

#1492

**THE STATE OF OHIO, OHIO DEPARTMENT OF PUBLIC  
SAFETY AND OHIO STATE TROOPERS ASSOCIATION  
LABOR ARBITRATION PROCEEDING**

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**THE MATTER OF THE ARBITRATION BETWEEN:**

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

**-AND-**

**OHIO STATE TROOPERS ASSOCIATION**

**GRIEVANT: JOHN P. LUCKETT**

**GRIEVANCE NO.: 15-00-000919-0130-04-01**

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**ARBITRATOR'S OPINION AND AWARD  
ARBITRATOR: DAVID M. PINCUS  
DATE: MAY 3, 2001**

**APPEARANCES**

**For the Employer**

Chris Lyons  
Reginald Lumpkins  
Marla K. Gaskill  
Elizabeth A. Dasilva  
Beth A. Lewis  
Renee B. Macy

Deputy Sheriff  
Lieutenant  
Lieutenant  
Sergeant  
Second Chair  
Advocate

**For the Union**

John P. Luckett  
Bob Stitt  
Edwin C. Richardson  
Ron Shaffer  
Elaine E. Silveira  
Herschel M. Siegall

Grievant  
President  
Staff Representative  
Deputy Sheriff  
Assistant General Counsel  
General Counsel and Advocate

**INTRODUCTION**

This is a proceeding under Article 20 – Grievance Procedure, Section 20.07 –

Grievance Procedure of the Agreement between the Ohio Department of Public Safety,

Division of the State Highway Patrol (hereinafter referred to as the "Employer") and Ohio State Troopers Association, Inc. (hereinafter referred to as the "Union"). The parties had selected Dr. David M. Pincus as the Arbitrator.

An arbitration hearing was held on January 24, 2001 at the Office of Collective Bargaining, Columbus, Ohio. At the hearing, the parties were allowed to present and introduce documents, testimony and evidence. They were, moreover, allowed to examine and cross-examine witnesses. At the conclusion of the hearing, the parties were asked if they wished to provide post-hearing briefs. Both parties supplied briefs in accordance with guidelines established at the hearing.

### **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.

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**(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 action.

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

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**(Joint Exhibit 1, Pgs. 29-30)**

**STIPULATED ISSUE**

Was the Grievant terminated for just cause? If not, what  
Shall the remedy be?

**CASE HISTORY**

John Lockett, the Grievant, served as a Highway Patrol Trooper assigned to the Springfield, Ohio post. At the time of his removal, he had been employed for a thirteen-month period.

The facts for the most part are not in dispute. On August 18, 2000, at approximately 11:35 p.m., the Grievant was dispatched to Champaign County. He was asked to check on a reported incident involving suspects throwing rocks at vehicles. While driving to the location in question, the Grievant stopped a motorist for DUI infraction and subsequently initiated an arrest.

The Grievant was back in service at approximately 2:17 a.m. The Grievant, however, was shortly thereafter involved in an accident while backing his car in the parking lot of a Marathon Gas Station in St. Paris, Ohio. His vehicle struck a yellow steel pole.

The Grievant continued on his dispatched call to Elm Tree Road in Champaign County. He did not, however, notify dispatch about his accident.

Eventually, at approximately 3:15 a.m., the Grievant did call dispatch. He reported two unknown suspects, in the above-mentioned location, had thrown rocks at his vehicle and had fled into a cornfield. The Grievant, moreover, remarked that his vehicle had been damaged. The suspects had damaged the rear bumper and tail light assembly.

The dispatcher initiated the proper protocol. The Champaign County Sheriff's office was contacted, as well as the Grievant's supervisor, Sergeant Beth Dasilva. Champaign County dispatched two Deputy Sheriffs to assist the Grievant in his search for the two perpetrators.

At approximately 5:20 a.m., the Grievant returned to his assigned post. Dasilva evaluated the vehicle for damage. She, moreover, advised the Grievant that a criminal cause of action would be initiated because criminal damage had been inflicted on division equipment. Also, an unusual teletype would be issued based on the circumstances surrounding the incident.

The extensive damage raised some suspicion and concern with Dasilva. As a consequence, she notified Post Commander Moser, who in turn dispatched another Sergeant and Trooper to the scene of the alleged incident. They were unable to surface any evidence in support of the Grievant's allegations.

Moser, himself, eventually investigated the damaged vehicle. He concluded that rock throwing could not have inflicted the resultant damage. Moser contacted District Headquarters and discussed the relevant particulars. Staff Lieutenant Ludlow and Moser determined an Administrative Investigation should be initiated.

Prior to the initiation of any Administrative Investigation, however, Dasilva contacted Moser and raised some concerns. She noted the Grievant's actions may have constituted a criminal act. Through the mutual agreement of several Employer representatives, the Administrative Investigation was held in abeyance pending the initiation of a Criminal Investigation.

On Monday, August 21, 2000, the Grievant was officially advised of a Criminal Investigation. The Grievant chose to remain on approved leave pending the outcome of the investigation.

An Administrative Investigation was subsequently initiated on August 28, 2000. The investigation resulted in the Grievant's termination on September 16, 2000. The termination letter stated in pertinent part:

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You are hereby advised that you are being removed from your employment with the Department of Public Safety at the close of business on Saturday, September 16, 2000.

You are hereby terminated for violation of Rule 4501: 2-6-02(E).

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**(Joint Exhibit 3 (D))**

It should be noted the rule infraction states:

**(E) False, statement, truthfulness**

A member shall not make any false statement, verbal or written, or false claims concerning his/her conduct or the conduct of others.

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**(Joint Exhibit 3 (D))**

The above-mentioned action caused the Grievant to file an official protest. The grievance contained the following Grievance Facts:

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That on Saturday, September 16, 2000, at 16:00 Hrs., I was terminated without just cause and that progressive discipline was not followed.

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**(Joint Exhibit 2)**

The parties were unable to settle the disputed matter during subsequent stages of the grievance procedure. Neither party raised procedural nor substantive arbitrability concerns. As such, the grievance is properly before the Arbitrator.

**THE MERITS OF THE CASE**

**The Employer's Position**

The Employer opined it had just cause to remove the Grievant for filing a false report in an attempt to conceal a patrol car crash. Arguments provided concerned the Grievant's intentional dishonesty to cover up a crash and the filing of a false police report. Arguments were also offered in rebuttal to the Union's claims dealing with the propriety of the Administrative Investigation and disparate treatment.

The Grievant lied when he initially attempted to cover-up his accident. He admitted to the lie during the course of the Administrative Investigation. Also, he intentionally promulgated a cover-up by failing to follow known and observed reporting protocols. One cannot equate the Grievant's actions as a mere error in judgment. Rather, the Grievant perpetrated an elaborate scheme intentionally engaged in to deceive the Employer.

The Grievant's actions were exacerbated by his own inactions. He never told County Deputies about the real reasons for the damage to his car. Upon returning to the post, the Grievant, although he had ample opportunity, never told Dasilva what

actually took place. In fact, when asked about the yellow paint on his bumper, the Grievant advised Dasilva that it was there at the beginning of his shift.

A negative inference should be readily drawn from the Grievant's failure to testify in his own defense. As such, the Arbitrator should conclude the Grievant had no adequate explanation for his conduct.

The Grievant, after deliberately lying, filed a false police report. Even though the Grievant's supervisor completed and signed the police report, the Grievant still was viewed as "filing" the report since his initial disclosure served as the triggering event.

The Grievant irreparably damaged his credibility as a law enforcement officer. His lie was not linked to internal departmental records or protocols. Rather, the Grievant's lie dealt with a public record, a false police report. His actions affected his credibility in future court proceedings where his testimony would be viewed as untrustworthy.

The Employer emphasized the imposed discipline was based on the Administrative rather than the Criminal Investigation. A Garrity violation was never initiated by the Employer. The Supreme Court in Garrity<sup>1</sup> prohibited the use of statements taken in an Administrative Investigation and in a Criminal Investigation, protecting an individual's Fourteenth Amendment rights. But, the aforementioned ruling in no way provides reciprocal protection for statements taken during a Criminal Investigation.

Here, the determination to discipline was based solely on the Administrative Investigation. Any decision by the County Prosecutor regarding the criminal nature of the disputed incident had no impact on the Employer's administrative finding.

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<sup>1</sup> Garrity v. New Jersey, 385 U.S. 493 (1967).

Dasilva's refusal to speak with the Grievant the evening of August 19, 2000, in no way served as a potential mitigating factor. Listening to the Grievant would not have erased his lies and deceptions. He had ample opportunity to "come clean" prior to the filing of the police report and unusual teletype, but failed to do so.

Dasilva acted in a reasonable and rationale fashion. She refused to converse with the Grievant to protect rather than entrap him. Realizing that his actions verged on criminal behavior, she refused to speak to the Grievant in an attempt to prevent him from incriminating himself.

The Union failed to prove its disparate treatment claim. Examples provided by the Union did not establish that the Grievant and other bargaining unit members were similarly situated. The disputed matter can, moreover, be distinguished as a consequence of aggravating circumstances. As such, the alluded to variations in discipline are reasonably related to the variations in circumstances.

### **The Union's Position**

It is the Union's position that the Employer did not have just cause to remove the Grievant. The Employer, moreover, failed to follow proper progressive discipline principles since the Grievant did not have any prior discipline on his departmental record. Also, the discipline imposed is inconsistent with discipline imposed in other similar situations.

Granted, the Grievant engaged in some questionable conduct. And yet, Dasilva's conduct precipitated the termination, which was avoidable under the circumstances. After reviewing the damaged vehicle she should have known that rocks could not have caused the damage. In fact, at the Arbitration hearing, she admitted not



believing the Grievant's version of the events. Sergeant Dale Horvath independently evaluated the vehicle and determined the damage could not have arisen as a consequence of a rock-throwing incident. Any reasonable person, conducting an impartial evaluation, would have come to the same conclusion.

Rather than intervening in a proper supervisory manner by providing guidance, Dasilva unnecessarily escalated the situation. Dasilva initiated a Criminal Investigation and caused the report to be filed. The Grievant never filed a criminal report and wanted to volunteer the truth; but Dasilva never provided the Grievant with an opportunity to recant.

The discipline imposed was defective because the Employer engaged in unequal treatment. Several similar situations have arisen in the recent past. Similarly situated Troopers reported false statements; but neither were charged with a crime. They were merely suspended for one day. Unlike the Grievant who attempted to come forward and admit the truth, the other Troopers were confronted before either told the truth; while criminal charges were never filed.

Circumstances surrounding the disputed matter clearly establish the need to apply progressive discipline principles. A less severe penalty will still protect the Employer's legitimate interests. The Grievant's service record had not been previously tainted. Nothing in the record, moreover, suggested that the imposed charges are so severe to be exempted from progressive discipline requirements.

#### **THE ARBITRATOR'S OPINION AND AWARD**

From the evidence and testimony adduced at the hearing, and a full and impartial review of the record including pertinent contract provisions, this Arbitrator finds the

Employer had just cause to remove the Grievant from State service. Clearly, his actions comport with transgressions in violation of Rule 4501:2-6-02(E). The imposed penalty was not excessive in light of the circumstances. Also, disparate treatment was not supported by the record, while other exacerbating circumstances justified removal.

Some preliminary comments are in order. Although the Union at the hearing alluded to the possible commingling of Criminal and Administrative Investigations, and possible related ramifications, it never truly challenged the propriety of the Administrative Investigation vis a vis its Garrity ramifications. The Union's post hearing brief, moreover, never referenced any Garrity argument nor any problems regarding the Administrative Investigation. Perhaps after some soul-searching and critical analysis, the Union concluded it had no basis for raising an initial inference unsupported by the record. This Arbitrator is left with no other plausible finding, but to support the Employer's un rebutted conclusion regarding the propriety of the Administrative Investigation.

The incident in dispute was surrounded by other experiences, which played no role in my ultimate determination. Whether other suspicious individuals were stopped with rocks in their possession, or whether citizens in the surrounding area were found with dirt on their boots are viewed as mere deflections. They do not properly rebut the essence of the Employer's claims in support of removal.

The Grievant's own admissions provide just cause for removal. As such, the Employer obtained sufficient evidence or proof that the employee was guilty as charged. The Grievant's attempt to subsequently recant his falsified initial version in no way minimizes this conclusion. He waited an inordinate amount of time to address his

concerns with his supervisor. The Grievant did, indeed, "file" the criminal report once he reviewed the circumstances with his supervisor. Filling out the paperwork was triggered by the Grievant's initial version of the events; and this review served as the triggering event for the documentation which followed. To place the blame on the supervisor for not allowing the Grievant to recant his falsified version is a fruitless effort. She merely attempted to insulate the Grievant from incriminating himself once she questioned his version of events, and the criminal report had already been filed. An alternate approach could have jeopardized an ensuing Criminal Investigation and the Grievant's rights.

The primary focus of the Union's argument centers on an unequal treatment claim. Here, however, the Employer did apply its rules, orders and penalties even-handedly and without discrimination. The Grievant is not similarly situated to the falsification examples offered by the Union. As such, the Employer was properly justified to administer differing levels of discipline. Granted, the Grievant and the Troopers used for comparison purposes damaged their vehicles through their own negligence, and lied about the circumstances surrounding their various events.

Beyond these similarities, more than a modicum of dissimilar circumstances preclude the Grievant's membership in the class of two forwarded as bona fide comparables. Even though the other Troopers lied, they never raised any justification involving a member of the general public as a cause for their damaged vehicles. Once the Grievant offered this lie as justification, he, not his supervisor, caused the filing of the criminal report and teletype.

The filing of a criminal report and related subsequent actions significantly distinguish the Grievant's circumstance from those of the other Troopers. Once the

criminal report was filed, the falsification surfaced and subsequent criminal proceedings initiated, the matter no longer retained an internal consumption departmental flavor. It became a matter of public record. Forever made available to any resourceful defense attorney willing to question the Grievant's credibility in any future legal forum. This circumstance would, in fact, inevitably interfere with the successful operation of the Ohio State Highway Patrol, and the Grievant's ability to perform his duties.

The parties in Article 19.05 have expressly recognized the Employer's ability to impose more severe discipline if the infraction or violation merits a more severe action. Here, in the Arbitrator's opinion, the Employer did not unreasonably apply its discretionary right. Application of progressive discipline was unnecessary in this instance. The Grievant's own actions and admissions explain the propriety of the administered penalty. His conduct is so obviously unacceptable that the employer-employee relationship cannot be repaired.

The Grievant's length of service also serves as an exacerbating or aggravating factor justifying the propriety of the imposed penalty. It is well established that employer's may justifiably consider an employee's years of service when rendering a disciplinary action. Here, at the time of the disputed matter, the Grievant had not yet realized two years of service with the Employer. Thus, the removal decision was additionally justified based on this factor.

**AWARD**

The grievance is denied. The Employer had just cause to remove the Grievant from employment.

May 3, 2001  
Moreland Hills, Ohio



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Dr. David M. Pincus  
Arbitrator