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THE SUPREME COURT OF NEW HAMPSHIRE

Personnel Appeals Board
No. 2005-592

APPEAL OF TRACY WATERMAN
(New Hampshire Personnel Appeals Board)

Argued: October 11, 2006
Opinion Issued: November 30, 2006

Donchess & Notinger, P.C., of Nashua (James W. Donchess on the brief and orally), for the petitioner.

Kelly A. Ayotte, attorney general (Nancy J. Smith, senior assistant attorney general, on the brief and orally), for the respondent.

DALIANIS, J. The petitioner, Tracy Waterman, appeals a decision of the New Hampshire Personnel Appeals Board (PAB) affirming her dismissal by the respondent, the New Hampshire Department of Safety, Division of State Police (Division), from her employment as a state trooper for willful insubordination because she refused to take a polygraph test. N. H. Admin. Rules, Per 1001.08(a)9. We affirm.

The PAB found on the record reflects the following facts. On August 29, 2003, Vicky Lamere, the wife of a state trooper, informed one of the petitioner's supervisors, Lieutenant Nedeau, that the petitioner had made threats against her supervisors. Lamere said that the petitioner had said that she did not know how she might react or what she might do if Nedeau or her other supervisor, Sergeant McCormack, yelled at her. The petitioner told Lamere

that she would "like to put a bullet in Lieutenant Nedeau's head" and "deck Sergeant McCormack."

The Division began an internal investigation of these allegations on September 3, 2003. Investigators interviewed several witnesses, including Lamere and the petitioner, who denied making any threats. The investigators found Lamere to be more credible than the petitioner, and, therefore, they recommended that the petitioner be ordered to submit to a polygraph examination. Colonel Gary Sloper, the Division director, authorized the investigators to conduct a polygraph test of the petitioner on September 15, 2003.

The petitioner arrived for the polygraph examination with her attorney and advised that she would not take the test. The investigating officer explained that her refusal could mean that she violated an order from Colonel Sloper and that she could receive discipline for this, up to and including dismissal. The petitioner indicated that she understood and still would not take the test.

In a September 18, 2003 memorandum, Colonel Sloper notified the petitioner of his intent to dismiss her from her employment as a state trooper because of willful insubordination for failing to take the polygraph examination as he had ordered. Colonel Sloper met with the petitioner and her attorney on September 22, 2003; her employment was terminated that day.

The petitioner appealed her termination to the PAB. The petitioner acknowledged that the Division's professional conduct standards authorized the use of polygraph examinations during internal investigations. Specifically, section 26-E.5.1 of those standards provides, in pertinent part:

During the course of internal affairs investigations, if conditions are such that certain investigatory procedures are appropriate, Division members may be compelled to provide specialized information or submit to testing or examinations. These procedures shall be specifically directed and narrowly related to the matter under investigation. . . . Examples of special investigative procedures which may be compelled during the course of an administrative internal affairs investigation include . . . polygraph examinations.

She further acknowledged that Colonel Sloper had ordered her to take a polygraph test and that she had refused. She also admitted that she was advised in the presence of counsel that her refusal to comply with Colonel Sloper's order could result in disciplinary action, which could include dismissal.

The petitioner urged the PAB to rule that her termination for refusing to take the polygraph test was unlawful because the test is unreliable and degrading and its results are inadmissible in court. She also argued that the order that she submit to the polygraph test was retaliatory. The PAB disagreed and upheld her termination. The petitioner filed a motion for rehearing, which the PAB denied.

This is an appeal from a filial decision of the PAB pursuant to RSA 21-I:58, II (2000), RSA 541:6 (1997) and Supreme Court Rule 10. The petitioner has the burden of demonstrating that the PAB's decision was clearly unreasonable or unlawful. RSA 541:13 (1997). The PAB's findings of fact are deemed to be prima facie lawful and reasonable. Id. We will affirm the decision unless we are satisfied, by a clear preponderance of the evidence before us, that it is unjust or unreasonable. See RSA 541:13; Appeal of Armaganian, 147 N.H. 158, 162 (2001).

Under Section 1.3.4 of the Division's professional standards of conduct, an employee is willfully insubordinate when he or she "deliberately and/or intentionally disobeys a lawful order." The petitioner contends that, contrary to the PAB's finding, she did not engage in willful insubordination because the order that she take the polygraph test was unlawful. The petitioner argues that the order was unlawful because: (1) it involved a polygraph test, which she contends is unreliable, unfair and degrading; and (2) the order was motivated by retaliation.

We first address whether the order was unlawful because it involved taking a polygraph test. Whether a police officer may be terminated for failing to take a polygraph test is an issue of first impression in New Hampshire. We therefore look to other jurisdictions for guidance. See Stateline Steel Erectors v. Shields, 150 N.H. 332, 334 (2003).

"[C]ourts have generally held that a public employer can require a policeman to submit to a polygraph test as part of an investigation of his conduct." D. Nagle, The Polygraph in the Workplace, 18 U. Rich. L. Rev. 43, 68 (1983); see also Annotation, Refusal to Submit to Polygraph Test, 15 A.L.R.4th 1207, 1209-18 (1982). "Courts have concluded that, since a police officer must be above suspicion of violation of the laws that he is sworn to enforce . . . and must perform his duty to investigate crime and maintain the public trust, questions concerning the propriety of his conduct must be resolved promptly." Nagle, supra at 68. "In furtherance of this objective, polygraph tests can be administered, and an officer's refusal to submit to such an examination can result in his dismissal." Id.

Thus, in Eshelinan v. Blubaum, 560 P.2d 1283, 1285 (Ariz. Ct. App. 1977), for instance, the court reasoned, "[T]he compulsory use of the polygraph during departmental investigations is consistent with the maintenance of a police or sheriff's department that is of the highest integrity and beyond suspicion." Therefore, the court ruled that a police officer may be ordered to submit to a polygraph test upon penalty of dismissal provided that there are reasonable grounds for demanding such a test, the answers are not used in any subsequent criminal prosecution, and the questions relate specifically and narrowly to the performance of the police officer's official duties. Eshelman, 560 P.2d at 1285-86; see also Roux v. New Orleans Police Department, 223 So. 2d 905, 912 (La. Ct. App. 1969) ('(While appellant's refusal to obey the order is not evidence of guilt or of knowledge of the identity of the guilty party, he may not be permitted to refuse to take the polygraph test in view of his sworn duty to cooperate in the investigation of crime.'), cert. denied, 397 U.S. 1008 (1970)).

While numerous courts, including this court, have ruled that polygraph test results are inadmissible as evidence of guilt or innocence in criminal trials, see State v. Ober, 126 N.H. 471, 471-72 (1985), courts have found that the unreliability of polygraph test results for these purposes does not negate their utility for other purposes. In City of Warrensville Heights v. Jennings, 569 N.E.2d 489, 492 (Ohio 1991), for instance, the court observed that polygraph tests "can be a useful tool in internal department investigations of police misconduct." At issue in Jennings was whether a police dispatcher's refusal to obey an order to take a polygraph constituted "just cause" for his dismissal, thus, making him ineligible for unemployment insurance benefits. Jennings, 569 N.E.2d at 491. The court ruled that because polygraph test results are reliable enough for some purposes, there was just-cause for the dispatcher's termination because he refused to take a polygraph after being ordered to do so. Id. at 492; see also Fichera v. State Personnel Board, 32 Cal. Rptr. 159, 164 (Ct. App. 1963) (observing in case involving investigation of officer misconduct, that a polygraph test "might have proved useful in limiting and channeling the investigation in this case"). But see Farmer v. City of Fort Lauderdale, 427 So. 2d 187, 190 (Fla.) ("[T]he possible investigative benefit of building a case upon the foundation of the results of a polygraph examination is too thin a reed to support a denial of a police officer's right to be subjected only to lawful and reasonable orders."), cert. denied, 464 U.S. 816 (1983); Kaske v. City of Rockford, 450 N.E.2d 314, 320 (Ill.) (recognizing that "a polygraph examination is . . . of some investigatory utility and value," but concluding that refusing to submit to polygraph test cannot be basis for disciplinary action against officer; to hold otherwise would be "inconsistent" with court's ruling that such test results are inadmissible in administrative hearings), cert. denied, 464 U.S. 960 (1983).

The Federal Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001-2009 (2000 & Supp. III), which prohibits many private sector employers from using polygraph tests for pre-employment screening or during

the course of employment, also appears to recognize that the polygraph test may be useful for some purposes. This act contains a limited exemption for ongoing investigations provided certain conditions are met, as well as an exemption for private employers whose primary business consists of providing security. 29.U.S.C. § 2006(d), (e)(2000).

"Although the superior officer has broad powers to order a polygraph examination, his request or order must still be reasonable in the view of most courts." Nagle, supra at 68-69; see Jennings, 569 N.E.2d at 494 (request to take polygraph test must be for a lawful reason). In Eshelman, 560 P.2d at 1286, the court found that there were reasonable grounds to require the officer to submit to a polygraph where the officer's credibility was in question. As the court explained: "[A] polygraph is always proper to verify statements made by law enforcement officers during the course of a departmental investigation." Id.; see Seattle Police Officers' Guild v. City of Seattle, 494 P.2d 485, 493 (Wash. 1972) (holding that where serious charges of crime and corruption have been levied against department and public has serious doubts about department's integrity and morality, it was permissible to request officers to submit to polygraph tests upon pain of dismissal).

Courts that have ruled that police officers may not be terminated for failing to submit to a polygraph test have done so for reasons that do not apply here. In the case upon which the petitioner relies, Stape v. Civil Service Commission of City of Philadelphia, 172 A.2d 161, 164 (Penn. 1961), "nowhere in the City Charter, the City Ordinances, the Civil Service Regulations, or the Police Department regulations [was] there a provision which authorize[d] the Police Commissioner or the Civil service Commission, expressly or by implication, to force a city employee to submit to a polygraph test." There was also no regulatory authority to require the police officers at issue in Molino v. Board of Public Safety of City of Torrington, 225 A.2d 805, 809 (Conn. 1966), to take polygraph tests..

By contrast, section 26-E.5.1(B)(6) of the Division's professional conduct standards expressly states that "Division members may be compelled to provide specialized information or submit to testing or examinations," which may include polygraph tests. Pursuant to this provision, any such testing or examination "shall be specifically directed and narrowly related to the matter under investigation."

Further, under section 26-E.5.1(B)(4), (5), before any interview of a Division member may take place, a so-called "Garrity Warning" must be given. See Garrity v. New Jersey, 385 U.S. 493 (1967). Such a warning informs the accused that the purpose of questioning is to assist in determining whether to impose administrative discipline. Even if the accused were to disclose during questioning information indicating that he may be guilty of criminal conduct, the warning explains that neither his "self-incriminating statements, nor the

fruits thereof' will be used against him in any criminal proceeding. The warning further states that if the accused refuses to answer questions or fails to give truthful answers, he will "be subject to disciplinary action, up to and including dismissal."

In light of the above discussion of the 'persuasive authority from other jurisdictions, we hold that an order made pursuant to the Division's professional conduct standards to require a Division member to take a polygraph test is a lawful order.

II

We next address whether the order at issue was unlawful because it was impermissibly motivated by retaliation. The petitioner asserts that Colonel Sloper ordered her to take the polygraph test to retaliate against her for filing a sex discrimination complaint against the Division. She observes that before she was ordered to do so, it had been eight years since the Division had ordered a trooper to take a polygraph test. She further contends that the Division did not order her to take a polygraph test until it knew that she would refuse to take one.

The PAB found that Colonel Sloper was not motivated by retaliation when he ordered the petitioner to take the polygraph test. The PAB credited Colonel Sloper's testimony that his primary concern was whether the petitioner had made threats of physical violence against her superiors. As Colonel Sloper testified: "[I]t was clear to me that the only one that could . . . really answer this truthfully was . . . [the petitioner], and it was clear to me that I had no other choice but to order her to submit to a polygraph and get these issues resolved." He explained that because Lamere did not work for the Division, he could not compel her to take a polygraph, but that he could compel the petitioner to do so. He also explained that, in his experience, it is generally not necessary to order an employee to take a polygraph because "usually there's an admission and one way or the other, it can be proved that they are being truthful or not. That wasn't the case here." Because there is evidence to support the PAB's finding, we uphold it. See RSA 541:13.

Having concluded that the order that the petitioner take the polygraph test was lawful, we affirm the PAB's determination that she engaged in willful insubordination.

Affirmed.

BRODERICK, C.J., and DUGGAN, GALWAY' and HICKS, JJ., concurred.

State of New Hampshire



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

APPEAL OF TRACY WATERMAN

Docket #2004-T-003

***Personnel Appeals Board Decision on Appellant's Motion for Reconsideration
And Appellee's Objection to Motion for Reconsideration***

July 13, 2005

By letter dated May 26, 2005, Attorney James Donchess filed a Motion for Reconsideration of the Board's April 27, 2005, decision denying the Appeal of Tracy Waterman, a former employee of the NH Division of State Police. Appellee's Objection to Motion for Reconsideration was submitted on June 2, 2005, by Attorney Sheri J. Kelloway.

In accordance with Per-A 208.03 (b) of the NH Code of Administrative Rules (Rules of the Personnel Appeals Board), a motion for reconsideration must "...set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." In reviewing the Motion, the Board found that the arguments raised by the Appellant in support of the request for reconsideration are essentially the same arguments raised by the Appellant in her pleadings and during the hearing on the merits of the appeal, and the Appellant has not shown good cause why the Board should now reconsider its decision and reverse or modify its April 27, 2005, decision denying Ms. Waterman's appeal.

In accordance with Per-A 207.12 (b)¹ of the NH Code of Administrative Rules, in order to prevail in her appeal to this Board, the Appellant needed to prove by a preponderance of the evidence that her termination was unlawful, that it violated the Rules of the Division of Personnel, that it was unwarranted by her conduct, or that it was unjust in light of the facts in evidence. In deciding to deny the appeal, the Board did not ignore the evidence, as the Appellant alleges, but gave all of the evidence the weight that it deserved in relation to the record as a whole. The evidence did not support the Appellant's assertion that she was subjected to sexual harassment, sexual discrimination, or gender bias, or that her dismissal was effected as a form of retaliation after she filed a formal complaint of discrimination with the NH Human Rights Commission.² As indicated in the Board's April 27, 2005 decision, the evidence reflects that:

The appellant was well aware of her obligations, and the Colonel's authority, under the provisions of the Division's Professional Standards of Conduct, to use a variety of means during the course of an internal investigation. The appellant admitted that she was clearly warned that refusing to take the polygraph could result in her dismissal. When she refused to submit to the polygraph, it was only reasonable to conclude that the Director of the Division of State Police would exercise the option to dismiss, given the appellant's prior, unappealed written warning and the number of active investigations regarding her work performance and obedience to orders.

¹ Standard of Review, Per-A 207.12 (b), NH Code of Administrative Rules

During the hearing on the merits of the appeal, Appellant's case focused primarily on allegations that Trooper Waterman was the victim of gender bias, sex discrimination and retaliation for having filed a formal complaint of discrimination with the NH Human Rights Commission. The Board concluded that such allegations were unsupported by the evidence. Appellant's Motion for Reconsideration is similarly focused. According to Appellee's Objection, p. 3, para. 5, "...the Human Rights Commission, who has primary jurisdiction over claims of discrimination, dismissed Ms. Waterman's claim of discrimination on May 16, 2005, for lack of probable cause, on the same issues presented to this Honorable Board, which certainly renders further credence to this Board's well-reasoned and detailed Order."

The Appellant's argument that the Board's decision "demonstrates a strong bias in favor of management" [Motion for Reconsideration, page 4, paragraph 8) is unsupported by the record. The Appellant had every opportunity to present her evidence and make her arguments.

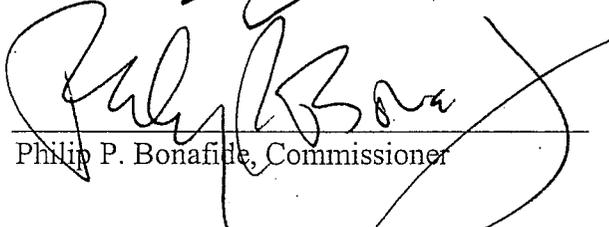
Therefore, in accordance with Per-A 208.03(e), and for the reasons set forth in Appellee's Objection, the Board voted unanimously to DENY Appellant's Motion for Reconsideration.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

Patrick H. Wood, Chairman



Robert J. Johnson, Commissioner



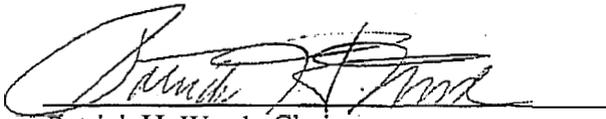
Philip P. Bonafide, Commissioner

cc: Karen A. Levchuk, Director of Personnel, 25 Capitol St., Concord, NH 03301
Attorney James Donchess, 402 Amherst St., Suite 204, Nashua NH 03063
Attorney Sheri J. Kelloway, Department of Safety, 23 Hazen Dr., Concord, NH
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The Appellant's argument that the Board's decision "demonstrates a strong bias in favor of management" (Motion for Reconsideration, page 4, paragraph 8) is unsupported by the record. The Appellant had every opportunity to present her evidence and make her arguments.

Therefore, in accordance with Per-A 208.03(e), and for the reasons set forth in Appellee's Objection, the Board voted unanimously to DENY Appellant's Motion for Reconsideration.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Patrick H. Wood: Chairman

Robert J. Johnson, Commissioner

Philip P. Bonafide, Commissioner

cc: Karen A. Levchuk, Director of Personnel, 25 Capitol St., Concord, NH 03301
Attorney James Donchess, 402 Amherst St., Suite 204, Nashua NH 03063
Attorney Sheri J. Kelloway, Department of Safety, 23 Hazen Dr., Concord, NH
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State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEAL OF TRACY WATERMAN

Docket #2004-T-003

Department of Safety/Division of State Police

April 27, 2005

The New Hampshire Personnel Appeals Board (Wood, Johnson and Bonafide), met on February 27, March 8, June 23 and August 11, 2004, under the authority of RSA 21-I:58, to hear the appeal of Tracy Waterman, a former employee of the Department of Safety. Ms. Waterman was appealing her September 22, 2003, termination from employment as Trooper First Class for refusal to obey an order from a superior officer to submit to a polygraph examination during the course of an administrative investigation, and "Willful Insubordination and Disobedience to Orders". At the hearing, Ms. Waterman and the Division of State Police were each represented by counsel. Attorney James Donchess appeared on Ms. Waterman's behalf. Attorney Sheri Kelloway appeared on behalf of the Department of Safety.

The record of the hearing in this matter consists of pleadings submitted by the parties, notices and orders issued by the Board, the audio tape recording of the hearing on the merits of the appeal, and documents admitted into evidence as follows:

State's Exhibits

1. September 18, 2003, Notice of Intent to Dismiss
2. September 22, 2004, Notice of Dismissal
3. Excerpts from the Division of State Police Rules and Regulations and Department of Safety PC/IA Investigation Policy and Procedures

4. May 30, 2003, Letter of Warning with 2 Performance Evaluations and Supporting Documentation
5. Investigative Report PSU-03-039 Concerning Late Reports
6. Investigative Report PSU-03-069 for May 18, 2003, Performance Evaluation, with Supporting Documentation
7. Investigative Report PSU-03-070 Concerning Late Reports/Obedience to Orders, with Supporting Documentation
8. Investigative Report PSU-03-073 Concerning Obedience to Orders/Late Reports, with Supporting Documentation
9. Investigative Report PSU-0-3-074 Concerning August 26, 2003, Performance Evaluation, with Supporting Documentation
10. Investigative Report PSU-03-073 Resulting in Dismissal, with Supporting Documentation
11. Performance Evaluations for the years 1990-2003

Appellant's Exhibits

- A. New Hampshire State Police Vision Statement
- B. May 14, 2003, Memo from TFC Tracy Waterman to Col. Gary M. Sloper, Subject: Evaluation
- C. May 29, 2003, Memo from TFC Tracy Waterman to Col. Gary M. Sloper, Subject: Evaluation
- D. June 7, 2003, Memo from TFC Tracy Waterman to Col. Gary M. Sloper, Subject: Transfer
- E. State of New Hampshire Department of Safety, Division of State Police Professional Standards of Conduct
- F. September 16, 2003, Letter from Attorney James Donchess to Lt. Mark Myrdek, Re: Trooper Tracy Waterman
- G. September 17, 2003, Facsimile Transmittal from Attorney James Donchess to Lt. Mark Myrdek, Re: Tracy Waterman
- H. Memoranda Including:

- a. February 4, 2002 from Lt. Nedeau to TFC Waterman Re: Excessive Sick Leave Usage
- b. March 6, 2002 from TFC Waterman to Lt. Nedeau Re: Memo of Counsel
- c. February 12, 2003, from TFC Waterman to Col. Sloper Re: Case Dismissal
- d. May 13, 2003, from TFC Waterman to Col. Sloper Re: State v. Hughes
- e. May 14, 2003, from TFC Waterman to Col. Sloper Re: Evaluation
- f. May 24, 2003, from TFC Waterman to Col. Sloper Re: Reports
- g. May 21, 2003, from TFC Waterman to Col. Sloper Re: Evaluation
- I. August 16, 2004, Letter to Attorney Donchess from Richard Morgan, Ossipee Chief of Police, Re: Tracy Waterman
- J. August 9, 2004, Letter from Lt. Donald Grow, Ossipee Police Department, Re: Tracy Waterman

The following persons gave sworn testimony:

Colonel Gary Sloper (former Director, NH State Police)

Jean Flayhan, Clerk of the Carroll County Southern District Court

Lieutenant Mark John Myrdek, NH State Police (Commander, Professional Standards Unit)

Sergeant Thomas McKenzie, Conway Police Department

Sergeant David Scott McCormack, NH State Police

Tracy Waterman, Appellant

Vicky Lamere

Trooper First Class John Curran Jr., NH State Police

Attorney Donald Ekberg

Jeanne Huntoon, Clerk of the Northern Carroll County District Court

Charlotte Waterman, Appellant's mother

Procedural Issues:

In both the original request for a hearing and the "Prehearing Conference Statement" filed on Ms. Waterman's behalf, Attorney Donchess argued that, "The Division of State Police discriminated against [Ms. Waterman] on the basis of her gender in the terms and conditions of her employment leading up to her termination. The Division also retaliated against Ms. Waterman for both making an internal complaint that she was being sexually harassed and for filing a Charge of Discrimination with the New Hampshire Commission for Human Rights..." Attorney Donchess asserted that Ms. Waterman was the first Trooper in eight years to be ordered to submit to a polygraph examination and that the Division of State Police did so in order to demean her and discredit her claim of sex discrimination.

In the "Prehearing Conference Proposed Order" filed on behalf of the Division of State Police, Attorney Kelloway asserted that, "Appellant was dismissed on September 22, 2003, for violating New Hampshire Code of Administrative Rules Per 1001.08(9) and sections of the Professional Standards of Conduct of the Division of State Police. Appellant was ordered by the Director of the Division of State Police, Colonel Gary Sloper, to submit to a polygraph examination as part of an administrative internal investigation initiated against Appellant, for allegedly making threats to harm her troop commander and another superior. Appellant, after being advised that refusal to submit to the ordered polygraph examination could result in disciplinary action, up to and including dismissal from state service, refused to submit to the polygraph examination, constituting Willful Insubordination. That in addition to other incidents of Disobedience to Orders and Willful Insubordination pending at the time, culminated in the decision to dismiss Appellant from state service."

The Board initially convened the hearing on the merits of the appeal on February 27, 2004. The hearing was recessed and reconvened on March 3, 2004, for the Board to continue receiving evidence. During the second day of hearing, however, the Board, on its own motion, voted to suspend the hearing, requesting the parties to file Memoranda of

Law on the issue of Ms. Waterman's refusal to submit to a polygraph examination as ordered by State Police Colonel Slopes. After reviewing the parties' memoranda, the Board issued a decision on May 21, 2004, in which the Board found that under the circumstances alleged by the State, Trooper Waterman's refusal to obey Colonel Sloper's direct order to take a polygraph examination could constitute valid grounds for her dismissal.

The appellant timely filed a Motion for Rehearing, and the State timely filed its Objection thereto. The Board granted the parties' subsequent request for a status conference and on June 23, 2004, heard oral argument on both the Appellant's Motion for Rehearing of the Board's May 21" order and the State's Objection thereto.

Motion for Rehearing

Attorney Donchess reiterated his argument that the State dismissed the appellant in retaliation for her having filed complaints of sexual harassment and gender bias. He argued that when the appellant originally complained of harassment by a fellow officer, the Division of State Police failed to conduct an internal investigation and became hostile toward her. Later he argued, her commanding officers subjected her to discriminatory treatment because of her weight, imposing different standards for her as an overweight female than those that applied to her overweight male counterparts. Under the provisions of RSA 21-I:58, I, he argued, the appellant was entitled to reinstatement without loss of status, pay or seniority because her termination was effected in violation of law and rules adopted by the Director of Personnel.

Attorney Kelloway objected, arguing that in order to conclude that Ms. Waterman was dismissed as an act of retaliation, "...this Board would have to ignore numerous documented instances of insubordination, poor work performance and excessive absences occurring years before June 19, 2003 [when the appellant's complaint with the Human Rights Commission was filed]." Ms. Kelloway argued that the Division's first real notice of the appellant's harassment and discrimination claims occurred when she filed a formal

complaint with the NH Human Rights Commission. At that point, Ms. Kelloway argued, there was no internal complaint for the Division to investigate, only a formal charge that the appellant filed with the Human Rights Commission against which the Division was actively defending itself. Ms. Kelloway argued that the Personnel Appeals Board was not the appropriate forum to review such a charge, and that the Division of State Police should not be required to litigate that issue before this Board while the appellant's complaint was under investigation by the NH Human Rights Commission.

The Board agrees that RSA 21-I:58, I requires certain remedies if the Board finds that a classified employee has been dismissed or demoted in violation of state law, including those laws prohibiting discrimination in employment. The Board also agrees that the NH Human Rights Commission has statutory jurisdiction for receiving and investigating claims of discrimination, conducting hearings, and issuing decisions with respect to alleged unlawful discriminatory conduct. (See: NH RSA Chapter 354-A.) In the absence of a finding by the Commission that harassment or discrimination has occurred, or clear evidence of harassment, discrimination or retaliation directly related to Colonel Sloper's decision to dismiss, the Board found that the issues properly before it are as follows:

1. Once Colonel Sloper was aware that the appellant had filed a formal complaint of discrimination with the NH Human Rights Commission, was the Division of State Police required to conduct its own investigation of that complaint, suspend its disciplinary investigation, or delay disciplinary action until the complaint before the Human Rights Commission had been resolved?
2. Was the Division of State Police required to conduct its own internal investigation of the appellant's harassment complaint if she refused to reduce the complaint to writing?
3. Was Colonel Sloper authorized to order the appellant to submit to a polygraph examination as part of an internal investigation?
4. Was there sufficient justification for Colonel Sloper to issue such an order in light of the appellant's alleged misconduct?

5. Did the appellant have legitimate reasons that would justify her refusal to obey the Colonel's order to submit to a polygraph examination?
6. Was the appellant aware of the possible consequences of refusing to obey such an order?
7. Was Colonel Sloper authorized to dismiss the appellant from her position for refusing an order to submit to a polygraph examination?
8. Are there facts or circumstances that would mitigate in the appellant's favor and justify an order by the Board, under the authority of RSA 21-I:58, to reinstate the appellant or otherwise change or modify any order of the appointing authority?

Position of the Parties on the Merits of the Appeal

Ms. Kelloway argued that Colonel Sloper's decision to dismiss the appellant was not retaliatory, but was based upon Ms. Waterman's declining work performance, willful insubordination and, finally, her refusal to obey his order to submit to a polygraph examination as part of an administrative investigation.

Ms. Kelloway asserted that in the years preceding her dismissal, the appellant's work performance had deteriorated substantially. She argued that the appellant's supervisors had filed a series of complaints about her work performance and ultimately had submitted requests for investigations as precursors to disciplinary action when the appellant's work performance continued to deteriorate. The investigations themselves, she said, involved issues such as late submission of reports, poor attendance and disobedience to orders. Ms. Kelloway noted that the first of those internal investigations resulted in a written warning being issued to the appellant on May 30, 2003, for violating the Division of State Police's Professional Standards of Conduct.¹ Although subsequent investigations concluded that the appellant's performance was not meeting expectations, they had not yet resulted in formal discipline by the date of dismissal.

¹ The appellant did not appeal that warning.

Ms. Kelloway argued that Colonel Sloper was not aware of any specific complaint by the appellant about her supervisors at Troop E when he learned of the Lamere complaint, although he was very much aware of performance issues involving the appellant's absenteeism, late-submission of reports, disobedience to orders and insubordination. The appellant's May 30, 2003, written warning, she noted, was issued before the appellant's complaint to the NH Human Rights Commission in mid-June, 2003.² The same was true, she argued, of the investigation into the appellant's failure to comply with her Sergeant's order to submit four late reports on or before May 16, 2003.

Ms. Kelloway argued that the appellant never made an actual complaint of harassment or discrimination until after she had been disciplined. She stated that the Division had cooperated fully in the Human Rights Commission investigation, and was actively defending itself against the appellant's charges. She argued that it would have been inappropriate for the Division to initiate a separate investigation of the harassment or discrimination allegations while the Human Rights Commission was engaged in an investigation of its own.

Ms. Kelloway denied the appellant's contention that the termination was retaliatory, arguing instead that it was an appropriate response to the appellant's continuing willful insubordination and disobedience to orders. She argued that when the Division of State Police received a report that Ms. Waterman might have been drinking on duty and had threatened physical violence against her supervisors, the Division had an obligation to conduct an investigation. She argued that when investigators determined that the report of misconduct was more credible than the appellant's denials, the Director of the Division of State Police acted reasonably and within the scope of his authority in ordering the appellant to submit to a polygraph examination as part of the administrative investigation. Ms. Kelloway argued that the decision to dismiss the appellant arose from the appellant's refusal to comply with a direct order from a superior to participate in a polygraph examination. She argued that on the totality of the evidence, the Division of State Police

² Although the appellant offered a copy of the June 2003, Human Rights Commission complaint into evidence, the Board declined to receive it, and noted the appellant's objection to that decision.

acted appropriately in deciding to dismiss Ms. Waterman from her position of Trooper First Class.

Attorney Donchess again argued that Ms. Waterman's termination was retaliatory in nature and that she was entitled to reinstatement with full pay under the provisions of RSA 21-I:58, I. He argued that Ms. Waterman had complained to her own supervisor of sexual harassment, but there was never an investigation. When Ms. Waterman reported the blatant discrimination directly to headquarters, he argued, the Division of State Police still took no action. He asserted that frequent evaluations of the appellant's performance did not start until after she had filed her complaint, that her initial requests to meet with Colonel Sloper were denied, and when she finally met with Colonel Sloper in the pre-disciplinary meeting prior to her termination, the Colonel refused to discuss the question of discrimination. Attorney Donchess argued that State Police rules require the Division to investigate complaints, but they ignored her and did nothing. He suggested that if Ms. Waterman's job performance had in fact begun to decline, the abusive and illegal behavior by her supervisors would have to be considered a contributing factor.

Ms. Waterman asserted that her supervisors dealt differently with her than they did male troopers. She testified, "It's how I looked, not what I did." She argued that Lieutenant Nedeau always complained about her weight and "made it personal" by calling her a disgrace and telling her that an overweight female looks much worse in a uniform than an overweight male. She argued that the Division of State Police wanted to fire her because of her appearance and was simply looking for an excuse to dismiss her.

Ms. Waterman acknowledged that the Division's Rules and Regulations authorize the Colonel to employ a variety of means, including use of the polygraph, during an internal investigation. She acknowledged that Colonel Sloper ordered her to submit to a polygraph examination and that she refused. Ms. Waterman admitted that she was advised in the presence of counsel that such refusal could result in disciplinary action, up to and including her dismissal from employment, for disobeying a direct order from a superior offices. When asked during the hearing why she refused to submit to a

polygraph examination, Ms. Waterman testified, "I wanted them to do a complete investigation... Truth of the matter is, it had been eight years since a trooper had been asked to take a polygraph, and I felt it was retaliation because I'd brought the gender bias [complaint]." Ms. Waterman argued that she doubted the reliability of the polygraph and was not willing to risk the polygraph, believing that if she railed the examination, the Division would dismiss her on that basis. She testified, "I thought it was just an easy way for them to get rid of me."

Findings of Fact:

1. Ms. Waterman testified that when her relationship with a male Sergeant at Troop E "ended badly" several years ago, she attempted to speak with those in her chain of command, including Captain (then Lieutenant) Burke, Major (then Lieutenant) Wiggin and Sergeant Carrie Nolet. She testified that the officers told her they hadn't seen anything, and never reported it "up the chain of command." She also testified that she told Sergeant Carrie Nolet how frustrated she was with "the old boys club." Ms. Waterman, however, offered no evidence to corroborate her testimony with regard to Burlte, Wiggin and Nolet, and called none of the named officers to answer questions on any of the issues related to those claims.
2. Upon receiving oral notice from the appellant that she had been sexually harassed, the Division of State Police acted appropriately and in accordance with its own rules and regulations by asking the appellant to reduce her complaint to writing. The Division of State Police took no further action when the appellant refused to make her complaint in writing.
3. The NH Human Rights Commission has jurisdiction to receive claims of harassment and discrimination, to investigate those claims and to hold hearings to determine whether or not an individual has been subjected to unlawful, discriminatory conduct. The Division of State Police cooperated with the Commission's investigation.
4. The appellant had been the subject of several internal investigations for poor work performance, excessive absenteeism, disobedience to orders and

insubordination years before she made any complaint of harassment or discrimination, and there were no requirements for the Division to suspend its disciplinary investigations or delay disciplinary action until the appellant's Human Rights Commission complaint was resolved.

5. Ms. Waterman testified that as soon as Lieutenant Nedeau was appointed Troop Commander, he complained constantly about her weight and called her "a disgrace" because of her appearance in uniform. She testified that Lieutenant Nedeau said that overweight females look much worse in uniform than overweight males. She also testified that no male trooper was ever rated "below expectations" for appearance as a result of being overweight. She attributed the complaints about her weight to bias on Lieutenant Nedeau's part. The evidence reflects that Ms. Waterman's weight, and its possible impact on her ability to do her job, was first addressed in her May 5, 1993 performance evaluation prepared by Corporal Kelly McClare. The issue of her weight and military bearing appears in subsequent evaluations. Each of those evaluations also includes praise for work well done as well as criticism of work that was below expectations. Ms. Waterman's October 31, 2000 evaluation noted a significant decline in work quality, some of which Ms. Waterman attributed to "burn out" and "stress." Her supervisor, Sergeant Carrie Nolet, acknowledged that, noting, "TFC Waterman appears to be experiencing effects of stress and has indicated that she is aware of and working on the problem. When late reports are brought to her attention, she does make an effort to submit them ASAP and has improved in this area since Lieutenant Wiggin brought the matter to her attention in the July 2000 meeting." Sergeant Nolet also wrote, "TFC Waterman has a good working relationship and is cooperative with her peers and outside agencies, assisting with and providing guidance for numerous investigations. However, she has displayed hostility in the presence of superiors and to myself at times earlier in this rating period, showing a lack of comportment. It has come to my attention since that time that TFC Waterman meant no disrespect and the actions were due to stressors outside the job. She explained her behavior as "frustration" with her current situation and "venting" due to circumstances beyond her control. In my opinion, these

vocal outbursts were inappropriate and unprofessional and TFC Waterman should work on this area for improvement. I explained that there is an appropriate time and a place out of earshot to vent. I have observed extensive improvement in this area and she is continuing to work on controlling her behavior." Sergeant Nolet also noted, "TFC Waterman practices proper military bearing and has a neat appearance, purchasing numerous business suits to create a professional image. She has acknowledged difficulty controlling her weight, consistently increasing each year to the point of seriously affecting her physical fitness for duty. She has made a solemn effort during this rating period to increase her physical fitness, joining a recreational hockey team and dieting. Since meeting with Lieutenant Wiggin in July, TFC Waterman has reportedly lost 21 pounds and I've noticed her clothing fitting more loosely. She should continue with her efforts to regain adequate physical fitness for the demands of this profession and to present a more professional appearance." (State's Exhibit 11, 2000 Evaluation, page 6)

6. Ms. Waterman testified that Paul Birmingham had warned her about Lieutenant Nedeau, telling her "Lieutenant Nedeau was out to get [her] job." The appellant offered no evidence to corroborate that testimony and did not call Ms. Birmingham to offer testimony or be cross-examined on that point.
7. Ms. Waterman testified that when she was called to Captain Burke's office on or about June 19, 2003, she complained to him that her supervisors at Troop E had subjected her to harassment and a hostile work environment. She testified that she told him at least three times that she was being discriminated against as an overweight female. She testified that Captain Burke told her, "This stops here. I'm not going to the Colonel because I've already talked to him about it." Ms. Waterman also testified that she told Captain Burke she didn't believe anything she said or did would make a difference, that Captain Burke told her he had already made up his mind about her complaint, and that Captain Burke "agreed 100%" with Lieutenant Nedeau. The appellant offered no evidence to corroborate her testimony concerning Captain Burke, nor did she call Captain

Burke as a witness to question him about that meeting or any conversation that might have occurred between him and the appellant.

8. Ms. Waterman testified that in May 2003, approximately one month before she filed her complaint with the Human Rights Commission, she made two written requests to meet with Colonel Sloper to discuss her treatment by supervisors at Troop E (Appellant's Exhibits B and C) Neither request to meet with Colonel Sloper mentions discrimination, harassment, gender bias, or hostile work environment. Both requests refer solely to the appellant's desire to discuss her performance evaluations.
9. Ms. Waterman testified that when she was called into headquarters and was interviewed by Lt. Myrdelc in connection with the investigation of her alleged threats against her Sergeant and Lieutenant, she told Lt. Myrdelc about sex discrimination, but he "blew it off," so she followed it up in writing (Appellant's Exhibit F, referring to Attorney Donchess' three-page letter of September 16, 2003, addressed to Lt. Myrdelc). Appellant's Exhibit F begins, "This is to confirm the discussion of yesterday regarding the investigation into the credibility of Ms. Lamere who accused Trooper Waterman of making statements about Lt. Nedeau and of being drunk 80% of the time..." It asks for six additional witnesses to be interviewed. It challenges the facts of a conversation that allegedly occurred between Ms. Waterman and her mother. It describes what the various witnesses could offer with respect to Ms. Waterman's and Ms. Lamere's credibility. It discusses the request for Ms. Waterman to be polygraphed. It suggests that Ms. Waterman was unable to complete outstanding reports when she did not have access to information kept in her cruiser. Only one paragraph of Appellant's Exhibit F refers to harassment or discrimination. It states, "As you know, Trooper Waterman has filed a Charge of Discrimination with the New Hampshire Commission for Human Rights alleging that the Division of State Police discriminated against her on the basis of her sex. During your interview of Trooper Waterman, she reported to you that she is being retaliated against by her commanding officers (who were specifically mentioned in her sex discrimination complaint) because she filed the sex discrimination

complaint. There does not seem to be any Division investigation regarding this retaliation. It seems to us that the Division has rushed to judgment concerning Lamere's allegations, without doing its normal thorough investigation, in order to discredit Trooper Waterman's sex discrimination complaint." Appellant's Exhibit F offers neither evidence nor argument to support the appellant's accusation that the Division "rushed to judgment concerning Lamere's allegations" or that it did so "in order to discredit Trooper Waterman's sex discrimination complaint."

10. The Division of State Police Professional Standards of Conduct effective June 1, 1998 outline the agency's and employee's obligations with respect to complaints against any "Division member." 26-E-2.1 of those regulations states, in pertinent part:

A. "Whenever any Division member receives a complaint against State Police personnel from any source, observes or receives information from any source that another employee has allegedly violated any state law, rule, regulation or order of the Division of State Police, they shall immediately notify their commanding officer or supervisor. (Per Division of State Police Rules and Regulations § 1.13.1)"

B. "This procedure shall apply to all complaints whether received in person, by telephone, in writing, or from an anonymous source."

1. The content of the complaint, not the manner in which it is received, shall determine the type of investigation required."

Division of State Police Rules and Regulations Section 26-E.5.1.B, 1, a, provides that, "Administrative Investigators for both personnel complaints and internal affairs investigations shall be responsible for: 1. Obtaining a detailed signed written statement from the complainant if possible. a. The statement should be sworn, if the investigator deems it appropriate." Based on the testimony and documentary evidence offered by the parties, there is no evidence to corroborate Ms. Waterman's assertion that she made any *bona fide* complaints of sexual harassment or gender bias prior to June 19, 2003, the date that she went

to headquarters and spoke to Captain Burke, refused to reduce her complaint to writing, and proceeded to the NH Human Rights Commission where she filed a formal complaint against staff at the Division of State Police.

11. In August, 2003, Vicky Lamere, the wife of a State Trooper, presented herself at Troop E and informed Lieutenant Nedeau that Ms. Waterman had made threats against her supervisors, Sgt. McCormack and Lt. Nedeau, that she had threatened to harm herself, and that on at least one occasion, the appellant had consumed alcohol while on duty. At the time, Ms. Lamere and her family were living with Ms. Waterman in her home. While the Lamere family was living temporarily at the Waterman house, Ms. Lamere and the appellant engaged in several discussions about appellant's difficulties at work. The appellant complained about being unable to get her reports submitted on time. She also discussed conflicts with her supervisors at Troop E. Ms. Waterman also told Ms. Lamere that she did not know how she might react or what she might do when she returned from sick leave if Lt. Nedeau or Sgt. McCormack confronted her or yelled at her. It was during one of those conversations that Ms. Lamere said the appellant told her she would "like to put a bullet in Lieutenant Nedeau's head" and "deck Sergeant McCormack." On September 3, 2003, the Division of State Police initiated an internal investigation into Ms. Lamere's allegations that the appellant had threatened physical harm to her supervisors, had threatened to harm herself, and may have consumed alcohol while on duty. The appellant was suspended with pay pending the outcome of that investigation. In conducting their investigation, State Police Investigators interviewed several witnesses including Ms. Lamere and Ms. Waterman. On the totality of the evidence, they determined that Ms. Lamere's statements were more credible than Ms.

Waterman's.

12. Although Ms. Lamere offered to take a polygraph examination to prove that her statements were truthful, she was not an employee of the Division of State Police and was not subject to the same rules and regulations that direct the conduct of sworn division members. Chapter 26-D.5.1.8.6.a(1) of the Division of State Police's Professional Standards of Conduct provides authorization for the

Colonel to order a sworn division member to submit to a polygraph examination as part of an internal investigation. Although polygraphs are used very infrequently during internal division investigations, resorting to the polygraph was permissible in this instance in light of the seriousness of the allegations and the investigators' conclusion that Ms. Waterman's statements had not been credible. Ms. Waterman was familiar with the regulation authorizing Colonel Sloper to require a trooper to undergo a polygraph examination during an internal investigation. She also was fully aware, and advised in the presence of her attorney, that refusing the polygraph could result in her dismissal. An officer's refusal to obey a direct order constitutes a serious violation of Per 1001.08 of the NH Code of Administrative Rules, and grounds sufficient for immediate dismissal.

Rulings of Law:

- A. Per 1001.08 (a) 9. of the NH Code of Administrative Rules provides for the immediate dismissal without prior warning if an employee has engaged in willful insubordination.
- B. Colonel Sloper's September 22, 2003 meeting with the appellant and her attorney satisfied the requirements of Per 1001.08 (c), for an appointing authority to offer to meet with an employee prior to termination in order to present the employee with the evidence supporting the employee's termination and allow the employee an opportunity to refute that evidence.
- C. Having determined that Ms. Waterman failed to refute the evidence supporting her dismissal, Colonel Sloper issued a written notice of dismissal as required by Per 1001.08 (d) of the NH Code of Administrative Rules, specifying the nature and extent of the offense for which the appellant was dismissed, and advising her of her rights to appeal under the provisions of RSA 21-I:58.

Decision and Order

Colonel Sloper's decision to dismiss the appellant from her position of Trooper First Class was both lawful and reasonable.

1. The appellant's assertion that Colonel Sloper dismissed her from her employment in retaliation for her having filed a complaint with the NJ-I Human Rights Commission is unsupported by the evidence.

The evidence reflects that Colonel Sloper was vaguely familiar with the appellant, having met her at some point earlier in his career. In his capacity as Director of the Division of State Police, Colonel Sloper was aware of Ms. Waterman primarily in terms of concerns raised by her supervisors about her job performance. Colonel Sloper testified that he did not recall receiving from the appellant the memoranda dated May 14, 2003, and May 28, 2003, requesting a meeting with him to discuss her performance evaluation. He also did not recall receiving a June 7, 2003, memo from the appellant requesting an immediate transfer.³ Colonel Sloper did recall signing off on the letter of warning issued to the appellant on May 30, 2003, for failing to meet performance expectations during the prior ten-month period.

Apart from the information he received through his senior staff and internal investigations unit, Colonel Sloper was not at all familiar with Ms. Lamere. Through the investigation, he learned that she was married to a Trooper, had resided briefly at Ms. Waterman's home, had reported that Ms. Waterman had made threats to harm herself, Lieutenant Nedeau and Sergeant McCormack, and had informed Lieutenant Nedeau that Ms. Waterman may have been drinking alcohol while on duty. Colonel Sloper testified that his senior staff and internal investigators considered Ms. Lamere's statements to be credible. Colonel Sloper testified that he had concerns about whether or not Ms. Waterman had a drinking problem. Overall, however, he testified that his primary concern was whether or not Ms. Waterman had made threats of physical violence against

³ The requests were offered by the appellant as Appellant's Exhibits B, C and D.

her superiors. Her refusal to submit to the polygraph, he said, was mother serious concern.

Colonel Sloper did not believe the appellant had filed any internal complaints about her treatment by supervisory staff at Troop E, and testified that he would expect an employee to file a written complaint if the employee felt that he or she had suffered harassment or discrimination. Colonel Sloper said he knew the employee had filed a written complaint with the NH Human Rights Commission; he believed that the complaint lacked merit. He knew the agency had made a timely response to the Commission.

2. State Police Regulations authorize the Director of the Division of State Police to order any uniformed officer to submit to a polygraph examination as part of an internal investigation. The appellant's refusal to submit to that examination constituted disobedience to a direct order and grounds for immediate dismissal without prior warning.

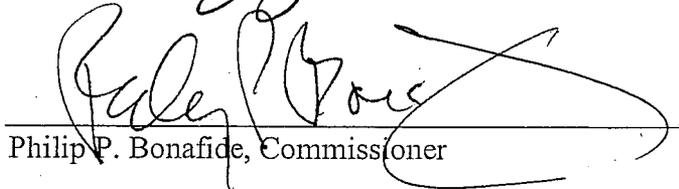
The appellant testified that she had concerns about the reliability of the polygraph. She also said she feared that she would be dismissed if she failed the polygraph examination. Neither of these concerns, which were raised after-the-fact, provided sufficient justification for the appellant to disobey Colonel Sloper's direct order and refuse the polygraph. The appellant was well aware of her obligations, and the Colonel's authority, under the provisions of the Division's Professional Standards of Conduct, to use a variety of means during the course of an internal investigation. The appellant admitted that she was clearly warned that refusing to take the polygraph could result in her dismissal. When she refused to submit to the polygraph, it was only reasonable to conclude that the Director of the Division of State Police would exercise the option to dismiss, given the appellant's prior, unappealed written warning and the number of active investigations regarding her work performance and obedience to orders.

There were no mitigating factors in the appellant's favor that would justify changing or modifying the order of the appointing authority. Therefore, for all the reasons set forth above, the Board voted unanimously to DENY Ms. Waterman's appeal.

The New Hampshire Personnel Appeals Board


Patrick H. Wood, Chairman


Robert J. Johnson, Commissioner


Philip P. Bonafide, Commissioner

cc: Karen A. Levchuk, Director of Personnel
Attorney Sheri J. Kelloway
Attorney James Donchess

State of New Hampshire



PERSONNEL APPEALS BOARD

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APPEAL OF TRACY WATERMAN DEPARTMENT OF SAFETY

2004-T-003

May 21, 2004

The New Hampshire Personnel Appeal Board (Bonafide, Johnson, and Wood) began hearing the appeal of Trooper Tracy Waterman of her dismissal as a Trooper First Class by the New Hampshire State Police for failure to follow the direct order of a supervisor, Colonel Gary Sloper, to take a lie detector test in an internal investigation of allegations concerning statements allegedly made by Trooper Waterman threatening harm to two of her immediate supervisors. Trooper Waterman was represented by Attorney James W. Donchess. The Division of State Police of the Department of Safety was represented by Attorney Sheri J. Kelloway.

After almost two days of hearing (February 27, 2004, and March 3, 2004), the Board halted the proceedings and requested the parties to present legal memoranda to the Board concerning the law relating to the authority of a police supervisor to order a police officer to take a polygraph test and whether the failure of that officer to take the test could be grounds for dismissal of the officer. Both parties timely submitted the requested memoranda.

The relevant facts presented to the Board are set forth in this decision.

A citizen, Ms. Vicky Lamere, who happened to be the spouse of a State Trooper, verbally reported to Lieutenant Nedeau that Trooper Waterman had made certain threats of physical harm to Lieutenant Nedeau and Sergeant McCormack, Trooper Waterman's immediate supervisors. Lieutenant Mark Myrdek and Sergeant Mark Mudgett were assigned to investigate these allegations. During the course of the internal investigation into these allegations, Trooper Waterman was asked if she would submit to a polygraph examination. Trooper Waterman, who had her attorney with her at the time, indicated her unwillingness to submit to such an examination, which unwillingness continued even after she was advised she could be ordered to take such an examination.

Lieutenant Myrdek subsequently met with Colonel Sloper and reported to the Colonel the status of the investigation, that they were unable to determine which person - Trooper Waterman or Ms. Lamere - was being truthful, and that they had asked Trooper Waterman if she would submit to a polygraph examination.

Lieutenant Myrdek also advised the Colonel of the unwillingness of Trooper Waterman to take a polygraph examination. Colonel Sloper testified that in reliance upon the report of the two "seasoned investigators," and the authority of Chapter 26-E.5.1.B.6:a(1) of the Professional Standards of Conduct of the New Hampshire Division of State Police, he ordered Trooper Waterman to take a polygraph examination on September 15, 2003.

The polygraph examination was scheduled for 1:00 p.m. on September 15 and was to be conducted by officers of the Vermont State Police. On that date, Trooper Waterman indicated she was willing to answer questions but would not submit to the polygraph examination. Lieutenant Myrdek asked Trooper Waterman if she would allow them to videotape her refusal and Trooper Waterman agreed. Lieutenant Myrdek testified that he advised Trooper Waterman of her "Garrity" rights and that she could be dismissed if she refused to take the polygraph examination. Trooper Waterman again refused to take the examination.

Lieutenant Myrdek subsequently reported to Colonel Sloper Trooper Waterman's refusal to take the polygraph examination. After reviewing that report, Colonel Sloper issued to Trooper Waterman a "Notice of Intent to Dismiss" dated September 18, 2003. In this Notice, Colonel Sloper stated that he had "determined that [Trooper Waterman's] conduct as outlined above constitutes serious violations of **Per 1001.08 (9) Willful Insubordination** and **Professional Standards of Conduct Chapter 1, Rules and Regulations, specifically Section 1.3.0 Obedience, Sub-section 1.3.3-Obedience to Orders and 1.3.4-Willfull (sic) Insubordination, Chapter 26-E - Internal Affairs Investigation Policy and Procedures, Section 26-E.5.1 - Investigative Procedures, Sub-section 26-E.5.1(B).6.**" The Notice concluded by telling Trooper Waterman that a meeting was scheduled for September 22, 2003, to discuss the evidence supporting the Colonel's decision to Dismiss Trooper Waterman and to provide her an opportunity to refute the evidence presented.

This meeting was held as scheduled. After the meeting and again reviewing the evidence, Colonel Sloper issued a Dismissal notice to Trooper Waterman effective September 22, 2003. The Dismissal notice referred to the same violations set forth in the Notice of Intent to Dismiss quoted above. In addition, though, the Colonel added the following: "Your blatant refusal to comply with an order issued from the highest rank within the Division of State Police has caused me to lose faith and trust in you. If an emergency situation arises and you are instructed by a superior to take a particular action, I will not be able to rely upon you to follow that action, based upon your previous history. As a result, this leaves me with no choice but to take the most severe form of disciplinary action against you."

As the representatives of the parties have noted in their legal memoranda, there is no case law in New Hampshire on the issue of whether a state trooper can be dismissed for failure to obey a direct order to submit to a polygraph examination. However, there are cases from other jurisdictions that provide guidance. In

Coursey v. Board of Fire and Police Commissioners, 234 N.E.2d 339, (Ill.App.,1967), a police officer was ordered to submit to a polygraph examination as part of an internal investigation arising from citizens' complaints against the officer. The court recognized that "[t]here may be circumstances wherein a superior officer's order that a subordinate submit to a polygraph test would be arbitrary, but here, with conflict between the juveniles' accusations and Coursey's denials, the order was reasonable." Id. at 344. Furthermore, the Court continued,

As a private individual Coursey did not have to submit to the examination, but as a policeman he did not have the privilege of refusing; having refused, he forfeited any right he had to be retained on the police force because his refusal was in conflict with his obligation as a policeman to obey the order of his commanding officer. His refusal impeded the investigation of a serious charge affecting the whole police department as well as himself. To sustain his action would be to vitiate the systematic authority and discipline upon which proper enforcement of the law is dependent.

Id. at 345.

Courts have also recognized that actions taken by police officers while off duty can also be the subject of disciplinary investigations in which polygraph examinations may be ordered. Harris v. Colorado Springs, 867 P.2d 217 (Colo. App. 1993). In that case, an off-duty officer was being disciplined for dangerous driving activities. In upholding the dismissal of the officer for failing to take the polygraph as ordered, the Court recognized that an "inquiry into private conduct must bear a rational connection to the officer's position as a public servant." Id. at 219. This is true especially where the alleged activity "extends to matters of and concerning an individual's fitness for public service." Id.

In an early case from California, the District Court of Appeal specifically held that the refusal of an officer to comply with an order to submit to a polygraph examination where the officer had been accused by a citizen of attempting to commit a felony, was justification for the dismissal of the officer. Frazee v. Civil Service Board of City of Oakland, 338 P.2d 943 (Cal. App. 1959). The Court noted that there may be times when such an order might be unreasonable or where there might be a legitimate reason for refusing to submit to a polygraph examination, the Court found no such facts or valid excuse for Officer Frazee to refuse to take the examination. The fact that the results of the polygraph examination would not be admissible in Court did not justify the refusal in light of the "peculiar and delicate position police officers hold in society." Id. at 945.

In the case before us, Trooper Waterman is accused by a citizen of making serious threats to cause physical harm to her immediate supervisors, Lieutenant Nedeau and Sergeant McCormack. These charges go directly to the fitness of Trooper Waterman to perform her public duties. Her refusal to comply with the order of

Colonel Sloper to take a polygraph examination runs contrary to the need for discipline and order in the State Police and caused her commander to lose confidence and trust in her.

For these reasons, the Board finds that the refusal of Trooper Waterman to obey the, direct order of Colonel Sloper to take a polygraph examination under the circumstances alleged by the State could constitute valid grounds for her dismissal. The Board will now schedule the matter for completion of testimony at the earliest date convenient for all parties and the Board.

FOR THE PERSONNEL APPEALS BOARD



Patrick H. Wood, Chairman

cc: Director of Personnel
Attorney James W. Donchess
Attorney Sheri J. Kelloway