed earlier, in deciding grievances, the Board has deemed it appropriate to look to Constitutional law where language in a collective bargaining agreement imports a Constitutional standard and the Board must interpret that portion of the agreement. However, absent that circumstance, the term "grievance" is not so infinitely expandable as to include every Constitutional right.

In one case involving the dismissal of a State manager not covered by a contract, the VLRB cited the merit system principle, contained in 3 V.S.A. §312(b)(5); which "assure(s) fair treatment of . . . employees in all aspects of personnel administration . . . with proper regard for their . . . Constitutional rights as citizens"; to decide a Constitutional claim concerning free speech rights.[137]

2.15 Burden and Quantum of Proof

In considering whether to impose disciplinary action, management needs to be mindful of its obligations in supporting the disciplinary action if the discipline is grieved. The Vermont Supreme Court has held that among the essentials of due process is the "right to have the burden of persuasion cast upon those who would terminate the right under consideration". In applying this to a state employee's dismissal case, the Court held the employer has the burden of proof where employees have a vested property interest in continued employment. The Court also held the burden of proof is met by the usual civil case standard of a preponderance of evidence.[138]

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239 (1987). Grievance of Porwitzky, 18 VLRB 530 (1995).

[137] Grievance of Morrissey, 7 VLRB 129, 169-171 (1984); *Affirmed*, 149 Vt. 1 (1987).

[138] Muzzy, 141 Vt. 463, 472 (1982).

2.16 Board's Authority Generally to Remedy Improper Disciplinary Actions and Authority to Modify Penalties

The Vermont Supreme Court has held that if the VLRB finds lack of just cause, its authority is limited to remedying the improper dismissal; with the proper remedy generally being reinstatement with back pay and other emoluments from the date of the improper discharge less sums of money earned or that without excuse should have been earned from that date.[139] The Board lacks authority to award attorney's fees, or to award compensatory and punitive damages.[140]

Also, lack of just cause for dismissal may not always result in reinstatement of the employee. In one case where the Board concluded that just cause did not exist for an employee's dismissal at the time he was dismissed, the Board remanded to provide the employer with an opportunity to decide whether to discipline the employee based on conduct which the employee was warned prior to his dismissal would result in disciplinary action if corroborated, and the conduct was not corroborated until after the employee was dismissed.[141] However, management may not gather evidence after a discharge to add an entirely new offense; the Board has concluded that is clearly inappropriate.[142]

In two cases, the Court questioned the VLRB's authority to fashion a remedy of its own when just cause was not found, an authority which the VLRB always considered it had.[143] Subsequent to these court decisions, the Vermont State Employees' Association and the State have explicitly given the Board the authority under the collective bargaining contract to impose lesser forms of discipline.

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[139] Brooks, 135 Vt. at 570.

[140] Grievance of Warren, 10 VLRB 154, 157 (1987). Grievance of Russell, 7 VLRB 60, 93 (1984).

[141] Grievances of Ackerson, 17 VLRB 105, 129 (1994).

[142] Grievance of Boucher, 9 VLRB 50, 57 (1986).

[143] See In re Grievance of Janes, 141 Vt. 648 (1984), In re Grievance of Murphy (Vermont Supreme Court, Unpublished decision, December 30, 1985).

The contract between the State Colleges and the State Colleges Staff Federation does not explicitly give the Board this authority, and the Board has indicated that, absent the explicit authority, it will remand the grievance to the Colleges for such further action as may be appropriate under the contract.[144]

2.17 Back Pay Issues

As stated in the section above, the proper remedy generally for improper dismissal is reinstatement with back pay and other emoluments from the date of the improper discharge less sums of money earned or that without excuse should have been earned from that date. In many cases, the Board has resolved specific back pay issues in applying this general standard.

In calculating a back pay award, the monetary compensation awarded shall correspond to specific monetary losses suffered; the award should be limited to the amount necessary to make the employee "whole".[145] To make employees whole is to place them in the position they would have been in had they not been improperly dismissed.[146]

An employee has a general duty to mitigate damages by making reasonable efforts to find interim work.[147] Where an employer is claiming an employee did not properly mitigate damages, the burden of proof on that issue is on the employer. Liability for back pay arises out of the employer's improper action and, accordingly, the employer must establish any claim of lack of mitigation.[148] It is the general rule in back pay cases that an

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[144] Grievance of Griswold, 12 VLRB 252, 265 (1989). *Reversed on other grounds*, (Vt. Supreme Court, Unpublished Decision, 1991).

[145] Grievance of Goddard, 4 VLRB 189, at 190-191 (1981). c.f., Kelley v. Day Care Center, Inc, 141 Vt. 608, at 615-616 (1982).

[146] Grievance of Lilly, 23 VLRB 129, 137 (2000); *Affirmed*, 173 Vt. 591 (2002). Grievance of Benoir, 8 VLRB 165, 168 (1985).

[147] Lilly, supra. Grievance of Hurlburt, 9 VLRB 229, 232 (1986).

[148] Lilly, supra. Grievance of Merrill, 12 VLRB 222, 226 (1989).

employee must make reasonable efforts to find new employment which is substantially equivalent to the position lost and is suitable to a person of his or her background and experience. A wrongfully discharged employee is not held to the highest standard of diligence in these efforts. The employee need only make a good faith effort to find suitable alternative employment.[149] Like many general rules, there are recognized exceptions to it; one such exception arises from the situation where a discharged employee becomes self-employed or engaged in a new business.[150] A discharged employee is entitled to some leeway in getting started with self-employment following a wrongful discharge, with the proviso that at some point a refusal to accept substantially equivalent employment that is offered terminates the former employer's back pay obligation.[151]

Where an employee is claiming an exception to the general rule that post-dismissal earnings are deducted from an employer's back pay liability, it is then the employee's burden to justify such exception.[152] The employee must establish that the employment was truly "moonlighting" and that he or she would have been employed in the non-state employment if still employed by the State.[153] Earnings for work which could be performed outside the hours that the employee would have worked for the employer are not properly deductible from a back pay award.[154]

It is Board practice to add interest, at the legal rate, to a back pay award to make an employee whole for income losses suffered as a result of an improper dismissal.[155] By

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[149] Lilly, supra. Grievance of Gregoire, 18 VLRB 205, 209 (1995).

[150] Gregoire, 18 VLRB at 209.

[151] Id. at 210.

[152] Grievance of Sullivan, 10 VLRB 71, 75 (1987).

[153] Grievance of Taylor, 15 VLRB 275, 281-82 (1992). Id.

[154] Taylor, 15 VLRB at 282. Chittenden South Education Association, Hinesburg Unit v. Hinesburg School District and Hinesburg School Board, 10 VLRB 106, 121 (1987).

[155] Grievance of Warren, 10 VLRB 64, 65-66 (1987).

awarding interest, the Board is not imposing a penalty or punishment on management, but is simply compensating the employee for the loss of the use of the money represented by the wages not paid the employee due to the dismissal.[156] Interest is calculated on gross pay, not net pay.[157]

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[156] Id.

[157] Grievance of Merrill, 13 VLRB 119, 125 (1990); *Affirmed*, 157 Vt. 150 (1991).

III. DISMISSALS FOR PERFORMANCE REASONS

In deciding whether just cause exists for a dismissal based on performance deficiencies, the Board applies the twelve factors, discussed above in Section II on dismissals and other disciplinary actions, relevant in determining the legitimacy of the dismissal.[158] The burden and quantum of proof standards, discussed above in Section II, apply to dismissals for performance deficiencies, as well as dismissals for misconduct.[159]

In Muzzy, the Court also indicated that progressive discipline should be applied where performance deficiencies exist, contrary to a VLRB ruling. However, the Vermont State Employees' Association and the State have since contractually provided that performance deficiencies should be handled outside of the progressive discipline route by following a procedure of progressive corrective action.

Pursuant to the contract, oral or written feedback on performance deficiencies is the first step in progressive corrective action to be taken by the employer.[160] Under the contract language, a supervisor is required to give an employee clear indication of dissatisfaction with that employee's performance.[161] The contract provides that an employee be told when his/her performance is unacceptable so there will be no "surprises" at evaluation time.[162] The burden is on management to put an employee clearly on notice of deficiencies.[163]

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[158] Grievance of Merrill, 8 VLRB 259, 286 (1985); *Affirmed*, 151 Vt. 270, 274-275 (1988).

[159] Muzzy, supra.

[160] Grievances of Choudhary, 15 VLRB 118, 155 (1992); *Affirmed*, (Unpublished Decision, Supreme Court Docket No. 92-317, February 4, 1994).

[161] Id.

[162] Id.

[163] Id. at 156.

Given the difference in perceptions among people, it is imperative that management indicate its dissatisfaction clearly and unequivocally so misconceptions are eliminated.[164]

The issuance of an annual or special performance evaluation, coupled with a prescriptive period of remediation, is the contractually prescribed second progressive step (i.e., after oral or written feedback on performance deficiencies) in the State's corrective action efforts to address the substandard performance of an employee.[165] Such corrective action may only be imposed for just cause.[166]

Placement in a warning period of 30 days to three months, extendable up to six months, is the contractually prescribed third step, before the final step of dismissal, in the State's corrective action efforts to address the substandard performance of an employee.[167] Such corrective action may be imposed only for just cause.[168]

Dismissal is the contractually prescribed fourth, and final, step in the State's corrective action efforts to address the unsatisfactory performance of an employee.[169] The Contract further provides that, "(i)n any case involving dismissal based on performance deficiencies, the Vermont Labor Relations Board shall sustain the State's action as being for just cause unless the grievant can meet the burden of proving that the State's action was arbitrary and capricious". The Contract also provides that progressive corrective action may be bypassed in appropriate cases.[170]

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[164] Id.

[165] Id. at 163.

[166] Id.

[167] Id. at 167.

[168] Id.

[169] Id. at 170.

[170] Id.

An "arbitrary" decision is one fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances or significance. "Capricious" is an action characterized by or subject to whim.[171]

The Board concluded that the dismissal of an employee was arbitrary and capricious in that it stemmed from absence of consideration of the contractual principles of proper notice of performance deficiencies, during the applicable rating period, and bypassing progressive corrective action only in appropriate cases.[172] The Board noted that the contract gives State employees a vested property interest in continued employment, absent just cause for dismissal, and that procedural due process protections attached to this property interest.[173] The Board concluded that the employer violated the employee's due process rights by lack of proper notice of performance deficiencies and inappropriately bypassing progressive corrective action.[174]

In Muzzy, the employee had been dismissed at the conclusion of a warning period. Therein, the Court ruled that if the employee "was in reality dismissed for deficiencies which occurred prior to the warning period, then it was not a warning period at all, and notice might well be inadequate".[175] Similarly, deficiencies occurring prior to a warning period cannot be used to justify an extension of that warning period.[176]

An employee is placed in a warning period for a specified period of time. However, the employee is not guaranteed employment for the warning period. An employer is free to

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[171] Id.

[172] Grievances of Schmitt, 15 VLRB 454, 499 (1992).

[173] Id., *citing* Muzzy, supra.

[174] Id.

[175] Id. at 473.

[176] Grievance of Carosella, 8 VLRB 137, 154 (1985).

terminate an employee at any point when just cause to do so could be demonstrated and the dismissal was clearly reasonable.[177]

Also, there are cases where it is appropriate for an employer to bypass a warning period. In one case, the Board concluded that it was appropriate for an employer to bypass a warning period and dismiss an employee at the conclusion of the prescriptive period of remediation. The employee's performance had deteriorated to the point where he failed to complete a majority of assigned tasks, refused to accept his supervisors' legitimate attempts to supervise him and define his appropriate role and responsibilities, and the program for which he was responsible had nearly ground to a complete halt.[178]

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[177] Grievance of Gadreault, 152 Vt. 119, 123 (1989).

[178] Grievance of Wilmerding, 21 VLRB 57 (1998).

IV. PROTECTED ACTIVITY AND DISCRIMINATION CLAIMS IN DISMISALS AND OTHER GRIEVANCES

4.1 Analysis in Protected Activity Cases

In several grievance cases, most of which have involved termination of employment, the VLRB has indicated the analysis it will employ where employees claim management took action against them for engaging in protected activities. The VLRB has determined that it will employ the analysis used by the U.S. Supreme Court: once the employee has demonstrated his or her conduct was protected, she or he must then show the conduct was a motivating factor in the decision to take action against him or her. Then the burden shifts to the employer to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct.[179]

This analysis has been employed by the VLRB in protected activity grievance cases involving union activity and filing of complaints and grievances[180], academic freedom[181],

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[179] Grievance of Sypher, 5 VLRB 102 (1982). Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). Grievance of McCort, (Vermont Supreme Court, Unpublished decision, Docket No. 93-370, 1994).

[180] Grievance of Roy, 6 VLRB 63 (1983); Grievance of Cronin, 6 VLRB 37 (1983); Sypher, supra; filing of grievances, Cronin, supra; Grievances of McCort, 16 VLRB 70 (1993), Affirmed, (Vermont Supreme Court, Unpublished Decision, Docket No. 93-370, (1994); Grievance of Day, 16 VLRB 312 (1993). Grievance of Greenia, 22 VLRB 336 (1999). Grievance of Brewster, 23 VLRB 314 (2000).

[181] Sypher, supra.

whistleblowing[182], and free speech rights.[183]The Vermont Supreme Court has approved use of such analysis.[184]

A threshold issue in these cases is whether an "adverse action" actually has occurred. The Vermont Supreme Court has indicated that "adverse action" should not be limited to dismissal, suspension, reprimand, adverse evaluation, diminished responsibilities, excessive work assignments or lost compensation.[185] In one case, the Court concluded that assignment of an undesirable snow plowing route to a transportation maintenance worker constituted an adverse action.[186]

The following guidelines apply in determining whether protected activity was a motivating factor in an employer's decision to take adverse action against an employee:

- whether the employer knew of the employee's protected activities;
- whether the timing of the adverse action was suspect;
- whether there was a climate of coercion;
- whether the employer gave as a reason for the decision protected activities;
- whether an employer interrogated the employee about protected activities;
- whether the employer discriminated between employees engaged in protected activities and employees not so engaged; and

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[182] Cronin, supra. McCort, supra. Brewster, supra. Grievance of Danforth, 22 VLRB 220 (1999); *Affirmed*, 172 Vt. 530 (2001). Grievance of Robins, 21 VLRB 12 (1998); *Affirmed*, 169 Vt. 377 (1999).

[183] Grievance of Moye and the Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO, 25 VLRB 106 (2002). Brewster, supra. Robins, supra. Grievance of Morrissey, 7 VLRB 129 (1984).

[184] Cronin, supra, (Unpublished decision, February 4, 1987); Morrissey, 149 Vt. 1 (1987); and McCort, supra.

[185] In re Grievance of Murray, (Vermont Supreme Court, Unpublished Decision, Docket No. 96-237, 1997).

[186] Id.

- whether the employer warned the employee not to engage in protected activities.[187]

A climate of coercion is one in which the employer's "conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights".[188] The critical inquiry is not whether the coercion succeeded or failed, but whether the employer's conduct reasonably tended to interfere with or restrain an employee's exercise of protected rights.[189]

The presence of improper employer motivation need not be shown by direct evidence.[190] It is appropriate to rely on circumstantial evidence to show that an improper factor motivated the employment action.[191]

4.2 Disparate Treatment Discrimination Cases

In grievances alleging that adverse actions were taken against employees on account of prohibited factors, such as race, national origin, sex and age, the VLRB also has indicated it will employ the analysis developed by the U.S. Supreme Court in such cases.[192]

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[187] Sypher, 5 VLRB at 131.

[188] Grievances of McCort, (Unpublished decision, Supreme Court Docket No. 93-237, 1994).

[189] Id.

[190] Grievance of McCort, (Unpublished Decision, Supreme Court Docket No. 93-237, 1994).

[191] Id.

[192] Grievance of McIsaac, 26 VLRB 24 (2003). Grievance of VSCFF (Re: Yu Chuen Wei), 18 VLRB 261 (1995). Grievance of Butler, 17 VLRB 247 (1994); *Affirmed*, Vt. 166 Vt. 423 (1997). Grievances of Choudhary, 15 VLRB 118 (1992); *Affirmed*, (Unpublished Decision, Supreme Court Docket No. 92-317, February 4, 1994). Grievance of Lowell, 15 VLRB 291 (1992). Grievance of Day, 14 VLRB 229 (1991). Grievance of Rogers and VSCSF, 11 VLRB 101, 125-126 (1988)

In one case, the Board concluded that a state employee had an actionable grievance under the state employees contract for discrimination based on non-partisan, as well as partisan, political reasons.[193] The analysis to be applied in determining whether discrimination occurred for political reasons generally is the same as that applied when discrimination based on sex, race, national origin or age is alleged. Only those modifications are made which are consistent with the nature of the alleged discrimination.[194]

Most of the discrimination cases decided by the Board have been based on the disparate treatment theory; that the employer engaged in intentional discrimination in taking adverse action against an employee. To establish a disparate treatment claim, "it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally."[195] In comparing employment discipline decisions, "precise equivalence in culpability between employees" is not required.[196] Rather, the plaintiff must show that the employees were engaged in misconduct of "comparable seriousness."[197] "The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated."[198]

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[193] Day, supra.

[194] Id. at 293.

[195] Butler, 166 Vt. at 431; *citing* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981).

[196] Butler, 166 Vt. at 431; *citing* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 n.11 (1976).

[197] Id.

[198] Butler, 166 Vt. at 431; *citing* Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir. 1989).

The U.S. Supreme Court articulated the burdens of proof in disparate treatment cases, distinguishing between the burden of proof in a "mixed motive" case and a "pretext" case involving alleged sex discrimination.[199]

4.2a "Pretext" Analysis

In a "pretext" case, the issue is whether the legitimate business reason offered by the employer for the adverse action is just a pretext for the real reason of discrimination.[200] The issue in pretext cases is whether illegal or legal motives, but not both, were the true motives behind the decision.[201]

First, the complainant carries the initial burden of establishing by a preponderance of the evidence a prima facie case of discrimination.[202] The burden of establishing a prima facie case of disparate treatment is not onerous.[203] The complainant must prove, by a preponderance of the evidence, that he or she was subject to an adverse employment action under circumstances which give rise to an inference of discrimination.[204] The U.S. Supreme Court has stated:

> The prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors". Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.[205]

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[199] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[200] Id.

[201] Id.

[202] Burdine, supra. Lowell, 15 VLRB at 329.

[203] Burdine, 450 U.S. at 253. Lowell, 15 VLRB at 330.

[204] Id.

[205] 450 U.S. at 254.

A prima facie case of discrimination when employment hiring or termination is involved consists of proving that: 1) the employee belongs to a protected class, 2) he or she was qualified for the position, 3) despite such qualifications he or she was rejected, and 4) after the rejection, a party not part of the protected class was hired or retained for the position.[206]

If the employee succeeds in proving the prima facie case, then the burden is shifted to the employer to articulate a legitimate non-discriminatory reason for the adverse action.[207] The employer need not persuade the court or the board that the proffered reason was the true motivation for the action. It must only raise a genuine issue of fact as to whether the employer engaged in discrimination.[208] To accomplish this, the employer must clearly set forth, through the introduction of admissible evidence, the reasons for its actions.[209] The explanation provided must be legally sufficient to justify a judgment for the employer.[210]

The employer must produce admissible evidence which would allow the court or the board rationally to conclude that the employer's actions had not been motivated by discriminatory animus.[211] The determination whether the employer has met the burden of production involves no credibility assessment.[212] If the employer fails to meet its burden of

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[206] McDonnell Douglas Corp., 411 U.S. at 802. Carino v. University of Oklahoma Board of Regents, 750 F.2d at 818. Day, 14 VLRB at 288. Smith, 12 VLRB at 53.

[207] Burdine, 450 U.S. at 253. Smith, 12 VLRB at 53.

[208] Burdine, 450 U.S. at 254.

[209] Id. at 255.

[210] Id.

[211] Id. at 257.

[212] St Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2748 (1993).

production, then the employee prevails on his or her claim of discrimination as a matter of law.[213]

Finally, if the employer carries this burden, the employee must then prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination.[214] The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the complainant remains at all times with the complainant[215].

In determining whether the employer's explanation was pretextual, the trier of fact may consider the evidence, and inferences properly drawn therefrom, previously introduced by the complainant to establish a prima facie case.[216] Disbelief of the reasons put forward by the employer (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.[217]

4.2b "Mixed Motive" Analysis

In a "mixed motive" case, the employee challenges an adverse employment decision on the grounds that the decision was the product of a mixture of legitimate and illegitimate motives.[218] Once an employee shows that a prohibited factor, such as race, national origin or sex, played a motivating or substantial part in an employment decision,

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[213] Id. Grievance of Day, 16 VLRB 312, 344 (1993).

[214] Burdine, 450 U.S. at 253. McDonnell Douglas, 411 U.S. at 804. Rogers, 11 VLRB at 126.

[215] Burdine, 450 U.S. at 253. Rogers, 11 VLRB at 125-26.

[216] Burdine, 450 U.S. at 255, n. 10. Lowell, 15 VLRB at 336-37.

[217] Hicks. Day, 16 VLRB at 345.

[218] Price Waterhouse, 490 U.S. at 244 - 249. Grievance of VSCFF (Re: Yu Chuen Wei), 18 VLRB 261, 294 -95.

the burden shifts to the employer to prove that the same decision would have been made if the prohibited factor had not played such a role.[219]

Direct evidence or circumstantial evidence may be used to show that one of the employer's motives was improper in "mixed motive" cases.[220] Direct evidence is evidence that, if believed, proves the existence of the fact in issue without inference or presumption.[221]

4.3 Sexual Harassment

An employee claiming discrimination based on sex may include sexual harassment as part of the discrimination claim. Generally, there are two types of harassment cases: 1) quid pro quo cases, in which employers condition employment benefits on sexual favors; and 2) "hostile" environment cases, where employees work in hostile or abusive environments. The VLRB has decided the latter type of case, but has not been called upon to rule in a quid pro quo case.

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.[222] 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".[223]

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[219] Id. Grievance of McCort, slip op. at 11-15 (Vt. Supreme Court, Docket No. 93-237, 1994).

[220] Id.

[221] VSCFF (Re: Yu Chuen Wei), 18 VLRB at 295.

[222] 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).

[223] 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).

This standard requires an objectively hostile or abusive environment - one that a reasonable person would find hostile or abusive - as well as the victim's subjective perception that the environment is abusive.[224] The determination whether an environment is "hostile" or "abusive" can be made only by looking at all the circumstances.[225] "These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[226]

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.[227] 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.[228] 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.[229] Intimidation and hostility toward women because they are women obviously can result from conduct other than explicit sexual advances.[230] For example, the pervasive use of derogatory and insulting comments relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment.[231] Similarly, so may the posting or display of any sexually oriented materials in common areas that tend to

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[224] Butler, 17 VLRB at 315; *citing* Harris, 114 S.Ct. at 370.

[225] Butler, 17 VLRB at 315; *citing* Harris, 114 S.Ct. at 371.

[226] Id.

[227] 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.

[228] Butler, 166 Vt. at 429.

[229] Butler, 17 VLRB at 315; *citing* McKinney, 765 F.2d at 1138.

[230] Butler, 17 VLRB at 315-16; *citing* Hall, 842 F.2d at 1014.

[231] Butler, 17 VLRB at 316; *citing* Andrews, 895 F.2d at 1485.

denigrate or depict women as sexual objects serve as evidence of a hostile environment.[232] Derogatory comments about a woman do not have to be made in the woman's presence to constitute evidence of an atmosphere of on-the-job harassment.[233]

4.4 Disparate Impact Discrimination Cases

In addition to disparate treatment cases, employees also may prevail under a "disparate impact" theory. Such a theory has been developed under the non-discrimination provisions of Title VII of the Civil Rights Act of 1964, which theory the Board has concluded is applicable to evaluating a sexual orientation discrimination claim.[234]

Non-discrimination requirements prohibit "not only overt discrimination but also practices that are fair in form but discriminatory in practice."[235] Under the disparate impact theory, a facially neutral policy may be deemed in violation of non-discrimination requirements without evidence of the employer's subjective intent to discriminate that is required in a "disparate treatment" case.[236]

Once the employee demonstrates that the employer practice causes a disparate impact on a protected class, the practice is prohibited unless the employer can demonstrate that the practice is related to job performance and consistent with business necessity.[237]

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[232] Butler, 166 Vt. at 430.

[233] Id.

[234] Grievance of B.M., et al, 16 VLRB 207, 216 (1993). Grievance of Miller, 24 VLRB 1, 9-10 (2001).

[235] Id.; Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[236] Wards Cove Packing Co. v. Antonio, 401 U.S. 642, 645-46 (1989); B.M., et al, 16 VLRB at 216.

[237] Griggs, 401 U.S. at 431. Section 703 of the Civil Rights Act of 1964 (42 U.S.C. §2000e-2), as amended by Section 105 of the Civil Rights Act of 1991. B.M., et al, 16 VLRB at 216.

Generally, the expense of changing employment practices is not a business purpose that will validate the effects of an otherwise unlawful employment practice.[238]

A conclusion of disparate impact does not require that an employer practice has no impact on individuals other than the group claiming protection against discrimination for a prohibited reason, but requires only a disproportionate impact on a protected class as compared to other individuals.[239]

4.5 Disability Discrimination

The VLRB has issued a grievance decision concerning alleged discrimination against an employee due to a disability. In that case, involving the dismissal of a University of Vermont employee, the University had adopted regulations incorporating requirements of federal disability discrimination statutes. As a result, the Board concluded that it was appropriate to look to case law under the Americans with Disabilities Act,[240] ("ADA"), and Section 504 of the Rehabilitation Act of 1973.[241] Similarly, the Vermont Supreme Court has concluded that, because the Vermont Legislature patterned the Vermont Fair Employment Practices Act on the federal ADA, the Court will look to federal case law under the ADA for guidance.[242]

Under the ADA, employers may not discriminate against qualified individuals with disabilities.[243] Disability is a recognized physical or mental impairment that substantially

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[238] Robinson v. Lorillard Corp., 444 F.2d 791, 800 (4th Cir. 1971). B.M., et al, 16 VLRB at 220.

[239] Griggs, supra. B.M., et al, 16 VLRB at 217. Miller, 24 VLRB at 9-11.

[240] 42 U.S.C. Section 1201, et seq.

[241] Grievance of Jameson, 18 VLRB 331, 349 (1995).

[242] Hodgdon v. Mt. Mansfield Co., 160 Vt. 150, 165 (1992).

[243] 42 U.S.C. Section 12112(a) and (b).

affects a major life activity.[244] A qualified individual is someone who can perform the essential functions of the job with or without reasonable accommodations.[245] An employer generally is required to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.[246] An employer is not required, however, to make accommodations to a qualified worker with a disability if doing so would present an undue hardship to the employer's business.[247]

The threshold issue in analyzing an employee's disability discrimination claim is whether the employer had knowledge of the employee's disability.[248] It is generally the employee's responsibility to request reasonable accommodation, and employers cannot be liable for failing to accommodate a disability of which it had no knowledge.[249] An employer knows an employee has a disability when the employee tells the employer about the disabling condition, or when the employer otherwise becomes aware of the condition.[250]

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[244] 42 U.S.C. Section 12102(2)(a).

[245] 42 U.S.C. Section 12111(8).

[246] 42 U.S.C. Section 12112(b)(5)(a).

[247] Id. Jameson, 18 VLRB at 349-50.

[248] Jameson, 18 VLRB at 350.

[249] Appx. To 29 C.F.R. Section 1630.9; Schmidt v. Safeway Stores, 864 F.Supp. 991, 997 (D.Or. 1994). Prewitt v. U.S. Postal Service, 662 F.2d 292 (5th Cir. 1981). Landefeld v. Marion General Hospital, 994 F.2d 1178, 1181-82 (6th Cir. 1993). Jameson, 18 VLRB at 350.

[250] Schmidt, 864 F.Supp at 997. Jameson, 18 VLRB at 350.

V. RESIGNATIONS

5.1 General Standards

The VLRB and the Vermont Supreme Court have addressed the issue whether employees have actually resigned from employment in grievances stemming from the state employees bargaining units. The employer bears the burden of proving that the employee resigned.[251]

Oral resignations can be valid and enforceable. The Board has concluded, and the Vermont Supreme Court has concurred, that an employer is not precluded from accepting a resignation based on an employee's verbal representations and other actions, if that employee fails to resign in writing.[252] Such representations and actions must clearly indicate, and demonstrate conclusively, that the employee has resigned.[253]

Another crucial issue is whether a valid resignation exists when a written agreement on the resignation is contemplated pursuant to verbal discussions, but is never executed.[254] The generally accepted rule is that when parties negotiating a proposed contract express an intent not to be bound until their negotiations have culminated in the execution of a formal contract, they cannot be held bound until that event has occurred.[255] However, parties are free to enter into a binding oral contract without memorializing their agreement in a fully executed document even if they contemplate a writing to evidence their agreement.[256]

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[251] Grievance of Wright, 16 VLRB 415, 428 (1993).

[252] Grievance of Baldwin, 13 VLRB 20, 35 (1990); *Affirmed*, 158 Vt. 644 (1992).

[253] Baldwin, 13 VLRB at 37. Grievance of Nye, 21 VLRB 47, 54 (1998).

[254] Wright, 16 VLRB at 429.

[255] Id. Jim Bouton Corp. v. Wm. Wrigley Jr. Co., 909 F.2d 1074, 1081 (2d Cir. 1990).

[256] Winston v. Mediafare Entertainment Corp., 777 F.2d 78, 80 (2d Cir. 1985). Wright, 16 VLRB at 429-30.

In any given case, it is the intent of the parties that will determine the time of contract formation.[257] To discern that intent, the court or board must look to "the words and deeds of the parties which constitute objective signs in a given set of circumstances."[258] There are several factors that help determine whether the parties intended to be bound in the absence of a document executed by both sides: 1) whether there has been an express reservation of the right not to be bound in the absence of a writing; 2) whether there has been a partial performance of a contract; 3) whether all of the terms of the alleged contract have been agreed upon; and 4) whether the agreement at issue is the type of contract that is usually committed to writing.[259]

If a union representative is involved in negotiations concerning the employee's potential resignation, in the absence of the employee, and a question exists whether a binding oral agreement for the employee to resign is reached in the negotiations, a threshold agency issue exists. An agreement will be enforced only if the evidence supports the conclusion that the representative had actual or apparent authority to reach such an agreement on behalf of the employee.[260]

5.2 Constructive Discharge/Involuntary Resignation

The VLRB and the Vermont Supreme Court have addressed the issue of whether resignations can be converted into discharges due to their involuntary nature. Constructive discharge refers to a resignation that was improperly procured or induced to the point that, conceptually, the resigned employee should be taken to have been discharged.[261] In constructive discharge cases, the general rule is that, if the employer deliberately makes an

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[257] Id.

[258] Id.

[259] Id.

[260] Wright, 16 VLRB at 430-31. NEET v. Silver Street Partnership, 148 Vt. 99 (1987).

[261] In re Grievance of Bushey, 142 Vt. 290, 291 (1982).

employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee.[262] The establishment of intolerable working conditions must be intended by the employer to get the employee to resign.[263]

A resignation also is involuntary, and thus invalid, if it is the result of undue influence by the employer.[264] Undue influence occurs when a person in a dominant position exerts excessive pressure on or unfairly persuades another in a vulnerable situation, to the extent that the will of the servient person is overcome by the will of the dominant person.[265] Undue influence may be present where an employee has been pressured to resign.[266]

In determining whether a decision resulted from undue influence, a number of factors are considered, including: 1) whether the servient party was in a susceptible or vulnerable state of mind; 2) whether the persuading party was in a dominant position over the person persuaded, and whether there was more than one person doing the persuading; 3) whether independent advice was made available to the servient party; 4) whether the discussion took place in an unusual place or at an unusual time; and 5) whether there was an emphasis on the negative consequences of delay or an insistence on an immediate answer.[267]

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[262] Grievance of Bushey, 4 VLRB 285, 298 (1981); *Reversed on other grounds*, 142 Vt. 290 (1982).

[263] 4 VLRB at 298-99.

[264] In re Taylor, (Unpublished Decision, Supreme Court Docket No. 91-108, January 6, 1992).

[265] Id.

[266] Id.

[267] Id.

VI. PERFORMANCE EVALUATIONS

Under the contract between the State and the Vermont State Employees' Association, the VLRB resolved several grievances in the 1980's concerning whether the employer violated the following contract language:

> During the rating year, the immediate supervisor shall call the employee's attention to work deficiencies which may adversely affect a rating, and, where appropriate, to possible areas of improvement.

Under the contract language, a supervisor is required to give an employee clear indication of dissatisfaction with that employee's performance.[268] The contract provides that an employee be told when his or her performance is unacceptable so there will be no "surprises" at evaluation time.[269] The burden is on management to put an employee clearly on notice of deficiencies.[270] Given the difference in perceptions among people, it is imperative that management indicate its dissatisfaction clearly and unequivocally so misconceptions are eliminated.[271]

The VLRB and the Vermont Supreme Court have recognized that employees may suffer adverse consequences if they do not receive a performance evaluation required by the contract or if they receive an adverse evaluation.[272] In cases where procedural shortcomings, such as failure to do a performance evaluation, existed where faculty members were not reappointed or not tenured, the VLRB determined if the breaches caused the college president to not approve reappointment or tenure of the faculty member.[273]

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[268] Grievance of Smith, 5 VLRB 272, 277 (1982).

[269] Grievance of Claude Rathburn, 5 VLRB 286, 293 (1982).

[270] Grievance of Calderara, 9 VLRB 211, 221 (1986).

[271] Id.

[272] VSCFF and Peck v. Vermont State Colleges, 139 Vt. 329 (1981); *On remand,* 4 VLRB 334 (1981). Grievance of McDonald, 4 VLRB 42, 4 VLRB 280 (1981).

[273] Id.

If so, backpay and/or reconsideration of the decision may be appropriate.[274] If not, conducting a performance evaluation and a monetary award may still be appropriate, since employees may have difficulty obtaining other employment without the evaluation.[275]

However, the VLRB and the Vermont Supreme Court have determined that the VLRB lacked jurisdiction to decide a resigned State employee's grievance contesting an adverse performance evaluation, concluding that the grievant's obtaining of satisfactory employment elsewhere meant there was an absence of any injury in fact or threat of injury.[276]

An issue which has arisen where notice of performance deficiencies is given is at what point a grievance is permitted contesting the alleged performance deficiencies.[277] In construing the State - VSEA contracts, the Board has concluded that the parties intended that performance issues be kept out of the grievance procedure until such time as an employee actually receives an adverse performance evaluation. Allowing the filing of grievances at the time an oral or written notice of performance deficiency is issued may impede to some extent the free flow of communication of a supervisor's expectations intended to improve an employee's performance.[278] If the oral or written notice serves its intended purpose - to improve performance - and the employee does not receive adverse comments or ratings on the performance evaluation, then the employee ultimately has suffered no harm.[279] If performance does not improve, and the employee receives an

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[274] Peck, 139 Vt. at 333-334. McDonald, 4 VLRB at 280-283.

[275] Peck, 139 Vt. at 133; 4 VLRB at 341-42.

[276] Grievance of Boocock, 7 VLRB 265 (1984); *Affirmed*, 150 Vt. 422 (1988).

[277] Grievance of Penka, 19 VLRB 26, 35-38 (1996).

[278] Id. at 36-37.

[279] Id. at 38.

adverse performance evaluation, the employee has not lost his or her right to grieve the notice and substance of performance deficiencies. [280]

[280] Id.

VII. LAYOFFS OF EMPLOYEES

The collective bargaining agreements between the State and the Vermont State Employees' Association recognize the right of the State to lay off employees in certain situations. There have been two major lines of cases which have come before the Board interpreting the provisions of the collective bargaining agreements.

The first line of cases involve "lack of work" or "lack of funds". The agreements provided that the employer "may determine that a reduction in force is necessary when a lack of work situation exists". The agreements defined "lack of work" as "when 1) there is insufficient funds to permit the continuation of current staffing, or 2) there is not enough work to justify the continuation of current staffing". The Board determined that disputes with respect to layoffs of employees on grounds of lack of work or lack of funds generally should be resolved through the grievance procedure, not through the unfair labor practice route, even where numerous layoffs occurring throughout state government are involved.[281]

The Board has decided two types of "lack of work" or "lack of funds" cases. In the first type, the Board decided whether the work force actually has been reduced due to lack of work or lack of funds, or whether staff simply has been redirected to perform certain work, rather than other work, and the size of the work force has remained constant. [282] In the second type, the Board decided whether employees actually were laid off due to lack of work or lack of funds, or whether the real reason for the layoff was for an illegal reason such as union activity, age discrimination or political reasons.[283]

The second major line of layoff cases which have come before the Board, applying the provisions of the State - VSEA collective bargaining agreements, involved the contracting out of work previously done by state employees and laying off the state employees. One provision of the agreements applicable to these situations provides that

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[281] VSEA v. State of Vermont, 14 VLRB 141, 144-45 (1991).

[282] Grievance of Ulrich, 12 VLRB 230, 238 (1989); *Affirmed*, 157 Vt. 290 (1991).

[283] Grievance of Santorello, 14 VLRB 203 (1991). Grievance of Day, 14 VLRB 229 (1991).

"prior to any such layoff or other job elimination . . . the VSEA will be notified and given an opportunity to discuss alternatives". To comply with these provisions, the employer must engage in good faith discussions with VSEA; otherwise the provision requiring discussion on alternatives would be meaningless.[284] This requires discussing alternatives to layoff with an open mind and sufficiently in advance of the layoff so that alternatives can be adequately considered before a layoff occurs.[285] This does not mean that all of the contractual obligations are placed on the employer. The contractual provision that VSEA will be "given an opportunity to discuss alternatives" necessarily implies that VSEA, in seeking to avert a layoff, has an obligation to present concrete alternatives to the layoffs of employees.[286] There is a mutual obligation to engage in good faith discussions to seek to avert the layoffs of employees.[287]

Another provision of the agreements applicable to contracting out situations allows employee layoffs, when the notice and discussion provisions discussed above have been satisfied, provided that at least one of three standards are met. One of the standards is that "the work or program can be performed more economically under an outside contract". In deciding whether the employer has met this standard, the Board focuses on reasonable cost estimates existing at the time the final decision whether to contract out the work was made.[288] The Board decision generally is guided by whether the employer made a reasonable decision based on the information it had at the time the decision was made; a deviation from these estimates occurring in actual experience under the contract is not pertinent without more.[289]

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[284] Grievance of VSEA, Barnard, et al, 17 VLRB 203, 228 (1994); *Affirmed*, 164 Vt.214 (1995).

[285] Id.

[286] Id.

[287] Id.

[288] Grievance of VSEA, Barnard, et al, 17 VLRB at 232.

[289] Id.

The determination of cost estimates should take into consideration the total hours needed to be worked by employees, overtime costs, and estimated unemployment compensation costs which would be incurred by the employer as a result of laying off state employees.[290] Also, the State is obligated pursuant to its own promulgated policy to ensure that there is a 10 percent savings differential between a program operated by state employees and a program operated by a contractor before the contracting out of state programs is approved.[291] Revenue-generating measures cannot be used to support more economical operation of the state-run program compared to that of the contractor where the measures would have the same economic effect whether the contractor or state employees operated the program.[292]

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[290] Id. at 233-35.

[291] Id. at 235.

[292] Id. at 236.

VIII. OVERTIME

The Board and the Vermont Supreme Court have addressed various issues concerning entitlement of employees to overtime compensation pursuant to the contracts between the State and the Vermont State Employees' Association. The leading cases have concerned whether employees were "on call", whether employees were on "standby status" or "available", whether employees were entitled to overtime compensation for travel time, or whether employees were entitled to "call in" pay.

In the "on call" cases, employees were entitled to overtime compensation outside of normal working hours if they were "on call", but received less compensation if they simply had to be "available." If the employee is so limited in activities that his or her time cannot effectively be used as his or her own, then the employee's availability is more beneficial to the employer than the employee, and the employee is "on call" and should be compensated. The employee is engaged to wait.[293]

On the other hand, if the employee, while making himself or herself available, may still carry out functions of his or her own and is only limited to a telephone number where the employee can be reached and a location from which the employee can respond to the call within a reasonable time, then the employee is not on call. He or she is waiting to be engaged.[294] Whether employees are waiting to be engaged or engaged to wait must be decided upon the facts in each case.[295] Whether the time spent is predominantly for the employer's benefit or for the employee's benefit is a question dependent upon all the circumstances.[296]

In the "standby status" cases, which followed a change in the contract language subsequent to the above "on call" cases, the issue was whether employees were entitled to

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[293] Grievance of Brady, 139 Vt. 501, 506-507 (1981). Grievance of Bornstein, et al, 4 VLRB 260, 275-276 (1981).

[294] Id.

[295] Id.

[296] Id.

compensation for all hours they essentially were required, while on a purported "available" status, to be reachable and to be able to respond as if they were on "standby" status.[297] Such a requirement exists when management leads employees to reasonably believe that they are not free to travel where they cannot be reached and would be unable to respond to an emergency.[298] Such a requirement does not exist where employees, while on "available" status, act as if they are on "standby" status as a result of self-imposed professional responsibility, rather than a requirement imposed on them by management.[299]

In the entitlement to overtime compensation for travel time cases, employees were eligible under the contracts for overtime for travel time between work locations, but the employee's home was not considered a work location for overtime purposes. Thus, employees clearly were not entitled to overtime compensation for travel time between home and assignment.[300] On the other hand, the overtime provisions of the contracts required that any travel time between official work station and another work location outside of normal working hours should be considered as time worked for purposes of computing overtime.[301]

In interpreting contract language providing that an "employee who is called into work at any time other than continuously into his normal scheduled shift" shall be considered as working overtime during all such hours worked, the Board and the Vermont Supreme Court came to different conclusions. The Board concluded that the "call in" provision applied only to situations where an employee has completed his or her regular

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[297] Grievance of Vermont State Employees' Association (re: Refusal to Pay Standby Pay), 15 VLRB 71, 89-91 (1992); *Affirmed*, 162 Vt. 277 (1994). Grievance of Vermont State Employees' Association, Perkins, et al, 23 VLRB 67 (2000).

[298] Id.

[299] Id.

[300] Grievance of VSEA on Behalf of the Meat Inspectors, Department of Agriculture, 4 VLRB 144 (1981); *Affirmed* , 141 Vt. 616 (1982).

[301] Grievance of McFarland, 10 VLRB 220, 227 (1987). Grievance of Beyor, 5 VLRB 222, 236 (1982).

work shift and subsequently is called to come in and work before the start of his or her next regular work shift and does not work continuously into his or her normally scheduled shift.[302]

However, the Court reversed the Board's decision.[303] The Court concluded that, given the context in which the contract was reached together with the practical construction placed upon it by the parties after its execution, the "call in" provision was to apply even if the employee received advance notice of the off duty work.[304]

It is management's prerogative to determine when overtime shall be performed. Generally, to be compensated as overtime worked, work must be assigned or approved by the employer, explicitly or implicitly, as work which the employer requires to be done.[305]

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[302] Grievance of Dickerson, 5 VLRB 249 (1982). Grievance of Cronan, et al, 6 VLRB 347 (1983).

[303] 151 Vt. 476 (1989).

[304] Id. at 479.

[305] Grievance of VSCSF and Laflin, 16 VLRB 276 (1993). Grievance of Austin, 6 VLRB 150 (1983).