

VERMONT LABOR RELATIONS BOARD

APPEAL OF:	)	
	)	DOCKET NO. 91-76
NATHAN WELLS	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On December 13, 1991, the Vermont State Employees' Association ("VSEA") filed an appeal, pursuant to 20 VSA §1880, on behalf of Nathan Wells, a Corporal with the Vermont State Police ("Appellant"). Appellant alleged that the State of Vermont, Department of Public Safety ("Employer"), violated the collective bargaining agreement between the State and VSEA for the State Police Unit, effective for the period July 1, 1990 - June 30, 1992 ("Contract") by suspending Appellant for two days and removing from his annual leave bank two days of accumulated annual leave. Specifically, Appellant alleged that the Employer violated Article 14, Section 2, of the Contract by: 1) failing to institute disciplinary proceedings within a reasonable time after a violation of the Code of Conduct occurred; 2) failing to apply discipline with a view toward uniformity and consistency; and 3) imposing discipline without just cause in that the penalty was unduly harsh given the nature of the alleged offense.

A hearing was held before Board members Charles McHugh, Chairman; Catherine Frank and Carroll Comstock on September 17, 1992. Mary Lang, Special Assistant Attorney General, represented the Employer. Jonathan Sokolow, VSEA Legal Counsel, represented

Appellant. At the hearing, Appellant withdrew his claim of failure to apply discipline with a view toward uniformity and consistency.

The parties filed briefs on October 1, 1992. The Employer filed a response to Appellant's brief on October 13, 1992.

#### FINDINGS OF FACT

1. 20 VSA §1880 provides as follows:

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 commissioner a request for the appointment of a hearing board in accordance with subsection (g) of this section, which shall be honored.

c) If the member does not request a hearing board, the commissioner shall appoint a panel of three members 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 hearing board, 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 hearing board, 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 hearing board 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 hearing board 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.

g) The hearing board shall be comprised of three members, two of whom shall be members of the state police advisory commission mutually selected by the parties. The third member of the hearing board shall be selected by the parties in accordance with the rules of the American

Arbitration Association, and shall serve as the chairman of the hearing board.

h) Costs of the chairman of a hearing board shall be borne equally by the parties.

2. Article 14, Section 2, of the Contract provides as follows:

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 or was discovered 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.

3. At all times relevant, Appellant was a member of the Vermont State Police with the rank of Corporal, and was stationed at the Colchester Station.

4. At all times relevant, the chain of command in relation to Appellant was as follows:

a) Appellant, as corporai at the Colchester Station, reported to Lieutenant Kerry Sleeper.

b) Lieutenant Sleeper reported to Captain James Cronan, Troop Commander for Troop A.

c) Captain Cronan reported to Major John Sinclair, Field Force Commander for the State Police.

d) Major Sinclair reported to Lieutenant Colonel Robert Horton, Director of the State Police.

e) Lieutenant Colonel Horton reported directly to Department of Public Safety Commissioner A. James Walton.

5. On December 28, 1990, the Ports Canada Police of Montreal, Quebec, contacted the Vermont State Police at the Colchester Station to request assistance with an investigation of the death of a youth, Tobias Tomasi, a resident of Williston, Vermont. Tomasi was found decapitated in a Montreal railyard.

6. Sergeant Shortsleeve and Sergeant #1 (whose identity was not otherwise revealed in this case) assumed responsibility for the investigation that day. Later that day, the two sergeants visited Theresa Tomasi, mother of the decedent, and

informed her of her son's death. Following this visit, Sergeant #1 told a Burlington Free Press reporter, contrary to instructions from his superior officer, that the cause of death was suicide.

7. On Saturday, December 29, an article on the Tomasi death appeared in the Burlington Free Press, which indicated that the Vermont State Police had referred to the death as a suicide. The Tomasi family was shocked at this article and called the Colchester Station to complain. A brother of the dead youth spoke with Appellant and explained that his mother was very upset by the article and wanted a retraction. Appellant urged the brother to speak to his mother in an effort to have her focus not on the news article, but on the death of her son. Appellant related his own experience in having lost his daughter nearly one year earlier. He indicated to the brother that what was important was to deal with the pain of the loss and not to focus on what was in the newspaper.

8. On Sunday, December 30, Mrs. Tomasi, the mother of the dead youth, called the Colchester Station and spoke with Appellant. She was very upset and demanded that the article be retracted. The following exchange occurred between Appellant and Mrs. Tomasi:

Appellant: "I don't know what all the fuss is about, he's dead, isn't he?"

Mrs. Tomasi: "Do you have a family?"

Appellant: "What does that have to do with it? I don't know why you're taking all this out on me and the dispatcher. Let me give you the facts of life, lady... There are two types of people down here at the State Police, the peons that work on weekends and the elites that don't. You need to talk with one of the elites."

(State's Exhibit 6, Page 1)

9. The conversation ended with Mrs. Tomasi asking Appellant to have Sergeant #1 contact her. Grievant responded by stating: "I'll give him the message, but I doubt he'll call on the weekend." (State's Exhibit 6, Page 1).

10. Appellant believed that when Mrs. Tomasi asked, "Do you have a family?", she was attempting to provoke him due to the fact that he had lost a child. Appellant assumed that Mrs. Tomasi knew, from speaking with her son whom Appellant had spoke to the previous day, that Appellant's daughter had died.

11. On January 10, 1991, Mrs. Tomasi called Major Sinclair to complain about the Department's press release and about the conduct of Appellant during the December 30 telephone conversation. Sinclair directed Captain Robert Vallie, Assistant Field Force Commander, to investigate the matter. On January 11, Captain Vallie interviewed employees in the Colchester Station. He did not interview Appellant. On January 15, 1991, Major Sinclair met personally with Mrs. Tomasi and discussed her complaint (State's Exhibit 2).

12. On January 17, 1991, Major Sinclair officially assigned Captain Vallie to do an internal investigation of the press release incident and Appellant's conversation with Mrs. Tomasi. Vallie's investigation took two and one-half months. In total, he interviewed 13 individuals. His report was signed on April 1, 1991. Vallie interviewed Mrs. Tomasi on January 28, 1991, and again in February, 1991. Vallie interviewed ten other individuals prior to March 6, 1991. Vallie did not interview Appellant until March 6, 1991, two days after Vallie informed Appellant of Mrs. Tomasi's complaint about Appellant's conduct. Prior to March 4,

1991, Appellant had not been informed that an investigation was taking place regarding his conduct with respect to the December 30, 1990, phone conversation with Mrs. Tomasi (State's Exhibit 3).

13. The Rules and Regulations for the Department of Public Safety, Section III, Article III, 5.2, provide in pertinent part as follows:

As soon as possible after receipt of an allegation and prior to the commencement of an investigation into it, the Internal Affairs Unit... shall notify the member against whom the allegation was made of the allegation... Such notification will include a complete explanation of the substance of the allegation made (State's Exhibit 1, Page 3).

14. There were three employees subject to the internal investigation: Appellant, Sergeant #1 and Dispatcher #2 (whose identity was not otherwise revealed in this case). No charges ultimately were brought against Dispatcher #2. Vallie combined the investigation of these three employees since any misconduct arose from the same series of events and concerned the same complainant.

15. During the time the internal affairs investigation was being conducted, the Ports Canada Police, the lead investigating agency with respect to the death of Tobias Tomasi, determined that Tobias Tomasi had died accidentally, and thus ruled out suicide as the cause of his death.

16. Vallie completed his internal affairs investigation report, and submitted it for review by the chain of command, on April 1, 1991. In his report, Vallie recommended that charges be preferred against Appellant and Sergeant #1 (State's Exhibit 3).

17. Lieutenant Sleeper, Captain Cronan, Major Sinclair and Lieutenant Colonel Horton reviewed the report and made a

recommendation to the Commissioner. Each concluded that disciplinary charges should be preferred against Appellant and Sergeant #1 for violations of the Code of Conduct. In addition, these officers volunteered their recommendations for disciplinary action should the charges be proven. Lieutenant Sleeper, Appellant's immediate supervisor on the day of the December 30 phone conversation, recommended that Appellant be given a written reprimand. Lieutenant Colonel Horton, the head of the Vermont State Police, also recommended a written reprimand. Captain James Cronan recommended that Appellant lose one annual leave day. Major Sinclair recommended a one-week suspension.

18. James Walton, the Commissioner of the Department of Public Safety, received the internal investigation report and the recommendations of the chain-of-command on or about May 1, 1991. Commissioner Walton had several discussions with Horton and the Department's attorney, James Crucetti, to determine an appropriate degree of discipline for Appellant and Sergeant #1.

19. By memorandum of June 24, 1991, Commissioner Walton preferred charges against Appellant. The memorandum provided in pertinent part as follows:

1. On Sunday, December 30, 1990, Theresa Tomasi, the mother of Tobias Tomasi, called the Colchester barracks of the Vermont State Police. Mrs. Tomasi was upset because the Saturday edition of the Burlington Free Press reported that the Vermont State Police had described the death of her son as a suicide. Mrs. Tomasi had also previously called the barracks on Saturday, December 29, 1990.

2. Mrs. Tomasi was very upset and expressed dismay at the fact that the death had been ruled a suicide and the investigation into the death of her son in Montreal had just begun. Mrs. Tomasi reports that Corporal Wells stated to her, "I don't know what all the fuss is about, he's dead

isn't he?" Mrs. Tomasi replied, "Do you have a family?" and Corporal Wells responded, "What does that have to do with it? I don't know why you're taking this all out on me and the dispatcher. Let me give you the facts of life, lady... There's two types of people down here at the State Police, the peons that work on weekends and the elites that don't. You need to talk with one of the elites."

3. Mrs. Tomasi reported that she was shocked to hear a Vermont State Trooper talking like this and immediately realized that there must be a terrible personnel problem within the State Police. Mrs. Tomasi further requested that Sergeant #1 call her and was advised by Corporal Wells, "I'll give him the message, but I doubt he'll call on the weekend."

4. This conduct of Corporal Wells constituted a violation of Part B, Section 6.1 of the Code of Conduct set forth in Section III, Article II of the Vermont State Police Manual of Rules and Regulations and Operational Policies and Procedures which states that members shall conduct themselves with propriety and dignity at all times both on and off duty. No member shall conduct himself 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.

...On the basis of the statements and evidence contained in the file and in the absence of extenuating or mitigating circumstances being brought to my attention by you, it would be my intent to take the following disciplinary action: Suspension for one week (four work days) without pay (State's Exhibit 6, Pages 1-2).

20. After the charges were preferred against Appellant, Appellant elected not to request a fact finding panel or hearing to contest the charges pursuant to 20 VSA §1880. By letter of November 14, 1991, Commissioner Walton informed Appellant in pertinent part:

Based on my review of this matter, I believe the disciplinary action is warranted as was outlined in the charges. However, after weighing the additional factors brought to my attention since the original charges were filed and after considering the mitigating circumstances surrounding the events as outlined in your discussion with me, I have decided to amend the proposed discipline to reflect a suspension of only two days without pay plus the loss of two days accumulated annual leave...(State's Exhibit 6, Page 3).



### OPINION

The threshold issue is whether the Employer violated the requirement of Article 14, Section 2, of the Contract that "(d)disciplinary proceedings shall be instituted within a reasonable time after the violation of the Code of Conduct occurred or was discovered." If the Employer did violate this administrative due process requirement of the Contract, then the Employer waived the right to institute disciplinary proceedings against Appellant. Grievance of Gorruso, 9 VLRB 14, 34 (1986). Rev'd on Other Grounds, 150 Vt. 139 (1988).

The alleged violation of the Code of Conduct at issue herein occurred on December 30, 1990, when Appellant spoke with Mrs. Tomasi on the telephone. The Employer "discovered" this alleged violation by Mrs. Tomasi complaining of Appellant's conduct during this telephone conversation to Major Sinclair on January 10, 1991. Disciplinary proceedings were instituted against Appellant approximately five and one half months later, when Commissioner Walton preferred charges against him on June 24, 1991.

Appellant contends that the reasonable period allowed by the Contract does not include a five and one-half month delay to investigate a telephone call. The Employer contends that this delay was reasonable because the investigation of Appellant was linked to the investigation of the circumstances surrounding the "suicide" press release and, thus, could not be completed until that more complicated investigation was complete. The Employer contends that separate investigations as to the conduct of Appellant, and those employees involved in the "suicide" press

release, were not conducted because the conduct complained of in all instances grew out of the error made by Sergeant #1 in publicizing that the Tomasi youth committed suicide. The Employer contends that to conduct separate investigations would result in a duplication of individuals to be interviewed and other evidence to be gathered; that this would be a waste of the Department's resources and possibly prolong the investigation and resolution of the entire matter. The Employer contends that the delay in instituting disciplinary action stemmed from the thoroughness of the entire investigation and the internal affairs procedure to which the Employer was required to comply.

We conclude that the Employer acted unreasonably under the circumstances by delaying the institution of disciplinary proceedings against Appellant until the entire investigation and review of the "suicide" press release was completed. This resulted in disciplinary proceedings against Appellant not being instituted within a reasonable time of the Employer's discovery of the alleged violation of the Code of Conduct.

The complaint against Appellant required a very simple investigation. The complaint by Mrs. Tomasi involved Appellant's conduct in a single phone call on December 30, 1990. The investigation primarily consisted of interviewing Mrs. Tomasi and Appellant with respect to what had occurred during the phone conversation. Appellant's alleged misconduct began and ended with this phone call. The determination whether the prior "suicide" press release was proper did not need to be decided before Appellant's conduct during the phone conversation could be evaluated.

Nonetheless, the Employer combined the investigation concerning Appellant with that of the "suicide" press release. This resulted in the institution of disciplinary proceedings against Appellant being unreasonably delayed. The delay caused by the combining of the investigations is most evident by Captain Vallie's two and one half month internal investigation.

Despite the Employer's own rules and regulations requiring that an employee be notified as soon as possible after an allegation is made against the employee and prior to the commencement of an investigation into the allegation, Appellant was not notified of Mrs. Tomasi's allegation against him until nearly two months after she made the allegation. Instead of complying with the notification requirement, the investigating officer, Captain Vallie, decided to delay Appellant's notification and interview until after he had investigated all aspects of the press release incident. This involved interviewing eleven individuals other than Appellant and Mrs. Tomasi, which interviews added nothing to an evaluation of Appellant's conduct during the December 30 phone conversation.

By combining the investigations, a very simple investigation of Appellant's conduct which could have occurred quickly became intertwined with the much more complicated investigation concerning the circumstances surrounding the "suicide" press release itself. As a result, an investigation which reasonably should have been conducted quickly took two and one-half months to complete.

The combining of the investigations inevitably slowed down the subsequent chain of command review of the investigation

report, which took nearly three months. The bulk of the delay during this process occurred after the report, and recommendations by others in the chain of command, reached the Commissioner. It took nearly an additional two months for the Commissioner to decide to prefer charges against Appellant, as well as Sergeant #1. This quasi-military chain of command review of an alleged improper telephone call by five levels of supervision ought not to justify stretching what would have been a brief period within which disciplinary proceedings were to have been instituted to a five and one-half month period of time.

The entire chain of command agreed that charges should be preferred against Appellant, and that he should receive at least some form of disciplinary action if the charges were proved. Further, the review of the circumstances with respect to the phone conversation between Appellant and Mrs. Tomasi was relatively simple. If that issue had been presented to the Commissioner separately from the more complicated circumstances involving the allegations against Sergeant #1, as it should have been, it is apparent that the Commissioner reasonably could have found time in his busy schedule to expeditiously decide whether to prefer charges against Appellant. However, the combining of the investigations made the Commissioner's review much more involved, inevitably delaying the decision whether to prefer charges against Appellant.

In sum, we conclude that the Employer violated the Contract by failing to prefer charges against Appellant within a reasonable time of the discovery of the alleged violation of the

Code of Conduct. Thus, the Employer is precluded from taking any disciplinary action against Appellant with respect to the December 30, 1990, telephone call.

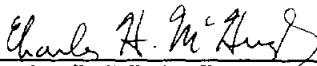
ORDER


NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

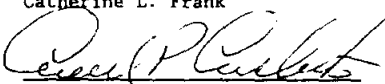
1. The Appeal of Nathan Wells is SUSTAINED;
2. The disciplinary action taken by the State of Vermont, Department of Public Safety, of suspending Appellant for two days and removing from his annual leave bank two days of accumulated annual leave, is RESCINDED;
3. The Employer shall pay Appellant two days wages at his pay rate effective at the time of his suspension, plus 12 percent interest per annum, and shall restore two days to his annual leave bank; and
4. The Employer shall remove all references to the disciplinary action from Appellant's personnel file and other official records.

Dated this 2nd day of March, 1993, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Charles H. McHugh, Chairman

  
Catherine L. Frank

  
Carroll P. Comstock