State of New Hampshire

**PERSONNEL APPEALS BOARD**
**25** Capitol Street
Concord, New Hampshire 03301
**Telephone (603) 271-3261**

# APPEAL OF ROBERT PROCHILO

## Docket #96-T-14

## Division of State Police - Department of Safety

**September** 19, 1996

The New Hampshire Personnel Appeals Board (Bennett, Johnson and Rule) met on May 8, May 22, June 18, and June 19, 1996[1], under the authority of RSA 21-I:58, to hear the appeal of Robert Prochilo, a former employee of the Department of Safety, Division of State Police. Attorney J. Joseph McKittrick appeared on the appellant's behalf. Sheri J. Kelloway-Martin, Esq., appeared on behalf of the Division of State Police. Mr. Prochilo was appealing his separation from employment as a State Police Corporal, effective November 15, 1996, when he tendered his resignation following notification that he was to be discharged under the provision of Per 1001.08 (b) for violation of three posted and published State Police Rules and Regulations governing the conduct of sworn members of the Division of State Police.

In earlier proceedings, the State had moved for dismissal of Mr. Prochilo's appeal, arguing that the appellant waived his rights to appeal when he opted to resign in lieu of dismissal. The State argued that before accepting the appellant's resignation, in compliance with Per 1001.08 (h) of the Rules of the Division of Personnel, the appellant had reviewed and considered the evidence used to support the decision to dismiss him, and that he had certified in writing his understanding that a resignation given in lieu of dismissal for cause could not be appealed to this Board.

[1] The record in this matter remained open until July 10, 1996, to allow the parties to submit additional written evidence, closing arguments, and requests for findings of fact and rulings of law.


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The appellant had argued that although he did tender a written resignation, he had done so only after being informed of the State Police Director's decision to discharge him for cause. He argued that because the termination decision had already been made, his subsequent resignation was invalid and could have had no practical effect. He also argued that his resignation should have been considered, invalid because he was under extreme psychological and emotional duress when he resigned, and was therefore unable to understand the consequences of his actions at the time. In support of that argument, the appellant had offered a Memorandum of Law in Support of Petitioner's Objection to the State's Motion to Dismiss. An undated Psychological Examination Report, signed by Ronald Longpre, Psy.D., was attached thereto.

In his report, Dr. Longpre indicated that the appellant had been referred to him for a Psychological Examination by Attorney McKittrick. He described the purpose of the examination as two-fold: to assess Mr. Prochilo's state of mind at the time he resigned from the New Hampshire State Police, and to determine whether the resignation was a rational act for which he understood the consequences of his actions.

Dr. Longpre reported that he had examined Mr. Prochilo on December 19,1995, and December 29, 1995. He detailed his use of the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) and Mental Status Exam, and summarized his 2 clinical interviews with Mr. Prochilo and his interview of the appellant's wife. He offered his opinion that, "Mr. Prochilo's state of mind at the time he signed the resignation letter of 11/10/95 was such that the act was not the result of a rational decision and not an act for which he, at the time, could appreciate the consequences." On the basis of that report, Attorney McKittrick argued that the Board had subject matter jurisdiction to hear Mr. Prochilo's appeal.

After hearing oral argument on that motion and reviewing Dr. Longpre's assessment, the Board denied the State's Motion to Dismiss. (See: Board's Order on Appellee's Motion to Dismiss, May 15, 1996) In so doing, the Board made a preliminary finding that, "...the appellant ha[d] made a

sufficient showing that his decision to resign was not a rational act to warrant a hearing [on the merits of his appeal]." However, the Board also noted that its ruling did not dictate the outcome of the case after receipt of evidence, nor did it preclude the parties from offering additional evidence on the appellant's state of mind, or his ability to have made a rational decision when he resigned in lieu of dismissal. The Board also advised the parties that Appellee's Motion to Dismiss could be renewed at any time that the record appeared to contain sufficient evidence to support it.

On June 10, 1996, Ms. Kelloway-Martin filed a renewed Motion to Dismiss. Attached thereto was the affidavit and Curriculum Vitae of Dr. Albert Drukteinis, MD., JD, whom the Department of Safety had selected to perform an independent psychiatric evaluation of the appellant. In his affidavit, Dr. Drukteinis stated, in part, "...for a psychiatric or psychological opinion to conclude that [Mr. Prochilo] was not rational requires the presence of a diagnosable mental disorder which affects thought processes, creates disorientation or confusion to one's surroundings, or otherwise distorts reality. The psychological examination [by Dr. Longpre] which has been offered does not identify such a disorder." He noted that he had not been able to examine the appellant, and therefore could not offer an opinion on Mr. Prochilo's state of mind, or ability to make a rational decision, without a personal interview and psychological testing.[2] The Board took the renewed motion under advisement and proceeded to the hearing on the merits of Mr. Prochilo's appeal.

At the close of testimony on June 19th, the Board agreed to allow the parties to submit reports from their respective mental health experts on the question of Mr. Prochilo's state of mind at the time of his separation from service, and to address the issue of whether or not his resignation in lieu of dismissal was the product of a rational act.[3] The parties were directed to submit those reports, along with any closing arguments and any proposed findings of fact and rulings of law, by the close of business on July 10, 1996.

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[2] Dr. Drukteinis was able at a later date to perform an extensive psychiatric examination of Mr. Prochilo.

[3] The parties had intended to offer expert testimony from their respective mental health professionals. However, in order to avoid the necessity of scheduling another day of hearing, and delaying the ultimate disposition of this appeal, the parties agreed to submit their experts' testimony in writing.

Per-A 202.04 of the Rules of the Personnel Appeals Board allows the parties to file requests for findings of fact and rulings of law. However, "Such requests shall not be unnecessarily numerous." [Per-A 202.04(c)] Having reviewed the parties' submissions, the Board voted to issue its own findings of fact and rulings of law. To the extent that the parties' requests are consistent with the order below, they are granted. Otherwise, they are denied.

Findings of Fact[4]

On September 10, 1995, Mr. Prochilo participated in a bus trip to Foxboro Stadium in Massachusetts, to attend a Patriots game with some State Police officers, Department of Transportation employees, local law enforcement personnel and construction company employees and their friends and relatives. The bus trip was organized by Costas Papachristos, an employee of the .Department of Transportation, who had organized a similar outing the previous year. The twenty-eight participants paid approximately $100 a piece for the cost of the bus, game tickets, food and beverages, including approximately 20 cases of beer.

On the morning of the trip, the appellant drove his wife's car to pick up Troopers Dinwoodie and Jepson at Trooper Dinwoodie's home. The three then traveled together to Bedford to pick up the bus. When Mr. Prochilo boarded the bus in Bedford, New Hampshire, he was armed with his service weapon.[5] Almost immediately after boarding the bus, he and other participants began drinking. After consuming several cans of beer, Mr. Prochilo walked down the aisle of the bus passing out cans of beer to the other men on the bus. As he was standing near Kurt West, a Continental Paving Company foreman, Corporal Richard Farrell made a remark about Mr. West working for a company that disliked the State Police. When Mr. Prochilo replied that Continental worked well with the troopers, Cpl. Farrell insisted that Continental was hiring sheriffs instead of

[4] The Board found the documentary evidence to be the most reliable. The transcribed version of Mr. Prochilo's interview with State Police investigators was first in time, and most contemporary.
[5] The record reflects that Mr. Prochilo usually carried a firearm on his person, and that he had valid licenses from Massachusetts and New Hampshire to carry a concealed weapon.

State Troopers to work construction details.[6] In his interview with State Police Investigators, Mr. Prochilo reported that he then sat down beside Mr. West, put his left arm around Mr. West's shoulder and "...took [his] gun out and brought it across and pointed it at him....in saying something like Continental is a good company and they wouldn't hire sheriffs." As he was returning the weapon to its holster, Cpl. Farrell told him to "put that god damned thing away!" Mr. West testified that he was very surprised that Mr. Prochilo was armed and had pointed the weapon at him, but he did not feel frightened or threatened.

After arriving at the game, Mr. Prochilo helped prepare food at the tailgate cookout which had been organized as part of the trip. After eating, he and the others attended the game. The group then re-boarded the bus and were escorted by a Massachusetts State Police Officer to the State Police Barracks in Foxboro for a post-game cookout. The group remained at the barracks for approximately two hours before boarding the bus for the return trip to New Hampshire.

On the return trip, Mr. Prochilo began telling jokes and making ethnic slurs directed at Jay Levine, a Department of Transportation employee, over the bus' public address system. Mr. Levine responded with unflattering remarks about Mr. Prochilo's wife. At some point in the exchange, Mr. Prochilo's comments included "burn the Jew." Mr. Levine did not consider the remarks threatening, although he was offended by them. While at the front of the bus, Mr. Prochilo also began pestering the bus driver, grabbing him in the area of the upper thigh. The bus drive, Rowdy Dow, told him to get away from him.

As the trip progressed, Mr. Prochilo became involved in "sexual horseplay" with Trooper Daniel Roche, daring him to give him a "blow job." Mr. Roche commented that the appellant did not have "the balls to take it out." Mr. Prochilo opened his pants and exposed his penis. Mr. Roche took hold of the appellant's penis and briefly bent down, feigning oral sex. Mr. Prochilo laughed and subsequently announced that he had been violated as he walked to the rear of the bus.

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[6] State Police officers frequently earn substantial amounts of additional compensation by working construction details in their off-duty hours.

After the day's outing, when the group returned to Bedford, Troopers Dinwoodie and Jepson believed that the appellant was sufficiently under the influence of alcohol that he should not be driving. Trooper Dinwoodie drove Mrs. Prochilo's car. Trooper Jepson sat in the front seat and the appellant sat in the back. They proceeded to Trooper Dinwoodie's house.

When the three arrived at the Dinwoodie residence, the appellant was left in the back seat of the car while Troopers Dinwoodie and Jepson went inside the house to make plans how to get Mr. Prochilo home. They came out to find that Mr. Prochilo had driven away. Concerned about the appellant's ability to drive home safely, Trooper Jepson followed the route he assumed Mr. Prochilo to have taken, but he did not see the appellant's car on the road. He then proceeded to his own home.

Within several days of the bus trip, rumors about the bus trip began circulating throughout the law enforcement community, and the community at large. The Division initiated an internal investigation, and upon its completion, charged Mr. Prochilo with violation of 1.3.1 (A), 1.3.2 (A), 1.4.4 (A), and 1.5.1 (A) of the Rules and Regulations of the Division of State Police. (See below.) Pursuant to Division of State Police Rules and Regulations, the Director of the State Police then convened a Disciplinary Hearing Board[7] to review the evidence obtained during the investigation and to make recommendations for disposition of the charges against the appellant. The Disciplinary Hearing Board was also responsible for recommending appropriate disciplinary action if the charges were sustained.

The Disciplinary Hearing Board unanimously voted to sustain Charge #1 that Mr. Prochilo violated 1.3.1 (A) - Laws, 1.3.2 (A) - Rules and Regulations, and 1.5.1 (A) - Personal Behavior. The board found that after returning from the football outing, while in a highly intoxicated state, Mr. Prochilo drove his vehicle from a fellow trooper's home in Weare, NH, to his own home in Antrim, NH.

[7] The members of the Disciplinary Hearing Board were Maj. Thomas F. Kennedy, Jr., Capt. Mark E. Furlone, Cpl. Susan Forey, Cpl. Patrick Poirier, Cpl. John LeLacheur.

The Disciplinary Complaint charged that Mr. Prochilo's actions violated the laws of the State of New Hampshire, and constituted a serious departure from the standards of conduct expected of a State Police employee. On the basis of Charge #1, the hearing board recommended that Mr. Prochilo be dismissed.

The Disciplinary Hearing Board unanimously voted to sustain Charge #2 that Mr. Prochilo violated 1.3.1 **(A)** - Laws, 1.3.2 **(A)** - Rules and Regulations, and 1.4.4 **(A)** - Use of Weapons. The board found that while he was in a highly intoxicated state, Mr. Prochilo removed his loaded service weapon fi-om a holster on his person and pointed it at close range at Kurt West, a Continental Paving Company employee. The hearing board found that Mr. Prochilo had no legal justification to handle the weapon, and that his handling of the weapon was careless and imprudent. The board recommended that Mr. Prochilo be dismissed for that conduct.

The Disciplinary Hearing Board unanimously voted to sustain Charge #3 that Mr. Prochilo violated 1.5.1 **(A)** - Personal Behavior. The board found that Mr. Prochilo was in a highly intoxicated state on the bus ride back to New Hampshire and that he made offensive remarks about the religious persuasion of another trip participant over the public address system on the bus. The board also found that Mr. Prochilo engaged in a verbal exchange with Trooper Daniel Roche about a "blow job," that Mr. Prochilo removed his penis from his trousers and participated in imitating oral sex with Mr. Roche. The board also found that during the bus ride home, Mr. Prochilo grabbed the civilian bus driver in the area of his genitals while he was driving the bus. The hearing board found that Mr. Prochilo's behavior reflected discredit upon him as a member of the State Police, and brought the Division of State Police into disrepute. On the basis of Charge #3, the hearing board recommended that Mr. Prochilo be demoted and suspended for a period in excess of 10 days.

The hearing board also recommended that the Director of State Police accept a resignation in lieu of dismissal from the appellant. In so doing, the hearing board concluded that Mr. Prochilo had been honest and cooperative throughout the investigation, and believed that his prior record of service should be taken into consideration in determining the appropriate discipline. The hearing board also

was aware of the personal difficulties which Mr. Prochilo was experiencing at the time of the incident.

Col. Presby, then Director of State Police, received the disciplinary hearing board's findings and recommendations at a "final disciplinary hearing," in the Colonel's office on November 15, 1995. Maj. Thomas Kennedy reported the Disciplinary Hearing Board's findings on each of the charges, noting that the board had voted unanimously to sustain each of the three charged violations. Capt. Barthelmas summarized his unit's investigation of the incident(s), and Mr. Prochilo was allowed to respond. He indicated that he understood and agreed with the charges, but attributed his behavior to his use of alcohol during the day. Maj. Kennedy told those present that the Disciplinary Hearing Board had recommended dismissal for the first charge, dismissal for the second charge, and demotion and suspension in excess of 10 days for the third charge. He also noted that the Disciplinary Hearing Board had recommended that Mr. Prochilo should be given the opportunity to resign in lieu of dismissal.

Col. Presby advised Mr. Prochilo that he had decided to accept the Board's recommendation to sustain all the charges. He informed Mr. Prochilo that he would be dismissed from service. Mr. Prochilo then accompanied Maj. Kennedy to his office where he was handed a pre-typed resignation letter. Maj. Kennedy explained that Col. Presby did not have to agree to accept the resignation and could, instead, decide to formally dismiss Mr. Prochilo. He also explained that if Mr. Prochilo elected to resign in lieu of dismissal, he would waive any right to appeal. Mr. Prochilo said he didn't know what to do. Maj. Kennedy told him he could have five minutes or so to contact his attorney.

The appellant telephoned his attorney's office for advice, but was informed that he would have to make the decision whether or not to resign on his own. However, he was advised that a resignation given in lieu of dismissal was not appealable to the Board. The appellant then called his wife, who cried and told him that she couldn't take it any more. Claiming that he believed that he might lose his wife and children if he were to challenge the termination decision, Mr. Prochilo decided to

resign in lieu of termination. He signed the letter which had been prepared for him by the Division of State Police, certifying his understanding that a resignation given in lieu of dismissal would not be appealable to this Board.

The Position of the Parties

The record reflects that when the bus trip took place, both of Mr. Prochilo's parents were seriously ill. In addition to working his regular assigned shift, and working off-duty construction details, Mr. Prochilo was also traveling almost daily to Massachusetts to visit his parents in the hospital, as well as trying to keep their business, a small garage, running. Mr. McKittrick argued that as a result, Mr. Prochilo had been overwhelmed by personal stress prior to the September 10th trip to Foxboro Stadium, and that these factors contributed to the appellant's uncharacteristic behavior on the day of the trip.

Mr. McKittrick asked the Board to find that the appellant's resignation was invalid because he had already received verbal notice of his dismissal when he was informed that he might be permitted to resign instead. He asserted that an agreement to resign in lieu of dismissal should be considered contractual in nature, wherein both parties are expected to obtain a benefit from the agreement. He argued that in Mr. Prochilo's case, the State benefited by being rid of the appellant without the necessity of defending the termination decision on appeal. He argued that on the other hand, Mr. Prochilo gained no advantage by resigning in lieu of dismissal. He noted that there was no offer to expunge any damaging information from the appellant's file. He also said that the Division of State Police failed to inform the appellant that the Police Standards and Training Council, once advised of the resignation in lieu of discharge, would likely revoke the appellant's police certification.[8]

[8] The Board does not rule that Per 1001.08(h) prohibits resignation in lieu of termination after the termination decision has been announced to the employee, or even implemented, in every case. While a resignation in lieu of dismissal may have benefited the state, it may have posed a worse option for the appellant. Nonetheless, the Board believes that a resignation need only be voluntary in order to pass muster on review. The Board does not rule that the agency had any obligation to advise the appellant regarding action which may be taken by the Police Standards and Training Council with respect to his police certification, whether under the resignation or termination scenarios.

The appellant admitted that he had engaged in conduct on the Foxboro trip that was "foolish and evidenced poor judgment." However, he argued that any offenses he may have committed occurred while he was off-duty and out of uniform. He also argued that none of his actions were so egregious as to warrant his immediate discharge without prior warning.

The appellant testified that he had been "overly honest" with investigators. He argued that it was only because he had been so honest and forthright during the course of the investigation that the State Police became aware of certain facts, including the handgun incident, which was later included in the charges supporting his termination.

Mr. Prochilo asserted that he was not responsible for bringing the Division of State Police into disrepute, and that any discredit or embarrassment which the Division suffered was the direct result of rumors circulated after the trip by a Department of Transportation employee. He also argued that before the Foxboro incident, he had a performance record free of any formal discipline, and that his prior service should have been given greater weight in the decision whether or not to discipline him. He argued that the Director of State Police also failed to take the appellant's personal circumstances into consideration before acting on the Disciplinary Hearing Board's recommendations. Finally, he suggested that while some discipline may have been appropriate, termination was too severe a punishment for the nature of the alleged infractions.

The State argued that the resignation was valid on its face. Ms. Kelloway-Martin stated that the Division of State Police had complied with the Rules of the Division of Personnel by apprising the appellant of all the charges against him, reviewing with him the evidence supporting his dismissal, and allowing him the opportunity to resign in lieu of dismissal. She argued that while it was clear that the appellant was faced with two equally unpleasant options, they were options nonetheless. She argued that the rule clearly precludes an employee from appealing a resignation simply because he or she has a change of heart.

Ms. Kelloway-Martin argued that even if the Board were to find that Mr. Prochilo's resignation was invalid, there was ample evidence to support dismissing the appellant without prior warning. She asked the Board to find that Mr. Prochilo's conduct on September 10, 1995, violated the Rules and Regulations of the Division of State Police, subjecting him to disciplinary action, up to and including his termination from employment.

Rulings of Law

1. Section 1.5.1 A. of the Rules and Regulations of the Division of State Police provides that, "Each Sworn Division Member shall, while on or off duty, conduct himself in a manner that will reflect credit on himself and the Division of State Police. Conduct unbecoming an officer shall include that which tends to bring the Division of State Police into disrepute or reflects discredit upon the officer as a member of the Division of State Police or which tends to impair the operation or efficiency of the State Police or the employee."
2. Section 1.3.1 A. of the Rules and Regulations of the Division of State police provides that, "All members of the Division of State Police are required to obey all laws of the United States of America, the State of New Hampshire, and the political subdivision thereof, to which they are subject."
3. Section 1.4.4 (A) of the Rules and Regulations of the Division of State Police provides that, "Sworn Division Members shall not use or handle weapons in a careless or imprudent manner."
4. Section 1.8.5 A. 4. f) of the Rules and Regulations of the Division of State Police provides that, "...After a hearing, the Director [of State Police] may reprimand the employee or, with the concurrence of the Commissioner, take the following action against the employee: ...dismissal."
5. Per 1001.08 (b) of the Rules of the Division of Personnel provides that, "In cases such as, but not necessarily limited to, the following, the seriousness of the offenses may vary. Therefore, in some instances, immediate discharge without warning may be warranted while in other cases one written warning prior to discharge may be warranted..."
6. Per 1001.08 (h) of the Rules of the Division of Personnel provides that an appointing authority may allow an employee to resign in lieu of dismissal provided that the employee makes a written

request to resign in lieu of dismissal, "…certifies that the resignation was given after review and consideration of the evidence used to support the decision to dismiss the employee; and the employee certifies in writing the employee's understanding that a resignation given in lieu of dismissal for cause may not be resolved through the settlement of disputes, pursuant to Per 202, or by appeal to the personnel appeals board pursuant to the provisions of RSA 21-I:58."

7. Per 202.04 of the Rules of the Division of Personnel provides, in part, "The following matters shall not be subject to settlement or appeal under Part Per 202. …(i) Resignation, unless the employee can demonstrate by a preponderance of the evidence that the resignation was made under extreme duress.[9]"

Jurisdiction

Per 202.04 lists resignation as an invalid basis for appeal, unless the employee can demonstrate by a preponderance of the evidence that the resignation was given under extreme duress. While it may seem reasonable to infer that such resignations are appealable only when the duress is attributable to the employer, as the State has suggested, the rule carries no such requirement. Therefore, the Board believes that in a case such as this, where the appellant has made a prima facie showing that his resignation was not entirely voluntary, he must be permitted the opportunity at a hearing to provide evidence on that point. Otherwise, the appellant would not have a reasonable opportunity to sustain his burden of proof.

On the issue of the appellant's resignation, the evidence reflects that the appellant and his wife independently made efforts to keep the appellant from being discharged from the Division of State Police. The appellant tried to plead his case directly with Col. Presby, in hopes of avoiding the Disciplinary Hearing Board procedure. Mrs. Prochilo tried to persuade Col. Presby to intercede during the second day of the Disciplinary Hearing Board, appealing to him on a personal level,

[9] Black's Law Dictionary (West, 6th edition) defines duress, in part, as "Any unlawful threat or coercion used by a person to induce another to act (or to refrain from acting) in a manner he or she otherwise would not (or would). Subjecting person to improper pressure which overcomes his will and coerces him to comply with demand to which he would not yield if acting as free agent. … Application of such pressure or constraint as compels man to go against his will, and takes away his free agency, destroying power of refusing to comply with unjust demands of another…"

explaining the difficulties her husband had been experiencing because of his parents' health. It appears that neither the appellant nor his wife had contemplated his resignation except in the context of pending disciplinary action. Therefore, if the Board were to find that the underlying basis for the dismissal decision was improper, the Board would retain the authority to vacate both the termination decision and the resignation which followed.

Decision and Order

In his appeal to this Board, Mr. Prochilo advanced the theory that the very serious nature of the charges against him were largely the result of his having been "overly honest" in his reports to Lieutenant Sloper and Investigators Pickering and Breen. That characterization, in this Board's view, is a poor excuse for sworn testimony which contradicts the appellant's earlier statements to investigators.

In his statement to investigators, Mr. Prochilo said that he had been drinking heavily throughout the day and had no idea how many beers he may have consumed. However, in testimony before this Board, Mr. Prochilo had a very clear recollection of how many beers he had consumed and when he had consumed them. Mr. Prochilo informed investigators that because he was in a highly intoxicated state after the football game and cookout, he had no recollection of the bus ride home from the Massachusetts State Police Barracks in Foxboro, to Bedford. However, in testimony before this Board, Mr. Prochilo claimed that he recalled the entire trip, including the "blow job" incident with Trooper Roche. Mr. Prochilo told investigators that when he drove home to Antrim, he was "highly intoxicated." He said that although he remembered leaving David Dinwoodie's driveway, he had no further recollection of the ride home until the time that he arrived in his own driveway. However, in his testimony before this Board, he had a clear, detailed recollection of the route he drove to get home, traffic conditions on the road, and whether or not he had encountered any police vehicles along the way.

Throughout his appeal to this Board, Mr. Prochilo described his behavior on September 10, 1995, as "foolish" and somewhat "stupid." He argued that as regrettable as his conduct may have been, the seriousness of the charged offenses had been blown out of proportion after the media picked up on rumors about the bus trip. Mr. Prochilo argued that the Division of State Police should have realized that his behavior was simply an uncharacteristic reaction to too much stress, too much fatigue and too much beer. He also suggested that any disrepute which the Division of State Police suffered as a result of his behavior was actually the fault of those who circulated unfounded reports of more serious misconduct on the trip. The Board does not agree.

The fact that a veteran law enforcement officer would "joke" with a loaded weapon under any circumstances, particularly where the use of alcohol was involved, is almost incomprehensible. Mr. Prochilo's conduct was not merely foolish or stupid, as he characterized it. It reflected dangerously poor judgment, and a reckless disregard for the State Police Rules and Regulations regarding the handling of firearms. Although Mr. Prochilo went to great lengths explaining that his fingers were outside the trigger guard when he pointed his service weapon at Mr. West, and that he had held the weapon in a manner which would not have allowed it to discharge, he also told investigators that if the weapon had discharged, the projectile could have struck Mr. West in the area of his ribcage.

There also is strong evidence to suggest that Mr. Prochilo was impaired when he drove from Trooper Dinwoodie's home to his own on the evening of the bus trip. Although Dr. Leipziger, the appellant's expert witness, testified that in his opinion Mr. Prochilo's blood alcohol content would not have been more than .02 or .03 by the time he drove home, the appellant himself told State Police investigators that he was highly intoxicated when he left Trooper Dinwoodie's house. That testimony was corroborated by Trooper Jepson's and Trooper Dinwoodie's statements to investigators. The Board found that the appellant, who described himself at the time as stressed, exhausted, and unaccustomed to consuming any substantial amount of alcohol, exercised dangerously poor judgment by driving himself home when he believed himself to be intoxicated, particularly when there was someone else available to drive him instead.

The Board also is unwilling to accept Mr. Prochilo's contention that his sexual antics should be excused as an aberration, or that any embarrassment which the officers of the Division of State Police suffered as a result of his behavior should be blamed on those who circulated the story of the "blow job" rather than on those who participated in this inchoate sex act. The fact remains that Mr. Prochilo exposed himself in the presence of fellow officers and civilians, and allowed another officer to feign an act of fellatio with him. While the Board certainly will not endorse rumor-mongering, were it not for Mr. Prochilo's and Mr. Roche's conduct, there would have been little fodder for the rumor mill. Had this been the appellant's only act of misconduct, and had the public not become aware of his behavior, the Division of State Police might have imposed a lesser penalty.[10] Those, however, are not the facts in this instance.

Mr. Prochilo argued that his personal difficulties at the time of the incident, coupled with his lifetime desire to be a State Trooper, his length of service with the New Hampshire Division of State Police, and a record free of prior discipline should weigh heavily in favor of his reinstatement. Again, the Board does not agree. The Board does not believe that any of the circumstances described by the appellant provide sufficiently mitigating factors to warrant any particular leniency on the part of his employer or this Board.

Mr. Prochilo exhibited dangerously poor judgment as well as engaging in lewd behavior and conduct unbecoming an officer, thereby violating the Rules and Regulations of the Division of State Police. Having done so, he was subject to dismissal under the optional dismissal provisions of the Rules of the Division of Personnel.

The public has a right to expect that those persons who are sworn to enforce the law will respect and abide by that law. Instead, Mr. Prochilo has asked the Board to find that because he invested a lifetime becoming a member of such an "elite" corps, he is somehow entitled to a degree of immunity that few, if any, members of the general public could expect under similar

[10] The Disciplinary Hearing Board recommended that Mr. Prochilo should be demoted from Corporal and suspended for a period in excess of 10 days on this particular charge.

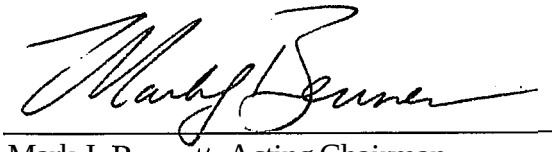
circumstances. The citizens of New Hampshire are entitled to demand that the members of the largest, most visible law enforcement agency in the State shall hold themselves to the highest possible legal, moral and ethical standards. Having failed to do so, Mr. Prochilo forfeited his place within that organization.

The Board found that the Division of State Police had sufficient evidence to warrant dismissing Mr. Prochilo, without prior warning, for violation of the Rules and Regulations of the Division of State Police, and for violation of Per 1001.08 (b) of the Rules of the Division of Personnel. The Board further found that when confronted with the evidence supporting his dismissal, the appellant elected to resign in lieu of dismissal.

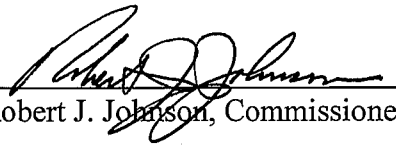
After Mr. Prochilo learned that the Disciplinary Hearing Board had sustained all the charges against him, that the Hearing Board had recommended his dismissal, and that the Director of State Police had decided to discharge him from his position, the appellant was given the opportunity to submit his resignation. He was allowed to consult with counsel and to speak with his wife before making the decision to resign or be discharged. He was advised by Maj. Kennedy, and by an attorney from the law offices of Wiggin and Nourie, that by resigning, he would waive his right to appeal the discharge decision. After speaking with his wife, the appellant was persuaded that the only way he could hope to preserve his marriage was to accept the Hearing Board's recommendations and resign his position.

In spite of his claim that the appellant was incapable of making a rational decision, the Board found Dr. Longpre s after-the-fact, reconstructive assessment of the appellant's state of mind to be inconsistent with the testimony and evidence as presented. Faced with two equally unpleasant options, the appellant made a rational, well-reasoned decision to resign in lieu of dismisal under the conditions set forth in Per 1001.08 (h) of the Rules of the Division of Personnel. Accordingly, the Board voted to dismiss Mr. Prochilo's appeal.

THE PERSONNEL APPEALS BOARD



Mark J. Bennett, Acting Chairman



Robert J. Johnson, Commissioner

Lisa A. Rule, Commissioner

cc: Virginia A. Larnberton, Director of Personnel

Sheri J. Kelloway-Martin, Esq., Department of Safety

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# State of New Hampshire

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***Appeal of Robert Prochilo***

***Docket #96-T-14***

***Division of State Police***

***Response to Appellant's Motion for Reconsideration and Appellee's Objection***

***January 31, 1997***

On October 16, 1996, the New Hampshire Personnel Appeals Board received the Appellant's Motion for Reconsideration of the Board's September 18, 1996, Decision in the above-referenced appeal. Appellee's Motion to Extend Time to File An Objection to Motion for Rehearing was received by the Board on October 17, 1996. Appellee's Objection to Motion for Reconsideration was then received on October 31, 1996.

Having considered both the Motion and Objection in conjunction with the Board's Decision in this matter, the Board voted unanimously to deny Appellant's Motion for Reconsideration. In so doing, the Board found that none of the grounds set forth in Appellant's Motion provide the basis for a finding that the Board's decision was either unlawful or unreasonable.

The Appellant argued that the Board failed to address due process issues associated with Col. Presby's communication with Disciplinary Hearing Board members before they had issued their recommendations. As noted in the Board's Decision on the merits of Mr. Prochilo's appeal, Section 1.8.5 B. of the Rules and Regulations of the Division of State Police allows the Director of the Division of State Police absolute discretion in determining when to convene a disciplinary hearing board, as well as full authority to accept or reject any or all of that board's findings and recommendations. Had these procedural issues had any substantive effect on the appellant's right to a fair hearing before this Board, the Board would have addressed them more specifically in its decision.



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Contrary to the Appellant's assertion, the Board also did not overlook Colonel Presby's testimony concerning the limits of his authority to dismiss a sworn member of the State Police, or the legal issue of whether the appellant could have been terminated without "the express consent of the Commissioner." Section 1.8.5 A. 4. F of the Rules and Regulations of the Division of State Police requires the Commissioner's "concurrence" in a decision to dismiss a sworn member of the Division of State Police, not his "express consent." If, in fact, the Commissioner did not concur with the dismissal decision, or the decision to allow Mr. Prochilo to resign from his position as a State Police Corporal, he had ample opportunity to overrule those decisions and correct the alleged procedural error. Evidence that Colonel Presby did not seek the Commissioner's approval is not tantamount to proof that the Commissioner of Safety did not concur with the disciplinary decision. Furthermore, the appellant failed to persuade the Board that immediate reinstatement would be the appropriate remedy for any procedural error which the Colonel may have committed.

Similarly, the Board did not overlook the direct testimony of Corporal Legranade. It simply gave more weight to the first hand observations by Troopers Dinwoodie and Jepson of the appellant's level of sobriety or intoxication immediately following his return to New Hampshire after the Foxboro trip. The Board considered Cpl. Legranade's testimony about the appellant's condition the day after the trip to be less significant than evidence concerning his condition when he drove home the night before.

The Board also did not fail to consider the appellant's claim 'chat numerous other similarly situated troopers were not terminated for their actions. In its decision on the merits of the appeal, the Board found that Mr. Prochilo exercised "...dangerously poor judgment, and a reckless disregard for the State police Rules and Regulations regarding the handling of firearms [Section 1.4.4 (A) of the Rules and Regulations of the Division of State Police]." (See Decision at page 14.) That conduct was sufficient to warrant his immediate termination without prior warning. The appointing authority should not be precluded from taking appropriate disciplinary measures simply because there is some evidence it may have failed to do so in the past.

The Board finds that the appellant waived any objection to the composition of the Board hearing his appeal. When the Board met on May 8, May 22, 1996, to hear Mr. Prochilo's appeal, it had already concluded the first two days of hearing in the Appeal of Daniel Roche. The names of those members of the Board scheduled to hear the case were a matter of public record, and the parties were given the opportunity to object to any of the member of the panel. Similarly, when the Board met on June 18 and June 19, 1996, for the conclusion of Mr. Prochilo's appeal, the Board had concluded the last two days of the Roche hearing (June 11 and June 12,1996). At no time prior to release of its decision in this matter did the appellant object to any member of the Board seated to hear his appeal, nor did he suggest that the Board would be unable to fairly and impartially decide his appeal.

The remainder of the arguments which the appellant has raised in support of his request for reconsideration are a restatement of the arguments which he raised in his hearing on the merits, and none of them provide sufficient grounds upon which to find that the Board's decision on the facts in evidence was either unreasonable or unlawful.

THE PERSONNEL APPEALS BOARD

Mark J. Bennett, Acting Chairman

Robert J. Johnson, Commissioner

Lisa A. Rule, Commissioner

cc: J. Joseph McKittrick, Esq.
Sheri J. Kelloway-Martin, Esq.
Virginia A. Lamberton, Director of Personnel