

IN THE MATTER OF ARBITRATION
BETWEEN
OHIO STATE TROOPERS ASSOCIATION
AND

STATE OF OHIO
DEPARTMENT OF PUBLIC SAFETY
DIVISION OF HIGHWAY PATROL

Before: Robert G. Stein
CASE# 15-00-000911-0125-04-01

Grievant: David Shockey (termination)

Principal Advocate(s) for the EMPLOYER:

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INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement ("Agreement") (Joint Exh. 1) between the State of Ohio ("Employer" or "OSHP") and the Ohio State Troopers Association, Inc., Unit 1 and 15 ("Union"). That Agreement is effective from calendar years 2006 through 2009 and includes the conduct which is the subject of this grievance.

Robert G. Stein was selected by the parties to arbitrate this matter as a member of the panel of permanent umpires, pursuant to Article 20, Section 20.08 of the Agreement.

A hearing on this matter was held on January 30, 2009 at 9:00 am in Columbus, Ohio. The parties mutually agreed to that hearing date and location, and they were each given a full opportunity to present oral testimony, documentary evidence, and arguments supporting their respective positions. The hearing, which was not recorded via a fully-written transcript, was subsequently closed upon the parties' submissions of closing arguments.

The parties have both agreed to the admission of three (3) joint exhibits. No issues of either procedural or jurisdictional arbitrability have been raised, and the matter is properly before the arbitrator for a determination on the merits. The parties have also agreed to the statement of the issue to be resolved.

ISSUE

Was Trooper David Shockey removed from his employment for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 19—Disciplinary Procedure
Article 20—Grievance Procedure
Article 41—Ohio Employee Assistance Program

BACKGROUND

David Shockey ("Shockey" or "Grievant") was originally commissioned as a trooper of the OSHP on July 30, 1999. After previous service in the Dayton area, he was transferred to the Marion OSHP post on August 23, 2007, and he most recently worked the 10:00 p.m. to 6 a.m. shift there.

Shockey had previously volunteered to work an overtime detail on May 7, 2008 from 2:00 p.m. until 6:00 p.m.; and he had also gotten prior

approval to change his shift starting time that day to 6:00 p.m., instead of the customary 10:00 p.m. After 1:00 p.m. on May 7 and while still at his parents' home after an admitted disagreement with his father, Shockey phoned Sgt. Jeffrey Redden ("Redden"), who granted Shockey's request to not serve the previously-approved overtime hours and to have his actual work schedule revert back to his original 10:00 p.m. start time. Shockey's shift sergeant, Sgt. Felix Rosario ("Rosario"), later placed a phone call to Shockey at about 4:30 p.m. that same afternoon and was informed by the Grievant that the latter was dealing with adverse affects from the recently-prescribed Prozac medication he had consumed and that "he didn't want to drive." (Union closing p. 5; Employer Exh. 1 at p. 1) Because the Grievant did not have enough sick leave to cover his absence that day, Rosario approved Shockey's use of accumulated vacation time, in lieu of sick leave.

After leaving his parents' home, from where he had engaged in the above phone calls, Shockey had his father transport him to a public lot in Marion where his own car was parked, and then the Grievant went to a local bar/pizza place and began drinking there from about 5:45 p.m. At 7:30 p.m., he took a cab ride home and, at approximately 8:00 p.m., he contacted the Marion Police Department, which subsequently transported him at his own request to Marion General Hospital, based on his expression of suicidal threats or tendencies. Shockey remained there

for treatment for the next five (5) days after having been admitted to the psychiatric unit. After Rosario received a call later that same evening from the Bucyrus OSHP post dispatcher, indicating that the Grievant had been transported to the hospital by the Marion Police Department, Rosario went to the hospital and subsequently learned that Shockey's blood alcohol level had been tested at the hospital and had been determined to be .38, more than four (4) times the legal limit for establishing intoxication. A hospital nurse assisting with the Grievant's care also reported that, in response to the nurse's questioning the Grievant about whether he wanted to harm anyone other than himself, he had responded that he wanted to kill his parents. (Employer closing p. 2)

In response to this incident, an administrative investigation was begun on May 8, 2008. (Employer Exh. 1) It noted that a reasonable suspicion alcohol test administered to the Grievant on June 19, 2007 indicated that he had appeared for his scheduled shift assignment with a blood alcohol level of .044. Because those results constituted a "positive test" pursuant to Appendix D, Section 3(A)(5) of the Agreement, the Employer had sought to remove the Grievant from his employment, based on his purported violation of OSHP rules included in Ohio Admin. Code § 4501:2-6-02(B)(1), Performance of Duty, and § 4501:2-6-02(I)(1), Conduct Unbecoming an Officer. The termination originally sought to be

imposed by the Employer ultimately was held in abeyance, pursuant to Article 19, Section 19.07 of the Agreement, and a last chance agreement became effective for five (5) years beginning on July 6, 2007. (Union Exh.

2) By signing that agreement, the Grievant agreed to successfully complete a substance abuse program certified by the Ohio Department of Alcohol and Drug Addiction Services. (Employer closing p. 6)

As part of the investigation, another incident was also reviewed which had occurred regarding the Grievant's duty time beginning at 10:00 p.m. on April 23, 2008. After having had time off on April 22 and 23, Shockey contacted Redden on the morning of April 23, requesting compensatory time off to visit his grandfather, a Kentucky resident who was purportedly very ill. Instead of making a trip to Kentucky, Shockey instead subsequently summoned the Marion Police Department at 10:16 a.m. on April 24, 2008 to provide him a ride to Marion General Hospital. Although he initially claimed that he had gone to the hospital due to the flu and dehydration, Shockey later admitted at the arbitration hearing that the dehydration was due to the large amount of alcohol he had consumed during the three (3) days he had been away from work. (Employer closing p. 4)

In response to the May 7, 2008 conduct, which ultimately led to this arbitration, a pre-disciplinary hearing was conducted on September 19, 2008. The hearing officer determined that the Grievant had violated the

two OSHP rules, which are included in Ohio Admin. Code § 4501:2-6-02(B)(1), Performance of Duty, and § 4501:2-6-02(I)(1), Conduct Unbecoming an Officer. The hearing officer noted that the Grievant had "call[ed] his supervisor and request[ed] sick leave, when it was revealed that he was in a state of alcohol intoxication during the hours of the requested sick leave and had to be transported to the hospital for emergency treatment by a local police department." (Joint Exh. 3[c]) Based on an Employer determination that reasonable and substantial cause existed to establish that Shockey had violated the two (2) rules identified above, he was advised by a letter dated September 26, 2008 that his employment was being immediately terminated.

The Union filed grievance number 15-03-20081001-0147-04-01 on behalf of Shockey, alleging the Employer's violation of §§ 19.01 and 19.05 of the Agreement. (Joint Exh. 2) Because the matter remained unresolved after passing through the preliminary stages of the grievance procedure, it has been submitted to the arbitrator for final and binding resolution.

SUMMARY OF THE EMPLOYER'S POSITION

The Employer argues that the termination of the Grievant's employment was the appropriate remedy to be imposed because Shockey has allegedly used sick leave to avoid the invocation of the last

chance agreement, based on his state of intoxication during his required work hours on both April 24 and May 7, 2008. (Employer's opening statement at hearing p. 2) The Employer also insists that the "Grievant's homicidal statement about wanting to kill his parents and his level of intoxication are indicative of conduct unbecoming an officer." (Employer opening statement pp. 2-3)

The Employer contends that the Grievant has demonstrated a pattern of abusing alcohol on his existing days off and then not being able to report to work for his scheduled duty time. By doing so, Shockey is purportedly avoiding the violation of the last chance agreement because he thereby avoids reporting to work in a condition reflecting his consumption of alcohol. (Employer closing p. 3) The Employer avers that that unacceptable conduct was demonstrated in both 2008 incidents. On April 23, the Grievant requested to use compensatory time to visit his ill grandfather who lived out of state. He never made said visit and was subsequently hospitalized due to adverse effects caused by excessive alcohol consumption. On May 7 the Grievant requested time off from work because he claimed to have suffered adverse effects from his newly-prescribed Prozac, but actually was intoxicated that day as well. The Employer underscores the fact that in addition to being untruthful in the instant matter, Shockey "was untruthful again when he said he was in the hospital for flu-like symptoms on April 24 when, in actuality, he was

drunk and dehydrated due to the large quantities of alcohol he drank."
(Employer closing p. 6)

The Employer states that the Grievant has had substance abuse problems since 2002 and was involved in a ten-day in-patient rehabilitation program at The Ohio State University through the OSHP's Employee Assistance Program. The Employer also points out that Shockey agreed to successfully complete a substance abuse program certified by the Ohio Department of Alcohol and Drug Addiction Services, but no information has been provided indicating continuing participation or successful completion of such a program. (Employer closing p. 6)

Because the Grievant admitted on cross-examination at the arbitration hearing that he is a chronic alcoholic, the Employer insists that he is prohibited from carrying firearms pursuant to Ohio Rev. Code § 2923.13 and, therefore, cannot perform the essential functions of his job as a trooper. (Employer closing p. 7) Also, the Employer argues that the Grievant's suicidal and homicidal statements certainly exemplify conduct unbecoming an officer and should not be tolerated by the OSHP because he was intoxicated.

Based on these claims, the Employer requests that the Union's grievance be denied in its entirety.

SUMMARY OF THE UNION'S POSITION

The Union contends that the Statement of Charges against the Grievant, provided to him on September 10, 2008, was based solely on the following cited conduct:

. . . calling into his supervisor and requesting sick leave, when it was revealed that he was in a state of alcohol intoxication during the hours of the requested sick leave and had to be transported to the hospital for emergency treatment by a local police department.

The Union argues that the allegations contained therein are both misleading and do not support the imposition of Shockey's discharge.

Because Shockey's physician had recently changed his depression medication to Prozac, the Union insists that the record in this matter clearly demonstrates that Shockey "alerted his superiors to the new medication; was experiencing adjustment sickness; and was not drinking at his parents' home when he called, requested time off, and was granted time off by the Employer. There is not even an inference in the evidence that the granting of the sick leave was obtained under false pretense or misstatement." (Union closing p. 5)

Purportedly, Shockey's own concerns about his consumption of alcohol were recognized by him in 2004, the year that he sought in-patient treatment at The Ohio State University, and he has subsequently sought assistance through medication, counseling and Alcoholics Anonymous. The Union specifically cites to the case of *Hazlett v. Martin*

Chevrolet, Inc., (1986) 25 Ohio St.3d 279 in support of its assertion that alcoholism has been recognized in Ohio as a disability or handicap pursuant to Ohio Rev. Code § 4112.01(A)(13), 4112.02. The latter statute, the Union insists, makes it unlawful to discharge an individual on the basis of a handicap without just cause. (Union closing pp. 8-9) The Union insists that the Grievant's work performance has not been compromised due to his admitted chronic alcoholism and that his termination cannot be justified due to his addiction to alcohol. The Grievant is attributed with having established the practice of not working or driving when he has ingested alcohol. The Union claims that the Grievant's physical and psychological ability to continue to do his job have been confirmed through examinations conducted by his personal physicians, as well as the Employer's doctor. He also purportedly has demonstrated no significant absenteeism or tardiness problem and has not been considered a potential sick leave abuser. (Union closing p. 13)

The Union contends that the Grievant's high blood alcohol level when he reported to work on June 19, 2007 was a result of his having reported for work without the normal period of time having elapsed for the alcohol to metabolize. More normally, "he would have his shots of liquor at a bar immediately upon the completion of his night shift at work. We would conclude this consumption in less than an hour and then take a taxi home." (Union closing pp. 10-11)

Specifically regarding the events of May 7, 2008, the Union insists that the Grievant ingested substantial alcohol during a relatively short period of time only after he had been granted vacation leave for his upcoming scheduled shift assignment. The Union insists that "[t]here is no evidence that he called off for other than legitimate considerations related to the change in medication [to Prozac]. He is not charged with sick leave abuse . . . He does not engage in any pattern of absenteeism." (Union closing p. 17) The Union argues that the Grievant's conduct of drinking after legitimately calling off sick is not prohibited by the terms of the last chance agreement nor any OSHP rule or regulation.

Based on the Union's claim that the Employer has failed to meet its burden of establishing that it did have just cause to impose the Grievant's discharge, the Union requests that its grievance be affirmed, that the Grievant be restored to his position as a trooper with the OSHP, and that he be made whole regarding his wages, benefits, and seniority, with the arbitrator retaining jurisdiction to confirm the implementation of the award.

DISCUSSION

Just as in all employee disciplinary matters, the Employer here has the burden of proof to demonstrate that it did have just cause to remove the Grievant from his position as an OSHP trooper. "Just cause" is not a

legal concept, but it embodies the principles of industrial justice. The purpose of "just cause" is to protect employees from unexpected, unforeseen, or unwarranted disciplinary actions, while at the same time protecting management's rights to adopt and to enforce generally-accepted employment standards. *Phillips Chem. Co. and Pace, Local No. 4-227, AFL-CIO, 00-2 Lab. Arb. Awards (CCH) P 3553 (Taylor 2000).*

"Just cause" imposes on management the burden of establishing: (a) that the standard of conduct being imposed is reasonable and is a generally-accepted employment standard which has been properly communicated to the employee; (b) that the evidence proves that the employee engaged in the misconduct which did constitute a violation of that standard; and (c) that the discipline assessed is appropriate for the offense after considering any mitigating or extenuating circumstances.

Phillips Chem. Co. Commonly-accepted "just cause" principles routinely used by arbitrators in disciplinary matters "are intended to ensure a higher level of fairness and due process for employees engaged in wrongdoing." They are also intended to increase the probability of workplace justice." *Paper, Allied-Indus., Chem., and Energy Workers Int'l Union, AFL-CIO, Oren Parker Local 8-171, Vancouver, Wash. and Petra Pak, Inc., 05-1 Lab. Arb. Awards (CCH) P 3078 (Nelson 2004).*

The crux of the problem leading to both the instant grievance, as well as the disciplinary situation resulting in the still effective last chance agreement, is the Grievant's admitted "chronic alcoholism." Despite the Grievant's willingness to use that terminology regarding himself at the arbitration hearing, it is not clear to this arbitrator that Shockey has come

to a full understanding of how that condition has come to permeate his life or that he has a full understanding of the gravity of both the real and potential consequences of his conduct due to his substance abuse problem. Certainly the Union, the Employer and this arbitrator empathize with the Grievant in his efforts to maintain his employment and his sobriety. However, in order to avoid the plethora of serious problems that will eventually result from chronic alcoholism, the recognized first step is for the Grievant to **fully commit** to his own rehabilitation. As noted by another arbitrator, "In the process of treating an alcoholic employee, the first step must begin with the employee's acceptance [or recognition] of the fact that he is in need of help." *Trans World Airlines and Indep. Fed'n of Flight Attendants*, 89-1 Lab. Arb. Awards (CCH) P 8186 (Eisler 1988). Consuming ten (10) to (12) shots soon after 6:00 a.m. and hoping that he is able to "sleep off" the effects before having to report to work again at 10:00 p.m. the same evening is conduct that will ultimately lead to a violation of the last chance agreement or exhaustion of all leave days. Either outcome is not in the best interest of either the Employer, who also shares vicarious liability for the Grievant's on-duty conduct, or the Grievant, who has thus far not been able to deal with the depression or other issues leading to his alcoholism. The circumstances and his own future rehabilitative success require the Grievant to be able to maintain

control over his off-duty conduct, which involves the chronic consumption of alcohol.

The record does reflect Shockey's involvement in a two-week residential treatment program at The Ohio State University, and additional rehabilitation efforts through the Employer's Employee Assistance Program ("EAP"), Alcoholics Anonymous, etc. He certainly is commended for making those efforts. Based upon his continuing alcohol abuse problems, however, his future with the OSHP is dependent upon his own willingness to recognize the need to have **additional and continuing assistance** in dealing with both the causes of his addictive behavior and also the methods he should continue to employ on a long-term basis to limit or avoid his own alcohol consumption. Those concerns would likely also include getting help in dealing with his episodes of depression and any tendencies for suicidal/homicidal conduct. Assistance in remedying those concerns and issues requires long-term professional assistance and a commitment from the Grievant to fully pursue the available options to ensure his full rehabilitation and fitness for duty.

The existence of the EAP evidences the Employer's commitment and dedication to the health and welfare of each individual employee. One of that program's primary concerns is identified as providing effective assistance and treatment for employees suffering from such disorders as alcoholism, family or marital distress, and mental or emotional

illness. (Article 41, Section 41.04) Notably, the intended purpose of that program is to encourage qualifying employees to come forth voluntarily and to acknowledge that they have a concern for which they need assistance, despite their own unsuccessful personal efforts to identify a successful solution or remedy.

Given the Grievant's severe addiction the arbitrator appreciates the Employer's healthy skepticism, however; in this matter the Employer failed to prove that the Grievant was intoxicated when he initiated the call to be excused from reporting to his overtime duty assignment on May 7, 2008 in violation of the Employer's rules. In addition, suicidal and or homicidal threats expressed by the Grievant must be placed in the context of his impaired state. But, the evidence clearly shows that Shockey subsequently used that granted leave time to consume excessive amounts of alcohol, which ultimately necessitated his self-initiated request for help. Clearly, no employer can be expected to tolerate an employee's repetitive requests for time off to allow for the employee's on-going addictive behaviors or his appearance at work with a blood alcohol level above the recognized .04 level. The employer has made a considerable investment in the Grievant in order that he may provide a vital service to the citizens of Ohio. Likewise Mr. Shockey has made a substantial investment in a noble and valuable career. It would be a loss for all parties if alcohol would bring this all to a premature end.

Therefore, the burden is ultimately upon the Grievant to demonstrate that he can regain control over his life so that he can properly be considered fit to continue in the capacity as an OSHP trooper.

AWARD

The grievance is granted in part and denied in part.

The Grievant's termination shall be reduced to a time-served unpaid suspension, but he shall be made whole for loss of seniority and benefits. The Grievant shall immediately be reinstated to his former position and he shall be placed on leave status. While on leave the Grievant, in accordance with the Agreement, shall have the option of using restored paid benefit leave and shall continue to earn benefits. Upon successful completion of the identified requirements listed below, Officer Shockey shall be returned to his former position and shift, unless otherwise agreed to by the parties. The below listed requirements shall be initiated and completed in an expeditious manner. The arbitrator shall retain jurisdiction in this matter for a period of ninety (90) calendar days from the date of this Award.

Prior to returning to work, the following requirements must be met:

- (1) Completion of a fitness-for-duty psychological exam performed by a mental health professional selected by and paid for by the Employer, which results in a fitness for duty finding.**
- (2) The Grievant must enroll in a rehabilitation program(s) recommended by the OSHP's Employee Assistance Program.***

*A commitment to these efforts shall be formalized in writing by Officer Shockey, the Union, and the Employer no later than (30) days from the date of this Award and shall be an addendum to the Last Chance Agreement. The Union and the Employer shall receive regular notification regarding the Grievant's continuing participation and attendance at the rehabilitation sessions.

The existing Last Chance Agreement shall not be reduced in duration as a result of the Grievant's time served suspension, but shall resume effective the date of this Award and it shall also be subject to the above stated requirements. If Officer Shockey fails to successfully complete the recommended rehabilitation program(s), as determined by the EAP, he shall be considered in violation of the Last Chance Agreement and shall be subject to termination.

Respectfully submitted to the parties this 3rd of April 2009.



Robert G. Stein, Arbitrator

Witnessed by [illegible]