

Decision and Award in the Matter of Arbitration between:

**Ohio Department of Public Safety,
Division of the State Highway Patrol
and
Ohio State Troopers Association**

Grievance #: 15-03-20130716-0058-04-01

Grievant: Roderick J. Sanchez

Arbitrator: Jack Buettner

Date of Hearing: November 21, 2013

Date Briefs Received: December 23, 2013

Date Decision Issued: January 20, 2014

Representing the Union:

Hershel M. Sigall, Esq.

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Ohio State Troopers Association

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Representing the Employer:

Lt. Ronald E. Raines

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INTRODUCTION

By mutual agreement the Hearing on the above referenced matter was convened on November 21, 2013 at 9:00 AM. The Hearing was held at the Ohio State Troopers Association in Columbus, Ohio. The parties stipulated to the fact that the issue was properly brought before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties agreed to submit closing briefs by December 23, 2013. The hearing was closed November 20, 2013. The Arbitrator's decision is to be issued by January 23, 2014.

In attendance for the Management:

Lt. Ron Raines	Advocate, OSHP
S/Lt. C. J. Linek	2 nd Chair, OCB
Aimee Szczerbacki	OCB
Lt. Cassie Kocab	OSP
Patrolman C. Wilson	Witness
Sgt. M.R. Crow	Witness

In attendance for the Union:

Mr. Roderick J. Sanchez	Grievant
Mr. Dave Riley	OSA Staff Representative
Mr. Larry Phillips	OSTA President
Ms. Elaine Silveira	Assistant General Counsel
Mr. Herschel Sigall	Advocate

STATEMENT OF ISSUE

In conformance with Article 20, Section 20.08 of the Collective Bargaining Agreement, the parties submit the following statement of issue for resolution by the arbitrator.

Did the Grievant receive a termination for just cause? If not, what shall the remedy be?

RELEVANT PROVISIONS OF THE 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.

19.07 Abeyance Agreements

The parties agree that it may sometimes be in the best interest of the parties to participate in the negotiation of discipline abeyance agreements, including Last Chance Agreements. The parties further agree that such agreements should be entered into under the spirit of the collective bargaining agreement. Abeyance agreements entered into pursuant to Appendix C are not subject to this section.

Abeyance agreements, including Last Chance Agreements, shall be two (2) years in duration and shall be signed by a representative of the Employer, the Union, and the Employee.

Violations of any cited work rule may cause the abeyance agreement to be invoked during the life of the agreement, pursuant to the three conditions stated below. A violation of the work rules within Performance of Duty 4501:2-6-02(B) must be of a same or similar nature to cause the abeyance agreement to be invoked. A non-sworn employee charged with a violation of work rule 501.01(C)(10)(b), Neglect of Duty, must be of a

same of similar nature to cause the abeyance agreement to be invoked.

1. Grievance rights related to a discipline action under the agreement will be limited to a challenge of whether his/her behavior constitutes a violation of a triggering rule(s). The level of discipline may not be challenged or made an issue at arbitration.
2. The Employee retains all rights to the grievance procedure in the labor agreement for violations not included within the abeyance agreement. If the Employee abides by the agreement, and the agreement is not invoked within two years of the signing, the agreement will become void and no active record of it will remain.
3. The parties agree the agreement is non-precedent setting and will not be used in any unrelated hearing, grievance, arbitration, or negotiation. The agreement may be used by either party to enforce its provisions.

Article 20- Grievance Procedure

Ohio State Highway Patrol Code of Ethics and Oath of Office

Ohio State Highway Patrol Work Rules and Regulations

4501:2-6-02(E)(1)- 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.

4501:2-6-02(I)(1)- Conduct Unbecoming an Officer

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.

The following were submitted as Joint Exhibits:

- Exhibit #1 Unit 1 Contract
- Exhibit #2 Grievance Trail #0058
- Exhibit #3 Discipline Package composed of:
- a. Statement of Charges
 - b. Pre-discipline Notice
 - c. Pre-disciplinary Hearing Response
 - d. Discipline Letter
 - e. Last Chance Agreement
 - f. Highway Patrol Rules & Regulations:
4501:2-6-02 (I) (1) Conduct Unbecoming an
Officer and 4501:2-6-02 (E) (1) False Statement,
Truthfulness
 - g. Deportment Record
- Exhibit #4 Written Document, Sanchez Stipulation, from Jeremy
Boyer

The following were submitted as Union Exhibits:

Union Exhibit #1 Medical Document [REDACTED]

The following were submitted as Management Exhibits:

Management Exhibit #1	Traffic Stop Video: Wilson/Sanchez
Management Exhibit #2	Report of Law Enforcement Officer Administrative License Suspension with Narrative Supplement
Management Exhibit #3	Summary: Administrative Investigation #2013-0323, Trooper R.J. Sanchez, Unit 1478, Piqua District
Management Exhibit #4	Transcript of Administrative Investigation #2013-0323, Trooper R.J. Sanchez, Unit 1478, Piqua District
Management Exhibit #5	Ohio State Highway Patrol Code of Ethics and Oath of Office
Management Exhibit #6	Document from Lima Municipal Court
Management Exhibit #7	Driver Intervention Program
Management Exhibit #8	CD: Sanchez Unemployment Hearing

Background:

The Grievant, Trp. Roderick Sanchez, was an employee of the Ohio State Highway patrol for over 19 years. The employer acted to terminate him based on violations of Rule 4501:2-6-02 (E)(1): False Statement, Truthfulness and Rule 4501:2-6-02 (I)(1): Conduct Becoming and Officer as they relate to a Last Chance Agreement (LCA) that was instituted in March 2012.

On May 4, 2013, Trp. Sanchez was arrested for Operating a Vehicle while under the Influence of Alcohol or Drugs (OVI). Prior to the arrest, he received a call from a friend, Jeremy Boyer, asking for a ride home from Jay's American Pub. When he arrived at the pub, someone had ordered him a beer which he drank. Upon leaving, Trp. Sanchez pulled into a Burger King to get food but the restaurant was closing. One of his passengers relieved himself in the empty parking lot. Subsequently, they headed out of the parking lot. Officer Wilson, a police officer with the Shawnee Township Police Department, saw the incident and followed the vehicle. He pulled the vehicle over after several failures to signal turns and lane violations.

Officer Wilson approached the vehicle and Trp. Sanchez immediately informed him that he was a police officer and had a loaded firearm in the vehicle. Trp. Sanchez refused to take a field sobriety test and was unwilling to voluntarily enter Patrolman Wilson's vehicle. Patrolman Wilson then arrested Trp. Sanchez and took him to the station.

The OVI was later dismissed but Trp. Sanchez was terminated based on violations of a LCA, specifically Rule 4501:2-6-02 (E)(1): False Statement, Truthfulness and Rule 4501:2-6-02 (I)(1): Conduct Becoming and Officer which triggered the LCA made in March of 2012.

Employer Position:

The Employer's position is that Trp. Sanchez was rightfully terminated for a violation of Rule 4501:2-6-02 (E)(1): False Statement, Truthfulness and Rule 4501:2-6-02 (I)(1): Conduct Becoming and Officer. Trp. Sanchez was under a Last Chance Agreement (LCA) at the time of the incident. According to the LCA, a violation of either one of the aforementioned work rules would result in termination of employment.

The Employer's position is that Trp. Sanchez violated the first rule, False Statement and Truthfulness, several times. He was untruthful with the arresting officer when he stated he had a loaded firearm in his vehicle. He was untruthful when he stated he had not consumed any alcoholic beverages prior to the traffic stop. At subsequent administrative hearings and an unemployment hearing, his testimony on these points was inconsistent.

The Employer's position is that Trp. Sanchez also violated the rule of Conduct Becoming an Officer. In addition to his untruthfulness, his actions and demeanor during the traffic stop fell short of conduct expected by the Ohio State Highway Patrol as Trp. Sanchez sought to challenge Patrolman Wilson's statutory authority and to intimidate him. In their closing statement, Management contends that Trp. Sanchez was aware of Officer Wilson's lack of experience in these situations and "was seeking to undermine his knowledge, skills, and ability to control the traffic stop." Additionally, he identified himself as an off-duty police officer in order to gain preferential treatment.

In conclusion, while only one (1) violation of the LCA is needed to trigger termination, Management's position is that Trp. Sanchez violated two (2) work rules of the LCA.

Union Position:

The Union's position is that Trp. Sanchez was wrongfully terminated and that said termination was based on the Last Chance Agreement (LCA) trigger without regard to the severity of the issue.

The Union addresses the statement of charges that, "Trooper Sanchez brought discredit to the Division (OHP) when he was arrested for operating a motor vehicle under the influence (OVI)." He was, indeed, arrested, but he was not convicted of an OVI or any lesser charge in the incident. Also, he was off-duty at the time of the incident. His behavior would not be "Conduct Unbecoming."

The Union also addresses the statement of charges that, "It was also found that Trooper Sanchez was untruthful to the arresting officer during the traffic stop." The Union contends that making a false statement while off duty about off duty activities does not breach the rule of False Statement, Truthfulness. Indeed, it is arbitrary, capricious, and discriminatory since it pertains to off duty activities.

Trp. Sanchez stated he had a loaded weapon in his vehicle when he was first pulled over. When put in back of the cruiser, he stated he did not, in fact, have said weapon. When Officer Wilson originally asked Trp. Sanchez how much he had had to drink, he stated he had not had anything. At the station he admitted to having only one beer which was corroborated by Jeremy Boyer.

In conclusion, the Union contends that the actions cited by the Employer were not sufficient to trigger the LCA which resulted in the termination of Trooper Sanchez.

DISCUSSION AND DECISION:

The issue at hand is whether the grievant, Trp. Sanchez, engaged in conduct which triggered his termination discipline that had been held in abeyance by a Last Chance Agreement (LCA) issued in March of 2012.

LCA's are a useful, corrective form of action to save and reform an employee who might otherwise have been terminated. It represents a tradeoff. The employee gets continued employment in return for relinquishing certain employment rights. An LCA sets forth very strict conditions for the continued employment of the Grievant. The terms and conditions are agreed upon by both parties in return for the Employer's agreement not to discharge the employee. LCA's are universally held to be enforceable against the employee for the specified duration of time. They are a means to provide an employee a "last chance opportunity", subject to the specific terms of the LCA, to demonstrate by his conduct that he is worthy of the confidence owed him by the employer. *Champion Int'l Corp. and United Paperworkers Int'l Union, Local 1161*, 94-1 Lab. Arb. Awards (CCH) p. 4207 (Howell,1993).

An LCA stands on its own, accepted and binding on both parties, even though it is an agreement outside of the contractually-binding agreement. It is enforced in the same way and does not automatically eliminate "just cause" requirements. As stated in *Champion Int'l Corp. and United Paperworkers Int'l Union, Local 1161*, 94-1 Lab. Arb. Awards (CCH) (Howell,1993):

"Just cause" requirements in a negotiated collective bargaining agreement are not completely negated by a last chance agreement; otherwise unions would be unwilling to sign such agreements. Some of the requirements of "just cause" are still applicable even under a last chance agreement—such as the occurrence of a disciplinary incident, due process, fair investigation, proof of guilt, and evenhandedness without discrimination. In other words, the correct application under a last chance agreement is that general "just cause" standards must be measured and conditioned in the context of the specific last chance agreement.

While “just cause” can be a nebulous concept, Arbitrator Carroll Daughtery (1964) devised a tool comprised of seven questions to help clarify the meaning. Upon review of these questions and the given situation, no violation of “just cause” can be leveled.

By agreeing to the terms of the LCA, Trp. Sanchez did not forfeit the protection against arbitrary treatment. In fact, he retained the rights to challenge his dismissal on the basis that he was not guilty of the alleged conduct and to demonstrate that his dismissal was arbitrary. *Johnstown A. Corp. and United Steelworkers of Am., AFL-CIO, Local 2635*, 95-1 Lab. Arb. Awards (CCH) (Tharp,1994). This brings into question what constitutes an arbitrary decision.

Arbitrary conduct is not rooted in reason or judgment but is irrational under the circumstances. It is whimsical in character and not governed by any objective rule or standard. An action is described as arbitrary when it is without consideration and in disregard of facts and circumstances of a case and without a rational basis, justification, or excuse. *City of Solon and Ohio Patrolman's Benevolent Ass'n* 114 LA 221 (Oberdank,2000)

Trp. Sanchez voluntarily signed the LCA in order to keep his job, so he was bound by the terms of that agreement. The question then becomes whether there was an actual violation of the LCA. If it is determined there was an actual violation, the LCA would be triggered and the penalty specified within, in this case termination, would be imposed. The question of appropriate penalty does not need to be considered according to Section 19:07(1) of the Unit 1 Contract which states:

Grievance rights related to a discipline action under the agreement will be limited to a challenge of whether his/her behavior constitutes a violation of a triggering rule(s). The level of discipline may not be challenged or made an issue at arbitration.

The arbitrator's ability to review disciplinary action is limited by two considerations: 1) whether the Last Chance Agreement was valid, and 2)

whether the terms of the agreement were violated. *Gaylord Container Corp.*, 97 LA 382, 383 (Goodman, 1991) It is assumed that the LCA was valid since the Grievant voluntarily signed it, so the question becomes one of whether or not the agreement was violated.

The first rule in question that Trp. Sanchez is charged with violating is Rule 4501:2-6-02 (E)(1): False Statement, Truthfulness. This charge stems from an incident that occurred on May 4, 2013. When Trp. Sanchez was pulled over for a suspected OVI, he stated, "Now, I am just letting you know... I am a police officer and I have a loaded firearm in the vehicle." (Management Exhibit #1: video.) He did not, in fact, have a loaded weapon in his car. When asked by a second officer on the scene if he had a weapon in the car, he stated he had only a Taser, which was the case. When investigations were conducted concerning this issue, Trp. Sanchez denied making the statement. Trp. Sanchez said he stated, "I am an off duty police officer but I do **not** have a loaded firearm on me." (Management Exhibit #4: line 290) During his Unemployment Hearing he stated that the video of the initial traffic stop did not pick up on the word 'not' and still contended that he did not say he had a loaded firearm. (Management Exhibit #8) [It should be noted that initially the Union objected to the admission of the recording of the Unemployment Hearing. The Union was given time to review the recording and it was subsequently admitted as Management Exhibit #4.]

Also at issue is Trp. Sanchez's statement about how much he had to drink the evening of the incident. When initially questioned by Patrolman Wilson as to how much he had, Trp. Sanchez said he had not consumed an alcoholic beverage. (Management Exhibit #2) Later at the station he admitted to having one beer with his friends. (Management Exhibit #2, Management Exhibit #4: line 56-60) The Grievant, therefore, provided false testimony during the formal investigation when he was first pulled over.

His testimony on both questions of truthfulness was inconsistent throughout the entire investigation. The fact that he changed his statements yet again while under oath during the Unemployment Hearing is evidence of that.

The concept of truth and its impact is many faceted. Several other arbitrators have commented on this very issue and all concur on the importance of truthfulness whether on duty or off. Arbitrator Susan Ruben states,

“Law enforcement personnel have enormous responsibilities—among them 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.”

The difficult inquiry is whether the Grievant's statements were simply human error, an inadvertent act made in good faith since he later changed his statements, or a willful intent to deceive. The inconsistency in Trp. Sanchez's statements made even under oath suggest an intent to deceive.

Management also charged Trp. Sanchez with violating Rule 4501:2-6-02 (I)(1): Conduct Becoming and Officer. The statement of charges read, “Trooper Sanchez brought discredit to the Division when he was arrested for operating a motor vehicle under the influence (OVI).” The OVI itself became a moot point when all charges were dismissed. Management contends, however, that the language was written to encompass his conduct and actions during the traffic stop.

Trp. Sanchez refused all field sobriety tests and refused to get into the police car unless he was arrested, both actions which were within his rights as a citizen to do. Management cites an “unacceptable level of arrogance” on the part of Trp. Sanchez, which is very subjective in nature. Management also states Trp. Sanchez displayed “agitated behavior” which is not indicative of misconduct but perhaps frustration at being pulled over. His behavior, which could be perceived as uncooperative and potentially questionable, was none the less within the limits of the law. As far as bringing discredit to the Division, there is no evidence that this incident brought any notoriety to the Division.

The fact that this incident occurred while Trp. Sanchez was off duty does not negate the Employer's ability to discipline if there is a "workplace nexus" linking off-duty behavior to the employer's business interests or operations. "Business interest' can included an agency's reputation, the morale or well-being of its employees, a grievant's ability to perform his regular duties, or any significant aspect of an employer's business interest or mission." (Cononco, Inc. v. Oil, Chemical and Atomic Workers Intl. Union, Local 4-555.) (Howell, 1997) The employee's misconduct, therefore, need not be linked to the employee's specific job performance. In this case one must consider a trooper's future ability to testify in court proceedings. A trooper would have to answer truthfully, if questioned, that he had previously been charged with false statements. His veracity would certainly be questioned. If he did not testify in order to avoid such questions, he would then be unable to execute one of his job requirements. Hence, a nexus is created in that Trp. Sanchez's false statements and untruthfulness could impact his job performance.

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In conclusion, according to section 19.07 of the Agreement, Abeyance Agreements, "Violations of any cited work rule may cause the abeyance agreement to be invoked during the life of the agreement." One rule, 4501:2-6-02(E)(1)- False Statement; Truthfulness, was found to be violated thereby triggering the LCA.

AWARD:

For the reasons stated above, the grievance is denied. The Ohio State Highway Patrol has carried its burden of proving it had just cause to terminate the Grievant.

This concludes the arbitration.

Respectfully submitted this 20th day of January, 2014,

John F. Buettner

Arbitrator