VERMONT LABOR RELATIONS BOARD

APPEAL OF:	)	
	)	DOCKET NO. 03-2
THOMAS REVENE	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On January 29, 2003, the Vermont State Employees' Association ("VSEA") filed an appeal on behalf of Senior Trooper Thomas Revene ("Appellant"), contending that the Vermont Department of Public Safety ("Employer") violated Articles 14 and 15 of the collective bargaining agreement between the State of Vermont and VSEA for the State Police Bargaining Unit, effective July 1, 2001 to June 30, 2003 ("Contract") by dismissing Appellant. Specifically, Appellant alleged that the Employer dismissed him without just cause, improperly bypassed progressive discipline, failed to apply discipline with a view toward uniformity and consistency, applied rules and regulations to him in a discriminatory manner, and did not properly advise him of his right to VSEA representation before questioning him.

The hearing in this matter was delayed due to Appellant securing different counsel to represent him and because of a continuance of a hearing requested by the parties. On May 26, 2003, VSEA notified the Board that alternate counsel was being sought to represent Appellant. On February 3, 2004, VSEA and Attorney Stephen Fine informed the Labor Relations Board that Attorney Fine was substituting for VSEA as attorney for Appellant. Appellant and the Employer then moved to continue a hearing in this matter scheduled for April 1, 2004. The Board granted the motion to continue the hearing.

The Board conducted hearings on July 1 and 15, August 18 and September 2, 2004, in the Board hearing room in Montpelier. During the hearings, Appellant withdrew his claim that the Employer did not properly advise him of his right to VSEA representation before questioning him. Board Chairperson Richard Park and Member John Zampieri were present at all hearings. Member Carroll Comstock was present at all hearings except the September 2 hearing. Member Comstock subsequently listened to the taped recording and otherwise reviewed the record of the September 2 hearing.

The Employer and Appellant filed post-hearing briefs on September 30 and October 4, 2004, respectively.

FINDINGS OF FACT

1. The Contract provides in pertinent part:

. . .

ARTICLE 14
DISCIPLINARY AND CORRECTIVE ACTION

1. **DEFINITIONS**

(a) "Disciplinary Action" is any action taken by the Commissioner as a result of an employee's violation of the Code of Conduct. Forms of disciplinary action include written reprimand, transfer, reassignment, suspension without pay, forfeiture of pay and/or other rights, demotion, dismissal, or a combination thereof.

. . .

2. **DISCIPLINARY ACTION**

(a) No disciplinary action shall be taken without just cause.

. . .

(c) Disciplinary action will be applied with a view toward uniformity and consistency.

2. Appellant was a member of the Vermont State Police from 1989 until his dismissal in January 2003. On March 31, 2002, he was Acting Sergeant stationed in

Brattleboro. He had served as Acting Sergeant for the past six months. His supervisor, Lieutenant Thomas Pettengill, Brattleboro Station Commander, viewed Appellant as doing an outstanding job as Acting Sergeant. There was a permanent Sergeant position opening in Brattleboro at that time. Pettengill considered Appellant to be a strong candidate for the position. Pettengill also had given Appellant an outstanding evaluation in the last performance evaluation Appellant had received prior to becoming Acting Sergeant.

3. Appellant worked on March 31, 2002, which was Easter Sunday. Corporal Paul Barci and Trooper David Gerard also were working that day in Brattleboro. Corporal Barci had been a member of the Vermont State Police for 26 years. He recently had been demoted from sergeant and transferred to Brattleboro as a result of discipline imposed on him resulting from charges that he failed to report misconduct by another officer. Kiki Knoras was the dispatcher on duty that day in Rockingham. She was responsible for dispatching duties for Brattleboro. She had been working as a dispatcher in Rockingham for approximately ten years.

4. Knoras received a telephone call on March 31 at approximately 10:00 a.m. from Todd Ambroz, an off-duty Trooper stationed in Brattleboro. He was calling from his home on Loop Road in Newfane, Vermont. Ambroz told Knoras that his neighbor, Thelma Mason, had come to his house requesting assistance in dealing with her son, Paul Mason, who was threatening to go to another residence with a gun. Ambroz told Knoras that he was going to the Mason residence. Knoras told Ambroz that she would dispatch troopers to the Mason residence. Ambroz took a personal handgun to the Mason residence with him. Knoras contacted the Brattleboro station and told Barci of the

incident. Barci then informed Appellant of the incident. Appellant was familiar with Paul Mason as a drug and alcohol abuser with a history of violence. Appellant and Barci immediately got in Appellant's cruiser to head toward the Mason residence, an approximate 15 minute drive.

5. As Appellant and Barci were leaving the Brattleboro station, with Appellant driving and Barci handling radio transmissions, Trooper Gerard pulled into the Brattleboro station in his cruiser. Gerard had heard of the Mason incident from dispatcher transmissions over the radio. Appellant and Barci told Gerard to follow them to the Mason residence. Gerard indicated that he had to use the bathroom facilities first and then would proceed to the Mason home. After using the bathroom facilities, he proceeded to the Mason home in his cruiser.

6. The telephone and radio transmissions between Knoras and troopers involved in the Mason incident were recorded and transcribed. At times in the transmissions, troopers are referred to by their officer numbers. "522" is Appellant. "535" is Ambroz. "546" is Barci. "525" is Gerard. "10-32" is State Police code for a firearm. The telephone and radio transmissions provide in pertinent part:

> . . .
> **Telephone Conversation:**
> . . .
> Barci: Paul Barci
>
> Knoras: Hey Paul, got Todd Ambroz on the other line.
>
> Barci: Okay.
>
> Knoras: He said that his neighbor just came over and saying her son is out of control.
>
> Barci: Okay.

Knoras: He's a whacked out druggy.

Barci: Okay.

Knoras: His name is Paul Mason.

. . .

Knoras: You know where Todd lives.

Barci: I do.

Knoras: Okay it's right next door at seventy-eight. I'll tell him you guys will be headed?

Barci: Seventy-eight Loop Road.

Knoras: Yup.

Barci: Yeah, we'll send somebody up there.

. . .

Knoras: Todd.

Ambroz: Yeah.

Knoras: Yeah, Paul's going to send somebody right up.

Ambroz: Okay, thanks.

Knoras: Okay?

Ambroz: I'll be over next door until you hear otherwise

Knoras: Okay. Give us a call if there's anything changed.

. . .

RADIO LOG

. . .

Knoras: 522

Appellant: Out with 546. –76 to that complaint in Newfane . . . have 525 head that way also. What type of response are you suggesting?

Knoras: 535 was going to go over there and try and get the subject to stay there. Apparently he's threatening to go to another residence, about a half mile up the road on Route 30 and mentioned to . . . the mother mentioned to 535 that he was going to bring a 10-32 up to the residence with him. So 535's gonna try and go over and . . . play interference until we can get there and . . . defuse the situation so he doesn't leave the residence and create more problems.

Appellant: 10-4

Knoras: 535 will give us an update if anything changes. At that time he was headed next door. I do have a number for the residence. I can do an update shortly.

Appellant: 10-4.

Knoras: Brattleboro 525

Gerard: Go ahead

Knoras: The other units are like just started sliding toward 78 Loop Road in Newfane, next door to 535's residence, for a subject reportedly out of control, threatening to go to another residence with a 10-32 . . . further problems.

Gerard: 10-4

. . .

Telephone conversation:

. . .

Knoras: Hi Todd.

Ambroz: Hey.

Knoras: You all set for right now?

. . .

Ambroz: I'm indisposed 10-32.

Knoras: Okay. Ahh . . . he has one?

Ambroz: Yup.

Knoras: Okay, you've got it away?

Ambroz: No.

Knoras: Okay where is he?

Ambroz: Right here.

Knoras: Okay. I'll up the response.

Ambroz: Okay.

Knoras: And . . . any threats toward you right at this point?

Ambroz: Yup.

. . .

Knoras: . . . I'll up the response highest priority.

Ambroz: Alright.

. . .

RADIO LOG:

Knoras: Brattleboro 546

Barci: 546

Knoras: You're going to need to up your response, 10-32. Again, up your response. Just spoke with 535, subject has a 10-32 making threats toward 35 at this point. I'm gonna keep the female at the residence on the line so we have an open line at all times.

Barci: 10-4. Also see if there is anybody from the Sheriff's Department any closer, we're still in the Bratt area.

Knoras: 10-4

Barci: We'll have to have air priority . . .

Knoras: 10-4, we'll take air priority at this time . . . Brattleboro to all area cars and stations, Rockingham area cars and stations, be advised Brattleboro requesting air priority at this time. No unnecessary traffic. Again, air priority for Brattleboro State Police.

. . .

RADIO LOG

Knoras: Brattleboro 546

Barci: Go ahead

Knoras: Windham County is going to dispatch units that way too. I am on an open line now. 535 answered the phone there. Ahh . . . sounds like the mother is very distraught over this and that she's trying to calm him down without much success.

Barci: -4

. . .

Knoras: At this point I have no person on the other end. I do have an open line. Sounds like 535 is getting a little bit of a rapport with him where it may calm him down a little bit. He doesn't seem quite as agitated vocally.

Barci: -4 thank you

. . .

RADIO LOG:

Knoras: Brattleboro 546

Barci: Go ahead

Knoras I think the male party's getting a little agitated again.

Barci: 10-4. 546 to Bratt. 22 and myself will be 23 momentarily.

Knoras: 10-4. I'm still on an open line. If you want to keep it open that's fine. Otherwise, you can disconnect when you get there. Just advise somebody to hang it up.

Barci: We'll let ya know.

Knoras: Right now things appear calm in the background from what I can hear. His voice keeps going up and down. It sounds like 535 may have him detained at this point, but not positive though.

Barci: 10-4.

. . .

Knoras: Brattleboro 525

Gerard: 525

Knoras: Just for you – 43, 46 and 22 are out there. I'm still on an open line with no person on the other end. Sounds like they are trying to remove the mother from the residence to defuse the situation a little bit, to be able to deal with it. Things are fairly calm in the background, although he does keep going through fits of . . . rage vocally.

Gerard: 10-4

Knoras: Brattleboro 525.

Gerard: 525.

Knoras: He still has . . . a 10-32 in his possession from what I'm hearing on the phone.

Gerard: Still has it in his possession?

Knoras: That what it sounds like from my side of the conversation. I don't have anybody I can speak to, its just an open phone line there for me. They're trying to talk him into putting it down.

Gerard: 10-4

. . .

(State's Exhibits 1, 2, 37)

7. Prior to Appellant and Barci arriving at the Mason residence, the cylinder of Mason's gun fell out of the gun and bullets fell on the floor. Ambroz did not attempt to pick up the cartridge or draw his gun and confront Mason. Mason picked up the cartridge and bullets and placed them back in his gun.

8. The fact that the Mason incident received "air priority" reflects the seriousness of the incident. Air priority means that the transmissions concerning the incident are the only communications being heard on that channel, and that no one else should use the channel unless they have an incident of higher priority.

9. Appellant drove to the Mason residence at high speed and with blue lights flashing. Enroute, Appellant gave Barci background on Mason. Appellant and Barci also addressed issues unrelated to the Mason incident such as Appellant discussing his family visiting his home for Easter. As Appellant and Barci neared the Mason residence, they discussed how they would handle Mason. They discussed bringing a shotgun into the home, but decided against that action. Appellant said "I'll stick him, you mace him", indicating that he would use his baton against Mason and Barci would use mace. Appellant initially drove by the Mason residence because they had not received the correct address. Appellant noticed Mason's truck in the driveway as they drove by the Mason residence. Appellant turned his cruiser around, and drove into the driveway of the Mason home.

10. Appellant and Barci entered the Mason home. When they walked in the house, Thelma Mason was screaming. Appellant holstered his handgun, pushed her out of the house, and told a sheriff at the scene to not allow her back into the home. Appellant then walked into the house. Barci stationed himself inside the house near the back door. As Appellant walked into the house, he observed Paul Mason with hands behind his back, and Ambroz in a corner of the same room as Mason. Mason then pulled his hands from behind his back and displayed a gun. Appellant stated that Mason had a gun. Appellant and Ambroz attempted to negotiate with Mason to defuse the situation. Mason pointed

his gun directly at Appellant a few times, placing Appellant in fear that Mason was going to kill him. Finally, after approximately fifteen minutes, Mason handed his gun to Ambroz and the cartridge fell out. The troopers then handcuffed Mason and drove him back to the Brattleboro station to lodge him. Gerard remained outside the house during the confrontation between the troopers and Mason.

11. After returning to the barracks, Appellant was quiet, contrary to his usual talkative nature. Appellant worked on an affidavit, in support of criminal charges against Mason, after returning to the barracks. He had difficulty completing the affidavit, and appeared confused and dazed. He had trouble remembering what occurred and the order in which events happened. He sought and received assistance from Knoras, Ambroz and Barci in completing the affidavit. It took him several hours to complete the affidavit. It stated in part:

> . . .
>
> On March 31, 2002 at approximately 10:00 a.m. VSP Dispatch requested that we respond to the Mason residence on Loop Road in Newfane. Dispatch advised that Paul Mason had a gun and was acting violent. Dispatch advised that Mason's mother summoned Trooper Ambroz for assistance and he was enroute to the Mason residence.
>
> Trooper Gerard, Barci and I responded to the Mason residence and I requested that the Windham County Sheriff's also be notified. From past experience working in the Newfane area for twelve years I know that Paul Mason is very violent and on one occasion shot holes through Rick's Tavern on Route 30 in Newfane. Additionally, approximately two weeks ago Mason had approached Trooper Ambroz regarding an ongoing dispute between himself and Steve Morrill of Newfane. At that time Trooper Ambroz was attempting to "keep the peace" in Newfane. Thus knowing Mason's past and presently violent acts and tendencies I felt this was a very volatile complaint.
>
> Cpl. Barci and I entered through an open breezeway door into the small entrance between the kitchen and living room. Paul Mason was standing in the middle of the living room with his hands behind his back talking to Trooper Ambroz.

Thelma Mason approached me and said Todd's been talking to him. Paul Mason then began shouting he was going to kill Morrill, referring to Steve Morrill as a "drug dealing piece of shit" as Trooper Ambroz continually explained he couldn't do that. During Mason's rage he moved to his side and I could see he had a chrome plated revolver in his right hand concealed behind his back. As Mason continued to yell he was going to kill Morrill I pushed Thelma Mason out of the house as I was in fear for everyone's safety within the house as it was apparently(sic) Paul Mason may utilize his firearm. At this time I believed Mason's firearm was a .357 revolver.

I had my service pistol un-holstered and I attempted to conceal myself as much as possible by standing near the wall that divided the kitchen from the living room where Mason continued his threats. Trooper Ambroz tried to convince Mason to stop.

Paul Mason challenged me that he could draw and shoot me faster than I could shoot him. I was extremely concerned for Trooper Ambroz's safety as Paul Mason was walking toward him and the gun was now carried down by Mason's right side. Trooper Ambroz and I moved back towards the kitchen and Mason would make quick jerking motions with the revolver and continue to comment he could shoot me before I could shoot him. It should be noted that Mason's right finger was on the trigger throughout this entire instance. Mason also waived(sic) the gun past Trooper Ambroz's and my positions during this exchange.

Cpl. Barci had taken a position in the open rear kitchen door leading outside this residence. I contemplated retreating to the exterior of the house, however, I felt that this movement may cause Mason to fire upon Trooper Ambroz and myself. Additionally I did not want to leave Trooper Ambroz alone inside the house as a potential hostage because Mason was physically larger than Ambroz and Ambroz did not have a gun to my knowledge.

Mason continued to swear at us and make remarks how he could kill us or kill Morrill if he could get to him.

As the dog in the house continued to bark in the kitchen Mason yelled take him out or I'll shoot him as this aggravated Mason. Mason was also irritated by the ringing phone and at this point the phone receiver was dropped to the floor. As Mason bent down and picked up the gun he pointed his revolver directly at me in a conscious effort to keep me from approaching him as he picked up the phone. I felt that I was in imminent threat of being shot.

I then talked Mason out of pointing the gun directly at me by telling him he did not want to kill me or Trooper Ambroz as it was Easter and we had kids waiting at home for us. Mason finally took the weapon off me. Ambroz negotiated with Mason to holster his weapon by placing it in his waistband, however, he kept his hands upon the butt of the revolver.

> After approximately fifteen minutes of negotiations with a highly angered Mason he pulled the gun out of his waistband and unexpectedly handed the gun to Trooper Ambroz. Mason was not finished as he challenged us to physically arrest him which I refused to participate in as I felt he would attempt to cause us injury or disarm Trooper Ambroz or I. Again Mason started(sic) that he just wants to kill Steve Morrill.
>
> After several more minutes I convinced Morrill(sic) to surrender by placing his hands in back of his waist to be handcuffed.
>
> . . .
>
> (State's Exhibit 3)

12. After the troopers had returned from the Mason incident, Appellant, Barci and Ambroz had a discussion in the troop room when they were sharing a pizza concerning whether Knoras had relayed to troopers knowledge of Mason having a gun.

13. Lieutenant Thomas L'Esperance, Rockingham Station Commander, was working on a special overtime detail at Vermont Yankee on March 31. He also was serving as Southern Zone duty officer for the State Police that weekend, which meant that he would be notified of any critical incident that occurred. L'Esperance had known Appellant since the late 1980's, and they were close friends. While L'Esperance was patrolling in his cruiser at Vermont Yankee, he heard radio transmissions on the Mason incident including Knoras stating that Mason had a gun. Once his shift at Vermont Yankee ended at 3 p.m., he went to the Brattleboro barracks to check on those involved in the incident. Appellant appeared stunned and shaken to him. L'Esperance asked Appellant if he knew there was a gun. Appellant responded with a shake of his head back and forth indicating that he did not know there was a gun. L'Esperance asked Appellant about his knowledge of a gun because he had spoken with Barci prior to arriving at the barracks, and from that conversation felt something had gone wrong during the incident.

L'Esperance asked Appellant if Ambroz had given him a high sign to alert him to Mason having a gun. Appellant indicated that this had not happened. L'Esperance was upset at Ambroz for not letting Appellant know that Mason had a gun. Appellant did not tell L'Esperance that he thought Mason was detained before he entered the Mason residence.

14. Appellant arrived home at approximately 7:30 p.m. on March 31. He was distracted and spent little time with his visiting family. He ignored food, which was unusual for him. Initially, Appellant did not mention the Mason incident.

15. Lieutenant Pettengill called Appellant at his home that evening to see how he was doing as a result of the Mason incident. Pettengill, who was in Massachusetts that weekend, had received a report on the Mason incident from L'Esperance. Appellant indicated to Pettengill that the Mason incident was a harrowing event. Appellant told Pettengill that he was okay. Pettengill also spoke with Ambroz that evening to see how he was doing. During that conversation, Ambroz told Pettengill that he had told the dispatcher that Mason had a gun when he was in the house with him.

16. When Appellant and his girlfriend Nancy went to bed that evening, she asked Appellant "Tom, what's going on?" Appellant responded: "Nancy, I almost got killed today". He went on to describe the incident, jumping back and forth between events and holding and rocking his head. He stated that, when Mason pointed the gun at him, "I went clear, quiet and blue". He indicated that he saw his life pass before his eyes and thought of his grandfather. Appellant continued talking into the early morning hours, and slept little that night.

17. Appellant worked on Monday, April 1. Lieutenant Pettengill advised Appellant, Ambroz and Barci by April 1 that Ken Kelley, a licensed psychologist that

performed consulting services for the Employer, was available as a resource to deal with the Mason incident. He also mentioned the Peer Support Team, which consisted of fellow troopers, as a resource. None of the troopers expressed interest in these resources.

18. Pettengill met with Appellant and Gerard during the late afternoon on April 1. Pettengill met with them because he wanted to see how they were doing, Pettengill's superior Captain Glenn Cutting had questions about the incident, and Pettengill wanted to start forming a critique of the incident to see what lessons could be learned for the future. At the time he met with Appellant and Gerard, Pettengill did not believe that discipline of Appellant and Gerard was a possibility. During the meeting with Pettengill, Appellant spoke much more often than Gerard. Pettengill told Appellant and Gerard that it was good everyone made if out of the incident safely. Appellant interrupted Pettengill during the meeting and stated that "there's no need to powder coat this" and "guys messed up". Pettengill asked Appellant whether he knew that Mason had a gun when Appellant entered the Mason residence. Pettengill asked this in the context of indicating to Appellant and Gerard that it would be a tactical error to enter a house when the suspect had a gun. Appellant responded that he did not know that Mason had a gun, and indicated that he would have entered the house with a shotgun if he knew that Mason had a gun. Pettengill asked Gerard at some point during the meeting when he knew that a gun was involved in the incident. Gerard indicated to Pettengill that he did not know what was going on during the Mason incident. Appellant did not tell Pettengill that he thought Mason was detained prior to going into the Mason residence. After speaking with Appellant and Gerard, it appeared to Pettengill that dispatcher Kiki Knoras had not done her job concerning making the responding troopers aware of the gun. Pettengill made

Appellant and Gerard aware that he was going to look further into the dispatch communications during the Mason incident.

19. Subsequent to his meeting with Appellant and Gerard, Pettengill asked the dispatching supervisor in Rockingham to send him the tape of the dispatch transmissions during the Mason incident.

20. Angela Sanborn, a friend of Appellant who worked as a secretary in the State's Attorney office in Brattleboro, saw Appellant on April 1 when he brought paperwork on the Mason case to the State's Attorney office. When Appellant spoke to Sanborn of the Mason case, his voice was shaky and he appeared teary and fearful. Sanborn had not previously seen Appellant act this way.

21. Appellant visited Jeffrey Robinson, a friend of Appellant, at Robinson's home on the evening of April 1, 2002. Robinson sensed something was wrong by how Appellant looked. Robinson asked him what was wrong. Appellant started crying, stating he had never been so scared and "I thought he was going to kill me". Robinson stayed with Appellant for a few hours, and ascertained that a man had pointed a gun at Appellant and Appellant thought he was going to die. A few days later, Robinson met with Appellant again. Appellant seemed better but again cried about the Mason incident. Prior to the incident, Appellant enjoyed activities such as working around his home and hunting with Robinson. After the Mason incident, Appellant appeared to Robinson to be uninterested in these activities.

22. State Representative Patti O'Donnell had known Appellant for approximately 13 years as of April 2002. She learned of the Mason incident on April 2, 2002. She spoke to Appellant about the incident that day. Appellant appeared very upset

to O'Donnell. He told O"Donnell that he saw his life go before his eyes during the incident. Appellant asked O'Donnell to work on legislation to make it a felony to point a gun at a police officer.

23. Appellant had a reputation of honesty in the community during the period he was a State Trooper.

24. On April 3, 2002, Appellant, who was off-duty, contacted Knoras at work by telephone. At the time of the conversation, Appellant did not think about the conversation being recorded. The telephone conversation, which was recorded and transcribed, proceeded as follows in pertinent part:

Knoras: State Police Dispatcher Kiki.

Appellant: Hi Keek, Tom Revene

Knoras: Hi. What's up?

Appellant: Hey you didn't get yelled at too much about that deal Sunday did ya?

Knoras: What do you mean I didn't get yelled at?

Appellant: Just be careful okay. There's a lot of finger pointing going on here.

Knoras: Huh?

Appellant: There's a lot of finger pointing going on.

Knoras: About the one in Newfane?

Appellant: Yeah. Just . . . just . . . trust me okay?

Knoras: Okay.

Appellant: I don't need to say anymore . . .

Knoras: No, I'm trusting ya.

Appellant: Just be prepared okay?

Knoras: Well let me know.

Appellant: Everybody's finger pointing, everybody's fucked up ya know what I mean? Get's fucked up every day around here.

Knoras: I haven't heard anything but . . .

Appellant: Well that's . . . how they operate.

Knoras: Give it two weeks and . . .

Appellant: That's how they operate anyhow.

Knoras: Yea it figures.

Appellant: When I heard that I fucking . . . I said listen to me, if you want to make things fucking better around here, I know it never will be . . .

. . .

Appellant: As long as it's a learning experience there's always mistakes in everything we do.

Knoras: But what, what are they pointing their finger . . .

Appellant: Well no . . . they hit a few areas and ya know . . . dispatching came up and ya know . . . and . . .

Knoras: When did you guys have a critique?

Appellant: We didn't have a critique.

Knoras: Oh.

Appellant: We just . . . we were just . . .

Knoras: Bsing?

Appellant: . . . yeah bullshitting . . .and I ain't gonna get into who's saying what . . .

Knoras: . . . no, it don't matter.

Appellant: I said, let me tell ya something, and I know no one will ever fucking change around here. The only way to get the experience that we need is when you have a desk sergeant on the fucking place. And the response to that was well it ain't never going to change and let me tell ya a desk sergeant wouldn't have been there cause he would have booked out for the holidays. I said well then a trooper with fucking fifteen years could have been there and then they could make mistakes too.

Knoras: Yeah.

Revene: But . . . I said ya know . . .

Knoras: Was it, was it in reference to . . .

Revene: Oh just . . .

Knoras: . . . calling the residence back?

Revene: It was just . . . ya know, we have enough information going in and this and that.

Knoras: Yeah.

Revene: I said well . . .

Knoras: I gave everybody everything that I had.

Revene: Yeah. I says yeah . . .

Knoras: You can never get too much.

Revene: And ya know calling back . . . I said that's fucking what we do and . . . yeah and it wasn't fucking great that day but . . . I'm just like . . . ya know I just said, I just said . . . I said, you know don't fucking expect twenty years of fucking experience from ahh . . . ya know a trooper that's been on the road for twenty years from somebody that . . . really ya know, has to do what they, they, they don't have on the job training.

Knoras: Right.

Revene: I can't take my experience over the last thirteen years and fucking put it in your back pocket.

Knoras: No.

Revene: Ya know.

Knoras: The only thing is I did everything that I've been trained to do.

Revene: Yeah . . . Nah, you did, you did alright. Ya know . . . Ya know what? You told Barci, he was heading over there and as soon as Barci told me . . .

Knoras: Yup.

Revene: I threw my gun belt on. I said let's get the fuck going.

Knoras: Yup.

Revene: And we blue-lighted from the fucking driveway way up there . . .

Knoras: Yup.

Revene: . . . because I knew Paul Mason was a fucking asshole . . .

Knoras: Yup. Oh yeah, you had knowledge . . .

Revene: and that's, that's all . . . . . Like I said, if I was running the fucking radio at, at that point of time, well yeah, it would . . . there have been different information, you don't have that information, you never will, but they don't want to address it.

Knoras: Right. Well Paul . . . I mean Todd had told me that he was a real whacko . . .

Revene: Yeah.

Knoras: . . . he goes I really need to go over there. His mother is flipping out and start guys my way.

Revene: Yeah.

Knoras: I mean . . .

Revene: I just wonder, I just wonder . . . just keep your mouth shut and listen.

Knoras: Yeah, the thing is . . .

. . .

Revene: Don't go running into fucking Lester's office . . .

Knoras: Oh God no.

Revene: . . . just listen to what fucking goes down but . . .

Knoras: Well they gonna . . .

Revene: . . . you'll be better if you keep your mouth shut.

Knoras: Better not be a week or two delay cause . . .

Revene: Well you're better off to keep your mouth shut and listen to what they all have to say and then you can, ya know . . . But I didn't have any fucking problems with ya. So . . . that's all that matters there.

. . .

Knoras: The bottom line is, thank God it came out okay.

Revene: All you can do is add up the fucking situation but . . . just keep, keep your cool and listen before you explode because I know, I saw some finger pointing all the way around this fucking thing and it is in . . . too early in the finger pointing session, ya know what I mean?

. . .

Revene: Yeah, who the fuck knows but the whole deal is, ya know, everybody should get together and talk about what the fuck, to make things better.

Knoras: This room right here is never included though.

Revene: But, I'll tell them that you ought to be. If he puts a date out ya know . . .

Knoras: It's never happened.

Revene: Yeah . . .

Knoras: We've asked. Some of us have asked . . . never happened.

Revene: Well I think on this one, trust me, I'll, I'll jump up and down a couple times. Put me through to Wayne Dengler's home, 869-2390, please.

. . .

Knoras: Hold on.

(State's Exhibits 7, 8)

25. Within a few days of this telephone conversation, the dispatching supervisor in Rockingham provided Lieutenant Pettengill with copies of the dispatching tape of the March 31 Mason incident and the tape of the April 3 telephone conversation between Appellant and Knoras. The dispatching supervisor had brought the April 3 conversation to Pettengill's attention after Knoras had spoken to the dispatching supervisor about the conversation. Lieutenants Pettengill and L'Esperance listened to the tapes together.

26. Subsequent to listening to these tapes, Pettengill discussed them with Captain Cutting. Cutting and Pettengill then had a telephone conversation with Lieutenant David Harrington, Director of the Employer's Internal Affairs Unit. Harrington indicated that an internal affairs investigation would be conducted. Harrington advised Pettengill not to complete a critique of the Mason incident because it could compromise the internal affairs investigation. Pettengill never did a critique of the incident.

27. Pettengill filed a complaint against Appellant, Barci and Gerard with the Internal Affairs Unit on April 11, 2002. The complaint provided:

> On 3-31-02 the above Troopers responded to a complaint of a man (Paul Mason) in Newfane, Vt who was out of control and threatening to kill another subject in Newfane. The Troopers were advised by dispatch that Trooper Amroz was at the Mason home attempting to difuse(sic) the situation. The Troopers were further advised that a weapon (10-32) was reported and that the weapon was pointed at Trooper Ambroz. Dispatch tape recordings @ D-1 Dispatch verify that the

> Troopers were advised multiple times via SP radio of the escalating threat. Despite this the Troopers responded to the scene and entered the house further escalating the tense situation. Once inside the Mason home Troopers were engaged in a very tense and dramatic standoff that included Mason repeatedly pointing a revolver at Troops. The standoff concluded with Masons(sic) arrest and no injuries to the Troopers or Mr. Mason. On 4-01-02 I conducted a briefing @D-2 with Troopers Revene and Gerard. During this meeting I inquired as to the Troopers knowledge of Mr. Mason having a weapon and the degrading situation at the Mason home. To this question Trooper Revene stated that he didn't know about a gun until he entered Masons(sic) home and saw Paul Mason with the revolver in his hand. Revene advised that he would have deployed his shotgun if he would have known about the gun. Trooper Gerard advised that he didn't know what was going on. Tape recordings from the Rockingham Dispatch (from Dispatcher Knoras) do not comport with the Troopers account of this incident. Nor does the account of Trooper Revene in my meeting mesh with a(sic) affidavit he has prepared in this case.
>
> On 4-2-02 I spoke briefly with Corporal Barci as to weather(sic) he knew about weapons (gun) while responding to the Mason incident. Barci advised that he believed a gun was mentioned but there was a lot going on. Once again this clearly does not comport with dispatch tape recordings of this incident or an affidavit he filed in this case. It was my intention to hold a formal in depth critique on this incident, however due to the inconsistencies of all of the Troopers and the tape from Dispatch a critique is not feasible at this time. This incident is further exasperated(sic) by a phone tape conversation on 4-3-02 between Trooper Revene and Dispatcher Knoras where it appears that Trooper Revene is attempting to influence the Dispatcher's recollection of this event.
>
> (State's Exhibit 9)

28. Lieutenant Harrington opened an internal affairs investigation on the complaint made by Pettengill. An internal affairs investigation was not opened on Ambroz for his actions during the Mason incident. Ambroz did not receive any discipline as a result of the incident.

29. On April 14, 2002, Corporal Barci completed a supplemental affidavit concerning the Mason incident. It provided in pertinent part:

> . . . while enroute, the dispatcher attempted to keep us abreast of the status of Tpr. Ambroz'es(sic) interaction with the accused. . . The dispatcher was able to overhear some information and attempted to pass it on to us as we drove to the scene. As is usually the case, the information being passed on to responding

> officers is always suspect, based on the tension of the incident and the interpretation of the third party (dispatcher) trying to understand and relay it.
>
> It was obvious there was a "firearm involved" in the incident, but it was never clear to me exactly what the "involvement" of a firearm was. It was known almost without doubt that firearms were present in the home. However, I was never positive the Accused possessed a firearm until our actual arrival.
> . . .
> (State's Exhibit 6)

30. Lieutenant Harrington first notified Appellant by memorandum dated April 30, 2002, that an internal affairs investigation had been opened on him concerning the Mason incident. Harrington informed Appellant that "(f)rom this point forward, you are hereby directed not to discuss this matter with Corporal Paul Barci or Trooper David Gerard" (State's Exhibit 11).

31. Lieutenant Harrington conducted an interview of Appellant on May 6, 2002, as part of the internal affairs investigation. VSEA Deputy General Counsel Michael Casey represented Appellant during the interview. Prior to the interview, Lieutenant Harrington provided Appellant with an internal investigation warning that included the statement: "I further wish to advise you that if you refuse to fully and truthfully answer questions relating to the performance of your official duties or fitness for duty, you may be subject to departmental disciplinary charges, including dismissal." During the interview, Appellant was emotional and appeared nervous. His responses at times were disjointed (State's Exhibit 19).

32. During the interview with Lieutenant Harrington, Appellant indicated that he was not aware that dispatch radio transmissions were recorded at the time of the Mason incident on March 31, 2002 (State's Exhibit 20).

33. The following exchange occurred between Appellant and Lieutenant Harrington during the interview:

Harrington: And the dispatcher has told you that she just spoke with Ambroz and that ahh the subject has a gun and is making threats toward 535. What do you think Ambroz had gotten himself into?

Appellant: I . . . I don't know. I can't . . . I'm having problems with saying . . . ya know, there was a gun. Ya know now . . . I . . . I don't know Dave.

Harrington: Alright.

Appellant: And . . .

Harrington: Did, did Barci say anything to you that would like, like lead you to believe he understood what was going on with the situation?

Appellant: I remember at one point in this ride I asked Paul about . . . you got your club or your mace or whatever and ahh . . . I said . . . he said, yeah, I got my club. And I said I'll mace him, you club him and that. That's . . . that was . . . preparing for the incident.

(State's Exhibit 20, pages 19-20)

34. The following exchange occurred between Appellant and Lieutenant Harrington during the interview concerning a discussion among Lieutenant Pettengill, Appellant and Trooper Gerard on April 1, 2002:

Harrington: Tom why did you tell Lieutenant Pettengill, in light of what . . . all that the dispatcher had to say about this incident ahh when . . . while you and Barci were responding, in light of all that, that is clearly on the tape . . .

Revene: It is.

Harrington: . . . why did you tell Lieutenant Pettengill you didn't know Mason had a gun until you walked into that place?

Revene: I . . . Bill asked me that and I'm like . . . first time I knew he had a gun. "When I saw the god damn thing" and . . .

Harrington: Despite the fact the dispatcher was telling . . .

Revene: I didn't . . . I didn't . . . I didn't put it together Dave. Or I didn't a know . . . I wasn't focusing on what the dispatcher was telling me when I was talking to Bill and . . . or and, and I don't even know.

. . .

Harrington: . . . when Lieutenant Pettengill asked you "when did you first know there was a gun" um . . . were you . . . attempting to mislead . . .

Revene: Absolutely not.

Harrington: . . . were you lying to Lieutenant Pettengill?

Revene: Absolutely not.

. . .

Harrington: Why didn't you tell him that the dispatchers did tell you there was a gun?

Revene: I didn't know it Dave.

Harrington: Okay.

Revene: I . . . I didn't know it.

. . .

Harrington: . . . why weren't things clicking with you then Tom, that the dispatcher did tell you there was a gun?

Revene: They're not clicking with me now Dave. That's all I can say.

Harrington: Okay.

Revene: That's all I can say Dave.

(State's Exhibit 20, page 30 -32)

35. The following exchange occurred between Appellant and Lieutenant Harrington during the interview concerning the April 3, 2002, telephone conversation between Appellant and Knoras:

Harrington: . . . Why did you have this conversation with Kiki Knoras?

Revene: We're, we're ahh . . . there's a lot of shit going on with Paul Barci and every . . . that's where the finger pointing bullshit comes down and . . .

Harrington: What's going on with Tom Barci, Tom, that has anything to do with answering this question?

Revene: I'm . . . I'm trying to get to that, okay?

Harrington: Okay.

Revene: Paul's scared about all the Internals shit that he's got going and he's like . . . they'll be finger pointing on this thing and saying what we did right, wrong . . . and it was all where . . . fuck it . . . we're here today and it's done right and . . . that kind of shit . . .

. . .

Harrington: So . . . what's this all about?

Revene: Fucking . . . paranoia . . . that's going on in our office . . .

Harrington: So your phone call to Kiki was motivated by fear and paranoia?

Revene: Yeah. I was upset . . . I was afraid . . . everybody's . . Monday morning quarterback second guessing us . . . I was frustrated . . .

. . .

Harrington: The phone call to Kiki would indicate that there was another reason going on . . . in terms of you not recalling this incident. And I'm, I'm just trying to understand here why you would feel the need to Kiki Knoras and this kind of conversation with her under the circumstances . . .

Revene: I didn't . . . I didn't want her to get in any trouble . . .

Harrington: When Lieutenant Pettengill asked you when you first knew of a gun . . .

Revene: I didn't want her to get in any trouble. If she didn't tell us that we didn't get a gun. I . . . I didn't, Dave.

Harrington: Okay.

Revene: I didn't want her to get in any trouble. I thought . . . everybody in . . . this frigging incident was doing a God darned good job and we got out it. And I didn't want her in trouble. I didn't want her in trouble.

. . .

Harrington: Why did you tell Kiki, well you're better off to keep your mouth shut and listen to what they have to say and then say to her, but I, but I didn't have any fucking problems with . . . so that's all that matters?

Revene: Cause I . . . listen to what's said, let her know I . . . didn't have any problems with her.

Harrington: Okay. Did Todd Ambroz have a discussion with you, Tom, about this situation in terms of . . . him telling Kiki that this, this guy had a gun? Him keeping an open phone line and yelling at, at . . . very loudly, "Paul put your gun down", "Paul put your gun down", so that Kiki would know what he was trying to relay to you guys? Do you remember having that conversation with Ambroz . . . the night of the arrest of Paul Mason when you guys were all sitting around having pizza? Do you remember . . . Todd Ambroz telling you that? That . . . what he told Kiki about this gun?

Revene: I . . . at what . . . I get . . . gotten . . . getting my stuff together writing an affidavit and I asked . . . did Kiki tell us he had a gun? And he goes . . . they go . . . yeah. And I . . . I was thinking that was in the troops room? Barci, Ambroz and them. Sitting around having pizza . . . I didn't sit around and have pizza. I went in, got pizza from those guys . . . and went down to my office and sat at my desk there and tried to organize what to hell I had in head.

Harrington: Okay so . . . alright.

Revene: I . . . asked Barci and Todd . . . to confirm . . . Kiki told us he had a gun. And . . . yeah they told me that.

. . .

Harrington: . . . I'm trying to understand why you walked into this situation . . . as you did . . . okay? And that you don't have any "fucking problems with what she did", meaning the dispatcher. Given how upset you were, how much sleep you lost, how dangerous it was, how close you came, I want you to explain to me . . . Why aren't you upset at Kiki for not telling you that there was a gun in the house?

Revene: I mean . . .

Harrington: Why don't you have a problem with what Kiki did?

Revene: Personally upset with her?

Harrington: Yeah.

Revene: No I'm not personally upset.

Harrington: You almost got shot.

Revene: I'm mad . . . I'm madder than hell . . .

Harrington: You almost got shot, Tom, why aren't you upset at that dispatcher for not telling you?

Revene: I am . . . I'm, I'm mad . . . at the pro . . . the process and . . . not having the twenty year desk sergeant and that . . .

Harrington: You didn't need a . . . you had an experienced dispatcher . . .

Revene: She did a damn good job at it.

Harrington: Okay.

Revene: But, but, but so . . .

Harrington: In one hand you're telling me she didn't tell us they had a gun, and that's why I told that to Lieutenant Pettengill, but in the other hand you find out later . . . that, that Ambroz told her . . .

Revene: I'm sympathetic for her I guess . . . I'm mad at her, sympathetic, I'm back and forth. The guy had almost killed me . . . I have them buy cigarettes for him, he's eating pizza. I don't know. I'm just screwed up.

(State's Exhibit 20, pages 40, 44-45, 50-52)

36. The following exchange occurred between Appellant and Lieutenant Harrington during the interview concerning the affidavit completed by Appellant on March 31, 2002, following the Mason incident:

Appellant: . . . dispatcher advised he, he had a gun in the first paragraph?

Harrington: Right.

Appellant: I gleaned those facts talking to Barci and Ambroz that afternoon . .

Harrington: When you were putting the affidavit together?

Appellant: Yeah.

Harrington: Okay . . . So . . . when you put that in there it was through no memory of your own?

Appellant: I gleaned that from them. I . . . I had to confirm that . . . I talked to Kiki that afternoon on the phone. I don't know if we directly asked her but . . . we talked about that, not, not that. But we're talking about the incident and that and I put my stuff together.

(State's Exhibit 20, pages 56-57)

37. Near the conclusion of the May 6 interview, Appellant and Harrington discussed the conversation Appellant had with Barci while they were driving to the scene of the Mason incident. Appellant indicated to Harrington that he was talking to Barci about taking care of things at the Mason home and then getting home to have Easter dinner with his family that was visiting. The following exchange occurred between Appellant and Harrington:

Harrington: So your focus was really get there, take care of business, get out.

Appellant: And get out of there.

Harrington: Cause you had other things to do?

Appellant: Yeah. My grandfather's 87 years old. He was up. My uncle who's lived with him for fifty years . . . He's up. My mother's friend . . . best friend. My mother's a widow. This lady's a widow. She just got diagnosed with terminal cancer . . . I wanted to go and see her . . . I want to get home . . . And my little niece is there . . . And I'm rushing.

Harrington: Okay. Did you offer any of this up to Lieutenant Pettengill?

Appellant: No.

Harrington: You didn't tell him that . . . hey Lieutenant, this whole thing, and the reason we just walked into this situation, kind of unprepared, is because I wasn't focused. I wasn't centered and I wasn't paying attention to what was going on here?

Appellant: I didn't.

Harrington. Okay. And you told Lieutenant Pettengill that you didn't know there was a gun.

Appellant: I didn't . . .

Harrington: Until you got in there?

Appellant: . . . I can't say that there was David.

Harrington: And knowing that this was all going to get figured out that . . . in fact Lieutenant Pettengill was going to get the tapes. I guess, Tom, where I'm at now is the phone call to Kiki. That still bothers me.

Appellant: Oh that sucked. That, that was wrong. It was fucking wrong . . .

. . .

Harrington: . . . in terms of why you called Kiki, were you . . . a little bit concerned that . . . your screw-up was going to come out given the fact that . . . Kiki dispatched this thing?

Revene: I mean I know this . . . I know I should have been paying attention more now. That, that . . . I don't think that is what I was trying to do. . . . I been blown away on this. . .when he was pointing that gun at me . . . my thought was I can't get killed or I can't get winged because my grandfather can't take this . . . And my other thought was, he's gonna shoot me and just unload your gun at him to save time. And . . . a lot of crazy shit going on in my mind . . .

(State's Exhibit 20, pages 64-66)

38. Appellant did not tell Harrington during the May 6 interview that the reason he entered the Mason residence the way he did was because he thought Mason had been detained.

39. Section 309.81 of the Quick Reference to the Diagnostic Criteria from DSM-IV-TR, published by the American Psychiatric Association, provides:

309.81 Posttraumatic Stress Disorder

A. The person has been exposed to a traumatic event in which both of the following were present:

(1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others
(2) the person's response involved intense fear, helplessness, or horror. . .

B. The traumatic event is persistently reexperienced in one (or more) of the following ways:

(1) recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions. . .
(2) recurrent distressing dreams of the event. . .
(3) acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intoxicated). . .
(4) intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.
(5) physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event

C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:

(1) efforts to avoid thoughts, feelings, or conversations associated with the trauma
(2) efforts to avoid activities, places, or people that arouse recollections of the trauma

(3) inability to recall an important aspect of the trauma
(4) markedly diminished interest or participation in significant activities
(5) feeling of detachment or estrangement from others
(6) restricted range of affect (e.g., unable to have loving feelings)
(7) sense of foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span)

D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:

(1) difficulty falling or staying asleep
(2) irritability or outbursts of anger
(3) difficulty concentrating
(4) hypervigilance
(5) exaggerated startle response

E. Duration of the disturbance (symptoms in Criteria B, C, and D) is more than 1 month.

F. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Specify if:
Acute: If duration of symptoms is less than 3 months
Chronic: If duration of symptoms is 3 months or more

. . .
(Appellant's Exhibit D-2)

40. Dr. Backus, a general practitioner, referred Appellant to Dr. Ray Abney. Dr. Backus spoke with Dr. Abney within the week prior to May 9, 2002. Dr. Abney has been a licensed psychiatrist in Vermont since 1973. His experience includes 15 years as a staff psychiatrist with the Brattleboro Retreat in Brattleboro, Vermont, and private practice of psychiatry in Brattleboro since 1992. He has seen dozens of persons with post-traumatic stress disorder over the years (Appellant's Exhibit B).

41. Dr. Abney diagnosed Appellant with post-traumatic stress disorder ("PTSD") during Appellant's first visit to him on May 9, 2002. Dr. Abney considered whether Appellant had an anxiety disorder, but concluded that Appellant's history did not

support such a diagnosis. Appellant reported during the May 9 visit that he woke up thinking he was back in the Mason incident and had recurring dreams of the incident. He reported that he had trouble sleeping and concentrating, and had diarrhea. He indicated that he kept rerunning events in his mind. Appellant told Dr. Abney that he was not doing things he previously enjoyed, and that he felt detached and isolated from others. Dr. Abney observed during the May 9 visit that Appellant was hyper and agitated. Since May 9, 2002, Appellant has been a regular patient of Dr. Abney, having more than 37 appointments with him though the hearings in this matter (Appellant's Exhibits D, D-1).

42. Dr. Abney concluded that there was no question that Appellant met the diagnostic criteria for PTSD set forth above in Finding of Fact No. 38. He does not believe it is possible that Appellant has "faked" the symptoms of PTSD. It is his opinion that Appellant's PTSD was triggered by the confrontation with Mason and preceded the internal affairs investigation of him, although the internal affairs investigation exacerbated Appellant's PTSD. Dr. Abney's notes of Appellant's visits from May 2002 until Appellant's dismissal contain references to Appellant's reaction to the internal affairs investigation being conducted on Appellant and references to Appellant's confrontation with Mason. Dr. Abney determined that one of the PTSD criteria met by Appellant was memory loss. He believed that Appellant could have lost memory of events occurring before the traumatic events given that memory is stored electronically. Dr. Abney is of the view that Appellant was fit for duty with no need for accommodations at the time of his dismissal (Appellant's Exhibit D).

43. Lieutenant Harrington conducted an internal affairs interview with Corporal Barci. Barci told Harrington that the reason he and Appellant did not take a

shotgun into the Mason home was because it was not a good weapon to use in close quarters. Barci did not tell Harrington that the reason they entered the residence they way they did was because they thought Mason had been detained.

44. At the time of the internal investigation of Barci for his conduct in connection with the Mason incident, he had an unrelated appeal pending before the Labor Relations Board over a demotion and transfer he received for alleged misconduct of not reporting misconduct of another officer. When the internal affairs investigation concerning the Mason incident arose, Barci filed for medical disability retirement. May 12, 2002, was his last day of work. He subsequently was on leave until his disability retirement was approved and effective. The internal affairs investigation of Barci concerning the Mason incident was placed on hold pending the determination whether Barci's disability retirement would be approved, and was never completed. Accordingly, there was no disciplinary action taken against Barci in connection with the Mason incident.

45. During the internal affairs interview that Lieutenant Harrington conducted with Trooper Gerard, Gerard indicated that he had made a mistake by telling Lieutenant Pettengill on April 1, 2002, that he was not aware that Mason had a gun when responding to the March 31 incident involving Mason. Gerard told Harrington that he did not go back to Pettengill to correct his mistake (State's Exhibit 10).

46. (This Finding of Fact concerning Gerard is sealed from the public record.)

47. The Employer's Code of Conduct provides in pertinent part:

SECTION III
ARTICLE II Code of Conduct – Part A – Misconduct

. . .

8.0 FALSE STATEMENTS

8.1 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.

8.2 Discipline

1st Offense – 30 days suspension without pay-Dismissal

Subsequent Offense – Dismissal

. . .

14.0 TRUTHFULNESS

14.1 Upon the order or inquiry of a superior officer and/or during the course of an internal investigation, members shall fully and 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.

14.2 Discipline

1st Offense – Dismissal

. . .

Part B – Improper Conduct

. . .

3.0 CONDUCT

3.1 Members shall conduct themselves with propriety and dignity at all times, both on and off duty. No member shall conduct himself/herself in a manner which is unbecoming to a Vermont State Police Officer. Conduct unbecoming an officer is that type of conduct which could reasonably be expected to damage or destroy public respect for or confidence in members of the Department or which impairs the operation or efficiency of the Department or the ability of a member to perform his/her duty. . .

3.2 Discipline

1st Offense – Letter of Reprimand – 5 days suspension without pay

Subsequent Offenses – 5 days suspension without pay – Dismissal

(State's Exhibits 30, 31)

48. By memorandum dated October 3, 2002, Commissioner A. James Walton, Jr., preferred charges on Appellant concerning the Mason incident. The memorandum provided in pertinent part:

> . . .
> Following the arrest of Mr. Mason, you and your fellow troopers returned to the barracks. While at the barracks, you and Trooper Ambroz and Corporal Barci were preparing your reports and/or affidavits. Trooper Amroz asked you if you knew that the suspect had a gun, and specifically if the dispatcher had communicated the information he had provided to her. You said you could not recall what the dispatcher told you. You also said that you did not know that there was a gun. You failed to tell Trooper Ambroz about the nature of the dispatcher's transmissions. You knowingly misled or attempted to mislead Trooper Ambroz into believing that the dispatcher failed in her duties. You engaged in this misconduct in order to avoid any criticism based upon your own performance.
>
> In your affidavit for the criminal charges against Paul Mason (that were, in part, based upon his actions towards Trooper Ambroz, you and Corporal Barci), you acknowledged that dispatch had advised that the suspect had a gun. You wrote that affidavit on the day of the incident.
>
> On the same day of the incident, Lieutenant L'Esperance met with you. Although you told Lieutenant Harrington that you could not recall much of your conversation with Lieutenant L'Esperance, you did not dispute Lieutenant L'Esperance's recollection. Lieutenant L'Esperance asked you if you knew that there was a gun, and you indicated to him that you did not know there was a gun before you entered the residence. He also asked you if Trooper Amroz had communicated that the suspect had a gun. According to Lieutenant L'Esperance, it should have been clear to you that he was angry that you and your fellow officers were placed in a dangerous situation because someone failed to tell you that there was a gun involved. Knowing that Lieutenant L'Esperance was upset that you were not told about a gun, and that Trooper Ambroz made no attempt to tell you about a gun; you failed to tell him the truth. You failed to tell him that the dispatcher told you that the suspect had a gun, and that she stated that Trooper Ambroz had reported to her that the suspect had a gun and was threatening Trooper Amroz.
>
> On April 1, 2002, the day following the incident, you met with Lieutenant Pettengill and Trooper Gerard. Although you told Lieutenant Harrington that you could not recall much of your conversation with Lieutenant Pettengill, you did not dispute Lieutenant Pettengill's recollection. During that meeting, Lieutenant Pettengill asked you when you first had knowledge that the suspect had a gun. You answered that you did not know that the suspect had a gun until he(sic) saw it in his hands.

Lieutenant Pettengill asked you whether the dispatcher told you what was going on. You stated that you did not know the suspect had a gun until you saw it in the suspect's hands. In response to a concern that you should not have entered the residence if you knew that there was a gun, you stated that you did not know that there was a gun involved. You also claimed that if you known that the suspect had a gun, you would have brought a shotgun with you when you entered the house.

According to Lieutenant Pettengill, it was clear that you knew he was concerned that you and your fellow officers were placed in a dangerous situation because someone failed to tell you that there was a gun involved. Lieutenant Pettengill made clear that he was concerned that the dispatcher failed to do her job and that he would deal with that matter. Knowing that Lieutenant Pettengill was upset that the dispatcher failed to give you information about the suspect and the gun, you failed to tell him the truth. You failed to tell him that the dispatcher told you that the suspect had a gun, and that she stated that Trooper Ambroz had reported to her that the suspect had a gun and was threatening Trooper Ambroz.

At no time in the days that followed did you approach Lieutenant L'Esperance or Lieutenant Pettengill to correct your false statements.

During your interview with Lieutenant Harrington you claimed that you were generally unable to recall and/or appreciate the dispatcher's transmissions and your discussions with Lieutenant L'Esperance and Lieutenant Pettengill.

At no time in the days that followed did you approach Lieutenant Harrington to correct your false statements.

PURSUANT TO THE AUTHORITY VESTED IN ME UNDER 20 V.S.A. 1880, I HEREBY PREFER CHARGES AGAINST YOU AS FOLLOWS:

1. FALSE STATEMENTS, Section III, Article II, Part A 8.0-8.2.

In preparing and making investigative, and other official reports, you knowingly entered or caused to be entered inaccurate, false, or improper information and/or you knowingly misrepresented or caused to misrepresented material information, and/or you knowingly withheld or caused to be withheld material information:

Count One:

You knowingly withheld or caused to be withheld from the affidavit, prepared by you in connection with case . . . State v. Mason . . . information highlighted from this dispatch communication:
"You're going to need to up your response, 10-32. Again, up your response. **Just spoke with 535; subject has a 10-32 making threats toward 35 at this point.**

I'm gonna keep the female at the residence on the line so we have an open line at all times."

2. TRUTHFULNESS, Section III, Article II, Part A 14.0 – 14.2.

Upon the inquiry of Lieutenant L'Esperance and Lieutenant Pettengill, and Lieutenant Harrington during the course of an Internal Affairs investigation, you failed to fully and truthfully answer all questions asked by them, which were specifically directed and narrowly related to the scope of your employment and/or the operations of the department and/or an allegation of misconduct or improper conduct under investigation:

Count One:

You falsely claimed to Lieutenant L'Esperance, in response to his inquiry, that you did not have knowledge that the suspect had a gun, before you entered the suspect's residence.

Count Two:

You failed to tell Lieutenant L'Esperance, in response to his inquiry, that Trooper Ambroz told the dispatcher that the suspect had a gun and was threatening him.

Count Three:

In response to Lieutenant Pettengill's inquiry (about when you first knew that the suspect had a gun), you falsely claimed to Lieutenant Pettengill that the first time you had knowledge that the suspect had a gun was when you saw it in the suspect's hands.

Count Four:

In response to Lieutenant Pettengill's inquiry (about whether the dispatcher told you what was going on), you falsely claimed to Lieutenant Pettengill you did not know that Paul Mason had a gun until you saw it in the suspect's hands.

Count Five:

In response to Lieutenant Pettengill's inquiry (about whether the dispatcher told you what was going on), you failed to tell Lieutenant Pettengill that you initiated your response based upon dispatcher information relayed to Corporal Barci by phone.

You failed to tell Lieutenant Pettengill that as you initiated your response to the complaint, you radioed the dispatcher and requested that she dispatch Trooper Gerard to the scene. You failed to tell Lieutenant Pettengill that in that

transmission, you also asked her for the response she was suggesting; and, that you received this transmission in response from the dispatcher:

"535 was going to go over there and try and get the subject to stay there. Apparently he's threatening to go to another residence, about a half mile up the road on Route 30 and mentioned too…the mother mentioned to 535 that he was going to bring a 10-32 up to the residence with him. So 535's going try and go over and…play interference until we can get there and…defuse the situation so he doesn't leave the residence and create more problems." [522:acknowledges transmission]

You failed to tell Lieutenant Pettengill, that subsequent to the transmission noted above, that you heard or had knowledge of this transmission from the dispatcher to Trooper Gerard:

"The other units are like just started sliding toward 78 Loop Road in Newfane, next door to 535's residence, for a subject reportedly out of control, threatening to go to another residence with a 10-32…to cause further problems." [525: acknowledges transmission]

You failed to tell Lieutenant Pettengill that you heard or had knowledge of the dispatcher's subsequent transmission (approximately five minutes after you initiated your response):

"You're going to need to up your response, 10-32. Again, up your response. Just spoke with 535; subject has a 10-32 making threats toward 35 at this point. I'm gonna keep the female at the residence on the line so we have an open line at all times". [546: acknowledges transmission]

The recording made of the dispatcher's communications also shows several transmissions that were broadcast while you were en route to the complaint. These transmissions were attempts by the dispatcher to communicate what she was hearing from the open telephone line she was maintaining into the suspect's (Mason) residence, and a call from another agency offering assistance. From the dispatcher's communications you would have at least known that Trooper Ambroz reported to the dispatcher that a suspect had a gun and was threatening Trooper Ambroz; that the suspect was at his residence with his mother and Trooper Ambroz; that Trooper Ambroz was trying to calm the suspect down; and, that at various times the suspect was agitated or getting quiet. You failed to tell Lieutenant Pettengill any of this information.

You failed to tell Lieutenant Pettengill that throughout the event involving Paul Mason, the dispatcher made every effort to obtain and manage critical information, including that she tried to maintain open phone line to the Mason residence so she could hear what was transpiring inside; and that she relayed that information to assist you in the performance of your duties.

Count Six:

During Lieutenant Pettengill's inquiry concerning you(sic) tactical entry into the Mason residence, Lt. Pettengill stated that if you had information that gun was involved you should not have gone into the house. In response, you falsely claimed that "I didn't know there was a weapon involved. If I knew the guy had a gun I would have gone into the house with a shotgun."

Count Seven:

You told Lieutenant Harrington that while en route to the scene, you and Corporal Barci were discussing matters that were related to personal maters(sic) and were unrelated to a tactical entry. You acknowledged to Lieutenant Harrington that the(sic) you failed to tell Lieutenant Pettengill that the reason you walked into the Mason residence unprepared, was because you were not focused or paying attention to what was going on.

Count Eight:

You failed to acknowledge to Lieutenant Harrington, that you heard and/or had a recollection and/or understanding and/or knowledge or appreciation of this transmission:

"The other units are like just started sliding toward 78 Loop Road in Newfane, next door to 535's residence, for a subject reportedly out of control, threatening to go to another residence with a 10-32…to cause further problems."

Count Nine:

You falsely claimed to Lieutenant Harrington, that you did not recall Lieutenant Pettengill's inquiry, or your response to the same, regarding the dispatch information you were made aware of concerning the matter.

Count Ten:

You falsely claimed to Lieutenant Harrington, that you did not understand and/or appreciate and/or know that the dispatcher said that the suspect had a gun.

Count Eleven:

You falsely claimed to Lieutenant Harrington, that you were not focusing on what the dispatcher had told you when you were answering Lieutenant Pettengill's questions about what the dispatcher had told you.

Count Twelve:

You falsely claimed, to Lieutenant Harrington, that during Lieutenant Pettengill's inquiry you were not attempting to mislead, misrepresent and/or omit information. Conversely, you failed to tell Lieutenant Harrington you lied to Lieutenant Pettengill; and you failed to tell Lieutenant Harrington the real reason you answered Lieutenant Pettengill's questions as you did.

Count Thirteen:

Lieutenant Harrington asked you questions about who you spoke to after leaving Lieutenant Pettengill's office; and he specifically asked that question about the dispatcher. In your initial response to that inquiry, you failed to tell Lieutenant Harrington that you had spoken to the dispatcher about the incident following your meeting with Lieutenant Pettengill.

Lieutenant Harrington revisited his initial inquiry about whether you spoke to the dispatcher following your meeting with Lieutenant Pettengill. At that time, you failed to fully and truthfully disclose the nature of the conversation, the reasons you had the conversation and the specifics of the conversation.

3. CONDUCT, Section III, Article II, Part B 3.0 – 3.2

You failed to conduct yourself with propriety and dignity at all times, both on and off duty; and/or in a manner that is unbecoming, by acting in a manner that could reasonably be expected to damage or destroy public respect for or in confidence in members of the department, or which impairs the operation or efficiency of the department or ability of a member to perform his/her duty:

Count One:

During Lieutenant L'Esperance's inquiry, following the incident with Paul Mason, you failed to fully and truthfully disclose that Trooper Ambroz had told the dispatcher that the suspect had a gun. You knowingly misled or attempted to mislead Lieutenant L'Esperance into believing that the(sic) Trooper Ambroz failed in his duties. You engaged in this misconduct in order to avoid any criticism based upon your own performance.

Count Two:

During Lieutenant Pettengill's inquiry, following the incident with Paul Mason, you failed to fully and truthfully disclose that the dispatcher had relayed that the suspect was in possession of a gun; and/or that Trooper Ambroz had told the dispatcher that the suspect was in possession fo(sic) a gun and was threatening Trooper Ambroz. You were critical of Trooper Ambroz. You otherwise failed to advise Lieutenant Pettengill that throughout the event involving Paul Mason, the

dispatcher made every effort to obtain and manage critical information, including that she tried to maintain open phone line to the Mason residence so she could hear what was transpiring inside; and, that she relayed that information to assist you in the performance of your duties. You knowingly misled or attempted to mislead Lieutenant Pettengill into believing that the situation you and Corporal Barci found yourselves in within the residence was caused by Trooper Ambroz and the dispatcher failing to perform their duties. You engaged in this misconduct in order to avoid any criticism based upon your own performance.

Count Three:

During your meeting with Lieutenant Pettengill, he advised you that the dispatcher would be debriefed concerning this matter. Following that meeting, you contacted the dispatcher and made an effort to have her "keep her mouth shut", when she was approached by any supervisors. You did this to avoid getting caught in your own lies and deceit; and to cover for your own misconduct and improper conduct. You did so by using foul and inappropriate language; by suggesting that people were out to get her; by suggesting that things would be worse if she spoke, by suggesting that people thought she made mistakes; by creating an atmosphere of distrust and by making disrespectful comments about the workings of the barracks and its management.

Count Four:

Following the arrest of Mr. Mason, you and your fellow troopers returned to the barracks. While at the barracks, you and Trooper Ambroz and Corporal Barci were preparing your reports and/or affidavits. Trooper Ambroz asked you if you knew that the suspect had a gun, and specifically if the dispatcher had communicated the information he had provided to her. You said you could not recall what the dispatcher told you. You also said that you did not know that there was a gun. You failed to tell Trooper Ambroz about the nature of the dispatcher's transmissions. You knowingly misled or attempted to mislead trooper Ambroz into believing that the dispatcher failed in her duties. You engaged in this misconduct in order to avoid any criticism based upon your own performance.

. . .

Within seven (7) days of the delivery of these charges to you, you may file with me a request for a hearing before a hearing panel . . .

If you do not request a hearing within seven (7) days of the receipt of these charges, I will take such disciplinary action as I deem appropriate, including reprimand, transfer, suspension, demotion or dismissal. . .

(State's Exhibit 29).

49. Appellant did not request a hearing before a hearing panel. Commissioner Walton informed Appellant by letter dated October 25, 2002, that he was contemplating dismissing Appellant. A Loudermill pre-termination meeting was held on October 28, 2002. Appellant attended the meeting with his representative, VSEA Attorney Michael Casey. Commissioner Walton was present at the meeting along with other Employer representatives. At the meeting, Commissioner Walton asked Appellant to present any mitigating circumstances before the Commissioner made his decision. Appellant indicated that he had seen a psychiatrist, Dr. Abney. Discussion occurred on some of the materials generated from Appellant seeing Dr. Abney. Commissioner Walton asked Appellant for permission to meet with Dr. Abney (State's Exhibit 33).

50. Commissioner Walton sent a letter dated October 30, 2002, to Attorney Casey, requesting: 1) when Doctor Abney met with Appellant regarding matters that led to the diagnosis of post-traumatic stress disorder and how much time each session lasted, 2) Doctor Abney's notes and reports, and 3) all the information Doctor Abney relied on in making his diagnosis. Appellant and Casey provided that information to Commissioner Walton (State's Exhibit 34).

51. Subsequent to reviewing these materials, Commissioner Walton met with Dr. Abney in December 2002. Commissioner Walton asked Dr. Abney if Appellant could be lying to him. Dr. Abney indicated that Appellant could be lying to him. Dr. Abney did not indicate that he could be mistaken in diagnosing Appellant with PTSD. Commissioner Walton did not ask Dr. Abney if Appellant could have fabricated his symptoms and persuaded Dr. Abney that he was telling the truth when he was not telling

the truth. Abney does not believe that Appellant could have been successful in this regard.

52. Dr. Maureen Lavallee has been a practicing psychologist in Massachusetts since 1988. She was Assistant Clinical Director and Clinical Director at the On-Site Academy in Gardner, Massachusetts from December 1999 to May 2004 providing services to emergency services personnel (specializing in police, fire and emergency medical services) (Appellant Exhibit C).

53. Appellant was treated at the On-Site Academy on six different occasions totaling 12 hours of treatment between July and November 2002. Dr. Lavallee diagnosed Appellant with PTSD. She concluded that he had all of the required symptoms for PTSD set forth in Section 309.81(B), (C), (D) and (E) of the diagnostic criteria set forth above in Finding of Fact No. 38. Dr. Lavallee concluded that it was not possible that Appellant was "faking" PTSD; that he had behavioral manifestations that could not be faked. In Dr. Lavallee's opinion, Appellant has one of the more severe cases of PTSD she has seen. Dr. Lavallee has been involved in hundreds of cases of PTSD. In a December 30, 2002, letter, Dr. Lavallee stated in part:

> . . .
> In order to diagnose . . . PTSD, there are three categories of symptoms which must be present: the individual must exhibit 1. a re-experiencing of the trauma, 2. a persistent avoidance of the trauma, and 3. persistent symptoms of increased physiological arousal. Trooper Revene exhibited many more than the required number of symptoms in each category to accurately make the diagnosis. Each category will be considered separately, and the symptoms he presented during his treatment will be described.
>
> Trooper Revene re-experienced the trauma of this incident in a number of different ways. He was experiencing recurrent and intrusive distressing recollections including thoughts, images, and perceptions about the events of March 31, 2002. He was replaying the events in the suspect's house over and over and could not "shut off" his thoughts and images of what he had experienced. He

was struggling with his fear that he “was going crazy” because he was not able to recall what happened, because his accounts of what happened differed from other accounts, and because he was unable to sequence the events as they unfolded that day (and subsequent days thereafter). He was intensely distressed by these thoughts and images and was visibly readrenalized; i.e., he re-experienced the physiological reactions of the event itself, shakiness, perspiration, dilated pupils, increased talkativeness, and hyper-altertness and hyper-responsiveness.

Trooper Revene also exhibited symptoms related to persistent avoidance of any stimuli associated with the traumatic incident and a numbing response to everything in general. He demonstrated a markedly diminished interest in activities he had previously greatly enjoyed or in which he previously felt very invested. He felt detached from others and not able to connect with even those people most significant in his life. His feelings were numb; he was unable to feel much of anything at all. He was also unable to recall important aspects of the incident. He could not think clearly and described a great deal of frustration with himself for not remembering the course of events accurately; he stated this was uncharacteristic of him as he usually prides himself on remembering the details of his calls exceptionally well.

Finally, persistent symptoms of increased arousal were also present. Trooper Revene reported difficulty falling asleep and staying asleep once he did fall asleep; he reported sleeping only 2 to 3 hours per night. He was feeling very irritable and was becoming very angry with very little provocation. He was having great difficulty concentrating and paying attention to even things which usually interest him. He also described and exhibited an exaggerated startle response; he was jumpy at sudden movements or sounds.

As you can see, Trooper Revene was highly symptomatic. His having been suspected of altering or withholding the truth only served to increase the traumatic effects of this incident. Usually after an incident of this nature, an individual fears they are going crazy because of the way their perceptions have been affected. Being unable to think clearly, unable to remember the details of what happened, incapable of correctly sequencing the events, to be physically shaky, to feel numb, and not to be able to stop thinking about it is enough to make anyone feel “crazy”. Now imagine what it is like to be experiencing all of the above and then be accused of lying about what happened. In my professional opinion, Trooper Revene did not attempt to cover up some wrong doing; he attempted to report what did happen to the best of his ability at a time when his ability to make such a report was compromised by what he had experienced. He, like any officer in his position would be, was negatively effected(sic) by the traumatic nature of this incident. He needs to be given the appropriate consideration and respect for what he has experienced, and further, be recognized for the job he performed that day. He cannot be expected to perform normally after such an event. In fact he can be expected to perform abnormally – indeed that is what he did.

> Over the course of 12 treatment hours, Trooper Revene was fully debriefed on this incident and received Eye Movement Desensitization Reprocessing, both well established techniques in the treatment and successful resolution of trauma. He responded well to treatment and most of his symptoms were resolved by the date of his last appointment (November 5, 2002). His remaining distress was primarily due to the internal investigation regarding his reports of what took place during this incident. Thus, the trauma associated with the incident itself is resolved but the trauma associated with his outstanding charges (i.e., with having been falsely accused) is responsible for any remaining symptoms.
> . . .
> (Appellant's Exhibit E)

54. The evidence does not indicate that Commissioner Walton reviewed this December 30, 2002, letter of Dr. Lavallee prior to deciding whether to dismiss Appellant.

55. In considering whether to dismiss Appellant, Commissioner Walton determined that Appellant had not been forthcoming and less than truthful to Lieutenants L'Esperance, Pettengill and Harrington subsequent to the Mason incident in denying knowledge of Mason having a gun. He concluded these were very serious offenses. He considered that Appellant, like other state police officers, had notice that dishonesty could result in dismissal. Commissioner Walton viewed dishonesty during an internal affairs investigation as warranting dismissal. He determined that Appellant's offenses warranted dismissal just like previous cases where the Commissioner had determined dishonesty warranted dismissal. He considered that Appellant's experience and performance on the job operated in his favor, but concluded that Appellant did not have the potential for rehabilitation given his dishonesty.

56. Commissioner Walton sent a letter dated January 8, 2003, to Appellant notifying him that he was dismissed. Commissioner Walton sent the letter the day before he left his position as Commissioner. The letter provided in pertinent part:

> I appreciated meeting with you and your psychiatrist Dr. Abney in an effort to determine whether or not I should consider any mitigating factors in your

> internal affairs case. I regret to inform you that none of those present, including myself, found Dr. Abney's presentation on your behalf compelling. As a result, I am forced to conclude that you have been less than honest in this matter and that you indeed committed each and every one of the counts originally charged . . . Given this finding and after weighing the . . . twelve factors relevant to evaluating the appropriateness of a penalty, I am left with no choice but to discharge you from your employment with the Department of Public Safety and the State of Vermont, said discharge to become effective immediately upon receipt of this notice.
> . . .
> (State's Exhibit 35)

57. Commissioner Walton sent Attorney Casey a letter dated January 8, 2003, that provided in pertinent part:

> Thank you for your response and your willingness to have Trooper Revene undergo an independent medical examination by a psychiatrist other than Dr. Abney. However, upon review and discussion with Colonel Powlovich, I have decided to forego that option and rely on Dr. Abney's input at the hearing i.e., that he could indeed be misled in this matter if Trooper Revene chose to be less than forthright in his presentation to him as regards his recollection of events, both before and after his participation in the incident. To that end, I genuinely regret to inform you that none of those present for the interview with Dr. Abney, including myself, found his presentation on behalf of Trooper Revene compelling . . . I am left with no choice but to discharge Trooper Revene . . .
>
> (State's Exhibit 36)

58. Dr. Joseph Hasazi received a Ph.D degree in Psychology from the University of Miami in 1970. He is engaged in the private practice of clinical and forensic psychology in South Burlington, Vermont. He deals with PTSD in his practice. He is President of the Vermont Trauma Institute, which he co-founded with a colleague. He has been a faculty member in the Department of Psychology at the University of Vermont since 1970 (State's Exhibit 39).

59. Dr. Hasazi reviewed the internal affairs investigation report of Lieutenant Harrington; the written materials on Appellant done by Dr. Abney and Dr. Lavallee, as well as their depositions and testimony in the hearings in this matter; and testimony by

David Yustin in the hearing in this matter. Dr. Hasazi has concerns bearing on the validity of Dr. Abney's diagnosis of Appellant having PTSD. He questions whether Dr. Abney adequately considered a rival diagnosis to PTSD, such as a situational disorder. He also is of the opinion that the possibility of Appellant engaging in malingering was not given adequate consideration. Malingering is the intentional production of false or grossly exaggerated physical or psychological symptoms motivated by external incentives, such as financial compensation. Given the complexities of a rival diagnosis and malingering possibility, Dr. Hasazi believes that Dr. Abney's PTSD diagnosis was made rather quickly. Dr. Hasazi does not believe he is in a position to determine whether Appellant has PTSD because he never examined him, but he questions the way the diagnosis was reached (State's Exhibit 42).

60. The possibility of malingering exists because the diagnosis of PTSD is based largely on the person's self-report of symptoms. It is helpful to do objective testing in addition to interviewing the person to seek to discover whether malingering is involved. A person who has been a responsible and honest member of society is unlikely to malinger PTSD. In reviewing the materials and testimony in this case, Dr. Hasazi cannot conclude that any malingering symptoms are shown by Appellant (State's Exhibit 42).

61. If PTSD is a valid diagnosis for Appellant, Dr. Hasazi does not see a connection between the traumatic incident and the memory loss of events prior to the traumatic incident. He finds retrogade amnesia to be an unusual symptom presentation. He cannot recall an incident of remembering the traumatic event well but forgetting prior events.

62. The Boston Police Department has a practice whereby officers involved in a traumatic event are immediately placed in an ambulance and brought to the hospital. They usually are given tranquilizers and their reports on incidents are delayed.

63. When police officers are involved in a high stress incident, they experience physiological changes in responding to the stress. They may experience "auditory exclusion" in that they do not hear everything that is communicated to them. Also, they may experience "tunnel vision" where the officer focuses on the threat to the exclusion of everything else.

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. 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. Appeal of Penka, 21 VLRB 182, 197 (1998). Grievance of Muzzy, 141 Vt. 463, 472 (1982). Once the underlying facts have been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven facts. Id. at 266.

The charges against Appellant consist of one count of false statement based on the affidavit prepared by Appellant on the day of the Mason incident; essentially twelve counts of untruthfulness based on Appellant's statements to Lieutenants L'Esperance, Pettengill and Harrington; and four counts of conduct unbecoming based on Appellant's

statements to Lieutenant Pettengill, Lieutenant L'Esperance, Trooper Ambroz and Dispatcher Knoras.

We first address the charge of false statement and charges of untruthfulness. The specific charge of false statement is that Appellant knowingly withheld from the affidavit information provided him by Dispatcher Knoras that Mason had a gun and was making threats to Trooper Ambroz. The specific charges of untruthfulness are:

1) Appellant falsely claimed to Lieutenant L'Esperance that he did not have knowledge that Mason had a gun before he entered Mason's residence;

2) Appellant failed to tell L'Esperance that Ambroz told Knoras that Mason had a gun and was threatening him;

3) Appellant falsely told Lieutenant Pettengill that the first time he had knowledge that Mason had a gun was when he saw it in his hands;

4) Appellant failed to tell Pettengill that Knoras had transmitted certain information to him, including that Mason was threatening to bring his gun to another residence, and that Mason had a gun and was threatening Ambroz;

5) Appellant falsely told Pettengill that he did not know there was a weapon involved when he went to the Mason residence, and that if he knew Mason had a gun he would have gone into the house with a shotgun;

6) Appellant failed to tell Pettengill that the reason he walked into the Mason residence unprepared was because he was not focused or paying attention to what was going on;

7) Appellant failed to acknowledge to Lieutenant Harrington that Knoras had transmitted information to him that Mason was threatening to go to another residence with a gun;

8) Appellant falsely claimed to Harrington that he did not recall Pettengill's inquiry or Appellant's response regarding the dispatch information he was made aware of concerning the matter;

9) Appellant falsely claimed to Harrington that he did not know that Knoras said that Mason had a gun;

10) Appellant falsely claimed to Harrington that he was not focusing on what the dispatcher had told him when he was answering Pettengill's questions about what the dispatcher had told him;

11) Appellant falsely claimed to Harrington that during Pettengill's inquiry he was not attempting to mislead, misrepresent and/or omit information; and conversely Appellant failed to tell Harrington that he lied to Pettengill; and

12) Appellant initially failed to tell Harrington that he had spoken to Knoras about the Mason incident following his meeting with Pettengill, and then failed to fully and truthfully disclose the nature of his conversation with Knoras, the reasons he had the conversation and the specifics of the conversation.

The false statement charge and the bulk of the charges of untruthfulness consist of allegations that Appellant was dishonest with Lieutenants L'Esperance, Pettengill and Harrington concerning Knoras transmitting information to him that Mason had a gun and was threatening Ambroz, and that Appellant was dishonest concerning his knowledge of Mason having a gun prior to Appellant arriving at the Mason residence. Appellant's

defense to these charges is that he suffered from post-traumatic stress disorder ("PTSD") triggered by the confrontation with Mason in which Appellant believed that he was going to be killed. Appellant contends that this PTSD, as well as the auditory exclusion experienced by police officers in such a high-stress and critical situation, blocked Appellant's recollection of the dispatcher's transmissions that Mason had a gun.

Ultimately, we conclude that the Employer has not met the burden of establishing by a preponderance of the evidence that Appellant made a false statement in his affidavit, and was dishonest with Lieutenants L'Esperance, Pettengill and Harrington, concerning Knoras transmitting information to him that Mason had a gun and was threatening Ambroz, and that Appellant was dishonest concerning his knowledge of Mason having a gun prior to Appellant arriving at the Mason residence. It is clear that Knoras did transmit information to Appellant and other responding officers that Mason had a gun and was threatening Ambroz. Nonetheless, this does not necessarily translate into a conclusion that Appellant was dishonest when he subsequently professed lack of knowledge that Mason had a gun until he arrived at the Mason residence and saw Mason with the gun.

The psychiatrist, Dr. Abney, and psychologist, Dr. Lavallee, that treated Appellant both diagnosed him with PTSD triggered by his confrontation with Mason in which Appellant believed that he was going to be killed. Dr. Abney believed that Appellant could have lost memory of events occurring shortly before the traumatic confrontation with Mason. Dr. Lavallee, in determining that Appellant had one of the more severe cases of PTSD that she had ever seen in her extensive experience with police officers, determined that the PTSD resulted in Appellant being unable to recall what happened, and the sequencing of events, during the day of the Mason incident. This

evidence, along with other evidence as to Appellant's on-duty and off-duty behavior during the hours and days subsequent to the Mason incident, presents a plausible case that Appellant's PTSD resulted in a lack of recollection that the dispatcher had informed him that Mason had a gun and was threatening Ambroz.

Our conclusion in this regard is bolstered by the evidence that Appellant had a reputation for honesty in the community during the fourteen years he was a state trooper. The Employer suggests that Appellant may have been engaging in malingering – i.e., the intentional production of false or grossly exaggerated physical or psychological symptoms – in regards to his PTSD claim. However, a person who has been a responsible and honest member of society is unlikely to malinger PTSD. Appellant's lengthy service as an honest officer provides credence to his claim that PTSD resulted in a lack of recollection on his part concerning knowledge of Mason having a gun.

The Employer has not presented sufficient evidence to overcome Appellant's PTSD defense. In deciding to dismiss Appellant, Commissioner Walton knew that Appellant's treating psychiatrist, Dr. Abney, had diagnosed Appellant with PTSD triggered by the confrontation with Mason. This PTSD was presented as a defense to charges that Appellant, subsequent to the Mason incident, dishonestly reported events that had occurred during the Mason incident.

Commissioner Walton did not act reasonably in responding to this PTSD defense. Although Appellant offered to undergo an independent examination by a psychiatrist other than Dr. Abney, Commissioner Walton decided to forego that option. Instead, he concluded that Dr. Abney's presentation on behalf of Appellant was not "compelling" due to Dr. Abney indicating that "he could indeed be misled in this matter if Trooper

Revene chose to be less than forthright in his presentation to him as regards his recollection of events". Commissioner Walton erred in giving such short shrift to Dr. Abney's diagnosis. Dr. Abney did not indicate to Commissioner Walton that he could be mistaken in diagnosing Appellant with PTSD. Under such circumstances, Commissioner Walton operated at his own peril by failing to more closely examine the PTSD defense through means such as an independent examination of Appellant by another psychiatrist. A result of Commissioner Walton's precipitous action is that the Employer has been left with an insufficient basis to successfully contest Appellant's plausible PTSD defense.

The critique of Dr. Abney's and Dr. Lavallee's PTSD diagnosis offered by Dr. Hasazi at the hearing suffers from the fact that Dr. Hasazi has never examined Appellant. Although Dr. Hasazi questions the way the diagnosis was reached, he indicated in his testimony that he does not believe he is in position to determine whether Appellant has PTSD. Further, although Dr. Hasazi expressed the opinion that the possibility of Appellant engaging in malingering was not given adequate consideration, Dr. Hasazi indicated that he cannot conclude that any malingering symptoms are shown by Appellant.

There is one other aspect of Dr. Hasazi's testimony that warrants discussion. If PTSD is a valid diagnosis for Appellant, Dr. Hasazi does not see a connection between the traumatic incident and the memory loss of events prior to the traumatic incident. He finds retrogade amnesia to be an unusual symptom presentation. He cannot recall an incident of remembering the traumatic event well but forgetting prior events. Such testimony calls into question Appellant's claim of inability to recall dispatcher

transmissions that occurred prior to the traumatic event of his confrontation with Mason in which Appellant believed that he was going to be killed.

However, Dr. Hasazi's views in this regard are based on a conclusion that Appellant remembered the traumatic event well during the period he did not recollect dispatcher transmissions. Such a conclusion is not warranted by the evidence. The evidence does not indicate that Appellant had a clear memory of the traumatic event. In completing an affidavit immediately following the incident, Appellant had difficulty remembering what occurred and the order in which events happened. He sought and received assistance from the dispatcher and other involved officers in the incident. His lack of clarity concerning events continued into the subsequent months when he was treated by Dr. Abney and Dr. Lavallee.

In sum, the Employer has not presented sufficient evidence to overcome Appellant's PTSD defense. Thus, we conclude that the Employer has not met its burden of establishing the false statement charge and the charges of untruthfulness concerning Knoras transmitting information to Appellant, and Appellant's knowledge, that Mason had a gun and was threatening Ambroz.

The remaining charge of untruthfulness is that Appellant initially failed to tell Harrington that he had spoken to Knoras about the Mason incident following his meeting with Pettengill, and then failed to fully and truthfully disclose the nature of his conversation with Knoras, the reasons he had the conversation and the specifics of the conversation. Our review of the evidence does not support a conclusion that Appellant's statements during his internal affairs interview with Harrington constituted a violation of the Code of Conduct's truthfulness provisions.

The remaining charges against Appellant consist of four counts of conduct unbecoming based on Appellant's statements to Lieutenant Pettengill, Lieutenant L'Esperance, Trooper Ambroz and Dispatcher Knoras. Two of the four counts involve allegations that Appellant was dishonest with Lieutenants L'Esperance and Pettengill concerning Ambroz telling Knoras that Mason had a gun, and Knoras transmitting information to him that Mason had a gun. The Employer contends that Appellant engaged in this dishonesty to avoid criticism of his own performance. As discussed above, the Employer has not met its burden of demonstrating that Appellant engaged in dishonesty with respect to these matters. Accordingly, the Employer has not established these two counts.

The third count of conduct unbecoming is an allegation that Appellant knowingly misled, or attempted to mislead, Ambroz at the barracks following the incident by telling him that he could not remember what Knoras had told him concerning Mason having a gun, and that he did not know there was a gun. The evidence does not support this charge. The charge presumes that Appellant acted dishonestly in communications with Ambroz concerning dispatcher transmissions and his knowledge of a gun. As discussed above, the Employer has not met its burden of demonstrating that Appellant engaged in dishonesty with respect to these matters.

The fourth and final count of conduct unbecoming provides:

> During your meeting with Lieutenant Pettengill, he advised you that the dispatcher would be debriefed concerning this matter. Following that meeting, you contacted the dispatcher and made an effort to have her "keep her mouth shut", when she was approached by any supervisors. You did this to avoid getting caught in your own lies and deceit; and to cover for your own misconduct and improper conduct. You did so by using foul and inappropriate language; by suggesting that people were out to get her; by suggesting that things would be worse if she spoke, by suggesting that people thought she made mistakes; by

creating an atmosphere of distrust and by making disrespectful comments about the workings of the barracks and its management.

We conclude that the Employer has established this charge in its entirety except with respect to the ascribed motive of Appellant for his actions of avoiding "getting caught in your own lies and deceit, and to cover for your own misconduct and improper conduct." The evidence does not establish that Appellant was attempting to cover up his dishonesty; it is apparent though that he did have concerns that the Employer may take some action against him due to his actions in responding to the Mason incident. In any event, as he recognized in his internal affairs interview with Lieutenant Harrington, his actions during the April 3, 2002, telephone conversation with Knoras were wrong. They violated Section III, Article II, Part B 3.0 – 3.2 of the Code in that he conducted himself "in a manner that is unbecoming, by acting in a manner that . . . impairs the operation or efficiency of the department or ability of a member to perform his . . duty".

Appellant contends that the telephone conversation was predicated on his disconnection from reality as a result of the trauma of the Mason incident. We conclude that Appellant has not established that his trauma can reasonably serve as an excuse for his inappropriate comments during the conversation with Knoras. We note that, while Appellant's comments in the telephone conversation were inappropriate, we disagree with the dissenting opinion that Appellant's actions were based on gender discrimination against Knoras. We do not believe there is sufficient evidence to warrant such a conclusion.

We next address whether Commissioner Walton had just cause to dismiss Appellant based on the proven charges against him. The ultimate criterion of just cause is whether an employer acted reasonably in discharging an employee for misconduct. In re

Grievance of Brooks, 135 Vt. 563, 568 (1977). There are two requisite elements which establish just cause for dismissal: 1) it is reasonable to discharge an employee because of certain conduct, and 2) the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. Id. In re Grievance of Yashko, 138 Vt. 364 (1980). The standard for implied notice is whether the employee should have known the conduct was prohibited. Grievance of Towle, 164 Vt. 145 (1995). Brooks, supra, 135 Vt. at 568. Knowledge that certain behavior is prohibited and subject to discipline is notice of the possibility of dismissal. Towle, supra. Grievance of Gorruso, 150 Vt. 139, 148 (1988).

The fact that the Employer has not proven all of the charges against Appellant does not necessarily mean that his dismissal lacked just cause. Failure of an employer to prove by a preponderance of the evidence all the particulars of each charge contained in a dismissal letter does not require reversal of a dismissal action. Grievance of McCort, 16 VLRB 70, 121 (1993). In such cases, the Board must determine whether the remaining proven charges justify the penalty. Id.

We look to the factors articulated in Colleran and Britt, 6 VLRB 235, 268-69 (1983), to determine whether the proven charges justify dismissal. The pertinent factors here are: 1) the nature and seriousness of the offense and its relation to Appellant's duties, including whether the offense was intentional and committed for gain, 2) Appellant's job level and type of employment, 3) the effect of the offense upon Appellant's ability to perform at a satisfactory level and its effect upon supervisors' confidence in Appellant's ability to perform assigned duties, 4) the clarity with which Appellant was on notice of any rules that were violated in committing the offense, 5) Appellant's past disciplinary

record, 6) Appellant's past work record, 7) mitigating circumstances surrounding the offense, 8) consistency of the penalty with the department table of penalties, and 9) the potential for Appellant's rehabilitation.

Appellant's proven offense of one count of conduct unbecoming was serious in that he essentially attempted to hinder the Employer's investigation of the Mason incident by advising Knoras to "keep your mouth shut". He exacerbated this misconduct by using inappropriate language, inappropriately inferring that Knoras was being blamed for her actions during the Mason incident, attempting to create an atmosphere of distrust, and making disrespectful comments about the management of the barracks.

Appellant had fair notice that such conduct was inappropriate. His offense was damaging to workplace relationships, and thereby adversely affected his ability to perform his duties. It also adversely impacted supervisors' confidence in his ability to be a constructive team player.

Nonetheless, the focus of the charges against Appellant resulting in his dismissal was the untruthfulness charges against Appellant which the Employer has not established by a preponderance of the evidence. It is evident that Appellant's alleged untruthfulness was the primary motivating factor for Commissioner Walton dismissing him. The one proven conduct unbecoming offense does not rise to the level of misconduct warranting dismissal. Such a conclusion is consistent with the Employer's table of penalties which prescribes "letter of reprimand – 5 days suspension without pay" for the first conduct unbecoming offense.

We note in this regard that there is no evidence before us of the Employer imposing discipline on other officers for comparable offenses. Appellant was charged

with misconduct based on untruthfulness and he alleged that the Employer treated him inconsistently in this respect from other officers involved in the Mason incident. However, since the Employer has not established the untruthfulness charges against Appellant, the posture of the case at this point eliminates the need to examine the claimed inconsistent treatment.

It also operates in Appellant's favor that he had a good work record during the 14 years of his employment and had received no previous disciplinary action. Also, although the trauma he had undergone a few days earlier did not justify his inappropriate telephone conversation, this was a difficult time for Appellant that tends to indicate that Appellant's misconduct was an aberration by an otherwise good employee. His potential for rehabilitation seems good. In sum, just cause does not exist for Appellant's dismissal.

The appropriate remedy to grant for this improper dismissal is to order that the dismissal be rescinded and that Appellant be reinstated with appropriate back pay. Brooks, 135 Vt. at 570. Consistent with Vermont Supreme Court guidance, we are without authority to impose a lesser disciplinary action for Appellant's proven offense absent explicit language in the Contract giving us such authority, and must remand this matter to the Employer for such further action as may be appropriate under the Contract between the parties. Grievance of Griswold and the Vermont State Colleges Staff Federation, AFT Local 4023, AFL-CIO, 12 VLRB 252, 265 (1989). Grievance of Janes, 144 Vt. 648 (1984).

In ordering the reinstatement of Appellant, we recognize that there is a question as to Appellant's fitness for duty as a result of the trauma triggered by the confrontation with Mason. Dr. Abney, his treating psychiatrist, is of the view that Appellant was fit for

duty with no need for accommodations at the time of his dismissal. However, we are not prepared to draw such a conclusion given the weight of the evidence before us. The best course of action at this point is that Appellant be reinstated in a paid leave status pending an independent medical examination by a psychiatrist to determine whether Appellant is fit to return to duty. This is consistent with our general remedial approach to make aggrieved employees whole by placing them in the position they would have been in had the improper dismissal not occurred. Appeal of Barci, 24 VLRB 78, 79-80 (2001). Grievance of Lowell, 15 VLRB 291, 339-40 (1992).

As discussed, Commissioner Walton did not act reasonably at the time he dismissed Appellant by failing to more closely examine the PTSD defense offered by Appellant. An independent examination of Appellant by a psychiatrist upon his reinstatement most closely places him in the position he would have been in had Commissioner Walton proceeded reasonably. It protects the interests of Appellant in ensuring that the effects of the traumatic incident on him are recognized. It also protects the interests of the Employer and the public in ensuring the fitness for duty of a trooper responding to critical incidents.

Finally, we make an observation on the unfortunate sequence of events that led to the dismissal of a long-serving, capable trooper. It is evident given the experience of this case that the Employer cannot rely simply on offering troopers involved in a traumatic event with voluntary referral to persons to assist them in coping with the effects of the event. A more aggressive approach is needed in a para-military organization like the Vermont State Police where the culture discourages expression of vulnerabilities resulting from responding to difficult incidents. Such an approach here would have

ensured that Appellant quickly received the professional help he needed to cope with the traumatic nature of the Mason incident. It also would have recognized that he could not be expected to perform normally after such an event.

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Carroll P. Comstock

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John J. Zampieri

DISSENTING OPINION

I dissent from the majority opinion that the Employer has not met the burden of establishing by a preponderance of the evidence that Appellant was dishonest with Lieutenants L'Esperance, Pettengill and Harrington, concerning Knoras transmitting information to him that Mason had a gun and was threatening Ambroz, and that Appellant was dishonest concerning his knowledge of Mason having a gun prior to Appellant arriving at the Mason residence. I conclude that the Employer has met this burden as well as the burden of demonstrating that just cause existed for Appellant's dismissal.

I so conclude even if it is assumed that Appellant was suffering from post-traumatic stress disorder due to the Easter Sunday confrontation with Mason. I am not persuaded that PTSD resulted in Appellant losing recollection of dispatcher transmissions clearly notifying Appellant and other responding officers that Mason had a gun and was threatening Ambroz. The weight of the evidence does not support a conclusion that the effect of PTSD was for Appellant to lose memory of communications that preceded the traumatic confrontation with Mason.

In fact, the best evidence we have of Appellant's recollection of dispatcher transmissions is his affidavit completed shortly after the Mason incident that states that "(d)ispatch advised that Mason had a gun and was acting violent". Although Appellant had assistance completing this affidavit due to his difficulty in remembering events, I presume he appreciated the significance of signing a legal document containing his statement of events. I conclude that Appellant did not lose memory of the dispatcher's communications preceding the confrontation with Mason. Instead, I believe that Appellant, not knowing that dispatcher telephone conversations and radio transmissions of the Mason incident were recorded, was dishonest with Lieutenants L'Esperance, Pettengill and Harrington in claiming lack of knowledge that Mason had a gun. He did this to cover up his own poor performance in responding to the Mason residence and shift the blame to the dispatcher and Ambroz.

Also, there is a notable omission in my view in the Findings of Fact in this matter in that they fail to indicate that Appellant demonstrated a clear recollection of the events unfolding in the confrontation with Mason during his testimony at the hearing. It is suspicious to me that Appellant has a clear recollection of these traumatic events but is vague on events preceding it that he felt could influence his employment status.

I am not diminishing the traumatic effect the confrontation with Mason had on Appellant. It is tragic that a long-serving employee with a good work record has lost his employment resulting from this traumatic event. I share the views of my colleagues that the Employer needs to consider a more aggressive approach in the future to ensure that employees quickly receive the professional help needed to cope with a traumatic incident. Nonetheless, this does not change the unfortunate occurrence here that Appellant was

dishonest with Lieutenants L'Esperance, Pettengill and Harrington in claiming lack of knowledge that Mason had a gun and was threatening Ambroz.

The remaining charge of untruthfulness is that Appellant initially failed to tell Harrington that he had spoken to Knoras about the Mason incident following his meeting with Pettengill, and then failed to fully and truthfully disclose the nature of his conversation with Knoras, the reasons he had the conversation and the specifics of the conversation. I conclude that the Employer has established this charge only to the extent of demonstrating that Appellant failed to fully and truthfully disclose to Harrington the reasons he had the telephone conversation. I concur with the Employer that the reasons Appellant had this conversation were to avoid getting caught in his dishonesty and to cover up his own poor performance in responding to the Mason residence, reasons that he did not acknowledge to Harrington.

The Employer makes a further charge that Appellant made a false statement by knowingly withholding from the affidavit information provided him by Dispatcher Knoras that Mason had a gun and was making threats to Trooper Ambroz. This charge is not supported by the evidence. As discussed above, Appellant's affidavit did state that "(d)ispatch advised that Mason had a gun and was acting violent". This statement immediately preceded another statement indicating that Ambroz was enroute to the Mason residence. Although Appellant's affidavit did not explicitly state that Knoras told him that Mason was making threats to Ambroz, this omission does not suffice to demonstrate that Appellant's affidavit constituted the knowing withholding of material information. It could be inferred from Appellant's affidavit that Ambroz was in a threatening situation since he was enroute to confronting a violent individual with a gun.

The remaining charges against Appellant consist of four counts of conduct unbecoming based on Appellant's statements to Lieutenant Pettengill, Lieutenant L'Esperance, Trooper Ambroz and Dispatcher Knoras. Two of the four counts involve allegations that Appellant was dishonest with Lieutenants L'Esperance and Pettengill concerning Ambroz telling Knoras that Mason had a gun, and Knoras transmitting information to him that Mason had a gun. The Employer contends that Appellant engaged in this dishonesty to avoid criticism of his own performance. As discussed above, the Employer has met its burden of demonstrating that Appellant engaged in dishonesty with respect to these matters. Accordingly, the Employer has established these two counts.

The third count of conduct unbecoming is an allegation that Appellant knowingly misled, or attempted to mislead, Ambroz at the barracks following the incident by telling him that he could not remember what Knoras had told him concerning Mason having a gun, and that he did not know there was a gun. The evidence presented to us is too vague to conclude that Appellant acted dishonestly in communications with Ambroz in the barracks following the incident concerning dispatcher transmissions and his knowledge of a gun.

The final count of conduct unbecoming relates to Appellant's telephone conversation with Dispatcher Knoras on April 3, 2002. I conclude that the Employer has established this charge in its entirety, including the ascribed motive of Appellant for his actions of avoiding "getting caught in your own lies and deceit, and to cover for your own misconduct and improper conduct." It is particularly offensive that Appellant was one of male officers in a paramilitary organization colluding to accuse a female employee in a lower level job of unsatisfactory performance to protect their own interests.

Appellant's behavior was most offensive in that he called the dispatcher purportedly to act as her protector but in reality was seeking to cover up his own deficiencies and, possibly, indirectly threaten her. Appellant's actions during this telephone conversation with Knoras, along with being offensive, violated the Code of Conduct provisions on conduct unbecoming. This is an egregious example of a male-dominated organization's discrimination against a female employee in a support role.

I turn to addressing whether Commissioner Walton had just cause to dismiss Appellant based on the proven charges against him. I look to the factors articulated in Colleran and Britt, 6 VLRB at 268-69, to determine whether the proven charges justify dismissal. The pertinent factors here are: 1) the nature and seriousness of the offenses and their relation to Appellant's duties, including whether the offenses were intentional and committed for gain, 2) Appellant's job level and type of employment, 3) the effect of the offenses upon supervisors' confidence in Appellant's ability to perform assigned duties, 4) the clarity with which Appellant was on notice of any rules that were violated in committing the offenses, 5) Appellant's past disciplinary record, 6) Appellant's past work record, 7) mitigating circumstances surrounding the offenses, 8) consistency of the penalty with those imposed on other employees for the same or similar offenses, 9) consistency of the penalty with the department table of penalties, 10) the potential for Appellant's rehabilitation, and 11) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Appellant's offenses were very serious. He engaged in a pattern of dishonesty beginning immediately after the Mason incident and continuing through the internal affairs investigation. Dishonesty by employees is grounds for serious punishment, and

dismissals for dishonesty have been upheld in several cases by the Board and the Vermont Supreme Court. Appeal of Danforth, 27 VLRB 153 (2004). Grievance of Westbrook, 25 VLRB 232 (2002). Grievances of Camley, et al, 24 VLRB 119 (2001). Grievance of Newton, 23 VLRB 172 (2000). Grievance of Corrow, 23 VLRB 101 (2000). Grievance of Pretty, 23 VLRB 260 (1999). Grievance of Coffin, 20 VLRB 143 (1997). Grievance of Graves, 7 VLRB 193 (1984); *Affirmed*, 147 Vt. 519 (1986). Grievance of Cruz, 6 VLRB 295 (1983). Grievance of Barre, 5 VLRB 10 (1982). Grievance of Carlson, 140 Vt. 555 (1982). The nature of a state police officer's duties requires accurate and truthful reporting of events, including providing testimony in various forums where credibility is crucial. Appellant acted contrary to these duties by his pattern of dishonesty with his superiors and during the internal affairs investigation.

Further, employees have a duty to cooperate in employer investigations whether to impose discipline. An employee's failure to cooperate constitutes serious misconduct contributing to a determination that just cause exists for dismissal. Danforth, supra. Newton, 23 VLRB at 195. Grievance of Pretty, 23 VLRB at 270. Appellant had the responsibility to cooperate in, and preserve the integrity of, the internal affairs investigation process. He intentionally and deceptively compromised the integrity of this process through his actions.

The seriousness of Appellant's conduct was significantly increased by his inappropriate telephone conversation with Dispatcher Knoras. As recognized by the majority opinion, he thereby attempted to hinder the Employer's investigation of the Mason incident by advising Knoras to "keep your mouth shut", used inappropriate language, inappropriately inferred that Knoras was being blamed for her actions during

the Mason incident, attempted to create an atmosphere of distrust, and made disrespectful comments about the management of the barracks.

Further, Appellant's dishonesty and inappropriate telephone conversation with Knoras was intentional and motivated by personal gain. He was attempting to cover up his own performance problems with respect to the Mason incident and deflect blame onto other employees, as well as ultimately seeking to cover up his continuing dishonesty.

Appellant was on fair notice that his misconduct could be a cause for dismissal. Honesty is an implicit duty of every employee, and Appellant knew that dishonest conduct was prohibited. Carlson, 140 Vt. at 560. Appellant also had fair notice that conduct that was damaging to working relationships, such as his telephone conversation with Knoras, was inappropriate and prohibited.

Appellant's misconduct understandably resulted in Commissioner Walton losing confidence in his ability to perform his assigned duties. Appellant's pattern of dishonesty with superiors and during the internal affairs investigation undermined his ability to function as a police officer and maintain the trust of his superiors. Further, Appellant's inappropriate telephone conversation with Knoras adversely impacted supervisors' confidence in his ability to be a constructive team player.

Mitigating circumstances do not support Appellant's retention. His misconduct occurred during a period that Appellant was traumatized by the confrontation with Mason. Nonetheless, Appellant has not established that his trauma can reasonably serve as an excuse for his pattern of dishonesty and inappropriate comments during the conversation with Knoras.

Appellant also was not treated inconsistently compared to other employees involved in the Mason incident. Any deficiencies that Ambroz may have exhibited during the Mason incident concerned performance, not misconduct that implicated the Code of Conduct and warranted disciplinary action. It was reasonable for no disciplinary action to be taken against Corporal Barci due to his disability retirement making moot any discipline to be imposed on him as a result of the incident. Further, Appellant's misconduct was proportionately greater than that of Trooper Gerard to justify the differences in actions taken against them.

I recognize that Appellant had a good work record over 14 years of service and previously had not received disciplinary action. However, the serious nature of his misconduct, taken together with lack of evidence indicating that Appellant was treated in an inconsistent manner from other employees or differently than the Employer's prescribed disciplinary guidelines, warranted bypassing progressive discipline and imposing dismissal. Commissioner Walton acted reasonably in concluding that Appellant was not a good candidate for rehabilitation and that a sanction less than dismissal would not have been adequate. He reasonably concluded that Appellant's misconduct warranted dismissal. In sum, I conclude that just cause existed for Appellant's dismissal.

I assess the majority opinion as giving less weight to the direct evidence we have in this case – the tapes and affidavit - and giving greater weight to the circumstantial evidence requiring the most interpretation. Further, I disagree with the majority's remedy of reinstatement and placement on administrative leave pending psychological evaluation of fitness for duty. When Dr. Abney was asked during the hearing if Appellant was fit for duty with no accommodations at the time of his dismissal, Appellant's counselor and ally

stated unequivocally “yes”. The majority would believe the counselor’s testimony concerning Appellant’s level of dysfunctionality for purposes of determining level of misconduct and eligibility for reinstatement, but not in terms of fitness for duty.

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Richard W. Park, Chairperson

ORDER

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

1. The Appeal of Thomas Revene is SUSTAINED;

2. The dismissal of Appellant is rescinded and he shall be reinstated to his position as Vermont State Police Trooper in the Brattleboro barracks. Upon reinstatement, Appellant shall be placed in administrative leave with pay status pending an independent medical examination by a psychiatrist to determine whether Appellant is fit to return to duty;

3. This matter is remanded to the Vermont Department of Public Safety for such further disciplinary action as may be appropriate under the Contract between the State of Vermont and the Vermont State Employees’ Association for the State Police Unit;

4. 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, and minus income for any period of suspension that the Vermont Department of Public Safety may impose on Appellant as a result of the remand of this matter;

5. 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 plus any period of suspension that the Vermont Department of Public Safety may impose on Appellant as a result of the remand of this matter, 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;

6. The parties shall submit to the Labor Relations Board by January 14, 2005, 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; and

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

Dated this 16th day of December, 2004, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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Carroll P. Comstock

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John J. Zampieri