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Labor Arbitrator and Mediator
30799 Pinetree Road, No. 226
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**IN ARBITRATION PROCEEDINGS PURSUANT TO THE
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES**

In the Matter of

**OHIO STATE TROOPERS
ASSOCIATION,**

and

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

Grievance # 15-03-20130501-0033-04-01

Grievant: Sean E. Carpenter

**ARBITRATOR'S
OPINION AND AWARD**

This Arbitration arises pursuant to the collective bargaining agreement (“the Agreement”) between the Parties, OHIO STATE TROOPER’S ASSOCIATION (“the Union”) and OHIO DEPARTMENT OF PUBLIC SAFETY, DIVISION OF HIGHWAY PATROL (“the State” or “the Division”) under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator.

The State moved to postpone the hearing on the basis the State has requested review before the Ohio Supreme Court on the Grievant’s related criminal case. The

Arbitrator denied the State's motion on the basis that: 1) she had already granted one postponement of the arbitration at the State's request; and 2) it was unknown when and if the Ohio Supreme Court would grant discretionary appeal of the criminal matter.

Hearing was held October 3, 2013 in Columbus, Ohio. Both Parties were represented by counsel who had full opportunity for the examination and cross-examination of witnesses, the introduction of exhibits, and for argument. Post-hearing briefs were submitted in a timely manner on or before November 12, 2013.

APPEARANCES:

On behalf of the Union:

HERSCHEL M. SIGALL, Esq., ELAINE N. SILVEIRA, Esq., PAUL D. RILEY,
and LARRY K. PHILLIPS, Ohio State Troopers Association

On behalf of the Employer:

LT. CASSANDRA L. KOCAB, Ohio State Highway Patrol

ISSUE

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

RELEVANT PORTION OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT

...

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.

...

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.

...

...

...

FACTS

The Grievant has been an Ohio State Trooper since February 21, 2003. He was removed from his position on or about April 24, 2013. The termination letter provides:

You are hereby advised you are being terminated from your employment with the Department of Public Safety, Ohio State Highway Patrol, effective immediately upon issuance on April 24, 2013, for violation of the Ohio State Highway Patrol Rules and Regulations. Specifically, OSHP Rules 4501.2-6-02(I)(1)(2), Conduct Unbecoming an Officer, 4501:2-6-02(B)(5), Performance of Duty and 4501:2-6-02(E)(1), False Statement, Truthfulness.

As a result of Administrative Investigation #2012-0542, it was found that you failed to take appropriate action at a crash scene involving an impaired motorist. You were subsequently charged and convicted for dereliction of duty. It is additionally charged you were untruthful during the administrative investigation.

OSHP Rule 4501:2-6-02(I)(1)(2), Conduct Unbecoming an Officer, provides:

- 1. For conduct, on or off duty, that may bring discredit to the division and/or any of its members or employees. A member shall not engage in any conduct which could reasonably be expected to adversely affect the public's respect, confidence, or trust for Ohio state highway patrol troopers and/or the division.**
- 2. For committing any crime, offense or violation of the laws of the United States, the state of Ohio, or any municipality.**

OSHP Rule 4501:2-6-02(B)(5), Performance of Duty, provides:

- 5. Members who fail to perform their duties because of an error in judgment, or other fail to satisfactorily perform a duty of which such member is capable, may be charged with inefficiency. Unsatisfactory performance may be demonstrated by a lack of job-related knowledge, an unwillingness or inability to perform assigned tasks, failure to take required action, or failure to take appropriate action at any time.**

OSHP Rule 4501:2-6-02(E)(1), False Statement, Truthfulness, provides:

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

The termination stems from the Grievant's on-duty conduct the night of July 28, 2012. On that night, several motorists on I-71N made 911 calls regarding an impaired motorist. The Grievant was dispatched, but the dispatcher gave the Grievant faulty information regarding the location of the impaired motorist. Before the Grievant located the impaired motorist, whose F-150 pickup truck eventually had become stuck on cable wires in a berm, two sheriffs' deputies, who had seen the incident information on their in-car computers, had arrived at the scene. The deputies had found an extremely intoxicated motorist, Uriel Juarez-Popoca, in the truck with the wheels still spinning. Mr. Popoca spoke almost no English, had no driver's license, and said he was from Mexico.

When the Grievant arrived upon the scene at approximately 21:18:50, he and the two deputies joked a bit about whose call this was. At approximately 21:19:49, Deputy Beggs said to the Grievant, "He [Mr. Popoca] looks at me like, I'm so drunk I can't figure

out who you are.” At approximately 21:20:42, the Grievant said to Deputy Beggs, “I say we call him a ride.” Deputy Beggs responded, “I’d say that’s a good idea.” Mr. Popoca spoke on a cellphone to a friend named Christy. Deputy Beggs said to the Grievant at approximately 21:29:39, “We’re gonna drop him [Mr. Popoca] off at Taco Bell. I figured they’ll have someone in there that interprets.” The Grievant responded at approximately 21:29:45, while chuckling, “There you go.”¹

The next day, Sgt. Pirrone asked the Grievant about the incident the night before; the Grievant told Sgt. Pirrone he hadn’t had much involvement, that the two deputies had handled the incident.

An Administrative Investigation began on approximately August 8, 2012 regarding the Grievant’s conduct relating to the impaired motorist. On August 16, 2012, the Delaware City Prosecutor charged the Grievant with two counts of misdemeanor dereliction of duty. On August 17, 2012, the Grievant was placed on administrative duty. His AI was suspended pending the disposition of his Grievant’s criminal charges. A jury trial was held in Delaware Municipal Court on December 13-14 and 17-18, 2012; the Grievant was found guilty of two counts of misdemeanor dereliction of duty in violation of R.C. 2921.44(A)(2).² The Grievant was fined \$500 for each count.

¹ Deputy Hughes drove Mr. Popoca to the Taco Bell; he dropped off Mr. Popoca without saying anything to anyone at Taco Bell. Mr. Popoca asked the Taco Bell cashier for a ride. The Taco Bell manager ushered Mr. Popoca, who she considered to be intoxicated, out of the Taco Bell and locked the restaurant door. Mr. Popoca walked over to a nearby Wendy’s. Later that night, Mr. Popoca was walking on a nearby dark road; he was struck and killed by a motorist. After his death, his blood alcohol level was determined to be .23.

² R.C. 2921.44(A)(2) provides:

No law enforcement officer shall negligently do any of the following:

...

Fail to prevent or halt the commission of an offense or to apprehend an offender, when it is in the law enforcement officer’s power to do so alone or with available assistance.

Criminal negligence is defined in R.C. 2901.22(D):

After the Grievant's criminal conviction, his AI resumed. In an AI interview on January 8, 2013, he was asked in pertinent part:

...

Q. Do you know [Deputy Beggs and Deputy Hughes] personally?

A. ...I work with them. I have good rapport with...Deputy Beggs, from working 3p shift.

...

Q. ...[D]id you look at [Mr. Popoca's] face?

A. No.

Q. You didn't look, you didn't even look at the guy's face?

A. He had a hat on. He was...facing kinda...southwest of me a little bit. So I saw what I saw. I never got a front view of him at all the whole time. Never approached him.

Q. So you're telling me that you had no signs of impairment?

A. I had no signs of impairment.

Q. But you're also telling me that you really didn't even look at the driver or pay any attention to him?

A. I didn't approach him...They had him in handcuffs, there [were] two deputies with him, there was no need...for me to...

Q. But they did unhandcuff him at some point...

A. We're not to that point yet, but yes.

Q. OK.

A. When I walked over there...I didn't come...within vicinity of him....I wasn't going to squeeze in between that guardrail and the truck and

A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

they had him under handcuffs. In my belief, he was under arrest and they were going to take him in for an enforcement.

...

Q. So you're telling me that at no time did you see, smell, or did he...put you in the mind of somebody that would have been intoxicated?

A. I never got within the vicinity of him. I didn't come close enough, they had him in handcuffs. I didn't come close enough, I didn't talk to the guy, I didn't speak to him, I didn't have him take his hat off to check his eyes that you would normally do for HGN [horizontal gaze nystagmus]. I didn't see bloodshot glassy eyes, I didn't get an odor, I didn't get slurred speech, nothing. 'Cause I didn't get close enough. I didn't talk to him. That was their arrest, their stop. I stop out with these guys all the time on crashing, they've never not taken their guy.

...

Q. Did [Mr. Popoca] make any inference to you that there was something that was not right, with his behaviors and actions?

A. He was not disorderly. He was not falling over drunk, nothing....

...

Q. ...[H]ow many times did Deputy Beggs allude that the driver was drunk?

A. I recall him saying...drunk when he said..."he looked at me like I don't know who you are." And then...I asked him if he's DUS, he says, "yeah and drunk."

...

Q. ...[Y]ou suggested to them to give him a ride and they went ahead and followed your suit so at [that] point, I mean what were you thinking?

A. I said call him a ride because when we arrest people whether they arrest him for DUI or no [operating license] that's...their choice....[W]e call everybody a ride. A lot of times I'll do it from the scene. I'll get on their cell, get the number from 'em, hey, have somebody come, meet me at the Post. So yeah, when I say call 'em a ride that doesn't mean drop 'em off at Taco Bell. That means call 'em a ride.

Q. But they eventually said we're going to drop him off at the Taco Bell.

- A. Right before I left the scene they said that. I didn't know that prior to that.
- Q. ...[H]ow could you still think they were joking at that time? There's a crime obviously that was committed and they were just going to take him and drop him off at the Taco Bell.
- A. He said, "I think we're going to take him to Taco Bell; they should have an interpreter there." And that was right before I got in my cruiser after Deputy Hughes walks the male, Hispanic male, to his car and placed him in the car. After the fact, after they already got him in the car, they already had custody of the guy from the minute I got there to the minute I left. They had custody of the guy.
- Q. OK, so you're thinking this whole time that they were just joking?
- A. I was thinking they're going...to take enforcement somehow....
- Q. But they told you that they weren't....You actually suggested to them that you could call him a ride. To give him a ride.
- ...
- A. Call him a ride, we do that with everybody we arrest.
- ...
- Q. ...[W]ould it be safe to say that it was their stop and you had the mentality of "you caught it you clean it" and that they were going to take it?
- A. In my belief, when I show up on the scene and the guy's in handcuffs, in custody, already out of the vehicle...my belief was out of those two deputies, one of them would have took enforcement action. In my belief.
- Q. OK. And if one of them didn't, what would you think?
- A. If one of 'em didn't? I can't, I don't know what they'd do after they leave. I don't...I can't speak for them.
- ...
- Q. ...[W]hat I'm asking you is when you watched them take him away from the scene and take him to Taco Bell without, you watched him being charged...
- A. I didn't watch them do that.

Q. You knew that they were talking, taking him to Taco Bell, he told...

A. Right before I got in my car to leave...

Q. Right...

A. They said only take him to Taco Bell, there should be an interpreter there. I didn't watch the guy walk to the cruiser. I didn't watch him leave. I didn't see 'em, I didn't go to Taco Bell.

...

Q. I'm just saying these guys, you said the whole time were just jokingly going about this stop and you basically went into with the...mentality that it was their stop, they have him under arrest, you didn't look any further into the crash because you were told no, and you told me earlier that you did not smell or see any indicators that this person was possibly intoxicated.

A. ...I had no observation or no knowledge of a crash.

Q. OK.

A. So, no, I didn't...

Q. Right, that's what I said...

A. ...I had no knowledge that they weren't going to take enforcement.

Q. At the very end you did.

...

A. That's not what I said.

Q. No, but the video does.

A. It says we're going to take him to Taco Bell, they should have an interpreter there. OK.

...

Q. ...[You said] call him a ride and then they tell you we're taking him to Taco Bell 'cause there's an interpreter, so what are you thinking at that point?

A. Right before I got in my car and leave and the other, the deputy that said, that didn't have the guy. The deputy that had the guy didn't

say that. So, I assumed that the deputy that had the guy would have taken enforcement action. Take it, no [operating license], six-hour hold, whatever they decide to do, whatever they want to do, they didn't, I didn't know what they would have done.

...

Q. ...[W]hat went through your mind when they said I'm going to drop him off at Taco Bell, there should be somebody there that interprets? At that point did it not spark interest to you thinking this guy's drunk and they're not going to do anything about it.

A. At that point, the guy is already in Deputy Hughes' custody and in back of his cruiser. At that point, I was getting ready to get in my cruiser when, there's somebody there to interpret, to me there could be a lot of reasons you could have somebody interpret...2255 [submitting to or refusing a breath test], to understand a court date, there's a lot of things that go along as you know with a non-speaking Hispanic male that you could use interpretation for. So my belief was that they were going to have somebody at Taco Bell to interpret something that they were going to enforce. Whether a ticket, whether a 2255, obviously they couldn't do it at the scene and that's why they got somebody [to] interpret it.

Q. How many interpreters have you seen at that Taco Bell?

A. I don't go to that Taco Bell, so I can't answer.

...

Q. ...I'm going back to why you told Sgt. Pirrone that...you did not know the driver was drunk? Because you were told that he was drunk...

A. Just because [the deputy] tells me [Mr. Popoca] is drunk doesn't mean he is. If the deputy says, "oh, he's really drunk," if the deputy does HGN, does his clues and then he has [an] observation then that's different, but I can't go by what another officer says if they're drunk. So just cause the deputy says he's drunk that doesn't mean he's impaired. That doesn't mean he's gonna test over. That does...

Q. OK, but you went on the lead of that officer when you pulled in that he was under arrest. You didn't know that for a fact but you, in your belief, you assumed.

A. I assumed, yeah.

- Q. ...[T]urn to page 7, please, about half-way down...Sgt. Pirrone recalled that you answered, you didn't get close enough to tell but from what you could see no, he wasn't drunk.**
- ...**
- A. Sgt. Pirrone is incorrect. Big time.**
- ...**
- Q. ...But the fact of the matter is that he put in there that you told him that you didn't get close enough to the guy and from what you could see, he was not drunk.**
- A. To my knowledge, I didn't know if he was drunk or impaired. To my knowledge. I didn't have the clues, I didn't have the field sobrieties, I didn't HGN, he was in their handcuffs. I can't do field sobrieties, I can't take over their arrest.**
- Q. OK, then how can you say that to him when you told me earlier that you wouldn't even know what the guy looked like 'cause you didn't pay any attention to him or look at him.**
- A. I didn't....I told him that I didn't get close enough to him.**
- ...**
- Q. What...part of this [written statement] is false from Sgt. Pirrone?**
- A. ...I never said, I never told Sgt. Pirrone that the guy was never drunk. I said I didn't get close enough is the only thing that I told him.**
- Q. OK.**
- A. So that's false.**
- ...**
- Q. OK, moving on. Why was the decision made to have someone pick up the driver?**
- A. I can't speak for the deputies. I don't know. They had the interpreter on the phone...**
- Q. You suggested it.**
- A. I suggested call 'em a ride.**

- Q. Why did you suggest that?
- ...
- A. 'Cause I mean, they, why would I suggest call a ride because call 'em a ride. See if he has a family member. Have somebody pick him up at the jail....Call 'em a ride.
- Q. Call him a ride and not take enforcement.
- A. I didn't say that. No, I call him a ride. That could mean a lot of things. If...it was my stop and my arrest, I would have called him a ride and have them meet me at the Post.
- ...
- Q. Do you believe that dropping the driver off at Taco Bell was based on his nationality?
- A. I can't speak for the deputy. I don't know.
- Q. OK, but you found humor in that because you laughed on the video.
- A. I said, "There you go" because it was just a comment.
- Q. And you chuckled.
- A. It was a comment...because I didn't want to not say nothing back. He made a comment, it was just a comment back. It wasn't, it didn't mean anything. The chuckle didn't mean anything. ...[I]f you know him, and us, you know them, we get along, we've always got along. We're...happy-go-lucky people and that's why we chuckle. That comment did not mean nothing. It was just so he knew I was commenting back to something. I didn't want to just not say nothing. He was leaving.
- Q. Did it offend you when he said it?
- A. When he said what?
- Q. That he was taking a Hispanic to Taco Bell for an interpreter.
- A. Did it offend me?
- Q. Yeah.
- A. No, it didn't offend me.
- Q. OK. Did you feel it was a little off-color? Unprofessional?

A. I didn't think about it until after the fact. It was so quick. I got in my car, they left, I stopped a car a minute later.

...

In a second AI interview on February 19, 2013, the Grievant was asked in part:

Q. ...[W]hen Sgt. Pirrone asked you [whether Mr. Popoca had been drunk], why wouldn't you tell him that I don't know, Sarge, but [the deputies] suspected him of being intoxicated?

A. I told him that I didn't get close enough. That's all I told him.

Q. He just asked you if he was drunk. He didn't ask how close you got and if it was their stop and their arrest...

A. I don't know that. I can't answer that question. I didn't know if he was drunk besides the deputy saying he was really drunk but that doesn't mean he's really drunk.

...

Q. ...[I]f we determine and you said that you didn't do anything with malicious intent, looking back on this whole situation, do you think you made...an error in judgment?

A. No.

Q. By not stopping that and by suggesting to them to give him a ride somewhere else?

A. No. A lot of things were not done right prior to that. So, no.

Q. So you don't think you made an error in judgment by suggesting to give him a ride or not stopping them from taking him to Taco Bell and dropping him off?

A. They have jurisdiction; there, and at Taco Bell.

Q. And you have jurisdiction, also.

A. Not at Taco Bell.

Q. No, but there [on I-71] you did.

A. I do. There's two of 'em on the scene. It was their traffic stop...we assist....

...

As set out above, the Grievant was terminated on or about April 24, 2013 for:

violation of the Ohio State Highway Patrol Rules and Regulations. Specifically, OSHP Rules 4501.2-6-02(I)(1)(2), Conduct Unbecoming an Officer, 4501:2-6-02(B)(5), Performance of Duty and 4501:2-6-02(E)(1), False Statement, Truthfulness.

As a result of Administrative Investigation #2012-0542, it was found that you failed to take appropriate action at a crash scene involving an impaired motorist. You were subsequently charged and convicted for dereliction of duty. It is additionally charged you were untruthful during the administrative investigation.

The Union filed the instant grievance on April 29, 2013, alleging violation of Articles 19.01, Just Cause, and 19.05, Progressive Discipline. The grievance provides:

On April 25th, 2013, I was terminated from my position as an Ohio State Trooper for allegedly violating rule 4501:2-6-02 Conduct Unbecoming an Officer, rule 4501:2-6-02(B)(5) Performance of Duty and rule 4501:2-6-02(E)(1) False Statement, Untruthfulness. I maintain that this discipline is without just cause and that it is not progressive in nature.

The grievance remedy requested is:

To have this discipline removed from my department record, that I be reinstated to my position as an Ohio State Trooper, and to made whole, to include shift differential, holiday pay, and fitness pay.

On August 6, 2013, the Fifth Appellate District vacated the Grievant's criminal conviction for insufficient evidence.³ On September 20, 2013, the State filed a

³ The appellate court held:

[W]e find that no rational trier of fact could have found that appellant acted negligently in failing to apprehend Popoca or in failing to halt the commission of disorderly conduct by Popoca in Taco Bell...[T]he video recording from appellant's cruiser...establishes that appellant had been given an incorrect mile marker by his dispatcher. By the time appellant arrived on the scene, Beggs and Hughes had Popoca out of the vehicle and in their custody. While the State characterizes the decision to take Popoca to Taco Bell as a joint decision, the tape demonstrates that appellant did not contribute to the decision-making process. Beggs and Hughes made the decision to not charge Popoca with driving while intoxicated, to let him call for a ride, and to take him to Taco Bell to await a ride before appellant arrived on the scene. Beggs merely informed appellant as to the decisions already made by the deputies; the scene was in the control of the deputies before appellant arrived. Appellant did not interact with Popoca. Appellant did not act negligently in failing to investigate a scene and personally apprehend Popoca when he was already under the

Memorandum in Support of Jurisdiction with the Ohio Supreme Court, seeking a reversal of the Fifth District decision.

PARTIES' POSITIONS

State's Position

The Grievant Failed to Perform his Sworn Duties and Take Required Action

Though the Union contends the Grievant was not responsible for the incident because he was never asked to take charge of the scene, that is not true. As soon as the Grievant arrived at the scene, Deputy Beggs asked him to handle the incident.

The Grievant alleges Deputy Beggs was joking with him about taking the incident. However, the Grievant's in-car video shows the Grievant knew he was being asked to handle the incident when he offered excuses to Deputy Beggs about why the Grievant could not handle it, stating in part, "You guys stopped it, not me. If I find it, I couldn't call you guys to handle it. I didn't see him drive so I can't charge him with that. I can't get him for DUS. I didn't observe any driving."

Deputy Beggs told the Grievant twice that Popoca was drunk. First, Deputy Beggs said to the Grievant, "He looked at me like, I'm so drunk I can't even figure out who you are." Later, the Grievant asked Deputy Beggs, "Is he just DUS?" Deputy Beggs responded, "Uh, yeah, but really drunk."

The video shows there was textbook justification for a drunken driving arrest. The officers knew of multiple 911 calls from concerned citizens reporting Popoca's driving;

control of two sheriff's deputies. Appellant had no reason to believe that Popoca did not actually have a ride and did not understand the translator. He further had no reason to believe that Popoca was going to be left at Taco Bell by Hughes without supervision given his state of intoxication and difficulty with the English language. Appellant did not act negligently, based on the information he received at the traffic stop, in allowing the deputies to maintain control of the scene.

the officers found Popoca after he crashed his truck into wires in the median; there were beer cans in the truck; and Deputy Beggs considered Popoca very drunk and said so to the Grievant.

In addition to the fact that Deputy Beggs asked the Grievant to handle the incident, the Grievant was the officer dispatched to handle the call, not the deputies. Deputy Beggs and Deputy Hughes were completing their meal break when they noticed several 911 call entries on their mobile computer terminals of a reckless operation on I-71 near the location where they were. A Delaware County Sheriff's Office Dispatcher transferred the 911 call to the Delaware Ohio State Highway Patrol Post because the incident was within the State Patrol's jurisdiction.

The Grievant failed to take over the incident by handling Popoca's OVI or physical control arrest and failed to handle a traffic crash report. At the very least, the Grievant had the responsibility to prevent the deputies from acting negligently by dropping off Popoca at Taco Bell. Dereliction of duty encompasses not only an officer's negligent acts, but also an officer's unreasonable failure to prevent other officers from acting negligently.

The Grievant suggested to the deputies that they not arrest Popoca, but rather find him a ride home. That alone was negligence on the Grievant's part.

Moreover, the Grievant negligently acquiesced to the deputies' decision to drop off Popoca at Taco Bell. It does not matter that Deputy Hughes dropped off Popoca at Taco Bell; the Grievant was aware Deputy Hughes intended to do so. The performance of duty rule violation does not allow the Grievant to hide behind the alleged control the deputies had over Popoca.

The Grievant significantly influenced events at the scene. He was the first to suggest, "I say call him a ride." This negligent plan went from bad to worse when Deputy

Beggs told the Grievant the deputies would drop off Popoca at Taco Bell, “We’re gonna drop him off at Taco Bell, I figure they’ll have somebody to interpret.” The Grievant laughed and responded, “There you go.”

Sgt. Pirrone testified at the arbitration that when the Delaware County Sheriff’s Office holds a scene, the trooper responding is expected to handle the call. Sgt. Pirrone further testified he had viewed the damage to Popoca’s truck the day after the incident. He found the damage to be fresh and consistent with the truck striking the cable in the median. He concluded a crash report should have been taken.

The Grievant admits he shined his flashlight on the cables; he denies shining his light on Popoca’s truck or that he checked in any other way to see if the truck was damaged. The Grievant testified he asked Deputy Beggs if Popoca had been involved in a crash and Deputy Beggs said no. The Grievant chose to believe Deputy Beggs with regard to there being no crash because this meant the Grievant would not have to complete a crash report. Yet, the Grievant chose not to believe Deputy Beggs’ two statements that Popoca was drunk. The Grievant’s self-serving testimony serves only to rationalize his failure to take action at the scene.

The Grievant’s Veracity

The Grievant was untruthful with Sgt. Pirrone when the Grievant recounted what had transpired, with then-Sgt. Fetty⁴ during the administrative investigation, and with the Arbitrator.

The Grievant’s untruthfulness with Sgt. Pirrone the night of the incident includes:

- When Sgt. Pirrone asked the Grievant if Popoca had been drunk, the Grievant, who knew by then that Popoca had been struck and killed, responded he hadn’t gotten close enough to Popoca to tell. The Grievant did not tell Sgt. Pirrone that Deputy Beggs had told the Grievant that Popoca was drunk. Sgt. Pirrone, while being

⁴ At the time of the AI, Fetty was a sergeant. Since then, he has been promoted to lieutenant.

interviewed during the AI, explained he saw the Grievant's in-car video only after this initial discussion with the Grievant. After viewing the video, Sgt. Pirrone said to the Grievant, "You lied to me, you told me you didn't know the guy was drunk, yet the deputy told you how drunk he was." Sgt. Pirrone testified at the arbitration that he was "pissed off" after watching the video and told the Grievant he was pissed because the Grievant had lied to him about what occurred at the scene.

The Grievant's untruthfulness during the AI includes:

- The Grievant told Sgt. Fetty the Grievant didn't know Popoca was drunk because the Grievant was only told that by Deputy Beggs who did not do field sobriety tests, so the Grievant couldn't say Popoca was drunk based on what Deputy Beggs told the Grievant. However, Deputy Beggs is a sworn law enforcement officer, and Deputy Beggs told the Grievant twice that Popoca was drunk. The Grievant has provided no logical reason for doubting what Deputy Beggs told him. If the Grievant doubted Popoca was drunk, the Grievant should have conducted his own field sobriety tests before suggesting to the deputies to call a ride for Popoca. Again, we see the Grievant attempting to rationalize his behavior.
- The Grievant told Sgt. Fetty the Grievant never got close enough to Popoca to tell if Popoca was drunk. However, the Grievant was close enough to Popoca that the Grievant's belt microphone was able to pick up the cellphone conversation between Popoca and Corrections Officer Williams, which was then recorded by the Grievant's in-car video.
- The Grievant told Sgt. Fetty the Grievant believed Deputy Hughes was taking Popoca to Taco Bell so that someone could interpret Popoca's Spanish. It is preposterous for the Grievant to have believed Popoca was being taken to Taco Bell for interpreting services, given that Corrections Officer Williams already had been interpreting via cellphone. Moreover, the Grievant had called off Trooper Kevin Riley from responding to the scene for interpreting services. When Deputy Beggs said to the Grievant, "We're gonna drop him off at Taco Bell, I figure they'll have somebody to interpret," and the Grievant laughingly responded, "There you go," these statements are derogatory statements meant to be defamatory toward's Popoca's ethnicity.⁵

⁵ During the arbitration, the Grievant was evasive in his testimony and wouldn't even readily admit what language needed to be interpreted for Popoca, even though the Grievant knew he had contacted Trooper Riley to provide Spanish interpretation. On cross-examination, the State asked the Grievant, "What other languages does Trooper Kevin Riley speak besides English?" The Grievant finally said Trooper Riley speaks Spanish. The Grievant's evasiveness further diminishes his credibility.

- The Grievant told Sgt. Fetty the deputies were taking Popoca to Taco Bell to possibly have someone interpret the BMV 2255 Form (which is read to an OVI arrestee). However, the Grievant knew Deputy Hughes was giving Popoca only a ride to Taco Bell.

The Grievant's untruthfulness during the arbitration includes:

- The Grievant testified the deputies were taking Popoca to Taco Bell for interpreting services. It is incredible the Grievant continued to reiterate this theory. What choice did he have, however, given that he had already been caught lying?

Making false statements under oath is incompatible with being a sworn law enforcement officer. The State has lost all trust in the Grievant and the employment relationship cannot be repaired. As set out by Arbitrator Brookins:

The Grievant's misrepresentations of material facts were intentional, untenable, and very likely inimical to his ability to perform certain duties in the future. Beyond that, as a general proposition, his misconduct has eroded OSHP's confidence in his ability to serve as a state trooper.

OSTA v. ODPS, Division of State Highway Patrol, Case No. 15-00-9901-0006-04-01 (1999).

The instant Arbitrator has written:

First, it must be said law enforcement personnel are legitimately held to an extremely high standard of integrity. Law enforcement personnel have enormous responsibilities – among these is to tell the truth. Truthfulness on the part of a member of law enforcement is an essential requirement. A State Trooper cannot take it upon himself to decide when it is important to tell the truth, and when it is not. There is no room in law enforcement for maverick behavior.

OSTA v. ODPS, Division of State Highway Patrol, Case No. 15-03-20080319-0040-04-01 (2009).

One of the Division's most important core values is honesty, and with good reason. If an officer is not honest, he loses his credibility. If a law enforcement officer is found to have credibility issues, the officer has rendered himself useless in a court of law. Numerous arbitrators including this one have recognized and upheld the Division's strong stance on untruthfulness:

While the Grievant has an excellent deportment record, he knew, as do all Troopers, that honesty and integrity are essential in the Division. Troopers are told from their first days in the Patrol Academy that lack of truthfulness results in removal.

OSTA v. ODPS, Division of State Highway Patrol, Case No. 15-03-20111223-0132-07-15 (2012).

Throughout the AI and again at the arbitration, the Grievant failed to accept any responsibility for his actions. When asked during the AI, "Now...looking back on the whole situation do you think you made...an error in judgment," the Grievant responded, "No." When asked at the arbitration if he felt he was negligent in any way or if he would have done things differently in hindsight, his response was a definitive no. He blamed the dispatcher for sending him to the wrong location and stated none of this would have occurred otherwise. By making this statement, we are led to believe the Grievant would have handled the incident if he had arrived on scene first. This adds further credence to the fact the Grievant should have taken over the incident when Deputy Beggs asked him to take it, especially since the Grievant was the officer dispatched to handle the call.

The Grievant's inability to admit wrongdoing and negligence in this case reinforces why he cannot be allowed to regain employment as a state trooper. He refuses to see what he has done wrong, showing the Division he is incapable of correcting his behavior.

The Division has a well-known, highly regarded tradition of high standards. Citizens are guaranteed our troopers will display honesty, integrity, and due diligence. When other law enforcement agents do not do the right thing, our officers are expected to step up and do what is right.

Mr. Popoca lost his life that night because the Grievant failed to perform his sworn job duty. Had the Grievant performed his sworn duty that night and handled the call he

was dispatched to, Mr. Popoca would not have lost his life. He would not have been in a position to walk down a dark roadway and be struck and killed. The Grievant failed to carry out all his duties as required and take appropriate action. He brought discredit to the Division.

The Division routinely imposes termination for a violation of its False Statement, Truthfulness rule. The Division has a consistent history of terminating good troopers with no department record when they make the poor decision to lie.

The State removed the Grievant after he was convicted in the Delaware County Municipal Court of two counts of Dereliction of Duty. The Fifth Appellate District Court overturned the conviction, and an appeal has been filed with the Ohio Supreme Court. The appellate court overturned the conviction without having reviewed the in-car video recordings of the incident. It is on these recordings where the Grievant's conversation, influence, and actions on scene can be clearly heard and understood.

The State has thoroughly proven its case. Due to the egregiousness of the offense, the Division was left with only one choice – to terminate the Grievant's employment and remove him from his position of public trust.

Union's Position

The Arbitrator stated at the end of the arbitration hearing that she would give little consideration to the Grievant's criminal conviction and its reversal, given that it was the Arbitrator's job to determine only whether the State has proven it had just cause for the termination of the Grievant. This is wrong. The issue of the Grievant's conviction and its reversal is of singular importance to the question of just cause; it is the tent pole of the State's case.

The Arbitrator's responsibility is to determine on the basis of the record evidence whether the State has sustained its burden of proving the charges it alleges supported its decision to terminate the Grievant. The reasons advanced by the State establish the parameters of the arbitration.

The evidence is overwhelming that the Grievant's criminal conviction was the central reason relied upon by the State in electing to fire him. The Agreement requires the Division to state disciplinary charges with specificity. Here, the Division charged the Grievant with:

1. You failed to take appropriate action at a crash scene involving an impaired motorist.
2. You were subsequently charged and convicted for dereliction of duty.
3. You were untruthful during the administrative investigation.

Additionally, in presenting a motion to stay the arbitration pending an attempt to have the Ohio Supreme Court grant discretionary jurisdiction for an appeal, the State put in the record the following:

Part of the charges and the imposed discipline was based on the criminal conviction of the Grievant for Dereliction of Duty. Grievant was found guilty of a misdemeanor of the 1st [sic] degree. It was subsequently appealed and the Fifth District Court of Appeals overrode the jury's verdict and reversed the Grievant's conviction.

On the record, the State considered the Grievant's criminal conviction as an important enough reason for having terminated the Grievant, that it did not want the arbitration to proceed without having exhausted every opportunity to restore substance to its justification for removal.

The evidence supports a conclusion the Division would not have terminated the Grievant absent the criminal conviction. Following the death of Mr. Popoca, the State opened a criminal investigation and an administrative investigation. As is often the case,

the AI was held in abeyance as the criminal investigation went forward. The criminal investigation was completed and submitted to the prosecutor on August 16, 2012.

Garrity issues no longer being a problem, the State could have reopened the AI at that time.

However, the State elected not to proceed with the AI at that time. It continued the Grievant's employment for five months. The State waited for the outcome of the Grievant's criminal trial. Why would the State wait those five months unless the outcome of the criminal charge was essential to the State's determination of what action to take regarding the Grievant? Immediately after the Grievant's criminal conviction in January 2013, the State reopened its AI. No other logical conclusion can be drawn but that the Grievant's criminal conviction was important to the State's decision to terminate the Grievant. Had the jury properly found the Grievant not guilty -- as any rational jury would have done, according to the unanimous Ohio Court of Appeals for the Fifth District -- the State would not have fired the Grievant. The Grievant was fired in large part because of his criminal conviction. The State has said this again and again by its actions and by its filings even up to the day of arbitration.

The State also charged the Grievant with failing "to take appropriate action at a crash scene involving an impaired motorist." It is imperative for the Division to create a situation where the Grievant had a "responsibility" to take control of the incident irrespective of the presence of two sheriffs' deputies who already had Mr. Popoca in custody. The Division needs the Grievant to be "obligated" to become involved beyond a half-jocular request by one of the deputies. The Division has seized upon the obligation of Ohio State Troopers to investigate a traffic crash.

The linchpin to the responsibility to investigate is the existence of a "crash." The State noted the Grievant's duties at a "crash" scene in the termination letter and in the

Step II response. The Division knows it needs the existence of a “crash” to create a duty to “investigate the crash,” which would then create a duty on the Grievant’s part to deal with the driver involved in the “crash.” But however many times the State repeated the assertion of a crash scene, there was no crash scene to investigate. There was no evidence of a crash having taken place at the scene where Mr. Popoca and his truck were when the Grievant arrived on that scene. That there may have been limited damage to a ten-year-old truck does not mean a crash took place at that scene.

The Grievant did not do a crash report because there was no crash that required the filing of a report. No crash report has been filed by anyone because there was no crash. At the scene, the Grievant asked Deputy Beggs if there had been a crash, and Deputy Beggs said no, that Mr. Popoca had simply run out of room to maneuver on the berm due to the cables that were there. The Grievant saw Mr. Popoca’s vehicle at rest and determined there was clearance on both sides of the vehicle, which would confirm there was no crash. Trooper Young, who was sent to the scene later, says there was no crash. Three Ohio Highway Patrol Sergeants who observed the scene or could have observed the scene did no crash report because there was no crash.

P. David Riley, Union investigator and a retired Sergeant with the Ohio State Highway Patrol, testified at the arbitration. His unchallenged testimony was that as an OSHP supervisor, he was called upon to review thousands of crashes over a lengthy career. He testified that from looking at photographs of the truck, the tire tracks, and the scene, there was a 100% certainty that the truck had struck neither the cable nor the guard rails. There was no crash.

The limited damage to the truck could have been preexisting. Sgt. Fetty’s investigation could have, but did not, contact the company that owned the truck to inquire about the truck’s limited damage. Sgt. Fetty, of course, had no incentive to

discover the damage was preexisting. He needed the damage to be connected to a crash scene. The State's accusation that the Grievant violated his sworn duty to investigate a crash scene is completely without substance.

The third leg of the allegations against the Grievant is that he was untruthful during the AI. This is the weakest of some pretty weak accusations. Sgt. Pirrone is relied upon as support for the Grievant misstating his degree of involvement with Mr. Popoca. Sgt. Pirrone says he "felt" lied to because when he reviewed the Grievant's dash cam, he found the Grievant had been much more engaged with the scene than the Grievant had told him. When the Grievant disagrees with Sgt. Pirrone's assertions about their interaction, Sgt. Fetty concludes the Grievant was not being truthful.

But there is no reason to believe the Grievant told Sgt. Pirrone anything other than the Grievant's recollection of events. Indeed, the Grievant, at the same time he was discussing the event with Sgt. Pirrone, handed over to Sgt. Pirrone the dash cam video recording of what had happened at the scene. You don't go out of your way to give someone a record of an event you were intentionally untruthful about.

Sgt. Pirrone's main point during his arbitration testimony was that the Grievant had downplayed his involvement at the scene, when in fact, the Grievant had been deeply involved in the decisionmaking at the scene. Sgt. Pirrone testified the Grievant had been at the scene for thirty minutes. But the Grievant was at the scene a total of only twelve minutes.

The Grievant's other alleged untruthfulness during the AI was anytime his recollection differed from Sgt. Pirrone or from what Sgt. Fetty concluded to be a fact. The Grievant said he did not converse with Mr. Popoca. Sgt. Fetty took issue with whether the Grievant could hear one of the deputies speaking with Mr. Popoca, and where the Grievant was standing in relationship to the truck. The untruthfulness charge

is filler; it is a nit-picking attempt to find variances between the Grievant's recollection of events compared to others' perception of events. There is no evidence the Grievant intentionally misstated any facts.

Regarding the video recording of the incident, it must be looked at without the knowledge that Mr. Popoca was struck and killed by a vehicle later that night. The video is disturbing. There is jocularly and Mr. Popoca is the subject of ridicule. Deputy Hughes does most of the laughing. The Grievant testified he had worked with Deputy Hughes before, and Deputy Hughes is always laughing. The Grievant is not the one filling the video with laughter or laughing at Mr. Popoca.

Ultimately, the deputies decided not to charge Mr. Popoca with OVI. The OSHP often cites for an OVI and releases the offender to a non-drinker. The deputies secured a Spanish-speaking deputy to speak on the phone with Mr. Popoca to establish who he might call to pick him up. The deputies decided to release Mr. Popoca at a nearby restaurant. More than likely, in an insensitive gesture, they chose Taco Bell. Deputy Hughes took Mr. Popoca there.

The decision to take Mr. Popoca to Taco Bell was not made by or in consultation with the Grievant. Deputy Beggs said to the Grievant, "Yeah, we are going to drop him to Taco Bell,⁶ I figure they'll have someone to interpret." The Grievant said, "There you go," and Deputy Beggs is laughing. Deputy Hughes had Mr. Popoca in his cruiser; the Grievant was not informed of Deputy Beggs' plan to have Mr. Popoca taken to Taco Bell until 15 seconds before Deputy Hughes drove off.

Deputy Hughes drove Mr. Popoca to the Taco Bell, but elected not to apprise the restaurant manager of what was going on. When the Taco Bell manager subsequently called the Sheriff's office about Mr. Popoca, who was hard to understand, the Sheriff's

office told the manager Mr. Popoca was waiting for a ride. Maybe there was a ride on the way that the Sheriff knew about; we don't know.

In summary, when the Grievant arrived at the scene, Mr. Popoca was in custody of the Sheriff. The Grievant never spoke with Mr. Popoca, never saw him driving, discerned no crash had taken place, did not take part in the discussions or decision to take Mr. Popoca to Taco Bell, and did not know of arrangements made by or for Mr. Popoca to be picked up. The Grievant must be restored to his position with no loss of pay or benefits.

ARBITRATOR'S OPINION

The Arbitrator's duty and jurisdiction is to determine whether the State has carried its burden of proving it had just cause to remove the Grievant from employment. Just cause in this context means the State must prove the Grievant did what he is accused of doing, and that termination is an appropriate response.

The Arbitrator's duty and jurisdiction does not include determining whether the Grievant's conduct on the night of July 28, 2012 led to an impaired motorist's death. Nor does the Arbitrator's duty and jurisdiction permit her to substitute her judgment for the State's judgment; specifically, in this matter, she cannot base her decision on anything other than what the State charged the Grievant with. Nor can she ignore how the case was processed by the State.

The State, in its termination letter to the Grievant, alleged he had:

1. "failed to take appropriate action at a crash scene involving an impaired motorist";
2. been "charged and convicted for dereliction of duty"; and
3. been "untruthful during the administrative investigation."

⁶ As heard on the Grievant's dash cam audio, Deputy Beggs said "we're gonna drop him off at Taco Bell."

The Union contends the State did not have just cause for removal because:

- 1. the State's reliance on the Grievant's duty to investigate a crash scene is undercut by the fact there was no crash;**
- 2. the State's reliance on the Grievant's criminal conviction is undercut by the appellate court's vacation of that conviction; and**
- 3. the State has not carried its burden of proof that the Grievant lied during the AI.**

1. Whether the Grievant Failed to Take Appropriate Action at a Crash Scene Involving an Impaired Motorist

The Union makes much of the fact there was no "crash," so the Grievant cannot be charged with failing to take appropriate action at a crash scene. The Union has a point. However, whether the July 28, 2012 incident on I-71N is called a crash scene, a traffic stop, a traffic incident, or a banana, the Arbitrator finds the Grievant's conduct that night deserved scrutiny and discipline.⁷

The Arbitrator finds the Grievant's conduct on the night in question was grossly unprofessional and ineffective. He put more emphasis on his rapport with Deputy Beggs than on his professional duty toward Mr. Popoca. It is clear from the record that even if the Grievant somehow believed at the time the deputies were handling Mr. Popoca safely and correctly, there was no rational basis for that belief. Deputy Beggs told the Grievant that Mr. Popoca was going to be dropped "off" at Taco Bell. "I figure they'll have somebody to interpret," said Deputy Beggs to the Grievant. The Grievant's explanation during the AI that he thought Mr. Popoca was actually being taken to Taco Bell for the purpose of having a 2255 or some other document translated for Mr. Popoca by some unknown Taco Bell employee is ludicrous. The plan also was offensive, and the Grievant should have recognized this.

⁷ The Union has not argued, and indeed, cannot argue, that the State's reference to a "crash scene" has deprived the Grievant and the Union of notice of the misconduct charged.

The Grievant conducted himself that night as if there is a law that if one law enforcement officer gets to an incident first, a later-arriving law enforcement officer has no professional duties or responsibilities upon arriving at the scene. The Arbitrator understands the issue of not wanting to step on another law enforcement officer's toes. That said, the Grievant went overboard on absolving himself of any duties toward Mr. Popoca, merely because the Grievant arrived on the scene after the deputies.

During the AI, the Grievant presented his "I got there second" defense:

- Q. ...[I]f we determine and you said that you didn't do anything with malicious intent, looking back on this whole situation, do you think you made...an error in judgment?
- A. No.
- Q. By not stopping that and by suggesting to them to give him a ride somewhere else?
- A. No. A lot of things were not done right prior to that. So, no.
- Q. So you don't think you made an error in judgment by suggesting to give him a ride or not stopping them from taking him to Taco Bell and dropping him off?
- A. They have jurisdiction; there, and at Taco Bell.
- Q. And you have jurisdiction, also.
- A. Not at Taco Bell.
- Q. No, but there [on I-71] you did.
- A. I do. There's two of 'em on the scene. It was their traffic stop...we assist....

During the arbitration, the Grievant held steadfast to his lack of wrongdoing:

- Q. Do you think you were negligent in any way?
- A. I do not.

Indeed, at the arbitration, he blamed the incident on the dispatcher:

If I had a dispatcher that knew what she was doing, I'd've been the first on the scene, and this wouldn't've happened.

The Arbitrator finds that, as alleged by the State, the Grievant's inactions the night of July 28, 2012 violated Ohio State Highway Patrol Rules and Regulations 4501.2-6-02(l)(1), Conduct Unbecoming an Officer; and 4501:2-6-02(B)(5), Performance of Duty.

2. The Criminal Conviction and its Vacation

The Union is correct that the record demonstrates the State placed great charging weight on the Grievant's criminal conviction. Indeed, the State kept the Grievant on the payroll for five months, performing administrative duty once he was criminally charged, and then discharged him only after he was convicted. Moreover, on the day of the arbitration hearing, because the conviction had been vacated by the appellate court, the State renewed its motion to continue the hearing pending any disposition of the Grievant's criminal conviction by the Ohio Supreme Court. This handling of the grievance by the State cannot be ignored in analyzing this prong of the charges against the Grievant.

As stated at the end of the arbitration hearing, the Arbitrator does not find either the trial court's or the appellate court's disposition of the Grievant's criminal charges to be dispositive of the question of whether the State had just cause to terminate the Grievant. The arbitration is an independent review of the facts as set out in the arbitration record.

The State, however, by waiting until after the Grievant's criminal conviction to make its decision whether to terminate him, and by making the Grievant's criminal conviction one of the three charges against him, has made the status of the criminal conviction a material part of whether the State had just cause to terminate him. And

because the appellate court vacated the conviction,⁸ and any Ohio Supreme Court addressing of the case is only speculative and without a definite timetable, this material prong of the State's charges against the Grievant has been undercut.

3. Whether the Grievant was Untruthful at the AI

It is clear from the record the Grievant downplayed his involvement with Mr. Popoca during the AI. He was careful with his statements, however, which makes it difficult to squarely find he lied. The Arbitrator finds the Grievant's inaction at the July 28, 2012 scene to be the crux of the analysis of his misconduct, as opposed to parsing what he said during the AI.

Conclusion

As set out above, the State has carried its burden of proving the Grievant violated Ohio State Highway Patrol Rules and Regulations 4501.2-6-02(I)(1), Conduct Unbecoming an Officer; and 4501:2-6-02(B)(5), Performance of Duty. The record demonstrates, however, that the State has not carried its burden of proving Ohio State Highway Patrol Rules and Regulations Rule 4501.2-6-02(I)(2), Conduct Unbecoming an Officer; or Rule 4501:2-6-02(E)(1), False Statement, Untruthfulness. Given this mixed result, the Arbitrator finds it is appropriate to reduce the Grievant's termination to a six-month unpaid suspension. Such a lengthy suspension correlates with the seriousness of the Grievant's inaction, but acknowledges the shortcomings in the State's removal case.

⁸ It must be said that the appellate court's description of the Grievant's dash cam video is inaccurate. Specifically, the appellate court's statement that "Beggs and Hughes made the decision to not charge Popoca with driving while intoxicated, to let him call for a ride, and to take him to Taco Bell to await a ride before appellant arrived on the scene" is incorrect. The Grievant was already on the scene and conversing with the deputies when all three of those events occurred.

AWARD

For the reasons set out above, the grievance is granted in part and denied in part. The Grievant's termination is reduced to a six-month unpaid suspension. He is to be reinstated to his former position and compensated for all other lost wages and benefits.

DATED: December 27, 2013

Susan Grody Ruben
Susan Grody Ruben, Esq.
Arbitrator