VERMONT LABOR RELATIONS BOARD

APPEAL OF:	)	
	)	DOCKET NO. 16-06
VERMONT TROOPERS ASSOCIATION	)	
AND LEWIS HATCH	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 18, 2016, the Vermont Troopers Association and Lewis Hatch ("Appellants") filed an appeal with the Vermont Labor Relations Board contending that the State of Vermont Department of Public Safety ("Employer") terminated Appellant Hatch without just cause, and in an untimely manner, in violation of Article 14 of the collective bargaining agreement between the State of Vermont and the Vermont Troopers Association for the State Police Bargaining Unit effective July 1, 2015 to June 30, 2016 ("Contract"). Appellants filed a motion to amend the appeal on April 11, 2016, to add an allegation that Article 5 of the Contract was violated. The Employer indicated on May 2, 2016, that it did not object to the amendment of the appeal. The Labor Relations Board issued an order on May 10, 2016, granting the application to amend the appeal.

Hearings were held in the Labor Relations Board hearing room in Montpelier on March 23 and 27, April 3, and May 2 and 22, 2017, before Board Members Gary Karnedy, Chairperson; Richard Park, and Edward Clark, Jr. Attorneys Kerin Stackpole and Kristina Brines represented the Employer. Attorney Susan Edwards represented Appellants. The Employer and Appellants filed post-hearing briefs on June 12 and 15, 2017, respectively.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

. . .

ARTICLE 14
DISCIPLINARY AND CORRECTIVE ACTION

1. DEFINITIONS
(a) "Disciplinary Action" is any action taken by the Commissioner as a result of an employee's violation of the Code of Conduct. Forms of disciplinary action include written reprimand, transfer, reassignment, suspension without pay, forfeiture of pay and/or other rights, demotion, dismissal, or a combination thereof.

. . .

2. DISCIPLINARY ACTION
(a) No disciplinary action shall be taken without just cause.
(b) Disciplinary proceedings shall be instituted within a reasonable time after the violation of the Code of Conduct occurred or was discovered and disciplinary action shall be taken within a reasonable time after disciplinary charges have been proved or admitted. Non-criminal internal investigations should normally be completed within thirty (30) work days, and notice of disposition should normally be given within (30) work days after completion of the investigation.
(c) Disciplinary action will be applied with a view toward uniformity and consistency.

. . .

(Exhibit 11)

2 VSP-DIR-417, Mobile Video/Audio Recording Equipment, provides in pertinent part:

1.0 PURPOSE

1.1 To provide uniform and proper use of mobile video/audio recording equipment (MVR) by Vermont State Police members.

. . .

3.0 PROCEDURE

3.1 Members assigned to patrol vehicles equipped with MVR digital recording equipment shall ensure that each system is tested at the beginning of the member's tour of duty and any problems shall immediately be brought to the attention of the shift supervisor or Senior Trooper in Charge . . .

3.2 Members using MVR / digital recording equipment shall record both video and audio in the following circumstances/scenes including but not limited to the following:

(A) All citizen contacts of a law enforcement nature.

(B) Major motor vehicle and criminal enforcement stops

. . .

(G) All searches

. . .

4.0 OPERATION

4.1 Responsibilities of Operators

. . .

(E) The audio microphone will be activated during all video recordings.

. . .

(Joint Exhibit 4)

3. VSP-DIR-403, Investigative Motor Vehicle Stop, provides in pertinent part:

1.0 PURPOSE

1.1 To enhance our ability to detect criminal activity within the State of Vermont, through the development of professional patrol techniques.

2.0 POLICY

2.1 All motor vehicle stops shall be based upon probable cause that a statutory motor vehicle violation has occurred or upon a reasonable suspicion to believe that a crime has been or is being committed or upon a community care taking function.

3.0 PROCEDURE

3.1 Each member shall perform his/her duties in a courteous and expeditious manner while enforcing the law pertaining to the traffic stop.

3.2 Observations

(1) The member shall remain vigilant and alert throughout the traffic stop and note any indication or evidence of possible criminal conduct within the stopped vehicle (i.e., popped ignition switch, possible stolen property, evidence of contraband within the vehicle, etc.)
(2) While conversing with the occupant(s), the member should note any discrepancies or evasive answers to normal and routine type questions. The member should observe the mannerisms of the vehicle's occupant(s) and be alert to excessive and/or abnormal nervousness, speech, sweating, eye contact, etc.
(3) The member should visually inspect each stopped vehicle to identify any alterations, modifications or other physical characteristics that indicate that the vehicle may possibly be used for illegal purposes.

4.0 AUTOMOBILE SEARCHES

4.1 In all search and seizure matters, constitutional standards shall be followed.

. . .

4.3 A motor vehicle may be searched upon issuance of a search warrant supported by probable cause.

4.4 Depending on the circumstances, there are three lawful ways in which a motor vehicle may be searched without a warrant during a traffic stop.

(1) Warrantless automobile searches may be based on:

(A) exigent circumstances
(B) consent – based on probable cause
(C) consent – based on reasonable suspicion

. . .

5.0 EXIGENT CIRCUMSTANCES

5.1 If a member forms a reasonable belief that officer safety, safety of another or destruction of evidence is likely and imminent, he/she may conduct such a search and/or seizure as is reasonably necessary.

. . .

6.0 CONSENT SEARCHES BASED ON PROBABLE CAUSE

6.1 If a member has probable cause to believe that a crime has been or is about to be committed and that evidence of that crime or contraband will be found in the vehicle, the member shall:

(1) Ask the operator for consent to search the vehicle. If the operator consents it is advisable, but not required that the consent be reduced to writing on DPS form 245B.
(2) If the operator declines, the member shall again request consent, explaining to the operator that he/she has probable cause to believe that evidence of a crime or contraband will be found in the vehicle and that if consent is not obtained that he/she will “apply to a judge for a search warrant”.
(3) The member will explain this process in a non-confrontational manner and stress that the choice between consent and the member applying for a search warrant is the person’s decision.

(4) If consent is obtained under this scenario, the consent should be reduced to writing on DPS 245B . . . or recorded by some other method.

. . .

(6) If consent is denied the member should apply to a judge for a search warrant.

7.0 CONSENT SEARCHES BASED ON REASONABLE SUSPICION

7.1 A member may ask for consent to search a vehicle based upon the totality of observations during the stop. The member's observations, coupled with circumstances surrounding the stop must give rise to a reasonable suspicion that criminal activity is or has occurred.

7.2 Members must be able to articulate those facts upon which a request for a consent search was made. Examples of such facts include the occupant being evasive or untruthful in response to routine conversation; inconsistencies in facts offered by the occupant or his/her explanation of events; observing items in the vehicle that you know have been used in area burglaries such as a screwdriver, pillowcases, etc., the discovery of hidden compartments or other physical characteristics not common to the vehicle stopped.

7.3 The facts relied upon when asking for a consent search need not rise to the level of probable cause, but should be sufficient enough to alert a trained member to the fact that criminal activity may be present

. . .

7.5 Consent searches are reviewed with "the most careful scrutiny" by courts. In view of this, members will be mindful of the following identified areas of concern:

. . .

(2) Voluntariness is a critical aspect of valid consent. Trickery, deception or threats will render a consent search involuntary and therefore illegal.

(3) A person subject to a consent search may withdraw consent at any time. If consent is withdrawn, the officer shall immediately terminate the search.

. . .

(Joint Exhibit 6)

4. VSP-DIR-512, Investigative Reports, provides in pertinent part:

1.0 PURPOSE

1.1 To establish a format and guidelines which members of this department will follow to document incidents or a criminal or non-criminal nature.

2.0 POLICY

2.1 Whether an employee physically writes a report, or submits it by electronic means, the criteria governing the reporting process are identical; accuracy, completeness, and timeliness. . .

. . .

2.0 PROCEDURE . . .

. . .

3.3 The outline below will be used as a guide in completing reports.

. . .

(6) Narrative – The chronological recording of facts, information, and circumstances gathered by the member during the investigation of the incident. The narrative should include all activities of the investigatory process and be written objectively and without personal opinion.

. . .

. . .

(Joint Exhibit 7)

5. VSP-DIR-526, Strip and Body Cavity Search, which became effective March 31, 2014, provides in pertinent part as follows:

. . .

3.0 DEFINITIONS

3.1 Strip Search: A search of any individual regardless of gender requiring the removal of some or all clothing to permit the visual inspection of any skin surfaces that include genital areas, breasts and buttocks.

3.2 Body Cavity Search: Any search involving the internal physical examination of body cavities, and in some instances, organs such as the stomach cavity. For purposes of this policy the mouth, nose and ears are not considered body cavities.

4.0 PROCEDURES

4.1 Individuals shall not be subject to strip searches unless the member believes that the individual is concealing a weapon; the member has obtained written or recorded consent; or the member has obtained a warrant.

. . .

4.4 When authorized, strip searches may be conducted only in the following circumstances:

. . .

(D) Under conditions that provide privacy from all but those authorized to conduct the search.

4.5 Individuals shall not be subjected to a body cavity search unless the member has obtained a warrant.

4.6 On the basis of a search warrant, a body cavity search shall be performed only by a physician or by any other medically trained personnel at a physician's direction.

4.7 For safety and security reasons, body cavity searches shall be conducted at a medical facility.

. . .

(Joint Exhibit 12)

6. Appellant signed off on reviewing the Strip and Body Cavity Search policy on March 31, 2014 (Joint Exhibit 16).

7. VSP-GEN-206, addressing Vermont State Police rules on Disciplinary Procedures, provides in part:

1.0 RESTRICTIONS ON DISCIPLINARY ACTION

1.1 No disciplinary actions shall be taken against any member except in accordance with the provisions of this policy.

1.2 Disciplinary action against a member may be taken only by the Commissioner.

1.3 The disciplinary guidelines shall be followed in imposing discipline unless the Commissioner finds in his/her discretion, just cause to deviate from the guidelines. Nothing in this provision prevents the imposition of constructive discipline for more than one violation occurring from the same incident. . .

. . .

(Joint Exhibit 3)

8. Appellant Hatch was a Trooper with the Vermont State Police from January 7, 2011 to January 23, 2016. He first worked in Fair Haven, then in Shaftsbury. He began work in the Rutland Barracks on May 5, 2013 (Joint Exhibit 2, p.000030-000035).

9. Appellant's overall performance for the period December 1, 2011 to November 30, 2012 was rated "meets job expectations (consistently meets job requirements)". His Troop Commander made the following comment on the evaluation: "Your motivation and criminal interdiction work is impressive." His overall performance was rated "above job expectations (consistently meets and occasionally exceeds job requirements) on the annual performance evaluations he received for the periods November 1, 2012 to October 31, 2013 and November 1, 2013 to October 31, 2014. In the 2013-2014 evaluation, Appellant was commended for the "excellent work" of "a total of 40 arrests for the year along with 60 consent searches" (Joint Exhibit 2, p. 000001 – 000021).

10. Appellant received the Combat Cross Award from the Director of the Vermont State Police in 2012 for his actions during a domestic disturbance when he helped secure the safety of a victim when a suspect was brandishing a firearm. Appellant received several commendatory letters and emails during his employment including commendatory letters and emails from his supervisors for his work on various types of cases, including consent searches; grateful letters from members of the public; and complimentary emails from prosecutors concerning Appellant's testimony (Joint Exhibit 2, p.000037; Joint Exhibits 51, 55, 56).

11. During his employment, Appellant received training concerning the proper procedures for conducting searches of persons and vehicles. Appellant had a particular interest in drug interdiction, or Proactive Criminal Enforcement ("PACE") work. There are many resources available for troopers engaging in PACE work. These include basic training, decisions from Vermont and federal courts, Vermont State Police Rules and Regulations, and information from other State Police members, State's Attorney's offices, or the Attorney General's Office (Joint Exhibits 1, 2, 6, 7).

12. On the afternoon of July 24, 2013, Appellant conducted a traffic stop of a black Kia Sedona on U.S. Route 7 in Rutland. The vehicle was initially on Appellant's left; after pulling up alongside the vehicle he slowed his cruiser and changed lanes to follow it. Appellant observed that a white female was driving the vehicle, which had two African-American male passengers. Appellant stopped the vehicle after checking on the license plate of the vehicle, and he discovered that its registered owner had an expired operator's license (Joint Exhibit 12a).

13. Appellant approached the vehicle and asked the occupants a series of questions before informing the operator of the reason for the stop. At some point during the conversation, Appellant confirmed that the operator, KW, was the registered owner of the vehicle and that her license was suspended. Appellant asked all the occupants of the vehicles their names. Appellant returned to his cruiser and contacted a person from the Drug Task Force and asked him if he had any information regarding the operator and two passengers. Appellant stated that he did not "know what's going on" and that the vehicle's occupants were "acting a little bit weird." He further noted that two of the vehicle's occupants were from New York, one was from Vermont, and that all three people in the vehicle intended to go to a nearby mall. He also stated that one of the male occupants made no eye contact and was "talking real low." Finally, after searching a database in his cruiser, Appellant discovered and noted to the Drug Task Force contact a 2012 possession of cocaine incident allegedly involving one of the vehicle's occupants. Appellant then called another person from the Drug Task Force. This person did not have any information regarding the occupants of the vehicle. Appellant then radioed dispatch and requested a check on one of the three passengers, and requested that any other troopers in the area "slide" his way (Joint Exhibit 12a).

14. Appellant then returned to the stopped car. He stated to KW "you mind hopping out real quick so I can run written information and give you a written warning for your violation?" Appellant did not inform KW that she had a choice on whether to exit the vehicle. KW exited her vehicle. Two other troopers, Dan Hall and Blake Cushing, arrived to provide Appellant with backup. Hall and Cushing had more seniority than Appellant, but served as backups in support of Appellant in this traffic stop. Shortly thereafter, Appellant informed one of the officers: "just keep an eye on 'em. Something is not right. Something is not adding up. I don't know what it is yet. I'm going to talk to her, see where we go" (Joint Exhibit 12a).

15. Appellant met with KW in his cruiser for approximately eight minutes and asked her multiple pointed and drug-related questions. Appellant issued KW a warning for the suspended license about 20 minutes into the vehicle stop (Joint Exhibit 12a).

16. Appellant, at the suggestion of Cushing, requested a canine ("K9") team be deployed to the site so the K9 could sniff the vehicle for the presence of drugs. When the K9 team arrived and the K9 circled the car, it apparently alerted to the possible presence of drugs on the vehicle's driver side door. Appellant asked KW for consent to search her person; he explained that this was voluntary and that she did not have to grant consent. KW granted consent to search her person. Appellant located nothing of interest when he did so. Appellant asked KW for consent to search her car, explaining that consent was voluntary. KW granted consent to search the vehicle (Joint Exhibits 12a, 12b).

17. Appellant subsequently asked one of the passengers, AH, for consent to search his person. AH consented to the search. Appellant found that AH had close to $1,000 in cash when he searched his person. During the search, AH protested when Appellant reached his groin area due to the way Appellant was conducting the search of the area. When Appellant attempted to

continue the search, returning his attention to the crotch of AH's pants because he felt a lump there, AH complained about continuing the search. Cushing also felt a lump when he examined AH's groin area. AH, in evident frustration because he stated that the lump was caused by his clothing, gyrated his hips so that his pants fell to his ankles, resulting in him standing by the side of the road with his underwear fully visible. One of the troopers pulled up AH's pants. Appellant subsequently conducted a roadside strip search between the doors of a parked cruiser during which AH's genitals were exposed while Appellant examined AH's groin area. The lump Appellant found in the crotch of AH's subject's jeans was apparently caused by the way that the inseam of his pants was stitched. The entire stop lasted approximately an hour and forty-five minutes. No drugs were found in the vehicle, or on any of vehicle's occupants (Joint Exhibits 12a, 12b).

18. Appellant prepared a written report on the July 24, 2013, incident which provided in pertinent part:

> On 7.24.13 at approximately 1557 hours I was south bound on US Rt. 7 in the Town of Rutland. My attention was drawn to vehicle directly in front of me . . . Said vehicle showed the female RO to have an expired license. I observed a female matching her description operating the vehicle. I conducted a motor vehicle stop . . .
>
> Upon stopping the vehicle I spoke with the operator . . . KW . . . KW was asked to come sit in my vehicle while I wrote her a written warning, she was advised she did not have to do this, she agreed to do so. While speaking with KW and a passenger in vehicle AH I observed several indicators of drug activity. I also noted their stories were different and one of them had to be lying to me as the details of their stories did not match up.
>
> I asked KW for consent to search her person, I explained this was voluntary and she did not have to allow this. She granted consent to search her person, nothing of interest was located. I asked KW for consent to search her car . . . she . . . granted consent to search.
>
> At this time a K9 unit arrived on scene and advised me the K9 alerted on the vehicle. AH was advised I wanted to search him but it was voluntary, he granted consent to search, a little over $1000 in cash was located on AH.

> Nothing of interest was located in the vehicle. KW was released with a written warning for her violation. (Joint Exhibit 12)

19. Sergeant Mark Perkins later verified that he had conducted a review of documentation of the July 24, 2013, traffic stop in the Spillman system, the records management database used by the Vermont State Police. Perkins did not require Appellant to make any corrections or provide additional information on the traffic stop (Joint Exhibit 12, p.000097).

20. On April 3, 2014, Appellant stopped a black Chevrolet Impala on U.S. Route 7 in Rutland because it had impermissibly tinted front windows. The Impala was operated by AH, the African-American male who was a subject of the July 24, 2013 search discussed above. Appellant smelled the odor of burnt marijuana coming from within the vehicle. AH was accompanied in the vehicle by a passenger, RH, who was his nephew. Appellant determined that AH's license to operate a motor vehicle within the State of Vermont was suspended. Appellant claims that he did not recognize AH until AH drew his attention to their previous encounter. We find that this claim is not credible (Joint Exhibit 12c).

21. Appellant asked AH for consent to search the vehicle, which AH granted. Appellant also asked RH for consent to search his person, which RH granted. The microphone on Appellant's WatchGuard MVR was not operating when he was speaking with AH and RH. This meant that there was video of this stop but there was no audio. Appellant contacted other troopers to back him up on the stop. Troopers Blake Cushing and Henry Alberico arrived at the scene. They had more seniority than Appellant, but they were present to provide backup support to Appellant during the stop (Joint Exhibit 12c).

22. Appellant conducted the search of RH adjacent to his vehicle on the side of the busy road in daylight in full view of passing motorists. During the roadside search of RH, Appellant requested that RH lower his sweatpants so that he could search the shorts that RH had

on underneath his sweatpants. When RH pulled down his sweatpants, his buttocks were exposed. This appeared to distress RH. Appellant did not discover anything of interest during this search (Joint Exhibit 12c).

23. AH initially consented to a search of his person. During the roadside search of AH, Appellant felt a soft lump in the crotch of his pants. He was unable to determine if this soft lump was contraband or a lump of clothing. He requested that AH drop his pants, and AH refused. Appellant then handcuffed AH and placed him in Alberico's cruiser to transport him to the State Police barracks so that he could apply for a warrant for a search of AH. Appellant and Cushing searched the Impala and found a small amount of marijuana (Joint Exhibits 12, p.000105-000106, 12c, 12d).

24. During the transport to the State Police barracks, AH was visibly upset and expressed frustration to Alberico with respect to Appellant's actions during the July 24, 2013, traffic stop and the April 3, 2014, traffic stop (Joint Exhibit 12d, 7:20 – 12:20).

25. Upon arriving at the barracks, AH consented to a strip search. Neither Appellant nor other troopers present at the search arranged to record the search on the video recording system in the barracks. The Vermont State Police do not have a rule that strip searches need to be recorded. During the search at the barracks, Appellant required that AH remove each layer of clothing that he was wearing. Appellant then spread AH's buttocks so he could see his anus and manipulated his testicles to check whether AH was concealing anything there. Appellant did not discover anything of interest during this search. Alberico, who observed the search, had concerns with the way the search was conducted and brought it to the attention of Sergeant Mark Perkins. Alberico had not mentioned his concerns to Appellant during the search.

26. Appellant prepared a written report on the April 3, 2014, incident (Joint Exhibit 12, p.000105-000106).

27. Sergeant Perkins later verified that he had conducted a review of documentation of the April 3, 2014, traffic stop in the Spillman system. Perkins did not require Appellant to make any corrections or provide additional information on the traffic stop (Joint Exhibit 12, p.000103).

28. The Rutland County State's Attorney provided negative feedback to Appellant's supervisors about Appellant's documentation in cases and the methods he used in stopping and searching vehicles during the period early 2014 to early Fall 2014. Also, a superior court decision in the spring of 2014 and another one in the early Fall of that year suppressed evidence in court cases based on the way Appellant stopped and searched vehicles (Joint Exhibits 13, p.000749-000778; 24; 28, 29; 30; 31; 38, p.003283 - 003297).

29. There was a civil suit brought by AH and RH in April 2014 against Appellant based on his actions during the July 24, 2013, and April 3, 2014, traffic stops. Assistant Attorney General Jon Alexander entered an appearance on behalf of Appellant on May 12, 2014, to represent him in the lawsuit. Another civil lawsuit also was filed against Appellant by another person detained by him in a March 2014 traffic stop (Joint Exhibits 58, 59).

30. In October 2014, Colonel Thomas L'Esperance, Director of the Vermont State Police, indicated to Public Safety Commissioner Keith Flynn that he would like an internal affairs investigation opened to determine whether Appellant committed misconduct during the traffic stops which resulted in the civil lawsuits filed by AH, RH and the other person. Commissioner Flynn instructed the Office of Internal Affairs on October 14, 2014, to open an investigation of Appellant's actions in these matters. An investigation was not opened on any of

the other troopers' conduct during these incidents. Flynn directed that the investigation involving the person detained in the March 2014 traffic stop be ended once Flynn reviewed the materials in the case (Joint Exhibit 12).

31. Lieutenant Ingrid Jonas, Director of the Internal Affairs Unit, conducted the investigation into the incidents involving AH and RH. The investigation was denoted Case No. 2014-20. Appellant was notified on October 14, 2014, of the investigation. Jonas conducted an extensive interview of Appellant on November 13, 2014, as part of the investigation. It was the practice of Jonas to conduct detailed interviews in the many internal affairs investigations she had conducted. Jonas reviewed 6 hours and 44 minutes of video footage for Case No. 2014-20. It generally takes Jonas two minutes to review every one minute of video footage during an investigation. In conducting this investigation and the investigation of the other cases pertinent to this appeal, Jonas was not aware of the provisions of Article 14, Section 2, of the Contract concerning the timing of investigations. Jonas issued her investigation report in Case No. 2014-20 on February 11, 2015 (Joint Exhibit 12).

32. On October 20, 2014, Colonel L'Esperance informed Captain Donald Patch that "I would like you to set up a meeting between (Appellant) and Sgt. Albright and Sgt. Studin (our interdiction instructors) sooner than later." Sergeants Eric Albright and Michael Studin had significant background in PACE work, and were considered "resident experts" in search and seizure law and trained in this area (Joint Exhibit 33)

33. The meeting occurred on the evening of October 27, 2014. In attendance were Appellant, Studin, Albright, Sergeant Henry Alberico and Sergeant Blake Cushing. Alberico and Cushing were two of Appellant's supervisors. This was intended as an educational opportunity for Appellant to improve his performance in PACE work as well as providing his immediate

supervisors, the Rutland patrol commanders, with a better understanding of PACE work (Joint Exhibit 47).

34. During the meeting, Appellant displayed a poor understanding of the main court decisions on criminal enforcement vehicle stops and searches. He also made comments about the methods he used in his PACE work which was very concerning to Studin and Albright. One of the comments he made at the meeting was "Do you want me to tell you what really happened or do you want me to tell you what's in the affidavit?". After the meeting, Appellant's supervisors provided Appellant with a copy of written directives Studin had given to another trooper whom he had coached which had been successfully used by that trooper (Joint Exhibits 17, 37, 47).

35. Studin and Albright met with Appellant's Patrol Commanders, Rutland Station Commander Charles Cacciatore, and Troop Commander Captain Donald Patch to discuss their concerns and recommendations with respect to Appellant. They recommended that Appellant focus on PACE training and education before he continued with aggressive drug interdiction work.

36. After the October 27 meeting, Appellant expressed concerns to Lieutenant Cacciatore about certain aspects of the directives which Studin had provided him at the October 27 meeting. Cacciatore revised the directives based on these concerns.

37. On November 17, 2014, Lieutenant Cacciatore and Sergeant Todd Wilkins met with Appellant. They provided him with, and discussed with him in detail, a memorandum dated November 10, 2014, prepared by Cacciatore which provided in pertinent part:

> The purpose of this memo/performance log is to institute workable guidelines to help direct Tpr. Lewis Hatch in his ongoing pursuit of proactive criminal motor vehicle enforcement work (PACE). . .
> . . .

Below are the guidelines/stipulations which are in place and to be accomplished and adhered to in order for Tpr. Hatch to continue proactive motor vehicle criminal enforcement work in the future:

Education Portion

- Terry Stop / Pat Down
- Exigent Circumstances
- U.S. Constitution – Amendments IV, V, VI
- State vs. Daquan Lawrence and Frank Jenkins
- State vs. Jonathan Sprague
- State vs. Phillip Savva
- VSP Rules & Regs., Investigative MV Stops (VSP DIR 526), Strip and Body Cavity Search (VSP DIR 403)

Verbal Portion

- Be able to verbalize and explain the above Education piece
  - This will aid in determining his knowledge and make him stronger in courtroom testimony

After the above has been accomplished, Tpr. Hatch will be able to conduct proactive motor vehicle criminal enforcement work, with the same guidelines which were outlined from the 10/27 meeting:

- All 0099 case narratives and dvds will be reviewed by Sgt. Wilkins.
- Roadside discretion as to charges being brought or not will be discussed with a Rutland P/C prior to a final decision being made by a Rutland P/C
- Tpr. Hatch will compose a list of all the indicators he has collected prior to pursuing a search of the vehicle. Tpr. Hatch will need to speak directly with a Rutland P/C prior to asking for consent to search a vehicle.
- Narratives/Reports/Affidavits/Search Warrants must include specific date, time, location and roadway as well as articulable facts or specific points of the stop-i.e.: furtive movements, reason for stop and any other pertinent observations. All statements must be clearly described in detail. Narrative should only include details that can be clearly explained by Tpr. Hatch. Review of dvd when writing the narrative will be done.
- All recommendations/directives for changes, additions, deletions and or declinations of any affidavit or search warrant by any county/federal attorney/prosecutor will be adhered to by Tpr. Hatch. (Joint Exhibit 18)

38. On the morning of November 29, 2014, Appellant conducted a traffic stop of a speeding vehicle on U.S. Route 7, near the East Dorset General Store. At this time, Appellant had not completed the educational component set forth in the November 10 memorandum. Appellant recorded the vehicle as traveling 68 miles per hour at a spot with a posted 50 miles per

hour speed limit. When Appellant exited his cruiser and approached the vehicle, he smelled the odor of burnt marijuana. When he spoke to the operator of the vehicle, KJ, he admitted that he had smoked marijuana earlier in the day. KJ denied smoking marijuana in the vehicle or having any marijuana in it (Joint Exhibit 13a).

39. Appellant asked KJ for consent to search his vehicle to make sure he did not have any marijuana in it. KJ began exiting the vehicle when Appellant asked him if he would allow a search. When KJ was outside the vehicle, Appellant asked KJ if he minded if he searched him. Appellant informed KJ that his consent to a search was voluntary. KJ advised he understood it was voluntary and agreed to a search. While searching his person, Appellant located Visine in his left front pants pocket (Joint Exhibit 13a).

40. Appellant did not speak or otherwise communicate with a Rutland Patrol Commander prior to asking KJ for consent to search the vehicle. After requesting consent to search the vehicle and searching KJ's person, Appellant returned to his vehicle. He contacted fellow trooper Elliott Justinger for backup. About two minutes after arriving back in his cruiser, Appellant attempted to contact Henry Alberico, who had been promoted to Sergeant since the April 3, 2014, traffic stop and was serving as Patrol Commander during this shift. Alberico did not instantly reply. Appellant then requested the dispatcher to open a case for "drugs". Appellant also informed the dispatcher that Justinger was coming his "way", and that if Alberico "wants to get ahold of me, reach out through IM". When Alberico returned to his vehicle after being away from it, he discovered that Appellant had sent him an instant message that said only "hi". Alberico responded "what's up?". Appellant responded "0099 for your 43 ", which means "consent search for your information", and that he could smell marijuana. Alberico responded: "call me". Appellant responded: "i can't. I don't have a dept phone". Alberico responded: "u

don't have a cell?" Appellant responded: "i do but i'm not using it". Alberico responded "since when?" Appellant did not respond to this question. Appellant previously had contacted Alberico by using his personal cellphone. While in his cruiser, Appellant used his cellphone to take a photo of KJ's license plate and sent it to a contact person at the Drug Task Force (Joint Exhibits 13, 19, 20 and 21).

41. Appellant was concerned about using his personal cellphone when contacting Alberico because of advice his fiancé, a deputy state's attorney at the time, had given him that his use of a personal cellphone in such situations could be used to his detriment by a defense attorney during litigation.

42. Appellant exited his cruiser and read KJ the wording from a consent to search form concerning voluntary consent to search his vehicle. KJ signed the card granting consent to search his vehicle. Appellant searched KJ's entire vehicle. While searching the vehicle, Appellant located a brown roach in a pocket near the dashboard. Appellant recognized this as marijuana based on its smell. Appellant issued KJ tickets for speeding and marijuana possession (Joint Exhibit 13, p.000480 - 000481).

43. During the stop, Appellant turned off the microphone on his vehicle's Mobile Video Recorder when he spoke with Justinger privately. Appellant did not subsequently turn on the Mobile Video Recorder when he was speaking with KJ. As a result, some interactions between him and KJ were not recorded.

44. In the meantime, Alberico sent Instant Messages to Appellant, asking him if he had forgot to contact him with "your PC" (probable cause), informing him that he was on his way, and telling him: "stand down". Appellant responded with an Instant Message, stating: "i just saw this ill stop where I am". When Alberico arrived at the scene, Appellant was sitting in

his cruiser. Alberico asked Appellant how much of KJ's vehicle he had searched. Appellant informed Alberico he had searched the entire vehicle (Joint Exhibits 19, 20, 21).

45. Appellant prepared a written report on the November 29, 2014, incident which provided in pertinent part:

> On 11.29.14 at approximately 0905 hours I was on duty . . . northbound on U.S.Rt. 7 in the Town of Dorset . . . I observed a lone vehicle southbound at a speed greater than the posted 50 MPH speed limit. I activated my in car radar and received a clear and consistent audible tone with a reading of 68 MPH. . .
>
> I turned around and caught up to said vehicle. I activated my emergency blue lights and conducted a motor vehicle stop on said vehicle. . .
>
> As I exited my cruiser I smelled the strong odor of marijuana. As I approached said vehicle I noted several of the windows were partially down and it was a balmy 18 degrees outside. I approached on the passenger's side and as I did the odor of marijuana grew in intensity. I began conversing with the operator and sole occupant of the vehicle who handed me his VT drivers ID . . .
>
> KJ advised he had not smoked marijuana and he did not have marijuana inside the vehicle with him. KJ shortly thereafter advised he smoked marijuana earlier in the morning, he again denied having any marijuana or paraphernalia in the vehicle. KJ began exiting the vehicle when asked if he would allow a search, I advised him to turn his car off and he could exit.
>
> KJ placed his hands on the rear of his vehicle, it appeared he was ready for a search of his person. I asked KJ if he mind if I search him and explained its voluntariness. KJ advised he understood it was voluntary and agreed to a search. While searching his person the only item of interest located was Visine in his left front pants pocket.
>
> I returned to my vehicle and ran KJ's license and registration . . . I exited my vehicle to check on KJ as it was cold outside, and explain what was taking place. While speaking with KJ now I could smell the odor of marijuana coming from his breath. I did not note anything uncommon about KJ's eyes. I also noted KJ's motor skills up until this point were normal for a sober driver. He exited the vehicle without incident, he stood talking to me in a common manner and he did not have trouble multitasking. . .
>
> I returned to my cruiser to finish issuing my enforcement action. . .
> I read KJ a consent to search form (DPS 245B) word for word, I then handed it to him to read. He signed the card granting consent to search his vehicle. While searching the vehicle I located a brown roach in a pocket near the dashboard. I immediately recognized this as marijuana based upon its smell.

> The suspected marijuana was field tested using a NIK Kit. It tested positive for marijuana. The suspected marijuana was weighed it weighed 1.3 grams.
> . . .
> (Joint Exhibit 13, p.000480 - 000481)

46. Alberico and Sergeant Todd Wilkins met with Appellant, and completed written performance logs on November 29, 2014, and December 1, 2014, respectively, concerning his performance with respect to the KJ car stop/consent search. They were critical of Appellant's actions of proceeding with the search of KJ in violation of the November 10, 2014, guidelines given him on November 17, 2014. When Wilkins met with Appellant, he questioned him about the stop and his reasoning for not calling Alberico on his cellphone. Wilkins informed Appellant that the guidelines he was under clearly state that he needed to have a Rutland Patrol Commander on scene prior to searching any vehicle. The performance logs completed by Alberico and Wilkins were placed in Appellant's personnel file (Joint Exhibits13, p. 000424 – 000426; 22).

47. Lieutenant Cacciatore did not initiate an internal investigation into Appellant's actions during the November 29, 2014, car stop and search. However, Captain Donald Patch filed a complaint to initiate an internal investigation, stating in his complaint: "I believe that Tpr. Hatch knowingly disobeyed the written directive he was given by his supervisors". Commissioner Flynn opened the case for internal investigation on December 9, 2014. Lieutenant Jonas conducted the investigation. The investigation was denoted Case No. 2014-32. Jonas reviewed and analyzed 1 hour and 47 minutes of video footage on the stop and search. Jonas conducted an extensive interview of Appellant on February 3, 2015, as part of the investigation. Jonas also interviewed KJ, Justinger, Alberico, Perkins and Wilkins as part of the investigation. Jonas issued her investigation report in Case No. 2014-32 on March 5, 2015 (Joint Exhibit 13).

48. Lieutenant Cacciatore sent an email to Rutland Patrol Commanders on December 5, 2014, informing them: "**Under no circumstances** is Lew Hatch to conduct any searches via a traffic stop, nor is he permitted to use his K9 on his own traffic stops. THERE ARE NO EXCEPTIONS TO THIS." Sergeant Wilkins verbally informed Appellant on December 8, 2014, not to search vehicles and to refrain from using his K9 on vehicles which he stopped (emphasis in original, Joint Exhibit 45).

49. During the early morning hours of January 6, 2015, Appellant and his K9 were called out to conduct a track of a suspect whose vehicle had crashed on a logging trail in Chittenden. Appellant arrived on the scene at approximately 3:20 a.m., and maneuvered his cruiser around two parked cruisers. A third cruiser was stuck on the icy trail in front of him, blocking his access. Appellant asked the trooper assigned to that cruiser, Eric Rademacher, how much farther to the crash site, and he responded that the crash site was approximately one-half mile ahead. Appellant asked Rademacher if he could move his cruiser. Rademacher responded to the effect that "you're not gonna make it through there." Appellant again asked Rademacher to move his cruiser, and he complied.

50. As Appellant attempted to climb the logging trail, his vehicle lost traction in the snow and ice. Appellant ran over a washed-out part of the road and, in the process, ran over a log on the trail and other hindrances. This caused significant damage to Appellant's cruiser. Appellant's cruiser and the suspect's wrecked vehicle were the only vehicles to make it to the crash site. After unsuccessfully tracking the suspect, Appellant could not navigate the trail back to the road. Loggers working in the area eventually arrived at the site and used their skidder to clear a path for Appellant's vehicle to exit the trail. Additional damage to the vehicle was caused

in the process of Appellant driving the cruiser back onto the road. A body shop made a preliminary estimate of $8,274.03 in damages to Appellant's cruiser (Joint Exhibit 15).

51. Commissioner Flynn directed that an internal investigation be conducted with respect to the January 6, 2015, incident. The investigation was opened in early February 2015. Captain Robert Cushing was assigned to be the investigator. The investigation was denoted Case No. 2015-06. Cushing issued his investigation report in Case No. 2015-06 on March 20, 2015 (Joint Exhibit 15).

52. On the afternoon of January 7, 2015, Appellant while on duty arranged to meet Trooper Justinger, at a pull-off area along U.S. Route 7 in Mt. Tabor, so that Justinger could return hunting equipment to Appellant. As Appellant neared the pull-off area where Justinger was waiting, he observed the driver of an oncoming Jeep Cherokee flashing his headlights several times. Appellant contacted Justinger and asked him if he was at the pull-off area. Justinger confirmed he was there. This made Appellant aware that the vehicle had just passed Justinger. Flashing headlights in this manner is not a violation of the law. Appellant turned his cruiser around, and after following the vehicle for approximately 45 seconds, stopped the Jeep Cherokee. Appellant attempted to justify this stop as a community care stop potentially aiding a person in distress. We do not find this explanation credible. Upon approaching the Jeep Cherokee, Appellant smelled the odor of marijuana coming from the vehicle (Joint Exhibits 14a, 14c).

53. Appellant requested that Justinger come to Appellant's location. When Justinger arrived, Appellant met him at the back of the Jeep and stated: "You might want to take a walk up there and see if you smell anything." Justinger did as Appellant advised, smelled marijuana, and began talking with the driver. The driver informed Justinger that there was a marijuana pipe in

the car, and handed the pipe to Justinger. Justinger then ordered the occupants out of the Jeep and radioed dispatch "please start me a case for a 0099. I'm gonna be taking over the traffic stop" (Joint Exhibits 14a, 14b).

54. A dispatcher informed Appellant's Patrol Commander, Sergeant Alberico, what was taking place. Alberico instructed the dispatcher to advise Appellant and Justinger to stand down, and that he was on his way. Alberico also instructed the dispatcher to tell Appellant to call him. The dispatcher relayed these instructions to Appellant and Justinger (Joint Exhibits14a, 14b, 14c).

55. Upon hearing the command to stand down, Appellant turned off the microphone on his MVR, and used his cellphone to call Alberico to explain the situation. Appellant then summarized the phone conversation to Justinger, stating: "so, I'm not allowed to partake, so right now you don't have back-up right now. I'm here but I'm not here, so if you can get someone else to back you up you can. If not . . . the Patrol Commander's in Pittsford" Joint Exhibit 14a, 14b).

56. Justinger did not want to wait for Alberico to arrive from Pittsford, an approximate 45-minute drive, because it would take him a long period of time to get to the scene. Justinger arranged for a police officer from the Town of Manchester Police Department to provide backup since the officer could arrive much more quickly than Alberico. At some point, Appellant stated to Justinger something to the effect of: "What a monkey game." An officer from the Town of Manchester Police Department arrived to provide backup. Appellant then revved the engine of his cruiser and drove away (Joint Exhibits 14a, 14b).

57. Before Alberico could arrive at the scene of the stop, the dispatcher informed him that both Appellant and Justinger had cleared the scene. Alberico then proceeded to Appellant's

new location and asked him what happened. Appellant informed him that he did not want to talk with him right now, and that he wanted to speak with his union representative.

58. Commissioner Flynn instructed the Internal Affairs Unit to conduct separate investigations of Appellant and Justinger with respect to the January 7, 2015, incident. The case concerning Appellant was opened for internal investigation on January 12, 2015.. Lieutenant Jonas conducted the investigation. The investigation was denoted Case No. 2015-01. Jonas reviewed and analyzed 1 hour and two minutes of video footage on the traffic stop. She also interviewed Alberico, Justinger, Hatch and the Manchester police officer who came to the scene in Mount Tabor. Jonas issued her investigation report in Case No. 2015-01 on March 22, 2015 (Joint Exhibit 14).

59. Appellant was placed on administrative leave with pay on January 9, 2015 (Joint Exhibit 14, p.000302).

60. During the period he was on administrative leave with pay status, Appellant received pay for his regularly scheduled hours. He did not receive special team pay, K9 pay, overtime compensation, weekend differential and shift differential pay which he previously had received when he was on active duty. Appellant had been on the clandestine lab special team, and his K9 work also involved being on a special team. Appellant failed to provide specific evidence as to what compensation he would have received in these areas if he was actively working during this period. He also did not have training opportunities and was prevented from taking promotional examinations or applying for promotions.

61. Effective March 22, 2015, Appellant was removed from administrative leave with pay status and was assigned to active duty as a Trooper in St. Johnsbury. He remained on active

duty until May 2015 at which time he was returned to administrative leave with pay status (Joint Exhibit 2, p. 000045).

62. Department of Public Safety Commissioner Keith Flynn decided whether to prefer charges against Appellant once all the investigation reports had been completed in Docket Nos. 2014-20, 2014-32, 2015-01 and 2015-06. He conducted an independent review, examining the written materials in the case files and reviewing the video footage in each case. He also read the chain of command review which is part of the internal affairs investigation process for State Police disciplinary cases.

63. Commissioner Flynn reviewed approximately 140 internal affairs investigations during his tenure as Commissioner. He had never seen so many internal affairs investigations opened on one trooper in the same time period as happened with respect to Appellant.

64. Commissioner Flynn sent a memorandum dated August 21, 2015, to Appellant, providing in pertinent part:

> Pursuant to the authority vested in me under 20 VSA § 1880, I hereby prefer charges against you as follows:
>
> **Case Number 2014-20**
>
> a) July 24, 2013 Traffic Stop
>
> On the afternoon of July 24, 2013, you conducted a traffic stop of a black Kia Sedona on U.S. Route 7 in Rutland. Your WatchGuard video shows that the vehicle was initially on your right, but you slowed your cruiser and changed lanes to follow it. The vehicle was being driven by a white female, and had two African-American male passengers. You stopped the vehicle because its registered owner had an expired operator's license.
>
> You approached the vehicle and asked the occupants a series of questions before informing the operator of the reason for the stop. At some point during the conversation, you confirmed that the operator was, in fact, the registered owner of the vehicle and that her license was suspended. You returned to your cruiser and called a person you identified as "Casey" and asked him for information regarding the operator and two passengers. You explained that you "didn't know what's going on"

and that the vehicle's occupants were "acting a little weird." You noted that one occupant was from New York, one was from Vermont, and that all three people in the vehicle intended to go to a nearby mall. You also specified that one of the male occupants made no eye contact and was "talking real low." Finally, you noted a 2012 possession of cocaine incident allegedly involving one of the vehicle's occupants. This behavior does not rise to the level of reasonable suspicion of drug activity.

When Casey did not have any additional information for you, you called someone you identified as "Jeff". Like Casey, Jeff did not have any information regarding the occupants of the vehicle. You then radioed dispatch and requested a check on one of the three passengers, and requested that anyone else in the area "slide" your way. (Video at 9:20 – 9:55). Asking for a backup at this point indicates that you had already made the determination that you would extend the traffic stop. You did so without anything approaching the necessary "reasonable, articulable suspicion of drug activity" on the day of the stop, despite the fact that such suspicion is required to extend a routine traffic stop. *State v. Cunningham*, 2008 VT 43, ¶ 19, 183 Vt. 401, 412, 954 A.2d 1290, 1296.

Next, you returned to the stopped car to ask the occupants additional questions. Without obtaining any more suspicion, you stated to the driver "you mind hopping out real quick so I can give you a written warning?" (Video at 11:15). Another trooper arrived to provide you with backup, and helped the operator of the Kia exit her vehicle. Shortly thereafter, you informed the other trooper: "just keep an eye on 'em. Something is not right. Something is not adding up. I don't know what it is yet. I'm going to talk to her, see where we go." (Video at 12:10).

You met with the operator of the vehicle in your cruiser for approximately eight minutes and asked her multiple pointed and accusatory drug-related questions. These questions were not connected to her expired license in any way. Based upon the nature of your questions, it was clear that you were conducting a drug investigation rather than just issuing the operator a written warning. You issued her the warning after she had been stopped for only 20 minutes (Video at 20:40). At that time, you lacked any justification for extending the traffic stop.

Despite your lack of justification, you requested a K9 sniff of the vehicle, and therefore extended the stop. From the video of the incident, it appears that the K9 alerted on the vehicle's driver's side door. (Video at 1:09:02). You did not note the area(s) of the vehicle upon which the K9 alerted in your report. You subsequently asked one of the passengers for consent to search his person. While conducting the search, the passenger protested when you reached his crotch area (Video at 1:21:10). Specifically, the passenger complained that you had manipulated his crotch. At this point, the passenger also believed that you had completed the search. However, you attempted to continue the search, returning your attention to the crotch of his pants. The subject asked disbelievingly "you need to search me again?" Then, frustrated by the continued manipulation, the subject stated "you need me to take my clothes off?" You eventually conducted a roadside strip search between the doors of a parked

cruiser. The "lump" you found in the crotch of the subject's jeans was apparently nothing more than the way that the hem / inseam of his pants was stitched. The entire stop lasted approximately an hour and forty-five minutes. Your report regarding the stop totaled five paragraphs, and did not include anything even approaching the required level of detail. No drugs were found in the vehicle, or on any of vehicle's occupants.

The above conduct constitutes two distinct violations of Vermont State Police policy relating to motor vehicle searches, and a violation of Vermont State Police policy regarding documentation. First, you impermissibly and without legal justification extended the traffic stop in violation of search policy. Vermont State Police policy regarding investigative motor vehicle stops provides, "[i]n all search and seizure matters, constitutional standards shall be followed." VSP-DIR-403, Section 4.1. "Depending on the circumstances, there are three lawful ways in which a motor vehicle may be searched without a warrant during a traffic stop, (A) exigent circumstances, (B) consent based on probable cause, and (C) consent based on reasonable suspicion." VSP-DIR-403, Section 4.4. Additionally, when temporarily detaining a vehicle based on a reasonable and articulable suspicion of wrongdoing, the police intrusion must not proceed any further than necessary to effectuate the purpose of the stop. *Cunningham, supra*, . . . 183 Vt. at 415 . . . "Citizens do not expect that police officers handling a routine traffic violation will engage, in the absence of justification, in stalling tactics, obfuscation, strained conversation, or unjustified exit orders, to prolong the seizure in the hope that, sooner or later, the stop might yield up some evidence of an arrestable crime." *Cunningham*, . . . 183 Vt. at 411 . . . (quoting *State v. Sprague*, 2003 VT 20, ¶ 17, 175 Vt. 123, 824 A.2d 539).

In the instant case, you had no reasonable and articulable suspicion that any of the occupants of the stopped car were engaged in drug activity. Checking your MDC, checking with dispatch, and making calls to "Casey" and "Jeff: did not yield any documented information connecting any of the car's occupants to drug use or any other illegal activity on the date of the stop. Despite this, you instructed the driver to "hop out" of the car, and you extended the stop. . . After talking with the operator for an additional eight minutes and issuing her a written warning, you continued to detain her without sufficient legal justification for doing so. In so doing, you violated the constitutional standards set out in *Cunningham* and *Sprague*, and therefore violated VSP-DIR-403, Section 4.1.

Next, you impermissibly failed to terminate the search and secure a search warrant after the subject of the search objected to the continued attention that you were paying to his crotch. By this time, the subject was accompanied by you and at least one other trooper, and there was no reasonable and objective basis to suspect that the subject was in possession of illegal drugs or engaged in any other criminal activity sufficient to justify an investigative detention. Because the detention was invalid, it "immediately tainted the consensual search" of the subject's person. *State v. Pitts*, 2009 VT 51, ¶ 20, 188 Vt. 71, 84, 978 A.2d 14, 24. Continuing the search of the subject without proper justification, and doing so after he objected to the attention

that you were paying to his crotch, violated the subject's constitutional rights, showed extremely poor judgment, and could reasonably be expected to damage or destroy public respect for or confidence in members of the Department.

Finally, as to documentation, according to Vermont State Police policy, reports are judged by their "accuracy, completeness, and timeliness." VSP-DIR-512, Section 2.0. Vermont State Police policy defines a report's Narrative as "[t]he chronological recording of facts, information, and circumstances gathered by the member during the investigation of the incident. The narrative should include all activities of the investigatory process[.]" VSP-DIR-512, Section 3.3.

In the instant case, your Narrative was neither accurate nor complete. For example, though your narrative claims that your "attention was drawn to the vehicle in front of (you)", the WatchGuard video shows that you slowed down and pulled behind the vehicle before the stop. At another point in the Narrative, you claim that the operator "was advised that she did not have to" join you in your cruiser. However, the WatchGuard video of the stop shows that you did not provide the operator with this advice. Additionally, your Narrative fails to provide anything close to the requisite level of detail. You state, for example, that you "observed several indicators of drug activity." However, you never set out which indicators you observed. As such, the report does not meet the standards of VSP-DIR-512. Errors such as these seriously undermine your credibility, and could easily be eliminated by reviewing video of your traffic stops while you are writing your reports.

By impermissibly extending the traffic stop without justification, and by failing to properly document the July 24, 2013 incident, you violated Vermont State Police General Order 204, Code of Conduct, Part C, Section 20.1, VIOLATION OF RULES. These are your first and second Part C violations. Vermont State Police General Order 204 provides:

20.0 VIOLATION OF RULES

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

20.2 Discipline 1st Offense – Letter of Reprimand–2 days loss of AL
Subsequent Offense – 3 days loss of AL-4 days loss of AL

On the basis of the statements and evidence contained in the file, and in consideration of the circumstances set forth above, it would be my intent to take the following disciplinary action for the above violations of Part C:

Two concurrent 4 day suspensions without pay. . .

By failing to terminate your "consent" search of a subject's groin when objection was raised, and by directing a subject to drop his pants by the side of the road, you showed extremely poor judgment, and engaged in conduct that could reasonably be expected to damage or destroy public respect for or confidence in members of the Department. Accordingly, you violated Vermont State Police General Order 203, Code of Conduct, Part B, Section 3.0, CONDUCT. This is your first Part B violation. Vermont State Police General Order 203 provides:

> 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 a member to perform his/her duty. Conduct which violates VSP-DIR-118 (Sexual Harassment) may constitute conduct unbecoming.
>
> 3.2 Discipline
>
> 1st Offense – Letter of Reprimand – 5 days suspension without pay
>
> Subsequent Offenses - 5 days suspension without pay – Dismissal

On the basis of the statements and evidence contained in the file, and in consideration of the circumstances set forth above, it would be my intent to take the following disciplinary action for the above violation of Part B:

> **Dismissal.** I base this decision on the totality of each of the incidents set out herein. The conduct in which you have consistently engaged demonstrates that you lack the judgment and the credibility to adequately perform the duties of a member of the Vermont State Police. The above violations, when taken in totality with those set out below, establish your pattern of repeatedly ignoring the constitutional rights of the citizens that you are sworn to protect. As set out in IA 2014-32 and IA 2015-01, your supervisors recognized your lack of regard for these rights and put in place remedial measures to help you address your shortcomings as a law enforcement officer. You did not abide by these remedial measures, or discuss your concerns with your supervisors before acting. In so doing, you have repeatedly demonstrated that you lack the judgment necessary to perform your duties. I make these findings pursuant to the authority granted to me by Section 1.3 of Vermont State Police Order 206.

b) April 21, 2014 Traffic Stop

On April 21, 2014, you stopped a black Chevrolet Impala on U.S. Route 7 in Rutland because it had impermissibly tinted front windows. The Impala was operated by the

African-American male subject of the July 24, 2013 search discussed above. You smelled what you described as "the moderate odor of burnt marijuana coming from within the vehicle." You also determined that the operator's "privilege to operate within the State of VT was suspended." You asked the operator for consent to search the vehicle, which he granted. You also asked the passenger for consent to search his person, which he granted. The exact language used during the requests is not available, as you did not activate the microphone on your WatchGuard MVR.

During the roadside search of the passenger, your report states that you "were unable to search his shorts as he had pants on over them." You therefore required that he lower his sweatpants. You explained that this was needed so that you could search the shorts that he had on underneath his sweatpants. The search took place in front of your cruiser, on a busy road, with no concern for the passenger's privacy.

During the roadside search of the driver, you "felt a soft lump in the crotch of his pants." You were "unable to determine if this soft lump was contraband or a lump of clothing." You requested that the operator drop his pants, and he refused. You then took him into custody so that you could apply for a warrant. You and your colleagues searched the Impala and found nothing more than "a small amount" of marijuana.

Upon arriving back at the barracks with the detained operator, the operator consented to a strip search. Although you were required to record the encounter using the barracks' video recording system, you failed to ensure that the system had a DVD in it and that it was powered on. As a result, the encounter was not recorded, despite the requirement of VSP-DIR,417 that "members using MVR / digital recording equipment shall record both video and audio . . . (A) All citizen contacts of a law enforcement nature; and (B) Major motor vehicle and criminal enforcement stops". The operator subsequently filed a lawsuit regarding your conduct during the unrecorded search.

During the search at the barracks, you required that the operator remove each layer of his clothing. You then manipulated his butt cheeks and either manipulated his testicles or had him manipulate his testicles while you observed that he was not concealing anything there. Like the passenger, the driver was not concealing any contraband. As in the previous stop, your report fails to document required information.

Your failure to ensure that the April 21, 2014 incident was properly recorded (in violation of VSP-DIR-417), and your failure to properly document the incident (in violation of VSP-512), constitute additional violations of Vermont State Police General Order 204, Code of Conduct, Part C, Section 20.1. . . These are your third and fourth Part C violations, and therefore shall be punishable under the guidelines set forth for a Part B violation pursuant to Section 21.0 of VSP-GEN-21.0.

. . .

> 21.0 THIRD OFFENSE OF ANY PART C CODE OF CONDUCT VIOLATION
>
> 21.1 Any third or subsequent offense of a Part C violation will be punishable under the guidelines set forth for a Part B violation.

21.2 Discipline

1st Offense – 1 day suspension without pay–4 days suspension without pay

Subsequent Offense – 4 days suspension without pay-Dismissal

On the basis of the statements and evidence contained in the file, and in consideration of the circumstances set forth above, it would be my intent to take the following disciplinary action for the above April 21, 2014 violations:

> **Dismissal.** I base this decision on the totality of each of the incidents set out herein. . . [1]

Case Number 2014-32

The above cases are not the only documented incidents in which you violated the constitutional rights of members of the public. For example, in *State v. Michaels* . . . and its companion case *State v. Stevens* . . . the trial court found that the WatchGuard video of the traffic stop did not support your claim that the vehicle you stopped had a defective brake light. . .

In *State v. Lawrence* . . . the trial court found that you impermissibly expanded a routine traffic stop into a drug investigation without sufficient legal justification for doing so. . . Similarly, in *State v. Socia* . . . the court again found that you ignored *State v. Sprague* and *State v. Cunningham* by unlawfully ordering a driver out of her car without justification, and by unlawfully turning a traffic stop into a drug investigation. . .

Due to the shortcomings and the serious red flags raised by your conduct during the above cases, on November 17, 2014, Lieutenant Charles Cacciatore and Sergeant Todd Wilkins presented you with a written directive that Lieutenant Cacciatore had drafted on November 10, 2014. . . The directive required that you, among other things, "compose a list of all the indicators that [you have] collected prior to pursuing a search of the vehicle." . . . You were also required to "speak directly with a Rutland P[atrol] C[ommander] prior to asking for consent to search a vehicle."

You were unwilling to abide by this directive. On November 29, 2014, you conducted a traffic stop of a speeding vehicle on U.S. Route 7, near the East Dorset General Store. As you exited your vehicle, you smelled the odor of burnt marijuana. Because of this, and because the operator of the vehicle admitted that he had smoked marijuana earlier in the day, you decided to call a friend and fellow trooper for backup, and to ask the operator of the vehicle for consent to search. You did not speak "directly with a Rutland Patrol Commander" prior to asking for consent to search the vehicle. Instead, you sent the patrol commander on duty an instant message that said only "hi".

[1] The remainder of this paragraph is omitted. It is identical to the paragraph set forth in the paragraph entitled "**Dismissal**" in the discussion above on the July 24, 2013, traffic stop in Case Number 2014-20.

The patrol commander responded "what's up?" and soon requested that you call him. You responded that you could not do so, because you "don't have a dept phone". During the stop, you also turned off the microphone on your vehicle's Mobile Video Recorder. As a result, key interactions between you and the vehicle's operator were not recorded.

Additionally, in your written documentation of this incident, as in your written documentation in each of the cases set out above, you failed to note key factual observations, or to explain their significance. . .

In requesting the driver's consent without receiving the prior approval of a Patrol Commander, you failed to follow a lawful order, namely the November 10, 2014 directive. In so doing, you violated Vermont State Police Directive 203, Code of Conduct, Part B, Section 11.0, OBEDIENCE TO ORDERS. This is the second founded Part B violation. Vermont State Police General Order 203 provides:

> 11.0 OBEDIENCE TO ORDERS
>
> 11.1 A member shall promptly obey and execute each and every lawful order issued to him/her, whether verbal or written, by a superior or supervisor, including orders relayed to the member by another. . .
>
> 11.2 Discipline
>
> 1st Offense – 4 days suspension without pay-Dismissal
>
> Subsequent Offense – 8 days suspension without pay-Dismissal

On the basis of the statements and evidence contained in the file, and in consideration of the circumstances set forth above, it would be my intent to take the following disciplinary action for the above violation of Part B:

> **Dismissal.** I base this decision on the totality of each of the incidents set out herein. . . [2]

In turning off the microphone on your mobile video recorder in violation of VSP-DIR 417, you also violated Vermont State Police General Order 204, Code of Conduct, Part C, Section 20,1, VIOLATION OF RULES. This is your fifth Part C violation, and therefore shall be punishable under the guidelines set forth for a Part B violation pursuant to Section 21.0 of VSP-GEN-21.0.
. . .

On the basis of the statements and evidence contained in the file, and in consideration of the circumstances set forth above, it would be my intent to take the following disciplinary action for the above violations of Part C

[2] Id.

Dismissal. I base this decision on the totality of each of the incidents set out herein. . . [3]

Finally, you have again placed your personal pursuit of drug detection above all else, including your duty to follow orders and your duty to properly and thoroughly document objective legal justification for your actions. In repeatedly engaging in this kind of tunnel vision, you have abused the authority of your position and violated Vermont State Police General Order 203, Code of Conduct, Part B, Section 1.0, ABUSE OF AUTHORITY. This is your third Part B violation. Vermont State Police General Order 204 provides:

1,0 ABUSE OF AUTHORITY

1.1 No member shall abuse the authority of his/her position.

1.2 Discipline

1st Offense – Letter of Reprimand – 5 days suspension without pay

Subsequent Offense – Dismissal

On the basis of the statements and evidence contained in the file, and in consideration of the circumstances set forth above, it would be my intent to take the following disciplinary action for the above violation of Part B:

Dismissal. I base this decision on the totality of each of the incidents set out herein. . . [4]

Case Number 2015-01

This case involves your conduct on the afternoon of January 7, 2015. On that date, you had arranged to meet your friend and colleague, Trooper Elliott Justinger, at a pull-off area along U.S. Route 7 in Mt. Tabor. As you neared the pull-off area where Trooper Justinger was waiting, you observed the driver of an oncoming Jeep Cherokee flash his headlights at you several times. You radioed Trooper Justinger to ask if he was "sittin' down there yet", and when he replied that he was, you turned your cruiser around and stopped the Jeep Cherokee. Upon approaching the Jeep Cherokee, you smelled the moderate odor of raw marijuana coming from the vehicle.

You immediately contacted Trooper Justinger and requested that he come to your location. When he arrived, you met him at the back of the Jeep and stated: "You might want to take a walk up there and see if you smell anything." Trooper Justinger did as you instructed, smelled marijuana, and began talking with the driver. The driver informed Trooper Justinger that there was a marijuana pipe in the car, and handed the pipe to the

[3] Id.
[4] Id.

trooper. Trooper Justinger then ordered the occupants out of the Jeep and radioed dispatch "please start me a case for a 0099. I'm gonna be taking over the traffic stop."

. . . (A) sergeant in Shaftsbury who was monitoring his radio heard Trooper Justinger call in the stop. The Sergeant contacted your Patrol Commander and informed him what was taking place. Your Patrol Commander instructed dispatch to advise you and Trooper Justinger to stand down, and that he was on his way. Dispatch did so . . . Dispatch informed Trooper Justinger that the Patrol Commander would have you give the Patrol Commander a call on your cell phone.

Upon hearing the command to stand down, you reacted immediately. You stated to Trooper Justinger "see how fucked up (inaudible". Only then did you take your cell phone from your pocket, turn off the microphone on your MVR, and call your Patrol Commander to explain the situation. You summarized your phone conversation to Trooper Justinger, stating: "so, I'm not allowed to partake, so right now you don't have back-up right now. I'm here but I'm not here, so if you can get someone else to back you up you can. If not . . . [The Patrol Commander's in Pittsford." Trooper Justinger immediately tried to reach a different Patrol Commander. Soon afterwards, you stated to Trooper Justinger: "What a fucking monkey game." An officer from a local police department arrived to provide backup, and you said good-bye, revved your engine and drove away.

Before your Patrol Commander could arrive at the scene of the stop, dispatch informed him that both you and Trooper Justinger had cleared the scene. Your Patrol Commander then proceeded to your new location and asked you what happened. You informed him that you did not want to talk with him right now, and that you wanted to speak with your union rep.

You were well aware that Lieutenant Cacciatore's November 17, 2014 written directive was in effect when you stopped the Jeep Cherokee on January 7, 2015. As set out above, that directive expressly provided the procedure that you were to follow when you felt that you had grounds for requesting consent to search a motor vehicle. It required that you, among other things, "compose a list of all the indicators that [you have] collected prior to pursuing a search of the vehicle." . . . You were also required to "speak directly with a Rutland P[atrol] C[ommander] prior to asking for consent to search a vehicle." The purpose of this directive was to ensure that a Patrol Commander reviewed each of your decisions regarding drug indicators, and to ensure that your requests for consent to search had a proper basis.

You did not follow this directive on January 7, 2015. Instead of calling your Patrol Commander to review the traffic stop and the appropriate indicators, you called your friend and colleague, Trooper Justinger. By doing this, you placed yourself in a position where your decision to stop the Jeep, and the indicators of drug activity that you had observed, could not be reviewed by a Patrol Commander. Instead, you turned your stop over to a friend and fellow trooper, a trooper who does not have supervisory authority. In so doing, you used Trooper Justinger as your agent, in an attempt to elude

the requirements of the November 10, 2014, directive. Needless to say, Trooper Justinger did not challenge your legally insufficient basis for the initial traffic stop.

Given the above, you failed to follow the November 10, 2014 directive. In so doing, you violated Vermont State Police Directive 203, Code of Conduct, Part B, Section 11.0, OBEDIENCE TO ORDERS. This is your fourth Part B violation. . .

On the basis of the statements and evidence contained in the file, and in consideration of the circumstances set forth above, it would be my intent to take the following disciplinary action for the above violation of Part B:

> **Dismissal.** I base this decision on the totality of each of the incidents set out herein. . . [5]

Additionally, both the language and the tone that you used to express your frustration to Tpr. Justinger was insulting, disrespectful and contemptuous toward the supervisors who contributed to the November 10, 2014 directive. If you had any problems with the directive, or if you wished to deviate from it in any way, you had many opportunities to privately discuss the memo with your Patrol Commanders and your Lieutenant. In fact, you were familiar with the process, as your supervisors had adjusted the terms of the directive on a prior occasion. Instead of securing the approval of a supervisor, you unilaterally acted in a way not authorized by the directive, then derided the terms of the directive to a friend and colleague. In so doing, you violated Vermont State Police General Order 204, Code of Conduct, Part C, Section 11.0, INSUBORDINATION. This is your sixth Part C violation, and therefore shall be punishable under the guidelines set forth for a Part B violation pursuant to Section 21.0 of VSP-GEN-21.0. Vermont State Police General Order 204 provides:

> 11.0 INSUBORDINATION
>
> 11.1 Members shall conduct themselves with propriety and dignity at all times. Members shall not use threatening, insulting language or behave in an insubordinate, disrespectful or contemptuous manner toward any member of the Vermont State Police, particularly those of superior rank. It is understood that such behavior detracts from the respect due the member and is contrary to good order and discipline. Such behavior may consist of acts, language, impertinence, undue familiarity or rudeness, however expressed.
>
> 11.2 Discipline 1st Offense - Letter of Reprimand– day loss of AL
> Subsequent Offense – 3 days loss of AL-7 days loss of AL
>
> . . .

On the basis of the statements and evidence contained in the file, and in consideration of the circumstances set forth above, it would be my intent to take the following disciplinary action for the above violations of Part C

[5] Id.

Dismissal. I base this decision on the totality of each of the incidents set out herein. . . [6]

Internal Affairs Case Number 2015-06

During the early morning hours of January 6, 2015, you and your K9 were called out to conduct a track of a suspect whose vehicle had crashed on a logging trail in Chittenden. You arrived on the scene at approximately 0320 hours, and maneuvered your EQ around two parked cruisers. A third EQ was apparently stuck on the icy trail in front of you, blocking your access. You asked the trooper assigned to that EQ how much farther to the crash site, and he responded that the crash site was approximately one half mile ahead. You did not want to walk that distance, so you asked the other trooper if he could move his EQ. He responded by telling you "you're not gonna make it through there." Because your K9 was barking, you asked the trooper "what?" and he repeated "you're not gonna make it up that way (to the crash site)". You again asked the other trooper to move his EQ, and he complied.

As you attempted to climb the logging trail, you noticed that your vehicle was heading directly toward a washout. You attempted to brake, but, predictably, lost traction in the snow and ice. You ran over the washout, and, in the process, ran over a log on the trail. During your ascent the frozen and stump-filled terrain caused significant damage to your cruiser. When you arrived at the scene of the crash the Patrol Commander immediately asked you why you drove up the logging trail. You responded that you did not feel like walking all the way up the trail. You also stated that you believed that other cars had made it to the crash site. This was, in fact, incorrect, as your EQ and the suspect's wrecked vehicle were the only vehicles to make it to the crash site.

After conducting the track of the suspect, you could not successfully navigate the trail back to the road. Loggers working in the area eventually arrived at the site and used their skidder to clear a path for your EQ to exit the trail. In the process of driving your EQ back onto the road, you caused additional damage. Your decision to attempt to drive up the logging train caused an estimated $8,274.03 in damages.

Any reasonable person would not have attempted to drive up the logging trail in the condition that it was in. At least one of your colleagues told you twice that the trail was not passable. Additionally, you failed to stop even after driving over both an icy washout and a log. You also knew or should have known that the road conditions caused the wreck of a suspect's vehicle. I consider your actions a gross deviation from the care that a reasonable person would have exercised in the situation, and without due regard for your own safety and for the safety of others.

Through these actions, you violated Vermont State Police General Order 203, Code of Conduct, Part B, Section 18.3, Third Degree Careless and Imprudent Operation. This is your second founded at-fault accident since 2012. . . The instant accident would

[6] Id.

constitute your first Third Degree Careless and Imprudent Operation violation. Vermont State Police General Order 203 provides:

> 18.3 Third Degree Careless & Imprudent Operation: Members shall operate Department issued motor vehicles in a careful and prudent manner; at all times operating without gross deviation from the care that a reasonable person would have exercised in that situation and with due regard for the safety of all persons.
> (1) Discipline
>
> 1st Offense – 2-30 days suspension without pay
> Subsequent Offense – 10 days suspension without pay-dismissal

On the basis of the statements and evidence contained in the file, and in consideration of the circumstances set forth above, it would be my intent to take the following disciplinary action for the violation of Part B, Section 18.3, Third Degree Careless and Imprudent Operation:

> **Dismissal.** I base this decision on the totality of each of the incidents set out herein. . . [7]

DISCIPLINE SUMMARY

As set out above, I intend to take the following actions.

In Case No. 2014-20, **two concurrent 4 day suspensions without pay; dismissal.**

In Case No. 2014-32, **dismissal**.

In Case No. 2015-01, **dismissal**.

In Case No. 2015-06, **dismissal**.

Within seven (7) days of the delivery of these charges to you, you may file with me a request for a hearing before a hearing panel. . .

If you do not request a hearing within seven (7) days of the receipt of these charges, I will take such disciplinary action as I deem appropriate . . .
. . .
(Joint Exhibit 8)

65. The Code of Conduct sections cited in the preferral of charges from Commissioner Flynn to Appellant are set forth accurately.

[7] Id.

66. A violation of Part A of the Code of Conduct is the most serious violation. A Part B violation is the next most serious. A violation of Part C is the lowest level of violation (Joint Exhibit 3).

67. There was a Loudermill hearing on October 8, 2015, and a hearing on October 27, 2015, before the State Police Advisory Commission, in which Appellant had an opportunity to respond to the charges against him prior to the decision being made as to what discipline to impose on him.

68. Commissioner Flynn sent Hatch a letter dated January 22, 2016, which provided in pertinent part as follows:

> I am notifying you of my decision to dismiss you from your position as a Trooper with the Vermont State Police ("VSP"), effective at the close of business January 22, 2016. . .
>
> . . . I am terminating you because I find that you committed misconduct, gross misconduct, and gross neglect as described in the . . August 24, 2015 memo. You displayed a pattern of poor judgment, insubordination, and deceit that caused DPS to lose confidence in your ability to responsibly carry out your duties as a Trooper, and destroyed DPS's ability to trust that you will reliably be able to control your behavior and act in a professional and appropriate manner in the future. Specifically, you repeatedly violated and deceptively circumvented the mandates of a written directive issued to you to evaluate the constitutionality of your stops, and when and how to properly perform a search; you made inconsistent statements to your employer when questioned about your behavior; repeatedly failed to follow proper Mobile Video Recorder protocols; and negligently caused an inordinate amount of damage to VSP property when you ignored the advice of your co-workers and exercised poor judgment driving your department vehicle up an impassable logging road. Because I found that you committed gross misconduct, you will not receive two weeks' notice or two weeks' pay in lieu of notice.
>
> While I considered all mitigation that you presented, I do not find that it justified or outweighed the nature of your actions, which I consider to be of the utmost seriousness. As a Vermont State Trooper, you represent the entire department and as a law enforcement officer you are held to the highest standards of integrity and honesty. Your conduct was insubordinate, disruptive, and diminished the public's trust. We made great efforts to train you and supervise your work to ensure that you conform your behavior to a satisfactory level; a level that complies with the laws of Vermont and does not violate citizen's rights, but you have demonstrated an inability and an unwillingness to modify your behavior and it is apparent that our efforts to rehabilitate are fruitless. My trust in you and your ability to perform as a Vermont State Trooper has been destroyed and

> cannot be repaired. You have demonstrated serious lapses in judgment, which have also served to diminish your credibility. Therefore, I find that no lesser penalty than dismissal is sufficient to address the totality of your actions.
> . . .
> (Joint Exhibit 9)

69. Flynn did not review Appellant's performance evaluations before deciding to dismiss him. He reviewed commendatory letters and emails from Appellant's personnel file presented to him by Appellant, but he did not find them of significance in deciding whether to dismiss Appellant.

MAJORITY OPINION

This is an appeal from the decision of the Commissioner of Public Safety to dismiss Appellant for misconduct in violation of the Employer's Code of Conduct. Appellant contends that the Employer violated Article 14 of the Contract by dismissing him. Specifically, Appellant contends that the Employer dismissed him without just cause, and in an untimely manner, in violation of Article 14 of the Contract.

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). Appeal of Danforth, 27 VLRB 153, 159 (2004). 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).

There is a threshold issue in this matter whether discipline was imposed in a timely manner. Article 14, Section 2(b), of the Contract provides:

> Disciplinary proceedings shall be instituted within a reasonable time after the violation of the Code of Conduct occurred or was discovered and disciplinary action shall be taken within a reasonable time after disciplinary charges have been proved or admitted. Non-criminal internal investigations should normally be completed within thirty (30) work days, and notice of disposition should normally be given within (30) work days after completion of the investigation.

This issue presents the potential tension that exists in dismissal cases between due process considerations and examination of the alleged misconduct underlying an employee's dismissal. The question which arises in such cases is whether due process violations exist which are sufficient to reduce or eliminate the imposed discipline.

The Vermont Supreme Court recently held that a lengthy delay in imposing discipline did not preclude an employer from dismissing an employee absent a showing of prejudice and actual harm to the employee. In re Grievance of Lepore, 2016 VT 129 ¶ 25 – 26 (2016). The Court determined that the evidence did not establish prejudice to the employee since he continued to work and receive his salary during the investigation, thereby suffering no monetary loss; and there was no discernable effect on the preservation of facts or testimony or any other adverse effect on the employee's ability to defend against the charges. Id. at ¶ 25. The Court further found no showing of prejudice where there was no evidence that the employer either sought to, or did, obtain any unfair advantage over the employee through the delay in disciplining him. Id. at ¶ 26.

Similarly, the Board has indicated in several cases that, absent demonstrated prejudice by the disciplined employee, it was not prepared to conclude that the time it took the employer to impose disciplinary action on the employee affected the validity of the disciplinary action. In these cases, employees were on temporary relief from duty with pay status during the investigation and did not demonstrate that they were prejudiced by the timing of the disciplinary

action. Grievance of Richardson, 31 VLRB at 383. Grievance of Abel, 31 VLRB 256, 274 (2011). Grievance of Sileski, 28 VLRB 165, 191 (2006). Grievance of Scott, 22 VLRB 286, 301-02 (1999).

The Board decided the contract language at issue in the matter now before us was violated in one case when an employee was not charged with an offense until five and one-half months after an incident requiring a simple investigation. Appeal of Wells, 16 VLRB 52 (1993). The Board concluded that this resulted in disciplinary proceedings against the employee not being instituted within a reasonable time of the discovery of an alleged violation of the Code of Conduct, and determined that management was precluded from disciplining the employee for the alleged offense. Id. at 61-64.

There have been several other cases where the Board has concluded that imposition of discipline was not unreasonably delayed even though a number of months passed between the alleged misconduct and the imposition of discipline. The Board determined that an employer acted reasonably in completing an investigation in five months into alleged misconduct by three correctional officers where the employer's investigation was complicated because criminal charges were brought against the employees. Grievances of Charnley, Camley and Leclair, 24 VLRB 119, 141-142 (2001). Similarly, the Board determined in another case that imposition of discipline on an employee was not unreasonably delayed where dismissal occurred four and one-half months after criminal charges were brought against an employee and the employer commenced an investigation of his alleged misconduct. Grievance of Brown, 24 VLRB 159, 174 (2001).

The Board held in another case that a delay of four months after receiving the investigator's report did not provide a reasonable basis to rescind the dismissal of a correctional

officer where the delay was substantially caused by unforeseen complications and the dismissed officer's claimed lack of memory. Grievance of Abel, 31 VLRB 256 (2011). Elsewhere, the Board concluded that a six and one-half month period before discipline was imposed was reasonable where there were a number of allegations against the employee which resulted in an extensive investigation, including allegations on two issues which did not surface until the investigation of other allegations was well underway. Grievance of Richardson, 31 VLRB 359, 383 (2011).

In applying these precedents here, we conclude there was not a violation of the contractual requirements that disciplinary proceedings shall be instituted within a reasonable time after the violation of the Code of Conduct occurred or was discovered, and that disciplinary action shall be taken within a reasonable time after disciplinary charges have been proved or admitted. A complex set of circumstances existed here involving five separate incidents occurring over a period of time, including a civil lawsuit being brought against Appellant for two of the incidents.

The two incidents leading to the April 2014 civil lawsuit filed against Appellant occurred on July 24, 2013, and April 3, 2014. The evidence is not sufficient to indicate that the Employer should have been aware that Appellant may have committed a violation of the Code of Conduct prior to the time the civil lawsuit was filed. Although a sergeant that supervised Appellant verified that he had conducted a review of documentation of the two traffic stops, the evidence does not establish the specific information the sergeant had concerning Appellant's actions during the two incidents.

Although it is unclear why the State did not initiate an initial investigation of the two incidents resulting in a civil lawsuit until more than five months after the lawsuit was filed, the

delay does not rise to the level of being unreasonable. The State found itself in the position of defending Appellant in the civil lawsuit for actions he took on the job and then deciding whether to initiate an investigation on whether he should be disciplined for these actions. The difficult position in which these competing considerations placed the State is part of the complexity of this case. We are not inclined under these circumstances to conclude the State acted unreasonably in the time it took to initiate the investigation.

Once the Employer initiated the investigation of these two incidents, the time it took to complete the investigation was reasonable even though it was well beyond the 30 days set forth in the Contract for normally completing an investigation. This was not a normal investigation. The two incidents themselves resulted in the investigator assigned to the case reviewing nearly seven hours of video footage on the case as well as conducting an extensive interview of Appellant. Further, the same investigator was assigned to work on two other internal investigations initiated on Appellant during the time the investigation of the first two incidents was ongoing. She had to review extensive video footage in these cases, as well as conduct numerous interviews of those involved in the incidents. Her investigations were thorough and the time it took to complete them was not unreasonable given their volume and complexity.

Also, the time it took Commissioner Flynn to impose disciplinary action was not unreasonable. He conducted an independent review of case materials and video footage of the four incidents discussed above as well as a fifth incident involving Appellant which also had been the subject of an internal investigation. This was well beyond a normal review on the Commissioner's part since he had never seen so many internal affairs investigations opened on one trooper in the same time period. Further, it was reasonable for him to review and consider all the incidents together since the investigations were completed close in time and placed

Appellant's actions in each case in context. Given these unique circumstances and the demanding nature of his responsibilities, Commissioner Flynn did not take an unreasonable amount of time to decide what action to take against Appellant.

Moreover, even assuming for the sake of argument that the timeliness provisions of the Contract were violated, we cannot conclude that the time it took the Employer to impose discipline provides a basis to impact the validity of the disciplinary action since Appellant has not established prejudice. First, he did not demonstrate specific monetary loss. Most significantly, he either worked or was on administrative leave with pay during the period between the incidents in question and his dismissal. Also, Appellant did not show any other specific monetary loss as he failed to provide specific evidence as to the amount of compensation beyond his regular pay he may have received if he had been working, rather than on administrative leave with pay status, in the areas of special team pay, overtime compensation, weekend differential pay and shift differential pay.

A further indication of lack of demonstrated prejudice is Appellant has not established any discernable effect on the preservation of facts or testimony or any other adverse effect on the employee's ability to defend against the charges. Appellant claimed some inability of himself and others to remember events due to the passage of time. However, we are not persuaded by this claim. Video footage of the incidents and extensive investigation materials preserved the facts of incidents so they could be sufficiently recalled. Appellant cited the absence of retired Colonel Thomas L'Esperance as a witness in this case as having an adverse effect on the preservation of testimony since L'Esperance moved out of state upon retirement. However, Appellant has not presented persuasive evidence demonstrating how this absence prejudiced his ability to defend against the charges against him.

Finally, Appellant failed to show prejudice where there was no evidence that the Employer either sought to, or did, obtain any unfair advantage over Appellant through the delay in disciplining him. In sum, Appellant has not demonstrated prejudice and we conclude that the time it took the Employer to impose disciplinary action on him did not affect the validity of the disciplinary action.

We turn to addressing the specific charges against Appellant. The Employer has the burden of proving by a preponderance of the evidence the charges against Appellant. Appeal of Penka, 21 VLRB 182, 197 (1998). Appeal of Revene, 27 VLRB 282, 331 (2004). Appeal of Davidson, 29 VLRB 105, 137 (2007). Once the underlying facts have been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven facts. Revene, 21 VLRB at 331. Davidson, 29 VLRB at 137.

The Employer has made numerous charges against Appellant, each of which we will address in turn. The Employer first charges Appellant with impermissibly and without legal justification violating State Police rules by extending the July 24, 2013, traffic stop in violation of search policy to investigate possible illegal drug activity. The Employer has established this charge. Vermont State Police policy provides that constitutional standards shall be followed with respect to searches, and there are three ways in which a motor vehicle may be searched without a warrant during a traffic stop: 1) exigent circumstances, 2) consent based on probable cause, and 3) consent based on reasonable suspicion. None of these factors were present during the traffic stop. Appellant had no probable cause or reasonable suspicion that any of the occupants of the vehicle were engaged in drug activity, and he impermissibly and without legal justification extended the traffic stop in violation of search policy.

The Employer next alleges that Appellant violated the Code of Conduct provisions prohibiting violation of State Police rules and "conduct unbecoming an officer" during the August 24, 2013, search by failing to terminate his search of AH's groin when AH objected and by directing AH "to drop his pants by the side of the road". The latter part of this charge is not proven because Appellant did not so direct AH; AH caused his pants to fall to his ankles without direction from Appellant. The Employer has established the first part of this charge that Appellant engaged in conduct unbecoming an officer by continuing a search of AH's groin area that he never should have started. Appellant failed to discontinue the search of AH's groin area when AH protested of the way Appellant was conducting the search and complained about the search continuing. This demonstrated extremely poor judgment and could reasonably be expected to damage public confidence in state police officers, as charged by the Employer.

The third charge the Employer makes against Appellant in connection with the August 24, 2013, traffic stop is that he violated State Police rules by acting contrary to the policy establishing "accuracy, completeness, and timeliness" as the criteria governing reports completed by State Police. The Employer alleges that Appellant's report on the traffic stop was neither accurate nor complete.

The Employer has established this charge. Appellant's report inaccurately states: 1) his attention was drawn to the vehicle in front on him, and 2) Appellant advised the driver that she did not have to join him in the cruiser. In fact, Appellant was alongside the vehicle before he slowed down and then moved behind it before pulling it over. Further, he did not advise the driver that she did not have to join him in the cruiser. Appellant's report also was woefully short of the required level of detail given its length and search process. This is best illustrated by his

statement in his report that he "observed several indicators of drug activity"; yet his report does not indicate the specific indicators which he observed.

The Employer makes three charges against Appellant in connection with the April 3, 2014, traffic stop. The first charge is that Appellant violated the Code of Conduct provisions prohibiting violation of State Police rules by not following a State Police directive requiring that he activate his microphone on his WatchGuard MVR during the traffic stop and search of the vehicle and its occupants. The Employer has established this charge. Appellant's failure to activate his microphone resulted in there being no audio recording of his exchanges with the operator and passenger during the stop and search.

The Employer alleges that Appellant similarly violated a State Police directive requiring him to record a strip search of vehicle operator AH at the State Police barracks using the barrack's video recording system by not recording the encounter. The Employer has failed to establish that there was such a requirement. Thus, the Employer has not proven this charge.

The third charge which the Employer makes regarding the April 3, 2014, traffic stop is that his report of the stop fails to document required information. Due process considerations require that a charge must be sufficiently specific to put an employee on notice of the misconduct for which the employee is charged to allow adequate preparation of the employee's defense. Grievance of Rosenberger, 28 VLRB 284, 296-301 (2006). The charge by the Employer here that Appellant's report fails to document required information is insufficiently specific to put Appellant on notice of the specific misconduct for which he is being charged. It is not clear in what areas the Employer faults Appellant for inadequate documentation. Thus, this charge fails for lack of specificity.

We next consider the charges the Employer has made against Appellant arising from the November 29, 2014, traffic stop. There is a threshold issue before we examine the merits of these charges. Appellant contends that the Employer already disciplined him for his actions during this traffic stop when his supervisors issued two negative performance logs on him for this incident and placed them in his personnel file, and that the Employer may not discipline him twice for the same infraction.

Appellant's claim in this regard is not consistent with the Contract's provisions. Article 14, Section 1, of the Contract defines "Disciplinary Action" as "any action taken by the Commissioner as a result of an employee's violation of the Code of Conduct. Forms of disciplinary action include written reprimand, transfer, reassignment, suspension without pay, forfeiture of pay and/or other rights, demotion, dismissal, or a combination thereof." A performance log issued by an immediate supervisor clearly is not disciplinary action within the meaning of this contract provision.

We turn to addressing the substance of the three charges the Employer makes against Appellant stemming from the November 29, 2014, traffic stop of KJ. The Employer first charges Appellant with failure to follow a lawful order in violation of the Code of Conduct provisions requiring obedience to orders by requesting KJ's consent to search his vehicle without receiving the prior approval of a patrol commander. The Employer has established this charge. Appellant's supervisors presented him a memorandum on November 17, 2014, informing him that he "will need to speak directly with a Rutland P(atrol) C(ommander) prior to asking for consent to search a vehicle". Appellant violated this order by asking KJ for consent to search his vehicle to make sure he did not have any marijuana in it. He did so prior to speaking or otherwise communicating with a Rutland Patrol Commander. He ultimately searched the vehicle following incomplete

communications with a patrol commander in which the patrol commander never approved Appellant searching the vehicle. This constituted a failure on Appellant's part to follow the order provided to him on November 17, 2014.

The next charge against Appellant concerning the November 29, 2014, traffic stop is that he violated the Code of Conduct provisions prohibiting violation of State Police rules by not following the State Police directive requiring that he have his microphone activated on his mobile vehicle recorder during the traffic stop and search of the vehicle and passenger. The Employer has established this charge. Appellant turned off the microphone on his mobile vehicle recorder during the stop and did not turn it back on during subsequent interactions he had with KJ. This resulted in there inappropriately being no audio recording of some of his exchanges with KJ during the stop and search.

The third charge against Appellant arising from the November 29, 2014, stop is that he abused the authority of his position in violation of a Code of Conduct provision. The Employer asserts that Appellant abused his authority "(i)n repeatedly engaging in . . . the tunnel vision" of placing "your personal pursuit of drug detection above all else, including your duty to follow orders and your duty to properly and thoroughly document objective legal justification for your actions." This statement reflects an accurate summation of the evidence in this matter when considered as a whole, and supports the charge of abuse of authority.

The Employer makes two charges against Appellant in connection with the January 7, 2015, traffic stop. The Employer charges Appellant with failure to follow a lawful order in violation of the Code of Conduct provisions requiring obedience to orders by again not following the directive given him on November 17, 2014, that he would need to speak directly with a Rutland Patrol Commander prior to asking for consent to search a vehicle. The Employer asserts

that Appellant did not follow this directive because, instead of calling his patrol commander to review the traffic stop which he had initiated and the appropriate indicators of drug activity he had observed, he called another trooper without supervisory authority over him to come to the scene and investigate indicators of drug activity.

We conclude that the Employer has proven this charge. At the time of the January 7, 2015, stop, Appellant continued to be under orders to speak directly with a patrol commander prior to asking for consent to search a vehicle as well as the additional order that he could not search a vehicle himself. Given these mandated restrictions, Appellant had only one reasonable course of action – notify the patrol commander of the indicators of drug activity and have the patrol commander decide what action to take. Instead, Appellant inappropriately eluded the restrictions placed on him by first contacting Trooper Justinger to intervene without contacting a patrol commander.

The second charge stemming from the January 7, 2015, stop is that the language and tone Appellant used to express his frustration to Trooper Justinger was insulting, disrespectful and contemptuous toward the supervisors who contributed to the directive given him on November 17, 2014. The Employer asserts that his actions violated the Code of Conduct provision prohibiting insubordination. We conclude, in examining the totality of the evidence before us of Appellant's statements and actions during this stop, that this charge was not established. Appellant expressed frustration with the situation but the Employer did not prove that his actions rose to the level of violating the Code of Conduct provision prohibiting insubordination.

The final charge against Appellant is that his actions operating his cruiser when he was called out during the early morning hours of January 6, 2015, to track a suspect violated Code of Conduct provisions prohibiting "careless and imprudent operation" of department vehicles. The

provisions state that "(m)embers shall operate . . . vehicles in a careful and prudent manner; at all times operating without gross deviation from the care that a reasonable person would have exercised in that situation and with due regard for the safety of all persons".

Appellant violated this provision when he carelessly and imprudently attempted to drive his vehicle to the site on a logging trail where the suspect had crashed his vehicle despite being told by a fellow trooper that he would not make it to the crash site due to dangerous driving conditions. This constituted, as charged, a gross deviation from the care that a reasonable person would have exercised in this situation, and without due regard for his own safety and the safety of others.

The fact that the Employer has not proven all the charges against Appellant does not necessarily mean that his dismissal lacked just cause. Failure of an employer to prove by a preponderance of the evidence each charge contained in a dismissal letter does not require reversal of a dismissal action. Grievance of McCort, 16 VLRB 70, 121 (1993). Revene, 21 VLRB at 340. 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 235, 268-69 (1983), 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 Appellant's duties, including whether the offenses were intentional and committed for gain, 2) Appellant's job level and type of employment, 3) the effect of the offenses upon Appellant's ability to perform at a satisfactory level and their effect upon supervisors' confidence in Appellant's ability to perform assigned duties, 4) the clarity with which Appellant was on notice of any rules that were violated in committing the offenses, 5) Appellant's past disciplinary record, 6) Appellant's past work record,

7) consistency of the penalty with those imposed upon other employees for the same or similar offenses, 8) the consistency of the penalty with the department table of penalties, 9) the potential for Appellant's rehabilitation, and 10) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by Appellant or others.

The nature and seriousness of an employee's offenses is always significant in determining whether just cause exists for dismissal. The Vermont Supreme Court has indicated that just cause analysis should "center upon the nature of the employee's misconduct." In re Morrissey, 149 Vt. 1, 13 (1987). Grievance of Merrill, 151 Vt. 270, 273 (1989). This includes the Board determining the substantiality of the detriment to the employer's interests. Merrill, 151 Vt. at 273-74.

Appellant's offenses were serious. Most seriously, he displayed a pattern of disregarding State Police policy requiring adherence to constitutional standards in search of vehicles and persons in suspected illegal drug activity cases, and disobeying supervisory orders to monitor and regulate his actions in search cases. Appellant's offenses in this regard constituted a substantial detriment to the Employer's interests. It is of critical importance for effective law enforcement to adhere to constitutional standards in search cases and for state troopers to follow lawful supervisory orders in a paramilitary organization such as the State Police. Also, the abuse of police authority and conduct unbecoming an officer which he demonstrated created the potential of damaging public confidence in state police officers.

Other offenses of Appellant, although less serious, contributed to exacerbating the detriment to the Employer's interests. His repeated failure to properly record interactions with citizens during traffic stops, and inaccurate and incomplete traffic stop reporting, impaired the effective law enforcement work of the State Police in search cases.

Appellant's remaining offense of carelessly, imprudently and unsuccessfully attempting to drive his vehicle in dangerous driving conditions to a site where he could track a suspect is of minor significance in evaluating whether just cause existed for his dismissal. This was not a "straw that broke the camel's back" incident. Rather, it placed more weight on the back that was already broken by his other offenses.

Appellant's offenses had a significant adverse impact on his ability to perform at a satisfactory level. His ability to adequately perform the drug detection work, for which he demonstrated a commitment and passion, was substantially undermined by his failure to adhere to proper search policies and the orders of his supervisors. The ironic result was a weakening of effective law enforcement in this area rather than a strengthening that would have resulted if he acted responsibly and reasonably.

His failings in this regard also damaged supervisors' confidence in his ability to perform assigned duties. Their explicit efforts to improve his performance in search cases and direct him accordingly were met with resistance and disobedience of orders on his part. This understandably resulted in supervisors being frustrated with him and doubtful that he would exercise his police authority appropriately and respond to their supervision.

Appellant had fair notice of the rules that he violated in committing his offenses. He was responsible for adhering to directives, policies and rules of conduct which governed the State Police. He knew or should have known that violating these requirements was prohibited. An employee who knows or should have known that certain behavior is prohibited and subject to discipline has fair notice of the possibility of dismissal. Grievance of Towle, 164 Vt. 145, 150 (1995). Grievance of Gorruso, 150 Vt. 139, 148 (1988). As detailed in the discussion above on whether the charges against Appellant have been established, Appellant's proven offenses

violated directives, policies and rules of conduct of which he was aware. He should have known he could be disciplined if he violated them.

Appellant's past work and disciplinary record is the sole factor which weighs in his favor in determining the legitimacy of his dismissal. He had no previous discipline and had a good performance record for his short tenure as a state trooper. It is most notable that his supervisors consistently commended him on his arrests, consent searches and drug interdiction work up until the incidents at question in this case came to light. It is concerning that Commissioner Flynn did not review Appellant's performance evaluations before deciding to dismiss him. An appointing authority should review an employee's work record in deciding what disciplinary action to take in a case. Nonetheless, we conclude under all the circumstances of this case that this failure by the Commissioner did not ultimately affect the legitimacy of the disciplinary action which he imposed.

The consideration of the factor examining the consistency of the penalty imposed on Appellant, compared to other employees committing similar offenses, does not aid Appellant's cause. Appellant directs our attention to some of the actions of other officers that were involved in the traffic stops for which he was disciplined. This comparison is not fitting. Appellant was the lead officer in the traffic stops and primarily responsible for what occurred. The other officers were there to back him up and support him. They did not have full knowledge of what had occurred prior to arriving at the scene and followed Appellant's lead. Also, the evidence does not indicate the other employees committed offenses that approached those committed by Appellant. Appellant also has not demonstrated that state police officers in incidents other than the ones for which he was disciplined received penalties for their offenses which were inconsistent with the discipline imposed on him.

We further conclude that the penalty of dismissal is consistent with the table of penalties set forth in the Employer's Code of Conduct. In so holding, we note that the circumstances of this case are unusual because so many incidents were bundled and considered together by Commissioner Flynn. As discussed above, it was reasonable for him to review and consider all the incidents together since the investigations were completed close in time and placed Appellant's actions in each case in context. Given the totality of the incidents and crediting only the proven charges against Appellant, the penalty of dismissal was consistent with the table of penalties set forth in the Code of Conduct.

Appellant has not demonstrated a strong potential for rehabilitation. Appellant's supervisors recognized his deficiencies in failing to adhere to department policies and constitutional standards in conducting searches, and they put into place remedial measures to help him address his shortcomings. Appellant did not follow these measures. Instead, he repeatedly disobeyed the orders of his supervisors and proceeded contrary to the remedial measures. His demonstrated continuing bad judgment and disregard of supervisory authority made him a poor candidate for rehabilitation.

The Employer reasonably concluded that alternative sanctions less than dismissal were not adequate to deter Appellant from engaging in similar misconduct in the future. Appellant's disregard of search policies protecting constitutional rights, abuse of authority, conduct unbecoming an officer, disobedience of supervisory orders, repeated poor judgment, and repeated failure to properly record interactions with citizens during traffic stops and inaccurate and incomplete reporting of these stops, justified his dismissal rather than a lesser disciplinary action. The Employer established that just cause existed for Appellant's dismissal due to the

gross misconduct, misconduct and gross neglect engaged in by Appellant with respect to the proven charges against him.

/s/ Gary F. Karnedy

Gary F. Karnedy, Chairperson

/s/ Richard W. Park

Richard W. Park

CONCURRING OPINION

I concur with all aspects of the Majority Opinion except for my colleagues' conclusion concerning whether the Employer imposed discipline in a timely manner. Article 14, Section 2(b), of the Contract provides:

> Disciplinary proceedings shall be instituted within a reasonable time after the violation of the Code of Conduct occurred or was discovered and disciplinary action shall be taken within a reasonable time after disciplinary charges have been proved or admitted. Non-criminal internal investigations should normally be completed within thirty (30) work days, and notice of disposition should normally be given within (30) work days after completion of the investigation.

I conclude, contrary to my fellow Board members, that there was a due process violation of this contract provision. In applying the applicable case precedents discussed in the Majority Opinion, I believe there was a violation of the contractual requirements that disciplinary proceedings shall be instituted within a reasonable time after the violation of the Code of Conduct occurred or was discovered, and that disciplinary action shall be taken within a reasonable time after disciplinary charges have been proved or admitted.

The Employer should have been aware that Appellant committed possible violations of the Code of Conduct during the July 24, 2013, and April 3, 2014, traffic stops at the latest when

the April 2014 civil lawsuit stemming from these two incidents was filed against Appellant. The Employer has presented no evidence explaining why it did not initiate an initial investigation of the two incidents resulting in the civil lawsuit until more than five months after the lawsuit was filed. This initial delay was unreasonable.

Once the Employer initiated the investigation of these two incidents, the time it took to complete the investigation was unreasonable. Given the complexity of the investigation, it is understandable that the investigation would extend beyond the 30 days set forth in the Contract for normally completing an investigation. However, the approximate four months it took to complete the investigation was not reasonable. A contrary ruling makes meaningless the contractual provisions on the timeliness of investigations.

I conclude likewise with respect to the investigations of the November 29, 2014, and January 7, 2015, traffic stops. The investigations took approximately three months, and two and one-half months, respectively. These were unreasonable in length given the contractual provisions on timeliness of investigations. The Employer is required to make timeliness of investigations a priority given its contractual commitment to do so.

Also, the time it took Commissioner Flynn to impose disciplinary action was unreasonable. Again, given the complexity of the case materials involving five incidents which he had to review, it is understandable that the disposition would extend beyond the normal time of 30 days after the completion of investigation set forth in the Contract. However, the preferral of charges by Commissioner of Flynn approximately five months after completion of the investigation, and the ultimate dismissal occurring five months after preferral of charges, are well outside the bounds of reasonableness mandated by the Contract's timeliness provisions.

The timelines provided for disciplinary proceedings in Article 14, Section 2(b), seem not to have been considered or understood by the Employer, Indeed, they were ignored. Lieutenant Ingrid Jonas, Director of the Internal Affairs Unit, testified that she was not aware of the provisions of the collective bargaining agreement regarding the timeliness of disciplinary investigations. Also, Commissioner Flynn could not define in any meaningful way "reasonable time" as it relates to Article 14, Section 2(b).

The delay caused by the Employer in this case was more costly than it had to be in terms of administrative leave with pay and most likely other administrative costs as well. The constitutional rights of the public also may have been put at risk by allowing Appellant to remain on the job for so long. It took more than two years from the first motor vehicle stop at issue herein to terminate Appellant's employment.

Nonetheless, my conclusion that the timeliness provisions of the Contract were violated does not provide a basis to impact the validity of the disciplinary action since, as detailed in the Majority Opinion, Appellant has not established prejudice under the circumstances of this case. This should not provide much comfort to the Employer. The Employer operated at its own peril due to the excessive amount of time and public monies exhibited in this case and skirted on the edge of having the dismissal reversed due to prejudice to Appellant, a conclusion that could have been reached under different circumstances.

/s/ Edward W. Clark, Jr.

Edward W. Clark, Jr.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Appeal of Lewis Hatch and the Vermont Troopers Association is dismissed.

Dated this 9th day of August, 2017, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Gary F. Karnedy

Gary F. Karnedy.

/s/ Richard W. Park

Richard W. Park

/s/ Edward W. Clark, Jr.

Edward W. Clark, Jr.