

**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 #: DPS-2015-01266-1**

**Grievant: Trooper Vic L. Wolfe**

**Arbitrator: Jack Buettner**

**Date of Hearing:** December 8, 2015

**Date Briefs Received:** January 19, 2016

**Date Decision Issued:** February 19, 2016

**Representing the Employer:**

Heidi A. Marshall, Advocate for the Employer

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**Representing the Union:**

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By Mutual agreement the Hearing was convened on December 8, 2015, at 9:00 AM. The Hearing was held at Capital University Law School in Columbus, Ohio. Jack Buettner was selected by the parties to arbitrate this matter as a member of the panel of permanent umpires pursuant to Article 20, Section 20.8, of the Collective Bargaining Agreement which is effective from 2012-2015.

The parties each stipulated to the statement of the issue, a series of background facts, and the admission of joint exhibits. The parties have also agreed to the arbitration of this matter. No issues of either procedural or jurisdictional arbitrability have been raised, and the matter is now properly before the arbitrator for a determination of the merits.

**In attendance for the Employer:**

S/Lt. Heidi Marshall	Advocate, OSHP
Lt. Harry Fellure	2 <sup>nd</sup> Chair, OSHP
Mr. Robert Patchen	3 <sup>rd</sup> Chair, OSHP
Sgt. David E. Bailey	Investigator/Witness
Sgt. Barry Thompson	OSHP Lisbon
Sgt. Shaun Baskerville	OSHP Lisbon
Dispatcher Amy L. Williams	OSHP Lisbon
Lt. J. M. Dragovich	OSHP D-1

**In attendance for the Union:**

Mr. Herschel Sigall	Advocate/Attorney
Ms. Elaine Silveira	Asst. General Counsel
Trp. Vic Wolfe	Grievant
Mr. Bob Cooper	Staff Representative
Mr. Jeremy Mendenhall	OSTA President

The parties were asked to submit exhibits into the record.

**The following were submitted as Joint Exhibits:**

- Joint Exhibit #1                    2012-2015 Bargaining Agreement between the State of Ohio and OSTA, Inc., Unit 1 and 15
- Joint Exhibit #2                    Electronic Grievance – DPS-2015-01266-1
- Joint Exhibit #3                    Discipline Package
- a. Administrative Duties Letter
  - b. Administrative Leave Letter
  - c. Statement of Charges
  - d. Pre-Disciplinary Notice
  - e. Discipline Letter
  - f. Department Record
  - g. Highway Patrol Rules and Regulations: 4501:2-6-02 (B) (5) Performance of Duty and 4501:2-6-02 (Y)(1)(2) Compliance to Orders

**The following were submitted as Management Exhibits:**

- Management Exhibit #1    Administrative Investigation
- a. Written Administrative Investigation #2015-0029 with 1 CD, February 3, 2015
  - b. Written Administrative Investigation #2015-0030, February 9, 2015
  - c. Written Administrative Investigation #2015-0106 , March 17, 2015
- Management Exhibit #2    Performance Document--Annual Review, 9-6-13 to 9-5-14
- Management Exhibit #3    Development Document—Performance Improvement Plan, 9-6-14 to 2-5-15

- Management Exhibit #4      Development Document—Performance Improvement Plan, 9-11-13 to 12-11-13
- Management Exhibit #5      OSP Training Record-Training Record for OSP Employees
- Management Exhibit #6      Inter-Office Communication, with Individualized Training Review Guide, 8-28-13

**The following were submitted as Union Exhibits:**

- Union Exhibit #1              Inter-Office Communication, Post Commander's Plan of Action, 11-6-14
- Union Exhibit #2              OSHP O.P.E.R.A.T.I.O.N.S Evaluations

**Background:**

The Grievant, Trp. Vic L. Wolfe, was commissioned as a trooper of the Ohio State Highway Patrol on September 30, 2000. The employer acted to terminate him based on violations of Rule 4501:2-6-02 (B)(5):Performance of Duty and Rule 4501:2-6-02 (Y)(1) and (2): Compliance to Orders.

The termination was based on three (3) investigations by the Employer. The first investigation, #2015-0029, stated Trp. Wolfe had seized a knife from a violator and had failed to return it during the course of the traffic stop. This investigation also cited many operational deficiencies during an arrest for operating a vehicle while intoxicated (OVI).The second investigation, #2015-0030, stated Trp. Wolfe failed to file two (2) citations with the East Liverpool Municipal Court, causing one case to be dismissed and another to be re-filed. The third investigation, #2015-0106, stated that Trp. Wolfe did not follow proper protocol in eliciting a urine sample from a female suspected of OVI.

The Union contends that these three (3) incidents, when viewed singly, do not constitute grounds for termination. The cited infractions are minor, and many aspects have

underlying explanations. Trp. Wolfe was placed in an Early Intervention Program. The Union contends that provisions of this program created the issues brought forth in Investigation #2 and allowed the Employer to stockpile individual events against the Grievant to make a case for termination. Moreover, the Employer, specifically Lt. Dragovich, who was Commander of the Lisbon Post, had a personal conflict with Trp. Wolfe.

**Issue:**

On April 16, 2015, Trp. Vic L. Wolfe was terminated from employment for violating Rules 4501:2-6-02 (B)(5), Performance of Duty, and 4501:2-6-02 (Y)(2), Compliance to Orders. The parties submit the following statement of issue for resolution by the arbitrator:

Was Trp. Wolfe terminated from his employment with the Ohio State Highway Patrol for just cause? If not, what shall the remedy be?

**Employer Position:**

The Employer's position is that Trp. Wolfe was rightfully terminated having violated Rules 4501:2-6-02 (B)(5), Performance of Duty, and 4501:2-6-02 (Y)(2), Compliance to Orders. The decision to terminate was based on three (3) investigations.

In the first investigation, #2015-0029 dated February 3, 2015, Trp. Wolfe had confiscated a knife from a violator and failed to return it after a routine traffic stop. The knife was unsecured in his patrol car for ten (10) days before it was found. In another traffic stop, Trp. Wolfe exhibited numerous operational deficiencies during an arrest of a female suspect for OVI. He did not activate his belt microphone, went beyond the legal bounds of a pat down frisk when patting down the suspect's pockets, did not do a complete search but stopped at the pockets, placed her in the patrol car unhand-cuffed, allowed her to have physical contact with her brother, and tried to administer a portable breath test but did not administer other court admissible tests. The suspect was transferred to the Lisbon Post, but Trp. Wolfe never advised her that she was under arrest for OVI nor did he advise her of her rights. At the Post, Trp. Wolfe decided to get a urine sample from the suspect and asked if a dispatcher would witness the test. This went against a written email from Sgt. B.L Thompson stating, "Do not ask a dispatcher to collect a urine sample. Take them to jail and have a female officer obtain the test if there are no female officers at the PD."

In the second investigation, #2015-0030 dated February 9, 2015, Trp. Wolfe mishandled two (2) citations. The first citation had an incorrect speed listed and had to be reissued and the second citation was turned in late. At the time, Trp. Wolfe was on a Personal Improvement Plan (PIP) and was required to put all of his paperwork in a specified folder to be checked by his supervisor. While the Grievant claims he placed the citations in the designated folder, Sgt. Thompson, the reviewing supervisor, stated he found one citation in Trp. Wolfe's personal file. This caused it to be submitted late to the court.

In the third investigation, #2015-0106 dated March 17, 2015, Trp. Wolfe was involved in an OVI arrest of a female subject. After a breath test, he asked the suspect to submit to a urine test. The urine test, however, was improperly collected, having no witness to the test. Trp. Wolfe claims he took extra steps to maintain the integrity of the urine sample. He claims a dispatcher witnessed it via camera but there was no documentation to that effect. Additionally, the dispatcher could not swear in court that she witnessed the urine test. Since the chain of custody was not verified, the OVI case was dismissed. This instance again went against the written directive from Sgt. B.L Thompson regarding the administration of urine tests of female subjects when there are no available female officers.

Investigations 1 and 2 both cite numerous occasions whereby Trp. Wolfe violated Rule 4501:2-6-02 (B)(5), Performance of Duty. Part of Investigation 2 and Investigation 3 cites instances where Trp. Wolfe did not comply with the directive concerning urine tests of female suspects thereby violating Rule 4501:2-6-02 (Y)(2), Compliance to Orders.

The Employer contends that past performance evaluations also show a pattern of deficiencies. The Union contends the recent disciplinary actions are a result of the personal bias of Lt. Dragovich, his evaluator. While a new system of evaluation has been instituted, a general pattern of behavior can be discerned from past reports. Prior evaluations, conducted by another evaluator, Lt. Orosz, from September 2006 through September 2009, also showed less than satisfactory areas of performance.

The Employer also established a past record of violations including a three (3) day suspension in March of 2005 [two (2) days held in abeyance], a seven (7) day suspension [five (5) day plus the two (2) days held in abeyance], and a ten (10) day suspension. Trp. Wolfe was recommended as a candidate for the Early Intervention Program in October of 2014. A plan was developed including a continuation of a current PIP. The Grievant performed acceptably in the program but only while under direct supervision.

The Employer contends that the imposed discipline was not arbitrary, capricious, or discriminatory but was indeed progressive and appropriate as illustrated by the various types of intervention used beginning in 2006.

## **Union Position:**

The Union's position is that Trp. Wolfe was wrongfully terminated. The three (3) investigations cited allegations that are minor and in some cases untrue.

In Investigation 1, while it is true that Trp. Wolfe took possession of a pocket knife from a suspect, he did not intentionally keep it and had nothing to gain from keeping it. The knife slipped between the car console and seat. When it was found, Trp. Wolfe returned it. A sergeant in the vehicle who was a part of the traffic stop also did not remember to return the knife. This investigation also cited Trp. Wolfe for numerous operational deficiencies when arresting a female suspect for OVI which can be explained. His belt microphone was not working, not intentionally left off. He did not administer a field sobriety test because the woman was wearing a brace and indicated she had Multiple Sclerosis, thus making it difficult for her to perform on such tests. He did not hand cuff her since she reported she had a broken wrist and that handcuffs would be a hardship. He did conduct a search after obtaining the suspect's permission but stopped the search upon determining the object in her pocket was an inhaler and not a weapon. Believing the suspect was impaired, Trp. Wolfe took her to the Post where he attempted a breathalyzer test, but the suspect was unable to perform due to asthma. He then asked a dispatcher, who voluntarily agreed, to witness the urine test. He took every step possible to remove an impaired driver from the road.

Investigation 2 cites the mishandling of two (2) citations which caused them to not be filed in a timely matter. The Union contends that these instances were caused by the Early Intervention Plan that was supposed to monitor Trp. Wolfe's actions. As a part of the plan, Trp. Wolfe was required to place his white paper citation in a file called the PIP file which contained only his work. This file would then be reviewed and signed off on by a non-specifically designated sergeant who would then put the citation in the open tray for filing with the court. One of his questionable citations did not reach the court on time. This was no reflection on Trp. Wolfe since his responsibility was to place the citation in the PIP file, which he did. The other citation in question was an e-citation that was delivered to the post and then reviewed and approved by Sergeant Louive. The Employer contends that the written copy was found in Trp. Wolfe's personal file. The Union contends that the work was completed and most likely overlooked in the EIP process.

Investigation 3 involved a female suspect who was arrested for OVI. She consented to a urine test and, although no female officer was present to witness the test, Trp. Wolfe took multiple measures to assure the veracity of the test. He adjusted cameras to capture the legs of someone in the bathroom, asked a dispatcher to be aware of the proceedings, and added colored antifreeze to the toilet bowl. His goal was to remove an impaired driver from the road.

The Union contends that these investigations are without merit and certainly questionable. They are minor in nature and do not constitute a termination offense. The impact is amplified by the fact that the intervention program, designed to help Trp. Wolfe, instead allowed the Employer to collect several incidents and build them into a larger case to support termination. Additionally, the Union contends that the post commander, Lt. Dragovich, had a personal bias against Trp. Wolfe and aggressively used any means he could to terminate him.

## **DISCUSSION AND DECISION:**

In reviewing the termination of Trp. Vic L. Wolfe, I have analyzed the testimony and all evidence put forth by both sides. I believe that the Employer established their discharge case by clear and convincing evidence, demonstrating they had just cause to remove the Grievant.

The issue before the arbitrator was to determine if the grievant was terminated for just cause. Article 19.01 of the Collective Bargaining Agreement between The State of Ohio and The Ohio State Troopers Association states that, "No bargaining unit member shall be reduced in pay or position, suspended or removed except for just cause." *In The Common Law of the Workplace, The Views of Arbitrators*, the principle of just cause is further delineated. It states, "The essence of the just cause principle is the requirement that an employer must have some demonstrable reason for imposing discipline. The reason must concern the employee's ability, work performance, or conduct, or the employer's legitimate business needs." (1998, pp. 164-165). Additionally, Article 19.05 of the CBA compels the employer to follow the principles of progressive discipline. Four (4) levels of discipline are enumerated. They are: one (1) or more verbal reprimands, one (1) or more written reprimands, one (1) day or more suspensions, or fines. Thus, progressive discipline as well as just cause must be considered.

The Employer has shown through testimony and written documentation that Trp. Wolfe has had a history of disciplinary actions. Department records (Joint Exhibit #3) and administrative investigation reports (Management Exhibit #1) show that over the last ten (10) years Trp. Wolfe has received ten (10) verbal reprimands, eight (8) written reprimands, one (1) fine, and nine (9) suspensions. Because of this history, he was placed in an Early Intervention Program on October 15, 2014. The mission of this program is to give early help and assistance to troopers facing a series of administrative investigations. These records, while documenting the past disciplinary actions, also demonstrate that the Employer did use progressive discipline in that all four levels of action as outlined in the CBA were used in an effort to remediate issues.



The Union contends that the issues that ultimately resulted in Trp. Wolfe's termination were a result of an accumulation of minor incidents and of the personal bias of the Post Commander, Lt. Dragovich. While several of the recent issues were used to support the termination, records show the disciplinary actions dated back to 2006 and occurred in almost every year thereafter. As to a personality conflict between Lt. Dragovich and Trp. Wolfe, evaluation reports (Union Exhibit #2) from Trp. Wolfe's previous Post Commander, Lt. Orosz, also showed that his performance was at times unsatisfactory or rating levels partially met.

The termination was predicated on three (3) investigations that took place between February 3, 2015 and March 17, 2015. The Employer contends that Trp. Wolfe violated Rule 4501:2-6-02 (B)(5), Performance of Duty and Rule 4501:2-6-02 (Y)(2), Compliance to Orders. In Investigation 1, Trp. Wolfe took possession of a suspect's pocketknife and failed to return it. In reviewing the circumstances and information supplied by the Union and Management, it is evident that there was no intent by the trooper to keep the knife for himself. It was misplaced. When Mr. Koontz called concerning the knife, Trp. Wolfe searched his patrol vehicle, found it, and arranged to return it. I don't find any violation of the aforementioned rules.

Another situation cited in Investigation 1 involved a female subject, Nancy Mackey. Numerous operational deficiencies by Trp. Wolfe were cited concerning the suspected OVI stop and arrest. (Management Exhibit 1-A) Some of the cited deficiencies could be questionable considering the medical problems and disabilities that afflicted the suspect. Other deficiencies were in violation of Performance of Duty such as not conducting a proper Terry frisk, not reading the suspect her rights, not activating his field microphone, and permitting her to have physical contact with her brother after the arrest. At the Post, Trp. Wolfe used improper procedures for a urine test when he asked a dispatcher to witness the sample collection. The sample was, thereby, inadmissible in court.

Investigation 2 dealt with the issuance of two (2) citations. The first citation had an incorrect speed listed and had to be reissued. It was reissued and the situation, a minor one, was remedied. The second citation was turned in late. There was a gray area here in that Trp. Wolfe was required by a PIP to put all of his paperwork in a "white folder" to be checked by a supervisor. He claimed he put it in the folder, but it was not reviewed in a timely manner. Sgt. Thompson claimed it was found in Trp. Wolfe's personal folder. There was no clear evidence to support either case as a blatant violation of Performance of Duty.

Investigation 3 involved another OVI arrest of a female and the improper collection of her urine test. Again, Trp. Wolfe asked a dispatcher to witness the sample collection. This was in direct contradiction to an email stating, "Do not ask a dispatcher to collect a

urine sample. Take them to the jail and have a female correction officer obtain the test if there are no female officers working at a PD.” (Management Exhibit 1a, Attachment C) As a result, the chain of custody was broken and the case was ultimately dismissed by the court. This was a violation of Compliance to Orders as well as Performance of Duty.

In reviewing not only these three (3) investigations but Trp. Wolfe’s department records, specifically Case # 20140881, Joint Exhibit #3 (f), it becomes evident that a pattern of behavior exists. In said case, Trp. Wolfe was suspended for 10 days for failing to properly handle evidence, a urine sample. He was charged with violation of Performance of Duty and violation of Evidence and Recovered Property.

In discussing what constitutes just cause, I refer to Arbitrator Carroll Daugherty’s definition (Brand, Norman, Editor. *Discipline and Discharge in Arbitration*. Washington, D.C.: BNA Books, 1998, pp. 31-33) which incorporates seven (7) questions. While these questions are not a definitive test, they provide a preliminary tool for determining just cause.

1. Did the employer give the employee forewarning of the possible or probable disciplinary consequences of the employee’s conduct?
2. Was the employer’s rule reasonably related to the orderly, efficient and safe operation of the company’s business?
3. Did the employer, before administering discipline to the employee, make an effort to discover whether the employee violated or disobeyed a rule of management?
4. Was the employer’s investigation conducted fairly and objectively?
5. At the investigation did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the employer reasonable related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee’s service?

In regard to these questions, the Employer has met their responsibility.

Additionally, in considering just cause one must consider what a reasonable, prudent person, mindful of the duties of their job, would decide. Trp. Wolfe has not shown that level of judgment. His previous disciplines and past record weigh in the analysis of whether his removal is appropriate. Progressive discipline’s purpose is to help rehabilitate an employee—to put the employee on notice that his/her conduct does not comply with the work rules. The record has shown that the Employer has made numerous attempts to work with the Grievant to change his behavior. The interventions and discipline have not, however, made a permanent change in Trp. Wolfe’s behaviors.

**AWARD:**

For the reasons stated above, the grievance is denied. The Employer had just cause to remove the Grievant.

This concludes the arbitration.

Respectfully submitted this 19<sup>th</sup> day of February, 2016,

John F. Buettner, Arbitrator