VERMONT LABOR RELATIONS BOARD

APPEAL OF:	)	
	)	DOCKET NO. 10-05
JOHN PLASTER	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On January 20, 2010, Attorney Pietro Lynn filed an appeal with the Labor Relations Board on behalf of John Plaster ("Appellant") pursuant to 3 V.S.A. §1102(c). The appeal arose from a decision by the Attorney General not to defend Appellant in a civil complaint filed by Brian Slutz against John Plaster alleging that Appellant, while acting as a Vermont State Trooper, used excessive force against him in violation of his Fourth Amendment rights under the U.S. Constitution. The Attorney General based the decision not to defend Appellant on the grounds that his conduct was in violation of Vermont State Police Policies and Procedures, in violation of criminal law, and was outside the scope of his official duties. Appellant contends that the Attorney General is required to provide legal representation of him in the civil action pursuant to 3 V.S.A. §1101-1102.

A hearing was held on September 23, 2010, before Labor Relations Board Members Gary Karnedy, Acting Chairperson; Leonard Berliner and James Kiehle in the Board hearing room in Montpelier. Attorney Philip Woodward represented Appellant. Assistant Attorney General William Reynolds represented the Attorney General. The parties filed post-hearing briefs on October 13, 2010.

FINDINGS OF FACT

1. Appellant was hired as a Vermont State Trooper in the late winter or early spring of 2005. He received a copy of Vermont State Police Policies and Procedures during his orientation period. In May 2005, he completed 16 hours of training on Vermont State Police Defensive Tactics (State's Exhibits 9, 10).

2. Section IV, Chapter 1, Article IV, "Non-Lethal Use of Force", of the Vermont State Police Policies and Procedures provides in pertinent part:

> 1.0 PURPOSE
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> > 1.1 To establish guidelines for the use of non-lethal force when such force becomes necessary in the member's performance of lawful duties.
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> 2.0 POLICY
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> > 2.1 Sworn members will use only the force which is necessary and reasonable to control a situation, effect an arrest, overcome resistance to an arrest or defend themselves or others from physical harm.
>
> 3.0 PROCEDURE
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> > 3.1 Definitions – For the purposes of this policy, the following definitions shall be utilized.
> >
> > > (1) Use of Force – The application of any force greater than that required for voluntary handcuffing.
> > >
> > > (2) Non-Lethal Force – Levels of force that, when employed, do not create a substantial risk of death. Such force is normally that force necessary to temporarily control or immobilize.
> > >
> > > (3) Impact Tools – Impact tools shall refer to the straight baton, flashlight, or other field expedient object, or other tools issued or recommended by the Use of Force Training Review Panel.
> > >
> > > (4) Ladder of Force – The Ladder of Force is a progression of steps that should be employed, when practical, in responding to the perceived actions of the subject. The Ladder of Force consists of the Confrontation Stage, Argumentative/Physical Stage, Combative/Assaultive Stage and Use of Deadly Force Stage.

3.2 Ladder of Force

(1) The Ladder of Force Training System details four stages:

Members shall use the appropriate technique or force for each stage as outlined below based on the situation, and subject(s) action.

This policy shall not prohibit a member from reacting to a perceived threat at any stage when the situation dictates.

(A) Confrontational Response Stage

(a) Officer presence
(b) Key verbal skills
(c) Verbal direction

(B) Argumentative/Physical Stage

(a) Control and restraint techniques
(b) Use of O.C., handcuffing and/or other temporary restraining devices.
(c) Searching
(d) Transporting

(C) Combative/Assaultive Stage

(a) Impact tools
(b) Disarming techniques
(c) Physical tactics
(d) Use of O.C.

(D) Use of Deadly Force

3.3 When the use of force is necessary, the degree of force used should be in direct relationship to the perceived resistance of the subject(s) or the perceived threat to the member or others.
3.4 No member shall use unreasonable or excessive force toward any person.

. . .

11.0 MISTREATMENT OF PERSONS IN CUSTODY

11.1 Members shall not mistreat persons who are in their custody.

. . .

(State's Exhibit 9)

3. The ladder of force was addressed in the Vermont State Police training received by Appellant. It is reasonable for an officer to use a chokehold, or lateral neck restraint, under the ladder of force training system only when the officer is in fear of his or own life or there is a threat of serious bodily injury to the officer.

4. On the evening of November 18, 2006, Appellant and State Trooper Julie Hammond responded to the Slutz residence in Eden, Vermont, in separate cruisers at approximately the same time. They were following up on a report that Brian Slutz had taken the car of his mother, Lauris Slutz, without her consent. Ms. Slutz had contacted the State Police earlier in the day to report that Brian had taken her car without her consent, and she followed up that evening to inform the State Police that Brian had returned to her residence. Appellant intended to cite Brian Slutz for the misdemeanor offense of operating a vehicle without the owner's consent. Before entering the residence, Appellant and Hammond did not discuss a plan of action (Appellant Exhibit B).

5. Appellant had previous dealings with Brian Slutz. When he responded to the call, Appellant knew that Brian Slutz had been issued a relief from abuse order requiring him to refrain from violent and threatening behavior towards his mother. Appellant also knew that Brian Slutz was prone to violent outbursts, had rage issues, and had a history of drug and alcohol abuse. Hammond also knew about the relief from abuse order. Hammond had previous dealings with Brian Slutz during which he was belligerent (Appellant Exhibit A).

6. Appellant went to the door of the Slutz residence, a trailer. He knocked on the door and identified himself as "State Police". When he did not receive a response,

Appellant opened the door and entered the kitchen of the residence. Hammond followed shortly behind Appellant (State's Exhibits 7, 14).

7. Appellant observed Brian Slutz standing in the living room, the room adjacent to the kitchen. Appellant told Slutz to "come over here brother." Slutz asked if he could turn down his radio which was in his bedroom, the first room down the hallway adjacent to the living room. Slutz was in the process of lighting a cigarette. Appellant told him: "Don't light your cigarette up, if you want to shut your radio off go ahead." Appellant followed Slutz and watched as he entered his bedroom (State's Exhibits 7, 14).

8. Slutz returned to the hallway and ignited his cigarette lighter within a few inches of Appellant's face. Appellant immediately told Slutz he was under arrest. Appellant grabbed Slutz and attempted an arm-bar takedown of him. This resulted in Appellant and Slutz going to the floor, with Slutz face-down and Appellant on Slutz's back and left-side. Slutz's hands were underneath him and he was squirming. Appellant's right arm was underneath Slutz's chin, and Appellant's hands were joined together under Slutz's body in an attempt to pull his arms out from beneath his body. Appellant tried to force Slutz's hands out from underneath him. Appellant told Slutz: "I will choke you out, get your hands out" (State's Exhibits 7, 14).

9. It was difficult for Hammond to assist Appellant because the hallway was narrow, approximately 30" wide. Hammond attempted to grab Slutz's arm. Initially, Hammond felt resistance by Slutz but then she felt that his right arm was limp when she eventually got hold of it. Hammond concluded that Appellant was choking Slutz because he was no longer squirming and had gone limp. Appellant ultimately was able to pull

Slutz's left arm from underneath his body. Appellant and Hammond then put handcuffs on Slutz (State's Exhibit 14).

10. The officers rolled Slutz over and sat him up. Slutz's mother had appeared and stated that Brian "usually carries a pocket knife". Appellant and Hammond checked for weapons but found none. Ms. Slutz inquired: "How did this happen?" Appellant replied: "He tried to resist arrest". Appellant also commented: "He definitely smells like he's intoxicated." Hammond smelled intoxicants on Slutz's breath (State's Exhibits 7, 14).

11. The officers stood Slutz up in the hallway outside his bedroom and began walking him towards the living room. Hammond held Slutz's right arm and was ahead of him. Appellant held Slutz's left arm and was behind him. Slutz began screaming and scuffling. Lutz kicked at Appellant, made body movements towards him and was swearing at him. Hammond felt Slutz being ripped out of her hands. Hammond did not feel any resistance from Slutz prior to this happening. Appellant brought Slutz to the floor. Slutz landed on his stomach and Appellant landed on top of him. Appellant's right hand hit the wall on the way down, breaking a bone in his hand. Hammond observed Appellant's right arm around Slutz's neck. She could not see the extent of force that Appellant was exerting on the underside of Slutz's neck. Appellant told Slutz: "If you keep playing this game, you're gonna keep getting dropped to the floor". Lauris Slutz said "Brian stop" and that he was "just making it worse . . . doing it yourself" (State's Exhibits 7, 14).

12. The officers attempted to get Slutz to his feet but were not able to do so in the narrow hallway. Appellant dragged Slutz out into the living room by his legs in order

to get out of the confined hallway, stating: “I want to get him out so we don’t have to fight in the hallway again.” Hammond asked Slutz if he had been drinking or taking any drugs. Slutz was crying and did not answer. Appellant and Hammond stood Slutz up. Slutz directed obscenities at Appellant during this time (State’s Exhibits 7, 8, 14).

13. Appellant and Hammond walked Slutz from the living room into the kitchen. Again, Hammond held Slutz’s right arm and was ahead of him, and Appellant held Slutz’s left arm and was behind him. Slutz was jerking his body around towards Appellant; this caused Appellant pain in his broken hand. As they entered the kitchen, Appellant saw spit around Slutz’s mouth and feared that Slutz was going to spit at him. Appellant took Slutz to the floor. Slutz landed on his back. Appellant placed his left hand, on which he wore a glove, over Slutz’s mouth. Appellant told Slutz “you spit, and I will pop you in the face, you got it?” Slutz directed obscenities at Appellant as his mouth was covered. (State’s Exhibits 7, 8, 14).

14. Spit is a safety hazard for officers given the potential for HIV and other communicable disease issues. Appellant had been spit on before while serving as a police officer and had to undergo subsequent blood test because the person that had spit on him was a suspected contagion. Neither Appellant nor Hammond had received specific training on how to handle persons who are threatening to spit on them.

15. Appellant and Hammond got Slutz back on his feet in the kitchen. Appellant was on Slutz’s left side and Hammond was on his right side. Appellant reached over with his left hand and placed it over Slutz’s throat as they walked out of the kitchen. Appellant applied sufficient force to Slutz’s throat so that Slutz’s face turned red.

Hammond could see the indentation of Appellant's fingers on Slutz's throat. Appellant had his hand over Slutz's throat for approximately 5 to 10 seconds (State's Exhibit 14).

16. The officers then took Slutz out of the residence and walked him towards Hammond's cruiser. Appellant repeatedly said to Slutz "stop resisting" on the way to the cruiser. Hammond repeatedly told Slutz to "walk with me". Appellant and Hammond placed Appellant in the back seat of Hammond's cruiser (State's Exhibits 7, 8, 14).

17. Hammond drove Slutz to the Morristown Police Department in her cruiser. Appellant drove there separately in his cruiser. Hammond and Appellant brought Slutz into the processing area of the Morristown Police Department. The plan was to place Slutz in a holding cell there and then transport him to a Hardwick police officer who would drive Slutz to St. Johnsbury for detoxification.

18. Morristown police officer Garth Christensen offered to assist Appellant in putting Slutz in a transport belt. Hammond was not present while Slutz was placed in a transport belt. As Christensen and Appellant prepared to place Slutz in a transport belt, they took hold of Slutz's arms. Christensen was on Slutz's left arm and Appellant was on his right arm. Christensen took the handcuff off of Slutz's right hand and handed it to Appellant. Slutz twisted his right arm and Appellant lost control of his arm. Appellant shoved Slutz forward head first into a cinderblock wall. Slutz's head hit the wall with an audible noise and Slutz said "ow". Christensen did not see or feel anything warranting Appellant shoving Slutz into the wall. After Slutz's head hit the wall, Appellant said to Slutz: "There are 206 bones in the human body, which one do you want me to break first?"

19. Hammond drove Slutz in her cruiser that evening to meet with a Hardwick police officer who then transported Slutz to St. Johnsbury. Hammond had a conversation with Appellant later that evening where she told him she was uncomfortable with his actions at the Slutz residence. Appellant told Hammond that he could justify his actions. He said that he sometimes got his martial arts training mixed up with his police training. The next day, Hammond spoke to her supervisor about concerns that she had with Appellant's actions in the Slutz residence.

OPINION

At issue is whether the State is obligated to provide legal representation to Appellant, who was named as a defendant in a civil action brought by Brian Slutz. The State is required to provide legal representation at state expense to defend an action on behalf of an employee "(i)n any civil action against a state employee for alleged damage, injury, loss or deprivation of rights arising from an act or omission to act in the performance of the employee's official duties".[1]

The Attorney General contends that the acts complained of by Slutz in his civil complaint – ie., alleged excessive force used by Appellant against him while Appellant was arresting him – did not occur within the scope of Appellant's official duties. Thus, the Attorney General contends that the State is not obligated to provide legal representation to Appellant. Appellant contends that his alleged acts forming the basis of the civil complaint occurred within the scope of his official duties, and thus he is entitled to legal representation by the State at State expense.

[1] 3 V.S.A. §1101(a).

In such cases, the Attorney General bears the burden of proving that the denial of representation was appropriate.[2] The Board has indicated that Vermont law on scope of employment cases is not appropriate to apply in determining whether the State is obligated to provide legal representation to a state employee pursuant to this statute.[3] The use of the words, "an act or omission to act in the performance of the employee's official duties", means that the General Assembly intended to require the State to represent employees in a broader category of cases than those where the issue is whether the State will be held vicariously liable for an employee's acts or omissions as in scope of employment cases.[4]

In appeals brought under 3 V.S.A. §1101-02, the statutory obligation of the State to defend State employees does not necessarily mean that the State assumes direct liability for the acts of an employee; rather its status is analogous to that of an insurer.[5] The employee may remain primarily liable, but is saved the cost of defending himself or herself.[6]

In these cases, the Board focuses on the alleged acts or omissions of the employee complained of by the plaintiff in the civil action.[7] This is because the obligation of the State to defend a state employee comes into play as a result of "alleged damage, injury, loss or deprivation of rights" arising from an act or omission to act "in the performance of the employee's official duties".[8]

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[2] Appeal of McCue, 17 VLRB 151, 156 (1994).
[3] Id. at 156-58.
[4] Id.
[5] Id. at 157.
[6] Id.
[7] Appeal of Leonard, 17 VLRB 191, 198 (1994).
[8] Id.

Also, the Board interprets the statutory provisions to create a presumption that the State will defend a state employee in a civil action arising from an alleged act or omission of the employee in a workplace during the work hours of the employee.[9] The State has the burden of rebutting that presumption.[10] This does not mean that the Board has created a narrow "workplace-work hours" test in determining the State's obligation to defend a state employee.[11] The Board's ultimate decision whether the employee's act or omission occurred "in the performance of the employee's official duties" requires examination of circumstances beyond simply whether acts or omissions occurred in a workplace during work hours.[12]

Under these standards, in one case the Board concluded that the State was obligated to provide legal representation where the employee's acts resulting in the civil action – i.e., crude, offensive and inappropriate comments - occurred in the workplace during working hours in the midst of, and in conjunction with, the employee engaging in other acts within his official duties.[13] The Board concluded that the close connection which existed between the employee's comments and his carrying out of official duties was sufficient to trigger the State's legal obligation to provide legal representation for the employee in a civil action brought by the individual about whom the comments were made.[14]

This close connection between the actions complained of and carrying out official duties was not present in another case decided by the Board in which the Board decided

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[9] McCue, 17 VLRB at 158-59.
[10] Id.
[11] Leonard, 17 VLRB at 200.
[12] Id.
[13] McCue, 17 VLRB at 159-60.
[14] Id.

that the State was not required to represent the employee in the civil action. There, the employee's acts occurred in his home under circumstances outside of working hours, and far removed from acts in the performance of the employee's official duties.[15]

The circumstances of the case before us are much closer to the first case, and we conclude that the Attorney General has failed to meet the burden of proving that Appellant's actions which formed the basis Slutz's civil complaint did not occur in the performance of Appellant's official duties. Slutz alleges in his civil complaint that Appellant used excessive force against him while Appellant was responding to a complaint made by Slutz's mother against him and was arresting him. The alleged excessive force occurred during working hours in a workplace in the midst of, and in conjunction with, Appellant engaging in acts within his official duties to effect Slutz's arrest. The close connection which existed between Appellant's actions forming the basis of the civil complaint and his carrying out of official duties is sufficient to trigger the State's legal obligation to provide legal representation for Appellant in the civil action brought by Slutz.

Our conclusion does not mean that we are making any judgments as to whether Appellant used excessive force against Slutz. We are not determining whether Appellant engaged in misconduct, as we would if Appellant had been disciplined for his actions and filed a grievance with the Board contesting the discipline. We also are not adjudicating the merits of whether Appellant's act actually occurred within the scope of employment. This will be adjudicated when the civil suit is tried in court.[16] Instead, we are concluding that the State is required to provide legal representation at State expense for Appellant in

[15] Leonard, 17 VLRB at 201.
[16] McCue, 17 VLRB at 157-58.

the civil action initiated by Slutz because the alleged acts of Appellant forming the basis for the civil complaint were acts in the performance of his official duties.[17]

Appellant requests, in addition to the State providing legal representation at State expense for him in the civil action, that he be reimbursed for the attorney fees reasonable and necessary to pursue this appeal before the Board. It is rare for the Board to award attorney fees in our cases. The Board generally follows the prevailing American rule that parties pay for their own legal costs and do not recover such costs by prevailing in a case absent specific contractual or statutory authorization.

In grievance cases, the Board has followed a consistent practice of never awarding attorney fees, and has specifically declined requests for such an award.[18] In unfair labor practice cases, the Board has recognized that the awarding of attorney fees to the prevailing party is an appropriate exercise of the Board's remedial powers in only three cases. The Board made such an award in one case where a union engaged in an illegal strike,[19] in another case where a school board's action in implementing a teacher employment policy made a mockery of good faith collective bargaining,[20] and in a third case where a school board displayed a blatant disregard of its bargaining obligation.[21] In other cases where the Board concluded that employers or unions committed unfair labor

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[17] Id. at 160.
[18] Grievance of Majors and the Vermont State Colleges Staff Federation, AFT Local 4023, ALF-CIO, 11 VLRB 30, 36 (1988). Grievance of Warren, 10 VLRB 65, 69 (1987); 10 VLRB 154, 157 (1987).
[19] Rutland School Board, 2 VLRB 250, 286-87 (1978).
[20] Cavendish Town Elementary School Teachers' Association, Vermont-NEA/NEA v. Cavendish Town Board of School Directors, 16 VLRB 378, 390-93 (1993).
[21] Flood Brook Staff Association, Local 632, Vermont-NEA v. Flood Brook Union School District #20 Board of School Directors, 19 VLRB 173 (1996).

practices, the Board practice has been to not award attorney fees and has specifically declined requests for such an award.[22]

We are inclined to follow the prevailing American rule that the parties in this case pay their own legal costs unless Appellant is able to demonstrate that the Attorney General acted in bad faith in pursuing its position in this matter. Appellant has not made such a showing here. Thus, we decline to order the Attorney General to reimburse Appellant for his attorney fees in pursuing this appeal before the Board.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered:

1. The determination of the Attorney General that the acts of John Plaster, complained of by Brian Slutz in his civil complaint, were not acts occurring within the scope of John Plaster's official duties is reversed; and

2. The State of Vermont shall provide legal representation at state expense to John Plaster for the purpose of defending the civil action on his behalf, and shall reimburse him for attorney fees and expenses already incurred by him to defend the civil suit.

Dated this 19th day of November, 2010, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Gary F. Karnedy

Gary F. Karnedy, Acting Chairperson

/s/ Leonard J. Berliner

Leonard J. Berliner

/s/ James C. Kiehle

James C. Kiehle

[22] Vermont State Colleges Faculty Federation, AFT, VFT, Local 3180, AFL-CIO v. Vermont State Colleges, 17 VLRB 1, 19-20 (1994). Caledonia North Education Association v. Burke Board of School Directors, 18 VLRB 45, 75 (1995).