

VERMONT LABOR RELATIONS BOARD

APPEAL OF:)	
)	DOCKET NO. 97-63
RUSSELL PENKA)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On November 24, 1997, Attorney Alan Biederman filed an appeal on behalf of Russell Penka ("Appellant"), contending that the Department of Public Safety ("Employer") improperly dismissed Appellant from his position as a State Police Corporal. The Employer charged Appellant with misconduct in violation of the Employer's Code of Conduct by untruthfully denying in an affidavit, and in statements to his supervisor and an Internal Affairs Unit investigator, that Melanie Neil had told him on July 15, 1997, that her husband had threatened and physically assaulted her. Appellant contended that there was no factual basis to support the conclusion that Appellant engaged in misconduct because Melanie Neil never told him that she had been threatened and assaulted.

Hearings were held in the Labor Relations Board hearing room in Montpelier before Labor Relations Board Members Catherine Frank, Chairperson; Leslie Seaver and John Zampieri on April 9 and 30, and May 21 and 22, 1998. Attorneys Alan Biederman and Nanci Smith represented Appellant. Assistant Attorney General David Herlihy and Department of Public Safety General Counsel Elizabeth Novotny represented the Employer.

The Employer filed a post-hearing brief on June 4, 1998. Appellant filed a brief on June 5, 1998.

FINDINGS OF FACT

1. Appellant had almost 20 years of service with the Vermont State Police when he was dismissed in November, 1997. Appellant was a Corporal assigned to the Shaftsbury station from June 1996 until his dismissal. The Shaftsbury Station Commander during Appellant's tenure there was Lieutenant James Baker. Appellant's patrol commander was Sergeant Danford O'Brian.

2. A personality conflict developed between Appellant and O'Brian stemming from their union activities. Prior to the Spring of 1997, Appellant was Chairperson of the State Police Unit of the Vermont State Employees' Association ("VSEA"), and O'Brian was Vice Chairperson. Appellant and O'Brian had differences with respect to the approaches the union should take in its dealings with management and in conducting union affairs. Appellant resigned as Chairperson of the Unit in the Spring of 1997 amid controversy after O'Brian and others had requested that he resign. O'Brian replaced Appellant as Chairperson.

3. On July 15, 1997, Appellant was working the day shift and was assigned to the southern patrol zone of the Shaftsbury patrol area. At approximately 4:00 p.m., Appellant received a radio report from the dispatcher for the Shaftsbury station indicating that a 911 call had been received from Pownal, Vermont, reporting that a vehicle had been vandalized at a home on Peak's Pine Road in Pownal. Appellant informed the dispatcher that he would respond to the call, and proceeded to Peak's Pine Road (State's Exhibits 10, 17).

4. Trooper Kenneth Laumann also was assigned to the day shift on July 15. He was on his way to the Bennington County's State's Attorney's office to drop

off some materials when he overheard the call on the radio, and heard Appellant respond to the call. Laumann contacted Appellant and offered to respond to the call in Pownal. Appellant told Laumann he would respond to the call and that he could finish what he was doing, and then meet Appellant at the scene. Under these circumstances, Appellant was the officer in charge at the scene and Laumann's role was to provide backup assistance (State's Exhibit 17).

5. At 4:23 p.m. Appellant arrived at the scene, which was the home of Melanie and Jeffrey Neil, wife and husband. He observed that Melanie and Jeffrey Neil appeared to be arguing, and that the passenger side of the windshield of a white Pontiac Sunbird appeared to be smashed (State's Exhibits 11, 17).

6. Appellant got out of his car, and asked Melanie Neil what was going on. Melanie Neil indicated that she and her husband had been arguing, and that her husband had become angry and broken the windshield of her car. She informed Appellant that she wanted to leave and go to her mother's residence in Rupert. She also indicated that she wanted to see her husband removed from the home. Appellant asked her if her husband had struck her; she did not indicate that she had been struck. Appellant observed that Melanie Neil did not appear as if she had been involved in a struggle. Appellant told her that she could file for a temporary restraining order to have her husband removed from the home. Appellant suggested that she pack some belongings and go with him to the police station to seek a restraining order (State's Exhibit 11).

7. Melanie Neil then went into the house to pack some belongings. Appellant then spoke with Jeffrey Neil. Jeffrey Neil told Appellant that he had

arrived home from work early due to the heat, and he found a man in the driveway speaking with his wife. Neil told Appellant that this angered him, and he admitted breaking the windshield of the car (State's Exhibit 11).

8. Laumann arrived on the scene at 4:27 p.m., during the time Appellant and Jeffrey Neil were conversing. Laumann heard Jeffrey Neil indicate that he was upset with his wife, and that was why he had smashed the windshield. He heard Neil state "if you found your wife screwing around, wouldn't you do the same thing?", or words to that effect (State's Exhibits 10, 17).

9. Melanie Neil was packing belongings into her car during this time. She told Appellant that her husband had a gun, and that she was concerned about what he may do with it after she left with the children. Appellant spoke with Jeffrey Neil about the gun. At first, Jeffrey Neil denied having a gun, but then admitted that he had a hunting rifle in the house. Appellant persuaded him to surrender the weapon for safekeeping. Appellant and Jeffrey Neil went into the house to retrieve the rifle. Laumann also went into the house (State's Exhibits 11, 17).

10. Once inside the house, Appellant went with Jeffrey Neil to retrieve the weapon from a bedroom in the house. Jeffrey Neil retrieved the rifle from beneath a bed in the bedroom, and handed it to Appellant. Appellant checked to make sure the rifle was not loaded, and then secured it in the trunk of his police cruiser. During the time Appellant and Jeffrey Neil were in the bedroom, Laumann and Melanie Neil were in an adjacent area which included the kitchen. They did not converse (State's Exhibits 11, 17).

11. Appellant, Laumann and the Neils then went outside. Melanie Neil attempted to leave with her children in the Pontiac Sunbird. However, the car would not start, and Melanie Neil indicated that her husband had done something to the car. Appellant asked Jeffrey Neil if he done something to prevent the car from starting. Jeffrey Neil admitted to removing the ignition wire from the car, and Appellant directed him to retrieve it. Jeffrey Neil indicated that he had thrown the ignition wire over the bank down the hill. As Jeffrey Neil prepared to get on a bicycle to retrieve the wire, Appellant cautioned Neil that he better retrieve the ignition wire and not take off. Jeffrey Neil then went to retrieve the ignition wire (State's Exhibits 11, 17).

12. During the period Jeffrey Neil was away from the scene retrieving the ignition wire, Melanie Neil remained in the car, and Appellant and Laumann were outside the car. Melanie Neal and Appellant engaged in conversation. The majority of the Board panel finds that the Employer has not established by a preponderance of the evidence that Appellant heard Melanie Neal inform Appellant during this period that her husband had threatened and physically assaulted her.

13. Jeffrey Neil returned with the ignition wire, and the car started. At 4:50 p.m., Melanie Neil left with her children in her car, Appellant left in his cruiser, and Laumann left in his cruiser. Jeffrey Neil was left at the house. Melanie Neil and Appellant left in separate cars to drive to the Shaftsbury State Police station. Appellant followed Melanie Neil and her children to the Shaftsbury station so that she could complete the necessary materials to seek a temporary restraining order (State's Exhibits 11, 17).

14. At the Shaftsbury station, Appellant arranged for the retention of the rifle obtained from Jeffrey Neil while Melanie Neil and her children waited for a crisis worker, called a "PAVE worker", to arrive to assist with the completion of the necessary paperwork to seek a temporary restraining order. When the PAVE worker arrived, Appellant left the PAVE worker and Melanie Neil alone (State's Exhibit 17).

15. By this time, it was past the end of Appellant's scheduled shift. Prior to heading home, Appellant spoke with Troopers Simone and Sorenson. He told them that Melanie Neil was meeting with the PAVE worker and that, if a temporary restraining order was issued by the court, they should serve it on Jeffrey Neil. He provided them with directions to the Neil home. Appellant then left the station to drive home. The majority of the Board panel finds that the Employer has not established by a preponderance of the evidence that Appellant was aware at this point that Melanie Neil was claiming that her husband had threatened and physically assaulted her (State's Exhibit 17).

16. That evening, Melanie Neil filed a request in the Bennington County Family Court for a Temporary Order For Relief From Abuse. The affidavit which she filed in support of the request provided in its entirety:

I was home from work today and I was standing in my driveway talking to a friend and his two children when my husband came home from work. He became very angry towards me and violent towards me and my car. When I told him to leave he wouldn't so I told him I would leave. As I was packing to leave he dismantled my car and smashed my car windshield. He also threatened me and threatened to kill himself. He grabbed my arms and threw me to the floor. He has a rifle and bullets so that is why I am nervous. He told me that he wanted to kill me. I was screaming so he held his hand over my mouth so I couldn't breathe so I kicked him to get him off me. Jeff said "I'm so angry with you I want to kill you." I don't want any

contact with him. I don't want him to come within 100 ft. of me, my house, my job. I also would like custody of children and home. (State's Exhibit 15)

17. At 7:00 p.m. that evening, Judge John Wesley issued a Temporary Order For Relief From Abuse. Troopers Simone and Sorenson attempted to serve the Order that evening on Jeffrey Neil at his home. However, Neil was not home and they were unable to serve it (State's Exhibit 14).

18. Trooper Michael Marvin was assigned to the Bennington County State's Attorney's Office as an investigator. One of his areas of responsibility was domestic abuse cases. On the morning of July 16, 1997, Marvin stopped at the Shaftsbury State Police station to review the paperwork on cases from the previous day. He reviewed the materials on the Neil case. Marvin was concerned upon reviewing the affidavit of Melanie Neil because the affidavit described a domestic assault and the paperwork on the case did not indicate that an arrest had been made. The Vermont State Police have a pro-arrest policy in domestic abuse cases, meaning that there is a preference to arrest and lodge persons accused of abuse if probable cause exists to believe that a domestic assault had occurred. The Bennington County State's Attorney also has a pro-arrest policy in domestic abuse cases. Officers in the Shaftsbury station had received training on the pro-arrest policy.

19. At approximately 8:30 a.m. on July 16, Trooper Marvin brought the Neil matter to the attention of Patrol Commander Danford O'Brien so that it could be further investigated. O'Brien reviewed the paperwork on the case, and discovered that Appellant and Laumann were the responding officers. O'Brien became concerned for the safety of Melanie Neil because the officers had been unable to

serve the Temporary Order For Relief From Abuse on Jeffrey Neil, and O'Brian discovered that Melanie Neil was *not at work and was not responding when paged*.

20. O'Brian knew that Appellant was on his way to Montpelier to attend a Vermont State Employees' Association ("VSEA") meeting. O'Brian also learned that Laumann was in Putney on a commercial vehicle detail. O'Brian had a telephone conversation with Appellant shortly after Appellant's arrival at the VSEA office in Montpelier. O'Brian asked Appellant why he did not arrest Jeffrey Neil since Melanie Neil had indicated in her affidavit that Jeffrey Neil had assaulted her. Appellant responded that Melanie Neil had not told him that her husband had assaulted her. O'Brian told Appellant to immediately return to the Shaftsbury station to investigate the Neil case.

21. Prior to Appellant arriving at the Shaftsbury station, O'Brian had a telephone conversation with Laumann who was still at the scene of the commercial vehicle detail. O'Brian asked Laumann what had occurred at the Neil house. Laumann told O'Brian that Melanie Neil had indicated that she had been thrown down by her husband and her husband had put his hand over her mouth. Laumann also told O'Brian that Melanie Neil had asked at the scene why her husband was not being arrested. O'Brian asked Laumann if he would have arrested Jeffrey Neil if it had been his case; Laumann responded that he would have arrested him. O'Brian instructed Laumann to write down any events which Laumann had observed while they were fresh in his mind. Laumann immediately made notes of the incident. After speaking with Laumann, O'Brian concluded that Jeffrey Neil should have been arrested.

22. At the Neil residence the preceding day, Laumann had not expressed to Appellant his view that Neil should be arrested. He had not requested a conference with Appellant to discuss the matter, and had taken no actions to arrest Jeffrey Neil.

23. Appellant arrived back at the Shaftsbury station around noon. He met with O'Brian to discuss the Neil case. O'Brian gave Appellant a copy of Melanie Neil's affidavit. Appellant reiterated that Melanie Neil had not told him that she had been assaulted by her husband. O'Brian instructed Appellant to attempt to locate Melanie Neil and to arrest Jeffrey Neil. Appellant indicated that he did not believe that an arrest was warranted, and that he wanted an order of arrest from O'Brian. O'Brian contacted the Deputy State's Attorney and summarized the case for him. The Deputy State's Attorney indicated that Neil should be arrested. O'Brian then ordered Appellant to arrest Neil.

24. Appellant was unable to locate either of the Neils during the afternoon of August 16, and he returned to the Shaftsbury station to prepare an affidavit in support of the arrest of Jeffrey Neil. In the affidavit, Appellant stated: "I asked the victim on several occasions if the accused struck her or assaulted her. She denied that this occurred and showed no signs of a physical struggle". He also stated: "As I left the office there was still no mention of a physical assault which had taken place." He further set forth the entire contents of Melanie Neil's affidavit (State's Exhibit 11).

25. Troopers Sorenson and Simone went to the Neil residence on the evening of July 16 to arrest Jeffrey Neil. Both Melanie Neil and Jeffrey Neil were at the residence. Melanie Neil told Simone and Sorenson that she and her husband had

pushed each other the preceding afternoon but that she had not been assaulted or hurt by her husband. Jeffrey Neil and Melanie Neil both indicated to Simone and Sorenson that they were trying to work out their marital problems (Appellant's Exhibit A3).

26. It is not unusual for a female domestic abuse victim to recant a previous statement that she had been abused by her husband.

27. Sorenson and Simone took Jeffrey Neil into custody for domestic assault/unlawful restraint/unlawful mischief, but he was not lodged at a correctional facility. Instead, Neil was issued a citation by the officers to appear in court the next day. The officers also served the Temporary Order For Relief From Abuse on him (Appellant's Exhibits A3, LLL).

28. Lieutenant Baker, the station commander, was on vacation the week of July 14. He returned to work on July 21. O'Brian began his vacation on July 21. O'Brian telephoned Baker on July 21 to inform him of the Neil case. O'Brian told Baker that he had concerns about the veracity of Appellant's affidavit in the case to the extent Appellant stated that Melanie Neil had not informed Appellant that she had been assaulted. Baker instructed O'Brian to obtain a memorandum from Laumann on the case. Because he was on vacation, O'Brian did not immediately pursue requesting a memorandum from Laumann. When O'Brian returned from vacation, Laumann was on vacation. After Laumann returned from vacation, O'Brian asked him to write a memorandum on the Neil case.

29. On August 15, 1997, Laumann wrote a memorandum to O'Brian on events at the Neil residence on July 15. The memorandum provided in pertinent part as follows:

Ms. Neil was observed trying to start her vehicle but the vehicle wouldn't start. Cpl. Penka asked Mr. Neil if he took the coil wire off. Mr. Neil said he would go get it. Mr. Neil then got on a bike and rode it down the road. While Mr. Neil was gone Ms. Neil asked why he wasn't being arrested. Cpl. Penka explained that the car was joint property and therefore he couldn't be arrested for that. Ms. Neil asked why he couldn't be arrested for assaulting her. Cpl. Penka asked her how he assaulted her. She said he threw her on the floor with him on top of her with his hand over her mouth to keep her quiet. Ms. Neil said she couldn't breathe so she kicked him off of her. Ms. Neil said that he did threaten to kill her and himself. Cpl. Penka said that he didn't see any physical marks on her so he couldn't arrest him. Cpl. Penka did tell her that he would assist her in getting a TRO . . . It was my observation that Ms. Neil was clearly upset when she was told that Mr. Neil wouldn't be arrested . . .

(State's Exhibit 17)

30. In early to mid-August, Station Commander Baker had a conversation with Sergeant William DiNunzio of the Bennington Police Department in which DiNunzio indicated that he had overheard a conversation between a PAVE worker and a domestic abuse victim that may concern him. Baker asked DiNunzio to write him a letter. DiNunzio wrote a letter to Baker dated August 20, 1997, which provided:

On or about July 15, 1997, while at work at the Bennington Police Station, I was in the process of using the copier machine located on the second floor of the building. This machine is located in the room next to the interview room.

Present in the interview room were two women talking. One of them was from a Domestic Assault that had occurred earlier in the afternoon on Peaks Pine Road in Pownal, Vermont.

I then overheard the victim say "The trooper told me that there was nothing that he could do because I didn't have any marks on me." I also heard the victim say "He held me to the floor and wouldn't let me up." I then left the room and went about my business.
(State's Exhibit 9)

31. On August 19, 1997, Jeffrey Neil pleaded nolo contendere to recklessly causing bodily injury to Melanie Neil on July 15, 1997. Pursuant to the plea, Judge Wesley entered a judgment of guilty on the offense (State's Exhibits 12, 13).

32. On August 25, 1997, Baker submitted a complaint to the Employer's Internal Affairs Unit against Appellant. Baker alleged that Appellant had failed to follow pro-arrest procedures in the Neil case and had made false statements in his affidavit (Appellant's Exhibit A11).

33. The Employer's Code of Conduct provides that allegations of misconduct and improper conduct will be reported on a Department complaint form within 24 hours of discovery or receipt of the allegations (Appellant's Exhibit MMM).

34. Lieutenant Timothy Bombardier of the Internal Affairs Unit conducted an investigation of Baker's complaint. He reviewed documents in the case, and interviewed Appellant, Laumann, Melanie Neil, O'Brian, and Marvin. He also obtained an affidavit from Simone. During his interview with Bombardier, Appellant reiterated that Melanie Neil had not told him that she had been assaulted by her husband. At the end of his investigation, Bombardier concluded that Appellant had authored a false affidavit in the Neil case and had been dishonest in the interview with him (State's Exhibits 4, 5, 6, 7, 8; Appellant's Exhibit A3).

35. On October 22, 1997, Department of Public Safety Commissioner A. James Walton, Jr., wrote a memorandum to Appellant preferring charges against him. The letter provided in pertinent part as follows:

The internal investigation into this matter concluded that Ms. Neil did in fact tell you that she had been threatened and physically assaulted when you responded to her residence on July 15, 1997. The investigation further concluded that your statements to Sgt. O'Brian, your affidavit of probable cause, and your statement to Lt. Bombardier were untruthful.

Your conduct in this matter constitutes a violation of Section 8.1 of Part A of the Department's Code of Conduct, which states that

In preparing and making investigative, and other official reports, a member shall not knowingly enter or cause to be entered any inaccurate, false or improper information, knowingly misrepresent or cause to be misrepresented any material information, or knowingly withhold or cause to be withheld any material information.

Your conduct in this matter also constitutes a violation of Section 14.1 of Part A of the Department's Code of Conduct, which states that

Upon the order or inquiry of a superior officer and/or during the course of an internal investigation, members shall fully or truthfully answer all questions asked of them which are specifically directed and narrowly related to the scope of their employment, the operations of the department, or an allegation of misconduct or improper conduct being investigated.

...
If you do not request a hearing (before a hearing panel) within (7) days of receipt of these charges, I will take such disciplinary action as I deem appropriate ...

(State's Exhibit 1)

36. Appellant elected not to have the charges heard by a hearing panel. On November 10, 1997, Commissioner Walton notified Appellant by letter that he *was contemplating his dismissal, and provided him with the opportunity to respond* to the charges against him. Commissioner Walton informed Appellant that, "should you choose not to respond to the charges against you, your employment will be terminated at the close of business 18 November 1997." Appellant chose not to respond to the charges against him, and he was dismissed effective November 18, 1997 (State's Exhibit 3).

37. The Employer's Code of Conduct includes disciplinary guidelines for acts of misconduct in violation of Part A of the Code of Conduct. *The recommended disciplinary action for false statements in violation of Section 8.1 of Part A of the Code of Conduct is 30 days suspension to dismissal. The recommended disciplinary action for untruthfulness in violation of Section 14.1 of Part A of the Code of Conduct is dismissal.*

38. The call-in pay provision of the collective bargaining agreement between the State and the VSEA for the State Police Unit has provided at all times relevant that *an employee called into work outside of the employee's normally scheduled shift shall be guaranteed a minimum of four hours' pay at the overtime rate, and that such guarantee covers any additional call-ins within the 24 hour period commencing with the first call-in.*

39. In May or June of 1997, Laumann was called out twice within a 24 hour period. Sergeant Vargo, a supervisor of Laumann's, suggested that Laumann submit a time report placing the second call-in on a day other than the actual day so

that Laumann would receive four hours of call-in pay twice, rather than just a total of four hours of call-in pay if he accurately reported the call-ins. Laumann followed the suggestion, and thereby submitted a time report seeking four hours of call-in pay twice. Baker spoke with Laumann and Vargo about this issue and told them they had used poor judgment. Laumann was not paid an additional four hours pay for the second call-in.

40. Section 7.1 of Part B of the Employer's Code of Conduct provides: "In preparing and making administrative reports a member shall not knowingly enter or cause to be entered any inaccurate, false, or improper information, knowingly misrepresent or cause to be misrepresented any material information, or knowingly withhold or cause to be withheld any material information." The Employer's Code of Conduct includes disciplinary guidelines for acts of improper conduct in violation of Part B of the Code of Conduct. The recommended disciplinary action for false statements in violation of Section 7.1 of Part B of the Code of Conduct is 4-8 days suspension. Laumann received no disciplinary action for the inaccurate time report which he submitted on call-in pay (State's Exhibit 20).

41. 20 V.S.A. §1880(c) provides in pertinent part as follows:

If the charged member does not request a hearing within seven days after receipt of the written charges, the commissioner may take such disciplinary action as the commissioner deems appropriate, including reprimand, transfer, suspension, demotion or removal. The member may appeal the charges and the disciplinary action taken by filing an appeal with the state labor relations board within 30 days of the imposition of the disciplinary action by the commissioner . . . All hearings before the board under this subsection shall be de novo.

MAJORITY OPINION

This is a *de novo* appeal, pursuant to 20 V.S.A. §1880(c), from the decision of the Commissioner of Public Safety to dismiss Appellant for misconduct in violation of the Employer's Code of Conduct. Specifically, the Employer contends that Appellant engaged in misconduct by untruthfully denying in an affidavit, and in statements to his supervisor and an Internal Affairs Unit investigator, that Melanie Neil had told him on July 15, 1997, that her husband had threatened and physically assaulted her.

In this case, where Appellant has a protected property interest in continued employment, the Employer has the burden of proving by a preponderance of the evidence the charges against Appellant. Grievance of Muzzy, 141 Vt. 463, 472 (1982). In seeking to meet this burden, the Employer requests that the statements which Melanie Neil made in her affidavit requesting a temporary relief from abuse order, and to the Internal Affairs Unit investigator, be considered both as direct evidence of the fact that she told Appellant that she was assaulted and corroboration of Kenneth Laumann's testimony that she told Appellant she had been assaulted. At the hearings in this matter, Appellant objected to the admission of such statements in the absence of Melanie Neil appearing as a witness. The Board admitted the affidavit of Melanie Neil and the transcript of her interview with the Internal Affairs Unit investigator into evidence for the limited purpose of considering them as part of the investigation against Appellant. However, the Board declined to admit them for the purpose of establishing that Melanie Neil had informed Appellant that she had been assaulted.

We decline the Employer's request that we reconsider our ruling. Any statements by Melanie Neil as to what transpired at her residence on July 15, 1997, in the presence of Appellant and Laumann go to the heart of the charges against Appellant. It is an essential right of due process for a discharged employee to be able to cross-examine a witness providing such crucial testimony. Appellant was not provided with the opportunity to cross-examine Melanie Neil since she was not produced as a witness at the hearings in this matter. It would be fundamentally unfair under the circumstances to allow the Employer to rely on Melanie Neil's statements for the truth of what transpired. *Cf. Watker v. Vermont Parole Board*, 157 Vt. 72, 78-79 (1991) (parolee failed to preserve claim that his right to confrontation of adverse witnesses was violated in a parole revocation hearing in which the parole board relied on hearsay evidence of alleged assault by parolee on a woman, where the parolee at no time objected that he was not allowed to confront the woman who had accused him of assault).

Grievant contends, on the other hand, that the Employer's failure to produce Melanie Neil at the hearing to testify should result in an inference that her testimony would have been adverse to the Employer's case. We disagree. It is true that an inference may be drawn against a party who fails to call a witness whose testimony would apparently be useful to that party. *Choiniere v. Sulikowski*, 126 Vt. 274, 279 (1967). However, this only applies if it is natural and reasonable to draw an adverse inference. *State v. Trombly*, 148 Vt. 293, 304 (1987).

We decline to draw an adverse inference in this case. The evidence indicated that Melanie Neil and her husband have moved to New York, and that Melanie Neil

rebuffed the Employer's attempts to have her appear as a witness in this matter. Subpoena powers in our proceedings extend only to in-state witnesses. V.R.C.P. 45. Since the Employer could not subpoena Melanie Neil to appear as a witness and she refused to appear, it would not be natural or reasonable to draw an inference that her failure to appear means her testimony would have been adverse to the Employer.

We now discuss the merits of the Employer's charges that Appellant engaged in misconduct by untruthfully denying that Melanie Neil had told him on July 15, 1997, that her husband had threatened and physically assaulted her. As indicated in the Findings of Fact, the Employer has failed to establish by a preponderance of the evidence that Appellant heard Melanie Neal inform Appellant that her husband had threatened and physically assaulted her.

Essentially, our decision primarily came down to examining and weighing the testimony of Appellant and Kenneth Laumann as to what transpired at the Neil residence, along with circumstantial evidence. This is a close and difficult case. Both Appellant and Laumann have presented plausible versions of events. The difficulty of the case is illustrated by neither Appellant nor Laumann having a compelling motive to fabricate their version of events. Ultimately, we have concluded that the Employer has not met the burden of establishing that Appellant heard Melanie Neal inform Appellant that her husband had threatened and physically assaulted her.

/s/ Leslie G. Seaver
Leslie G. Seaver

/s/ John J. Zampieri
John J. Zampieri

DISSENTING OPINION

I dissent from my colleagues' decision solely with respect to their finding that the Employer has not established by a preponderance of the evidence that Appellant heard Melanie Neil inform Appellant that her husband had threatened and physically assaulted her. This is a close and difficult question, but ultimately I have concluded that the Employer has met its burden by a preponderance of the evidence.

I believe Appellant heard Melanie Neil state that her husband had threatened and physically assaulted her, but did not believe her. In my view, Appellant's disbelief explains why he acted the way he did. Thus, I conclude that the Employer has established the charges that Appellant engaged in misconduct by untruthfully denying in an affidavit, and in statements to his supervisor and an Internal Affairs Unit investigator, that Melanie Neil had told him that her husband had threatened and physically assaulted her.

/s/ Catherine L. Frank
Catherine L. Frank, Chairperson

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

1. The Appeal of Russell Penka is SUSTAINED;
2. Appellant shall be reinstated to his position as Vermont State Police Corporal in the Shaftsbury barracks;
3. Appellant shall be awarded back pay and benefits from the effective date of his dismissal until his reinstatement for all hours of his regularly-assigned shift, minus any income (including unemployment

compensation received and not paid back) received by Appellant in the interim;

4. The interest due Appellant on back pay shall be computed on gross pay and shall be at the rate of 12 percent per annum and shall run from the date each paycheck was due during the period commencing with Appellant's dismissal, and ending on the date of his reinstatement; such interest for each paycheck date shall be computed from the amount of each paycheck minus income (including unemployment compensation) received by Appellant during the payroll period;
5. The parties shall submit to the Labor Relations Board by October 14, 1998, a proposed order indicating the specific amount of back pay and other benefits due Appellant; and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Board. A hearing on these issues shall be held on October 22, 1998, at 9:00 a.m. in the Labor Relations Board hearing room; and
6. The Employer shall remove all references to Appellant's dismissal from Appellant's personnel file and other official records.

Dated this 21st day of September, 1998, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Leslie G. Seaver
Leslie G. Seaver

/s/ John J. Zampieri
John J. Zampieri