VERMONT LABOR RELATIONS BOARD

APPEAL OF:	)	
	)	DOCKET NO. 01-1
DENNIS MADORE	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On January 5, 2001, Dennis Madore ("Appellant"), through Attorney Thomas Zonay, filed an appeal with the Labor Relations Board over his dismissal from employment as a State Police Lieutenant. In appealing the dismissal and requesting that it be rescinded, Appellant contends that the Department of Public Safety ("Employer") violated Article 14 of the collective bargaining agreement between the Vermont State Employees' Association and the State of Vermont for the State Police Unit ("Contract") by imposing discipline without just cause, bypassing progressive discipline, not imposing discipline in a uniform and consistent manner, not preferring charges in a timely manner, and not instituting disciplinary proceedings within a reasonable time after a violation of the Code of Conduct occurred and was discovered.

The Labor Relations Board issued two previous discovery orders in this matter. 24 VLRB 201 (2001); 25 VLRB 101 (2002). On March 28, 2003, the Vermont Supreme Court affirmed the Board discovery orders (Supreme Court Docket Nos. 2002-220). Following discovery and prior to the hearing on the merits, the parties jointly moved on August 6, 2003, to bifurcate the issues scheduled for hearing. The parties moved that the Board first have a hearing limited to the issue of whether Appellant committed violations of the Rules of Regulation/Code of Conduct as charged. The Board granted the parties' bifurcation motion. 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 will schedule an additional hearing to address the remaining issues raised by Appellant in his appeal. 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 September 11 and October 9, 2003, in the Labor Relations Board hearing room in Montpelier before Labor Relations Board Members Edward Zuccaro, Acting Chairperson; Carroll Comstock and Joan Wilson. Attorney Zonay represented Appellant. William Reynolds, Assistant Attorney General, and Elizabeth Novotny, Counsel for the Employer, represented the Employer. Appellant and the Employer filed briefs on November 18, 2003.

FINDINGS OF FACT

1. 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.
>
> . . .
>
> 14.0 TRUTHFULNESS
>
> 13.1 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

. . .

1.0 CONDUCT

1.1 Members shall conduct themselves with propriety and dignity at all times, both on and off duty. No member shall conduct himself/herself in a manner which is unbecoming to a Vermont State Police Officer. Conduct unbecoming an officer is that type of conduct which could reasonably be expected to damage or destroy public respect for or confidence in members of the Department or which impairs the operation or efficiency of the Department or the ability of the a member to perform his/her duty. Conduct which violates Section V, Chapter 6, Article 1 (Sexual Harassment) may constitute conduct unbecoming.

. . .

2.0 CRIMINAL CONDUCT-MISDEMEANOR

2.1 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 misdemeanor under any jurisdiction.

. . .

(State's Exhibits 21, 22)

2. The Employer hired Appellant in October 1977 as a trooper. Appellant's first assignment as a trooper was with the Middlesex barracks. He worked there for six or seven years. Among his duties was responding to domestic violence complaints. The Employer then transferred Appellant to Waterbury where he worked for six or seven years as an intelligence analyst dealing with matters involving organized crime. The Employer transferred Appellant in 1990 to head the Governor's Security Detail. He remained in that position until his dismissal on December 7, 2000.

3. Appellant and Donna Madore were married in 1975. During their marriage, they had three children.

4. During the marriage, Appellant had three extra-marital affairs. In 1978, Appellant had an affair with C.B. that lasted three to four months. Appellant did not disclose this affair to his wife until the affair ended. In 1981, Appellant began an affair with S.G. that was on and off for a period of two to three years. During the period of the affair, Appellant's wife was pregnant with, and gave birth to, her and Appellant's first child. During the affair, Appellant and S.G. had sexual relations on numerous occasions. Appellant never told his wife about his affair with S.G. In 1993, Appellant had an affair with Jane Doe that lasted five to six months (State's Exhibit 12).

5. During his career as a State Police officer, Appellant received training on responding to domestic violence situations. On October 25, 1991, Appellant took a six-hour course entitled Domestic Violence Response Training. Among the topics addressed in the course were psychological dynamics of abusive relationships, forms of spouse abuse and history of the legal response to abuse in Vermont (State's Exhibits 28, 29).

6. In the summer of 1994, Donna Madore was sitting on the couch in her and Appellant's home when Appellant pulled her off the couch by her nightgown, pushed her against the wall and then down onto the floor. At the time, Appellant weighed approximately 185 pounds and his wife weighed approximately 110 pounds.

7. In the spring of 1995, Appellant attended a Bellows Falls High School reunion with his wife and a mutual friend, Deborah Hayes. As the three were leaving a reunion gathering, Appellant's wife made a remark that angered Appellant. As they approached their car, Appellant grabbed his wife by her arm and her hair and pushed her into the car. As a result, his wife began crying and indicated that Appellant had hurt her.

The three went to a restaurant together, and Appellant's wife continued to cry in the restaurant.

8. In the fall of 1995, Appellant punched his wife in the head with his knuckle as she sat on stairs in their home with their daughter. Appellant's wife cried as a result of being struck by Appellant. She later complained to Appellant of physical problems she had, such as difficulties seeing as a result of Appellant striking her (State's Exhibits 6, 8).

9. In the spring of 1996, while Appellant was cleaning out the garage, he hit his wife in the hip area with the wooden part of a push broom and she fell to the garage floor. Appellant's wife cried due to being struck by Appellant. Subsequently, Appellant's wife showed Appellant a bruise on her hip resulting from this incident (State's Exhibits 6, 8).

10. In the fall of 1996, Appellant's wife went to the home of neighbors Hara and Dave Dwyer. She entered the home crying, rubbing her leg, and told Hara Dwyer "he hurt me", he hurt me", or words to that effect. She had a large bruise on her thigh, and told Dwyer that the bruise was caused by Appellant kicking her. Appellant's wife stayed at the Dwyer home that evening. During the evening, Appellant called his wife at the Dwyer home and stated words to the effect of "Donna, don't come home tonight. I'm going to fuck you up the ass".

11. Appellant and his wife separated in February 1997. Appellant's wife filed a petition for divorce in Washington Family Court. Marital fault was at issue during the divorce proceedings as it related to contested issues of property distribution, spousal maintenance, and parental rights and responsibilities. (Appellant's Exhibit 7, State's Exhibits 25, 26).

12. On September 11, 1998, Donna Madore's attorney filed Proposed Findings of Fact and Conclusions of Law in the divorce case. One paragraph of the Proposed Findings of Fact described at incident when, as Donna Madore was returning home from a grocery store one evening, she observed Appellant and S.G. together in a car and Appellant told his wife in vulgar terms to get home. Donna Madore's attorney sent the Proposed Findings to Appellant's attorney when she submitted them to the court. Appellant reviewed them prior to the court hearing on the case (State's Exhibit 27, pages 417-18).

13. On September 15, 1998, the first day of the Madores' contested divorce hearing in Washington Family Court, Donna Madore testified about the incident set forth above in Finding of Fact No. 12. Her attorney asked her: "(D)id there come a time in 1981 when your husband attended a party?". She responded:

> Yes, he had gone over to a party at a friend's house and I had gone – I didn't go to the party and he – I had gone down to the store and on the way home I met him coming down the road with a woman and he told me to get my fucking ass home now. That he would be back or something of that nature and he didn't come home for four hours and when I asked him what had happened, what had gone on, he told me it was none of my fucking business.
> (State's Exhibit 3, page 73)

14. Appellant was present in the courtroom when Donna Madore presented this testimony.

15. On September 22, 1998, after taking an oath swearing that his testimony would be truthful, Appellant testified in the divorce hearing. In response to questioning by his attorney, Appellant described five instances when he engaged in physical confrontations with his wife: 1) while driving in the car, Appellant backhanded his wife after she struck him; 2) Appellant pulled his wife off the couch by her nightgown and pushed her against the wall; 3) Appellant punched his wife in the head with his knuckle,

4) Appellant hit his wife with a wooden push broom; and 5) Appellant shoved his wife into the car at the Bellows Falls high school reunion. The following exchange then occurred between Appellant's attorney and Appellant:

Question: Now, Denny, were there any other incidents besides these ones you mentioned?

Answer: Physical incidents?

Question: Physical incidents.

Answer: No.

. . .

Question: Now, your spouse testified as to other incidents, I believe, on direct about physical confrontations between you and her in which you were the aggressor, do you recall that testimony?

Answer: Yes, I do.

Question: You told the Court about five incidents on my count, were there any others?

Answer: Where I was the physical aggressor?

Question: Yes.

Answer: No, there were not.

Question: Were there any others in which you responded to aggression by aggression that you haven't told the Court about today?

Answer: No.
(State's Exhibit 6, pages 220-21)

16. The following exchange then occurred during the September 22 hearing between Appellant's attorney and Appellant concerning extramarital affairs:

Question: Denny, how many extramarital affairs did you have during the course of the marriage?

Answer: I had two.

Question: When?

Answer: I had one in 1978.

Question: How long did that last?

Answer: Maybe three months, four months, I'm not exactly sure.

Question: Did you have any others?

Answer: Yes

Question: When?

Answer: I had one in 1993.

Question: How long did that last?

Answer: Probably five or six months.

Question: Did you tell your spouse about these affairs?

Answer: Yes, I did.

Question: Did you have any other affairs during the course of your marriage?

Answer: No, I did not.

Question: You heard your wife testify that there were other affairs?

Answer: Yes, I have.

Question: Is that testimony, according to your testimony, is inaccurate?

Answer: Yes, it is.
(State's Exhibit 6, pages 221-22)

17. On August 4, 2000, Lieutenant David Harrington, Internal Affairs Director for the State Police, notified Appellant that an internal affairs investigation had been opened on him concerning allegations of the Employer's Code of Conduct. On September 6, 2000, Harrington met with Appellant and his attorney to conduct an interview as part of the investigation. Prior to the interview, Harrington provided

Appellant with a copy of an Internal Investigation Warning that provided in pertinent part: "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." (State's Exhibits 7, 13).

18. Harrington asked Appellant during the September 6, 2000, interview: "are the only physical confrontations, that resulted in assaults where there was bodily injury inflicted, were the only incidents the ones that you outlined in front of the court?" Appellant responded: "yes, that's true. Harrington asked Appellant if he had kicked his wife in the thigh with his boot, causing her to leave the house to go for help. Appellant denied this (State's Exhibit 8, pages 290-92).

19. Harrington questioned Appellant about extramarital affairs during the September 6, 2000, interview. Harrington asked Appellant whether C.B. and Jane Doe were the only two women he had affairs with during his marriage. Appellant replied: "Yes" (State's Exhibit 8, page 300).

20. Public Safety Commissioner A. James Walton, Jr. sent Appellant a memorandum dated November 7, 2000, providing 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 or about September 22, 1998, you gave testimony under oath in the Washington County Family Court. This testimony was given during hearings in your divorce from your wife Donna.
>
> 2) During your sworn testimony, you were asked by your attorney if there were occasions in the course of your marriage when you had engaged in physical confrontations with your wife. You replied that there were. In response to further questioning, you described five instances when you had struck or otherwise physically assaulted your wife. When your

attorney asked you if there were other physical confrontations with your wife in which you had been the aggressor, you replied that there were not.

3) Also under questioning from your attorney, you admitted to having two extra-marital affairs, one in 1978 and one in 1993. When asked, still under oath, if you had any other affairs during the course of your marriage, you replied, "No, I did not."

4) An investigation into the allegation that you had physically abused your wife substantiated six incidents of physical abuse which meet the elements of the crime of Domestic Assault, 13 V.S.A. Section 1042. These six incidents can be summarized as follows:

   a) In the summer of 1994, you grabbed your wife by the neck, choked her, and slammed her against a wall. You then released her and went to bed.
   b) In the summer of 1994, you beat your wife's head against a doorframe of your dining room and choked her. You flipped over a table and broke an antique bowl. When your wife called the state police in Middlesex, you took the phone from her and indicated to the dispatcher that everything was fine, and not to write the incident in the log.
   c) In the spring of 1995, you grabbed your wife by the hair and pushed her into your car following a reunion party in Bellows Falls.
   d) In the fall of 1995, you kicked your wife and then punched her in the head with your knuckle as she sat on the stairs.
   e) In May of 1996, you struck your wife in the hip with a broom handle, knocking her to the cement floor of your garage.
   f) In October of 1996, you kicked your wife in the thigh with your boot, which resulted in your wife leaving your house to seek help.

   . . . Two of these incidents, those described in b) and f) above, were not among the incidents you testified to in court on 9/22/98.

5) The investigation also concluded that you had a third affair, beginning in 1981 and lasting two or three years. This affair was not one of two affairs you testified to in court on 9/22/98.

6) On September 6, 2000, you were interviewed by Lt. Harrington in connection with this investigation. Your attorney was present during the entire interview.

7) During this interview, you denied having more than two extramarital affairs. You denied that you kicked your wife in October of 1996. In addition, you made numerous other statements to Lt. Harrington which led him to believe that you were not answering his questions fully and truthfully. . .

8) By testifying in court, under oath, that you had no more than two affairs during the duration of your marriage, and that you physically abused your wife no more than four times between 1993 and 1996, you committed the felony of perjury, 13 V.S.A. Section 2901. This action on your part constitutes a violation of Part A, Section 3.1 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:

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.

9) Based on the information set forth in the investigative report and supporting documents relating to the incident wherein you grabbed your wife by the neck, choked her and slammed her against the wall in the summer of 1994, you committed the misdemeanor crime of domestic assault, 13 V.S.A. Section 1042. This action on your part constitutes a violation of Part B, Section 4.1 of the Code of Conduct . . . which states:

4.0 CRIMINAL CONDUCT-MISDEMEANOR

4.1 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 misdemeanor under any jurisdiction.

10) Based on the information set forth in the investigative report and supporting documents relating to the incident wherein you beat your wife's head against a doorframe and choked her in the summer of 1994, you committed the misdemeanor crime of domestic assault, 13 V.S.A. Section 1042. This action on your part constitutes a violation of Part B, Section 4.1 of the Code of Conduct . . .

11) Based on the information set forth in the investigative report and supporting documents relating to the incident wherein you grabbed your wife by the hair and pushed her into your car in the spring of 1995, you committed the misdemeanor crime of domestic assault, 13 V.S.A. Section 1042. This action on your part constitutes a violation of Part B, Section 4.1 of the Code of Conduct . . .

12) Based on the information set forth in the investigative report and supporting documents relating to the incident wherein you kicked your wife and struck her in the head with your knuckle in the fall of 1995, you

committed the misdemeanor crime of domestic assault, 13 V.S.A. Section 1042. This action on your part constitutes a violation of Part B, Section 4.1 of the Code of Conduct . . .

13) Based on the information set forth in the investigative report and supporting documents relating to the incident wherein you struck your wife in the thigh with a broom handle and knocked her to the cement floor of your garage in May of 1006, you committed the misdemeanor crime of domestic assault, 13 V.S.A. Section 1042. This action on your part constitutes a violation of Part B, Section 4.1 of the Code of Conduct . . .

14) Based on the information set forth in the investigative report and supporting documents relating to the incident wherein you kicked your wife in the thigh with your boot in October of 1996, you committed the misdemeanor crime of domestic assault, 13 V.S.A. Section 1042. This action on your part constitutes a violation of Part B, Section 4.1 of the Code of Conduct . . .

15) Your actions in not fully and truthfully answering Lt. Harrington's questions during your internal affairs interview on September 6, 2000, constitute a violation of Part A, Section 14.1 of the Code of Conduct . . . which states:

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.

16) Your continuing physical abuse of your wife, which was the subject of testimony in court and is now a matter of public record, along with the subsequent reporting of this abuse by statewide media, constitutes a violation of Part B, Section 3.1 of the Code of Conduct . . . which states:

3.0 CONDUCT

3.1 Members shall conduct themselves with propriety and dignity at all times, both on and off duty. No member shall conduct himself/herself in a manner which is unbecoming to a Vermont State Police Officer. Conduct unbecoming an officer is that type of conduct which could reasonably be expected to damage or destroy public respect for or confidence in members of the Department or which impairs the operation or efficiency of the Department or the ability of the a member to perform his/her duty. Conduct which

> *violates Section V, Chapter 6, Article 1 (Sexual Harassment) may constitute conduct unbecoming.*

. . .
(State's Exhibit 14)

21. 13 V.S.A. Section 1042, entitled "Domestic assault", provides: "Any person who attempts to cause or willfully or recklessly causes bodily injury to a family or household member, or willfully causes a family or household member to fear imminent serious bodily injury shall be imprisoned not more than one year or fined not more than $5,000.00 or both." 13 V.S.A. Section 1021(1) defines "bodily injury" as "physical pain, illness or any impairment of a physical condition" (State's Exhibits 17, 18).

22. 13 V.S.A. Section 2901, entitled "Punishment for perjury", provides: A person who, being lawfully required to depose the truth in a proceeding in a court of justice, commits perjury shall be imprisoned not more than fifteen years and fined not more than $10,000.00, or both. 13 V.S.A. Section 2904, entitled "False swearing", provides in pertinent part: "A person of whom an oath is required by law, who willfully swears falsely in regard to any matter or thing respecting which such oath is required, shall be guilty of perjury" (State's Exhibit 19).

23. Commissioner Walton sent Appellant a memorandum dated December 7, 2000, entitled "Amended Preferral of Charges" that provided:

> The charges served upon you in connection with internal investigation #2000-24 are hereby amended to include the following additional violation of the Vermont State Police Code of Conduct:
>
> CRIMINAL CONDUCT FELONY – FALSE SWEARING
>
> By testifying in court, under oath, that you had no more than two affairs during the duration of your marriage, and that you physically abused your wife no more than four times between 1993 and 1996, you committed the felony of false swearing, 13 V.S.A. Section 2904. This action on your part constitutes a violation of Part A, Section 3.1 of the Code of Conduct . . . which states:

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.

(State's Exhibit 15)

24. Commissioner Walton informed Appellant of his dismissal by letter dated December 7, 2000. The letter provided in pertinent part as follows:

> On November 29, 2000 you met with me in response to charges which were served on you in connection with internal affairs investigation 2000-24. I had informed you that I was contemplating your dismissal based on the information contained in that investigation and in the resultant preferral of charges, as amended on December 7. I have taken into account the information you presented to me at our meeting on November 29. After careful and deliberate consideration, I have concluded that no mitigating circumstances sufficient to explain or excuse your conduct exist.
>
> Therefore, in light of the serious nature of your misconduct, and the absence of mitigating circumstances, your employment with the Department of Public Safety is hereby terminated, effective immediately.
>
> . . .
>
> (State's Exhibit 16)

OPINION

We first address a preliminary matter raised by the Employer. The Employer has renewed its motion to admit into evidence the Washington Family Court decision in the divorce case of Appellant and his wife, and the sworn testimony of Appellant's wife provided during that case. We denied this motion when made during the hearing in this matter. The Employer has presented no additional evidence or argument that causes us to reconsider our earlier ruling, and the Employer's motion is again denied for the same reasons stated on the record at the hearing.

The primary issue before the 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 will schedule an additional hearing to address the remaining issues raised by Appellant in his appeal.

The Employer charges Appellant with six separate counts of violating Part B, Section 4.1, of the Code of Conduct. Section 4.1 provides that "(m)embers shall not commit any violation of law which by definition of statute is a misdemeanor under any jurisdiction". The Employer alleges that Appellant violated this section by committing the misdemeanor crime of domestic assault pursuant to 13 V.S.A. Section 1042 on six occasions: 1) grabbing his wife by the neck, choking her and slamming her against the wall in the summer of 1994; 2) beating his wife's head against a doorframe and choking her in the summer of 1994; 3) grabbing his wife by the hair and pushing her into his car in the spring of 1995; 4) kicking his wife and striking her in the head with his knuckle in the fall of 1995; 5) striking his wife in the thigh with a broom handle and knocking her to the cement floor of the garage in May of 1996; and 6) kicking his wife in the thigh with his boot in October of 1996.

We discuss each of these six charges in turn. Appellant admits that he engaged in the misdemeanor offense of domestic assault concerning the first charge. His admission, however, does not mean he agrees with all of the factual allegations set forth in the charge (Appellant's Exhibit 8). He disagrees that he grabbed his wife by the neck and choked her. The evidence indicates that he did not grab his wife by the neck and choke her. Instead, he pulled her off the couch by her nightgown, pushed her against the wall

and then down onto the floor. Accordingly, this charge of domestic assault is established as proved by the evidence.

The Employer has presented no evidence supporting the second charge of beating his wife's head against a doorframe and choking her in the summer of 1994. Thus, this charge has not been established. Appellant admits that he engaged in the misdemeanor offense of domestic assault concerning the third charge, but he disagrees with the allegation that he grabbed his wife by the hair (Appellant's Exhibit 8). We conclude by a preponderance of the evidence that Appellant grabbed his wife by her arm and her hair and pushed her into the car. Thus, we hold that the Employer has substantially established the third domestic assault charge against Appellant.

Appellant admits that he engaged in the misdemeanor offense of domestic assault concerning the fourth charge, but he disagrees with the allegation that he kicked his wife during this incident in the fall of 1995 (Appellant's Exhibit 8). The Employer has not demonstrated that Appellant kicked his wife during this incident. The evidence indicates that Appellant's misconduct during this incident consisted of striking his wife in the head with his knuckle. Accordingly, the fourth charge of domestic assault is established as proved by the evidence.

Appellant admits that he engaged in the misdemeanor offense of domestic assault concerning the fifth charge but has a minor disagreement with the factual allegations made in the charge (Appellant's Exhibit 8). Appellant contends that he hit his wife in the hip area with the wooden part of a push broom and she fell to the garage floor, rather than hitting her in the thigh with the broom handle. We conclude by a preponderance of the evidence that Appellant hit his wife in the hip area with the wooden part of a push broom

and she fell to the garage floor. Accordingly, the fifth charge of domestic assault is established as proved by the evidence.

The Employer alleges in the sixth and final charge of domestic assault that Appellant kicked his wife in the thigh with his boot in October of 1996. Appellant disputes that this incident occurred. The Employer introduced evidence on this alleged incident from the testimony of Hara Dwyer. Dwyer did not witness the incident. Instead, Appellant's wife told her that Appellant had kicked her in the thigh with his boot. This uncorroborated evidence from a person who did not observe the incident is insufficient for us to conclude that the incident occurred as charged. Accordingly, the Employer has not established this charge.

The Employer further charges Appellant with violation of Part B, Section 3.1 of the Code of Conduct, which prohibits conduct unbecoming a State Police officer, through "continuing physical abuse of (his) wife, which was the subject of testimony in court and is now a matter of public record, along with the subsequent reporting of this abuse by statewide media". Appellant admits that his physical abuse of his wife constitutes conduct unbecoming a State Police officer. Thus, the Employer has established this charge.

The Employer next charges Appellant with violating Part A, Section 3.1, of the Code of Conduct. Section 3.1 provides that "(m)embers shall not commit any violation of law which by definition of statute is a felony under any jurisdiction". The Employer alleges that Appellant committed the felonies of perjury and false swearing by testifying in court under oath that he had no more than two affairs during the duration of his marriage, and that he physically abused his wife no more than four times between 1993 and 1996.

Appellant acknowledges that, when he testified under oath in court that he had only two extra-marital affairs, he was incorrect because he in fact had engaged in a third extra-marital affair with a woman identified as S.G. However, Appellant contends that at the time he testified about the affairs he was testifying to the best of his recollection and he did not intentionally leave out the S.G. affair.

In determining whether Appellant committed perjury pursuant to 13 V.S.A. Section 2901 as well as common law, we must conclude that the false statement was material and that it occurred in a judicial proceeding. State v. Lawrence, 134 Vt. 373, 374 (1976). Appellant must have known his testimony was false. State v. Bissell, 106 Vt. 80, 89 (1934).

Appellant's statement that he had two extra-marital affairs was made in a judicial proceeding, namely his family court divorce case. The statement was material because it concerned Appellant's marital fault, which was at issue during the divorce proceedings as it related to contested issues of property distribution, spousal maintenance, and parental rights and responsibilities. The statement was false because he had a third extra-marital affair.

We also conclude that Appellant knew his statement was false. The affair involved numerous instances of sexual relations occurring over a two to three year period, including a period of time during which Appellant's wife was pregnant with, and gave birth to, her and Appellant's first child. Under these circumstances, we do not find credible Appellant's claim that he had forgotten about this affair at the time he testified in court. Our conclusion is bolstered by the fact that, both in proposed Findings of Fact served on Appellant prior to the family court hearing and during the hearing, Appellant's wife and her attorney mentioned an occasion where Appellant's wife witnessed Appellant

and S.G. together. We are not persuaded by Appellant's claim that these references did not trigger his memory of the S.G. affair. Thus, we conclude that the Employer has established its charge that Appellant committed perjury by testifying in court under oath that he had no more than two affairs during the duration of his marriage.

We reach the same conclusion concerning the Employer's charge that Appellant engaged in false swearing pursuant to 13 V.S.A. Section 2904 through this testimony. Section 2904 enlarges the scope of the crime of perjury so that it includes false swearing relating to any matter respecting which an oath is required by law. State v. Lawrence, 134 Vt. at 374-75. Appellant took an oath in the family court divorce proceedings, which oath is required by the Vermont Rules of Evidence. V.R.E. 101, 1101. Appellant testified falsely on the matter of extra-marital affairs that by law required an oath.

We reach a different conclusion on the Employer's charges that Appellant committed the felonies of perjury and false swearing by testifying in court under oath that he physically abused his wife no more than four times between 1993 and 1996. The Employer has not established that Appellant physically abused his wife on more than four occasions between 1993 and 1996. As discussed above, the Employer has established that Appellant committed domestic assault on his wife on four occasions. Accordingly, we cannot find that Appellant engaged in perjury and false swearing by testifying in court to four incidents of physical abuse.

In sum, we conclude that the Employer established its charges that Appellant violated Part A, Section 3.1, of the Code of Conduct through committing violations of law which by definition of statute constitute the felonies of perjury and false swearing when he testified in court under oath that he had no more than two affairs during the duration of his marriage. The Employer has not established its charges that Appellant

engaged in perjury and false swearing by testifying that he physically abused his wife no more than four times between 1993 and 1996.

Finally, the Employer charges that Appellant violated Part A, Section 14.1 of the Code of Conduct, which provides that "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 Employer alleges that Appellant violated this section by not fully and truthfully answering the investigator's questions during his internal affairs interview on September 6, 2000.

Given the above discussion, we need not engage in an extended analysis of this charge. The Employer established this charge to the extent that Appellant did not fully and truthfully answer the internal affairs investigator's questions by telling the investigator that he had affairs with only two women during his marriage. The Employer did not establish this charge to the extent of demonstrating that Appellant did not fully and truthfully answer the internal affair investigator's questions concerning physical abuse of his wife. Appellant indicated to the investigator that the only incidents of abuse were those about which he testified in court. We cannot conclude that Appellant was untruthful in this regard since the Employer has not demonstrated that he engaged in incidents of abuse that he failed to testify to in court.

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 Dennis Madore committed violations of the Code of Conduct are established to the extent set forth in this Opinion, and

the Labor Relations Board shall schedule an additional hearing to address the remaining issues raised by Appellant in his appeal.

Dated this 31st day of December, 2003, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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Edward R. Zuccaro, Acting Chairperson

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Carroll P. Comstock

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Joan B. Wilson