

To: The House Committee on Government Operations and Military Affairs and the Senate
Committee on Government Operations
From: Vermont Criminal Justice Council, Act 56 Review Subcommittee
Re: Vermont Criminal Justice Council Authority Report Pursuant to H.476 (Act 74)
Date: January 3, 2024

Background

On June 13, 2023, the Vermont General Assembly delivered to the Governor H.476, “An act relating to miscellaneous changes to law enforcement officer training laws,” which Gov. Phil Scott subsequently signed into law as Act 74 on June 19, 2023. Section 4a of the legislation – “Vermont Criminal Justice Council (VCJC) Authority; Report” - requires that the Council report to the House Committee on Government Operations and Military Affairs and the Senate Committee on Government Operations on the following:

- I. whether the current statutes pertaining to unprofessional conduct in 20 V.S.A. §§ 2401–2411 should be amended to apply to all off-duty conduct of law enforcement officers;
- II. whether the current statutes pertaining to unprofessional conduct in 20 V.S.A. §§ 2401–2411 should be amended to adjust the scope of Category B conduct that the Vermont Criminal Justice Council may take action on for a first offense; and
- III. any other recommendations as deemed appropriate by the Vermont Criminal Justice Council.

VCJC Executive Director Heather Simons, on June 29, 2023, drafted a memorandum, pursuant to VCJC Rule 6, which established the “Act 56 Review Subcommittee” to assist the Council in analyzing the issues raised by the legislature in H.476 (Act 74). The Subcommittee convened fourteen meetings over a six-month period, with its final meeting occurring on December 13, 2023. The Office of Professional Regulation (OPR) and the Department of Human Resources (DHR) were invited to all meetings and included in document revisions via email. Kevin Rushing, from OPR, was a consistent participant at our meetings. All meetings were held in open and advertised remote forums, and Subcommittee meeting minutes were dutifully posted



to the VCJC website for review by both the public and the state’s criminal justice stakeholders. In addition, the Subcommittee conferred with the International Association of Directors of Law

Enforcement Standards and Training (IADLEST), a nationally recognized organization that is a subject matter expert in the field of law enforcement professional regulation.

The Subcommittee presented its recommendations to the full Council on December 19, 2023. The Council approved the Subcommittee’s recommendations presented below with the understanding that the language in the ‘Code of Conduct’ (Appendix A) is for illustrative purposes only. If the legislature supports the Subcommittee’s proposal for a Council Code of Conduct, the Council will spend additional time analyzing and finalizing a Code of Conduct.

Findings and Premises

During its deliberations, the Subcommittee identified several challenges and opportunities regarding the current statutory definition of Category B policy violation(s) which guided the Subcommittee’s work, including:

1. That the current definition for Category B conduct is, in part, unnecessarily tied to local law enforcement agency’s individual policies which creates inconsistent outcomes;
2. That the current definition for Category B conduct can be simplified and its ambiguity significantly curtailed, if not eliminated;
3. That law enforcement officers, and both those who represent and lead officers, understand the need to expand the VCJC’s ability to sanction unprofessional conduct behavior that has historically fallen outside the current definition of Category B behavior, but nonetheless rises to unprofessional conduct within the profession and should be actionable by the Council;
4. That any expansion of the Council’s ability to sanction an officer for a Category B offense should be balanced with greater clarity to the definition of Category B conduct so that officers have proper prior notice of expectations; and, importantly,
5. That actionable off-duty behavior requires a nexus between the offending conduct and the officer’s job-related responsibilities (no nexus needs to be determined for conduct already pre-determined by statute to be actionable either on- or off-duty; e.g., domestic assault.)

I. Recommendations – H.476 (Act 74) Sec. 4a. (1) off-duty behavior

Having found that current statutory language is ambiguous and lacks the necessary clarity to effectively respond to and address Category B conduct, the Council recommends that 20 V.S.A.

§ 2401(2) be amended so that the definition of Category B misconduct adds a newly proposed statewide law enforcement officer Code of Conduct (Appendix A). The Code of Conduct would be created and administered through the Criminal Justice Council. The Code of Conduct will encapsulate the values of, and expectations of behavior for, all law enforcement officers in the State of Vermont. By creating and using a state-wide Code of Conduct, Category B conduct violations would not be tethered to an individual agency's employment policies. A Code of Conduct would provide greater consistency in violation sanction outcomes across agencies.

Since the proposed Code of Conduct provides greater clarity to law enforcement officers as to what behavior would constitute a Category B violation, the Code encompasses both on- and off-duty behaviors unless specifically authorized otherwise. The Subcommittee discussed at length the importance that off duty behavior that is sanctionable by the Council as unprofessional conduct must have a nexus between the offending behavior and the officer's ability to effectively continue with their law enforcement duties and/or represent their agency well. The Subcommittee believes that a Code of Conduct, like the draft Code in Appendix A, incorporates within the body of the document this important nexus.

The genesis of the proposed Code of Conduct was two-fold. First, the Subcommittee reviewed how other States regulated off-duty behavior of law enforcement officers and whether other States limited their respective Council's ability to respond to first offense, non-criminal misconduct behavior. This review was done by submitting a short survey to the Directors' listserv at the International Association of Directors of Law Enforcement Standards and Training (IADLEST). After analyzing the responses, two themes emerged: one, no other State tied its law enforcement regulating body to local law enforcement employment policies and two, most other States had some form of state-wide Code of Ethics or Code of Conduct for its law enforcement professionals.

With these results, the Subcommittee took its second step and looked within the State for a template Code of Conduct. The Subcommittee used section A of the Vermont State Police's (VSP's) Code of Conduct to form the outline of the attached draft language. The Subcommittee determined this to be a sound strategy due to VSP's ongoing effective and objective use of its own Code of Conduct to assess whether an officer's behavior fails to uphold the standards that both the public and the law enforcement community expect from a law enforcement professional. The Subcommittee then edited and winnowed the Code of Conduct down to ten principles.

In drafting the Code of Conduct, and the associated proposed changes to 20 V.S.A. § 2401(2) (Appendix B), the Subcommittee ensured that the final product incorporated all the policies that

are enumerated by the legislature in 20 V.S.A. § 2401(2)(A)-(I), thereby maintaining the historic legislative expectations of Category B misconduct violations that are actionable as a first offense.

II. Recommendations – H.476 (Act 74) Sec. 4a. (2) expansion of the scope of Category B, first offense.

The current limitations on the Council’s ability to sanction officers for the majority of Category B, first offenses, fails to adequately address concerns raised by the public, criminal justice stakeholders and policymakers, and the law enforcement community. With the proposed Code of Conduct and the suggested simplified definition for a Category B violation, 20 V.S.A. § 2401(2), the Subcommittee believes that it is appropriate to authorize the Council to act on all Category B, first offenses.

However, the Subcommittee’s recommendation limits the Council’s ability to sanction a first offense Category B violation, to some extent, so that the Council cannot exceed an agency’s disciplinary action of an officer for a Category B, first offense. The Subcommittee believes that this allows an agency’s executive officer the ability to work with an officer with a Category B, first offense, without concern that the Council will overreach and remove the officer’s certification. However, if an officer is terminated by an agency due to a misconduct investigation or an officer resigns while under a misconduct investigation, the Council will have no limitations concerning its ability to sanction an officer for a first offense Category B violation. In addition, to ensure consistency of outcomes, the Council will not be limited in its ability to sanction a first offense Category B violation if the agency’s disciplinary action of the officer is clearly unreasonable. With these balancing factors in mind, the Subcommittee recommends that 20 V.S.A. § 2407, Limitation on Council Sanctions, is edited with the proposed language provided in Appendix B.

III. Recommendations – H.476 (Act 74) Sec. 4a. (3), other recommendations?

Several issues were identified during the Subcommittee’s work that the Council finds may need legislative consideration to continue to build out the effectiveness and clarity in law enforcement and/or criminal justice policy. These potential areas of interest include: the establishment of statewide policy on sexual misconduct; unemployment compensation challenges for those agencies whose officers face decertification by the Council and must be let go; an ongoing discussion of how to address misconduct by agency heads/leaders and organizational disparities across Vermont’s law enforcement community; a mechanism to allow for officer decertification without the VCJC and its Professional Regulation Subcommittee; i.e. may an officer voluntarily surrender their license with a pending investigation; and deeper

discussions around officer wellness, treatment, and effective and efficacious mental health behavioral management.

Respectfully submitted by the Vermont Criminal Justice Council.

Act 56 Review Subcommittee Members

Christopher Louras, Chair - VCJC Appointee

Chief Jennifer Frank, Vice-Chair - Windsor Police Department

Erin Jacobsen, Esq. - Attorney General's Office

Exec. Dir. Karen Tronsgard-Scott - Vermont Network Against Domestic and Sexual Violence

Mike O'Neil - Vermont Troopers Association

Trevor Whipple - Vermont League - Cities and Towns

Lt. Colonel James Whitcomb - Vermont State Police

Tucker Jones, Esq. proxy for Commissioner Jennifer Morrison – Dept. of Public Safety

Officer Mike Major - Vermont Police Association

Sheriff Mark Anderson - Vermont Sheriffs' Association

Chris Brickell - Deputy Director, Vermont Criminal Justice Council

Kim McManus, Esq. – Assoc. General Counsel, Vermont Criminal Justice Council

Appendix A

Act 56 Subcommittee
Code of Conduct
DRAFT Version 10.0
12.13.23

Vermont Criminal Justice Council Code of Conduct

I recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of law enforcement service. In furtherance of these duties, I hereby adopt and accept the following Code of Conduct and understand that this Code applies to conduct occurring at any time, including conduct on duty and off duty, unless otherwise specified:

- 1. Untruthfulness.** I shall not knowingly make an untruthful statement concerning a material fact or knowingly omit a material fact on an official criminal justice record, while testifying under oath, or during an agency's internal affairs or VCJC investigation.
- 2. Discrimination.** I shall not engage in a course of conduct or a single egregious act that evidences discriminatory conduct, or exhibits bias against individuals, based on race, color, creed, national origin, ancestry, sex, gender identity/expression, marital status, pregnancy, religion, age, socio-economic status, physical or mental disability, medical condition, disabled, or veteran status, sexual orientation, citizenship, or any other protected characteristic under law, which does not involve an expression of public concern, and which clearly and substantially demonstrates that I cannot perform my duties of office in a fair and impartial manner, with respect for the rights of others and laws of the state and nation.
- 3. Misuse of Official Position.** I shall not misuse my official position for personal or economic gain.
- 4. Domestic Violence.** I shall not attempt to cause, or cause, physical harm to a family or household member, nor place a family or household member in fear of imminent serious physical harm. I shall not violate the Domestic Violence Involving Law Enforcement Model Policy.
- 5. Unlawful Use of Force.** While on duty or under authority of the State, I shall only use force in accordance with the Statewide Use of Force Policy and 20 V.S.A. § 2368 (Standards for law enforcement use of force), including with the duty to intervene as provided therein.

6. **Criminal Conduct.** I shall not engage in criminal conduct as defined by 20 V.S.A. § 2401(1) (Category A conduct).
7. **Sexual Misconduct.** I shall not misuse my official position or use official resources to engage in unwelcome sexual advances, requests for sexual favors, and other verbal, physical, written, auditory, or visual conduct of a sexual nature.
8. **Falsification and Misuse of Property and Evidence.** I shall not manufacture or falsify evidence and shall not tamper with, conceal, withhold, or convert to my own use any property or evidence which has been discovered, seized, gathered, or received in connection with the performance of law enforcement duties.
9. **Bribes.** I shall not solicit or accept any solicitation or transfer of any item of value for the purpose of influencing my judgment or conduct.
10. **Cheating on Examinations.** While preparing for, administering, or participating in any official examination either conducted by the VCJC or law enforcement agency, I shall not cheat or use any dishonest method to obtain, furnish, or accept, or attempt to obtain, furnish, or accept, questions or answers to such examination.

I certify that I have read the above law enforcement officer code of conduct. I indicate that I am fully aware of each section of the code and by signing below, indicate that I agree to abide by the code of conduct, and that a failure to do so may result in a Council sanction, up to, and including, loss of my law enforcement certification.

Print Name _____

Signature _____ Date _____

Appendix B

Proposed statutory changes to 20 V.S.A. §§ 2401(2) and 2407 that support VCJC's recommendations contained in this report.

20 V.S.A. § 2401(2). Definitions

Added language

Suggested deletion

(2) "Category B conduct" means ~~gross professional misconduct amounting to actions on duty or under authority of the State, or both, that involve a willful failure to comply with a State-required policy~~ **or the Council's Code of Conduct.** ~~or a substantial deviation from professional conduct as defined by either the law enforcement agency's policy or Council policy for the following: or if not defined by the agency's policy, then as defined by Council policy, and shall include:~~

- (A) ~~sexual harassment involving physical contact or misuse of position;~~
- (B) ~~misuse of official position for personal or economic gain;~~
- (C) ~~excessive use of force under authority of the State, first offense;~~
- (D) ~~biased enforcement;~~
- (E) ~~use of electronic criminal records database for personal, political, or economic gain;~~
- (F) ~~placing a person in a chokehold;~~
- (G) ~~failing to intervene and report to a supervisor when the officer observes another officer placing a person in a chokehold or using excessive force.~~
- (H) ~~while on duty or off duty, attempting to cause or causing physical harm to a family or household member, or placing a family or household member in fear of imminent serious physical harm; or~~
- (I) ~~while on duty or off duty, a violation of the Domestic Violence Involving Law Enforcement Model Policy adopted pursuant to [section 2365](#) of this title.~~

20 V.S.A. § 2407

Strike and replace with:

§ 2407. Limitation on Council sanctions

(a) After a valid investigation of Category B conduct made pursuant to section 2404 of this title concludes, the Council may impose for a first offense of Category B conduct:

- (1) a sanction up to the degree of the agency's discipline for the same conduct;
- (2) any degree of sanction if the employee resigns or is terminated for the same conduct;
- (3) any degree of sanction if the agency fails to conduct a valid investigation; or
- (4) any degree of sanction if the misconduct is committed by an agency's executive officer.

(b) The limitation on the degree of the Council's sanction in subsection (a)(1) of this section shall not apply if the agency's imposition of discipline for substantiated misconduct or failure to impose discipline for substantiated misconduct is clearly unreasonable considering the following factors:

- (1) the nature and seriousness of the offense;
- (2) the employee's job level and type of employment;
- (3) the employee's past disciplinary record;
- (4) the employee's work record;
- (5) the effect of the offense on the employee's ability to perform satisfactorily;
- (6) the consistency of the penalty with those imposed upon other similarly situated employees;
- (7) the consistency of the penalty with any applicable agency table of penalties;
- (8) the notoriety of the offense or its impact on the reputation of the agency;
- (9) the clarity of notice;
- (10) the potential for the employee's rehabilitation;
- (11) mitigating circumstances surrounding the offense; and
- (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

(c) It is the intent of the General Assembly that in construing subsection (b) of this section, the Council and the courts of this State will be guided by the construction of similar terms used in labor relations proceedings in this State.