

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	DOCKET NO. 87-43
)	
JOHN MORIARTY)	
)	
)	
APPEAL OF:)	DOCKET NO. 87-60
)	
JOHN MORIARTY)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On September 10, 1987, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Lieutenant John Moriarty ("Grievant") of the Vermont State Police, Department of Public Safety ("Employer"). The grievance, which was docketed as Docket No. 87-43, alleged that the transfer of Grievant from assignment as Station Commander of the Brattleboro Barracks to a position in Waterbury was disciplinary or discriminatory, within the meaning of 20 VSA §1921(b), and in violation of 20 V.S.A. §1880.

On December 24, 1987, the VSEA filed an appeal on behalf of Grievant. The appeal, which was docketed as Docket No. 87-60, alleged that the 5-day suspension and issuance of a letter of reprimand to Grievant was too harsh, that it constituted double punishment and that there was no cause to bypass progressive discipline.

A hearing in Docket No. 87-43 was held before Board Members Charles H. McHugh, Chairman; Catherine L. Frank and Dinah Yessne on January 14, 1988. Michael Zimmerman, VSEA Staff Attorney, represented Grievant. Michael Seibert, Assistant Attorney General, represented the Employer. A further hearing in Docket No. 87-43 was held on

February 18, at which time Docket No. 87-60 was consolidated for hearing with Docket No. 87-43.

Grievant filed Requested Findings of Fact and a Memorandum of Law on March 11, 1988. The Employer filed a Memorandum of Law on March 11, 1988.

FINDINGS OF FACT

1. The Grievant has been a member of the Vermont State Police since February 1971. Grievant is married, with three children, one of whom is a high school sophomore. During his career, Grievant has had numerous assignments. He has had to move his family once, from the Burlington area to the Vernon area, as a result of his promotion and assignment to the Brattleboro Barracks as Station Commander in December of 1984. That move was a difficult one for Grievant and his family, a fact well known up the chain-of-command.

2. At all times relevant herein, the chain-of-command from Grievant to the Commissioner was as follows:

A. Grievant, as Station Commander at the Brattleboro Station, reported to the Troop "D" Commander, Captain Robert Hains;

B. Hains reports to the Field Force Commander, Major Lane Marshall;

C. Marshall's office is at State Police Headquarters in Waterbury, Vermont. Marshall reports to the Director of the State Police, Lieutenant Colonel Robert Horton; and

D. Horton reports directly to A. James Walton, Department of Public Safety Commissioner.

3. At the Brattleboro station, the next level in the chain-of-command below Grievant is the Patrol Commander level. When fully staffed, there are three Patrol Commanders per station, and the Patrol Commander positions are manned by officers of the rank of Sergeant. Beneath the Patrol Commanders are the Troopers. (Grievant's Exhibits 24A, 24B).

4. The pertinent statutory provisions concerning this matter are as follows:

A. 20 V.S.A. §1874:

(a) The commissioner, with the approval of the governor, shall so organize and arrange the department as will best and most efficiently promote its work and carry out the objectives of this chapter. To that end he may, with such approval, ...formulate, put into effect, alter and repeal rules and regulations for the administration of the department.

(b) The commissioner may ...transfer members to serve at such stations and, within the limits of this chapter or other existing law, to perform such duties as he shall designate ...

B. 20 V.S.A. §1921(b):

Nondisciplinary transfers shall be grievable directly to the Vermont Labor Relations Board in accordance with the Rules of Practice of the Board. In any such grievance, the burden shall be on the grievant to establish that the transfer was either discriminatory or disciplinary.

C. 20 V.S.A. §1880:

(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. At the discretion of the member, the hearing may be public. It shall be conducted in accordance with the rules applicable to civil actions in such court but there shall be no jury.

(c) If the member does not file with the district court, the commissioner shall appoint a panel of three member who shall have had no connection with the matters at issue. The panel shall promptly hold such hearings as it may determine to be necessary, at which the member or his representative or both shall be entitled to cross-examine witnesses, and to present evidence. The panel may issue subpoenas. At the discretion of the member, the hearings may be public.

(d) The panel or the district court, as the case may be, shall report to the commissioner whether the charges have been proved or not proved by a preponderance of the evidence. The panel or the district court, as the case may be, may make recommendations to the commissioner with respect to the action he should take if the charges are proved.

(e) If the panel or 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 panel or 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.

5. At all times relevant, the rules governing the State Police have been contained in a two-part manual. The first part consists of rules issued by the Commissioner (with the Governor's approval), and the second part consists of policies and procedures issued by the Director. Included within the first part of the manual (i.e., the portion issued by the Commissioner) is the "Code of Conduct" which governs the behavior of uniformed members of the State Police, both on and off duty. The Code of Conduct is divided into two parts, Part A and Part B. Part A violations are the more serious, and are labeled

as acts of misconduct. "Misconduct" is defined as "conduct on the part of a member which constitutes criminal conduct and/or which violates any provision(s) of Part A ..." Part B violations, less serious than Part A violations, are labeled acts of improper conduct. "Improper conduct" is defined as "conduct on the part of a member which violates any provision(s) of Part B ..." The following sections of Part B of the code are relevant herein:

... 6.0 CONDUCT

6.1 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.

... 33.0 USE OF ALCOHOL ON DUTY

33.1 Members shall not consume alcoholic beverages while in uniform or on duty except in the performance of duty.

(Grievant's Exhibit 7)

6. The following definitions are contained in the first part of the manual in Section 1, Chapter 4, Article 1:

... 2.1 'ADMINISTRATIVE ACTION' means any supervisory action, other than a disciplinary action, taken with respect to a member by a commanding officer or other supervisor, including training, counseling, warning, or a combination thereof.

... 3.1 'ALLEGATION' means an accusation of misconduct or improper conduct made by a member or other person against a member.

... 5.1 'CHARGES' means a written allegation of misconduct or improper conduct, signed by the Commissioner, which shall include the name and address of the member or other person who made the allegation against the member, if known; a statement of pertinent facts as determined during the course

of the investigation into the allegation; a specification of the provision(s) of the Code of Conduct alleged to have been violated; and an explanation of the member's right to a hearing in Vermont District Court or before a three (3) member hearing panel.

...14.1 '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. (Grievant's Exhibit 7).

7. The first part of the manual (in Section III, Article IV) contains the following pertinent provisions with respect to disciplinary proceedings against members:

1.0 RESTRICTIONS ON DISCIPLINARY ACTION

1.1 No disciplinary action shall be taken against any member except in accordance with the provisions of this Article.

1.2 Disciplinary action against a member may be taken only by the Commissioner.

... 2.0 COMMENCEMENT OF DISCIPLINARY PROCEEDINGS

2.1 Disciplinary proceedings against a member commence with the service of charges upon the member.

... 3.0 RIGHTS OF A CHARGED MEMBER

... 3.2 A charged member may...either admit or deny the charges preferred... A charged member who wishes to admit the charges shall so advise the Commissioner in writing. When a charged member admits the charges, it shall be deemed that the charges have been proved. Nonetheless, such an admission of charges shall not, but(sic) itself, constitute a waiver of the charged member's right to a hearing at which he/she may present evidence of mitigating or extenuating circumstances....

... 5.0 DISCIPLINE OF MEMBER

5.1 In a case in which the charged member admits the charges preferred against him/her and waives his/her right to a hearing...the Commissioner shall determine

what, if any, disciplinary action to take against the member.

5.2 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...and the nature and extent of disciplinary action taken in prior cases of a similar nature. (Grievant's Exhibit 7A).

8. The second part of the manual (i.e., that portion containing the Director's "policies and procedures") contains the following pertinent provisions concerning transfers, which provisions were adopted to eliminate confusion among members as to when they were entitled to moving expenses as a result of a transfer:

"ARTICLE IV Lateral Transfer Requests and Moving Expense

1.0 PURPOSE

1.1 Because the Department...must fill vacancies which arise from time to time, it is sometimes necessary to move its personnel from one location to another.

1.2 When this is done, it often creates extreme hardships in the personal lives of Departmental Officers and their families. There are times, however, when Departmental officers wish to make a lateral transfer for their own benefit. Contractual agreements between employer and employees involved in certain voluntary transfers negate the possibility of financial reimbursement for the officer. This policy attempts to define the difference between voluntary and involuntary transfers and the procedure for volunteering for a transfer.

2.0 POLICY

2.1 Transfers shall be placed into one of two categories:

(1) Voluntary transfer

(A) Is for the benefit of the officer and made at the officer's request for a transfer from one location to another and at an equal or lower rank.

(B) Will be made without financial reimbursement to the officer.

(2) Involuntary transfer

(A) Is for the good of the Department and officers are eligible for compensation to cover moving expenses and are as follows:

(a) Disciplinary transfers

(b) No requests for the vacancy

Note: If a vacancy exists and there are no requests to transfer and the Department solicits officers to fill the vacancy, it shall be considered an involuntary transfer if an officer accepts.

(c) Into an outpost assignment

(d) Out of an outpost assignment if two (2) years have expired since the officer was assigned and the transfer is recommended by the officers (sic) supervisor."

(Grievant's Exhibit 7, pages 11-12).

9. State Police Lieutenants are covered by the collective bargaining agreement between the State and the VSEA for the Supervisory Unit effective for the period July 1, 1986 to June 30, 1988 ("Contract"). At all times relevant, the Contract provided in pertinent part as follows:

ARTICLE 15

DISCIPLINARY ACTION

... B. STATE POLICE CAPTAINS AND LIEUTENANTS

1. DEFINITION

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

... 2. DISCIPLINARY ACTION

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

b. Disciplinary proceedings shall be instituted within a reasonable time after the violation of the Code of Conduct occurred and disciplinary action shall be taken within a reasonable time after disciplinary charges have been proved or admitted.

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

(Grievant's Exhibit 8, pages 1 and 3)

10. The Department of Public Safety transfers State Police members upon promotion, to fill vacancies, to fill newly-created positions, upon requests of members at times, for disciplinary purposes and involuntarily, without promotion, for the efficient operation of the Department. In the event of vacancies and newly-created positions, the Department makes an effort to avoid involuntary transfers. In those cases, the Department invites "bidding" for the position and will order an involuntary transfer only if there are no qualified bidders.

11. Since 1980, there have been no disciplinary transfers of State Police members.

12. Since 1980, there have been non-disciplinary administrative transfers of State Police members in conjunction with chain-of-command reviews where disciplinary charges have been brought against State Police members for violations of the Code of Conduct.

13. In the first two performance evaluations given to Grievant following his assumption of the duties of Station Commander (i.e., the performance evaluations for the periods December 2, 1984 to June 2, 1985, and the period June 30, 1985 to June 30, 1986), Grievant re-

ceived overall ratings of "3" ("consistently meets job requirements/standards") and "4" ("frequently exceeds job requirements/standards"), respectively. (Grievant's Exhibit 11A, Pages 1-4).

14. On December 11, 1986, one of the Patrol Commanders at the Brattleboro Station telephoned Captain Hains, and made certain allegations against Grievant. Specifically, he alleged (1) that Grievant was "moonlighting" (i.e. engaging in off-duty employment outside of the Department) without authority, (2) that Grievant had been running criminal records checks for the same local business for which Grievant was allegedly "moonlighting," and (3) that there were "rumors" that Grievant had "fixed" tickets for employees of the firm. (Grievant's Exhibit 10, Pages 1-3, Grievant's Exhibit 7, page 3).

15. As a result of those allegations, an Internal Affairs investigation was conducted. In his report, the investigating officer concluded that two of the allegations against Grievant (i.e., that he had conducted criminal records checks, and that he had improperly "fixed" traffic tickets) were not supported by the evidence, but that Grievant had "moonlighted" without authority, in violation of Part B of the Code of Conduct. Following the completion of the investigation, the report was reviewed by all officers in the chain-of-command between Grievant and the Commissioner. (Grievant's Exhibit 10, Pages 4-15, Grievant's Exhibit 10A).

16. On March 24, 1987, subsequent to the chain-of-command review, Commissioner Walton preferred charges against Grievant for violating the "moonlighting" section of Part B of the Code of Conduct. Commissioner Walton ultimately imposed a letter of reprimand and a loss of three days of annual leave against Grievant for the "moonlighting" violation. (Grievant's Exhibit 10A, Grievant's Exhibit 12).

17. In discussions with Grievant during the course of his review of the "moonlighting" allegations, Commissioner Walton told Grievant that he was concerned about his judgment in the situation. Grievant assured Walton that the problem would not recur. Commissioner Walton and Grievant's superiors in the chain-of-command were particularly concerned because a sergeant in Grievant's station also had been accused of improper "moonlighting," and they questioned Grievant's effectiveness in dealing with that problem when similar allegations had been made against him.

18. At the time the "moonlighting" investigation was underway, a performance evaluation of Grievant covering the period July 1, 1986 to February 28, 1987, was being prepared by Captain Hains. In the evaluation, which Hains completed subsequent to doing his chain-of-command review concerning the moonlighting allegation against Grievant, Hains rated Grievant's performance as a "3" overall, and assigned "3" ratings in all categories, except that he rated Grievant's performance as "4" in the category "Quantity," a "5" ("consistently and substantially exceeds job requirements/standards") in the category "Communications - Written," and as "2" ("inconsistently meets job requirements/ standards") in the categories "Judgment, Decision Making, Common Sense," "Policies & Procedures - Department," and "Personnel Management." Among the comments made by Hains on the performance evaluation form were the following:

(Grievant) must learn to keep abreast of problem areas within the Brattleboro Station and to take remedial action to rectify same. His outside employment interests cannot take precedence over or in any way interfere with his job as Station Commander. Morale at the Brattleboro Station has to be brought up and the Station working together as a team.

Hains signed the evaluation on April 7, 1987. (Grievant's Exhibit 11).

19. Major Marshall generally concurred with this evaluation and signed it on April 15, 1987, subsequent to his chain-of-command review concerning the moonlighting allegations against Grievant. Among the comments made by Marshall on the evaluation were the following:

(Grievant's) shortfall, I believe, is in the area of personnel management. During this rating period a multitude of personnel problems became an issue at the Brattleboro Station. (Grievant) eluded (sic) to some of those problems in performance evaluations completed on his subordinates. In my opinion, (Grievant) bears much of the responsibility for failing to recognize the gravity of those personnel problems and failing to take positive steps to eliminate them. While additional blame does fall on Captain Hains, and ultimately this writer, (Grievant) is in the obvious position to address them. (Grievant's Exhibit 11, Page 5).

20. On the performance evaluation form, Grievant stated the following as an objective, which objective was mutually agreed upon by Grievant and his superiors:

"To adhere to a stricter interpretation of the Department's Policies and Procedures with respect to my off duty activities and to be cognizant of the potential impact that appearances play in my effectiveness as a supervisor." (Grievant's Exhibit 11, Page 3).

21. On June 29, 1987, Grievant (as senior officer) and 4 other officers from Brattleboro (2 Sergeants, 2 Senior Troopers) served on a funeral detail in connection with services for the mother of one of the Brattleboro Troopers. The detail took two unmarked police cars. One car, driven by Grievant, carried Senior Trooper Wooldridge. The other car carried Sergeant Markiewicz (a new Patrol Commander at Brattleboro Station) Sergeant Hebert, and Senior Trooper Bedson. All detail members were in full dress uniform, including blouse. It was hot that day. The detail commenced at 7:00 a.m., and involved both

the funeral, which took place in Springfield, Massachusetts, and the burial, which took place in Bloomfield, Connecticut, as well as a motorcade between the two locations, and travel from Brattleboro to Springfield and back. The members' nine hour workday would terminate at some point between Springfield, Massachusetts, and the Vermont border.

22. At about 2:00 p.m., on their way back to Vermont, the detail stopped at Valle's Steak House, a Springfield-area restaurant. There were approximately 35 patrons in the restaurant as the 5 officers, still in dress uniform, entered. Several patrons complimented the group on its appearance. The group was first seated at a table in the middle of the restaurant. At the table, Grievant was asked by someone in the group whether they could "call it a day," and whether the State of Vermont would pay for the meal. Grievant indicated in the affirmative to the first question, and, with respect to the second, he told the group that he, personally, would pay any difference between the meal cost and the amount of reimbursement. Wooldridge then asked Grievant if it was permissible to have a beer with lunch. At first Grievant said no, but then he told the group that would be permissible provided they moved to a table isolated from the patrons. At their request, the party was moved to a table separated from the rest of the restaurant by a wall which was solid from the floor to a height of about 3 feet. The party remained in view of the other patrons. After the move, Grievant, Wooldridge and Bedson each ordered one beer with lunch. After the move, a number of the party loosened their ties, and removed their dress blouses. The two other members of the detail did not drink alcohol with their meals. The detail remained in the

restaurant for about two hours. As they were leaving, some patrons again complimented their appearance.

23. No member of the public complained to the Department about the members of the detail drinking beer.

24. On July 6, 1987, Sergeant Markiewicz telephoned Hains and reported to him that Grievant and two other members of the funeral detail had beer with lunch in Springfield. Hains completed the required form concerning the complaint, thereby initiating an internal investigation. (Grievant's Exhibit 13, Page 1).

25. In his report, the investigating officer concluded that Grievant and the two others had violated section 33.0 of the Code of Conduct by each having a beer with his meal on June 29th. (Grievant's Exhibit 13, Page 6).

26. In his chain-of-command review of the investigation, Captain Hains concluded that Grievant and the two others had violated not only Section 33.0 of the Code of Conduct, but section 6.0 as well, and recommended that charges be preferred against all three. Captain Hains recommended that Grievant be suspended without pay for five days and that he be relieved of duty as a Station Commander in Brattleboro and transferred. (Grievant's Exhibit 13A, Pages 4-5).

27. In his chain-of-command review, Major Marshall concluded that Grievant and two others had violated sections 6.0 and 33.0 of the code of Conduct and that Grievant, in addition, had violated section 2.1 of the code. Marshall recommended that Grievant be transferred or if that could not be accomplished, that Grievant be demoted and transferred (Grievant's Exhibit 13, Pages 6-7).

28. In his chain-of-command review, Lieutenant Colonel Horton concluded that Grievant and the two others had violated sections 6.0 and 33.0 of the Code of Conduct. Horton recommended that Grievant be demoted if there were any Sergeant openings in Brattleboro, or if there were no such openings, that Grievant be transferred from Brattleboro. (Grievant's Exhibit 13A, Page 2).

29. In the course of his review, Commissioner Walton took account of the recommendations of Hains, Marshall, and Horton. Walton concluded by July 30, 1987, that there was a reasonable basis to believe an act of misconduct or improper conduct had been committed by Grievant and the two others and decided to prefer charges against the three individuals for violations of sections 6.0 and 33.0 of the Code of Conduct. Walton's tentative conclusion as to the discipline to be imposed against Grievant was that Grievant be suspended for five days without pay, receive a letter of reprimand, and be demoted to the rank of Sergeant. With respect to the other two offenders, Walton concluded that they would receive letters of counseling by virtue of the fact that they had received Grievant's permission to have beers with their meals. (Grievant's Exhibit 13A, page 2).

30. On August 11, 1987, Grievant met with Captain Hains and Major Marshall at the Brattleboro barracks. At that time, Hains served Grievant with a memorandum, dated August 7, 1987, from Commissioner Walton, which was entitled "Preferral of Charges." In it, Walton advised Grievant that, among other things, he was charged with violating Section 6.1 and 33.1 of Part B of the Code of Conduct by reason of his having had a beer with his meal on June 29th, Walton also informed Grievant as follows:

On the basis of the statements and evidence contained in the file and in the absence of mitigating or extenuating circumstances being brought to my attention by you, it would be my intent to take the following disciplinary action: demotion to Sergeant. (Grievant's Exhibit 15).

31. Within moments after Hains had served Grievant with the preferral of charges, Marshall handed Grievant a second memorandum, also dated August 7, 1987, from Lieutenant Colonel Horton, which provided, in pertinent part, as follows:

"SUBJECT: Reassignment

Effective immediately, you are temporarily reassigned to Headquarters. During this period you will perform administrative duties which will include rewriting Title 20. You will work your normal work hours which shall include commuting time." (Grievant's Exhibit 14).

32. Commissioner Walton had given Horton his approval to temporarily reassign Grievant.

33. Upon handing Grievant the notice of temporary reassignment, Marshall informed Grievant that the reassignment was temporary and that it was not disciplinary action. Marshall told Grievant that he would be working on proposed revisions of Title 20 in his temporary reassignment.

34. Grievant did not believe his reassignment was temporary and asked Michael Zimmerman, VSEA Staff Attorney, to obtain something in writing from Lieutenant Colonel Horton indicating that the assignment was temporary. Zimmerman spoke with Horton on August 13. Horton told Zimmerman that the transfer away from Brattleboro was permanent; that Grievant was going to be on a permanent assignment somewhere else. Zimmerman informed Grievant of his conversation with Horton later that day.

35. On August 13, Captain Hains assured Grievant's wife that the reassignment of Grievant was temporary and that he would be back in Brattleboro, perhaps in as little as 4 to 6 weeks.

36. By August 13, Lieutenant Colonel Horton and Commissioner Walton had decided to permanently transfer Grievant out of the Brattleboro station. The question remaining at that point was into which location to transfer him.

37. Shortly after the decision to reassign Grievant was made, there was a staff meeting at the Brattleboro Barracks. Marshall told those present that Grievant's reassignment was temporary.

38. Following the preferral of charges, Grievant and his VSEA representative met with Commissioner Walton to present Grievant's view that certain mitigating factors existed (i.e., the heat of the day, his belief that a long lunch paid for, in part, by him, would build camaraderie in Brattleboro; and moving the party away from other patrons in the restaurant). Walton informed Grievant by letter of October 19, 1987, that he had decided not to demote Grievant, but to impose a five day suspension without pay, and a letter of reprimand. (Grievant's Exhibit 18).

39. In deciding to suspend Grievant for five days and to impose a letter of reprimand, Commissioner Walton concluded that Grievant's offense in the drinking incident was serious; that he had violated a well-established organizational policy which, as a supervisor, he was obligated to enforce. Walton concluded that Grievant had demonstrated a lack of judgment, which was a repeat of a judgment problem demonstrated in the "moonlighting" offense. He believed that the fact the drinking incident was public impacted adversely on the Department as a

whole. Walton concluded that Grievant had undermined Walton's confidence in him. Due to the mitigating circumstances presented by Grievant in his meeting with him, however, Walton decided to back off of his original inclination to demote Grievant and, instead, decided to suspend him and issue a written reprimand. Commissioner Walton viewed a suspension and a letter of reprimand as a higher penalty than just a suspension. He issued a letter of reprimand because he wanted to ensure that the matter was in Grievant's personnel file. Walton knew that a letter of reprimand was put into the personnel file and he was not sure if letters of suspension were placed in the file.

40. By a memorandum to "(a)ll personnel" dated October 16, 1987, Commissioner Walton announced two promotions, and 13 transfers. Among the 13 members transferred was Grievant. In the memorandum, Grievant's transfer was described as one from Station Commander to "Staff Operations." (Grievant's Exhibit 17).

41. On November 2, 1987, Commissioner Walton issued a Special Order which provided in pertinent part as follows:

SUBJECT: Lateral Transfers/Change of Station

1. Effective December 13, 1987 but not later than January 10, 1988, the following will stand detached from his present duty assignment and will report through his respective Supervisors for assignment to duty as indicated:

... MORIARTY, John M. To fill a vacancy from Lieutenant, Station Commander, Brattleboro Station, to Lieutenant, Staff Operations, Headquarters

- ... 3. Within 30 days from the effective date of this Order, the above named shall establish a residence within the geographic area of responsibility of their Station ...

... 5. Expenses incurred for the moving of their families and/or personal possessions to their new Station will be borne by the Department of Public Safety ...

... 7. I certify that these transfers are made for the convenience of the State of Vermont and not for the convenience or at the request of the employee ... (Grievant's Exhibit 19).

42. The Department has agreed, pending the resolution of these matters, that Grievant need not comply with the order insofar as it requires him to move his family. Since his transfer, Grievant has commuted between Vernon and Waterbury.

43. As a result of the transfer, Grievant is the Assistant Staff Operations Officer in Department headquarters. He reports to the Staff Operations Officer, a Captain, who reports to Lieutenant Colonel Horton. (Grievant's Exhibit 24B, Page 3).

44. Commissioner Walton did not view the permanent transfer of Grievant as a disciplinary action because it was not taken as a punitive sanction. Walton had concluded that the beer-drinking incident was a continuation of a supervisory problem and increased, rather than resolved, dissidence at Brattleboro. Walton was extremely disappointed that the drinking incident had surfaced in the wake of the moon-lighting offense. Walton concluded that Grievant had demonstrated extremely poor judgment and had compromised himself as a supervisor before his subordinates; that Grievant had violated his obligation to manage the Brattleboro station and that the situation at Brattleboro could not be rehabilitated with Grievant as the station commander. Walton viewed the transfer of Grievant as an administrative transfer for the good of the Department. (Grievant's Exhibits 21, 22).

45. On November 20, 1987, Grievant informed Commissioner Walton by memorandum that he was waiving his right pursuant to 20 VSA §1880 to request a hearing before the District Court or Department hearing panel concerning the preferral of charges against him. Grievant informed Walton that he was reserving his right to appeal the disciplinary action to the Labor Relations Board. (Grievant's Exhibit 23).

46. Since 1980, only one other Station Commander has been the subject of charges. There never has been another Station Commander who has been the subject of two Internal Affairs investigations. No other Station Commander has been involved in a situation similar to Grievant's situation with respect to the moonlighting offense and the beer-drinking offense.

47. Since 1981, no Station Commander except Grievant has been transferred other than as a result of his promotion or at his own request.

OPINION

1. #87-43, Transfer of Grievant

Grievant contends that his transfer from the Station Commander position in Brattleboro to a position at Department Headquarters in Waterbury was disciplinary, within the meaning of the Contract and 20 VSA §1921(b), and alternatively, that the transfer was discriminatory within the meaning of 20 VSA §1921(b).

It is clear from a review of the statutory language that the legislature has accorded the Commissioner of Public Safety a great deal of discretion in transferring State Police members. The Commissioner may assign or transfer members and, within the limits of the law, may require them to perform such duties as the Commissioner shall

designate. 20 VSA §1864. Transfers of State Police members are not subject to collective bargaining and members may not grieve transfers to the Board, 3 VSA §1004, unless they are claiming that the transfer was either discriminatory or disciplinary. 20 VSA §1921(b).

Accordingly, the Commissioner is given the authority to order administrative transfers subject only to two limitations. First, administrative transfers may not stand if they are, in reality, disciplinary actions. This safeguard ensures that all bona fide disciplinary matters will be handled in accordance with the procedures outlined in 20 VSA §1880. Second, such administrative transfers may not stand if the Commissioner's action was discriminatory in nature.

At the outset, we reject Grievant's claim that the Commissioner is limited by Article IV, Lateral Transfer Requests and Moving Expense, of the State Police Director's "policies and procedures" with respect to the types of involuntary administrative transfers which he may order. Such policies and procedures are not part of the Department Rules and Regulations promulgated by the Commissioner, and it is evident that the Director's policies and procedures were not intended to and could not limit the discretion of the Commissioner. Moreover, a review of the provisions of the policies and procedures concerning transfers indicates that the intent is to clarify under what circumstances transferred members are eligible for expense reimbursement, and is not directed toward limiting the types of transfer the Department may use.

While keeping in mind the broad range of discretion the Commissioner has with respect to transfers, we turn to determining whether Grievant has met his burden of establishing that the transfer was

either discriminatory or disciplinary. We conclude that Grievant has met neither burden.

Pursuant to the Contract and consistent with the Department Rules and Regulations, disciplinary action is defined as "any action taken by the Commissioner as a result of an employee's violation of the Code of Conduct." Approved forms of disciplinary action include transfer. Grievant has not met his burden of proving by a preponderance of the evidence that his transfer was a result of his violation of the Code of Conduct.

While the beer-drinking and moonlighting incidents were violations of the Code of Conduct, and while the beer-drinking incident triggered the transfer of Grievant, Grievant simply has not demonstrated by a preponderance of the evidence that the transfer was not the result of a legitimate management concern of Commissioner Walton that Grievant could no longer effectively supervise the Brattleboro station due to a lack of judgment.

Grievant also has not established that the transfer was discriminatory. In related contexts, the Supreme Court has defined discrimination as the "unequal treatment of individuals in the same circumstances under the applicable rule". Fairchild and the Vermont State Colleges Faculty Federation v. Vermont State Colleges, 141 Vt. 362 (1982). Nzomo v. Vermont State Colleges, 136 Vt. 97 (1978). The evidence indicates that Grievant has not been treated unequally compared to other State Police members in similar circumstances since

there have been other instances since 1980 where the Commissioner did combine administrative non-disciplinary transfers with disciplinary proceedings. While no other Station Commander has been transferred other than as a result of a promotion or at his own request since 1981, no other Station Commander has been in circumstances similar to those which led to the transfer of Grievant.

2. #87-60 5-Day Suspension and Letter of Reprimand

In determining whether just cause exists for the 5-day suspension and letter of reprimand imposed against Grievant for his violation of the Code of Conduct, the analysis adopted by the Board in Grievance of Colleran and Britt, 6 VLRB 235 (1983), applies. Appeal of Kennedy, 6 VLRB 129, 139 (1983).

At issue is whether the penalty imposed for Grievant's violation of the Code of Conduct is within the limits of law or contract; whether it is a reasonable action within the broad discretion of management. Grievance of Goddard, 142 Vt. 437 (1983). The statutory disciplinary provisions relating to State Police indicate that the Commissioner has 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). Kennedy, supra, at 141.

Grievant contends that the penalty imposed was too severe, constitutes double punishment, and, with respect to the suspension, that there is no just cause for bypassing progressive discipline.

In Colleran and Britt, supra, at 268-269, the Board enumerated a number of factors that are relevant in determining the legitimacy of a particular disciplinary action. A review of those factors leads us to

conclude that the penalty imposed was for just cause; that it was a reasonable action within the legitimate discretion of the Commissioner.

Grievant's conduct in the beer-drinking incident was serious, particularly given his supervisory position. He violated a well-established organizational policy against in-uniform and on-duty drinking of alcohol which, as a supervisor, he was obligated to enforce. Commissioner Walton was justified in concluding that, through this incident and the earlier "moonlighting" offense, Grievant had undermined his confidence by the offense.

Grievant clearly had fair notice that his conduct was in violation of the Code of Conduct. Given the prior "moonlighting" offense and his supervisory responsibilities, the level of the penalty imposed was reasonable and was not inconsistent with lesser sanctions imposed against the two subordinate officers whom also violated the Code of Conduct in the drinking incident. Also, Commissioner Walton appropriately considered mitigating circumstances brought to his attention by Grievant in reducing the penalty from what he had originally contemplated.

We conclude that Grievant's claim that he was subjected inappropriately to double punishment here is specious. The Contract clearly permits the Commissioner to impose a combination of disciplinary sanctions, and his imposition of a suspension and a letter of reprimand was not an abuse of this discretion. We further conclude that Grievant being charged with violations of two sections of the Code of Conduct - i.e., the section relating to conduct unbecoming an officer and the section on drinking alcohol - was appropriate, since the

Commissioner reasonably concluded that Grievant was, in fact, in violation of both sections.

ORDER

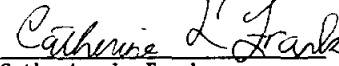
Now therefore, based on the foregoing finding of fact and for the foregoing reasons, it is hereby ORDERED:

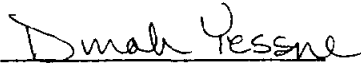
1. The Grievance of John Moriarty, Docket No. 87-43, is DISMISSED.
2. The Appeal of John Moriarty, Docket No. 87-60, is DISMISSED.

Dated the 27th day of May, 1988, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Catherine L. Frank


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