

#1410

**VOLUNTARY RIGHTS ARBITRATION
STATE OF OHIO**

IN THE MATTER OF THE ARBITRATION BETWEEN:

**THE STATE OF OHIO, OHIO DEPARTMENT OF PUBLIC SAFETY,
DIVISION OF THE STATE HIGHWAY PATROL**

-AND-

THE OHIO STATE TROOPERS ASSOCIATION, UNIT 1

GRIEVANT: JENNIFER D. KNOTTS

GRIEVANCE NO.: 15-00-990416-0026-04-01

**ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DR. DAVID M. PINCUS
DATE: November 22, 1999**

APPEARANCES

For the Employer

Reginald Lumkins
Rhonda G. Bell
Robert J. Young
Susan M. Rance

Sergeant
OCB
Staff Lieutenant
Staff Lieutenant/Advocate

For the Union

Jennifer D. Knotts
Bob Stitt
Herschel M. Sigall

Grievant
President
Advocate

INTRODUCTION

This is a proceeding under Article 20, Grievance Procedure, Section 20.08 – Arbitration of the Agreement between The Ohio Department of Public Safety, Division of the Ohio Highway Patrol, (the “Employer”) and The Ohio State Troopers Association, Inc. Unit 1 (the “Union”) for the period July 1, 1997 to June 30, 2000 (Joint Exhibit 1).

The arbitration hearing was held on July 14, 1999, at the Office of Collective Bargaining, Columbus, Ohio. The parties had selected David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the hearing, the parties were asked if they planned to submit post hearing briefs. Both parties did, in fact, submit briefs.

PERTINENT CONTRACT PROVISIONS

ARTICLE 19 - DISCIPLINARY PROCEDURE

19.01 Standard

No bargaining unit member shall be reduced in pay or position, suspended or removed except for just cause.

xxx
(Joint Exhibit 1, Pg. 27)

19.05 Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

1. One or more Verbal Reprimand (with appropriate notation in employee's file)
2. One or more Written Reprimand
3. One or more day(s) suspension(s) or a fine not to exceed five (5) days pay, for any form of discipline, to be implemented only after approval from the Office of Collective Bargaining
4. Demotion or Removal

However, more severe discipline (or a combination of disciplinary actions) may be imposed at any point if the infraction or violation merits the more severe actions.

The Employer, at its discretion, is also free to impose less severe discipline in situations which so warrant.

The deduction of fines from an employee's wages shall not require the employee's authorization for the withholding of fines from the employee's wages.

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(Joint Exhibit 1, Pgs. 29-30)

ISSUE

Was the Grievant removed for just cause? If not, what shall the remedy be?

BACKGROUND

Jennifer D. Knotts, the Grievant, served as a Dispatcher at the Granville Post of the Ohio Highway Patrol. The facts for the most part are not in dispute. Their interpretation, and severity attached to certain circumstances, have become the focus of this dispute.

The dispute originally arose out of a complaint initiated by the Grievant against a fellow co-worker, Trooper David Katafias. The Grievant had certain concerns surrounding Katafias' conduct, which she found alarming and fearful. A casual relationship had evolved into sexually harassing and threatening behavior.

These concerns caused the Grievant to write a letter to her post commander. The letter contained a number of allegations, which included in pertinent part: improper advances; sexually explicit calls to her voice mail following pages to her number; and unwanted and embarrassing sexually aggressive conduct at a Union sponsored District 6 Christmas party. The Grievant provided a list of witnesses who could collaborate her views regarding Katafias' conduct.

The January 25, 1999, letter prompted an administrative investigation. Sergeant Reginald Lumkins met with the Grievant on January 26, 1999, to investigate her allegations. The Grievant was allegedly counseled to continue monitoring her voice mail in the hope she would gather additional incriminating evidence.

A few days after interviewing the Grievant, Sergeant Lumkins interviewed Katafias. He purportedly told him the Patrol would not endure his alleged activities if substantiated. Interestingly, once this discussion took place, additional harassing and/or sexually explicit messages to the Grievant's voice mail failed to materialize. Part of Sergeant Lumkin's investigation involved reviewing telephone bills and dictaphone tapes coming in and out of the Granville post. The phone call tapes covered the period November of 1998 through December of 1998.

Upon reviewing this data, a few disconcerting outcomes surfaced. Sergeant Lumkins noticed the Grievant made numerous personal long distance calls out of the Granville Post. The majority of these calls were made to the Grievant's personal pager and voice mail access; a cellular telephone or pager owned by the Grievant's roommate; and the City of Lancaster's Police and Fire Department dispatch phone number.

While reviewing the dictaphone tapes, Sergeant Lumkins came upon an emergency 911 call. The call came from a female driver on an interstate. She reported a suspicious man had been following her for a considerable period of time. While conversing with this civilian, another phone rang which caused the Grievant to place the 911 call on hold. This particular caller hung up with no required intervention nor response by the Grievant. Shortly thereafter, the phone rang; and once again the Grievant responded. On this occasion, the Grievant's boyfriend was on the line. The Grievant conversed with her boyfriend for a brief period of time while ignoring the civilian she had placed on hold prior to the two interruptions. The conversation with her boyfriend took approximately 45 seconds; the Grievant eventually returned to the

civilian who she had placed on hold. The civilian acknowledged the alleged perpetrator had eventually exited the highway, and no longer served any potential threat.

The fruit of Sergeant Lumkins' investigation caused the Employer to investigate the Grievant's purported neglect of her own duties. An investigatory interview was conducted on February 26, 1999. At the interview, the Grievant was questioned about her personal long distance calls to her pager/voice mail, and the 911 incident.

On April 5, 1999, the Grievant was removed from employment for violation of Rule 501.1(c)(10)(b) – Neglect of Duty. The pre-disciplinary notice indicates the Grievant was charged with making numerous unauthorized long distance calls, and failing to log these calls. Also, on November 30, 1998, the Grievant failed to properly handle a 911 call, and placed the caller on hold in order to continue a personal conversation on another line.

On April 11, 1999, the Grievant formally protested the removal decision by filing a grievance. She remarked:

I was terminated without just cause for making long distance phone calls and that I improperly handled a 911 call.

(Joint Exhibit 3)

The parties were unable to resolve the dispute. Neither party raised substantive nor procedural arbitrability issues. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Employer's Position

The Employer asserts it had just cause to remove the Grievant. The record clearly provides substantial proof that the Grievant was guilty as charged.

The Employer claimed the Union's emphasis on the Grievant's sexual harassment claim was misplaced. The mere filing of the complaint, and subsequent investigation, did not bias nor prejudice the Employer's review and determination dealing with the present dispute. The Grievant's actions are at issue here, and not those engaged in by Trooper Katafias.

The Grievant's handling of the emergency 911 call was totally improper and warrants discipline. Rationale provided by the Grievant seems peculiar and contrary to certain admissions. The Grievant assessed the circumstances surrounding the call and then determined she could talk to her boyfriend. She noted that she prioritized the boyfriend's call because she wanted to get the call completed. The Grievant did not want to have to talk to him at some later time during the shift.

The previously described version runs counter to an explanation provided during the investigatory interview. The Grievant admitted that she mishandled the situation; the 911 call should have been handled first and given priority.

When one reviews the tape of the 911 call, the Grievant's obvious neglect of duty becomes apparent. This determination surfaces when she discusses the existing circumstances with her boyfriend. She tells him that she is "a little busy" and that "people are driving me crazy." Clearly, these remarks indicate the fate of the 911 caller was not given sufficient priority, and in fact, minimized.

What exacerbates the situation, and indicates that further progressive or corrective action might be inappropriate, is the Grievant's prior disciplinary record. Approximately one year prior to the present dispute, the Grievant was disciplined for mishandling another 911 call. Similarly, her discipline record indicates a prior reprimand for misuse of State of Ohio telephones and of LEADS. All of these priors took place within a four-year period.

The phone call allegations are further supported based on notice considerations and admissions made by the Grievant. The Grievant had to have known that calls between Granville and Lancaster were long distance. Calls to Lancaster were never billed as local calls even prior to the area code change. The Grievant, moreover, had been disciplined for making similar calls; while the local versus long distance designation had never been altered. Finally, further notice was provided via the Post 45 Telephone Calling Guide (Union Exhibit 2). This guide was posted, clearly visible and at the Grievant's disposal, if she needed further explanations concerning what constituted a long distance call.

The Grievant's explanations further lessened her credibility regarding the matter. While being interviewed by Sergeant Lumkins, the Grievant remarked she was unsure whether calls to her pager were long distance, and yet, she knew these calls were not free nor local. This inconsistency exposes the Grievant's true understanding regarding the long distance allegation, and what constitutes proper long distance phone usage.

The Union's Position

The Union opines the Employer did not have just cause to remove the Grievant. Emphasis was placed on the totality of circumstances surrounding the matter, including the Grievant's initial sexual harassment allegations.

The Union raised an inference which linked the Grievant's sexual harassment charge, with the Employer's subsequent attempt on removing the punitive victim. In a way, the Employer's irresponsible investigation of the Grievant's allegations, and subsequent examination of her own alleged misconduct, smacks of retaliation. If this strategy proves fruitful, it will have a chilling affect on any women who considers filing sexual harassment charges against a male working for the Ohio Highway Patrol.

The Employer's investigation of the sexual harassment claim was flawed and defective. The matter was never fully investigated and the Grievant's witnesses were never contacted. Further, the alleged perpetrator was given advanced notice regarding the investigation. This intervention caused the perpetrator to curtail his activity; which reduced the possibility of surfacing additional examples of misconduct.

The facts surrounding the dispute are for the most part, not in dispute. The emphasis placed on them, and their interpretation, however, are heavily disputed by the Union.

The duties engaged in by a Dispatcher or a Trooper "sitting desk" are quite diverse. These include in pertinent part:

- Handling of cellular 911 calls
- Communication with Troopers in the field via radio
- Answer regular inquiry calls on a landline

- Operate the leads computer

It should be noted a Dispatcher is given wide latitude in the handling of diverse duties. The Patrol has never provided Dispatchers with any notice regarding any priority hierarchy; this appears to be a highly independent responsibility based on differing circumstances and conditions. The mix becomes even more difficult when one considers that these tasks are being accomplished while Dispatchers log various radio and telephone traffic.

The tape of the 911 call in dispute accurately depicts the multi-faceted duties engaged in by the Grievant. While interacting with the 911 caller, she determined the incident to be a non-immediate emergency. During this short period of time, the Grievant was contacted twice by Troopers on the road, accessed the LEADS computer and took a call from her boyfriend.

The Employer, moreover, mischaracterized her handling of the 911 call, as well as the accompanying call made by her boyfriend. The civilian making the 911 call never filed a complaint regarding the Grievant's conduct. In fact, at the conclusion of the call, she thanked the Grievant. Clearly, any reasonable person reviewing this incident would concur with the Grievant's assessment. The call never reached the level of emergency status.

The boyfriend's incoming call was not a call the Grievant could have declined. She is required to take all incoming calls. The record indicates her conversation with her boyfriend lasted approximately forty-five seconds. The Grievant admitted she should have shortened the duration of the conversation. Yet, she engaged her

boyfriend to eliminate a subsequent call during her shift. If anything, one could chastise the Grievant for an error in judgment, but nothing approaching a dischargeable offense.

The telephone calls charge was defective for a number of reasons. Sergeant Lumkins' investigation was defective because it was incomplete. The record establishes that "business" related calls have been permitted even if they were long distance. Such calls often dealt with schedule changes, departures, or other matters somehow related to post matters. Some of the Grievant's non-pager initiated calls to her voice mail fell into this category of calls, as well as calls initiated by other individuals. Yet, Sergeant Lumkins was never aware of this practice.

Another defect concerns the nature of the Post's phone system. For a considerable period time, calls made by the Grievant, and others, on a particular line were local calls. She often used this line after being paged to her voice mail to determine the source and content of the page.

The phone system at the Post became quite confused after the phone company added a new area code number of 740. Prior to this change, calls to Lancaster and Columbus, Ohio were viewed as local calls. After the change, Columbus calls were still local even though access would be provided by using a long distance area code. Other lines, which had been designated as local, and used by the Grievant for accessing her voice mail, became long distance calls. The Grievant continued to use this line in error thinking the calls were still local. These errors were unintentional and easily understandable.

Confusion regarding the phone system was adequately documented. The secretary at the Post had to prepare a calling guide which outlined the new guidelines.

In fact, on February 8, 1999, after the investigation had been initiated, the Grievant was advised to cease her personal long distance calling practice or face future discipline.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, a complete review of the record, including pertinent contract provisions, it is the opinion of this Arbitrator that the Employer did not have just cause to terminate the Grievant. The Employer did, however, have just cause to discipline the Grievant by administering a less severe penalty for the actions she engaged in. A modification of the imposed penalty seems in order because the penalty is not commensurate with the proven offenses.

It should be noted that the analysis which follows was in no way tempered or impacted by the Union's "retaliation" theory. Even though the investigation was initiated as a consequence of alleged co-worker misconduct, and eventually led to an investigation of the Grievant's conduct, the true focus has to rest on whether the Grievant is guilty as charged. Whether the sexual harassment allegation was botched or mishandled is not relevant to an understanding of the Grievant's conduct. The conduct of both individuals is related, somewhat, in terms of the personal telephone charge, but they are not linked. Neither the Grievant nor the Union established any nexus dealing with the disputed matter.

The record clearly indicates the Grievant engaged in some form of misbehavior regarding the disputed charges. There is no doubt in the Arbitrator's mind that she engaged in misconduct regarding the personal telephone call allegations. The notice and confusion defense regarding the change in telephone system does not seem persuasive. The telephone calling guide (Union Exhibit 2), which was posted, available

and relatively unambiguous retards this allegation. Probably most glaring are certain admissions made by the Grievant. She noted the calls were not "free of charge" and "not local." Any reasonable person, with this understanding, would conclude that the calls were long distance and personal. Granted, some of the calls appear to be "business related." But still, some of the other disputed long distance calls were clearly of a personal nature.

A certain degree of misconduct also surrounds the 911 call. The Grievant admitted she should have handled the episode differently. Even if the entire exchange took forty-five seconds, and she had no way of knowing her boyfriend had initiated the call, the episode is troubling because it suggests a careless approach to her duties as a Dispatcher. She should have gotten back to the 911 caller a bit more quickly. In this instance, her evaluation of the situation proved to be accurate; it was a non-emergency situation. Yet, whether an emergency situation or not, her primary focus should be on the motoring public, and not her boyfriend. He could have called the Grievant back during a break. The Grievant's rationale for continuing the conversation appears self-serving and completely unpersuasive.

The Employer, based on the previous analysis, has established some degree of guilt. The penalty administered, however, appears excessive based on the handling of this particular dispute as opposed to previous episodes of similar misconduct.

In this instance, the discipline imposed was not commensurate with the offense. The Arbitrator concludes the imposed penalty is too severe and must be modified. The Grievant does have a prior disciplinary record which contains the following acts of misconduct:

- Written reprimand – misuse of LEADS
- 1 day suspension – failure to take action on 911 call
- 3 day suspension – misuse of State telephones

(Joint Exhibit 3)

The level of discipline imposed for these prior acts serve as a threshold for analysis. If these infractions are so egregious, then more severe forms of discipline should have been imposed initially. Obviously, the Employer's prior disciplinary actions do not identify long distance personal calls and mishandling 911 calls as removable offenses. This Arbitrator can only, therefore, conclude that these types of offenses, unless severely egregious, are correctable in accordance with Article 19.05. Nothing in the record discloses that these more recent indiscretions were significantly different from those previously discussed.

Removal in this instance is an inappropriate penalty. And yet, the Grievant must be placed on clear and convincing notice that these acts of misconduct will not be tolerated. The Award specified below should not be viewed as condoning the Grievant's behavior. If she continues along this tortuous path, the outcome could be calamitous.

AWARD

The Employer did not have just cause to remove, but did have just cause to discipline the Grievant. The removal order shall be converted to a ten (10) day suspension. The Grievant shall be reinstated to her former position with full seniority and be made whole for all lost wages less any normal and typical set asides. Any and all benefit banks shall be reconstituted to reflect this Award.

November 22, 1999
Moreland Hills, Ohio


Dr. David M. Pircus
Arbitrator

DR. DAVID M. PINCUS
Arbitrator
4026 Ellendale Road
Moreland Hills, Ohio 44022

November 22, 1999

Mr. Herschel Sigall, Esq.
Ohio State Troopers Association
6161 Busch Blvd., Suite 130
Columbus, Ohio 43229-2553

-and-

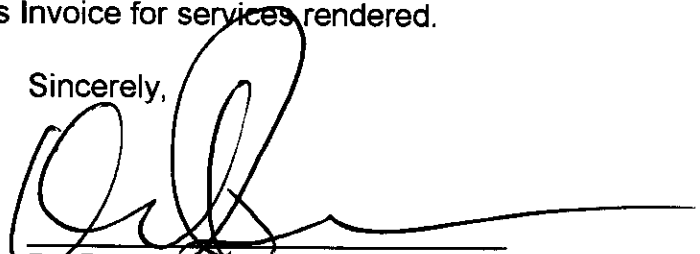
Mr. Mike Duco
Chief of Arbitration Services
106 North High Street
Columbus, Ohio 43215-3019

Re: The State of Ohio, Ohio Department of Public Safety, Division of the State
Highway Patrol
Grievant: Jennifer D. Knotts
Grievance No.: 15-00-990416-0026-04-01

Dear Herschel and Mike:

Enclosed please find the Opinion and Award dealing with the above captioned matter. I have also enclosed an Arbitrator's Invoice for services rendered.

Sincerely,



Dr. David M. Pincus
Arbitrator