

Susan Grody Ruben, Esq.
Labor Arbitrator
30799 Pinetree Road, #226
Cleveland, OH 44124

**ARBITRATION PROCEEDING PURSUANT TO
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE
PARTIES**

In the Matter of	◆	
	◆	
THE OHIO STATE TROOPERS	◆	
ASSOCIATION	◆	
	◆	
and	◆	ARBITRATOR'S
	◆	OPINION
STATE OF OHIO,	◆	and AWARD
OHIO DEPARTMENT OF	◆	
PUBLIC SAFETY, DIVISION OF THE	◆	
OHIO STATE HIGHWAY PATROL	◆	
	◆	
Grievant: Morris M. Johnson	◆	
Case No. DPS-2015-04566-1	◆	

This Arbitration arises pursuant to the collective bargaining agreement ("the Agreement") between the Parties, THE OHIO STATE TROOPERS ASSOCIATION ("the Union") and the STATE OF OHIO ("the State," "the Department," or "the Division") under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. Her decision

shall be finding and binding pursuant to the Agreement. The record indicates no procedural impediments to a final and binding Award.

Hearing was held March 17, 2016. Both Parties were represented by advocates who had full opportunity to examine and cross-examine witnesses and introduce documentary evidence. Both Parties filed timely post-hearing briefs.

APPEARANCES:

On behalf of the Union:

ELAINE N. SILVEIRA, Esq. and HERSCHEL M. SIGALL, Esq., The Ohio State Troopers Association

On behalf of the State:

LT. MARTY FELLURE, Ohio State Highway Patrol

STIPULATED ISSUE

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

RELEVANT PORTIONS 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.

...

...

...

...

FACTS

The Grievant has been employed by the State as a Trooper since 2001. On December 5, 2013, the State, the Union, and the Grievant signed a Last Chance Agreement that provides in pertinent part:

As a result of administrative investigation #2013-0568, the Employee was found to have violated Ohio State Highway Patrol Rules and Regulations, specifically: Rule 4501:2-6-02(I)(3) Conduct Unbecoming an Officer and Rule 4501:2-6-02(B)(5) Performance of Duty.

The investigation revealed Trooper Johnson stopped a vehicle for no obvious violation and engaged the driver in conversation for purposes other than those necessary for the performance of his official duties.

Due to the Employee's failure to meet behavioral expectations of the Employer, the Director of Public Safety

determined termination was appropriate. However, the parties hereby agree to provide the Employee with a last chance to correct his behavior. The Employer will hold the termination in abeyance provided the Employee does not violate the terms of this agreement. The following are the terms the parties agree to:

1. If the Employee violates Rule 4501:2-6-02(I)(3) Conduct Unbecoming an Officer, the Employee will be terminated.

2. If the Employee violates Rule 4501:2-6-02(B)(5) Performance of Duty and the behavior is of a same or similar nature, the Employee will be terminated.

...

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

8. This agreement is valid for two years.

...

**The instant Statement of Charges, dated December 1, 2015, states
in pertinent part:**

It is herewith stated that reasonable and substantial cause exists to establish that Trooper Morris M. Johnson has committed an act or acts in violation of the Rules and Regulations of the Ohio State Highway Patrol, specifically of:

Rule 4501:2-6-02(I)(1)(3) Conduct Unbecoming an Officer

Through administrative investigation #2015-0730, it was found that Trooper Johnson attempted to cultivate a personal relationship with a female arrestee. Trooper Johnson obtained personal information from Division issued forms in an attempt to make personal contact with the arrestee via cell phone.

The instant termination letter, dated December 4, 2015, states in pertinent part:

You are hereby advised you are being terminated from your employment with the Department of Public Safety, Ohio State Highway Patrol, effective immediately upon receipt of this letter, for violation of the Rules and Regulations of the Ohio State Highway Patrol. Specifically, you are being terminated for violation of OSHP Rule 4501:2-6-02(I)(1)(3) Conduct Unbecoming an Officer, which violates and invokes the Last Chance Discipline Agreement you signed on December 5, 2013.

As a result of administrative investigation #2015-0730 it was found that you attempted to cultivate a personal relationship with a female arrestee. You obtained personal information from Division issued forms in an attempt to make personal contact with the arrestee via cell phone.

POSITIONS OF THE PARTIES

State Position

The Grievant voluntarily and knowingly entered into a Last Chance Agreement on December 5, 2013. The two work rules he violated and that resulted in the Last Chance Agreement were 4501:2-6-02(I)(3), Conduct Unbecoming an Officer, and 4501:2-6-02(B)(5), Performance of Duty. The terms of the Last Chance Agreement state that if the Grievant violates either of those work rules in the following two years, the Last Chance Agreement would be invoked and the Grievant would be terminated from his employment.

In the instant case, the fact the Grievant stayed at Ms. S's residence for 32 minutes discussing personal business after putting himself on patrol is a violation of 4501:2-6-01(I)(1)(3) Conduct Unbecoming an Officer. This in and of itself is enough to invoke the Last Chance Agreement.

The Grievant did learn something as a result of his Last Chance Agreement. He learned to deactivate his video camera when violating the Department's rules. Unfortunately, even though he was given a second

chance, he did not learn to refrain from attempting to establish a dating pool from women he has arrested for OVI.

Ms. S testified at the arbitration hearing that she had called her friend RS to come to the police department to pick her up. RS verified this during his arbitration testimony. Ms. S testified the Grievant was within a few feet of her when she made the phone call to RS. The Grievant ignored the fact Ms. S had a ride and took her home.

Ms. S testified when they arrived at her house, the Grievant opened her cruiser door and followed her to the front of her house. As she went to her front door, the Grievant placed himself at the first step of the porch with one foot on the step. It was at this location where the Grievant continued his conversation with Ms. S and began making inappropriate comments to her.

Ms. S said during her interview and at the arbitration hearing that the Grievant asked her "if I've ever been with a black guy, and I told him 'no' and he...made a comment that he would be my first black guy." She further testified she owns a Cadillac which the Grievant saw at her house. Ms. S stated the Grievant said that "his BMW would look nice sitting in her driveway next to my Cadillac."

Ms. S testified about knowledge she had of the Grievant's personal life. She testified the Grievant was originally from New York, now lived in Beavercreek, was married with three children, and owned a BMW. Ms. S knew two of his children were step-children. The Grievant testified this personal information was accurate.

Ms. S further testified she said to the Grievant, "How can you hit on me and you're giving me a DUI?" At that point, Ms. S began to tell the Grievant she hated him.

Ms. S testified the Grievant told her he would call "Anne" at the court who could help Ms. S with the charges. Ms. S testified she did not know who Anne was. Although the Grievant denied he said this to Ms. S, he admitted he knew Anne Tamashasky, a local prosecutor.

Ms. S testified she received a text after that Grievant had left that read, "Yo yo." She replied, asking who it was. The next text she received stated, "The person you hate." The Grievant admitted he sent these texts from his personal cellphone.

The Union introduced into evidence a web page from Whitepages Premium to show it would have been easy for Ms. S to obtain personal information about the Grievant between her arrest and the arbitration.

However, the web page did not state the Grievant owns a BMW, is married with three children, and is originally from New York. The fact that Ms. S was able to testify about the Grievant's personal information clearly shows a personal conversation took place between the Grievant and Ms. S.

The Grievant, in his attempt to cultivate a romantic relationship with Ms. S, provided personal information to her, made sexually suggestive comments, and used his personal cell phone to send her texts; he had obtained Ms. S's phone number from the traffic citation he wrote.

The Union will contend the Grievant is a star Trooper, a leader in OVI and seatbelt arrests. But this case is not about the Grievant's ability to write citations. It is about the Grievant's conduct outside of his required duties as a Trooper.

The Grievant made several errors while attempting to cultivate a personal relationship with Ms. S. First and most significant, he falsified his status when he cleared himself from the traffic stop, yet remained at Ms. S's house for an additional 32 minutes even though he admitted he had no further patrol business. The Grievant alleges Ms. S walked to his cruiser to talk to him, and that is why he stayed at her residence an

additional 32 minutes. He should have notified dispatch he was still there. But had he done this, it would have raised suspicions as to why he stayed at a female's house for that length of time after taking her home.

During the Grievant's testimony, he stated he did not recall telling Ms. S personal details about himself. He contradicted himself a few minutes later, however, when he stated, "I don't 100% know."

The Grievant admitted he consistently violates policy with regard to turning on his in-car camera audio. His statement that he activates the system only when he encounters a problem with an individual is in total contrast to what he remembers happened on the night in question. The Grievant stated Ms. S was upset, she told him she hated him, and she threatened him to get out of the ticket. Yet, the Grievant stated in his interview and in his arbitral hearing testimony that there were no issues with Ms. S.

Another violation of the Conduct Unbecoming an Officer Rule the Grievant readily admits to is the fact he sent Ms. S text messages from his personal phone. He admitted he obtained her phone number from the information she provided for the traffic citation. This information is not to be used for personal reasons and is strictly for court purposes only.

The first message stated “Yo yo.” Not only did he improperly obtain and use Ms. S’s phone number, the text messages he sent were unprofessional coming from a State Trooper to a female he had just arrested for OVI.

The Grievant’s conduct falls short of the conduct expected by the Ohio State Highway Patrol and the citizens of Ohio. The expected conduct ensures mutual trust and is supported by each officer’s integrity and personal character.

Captain Charles Linek, a 22-year veteran of the Division and the Executive Officer of the Office of Personnel, testified that once the Grievant issued all the paperwork, released Ms. S from his vehicle, and entered the information on his MDT, he was no longer performing patrol business. In essence, the Grievant had no business being at her residence for an additional 32 minutes. Captain Linek stated this in and of itself is a violation of 4501:2-6-02 (I) (1) (3), and is worthy of termination.

It is evident the Grievant did not learn from the mistake he made in 2013 when he attempted to cultivate a relationship with a previous female driver. He continues to make poor decisions when dealing with

females he has stopped. This places the State in a precarious position of potential liability.

The State does not take the termination of employees lightly, especially long-term employees. The State has a considerable amount of time and taxpayer money invested in long-term employees. As stewards of taxpayer money and striving to meet its responsibilities to the public, termination of an employee is viewed as a last resort. However, the State already gave the Grievant the opportunity to correct his behavior through his Last Chance Agreement. The conduct of the Grievant, not once, but twice within the past two years was counter to the ideals expected of an Ohio State Highway Patrol Trooper.

Union Position

The termination provision of the Last Chance Agreement was not triggered by the actions of the Grievant. The Grievant never engaged in any action, or failed to take any action, that would justify any discipline.

If the Grievant had attempted to cultivate a personal relationship with Ms. S., as opposed to engaging and interacting with her professionally in the course of carrying out his duties and responsibilities,

he would have triggered the termination provision of the Last Chance Agreement and his termination would have been justified.

However, the record evidence is that the Grievant' contact with Ms. S consisted only of the following:

--The Grievant conducted a regular traffic stop based upon his observation of Ms. S's driving conduct.

--The Grievant took a drunk off the highway and appropriately charged her with OVI and other offenses.

--The Grievant saw to the safety of Ms. S's vehicle by moving it into a position off the roadway, instead of having it towed.

--The Grievant transported Ms. S to a police station equipped to perform a blood alcohol test (BAC).

--The Grievant transported Ms. S home following completion of the arrest paperwork when Ms. S was apparently unable to find a ride.

--The Grievant returned to Ms. S's parked vehicle after taking Ms. S to her home to help allay Ms. S's oft-repeated fear of having her vehicle towed. The Grievant placed a note on the vehicle saying the owner would be moving the vehicle.

--The Grievant texted Ms. S to tell her he had placed a note on her vehicle to allay her oft-repeated fear that her vehicle would be towed.

The Grievant never had any additional contact with Ms. S by phone or in person. Nor did he ever drive his vehicle in the vicinity of her

residence after he drove her home. Based upon the record evidence, it is impossible to conclude the Grievant engaged in any conduct that would merit discipline, let alone conduct that would trigger the termination clause of the Last Chance Agreement.

The Grievant's conduct during Ms. S's traffic stop was professional. In putting a note on her vehicle, he was acting in an appropriate, helpful manner. He did not assault Ms. S nor engage in sexual innuendo or vulgar language. Accordingly, he did not violate the terms of his Last Chance Agreement. He did not attempt to establish a personal, nonprofessional relationship with Ms. S; therefore, the termination provision under the Last Chance Agreement should not have been triggered.

Weighing the physical evidence, including the in-car video, and weighing the witness testimony leads to a determination that Ms. S was not a credible witness. Further, the Grievant's testimony was credible and compelling as to his recollection of his interaction with Ms. S. He engaged in no activity that would support discipline, let alone the termination of his 15-year career. The Grievant did not speak flirtatiously to Ms. S, did not "hit" on her, and used no vile or vulgar language.

From the video and the text messages, there is no evidence upon which to conclude the Grievant's conduct was anything other than professional. For the State to successfully prosecute this case, it must rely upon Ms. S's testimony, which was neither truthful nor accurate.

Ms. S said during her AI interview that the Grievant had made objectionable sexual comments on the way to the police station. We know from the video that the Grievant did not make any off-color, sexual innuendo, or unprofessional statement of any kind to Ms. S.

On the central question of whether the Grievant drove Ms. S home despite the fact she had someone coming to the police station to take her home, she was asked during her AI interview:

Q. Was there conversation between you and Trooper Johnson that...your friend was coming to get you?

A. I don't know. I can't remember if I told him that someone was coming to get me.

Ms. S's arbitration testimony was muddled at best in constructing when the Grievant made objectionable and vulgar statements to her once he was at her home. She initially said that upon arrival at her home, she opened her garage door, which showed the Cadillac inside, and the Grievant then said his BMW would look good parked in her driveway

behind her Cadillac. This testimony is false; among the items secured from her vehicle, there was no garage door opener.

During her AI interview, Ms. S said the Grievant told her he would be getting off work at 7am. In fact, the Grievant was scheduled to get off work at 2pm that day.

Ms. S's history includes a criminal conviction, a sworn affidavit regarding domestic violence that she recanted, and she sued an assistant prosecutor for leveraging an affair with her. The IA investigator did not challenge any of Ms. S's statements irrespective of their inconsistencies. Nor did he check her personal history in an attempt to establish her reputation for veracity or lack thereof.

In addition to the Grievant's 15 years of service and his many accolades, his testimony was simple and straightforward. After the paperwork was completed, the Grievant transported Ms. S to her home due to the fact she had not indicated she had contacted anyone to pick her up. On 18 previous occasions, the Grievant has transported OVI violators – males, females, and couples -- home. On none of those occasions did the Grievant reactivate the in-car camera. The Grievant testified that if the arrestee was not belligerent, it was his practice to not

reactivate the camera. Trooper Robert Waulk also testified it was his practice as well to transport OVIs home if they did not have transportation.

The Grievant testified he pulled into Ms. S's driveway, opened his door, went around the rear of his cruiser and unlocked the rear passenger door for Ms. S to exit. He testified that as she started walking toward her house, he returned to his cruiser and changed his status from transporting to being available for service. At that point, Ms. S did not enter her home, but rather returned to the Grievant's cruiser and engaged him in conversation. They conversed for approximately 30 minutes. Ms. S eventually entered her house. The Grievant pulled out of her driveway and returned to patrol. Had he waited until she had entered her house when she first exited his cruiser, his status would rightfully have remained in "transport" and the State would have had no concern about what it viewed as an inordinate time spent at the scene.

The Grievant testified he never touched Ms. S. His texts to her were merely to inform her that her car was safe. He never again contacted her or even drove near her house. He had no intention of

creating a personal relationship with her. Rather, he simply did his duty and showed concern for her.

While the Grievant was not obligated to drive Ms. S home, we have seen what happens when law enforcement elects not to ensure the safety of an OVI. Here, the Grievant demonstrated professional responsibility and was targeted by a woman with experience and legal representation which she used to escape the consequences of her driving misconduct. She was able to accomplish the dismissal of all charges against her and was never challenged or questioned in depth.

The Union requests the Arbitrator to restore the Grievant to his position with no loss of seniority, pay, or fringe benefits. The Union also requests the Arbitrator to retain jurisdiction until the Award is fully implemented.

OPINION

The stipulated issue, whether the termination was for just cause, governs what is before the Arbitrator. Just cause¹ consists of whether the Grievant did what he is accused of doing, and if he did, whether removal is an appropriate discipline under all the circumstances.²

The Department found the Grievant violated Rule 4501:2-6-02(I)(1)(3) Conduct Unbecoming an Officer, which provides:

(I) Conduct unbecoming an officer

A member may be charged with conduct unbecoming an officer in the following situations:

(1) For conduct, on or off duty, that may bring discredit to the division and/or any of its members or employees. A member shall not engage in any conduct which could reasonably be expected to adversely affect the public's respect, confidence, or trust for Ohio state highway patrol troopers and/or the division.

...

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

¹ See City of Piqua v. FOP, Ohio Labor Council, 183 Ohio App. 3d 495 (2009).

² As seen below, even if the grievance were analyzed on narrower "last chance" grounds, the outcome would be the same as it is under the broader just cause standard.

...

The State's primary witness was Ms. S. She was not particularly credible or forthcoming. She testified the Grievant had touched her breast and made multiple sexual comments to her. She had not, however, made the "touching" allegation during her AI interview. And she testified at the arbitration to only one sexual comment.

The Arbitrator, however, is struck by the Grievant's admitted text messages from his personal cellphone to Ms. S's cellphone after he left her home and was still on duty. First, the Grievant inappropriately obtained Ms. S's cellphone number from the arrest form. Second, the content of the Grievant's text messages to Ms. S were highly unprofessional:

The Grievant: Yo yo.

Ms. S: Who is this? Lol I don't recognize this number

The Grievant: Me the person you hate

Ms. S: Ha ha! Hate?

The Grievant: Put note on your van. Get some rest.

Both “Yo yo” and “Me the person you hate” fall into the category of trying to cultivate a personal relationship. They certainly are not communications of a professional nature.

While the record shows the Grievant did not approach Ms. S after the day of her arrest – maybe he came to his senses or maybe he remembered he was working under a Last Chance Agreement – the text messages are proof of the Grievant’s attempt to cultivate a personal relationship with Ms. S.

The Grievant’s personal cellphone texts to an arrestee are Conduct Unbecoming to an Officer under both Sections (1) and (3). Such a violation is the basis for the Grievant’s just cause termination. Moreover, his Last Chance Agreement, which was still in force on the date he sent the texts, made the termination inevitable.

AWARD

For the reasons stated above, the grievance is denied.

The State carried its burden of proving it had just cause to remove the Grievant and that the Grievant violated his Last Chance Agreement.

June 29, 2016

Susan Grody Ruben
Arbitrator