

VERMONT LABOR RELATIONS BOARD

APPEAL OF:)	
)	DOCKET NO. 82-65
STEPHEN KENNEDY)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On November 3, 1982, the Vermont State Employees' Association ("VSEA"), filed an appeal with the Vermont Labor Relations Board pursuant to 20 VSA §1880(f), on behalf of Stephen Kennedy, Trooper First Class of the Department of Public Safety ("Appellant"). VSEA alleged the October 4, 1982, disciplinary action taken against Appellant by the Commissioner of the Department of Public Safety was unreasonable. The Department of Public Safety ("Department") filed an answer to the appeal on November 24, 1982.

A hearing was held before the Board on April 7, 1983. Chairman Kimberly Cheney and Member William G. Kemsley, Sr., were present for the Board; Member James S. Gilson was absent. The Department was represented by Department Counsel, Brooke Pearson. Susan Dole, a staff attorney for VSEA, represented Appellant.

At the hearing, the parties stipulated to the submission of the matter for decision by the Board on the basis of the exhibits and stipulations entered into the record at the hearing and memoranda to be submitted by the parties.

On April 21, 1983, the parties filed Requested Findings of Fact and Memoranda of Law with the Board. On April 27, 1983, the Department filed a Supplemental Memorandum of Law in response to Appellant's Memorandum of Law. Appellant filed a response to the Department's Supplemental Memorandum on April 28, 1983. On April 29, 1983, the Department filed a response to Appellant's reply memorandum.

The disciplinary action taken by the Department Commissioner against Appellant was taken subsequent to a decision by the District Court of Vermont, Unit VI, Windham Circuit, that the charges against Appellant had been proved. The facts relied on by the District Court in its decision (Appellant's Exhibit B) are not in dispute and are contained herein as Findings of Fact 2-25. The remaining facts contained herein are based on exhibits and stipulations entered into the record by the parties and admissions made by the Department in its November 24, 1982, answer to the appeal.

FINDINGS OF FACT

1. At all times relevant, Appellant was a permanent-status, uniformed member of the Department, and was entitled to all rights granted to such members by law.

2. Appellant is a senior trooper with the Vermont State Police with approximately five years experience. On Sunday, January 31, 1982, he was on duty working a day shift and while in Brattleboro received a call from the dispatcher to investigate a motor vehicle accident involving a pickup truck which appeared to have rolled over several times on Interstate 91 at mile marker 14.

3. At that time Appellant proceeded in a northerly direction on I-91. At that time there was light snow falling and the road conditions were slippery.

4. At approximately mile marker 14, Appellant saw in the southbound lane activity which indicated to him that that was the scene of the accident.

5. He proceeded northerly to approximately mile marker 16 at which time he proceeded to use a U-turn to enable him to return southbound on I-91.

6. As he entered the U-turn his headlights were on and he was displaying his blue lights.

7. The surface of the roadway in the U-turn was slush and snow covered.

8. He traveled through the U-turn in an east to west direction at a slow rate of speed along the southerly portion of the U-turn and came to a complete stop at the U-turn's intersection with the southbound lane of I-91. At that time the southbound travel lane of I-91 was extremely slippery and covered with "black ice". The passing lane, southbound, was slushy and snow covered; and the breakdown lane on the easterly side of the southbound lanes was slushy and snow covered.

9. Before proceeding into the southbound lane of the interstate from the U-turn, Appellant looked in a northerly direction and observed two motor vehicles traveling south and approaching him. These vehicles were traveling in the travel lane of the interstate and Appellant was unable to estimate their speed.

10. After looking northerly he proceeded in a westerly direction

crossing the passing and travel lane of the southbound lanes of the interstate and turned into the breakdown lane, along the westerly portion of the interstate, turning southerly and traveling for some distance in the breakdown lane of the interstate.

11. As his vehicle left the U-turn crossing the southbound lanes of the interstate, there was some spinning of his rear wheels in acceleration; but as his vehicle crossed the southbound lanes of the interstate, his vehicle was under control and continued to be under control as he turned to his left and in a southerly direction and along the breakdown lane. While traveling in the breakdown lane, Appellant accelerated in an attempt to pull out of the driving lane at which point he lost control of his cruiser and the rearend started sliding in a counterclockwise direction.

12. As Appellant pulled from the breakdown lane into the travel lane he did not look to the rear to see what cars were approaching. He was aware that the two vehicles he had seen before leaving the u-turn were approaching from his rear.

13. At the point where his cruiser began sliding, he was traveling approximately 35 miles per hour.

14. He attempted to correct the slide but was unable to do so and the cruiser proceeded across the travel lane and into the passing lane, and it was struck by an automobile driven by one Mr. Hegenberger. This vehicle was one of the vehicles which he had previously seen before exiting the u-turn. Appellant first saw the Hegenberger vehicle when it was very close to him, and he saw this out of the corner of his eye and saw it just prior to the collision.

15. The road conditions at the time of the collision in the travel lane of the southbound lanes of the interstate were extremely slippery.

16. Considerable evidence was presented with respect to the location of the Hegenberger vehicle and the other vehicle at the time they were seen by Appellant just prior to his leaving the U-turn. This evidence is conflicting and it is difficult to find what the distance was. However, the approaching vehicles were sufficiently distant from Appellant's cruiser to enable him to safely cross the southbound lanes of the interstate.

17. Considerable testimony was also received with respect to the stopping distances of motor vehicles traveling southerly on the interstate at the time at various speeds. Although this testimony is helpful, it is not completely relevant in determining whether or not those vehicles could have stopped prior to reaching the point of impact. That question is not really despositive of the issues presented in this matter. The Hegenberger vehicle, if it had taken some evasive action at the time its operator saw the cruiser leaving the U-turn, could have avoided the collision.

18. At the time Appellant's cruiser began to slide until the time of impact the cruiser was completely out of control.

19. The cruiser was traveling approximately 30 miles per hour at the time of the collision.

20. At the time in question the cruiser was equipped with snow tread tires which had a tread of 4/32 inch which is the minimum tread which the Department recommends.

21. The acceleration of the cruiser during its travel from the

breakdown lane into the travel portion of the southbound lanes caused the loss of control.

22. Appellant believed that he was responding to a situation that required urgency in that there was a high probability of injuries.

23. It is not uncommon for motorists having seen emergency vehicles or police vehicles displaying warning lights to ignore those lights and not immediately come to a stop on the right hand side of the road and Appellant was aware of that factor.

24. It is apparent that the Hedenberger vehicle did not obey the command of the law and upon seeing the flashing blue lights immediately pull to the right and come to a complete stop. In fact, the only evasive action taken by the Hegenberger vehicle was to move from the travel portion of the southbound lanes to the passing lane: If the Hegenberger vehicle had slowed and pulled to the breakdown lane, the collision would have been avoided.

25. It is not reasonable for a law enforcement officer of Appellant's experience to assume that motorists will take the precautionary measures required by 23 VSA §1050 upon seeing an emergency vehicle displaying flashing lights.

26. On April 26, 1982, the Department Commissioner preferred charges against Appellant as a result of the above incident (Appellant's Exhibit A).

27. Appellant appealed the Commissioner's action preferring charges to the Windham County District Court (Appellant's Exhibit B).

28. By decision dated September 28, 1982, the Honorable Robert

Grussing III, the Vermont District Court Judge who conducted the disciplinary hearing, reported to the Commissioner that the charges had been proved. Judge Grussing recommended to Commissioner Philbrook that "in view of the low level of (Appellant's) negligence... no disciplinary action be taken that would result in any suspension, loss of pay or benefits or lessening of responsibility. The Court does recommend that these findings be placed in his personnel file and kept there for a period of three years and that in the event that during such three year period no further findings of a violation of disciplinary rules are made, they be removed" (Appellant's Exhibit B).

29. On October 4, 1982, Commissioner Philbrook informed Appellant: "The disciplinary action imposed is that you shall forfeit one full day's pay, or as an alternative, you may choose to work one full tour of extra duty" (Appellant's Exhibit A).

30. No disciplinary action had been taken against Appellant by the Department prior to the imposition of the discipline in question here.

31. In performance evaluations done prior to the imposition of the disciplinary action here, Appellant was always given an overall rating of "consistently meets job requirements/standards", with the exception of the period July 1, 1978 - October 31, 1979, when he was given an overall rating of "frequently exceeds job requirements/standards" (Joint Exhibit 5).

32. In deciding what disciplinary action to take against Appellant, Commissioner Philbrook considered "the nature and severity of the improper conduct involved, the recommendation concerning discipline made by the

Honorable Robert Grussing, III, the Vermont District Court Judge who conducted the disciplinary hearing, and the nature and extent of disciplinary action taken in prior cases of similar nature, specifically, cases involving the operation of Department vehicles and accidents with Department vehicles". He did not recall whether or not he reviewed Appellant's personnel file; however, he was aware that Grievant's past performance evaluations had been satisfactory and that Grievant had not previously had disciplinary charges preferred against him or had disciplinary action taken against him (Joint Exhibit 1).

33. Since July 1, 1980, there have been six cases (excluding the one before us) where charges have been either admitted by or proven against Department members involving use of Department vehicles. In four of the cases, an accident was involved. In three of those cases, the member was charged with "careless use and operation of Department vehicle", and in the fourth case was charged with "use of Department vehicle in violation of Department procedure - high risk pursuit - blue light policy". In two of those cases, the disciplinary action taken was a written reprimand, in one case (involving "careless use and operation of Department vehicle") the discipline was forfeiture of six hours' pay, and no discipline was taken in the fourth case. No accident was involved in two cases. In one of those cases, the member was charged with speeding and the disciplinary action imposed was forfeiture of one day's pay or one day extra duty. In the remaining case, the member was charged with careless use and operation of a Department vehicle and the discipline imposed was forfeiture of one day's pay or one day extra duty (Joint Exhibit 2).

34. In none of the above cases had the members involved had any prior disciplinary action taken against them.

35. No evidence concerning either Appellant's past performance or prior disciplinary actions taken by Commissioner Philbrook in cases of a similar nature was presented at Appellant's disciplinary hearing, and, accordingly, Judge Grussing had no such evidence before him in reaching his recommendation as to appropriate disciplinary action.

36. At all times relevant herein, the Department's Rules and Regulations provided, in pertinent part, as follows:

Disciplinary Action means any action taken as discipline against a member by the Commissioner as a result of the member's commission of an act of misconduct or improper conduct, including a written reprimand, disciplinary transfer, disciplinary reassignment, suspension without pay, forfeiture of pay and/or other rights, demotion, dismissal or a combination thereof.

Article 1A, Section 13

Improper Conduct or Act of Improper Conduct means conduct on the part of a member which violates any provision(s) of Part B of the Code of Conduct

Article 1A, Section 15

In determining what, if any, disciplinary action to take, the Commissioner may consider the nature and severity of the misconduct or improper conduct, the member's personnel record, the recommendations, if any, of the court or hearing panel, and the nature and extent of disciplinary action taken in prior cases of a similar nature.

Article V, Section 5(b)

(Joint Exhibit 4)

OPINION

Appellant, a State Police trooper, seeks a mitigation of the disciplinary action taken against him by the Department commissioner, Paul Philbrook. Disciplinary action taken against State Police officers is governed by 20 VSA §1880, which provides, in pertinent part:

- a) Except for a temporary suspension, no disciplinary action shall be taken by the department against a member of the department without following the procedures set forth in this section.
- b) Within seven days after the delivery to a member of written charges against such member, the member may file with the district court of the circuit in which he is stationed, or with the district court, unit 5, Washington circuit, a copy of the charges. The court shall set the matter for hearing at the earliest possible date...
- d) The... district court... shall report to the commissioner whether the charges have been proved or not proved by a preponderance of the evidence. The... district court... may make recommendations to the commissioner with respect to the action he should take if the charges are proved.
- e) If the... district court shall find that the charges are not proved, any pay or other rights lost through temporary suspension shall be restored. If the... district court shall find the charges are proved, the commissioner shall take such disciplinary action as may be appropriate, including suspension, demotion or removal.
- f) The member may appeal to the state labor relations board within thirty days after the action of the commissioner.

20 VSA §1880 is clear to the extent that it does not intend the Board to conduct a de novo review of the facts of the incident leading up to the imposition of the penalty, and it grants a State Trooper the right to appeal a disciplinary action imposed by the Department to the Board. However, the statute does not address the scope of the Board's review, or the Board's authority to mitigate penalties. There is no legislative history or case law to guide us. There is no indication the

legislature intended us to have a different scope of review regarding discipline taken against State Police officers than action taken against other State employees; except that we are not to determine the facts of the incident leading up to the disciplinary action taken in State Police disciplinary matters as we do for other State employees. Accordingly, the analysis adopted by the Board in Grievance of Collieran and Britt, 6 VLRB ____ (1983), applies in this case as well with the exception of our role determining the facts of the incident leading up to the disciplinary action.

Here, the charges made against Appellant have been proven; the issue is whether the penalty imposed is within the limits of law or contract; whether it is a reasonable action within the broad discretion of management. Grievance of Goddard, ____ Vt. ____ (1983). The State Police Unit Contract is inapplicable to disciplinary actions, thus, we need only decide whether the penalty imposed is within the limits of law. Article 3, Section 2(c), Agreement between the State of Vermont and VSEA, State Police Bargaining Unit, Effective July 1, 1982 - June 30, 1984.

We conclude the Department has sustained its burden of proving by a preponderance of the evidence the penalty imposed was within the law for the offense committed. First, the facts found by the District Court conclude there was improper conduct engaged in which demonstrates a "shortcoming detrimental to the employer's interests". Appellant acted negligently by moving out of the breakdown lane into the travel lane of the interstate highway in extremely slippery conditions without looking

to the rear to determine the location of approaching cars, notwithstanding his awareness of approaching vehicles which he could not reasonably expect would take appropriate precautionary measures upon seeing his vehicle. His negligence was a contributing factor in the resulting accident. His actions demonstrated a lack of proper caution in operating his vehicle, an obvious shortcoming detrimental to the Department's interests in view of his duty as a trooper to enforce the rules of the road.

Thus, the Department has justified the reasonableness of some disciplinary action. The next step is whether the specific action imposed was within the limits of law. In Colleran and Britt, supra, we enumerated a number of factors that are relevant for consideration in determining the legitimacy of a particular disciplinary action. Factors 1, 2, 3, 4, 6 and 9 are relevant to this case, with the other factors not appearing to be important. Commissioner Philbrook considered the relevant factors and we conclude he acted reasonably in imposing the relatively minor penalty of an effective one-day suspension.

Appellant is guilty of negligence which contributed to an accident, a relatively serious offense given his duty to police safe driving procedures. We recognize mitigating circumstances exist here; namely that the offense was inadvertent and Grievant had a good prior work record with no past disciplinary problems. However, the penalty imposed here is relatively minor and within management's discretion; even given a good prior work record. A good work record does not insulate an employee from any disciplinary action.

We further conclude Grievant was on fair notice his conduct could be grounds for discipline since it is implied in the very nature of his job that he not be careless in the operation of his motor vehicle.

Also, it was not unreasonable for Commissioner Philbrook to impose a more severe penalty than recommended by District Court Judge Grussing. The statute clearly intends the Commissioner will have a great deal of discretion in imposing disciplinary action, in providing the "Commissioner shall take such disciplinary action as may be appropriate". 20 VSA §1880(e). On the other hand, the district court judge, while having authority to determine whether charges have been proved, has only a statutory function to "make recommendations" with regard to any disciplinary action.

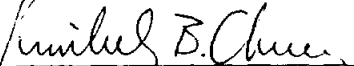
ORDER

Now, therefore, based on the foregoing findings of fact and for all the foregoing reasons, it is hereby ORDERED:

The Appeal of Stephen Kennedy is DISMISSED.

Dated this 9th day of June, 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


William G. Kemsley, Sr.