VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
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CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN AND HELPERS UNION NO. 597 (RE: MATTHEW SHEEHAN)	)	DOCKET NO. 03-14

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 28, 2003, the Chauffeurs, Teamsters, Warehousemen and Helpers Union No. 597 ("Union") filed a grievance with the Vermont Labor Relations Board, alleging that the University of Vermont Department of Police Services ("Employer" or "Department") violated Articles 6, 9, 13, 21, 22 and 23 of the July 29, 2002, to June 30, 2004 collective bargaining agreement between the Union and the University of Vermont ("Contract") by dismissing police officer Matthew Sheehan without just cause.

Hearings were held on August 28 and September 23, 2003, in the Labor Relations Board hearing room in Montpelier before Members Richard Park, Chairperson; Joan Wilson and Edward Zuccaro. Attorney Richard Cassidy represented the Union. Attorney Nicholas DiGiovanni, Jr., represented the Employer. The Union and Employer filed briefs on October 28 and 29, 2003, respectively.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

. . .

ARTICLE 13
DISCIPLINE AND DISCHARGE

1. Except for probationary employees, no employee shall be disciplined, suspended or discharged without just cause. . .

> 2. Ordinarily, prior to suspension or discharge, an employee who may be subject to discipline shall be issued a written warning for violations of University policy or work rules or other misconduct. It is understood, however, that some situations may warrant immediate suspension or discharge. An employee who has received a written warning for one type of offense may nonetheless be suspended for a future violation or act of misconduct even if the subsequent offense is different from the type which led to the previous written warning.
>
> 3. Written warnings and suspensions shall remain permanently in the employee's personnel file. However, after eighteen (18) months, a written warning shall not be used to form the basis for the progressive disciplinary step of suspension or discharge. However, in any hearing before the Vermont Labor Relations Board on a disciplinary suspension or discharge, all written warnings, even if older than 18 months, may be introduced as part of the overview of the employee's overall work record.
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> . . .
>
> 6. Where discipline or discharge cases are grieved and brought to the Labor Board, the Labor Board shall determine the appropriate remedy where there is a finding of no just cause. They may in their discretion reinstate the employee with all back pay and benefits, partial back pay and benefits or no award except for reinstatement in cases of suspension or discharge.
>
> . . .
>
> (Joint Exhibit 1)

2. The Union represents the police officers, service officers and dispatchers of the Police Services Department. The Department has approximately 35 employees, including 14 police officers, five service officers and five dispatchers. Gary Margolis has been Chief of the Department since 1998. Lianne Tuomey has been the Captain of Police Operations since 2000. She reports directly to Chief Margolis. Captain Tuomey directly supervises three sergeants and two detectives. James Phelps is one of the three sergeants. The sergeants are the immediate supervisors of the patrol officers and service officers. The Chief, Captain and sergeants are not in the bargaining unit represented by the Union (Joint Exhibit 2, Employer Exhibit 2).

3. Matthew Sheehan was employed by the University of Vermont for approximately 18 years until he was dismissed on December 16, 2002. During the first

six to seven years of his employment, he was a security officer for the University. Then, in 1990 or 1991, when the security department was reconstituted as a police department, Sheehan received training to become a police officer and remained a police officer until his dismissal. During his last ten years of employment immediately preceding his dismissal, except for the final performance evaluation, his overall performance generally was rated “satisfactory” or “meets performance expectations”. Sheehan received a number of letters of praise and commendation for his performance during his employment (Union Exhibit 8, pages 337-403; Union Exhibit 9; Employer Exhibit 20).

4. Chief Margolis issued Sheehan a written reprimand on October 19, 1998, for misuse of medical leave on account of calling into work to indicate that he would be out on medical leave, and instead going hunting. Margolis informed Sheehan that his “use of medical leave for recreational purposes is in direct violation of university policy” (Employer Exhibit 18).

5. On June 8, 2002, Sheehan’s supervisors gave him a written performance appraisal covering the period June 2001 – April 2002. Sheehan’s performance was evaluated in fourteen areas. He received “above average” ratings in the two areas of appearance, and equipment care and responsibility. He received “average” ratings in the three areas of knowledge of operations, community relations, and teamwork and collaboration. Sheehan was rated “below average” in the seven areas of work quality, written communication, initiative, personal development, problem solving and creative complaint resolution, investigative skills, and enforcement. He received “unsatisfactory” ratings in the two areas of judgment and analysis, and planning and organization.

Sheehan's supervisors established an improvement plan for Sheehan for those areas in which he was rated "below average" or "unsatisfactory" (Employer Exhibit 20).

6. On August 17, 2002, Chief Margolis suspended Sheehan for one day. The memorandum informing Sheehan of the suspension provided in pertinent part as follows:

> On August 15 at approximately 1115 hours, Officer Timothy Biloedau informed Captain Lianne Tuomey that you had recently called and asked him to grant you leave from your assigned midnight shift. Officer Bilodeau told Captain Tuomey that he explained to you that he wasn't able to grant such a request and how you would need to talk with a supervisor.
>
> Captain Tuomey retrieved your home number . . . from Dispatch and left a message on your answering machine at approximately 1130 hours on August 15. In her message she informed you that you were one of only two officers scheduled and asked you to call her. She did not hear from you and did not grant your request.
>
> On Friday, August 16 Captain Tuomey was informed by Sgt. James Phelps that you did not appear for duty as scheduled. You told Sgt. Phelps in a recorded phone conversation that evening that Officer Bilodeau had granted you leave from the August 15 midnight shift. Sgt. Phelps contacted Officer Bilodeau who denied your assertion. He explained how he had referred you to a supervisor and indicated that he did not have the authority to grant such requests. Officer Bilodeau went on to say that he informed Captain Tuomey and left the matter in her hands.
>
> . . .
>
> Your failure to report for duty created an operational hazard resulting in Officer Patrick Flynn being ordered to cover your absence from 0300-0700 hours. As a result, Officer Flynn was forced to work a 14-hour shift and the department to incur unnecessary overtime expenses.
>
> 1. Your absence without leave on August 15, 2002 was in violation of our Rules and Regulations Policy . . . You failed to follow the established process for requesting leave. Even if he had given you permission, Officer Bilodeau does not have the authority to do so and Captain Tuomey was on-duty. Your length of service and status as a field training officer leave no doubt that you are aware of the proper procedure for requesting leave time.
> 2. You substantially failed to tell the truth to Sergeant Phelps in recalling your conversation with Officer Bilodeau in violation of policy . . . Officer Bilodeau's consistent recollection of your conversation to both Captain Tuomey minutes after your initial call, and Sergeant Phelps later that evening, establishes the veracity to his statements.

3. In total, your actions are found to be in violation of 900.1.2(A) Conduct Unbecoming. . .

Based on the above findings I am suspending you for (1) one day without pay. . .

In addition you are suspended from participating as a field training officer in the Field Training Program for a period of 6 months . . .

Any further violation of University and department rules, policy, or accepted practices may result in your dismissal from University employment. . . (Employer Exhibit 19)

7. The Employer's Rules and Regulations require officers to be "truthful at all times and under all circumstances where doing so will not compromise . . .their effectiveness as law enforcement officers". The Rules and Regulation further prohibit unnecessary force, stating: "In no case will commissioned officers use more physical force than that which is necessary to accomplish a proper police purpose. Officers shall only use force in accordance with department policy and governing law." (Employer Exhibit 16).

8. The Employer has a directive on the use of mobile video/audio recorders that are attached to each cruiser assigned to officers. The officers are expected to use the recorders to provide evidence and documentation of events during their shifts. The officer may deactivate the recording equipment during non-enforcement activities. The directive provides that "(v)iolations of this directive, if proven, can . . . form the basis of a complaint by this department . . . in a non-judicial administrative setting (Employer Exhibit 17).

9. The Department has a Use of Force directive. Sheehan received a copy of this directive when it became effective on June 10, 2002. The Department provided officers with two hours of training on the use of force directive when it was issued. The

Use of Force Policy directive effective June 10, 2002 is substantively identical to the Use of Force directive that preceded it (Union Exhibit 4, pages 276 – 291; Employer Exhibits 4 and 10).

10. The Use of Force directive provides in pertinent part as follows:

Purpose:

. . . Violations of this policy may form the basis for departmental administrative sanctions . . .

I. General Policy

. . .

C. In all cases, only the minimum amount of force necessary to control the situation and/or gain compliance will be used.

. . .

II. Use of Force Continuum

. . . The following are options of force:

. . . G. Deadly Force

Deadly force involves the use of a firearm or other "Deadly Weapon." As per Title 13, Vermont Statutes annotated, Chapter 19 Section 1021(3), "Deadly Weapon" means any firearm, or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.

III. Use of Deadly Force

Definitions:

- Deadly Force – Force likely or intended to cause death or serious bodily injury.
- Reasonable Belief – The facts or circumstances which would cause a reasonable officer to act or think in a similar way under similar circumstances. . .

  . . .
- Imminent – Imminent does not mean immediate or instantaneous, but that an action is pending. Thus, a subject may pose an imminent danger even if he/she is not at that very moment pointing a weapon at a member. For example, imminent danger may exist if officers have probable cause to believe any of the following:

1. The subject possesses a weapon, or is attempting to gain access to a weapon, under circumstances indicating an intention to use it against the officer or others; or
2. The subject is armed and running to gain the tactical advantage of cover; or
3. A subject with the capability of inflicting death or serious physical injury – or otherwise incapacitating officers without a deadly weapon, is demonstrating an intention to do so; or
4. The subject is attempting to escape from the vicinity of a violent confrontation in which he/she inflicted or attempted the infliction of death or serious physical injury.

- Necessity – In evaluating the necessity to use deadly force, two factors are relevant:
    1. The presence of an imminent danger to the officer or others; and
    2. The absence of safe alternatives to the use of deadly force. Deadly force is never permissible under this policy when the sole purpose is to prevent the escape of a suspect.
        a) Absence of a safe alternative – officers are not required to use or consider alternatives that increase danger to themselves or to others. If a safe alternative to the use of deadly force is likely to achieve the purpose of averting an imminent danger, deadly force is not necessary. Among the factors affecting the ability of officers to **safely** *(emphasis in original)* seize a suspect, the following are relevant:
            i. Response to commands – verbal warnings prior to using deadly force are required **when feasible** *(emphasis in original)* – i.e., when to do so would not significantly increase the danger to officers or others. While compliance with officers' commands may make the use of deadly force unnecessary, ignoring such commands may present officers with no safe option.
            ii. Availability of cover – availability of cover provides a tactical advantage. An armed suspect attempting to gain a position of cover may necessitate the use of deadly force; conversely, an officer in a position of cover may gain additional time to assess the need to use deadly force without incurring significant additional risks.
            iii. Time Constraints – The inherent disadvantages posed by the issue of action/reaction, coupled with the lack of a reliable means of causing an instantaneous halt to a threatening action, impose significant constraints on the time-frame in which

officers must assess the nature and imminence of a threat.

a) Application of Deadly Force

i. When the decision is made to use deadly force, officers may continue its application until the subject surrenders or no longer poses an imminent danger.

ii. When deadly force is permissible under this policy, attempts to shoot to cause minor injury are unrealistic and can prove dangerous to officers and others because they are unlikely to achieve the intended purpose of bringing an imminent danger to a timely halt.

iii. Even when deadly force is permissible, officers should assess whether its use creates a danger to third parties that outweighs the likely benefits of its use.

IV. Defense of Life

A. An officer of the UVMPS may use Deadly Force when he/she reasonably believes the action to be necessary to protect human life, to protect any person from imminent danger of serious bodily injury or death. The officer will apply the principles of ability, opportunity and jeopardy as a guide to establish probable cause for the use of deadly force. The three factors which, when co-existent, create the threat of serious bodily injury or death are:

1. Ability – A potential adversary must be physically capable of presenting the threat of serious bodily injury or death. This ability must be present at the exact instant that the officer makes the decision to respond with deadly force.
2. Opportunity – Circumstances of time, distance, and awareness of the victim's presence must coincide to provide the opportunity to create a risk of serious bodily harm or death to the officer or third party.
3. Jeopardy – Given the ability and the opportunity, an adversary must commit an overt act, which would cause a reasonable person to believe it would result in serious bodily injury or death to the officer or a third party.

B. Under Tennessee v. Garner, 471 U.S. 1 (1985), the United States Supreme Court set forth a four part constitutional standard for justification of the use of deadly force upon a fleeing felon by police officers:

1. That the officer must have probable cause to believe that the suspect has committed a felony.

2. That the officer must give the suspect a warning, *if feasible*. (emphasis added in original)
3. That the officer must have probable cause to believe that the suspect poses a threat of serious physical harm to the officer or other people.
4. That the use of deadly force must be necessary to prevent escape.

V. Display of Weapon

A. Officers are authorized to unholster and display their firearms under the following circumstances:
   1. Where the use of Deadly Force is justified.
   2. Under circumstances where an officer reasonably believes that the potential for immediate use of the weapon is high and officer/public safety dicta's(sic) that the weapon be upholstered and ready.

. . .

(Union Exhibit 4, pages 276 - 281)

11. The Employer trains officers on use of firearms on a regular basis, at least twice a year. Sheehan was regularly trained on use of firearms during his tenure with the Employer, most recently from October 22 – 23, 2002 (Employer Exhibits 7 – 11).

12. Sheehan participated in the October 22 – 23, 2002, firearms training with other Department officers, including Captain Tuomey. Objectives of the training included developing necessary skills in decision-making and tactics concerning the use of deadly force. The instructor of the training was Officer Jeffrey Jackman. Jackman used commands to have training officers identify the threat they were facing and determine whether it warranted the use of deadly force. Examples of the commands that Jackman used at the firing range were: "Suspect's got a shotgun", "He's got a feather duster", "He's got a coathanger", and "Suspect's got a knife". All of the targets were plain paper silhouette targets on a gray background. The targets were stapled to cardboard and mounted on stationary metal target frames. Based on the commands, the officers had to identify the threat and determine the appropriate use of force (Union Exhibit 5A).

13. During the training session, Jackman instructed the officers on the "21 foot rule". He explained that an edged weapon, such as a knife, could be considered dangerous enough to inflict death or serious injury on an officer within 21 feet. He indicated that a person with a knife could conceivably cover 21 feet before the officer had a chance to draw his or her weapon from the holster and fire on target (Union Exhibit 5A).

14. Subsequently, the officers were standing 75 feet from a silhouette. Jackman shouted "suspect has a knife". All the officers drew their weapons and took cover behind a barricade. Several of the officers, including Sheehan, shot at the silhouette. Jackman told the officers that he had no problem with them drawing their weapons and pointing them at a suspect who had a knife and ordering them to drop the knife, but that the suspect was too far away to fire their weapon (Union Exhibit 5A).

15. On November 6, 2002, at 3:26 p.m., Department dispatcher Diane Gagnon received a call from a student in Tupper Hall stating that he had been robbed at knife point by a person described as six foot two inches tall, black male, in his early 20's, wearing a black puffy jacket with fur surrounding the hood. The student indicated that the robbery had occurred approximately ten minutes earlier. The suspect was reported as heading away from Tupper Hall, cutting through the area of the Living and Learning Center, and heading toward the main campus (Employer Exhibit 5, pages 26 – 29).

16. At 3:28:35, Gagnon contacted Sheehan on the radio and informed him: "you can start heading to the area of Living and Learning, 3rd floor, 4th floor Tupper, resident advised he was robbed at knife point, male black, wearing a black puffy jacket with a fur hood. He left on foot towards Living and Learning, unknown direction after

that. Described as 6 foot 2, unknown on weight, not the age of a student". Gagnon did not indicate that the robbery had occurred 10 minutes earlier. She inaccurately reported that the robbery suspect was not the age of a student. Sheehan was in the Centennial Field area when he received the dispatch from Gagnon (Employer Exhibit 5, page 29).

17. Immediately thereafter, other Department police officers became involved in the pursuit of the robbery suspect. Upon hearing the dispatch call from Gagnon, Sergeant Phelps, who was on duty and at headquarters, immediately got in his cruiser with Officer William Sullivan, who was off duty but at headquarters. Phelps asked Sheehan his location; Sheehan told him he was leaving Centennial Field. Phelps told him: "Take a spin through the hospital, I'm going to cover Main Street and we'll go from there." Sheehan responded: "10-4" and proceeded up East Avenue towards the hospital (Employer Exhibit 5, page 29).

18. Officer Andy Apgar had just come off duty and was in his personal vehicle when he heard the dispatch call from Gagnon. He decided to self-deploy from his position near the Sheraton Hotel. At 3:30:18, he informed Phelps over the radio: "I'm just going to eyeball Main Street. I won't take any action. Black male, puffy jacket, fur hood 6 foot 2. 10-4?" Phelps responded: "10-4" (Employer Exhibit 5, page 29).

19. Captain Tuomey left headquarters when she heard the dispatch call from Gagnon. She proceeded in her cruiser toward Tupper Hall where she intended to meet with the victim of the robbery.

20. At 3:30:42, Apgar informed Phelps over the radio: "it looks like he's walking down the L and L walkway toward Main Street, dark blue pants, dark jacket, fur hood, black male." Phelps responded: "10-4. I see him". Upon hearing this exchange,

Sheehan decided not to go the hospital parking lot but instead continued driving up East Avenue to go to Main Street. Sheehan did not inform the other officers he was heading to Main Street. When Tuomey heard the exchange between Apgar and Phelps, she stated over the radio: “I’m heading over to keep an eye on him until we can get other armed officers in place”. Phelps and Sheehan heard this statement by Tuomey (Employer Exhibit 5, page 30).

21. The following exchange then occurred over the radio, beginning at 3:31:23:

Phelps: (To Apgar) you talking about the one coming right up on Main Street?

Apgar: I just went by but he was just coming up on Main Street 10-4, 6 foot, navy blue jacket, or dark color. It looks like navy pants, very dark skin, black male.

Phelps: 10-4, he’s got a red satchel on his back?

Apgar: I didn’t see that, I was I was in traffic. I couldn’t stop.

Phelps: 10-4. He doesn’t appear to have a fur collar.

Sheehan: If he’s got a red backpack, I got him. He right in front of, he’s right across from me Jimmy.

Phelps: I see him.
(Employer Exhibit 5, page 30)

22. Sheehan first observed the person with the red backpack when the person was crossing Main Street at a crosswalk after leaving the Living and Learning walkway. At 3:32:09, 15 seconds after Sheehan made his statement concerning seeing someone with a red backpack, Sheehan indicated that he was “out” of his cruiser. He did not otherwise communicate with other officers or tell them his plan. Sheehan pulled his cruiser over to the side of Main Street in the area of 622 Main Street and ahead of the

person with the red backpack. He activated the blue lights in his cruiser and exited the cruiser. When Sheehan pulled his cruiser over, the person with the red backpack was approximately 47 feet away and walking towards him (Employer Exhibit 5, pages 10 and 30).

23. After exiting his cruiser, Sheehan walked along the driver's side of the car towards the back of the car. He had his hand on his gun in the holster. He approached the person with the red backpack who was walking towards him west (towards Burlington) on Main Street. Sheehan observed that the person was black but could not ascertain the person's gender. He left the cover of his cruiser with his hand on his gun and walked towards the person. When he got within 10 - 16 feet of the person, he took his gun out of the holster, pointed it at the person and yelled: "On the ground. On the ground. On the ground." The person immediately went face down to the ground. Phelps and Sullivan ran toward the scene. Phelps placed handcuffs on the person. Sheehan kept his gun pointed at the person approximately 30 seconds. After the person was handcuffed and stood up, it was apparent that the person was a woman. The handcuffs were removed. Sheehan apologized to her (Employer Exhibit 5, page 10).

24. The person detained by Sheehan was an African American female student of the University of Vermont. She was wearing a dark blue hooded sweatshirt, with the hood up, and dark blue pants. She was considerably shorter than six feet tall.

25. The area where Sheehan detained the student had moderate pedestrian traffic. Vehicular traffic on Main Street during that time was moderate to heavy. The temperature was in the upper 30's with light rain at times.

26. When Chief Margolis heard on the radio that a person had been detained by Sheehan, he drove his cruiser toward 622 Main Street. He parked near there and walked to the scene of the detention. Phelps told Margolis that there was a problem. Margolis went over to speak with the student. She was crying and quite upset and asked to whom she could file a complaint. Margolis said she could file with him. Margolis offered her a ride. The student declined and left the scene. Margolis then went to the ALANA (which signifies "African-American, Latino, Asian, Native American") Student Center because he wanted to make persons there aware of the incident and the traumatized student could receive support services there due to the detention. The campus-wide ALANA organization serves and represents students, faculty and other employees of color at the University.

27. The Department's officers continued searching for the robbery suspect but were unable to find him that day or thereafter.

28. Armed robberies are rare at the University of Vermont. Prior to the November 6 incident, the last armed robbery at the University was during the mid-1990's. The November 6 armed robbery was the first time Sheehan had to deal with an armed robbery during his employment with the Department.

29. Later that day, Margolis informed Union Steward Sharon Patenaude that he was considering assigning Sheehan to administrative duty temporarily pending investigation of the incident. Later that evening, while Margolis was home, Patenaude called Margolis and asked him if he could come to headquarters to meet with Sheehan to discuss placing him on administrative duty. Margolis agreed. He met Sheehan and Patenaude at headquarters at approximately 11 p.m. Sheehan indicated that he wished to

discuss what happened that day. Margolis advised that was not necessary since there would be an investigation. Nonetheless, Sheehan discussed his actions concerning the detention of the student (Employer Exhibit 5, pages 157-58).

30. There was campus-wide attention on the November 6 incident. There was widespread discussion about racial issues due to the incident. On November 7, University President Daniel Fogel sent an email to students, faculty and other University employees to inform them of the armed robbery and the detention of the student. President Fogel indicated that he had set in motion "an immediate investigation of police conduct in the apprehension of the student who was briefly detained". He stated: "While not prejudging the outcome of the investigation of police conduct, we all understand that the detention of an innocent student raises serious questions about the campus climate for persons of color" (Union Exhibit 13B).

31. President Fogel and the Provost attended a meeting on the evening of November 7 with ALANA members concerning the November 6 incident. The meeting lasted more than two hours. In a letter dated November 8, 2002, to the University Board of Trustees, President Fogel included a postscript in which he discussed meeting with ALANA the previous evening concerning the November 6 incident. He stated: "They may be right, they may be wrong, or the truth may lie midway, but our students of color believe that the young woman was subjected to the threat of lethal force simply for the crime of walking while black. The Provost and I are determined to take this incident as a teachable moment for advancing campus climate issues and diversity initiatives as well as for a thorough-going review of police practices and training" (Union Exhibit 13A).

32. The November 6 incident also resulted in media coverage. There were several articles in the daily newspaper *Burlington Free Press*. The University newspaper *The Vermont Cynic* reported the incident. There was a news story run on a local television station. The media coverage included discussion of race relations and racial profiling (Union Exhibit 6, Employer Exhibit 5, pages 175-81).

33. Chief Margolis assigned Department Lieutenant Laurence Magnant to conduct the investigation of the November 6 incident. Lieutenant Magnant conducted interviews of the officers and dispatcher involved in the incident. He submitted typed summaries of his interviews to Chief Margolis on November 7, 2002. Chief Margolis then contacted Captain Tuomey and assigned her to review the investigation, synthesize the information and submit a report to him by November 11, 2002. Captain Tuomey concluded that further investigation was necessary and informed the Chief that she was going to conduct further investigation (Employer Exhibit 5).

34. During her investigation, Tuomey had an interview with Sheehan on November 11, 2002. Patenaude was present at the interview. Prior to the interview, Tuomey notified Sheehan that he was required to answer questions truthfully and completely, and that he may be disciplined, up to dismissal, for failure to do so. During Tuomey's questioning of Sheehan concerning his actions as he drove on Main Street before detaining the student, the following exchange occurred:

> Tuomey: Did you have your MVR tape in?
>
> Sheehan: Ah, I think I did.
>
> Tuomey: OK. Can I get that tape from you?
>
> Sheehan: Yeah, yeah, yeah, yeah.
> (Employer Exhibit 5, pages 68, 101)

35. At the conclusion of the November 11 interview, Tuomey asked Sheehan to get the tape for her. Sheehan left the office, came back with a tape and handed it to Tuomey. Then he left. Tuomey then went down the hall to play the tape in the VCR in a conference room. She noticed that the tape seemed not to have been used. Meanwhile, Sheehan spoke with Patenaude about whether he had used the MVR tape on November 6. Sheehan then walked into the room and approached Tuomey at the VCR. Sheehan told Tuomey that he did not think that there was anything on the tape. He also made a comment to the effect that he cannot remember what happened at the end of that day. Sheehan then left. Tuomey played the tape and discovered it was blank.

36. On November 12, 2002, Tuomey met with Sheehan and Patenaude. Tuomey asked Sheehan when he knew that he had not put the tape in the MVR on November 6. Sheehan responded to the effect that he did not remember his actions concerning the MVR tape on November 6. When Tuomey questioned him concerning his use of MVR tapes generally, he indicated that he occasionally used them but not all the time.

37. On November 13, 2002, Tuomey again met with Sheehan and Patenaude. Tuomey sought clarification from Sheehan concerning when he knew that he had not used a MVR tape. Sheehan told Tuomey that he did not specifically recall his actions on November 6 concerning the MVR tape. He also told Tuomey that he was afraid due to the ongoing investigation.

38. Captain Tuomey prepared a written report on the investigation of the November 6, 2002, incident, and gave that report to Chief Margolis on November 14,

2002. Margolis provided the Union with a copy of the report on November 15, 2002. The "Findings" section of the report provides:

> Numerous mistakes occurred during the initial response to this investigation which lead(sic) to the missteps culminating in Ofc. Sheehan's detention of (the student) on Main Street:
>
> Contributing factors:
>
> - Inexperienced staff handling a major incident
>
> - Poor communication by Dispatcher Gagnon, Sgt. Phelps, Ofc. Sullivan, Ofc. Apgar, and Ofc. Sheehan
>
> - Poor operational control:
> - Officers self deployed
> - Officers failed to follow assignments
> - Lack of clear supervisory oversight and direction
>
> - Poor police practice and tactics:
> - Location of contact; Ofc. Sheehan
> - Failure to use information known; All
> - Baseless assumptions about the known information were made; Ofc. Apgar, Ofc. Sheehan
> - Choice of location of cruiser placement; Ofc. Sheehan
> - Lack of planned approach; Ofc. Sheehan
> - Failure to use verbal skills; Ofc. Sheehan
> - Left cover and closed the reactionary gap; Ofc. Sheehan
>
> (Employer Exhibit 5, pages 6 and 60A)

39. Tuomey described the November 6 incident in her report as a "rapidly unfolding situation, and high stress." She stated that "(n)one of the mistakes, taken in isolation, are extreme and shocking but provide a context for a decision made under a significant amount of stress, compounded by a very poor communication and command and control over the broader incident response". Tuomey did not make any recommendations to Chief Margolis concerning discipline in the report or otherwise (Employer Exhibit 5, page 9).

40. Chief Margolis informed Sheehan by letter dated November 18, 2002, that he was contemplating terminating his employment due to: 1) his conduct in apprehending and detaining the student, 2) his lack of candor during the investigation of such conduct, 3) unacceptable annual performance evaluations, 4) issues surrounding the use of the MVR system; and 5) prior performance problems warranting an earlier suspension. Margolis indicated that he would meet with Sheehan that day to discuss the contemplated dismissal, and informed Sheehan that he and his Union representative had ten days to submit a written rebuttal to the contemplated termination of employment (Employer Exhibit 13).

41. On November 28, 2002, Ronald Rabideau, Secretary-Treasurer and Business Agent of the Union, submitted a five page response to Chief Margolis' November 18, 2002, letter. Rabideau set forth in detail why he believed that the charges against Sheehan were unjustified (Employer's Exhibit 14).

42. Margolis considered Sheehan's complete personnel record in deciding what disciplinary action to impose on him. This included performance evaluations, letters of commendation and disciplinary actions. On December 16, 2002, Margolis informed Rabideau by letter that he had decided to dismiss Sheehan. The letter provided in pertinent part:

> In accordance with the Agreement between the University . . . and the . . . (Union) I am notifying the union that I have reviewed your rebuttal (in a letter dated November 28, 2002) to my contemplated action of termination. Based on my review of the information presented by the union, I have decided to terminate Officer Matthew Sheehan's employment with the Department of Police Services. The reasons for my decision are included in this letter.
>
> First, I view as a serious breach of professional standards statements Officer Sheehan made to Captain Tuomey during the investigation regarding use of the Mobile Video Recorder (MVR). In its best light, Officer Sheehan's

response to questions pertaining to the MVR investigation was evasive and inaccurate. In its worst light, during his November 11, 2002 interview, Officer Sheehan deliberately misrepresented the facts. He acknowledged to Captain Tuomey on November 13, 2002 that he knew moments after handing her a blank MVR tape on November 11 that he had not used the tape on November 6. He was not forthcoming with this information, and his response was therefore deceptive. Moreover, Officer Sheehan had several opportunities to clarify the facts with the Captain during their conversation and did not do so until prompted, thus leading me to conclude that he did not intend to correct his statement. Statements Officer Sheehan made to Captain Tuomey as she placed the videoptape into the player do not erase the misconduct associated with the misleading statements he earlier made.

Furthermore, his failure to exercise good judgment and act with integrity under stress do not create confidence that he will act, or has acted, appropriately in the stressful situations that arise routinely in police work. Officer Sheehan told Captain Tuomey he was not forthcoming with this information because he was afraid of the consequences -- of getting into more trouble. This undermines any argument that Officer Sheehan honestly believed he had a tape inserted, as required, in the MVR. In short, while I agree that the use, or lack thereof, of the MVR tape is not itself a basis for serious disciplinary action, Officer Sheehan's lack of candor and forthrightness relative the MVR inquiry is a basis for such action as it calls into question his integrity as a police officer. No length of service or amount of loyalty to the University can excuse shortfalls of this kind. Integrity is the foundation of police service.

For the record, nothing I have found supports the union's assertion that Department officers regularly disregard the policy on use of the MVR. Quite the opposite is apparent when examining the video tape sign-out sheets. All supervisors responsible for patrol oversight confirmed that they are not aware of any police officer who deliberately fails to use the MVR system in violation of policy or practice. It is the supervisors' expectations – supported by numerous instances when they have referred to the MVR tape to field a complaint, critique an event, or train their subordinates – that officers are using the system. Regarding Officer Sheehan, Sgt. Phelps stated to me that, in a conversation with Officer Sheehan on September 29, 2002, he expressly instructed Sheehan to use the MVR system.

Second, a factor of key concern to me in this matter is Officer Sheehan's inappropriate use of force. Our use of force policy clearly states that "Deadly force involves the use of a firearm or other 'deadly weapon.' As per Title 13, Vermont Statutes Annotated, Chapter 19 Section 1021 (3), " 'Deadly Weapon' means any firearm, or other weapon, device, instrument, material, or substance, whether animate or inanimate which in the manner it is used or *is intended to be used* is known to be capable of producing death or serious bodily injury." [Emphasis added]. I strongly disagree with the union's assertion that there is a

distinction to be made between "use" and "threatening use." By drawing his firearm, Officer Sheehan chose a level of force (deadly force) unjustified given the information known, or that he reasonably should have known, at the time. His decisions and actions are in violation of Department Directive #ADM-120 (Use of Force), which states that "in all cases, only the minimum amount of force necessary to control the situation and/or gain compliance will be used." Per our policy, an officer "may use deadly force when he/she reasonably believes the action to be necessary to protect human life, to protect any person from imminent danger of serious bodily injury or death. The officer will use the principles of ability, opportunity and jeopardy as a guide to establish probable cause for the use of deadly force."

The union has not made a convincing argument that the definition of "imminent" was met under these circumstances, in that an action was not pending. (The student) was not displaying a weapon or running to gain the tactical advantage of cover, nor was she attempting to escape from the vicinity of a violent confrontation. Ability, opportunity and jeopardy – as defined in our policy – did not exist to establish probable cause and justify Officer Sheehan's actions at the moment he made contact with (the student). He indicated in a taped statement that, at the time of apprehension, he was not afraid of (the student) and that he did not see a weapon. Given the lack of matching characteristics, a reasonable and prudent officer would not have believed (the student) was an imminent threat to self or others. Moreover, our policy on the use of deadly force defines "necessity" as both the presence of imminent danger *and* the absence of safe alternatives to the use of deadly force which do not increase the danger to the officer. Safe alternatives include the availability of cover, which Officer Sheehan denied himself, and time constraints, which were not applicable. By his own admission, the Officer created the circumstances that led him to draw his firearm. Without the justification of deadly force, he was in violation of ADM-120 (Use of Force), Section V (Display of Weapon), which I view as a serious policy violation. Such an action only serves to undermine my confidence in his abilities.

Contrary to the union's assertion, Officer Sheehan was not instructed by Officer Jeffrey Jackman during firearms training on October 22-23, 2002 to do what he did at the time of the incident. Officer Jackman, in the presence of Captain Tuomey (the Department's chief use of force instructor) trained officers to draw their firearm on a suspect wielding a knife if the suspect was 21 feet or closer in an unbroken, unobstructed line, and when ability, opportunity and jeopardy exist in combination with other relevant factors as outlined previously. Officer Sheehan was not told by department instructors to leave protective cover and engage a suspect he believed posed a threat to his or another's safety – quite the contrary was taught. Insofar as the ultimate decision to use force rests with the individual officer, Officer Sheehan had responsibility as a police officer to confirm what he actually saw against what he admits knowing the suspect's description to be. Nothing in our training as police professionals abdicates our individual decision making responsibilities. In this connection, Officer Sheehan's

acknowledgment that the person being observed was wearing a red backpack and lacking a fur collar should have been an important piece of information in Officer Sheehan's decision making process. His failure to exercise independent reasonable judgment with regard to identification of a possible suspect, combined with inappropriate use of force, constitutes a serious departure from professional standards.

Third, the question of failure to follow orders is of major concern from the standpoint of professional standards. In a law enforcement unit, use of the command structure is essential to the preservation of the safety of the public and Department officers as well as to efficient and orderly operations. It is a standards violation of the highest order for an officer to disregard a superior's order. In this situation, the Captain clearly stated that she wanted officers to wait until other armed officers were in place before engaging any suspect. A reasonable police officer would understand this instruction to be predicated on coordinated team work as well as safety considerations. I find no ambiguity in the Captain's comments that could justify Officer Sheehan's actions. No other police officer at the scene interpreted the Captain's comments as Officer Sheehan did; each waited as she instructed.

In sum, the facts established in the investigation demonstrate that Officer Sheehan minimally did not display the candor and forthrightness expected of an officer during an investigation, thus raising questions of integrity; engaged in an inappropriate use of force; acted unreasonably in the exercise of his own judgment in detaining a civilian; did not follow the instructions of a superior; and failed to follow procedure with respect to the use of MVR equipment. In their totality, these acts justify termination for cause.

The union asks that I make this decision in the larger context of Officer Sheehan's employment, yet appears to take issue with consideration of Officer Sheehan's last performance evaluation. I do view Officer Sheehan's record of service overall as relevant insofar as it might provide compelling evidence, either favorable or unfavorable, regarding his adherence to professional standards and job expectations. Having reviewed Officer Sheehan's entire performance record, I do not find evidence that the incidents were an aberration in a uniformly outstanding career. Rather, although Officer Sheehan's many years of service are valued – and he has acted commendably in many instances – I also find (1) his most recent performance evaluation, identifying several areas of below-average performance; (2) a disciplinary action on August 20, 2002, based both on an unexcused failure to report for duty, and a lack of truthfulness in relation to the failure to report, resulting in a suspension and notice that further violations may result in dismissal; and (3) a letter of reprimand dated August 8, 1998, in which Officer Sheehan falsely claimed a medical absence to enable him to pursue a recreational interest instead of work. This record does not create compelling evidence that Officer Sheehan should not be subject to termination.

> In closing, the union contends that this termination decision is driven by issues of politics – in particular, racial politics – and not the merits of the case. As members of the University community, department staff and I share our institutional commitment to civil rights and diversity. That commitment is not at issue here. It is nonetheless the case that a *basic function* (emphasis in original) of a police officer is to "cultivate relationships and develop rapport with the University community and to foster mutual trust, understanding and respect of individual rights and responsibilities." *(Position Description, UVM Police Officer*). A wrongful detention and inappropriate use of force compromise public trust in the Department. I also note that law enforcement is a field in which errors can and do endanger the lives of others. It is thus essential that proper procedures be followed and good judgment be exercised, most especially in stressful situations. In addition, the integrity of a police officer is the hallmark of a successful, effective public servant. When lost or corrupted, we are useless. For all these reasons, I can find no disciplinary action other than termination appropriate to this situation.
> . . .
> (Employer Exhibit 15)

43. Sheehan was the only Department employee who was disciplined in connection with the November 6 incident. Chief Margolis met with other involved officers as a group to discuss "learning points" from the incident, and met with them individually to discuss what they could do differently in the future. He did not discipline any other officer because he concluded they had not engaged in misconduct.

44. The University arranged for an external review of the November 6 incident and Department policies. The external review team found systematic issues that needed to be addressed to prevent a reoccurrence of a similar issue, including the lack of policies and training in tactical operations and incident command systems.

OPINION

The issue is whether the University of Vermont Department of Police Services violated the Contract by dismissing police officer Matthew Sheehan without just cause. The ultimate criterion of just cause is whether an employer acted reasonably in discharging an employee for misconduct. In re Grievance of Brooks, 135 Vt. 563, 568

(1977). There are two requisite elements which establish just cause for dismissal: 1) it is reasonable to discharge an employee because of certain conduct, and 2) the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. Id. In re Grievance of Yashko, 138 Vt. 364 (1980).

The standard for implied notice is whether the employee should have known the conduct was prohibited. Grievance of Towle, 164 Vt. 145 (1995). Brooks, supra, 135 Vt. at 568. Knowledge that certain behavior is prohibited and subject to discipline is notice of the possibility of dismissal. Towle, supra. Grievance of Gorruso, 150 Vt. 139, 148 (1988).

The burden of proof on all issues of fact required to establish just cause is on the employer, and that burden must be met by a preponderance of the evidence. Colleran and Britt, 6 VLRB 235, 265 (1983). Once the underlying facts have been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven facts. Id. at 266.

The Employer's charges against Sheehan can be summarized as follows: a) failing to follow the instructions of a superior during the November 6 incident in which police were seeking a robbery suspect and Sheehan pointed his firearm at a student who he believed was the suspect; b) acting unreasonably in the exercise of his own judgment in detaining the student; c) engaging in inappropriate use of force during the incident; d) failing to display the candor and forthrightness expected of an officer during an investigation; and e) failing to follow procedure with respect to the use of mobile video/audio recording ("MVR") equipment.

We first discuss the charge concerning failing to follow the instructions of a superior during the November 6 incident. The Employer alleges that Sheehan failed to follow Captain Tuomey's instruction that she wanted officers to wait until other armed officers were in place before engaging any suspect.[1] The Union contends that Captain Tuomey's instruction was neither clear nor direct.

It is evident that there was a lack of clear command during the November 6 incident in which police were searching for a suspect to a campus robbery. Prior to Captain Tuomey's instruction, the other supervisory officer involved in the incident, Sergeant Phelps, told Sheehan to "(t)ake a spin through the hospital". The Employer contends that this directive from Phelps meant that Sheehan should go to the hospital and stay there until ordered to do something else. We disagree that the directive was as clear as the Employer suggests. It was reasonable for Sheehan to view this directive as part of a plan to locate the suspect that could be abandoned once other officers reported over the radio that they had a person who may be a suspect in view. If Phelps intended to establish a definite perimeter for the search which could not be compressed without specific instructions, his direction should have been more specific than just "(t)ake a spin through the hospital".

Nonetheless, this lack of clear command preceding Captain Tuomey's instruction does not excuse Sheehan from disregarding her instruction. She clearly indicated that she was headed toward the area whether the officers saw the potential suspect, and that she

[1] There was evidence presented concerning Sheehan's alleged failure to heed the order of Sergeant Phelps to "(t)ake a spin through the hospital" in the search for the robbery suspect. We do not consider whether Sheehan failed in this regard in our decision because it was not mentioned in the dismissal letter. The dismissal letter referred only to the alleged failure of Sheehan to follow the instruction of Captain Tuomey. In reviewing a disciplinary action, the Board will not look beyond the reasons given by the employer in the disciplinary letter for the action taken. Grievance of Swainbank, 3 VLRB 34, 48 (1980). Grievance of Erlanson,, 5 VLRB 28 (1982).

wanted officers to wait until other officers were in place. Nonetheless, Sheehan acted contrary to this instruction by proceeding to Main Street and detaining the potential suspect without waiting for Captain Tuomey to arrive at the scene and without communicating to other officers his intentions to do so.

He should have known that Captain Tuomey was establishing a coordinated plan to address the situation, and he used poor judgment in derailing the plan. Accordingly, although there was a failure of command in the handling of the November 6 incident, Sheehan failed to follow the instruction of Captain Tuomey as charged.

The Employer next charges Sheehan with acting unreasonably in the exercise of his own judgment in detaining a student during the November 6 incident who he believed was a robbery suspect. The Union refutes this charge through citation to a number of cases standing for the proposition that there are occasions an officer may formulate a reasonable suspicion to detain a person based on information obtained from other officers rather than personal observations.

We do not quarrel with this proposition, but conclude that the circumstances did not justify the actions Sheehan took to detain the student. Detention occurs whenever a police officer "accosts" an individual and "restrains (the individual's) freedom to walk away", or "approaches and questions" an individual "suspected of being personally involved in criminal activity". Black's Law Dictionary, 6th Ed. (West Pub. 1990). The circumstances did not justify Sheehan employing the most severe detention method contained in this definition.

At the time Sheehan detained the student by the severe method of holding her at gunpoint, Sheehan did not possess adequate information to take such a drastic step. He

knew that other officers had identified the student as a possible suspect in the robbery, but also knew that their description of the student differed in several respects from the description of the suspect given by the dispatcher. The dispatcher described the suspect as a 6’2’’ black male, wearing a black puffy jacket with a fur hood. When Sheehan left his cruiser to detain the student, he knew that Officer Apgar had described the person he believed to be the suspect as a 6 foot black male wearing a jacket that was “navy blue” or a “dark color”. He knew that Sergeant Phelps had just stated that the person had “a red satchel on his back” and did not “appear to have a fur collar”.

The other officers’ description differed significantly from the dispatcher’s description of the suspect in that there was an absence of a black, puffy jacket with a fur collar and the addition of a “red satchel”. Due to the discrepancy in description, Sheehan needed to act with extreme caution. He failed in this regard by taking the immediate and unilateral action of holding the student at gunpoint.

In addition to the discrepancy in description, Sheehan had heard Captain Tuomey’s statement that she was headed toward the area whether the officers saw the potential suspect and she wanted officers to wait until other officers were in place. Under these circumstances, the only reasonable action for Sheehan to take was to make his own personal observations of the potential suspect and participate in a coordinated plan to address the situation. His failure to do so results in our conclusion that Sheehan acted unreasonably in the exercise of his own judgment in detaining the student, as charged.

The next charge against Sheehan is that he engaged in inappropriate use of force in detaining the student. As indicated in the preceding discussion, Sheehan did not reasonably detain the student. Nonetheless, we need to examine whether he exacerbated

his misconduct through the method by which he detained the student; specifically whether he engaged in inappropriate use of force during a detention he never should have made.

The use of force used by Sheehan was to point his firearm at a student and order her to the ground. The student complied with Sheehan's order and another officer placed handcuffs on her. In determining whether Sheehan engaged in an inappropriate use of force, we need to compare his actions to the Department's Use of Force directive. At the time of the incident, Sheehan had both received a copy of, and training on, the directive. The Union contends that the directive is long, complicated and ambiguous. In any event, the Union contends that Sheehan's use of force was justified under any of the standards set forth in the directive. While the directive could be written with greater clarity and consistency, nonetheless, in applying the directive to this case, it is clear that it provided Sheehan with fair notice that his actions did not constitute the appropriate use of force.

Pursuant to the Use of Force directive, Sheehan's pointing his firearm at a student and ordering her to the ground constituted the use of deadly force. This use of deadly force would be appropriate only if it conformed to the general policy under the directive that "(i)n all cases, only the minimum amount of force necessary to control the situation and/or gain compliance will be used". Pursuant to the directive, the police officer may use deadly force "when he/she reasonably believes the action to be necessary to . . . protect any person from imminent danger of serious bodily injury or death". The officer is required to "apply the principles of ability, opportunity and jeopardy as a guide to establish probable cause for the use of deadly force". Ability, opportunity and jeopardy have to be "co-existent" to justify the use of deadly force.

In applying those factors to this case, we give Sheehan the benefit of the doubt that he reasonably believed the person he was going to detain had a knife. This satisfied the “ability” factor of the “ability-opportunity-jeopardy” triangle because Sheehan thought the person was “physically capable of presenting the threat of inflicting serious bodily injury and death”, the definition of “ability” in the Use of Force directive.

The Union contends that Sheehan also met the “opportunity” factor because he was less than 21 feet from the student when he drew his weapon, thus meeting the “21 foot rule” allowing the use of deadly force when a suspect has a knife within 21 feet of the officer. Sheehan and other Department police officers received training in the “21 foot rule”. Officers were trained that an edged weapon such as a knife could be considered dangerous enough to inflict death or serious injury on an officer within 21 feet, and that a person with a knife could conceivably cover 21 feet before the officer had a chance to draw his or her weapon from the holster and fire on target.

The Union’s argument with respect to the 21 foot rule ignores the fact that Sheehan inappropriately placed himself within 21 feet of a person whom he thought had a knife. The Use of Force directive indicates that use of force is necessary if there is the presence of an imminent danger to the officer or others, and the absence of safe alternatives to the use of deadly force. Sheehan had safe alternatives to the use of deadly force; specifically use of verbal warnings and the availability of cover.

He safely could have issued verbal warnings to the student when he was more than 21 feet from the student, thereby not placing himself within the “opportunity” zone of danger. He also had the cover of his vehicle that would have given him additional time to assess the need to use deadly force. He could have more closely observed the student

from the cover of his vehicle and come to the realization that the student did not match the description of the suspect. He also could have communicated with the student or the other officers from the cover of his vehicle, and thereby forestalled the rash, unilateral action he did take.

The Union maintains that it would have been dangerous for Sheehan to use the cover of his vehicle because another vehicle could have struck Sheehan's cruiser from the rear given the placement of Sheehan's vehicle. Again, this argument of the Union ignores the fact that Sheehan's vehicle was at its then location where it was because of Sheehan's inappropriate action in choosing a location to make the stop. The potential suspect was not acting furtive, was not fleeing, was not displaying a weapon and was not engaging in any other action that prevented Sheehan from taking the time to find a better place to park so that he could safely use his vehicle for cover.

Moreover, even if we assume *arguendo* that Sheehan stopped his vehicle in an appropriate location, it would have been safer for Sheehan to place himself at the front of his vehicle than completely abandon the cover of his vehicle. The chance of his vehicle being struck by oncoming traffic posed less of a risk to Sheehan than placing himself in the zone of danger.

In sum, Sheehan did not meet the "opportunity" factor of the "ability-opportunity-jeopardy" triangle. We further conclude that Sheehan did not meet the "jeopardy" factor. That requires that "an adversary must commit an overt act, which would cause a reasonable person to believe it would result in serious bodily injury of death to the officer or a third person". The Union contends that an "overt act" had been committed because the robbery suspect had held a person at knifepoint. The overt act referred to by the

Union was too remote in time and place to constitute the overt act within the definition of "jeopardy". The student was not displaying a knife to Sheehan or demonstrating any intent to use a weapon against him. There was no imminent danger to Sheehan that results in a conclusion that "jeopardy" existed at the point in time that Sheehan decided to point his weapon at the student.

The Union nonetheless claims that it was reasonable for him to point his firearm at the student because, during training he had taken a few weeks before the November 6 incident, the trainer had indicated that it was permissible to draw a weapon at a suspect who was 75 feet away. We disagree that this training justified Sheehan's actions. During the training, it was evident that the trainer made his comments in the context of an exercise in which the suspect had a visible knife and the officers took cover behind a barricade. There was no visible knife when Sheehan pointed his firearm at the student and he inappropriately left cover when he pointed his firearm. Further, the isolated training exercise cannot somehow override the explicit requirements of the Use of Force directive before deadly force can be used.

Thus, two of the three necessary elements of the "ability-opportunity-jeopardy" principle were absent when Sheehan engaged in inappropriate use of force as charged, and pointed his firearm at a student ordering her to the ground. He did not have reasonable belief or probable cause that his actions were necessary to protect himself or any other person from imminent danger of serious bodily injury or death. He had notice through the Use of Force directive and training that his actions were prohibited.

The Employer made an additional charge against Sheehan that he failed to display the candor and forthrightness expected of an officer during the investigation concerning

whether he used the MVR equipment during the November 6 events. Specifically, in the letter of dismissal, Chief Margolis stated:

> In its best light, Officer Sheehan's response to questions pertaining to the MVR investigation was evasive and inaccurate. In its worst light, during his November 11, 2002, interview, Officer Sheehan deliberately misrepresented the facts. He acknowledged to Captain Tuomey on November 13, 2002 that he knew moments after handing her a blank MVR tape on November 11 that he had not used the tape on November 6. He was not forthcoming with this information, and his response was therefore deceptive. Moreover, Officer Sheehan had several opportunities to clarify the facts with the Captain during their conversation and did not do so until prompted, thus leading me to conclude that he did not intend to correct his statement. Statements Officer Sheehan made to Captain Tuomey as she placed the videoptape into the player do not erase the misconduct associated with the misleading statements he earlier made.

The Employer has not met its burden of demonstrating that Sheehan was deceptive during the November 11 interview with Captain Tuomey. Sheehan stated to Tuomey during the interview that he thought he had used the MVR equipment and then gave her a MVR tape upon her request after the interview. However, before Tuomey had an opportunity to play the tape and after Sheehan met with his union representative, Sheehan told Captain Tuomey that he did not think there was anything on the tape.

Under these circumstances, where Sheehan gave Tuomey inaccurate information during an interview and then corrected it shortly after the interview, we do not believe that the Employer has established deception on Sheehan's part. Sheehan's initial representation to Tuomey when she asked him whether he used the MVR tape was equivocal in that he responded: "I think I did". This does not constitute an unequivocal statement that he did use the tape. In the dismissal letter, Chief Margolis contends that Sheehan was deceptive because "he knew moments after handing (Tuomey) a blank MVR tape on November 11 that he had not used the tape on November 6".

This does not prove by a preponderance of the evidence deception by Sheehan. Immediately after handing Tuomey the tape he met with his union steward. It is plausible, as Sheehan contends, that it was during the conversation with the steward that he realized he had not used the tape. Immediately after that conversation, he told Tuomey that he did not think anything was on the tape. Since Sheehan's conversation with the steward was subsequent to his interview with Tuomey where he made the allegedly deceptive comment, it is plausible that Sheehan was not being deceptive with Tuomey.

In sum, the evidence is not sufficiently strong to demonstrate by a preponderance of the evidence that Sheehan was deceptive when he told Tuomey during the November 11 interview that he thought he had used the MVR tape. Sheehan was equivocal and evasive on his knowledge concerning use of the MVR tape during the investigation, but a charge of deception is stronger than we are prepared to sustain. Thus, we conclude that the Employer has not proven its charge that Sheehan was deceptive during the investigation.

The final charge that the Employer made against Sheehan was that he did not follow procedure with respect to the use of MVR equipment attached to officers' cruisers. This charge has been established. The Employer issued a directive indicating that officers are expected to use the recording equipment to provide evidence and documentation of events during their shifts. Sheehan did not have the recording equipment operating during the events of November 6, and thus failed to follow procedures as charged.

The fact that the Employer has not proven all of the charges against Sheehan does not necessarily mean that his dismissal lacked just cause. Failure of an employer to prove by a preponderance of the evidence all the particulars of each charge contained in a

dismissal letter does not require reversal of a dismissal action. Grievance of McCort, 16 VLRB 70, 121 (1993). In such cases, the Board must determine whether the remaining proven charges justify the penalty. Id.

We look to the factors articulated in Colleran and Britt, 6 VLRB at 268-69, to determine whether the proven charges justify dismissal. The pertinent factors here are: 1) the nature and seriousness of the offenses and their relation to Sheehan's duties, 2) the effect of the offenses upon supervisors' confidence in Sheehan's ability to perform assigned duties, 3) the clarity with which Sheehan was on notice of any rules that were violated in committing the offenses, 4) Sheehan's past disciplinary record, 5) Sheehan's past work record, 6) notoriety of the offenses or their impact upon the reputation of the Police Department, 7) mitigating circumstances surrounding the offenses, 8) consistency of the penalty with those imposed on other employees for the same or similar offenses, 9) the potential for Sheehan's rehabilitation, and 10) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Taken in their entirety, Sheehan's offenses are of a very serious nature. His most serious offenses were taking the unilateral and unreasonable action of detaining a student during the November 6 incident, and then using inappropriate force during the incident. Detaining a student was a rash action contrary to the direction of his superior and taken without communications with other officers. He exacerbated his misconduct by then pointing his firearm at a student and ordering her to the ground. These offenses were clearly contrary to training and the Department's use of force policy that Sheehan had received. The results of these offenses were that an innocent student was subjected to

deadly force, there was media coverage and widespread campus discussion of racial issues, and the reputation of the Police Department was adversely impacted.

Sheehan's further offense of failing to follow procedure with respect to the use of MVR equipment is much less serious. We concur with Chief Margolis' view stated in the dismissal letter that this offense "is not itself a basis for serious disciplinary action". It does indicate Sheehan's disregard of procedure concerning a matter that could have provided more evidence on the November 6 events, but is of limited significance compared to his other offenses.

Sheehan's serious offenses understandably resulted in his superiors losing confidence in his ability to perform assigned duties. He demonstrated disregard of a superior's instruction, and an inclination to act unilaterally and unreasonably, in addressing an armed robbery that needed coordinated action by all officers. He exhibited substantial lack of compliance with important policies and training in responding to a campus crime. He showed serious lack of judgment in exercising his law enforcement responsibilities to the extent that he unreasonably and negligently subjected an innocent student to trauma, caused a widespread controversy on racial issues, and significantly damaged the image of the Department. In sum, he demonstrated substantial shortcomings detrimental to the Employer's interests that reasonably caused his superiors to lose confidence in him.

Sheehan had fair notice that his actions were prohibited. This notice came through the Employer's policies and training that he received, as well as 18 years experience as either a security officer or a police officer. Taken together, these provided him with fair notice, express and implied, that his disregard of procedure and a superior's instructions,

unreasonable detention of a student, and inappropriate use of force were prohibited actions.

Sheehan's past disciplinary record, on balance, does not aid his contention that dismissal was too severe a sanction. A few months prior to the November 6 incident, he had received a one-day suspension for an unexcused failure to report for duty and lack of truthfulness in relation to the failure to report. His previous written reprimand in 1998 for misuse of medical leave to go hunting cannot, under Article 13(3) of the Contract, be used as a basis for progressive discipline. However, it can be used as evidence of the overview of the employee's overall work record. In this case, the written reprimand along with the one-day suspension provide an overview of a long-term employee with a flawed disciplinary record.

Sheehan also had a flawed performance record. Prior to his last year of evaluated performance, Sheehan's overall performance was satisfactory. However, during the rating period preceding his dismissal, he received either "below average" or "unsatisfactory" ratings in nine of fourteen rated areas of performance. As a result, his supervisors established an improvement plan for him. This does not constitute a good work record assisting Sheehan's case for imposition of an action less than dismissal.

The notoriety of Sheehan's offenses, and their impact on the reputation of the Police Department, are factors weighing in favor of Sheehan's dismissal. As previously discussed, Sheehan's offenses resulted in media coverage and widespread campus discussion of racial issues, and the reputation of the Department was adversely impacted. It is important that a police department have the trust of the community it serves to

responsibly exercise its law enforcement powers. Sheehan's offenses had a substantial detrimental impact on the achievement of that objective.

Mitigating circumstances are not nearly sufficient to negate the justification for Sheehan's dismissal. The November 6 incident illustrated weaknesses of the Department of lack of a clear command system and deficient tactical operations in addressing a serious incident. Nonetheless, these systematic weaknesses do not approach excusing Sheehan's unreasonable actions and serious offenses in detaining the student.

The Union further contends that Sheehan's limited experience in responding to felonies in progress and the stressfulness of the situation mitigate the penalty. We disagree. Sheehan received sufficient training to appropriately respond to an armed robbery. Also, the nature of a police officer's responsibilities require appropriate response to stressful situations. Sheehan's failure to appropriately apply his training and reasonably respond to a stressful situation are not mitigating circumstances supporting an action less than dismissal.

The Union questions the fact that no other employees were disciplined for their conduct during the November 6 events. We believe the Employer acted fairly and reasonably in this regard. Other employees demonstrated performance problems that were appropriately addressed by Chief Margolis as "learning points" to guide future performance. However, none of the other employees demonstrated deficiencies remotely comparable to Sheehan's serious offenses of detaining the student and using inappropriate force.

In sum, we conclude that Sheehan's serious offenses of taking the unilateral and unreasonable action of detaining the student during the November 6 incident, and then

using inappropriate force during the incident, justified dismissal rather than a lesser penalty. He demonstrated disregard of a superior's instruction, an inclination to act unilaterally and unreasonably, substantial lack of compliance with important policies and training, and serious lack of judgment in exercising his law enforcement responsibilities. The Employer acted reasonably in concluding that alternative sanctions less than dismissal were not adequate given the severity of Sheehan's demonstrated shortcomings. His potential for rehabilitation was not promising, as demonstrated by his seeming lack of understanding of the Employer's use of force policies and practices. It was reasonable for the Employer to conclude that a lesser sanction would not have been effective in deterring similar misconduct by Sheehan in the future.

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of the Chauffeurs, Teamsters, Warehousemen and Helpers Union No. 597 concerning the dismissal of University of Vermont Department of Police Services police officer Matthew Sheehan is dismissed.

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

VERMONT LABOR RELATIONS BOARD

_____
Richard W. Park, Chairperson

_____
Edward R. Zuccaro

_____
Joan B. Wilson