

Arbitration Decision and Award

Arbitrator: Jack Buettner
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In the Matter of:

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

and

The Ohio State Troopers Association

Case Number: DPS-2023-00802-01

Grievant: Michael P. Herdman

Date of Meeting: June 7, 2023

Post Hearing Briefs Received: July 7, 2023

Date Decision Issued: July 31, 2023

Advocate for the Union:

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Appearances for Management:

S/LT. Aaron Williams	1 st Chair
Cullen Jackson	OCB
Sgt. Timothy Bunell	Witness
Lt. Kaitlin Fuller	Witness
Sgt. Chad Smith	Witness

Appearances for Union:

Ronald Snyder	OSTA Attorney
Larry Phillips	Staff Representative
Michael Herdman	Grievant

Joint Exhibits:

#1 – 2022-2024 Collective Bargaining Agreement between the State of Ohio and the Ohio State Trooper Association, Inc., Units 1 and 15

#2 – Electronic Grievance

#3 – Discipline Trail

- a. Statement of Charges
- b. Pre-Disciplinary Notice
- c. Discipline Letter
- d. Highway Patrol Rules & Regulations
 - 4501:2-6-02(E)(1) – False statement, truthfulness
 - 4501:2-6-02(I)(3) – Conduct unbecoming an officer
- e. Department Record
- f. Last Chance Agreement dated 7/10/2020

Management Exhibits:

#1 – Administrative Investigation #2022-11843, 1/18/23

Artifact A – Email Chain from Herron, Akers, Markowski, Bullock

Artifact B – Unit 1116 AVL History Report near US-33A and Claypool St.

Artifact C - Unit 1116 AVL History Report near US-33 Milepost 13

Artifact D - Unit 1116 AVL History Report near Greenfield Dam Wildlife Area

Artifact E - Unit 1116 AVL History Report near US-33 and Milepost 13

Artifact F – OSHP Unit 116 and ODNR Unit 3142 AVL History at Shallenberger
Nature Preserve

Artifact G - Incident Recall Report: 11/12/22 to 1/13/22

Artifact H - OSHP Unit 116 and ODNR Unit 3142 AVL History at Greenfield Dam
Wildlife Area

Artifact I – No Contact Order, 11/18/22

Artifact O - Incident Recall Report: 9/18/22 to 9/19/22

Artifact Q – Internal Investigation Pre-Interview

Artifact R – Case Report: Heather Byers

Artifact S – Department Record: Herdman

Artifact U – Byers Interview on 12/12/22

Artifact W – Internal Investigation Pre-Interview 12/27/22

Artifact Y - Internal Investigation Pre-Interview 2/6/23

Union Exhibits:

#1 – Ohio Revised Code, Section 2907.01: Sex offenses general definitions

#2 – GoTranscript: Audio Interview with Herdman, 12/19/22

#3 – GoTranscript: 2nd Audio Interview with Herdman, 1/27/23

#4 – GoTranscript: 3rd Audio Interview with Herdman, 2/6/23

#5 – Report of Corrective Counseling, Heather Byers, Natural Resources Officer

Background:

The grievant, Michael Herdman, was an Ohio State Trooper and a member of the Ohio State Highway Patrol for almost five (5) years. On July 10, 2020, Trooper Herdman signed a Last Chance Agreement with a duration of three (3) years. (Joint Exhibit 3F) The conduct specified in the Last Chance Agreement was a violation of the rules regarding the making of false statements and the care of equipment. On March 20, 2023, the Grievant was terminated by the State (hereafter known as "Management") for violating said Last Chance Agreement.

The Grievant is represented by the Ohio State Troopers Association (hereafter known as the "Union" or "OSTA"). The Parties are operating under a collective bargaining agreement (CBA) that is effective from 2022 through 2024.

Arbitrator Jack Buettner was mutually selected by the Parties to arbitrate this matter, having been chosen from the existing permanent panel of umpires identified in Article 20, Section 20.08 of the CBA. An arbitration hearing was held on June 3, 2023, at the OSTA offices in Gahanna, Ohio. Both Parties were given a full opportunity to present both oral testimony and documentary evidence to support their respective positions.

The Parties stipulated that the agreed-upon grievance procedure was followed and that the matter was properly before the arbitrator. Further, both Parties waived service of the Arbitrator's report via overnight delivery and agreed upon service via email.

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:

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

Management's Summary and Position:

The State believes that Trooper Herdman was properly terminated for violating Ohio State Highway Patrol Rules & Regulations 4501:2-6-02(I)(3) – Conduct Unbecoming an Officer, which states:

For improper on-duty association with any individual for purposes other than those necessary for the performance of official duties.

Management also contends the Grievant violated 4501:2-6-02(E)(1) – False statement, truthfulness, which states:

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

On November 2, 2022, the Grievant's post commander, Lt. Michael Akers, received information that Trooper Herman was spending time on-duty with Heather Byers, a female Ohio Department of Natural Resources (ODNR) officer. On November 15th, 2022, an administrative investigation was initiated. The investigation showed multiple times whereby the Grievant gave a verbal checkup of his location that did not coincide with his automatic vehicle locator (AVL). Further, in each of these instances the Grievant was in the company of Ms. Byers.

October 21, 2022 – October 22, 2022 (Shift 10:00 p.m. – 6:00 a.m.)

The Grievant verbally advised dispatch that his location at 11:07 p.m. was Becks Knob Road and U.S. 22. His AVL map, however, showed he was at the Shallenberger Nature preserve from 10:42 p.m. to 11:22 p.m. (Management Exhibit 1, Artifact B) The Grievant admitted and witnesses observed Byers with him the entire time he was at the nature preserve.

October 22, 2022 – October 23, 2022 (Shift 10:00 p.m. – 6:00 a.m.)

The Grievant's Unit History Report shows he provided a verbal check-up at 12:27 a.m. of Millersport and Refugee Roads. His AVL map, however, shows he was at the ODNR Office at Buckeye Lake State Park from 12:23 a.m. to 1:35 a.m. (Management Exhibit 1, Artifact B) Byers was present the entire time the

Grievant was at the park office although the Grievant changed his status from “45 on patrol” to “38 eating”.

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October 23, 2022 – October 24, 2022 (Shift 10:00 p.m. – 6:00 a.m.)

The Grievant’s Unit History Report shows he provided two voice check-ups at 12:25 a.m. and 12:47 a.m. of Coonpath Road and State Route 158. The AVL shows that he was at the Greenfield Dam Wildlife Area from 12:17 a.m. to 1:09 a.m. (Management Exhibit 1, Artifact C) Mr. Herdman’s status was “45 on patrol” although he claimed he was eating. Ms. Byers was with him the entire time.

October 29, 2022 – October 30, 2022 (Shift 10:00 pm – 6:00 am)

The Grievant’s Unit History Report shows he provided a voice check-up for a Love’s Travel Stop on Route 310 at 3:22 AM. The AVL map shows he was parked at an 84 Lumber store off of the Columbus Expressway from 3:01 AM until 3:42 AM and was never at the Love’s Travel Stop. (Management Exhibit 1, Artifact E) The 84 Lumber was a closed business in Licking County, a county not assigned to the units of the Grievant’s post. Ms. Byers, who was off duty, was with the Grievant.

October 30, 2022– October 30, 2022 (Shift 10:00 p.m. – 6:00 a.m.)

The Grievant’s Unit History Report shows he provided a voice check-up of U.S. 22 and U.S. 33 at 12:39 a.m. with a “45 on patrol” status. (Management Exhibit 1, Artifact E) The AVL map shows he was parked at Shallenberger Nature Preserve from 12:17 a.m. to 12:39 a.m. (Management Exhibit 1, Artifact B) Ms. Byers was with the Grievant as witnessed by Trooper Clarke Franz. After leaving Shallenberger, the Grievant and Officer Byers traveled to three (3) more nature preserves together.

November 12, 2022 – November 13, 2022 (Shift 10:00 p.m. – 6:00 a.m.)

At 10:22 p.m., the Grievant was dispatched to a car crash. Trooper Herdman went to the ODNR Buckeye Lake State Park Office (Management Exhibit 1,

Artifact G) to supposedly use the bathroom. Officer Byers was there. The car crash was not near the ODNR office nor did the Grievant inform dispatch he would be delayed.

Management contends that these incidents show a pattern of behavior that suggests that the Grievant was having some type of relationship with Ms. Byers. Trooper Herdman alleges these interactions were in order to assist Ms. Byers with arrest reports, “criminal interdiction”, and “area familiarization.”

During the investigation, three (3) interviews were conducted. In the first interview, the Grievant was asked several times if he had done anything inappropriate or displayed any employee misconduct with Ms. Byers. He replied, “No sir. Absolutely not.” (Union Exhibit 2, [01:10:49 - 01:10:58]) During the second interview, the Grievant initially denied any physical contact with Ms. Byers but later admitted that they did hug and kiss on multiple occasions while he was on duty. (Union Exhibit 3, [00:18:57 - 00:23:37]) He further stated that it was a “goodbye hug like you would do with your wife, your significant other.” (Union Exhibit 3, [00:19:43]) Further, in the third interview, the Grievant replied that he had been “intimate” with Ms. Byers in that he did hug and kiss her but did not engage in full-blown sex. (Union Exhibit 4, [00:23:59 - 00:24:06]) Management contends that the inconsistent testimony validates their belief that the Grievant was dishonest and is not credible.

Thus, Management argues that the Grievant violated both cited work rules. He violated OSHP Rules & Regulations 4501:2-6-02(I)(3) – Conduct Unbecoming an Officer - when he had an improper on-duty association for purposes other than official duties with Ms. Byers. He also violated 4501:2-6-02(E)(1) – False Statement, Truthfulness - when he initially claimed he did not have a relationship with Ms. Byers. He later changed his position. Additionally, Management claims he gave false information about his location on multiple occasions to cover up said relationship.

Management argues that termination is appropriate since the Grievant was already on

an active Last Chance Agreement issued on July 10, 2020. This Agreement stated that the Grievant had violated Division Work Rule 45:01:2-02 (E)(1) – False Statement, Truthfulness - as well as another rule. If he violated either cited rule, he would be terminated. (Joint Exhibit 3f) Thus, his termination should stand since he again violated the rule concerning false statements and truthfulness.

Union's Summary and Position:

The Union contends that the Grievant was not untruthful during his Internal Affairs interviews or in the performance of his duties. Further, he did not engage in an inappropriate association with Officer Byers.

While Management spent much time during the hearing asserting that the Grievant falsely reported his location or status, he was not charged with that conduct. Management asserted he was dishonest **during his interview** (Union added emphasis) regarding the circumstances around the incidents. The Grievant, however, did not dispute the locations on the State's AVL records and was forthcoming about his exact location for each incident referenced during the interviews.

The Union further contends that the Grievant was not untruthful about his actions with Officer Byers. During the first interview, no questions were asked of the Grievant in which the terms "kiss" or "kissing" were used. (Union Exhibit #2) The Grievant was asked if he had engaged in any "inappropriate" or "improper" conduct to which he answered no. He answered no because he did not believe his actions were inappropriate or improper. He was also asked if he had had any "sexual contact or conduct" with Officer Byers. (Union Exhibit 2, [01:08:22 to 01:08:30]) He again replied no because he assumed sexual contact or sexual conduct referred to actions as delineated in Ohio Revised Code, Section 2907.01, Sex offenses general definitions.

Sexual conduct is defined as intercourse, oral sex, and acts involving penetration.

Sexual contact is defined as touching of an erogenous zone for the purpose of arousing or gratifying either person. (Union Exhibit #1). ORC does not mention kissing or hugging as sexual contact. Thus, the Grievant answered no to the questions asked during the interview.

During the second interview, Trooper Herdman did initially respond in the negative to a question about physical contact with Officer Byers. Again, he was interpreting physical contact as it is defined in ORC which makes no mention of kissing and hugging. Before the interview ended, Trooper Herdman, in an effort to be transparent, stated that he had hugged and kissed Officer Byer goodbye on one or two occasions. He also stated that there was no other physical contact besides that. Sergeant Smith, the interviewer, had never explicitly asked about kissing and hugging. Thus, when the Grievant stated he had no physical contact, he did not think kissing and hugging was included. He was not misleading anyone or making false statements. He was answering the questions as asked and in relation to his definition of what physical and sexual contact meant in accordance with ORC.

During the third interview, when asked if sexual contact includes the lips and would include kissing, the Grievant rightly disagreed. (Union Exhibit 4, p. 24) Lips and kissing are not mentioned in the definition of sexual contact under ORC 2907.01 (B).

Thus, the Union contends that Trooper Herdman did not lie at any point during his interviews or make false statements.

The Union further contends that the Grievant did not improperly associate with Officer Byers while on duty. The Grievant contends his time spent with Byers was work-related. While some of the time spent with Officer Byers may have been considered unjustified, that does not warrant termination. First, the Union argues that the behavior does not violate the Last Chance Agreement. Secondly, Trooper Herdman never received any prior discipline or corrective action regarding such alleged behavior in the past.

Progressive discipline would be justified, not termination. Thirdly, other than the Grievant's acknowledgment of a causal hug and kiss goodbye, the State produced no evidence that the relationship involved anything other than work-related matters.

Lastly, the Union argues that the evidence does not establish that the Grievant falsified his location or status. In each instance cited by the State the Grievant was in close proximity to the reported location and was within eyesight of the reported location. While the State claimed the Grievant was inaccurate in reporting his status such as "eating" or on "patrol", Sergeant Smith admitted not all troopers are consistent in their reporting. Further, no investigation was made to determine if the Grievant routinely reported locations that precisely matched his GPS location or that his reporting status differed when he was with Officer Byers.

Thus, the Union contends that the Grievant was improperly terminated. Management did not show just cause for discipline as specified in Section 19.01 of the CBA nor did it they follow the steps of progressive discipline as outlined in Section 19.05.

Arbitrator's Summary and Position:

Termination of an employee is a decision that is not taken lightly. Virtually all CBAs, including the one between the Ohio State Troopers Association and the State, provide that the employer may suspend, discipline, or discharge employees only for "just cause". This case, however, involves a Last Chance Agreement which was approved by both Parties. As one arbitrator stated,

Last chance agreements ordinarily remove elements of just cause from an individual's job protections. They provide the employer a guarantee that an undesirable employee can be discharged if s/he does not improve. They are what they say they are—one *last* chance. They are bargained for and approved by unions when the probable alternative is an employee's dismissal. [Genie Co., 97 LA 542 (Dworkin, 1991)]

The Last Chance Agreement cited two rule infractions: Rule 4501:2-6-02(E)(1) – False Statement, Truthfulness and Rule 4501:2-6-05(A)(5) – Care of Equipment. Care of equipment was never in question so the issue becomes whether or not the Grievant violated the rule on False Statement, Truthfulness. If so, the CBA (Joint Exhibit #1) clearly states that termination is warranted. Section 19.07 – Abeyance Agreements, 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 work rule(s). The level of discipline may not be challenged or made an issue at arbitration.

The case before this Arbitrator, therefore, is whether or not the Grievant was untruthful.

While the Union discounted the numerous times the Grievant inaccurately reported his location, this Arbitrator finds that that evidence, while not cited in the termination, provides convincing evidence as to a relationship between the two officers.

Management cited no less than six (6) incidents dating from October 21 through November 12, 2022, whereby the Grievant gave a location close to but not accurately showing where he was. In all these instances he was with Officer Byers and in most cases in ODNR parks or offices. In one instance he was in the parking lot of a business after hours in a county not assigned to his unit where Officer Byers, who was off-duty, joined him. Also of importance is the incident that occurred on November 12, 2022. The Grievant was dispatched to a car crash yet proceeded to the ODNR office, where Officer Byers was, instead of to the accident. He stated that he needed to use the restroom. The ODNR office was not near the crash, and he did not inform dispatch of his location or that he would be delayed.

The Union argued that Management never looked at the Grievant's previous location reportings to see if it was only these six (6) instances where he reported his location differently or if that was a common practice. The Union, however, provided no data or information to support their claim.

Further, testimony from three (3) of the Grievant's peers suggest that there was an improper on-duty association occurring between the Grievant and Officer Byers. Trooper Clarke Franz testified that the Grievant had been spending time in secluded parks at night which is unusual for a night shift trooper. He drove by one of these locations and observed the Grievant with Byers. (Management Exhibit #1, p. 6) Dispatcher Jeramey Knowlton testified that it was odd for any trooper to be at the various nature preserves and that no other trooper patrolled those areas. (Management Exhibit #1, p. 10.) Dispatcher Rachelle Flemming testified that the Grievant's behavior changed after he first assisted Officer Byers at the post with a breath machine. His reported location at Buckeye Lake State Park as "38 eating" was unusual since everything is closed at that hour and that the location was out of his preferred patrol area. Further, the Grievant usually started his shift at the post but instead started from home and went to the park. She also testified that the Grievant had rarely worked in the Millersport or Buckeye Lake areas until after he assisted Officer Byers at the post. (Management Exhibit #1, p. 8-9) As several employees testified, the Grievant's responsibility did not involve state parks or nature preserves.

Further, after a No Contact Order was issued, the Grievant never returned to the parks. If these areas were truly a part of his official job duties, it would be reasonable to think the Grievant would continue to patrol them but just not have contact with Byers. He did not patrol them again.

A preponderance of evidence and testimony suggests the Grievant had an improper on-duty association with Officer Byers, and he improperly reported his location to cover it. He admitted to hugging and kissing another officer on duty several times which a reasonable person would not deem as "proper association." This Arbitrator concludes he did violate Division Work Rule 45:01:2-6-02 (I)(3) – Conduct Unbecoming an Officer – Improper On-Duty Association. This violation, however, would most likely warrant progressive discipline, not trigger the Last Chance Agreement. Thus, the question of untruthfulness comes under consideration.

The Union argued that the statement of charges does not include falsifying status or location and is strictly limited to dishonest statements the Grievant made “**during his interview**”. (Emphasis added by Union) The State considered location reporting as a factor for dishonesty and stated as much in the response to the initial grievance meeting held on March 28, 2023. Lt. Fuller wrote, “Also, the Grievant was deceitful with his locations through the CAD system.” (Joint Exhibit 2, p.3) The Union’s narrow interpretation cannot be used to discount untruthfulness that happened outside of the interviews and that contribute to the credibility of the Grievant.

The interviews brought out another untruth. In the first interview, the Grievant denied any physical contact with Byers, later stating his interpretation of physical contact was in a sexual sense and as delineated in ORC. He was specifically asked early on in the interview, “Anything that would be considered inappropriate or any employee misconduct?” [Union Exhibit #2, (00:17:17)] He replied absolutely not. Later in the interview he was asked. “...did you ever engage in any type of sexual contact or conduct with Officer Byers while on duty?” [Union Exhibit #2, (01:08:22)] He again replied no. In the second interview he again denied any physical contact with Byers. [Union Exhibit #2, (00:02:36)] The interviewer became more specific about what physical contact meant and stated, “So, you would agree that would include any kissing, touching, inappropriate touching, touching of the buttocks, breast, or anything like genital area, um, sex acts you...” The Grievant replied, “Sexual, yeah. Actually...” The interviewer then asked again if there had been any physical contact. The Grievant once more replied no. [Union Exhibit #2, (00:02:38 to 00:03:14)] Later Trooper Herdman admitted kissing and hugging Officer Byers. [Union Exhibit #2, (00:19:22)] The Grievant’s defense was that he didn’t consider kissing and hugging to be inappropriate. This statement itself seems rather contrived since it would be difficult to find any occupation where kissing and hugging of others is acceptable on-duty. It is clear that the Grievant made false statements in his first interview since the questions did not focus just on sexual contact but other physical contact. It is clear that the Grievant made false statements in the second interview although he later changed his response.

Discipline and Discharge in Arbitration [Brand, N. (1998). BNA Books. pp. 233-236] cites several factors to be considered in falsification cases. The first is intent. Did the employee intentionally engage in the falsification? Evidence supports that he did intentionally misrepresent his location when he was meeting with Officer Byers and that he lied about his relationship with Byers. The second factor is motive. The only reasonable motive would be to cover up a relationship which the Grievant knew was improper. The third factor is the effect of the falsification on the business or on the Grievant's fellow workers. Management needs to depend on a trooper to be where he says he is and to respond directly to calls without taking a detour to a state park. Fellow troopers need to be able to trust and rely on each other. That level of trust was breached when the Grievant falsified information. Yet another factor is clarity and consistency of company policies. While the CBA and Code of Conduct may address falsification, the Last Chance Agreement itself is very clear that termination is the only possible recommendation.

The hearing record shows that the State has proven by a preponderance of evidence that the Grievant violated Ohio State Highway Patrol Rules & Regulations 4501:2-6-02(I)(3) – Conduct Unbecoming an Officer and 4501:2-6-02(E)(1) – False Statement, Truthfulness. Since Trooper Herdman was already on a Last Chance Agreement for violating Ohio State Highway Patrol Rules & Regulations 4501:2-6-02(E)(1) – False Statement, Truthfulness, this Arbitrator upholds the termination and denies the grievance in its entirety.

CERTIFICATE OF SERVICE

The foregoing report was delivered via email on this the
the day of 31st day of July, 2023.

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