

VERMONT LABOR RELATIONS BOARD

APPEAL OF:	)	
	)	DOCKET NO. 06-6
JOEL DAVIDSON	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 21, 2006, attorney Susan Edwards filed an appeal on behalf of Joel Davidson (“Appellant”), contending that the Vermont Department of Public Safety (“Employer”) dismissed Appellant from his position as Sergeant with the Vermont State Police in violation of Articles 14 and 15 of the collective bargaining contract between the Vermont State Employees’ Association and the State of Vermont, effective July 1, 2005 – June 30, 2007 (“Contract”). Specifically, Appellant contends that: 1) his dismissal was not based in fact or supported by just cause, 2) the Employer improperly bypassed progressive discipline, 3) the Employer failed to apply discipline with a view toward uniformity and consistency, and 4) the Employer’s decision constituted a discriminatory application of rules and regulations.

Hearings were held in the Labor Relations Board hearing room in Montpelier on December 6 and 7, 2006; January 3 and 4, 2007; and February 5, 2007 before Board Members Edward Zuccaro, Chairperson; Joan Wilson and Leonard Berliner. Attorney Susan Edwards represented Appellant. William Reynolds, Assistant Attorney General, and Howard Kalfus, Counsel for the Employer, represented the Employer. The parties filed post-hearing briefs on February 26, 2007.

## 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 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.

...

(Appellant's Exhibit 1a)

2. The Rules and Regulations, and Operational Policies & Procedures, of the

Employer provide in pertinent part:

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

...

#### **8.0 FALSE REPORTS/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 Upon the order or inquiry of a superior officer, members shall fully and truthfully answer all questions asked them related to their employment, or operations of the Department and shall not knowingly misrepresent or cause to be misrepresented any material information or knowingly withhold or cause to be withheld any material information.

### 8.3 Discipline

1<sup>st</sup> 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

1<sup>st</sup> Offense - Dismissal

3. Appellant worked for the Vermont State Police from 1988 until his dismissal on January 17, 2006. He was employed as a Trooper in the Field Force Division from 1988 to 1998. He was a Detective Sergeant in the Bureau of Criminal Investigation (“BCI”) from 1998 to the spring of 2005 working out of the Rutland State Police Barracks. He then transferred to the Office of Professional Development (“OPD”). OPD is located at the Vermont Police Academy in Pittsford.

4. The annual performance evaluations received by Appellant during his employment rated his overall performance as “exceeds job requirements” or “meets job expectations”. Appellant received several commendations during his employment (Appellant’s Exhibits 5a-5c, 6a-6f).

5. Lieutenant Donald Patch has been Station Commander at the Rutland State Police Barracks since 2003. Patch found Appellant annoying at times. There were occasions where Patch mocked Appellant behind his back. He called Appellant “Joelski” in conversations with him, which Appellant found to be inappropriate. There was an

occasion where Patch was upset with Appellant, and spoke to him in a loud and angry manner.

6. An overtime detail for Vermont State Police was established after September 11, 2001, to provide security for the commercial airline flights at the Rutland Airport. In 2005, the overtime detail required that officers arrive at the airport at least one hour before the flight was scheduled to arrive, stay for at least ten minutes after the flight left, and work a block of no more than four hours, including 15 minutes of travel time on each end of the detail. The airport overtime detail was popular among officers because it was easy and there was not a lot of paperwork.

7. Other than the requirement of checking in at the airport at least one hour before a flight arrived, troopers working the airport detail were not required to be at the airport when a plane was not present. They were required to remain in the vicinity of the airport, but were permitted to obtain food, get gas for the vehicles, and run other errands as long as they remained in the vicinity of the airport, which generally meant within ten minutes driving time of the airport.

8. Appellant worked the overtime detail three to four times a month when he was a BCI Detective Sergeant working out of the Rutland Barracks. During this period, there was an occasion where Appellant spoke to the State Police officer, Sergeant James Hogan, doing the scheduling for airport overtime details and asked him if there were any other overtime details available at the airport for the next schedule. While Appellant was speaking to Hogan, Lieutenant Patch came out of his office and made a comment to Hogan to the effect of "Is he whining about the airport detail?" Hogan indicated that Appellant was asking about receiving additional details. Patch responded with a

statement to the effect of “take him right off the detail”. Appellant told Patch that he would file a grievance if he was taken off the detail. Patch responded with words to the effect of: “On second thought, take all BCI off the detail.” Appellant was not removed from the airport detail.

9. Lieutenant Patch himself worked airport overtime details. During those details, there were occasions where he spoke disparagingly of Appellant to airport employees. He showed them pictures of Appellant doing physical fitness tests that he had stored on his laptop computer, and spoke of Appellant in a derogatory manner concerning the pictures. He told an airport employee that he did not like Appellant. Airport employees instigated conversations with Patch about Appellant because it would get Patch “all fired up” and cause him to speak negatively about Appellant. Appellant did not speak negatively about Patch with airport employees.

10. In 2005, when Appellant was under consideration for a transfer from BCI to OPD, Patch told Appellant that he could not continue to work the overtime detail at the airport while he worked at OPD. Appellant wished to continue to work the overtime detail. Appellant desired to work more overtime in the later years of his career due to his retirement benefits being based on his highest compensation years. Prior to Appellant’s transfer to OPD, the State Police Command staff, including Colonel Thomas Powlovich, Director of the State Police, and Colonel James Baker, Commander of the Field Force Division, decided, over Patch’s stated objections, that Appellant could continue to work the airport overtime detail while assigned to OPD. Lieutenant Patch did not agree with this decision.

11. On Thursday, June 30, 2005, the Rutland State Police Barracks had its annual picnic at the Pittsford Recreation Facility, which is adjacent to the Vermont Police Academy and the OPD office. The picnic was combined with a retirement party for State Police Sergeant Dennis Holman. The picnic began at approximately 1:00 p.m. and ended sometime before 5 p.m. Free beer and soft drinks were available to picnic attendees. Lieutenant Patch was not working on June 30. Patch and his wife arrived at the picnic before 1 p.m. to assist in the setup of the picnic and stayed to the end and helped clean up. Lieutenant Patch drank approximately three to four beers at the picnic. Appellant, who was working that day at OPD, attended the picnic for only a short time and then returned to his office at OPD. Appellant did not drink any beer. State Police Major James Baker arrived late to the picnic, and left at approximately 3 p.m. to meet with a trooper at the Rutland Barracks.

12. Appellant was assigned to work the Rutland Airport overtime detail on June 30, 2005. This was the fourth time he had worked the airport detail in June. The flight that evening was scheduled to arrive at Rutland Airport at 7:25 p.m., meaning that Appellant was required to be at the airport no later than 6:25 p.m. At 4:52 p.m., Appellant called State Police dispatch from his OPD office at the Police Academy in Pittsford and stated: "Car 24. If you could put me . . . 41 Airport, I'd appreciate it." 10-41 is the code for "on duty" (State's Exhibit 4, p. 16 & 21).

13. After making this call, Appellant left his office and walked to his car which was parked in the parking lot adjacent to the building where the OPD office is located. The walk from his office to his car took approximately one and one-half minutes.

14. Appellant then drove out of the parking lot onto Academy Drive. He observed retired Sergeant Holman, State Police Sergeant David Sutton and another man (who was subsequently identified as Holman's brother-in-law) standing by a pickup truck stacked with chairs and tables near the Police Academy gymnasium. Appellant stopped his cruiser, approached the three men and asked them if they needed assistance. Holman responded that they needed help getting into the gymnasium. Appellant exited his car and tried opening the gymnasium with his office keys. The keys did not open the door.

15. Appellant then obtained a set of training assistant keys to seek to gain access to the gymnasium. In a July 17, 2005, e-mail that Appellant sent to VSEA Representative Gretchen Naylor, Appellant stated: "I then got a set of keys from my office that also did not fit." Appellant testified that by this statement he meant that he retrieved the set of keys that normally were in his office but that he had moved those keys to his car by June 30. Testimony was not elicited from other witnesses concerning whether Appellant obtained the keys from his vehicle or whether he went back to his office to get them. We conclude by a preponderance of the evidence that Appellant obtained the keys by walking back to his vehicle to get them. Grievant then tried unsuccessfully to gain entrance to the gymnasium using the training assistant keys in the lock and walking around the building and checking if any other doors were open that would grant access to the gymnasium. Appellant then told Holman, Sutton and Holman's brother-in-law to leave the chairs and tables by the door, and that he would arrange to have them put in the gymnasium the next day. We conclude by a preponderance of the evidence that Appellant spent approximately five minutes at the gymnasium seeking to gain access to the building (State's Exhibit 19, p.234).

16. After attempting to assist Holman with the table and chairs, Appellant drove out Academy Drive, turned right on Furnace Road, and then turned onto Route 7 South heading towards Rutland. Appellant drove past McKinley Avenue and Woodstock Avenue heading toward downtown Rutland. He took a right-hand turn off of Route 7 onto Washington Street.

17. Prior to Appellant turning onto Washington Street, Lieutenant Patch and his wife observed Appellant traveling south on Route 7. Patch and his wife had left the picnic sometime around 5 p.m. and headed home. Patch's wife drove them home in their personal vehicle, a 2005 Nissan Pathfinder. Their route home took them down Route 7 South, past Washington Street in Rutland, continuing down Route 7 South, and then south on Route 103 to Mt. Holly.

18. Appellant drove down Washington Street into the Rutland Shopping Center, where he stopped to pick up a package for his wife at Wal-Mart. He retrieved the package from a desk at the front of the Wal-Mart store. It took him approximately a minute from when he left his car to walk into Wal-Mart to when he returned to his car after picking up the package. Appellant then drove his car out of the Rutland Shopping Center parking lot. As he was exiting the parking lot, Appellant observed State Police Major James Baker driving into the parking lot. Appellant and Major Baker waved at each other.

19. Major Baker had left the Rutland Barracks at 4:38 p.m. to search for an optical shop to repair his eyeglasses. He first traveled on Route 7 South through Rutland and out to Diamond Run Mall, which is 3.87 miles from the Rutland Barracks. Major Baker tried unsuccessfully to have his glasses repaired at two different stores in the



Diamond Run Mall. He then drove to the Rutland Shopping Center, a distance of 2 miles from Diamond Run Mall. Major Baker saw Appellant as he was entering the parking lot of the Shopping Center. Major Baker did not refer to a watch and make note of the time that he saw Appellant. He parked his car in the lot, went into Optics Express in the shopping center, and had his glasses repaired there. Major Baker then drove to his home in Arlington, a distance of 44.5 miles from the Rutland Shopping Center. He arrived home at 6:43 p.m. (State's Exhibit 2, Appellant's Exhibit 3a – 3e).

20. Appellant, upon exiting the parking lot, drove his vehicle southeast on Strongs Avenue. He then took a right turn, heading south on Routes 7 and 7B toward the Rutland Airport. He then turned onto Route 103 at the intersection of Routes 7B and 103 and then turned onto Airport Road which led to the airport.

21. Appellant reached the intersection of Routes 7B and 103 at approximately 5:19 p.m. At 5:19 p.m., he called Rutland dispatch on his cell phone, and stated in pertinent part: “. . . you can put me 10-7 airport . . . I'll be out of the car in a little while but I'm going to drive around a little bit”. The “10-7” code denotes “out of service”, meaning that an officer will be out of his vehicle and not able to respond to radio transmissions. The practice of troopers working the airport detail was to indicate they were “10-7 airport” when they first arrived at the airport or were first in the vicinity of the airport (State's Exhibit 4, p. 16, 17, 21).

22. Rutland Airport employee Leanne Hamell left the airport terminal at approximately 5:15 p.m. or shortly thereafter on June 30 to head into Rutland via Airport Road, Route 103 and Route 7 North. Hamell observed Appellant's vehicle heading

toward the airport on Route 103 after she left the airport. Hamell recognized Appellant's cruiser and his license plate number.

23. At 5:22 or 5:23 p.m., Lieutenant Patch used his cell phone from his vehicle and called the Rutland dispatcher. Patch asked Dispatcher Carr who was working the night shift that night and who was "working the airport". Carr responded: "the airport right now is Car 24". Car 24 referred to Appellant (State's Exhibits 1, 3, 4, p. 22).

24. When Appellant arrived at the airport and pulled up to the airport terminal, he spoke with Leon "Scott" Stevens, a Transportation Security Administration ("TSA") officer, who was sitting outside the airport terminal at a picnic table. Stevens told Appellant that there were no airline employees present in the terminal. Appellant went to a box near the door of the terminal and obtained keys from the box. Appellant then told Stevens he had to go somewhere, and got back in his cruiser and drove off. Stevens could not see whether Appellant drove outside the airport grounds or stayed within the grounds. Appellant spoke with Stevens for one or two minutes.

25. After speaking with Stevens, Appellant left the airport grounds and traveled back onto Route 7, heading north towards Rutland, to get gas at Mac's South Citgo Station on Route 7. Appellant passed two other stations closer to the airport, and close to Mac's, before going to Mac's. Mac's was on the right-hand side of Route 7 South on the way back to the airport while the other stations were on the other side of Route 7. Mac's was Appellant's fuel supplier for his home. The fuel pump at Mac's Gas Station registered Appellant purchasing gas at 5:29 p.m. The Mac's clock was five to eight minutes slower than the actual time (State's Exhibit 4, p.23; State's Exhibit 7, p.67, 78; Appellant's Exhibits 8d, 8f).

26. The distance from the Vermont Police Academy to various locations on Appellant's route to the airport is as follows: a) 6.7 miles to McKinley Avenue, b) 8.2 miles to Woodstock Avenue, c) 8.5 miles to Washington Street, d) 9 miles to Wal-Mart, e) 9.1 miles to Strong's Avenue, f) 9.7 miles back onto Route 7 South from Strong's Avenue, g) 14 miles to Vermont Route 103, and h) 15.1 miles to Rutland State Airport. It was 5.1 miles from the airport to Mac's Citgo Station on Route 7 (Appellant's Exhibits 1b, 3g, 7b, 7c, 7d).

27. Upon returning to the airport after getting gas, Appellant went to the Civil Air Patrol Building on airport grounds. He was observed there at approximately 5:45 p.m. by Theresa Murdock (State's Exhibit 8, p.169).

28. Lieutenant Patch sent Appellant an e-mail message on July 1, 2005, at 7:35 a.m., providing:

Your radio log for 06-30-05 indicates you were 10-41 airport at 1652 hours and 10-07 the airport at 1719 hours. You then went 10-08 from the airport at 2053 hours and were off duty by 2110 hours. A 17 minute trip from Clarendon to Wells? Is this an accurate radio log? Were you at the airport at 1719 hours? Did you stay at the terminal until 2053 hours?

If you would reply so I can follow-up with dispatch if needed. If these times are accurate, I think we need to talk about the airport assignment.  
(State's Exhibit 4, p.15).

29. Appellant responded on July 1 at 9:24 a.m. with an email message stating:

The times are accurate, however, I was in Rutland when I went 42 due to a stop at my parents house before going home. If I don't tell dispatch I am 42 then they sometimes start calling to look for me when I am not on the radio.  
(State's Exhibit 4, p.15)

30. On July, 5, 2005, Appellant met with his OPD supervisor, Captain David Harrington, and Lieutenant Patch regarding a training program. At the end of the meeting, Harrington raised the airport overtime detail and asked Patch if he wanted to

speaking about it. Harrington indicated to Patch that he knew Patch was not happy with Appellant working the airport detail and that Patch previously had complained to Harrington about this, but that it now had to stop. Patch then asked Appellant to confirm that the times in the radio log for the June 30 airport detail were accurate. Appellant indicated that the times were accurate, and told Patch that he was at the intersection of Routes 103 and 7B when he called in that he was “10-7 the airport”. Patch told Appellant that he had seen him on Route 7 near McKinley Avenue in Rutland that day after the time that Appellant claimed to have been on duty at the airport. Appellant responded by reiterating that he was at Routes 103 and 7B when he called in that he was “10-7”. Harrington then suggested that in the future Appellant would not “go 10-7” until he was at the airport terminal. Appellant indicated that this was fine with him. Patch did not respond.

31. Appellant continued to work the airport detail after June 30, 2005, until his dismissal. After July 5, 2005, Appellant signed on “10-7” when he arrived at the airport terminal.

32. On July 7, 2005, Lieutenant Patch submitted a complaint on Appellant to the Employer’s Internal Affairs Unit. The complaint provided:

On June 30, 2005 at approximately 1725 hours I was traveling on US 7 in Rutland City in my personal vehicle when I observed Sergeant Davidson traveling South on US 7. I was in the area of CVS Pharmacy and Davidson was in the right hand turning lane. I did not observe if he turned into a business or onto West Street but he did not continue South on US 7 as I did. Curious if he was working the airport assignment I called dispatch by telephone and inquired about it. They advised that he was working the airport detail.

The following day I checked the radio log to discover that Davidson called in 10-07 at the airport at 1719 hours. I e-mail him to confirm that the times were accurate. He confirmed by e-mail that the log times were correct. See attached e-mail.

On 07-05-05 I met with Davidson and Captain Harrington at the Office of Professional Development. After a meeting on other issues we discussed the airport detail. During this discussion I asked Davidson about the 30<sup>th</sup> of June. Davidson advised that he was at the Office of Professional Development around 1700 hours and had signed on for the airport by telephone. He advised that he left there and traveled to the airport and that he was on VT 7B when he went 10-07 the airport. I advised Davidson of my observations on US 7 in Rutland at 1725 hours. He advised that was sure that he was on VT 7B at the airport when he went 10-07. Captain Harrington was present for this conversation. I advised Davidson that I was positive that it was him I observed and he stuck to his story. The issue was not pursued any further.

On 07-06-05 I asked PSAP Administrator Laura Wallett to listen to the recordings of the radio and telephone and in particular Davidson's call to be 10-07 at the airport. She left me a note indicating that he called out of the car at the airport at 1718 hours.

On 07-07-05 I listened to the radio / telephone recordings for the time frame in question on June 30, 2005. At 1651 hours Davidson called on the telephone to advise that he was 10-41 airport. At 1718 hours Davidson called on the telephone to advise he was 10-07 the airport and would be out of the car in a little while, he would be driving around a little bit. At 1723 hours I called into dispatch by telephone to inquire who was working on shift and at the airport.

Based on the information above I believe that Sergeant Davidson was untruthful when questioned by me about his location while working the airport detail. He was asked a specific question and responded with a known lie. He could not have been at the airport at 1718 hours when he was observed in Rutland City by me at 1723 hours.

(Employer Exhibit 4, p. 13-14)

33. Lieutenant Daniel Troidl, Internal Affairs Director, sent Appellant an e-mail message on July 11, 2005, that stated in pertinent part:

This e-mail is to inform you that Internal Affairs has opened an investigation concerning allegations of violations of the Code of Conduct. These allegations represent Part A, Subsection 8.0 [False Statements/False Reports] and Part C, Subsection 15.0 [Reporting for Duty] of Section III, Article II of the Rules and Regulations. It is alleged that you were not at an overtime detail as indicated by your radio log and that when questioned regarding this by Lt. Donald Patch, you lied. The complainant in this matter is Lieutenant Donald Patch.

...

Please contact me by July 18, 2005 so that we can schedule an interview. If you wish to have VSEA representation at this meeting, you are responsible for making those arrangements.

...

(State's Exhibit 4, p.24)

34. On July 26, 2005, Lieutenant Troidl met with Appellant to interview him regarding the allegations. Prior to the interview, Troidl showed Appellant copies of the complaint filed by Patch against him on July 7, the e-mail exchange between Patch and Appellant on July 1, and the radio history from June 30. Appellant acknowledged verbally and in writing that he had the right to have an attorney or VSEA representative present during the interview. He waived that right.

35. During the July 26 interview, the following exchanges occurred between Troidl and Appellant:

...

Troidl: You called Rutland dispatch and told them that you were 41 for the airport duty?

Appellant: Yes.

Troidl: Okay, what did you do then?

Appellant: ... after I made that call I got right outside to my car ... I started to go out. I saw Dennis Holman and ... two other men with a truck and chairs and they were sitting behind the gymnasium. So I stopped, said "are you all set Dennis?" ... he said ... we can't get in the building. So I stopped to see if my keys would fit the door and they wouldn't. I then walked back over to see if I had a key on a ... ring, which I didn't. ... so I said to him "Dennis, just leave the chairs there. I'll take care of them in the morning, I got to run to the airport." So I got back in my car, I took off, and they did in fact leave the chairs there. ... I was probably there about five minutes ...

...

Troidl: Now when did you go ... 10-7 the airport?

Appellant: 10-7 on . . . and this is exactly how I did that. I took it right off the radio history here. It's . . . 10-7 airport at 1719.38 on 6-30-2005.

Troidl: Okay, did you call in or did you use the radio?

Appellant: I used the cell phone.

. . .

Troidl: Do you have a recollection of making that call?

Appellant: Yes I do.

Troidl: Where were you when you made that call?

Appellant: I was down at the intersection of . . . 7B and 103. . .

Troidl: Now the radio history showed you making that call at 0519. . . Lieutenant Patch called, also made a telephone call, and this is on the tape, to Rutland dispatch at . . . 1723 hours . . . which is the time he said he saw you at the junction of 4 and 7. And at that point you've already made that phone in that . . . you're 10-7. Is there any chance that you could have gone 10-7 prior to that point?

Appellant: No.

. . .

Troidl: At 1723 hours, Lieutenant Patch claims that he sees you, nowhere near the airport . . . but probably I don't know, seven or eight miles away?

Appellant: No. . . Rutland is only about . . . less than three miles away from the airport. . . Two, three . . . maybe four at the most.

Troidl: Even if that's the case . . . he's saying he sees you and he makes this phone call when he sees you, at 1723 hours. . . At which point you're already at the airport. Did you leave the airport for anything?

Appellant: No.

Troidl: After getting there that day?

Appellant: I went down to the terminal . . . the only person that was there was the TSA guy. . . The two airport employees that are suppose to be there, weren't there and he said . . . they booked out. He said they'll be back in a while. . . So I grab my keys from the box, went over to the FBO, Fixed Base of Operations, which is . . where the guys pump gas for the planes and all that stuff. Stayed and talked to them for awhile. Then I went out and about, went to the . . Civil Air Patrol building . . .

Troidl: But you did not leave the airport once you . . . when you called, you were at the airport when you called or within . . .

Appellant: No, I was down at the intersection of 103 and 7B . . .

Troidl: How do you explain the discrepancy then?

Appellant: I don't know. That's, that's what I'm curious about. I don't have any idea how there can be a discrepancy. I called in when I called in. . .

Troidl: I'm going to stop you from going any further. Do you understand what . . . the truthfulness issue?

Appellant: Absolutely. Absolutely.

Troidl: Do you know what our policy is with truthfulness?

Appellant: Yes.

Troidl: When you lie to Internal Affairs?

Appellant: Yes.

Troidl: What, what is your understanding?

Appellant: My understanding is that it's a pretty serious offense and it can lead to anything up to termination.

Troidl: It, it will be termination. . . The reason I'm saying this to you Joel, is because I . . . have other evidence that indicates . . . this corroborates with what Lieutenant Patch is saying and I need . . . if you were in Rutland at that time you need to tell me that so that we can get that straightened out now.

Appellant: I did exactly as I told you . . .



Troidl: Do you know where Max's South Citgo is?

Appellant: Max's South Citgo? Yes I do. . .

Troidl: Because on June 30<sup>th</sup> at 0529, somebody using your credit card with your EQ, and your number got gas at that gas station. At 0529.

Appellant: I, I don't remember if I got . . . I'm trying . . . I didn't think I got gas that day. . . Ya know, I don't remember getting gas that day but I could have. I don't remember doing that.

. . .

Troidl: So how, what explanation could there possibly be for, for this entry?

Appellant: I do not know. I, I don't know whether I got gas that day or not, but if I got gas . . . it shouldn't of been 529. . . all I can tell you is that I signed off there . . . 10-7. I called in, and I used that time on my radio . . . on the radio history for my time sheet, that's what I did.

Troidl: Okay.

Appellant: I can't . . . I'm sorry, I can't explain minutes of time and . . . and the scenario for that day because I . . .

Troidl: Joel, I'm sorry but I just . . . this is pretty damning evidence and I . . .

Appellant: Ya know something, the way I feel about it is, if that is damning then damn me to hell. Because you know what, I signed off down there, I use the time that I signed off from the radio history. I can't tell you any more. I know that I did this. I went there, I did this, I don't remember getting gas. I could of gotten gas that day, I'm not saying that I didn't get gas that day. But if I did, I still . . . it would have still be travel time from here down. It doesn't take that long to get there. If you look at my radio history of other days that I went down there, and signed on at the terminal, as a matter of . . . ya know, it's always less than fifteen minutes. I don't think I've ever been longer than that to get down there. Unless I really hit the lights bad or there's an accident and I get held up.

Troidl: You're missing the point. I don't think the time is as much as an issue as, as whether or not you're being honest about what time you signed off there.

Appellant: I'm, I'm telling you that I signed off there on the phone and I went . . . on the 10-7 there, I went back and pulled that information from the radio log like I always do for my time sheet, and that's what I did.

Troidl: . . . it's in there, it's in the time sheet. But what I'm saying is . . . Lieutenant Patch says he sees you at that junction at 0523, which you were right in the area in your estimation earlier than that, you turn down here . . . you pick up a package and you come back up, you go right by this gas station, that had you there at 0529.

Appellant: Yup.

Troidl: But 0519, you told me you signed off at the airport.

Appellant: That's the time I took off of the radio.

Troidl: If you signed off at 0519 here, there's no way you could have been here getting gas at 0529.

Appellant: I agree with you if that's an accurate time. That's what I'm saying. If that . . . which, which time is accurate. I'm, I'm saying that I went from up at the Academy here, I drove down through here, went down Washington, stopped there and picked up that package, no more than minutes there; I then drive down Strongs, back on to 7 and continue south. Now if I did stop for gas . . . I stopped for gas. I don't remember . . .

. . .  
(State's Exhibit 4, p. 35-36, 41-49; State's Exhibit 5)

36. Appellant telephoned VSEA Representative Gretchen Naylor on July 26 after his interview with Troidl. He advised Naylor of the interview. Naylor told Appellant that she would request a copy of the tape of the interview and get back to him.

37. On July 27, Appellant called Naylor and told her he now had a recollection of having left the airport on June 30 after he had initially arrived there. Appellant asked Naylor to pass this information on to Troidl. Naylor told Appellant that she would check with VSEA attorneys and that she wished to review the tape of the July 26 interview. A few days later, Naylor informed Appellant that VSEA did not intend to

pass on Appellant's claim that he left the airport to get gas due to this version of events being inconsistent with what Appellant told Troidl during the July 26 interview.

38. Troidl spoke to Major Baker after the July 26 interview with Appellant. Baker told Troidl that he estimated that he saw Davidson at 5:30 p.m. or later on June 30 as he was entering the Rutland Shopping Center parking lot (State's Exhibit 4, p.11).

39. Department of Public Safety Commissioner Kerry Sleeper sent Appellant a memorandum dated October 6, 2005, providing in pertinent part:

Pursuant to the authority vested in me under 20 VSA Section 1880, I hereby prefer charges against you as follows:

On June 30, 2005, you were scheduled to work a voluntary overtime detail at the Rutland Airport. You stated that you upon leaving the Office of Professional Development (the radio log indicates that you signed on for airport duty at 1652 hours), you drove on Route 7 south into Rutland, turned right onto Washington Street, stopped at Wal-Mart to pick up a package, drove out Strongs Avenue and turned right onto Route 7, then left onto Route 103 to the airport. You called into VSP dispatch on your cell phone to report that you were at the airport at 1719 hours. Your cell phone bill from Verizon verifies this time as does the VSP radio log and your reported call to dispatch. On this same day, you were seen by Lieutenant Donald Patch at approximately 1723 hours traveling south on Route 7. Lieutenant Patch is certain that he saw you and he called into VSP dispatch to find out who was working the airport. He lost sight of your vehicle just after the intersection of Routes 4 and 7 and concluded that you must have turned off Route 7 (this conclusion is consistent with your own description of your route as you did turn onto Washington Street, just after the Route 4 intersection). The Lieutenant's call to dispatch was made at 1723 hours. You were seen by Major Baker in downtown Rutland at approximately 1730. Both you and the Major recall seeing each other and the Major recalls the approximate time because he was looking to find a repair shop that was still open. Your credit card bill indicates that on this day you also stopped to get gas at Macs Citgo South. The time of purchase, according to the bill, is 1729 hours. This gas station is located at the corner of Strongs Avenue and Route 7 which is consistent with the route you described taking.

The Lieutenant's sighting of you, your encounter with Major Baker, and your gas purchase are all consistent with the route that you took to the airport. The times reported by Lieutenant Patch, Major Baker and the Credit card bill reflecting the gas purchase are also consistent with that sequence of events. The only time that does not fit is the time that you reported in as being at the airport. You could not

have been at the airport at 1719 hours if you were seen by Lieutenant Patch near the intersection of Routes 4 and 7 at 1723 hours, and by Major Baker in downtown Rutland at approximately 1730 hours and if you were purchasing gas at Macs Citgo at 1729 hours. In spite of all this evidence to the contrary, however, you have insisted that when you called dispatch at 1719 hours you were in fact at the airport. You were questioned about this incident by Lieutenant Patch, in the presence of Captain Harrington, and by Lieutenant Troidl. Given all of the evidence, the only logical conclusion is that you were untruthful when you: 1) phoned in to dispatch on June 30, 2005, at 1719 hours claiming that you were at the airport; 2) spoke to Lieutenant Patch regarding the time you arrived at the airport at the airport on that day; and 3) when you spoke to Lieutenant Troidl about this incident during this internal affairs investigation.

**In so doing you failed to comply with Section III, Article II, Code of Conduct Part A, Section 8.2:**

8.2 Upon the order or inquiry of a superior officer, members shall fully and truthfully answer all questions asked them related to their employment, or operations of the Department and shall not knowingly misrepresent or cause to be misrepresented any material information or knowingly withhold or cause to be withheld any material information.

**In so doing you also failed to comply with Section III, Article II, Code of Conduct Part A, Section 14.1:**

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.

On the basis of the statements and evidence contained in the file and in the absence of extenuating or mitigating circumstances being brought to my attention by you, it would be my intent to take the following disciplinary action: **Up to and including Dismissal.**

. . . (State's Exhibit 16)

40. Appellant met with Naylor on or about October 11 after receiving the preferral of charges. Appellant expressed concern about the representation he was receiving from VSEA. He had a conference call the following day with Naylor and

VSEA counsel discussing his concerns. VSEA withdrew its representation of Appellant following this conference call (State's Exhibit 7, p.76).

41. On October 11, 2005, Appellant borrowed a State Police cruiser equipped with a video camera to make a re-enactment video of the route he traveled on June 30 in connection with the airport detail that evening. In the re-enactment video, it took Appellant 24 minutes to drive from the Police Academy gymnasium to the junction of Route 7B and 103. It took Appellant approximately eight minutes to get past McKinley Avenue, another approximate four minutes to take the turn onto Washington Street, another approximate three and one-half minutes to exit the Rutland Shopping Center parking lot (including spending less than a minute parking his car and going into Wal-Mart), another approximate four minutes to pass Mac's Citgo Station on Route 7 South, and another approximate four and one-half minutes to reach the junction of Routes 7B and 103. In the re-enactment video, it took Appellant approximately two minutes from the 7B and 103 junction to pull into the airport terminal parking lot, approximately two minutes to then return to 7B and 103 junction, and then another approximate seven minutes to enter the Mac's Citgo Station parking lot. Appellant drove this route faster on June 30 than on the date of the re-enactment video (State's Exhibit 6).

42. Leon Stevens completed a statement dated October 14, 2005, providing:

On 30 June 2005 I was working at Rutland State Airport. I was alone at the time as one airline worker had to take care of some personnel (sic) business and the other was going to be late. During this time Trooper Davidson arrived and after a short conversation stated he was going somewhere and would return shortly.

Where he was going and the time of arrival and return I cannot recall or can accurately guess, but the airline employees had returned prior to Trooper Davidson.

(State's Exhibit 7, p.77, Appellant's Exhibit 8b)

43. Theresa Murdock completed a statement dated October 18, 2005, providing in pertinent part:

On June 30, 2005 I brought my son to his Civil Air Patrol meeting at the Rutland Airport at 1745 hours. I saw Sgt. Joel Davidson at that time at the airport. Then when I returned at 1930 hours, I was speaking with Sgt. Davidson in the office. He was entering his gas slips into the computer. . .

When I left the CAP meeting with my son at 2100 hours, Sgt. Davidson was still there.

(State's Exhibit 8, p.169; Appellant's Exhibit 8c)

44. On October 18, 2005, Appellant met with Commissioner Sleeper and explained that he had further information relating to the charges against him. Commissioner Sleeper listened to Appellant's explanation of the information and informed him that he would ask Troidl to conduct a supplemental investigation. The Commissioner asked Appellant to turn over the re-enactment video and other documents he had to Troidl.

45. On November 3, 2005, Lieutenant Troidl met with Appellant to interview him. Attorney Max Taylor was present to represent Appellant. During the interview, the following exchanges occurred between Troidl and Appellant:

. . .

Troidl: You also gave me a statement from a Leon Stevens?

Appellant: Yes.

. . .

Troidl: How, how does his statement have any relevance to the case, can you explain that to me?

Appellant: He was the . . . TSA employee, that was the only person at the airport when I arrived initially. And when I spoke to him and asked where everybody was . . . he doesn't have an exact recollection. I

remember telling him after our conversation that I was going to get gas. . . this is a recollection I had after our initial interview because I didn't even recall getting gas that day initially. I later did recall that I did get gas, but it was only after I had gotten to the airport that I had left and gotten gas and then came back. . . he does recall me telling him I was going some place, he just doesn't recall where it was that I was going. He recalls me leaving, and then recalls seeing me later on, on the . . . driving on to the airport tarmac.

Troidl: So he says that he remembers you leaving, that's when you left to get gas?

Appellant: Yes.

Troidl: You're 100% sure about that?

Appellant: Yes.

...

Troidl: Here's a statement that you gave me . . . or I shouldn't call it a statement, it's a typed message to you, it says . . . "To Joel . . . and then signed . . . Senior Sergeant Yustin." And he mentions going to get gas on October 12<sup>th</sup> at 0930 and when you looked at the gas slip it was approximately seven minutes off from your watch, and eight minutes off from his watch.

Appellant: Actually it wasn't my watch it was the cell phone. I used the cell phone time.

Troidl: Okay. . . the Mac's gas slip, was it seven minutes fast or seven minutes slower?

Appellant: That was seven minutes slower. . . if the Mac slip showed, as in this case . . . 0529, then it would be 0529 plus seven minutes.

Troidl: So the actual time you would of been getting gas would of been closer to 0536?

Appellant: Just about 0535, yes. 0535, 0536 okay.

Troidl: You sure about that?

Appellant: Yes.

...

Troidl: When did you first remember that you did leave the airport to get gas?

Appellant: After the interview with you, it was the following day that I recalled that.

Troidl: Now when you had this recollection, assuming that it's the truth, why did you not come forward with this new memory?

Appellant: I actually asked . . . I had already contacted VSEA after the interview. . . The next day I called and spoke to Gretchen Naylor who's the rep down there and I discussed with her, I said, I do recall now that . . . and I was still putting things together in my head because I said, ya know you had presented this gas slip. And I said I do not recall getting gas. But I do remember that particular TSA member, that I do remember getting down to the airport one time and seeing him there and telling him that I was going to get gas and then coming back. I was trying in my mind to resolve what day that would have been and eventually I did resolve that and I talked to Gretchen about that. I said we should give that information to Dan Troidl because it could be relevant to this. . . at that time she said okay, I'm going to check with the attorney, which was Stewart there. . . she then calls me back and say, no we're not going to do that. I said, why not? It's just information that will help Dan do his investigation. . . she said it's not consistent with your statement when you said you didn't remember. I said it is consistent. . . at that point I was not happy about it. We had a lengthy discussion about it. . .

Troidl: Why didn't you just come forward with that on your own? You understand from the . . . warnings that I gave ya, both today and back on that date, that you're obligated to tell the truth, fully and truthfully.

Appellant: Which I did at the time I gave the statement.

Troidl: But once you realized that there was new information that made your old information inaccurate don't you feel there's an obligation to come forward with that right away?

Appellant: That was my argument with the VSEA rep and they were telling me, the rep and the attorney saying, absolutely not. You're not going to provide this, you aren't going to give that to him, we're not passing it on and that was my concern. The exact same thing, I said, we should be passing this on. But . . . at the same time VSEA



is supposed to be representing me and I've got an attorney telling me no, we're not going to do that. . . who am I going to listen to?

. . .

Appellant: . . . I did come forward to the Commissioner at the meeting with that information.

Troidl: Well when did you . . . end your VSEA representation?

Appellant: Just before I sent in the memo that I sent to the Commissioner . . . That was a letter along with a response with the preferral of charges.

. . .

Troidl: Now after you made that telephone call to dispatch to advise them that you were 10-7, what exactly did you do next?

Appellant: I continued up Airport Road, pulled up in front of the terminal, saw the TSA employee out there, stepped out and talked to him for a moment . . . where is everybody, and the rest is exactly as I described it. I then told him that I was going to get gas . . .

. . .

Troidl: How long did you talk to him for?

Appellant: About a minute.

Troidl: Okay, and then what did you do?

. . .

Appellant: I drove back to the gas station and got gas.

Troidl: When did you realize you needed gas?

Appellant: I didn't really need gas . . . if you recall the slip, I only got eleven gallons. I would have had just a hair under a half of tank . . . but I usually try and keep gas in my car so at the end of the airport detail I don't need to stop and get gas.

Troidl: Then why didn't you stop on the way to get gas? Cause you would . . . go by five to ten gas stations. You drove right by them?

Appellant: Yeah I actually would have . . . a lot more than five or ten but . . . I just didn't think of it.

Troidl: So when did you first think of getting gas? . . .

Appellant: Well it would have been after I got to the airport. But I don't recall exactly when I . . . thought about it and realized whether I needed to get gas. I just decided to go get gas.

. . .

Troidl: Why would you do that?

Appellant: I, I wanted to have a full tank of gas. It was just below a half a tank. I prefer to keep a full tank of gas in the car.

. . .

Troidl: . . . why did you go to Macs?

Appellant: It was . . . when you go back to Rutland, it's one of the first gas stations there.

Troidl: You passed two gas stations on the right when you leave the airport, right on your video. Two that you can see that you have to go right by on the right hand side of the road that you could of pulled in and turned right around and gone back. You passed one, you passed the other, and then you go down to Mac's, cross a four lane highway to go over and get gas.

Appellant: Actually that's not true. They're all within about a hundred yards of each other. . . And I usually use Mac's. Typically I use Mac's. That's usually where I get my gas. I have gotten it in other places, but typically Mac's has a better price. . .

Troidl: So you're telling me that you are actually cost conscious with the Department's credit card when you get gas . . .

Appellant: Absolutely. You go check my gas slips.

. . .

Troidl: How do you know it was cheaper that day?

Appellant: I don't know that it was that particular day. But I'm telling you I usually use Mac's because they usually are the lowest price.

. . .

Troidl: Is it a known thing with the guys at the office that Mac's has got cheaper prices or is it just something that you noted?

Appellant: Well they're my personal fuel company. I buy fuel from them, bulk for diesel and I also buy my home heating fuel from them . . .

. . .

(State's Exhibit 7, p.122-124, 129-132, 138-143; State's Exhibit 9)

46. Appellant's statements during the November 3 interview concerning the accuracy of the Mac's Citgo time clock were based on observations made by him and State Police Sergeant David Yustin on October 12, 2005, when they were at the station. Yustin found the time clock to be off by eight minutes from his watch. Appellant found the time clock to be 7 minutes slower than his watch. Troidl also checked the Mac's Citgo time clock during his investigation and found it to be five minutes slow (Appellant's Exhibit 8(f), State's Exhibit 7, p.67).

47. Mac's gas stations did not generally have the lowest gas prices in the Rutland area. Mac's attempts to set its gas prices close to the lower gas prices in Rutland and generally was a few cents per gallon higher than the lower-priced stations. Appellant purchased gas at a Mac's station a minority of times that he used the state fuel card (State's Exhibits 10, 11, 24).

48. On November 8, 2005, Troidl interviewed Leon Stevens. Stevens told Troidl that he was right outside the main airport terminal on June 30, 2005, when Appellant pulled up in his vehicle. When Troidl asked Stevens how long a conversation he had with Appellant, Stevens stated: "Probably with Joel it was anywhere from five to ten minutes". Stevens told Troidl that Appellant told him "(h)e had to go take care of something and he'd be right back", and then he drove off in his vehicle . Stevens indicated that he did not know whether Appellant exited the airport grounds or stayed within the grounds (State's Exhibit 7, p.145-153).

49. Commissioner Sleeper sent Appellant a memorandum dated December 21, 2005, providing in pertinent part:

Pursuant to the authority vested in me under 20 VSA Section 1880, I hereby prefer the following additional charges against you as follows:

On October 18, 2005, you met with me to discuss the internal affairs charges originally preferred against you in this case on October 6, 2005. These supplemental charges come from statements you made to me in an effort to explain the discrepancies between your version of events regarding your 6/30/05 overtime detail at the Rutland Airport and the evidence provided by two sworn members, dispatch records and a gas receipt. During our 10/18/05 meeting, you alleged that after having met with the IA investigator, Lieutenant Troidl, on 7/26/05, you remembered a trip to the gas station which would explain the 6/30/05 receipt from Mac's Citgo Station for which you had no memory at the time of that meeting with Lieutenant Troidl. You told me that you reported to the airport on 6/30/05 at 1719 hours, the time indicated by dispatch records, and that after being at the airport for a short time, left to fill your car with gas in order to be sure that you had a full tank before heading home. You also responded to the evidence of your having been seen in downtown Rutland after 1719 hours; this evidence came from Lieutenant Patch and Major Baker. You surmised that Lieutenant Patch was mistaken because he had been drinking at a retirement party earlier that day, and that Major Baker was either mistaken or lying about the time he saw you. As a result of my meeting with you, I asked Lieutenant Troidl to re-interview you and to investigate your new version of events. On 11/3/05, during your subsequent meeting with Lieutenant Troidl, you repeated to him what you had told me: That you reported to the airport at 1719 hours on 6/30/05; that you spoke to TSA employee, Leon "Scott" Stevens, when you first arrived at the airport, and that you left within a few minutes to get gas for your car; you went to Mac's gas station because you like to get the cheapest gas possible and because you usually go to Macs. You also repeated your assertion that both Lieutenant Patch and Major Baker were mistaken about when they saw you – or in Lieutenant Patch's case you assert that he did not see you at all. In support of your version of events, you gave Lieutenant Troidl a video taped re-enactment of your trip from your office at the Office of Professional Development to the Rutland Airport. The videotape was made on October 11, 2005. On your way to the airport on 6/30/05, you stopped at Wal-Mart to pick up something for your wife. In your re-enactment, you are able to get in and out of the store in 30 seconds. You also provided a copy of an email to you from Sergeant Yustin indicating that you and he had stopped at Mac's Citgo and checked the time stamp on the gas receipt. According to Sergeant Yustin's email, the time on the receipt was 7 minutes different from your clock and 8 minutes different from his own watch. There is no indication in the email as to whether "different" means slower or faster, but it appears from your testimony that the time kept by the gas station is slower than the time on your cell phone.

Unfortunately, your new version of events is not believable and, more importantly, is not supported by the evidence. TSA employee, Scott Stevens, told Lieutenant Troidl that he did see you on 6/30/05 when you first arrived at the airport and that he told you that they were short staffed at the airport and that a plane was scheduled to arrive that evening. He also stated that after talking for a few minutes, perhaps 5 to 10 minutes, you told him that you had to take care of something and would be right back. He does not recall what time this conversation occurred, sometime after 5 o'clock was his best estimate, and he assumed that you went off to do a security check which is what he thought you normally did when you first arrived at the airport. While his statement that you left for a little while does mean that you could have left to get gas, the rest of the evidence does not support that claim. First, you had no recollection of this trip to get gas until sometime after your meeting with Lieutenant Troidl on 7/26/05. When you spoke to Lieutenant Troidl on the 26<sup>th</sup>, you had already spoken with Lieutenant Patch and Captain Harrington about the events on this day and you had been served with very serious truthfulness charges which indicated that dismissal was contemplated. And yet, even in the face of a gas receipt indicating that you had stopped at Mac's Citgo on 6/30/05 at approximately 1729 hours, you claimed that you had no memory of stopping there for gas until after your meeting on July 26<sup>th</sup> with Lieutenant Troidl. It is difficult to understand how your memory improved over time. Your new version of events is that you did report to the airport at 1719 hours but then left to get gas. This would explain how the time on the gas receipt is later than your reporting time. However, this sequence of events is clearly not what happened.

According to your own reenactment of your trip on 6/30/05, the driving time from the airport to Mac's is nine minutes. The driving time from where you called dispatch to the airport is approximately two minutes. 1719 add two minutes is 1721, add nine minutes is 1730. Assuming that all you did was drive to the airport, turn around, and drive back to the gas station, the timing works. But, you did not go to the airport and turn around; you got out and spoke with Scott Stevens. Scott told you that they were short staffed and were expecting a plane that evening. Upon hearing that information, you decide to leave the airport and go get gas, even though you had approximately half a tank of gas and had just passed numerous gas stations on your way to the airport. Even assuming that this is a believable story, the timeline does not allow for your conversation with Scott Stevens. In addition, your explanation for why you would travel all the way back to Mac's, passing numerous gas stations, is implausible and unsupported. You claim that you usually stop at Mac's because it is the cheapest gas and that you shop for the cheapest gas even when the Department is paying for it. On 6/30/03, Mac's was not the cheapest gas and your gas receipts from the past two years show you have stopped at Mac's twice, compared with 16 times at the Gulf Station across the road and 58 times at a Sunoco on Route 4. Mac's was neither the cheapest gas, the gas station you most often frequent, nor was it the station closest to the airport.

In order for your version of events to be true, it must also be true that you stopped at Wal-Mart, picked up a package for your wife and got back into your vehicle all in a matter of 30 seconds. Lieutenant Troidl spoke with a manager at the Wal-Mart store in Rutland who said that packages would generally be kept for pick up at the back of the store, that summertime is the busiest time of year for the store and that between 1700 and 1730 hours is the busiest time of day. The manager also stated that it is very unlikely that someone could get in and out of the store in 30 seconds. In order for your version of events to be true, it must also be the case that both Major Baker and Lieutenant Patch are lying or are mistaken about the time that they saw you. Neither the Major nor the Lieutenant has reason to lie. Moreover, their memories of when and where they saw you not only corroborate each other but also corroborate the time stamp on the gas receipt from Mac's Citgo; the fact that the time on the receipt may reflect an earlier time than you were actually there further corroborates both Major Baker and Lieutenant Patch's statements.

The truth is usually the simplest explanation. Your actions in lying to me in an effort to explain your earlier story violate State Police Rules and Regulations regarding truthfulness.

**In so doing you failed to comply with Section III, Article II, Code of Conduct Part A, Section 8.2 and 14.1:**

. . .

**In so doing you also failed to comply with Section III, Article II, Code of Conduct Part B, Sections 3.1:**

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. . .

On the basis of the statements and evidence contained in the file, including the statements and evidence relevant to the original charges, and in the absence of extenuating or mitigating circumstances being brought to my attention by you, it would be my intent to take the following disciplinary action: **Dismissal.**

. . . (State's Exhibit 17)

50. Commissioner Sleeper sent a letter to Appellant dated January 17, 2006, providing in pertinent part:

On October 7, 2005, you were served with original Preferral of Charges in this case. The charges related to truthfulness and false statements around your signing on for duty on June 30, 2005. On October 13, 2005, you responded to the Preferral of Charges by denying them. In your response, you declined a *Loudermill* hearing and, instead, requested a meeting with me “in person in order to present evidence which [you] feel will convince [me] that these charges are not justified.” This is, in essence, a *Loudermill* hearing.

In preparation of that meeting, you used a VSP cruiser’s video recorder to re-trace the route which you indicated you took on June 30<sup>th</sup>. Your intent, as stated in your meeting request, was to convince me that your original story was true. Your meeting with me occurred on October 18, 2005.

Based upon your representations to me during that meeting, I requested that Lt. Troidl conduct an additional investigation. This supplemental investigation only further substantiated that your original account was not true. More significantly, however, the evidence set forth in the investigations (including the supplemental) indicated that the evidence which you presented to me on October 18<sup>th</sup> was also false and presented by you in an attempt to corroborate the first set of lies.

As a result of the supplemental investigation, you were served with the supplemental charges in the above-referenced internal affairs investigations on December 28, 2005. In your response to the Preferral of Charges (dated January 4, 2006), you indicated that you wanted me to impose discipline. You also indicated that you did not want a *Loudermill* hearing and that you reserved the right to appeal to the Labor Relations Board.

I have considered the investigation conducted by Lt. Troidl of the Office of Internal Affairs (including his supplemental investigation), and the information you presented to me in our meeting on October 18, 2005. I tried to resolve the evidence giving you the benefit of the doubt. In the end, I find that the evidence simply does not support your story. In addition, in light of the information presented, your story simply does not make sense. Based upon my consideration of all of the information made available to me at this time, I conclude that the conduct violations as set forth in the Preferral of charges dated October 6, 2005 and December 21, 2005 are proved.

Your lack of truthfulness throughout this process is deeply disturbing; especially since you failed at the outset to be truthful about such a minor matter (whether you signed on duty at the airport before arriving there) where the consequences for telling the truth would have been minimal at best. Of particular concern to me, however, is that you spent considerable time and effort gathering information, casting doubt on the credibility of Major Baker and Lt. Patch, and devising evidence in an attempt to mislead me into believing that your story (which you know to be untrue) was in fact true.

I am, therefore, left with no reasonable conclusion other than you deliberately engaged in a series of compounding untruths; despite having been given several opportunities to be forthcoming with the Internal Affairs officer and me following your initial false statements to Lt. Patch.

Your propensity to tell untruths throughout this matter represents at a minimum a gross disservice to the Department, the Internal Affairs process and the community in general. At its worst, it undermines your credibility in all aspects of your employment because I have no confidence that you will be truthful about future matters, especially if your own interests (i.e. liability, reputation, income earnings, case status), large or small, are at stake.

State troopers are often called upon to testify in their capacity as troopers in a variety of cases. Opposing attorneys spend considerable effort trying to cast doubt on the credibility of the trooper by claiming that the trooper had something to gain or lose by not being truthful; something at stake. As you know, it is often the case that fact-finding comes down to the trooper's word/recollection against another's word/recollection. The department often makes serious administrative decisions that pivot, in part, on the word of the trooper. In short, I and others (managers, judges, prosecutors, and the public), need to be fully confident that, regardless of the stakes involved, a trooper will tell the truth.

I have given this situation very careful and deliberate consideration including the 12 Colleran and Britt factors and conclude that no mitigating circumstances sufficient to explain or excuse your conduct exist. Therefore, in light of the serious nature of your misconduct and the absence of sufficient mitigating circumstances, your employment with the Department of Public Safety is hereby terminated, effective immediately.  
... (State's Exhibit 18)

### OPINION

This is an appeal from the decision of the Commissioner of Public Safety to dismiss Appellant for misconduct in violation of the Employer's Code of Conduct. Appellant contends that the Employer violated Article 14 of the Contract by dismissing him. Specifically, Appellant contends that: 1) his dismissal was not based in fact or supported by just cause, 2) the Employer improperly bypassed progressive discipline, 3) the Employer failed to apply discipline with a view toward uniformity and consistency,



and 4) the Employer's decision constituted a discriminatory application of rules and regulations.

The Board is faced with the difficult task of weighing the significant responsibility of the Employer to ensure that its uniformed officers are of the highest degree of honesty and integrity versus the degree of evidence required to justify the firing of an 18 year employee with a good work record. 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). Appeal of Danforth, 27 VLRB 153, 159 (2004). There are two requisite elements which establish just cause for dismissal: 1) is it reasonable to discharge an employee because of certain conduct, and 2) did the employee have 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 Employer has the burden of proving by a preponderance of the evidence the charges against Appellant. Appeal of Penka, 21 VLRB 182, 197 (1998). Appeal of Revene, 27 VLRB 282, 331 (2004). Once the underlying facts have been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven facts. Revene, 21 VLRB at 331.

The Employer charges Appellant with being untruthful when he: 1) telephoned into dispatch on June 30, 2005, at 5:19 p.m. claiming that he was at the airport; 2) told Lieutenant Patch that he was at the intersection of Routes 7B and 103 when he telephoned dispatch at 5:19 p.m. that day; 3) spoke to Lieutenant Troidl about this incident during this internal affairs investigation; 4) spoke to Commissioner Sleeper about the incident; and 5) told Commissioner Sleeper on October 18, 2005, and

Lieutenant Troidl during the supplemental investigation of this matter that he first reported to the airport, but then left to get gas.

Based upon the Findings of Fact, we conclude that the Employer has not established any of these charges by a preponderance of the evidence. The evidence presented by the Employer is insufficient to demonstrate that Appellant, a member of the State Police with 18 years of service and no prior record of dishonest actions, acted dishonestly as charged.

To support its charge that Appellant could not have been at the intersection of Routes 7B and 103 at 5:19 p.m. as he claimed, the Employer relies on the amount of time Appellant was at the Vermont Police Academy gymnasium attempting to assist his fellow officers at the beginning of his journey to the Rutland Airport. There is a disagreement between the parties, and the evidence is in dispute, as to how long Appellant was at the gymnasium attempting to open it.

Appellant, during the investigation and in his testimony at the hearing, stated that it took approximately five minutes. The Employer contends that this took approximately fifteen minutes. The Employer is basing this time estimate on the testimony of Sergeant Sutton. During the hearing, Sutton testified that it was his “feeling” that it took between 10 – 15 minutes, and was no less than 10 minutes. Neither Sutton nor Appellant referred to a watch on the day in question as a basis for their time estimates.

We do not question the sincerity of Sergeant Sutton’s attempt to reconstruct a time estimate. Nonetheless, an estimate of time based on a feeling unsupported by the reliance on a measurement of time is not reliable. It is a thin reed to support a dismissal of a longtime employee for dishonesty. We conclude by a preponderance of the evidence

that, when all evidence in this case is considered, Appellant's time estimate has more validity.

To support its charge that Appellant could not have been at the intersection of Routes 7B and 103 at 5:19 p.m. as he claimed, the Employer further relies on then-Major Baker's observation of Appellant as they passed each other at the entrance and exit to the Rutland Shopping Center parking lot. Major Baker indicated during the investigation, and testified at the hearing, that the time he and Appellant saw each other was 5:30 p.m. or later.

Again, we do not question the sincerity of Major Baker's attempt to reconstruct a time estimate, but for the reasons herein set forth, we conclude that his estimate is not reliable. Like Sergeant Sutton, Major Baker did not refer to a watch as the basis for the time of his observation of Appellant. The only times known for certain in Major Baker's travels that evening are that he left the Rutland Barracks at 4:38 p.m. and arrived home at 6:43. In the interim, he visited two shopping centers miles apart in a busy traffic area in a search to repair his eyeglasses and made a lengthy trip home. Given these circumstances, times are too imprecise to draw a reasonable conclusion as to when Baker and Appellant encountered each other. Our examination of all the evidence results in a conclusion that Major Baker's time estimate could have been as much as 20 minutes later than the actual encounter, allowing Appellant to reach the intersection of Routes 7B and 103 by 5:19 p.m. as he claimed.

The Employer further relies on the observation of Appellant by Lieutenant Patch and his wife on Route 7 South, prior to the time Appellant turned onto West Street to go to Wal-Mart, to support its charge that Appellant could not have been at the intersection

of Routes 7B and 103 at 5:19 p.m. as he claimed. Patch testified that he did not see Appellant's vehicle travel past West Street and, within a "minute or so" of passing West Street, he picked up his cell phone to call the Rutland Barracks and discover that Appellant had signed in as working at the airport. Since the dispatch tape and Patch's cell phone records indicate that Patch's call was made at 5:22 or 5:23 p.m., the Employer contends that Appellant could not have been at the intersection of Routes 7B and 103 at 5:19 p.m. as he claimed.

This presents a direct conflict between Lieutenant Patch and Appellant since Appellant has asserted consistently since June 30, 2005, that he was at the intersection of Routes 7B and 103 when he called into dispatch at 5:19 p.m. that he was "10-7 airport". We have found by a preponderance of the evidence that Appellant reached the intersection of Routes 7B and 103 at approximately 5:19 p.m. at which time he telephoned into Rutland dispatch and stated that he was "10-7 airport". We have found that Patch and his wife's observation of Appellant on Route 7 South occurred at an earlier time, allowing Appellant to complete a trip to Wal-Mart and reaching the intersection of Routes 7B and 103 by 5:19 p.m.

A significant factor in this conclusion was that Appellant's version of events was corroborated by airline employee Leanne Hamell, a witness without personal stakes in this matter. Hamell testified that she observed Appellant's vehicle heading toward the airport on Route 103 in conformity with the timeframe claimed by Appellant. We found Hamell's explanation of events to be credible, including her reconstruction of the pertinent timeframe.

The credibility of Lieutenant Patch was weakened by his relationship with Appellant. His admitted dislike of Appellant, his mocking of Appellant to others, and his obvious dissatisfaction with the assignment of Appellant to the Rutland Airport detail made him biased, and affects his reliability as a reporter of Appellants' actions. His credibility also is weakened by the potential that his judgment was impaired by imbibing three or four beers during the afternoon of June 30.

The Employer also relies on the re-enactment video conducted by Appellant of his June 30 trip to the airport to support its charge that Appellant could not have been at the intersection of Routes 7B and 103 at 5:19 p.m. as he claimed. The Employer contends that the time it took Appellant to reach the intersection of Routes 7B and 103 during the re-enactment indicates that, even otherwise accepting Appellant's time estimates, Appellant could not have reached the intersection at the time he claimed. Appellant offers various reasons in support of making the actual trip on June 30 in less time than he did during the re-enactment video.

There are variables in the two trips that account for different times in making the trip. The most prominent variables are the speed at which Appellant drove, the volume and flow of traffic, and the amount of red lights causing Appellant to stop. In consideration of these variables and all the evidence presented in this matter, we conclude by a preponderance of the evidence that Appellant drove faster on June 30 than he did during the re-enactment video and reached the intersection of Routes 7B and 103 at 5:19 p.m. as he claims.

We finally discuss the Employer's charge that Appellant was being untruthful when he told Commissioner Sleeper on October 18, 2005, and Lieutenant Troidl during

the supplemental investigation of this matter that he reported to the airport first, and then left to get gas. We have found by a preponderance of the evidence that this charge has not been established, and that Appellant left the airport to get gas after first reporting to the airport. Our conclusion is bolstered by the consistency of the time he purchased gas with the time his vehicle was observed by Hamell on Route 103 heading toward the airport. He had sufficient time after Hamell's observation to drive to the airport, speak with the airport employee there, and then drive to the gas station to purchase gas.

The fact that Appellant indicated in his July 26 interview with Lieutenant Troidl that he did not leave the airport on June 30 after arriving there, and further told Troidl in the interview that he did not recall getting gas, does not result in a conclusion that he later fabricated a recollection that he did leave the airport to get gas. It is credible that he did not remember leaving the airport to get gas until after Troidl informed him for the first time at the July 26 interview that he had a gas slip indicating that Appellant purchased gas on June 30. It also is credible that he only recollected getting gas, and the details of it, on the day following the interview after having the opportunity to reflect on the matter. It is not unusual to recollect an event only after being presented with some detail concerning it and having an opportunity to reflect on it.

In addition to the considerations discussed above, the other evidence presented in this case by the Employer is insufficient to conclude that the Employer has met its burden of proving any of its charges against Appellant by a preponderance of the evidence. In sum, we conclude that the Employer has not established that any discipline should have been imposed on Appellant. Accordingly, Appellant should be reinstated with back pay.

## ORDER

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

1. The Appeal of Joel Davidson is sustained;
2. Appellant shall be reinstated to his position as Sergeant with the Office of Professional Development of the Vermont State Police, Department of Public Safety;
3. Appellant shall be awarded back pay and benefits from the effective date of his dismissal until his reinstatement, for all hours of his regularly assigned shift plus the amount of overtime Appellant would have worked, minus any income (including unemployment compensation received and not paid back) received by Appellant in the interim;
4. The interest due Appellant shall be computed on gross pay, shall be at the legal rate of 12 percent per annum and shall run from the date each paycheck was due during the period beginning with Appellant's dismissal, and ending on his reinstatement; interest shall be computed from the amount of each paycheck minus income (including unemployment compensation) received by Appellant during the payroll period;
5. The parties shall file with the Board by June 1, 2007, 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 by that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues

which need to be decided by the Board. A hearing on disputed issues, if any, shall be held on June 14, 2007, at 9:00 a.m., in the Labor Relations Board hearing room; and

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

Dated this \_\_\_\_ day of May, 2007, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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Edward R. Zuccaro, Chairperson

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Joan B. Wilson

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Leonard J. Berliner