VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 93-64
STEPHEN L. KENNEDY	)	

FINDINGS OF FACT, OPINION AND ORDER

On November 5, 1993, Stephen L. Kennedy ("Grievant") filed a grievance against the State of Vermont, Department of Public Safety ("Employer"). The grievance was amended on November 19, 1993, to conform to the Board Rules of Practice. The amended grievance alleges that the Employer violated Articles 5, 14 and 15 of the collective bargaining agreement between the State and the Vermont State Employees' Association, Inc. ("VSEA") for the State Police Bargaining Unit, effective for the period July 1, 1992 to June 30, 1994 ("Contract"), the Vermont Fair Employment Practices Act, the Rehabilitation Act of 1973, the Americans With Disabilities Act and the Civil Rights Act. Specifically, Grievant alleges that the Employer discriminated against him on account of a handicap by dismissing him, and that further, there was no just cause for such dismissal.

On November 23, 1993, the Employer filed the State's Answer and requested that the Board strike Grievant's allegations that the Employer had violated the Vermont Fair Employment Practices Act, the Rehabilitation Act of 1973, the Americans With Disabilities Act and the Civil Rights Act because the Board lacked jurisdiction to consider such claims. On July 18, 1994, the parties filed a joint Motion for Bifurcated Hearing and the Employer filed a Motion to Compel. On July 22, 1994, Grievant

filed a Memorandum in Opposition to Compel Privileged Information.

A hearing was held before Charles McHugh, Chairman, Louis Toepfer and Carroll Comstock at the Board's hearing room in Montpelier on July 28, 1994. Cindy Maguire, Legal Counsel for the Employer, represented the Employer. Attorney Alan Biederman represented Grievant. At the hearing, the Board granted the parties' Motion for Bifurcated Hearing, reserved judgment on the Employer's request to strike and denied the Employer's Motion to Compel. The parties stipulated to certain facts during the hearing. The parties filed post-hearing briefs.

As a result of the Board's granting the parties' Motion for Bifurcated Hearing, the sole issue before the board at the July 28, 1994, hearing was whether Grievant resigned or was terminated. The parties agreed that, if, after hearing the evidence on July 28, 1994, the Board decided that Grievant resigned, it would treat the Motion for Bifurcated Hearing as the State's Motion to Dismiss, and it would grant such motion and issue its decision; if the Board decided that Grievant did not resign but was terminated, it would notify the parties that it had denied the Motion to Dismiss and schedule further hearings to hear evidence on whether Grievant had been discriminated against and whether there was just cause for dismissal. The Board notified the parties on August 25, 1994, that it denied the Motion to Dismiss.

A second hearing was held before Board Members Charles McHugh, Chairman, Louis Toepfer and Carroll Comstock at the

Board's hearing room in Montpelier on October 4, 1994. Attorney Maguire represented the Employer. Attorney Biederman represented Grievant. Grievant did not present any evidence at this hearing. The Employer filed a post-hearing brief. Grievant declined to file a post-hearing brief. Instead, Grievant sent a letter to the Board in which he set forth an explanation for not filing a post-hearing brief and not presenting any evidence at the October 4, 1994, hearing.

FINDINGS OF FACTS

Findings of Fact 1 - 8 were stipulated to by the parties and read into the record by attorneys Biederman and Maguire on July 28, 1994:

1. Grievant submitted a letter of resignation by fax to A. James Walton, Commissioner of Public Safety, on October 8, 1993. Such letter stated in pertinent part:

> This is to advise you that I hereby tender my resignation from the Vermont State Police in accordance with the discussions held on this date relative to the same matter.
>
> I have attempted to serve the Department and Vermont citizens to the best of my abilities during my 16 years in the uniformed State Police, and offer this resignation with regret, looking back on my years with the Department with pride and honor (Deposition Exhibit 3).

2. Grievant was paid 20 days annual leave upon separation from service.

3. On October 7, 1993, and October 8, 1993, Commissioner Walton had discussions with Jonathan Sokolow and Annie Noonan, both of whom had the authority to speak on Grievant's behalf.

4. Noonan had complete authority to negotiate an agreement for Grievant with respect to any discipline, any actions the Department might take, or any resignation issues. If Noonan

reached an agreement with Commissioner Walton, she had complete authority from Grievant to bind him to such agreement.

5. Sokolow had the authority to discuss or negotiate on behalf of Grievant.

6. After a disciplinary proceeding before a hearing panel, Grievant was found guilty of driving while under the influence of alcohol and of being not fully truthful during the course of an internal investigation in August, 1993.

7. On October 7, 1993, the hearing panel issued its report and findings based on testimony that it had heard; the hearing panel recommended that Grievant be terminated.

8. On December 3, 1993, the unemployment compensation division of the Vermont Department of Employment and Training determined that Grievant was not eligible for receiving benefits for the period beginning with the week ending November 13, 1993, and running to the week ending December 18, 1993. The reason cited by the Department of Employment and Training for such disqualification was "misconduct".

9. 20 VSA §1880 provides in pertinent part:

> (a) Except for a temporary suspension, no disciplinary action shall be taken by the department against a member of the department without following the procedures set forth in this section.
>
> (b) Within seven days after 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 panel...
>
> ...
>
> (d) The...hearing panel...shall report to the commissioner whether the charges have been proved or not proved by a preponderance of the evidence. The panel...may make

recommendations to the commissioner with respect to the action he should take if the charges are proved.

(e) ...*If the panel...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.

...

10. 20 VSA § 1922 creates a state police advisory commission ("SPAC") which "provides advice and counsel to the commissioner in the carrying out of his responsibilities for the management, supervision and control of the Vermont state police". Section 1922 also provides, "To ensure that state police officers are subject to fair and known practices, [SPAC] shall advise the commissioner with respect to...discipline." During all relevant time periods, Karen Bradley was chair of SPAC. Walton has no supervisory authority over SPAC.

11. The Department of Public Safety's Code of Conduct states in pertinent part:

Article II Code of Conduct - Part A

...

13.0 TRUTHFULNESS

13.1 Upon the order 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.

Code of Conduct - Part B

...

6.0 CONDUCT

6.1 Members shall conduct themselves with 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.

...

7.0 CONFORMANCE TO LAWS

7.1 Members shall obey and abide by the laws of the United States, the State of Vermont, and any state or local jurisdiction in which they are present (State's Exhibit B).

12. On October 7, 1993, A. James Walton, Commissioner of Public Safety, sent a copy of the hearing panel's report referenced in Finding No. 7 to Attorney Sokolow. Such report was 21 pages in length.

13. On October 7, 1993, SPAC held its quarterly meeting with Walton and discussed the hearing panel's report. The individual members of SPAC were polled and recommended that Walton terminate Grievant. Such recommendation was advisory only. SPAC members told Walton during this October 7, 1993, meeting they had no intention of releasing the hearing panel's report.

14. Walton decided to dismiss Grievant. He made this decision based on many factors, including, but not limited to: the hearing panel's report and recommendation; the extensive notoriety of Grievant's conviction for driving while under the influence of alcohol; the negative impact of such notoriety on the Department; Grievant's past disciplinary record; and the

nature of Grievant's offenses, which violated the Code of Conduct.

15. Grievant had pled guilty on April 26, 1994, to a charge of driving under the influence of alcohol on February 21, 1994, and had his driver's license revoked for 90 days. Walton believed that such conviction and Grievant's previous disciplinary record (set forth below) eroded Grievant's credibility as a witness in court as a law enforcement officer (State's Exhibit B).

16. Grievant's previous disciplinary record included the following disciplinary actions:

> December, 1987 - suspended for six months for driving a Department vehicle while under the influence of alcohol;
>
> October, 1991 - suspended for 30 days, transferred, ordered to obtain assessment for alcohol counseling, and denied permanent assignment to a Department vehicle because he had operated a Department vehicle while under the influence of alcohol in September, 1989 and fraudulently obtained a Massachusetts drivers license in December, 1987 while his Vermont driver's license was suspended (State's Exhibit B).

17. Walton telephoned Sokolow either during or after the SPAC meeting and told him he intended to terminate Grievant. Sokolow asked Walton to delay the imposition of any discipline until they had an opportunity to meet. Walton agreed to meet with Sokolow the next morning. During this conversation, Sokolow told Walton he intended to seek an injunction to prevent the release of the hearing panel's report. Walton told Sokolow he did not intend to release the report. Walton did not believe he had the authority to release the report because it involved a

personnel matter. Walton told Sokolow that SPAC also had no intention of releasing the report, at least in the immediate future. Sokolow did not seek an injunction.

18. Walton and Sokolow met at Walton's office the next morning, October 8, 1993. Sokolow advocated various other disciplinary options for Grievant in lieu of termination, including transfers to other positions in State government. Walton would not consider such possibilities. During the morning, Sokolow moved the negotiations toward the possibility of Grievant resigning with certain conditions. Walton would not agree to any conditions.

19. Walton was not inclined to accept a conditional resignation from Grievant because he knew he would be under heavy criticism from the public, SPAC and other officers in the Department. There had been a great deal of media attention given to Grievant's conviction for driving while under the influence of alcohol because he was a law enforcement officer. Michael Donoghue, a reporter for the Burlington Free Press, had shown an unflagging interest in Grievant's case.

20. Sokolow left Walton's office at approximately 12:30 p.m. with the understanding that Walton would take no action against Grievant until Sokolow talked with Grievant and got back in touch with Walton that afternoon. This was the only agreement Walton and Sokolow reached.

21. Sokolow called Walton at approximately 2:00 p.m. and told him Grievant was willing to offer his resignation under two conditions: 1) that the 21 page hearing panel report not be made

public, and 2) that Walton would not discuss the circumstances of Grievant's resignation with any future prospective employer. Walton would not accept these conditions. Sokolow said he would get back in touch with him after talking again with Grievant.

22. Noonan telephoned Walton a short time later from a public telephone on Route 4 in Menden, Vermont. Grievant was with her. She and Grievant had spent the morning consulting with an attorney about Grievant's employment situation at the attorney's office in Rutland. Noonan had spoken by telephone to Sokolow and was on her way back to Montpelier. She told Walton she was concerned that Sokolow had not explored all Grievant's options.

23. Noonan told Walton she now had the authority to negotiate on Grievant's behalf. Walton and Noonan had negotiated numerous personnel matters over approximately 12 years and had developed a good and trusting working relationship with each other. Walton made it clear to Noonan that he intended to terminate Grievant by the close of the business day. Noonan re-explored some of the same options Sokolow had earlier discussed with Walton.

24. Noonan and Walton eventually discussed the possibility of Grievant offering his resignation. During the next two hours, there were several telephone conversations between Noonan on Route 4 and Walton in Waterbury. Noonan and Walton's discussions covered four general areas.

25. The first general area of discussion centered around the Department's release of information. There was information

connected with Grievant's disciplinary proceedings that Noonan did not want publicized, including the hearing panel's 21 page report. Noonan considered the suppression of the 21 page report to be an important part of Grievant's resignation package. Walton told Noonan he had no intention of releasing the 21 page report of the hearing panel and that it was his understanding that SPAC also had no intention of releasing the 21 page report. Walton told Noonan that if SPAC released the 21 page report, Grievant could rescind his resignation and be considered to have been terminated.

26. A second general area of discussion centered around a lump sum payout of Grievant's earned annual leave. A new contractual provision, effective January 1, 1993, provided "...up to 20 days of annual leave accrued by an employee separating from State classified service shall be paid as a lump sum...". Article 25, Section 2(p). Grievant had earned 47 days annual leave and would therefore forfeit 27 days under the terms of the current Contract. Noonan asked that Grievant receive a lump sum payout for his additional 27 annual leave days. Walton told Noonan he did not want to do anything "special" for Grievant. Noonan indicated that this type of arrangement had been worked out with other employees resigning from State service. She asked if Walton would support her if she could work something out with his Personnel Administrator, Duncan Higgins, or with Tom Ball at the Department of Personnel. Walton said he had no objections to her pursuing this, provided that Grievant did not receive special treatment.

27. A third general area of discussion centered around Grievant's eligibility for collecting unemployment compensation benefits. Noonan asked that the Department not oppose Grievant's claim for unemployment benefits. Noonan told Walton the State did not always contest an employee's claim for unemployment compensation benefits. Again, Walton indicated he would not give Grievant "special treatment", but he would do whatever was usual or customary.

28. A fourth general area of discussion was publicity. During their two hours of negotiations, Walton read Noonan a letter in which he accepted Grievant's resignation. Walton had drafted a dismissal letter prior to meeting with Sokolow earlier in the day and then changed the last paragraph so as to reflect a resignation. Noonan may have made modifications to Walton's letter, however, at some point both Noonan and Walton agreed that Walton's acceptance of Grievant's resignation would read in pertinent part, as follows:

> On October 7, 1993, the Department and your attorney received the report issued by the hearing board empaneled to hear charges filed against you. Based upon the evidence presented on August 4, 1993, the board determined that you violated the Department's Code of Conduct. These charges alleged that you operated a motor vehicle while intoxicated, and secondly, that you failed, during the course of an internal investigation, to fully and truthfully answer questions asked of you as enumerated in the statement of charges dated April 1, 1993.
>
> The hearing board also analyzed the newly enacted American Disabilities Act which you argued acted as a bar to discipline and dismissal of an employee in such circumstances. The hearing panel determined that the Disabilities Act did not apply in this situation.
>
> The hearing board has recommended to me that you be dismissed from employment. The State Police Advisory

Commission has concurred with that recommendation. I hereby accept your resignation from the Vermont State Police effectively immediately (Deposition Exhibit 2).

29. Walton agreed to be the principal spokesperson for the Department and to do the best he could to keep the information limited to the above-referenced letter. Walton also gave Noonan assurances that Bradley also authorized the release of this letter as a press release.

30. Noonan and Walton believed they had reached an agreement at approximately 4:30 p.m. Noonan drafted the resignation letter set forth in Finding No. 1 between 4:30 p.m. and sometime shortly after 5:00 p.m. Noonan drove several miles to the Bethel State Police barracks and exchanged letters by fax with Walton. No one at the Bethel barracks assisted Noonan at the fax machine. Attached to Walton's October 8, 1993, letter was a letter from Bradley indicating that SPAC authorized Walton's letter as a press release.

31. Lieutenant Colonel Robert Horton and attorney James Crucitti were with Walton during his above-referenced discussions with Noonan. Horton immediately sent a notice to all 12 State Police barracks in the State informing each barracks about Grievant's resignation and directing all press inquiries to Walton.

32. It was Walton's understanding that the agreement he had reached with Noonan was as follows: Grievant would resign with two stipulations: 1) Walton would not release the hearing panel's 21 page report and 2) if SPAC released the 21 page report, Grievant could rescind his resignation. It was Walton's

understanding that the other issues they discussed; annual leave accrual, unemployment compensation and publicity; were not part of the resignation agreement. His support for the annual leave and unemployment compensation requests was limited to assurances that Grievant not receive special privileges. He recognized he had no authority over SPAC members who may speak with the news media.

33. It was Noonan's understanding that the agreement she had reached with Walton was as follows: Grievant would resign subject to four stipulations: 1) the only information that would be released to the media was a copy of Walton's October 8, 1993, letter with the understanding that Walton and Bradley would personally handle all media questions and tailor their remarks to this letter; 2) Walton would support paying Grievant his additional 27 days of earned annual leave; 3) Walton would not contest Grievant's claim for unemployment compensation; 4) if the agreement fell apart, Grievant could rescind his resignation.

34. As soon as Noonan and Walton completed their negotiations, Walton and Crucitti attempted to reach all SPAC members by telephone because they knew SPAC would expect to read and hear in the media that Walton had dismissed Grievant.

35. Donoghue reached certain SPAC members before Walton or Crucitti. He polled them to determine what disciplinary action they had advised. Donoghue called Walton at home that night after he had already talked to and polled SPAC members. Donoghue also talked to Bradley and to Crucitti.

36. The next day an article appeared in the Burlington Free Press in which Walton, Bradley and Crucitti were all quoted. The article stated that SPAC had voted 5 - 0 to dismiss Grievant. Bradley was reported to have stated that SPAC was adamant concerning its unanimous decision. Crucitti was reported to have stated that if Grievant had been fired, he could have appealed to the state Labor Relations Board and the Vermont Supreme Court (State's Exhibit C).

37. Noonan believed Walton had breached their agreement because Crucitti spoke with the press and because there was more information in the article than that contained in Walton's October 8, 1993, letter.

38. Although Noonan believed that Walton had breached the agreement, she continued to pursue a lump sum payout for Grievant's 27 additional annual leave days and unemployment compensation benefits.

39. On or about October 13, 1993, Walton told Higgins about his discussions with Noonan regarding the possibility of a lump sum payout to Grievant for his additional 27 days of annual leave. Higgins had never arranged such a payout because this was a new contractual provision which had only been in effect for approximately ten months. Walton asked Higgins to explore the possibility of arranging such a lump sum payout administratively.

40. Higgins contacted the Department of Personnel and was told that such an arrangement would violate the Contract. It would require written authorization from the Commissioner and VSEA. Walton would not sign a written authorization.

41. Grievant filed a grievance with the Vermont Labor Board on November 5, 1993.

42. On November 10, 1993, Grievant filed a claim for unemployment compensation with the Department of Employment and Training. Noonan sent Higgins proposed language for his response to the standard request the Department of Employment of Training would be making for additional information with respect to Grievant's separation from employment. The Department of Employment and Training would use such information to assess eligibility for unemployment compensation benefits. Higgins met with Crucitti and decided not to use Noonan's proposed language. Higgins used the following language instead:

> [Grievant] had been brought up on disciplinary charges by the Department of Public Safety on [an] off duty incident. The charges alleged that [Grievant] violated the department Code of Conduct in that he operated a motor vehicle while intoxicated and failed to fully and truthfully answer questions conducted during an internal affairs investigation. He was found guilty on both offenses. Once the disciplinary process was complete, the results were forwarded to the State Police Advisory Commission (SPAC) for approval. The final recommendation from the SPAC was for immediate involuntary termination. [Grievant] and his legal representative negotiated with the Commissioner of Public Safety for an immediate voluntary resignation effective Oct. 8, 1993.
>
> Since receipt of that resignation, [Grievant] has filed a grievance with the Vermont Labor Relations Board in an attempt to overturn the resignation (State's Exhibit 1).

43. In response to an additional request from the Department of Employment and Training, Walton sent a letter on or about December 2, 1993, in which he stated that Grievant had submitted a letter of resignation on October 8, 1993, and that this resignation letter "was submitted after negotiations with

[Grievant] and his VSEA attorney with this department". On December 3, 1993, the Department of Employment and Training disqualified Grievant from receiving benefits for six weeks (see Finding No. 7) (State's Exhibit 4).

44. On December 10, 1993, Walton sent Grievant a letter which stated in pertinent part:

> I received your grievance dated November 5, 1993, which alleges that you did not resign from the Vermont State Police on October 8, 1993. I believe that it was quite clear to all involved that I accepted your resignation at that time, upon your request, in lieu of dismissal. You are hereby notified that based upon the findings of the hearing board, and the recommendation of the the board, as well as the recommendation of the State Police Advisory Commission, and after considering your representative's arguments, by dismissal or resignation it is my decision that you shall no longer be employed as a member of the Vermont State Police.
>
> If you did not validly resign you are hereby notified that you are dismissed from the Vermont State Police. In the meantime your record will indicate resignation and the reasons therefor. The reasons for your dismissal are outlined in the Board's decision dated October 7, 1993, and my memo of October 8, 1993 to you, in which I accepted your resignation.
>
> The contract requires that a dismissal letter contain notice that you have a right to file a grievance over the action at the Vermont Labor Relations Board, 133 State Street, Montpelier, Vermont 05633-6107, within thirty (30) days. In light of the fact that a grievance over your separation is already pending, this Department considers any required grievance to have already been filed (State's Exhibit D).

45. Neither Walton nor SPAC has released the hearing panel's 21 page report to the media.

OPINION

Grievant contends that the Employer discriminated against him because of his handicap when he was dismissed as a Vermont State Trooper in violation of Article 5 of the Contract, the Vermont Fair Employment Practices Act ("FEPA"), the Rehabilitation Act of 1973, the Americans with Disabilities Act and the Civil Rights Act. Grievant further contends that the Employer violated Articles 14 and 15 of the Contract in that there was no just cause for such dismissal.

Before addressing the merits, we briefly discuss a jurisdictional issue raised by the Employer in its Answer. The Employer contends that the Board does not have jurisdiction over FEPA and federal law, including the Rehabilitation Act of 1973, the Americans with Disabilities Act and the Civil Rights Act, and requests that the Board strike these claims.

We concur with the Employer that we lack jurisdiction over Grievant's claims of violations of FEPA and federal law. The Board has such adjudicatory jurisdiction as is conferred only by statute. Grievance of B.M, B.B., S.S., C.M. and J.R. 15 VLRB 503, 504 (1992). In re Grievance of Brooks, 135 Vt. 563, 570 (1977). In deciding grievances, the Board is limited by the definition of the term grievance in 3 VSA §902(14). In re Grievance of Guttman, 139 Vt. 574, 576 (1981). Section 902(14) defines a grievance as "an employee's...expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under the collective bargaining agreement or the discriminatory application of a rule or regulation..." This

definition of "grievance" is not so expansive to permit us to take jurisdiction over alleged violations of FEPA; B.M., et al; and over alleged violations of federal law. Thus, we grant the Employer's request to strike these claims.

We now turn to the two issues before the Board as a result of our granting of the parties' Motion to Bifurcate. The parties agreed that if we decide that Grievant resigned, the grievance will be dismissed; if we decide Grievant did not resign but was terminated, we will continue our inquiry as to whether such termination violated Articles 5, 14 and 15 of the Contract.

Resignation

We have before us an unusual case in that there is no dispute between the parties that Grievant offered a written letter of resignation on October 8, 1993. This letter was part of a purported agreement reached between Commissioner Walton and Grievant's union representative, Annie Noonan. There is no dispute that Noonan had complete authority to negotiate such an agreement. There is also no dispute that if Grievant had not resigned before the close of business that day, Walton would have dismissed him. However, it is Grievant's contention that the resignation he offered and the Employer accepted on October 8, 1993, is invalid. Grievant offers a number of arguments to support his claim that the resignation is invalid.

Grievant first contends that the resignation he offered on October 8, 1993, was involuntary because it was the the result of undue influence on the part of the Employer. The Vermont Supreme Court ordered the reinstatement of an employee who had resigned,

finding that the resignation was involuntary because it was the result of undue influence. In re: Taylor, Vermont Supreme Court, Docket No. 91-108 (unpublished opinion January 6, 1982). See 158 Vt. 657. The Court provided a number of factors to weigh and consider in determining whether there was undue influence: whether the employee was in a vulnerable state of mind, whether the employer was in a superior position, whether independent advise was available to the employee, whether the discussions took place in an unusual time or setting, and whether there was an emphasis on the negative consequences of a delay.

In applying the pertinent factors to this case, the state of the evidence is such that we do not find that Grievant's resignation was the result of undue influence. Grievant did not testify before us and we can only speculate as to his state of mind. Grievant had the benefit of independent advice. On the day in question, Grievant and his union representative consulted with two attorneys. Grievant had been represented by an attorney throughout a formal disciplinary proceeding - it is reasonable to conclude that he had been well aware for several months that the hearing panel, as well as SPAC, could recommend his termination and that Walton would concur with such recommendation. Although there was a limited amount of time to negotiate something less than a dismissal, and the discussions leading up to the negotiated resignation took place on the telephone, there was no evidence that such factors influenced Grievant's decision to offer a resignation in lieu of a dismissal that he might otherwise not have offered. There was no other

evidence offered to support that contention. Undue influence is not necessarily present just because an employee is confronted with a choice of resigning or being fired. Id. In light of the limited evidence before us, we reject Grievant's claim that his resignation was involuntary because it was the result of undue influence.

Grievant next contends that his offer of resignation and the Employer's acceptance of such offer constituted a contract and that the Employer breached this contract by failing to abide by its terms. Grievant would have us find that Noonan and Walton, as respective agents for Grievant and the Employer, entered into a binding agreement. Grievant contends he offered through his agent to resign from his position as a Vermont State Trooper with four specific stipulations (set forth in Finding No. 33), Walton understood all the essential terms of this offer, accepted the offer, then breached several terms of the agreement. We decline to analyze this case in this manner as we conclude that the evidence does not support Grievant's claim that a binding agreement was ever reached.

Alternatively, Grievant contends that Walton and Noonan were mistaken about what each believed to be essential terms of the agreement they reached on October 8, 1993; therefore, there was no agreement or contract because the parties shared no mutual understanding as to its terms. In considering this claim and the totality of the circumstances surrounding the negotiations, we conclude that both Noonan and Walton credibly misunderstood the terms to which they were agreeing.

It is a basic tenet of the law of contracts that there must be mutual manifestations of assent or a "meeting of the minds" on all essential particulars. Evarts v. Forte, 135 Vt. 306, 309 (1977). A court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think they have made a contract; they must have expressed their intentions in a manner that is capable of such an understanding. It is not even enough that they have actually agreed, if their expressions, when interpreted in the light of accompanying factors and circumstances, are not such that a court can determine what the terms of the agreement are. 1 Corbin on Contracts §95. The time for measuring a "meeting of the minds" is at the point of agreement. Vaughan v. Tetzlaff, 141 Vt. 150, 154 (1982).

There is no dispute that in the late afternoon of October 8, 1993, Noonan and Walton discussed the release of the 21 page hearing panel's report. Noonan considered the suppression of this report to be an important part of Grievant's resignation package. Walton specifically agreed that, if Grievant offered his resignation, he could withdraw such resignation if the report was made public. There is no dispute that Walton and Noonan also discussed Noonan's other areas of concern with respect to Grievant's immediate welfare: an annual leave payout to Grievant above the contractual amount of 20 days, Grievant's ability to receive unemployment compensation benefits and Walton's ability to control the release of information to the media with respect to Grievant's departure from State service.

Walton and Noonan had a long and trusting relationship that had developed over many years of negotiating personnel matters between the Employer and employees represented by VSEA. It is understandable, given this relationship, that Walton was amenable to discussing with Noonan other areas of concern that were beyond the limits of what he intended to be the two essential terms of the resignation agreement: not releasing the 21 page report and allowing Grievant to rescind his offer of resignation if SPAC released such report. Similarly, because Walton was willing to engage in additional areas of concern with respect to Grievant's immediate financial welfare and the control of negative publicity, it is reasonable to conclude that Noonan believed that the entire scope of their discussions was a part of Grievant's resignation offer. Noonan genuinely believed Grievant's offer to resign included four stipulations. Walton accepted the offer, credibly believing the offer only included two; the other areas he was willing to discuss with Noonan were merely peripheral to the agreement. An acceptance on terms differing from those offered is a not binding. Ackerman v. Carpenter, 113 Vt. 77, 81 (1943).

At no time on October 8, 1993, were Noonan and Walton able to meet in person. Their negotiations took place over two hours in the late afternoon during separate telephone conversations. There was pressure on both Noonan and Walton to reach and finalize an agreement in a matter of hours. There was pressure on Noonan to draft a brief letter of resignation, drive several miles to the Bethel barracks and exchange Grievant's letter of

resignation with Walton's acceptance of such resignation. Given the breadth of the discussions and the somewhat irregular circumstances of such discussions, we find it plausible that Noonan and Walton both misunderstood what each believed to be the essential terms of the agreement. In short, the parties shared no mutual understanding at the point of agreement and there was no enforceable contract. Accordingly, there was no resignation agreement.

Consistent with our granting the parties' Motion to Bifurcate, we now turn to the merits of the case - whether the Employer discriminated against Grievant on account of his handicap by dismissing him, in violation of Article 5 of the Contract, and further, whether there was just cause for such dismissal, in violation of Articles 14 and 15.

Articles 5, 14 and 15

Grievant declined to offer any evidence to support his claims that the Employer violated Articles 5, 14 and 15 of the Contract. Instead, Grievant relied on Board precedent; Grievance of Kennedy, 6 VLRB 129, 138-139 (1983); in which the Board held that it would not conduct a de novo review of the facts in a State Police disciplinary matter. It was Grievant's position that, under Kennedy, the Board was bound by the hearing panel's findings of fact. Grievant did not contest, based on such findings of fact, that there was just cause for his termination. Grievant's intended purpose in filing this grievance was to exhaust administrative remedies in order to proceed in his claim of handicap discrimination in a different forum. Grievant's unusual position was set forth in a letter addressed to the Board

and submitted in lieu of requested findings and conclusions of law. We decline to comment on Grievant's argument other than to say that he leaves us to find that there is no genuine issue as to any material fact in dispute relevant to the question of whether there is just cause to dismiss.

The Employer has the burden of establishing by a preponderance of the evidence that an employee was dismissed for just cause. In re Grievance of Muzzy, 141 Vt. 463, 472 (1982). To establish just cause for discipline, it is necessary for the Employer to show that disciplining the employee for certain conduct is reasonable; In re Grievance of Brooks, 135 Vt. 563, 568 (1977); and that the employee had fair notice, express or implied that such conduct would be grounds for discharge or other discipline. In re Grievance of Yashko, 138 Vt. 364 (1980).

The Employer charges there was just cause to dismiss Grievant because he was convicted of driving while under the influence of alcohol and he was not truthful in the course of an internal investigation, as set forth in the hearing panel's report and Finding No. 6. Such actions violated the Employer's Code of Conduct. The Employer has met its burden.

The charges against Grievant having been established, we look to the specific factors articulated in Grievance of Colleran and Britt, 6 VLRB 235, 268-69 (1983), to determine the reasonableness of the disciplinary action imposed on Grievant. The pertinent factors here are: 1) the nature and seriousness of the offense and its relation to the employee's duties, position and responsibilities, including whether the offense was repeated; 2) the effect of the offense upon supervisors' confidence in the

employee's ability to perform assigned duties; 3) the clarity with which the employee was on notice that the conduct was prohibited by the employer; 4) the employee's past disciplinary record; and 5) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

The charges against Grievant were serious. Grievant's ability to perform the duties and responsibilities of a law enforcement officer was jeopardized as a result of his having violated the laws he was sworn to enforce. Grievant's conduct was widely reported in the media and such negative media attention reasonably had the effect of undermining the public's confidence in him and the Department as a whole. The hearing panel's conclusion that Grievant had been untruthful in the course of an internal investigation also eroded Grievant's credibility and his supervisors' confidence in his ability to perform his job. There is no question that Grievant was on notice that driving while under the influence of alcohol would lead to severe disciplinary action. Such conduct in the past had led to two suspensions, however, such disciplinary action had not been effective in deterring Grievant's conduct.

We conclude the nature and seriousness of Grievant's offenses, the serious breach of trust he committed by violating the laws of Vermont and the Code of Conduct, and the fair notice he had that such conduct could result in severe disciplinary action, justify Grievant's dismissal.

ORDER

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

The Grievance of Stephen Kennedy is DISMISSED.

Dated this 13th day of January, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh

Louis A. Toepfer

Carroll P. Comstock