

MARC A. WINTERS
ARBITRATOR

In The Matter of Arbitration

Between

State of Ohio, Department of Public Safety,
Division of Highway Patrol,

Employer

And

Ohio State Troopers Association,

Union

OPINION & AWARD

Arbitrator Case No.:	OCB #: DPS-2022-04644-01
Employer Advocate:	Lt. Kaitlin D. Fuller
Union Advocate:	Elaine N. Silveira, Esquire
Subject:	Termination
Grievant:	Trooper Jovande M. Coleman
Date of Hearing(s):	August 9, 2022
Location of Hearing:	Columbus, Ohio
Record Closed:	September 20, 2022
Opinion and Award Issued:	October 14, 2022

APPEARANCES

For the Union:

Elaine N. Silveira, General Counsel, Advocate

Also Present:

Larry K. Phillips, 2nd Chair, Staff Rep.

Jovande Coleman, Grievant

Kari L. Root, OSTA President

David Richendollar, OSTA Vice President

Anthony Percy, Witness

Sgt. Nathan Pabin, Witness

Indica Salyers, Witness

For the Employer:

Lt. Kaitlin D. Fuller, 1st Chair, Advocate

Also Present:

S/LT Aaron Williams, 2nd Chair, Advocate

Cullen Jackson, OCB Rep.

S/LT Chad Miller, Witness

Lt. Scott Aker, Witness

Major Charles Linek, Witness

PRELIMINARY STATEMENT

The parties, Ohio Division of Highway Patrol, (“Employer”) and Ohio State Troopers Association, (“Union”), having failed to resolve a dispute involving termination, proceeded to final and binding arbitration pursuant to the terms of their collective bargaining agreement, (“Agreement”). Marc A. Winters was mutually selected to serve as impartial arbitrator. The Arbitrator assigned Case Number to the Grievance is DPS-2022-04644-01. The Grievance was filed on April 18, 2022. An oral hearing was held on August 9, 2022. Both parties were given full opportunity to present evidence, to cross-examine the witnesses and to argue their respective positions. A stenographic record of the hearing was not made. The Arbitrator has full authority to resolve any arbitral challenges or procedural issues and to decide the case on its merits. Post-hearing briefs were filed, electronically, by the parties on September 20, 2022 and exchanged, electronically, through this Arbitrator on September 20, 2022.

BACKGROUND

The Grievant, Jovande M. Coleman, was terminated from his position as a State Trooper by his Employer, the Ohio State Highway Patrol, for violating the Department of Public Safety’s Rules and Regulations;

4501:2-6-02(B)(5) – Performance of Duty

Members who fail to perform their duties because of an error in judgment, or otherwise fail to satisfactorily perform a duty of which such a 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.

4501:2-6-02(V)(2) – Response to Resistance and Firearms

A member shall exercise care in handling, carrying, transporting, storing and using firearms so as to avoid endangering any person. A member shall only draw and display his/her firearm in a time of demonstrated need, for official inspection, or during training, qualification, or cleaning.

4501:2-6-02(Y)(2) – Compliance to Orders

A member shall conform with, and abide by, all rules, regulations, orders and directives established by the superintendent for the operation and administration of the division.

There were two administrative investigations combined culminating in the Grievant's termination.

The statement of charges read:

Through administrative investigation #2021-11357, it was found that Trooper Coleman displayed operational deficiencies during a traffic stop and improperly brandished his division-issued firearm. Trooper Coleman failed to comply with policy and procedure.

Through administrative investigation #2022-11485, Trooper Coleman was involved in an off-duty incident and brandished his personal firearm.

The first incident involved the Grievant pointing his division-issued firearm out his patrol car on August 1, 2021.

The second incident occurred on January 18, 2022, when the Grievant traveled to his girlfriend's, ex-husband's residence to confront him on calling her a bitch.

The Grievant was terminated, April 15, 2022, by letter dated April 14, 2022.

Subsequently the Union filed a grievance on behalf of the Grievant requesting that the Grievant be reinstated to his position as a State Trooper, without loss of seniority or state time, and to be made whole for all loss of wages and benefits, including but not limited to, fitness pay, holiday pay, and shift differential.

This issue is now properly before this Arbitrator for adjudication.

The following documents were entered into the Record:

- Jt. Ex. 1, 2018-2021 Collective Bargaining Agreement between the State of Ohio and the Ohio State Trooper Association, Inc., Unit 1 and 15.
- Jt. Ex. 2, Grievance Trail – DPS-2022-04644-01.
- Jt. Ex. 3, Discipline Trail.
- a. Statement of Charges
 - b. Pre-discipline Notice
 - c. Highway Patrol Rules and Regulations:
 - 4501:2-6-02 (B) (5) – Performance of Duty
 - 4501:2-6-02 (Y) (2) – Compliance to Orders
 - 4501:2-6-02 (V) (2) – Response to Resistance and Firearms
 - d. Discipline Letter
 - e. Deportment Record

Management's Exhibits

- M. Ex. 1, Administrative Investigation #2021-11357.
- M. Ex. 2, Administrative Investigation #2022-11485.
- M. Ex. 3, 2-TRA dated October 16, 2020 Individualized Training.
- M. Ex. 4, Training Review Guide dated April 12, 2021.
- M. Ex. 5, Arbitration Decision dated May 23, 2022, Arbitrator Sarah R. Cole.
- M. Ex. 6, Monthly Quality Review dated 07/21, signed August 11, 2021.
- M. Ex. 7, 3-TRA dated March 8, 2019 RTR case #19-072007-0831.
- M. Ex. 8, 2-TRA dated December 16, 2019 RTR 19-322038-0831.
- M. Ex. 9, 2-TRA dated August 6, 2020 RTR 20-322012-0831.
- M. Ex. 10, 2-TRA dated March 20, 2020 – 20-220007-0809.

Union Exhibits

- U. Ex. 1, Jovande Coleman Comprehensive Training Record dated 04/25/2022.

- U. Ex. 2, 2-ADM dated June 21, 2019. Administrative Investigation #2019-10169.
- U. Ex. 3, August 8, 2019 Suspension Letter Trooper Anthony Guajardo.
- U. Ex. 4, Guajardo Department Record.
- U. Ex. 5, January 4, 2022 Pre-disciplinary Notice Jovande Coleman.
- U. Ex. 6, Policy and Procedure Sign Off Report- Response to Resistance.
- U. Ex. 7, 2018-2019 Annual Review Evaluation, Jovande Coleman.
- U. Ex. 8, Google Street View Map 1988 Connecticut Drive.
- U. Ex. 9, Google Overhead View Map showing Connecticut Drive to Commonwealth and Nebraska.
- U. Ex. 10, Google Street View Map Commonwealth and Nebraska.

PERTINENT PROVISIONS OF THE AGREEMENT

Negotiated agreement between Ohio State Troopers Association, Inc. Unit 1 & 15 and The State of Ohio 2018 – 2021

ARTICLE 19 – DISCIPLINARY PROCEDURE (Relevant Sections)

19.01 Standard

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

19.03 Length of Suspension

No suspension without pay of more than ninety (90) calendar days may be given to an employee.

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 Written Reprimand(s).
2. 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.

3. One or more day(s) Working Suspension(s). If a working suspension is grieved, and the grievance is denied or partially granted by the Arbitrator, and all appeals are exhausted, whatever portion of the working suspension is upheld will be converted to a fine; the employee may choose a reduction in leave balances in lieu of a fine levied against him/her.
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.

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

ISSUE

(As Stipulated by the Parties)

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

SUMMARY OF EMPLOYER'S POSITION

The matter before you address the termination of the Grievant, Jovande M. Coleman, for violation of the Department of Public Safety's Rules and Regulations; specifically,

4501:2-6-02(B)(5) – Performance of Duty
4501:2-6-02(V)(2) – Response to Resistance and Firearms
4501:2-6-02(Y)(2) – Compliance to Orders

Through administrative investigation #2021-11357, it was found that Trooper Coleman displayed operational deficiencies during a traffic stop and improperly brandished his division-issued firearm. Trooper Coleman failed to comply with policy and procedure. Through administrative investigation #2022-11485, Trooper Coleman was involved in an off-duty incident and brandished his personal firearm.

As observed in the statement of charges, there were two administrative investigations which were combined, and a single set of discipline was issued. The first incident involved the Grievant pointing his division-issued firearm out his patrol car.

In the administrative investigation, the Grievant admitted he intentionally pulled his vehicle alongside Mr. Harris' and pointed his division-issued firearm at him. This was not simply a mistake; rather, an aggressive, deliberate decision that violates everything the Employer has

trained our employees to do. This act is so egregious even Lieutenant Clint G. Arnold, the Grievant's post commander and supervisor, stated,

I've never seen that done before in the twenty-five years I've been doing this...there was nothing that I saw that would have caused him to feel this level of alarm, and even if there was, I've never seen a traffic stop conducted in this fashion, ever! Completely unorthodox

Lieutenant Scott Aker articulated the Grievant's conduct was outside the parameters of his training. Lieutenant Aker also explained the Grievant's inability to make sound decisions under stress, which were documented in past incidents, caused the Grievant to put himself and citizens in greater danger.

The second incident occurred on January 18, 2022, when the Grievant traveled to his girlfriend's, ex-husband's residence to confront him on calling her a bitch. Mr. Steven Salyers, the ex-husband, stated the Grievant threatened to "whip my ass" prior to arriving at his residence. While at the residence, Mr. Salyers did not want to talk to the Grievant and went inside his home. The Grievant left the residence and a friend, Mr. Brandon Brewer, who was at the residence with Mr. Salyers, left at approximately the same time as the Grievant. The Grievant and Mr. Brewer met in a different portion of the neighborhood where the facts become disputed. The undisputed facts are that Mr. Brewer and the Grievant met, and the Grievant brandished his personal firearm.

Through the administrative investigation it became apparent the Grievant, once again, was aggressive and exhibited poor decisions. The Grievant denies the accusation of threatening Mr. Salyers; however, evidence shows the Grievant texted, "Don't get quiet on me now. Be that pit pull and I'll show you how the dog pound play" to Mr. Salyers. The Grievant clearly traveled to Mr. Salyers' residence to confront him on the name calling of his girlfriend. This action created a domino effect of more bad circumstances which eventually led to the Grievant brandishing his personal firearm at another individual. If the Grievant would have controlled his emotions and utilized common sense, with good decision making, this incident would not have occurred.

The Grievant's actions warrant termination. Lieutenant Aker testified the Grievant's inability to adapt to the continued training provided to him was unique compared to other employees within the Division. This uniqueness is evident in his actions on and off duty. The Grievant's inability to be rehabilitated is validated through nine known incidents, including five (5) administrative investigations and four (4) training incidents, which is supported through evidence and testimony. Furthermore, his response to questions during the arbitration confirm is inability to be rehabilitated.

Evidence from both investigations demonstrate the Grievant is aggressive, has failed to display sound decisions, and continually operates outside the methods of which he has been trained. The Grievant's inability to adapt to the several trainings, coaching, and discipline issued is inexcusable. The result of his actions has placed himself and the public in danger while congruently placing a grave liability on the Employer.

Evidence shows the Grievant had prior notice of the Employer's expectations to operate within the parameters of his training. In addition, the Employer has provided the necessary training to the

Grievant at the post level, online, and individualized training at the academy. Discipline had been issued to modify behavior and has been unsuccessful. Despite all these attempts, the Grievant has significantly regressed in his actions. The Grievant continually acts aggressively and continues to display poor decisions which put himself and the public in danger. The pattern of behavior is obvious and is a grave liability for the Employer.

The discipline imposed was not arbitrary, capricious, or discriminatory. The Employer established just cause for termination, and factors of mitigation are not present for modification of discipline. The Grievant made the intentional decision to pull alongside Mr. Harris and point his division-issued firearm. He failed the simple task of communication with dispatch prior to initiating a traffic stop, and he failed to comply with policy and procedure. While off-duty, the Grievant's inability to be rehabilitated is confirmed through his pattern of behavior which shows he continually exhibits poor decisions through his confrontation with Mr. Salyers and is unnecessarily aggressive. There is no doubt these actions will continue if reinstated.

SUMMARY OF UNION'S POSITION

In a discipline case, the Employer has the burden of proof to show that the discipline imposed is both (1) for just cause and (2) that the level of discipline is commensurate with the offense. The Employer has failed on both counts.

By combining two separate and distinct administrative investigations to justify the termination, the Employer is attempting to paint Trooper Coleman as a troublesome trooper that simply cannot be rehabilitated.

The Employer has simply not met its burden to justify the termination of Trooper Javonde Coleman. An existing three-day suspension does not justify violating the principle of progressive discipline and jumping to a termination.

Sergeant Pabin, Coleman's direct supervisor, testified he believed that Trooper Coleman could return to work without issue and continue being a good trooper. Sergeant Pabin testified that Trooper Coleman was a hard-working and dedicated trooper that was an asset to the patrol post.

Because this termination is based on two separate administrative investigations, each investigation must be examined on its own. The Union maintains the only investigation that the Arbitrator should consider is Management Exhibit #1, A# 2021-11357, as the second investigation (M2, AI# 2022-11485) is entirely based upon double hearsay.

The Union does not have any issues with the manner in which the Employer conducted Management Exhibit #1. It established the facts accurately per Trooper Coleman's statement and the Union maintains that Trooper Coleman did exhibit operational deficiencies, which may justify discipline, but certainly not termination. Both Trooper Coleman and his supervisor, Sergeant Nathan Pabin testified that neither was aware that Coleman should have notified Sgt. Pabin that he displayed his service weapon.

The Employer sent Trooper Coleman for individualized training at the academy, prior to the August 1, 2021 incident, which was the subject of Management Exhibit #1, where those instructors recommended additional training at the post level. That additional training at the post level never took place, despite the instructors clearly recommending it in their interoffice communications. Testimony revealed that the Employer does not have a follow up system in place to make sure additional training is conducted. Trooper Coleman did not receive any training at the post or district level.

The district or post should have conducted the additional training recommended by Sergeant Spradlin. Any discipline arising out of Management Exhibit #1, must follow progressive discipline.

Management Exhibit #2 was neither fair nor objective. The facts concern an off-duty incident between Trooper Coleman and his girlfriend's ex-husband, Steven Salyers and his friend, Brandon Brewer. The Employer attempted to interview Mr. Brewer, who refused to participate. The Employer's reliance on Mr. Salyers recitation of what Mr. Brewer told him is a fatal flaw to the establishment of just cause. The inclusion of the Xenia Police Department's report of this incident is also hearsay, which should be excluded. Mr. Salyers' statement to Xenia P.D. differs from what he told Sgt. Bass, another indication that the administrative investigation was not fair. The only direct evidence contained in the investigation is Trooper Coleman's interview with Sgt. Bass, of the Employer's Administrative Investigation Unit. Trooper Coleman has been consistent in his recollection of the events of January 18, 2022, both in his AI interview and his testimony at the arbitration hearing.

Management Exhibit #2 failed to uncover any proof, substantial or otherwise, that Trooper Coleman was guilty of violating any of the rules he was charged with violating. As already discussed, the investigation was largely based upon double hearsay as the only person involved in the incident between Trooper Coleman and Mr. Brewer, was Trooper Coleman.

The Employer did not produce any direct evidence to contradict Trooper Coleman's statements and his veracity was not challenged by the Employer. There is no reason not to believe the statements made by Trooper Coleman in his administrative investigation interview and his arbitration testimony.

There was no evidence presented that Trooper Coleman has caused harm to the reputation of the Employer. There is nothing in the record that supports the contention that Trooper Coleman has been rendered unable to perform his job duties. The Employer did not present any evidence indicating that Trooper Coleman's co-workers refused to work with him, and Sergeant Pabin's testimony certainly indicated that was not the case.

DISCUSSION AND FINDINGS

The basic principle in arbitration, when discussing discipline or discharge/termination, is that an Employer must have just cause for imposing such a penalty. The burden of proof falls directly on

the Employer. Here, the Employer bears the burden of proving their charges by a preponderance of the evidence.

Preponderance of the evidence, simply put, means the evidence has to be sufficient, to create, in this Arbitrator's mind, that the Employer has established its case.

The Grievant, in this case, has been charged with and terminated for violating the Department of Public Safety's Rules and Regulations;

4501:2-6-02(B)(5) – Performance of Duty

4501:2-6-02(V)(2) – Response to Resistance and Firearms

4501:2-6-02(Y)(2) – Compliance to Orders

There were two administrative investigations combined culminating in the Grievant's termination.

When addressing discipline or discharge/termination, Arbitrators normally look for two distinct areas of proof. First, whether guilt has been established. Second, has the proper penalty been handed out?

This Arbitrator first must determine if the Grievant's conduct did in fact rise to the level of misconduct which would satisfy the elements of just cause for which the end result would warrant discipline. Second, whether the appropriate discipline in this case should be a termination.

The question becomes. Was the evidence presented at the Hearing, in support of the charges, sufficient to prove the allegations made by the Employer against the Grievant?

The most important evidence in a case, such as this, comes in the form of testimony from witnesses. The source of such testimony whether it is firsthand knowledge or merely hearsay is an important part for proving just cause and whether the appropriate penalty was handed out. This Arbitrator relies heavily on the firsthand knowledge of such witnesses since the consequences to the Grievant are so great.

The Advocates for the Employer and for the Grievant have raised a number of issues at the Hearing and then in their respective post-hearing briefs. It is, however, not necessary, in arriving at a decision to discuss each and every issue.

The Grievant, as stated above was charged with violating the Department of Public Safety's Rules and Regulations.

The statement of charges read:

Through administrative investigation #2021-11357, it was found that Trooper Coleman displayed operational deficiencies during a traffic stop and improperly

brandished his division-issued firearm. Trooper Coleman failed to comply with policy and procedure.

Through administrative investigation #2022-11485, Trooper Coleman was involved in an off-duty incident and brandished his personal firearm.

The first incident involved the Grievant pointing his division-issued firearm out his patrol car on August 1, 2021.

The second incident occurred on January 18, 2022, when the Grievant traveled to his girlfriend's, ex-husband's residence to confront him on calling her a bitch.

The Employer argues that evidence from both investigations demonstrate the Grievant is aggressive, has failed to display sound decisions, and continually operates outside the methods of which he has been trained. The Grievant's inability to adapt to the several trainings, coaching, and discipline issued is inexcusable. The result of his actions has placed himself and the public in danger while congruently placing a grave liability on the Employer.

For charges listed in Administrative Investigation 2021 as argued by the Employer:

On August 1, 2021, the Grievant stopped Mr. Nicholas Harris for approximately 90 MPH and several lane violations. Upon activation of the overhead patrol lights, Mr. Harris immediately pulled to the right side of the roadway. Instead of following departmental procedure and advising dispatch of the vehicle he was stopping, the Grievant intentionally pulled his vehicle, still in the lane of travel, alongside Mr. Harris'. Contrary to OSP training, the Grievant rolled down his passenger-side-window and pointed his division-issued firearm at Mr. Harris and ordered Mr. Harris to throw his keys out the window. Once Mr. Harris tossed the keys outside the window, the Grievant reversed the patrol car and positioned it behind Mr. Harris' vehicle where he made contact with the driver as though it were an ordinary traffic stop.

Upon speaking with Mr. Harris, the Grievant requested Mr. Harris exit the vehicle. Although the Grievant stated he originally believed Mr. Harris to have a firearm or weapon, the Grievant conducted a poor pat down of Mr. Harris' person. After the traffic stop concluded the Grievant admitted he failed to generate a case report for the use of force with his firearm, and failed to notify supervision of the incident, in violation of OSP Policy 203.20 – Response to Resistance.

In the administrative investigation, the Grievant admitted he intentionally pulled his vehicle alongside Mr. Harris' and pointed his division-issued firearm at him. This was not simply a mistake; rather, an aggressive, deliberate decision that violates everything the Employer has trained our employees to do. This act is so egregious even Lieutenant Clint G. Arnold, the Grievant's post commander and supervisor, stated,

I've never seen that done before in the twenty-five years I've been doing this...there was nothing that I saw that would have caused him to feel this level of alarm, and

even if there was, I've never seen a traffic stop conducted in this fashion, ever!
Completely unorthodox.

Lieutenant Scott Aker articulated the Grievant's conduct was outside the parameters of his training. Lieutenant Aker also explained the Grievant's inability to make sound decisions under stress, which were documented in past incidents, caused the Grievant to put himself and citizens in greater danger.

The Union, in defense of the Grievant states:

The Union does not have any issues with the manner in which the Employer conducted administrative investigation 2021. It established the facts accurately per Trooper Coleman's statement and the Union maintains that Trooper Coleman did exhibit operational deficiencies, which may justify discipline, but certainly not termination. Both Trooper Coleman and his supervisor, Sergeant Nathan Pabin testified that neither was aware that Coleman should have notified Sgt. Pabin that he displayed his service weapon.

The Employer sent Trooper Coleman for individualized training at the academy, prior to the August 1, 2021 incident. Those instructors recommended additional training at the post level.

The Union argues that the additional training at the post level never took place, despite the instructors clearly recommending it in their interoffice communications. The district or post should have conducted the additional training.

The Union further argues that any discipline arising out of administrative investigation 2021 must follow progressive discipline as the operational deficiencies displayed by the Grievant, in this investigation, did not justify termination.

For charges listed in Administrative Investigation 2022 as argued by the Employer:

The incident occurred on January 18, 2022, when the Grievant traveled to his girlfriend's, ex-husband's residence to confront him on calling her a bitch. Mr. Steven Salyers, the ex-husband, stated the Grievant threatened to "*whip my ass*" prior to arriving at his residence. While at the residence, Mr. Salyers did not want to talk to the Grievant and went inside his home. The Grievant left the residence and a friend, Mr. Brandon Brewer, who was at the residence with Mr. Salyers, left at approximately the same time as the Grievant. The Grievant and Mr. Brewer met in a different portion of the neighborhood where the facts become disputed. The undisputed facts are that Mr. Brewer and the Grievant met, and the Grievant brandished his personal firearm.

Through the administrative investigation it became apparent the Grievant, once again, was aggressive and exhibited poor decisions. The Grievant denies the accusation of threatening Mr. Salyers; The Grievant clearly traveled to Mr. Salyers' residence to confront him on the name calling of his girlfriend. This action created a domino effect of more bad circumstances which eventually led to the Grievant brandishing his personal firearm at another individual. If the

Grievant would have controlled his emotions and utilized common sense, with good decision making, this incident would not have occurred.

The Union, in defense of the Grievant states:

Administrative Investigation 2022 was neither fair nor objective. The facts concern an off-duty incident between Trooper Coleman and his girlfriend's ex-husband, Steven Salyers and his friend, Brandon Brewer.

Administrative Investigation 2022 failed to uncover any proof, substantial or otherwise, that Trooper Coleman was guilty of violating any of the rules he was charged with violating. The investigation was largely based upon double hearsay as the only person involved in the incident between Trooper Coleman and Mr. Brewer, was Trooper Coleman. The Employer attempted to interview Mr. Brewer, who refused to participate. The only direct evidence contained in the investigation is Trooper Coleman's interview with Sgt. Bass.

The Union argues that the Employer did not produce any direct evidence to contradict Trooper Coleman's statements and his veracity was not challenged by the Employer. There is no reason not to believe the statements made by Trooper Coleman in his administrative investigation interview and his arbitration testimony.

There was no evidence presented that Trooper Coleman has caused harm to the reputation of the Employer. There is nothing in the record that supports the contention that Trooper Coleman has been rendered unable to perform his job duties.

The Employer did not present any evidence indicating that Trooper Coleman's co-workers refused to work with him

With respect to both Administrative Investigations for on duty and off duty conduct:

The Employer argues that the Employer has provided the necessary training to the Grievant at the post level, online, and individualized training at the academy. Discipline had been issued to modify behavior and has been unsuccessful. Despite all these attempts, the Grievant has significantly regressed in his actions. The Grievant continually acts aggressively and continues to display poor decisions which put himself and the public in danger. The pattern of behavior is obvious and is a grave liability for the Employer.

The Grievant made the intentional decision to pull alongside Mr. Harris and point his division-issued firearm. He failed the simple task of communication with dispatch prior to initiating a traffic stop, and he failed to comply with policy and procedure. While off-duty, the Grievant's inability to be rehabilitated is confirmed through his pattern of behavior which shows he continually exhibits poor decisions through his confrontation with Mr. Salyers and is unnecessarily aggressive.

The Union argues that Sergeant Pabin, Coleman's direct supervisor, testified he believed that Trooper Coleman could return to work without issue and continue being a good trooper. Sergeant Pabin testified that Trooper Coleman was a hard-working and dedicated trooper that was an asset to the patrol post.

It is clear that the Grievant was not terminated for any one event, but based in part on the events displayed in the two incidents outlined in the charges, one set of charges for on duty conduct and one set of charges for off duty conduct.

When deciding whether a termination or a lesser form of discipline is appropriate arbitrators generally look to see if the Employer can show a nexus between the misconduct and job performance. Did the Grievant's conduct render him unable to perform his job satisfactory?

There must be a direct and demonstrable relationship between the misconduct and the performance of the Grievant's job.

Additionally, the range of discipline for off duty conduct will also depend on the effect of that conduct on the Employer's operation. Whether there is a readily discernable harmful effect on the Employer's operation such as creating publicity that harms or tarnishes the Employer's public image.

The Grievant, as a State Trooper, and it goes unsaid, must be held to a higher standard for conduct displayed on and off duty alike.

The following is a synopsis of the Grievant's training and discipline record prior to the charges here before this Arbitrator.

Training - Inter-Office Communication (IOC), February 21, 2019

In 2019, the Grievant received a corrective counseling regarding the proper use of force guidelines. The Grievant was involved in a response to resistance with an individual which involved a vehicle and foot pursuit. Subsequent training was provided.

Training - IOC – December 8, 2019

A second corrective counseling provided notice to the Grievant that his response was unacceptable in another response to resistance incident. On December 8, 2019. Subsequent training was provided.

Training - IOC – February 22, 2020

A third corrective counseling was issued to the Grievant for off-duty conduct. On February 22, 2020 and subsequent training was provided.

Written Reprimand – April 7, 2020

The Grievant received his first issuance of discipline through a written reprimand on August 5, 2020, from an incident that occurred on April 7, 2020. The Grievant was charged for violation of work rules 4501:2-6-02(I)(4) – Conduct Unbecoming an Officer and 4501:2-6-05(D)(1) – Motor Vehicle and Aircraft Operation. The Grievant was found to be unprofessional during a verbal altercation with his supervisor and drove his patrol cruiser recklessly.

Training – IOC – August 1, 2020

On August 1, 2020, the Grievant was involved in another response to resistance incident with a female suspect. Subsequent training was provided.

A fourth corrective counseling was generated to capture this incident and the Employers attempt to help the Grievant control his emotions and make good decisions without resorting to discipline. Administrative Investigation 2021-10994 – September 19, 2020

Less than one month after the Grievant completed his Managing Conflict training, he was involved in another response to resistance incident where he tased an individual. Subsequent training was provided.

Individualized Training – October 7, 2020

The Grievant appeared at the training academy on October 7, 2020, to receive individualized training for the administrative investigation which involved the Grievant's failure to use de-escalation techniques.

Administrative Investigation – 2021-11097 – January 30, 2021

Shortly after the Grievant completed his individualized training he was involved in another response to resistance incident. While the Employer admits the altercation was indeed stressful, that does not justify the Grievant's operational deficiencies and inadvertent discharge of his firearm near the suspect.

Due to this administrative investigation being relatively close in time to the prior administrative investigation (taser incident), the two incidents were combined, and a single form of discipline was issued; The Employer issued a five (5) day suspension; however, it was modified to a three (3) day suspension as one work rule, 4501:2-6-02(I)(4) – Conduct Unbecoming an Officer, was found not to have just cause. However, just cause was upheld for violation of 4501:2-6-02(B)(5) – Performance of Duty and 4501:2-6-02(V)(2) – Response to Resistance and Firearm, the same work rules which were violated in the current incident.

Individualized Training – April 28, 2021

After the operational deficiencies and accidental discharge, the Grievant was sent to the Ohio State Highway Patrol Academy for individualized training, again.

This Arbitrator finds that the Grievant received the necessary training to be a State Trooper while in the academy and he continued to receive annual/regular training as well as specialized trainings to address performance deficiencies.

It is abundantly clear, from the record, that the Grievant even with the above-listed continued training, at least 7 occurrences, from 2019 through 2021, and the above-listed associated discipline, the Grievant still does not adhere to the policies and procedures associated with being a State Trooper.

The evidence presented for Administrative Investigation 2021 was overwhelming. The Grievant clearly violated Department training and procedures. The act of brandishing a firearm through the vehicle window at a motorist pulling over in and of itself could be a dischargeable offense, if presented that way. The Union's arguments for additional training and progressive discipline are not enough to diminish the seriousness of the charges in Administrative Investigation 2021.

However, the charges filed contained in Administrative Investigation 2022, which contained mostly uncorroborated hearsay and double hearsay as evidence for off duty misconduct was not sufficient to prove misconduct which would aid in presenting a termination as a penalty.

Here, there was no evidence presented that would suggest the Grievant's actions would render him incapable of continuing to perform his duties in a satisfactory manner. Likewise, based on the entire record, there was no proof, i.e., newspaper, tv news media, social media etc., articles or posts that showed the Grievant's conduct in anyway had a harmful effect on the Employer's operation or image.

Also important in this consideration is the fact that no criminal charges were filed against the Grievant.

The Grievant, however, is ultimately responsible for putting himself in the position that he found himself in at his girlfriend's ex-husband's residence and any events thereafter. Although there may have been many mitigating factors, the Grievant still did not represent or hold himself to a higher standard as required by all Police Officers. For that, the Grievant needs to be held accountable.

When charges are combined, such as in this case, the Employer runs the risk where one set of circumstances has merit, and the other set of circumstances does not then the total severity of the penalty given may be lost or lessened by virtue of the charges without merit.

As mentioned above, the act of brandishing the firearm at a motorist pulling over, for all intents and purposes, could be a dischargeable offense had it been presented that way. Combining that charge with the lesser off duty incident now takes some of the severity of the total penalty away.

Based on the reasoning and discussion above and the entire record before me, this Arbitrator finds that the evidence presented at the Hearing, in support of the charges, were not sufficient to show just cause exists whereby the end result would justify in a termination.

The Employer, in this case, was not able to show that the Grievant's conduct, based on a

preponderance of the evidence, did rise to the level of misconduct whereby a termination would be the appropriate penalty at this time. However, the evidence presented at the Hearing, in support of the charges, were sufficient to show just cause exists whereby the end result would justify discipline in the form of a suspension.

The Grievant, in this case, should take notice that any future similarly situated violations will probably end his career as a State Trooper.

The evidence presented, the weight associated, and the credibility of the witnesses support these findings and conclusion.

AWARD

Based on the discussion and reasoning above, this grievance is granted in part and denied in part.

This Arbitrator finds that the evidence presented at the Hearing, in support of the charges, were not sufficient to show just cause exists whereby the end result would justify in a termination.

The evidence presented at the Hearing, in support of the charges were sufficient to show just cause exists whereby the end result would justify discipline in the form of a 90 day unpaid suspension as permitted by the parties Collective Bargaining Agreement.

The Employer is hereby ordered to reinstate the Grievant to his former position as a Trooper with the State Highway Patrol under the following conditions:

The Termination will be converted to a ninety (90) day unpaid suspension. The Grievant shall be restored in seniority and made whole for all loss of earnings and benefits for the time period that extends beyond the 90-day unpaid suspension.

The Employer will provide the Grievant with whatever mandatory training and re-training that the Employer deems necessary with respect to the deficiencies outlined in the termination letter.

This Arbitrator will retain jurisdiction over the remedy portion of this Award, for a period of 90 days, should any issues, between the parties, arise which would also include the mitigation of damages

It is hereby so Ordered, this 14th Day of October 2022.



Marc A. Winters
Arbitrator
Seven Fields, Pennsylvania