VERMONT LABOR RELATIONS BOARD

APPEAL OF:	)	
	)	DOCKET 99-62
GLORIA DANFORTH	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On September 30, 1999, Gloria Danforth ("Appellant") filed an appeal with the Labor Relations Board over her dismissal from employment as a Detective Sergeant with the Vermont Department of Public Safety ("Employer") through her attorney Kimberly Cheney. Appellant alleged that, in dismissing her, the Employer violated various provisions of the Employer's Rules and Regulations and the collective bargaining agreements between the State of Vermont and the Vermont State Employees. Association ("VSEA") for the State Police Unit, effective July 1, 1997 – June 30, 1999 and July 1, 1999 – June 30, 2001 ("Contract").

The Labor Relations Board issued four previous discovery orders in this matter. 23 VLRB 51 (2000); 23 VLRB 288 (2000); 24 VLRB 52 (2001); 24 VLRB 81 (2001). On October 4, 2002, the Vermont Supreme Court affirmed two Board discovery orders (Supreme Court Docket Nos. 2000-185 & 2001-022). Following discovery and prior to the hearing on the merits, the parties jointly moved on March 17, 2003, to bifurcate the issues scheduled for hearing. The parties moved that the Board first have a hearing limited to whether Appellant committed violations of the Rules of Regulation/Code of Conduct as charged. Should the Board conclude that Appellant did not commit such a violation, the remaining issues raised by Appellant would be moot. Should the Board conclude that Appellant did commit such a violation, the Board can schedule an additional hearing to

address the remaining issues raised by Appellant in her appeal. On March 18, 2003, the Board granted the parties' bifurcation motion. Thus, the only issue before the Board at this stage of the proceedings is whether Appellant committed violations of the Rules of Regulation/Code of Conduct as charged.

Hearings on this issue were held on March 20, April 8, and April 16, 2003, in the Labor Relations Board hearing room in Montpelier before Labor Relations Board Members Edward Zuccaro, Acting Chairperson; Richard Park and Joan Wilson. Attorney Cheney represented Appellant. Attorneys Daniel Burchard and Elizabeth Novotny, Counsel for the Employer, represented the Employer. Appellant and the Employer filed briefs on May 5 and 8, 2003, respectively.

FINDINGS OF FACT

1. The Contract provides in pertinent part:

ARTICLE 14 – DISCIPLINARY AND CORRECTIVE ACTION

1. DEFINITIONS

(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 or was discovered and disciplinary action shall be taken within a reasonable time after disciplinary charges have been proved or admitted. Non-criminal internal investigations should normally be completed within 30 work days after completion of the investigation.

. . .

3. The Department shall, on a one-time basis, notify each member of the Bargaining Unit in writing that: Whenever an employee is required, by his or her supervisor or management, to give oral or written statements on an issue involving the employee, which may lead to discipline against the employee, or whenever an employee is called to a meeting with

management where discipline is to be imposed on the employee, he or she has the right to request the presence of a VSEA representative and, upon such request, the VSEA representative shall have the right to accompany the employee to any such meeting.

. . .

(Employer Exhibit 1)

2. The Rules & Regulations & Operational Policies & Procedures of the Employer provide in pertinent part as follows:

. . .

SECTION III
ARTICLE II Code of Conduct – Part A – Misconduct

. . .

3.0 CRIMINAL CONDUCT – FELONY

3.1 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. Members shall not commit any violation of law which by definition of statute is a felony under any jurisdiction.

. . .

8.0 FALSE STATEMENTS

8.1 In preparing and making investigative, and other official reports, a member shall not knowingly enter or cause to be entered any inaccurate, false, or improper information, knowingly misrepresent or cause to be misrepresented any material information, or knowingly withhold or cause to be withheld any material information.

. . .

14.0 TRUTHFULNESS

14.1 Upon the order or inquiry of a superior officer and/or during the course of an internal investigation, members shall fully and truthfully answer all questions asked of them which are specifically directed and narrowly related to the scope of their employment, the operations of the department, or an allegation of misconduct or improper conduct being investigated.

. . .

SECTION III
ARTICLE II Code of Conduct – Part B – Improper Conduct

. . .

11.0 OBEDIENCE TO ORDERS

11.1 A member shall promptly obey and execute each and every lawful order issued to him/her, whether verbal or written, by a superior or supervisor . . .

. . .

20.0 VIOLATION OF RULES

20.1 Members shall not commit or deliberately omit any act which constitutes a violation of any Department General or Special Order, Rule or Regulation, Policy or Procedure, or other directive.

. . .

SECTION III

ARTICLE III Receipt, Reporting and Investigation of Allegations of Misconduct and Improper Conduct

1.0 OBLIGATION TO REPORT ALL ALLEGATIONS

1.1 Every member has the obligation to report all allegations received by him/her and all acts or substantial evidence of acts of misconduct and improper conduct discovered by him/her in accordance with the provisions of this Article . . .

. . .

5.0 NOTIFICATION

. . .

5.4 . . . all members of the State Police Bargaining Unit shall be notified, on a one-time basis, in writing that whenever an employee is required, by his or her supervisor or management, to give oral or written statements on an issue involving the employee, which may lead to discipline against the employee, or whenever an employee is called to a meeting with management where discipline is to be imposed on the employee, he or she has the right to request the presence of a V.S.E.A. representative, and upon such request, the V.S.E.A representative shall have the right to accompany the employee to any such meeting.

6.0 All allegations of misconduct and improper conduct will be investigated expeditiously . . .

7.0 CONDUCT OF INVESTIGATION

. . .

> 7.3 During the course of an investigation, any member, including the member against whom the allegation was made, may be ordered to appear before the investigator at a reasonable time and place to submit to questioning or other investigation. In the interrogation of a member, the questions asked by the investigator shall be specifically directed and narrowly related to the allegation under investigation.
>
> 7.4 During the course of an investigation, any member, including the member against whom the allegation is made, must answer fully and truthfully all questions asked him/her by the investigator which are specifically directed and narrowly related to the allegation under investigation. Disciplinary action, including dismissal, may be taken against any member who lies and/or refuses to fully and truthfully answer any such question(s) asked of him/her by the investigator.
>
> 7.5 During the interview with or questioning by the investigator, any member, including the member against whom the allegation was made, may have an attorney or other representative present to assist him or her in formulating answers, clarifying the facts, and suggesting additional sources of information. However, the presence of an attorney or other representatives shall not relieve the member of his or her obligation to answer fully and truthfully all questions specifically directed and narrowly related to the allegation under investigation.

. . .

(Employer Exhibits 2, 31, 32)

3. Appellant worked for the Employer from 1976 until her dismissal in 1999. She started her career working as a trooper at the Middlesex barracks. She then worked as a trooper at the Chelsea outpost and as a detective trooper assigned to the Washington County State Attorney's Office. In 1981, Grievant became a corporal, a position now equivalent to the position of sergeant, and was assigned to the St. Johnsbury barracks. She later became patrol commander/shift supervisor at the Bethel Barracks. After three years as a patrol commander in Bethel, Grievant transferred to Public Safety headquarters in Waterbury and worked in a newly created child protection unit. In 1991, Grievant started working as a detective sergeant in the Employer's bureau of criminal investigation unit ("BCI") working

out of the Bethel barracks. She remained in that unit and barracks from that time until her dismissal in 1999. Grievance of Danforth, 22 VLRB 220, 222-223 (1999).

4. In September 1998, the VSEA filed a grievance, VLRB Docket No. 98-65, on behalf of Appellant and two fellow employees of the Employer. The grievants alleged that the Employer and Lieutenant Glenn Cutting discriminated against them, intimidated them and retaliated against them on the basis of their gender, union membership and complaint and grievance activity and created a hostile work environment after they filed an unfair labor practice charge against the Employer. Further, the grievants alleged that the Employer discriminated and retaliated against them for whistleblowing activities. Prior to the hearing before the Board on that grievance, Appellant's fellow employees withdrew as grievants, leaving Appellant as the only grievant in Docket No. 98-65.

5. The grievance in Docket No. 98-65 was heard over several days from April through June of 1999. VSEA General Counsel Samuel Palmisano and VSEA Deputy General Counsel Mark Heyman represented Appellant. During a hearing on June 1, 1999, one of the witnesses was Detective Sergeant Ray Keefe, with whom Appellant shared office space at the Bethel barracks. During Heyman's cross-examination of Sergeant Keefe, the following exchange took place:

Heyman: Sergeant Keefe, have you ever lied while testifying under oath?

Keefe: Never.

Heyman: Have you ever lied during a deposition?

Keefe: Never.

Heyman: Didn't you tell Sergeant Danforth that you had lied during a deposition at one point and that a defense attorney had caught you?

Keefe: Not likely unless -- lets have specifics.

(Employer Exhibit 6)

6. Lieutenant Timothy Bombardier was an investigator with the Employer's Internal Affairs Unit from January 1997 to January 2000. Among other duties, Lieutenant Bombardier investigated allegations of misconduct made against State Police members. Early in his tenure as an internal affairs investigator, Lieutenant Bombardier attempted to accommodate State Police members with respect to the timing of interviews during investigations. Then, Lieutenant Bombardier changed his practice by informing members of dates he was available for interviews and telling members to get back to him. If a member had a conflict, Lieutenant Bombardier expected that the details of the conflict be brought to his attention quickly. His accommodations of conflicts depended on the seriousness of the situation (Appellant's Exhibits E – I).

7. Lieutenant Bombardier was present at the Board offices on June 1, 1999, during the hearing in Docket No. 98-65. Immediately following the conclusion of Sergeant Keefe's testimony at the June 1 hearing, Sergeant Keefe approached Lieutenant Bombardier in the library of the Board offices. Sergeant Keefe informed Lieutenant Bombardier of the question from Heyman about whether Sergeant Keefe told Appellant that he (Keefe) had lied during a deposition. Lieutenant Bombardier informed Sergeant Keefe that there would be an internal affairs investigation on the issue. Sergeant Keefe told Bombardier that he wanted the investigation conducted as soon as possible. At this time, Sergeant Keefe was involved in pending criminal cases in court in which he was deposed, and potentially could be a witness, due to investigating the cases (Employer Exhibits 23, 25).

8. During the next two days, Lieutenant Bombardier obtained a copy of the transcript of Sergeant Keefe's June 1 testimony, and consulted the Code of Professional

Responsibility for attorneys to determine whether Heyman was required to have a factual basis for asking questions. After determining that the question was required to be supported by admissible evidence, Lieutenant Bombardier concluded that Heyman's question amounted to an allegation of misconduct against Sergeant Keefe pursuant to Section 3.1 (Criminal Conduct – Felony) of Part A of the Employer's Code of Conduct. On the morning of June 3, Lieutenant Bombardier opened an internal affairs investigation of Sergeant Keefe under case number 99-M-4 ("Keefe Investigation") (Employer Exhibits 4, 5, 6, 7, 9 and 31).

9. Immediately after opening the investigation, Lieutenant Bombardier called Heyman at approximately 9:37 a.m. on June 3 to discuss Heyman's questioning of Sergeant Keefe at the June 1 hearing. Heyman, citing the attorney-client privilege, would not discuss the issue with Bombardier other than acknowledging that he asked the question of Sergeant Keefe (Employer Exhibit 10).

10. Immediately after finishing his conversation with Heyman, Lieutenant Bombardier spoke with VSEA General Counsel Samuel Palmisano and told him he wanted to interview Appellant quickly as part of the Keefe investigation. Palmisano told Lieutenant Bombardier that he was available to accompany Appellant to an interview the following day, June 4, at 2:30 p.m., and that he would contact Appellant to set up the interview (Employer Exhibit 10).

11. Following the accepted investigative practice of interviewing source witnesses before interviewing the subject of the investigation, Lieutenant Bombardier wished to interview Appellant before interviewing Sergeant Keefe. Given that Heyman was acting as Appellant's attorney when he questioned Sergeant Keefe at the June 1 hearing and given the

nature of the question, Lieutenant Bombardier believed that Appellant was the source of the information leading to the question.

12. At some point later on June 3, Palmisano contacted Appellant and told her of Lieutenant Bombardier's desire to interview her on the following afternoon concerning the Keefe investigation. Appellant told Palmisano to inform Lieutenant Bombardier that she was not able to meet with him the following afternoon and would not be able to meet with him until June 18, 1999. Palmisano then left a message to that effect for Lieutenant Bombardier.

13. At the time Appellant spoke with Palmisano on June 3, she knew that she did not want Palmisano or Heyman to represent her at the interview by Lieutenant Bombardier. She thought that Heyman's question made her workplace situation worse, and further concluded that her distrust of the VSEA attorneys resulted in the need to seek independent counsel. The Board is unable to find that Appellant informed Palmisano prior to June 8 that she did not want him to represent her.

14. When Appellant asked Palmisano to inform Lieutenant Bombardier that she was unable to meet him until June 18, she knew that there were many openings in her schedule allowing her to meet with Lieutenant Bombardier prior to June 18. Appellant wanted to wait until June 18 to meet with Lieutenant Bombardier because she believed that the next and final day of hearings at the Board in her grievance in VLRB Docket No. 98-65 would be June 17. She wished to wait until that hearing was over because she was concerned that Elizabeth Novotny, the Employer Counsel who was representing the Employer in the hearing, would attempt to use information she provided to Lieutenant Bombardier in an interview to attack her credibility during the hearing (Employer Exhibit 33).

15. As it turned out, there was no grievance hearing at the Board on June 17; the final day of hearing instead occurred on June 22. Nonetheless, at all times pertinent to the grievance now before us, Appellant believed the hearing would be June 17 (Employer Exhibit 33).

16. After Lieutenant Bombardier received Palmisano's message, he telephoned Palmisano at approximately 5:15 p.m. on June 3 to discuss the urgency of interviewing Appellant and to inform Palmisano that it was not acceptable to wait until June 18 for the interview. Palmisano responded that he was still available to meet the following day at 5:30 p.m., but that Appellant had indicated she was unavailable to meet until June 18. Lieutenant Bombardier told Palmisano that he would contact Lieutenant Myles Heffernan, Grievant's supervisor, to determine whether Appellant was available to be interviewed the following afternoon (Employer Exhibit 10).

17. Lieutenant Bombardier spoke with Lieutenant Heffernan at approximately 5:30 p.m. on June 3. Lieutenant Heffernan informed Lieutenant Bombardier that he was not aware of anything that would prevent Appellant from meeting with him on the afternoon of June 4. Lieutenant Heffernan mentioned that Appellant was working on a sexual assault case and, as far as he was aware, Appellant would be doing paperwork on the case (Employer Exhibit 10).

18. Lieutenant Bombardier called the Bethel Barracks at approximately 8:16 a.m. on June 4, and left a message for Appellant to call him. At approximately 9:45 a.m., he called the barracks again and spoke with Appellant. Appellant informed Lieutenant Bombardier that she wanted to wait until after the grievance hearing at the Board on June 17 before being interviewed by him. Lieutenant Bombardier informed Appellant that he was not

willing to wait until June 18 to conduct her interview and he wanted to proceed with the interview that afternoon. Appellant then indicated that she had a suspected sex offender coming in to meet with her that afternoon. Bombardier indicated that the interview with him was still on for that afternoon. Appellant said she would not be there. Lieutenant Bombardier then told Appellant to consider it an order to be at VSEA that afternoon at 2:30 p.m. to be interviewed. He also told Appellant to have Lieutenant Heffernan call him if there were any difficulties or problems with the 2:30 interview (Employer Exhibit 10).

19. Shortly thereafter, Appellant spoke with Lieutenant Heffernan. Appellant acknowledged to Lieutenant Heffernan that her meeting with the suspected sex offender likely would be concluded in time to allow her to meet with Lieutenant Bombardier. Nonetheless, Appellant informed Heffernan that she did not think it was appropriate for her to meet with Lieutenant Bombardier that afternoon for the following reasons: a) Lieutenant Bombardier was a witness against her in the grievance hearing before the Board and thus was biased against her; b) she did not want to be represented by VSEA and her attorney was not available that afternoon; c) the Board grievance hearing was out of control; and d) she had not made an allegation against Sergeant Keefe initiating the investigation (Employer Exhibit 25, pages 2-3).

20. Lieutenant Heffernan then relayed the concerns raised by Appellant to Captain DeVincenzi who relayed them to Lieutenant Bombardier. Lieutenant Bombardier then spoke with Appellant at approximately 1:40 p.m. During that conversation, Appellant indicated that she wanted more of an opportunity to consult with an attorney of her choice

before being interviewed by Lieutenant Bombardier. Appellant mentioned Attorney Bernie Lambek when Lieutenant Bombardier inquired about the attorney Appellant had in mind to represent her. Lambek had represented Appellant and other grievants during a mediation attempt in Docket No. 98-65. During the conversation with Lieutenant Bombardier, Appellant mentioned that he was a witness against her in the Board hearing in Docket No. 98-65. Lieutenant Bombardier responded that he was not a witness against anyone. Appellant also mentioned that she did not want to do an interview until after June 17 because she did not want "Beth Novotny beating up on her". This was a reference to Novotny representing the Employer in the pending hearing before the Board in Docket No. 98-65. The conversation concluded with Lieutenant Bombardier agreeing to postpone his interview of Appellant to the following week; he gave June 7, 8 or 9 as alternative dates (Employer Exhibits 10, 25).

21. Shortly after this conversation with Appellant, Lieutenant Bombardier realized that June 9 was not a good day for the interview because he had to participate in training that day. He spoke with Appellant at approximately 2:09 p.m. on June 4 to inform her of this and to schedule the interview for Tuesday, June 8 at 2:00 p.m. Appellant told Lieutenant Bombardier that she may have difficulty obtaining counsel to represent her for the interview. Lieutenant Bombardier responded that this should not be a problem for her since she had three attorneys to choose from to represent her (Employer Exhibit 10).

22. Appellant did not contact Lambek to represent her. She did call Attorney David Putter at some point on the afternoon of June 4. Appellant had confidence in Putter based on past dealings she had with him. She had previously discussed issues arising out of the grievance in Docket No. 89-58 with Putter, and he had indicated to her that she may have

protection for the problems she was experiencing with the Employer under the First Amendment of the Constitution. In her June 4 conversation with Putter, Appellant briefly discussed with Putter that she wanted him to represent her in the interview with Lieutenant Bombardier. Putter informed Appellant that he could not represent her on June 8 due to time pressures he had involving another matter, and because he was not familiar with State Police procedures pertaining to internal affairs investigations. Appellant made no attempt prior to June 8 to contact any other attorney.

23. On the afternoon of June 4, Appellant sent the following e-mail to Lieutenant Bombardier:

> Tim
>
> It's about 1600, I have not been able to contact Sam for counsel. I'll keep trying. It may not be until Monday morning.
>
> Danforth
>
> (Employer Exhibit 12)

24. On Monday, June 7, at 10:15 a.m., Appellant sent the following e-mail to Lieutenant Bombardier:

> Tim:
>
> Sam is in a staff meeting this morning. I have a telephone call into another attorney as well.
>
> Danforth
>
> (Employer Exhibit 13)

25. The next communication between Appellant and Lieutenant Bombardier took place on Tuesday, June 8, when Appellant telephoned him at approximately 12:45 p.m. Appellant indicated that she had spoken with Putter, that Putter was doing research, and that

Putter was not sure he was going to make the 2:00 p.m. interview of Appellant scheduled that day with Lieutenant Bombardier. Appellant told Lieutenant Bombardier that she would be at the meeting but would not speak without counsel present. Lieutenant Bombardier told Appellant the meeting was still scheduled for 2:00 p.m. and that she should be there unless she heard differently from him (Employer Exhibit 10).

26. Lieutenant Bombardier telephoned Putter at approximately 12:50 p.m. on June 8. Putter was surprised to receive the call. Putter would not confirm whether he represented Appellant. Lieutenant Bombardier asked Putter if he planned to be at the 2:00 p.m. interview of Appellant. Putter told him that he had no intention of being there. Lieutenant Bombardier also asked Putter if he would be willing to set up a meeting among the two of them and Appellant. Putter indicated he would not set up such a meeting (Employer Exhibit 10).

27. At approximately 1:00 p.m., Lieutenant Bombardier called Palmisano. He informed Palmisano of the 2:00 p.m. meeting, and indicated based on his conversations that he was unsure which attorney was representing Appellant (Employer Exhibit 10).

28. Palmisano then spoke with Appellant. Appellant informed Palmisano that she did not want him representing her with respect to the Keefe investigation. The Board is unable to find that Appellant informed Palmisano prior to this that she did not want him to represent her.

29. At approximately 1:22 p.m., Palmisano called Lieutenant Bombardier and informed him that he was not representing Appellant but that he may in the future. Palmisano also said that he could not tell him anything about Putter (Employer Exhibit 10).

30. Lieutenant Bombardier concluded at this point that Appellant was throwing up roadblocks to delay giving him an interview. He decided to proceed with the interview. At approximately 2:00 p.m. on June 8, Lieutenant Bombardier met with Appellant at Department headquarters in Waterbury to interview her in connection with the Keefe investigation. At the time of the meeting, Lieutenant Bombardier understood that Appellant had a right to VSEA representation at the meeting which could include an attorney. He did not understand that Appellant had a right to representation by a non-VSEA attorney. When a State Police member is interviewed during an internal affairs investigation when they are not the subject of the investigation, the member is presented with a witness warning that provides:

> I . . wish to advise you, per Section III, Article II, Part A, Subsection 13.1 of this Department's Code of Conduct and Section III, Article III, Subsection 7.4, Conduct of Investigation, you must answer fully and truthfully all questions asked of you, related to this investigation.
>
> If you refuse or do not answer fully and truthfully, disciplinary action, including dismissal, may be taken against you.

(Employer Exhibits 17, 22 & 24)

31. Appellant understood as of June 8, 1999, that she was required to fully and truthfully answer all questions asked of her when she was a witness during an internal affairs investigation, and that she could be disciplined if she did not do so. When Lieutenant Bombardier began to read Appellant the witness warning at the June 8 meeting, Appellant informed him that he need not bother because she was refusing to give an interview without counsel present. Lieutenant Bombardier twice ordered Appellant to give a statement regarding the Keefe investigation. Appellant refused to give a statement. Appellant then left the meeting (Employer Exhibits 10, 45).

32. Prior to June 8, no Vermont State Police member or other witness being questioned during an internal affairs investigation had refused to give a statement to Lieutenant Bombardier.

33. On June 8, after Appellant failed to give a statement to Lieutenant Bombardier, Lieutenant Bombardier completed the form to make an allegation of misconduct against Appellant to the Internal Affairs Unit. He stated on the form: "Det/Sgt Danforth was ordered to give a statement regarding an internal affairs investigation (twice) in person. Sgt Danforth failed to comply with my lawful order(s) refusing to give a statement." He alleged that Appellant violated Part A, Subsections 14.1, and Part B, Subsections 11.1 and 20.1 of the Code of Conduct. He opened a new internal affairs case, numbered 99-M-5, on this matter ("investigation of Appellant") (Employer Exhibit 56).

34. Lieutenant Bombardier did not conduct the internal affairs investigation of Appellant because he was a complainant and probable witness in the investigation. On June 10, the investigation was assigned to Lieutenant William Pettengill. In previous investigations conducted by Lieutenant Pettengill, he had never had an issue with a witness claiming a scheduling conflict. If a conflict did exist, he would expect it to be brought to his attention as soon as possible. Similarly, he had never experienced a witness refusing to answer questions during an internal affairs investigation interview.

35. The notice of charges made by Lieutenant Bombardier were hand-delivered to Appellant at approximately 12:20 p.m. on Friday, June 11. The notice informed Appellant: "This memo is to inform you that Internal Affairs has opened an investigation concerning allegations of violations of the Code of Conduct. These allegations represent Part A,

Subsection 14.1, and Part B, Subsections 11.1 and 20.1 of the Rules and Regulations. The complainant in this investigation is Lt. Timothy J. Bombardier." (Employer Exhibits 20, 21).

36. Approximately 15 minutes later, Lieutenant Pettengill, who was in transit to Hartford, Vermont, called Appellant at the Bethel barracks on his cell phone to discuss the investigation of Appellant. He informed Appellant that a meeting concerning the investigation was scheduled for Tuesday, June 15, 10:00 a.m., at the Rockingham barracks. Appellant told Lieutenant Pettengill that she did not know what the investigation was about and started asking questions concerning the notice of charges. Lieutenant Pettengill told Appellant to read the notice of charges and look up in the Rules and Regulations the alleged violations enumerated in the notice. He informed Appellant that she could have a representative or an attorney of her choice at the June 15 meeting. Appellant again indicated that she did not understand the charges. Lieutenant Pettengill informed her that the charges had to do with her last meeting with Lieutenant Bombardier. Appellant told Lieutenant Pettengill that she would attempt to get representation for the June 15 meeting. Appellant did not object to the timing of the meeting with Lieutenant Pettengill (Employer Exhibit 21).

37. After his conversation with Appellant, Lieutenant Pettengill interviewed Lieutenant Heffernan and Sergeant Keefe concerning the investigation of Appellant. Sergeant Keefe told Lieutenant Pettengill that Appellant had told him on June 9 that she did not intend to be interviewed concerning the Keefe investigation until the conclusion of the Board grievance hearings in VLRB Docket No. 89-58. Lieutenant Pettengill did not interview Lieutenant Bombardier concerning the investigation of Appellant. He instead reviewed a narrative written by Lieutenant Bombardier on the Keefe investigation (Employer Exhibits 9, 22, 23, 24, 25).

38. Appellant did not attempt to get representation for the June 15 interview. Her last communication with Putter was on June 4. She did not attempt to contact Lieutenant Pettengill prior to appearing for the June 15 meeting.

39. Lieutenant Pettengill and Appellant met at the Rockingham barracks at 10:00 a.m. on June 15. Appellant appeared without a representative. At the outset of the meeting, Lieutenant Pettengill provided Appellant with, and had her sign, an internal investigation warning. The warning stated in pertinent part:

> I wish to advise you that you are being questioned as part of an official investigation of the State Police. . . (Your) statements may be used against you in relation to subsequent departmental charges.
>
> You have the right to have an attorney or other representative present in any meeting, during any interrogation or request to give oral or written statements.
>
> I further wish to advise you that if you refuse to fully and truthfully answer questions relating to the performance of your official duties or fitness for duty, you may be subject to departmental disciplinary charges, including dismissal.

(Employer Exhibit 26)

40. After answering a few of Lieutenant Pettengill's questions at the June 15 meeting, Appellant indicated that she wished to have counsel present at the meeting. When Lieutenant Pettengill questioned why Appellant had not come to the meeting with counsel, Appellant stated that "(b)ecause the interview was planned so rapidly, I could not provide for that". During the meeting, Appellant stated that she had contacted only Putter on June 4 in an effort to obtain counsel for the June 8 interview with Lieutenant Bombardier. Appellant stated that Putter had told her "he was going to do some research" for her, that "he would get back in touch with her", and that "he was not sure he could make it" to the June 8 meeting. Grievant indicated that she had not communicated with Putter after the June 4 conversation with him, and said she did not call him to inform him of the June 15 meeting "because he

hasn't gotten back to me on the first issue." Appellant refused to answer any questions concerning whether Keefe had spoken to her about his alleged lying during a deposition. Lieutenant Pettengill ordered Appellant to answer these questions. Appellant still refused to answer the questions without her counsel being present (Employer Exhibit 27).

41. Following his interview of Appellant, Lieutenant Pettengill prepared a report on the investigation of Appellant (Employer Exhibit 21).

42. By letter dated July 23, 1999, Commissioner A. James Walton, preferred charges on Appellant. The letter provided in pertinent part:

> Pursuant to the authority vested in me under 20 VSA Section 1880, as amended, I hereby prefer charges against you as follows:
>
> 1) On June 3, 1999, Lt. Bombardier of the office of internal affairs contacted Attorney Sam Palmisano of the Vermont State Employees' Association, who was representing you before the Vermont Labor Relations Board at the time. Lt. Bombardier's purpose in contacting attorney Palmisano was to set up an interview with you regarding allegations that Sergeant Ray Keefe had lied at a deposition. You were to be interviewed as a witness in an internal affairs investigation.
>
> 2) Attorney Palmisano advised that he would be available for a meeting between you and Lt. Bombardier after 1430 hours on the following day, June 4th and that he would attempt to contact you. Later that day, Bombardier spoke with Palmisano again. Palmisano advised that he had spoken with you and that you would not be available for an interview until June 18th. Bombardier told Palmisano that this represented an unacceptable delay, given the serious nature of the allegations and the need to expedite the investigation. Palmisano replied that he was still available on the afternoon of June 4th, but that you had indicated to him that you were not available until June 18th. Bombardier advised Palmisano that he would attempt to contact your supervisor, Lt. Heffernan, and determine if in fact you were not available to be interviewed on June 4th. At no time during their conversations on June 3rd did Palmisano give Bombardier reason to believe that he was not representing you in this matter.
>
> 3) After speaking with Palmisano, Bombardier contacted Lt. Heffernan and asked if there was any reason you could not meet with Bombardier on the afternoon of June 4th. Heffernan indicated that there was none.
>
> 4) Bombardier contacted you at the Bethel barracks on the morning of June 4th, and advised you that he had spoken with Palmisano and that the interview could

not wait until June 18th. When you expressed your reluctance to be interviewed that afternoon, Bombardier ordered you to be at the VSEA office in Montpelier at 1430 that afternoon unless you heard otherwise from him, and that if you had problems with that you should contact Lt. Heffernan. At no time during this conversation did you give Bombardier reason to believe that attorney Palmisano was not representing you in this matter.

5) Later that morning Bombardier learned from Captain DeVincenzi that you had informed Lt. Heffernan that you did not wish Palmisano to represent you during your interview with Bombardier, and that your attorney of choice was not available for an interview that day. Bombardier then called you directly and you advised him that you wished to consult with other attorneys. He asked you who the attorney of choice was that you had mentioned to Lt. Heffernan. You replied that attorney Bernie Lambeck (sic) represented you, but that you had not yet spoken with him. Lt. Bombardier then agreed to cancel the interview on the afternoon of June 4th in order to give you an opportunity to obtain representation by an attorney of your choice, but that the interview would have to be scheduled no later than the following Wednesday, June 9th. Bombardier subsequently realized that he had a conflict on the 9th, and called you back, ordering you to appear for an interview at Headquarters on Tuesday, June 8, 1999, at 1400 hours. Bombardier also called Palmisano on the 4th to make him aware of the scheduled interview.

6) On June 8, 1999, at approximately 1245 hours, you called Lt. Bombardier and informed him that your attorney was David Putter, and that he was aware of the scheduled interview at 1400 hours, but you weren't sure he could make it. This was the first time that Lt. Bombardier learned that you considered your attorney to be David Putter. Bombardier advised that the interview was still on for 1400 hours, and that he would call you back.

7) Immediately following this conversation, Bombardier called Attorney Putter. He declined to discuss his representation of you, saying it had not been firmed up, and advised he had no intention of either attending the scheduled interview or attempting to set up another meeting. Bombardier called you back and told you to report to Headquarters at 1400 hours as originally scheduled.

8) Bombardier then spoke with attorney Palmisano, to confirm the meeting and to attempt to determine who was actually representing you. Palmisano later advised that he was not representing you at that point and that he would not be at the meeting.

9) At approximately 1400 hours on June 8, 1999, you met with Bombardier at State Police Headquarters. Bombardier attempted to interview you as a witness in connection with an internal investigation. When Bombardier attempted to give you the standard witness warnings, you stated that you would not speak to Bombardier without your counsel present. Bombardier ordered you to give a statement twice, and you refused each time.

10) As a result of your refusal to be interviewed by Lt. Bombardier, internal investigation 99-M-5 was opened on June 8, 1999, based on allegations that you failed to fully and truthfully answer questions in connection with an internal investigation and that you failed to obey a lawful order. These charges were served on you by Lt. Heffernan on June 11, 1999. In connection with this internal investigation, Lt. William Pettengill called you on June 11th and scheduled an interview with you for June 15th, 1000 hours, at the Rockingham barracks. Pettengill advised you that you had the right to have a union representative or attorney of your choice present at the interview.

11) On June 15th, you met with Lt. Pettengill at the Rockingham barracks. You did not have an attorney or other representative with you. Pettengill advised you of your rights in connection with an IAU interview, and began asking you questions relating to the allegations made against Sgt. Keefe. You refused to answer those questions. After you refused to answer a number of questions, Pettengill ordered you to answer the questions. You again refused to answer Pettengill's questions. At no time during your interview with Pettengill did you deny that you had refused to give a statement to Lt. Bombardier.

12) These actions on your part constitute a violation of Part A, Section 8.1 of the Code of Conduct set forth in Section III, Article II of the Vermont State Police Manual for Rules and Regulations and Operational Policies and Procedures which states:

> *In preparing and making investigative, and other official reports, a member shall not knowingly enter or cause to be entered any inaccurate, false, or improper information, knowingly represent or cause to be misrepresented any material information, or knowingly withhold or cause to be withheld any material information.*

13) These actions on your part also constitute a violation of Part A, Section 14.1 of the Code of Conduct set forth in Section III, Article II of the Vermont State Police Manual for Rules and Regulations and Operational Policies and Procedures which states that

> *Upon the order or inquiry of a superior officer and/or during the course of an internal investigation, members shall fully and truthfully answer all questions asked of them which are specifically directed and narrowly related to the scope of their employment, the operations of the department, or an allegation of misconduct or improper conduct being investigated.*

14) These actions on your part also constitute a violation of Part B, Section 11.1 of the Code of Conduct set forth in Section III, Article II of the Vermont State Police Manual for Rules and Regulations and Operational Policies and Procedures which states that

> *A member shall promptly obey and execute each and every lawful order issued to him/her, whether verbal or written, by a superior or supervisor . . .*
>
> 15) These actions on your part also constitute a violation of Part B, Section 20.1 of the Code of Conduct set forth in Section III, Article II of the Vermont State Police Manual for Rules and Regulations and Operational Policies and Procedures which states that
>
> > *Members shall not commit or deliberately omit any act which constitutes a violation of any Department General or Special Order, Rule or Regulation, Policy or Procedure, or other directive.*
>
> The complainant in this matter is Lt. Timothy Bombardier.
>
> Within seven (7) days of the delivery of these charges to you, you may file with me a request for a hearing before a hearing panel . . .
>
> If you do not request a hearing within (7) days of the receipt of these charges, I will take such disciplinary action as I deem appropriate, including reprimand, transfer, suspension, demotion or dismissal . . .
>
> (Employer Exhibit 35)

43. Appellant did not request a hearing before the hearing panel. In her written response to the preferral of charges on August 13, 1999, Appellant stated: "I am not admitting these charges and I request a meeting with Commissioner Walton" (Employer Exhibit 36).

44. After Appellant was served with the preferral of charges, she contacted Lieutenant Bombardier and informed him that she was prepared to meet with him concerning the Keefe investigation. That meeting took place on August 23, 1999. Putter was present to represent Appellant. At the meeting, Appellant told Lieutenant Bombardier that Sergeant Keefe had told her on a prior occasion that he had been "caught lying" in a deposition in a Windsor County case. When Lieutenant Bombardier asked Appellant why she had not

reported it, she responded that she did not have the specifics and did not know whether it was material to the deposition (Employer Exhibit 18).

45. By letter dated September 8, 1999, Commissioner Walton informed Appellant that she was dismissed from her Detective Sergeant position for the reasons set forth in the July 23, 1999, preferral of charges.

OPINION

The issue before the Labor Relations Board in this bifurcated proceeding is limited to determining whether Appellant committed violations of the Code of Conduct as charged. Should the Board conclude that Appellant did not violate the Code of Conduct, the remaining issues raised by Appellant would be moot. Should the Board conclude that Appellant did violate the Code of Conduct, the Board can schedule an additional hearing to address the remaining issues raised by Appellant in her appeal.

The Employer first alleges that Appellant violated Part A, Section 8.1, of the Code of Conduct. Section 8.1 states:

> In preparing and making investigative, and other official reports, a member shall not knowingly enter or cause to be entered any inaccurate, false, or improper information, knowingly represent or cause to be misrepresented any material information, or knowingly withhold or cause to be withheld any material information.

The Employer contends that this section is broad enough to obligate members to be completely honest and forthcoming when giving interviews in internal affairs investigations because their statements become part of the official internal affairs report, and that Appellant violated this section when giving interviews in internal affairs investigations to Lieutenants Pettengill and Bombardier. We conclude that the Employer is reading too much into the

common meaning of this section. This section applies when a member is "preparing and making investigative, and other official reports". This refers to situations when a member is the one actually preparing and making an investigative report or some other official report. It does not encompass situations where a member, during an internal affairs investigation, gives an interview to the investigating officer that will be referenced in the investigating officer's investigation report. Thus, we determine that Appellant did not violate this section when giving interviews in internal affairs investigations to Lieutenants Pettengill and Bombardier.

The Employer next alleges that the Employer violated Part A, Section 14.1 of the Code of Conduct, which states:

> Upon the order or inquiry of a superior officer and/or during the course of an internal investigation, members shall fully and truthfully answer all questions asked of them which are specifically directed and narrowly related to the scope of their employment, the operations of the department, or an allegation of misconduct or improper conduct being investigated.

We must examine the Employer's rules and regulations concerning investigation of allegations of misconduct and improper conduct to determine whether Appellant violated Section 14.1 of the Code of Conduct. Section III, Article III, Section 7.4 of the Employer's Rules and Regulations states that "(d)uring the course of an investigation, any member . . . must answer fully and truthfully all questions asked him/her by the investigator which are specifically directed and narrowly related to the allegation under investigation".

Section 7.4 must be considered in conjunction with Section III, Article III, Sections 7.3 and 7.5 of the Rules and Regulations. Section 7.3 states that "(d)uring the course of an investigation, any member, including the member against whom the allegation was made, may be ordered to appear before the investigator at a reasonable time and place to submit to

questioning or other investigation." Section 7.5 states that "(d)uring the interview with or questioning by the investigator, any member, including the member against whom the allegation was made, may have an attorney or other representative present to assist him or her in formulating answers, clarifying the facts, and suggesting additional sources of information".

Appellant contends that only if the Employer carries the burden of showing by a preponderance of the evidence that the time allotted to her to obtain counsel was reasonable, and that Appellant's discharge of the VSEA lawyers and insistence on her own counsel was done in bad faith, can she be disciplined. Appellant contends that the time allotted for her to obtain counsel for either Lieutenant Bombardier's or Lieutenant Pettengill's interview was not reasonable under the circumstances.

We disagree that Lieutenant Bombardier and Lieutenant Pettengill acted unreasonably when Appellant's actions are considered in conjunction with the circumstances surrounding their requests. First, good reasons existed for Lieutenant Bombardier to open an investigation on whether Sergeant Keefe told Appellant that he had lied during a deposition. In addition, Lieutenant Bombardier had a legitimate interest in wanting to proceed with the investigation quickly, and to begin by interviewing Appellant.

The credibility of a state police officer is critical. Since the question of whether Sergeant Keefe had told Appellant he had lied during a deposition arose in a public forum – a Board grievance hearing – it easily could have been publicized and subsequently used to discredit Sergeant Keefe's credibility in a case where he was a witness. The Employer has an obvious interest in protecting the integrity of its work and ensuring its employees are

trustworthy. Thus, the quicker the question of Sergeant Keefe's credibility was resolved the better.

Clearly, the Employer had legitimate interests to conduct an expeditious investigation. Appellant did not engage in a good faith effort to cooperate in the investigations conducted by Lieutenant Bombardier and Lieutenant Pettengill. She did not diligently seek to obtain the services of an attorney and was not forthcoming. Rather, she engaged in deception to delay being interviewed as part of the Keefe investigation and the subsequent investigation of her own actions.

Appellant had five days from when she first was informed on June 3 that Lieutenant Bombardier wanted to interview her to the June 8 ultimate date of the interview to obtain counsel. Yet, she only contacted one attorney to seek to obtain legal representation even though that attorney informed her on June 4 that he would be unable to represent her on June 8.

Further, she was not forthcoming with Lieutenant Bombardier and misled him concerning her availability for an interview and her efforts to obtain legal representation. She falsely had an attorney inform Lieutenant Bombardier that she was unavailable for the interview until June 18. In fact, Appellant had many openings in her schedule allowing her to meet with Lieutenant Bombardier prior to June 18. Also, the reason Appellant wished to wait until June 18 for the interview did not justify failure to quickly proceed with the interview. She wished to wait until the Board hearings in VLRB Docket No. 98-65 were over because she was concerned that the attorney for the Employer in that case would attempt to use information she provided to Lieutenant Bombardier in an interview to attack her credibility during the Board hearings. If Appellant had cooperated in the investigation and been

forthcoming and forthright during the interview with Lieutenant Bombardier, it would not have been reasonable for her to fear an attack on her credibility.

Also, Appellant did not inform Lieutenant Bombardier that she did not want VSEA attorneys to represent her in the Keefe investigation until June 8 even though she knew by June 3 that she did not want their representation. She went beyond not being forthcoming in this regard; she misled Lieutenant Bombardier. This is evident by Appellant sending him e-mails on June 4 and June 7 leading him reasonably to believe Appellant was still trying to contact one of the VSEA attorneys for possible representation.

Appellant compounded her deception and misdirection on June 8 when she called Lieutenant Bombardier shortly before the June 8 interview and told him David Putter was her attorney and she was not sure he would be able to attend the June 8 interview. Lieutenant Bombardier then called Putter, who declined to indicate whether he was representing Appellant and informed Lieutenant Bombardier that he had no intention of attending the June 8 interview and would not set up a meeting at another time. Then, Lieutenant Bombardier spoke with VSEA Attorney Palmisano who informed him that Appellant had told him that day that she did not want him to represent her.

It was reasonable for Lieutenant Bombardier to conclude at this point that Appellant was throwing up roadblocks to delay giving him an interview. His conclusion was well-founded since he had not been informed until that day that VSEA attorneys were not representing her and Appellant knew that Putter would not attend the June 8 interview because Putter had told her on June 4 that he could not represent her on June 8.

Under these circumstances, Lieutenant Bombardier's decision to go forward with the June 8 interview was reasonable. He had provided Appellant with reasonable time to obtain

counsel and appear for the interview, and Appellant had failed to cooperate in the Keefe investigation by not diligently seeking to obtain the services of an attorney, not being forthcoming, and engaging in deception.

We also conclude that Lieutenant Pettengill provided Appellant with reasonable time to obtain counsel and appear for the interview. When he informed Appellant on June 11 that his investigatory interview of her was scheduled for June 15 and that she could have a representative or an attorney of her choice at the interview, Appellant told him that she would attempt to get representation for the June 15 meeting and she did not object to the timing of the meeting.

Nonetheless, Appellant did not attempt to get representation for the June 15 interview and she did not attempt to contact Lieutenant Pettengill prior to appearing for the June 15 meeting to inform him of any difficulties in obtaining counsel. Under these circumstances, Appellant acted unreasonably in obtaining counsel rather than Lieutenant Pettengill setting an unreasonable time for Appellant to obtain counsel.

We further disagree with Appellant's premise that she can only be disciplined if her refusal to use VSEA lawyers and her insistence on her own counsel was done in bad faith. We accept that Appellant acted in good faith by insisting on counsel other than VSEA attorneys to represent her in the internal affairs investigations. She thought that the question VSEA Attorney Mark Heyman asked Sergeant Keefe at the June 1 hearing before the Labor Relations Board in VLRB Docket No. 89-58 made her workplace situation worse, and concluded that her distrust of the VSEA attorneys resulted in the need to seek counsel independent of VSEA. This was a reasonable and good faith conclusion on Appellant's part.

Nonetheless, Appellant was not disciplined because the Employer concluded that she acted in bad faith by not having VSEA lawyers represent her in the investigations and insisting on her own counsel. Instead, she was disciplined because the Employer concluded that, independent of her decision to not have VSEA represent her, she violated provisions of the Code of Conduct given her failure to cooperate in the internal affairs investigations.

In light of these considerations and in examining the totality of the evidence, we ultimately conclude that Appellant violated Section 14.1 of Part A of the Code of Conduct which provides that "upon the order or inquiry of a superior officer and/or during the course of an internal investigation, members shall fully and truthfully answer all questions asked of them which are specifically directed and narrowly related to . . . an allegation of misconduct or improper conduct being investigated". The language of this provision is broad enough to encompass inquiries by an internal affairs investigator concerning a member's availability to give an internal affair interview and efforts to obtain legal representation, as well as a member answering questions of an investigator during an internal affairs interview.

We conclude that Appellant failed to fully and truthfully answer questions that were specifically directed and narrowly related to allegations of misconduct or improper conduct being investigated, within the coverage of this section of the Code of Conduct, on the following occasions that were included in the preferral of charges on her:

a) when she had her attorney tell Lieutenant Bombardier on June 3 that she was not available for an interview until June 18, when Lieutenant Bombardier was working to establish an earlier interview and in fact Appellant was available before that date;

b) when she misled Lieutenant Bombardier prior to June 8 by leading him to believe that VSEA attorneys possibly would represent her in the Keefe investigation, when

Lieutenant Bombardier had earlier made inquiries of her concerning who was representing her and she knew by June 3 that she did not want VSEA to represent her;

c) when she informed Lieutenant Bombardier on June 8 that she was not sure whether Attorney Putter would attend the June 8 interview, when she knew that he would not attend;

d) when she refused to give a statement to Lieutenant Bombardier concerning the Keefe investigation on June 8 after he had twice ordered her to do so; and

e) when she failed to answer questions of Lieutenant Pettengill at the June 15 interview specifically directed and narrowly related to the allegations against her being investigated even though he ordered her to do so.

Appellant further alleges that the Employer violated Part B, Section 11.1 of the Code of Conduct, which states:

> A member shall promptly obey and execute each and every lawful order issued to him/her, whether verbal or written, by a superior or supervisor.

The Employer contends that Appellant violated this section of the Code of Conduct when Lieutenant Bombardier twice ordered her to give him an interview concerning the Keefe investigation and Appellant refused. The Employer further charges Appellant with violating Section 11.1 by refusing Lieutenant Pettengill's order to answer questions concerning whether Sergeant Keefe had spoken to her about his alleged lying during a deposition.

We ultimately conclude that Appellant violated Section 11.1 of the Code of Conduct by refusing Lieutenant Bombardier's orders to give him an interview concerning the Keefe investigation, and refusing Lieutenant Pettengill's order to answer questions concerning whether Sergeant Keefe had spoken to her about his alleged lying during a deposition. In so

doing, she violated the dictate of Section 11.1 to promptly obey and execute each and every lawful order issued to her by a superior.

Finally, the Employer alleges that Appellant violated Part B, Section 20.1, of the Code of Conduct which states that "(m)embers shall not commit or deliberately omit any act which constitutes a violation of any Department General or Special Order, Rule or Regulation, Policy or Procedure, or other directive." Appellant violated this section by violating the provisions of Part A, Section 14.1, and Part B, Sections 11.1 and 20.1, of the Code of Conduct detailed above.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Vermont Department of Public Safety's charges that Gloria Danforth committed violations of the Code of Conduct are established to the extent set forth in the Opinion in this matter, and the Labor Relations Board shall schedule an additional hearing to address the remaining issues raised by Appellant in her appeal.

Dated this ____ day of July, 2003, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
Edward R. Zuccaro, Acting Chairperson

_____
Richard W. Park

_____
Joan B. Wilson