

NOTES

THE VERMONT LABOR RELATIONS BOARD'S ROLE IN GRIEVANCE PROCEEDINGS: LET'S MAKE THIS PROCESS WORK

From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere—wherever it is vested it is susceptible of abuse.¹

INTRODUCTION

Over the last decade, a pattern of confusion has developed regarding the Vermont Labor Relations Board's (hereinafter the VLRB or Board) function when hearing grievances of state employees.² As a result, both the VLRB and the Vermont Supreme Court have spent considerable time trying to determine the Board's role in grievance proceedings. In large part, the confusion is a consequence of the conflicting language of sections 926 and 1003 of the Vermont State Employees Labor Relations Act, and the dual functions carried out by the VLRB.³ Section 926 provides for the Board to make "final determination[s]" in grievance proceedings, while section 1003 provides for appeals from Board decisions.⁴ Consequently, as a result of inconsistency between section 926 and 1003 grievance decisions by the Board have not been accorded the finality contemplated by the language of section 926.⁵ The continuing uncertainty surrounding the Board's role in grievance proceedings, especially those proceedings involving disciplinary actions, has created an atmosphere of instability that perme-

1. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 345 (1816).

2. *See, e.g.*, *Grievance of Sherman*, 7 V.L.R.B. 380 (1984); *Grievances of Colleran and Britt*, 6 V.L.R.B. 235 (1983); *In re Goddard*, 142 Vt. 437, 457 A.2d 637 (1983); *In re Harrison*, 141 Vt. 215, 446 A.2d 366 (1982); *In re Gage*, 137 Vt. 16, 398 A.2d 297 (1979); *In re Brooks*, 135 Vt. 563, 382 A.2d 204 (1977).

3. VT. STAT. ANN. tit. 3, § 926 (1985) provides in pertinent part: "The board shall hear and make final determination on the grievances of all employees who are eligible to appeal grievances to the board." VT. STAT. ANN. tit. 3, § 1003 (1985) provides in pertinent part: "Any person aggrieved by an order or decision of the board issued under the authority of this chapter may appeal on questions of law to the supreme court." *See infra* text accompanying note 27.

4. VT. STAT. ANN. tit. 3, § 1003 (1985).

5. *Id.* § 926.

ates state labor relations.

This note determines what the precise function of the VLRB should be when it hears state employees' grievances regarding disciplinary actions. Section I of this note examines some of the pertinent background to the problem surrounding the VLRB's function in grievance procedures. This section includes a discussion of the statutory provisions that govern grievance proceedings⁶ and judicial review of Board decisions.⁷ Section II reviews relevant case law to demonstrate how the problem has evolved, including a review of relevant Board opinions.

Section III examines the practical consequences of grievance proceedings on individual grievants, state employees, and management. This section also looks at the problems caused by the delay between an appealed VLRB decision, and the court's subsequent opinion. Section IV discusses the treatment by other jurisdictions of similar state employee grievances. This includes an examination of state labor relations acts in surrounding states. Section V proposes solutions to the problem regarding the Board's function in grievance proceedings.

I. BACKGROUND OF GRIEVANCE PROCEEDINGS

The VLRB has statutory authority to hear and make final determinations of employee grievances.⁸ The exact meaning and extent of the Board's authority, as provided for in the section of the statute governing grievance proceedings, is central to the controversy concerning what the Board's function in these proceedings should be.⁹

A. *The Statute*

The Vermont Supreme Court and the VLRB both utilize the State Employees Labor Relations Act to determine the function and authority of the Board.¹⁰ One of the purposes of the act is to

6. *Id.*

7. *Id.* § 1003.

8. *See, e.g., In re Guttman*, 139 Vt. 574, 576, 431 A.2d 491, 493 (1981); VT. STAT. ANN. tit. 3, § 926 (1985).

9. *See, e.g., In re Richard Harrison*, 141 Vt. 215, 446 A.2d 366 (1982); *In re Guttman*, 139 Vt. at 576, 431 A.2d at 493 (1981); *Grievance of James Harrison*, 2 V.L.R.B. 171, 183 (1979).

10. VT. STAT. ANN. tit. 3, §§ 901-1007 (1985).

provide an orderly and peaceful procedure for labor relations.¹¹ However, while grievance proceedings have been orderly they have not provided timely resolutions of grievances. A significant number of grievances brought before the Board are subsequently appealed to the Vermont Supreme Court.¹²

Section 926 of the State Employee Labor Relations Act provides in pertinent part: “[t]he Board shall hear and make *final determination* on the grievances of all employees who are eligible to appeal grievances to the Board.”¹³ Eligibility to appeal is determined by examining whether an employee has tried to resolve the dispute through informal means.¹⁴ A party seeking to have the Board hear a grievance must file a written statement explaining the aspect of employment which is the subject of the grievance.¹⁵

Section 1003 of the State Employee Labor Relations Act states, “[a]ny person aggrieved by an order or decision of the board issued under the authority of this chapter may appeal on questions of law to the supreme court.”¹⁶ Therefore, section 926, which authorizes the Board to make “final determination” in grievance proceedings is in conflict with section 1003, which permits decisions of the Board to be appealed to the Vermont Supreme Court. Section

11. *Id.* § 901.

12. *Id.* § 1003. In 1983 there were 30 grievances before the VLRB. Ten grievances were appealed to the supreme court (*i.e.*, one third). Six of the 10 appeals to the supreme court involved disciplinary actions. 6 VLRB ANN. REP. i, vi (1983). In 1985, 33 grievances were filed and seven were appealed. 8 VLRB ANN. REP. i-ii (1985). Tim Noonan, Executive Director of the VLRB, stated that the number of appeals from the Board to the court were considered by him to be unacceptably high. Telephone interview with Tim Noonan, Executive Director of the Vermont Labor Relations Board (Oct. 6, 1986). *See also* 9 VLRB ANN. REP., iv (1986) (section on grievances). The Board commented:

Although the number of Board grievance decisions appealed decreased substantially, *the backlog of appeals of Board decisions at the Supreme Court continued to be a serious problem*. Seventeen cases appealing Board grievance decisions, all involving State employees, were pending before the Supreme Court at the end of 1985. Eight of the pending cases are dismissal cases. Seven of the 17 pending cases have been on appeal for over three years, four more have been on appeal for over two years, and four more have been pending for over a year. *In a field such as labor relations, where the importance of promptness in resolving disputes has long been recognized, the fact [that] nearly 90 percent of appeals have been pending more than a year is a serious problem.*

Id. (emphasis added).

13. VT. STAT. ANN. tit. 3, § 926 (1985) (emphasis added).

14. *Id.* § 902(14).

15. *Id.*

16. *Id.* § 1003.

1003 restricts the Board's power to render final determinations and may have not been designed with grievance proceedings in mind. Primarily the Board performs other functions (*e.g.*, hearing unfair labor practices and making unit determinations) that should be subject to judicial review. However, section 1003 does not take account of the separate and distinct function the Board has in grievance proceedings.¹⁷ The Board's determinations cannot be final if they are subject to appeal. The Board has relied on the precise language of section 926 to determine its authority.¹⁸ On the other hand, the court has relied on section 1003 for its authority to review Board decisions.¹⁹ The inconsistency between the two statutory provisions may cause instability in labor relations.

B. *The Traditional Role of a State Labor Relations Board*

Most state labor relations boards are modeled after the National Labor Relations Board.²⁰ Like the National Labor Relations Act,²¹ the Vermont State Employees Labor Relations Act's general purpose is to protect the legitimate rights of state employees.²²

17. *Id.*

18. *Id.* § 926. *See also* Grievances of Collieran and Britt, 6 V.L.R.B. 235, 270 (1983). The Vermont Supreme Court has interpreted statutes according to their plain meaning. *See, e.g.*, *State v. Harty*, 147 Vt. 400, 402, 518 A.2d 30, 31 (1986) ("Our primary objective in interpreting statutes is to give effect to legislative intent. . . . We presume that the plain, ordinary meaning of statutory language is intended.") (citations omitted); *Littlefield v. Department of Employment and Training*, 145 Vt. 247, 253, 487 A.2d 507, 510 (1984) ("When . . . there are two opposing interpretations of statutory language [it is the Supreme Court's function] to apply to the facts as accurately as possible the intent of the legislature as evidenced by the statute itself."); *Hill v. Conway*, 143 Vt. 91, 93, 463 A.2d 232, 233 (1983) (plain meaning "provides that when the meaning of a statute is plain on its face it must be enforced according to its terms and there is no need for construction; the legislative intent is to be ascertained from the act itself, which is presumed to be in accordance with the ordinary meaning of the statutory language."); *Committee to Save the Bishop's House v. Medical Center Hosp. of Vt.*, 137 Vt. 142, 150-51, 400 A.2d 1015, 1019-21 (1979) ("It is a 'venerable principle that construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.'" (quoting *Red Lion Broadcasting Co. v. Federal Communication Comm'n*, 395 U.S. 367, 381 (1969) (emphasis added)). Because there is no legislative history available on Vt. STAT. ANN. tit. 3, §§ 926, 1003, the Vermont Supreme Court is left with only the wording of the statute and general policy guidelines of labor law to determine the intent behind the "final determination" provision of section 926.

19. Vt. STAT. ANN. tit. 3, § 1003 (1985).

20. *See generally* 48A AM. JUR. 2D *Labor and Labor Relations* §§ 1727-1775 (1979).

21. 29 U.S.C. §§ 151-169 (1982).

22. *Compare* Vt. STAT. ANN. tit. 3, §§ 901, 903, 941-942, 961-962 (1985) with 29 U.S.C. §§ 157-159. Although the duties and powers of the NLRB are more elaborate than the VLRB, there are similarities between their functions. The NLRB is primarily responsible for protecting the statutory rights guaranteed by the NLRA. Similarly, the VLRB protects

The purpose section of the Vermont State Employees Labor Relations Act provides in pertinent part: "[i]t is the purpose and policy of this chapter to prescribe the legitimate rights of both state employees and the State of Vermont and . . . to provide orderly and peaceful procedures for preventing the interference by either the legitimate rights of the other" ²³ To this end, the VLRB is empowered to investigate unfair labor practices ²⁴ and to conduct representative elections. ²⁵ In addition, the VLRB also hears grievances. ²⁶ The dual functions of the VLRB distinguish it from other state labor boards, ²⁷ as well as the National Labor Relations Board. ²⁸

An employee grievance is distinguishable from an unfair labor practice. The Vermont State Employees Labor Relations Act defines a grievance as an "expressed dissatisfaction . . . with aspects of employment of working conditions under [a] collective bargaining agreement or the discriminatory application of a rule or regulation" ²⁹ Sections 961 and 962 define what constitutes unfair labor practices for employers and employees respectively. ³⁰ For example, it is an unfair labor practice for an employer "[t]o *interfere with, restrain or coerce*" an employee who is attempting to exercise his guaranteed rights. ³¹ Similarly, it is an unfair labor practice for an employee organization "[t]o *restrain or coerce* employees in the exercise of the rights guaranteed to them by law, rule or regulation." ³² Both sections 961 and 962 enumerate other unfair labor practices. ³³ Interference with the guaranteed rights of employees, either through some form of restraint or coercion, is the benchmark of an unfair labor practice.

the statutory rights of organized state employees under the Vermont State Employees Labor Relations Act.

23. VT. STAT. ANN. tit. 3, § 901 (1985).

24. *Id.* §§ 961-966.

25. *Id.* §§ 941-942.

26. *Id.* § 926.

27. The dual functions of the VLRB are: one, the Board protects the rights of employees through various means; two, the Board hears grievances. The former function conforms with the traditional role of a state labor board, while the latter function is an anomaly. See *infra* text accompanying notes 147-183.

28. 29 U.S.C. § 160.

29. VT. STAT. ANN. tit. 3, § 902(14) (1985).

30. *Id.* §§ 961-962.

31. *Id.* § 961(1) (emphasis added).

32. *Id.* § 962(1) (emphasis added).

33. *Id.* §§ 961-962.

When an employee has a grievance it does not mean an unfair labor practice has been committed. A grievance generally involves dissatisfaction with a working condition or a disciplinary action imposed against an employee. In instances involving disciplinary actions, employees often believe their punishment involves the misapplication of a working rule, or lack of just cause for their punishment.³⁴ If an employee believes that a working condition or disciplinary action is a result of an employer's attempt to interfere with the employee's guaranteed rights, then he or she should make an unfair labor practice charge to the VLRB.³⁵ An employee's grievance may be founded upon an employer's unfair labor practices, but grievances and unfair labor practices are distinct and require recourse to separate proceedings. Grievance hearings are not the appropriate forum for an unfair labor practice charge.

II. JUDICIAL PRECEDENT

A. *The Brooks Standards*

*In re Brooks*³⁶ is the first case that demonstrates the difference between the court's and Board's perception of the Board's proper function in grievance proceedings.³⁷ In *Brooks*, the grievant was an employee of the state military department for six years.³⁸ He often argued with fellow employees and on one occasion used physical force against a female employee, which led to his dismissal. The Vermont State Employee Association (VSEA) filed an appeal on behalf of the grievant before the Board. The Board found the discipline inappropriate and reinstated the grievant.³⁹ Subsequently, the state appealed the Board's decision to the Vermont Supreme Court⁴⁰ in accordance with the State Employees Labor Relations Act.⁴¹ The court held that as a matter of law there was "just cause" for the grievant's dismissal.⁴² Consequently, the Board's decision to reinstate the grievant was reversed. In reaching its decision, the court discussed several standards that it cited as

34. See *infra* text accompanying notes 55-61.

35. VT. STAT. ANN. tit. 3, § 965 (1985).

36. 135 Vt. 563, 382 A.2d 204 (1977).

37. See *id.* at 570-71, 382 A.2d at 208-09.

38. *Id.* at 565, 382 A.2d at 205-06.

39. *Grievance of Brooks*, 1 V.L.R.B. 14, 18, *rev'd*, *In Re Brooks*, 135 Vt. 563, 382 A.2d 204 (1977).

40. *In re Brooks*, 135 Vt. at 565, 382 A.2d at 206.

41. VT. STAT. ANN. tit. 3, § 1003 (1985).

42. *In re Brooks*, 135 Vt. 563, 569, 382 A.2d 204, 208.

important to the Board's function of reviewing disciplinary actions taken by the state as the employer.⁴³ The *Brooks* standards are still operative today.⁴⁴

In *Brooks*, the court defined the VLRB as an administrative body with various functions.⁴⁵ The court explained the Board's role in grievance proceedings as that of a "quasi-judicial body."⁴⁶ In discussing the statutory provision governing grievances,⁴⁷ the court omitted language that was part of the statute giving the Board power to make "final determination[s]."⁴⁸ The court's omission of this language is consistent with its opinions in later cases⁴⁹ that the Board may not substitute its judgment for that of the employer. In subsequent cases, the court has repeatedly stated that "the Board is not given, by *statute* or by agreement, any authority to substitute its own judgment for that of the employer, exercised within the limits of law or contract."⁵⁰

However, the language of section 926, referring to the Board's authority to make "final determination[s],"⁵¹ suggests that the Board does indeed have statutory authority to substitute its judgment for an employer when it is necessary to reach a final determination. Inherent in the power to make final determinations is the ability to correct arbitrary actions regarding disciplinary decisions by the state employer. Indeed, the court has recently stated that it is within the Board's power "to police the exercise of discretion by the employer and to keep such actions within legal limits."⁵² The correction of arbitrary decisions made by the employer requires that the Board exercise its judgment when assessing the appropriateness of an employer's disciplinary action. Nevertheless, the

43. *Id.* at 565-68, 570, 382 A.2d at 206-07.

44. *See, e.g.*, *Grievance of Byrne*, 147 Vt. 265, 268, 514 A.2d 709, 711 (1986); *In re Goddard*, 142 Vt. 437, 443, 457 A.2d 637, 641 (1983); *In re Carlson*, 140 Vt. 555, 559, 442 A.2d 57, 59 (1982); *In re Gage*, 137 Vt. 16, 18-20, 398 A.2d 297, 299 (1979).

45. *In re Brooks*, 135 Vt. at 566, 382 A.2d at 206.

46. *Id.* at 565, 382 A.2d at 206. When the Board operates in a quasi-judicial manner it determines questions of law and fact incident to its administrative duties. *Id.*

47. VT. STAT. ANN. tit. 3, § 926 (1985).

48. *Id.*; *In re Brooks*, 135 Vt. at 565-66, 382 A.2d at 206.

49. *See, e.g.*, *Grievance of Byrne*, 147 Vt. 265, 514 A.2d 709 (1986); *In re Harrison*, 141 Vt. 215, 446 A.2d 366 (1982); *In re Gage*, 137 Vt. 16, 398 A.2d 297 (1979).

50. *In re Goddard*, 142 Vt. 437, 445, 457 A.2d 637, 641-42 (1983) (quoting *Gage*, 137 Vt. at 19, 398 A.2d at 299) (emphasis added). *See also* *Grievance of Byrne*, 147 Vt. at 268, 514 A.2d at 711.

51. VT. STAT. ANN. tit. 3, § 926 (1985).

52. *Grievance of Byrne*, 147 Vt. at 268, 514 A.2d at 711 (quoting *Gage*, 137 Vt. at 19, 398 A.2d at 299).

court has consistently prohibited the Board from substituting its judgment for the employer's, regardless of the existing language of section 926, which indicates that while the Board hears grievances it may have such a power.

To render final determinations in a grievance proceeding, the Board has to review the facts that led to a particular disciplinary action.⁵³ If the Board finds no just cause for discipline, or for the particular disciplinary measure in question, it should modify the disciplinary action in order to meet its statutory duty to render final determinations. Inherent in the Board's review of grievances is the use of its expert judgment to determine whether a disciplinary action was appropriate. When the Board finds a discipline excessive, based upon its review of the facts, it should have the authority to substitute its judgment for that of the employer. It is necessary for the Board to substitute its judgment when it makes a just cause determination. Although the court has stated that the VLRB cannot substitute its judgment for the employer's, the court has acceded to the Board's authority to "decide whether there was, in law, just cause for the action taken, not whether it agrees or disagrees with that action."⁵⁴ This has contributed to the confusion between the Board's view of its role and the court's view of the Board's role.

The rationale behind the just cause doctrine is to remove the ability of an employer to arbitrarily dismiss an employee.⁵⁵ In *Brooks*, the central issue the court considered was whether the employer had just cause to dismiss the grievant.⁵⁶ The court concluded that unless the Board found that no just cause existed for the dismissal, it could not reinstate the grievant.⁵⁷ The general definition of just cause is "some substantial shortcoming detrimental to the employer's interests . . . which the law and a sound public opinion recognize as a good cause for dismissal."⁵⁸ The court went on to state two vital criteria⁵⁹ for determining whether just cause

53. See *Grievances of Colleran and Britt*, 6 V.L.R.B. 235, 270-71 (1983).

54. *In re Goddard*, 142 Vt. at 444, 457 A.2d at 641 (quoting *Gage*, 137 Vt. at 19, 398 A.2d at 299); see also *In re Carlson*, 140 Vt. 555, 560, 442 A.2d 57, 60 (1982); *In re Brooks*, 135 Vt. 563, 567, 382 A.2d 204, 207 (1977).

55. See *In re Gage*, 137 Vt. 16, 18, 398 A.2d 297, 298 (1979); *In re Brooks*, 135 Vt. at 568, 382 A.2d at 207. Cf. *Grievance of Cronin*, 6 V.L.R.B. 37, 56-62 (1983).

56. *In re Brooks*, 135 Vt. at 567, 382 A.2d at 207.

57. *Id.*

58. *Id.* at 568, 382 A.2d at 207.

59. *Id.*

for a particular discipline exists: first, it must be reasonable to apply the discipline because of certain conduct;⁶⁰ and second, the employee must receive express or implied notice that such conduct is grounds for the discipline applied.⁶¹

In *Brooks*, the Board found that the state failed to follow the general principles of progressive discipline.⁶² The court held that the Board's belief that progressive discipline was inherent in the concept of just cause was an impermissible substitution of its judgment for that of the employer.⁶³ However, the court did extend an implicit invitation to the parties to incorporate the idea of progressive discipline into their future collective bargaining agreements,⁶⁴ and consequently alter what would establish just cause for a particular disciplinary action.⁶⁵ "This is not to say that the parties could not negotiate the requirement of progressive discipline into the collective bargaining agreement. Nor do we mean to preclude the parties from varying the above stated definition of just cause either expressly in the agreement or implicitly by their conduct."⁶⁶ When a collective bargaining agreement contains a progressive discipline plan, the Board must interpret the agreement to determine whether just cause existed for any level of disciplinary action applied by an employer. The court has stated "[t]he Board's expertise in construing collective bargaining agreements is presumed, and substantial deference is accorded the Board's constructions."⁶⁷ However, even after the state and the VSEA began including progressive discipline plans in their contracts, the court still maintained its position that the Board had no authority to substitute

60. *Id.* at 568, 382 A.2d at 207-08.

61. *Id.* at 568, 382 A.2d at 208.

62. *Id.* at 569, 382 A.2d at 206. Progressive discipline is incorporated into many collective bargaining agreements as a systematic method of disciplining employees for different types of misconduct. Progressive discipline plans provide for varying levels of severity of disciplinary action. Each level requires that just cause exist for a particular kind of discipline before that discipline is applied. *Id.*

63. *Id.*

64. *Id.*

65. On several occasions, the court has restated its invitation to the state and the state employees' union to alter the definition of "just cause" within their collective bargaining agreements. *See, e.g., In re Goddard*, 142 Vt. 437, 443, 457 A.2d 637, 641 (1983); *In re Harrison*, 141 Vt. 215, 220, 446 A.2d 366, 368 (1982); *In re Muzzy*, 141 Vt. 463, 468, 449 A.2d 970, 972 (1982).

66. *In re Brooks*, 135 Vt. 563, 569, 382 A.2d 204, 208 (1977).

67. *In re Carlson*, 140 Vt. 555, 560, 442 A.2d 57, 60 (1982). The VSEA and the State of Vermont have included progressive discipline plans in their collective bargaining agreements since 1981. For the basic text of a progressive discipline plan, see *id.* at 558, 442 A.2d at 59.

its judgment for that of the employer.⁶⁸

Brooks occurred under the terms of the 1976-1979 collective bargaining agreement⁶⁹ between the state and the VSEA. Under the terms of that agreement, no provision for a progressive discipline plan existed.

Starting with the 1979-1981 agreement, the VSEA and the state included a progressive discipline plan in their collective bargaining agreements.⁷⁰ Article 15 of the collective bargaining agreement provided for five graduated steps of discipline.⁷¹ Moreover, the contract provided that any number of steps could be bypassed by the employer if there was just cause.⁷² For example, gross misconduct might provide sufficient just cause for dismissal, whereas a minor violation of a work procedure would not establish sufficient just cause for dismissal, but might for a lesser discipline (*e.g.*, an oral reprimand). The Board believed that the contract provision for progressive discipline altered its function:

[T]he Board likened its responsibility and authority in disciplinary cases to that of an arbitrator. The Board held that where the parties have expressly agreed to a policy of progressive discipline designed to correct misconduct, and the Board finds a particular disciplinary action excessive, it is within the authority and responsibility of the Board to impose a penalty commensurate with the employee's offense.⁷³

However, in several later cases the court disagreed with the Board's interpretation of the progressive discipline provision.⁷⁴ The court restated its position that the Board had no authority to substitute its judgment for that of the employer, and asserted "[w]hatever its powers . . . the Board does not sit as an arbitrator."⁷⁵ Rather, as the court had stated in the past, the Board acts

68. See, *e.g.*, *Grievance of Byrne*, 147 Vt. 265, 514 A.2d 709 (1986); *In re Harrison*, 141 Vt. 215, 446 A.2d 366 (1982).

69. See *Grievance of Sherman*, 7 V.L.R.B. 380, 401 (1984).

70. See *id.*

71. See, *e.g.*, *In re Muzzy*, 141 Vt. 463, 475 n.1, 449 A.2d 970, 975 n.1 (1982). The five steps are: oral reprimand; written reprimand; suspension without pay; demotion; dismissal. *Id.*

72. *Id.*

73. *Grievance of Sherman*, 7 V.L.R.B. at 402.

74. See, *e.g.*, *In re Goddard*, 142 Vt. 437, 457 A.2d 637 (1983); *In re Harrison*, 141 Vt. 215, 446 A.2d 366 (1982); *In re Muzzy*, 141 Vt. 463, 449 A.2d 970 (1982); *In re Carlson*, 140 Vt. 555, 442 A.2d 57 (1982).

75. *In re Harrison*, 141 Vt. at 220, 446 A.2d at 368.

as a quasi-judicial body.⁷⁶

B. Board Opinions

In two recent opinions,⁷⁷ the Board reevaluated its function and review power in regard to grievances involving disciplinary action. In *Colleran and Britt*,⁷⁸ the Board attempted to formulate standards that would be useful in determining whether just cause for a disciplinary action existed. The Board stated that its role was to make final determinations in grievances involving disciplinary actions.⁷⁹ However, the Board recognized that the court had the power to review Board decisions.⁸⁰ Nevertheless, the Board stated that it had the authority to modify discipline⁸¹ without substituting its judgment for that of an employer.⁸² Only when an employer abuses his or her discretionary power should the Board lessen a disciplinary action. The Board retreated from its earlier position that it acted as an arbitrator,⁸³ and acknowledged the long-standing view of the court that the Board's function was that of a quasi-judicial body.⁸⁴

In *Colleran and Britt*, the Board sought to harmonize its view with that of the court regarding its function in grievance proceedings.⁸⁵ Although the Board did moderate its standpoint, it continued to assert that it had the authority to modify disciplinary actions it viewed as an abuse of employer discretion.⁸⁶ This is precisely the point of contention between the court and Board. One of the primary problems facing the court and the Board is how to address disciplinary action that may have resulted from an abuse of discretion. This type of abuse requires the Board to impose its view of what should be proper punishment if any. In other words, the Board is sometimes left with no choice but to lessen a

76. *In re Brooks*, 135 Vt. 563, 565, 382 A.2d 204, 206 (1977).

77. Grievance of Sherman, 7 V.L.R.B. 380 (1984); Grievances of Colleran and Britt, 6 V.L.R.B. 235 (1983).

78. Grievances of Colleran and Britt, 6 V.L.R.B. at 268-69 (citing Douglas, 5 M.S.P.B. 313 (1981)).

79. *Id.* at 265.

80. Grievances of Colleran and Britt, 6 V.L.R.B. at 269.

81. *Id.* at 270-72.

82. *Id.* at 266.

83. See Grievance of James Harrison, 2 V.L.R.B. 171, 183 (1979); Grievance of Richard Harrison, 2 V.L.R.B. 304, 324 (1979).

84. See *In re Brooks*, 135 Vt. 563, 565, 382 A.2d 204, 206 (1977).

85. Grievances of Colleran and Britt, 6 V.L.R.B. at 266 (1983).

86. *Id.* at 266, 269-72.

disciplinary actions by substituting its judgment for that of an employer. The problem is not merely one of semantics, but goes directly to the question of whether the Board has (or should have) the power to review and adjust disciplinary actions that are the subject of grievance proceedings. For the Board to render a meaningful judgment, the Board must substitute its judgment for that of an employer, and the court should permit that substitution.

The Board conducted a review of past decisions in grievance proceedings, because of the renegotiation of the contract between the state and the VSEA in 1984.⁸⁷ The VSEA and the state have renegotiated their service contracts five times between the period of 1976-1986.⁸⁸ Changes in the provisions of these contracts have altered the Board's perception of its role in contract disputes. For example, when the VSEA and the state renegotiated their contract in 1979 to include a progressive discipline plan, the Board believed its power to be expanded, but the court disagreed.⁸⁹ Although the contract between the VSEA and the state was renegotiated again in 1982, the terms remained essentially the same. However, in 1984 the contract had provisions added to it that gave the Board the express authority to lessen disciplinary actions. As a result of the changes in the terms of the contract, the Board conducted a review of its past grievance decisions. The Board wanted to reassess its role in grievance hearings before it embarked on a new path. Under the new contract the Board thought it was possible to substitute its judgment for that of the employer, in matters pertaining to appropriate discipline.⁹⁰ The Board recognized that the VSEA sought finality with respect to Board decisions, but the Board also realized its difficulty with the court's interpretation of the Board's function. The new contract provision in question provided that "[i]n any case involving a suspension or dismissal, should the Vermont Labor Relations Board find just cause for discipline, but determine that the penalty was inappropriate or excessive, the Vermont Labor Relations Board shall have the authority to impose a lesser form of discipline."⁹¹ Considering this provision of the 1984-1986 contract, it is plausible that the parties intended the Board to substitute its judgment for the employer's judgment re-

87. *Grievance of Sherman*, 7 V.L.R.B. 380, 400 (1984).

88. *See id.* at 401-03. Contracts have been negotiated in the following years: 1976-79; 1979-81; 1981-82; 1982-84; 1984-86. *Id.*

89. *See supra* text accompanying notes 70-76.

90. *See* *Grievance of Sherman*, 7 V.L.R.B. at 400.

91. *Id.* at 396 (quoting from Grievant's Exhibit 19).

garding appropriate disciplinary measures.

In *Brooks*, the court stated that the parties could alter the definition of just cause by changing the terms of their agreement.⁹² In opinions following *Brooks*, the court stated the Board had no authority by statute or agreement to substitute its judgment for that of the employer.⁹³ Under the 1984-1986 contract between the state and the VSEA, the Board apparently has the authority under the agreement to lessen disciplinary actions imposed by employers that are excessive and an abuse of power.⁹⁴ Moreover, although the court has disagreed, it is possible that the statute governing the Board's hearing of grievances⁹⁵ may already give the Board the authority to substitute its judgment for the employers'.⁹⁶ Because the court has not yet rendered any decisions on grievances arising from the 1984-1986 contract, it is impossible to know with certainty how it will view the Board's function in light of the contract provision in question.

C. Questions Raised by the History of Court and Board Decisions

The court has stated that the function of the VLRB in grievance proceedings is that of a quasi-judicial body.⁹⁷ Yet, it has repeatedly reminded the Board that it is not to substitute its judgment for that of the employer.⁹⁸ Despite the court's repeated attempts to limit the Board's role in grievance proceedings, there is still an obvious difference of opinion between the Board and the court.⁹⁹

The basis of this dispute between the court and the Board has been the Board's interpretation of factual situations when deter-

92. *In re Brooks*, 135 Vt. 563, 569, 382 A.2d 204, 208 (1977).

93. *See, e.g.*, *Grievance of Byrne*, 147 Vt. 265, 268, 514 A.2d 709, 711 (1986); *In re Goddard*, 142 Vt. 437, 445, 457 A.2d 637, 641-42 (1983); *In re Gage*, 137 Vt. 16, 19, 398 A.2d 297, 299 (1979).

94. *See* *Grievance of Sherman*, 7 V.L.R.B. at 396.

95. VT. STAT. ANN. tit. 3, § 926 (1985).

96. Since there is no legislative history covering the State Employees Labor Relations Act, the court is left to determine the intent of the Act from its plain language viewed in a labor context. *See* cases cited *supra* note 18.

97. *In re Brooks*, 135 Vt. 563, 565, 382 A.2d 204, 206 (1977).

98. *Grievance of Byrne*, 147 Vt. 265, 268, 514 A.2d 709, 711 (1986); *In re Goddard*, 142 Vt. 437, 445, 457 A.2d 637, 642 (1983); *In re Gage*, 137 Vt. 16, 19, 398 A.2d 297, 299 (1979).

99. *See, e.g.*, *In re Goddard*, 142 Vt. at 444, 457 A.2d at 641; *In re Muzzy*, 141 Vt. 463, 469, 449 A.2d 970, 971 (1982); *In re Harrison*, 141 Vt. 215, 219, 446 A.2d 366, 368 (1982).

mining whether there is just cause for a particular disciplinary action.¹⁰⁰ The Board often evaluates the facts used by the employer to determine the discipline applied to the employee misconduct.¹⁰¹ Employers have discretion when they discipline employees. One of the Board's functions is to keep employer discretion within reasonable limits.¹⁰² This function is consistent with the principles stated in *Brooks* for determining just cause.¹⁰³

However, when the Board determines that the facts which were the basis for a particular disciplinary action did not warrant the discipline applied, it is essentially substituting its judgment for that of the employer. Evaluation of facts is a subjective process. Two entities can draw from the same factual pattern different conclusions of what would be the most appropriate disciplinary action.¹⁰⁴ When the Board determines that the facts in a particular case were not sufficient to warrant the discipline applied by the employer, the court generally finds that the Board has substituted its judgment for that of the employer, and reverses the Board's finding.¹⁰⁵

The Board has attempted to standardize the process of determining whether a particular fact situation warrants a particular kind of disciplinary action. In *Colleran and Britt*, the Board established twelve factors for determining the legitimacy of any disciplinary action.¹⁰⁶ However, it is possible that when the court renders

100. *In re Harrison*, 141 Vt. at 218-19, 446 A.2d at 368.

101. *See, e.g.*, *Grievances of Colleran and Britt*, 6 V.L.R.B. 235, 269-70 (1983).

102. *Id.* at 266.

103. *See In re Brooks*, 135 Vt. 563, 568, 382 A.2d 204, 207 (1977).

104. *See, e.g.*, *In re Harrison*, 141 Vt. 215, 446 A.2d 366 (1982); *In re Carlson*, 140 Vt. 555, 442 A.2d 57 (1982).

105. *Grievance of Byrne*, 147 Vt. 265, 268, 514 A.2d 709, 711 (1986); *In re Goddard*, 142 Vt. 437, 445, 457 A.2d 637, 641-42 (1983); *In re Gage*, 137 Vt. 16, 19, 398 A.2d 297, 299 (1979).

106. *Grievances of Colleran and Britt*, 6 V.L.R.B. 235, 268 (1983) (quoting from Douglas, 5 MSPB 313 (1981)). The Board adopted the following 12 factors for determining the legitimacy of any 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 of the position;
- 3) the employee's past disciplinary record;
- 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 satis-

its decision in the appeal of this case it will find that the twelve factors constitute another substitution of the Board's own judgment for that of the employer. This continual disagreement requires clarification in order to allow the Board to operate more efficiently in grievance proceedings, and thus provide a better atmosphere for labor relations.

III. THE PRACTICAL CONSEQUENCES OF GRIEVANCE PROCEEDINGS

A. *Impact on the Grievant*

When an employee files a grievance with the VLRB concerning disciplinary action, the employee's work status has usually been affected.¹⁰⁷ Therefore, it is important for the grievance to be resolved as quickly as possible. A decision from a grievance proceeding provides a standard upon which both management and employees can structure their conduct. Both the grievant and the employer need a timely resolution of the problem so that they can proceed with their affairs. The current process does not facilitate timely resolution of grievances; there is often a long delay between the time a decision is rendered by the Board and the time when the supreme court issues an opinion.¹⁰⁸ In one case, *Grievance of*

factory 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 offense or its impact upon the reputation of the agency;

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 the 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 the matter; and

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

Id.

107. See, e.g., *Grievance of Gadreault*, 8 V.L.R.B. 87 (1985) (employee suspended); *Grievance of Sherman*, 7 V.L.R.B. 380 (1984) (employee dismissed); *Grievances of Collieran and Britt*, 6 V.L.R.B. 235 (1983) (employees suspended and demoted); *Grievances of Earley and Ibey*, 6 V.L.R.B. 72 (1983) (employees suspended and demoted).

108. Compare *Grievance of Bishop*, 5 V.L.R.B. 347 (1982) with *enforced sub nom. Grievance of Brileya*, 147 Vt. 280, 515 A.2d 129 (1986) (A four year time period elapsed between the Board's decision and the court's opinion. During this time period the grievant died); compare *Grievance of Murphy*, 5 V.L.R.B. 263 (1982) with *Grievance of Murphy*, No.

Bishop,¹⁰⁹ originally decided by the Board in October of 1982, the court did not render a decision until July of 1986.¹¹⁰ In another case, *Grievance of Byrne*,¹¹¹ the Board issued its opinion in January of 1983, but again the supreme court did not make a decision until July of 1986.¹¹²

Seventeen cases appealing Board grievance decisions, all involving State employees, were pending before the [Vermont] Supreme Court at the end of 1985. . . . Seven of the 17 pending cases [were] on appeal for over three years, four more [were] on appeal for over two years, and four more [were] pending for over a year. In a field such as labor relations, where the importance of promptness in resolving disputes has long been recognized, the fact nearly 90 percent of appeals have been pending more than a year is a serious problem.¹¹³

This delay leaves the grievant without a resolution and it leaves other employees, and the employer, with a sense of uncertainty.

If either party decides to appeal a Board decision to the Vermont Supreme Court, the appeal has the effect of staying the Board's decision. The parties' positions remain status quo until the appeal is decided. Until the court renders a decision the employee is not reinstated. Because the average appeal of Board decisions

82-372, slip op. (Vt. Dec. 30, 1985) (The court decided appeal from Board decision three years later); see also 9 VLRB ANN. REP. iv (1986).

109. 5 V.L.R.B. 347 (1982).

110. The delay in resolving a grievance has been anywhere from a year to four years. See, e.g., *Grievance of Bishop*, 5 V.L.R.B. 347 (1982), *enforced sub nom.* *Grievance of Brileya*, 147 Vt. 280, 515 A.2d 129 (1986). In *Bishop*, during the four year interim between decisions the grievant had met a tragic death. During the delay period between Board and court decisions the grievant killed his estranged wife and children and then committed suicide. Telephone interview with Kimberly B. Cheney, Former Chairman of Vermont Labor Relations Board (Oct. 7, 1987). Although the delay in resolving the grievance probably was a small factor in this tragic event, it may have played some part in the outcome. Cf. *Grievance of Richard Sherman*, 7 V.L.R.B. 380 (1984), in which the grievant committed suicide shortly after the Board's decision. These two cases indicate possibly the most damaging and dramatic potential consequences surrounding grievance proceedings and the effect it can have on the grievants and their families.

111. 6 V.L.R.B. 1 (1983), *enforced*, 147 Vt. 265, 514 A.2d 709 (1986).

112. *Grievance of Byrne*, 147 Vt. 265, 514 A.2d 709 (1986).

113. 9 VLRB ANN. REP. iv (1986). The Court Administrator for the Vermont Supreme Court keeps no statistics regarding the length of delay between the time an appeal is taken to the supreme court and the time an opinion is rendered. The Court Administrator explained that appeals from administrative board hearings often take longer than appeals from criminal and civil cases for a variety of reasons. One reason stated was that priority is accorded criminal appeals, especially juvenile cases. Consequently, some appeals from administrative agencies are on a slower track. Interview with Thomas Lehner, Court Administrator, at Vermont Supreme Court (Feb. 3, 1987).

takes approximately two years, and sometimes longer,¹¹⁴ the employee has, for all practical purposes, lost the grievance due to the length of the process. This is demonstrative of a systematic flaw in the current grievance process. Because an appeal from a Board decision often entails a long wait, the grievance becomes moot. In cases concerning lesser forms of discipline, the grievant remains a state employee, but may lose confidence in a system which forestalls timely resolution of his or her grievance. Therefore, the current grievance process, albeit "peaceful" and "orderly", does not provide a timely procedure to protect the legitimate rights of an employee. This is inconsistent with the spirit and purpose of the Act.¹¹⁵

B. Impact on Other State Employees and Management

Because of the delay between Board decisions and court opinions, state employees are left with a sense of uncertainty concerning what constitutes punishable misconduct and the severity of the punishment. Consequently, employees may be apprehensive about how to conduct themselves while on the job. This may have a damaging effect on their job performance. The impact from uncertainty will vary. For example, state employees who work in offices may be unsure of exactly what is expected from them with regard to job performance,¹¹⁶ or how many absences they are allowed.¹¹⁷ In addition, those working in more volatile surroundings, such as mental facilities¹¹⁸ or prisons,¹¹⁹ will not be sure what degree of restraint or force they can use while performing their duties. The overall effect of such uncertainty may result in poor job performance.

The state employer, on the other hand, may be unsure about the proper discipline for particular misconduct. An employer may consider that certain misconduct warrants dismissal only to have the Board reinstate the employee, or apply a lesser discipline.¹²⁰ On appeal, the Vermont Supreme Court may reverse the Board's

114. See 9 VLRB ANN. REP. iv (1986).

115. VT. STAT. ANN. tit. 3, § 901 (1985).

116. See, e.g., *In re Muzzy*, 141 Vt. 463, 449 A.2d 971 (1982).

117. See, e.g., *In re Gage*, 137 Vt. 16, 398 A.2d 297 (1979).

118. See, e.g., *Grievance of Sherman*, 7 V.L.R.B. 380 (1984).

119. See, e.g., *Grievances of Colleran and Britt*, 6 V.L.R.B. 235 (1983).

120. See, e.g., *Grievance of Brooks*, 1 V.L.R.B. 14, *rev'd*, *In re Brooks*, 135 Vt. 563, 382 A.2d 204 (1977).

decision.¹²¹ During the time between the Board's opinion and the court's decision, the employer will be uncertain how to discipline employees who act similarly. The net effect of the ability to appeal Board decisions, which are supposed to be "final determination[s],"¹²² is the creation of an environment of uncertainty in the work place with respect to acceptable employee conduct and appropriate employer disciplinary action.

C. Party Conformity to Board Decisions

As a result of the delay between Board opinions and court decisions, the state and the VSEA often conform their actions to follow the Board's opinions. This may be because Board decisions provide an immediate standard upon which employers, as well as employees, can base their actions. Yet, the standard arising from a Board decision is subject to change pending any appeal of a question of law to the Vermont Supreme Court.

In *Brooks*, the Board found that a plan of "progressive discipline" would be more appropriate than firing an employee out of hand.¹²³ In rendering its decision, the court stated that the Board's view that progressive discipline would be more appropriate was an improper imposition of its view for that of the employer.¹²⁴ In *Brooks*, the court stated "progressive discipline is not inherent in the concept of just cause, and the Board's order is thus fatally defective."¹²⁵ However, subsequent to the court's decision, the state and the VSEA negotiated their 1979-1981 contract to include a progressive discipline plan.¹²⁶ Therefore, the VSEA and the state added a progressive discipline plan in their collective bargaining agreement in conformity with the Board's view that progressive discipline is a general principle for the orderly application of disciplinary measures.¹²⁷

The language of the 1979-1981 contract providing for a progressive discipline plan was extended to the 1981-1982 and 1982-1984 contracts as well.¹²⁸ The plan included a provision for bypas-

121. See, e.g., *In re Brooks*, 135 Vt. 563, 382 A.2d 204 (1977).

122. VT. STAT. ANN. tit. 3, § 926 (1985).

123. *Grievance of Brooks*, 1 V.L.R.B. at 18.

124. *In re Brooks*, 135 Vt. at 569, 382 A.2d at 208.

125. *Id.*

126. See *Grievance of Sherman*, 7 V.L.R.B. 380, 401 (1984).

127. *Grievance of Brooks*, 1 V.L.R.B. at 18.

128. *Grievance of Sherman*, 7 V.L.R.B. at 401.

sing progressive discipline if particular conduct warranted it.¹²⁹ This provision raised the question of what would be just cause for bypassing progressive discipline. The court and the Board disagreed over what was sufficient to override the progressive discipline plan.¹³⁰ By not allowing the Board to make decisions regarding the use of progressive discipline, the court in essence placed the parties back in the situation that existed prior to the inclusion of the progressive discipline plan in the contract. This eventually led the VSEA to bargain for a contract that would give the Board's decisions finality.

In 1984, the state and the VSEA negotiated a new contract. The new chairman of the VSEA recognized the instability created by the disagreement between the court and the Board over the Board's function in grievance proceedings. He sought to include provisions in the new (1984-1986) contract that would give finality to the Board's decisions.¹³¹ The new contract included a provision that allowed the Board to reduce disciplinary measures.¹³²

The best policy for ending the delay between Board and court decisions and bringing finality to the process, would be to rest the final appeal of grievances with the VLRB. This would be more consistent with the purpose of the Act and the grievance provision. It would hasten the resolution of grievances, thus leading to a better environment for labor relations. Grievances that remain unresolved damage employee-management relations and produce a lack of confidence in the system. To achieve this end, section 926 should be revised to provide that review of grievance proceedings by the court is precluded. By revising this section of the existing statute, the appeals provision would be retained for other purposes, such as hearings on unfair labor practices, representation elections, and unit determinations.

Opponents of eliminating appeals from grievance proceedings may claim that to do so would violate employees' procedural due

129. *Id.*

130. *See id.* at 402-03. The Board's decision discussed the difference between its understanding of what was a sufficient reason for bypassing progressive discipline and the court's view of when it was proper to forego a particular stage within a progressive discipline plan. *Id.*

131. *Id.* at 394.

132. For the pertinent part of this contract provision *see infra* text accompanying note 91.

process rights.¹³³ However, there may be several stages of appeal before a grievance reaches the Board. Additionally, there are existing notice requirements before an employee can be disciplined.¹³⁴ Because employees are provided with notice and several stages of appeal, it would not be a violation of due process to make the Board the place of final appeal. Therefore, employees' due process concerns could be adequately addressed by an internal appeals process and final appeal to the Board.

After several internal appeals, employees and their employers should have the opportunity to appeal to the Board. Opponents may argue that such an internal process would not be fair because those who would hear appeals are part of the machinery that disciplined an employee in the first place. Although this is an accurate statement, one must not forget that the Board is impartial. While the Board is an organ of the state, it is not associated with any other state agency.¹³⁵

IV. COMPARABLE STATUTES OF OTHER STATES

Vermont's method for handling state employee grievance proceedings is unusual when compared to the methods used by surrounding states. Of four states¹³⁶ examined, each had a board separate from its state labor relations board that heard grievances. In Vermont, the Board hears grievances in addition to performing other duties common to a state labor board.¹³⁷ In general, this creates confusion regarding the Board's operation.

A. *State Labor Relations and Personnel Boards*

In each state examined, there were separate provisions outlining the duties of the state labor board, and separate provisions describing the responsibilities of the panel(s) authorized to hear grievances. For example, the state labor relations board for Maine

133. See *Grievances of Collieran and Britt*, 6 V.L.R.B. 235, 270-71 (1983).

134. See *In re Brooks*, 135 Vt. 565, 568, 382 A.2d 204, 206 (1977); *Grievances of Collieran and Britt*, 6 V.L.R.B. at 265.

135. VT. STAT. ANN. tit. 3, § 921 (Supp. 1986). Although members of the Board do not have to be attorneys, they are selected by the governor and are therefore independent of the judicial branch of government. A member of the Board may not hold any other state office. *Id.*

136. Maine, Massachusetts, Connecticut, and New Hampshire.

137. See generally 48A AM JUR 2D *Labor and Labor Relations* §§ 1727-75 (1979); see also *supra* text accompanying notes 23-38.

has rule making power,¹³⁸ authority to review representation proceedings,¹³⁹ and authority to prohibit conduct that might be considered an unfair labor practice.¹⁴⁰ The Maine State Labor Relations Board is empowered to hold hearings.¹⁴¹ It hears grievances of state employees involving demotions, suspensions, or dismissals only when the collective bargaining agreement provides for arbitration as a last step in a grievance process.¹⁴² At all other times, state employees file grievances with the State Employees Appeals Board.¹⁴³ The Appeals Board is independent of the State Labor Board; its primary function is to settle disputes between state employees and the state.¹⁴⁴ Furthermore, Maine's State Employee Labor Relations Act¹⁴⁵ encourages the inclusion of arbitration clauses¹⁴⁶ within public employees' contracts as a mechanism for resolving grievances.

Massachusetts state employees have two options when they seek resolution of grievances. State employees may appeal their grievance to the Civil Service Commission¹⁴⁷ or to the Labor Relations Commission.¹⁴⁸ If state employees choose to take their grievance to the State Labor Relations Commission, it must be for purposes of arbitration. The Labor Commission has the authority to arbitrate grievances when the state and the state employees have a contract that provides for arbitration.¹⁴⁹ In cases where there is no arbitration clause, the Labor Commission can order binding arbitration if one of the parties to the dispute requests it.¹⁵⁰ This suggests an underlying public policy in favor of quick and final resolution of labor grievances and disputes.¹⁵¹

On the other hand, when a Massachusetts state employee chooses to bring a grievance before the Civil Service Commission

138. ME. REV. STAT. ANN. tit. 26, § 968(3) (Supp. 1986).

139. *Id.* § 968(4).

140. *Id.* § 968(5).

141. *Id.* § 968(6).

142. *Id.* § 979-K.

143. *Id.* tit. 5, §§ 751, 753 (1964).

144. *Id.* §§ 752, 753.

145. *Id.* tit. 26, § 979.

146. *See id.* § 979-K.

147. MASS. GEN. L. ch. 31, § 43 (1986).

148. *Id.* ch. 150E, § 8.

149. *Id.*

150. *Id.* *See also* Note, *Grievance Arbitration in the Public Sector: The New Massachusetts Law*, 9 SUFFOLK U.L. REV. 721, 726, 743 (1975).

151. Note, *supra* note 150, at 728.

the Labor Commission is precluded from ordering arbitration.¹⁵² The Labor Commission cannot order arbitration unless arbitration is the exclusive procedure for the resolution of a grievance concerning dismissal, suspension, or demotion.¹⁵³ Although the Civil Service Commission has the power to hear grievances and modify disciplinary measures,¹⁵⁴ its decisions are subject to judicial review.¹⁵⁵ Therefore, the primary difference between the Civil Service Commission and the Labor Commission is that the Civil Service Commission provides for the first step in an appeals process, while the Labor Commission advances final resolutions through arbitration.

The grievant can choose whether to appear before the Civil Service Commission or the State Labor Commission. However, the ability of the Labor Commission to order arbitration under the appropriate circumstances facilitates finality of grievance decisions. Therefore, a state employee in Massachusetts who wants a timely final decision regarding a grievance would be wise to utilize the Labor Commission rather than the Civil Service Commission for such a hearing. In fact, when the Massachusetts Legislature enacted the provisions, which allowed the Labor Commission to order arbitration, it may have intended to divert grievance proceedings away from the Civil Service Commission,¹⁵⁶ thereby encouraging utilization of the Labor Commission's arbitration power. Consequently, this would result in a more orderly and less time consuming process for resolving labor grievances, thus providing a better atmosphere for labor relations.

As in Massachusetts, Connecticut also provides state employees with two ways of pursuing grievances. State employees' organizations may file a grievance with the State Board of Mediation and Arbitration.¹⁵⁷ State employees who are not members of a union may appeal grievances regarding dismissal, suspension, or demotion to the Employees Review Board.¹⁵⁸ Those state employees who are members of a union may use the State Board of Mediation and Arbitration;¹⁵⁹ however, they are not precluded from using

152. *Id.* at 752.

153. MASS. GEN. L. ch. 150E, § 8 (1986).

154. *Id.* ch. 31, § 43.

155. *Id.* § 44.

156. Note, *supra* note 150.

157. CONN. GEN. STAT. ANN. § 5-276 (West Supp. 1986).

158. *Id.* § 5-202(a).

159. *Id.* § 5-276(a).

other arbitration mechanisms.¹⁶⁰ Connecticut accommodates arbitration of state employees' grievances by providing a mechanism for the arbitration process.¹⁶¹ It also encourages arbitration by not limiting grievants to one particular panel that performs arbitration functions.¹⁶²

New Hampshire's system for resolving grievances presents an interesting variation from the grievance procedures previously discussed. The New Hampshire Public Employee Relations Board¹⁶³ does not hear grievances.¹⁶⁴ However, the Public Employee Labor Relations Act does mandate that all agreements negotiated in accordance with the Act must include "workable grievance procedures."¹⁶⁵ Therefore, the state and any organization representing state employees have the ability to choose whatever grievance resolution process they think will best suit their needs. Requiring the inclusion of a grievance procedure in all collective bargaining agreements supports the public policy goal of promoting "harmonious and cooperative relations between public employers and their employees."¹⁶⁶

The New Hampshire Personnel Appeals Board also hears grievance appeals.¹⁶⁷ The Personnel Appeals Board is part of the Department of Administrative Services, Division of Personnel.¹⁶⁸ The Board hears grievances regarding dismissals, suspensions, and demotions and provides a grievance process for those state employees who are not members of a union and thus do not have collec-

160. *Id.* § 5-276(b).

161. *Id.* § 5-276(a).

162. See CONN. GEN. STAT. ANN. § 5-276(b) (providing for an organization, representing state employees, which chooses the forum for the hearing). Arbitration is encouraged because state employee unions are not limited to using one state run board as an arbiter. Once an arbiter is chosen, consistent with general principles of arbitration, his or her jurisdiction is exclusive and his or her decision is final. See, e.g., VT. STAT. ANN. tit. 12, § 5677 (Supp. 1986); UNIF. ARBITRATION ACT § 12, 7 U.L.A. 140 (1985); See generally *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599-601 (1960). *Enterprise Wheel* is one of three cases commonly referred to as the steelworkers trilogy. See also *Steelworkers v. Warrior & Gulf Corp.*, 363 U.S. 574 (1960); *Steelworkers v. American Mfr. Corp.*, 363 U.S. 564 (1960). These cases have set a foundation for arbitration involving organized labor.

163. N.H. REV. STAT. ANN. § 273-A:2 (1987).

164. *Id.* § 273-A:1-16.

165. *Id.* § 273-A:4. "Every agreement negotiated under the terms of this chapter shall be reduced to writing and shall contain workable grievance procedures." *Id.*

166. Appeal of Town of Pelham, 124 N.H. 131, 136, 469 A.2d 1295, 1298 (1983).

167. N.H. REV. STAT. ANN. § 21-I:46 (Supp. 1986).

168. *Id.* § 21-I:42, 45.

tive bargaining agreements.¹⁶⁹

The New Hampshire grievance procedure statute which mandates the inclusion of a "workable grievance procedure" does not specify what that procedure should be.¹⁷⁰ The contracting parties may choose arbitration as their mechanism for grievance resolution and have an independent third party or the existing Board of Conciliation and Arbitration¹⁷¹ act as arbiter. Alternatively, the parties could have the Personnel Appeals Board hear all grievances as it usually does for non-unionized state employees. However, parties are unlikely to choose this option because it would detract from one of the benefits of unionization, which is exemption from the already existing appeals process. In any case, the ability to choose another grievance procedure¹⁷² allows employee organizations to select a procedure that they believe will provide a faster and more equitable system for resolving grievances. It is likely that employees would perceive the ability to choose their own systems of grievance procedures as a more equitable way to resolve grievances.¹⁷³

B. Modification of Disciplinary Measures

In each of the states examined, the grievance procedure provided for the reviewing board to modify inappropriate disciplines.¹⁷⁴ Where arbitration is used to resolve grievances, the decision of the arbiter is final and binding.¹⁷⁵ Therefore, if the arbiter or examining board found that the employee was disciplined for just cause, but that punishment was too severe, the arbiter could order a lesser discipline. Notwithstanding the provision of the 1984-1986 collective bargaining agreement between the VSEA and the State of Vermont, which allows the Board to lessen a discipline, under the current case law the Board does not have the authority to substitute its judgment for that of the employer. There-

169. *Id.* § 21-I:58.

170. *Id.* § 273-A:4 (1987).

171. *See id.* § 273-12 (1987).

172. *Id.* § 273-A:4 (1987).

173. *See Hayford, Grievance Adjudication for Public Employees*, ARB. J., Sept. 1980, at 22, 23.

174. ME. REV. STAT. ANN. tit. 5, §§ 752, 753 (1964); MASS. GEN. L. ch. 31, § 43 (1986); CONN. GEN. STAT. ANN. § 5-202(b) (West Supp. 1986); N.H. REV. STAT. ANN. § 21-I:58 (Supp. 1986). *See also Johnson v. Personnel Appeal Bd.*, 174 Conn. 519, 521-22, 391 A.2d 168, 170 (1978).

175. *See ME. REV. STAT. ANN. tit. 26, §§ 979-K, 979-M* (1964 & Supp. 1986); MASS. GEN. L. ch. 150E, § 8 (1986).

fore, the Board's power to reduce disciplinary measures is inhibited.

The Vermont Supreme Court's limitation of the Board's ability to modify disciplinary actions may damage labor relations between the state and its employees. Employee confidence in a credible grievance appeals process is vital to employee morale and performance. The Board's restricted ability to modify disciplinary actions may lower employee confidence in the existing grievance procedure. When compounded by the delay that exists between Board hearings and decisions of the Vermont Supreme Court,¹⁷⁶ the restriction creates an overall negative effect on labor relations. This is patently inconsistent with the purpose and policy of the Act.¹⁷⁷

C. *Judicial Review of Grievance Proceedings*

Judicial review of grievance proceedings is generally limited in scope to questions of law.¹⁷⁸ When a grievance is arbitrated the court will not vacate an order unless the arbiter has committed an impropriety or exceeded his or her jurisdictional authority.¹⁷⁹ The New Hampshire Supreme Court has stated that its standard of review of labor board decisions is very narrow.¹⁸⁰ For example, in *Appeal of Town of Pelham*, the New Hampshire Supreme Court held that both a public employer and its employees were bound by the grievance procedure they had agreed upon, because the Public Employee Relations Board had directed that the matter be resolved according to that agreement.¹⁸¹ The Maine Supreme Court has held that the Maine State Employees Appeals Board's decisions are final and binding as long as the Board has not acted un-

176. See *supra* text accompanying note 108-13.

177. VT. STAT. ANN. tit. 3, § 901 (1985). "It is the purpose and policy of this chapter . . . to provide orderly and peaceful procedures . . ." *Id.*

178. See ME. REV. STAT. ANN. tit. 5, § 752 (Supp. 1986); Department of Mental Health and Corrections v. Chase, 428 A.2d 410, 412 (Me. 1981); See also MASS. GEN. L. ch. 31, § 44 (1986). Connecticut follows the Model State Administrative Procedure Act, 14 U.L.A. 371 (1961) (superseded 1981). CONN. GEN. STAT. ANN. § 4-166 to 189 (West Supp. 1986). New Hampshire follows its own state Rehearing and Appeals Act. See N.H. REV. STAT. ANN. §§ 541:6-20 (1974).

179. See, e.g., ME. REV. STAT. ANN. tit. 26, § 979-M (1964); UNIF. ARBITRATION ACT § 12, 7 U.L.A. 140 (1985).

180. Appeal of Town of Pelham, 124 N.H. 131, 134, 469 A.2d 1295, 1297 (1983); See also Appeal of White Mountains Regional School Bd., 125 N.H. 790, 794, 485 A.2d 1042, 1046 (1984).

181. Appeal of Town of Pelham, 124 N.H. at 137-38, 469 A.2d at 1299.

constitutionally or exceeded its jurisdiction.¹⁸²

In Vermont, judicial review of Board decisions regarding grievance proceedings is interwoven with the power of the court to review Board decisions concerning other matters.¹⁸³ In other states, grievance proceedings are separated from the more traditional functions of a labor relations board.¹⁸⁴ Often, a separate board will exist for the exclusive purpose of hearing grievances. Therefore, the scope of review may vary and a different standard may be applied to a state board that only hears grievances.¹⁸⁵ In Vermont there is only one state labor relations board. It performs the traditional functions of a labor board and also hears grievances.

The dual functions of the Vermont Labor Relations Board are the primary cause of the confusion over the Board's proper role in grievance proceedings. Two conflicting provisions within the State Employees Labor Relations Act exacerbate this confusion.¹⁸⁶ If the language of section 926 is given its plain meaning, then a decision by the Board should be final, as long as the Board has not exceeded its jurisdictional authority. Labor relations can be improved, and a better working environment created, if the Board has the last word on grievances. Allowing the Board to render final determinations, as the plain meaning of the statute provides, would eliminate the delay between Board and court decisions. Consequently, the negative effects associated with delays between Board decisions and court opinions would be eliminated as well.

V. POLICY RECOMMENDATIONS

In order to promote better labor relations, the Vermont Labor Relations Board should have the power to issue final and binding decisions in grievance proceedings. This would effectively eliminate the delay that now exists between Board decisions and court opinions. Statutory authority already exists under section 926 for the Board to make final determinations.¹⁸⁷ The statute granting the Board the power to make "final determination[s]," should be given

182. *McElroy v. State Employees Appeal Bd.*, 427 A.2d 958, 960 (Me. 1981).

183. VT. STAT. ANN. tit. 3, § 1003 (1985). *See also supra* text accompanying notes 10-19.

184. *See, e.g.*, ME. REV. STAT. ANN. tit. 5, § 752 (1964); ME. REV. STAT. ANN. tit. 26, § 979 (1964); MASS. GEN. L. ch. 31, § 41 (1986).

185. *See, e.g.*, N.H. REV. STAT. ANN. § 21-I-58 (Supp. 1986).

186. *Compare* VT. STAT. ANN. tit. 3, § 926 (1985) *with* VT. STAT. ANN. tit. 3, § 1003 (1985).

187. VT. STAT. ANN. tit. 3, § 926 (1985).

the effect of its plain meaning. Accordingly, Board decisions in grievance proceedings should be left undisturbed, unless there is evidence of an impropriety, or the decision is clearly erroneous based on the Board's own findings of facts.

Dividing the existing grievance procedure section of the State Employees Labor Relations Act into three parts would give the Board the clear power to make final grievance determinations that are subject to judicial review only under very limited circumstances. The following are suggestions for revising the Act.

A. *A Revised Section 926*

§ 926. Grievances¹⁸⁸

(a) The board shall hear and make final determination on the grievances of all employees who are eligible to appeal grievances to the board. Grievance hearings . . . shall be conducted in accordance with the rules and regulations promulgated by the board. The right to institute grievance proceedings extends to individual employees, groups of employees and collective bargaining units.

The language of proposed subsection (a) is the same as the now existing language except that the phrase "at the board level" in the second sentence has been omitted.

(b) *If the board determines by a preponderance of the evidence that there was just cause for an action taken against the grievant it shall affirm the action of the employer, otherwise it has the power to lessen the imposed penalty to a level it finds appropriate, including reinstatement without loss of compensation or other benefits.*¹⁸⁹

(c) *The decision of the board shall be final and binding upon the employer and state employees involved in the dispute, and shall supersede any prior action taken by the employer with reference to the employment of such employees. Grievance decisions under this section shall not be subject to judicial review as provided for in section 1003 of this Act, unless there is evidence of fraud or other substantial impropriety by the board, including the board exceeding its juris-*

188. Proposed additions to the Vermont State Employees Labor Relations Act are italicized.

189. Proposed subsection (b) is based on MASS. GEN. L. ch. 31, § 43 (1986).

*diction as defined by this chapter.*¹⁹⁰

In order to define more clearly what a grievance proceeding is, an addition to the definitional section¹⁹¹ of the Act should be added:

(14)(a) "*Grievance proceedings*" mean a review of factual circumstances to determine whether just cause existed for any disciplinary action or for a particular disciplinary measure.

B. *Alternative Grievance Procedures*

An alternative to amending the current grievance process is the creation of a subsection within the Act requiring that a grievance procedure be included in all collective bargaining contracts, similar to the method used in New Hampshire.¹⁹² Such a procedure should be binding on both parties to the agreement.¹⁹³ A section requiring a grievance procedure in all collective bargaining agreements could be added to the current section 926, or the revised section 926 suggested above, or it could replace section 926 entirely.

As an addition to the current language of section 926, a subsection could be included that provides as follows:

(b) *Every agreement negotiated under the terms of this chapter shall contain a workable grievance procedure.*¹⁹⁴ *If arbitration is the chosen grievance procedure it shall be subject to the provisions of 12 V.S.A. § § 5651-5681.*¹⁹⁵

By leaving the current language of section 926 intact and adding a new subsection the parties would be able to choose the existing grievance procedure or opt for another procedure that better

190. Proposed subsection (c) is based on ME. REV. STAT. ANN. tit. 5, § 752 (1964).

191. VT. STAT. ANN. tit. 3, § 902(14) (1985).

192. N.H. REV. STAT. ANN. § 273-A:4 (1987).

193. See Appeal of Town of Pelham, 124 N.H. 131, 138, 469 A.2d 1295, 1299 (1983) ("Grievance language specifically negotiated and agreed upon by public employer and employees is binding on both.")

194. This language is taken from the grievance procedure provision of the New Hampshire Public Employee Labor Relations Act. N.H. REV. STAT. ANN. § 273-A:4 (1987).

195. This statute is the recently enacted Vermont Arbitration Act. See VT. STAT. ANN. tit. 12, §§ 5652-5680 (Supp. 1986).

suits their needs.

A second alternative is to add this subsection to the revised section 926.¹⁹⁶ This would allow the contracting parties a greater choice in selecting a grievance procedure, and if they chose to have the Board resolve the grievance, it would assure them that the decision would be final.

The third option is to repeal section 926 entirely and substitute the suggested provision. This substitution would mean that the parties would have to devise their own grievance procedure. The chosen procedure would then be subject to judicial review as now provided in section 1003. Repealing the current section 926 would also relieve the Board of the grievance proceeding function that has been unclear and controversial and would allow the Board to concentrate on more traditional duties. Hopefully, requiring the parties to formulate their own grievance procedure would bring more regularity to the process and would eliminate the delay that now exists between Board decisions and court opinions.

CONCLUSION

The Board's authority to make final determinations is vital to stable labor relations. The delay that exists between Board decisions and the Vermont Supreme Court's opinion from appeals of Board decisions tends to create an environment of uncertainty. This damages employee-management relations, as well as the lives of employees who must wait long periods of time before their grievances are resolved. The Board must be able to substitute its judgment for that of an employer when the Board finds the factual circumstances did not warrant the disciplinary action under review. This approach is consistent with the role of public employee review boards throughout New England.

The case law and Board opinions demonstrate a fundamental disagreement between the court and the Labor Board over the Board's function in grievance proceedings. This discrepancy has created a situation that is inconsistent with the purpose of the Act. In order for the Act to achieve its stated purpose of orderly and peaceful labor relations this inconsistency must be eliminated. The goal of the State Employees Labor Relations Act can be better met

196. See *supra* text accompanying notes 186-88.

by clarifying how the grievance process should operate and by specifically delineating the Board's role in that process.

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