VERMONT LABOR RELATIONS BOARD

APPEAL OF:	)	
	)	DOCKET NO. 22-34
DAVID ROOS	)	

FINDINGS OF FACT, OPINION, AND ORDER

David Roos ("Mr. Roos" "Appellant"), a Seargeant with the Vermont State Police ("VSP"), appeals the decision of the Commissioner of the Department of Public Safety ("State" "Employer") to terminate him for misconduct. Appellant claims the Employer terminated him without just cause in violation of the Collective Bargaining Agreement ("CBA") between the State and the Vermont Troopers' Association, Inc., effective July 1, 2020, through June 30, 2022.

The Vermont Labor Relations Board ("Board") held hearings on March 30, 31, and April 27, 2023, via Microsoft Teams, before Board members, David Boulanger, Acting Chairperson, Alan Willard, and Michelle Phelps. The Department was represented by Assistant Attorney General William Reynolds, Esq. The Appellant was represented by Pietro Lynn, Esq., of Lynn, Lynn, Blackman & Manitzky, P.C. The parties filed post-hearing briefs on July 21, 2023.

FINDINGS OF FACT

1. Appellant was hired by the Vermont State Police in July 2007 as a Trooper and was promoted to the rank of Sergeant in 2014. Throughout his tenure he received positive performance evaluations.
2. Appellant received extensive training on State policies, procedures, and rules regarding sexual harassment, discrimination, and unprofessional conduct. Appellant's employee training reports from 2009 to 2017 and 2017 to 2021 demonstrate that he completed numerous training courses on preventing harassment and discrimination in the workplace.

3. Appellant worked at the St. Johnsbury barracks where he supervised Troopers. The line of command or hierarchy at the St. Johnsbury barracks extended from Troopers, to Sergeant, to Lieutenant. Appellant worked primarily during the night shift.
4. Appellant received a written reprimand in 2014, for failing to enter information about a missing teenaged girl into the Amber alert, or NCIC database.
5. In 2013, Appellant responded to a domestic call during which he seized two guns from the home. The two guns were secured in the evidence locker. One of the guns, described as a folding gun, was subsequently determined not to be illegal and Mr. Roos removed it from the evidence locker. In 2018, Mr. Roos discovered the folding gun in his home and returned it to the Vermont State Police barracks.
6. Once the gun was discovered, Mr. Roos received discipline for the following three violations of the Vermont State Police Code of Conduct. He received a five-day suspension without pay for violation of Part 11 B, Conduct, Section 3.0 (Conduct). He also received four days loss of annual leave for violation of Part C, Section 20 (Violation of Rules). Finally, he received a letter of reprimand for violation of Part C, Section 12.0 (Neglect of Duty).
7. On May 16, 2022, the Department of Public Safety terminated Appellant for misconduct and gross misconduct. The termination letter provides that Appellant "failed to fully and truthfully answer questions posed to [him] during an Internal Affairs investigation" he "engaged in discrimination and sexual harassment against his female subordinates based on gender" as set out in three preferral of charges, and the conduct of his subordinates in the three "preferral of charges constitutes his second violation for unbecoming conduct." State's Exhibit 15
8. Article 14 of the CBA provides that the Commissioner of the Department of Public Safety may take disciplinary action against an employee for violation of the Vermont State Police Code of Conduct. "No disciplinary action shall be taken without just cause." State's Exhibit 29.

9. The Vermont State Police Code of Conduct, General Order 203, Part B, Section 3.0 states:

> 3.1 Members shall conduct themselves with propriety and dignity at all times, both on and off duty. No member shall conduct himself/herself in a manner which is unbecoming to a Vermont State Police Officer. Conduct unbecoming an officer is that type of conduct which could reasonably be expected to damage or destroy public respect for or confidence in members of the Department or which impairs the operation or efficiency of the Department or the ability of a member to perform his/her duty.
>
> 3.2 Discipline
> A. 1st Offense – Letter of Reprimand – 5 days suspension without pay
>
> B. Subsequent Offenses – 5 days suspension without pay – Dismissal

State's Exhibit 26.

10. Vermont State Police Code of Conduct, General Order 204, Part C, Section 20.0 (Violation of Rules) states:

> 20.1 Members shall not commit any act or omit any act which constitutes a violation of any Department General or Special Order, Rule or Regulation, Policy or Procedure, or other directive.
>
> 20.2 Discipline 1st Offense – Letter of Reprimand – 2 days loss of AL
> Subsequent Offense – 3 days loss of AL – 4 days loss of AL.

State's Exhibit 27.

11. Vermont State Police Code of Conduct, General Order 202, Part A, Section 14.0 (Truthfulness) states:

> 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
>
> A. 1st Offense – Dismissal

State's Exhibit 27.

12. Vermont State Police Code of Conduct, General Order 202, Part A, Section 7 (Discrimination) states:

> 7.1 No member shall discriminate in favor of or against any person or other member on the basis of race, religion, politics, national origin, sex, gender identity, sexual orientation, lifestyle, or similar personal characteristics. Conduct which violates VPS-DIR-118 (Sexual Harassment) may constitute discrimination.
>
> 7.2 Discipline
>
> A. 1st Offense – 4 days suspension without pay – Dismissal
> B. Subsequent Offense – Dismissal

State's Exhibit 25.

13. The Vermont State Police Directive regarding Sexual Harassment VSP-DIR-118 (Sexual Harassment) provides in pertinent part:

> 1.0 Purpose:
> 1.1 The Vermont State Police prohibits sexual harassment.
> 1.2 Sexual harassment violates an individual's basic civil rights, undermines the integrity of the workplace, and adversely affects workers and clients whether or not they are direct subjects of harassment.
> 1.3 Sexual harassment is a form of discrimination on the basis of sex and/or gender identity and is, therefore, prohibited in the work place; or at any employer-sponsored event or activity during or after business hours, by both state and federal law as well as the collective bargaining agreements between the State of Vermont and the exclusive bargaining entities for State employees, including respective collective bargaining agreements between the State of Vermont and the Vermont Trooper's Association and the Vermont State Employees Association. 1.4 It is also unlawful to retaliate against an employee for filing a complaint of sexual harassment or for cooperating in an investigation of sexual harassment.
>
> 2.0 Policy
> 2.1 All employees, including but not limited to staff, supervisors, managers, and appointing authorities, are expected to comply with this policy and take appropriate measures to ensure that sexual harassment does not occur, and are encouraged to report it when it does. Disciplinary action, up to and including dismissal, will be taken against any employee who engages in sexual harassment or who otherwise violates this policy.
> 2.2 In addition, every manager and supervisor within the department is responsible for providing a work place free from sexual harassment.
> 2.3 Managers and supervisors are responsible for ensuring that all new employees receive a copy of this policy; for posting this policy in prominent and accessible locations in the work place; and striving to provide employees with

training designed to educate the work force about what sexual harassment is and how to prevent it in the workplace.
2.4 Any manager or supervisor who fails to treat sexual harassment complaints in a manner consistent with the terms of this policy may be subject to disciplinary action up to and including dismissal.

3.0 Definitions
3.1 Sexual Harassment 1) The prohibition of sexual harassment is found in the Vermont Statutes at Title 21 § 495h. Sexual harassment is a form of discrimination based on sex (and/or gender identity) and is defined in Title 21 § 495d (13). 2) Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when: a) submission to such conduct is made either explicitly or implicitly a term or condition of employment; or b) submission to or rejection of such conduct by an individual is used as a component of the basis for employment decisions affecting that individual; or c) the conduct has the purpose or effect of unreasonably interfering with an individual's work performance or of creating an intimidating, hostile, or offensive work environment. 3) Sexual harassment can be verbal, physical, auditory, and/or visual. It can be either subtle or overt. 4) Sexual harassment refers to behavior that is not only unwelcome, but which can also be personally offensive, fails to respect the rights of others, lowers morale and interferes with work effectiveness, or violates a person's sense of well-being. 5) Both men and women can be the victims of sexual harassment and sexual harassment can occur in instances where the parties are both opposite and same sex. It can occur in situations where one person has authority (or the appearance of authority) over another, and can also occur between persons at the same managerial or pay grade, that is persons who are equals in terms of responsibility.

4.0 Prohibited Conduct
4.1 Managers, supervisors, and employees with the appearance of authority shall not threaten or insinuate, either explicitly or implicitly, that an employee's submission to or rejection of sexual harassment will in any way affect the employee's employment, evaluations, wages, advancement, assigned duties, shifts, or any other condition of employment or career development.
4.2 Sexual harassment by co-workers is also unlawful and prohibited by applicable federal and state laws and the collective bargaining agreements, even though the loss to the victim may not involve the tangible benefits outlined above. Persons found to have engaged in such behaviors may be subject to disciplinary action up to and including dismissal.
4.3 Employees should be aware of the growing role of social media as a platform for illegal and offensive behavior, including the compiling or sharing of images or words via computer or cell phone, or posts on Facebook, Twitter and any other social media outlet. Refer to VSP-DIR-123 Social Media Policy.

5.0 Responsibility
5.1 Supervisors are responsible for providing a workplace free from sexual harassment. 1) Supervisors shall ensure that all employees whom they supervise are familiar with this policy; 2) Respond to sexual harassment complaints consistent with this policy and VSP-GEN-205; 3) Every supervisor who learns

> of an incident of harassment either witnessed or reported has a duty to report the incident; 4) Supervisors must intervene in observed or reported act of sexual harassment and take immediate appropriate steps whether or not the member falls under their direct supervision; 5) ANY supervisor who does not deal with sexual harassment complaints consistent with the terms of this policy shall be subject to disciplinary action.

State's Exhibit 28.

14. Appellant was stationed as the duty Sergeant at the St. Johnsbury barracks. At all times relevant to his Grievance, Appellant was a supervisor of the three female State Troopers, Kimberly Harvey, Elizabeth Plympton, and Domonique Figueroa, that made allegations of sexual harassment against him.
15. On December 4, 2020, into the morning of December 5, 2020, Trooper Figueroa, a female Trooper working out of the St. Johnsbury barracks ripped her paints in the performance of her duties. She called Appellant before returning to the St. Johnsbury barracks alerting him that she had split her pants. Appellant recommended she go home to change. Because she lives an hour from work, Trooper Figueroa said it would take too much time and she had only an hour left to her shift. She returned to the barracks and stopped outside the office where Appellant was working and revealed the split which extended along the inseam from her thigh to the groin area.
16. Trooper Figueora recalls that when she showed her ripped pants, Appellant said something like "Do you have a sister with an ass like that."
17. Trooper David Hastings was also present in the barracks during the exchange between Trooper Figueora and Appellant. Trooper Hastings described the exchange as banter. After Figueroa revealed her ripped pants, Appellant said "something to the effect of, that's because you have thick thighs, Figueora. Do you have a sister I could date, in a joking manner."
18. Appellant disputes that he made this comment, a comment like that, or mentioned the word "ass" or referenced her buttocks or behind. He testified that he said something like she won the battle over her pants, or a similar comment alluding to her fitness and strength. He recalled the

other male with him at the time also said something trying to make light of the situation and may have said something like he was not interested, but if she had a sister he could date. Appellant believed whatever was said was not sexually explicit and appeared intended to make the situation less awkward.

19. After the incident, Trooper Figueroa tried to avoid Appellant. If he were at the barracks, she would avoid the barracks because she did not want any awkward interactions with him. When she needed to use the restroom, she found alternative public locations like convenience stores or slip quickly in and out of the barracks.
20. On 4/29/2021, Trooper Kimberly Harvey was standing or leaning over a desk entering information into a computer at the St. Johnsbury barracks. While entering information in the computer, she heard something behind her, and Appellant placed something into her back pocket. She felt it was inappropriate and was embarrassed. Appellant then removed the item from her back pocket.
21. Appellant admits that he placed something, a key, or a card, into Trooper Harvey's back pocket and then removed it. He could not answer why he would need to place keys or a card in Trooper Harvey's back pocket.
22. Trooper Harvey testified that the encounter made her feel like she had to answer for being sexualized in the work environment.
23. On the same evening, Trooper Harvey initiated a joke to commemorate the small quantity of drugs seized in an arrest. She and other Troopers staged a scene featuring the small amount of evidence for photographing. The drugs and other evidence were placed on a table along with the case number, and Appellant's K-9. As the picture was being taken, Trooper Harvey pulled down her lower lip to expose her lip tattoo for the photograph. Appellant said, "that's hot."

24. Appellant does not recall saying “that’s hot” in response to seeing the tattoo or the staged tableau. He does recall that Trooper Harvey was joking and laughing during the setup and photographing.
25. At around the same time, Trooper Harvey and Appellant both needed to make-up their firearms qualification test. They made a bet on which of the two would perform better. Whomever received the lower score would bring cupcakes in for the other. After she received a lower score and agreed to bring in cupcakes, Trooper Harvey kept forgetting to bring in cupcakes. As time progressed and Trooper Harvey kept forgetting to bring in cupcakes, Appellant expressed that at this point I have something else in mind. A few moments later, he said he wanted a Great Dane puppy.
26. After Appellant said he had something else in mind, Trooper Harvey felt that was a leading comment and was not certain what would follow, whether it would be sexual innuendo or something else.
27. Appellant did not make a sexual comment to Trooper Harvey, instead he requested a Great Dane puppy.
28. Trooper Plympton started at the St. Johnsbury barracks in January 2021. On November 2, 2021, Trooper Plympton came into the barracks after an arrest when Appellant asked her to come to the Sergeant’s room. She alerted him that she “was hot” a phrase meant to signal that her body camera was still activated. She then went to her patrol car to place the camera in its dock in the police cruiser. When she returned to the barracks and the Segreant room she told Appellant she was no longer recording, or no longer hot. Appellant said that she was “still hot.” Trooper Plympton felt awkward and tried to make light of the comment and responded that she was “lukewarm at best.”

29. Appellant has no memory of the event and disputes that he used such language with Plympton. He acknowledges that joking among the State Police officers was common, especially since they worked the night shift, and the job was stressful and challenging.
30. In November 2021, Appellant was talking with staff about coverage over Christmas in the Derby barracks. Christmas coverage is based on seniority and Trooper Plympton, the newer staff member, was responsible for covering the Christmas holiday. On Christmas, Troopers were historically allowed to stay at home with their families as long as they were available for calls. Trooper Plympton wondered if she could cover from her home, but Appellant explained that she could not because she lived too far away. He presented options to her including that she could stay in the barracks. He also suggested that she make friends with someone in the Derby area and treat their house as her house and be ready for calls. Appellant tried to convey that she had to be ready for calls.
31. Trooper Plympton testified that Appellant said that she had to keep her clothes on. Trooper Fecher was part of the conversation and also heard Appellant say that Trooper Plympton should keep her clothes on. He thought it was a poor choice of words but took it to mean that she should keep her uniform on.
32. Appellant denied that he said keep your clothes on but recalls answering Trooper Plympton's questions trying to explain the latitude she might have in covering the shift. He attempted to convey that she should be prepared to respond to calls. During the investigation of this incident, Appellant denied making the statement or a statement like that.
33. On November 21, 2021, Trooper Plympton had questions for Appellant about a domestic assault case. Because of the nature of the conduct between the domestic partners, Trooper Plympton questioned whether the conduct could be charged as a sexual assault instead of a domestic assault. The male attempted to initiate sexual intercourse with the complainant and the complainant had indicated she did not want to engage in sexual intercourse. During the

exchange the male hit the female in the breast injuring her. Appellant explained that a sexual assault charge would be more difficult to prove. In explaining this point, Appellant used himself and Trooper Plympton as examples. According to Trooper Plympton, Appellant described that if he and Trooper Plympton were "getting it on" and you asked me to hit you and the cops came to my house and asked why I hit you, I would say that you wanted me to hit you. According to Trooper Plympton Appellant gestured or moved his hips back and forth during this exchange.

34. The exchange made Trooper Plympton feel uncomfortable.

35. Appellant admits that used himself and Trooper Plympton as examples to explain the difference in the two offenses and the elements of each crime. In retrospect, he wished he had not. Appellant was clear that he would not want Plympton or any other trooper to feel uncomfortable with this supervision

36. Sometime in November 2021, Trooper Plympton was talking with other Troopers about whether a new recruit would be stationed in St. Johnsbury. Trooper Plympton indicated that this new recruit could not be stationed in St. Johnsbury because she had a relationship with him when she was a teenager and that there was a policy against working with significant others or former significant others. According to Trooper Plympton, Appellant joined the conversation and asked Trooper Plympton if she had lost her virginity to this new recruit. He also asked how old she was when she lost her virginity.

37. Trooper Plympton tried to brush off the questions which made her feel uncomfortable or violated. She did not welcome the comments by Appellant. Because of Appellant's rank, Trooper Plympton did not tell him that these comments were unwelcome. She felt she needed to respond to his questioning because he was a Sergeant and outranked her.

38. Trooper Schrauf was present during the conversation. He did not recall all of the details of the conversation, but testified that the two were speaking about something "along the lines of"

virginity. He recalled Appellant asking whether he took your virginity, then later asked when she lost her virginity. Trooper Schrauf stated that the conversation about the new recruit began when Plympton approached Appellant, expressing her objections to him. Thereafter, Appellant raised questions about the relationship between Plympton and the new recruit and the nature of their relationship.

39. In his investigation interview, Trooper Schrauf stated that Appellant and Plympton "were talking about something regarding the lines like virginity." Trooper Schrauf reported he heard Appellant say something like: "Did you guys, you know, did you have sex?" "Or did you guys lose your virginity." Those were the "kind of questions" he heard.
40. As a result of the interactions with Appellant, Trooper Plympton began saving paperwork that needed approval or authorization for a time when a Sergeant other than Roos was in the barracks. She gave her arrest packets to this other Sergeant. She also avoided going to the St. Johnsbury barracks to print out tickets or use the bathroom when Appellant was there.
41. Trooper Plympton was familiar with the sexual harassment policy and was aware that she could report sexual harassment to someone other than Appellant.
42. Trooper Figueroa is Puerto Rican. Appellant positioned a Puerto Rican flag on which he inserted a picture of a Chihuahua over Trooper Figueroa's desk. Appellant also placed a post-it on a jar of Fluff, which said product of Puerto Rico
43. On December 7, 2021, Acting Lieutenant Owen Ballinger filed a complaint to the Office of Internal Affairs indicating that Appellant "had potentially sexually harassed three female troopers under his charge."

Investigation

44. The Internal Affairs Unit opened three investigations were open related to the allegations of sexual harassment against each of the three female State Troopers: 21VSPIA-0149, (Figueroa), 21VSPIA-150, (Harvey), and 21VSPIA-0151, (Plympton).

45. On December 7, 2021, Colonel Matthew Birmingham notified Appellant that he was suspended from duty, "[i]n light of serious and credible allegations of misconduct and/or improper conduct on your part." State's Exhibit 2. The letter did not advise Appellant of the specific allegations against him.

46. Internal Affairs Officer Lieutenant Robert McKenna conducted the investigations into the allegations of sexual harassment.

47. On February 1, 2021, Investigator McKenna met with Appellant. The Investigator asked questions about the St. Johnsbury barracks and Appellant's relationship with the three female Troopers. He did not identify or describe the specific allegations raised by the three female Troopers.

48. Appellant recalled Officer Figueroa coming into the office with ripped pants and he tried to make light of the situation to lessen the embarrassment for her. He initially claimed he remarked about her fitness and strength and that she was too strong or powerful for her pants. Appellant believed that Lieutenant Letourneau was in the area and may have made a comment to Officer Figueroa to make it less awkward for her. Appellant did not recall anyone using the term "ass" or a comment being made referencing Trooper Figueroa's sister or whether she "had an ass like that."

49. Appellant also disclosed that he put a picture of a Chihuahua dog on a Puerto Rican flag he had printed and placed it near Trooper Figueroa's desk. He shared that making the flag followed a conversation he had about dogs with Trooper Figueora. He said, attempting to be funny, that the Chihuahua was the national dog of Puerto Rico. Trooper Figueroa said that it was the national dog of Mexico.

50. Appellant did not recall saying "that's hot" after Trooper Harvey exposed her inner lip tattoo. He did recall being shocked.

51. Regarding Trooper Harvey, he recalled putting something in her back pocket. He thought her hands were full and he recalled retrieving something for her and placing it in her back pocket. He thought he retrieved her keys then returned them to her pocket. He did not touch her body while doing that.
52. Regarding the competition with Trooper Harvey over the firearms qualifications, he recalled that he won, and she did not bring in the cupcakes and it became a running joke, whether and when she would bring in cupcakes. He said he suggested instead that she bring in a Great Dane as a joke.
53. When discussing Trooper Plympton, Appellant indicated he had no personal relationship with her outside of work, and that he had worked with her on night shift and approved her cases.
54. Appellant did not recall the comment Trooper Plympton said he made about her being still hot. Regarding the coverage of the Derby area. He recalled providing an overview of the requirements to stay "geared down" but to be prepared to throw on her duty belt. He did not recall saying you have to keep your clothes on.
55. Regarding the allegation involving his advising Trooper Plympton on when it would be appropriate to charge sexual assault in a domestic assault situation, Appellant explained that he tried to differentiate the types of charges that could be brought, but that sexual assault was likely not appropriate. He recalled inviting her to talk to the state's attorney and using several examples to differentiate the different crimes. He used a tiered approach to explain different types of encounters or relationships and how they could be charged. He recalled mentioning the two of them and explaining that because he had a position of power over her that might warrant a different offense. After prompting from the investigator, he acknowledged that one of the examples included a relationship where one partner was harmed during sex, and Appellant explained that if that were part of their relationship to engage in rough sex, it might be hard to show lack of consent. Appellant stated that during that portion of the discussion he

did not use he and Trooper Plympton as examples. He did not intend to make her feel uncomfortable, he was trying to differentiate the possible scenarios that could influence the charging decision.

56. Appellant recounted his recollection about the discussion involving a new recruit with whom Trooper Plympton had a past relationship. Apellant recalled that Trooper Plympton was upset because she did not think she should have come up in the background check for the new recruit because the relationship was insignificant and did not warrant mention. Appellant recalls telling Plympton that the staff at St. Johnsbury liked her and did not want her to feel nervous or uncomfortable about the possibility of having to work with the new recruit. He denied asking her when she lost her virginity or if "she lost her virginity" to the new recruit. Appellant did not understand her strong reaction if the relationship was insignificant.

> Appellant: Like, the conversation with the – like, we talked about the are you the one, or is he the one, and I remember like having some clarification about their relationship, and she kept coming back to she didn't consider it any type of relationship, and I remember it not matching the way she was emotional about it, that type of thing. I don't remember asking her, I don't think that I asked her about if she lost her virginity to him. I know it seemed like he was connected to her, so I don't know if I asked if he was a virgin before they were together. I don't know if I did ask that direction, but not the other direction.
> Q: About her losing her virginity.
> A. To him, right

State's Exhibit 7 (Transcript of February 1, 2022, Interview with David Roos)

57. On February 17, 2022, Appellant was interviewed again by Investigator Mckenna. During that interview, Investigator McKenna asked Appellant if he put a post-it on a jar of Fluff designating it as "product of Puerto Rico" and placing it on Trooper Figueroa's desk. Appellant recalled that he did not remember exactly but could recall doing something like that as part of friendly banter. He denied ever making a comment to or about Trooper Figueroa that she was a freak.

58. On March 16, 2022, Commissioner Michael Schirling ordered a fourth investigation to be opened, 22VSPIA-0028, investigating whether Appellant was untruthful during the

investigation into the allegations involving comments made to or about Trooper Figueroa when her trousers were ripped, 21VSPIA-0149. The new or fourth investigation involved the allegation that Appellant had indicated that Letourneau was the person who had made a comment to Figueroa following her pants ripping.

59. On March 21, 2022, Appellant was interviewed a third time by Investigator McKenna on the subject of the untruthful allegation. Appellant indicated that he was mistaken when he said Lieutenant Letourneau was there on the evening of the ripped uniform. Appellant could not recall who was at the barracks on that night but believed that the other person with him was male. After going through the roster of people working that night, he could not identify or recall who was with him or might have said something to Figueroa that night. He said he was "lamenting that I think that it was Letourneau or thought that it was Letourneoau. I like Jason, you know, we had conversations about me not even wanting to name him because I'm not trying to get somebody else in trouble." State's Exhibit 7. He explained his further

> But I definitely wasn't trying to lie or deflect investigation, or place blame on Jason unrightfully so. And if anything, I had hesitation about, you know, even naming him, and I think part of that hesitation was the lack of a hundred percent certainty that it was, in fact, him. There is that the ambiguity of my thought it was him, but I'm not certain.
>
> Id.

60. Despite repeated prompting from the investigator about other staff or males in the station, Appellant could not identify and did not name another person that might have made a comment about or in response to the ripped trousers.

61. In response to the investigation, on April 20, 2022, Commissioner Schirling served on Appellant four preferral of charges in the four internal investigations which provided in pertinent part:

> 21VSPIA-0149
> Based on an Internal Affairs (IA) investigation conducted by Lieutenant Robert McKenna, and as set out more fully below, you engaged in conduct that violated the Vermont State Police Code of Conduct. Specifically, in December of 2020, you engaged in discrimination, sexual harassment, and unbecoming conduct by making

a sexually harassing statement to Trooper Figueroa. You also engaged in discrimination by making comments about Trooper Figueroa's nationality. These behaviors represent violations of Vermont State Police (VSP) policy as set forth in VSP-GEN-202, Part A, Section 7 (Discrimination), VSP-GEN-203, Part B, Section 4.01 (Conduct), and VSP-GEN-204, Part C, Section 20.0 (Violation of Rules/Sexual Harassment). As a consequence and in accordance with the Vermont State Police Code of Conduct, absent any extenuating or additional mitigating factors presented, it is my current intention to impose the disciplinary action of dismissal.

State's Exhibit 8.

21VSPIA-0150
Based on an Internal Affairs (IA) investigation conducted by Lieutenant Robert McKenna, and as set out more fully below, you engaged in conduct that violated the Vermont State Police Code of Conduct and Vermont State Police Rules. Specifically, you engaged in discrimination and unbecoming conduct by making sexually harassing comments and sexual harassment in violation of VSP-GEN-202, Part A, Section 7 (Discrimination), VSP-GEN-203, Part B, Section 3.0 (Conduct), an VSP-GEN-204, Part C, Section 20.0 (Violation of Rules/Sexual Harassment). As a consequence and in accordance with the Vermont State Police Code of Conduct, absent any extenuating or additional mitigating factors presented, it is my current intention to impose the disciplinary action of dismissal.

State's Exhibit 9.

21VSPIA-0151
Based on an Internal Affairs (IA) investigation conducted by Lieutenant Robert McKenna, and as set out more fully below, you engaged in conduct that violated the Vermont State Police Code of Conduct. Specifically, in November 2021, you engaged in discrimination and unbecoming conduct by making sexually harassing statements to Trooper Plympton, and you sexually harassed Trooper Plympton in violation of Vermont State Police (VSP) policy as set forth in VSP-GEN-202, Part A, Section 7 (Discrimination), VSP-GEN-203, Part B, Section 3.0 (Conduct), and VSP-GEN-204, Part C, Section 20.0 (Violation of Rules/Sexual Harassment). As a consequence and in accordance with the Vermont State Police Code of Conduct, absent any extenuating or additional mitigating factors presented, it is my current intention to impose the disciplinary action of dismissal. *State's Exhibit 10.*

22VSPIA-0028
Based on an Internal Affairs (IA) investigation conducted by Lieutenant Robert McKenna, and as set out more fully below, you engaged in conduct that violated the Vermont State Police Code of Conduct. Specifically, you provided untruthful information during the course of your Internal Affairs investigation in violation of the Vermont State Police Code of Conduct, General Orders 202, Part A, Section 14.0 (Truthfulness). As a consequence and in accordance with the Vermont State Police Code of Conduct, absent any extenuating or additional mitigating factors presented, it is my current intention to impose the disciplinary action of dismissal.

State's Exhibit 11.

62. On May 5, 2022, Commissioner Schirling conducted a Loudermill hearing at which Appellant appeared with his counsel.
63. The employer prepared a twelve-factor analysis examining the preferred charges against Appellant to determine whether just cause exists to terminate him.
64. After reviewing the twelve-factor analysis, Commissioner Schirling decided to terminate Appellant. Appellant was dismissed from his position on May 16, 2022.

OPINION

Appellant appeals the decision of the Commissioner of Public Safety to dismiss him for misconduct in violation of the VSP Code of Conduct. Appellant claims the Employer dismissed him without just cause in violation of the Collective Bargaining Agreement ("CBA").

In evaluating just cause for termination under the applicable CBA, the Board must determine whether the employer acted reasonably in discharging the employee for misconduct. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). Just cause for dismissal is some substantial shortcoming detrimental to the employer's interests which the law and sound public opinion recognize as a good cause for dismissal. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). The ultimate criterion of just cause is whether an employer acted reasonably in discharging an employee for misconduct. Id. There are two requisite elements which establish just cause for dismissal: 1) it is reasonable to discharge an employee because of certain conduct, and 2) the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. Id.

In carrying out our function to hear and make a final determination on whether just cause exists, the Labor Relations Board determines *de novo* and finally the facts of a particular dispute, and whether the penalty imposed on the basis of those facts is within the law and the contract. Grievance of Colleran and Britt, 6 VLRB 235, 265 (1983). The burden of proof on all issues of fact required to establish just cause is on the employer, and that burden must be met by a preponderance of the

evidence. Id. Once the underlying facts have been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven facts. Id. at 266.

Appellant was terminated for engaging in sexual harassment of three State Troopers, discrimination on the basis of sex and national origin, conduct unbecoming and providing untruthful information during the investigation into his misconduct.

Sexual Harassment and Sex or Gender Discrimination

The Board turns first to the allegations of sexual harassment against Troopers Harvey, Plympton, and Figueroa. Sexual harassment is a form of sex discrimination and "means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when . . . the conduct has the purpose or effect of unreasonably interfering with an individual's work performance or of creating an intimidating, hostile, or offensive work environment." VSP -DIR-118, Section 3.

The State has proven by a preponderance of the evidence that Appellant engaged in sexual harassment against Troopers Plympton, Harvey, and Figueroa, in violation of VSP-DIR-118. Regarding the allegations involving Trooper Plympton, the Board finds the testimony of Troopers Plympton and Schrauf to be consistent and credible. Both described Appellant asking Trooper Plympton about her past romantic and sexual experience with a new recruit. Appellant concedes he asked a series of questions of Trooper Plympton about her first love or whether the new recruit was her first love. Although denying he used the term virgin or virginity in the conversation, he acknowledged asking questions trying to elicit the extent of their relationship. The scope of the conversation in front of other staff was inappropriate and the Board finds it more likely than not that Appellant asked questions about her sexual history. The conversation and the language used in the conversation was sexual in nature and offensive.

Appellant admits he placed an item in the back of Trooper Harvey's pants and then removed the item. Appellant believes there was some form of communication or gesture between them before

he placed then removed something from her back pocket. Appellant could not recall whether or what the gesture or communication was. Trooper Harvey was clear that she did not consent to nor indicate that she wanted Appellant, her supervisor, to place something in the back pocket of her trousers and then remove it. The action was unwelcome, offensive, and failed to respect the autonomy or rights of Trooper Harvey.

Aggregating the testimony recounting the exchange regarding Trooper Figueroa's ripped pants, the Board finds that Appellant alluded to Trooper Figueroa's body or body shape when commenting about the ripped pants and questioned whether she had a sister he could date. As a result of Appellant's comment, Trooper Figueroa felt awkward and offended. Troopers Figueroa and Hastings both testified that Appellant commented on her body and made a reference to her sister. Trooper Hastings recalled that Appellant commented on her thick thighs and asked if she had a sister he could date. Trooper Figueroa testified that Appellant asked if she had a sister with an ass like that he could date. Appellant himself recalls a similar comment being made, a remark about Figueroa's body, and an awkward request or inquiry into whether she had a sister the speaker could date. Because Appellant attributed the comment to an officer who was not at the barracks that night, and both Trooper Hastings and Trooper Figueroa are certain that Appellant referenced her body and sister, the Board finds their testimony more credible on the source of the statement. Appellant as the supervisor should not have commented on Trooper Figueora's body or attempted to make a joke about her physical attributes. This incident in combination with Appellant's actions against Trooper Harvey and Plympton supports the finding that Appellant engaged in sexual harassment.

Appellant's actions caused the three Troopers to avoid him and interfered with their ability to perform their jobs. Troopers Plympton and Figueroa delayed submitting their paperwork until a different Sergeant was available to review their work. Trooper Plympton avoided printing off tickets if Appellant was at the St. Johnsbury barracks. Trooper Harvey tried to avoid being at the barracks when Appellant was there to avoid awkward conversations or interactions. Trooper Figueroa avoided the

barracks even when needing to use the restroom. Appellant engaged in unwelcome conduct or actions of a sexual nature which had the effect of unreasonably interfering with the female Troopers work performance and created a hostile work environment in violation of the VSP sexual harassment directive.

Sexual harassment is a form of sex or gender discrimination. By proving by a preponderance of the evidence that Appellant has engaged in sexual harassment, it has also proven that Appellant engaged in sex or gender discrimination. VSP -GEN-202, Part A, Section 7.

Race or National Origin Discrimination

The State has not proven by a preponderance of the evidence that Appellant discriminated against Trooper Figueora on the basis of her ethnicity or national origin. Although Hispanic and individuals of Puerto Rican descent can bring an action for discrimination, the State has not proven nor alleged that she suffered an adverse employment action as a result of Appellant's actions. In addition to showing that the Figueroa is a member of a protected class, through her Hispanic or Puerto Rican background, to demonstrate discrimination requires a showing the employee suffered an adverse employment action and that the circumstances surrounding the adverse employment action support an inference of discrimination. See Kwon v. Univ. of Vermont & State Agric. Coll., 912 F. Supp. 2d 135, 142 (D. Vt. 2012); Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 25, 176 Vt. 356.

The cases cited by the State to support that Appellant engaged in race or national origin discrimination both outline the required elements to prove a prima facie case of discrimination on the basis of race or national origin under Title VII of the Civil Rights Act of 1964. "To succeed under this section [of Title VII] employees must prove that they suffered an adverse employment action that was at least partially motivated by the employer's animus to their protected status." Ortiz-Diaz v. U.S. Dep't of Hous. & Urb Dev., 961 F.Supp.2d 104, 110-11(D.D.C. 2013) (citing 42 U.S.C. 2000e-2(m)). See Mulero-Rodriques v. Ponte, Inc 98 F.3d 670, 673 (1st Cir. 1990) (to establish a prima facie case of

national origin discrimination, plaintiff of Puerto Rican descent must show they suffered adverse action).

Although Ms. Figueora is a member of a protected class, there was no evidence that she suffered an adverse employment action motivated by or as a result of Appellant's slurs and actions. Trooper Figueora did not testify that the comments resulted in an adverse employment action. She was offended because she believed Appellant was conflating or confusing Mexico and Puerto Rico and suggesting she was from Mexico rather than Puerto Rico. Although Appellant's misplaced and inappropriate attempt at humor displayed poor judgment, there was no evidence presented that he took any adverse employment action against Trooper Figueroa on the basis of race or her national origin. Absent evidence or a demonstration of an adverse employment action, the State has not proven by a preponderance of the evidence that Appellant discriminated against Figueora.

Dishonesty

The Employer has proven by a preponderance of the evidence that Appellant was not truthful when discussing the events about Figueroa's ripped pants with the investigator. The Board finds that Appellant did comment on Figueroa's body and did say or mention her sister in connection with the exchange. Appellant recalls these comments being made but attributes them to another male officer who was not at the barracks when the incident occurred. Appellant admits that he remembered incorrectly, but continued to assert that someone other than himself made these comments. Despite the efforts of the investigator to assist Appellant in identifying the author of these comments, Appellant could not. The State has proven by a preponderance of the evidence that Appellant made untruthful statements about his comments to Trooper Figueroa and that someone other than himself made inappropriate comments about her body and her sister.

Conduct Unbecoming

The State also charged Appellant with conduct unbecoming an officer. Code of Conduct Part B – Misconduct, Section 3.0 states in pertinent part:

> 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.

The State has proven by a preponderance of the evidence that Appellant engaged in conduct unbecoming a Vermont State Police Officer. By sexually harassing three of his subordinates in front of other officers in the barracks, Appellant failed to conduct himself with the propriety and dignity. Appellant's behavior towards three female Troopers under his command was improper and impacted their ability to perform their duties. The comment "that's hot" in response to the small drug haul display and lip tattoo reveal also demonstrates poor judgment and conduct unbecoming.

The State has proven by a preponderance of the evidence that Appellant has violated the Rules, VSP Code of Conduct, Part C, Section 20, engaged in conduct unbecoming a Vermont State Police Officer, VSP Code of Conduct, Part B, Section 3.0, and violated the Sexual Harassment. By violating the Sexual Harassment Policy, Appellant has violated the rules.

Reasonableness of the Termination Decision

In determining whether the proven charges justify the termination decision, the Board applies the factors announced in Grievance of Colleran and Britt, 6 VLRB 235, 268-69 (1983). The factors include: 1) the nature and seriousness of the proven offenses, 2) the Appellant's job level, 3) the Appellant's past work record including length of service, performance on the job, and past disciplinary record, 4) the effect of the offenses upon Appellant's ability to perform at a satisfactory level and their effect on supervisors' confidence in Appellant's ability to perform assigned duties, 5) the consistency of the penalty, 6) the clarity of notice, 7) the notoriety of the offense or its impact upon the Employer's reputation, 8) the potential for Appellant's rehabilitation, 9) mitigating factors, 10) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future, and 11) mitigating factors. See Id. at 268-69 (1983).

The Colleran factors provide a means of assessing the reasonableness of the employer's decision. The employer is not required to prove each factor to support the reasonableness of its decision, "only that 'on balance the relevant factors support management's judgment.'" In re Jewett, 2009 VT 67, ¶ 23, 186 Vt. 160, 170 (quoting In re Colleran, 6 VLRB at 269).

We first consider the nature and seriousness of Appellant's offenses and their relation to Appellant's duties, position, and responsibilities. The just cause analysis centers upon the nature of the employee's misconduct. Grievance of Merrill, 151 Vt. 270, 273 (1989); In re Morrissey, 149 Vt. 1, 13 (1987). In deciding whether there is just cause for dismissal, the Board determines the substantiality of the detriment to the employer's interests. Merrill, 151 Vt. at 273-74.

The Colleran and Britt factors focus on the seriousness of the misconduct as it relates to the Appellant's "duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated." Grievance of Colleran and Britt, 6 VLRB at 268.

Seriousness of the Offense and Appellant's position

Appellant engaged in misconduct involving sexual harassment. Sexual harassment is serious and should be discouraged and never condoned or engaged in for any reason. Appellant was the supervisor of all the complainants and engaged in inappropriate behavior towards them. Although he may have intended to bond with his subordinates and display camaraderie with them, as a supervisor he was the role model expected to model positive behavior and not cross the line into sexual harassment. Appellant had a position of trust and authority over the Troopers in the barracks and he betrayed that trust. As a result of the treatment, his subordinates avoided him and changed their behavior and work patterns to avoid being in proximity to Appellant at their work site. This factor weighs in favor of the reasonableness of the Commissioner's termination decision.

Past discipline and work history

Prior to the events leading to the four investigations and termination, Appellant had a history of discipline. In 2014, he received a letter of reprimand for failing to properly process a notification involving a missing teenage girl. As a result of his actions, the entry into the "Amber Alert" or NCIC system was delayed.

In 2018, Appellant committed violations of Conduct, Neglect of Duty, and Violation of Rules in connection with his failure to properly account for firearms that were missing then turned up in Appellant's garage years later. For these offenses, Appellant received a five-day day suspension, a Letter of Reprimand, and four days loss of Annual Leave. Both offences were committed within ten years of the current case and Appellant's offense relating to his failure to properly store the firearms continued up until his conduct was discovered. This factor supports the reasonableness of the State's termination decision.

Grievant received positive employee evaluations. He was also promoted to the position of Sergeant. He was promoted to Sergeant in 2014.

Effect of offense on Supervisors' confidence in the employee's ability to perform assigned job duties.

Appellant is responsible for supervising his subordinates and treating them with respect and dignity. Appellant has failed to maintain professional boundaries and displayed poor judgment in his interactions with his female subordinates. Appellant has created a hostile work environment which resulted in three of his subordinates fleeing the barracks. Appellant has failed to conform his behavior to adhere to the directives, rules, and conduct required of a supervisor. This factor weighs in favor of the reasonableness of the Commissioner's termination decision.

Consistency of the Penalty

The State did not cite analogous cases on point in its reasonableness or twelve-factor memorandum. Many of the cases resolved through resignation and are not instructive. The Board and

the Vermont Supreme Court, however, have upheld dismissals for dishonesty. See e.g., Grievance of Graves, 147 Vt. 519 (1986) (affirming Board's upholding termination decision where employee's dishonesty, engaged in time and again at public expense, justifies dismissal as a reasonable discipline."); Grievance of Alexander, 31 VLRB 411 (2011) (affirming termination of community correctional officer for failing to comply with supervisor's directive to ride in pairs and engaging in time card fraud). The Board has upheld termination decisions that combine dishonesty with other misconduct. See Appeal of Danforth, 27 VLRB 153, 166 (2004); Appeal of Danforth, 26 VLRB 140, 166 (2003); Appeal of Madore, 26 VLRB 284, 303 (2003). The Board has also upheld termination decisions where the employee has been found to have engaged in sexual harassment. See Grievance of Nappi, 36 VLRB 86, 124 (2012). This factor weighs in favor of the reasonableness of the termination decision.

The consistency of the penalty with any applicable agency table of penalties

The Vermont State Police employs a table of penalties. The Board has found the Appellant to have violated the Vermont Code of Conduct, General Order 202, Part A, Section 7 (Discrimination), by sexually harassing the three Troopers he supervised. Dismissal fits within the range of penalties for a first offense.

The Board has found that Appellant engaged in a second offense of violating the Vermont Code of Conduct, General Order 203, Part B, Section (3) (Conduct Unbecoming). Dismissal falls within the range of penalties for a second offense.

The Board has also found that Appellant was untruthful during the investigation in violation of the Vermont Code of Conduct, General Order 202, Part A, Section 14.0. Dismissal is the discipline imposed for the first offense of this breach.

The penalty or discipline of dismissal is consistent with the VSP table of penalties. This factor weighs in favor of Appellant's dismissal.

Clarity of Notice

Appellant had clarity of notice. Appellant received training at the Academy and was a supervisor himself and responsible for leading and teaching his employees about the policies and procedures of the VSP and the Code of Conduct. He knew about the prohibition against sexual harassment and gender or sex discrimination. He was also aware of the responsibilities of acting with propriety and dignity at all times. Appellant had already received discipline for conduct unbecoming and was personally aware of the consequences for a second or subsequent offense.

Notoriety

Appellant's actions became known to the women of the St. Johnsbury barracks. If this became known outside of the barracks, the public would lose confidence. There was no testimony, however, that his actions had extended beyond the Vermont State Police.

Potential for Rehabilitation/Mitigation and Alternative Penalties

Notoriety-the offense became known within the Vermont State Police. There was no testimony that it has become known outside the Vermont State Police.

The potential for rehabilitation is not strong because Appellant has not taken responsibility for his actions. He has tried to minimize the incidents. The collection of events, however, from questions about past relationships, placing objects in a female subordinate's back pocket, and inappropriate jokes about a subordinate's national origin demonstrates that he does not understand his role as a supervisor and his impact on his subordinates.

Although the events in question took place during COVID-19, the challenges of the pandemic do not excuse or explain Appellant's conduct. The gallows humor and informal banter should never allow for offensive or sexually harassing comments at work.

There are no alternative penalties. Appellant's behavior is likely to continue because he does not recognize his lapses in judgement. Appellant fails to understand that his misguided attempts at team building crossed the line into inappropriate behavior and misconduct.

The balance of factors supports the reasonableness of the Employer's termination decision.

ORDER

Based on the foregoing findings of fact and reasoning of the Board, it is hereby ORDERED that the Appeal of David Roos is DISMISSED.

Dated this 28th day of March 2024, at Montpelier Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ David Boulanger

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David Boulanger, Acting Chairperson

/s/ Alan Willard

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Alan Willard

/s/ Michelle Phelps

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Michelle Phelps