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DECISION AND AWARD OF ARBITRATOR  
CASE NOS. 15-00-980807-0097-04-01 &  
15-00-980807-0098-04-01

In The Matter of Arbitration Between:

OHIO STATE TROOPERS ASSOCIATION )  
 )  
 -AND- )  
 )  
 STATE OF OHIO, DEPARTMENT OF )  
 PUBLIC SAFETY HIGHWAY PATROL )

APPEARANCES

For The State

Richard G. Corbin Captain  
Susan M. Rance Lieutenant  
Heather L. Reese Office of Collective Bargaining

For The Association

Herschel M. Sigall, Esq., Attorney  
Dennis E. Paul, Esq., Attorney  
Jim Roberts Executive Director O.S.T.A.  
Timothy K. Houston Grievant

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BEFORE ALAN MILES RUBEN, ARBITRATOR  
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PRELIMINARY STATEMENT

The undersigned Arbitrator was selected from the permanent panel by the parties to hear and decide the within dispute over the removal from service of Trooper Timothy K. Houston for alleged falsification of traffic tickets and crash reports and his refusal to respond to questions during an Administrative Investigation interview.

At the direction of the parties the arbitral hearing was held on October 14, 1998, in Columbus, Ohio.

Thereat, the jurisdiction of the Arbitrator over the subject matter of the dispute and the parties thereto was acknowledged, and all objections, procedural and substantive, to his exercise of jurisdiction were waived.

The parties were afforded full and equal opportunity to present testimonial and documentary evidence. At the request of the Department the Arbitrator issued subpoenas to compel the attendance of the witnesses.

All witnesses were separated, placed under oath and subject to cross-examination, but their testimony was not recorded and transcribed.

The advocates for the parties made opening statements and, at the conclusion of the evidentiary portion of the hearing, elected to file post-hearing briefs.

With the receipt of those briefs on November 16, 1998, the Arbitrator declared the hearing closed.

SUMMARY OF THE EVIDENCE

The operative facts are not in dispute.

The Grievant, Mr. Timothy Kirk Houston, was sworn in as a State Highway Patrol Trooper in 1994 after having graduated second in his Police Training Academy class. He was assigned to the Highway Patrol Office at Medina, Ohio (Post 53, District 3). Prior to joining the Patrol he had served as a Police Officer in Hinckley, Ohio for three years, and as a member of the Marine Corps Military Police for six years. He was promoted to the rank of Sergeant for his exemplary military service which included tours of duty in Kuwait, Panama and Somalia.

During the course of his tenure as a Trooper he led his Post in the number of stolen vehicles recovered with "on the spot apprehensions." In January, 1997 he received an Award as the Department of Public Safety's "Employee Of The Month." He was also given a letter of commendation for outstanding service in connection with the death of a fellow Officer.

In 1997 he had investigated some 250-260 crashes and issued between 1,200-1,400 uniform citation traffic tickets (HP7's). In addition, he led the Post in the number of assists to motorists and warnings (HP2's) issued.

All of the Officers from the Post who testified at the hearing agreed that the Grievant was highly motivated, competitive and got along well with his co-Officers.

In April of 1998 Mr. Houston had already amassed a record 517 arrests. Then a fellow Trooper, Mr. Clifford E.

Carpenter, became curious about Mr. Houston's sensitivity to a joking remark about how many of his arrests were "good." He compared Officer Houston's "arrest recap" sheet with other Post logs and noticed that the numbers "did not add up." He then opened the Grievant's locker and found a number of the so-called "buff copies" of the citations which were kept as Post records. He observed numerous gaps in the numeral sequence. All of the missing tickets had one thing in common, they had been issued to commercial drivers.

This information was conveyed to the Post Commander, Lieutenant Culbrin C. Robinson, who, on May 1, 1998, began an Administrative Investigation. Lieutenant Robinson correlated the relevant court records with the arrest recapitulation logs at the Post, and found that none of the missing numbered citations had been filed.

On May 4th, Lieutenant Robinson advised Trooper Houston that an investigation of his conduct was underway. On May 6th, upset over a rumor that he had taken "road bond" - the term given to bribes offered by motorists - the Grievant voluntarily gave a statement of his activities.

The Grievant admitted that since the middle of 1997 he had been writing "fictitious citations." He estimated that he had engaged in this type of action twenty times in 1998 and perhaps as many the prior year. He explained that he made legitimate traffic stops, but just did not issue the violators their "blue copy," and destroyed the white court copy along

with the yellow copy which, after conviction, is sent to the Bureau of Motor Vehicles.

However, when asked whether he had occasionally "merely claimed citations on his recap report without actually having written them," Trooper Houston responded, "I might have, I am not one hundred percent sure." He insisted these actions only took place with truck drivers because, after listening to their pleas, "I have a change of heart and then decide not to issue a blue copy and tell ... [them] to get out of there."

Mr. Houston never accepted money or any other consideration for destroying the tickets.

But, Mr. Houston also conceded that his issuance of fictitious citations was limited to commercial drivers "because that is where my activity is lowest. It is the only area the Supervisors ever made comment about."

Article 34 of the Contract provides that:

"The Employer shall not establish a quota system for the issuance of law enforcement violations."

But, Troopers are urged to commit themselves to achieve the Post's "goal" that twenty percent of all citations issued be given to operators of commercial vehicles.

While "warnings" may be given to drivers instead of citations, no permanent records are kept, nor are standards established to provide guidance as to when a warning may or should be issued.

On May 8th, the Administrative Investigation was suspended and a Criminal Investigation commenced under Sergeant Robert L. Van der Wissel. Officer Van der Wissel focussed his inquiry upon enforcement of traffic regulations against operators of commercial vehicles because of the greater risk to persons and property in the event of a crash caused by improper driving. In the course of his review Sergeant Van der Wissel discovered that between January of 1998 and May of 1998 there were twenty-one citations which had never been filed in Court. At least one of the fictitious citations was supposedly issued to passenger car driver who did not hold a commercial driver's license. He also found four cases in which although the Grievant had written in the "offense charged and description" space on Traffic Crash Reports (OH-I) that a citation had been issued to one of the parties, the citation had never been filed in court. Trooper Houston had not reported the citations on his activity logs.

On May 27th, the Grievant answered questions posed by Officer Van der Wissel, about his law enforcement activities. He again acknowledged that he had issued citations for violations of both speed and seat belt regulations which were never given to the offender or filed in court. When asked:

"Q: Were these all commercial drivers, or were these cars involved also?

The Grievant responded:

A: It was commercials because I had enough activity that I didn't have to worry about the cars."

The Grievant explained that he would make a legitimate traffic stop, but then had a change of heart after listening to the driver's story of the hardship that the ticket would impose upon him and his family. He was under the impression that "if a truck driver received three tickets in a year, ... [he] would lose ... [his] license. I didn't want them to lose their livelihood due to a speeding ticket."

However, the Grievant did not recall ever reporting the issuance of citations arising out of accident investigations which he had not filed with the Court.

The Grievant conceded that he had violated Departmental policy and procedure, but since he had made a proper traffic stop, he had committed no criminal offense. Nevertheless, he acknowledged: "when you do wrong you have to face the consequences." The "consequence" in his case, he believed, was a suspension.

On July 7th, the Grand Jury handed down a sixteen count indictment against Trooper Houston consisting of eight counts of felony forgeries and eight counts of misdemeanor falsifications.

The following day the Administrative Investigation was resumed under the direction of Sergeant Reginald Lumpkins. The subject of the investigation was the Grievant's alleged failure to issue citations to traffic violators involved in automobile crashes.

A review of the Grievant's crash reports for 1997 and 1998 had disclosed a number of "suspicious crashes" where a

citation listed on the crash report did not appear on his recap list. The individuals involved were contacted, and all denied receiving a citation. Their driving records were also inspected and confirmed the absence of any such citations. Sergeant Lumpkins was also able to verify that at least fifteen of the supposed citations had never been filed in any court. In contrast to the Grievant's practice of destroying the operative copies of citations issued to truck drivers for speeding and seat belt violations, it appeared that he had never actually issued the tickets referred to in the suspect car crash cases.

At the interview the Grievant was represented by his Steward and ordered to give a statement after having been advised that any information he gave could result in disciplinary action, but could not be used in the criminal prosecution.

Article 18 of the Collective Bargaining Agreement which governs Administrative Investigations provides:

"4. An employee who is to be interviewed, questioned, or tested concerning the employee's performance or fitness for office shall be informed that the interview, questioning or test is part of an official investigation and that the employee is subject to disciplinary action, including dismissal, for failing to answer the questions. The employee will be advised that the answers may not be used against him/her in criminal proceedings. If, during the investigation, it is believed the member has knowledge of, or has participated in, any act which violates the criminal laws of the United States, the State of Ohio or any of its political subdivisions, the employee



shall be advised of all constitutional and other legal rights applicable.

...."

The Grievant, however, declined to answer any questions on the advice of his Counsel. In fact the Grievant's Attorney had sent the following letter to Captain Harvey J. Callahan:

"....

"It is my understanding that Patrolman Houston has already been subjected to an "administrative investigation" which led to a "criminal investigation" by the Ohio State Highway Patrol. As a result of those investigations, he was served with a 16-count indictment by the Medina County Grand Jury on July 7, 1998.

"It is this office's position that the alleged "administrative investigation" scheduled for 12 noon on July 8, 1998, is criminally directed and as a result, my client has all rights and privileges guaranteed by the laws of the Constitution of Ohio and the Constitution of the United States, including but not limited to the right not to be compelled to incriminate himself under the Fifth Amendment. In addition, it is this office's position that Patrolman Houston has the right to counsel when he is confronted by the Ohio State Highway patrol concerning the alleged "administrative investigation" at 12 noon today. I am not available today due to prior commitments, but I would be available for attendance and representation of my client beginning Wednesday, July 15, 1998, or Thursday, July 16, 1998.

"Please note that I am sending this notification to you for purposes of advancing this notice to whomever is responsible for the scheduling of these matters with the Ohio State Highway Patrol. I request that those offices contact me so we can converse about a mutually convenient time and place for further discussions. I am also asking that a copy of this notice be

given to Bob Warden, OSTA Staff Representative.

...."

As a result of Trooper Houston's failure to respond to questions, the interview was adjourned, and an independent Administrative Investigation for his alleged insubordination was begun. The interview on this charge was convened on July 22nd. After being given a reprimand for his refusal to answer questions at the July 8th interview. Trooper Houston was again advised of his rights and informed that the subjects upon which he would be examined were not involved in the pending criminal charges. The Grievant once more refused to answer upon advice of his Attorney who was present along with his Union Representative. At a recess the Department's Representative attempted to provide adequate written assurance of the use immunity of Trooper Houston's statements. The proposed text recited that the transcript would not be "voluntarily" provided to prosecutors. This written guaranty was unacceptable to Grievant's Counsel, and he again advised Trooper Houston to invoke his Fifth Amendment protection against self-incrimination.

On August 3, 1998 District 3 Commander Captain Harvey J. Callahan issued two reports to the Superintendent of The Ohio State Highway Patrol, Colonel Kenneth B. Marshall, of his findings of "cause" to discipline Trooper Houston:

(1) "It is herewith stated that reasonable and substantial cause exists to establish that Trooper Timothy K. Houston has committed an act in violation of the Rules

and Regulations of the Ohio State Highway patrol, specifically of:

"Rule: 4501:2-6-02(B) (1) - Performance of Duty.<sup>1</sup>

"It is charged that on July 22, 1998, Trooper Houston refused to answer questions relating to his actions while on duty during an administrative investigation interview."

"...."

[2] "Rule: 4501:2-6-02(E) - False Statement, Truthfulness.<sup>2</sup>

"Rule: 4501:2-6-02(I) (1) - Conduct Unbecoming an Officer.<sup>3</sup>

"It is charged that as documented in Administrative Investigation 98-0346 Trooper Houston falsified information on crash reports regarding enforcement activity. Additionally, as documented in criminal investigation 98-4184-0033 Trooper Houston falsified numerous official documents relating to his enforcement contacts."

1. "Rule 4501:2-6-02 (B) (1) provides:

"(B) Performance of duty.

"(1) A member shall carry out all duties completely and without delay, evasion or neglect. A member shall perform his/her duties in a professional, courteous manner.

2. Rule 4501:2-6-02 (E) provides:

"(E) False statement, truthfulness.

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

...."

3. "Rule 4501:2-6-02 (I) (1) provides:

"(I) Conduct unbecoming an officer.

"...."

"(1) For conduct that brings discredit to the division and/or any of its members or employees.

...."

Superintendent Marshall thereupon notified Trooper Houston of a pre-disciplinary meeting on two sets of charges.

The first letter charged the Grievant with violation of:

"....

"Rule 4501:2-6-02 (B) (1) to wit: it is charged on July 22, 1998, you refused to answer questions relating to your actions while on duty during an administrative investigation.

"This discipline is based on administrative investigative reports by Sergeant R. Lumpkins.

"Captain S.M. Raubenolt, Meeting Officer, will conduct a pre-disciplinary meeting on the matter August 7, 1998, at 10:30 a.m. at the Ohio State Highway Patrol headquarters, Human Resource Section, 3rd Floor, (3C9), 1970 West Broad Street, Columbus, Ohio 43223.

"At this pre-disciplinary meeting you may present your version of the events or respond to the charges. You may be accompanied by a union representative or private counsel if not a member of a bargaining unit.

"The employer will provide a summary of the evidence gathered in support of the proposed discipline.

"Following the pre-discipline meeting, the meeting officer will consider all evidence. He will then submit a written recommendation to the Director within five days. You shall be provided with a copy of the meeting officer's recommendation."

The second letter which was concurrently issued charged the Grievant with violation of Rules 4501:2-6-02 (E), and (I) (1):

"....

"to wit: it is charged that you falsified information on crash reports regarding enforcement activity as documented in Administrative Investigation 98-0346. Additionally, as documented in criminal investigation 98-4184-0033, you falsified numerous official documents relating to your enforcement contacts.

"This discipline is based on administrative investigative reports by Sergeant R. Lumpkins.

"Captain R.D. Myers, Meeting Officer, will conduct a pre-disciplinary meeting on the matter August 7, 1998, at 1:00 p.m. at the Ohio State Highway Patrol Headquarters, Human Resource Section, 3rd Floor, (3C9), 1970 West Broad Street, Columbus, Ohio 43223.

...."

The August 7, 1998 pre-disciplinary meeting on the charge of "refusing to answer questions relating to [Trooper Houston's] ... actions while on duty during an administrative investigation" was held as scheduled. Hearing Officer Captain S.M. Raubenolt found "just cause" for discipline and filed the following report on the same day.

"....

"Sergeant R. Lumpkins presented the investigative facts.

"Trooper Houston was present at the meeting but did not give testimony on his behalf. He was represented Mr. Bob Warden of the Ohio State Trooper's Association.

"After listening to the evidence, reviewing the provided documentation, and considering information brought out during the questioning, I find just cause exists for discipline."

The second pre-disciplinary meeting on August 7th was conducted by Captain R.D. Myers on the accusation of falsifying information on crash reports regarding enforcement activity, and official documents relating to enforcement contacts.

Captain Myers similarly found "just cause" for discipline in a report filed following the hearing:

"....

"Sergeant R. Lumpkins presented the investigative facts.

"Trooper Houston was present at the meeting but did not give testimony on his behalf. He was represented Mr. Bob Warden of the Ohio State Trooper's Association.

"After listening to the evidence, reviewing the provided documentation, and considering information brought out during the questioning, I find just cause exists for discipline."

Article 19.05 of the Contract commits the Department to follow "progressive discipline," but allows for more severe action if the violations warrant:

"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 Verbal Reprimand (with appropriate notation in employee's file;
- "2. One or more Written Reprimand;
- "3. 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.

"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.

...."

Director of the Ohio Department Of Public Safety M.J. Brown, received the reports, and determined to impose the discharge penalty. He sent Trooper Houston the following notice of separation from service:

"Please be advised that for disciplinary purposes you are being terminated from your position as a Highway Patrol Trooper with the Ohio Department of Public Safety, State Highway Patrol Division, effective August 7, 1998.

"This action is based upon the charges arising from both Administrative Investigation 98-0346 and Administrative Investigation 98-0574, each independently sufficient for termination."

On August 11, 1998 Trooper Houston grieved each of the two notices of termination:

"On August 7, 1998 I was terminated for [violating] Rules and Regulations 4501:2-6-02 B(1) and 4501:2-6-02 E and I(1). This termination was without just cause and ... [not] progressive. Management violated my rights by requiring me to answer questions after criminal charges have been filed."

The grievances were denied after the step-two meeting in Answers which read as follows:

[Termination for violating Rules and Regulations 4501:2-6-02 (E) and (I)1].

"FACTS:

"The Grievant was a Trooper assigned to the Medina Post. He had been a trooper four years. The Grievant became the focus of an administrative investigation, (98-0346) when a trooper reported to a supervisor that the Grievant was creating fictitious traffic citations. A preliminary check revealed there were certain citations listed on the Grievant's arrest recap that were not filed with the local courts. Further inquiries revealed copies of the same citation had been forwarded to the Data Entry Section at General Headquarters.

"On May 6, 1998, the Grievant admitted during an administrative investigation interview that he had written fictitious traffic citations in 1997 and 1998. The fictitious citations involved commercial truck drivers where he would stop the drivers for legitimate violations. The Grievant stated he then had a change of heart and allowed the violator to go with only a warning. However, after releasing the driver, the Grievant would fill out a citation using information he had obtained during the traffic stop. The Grievant stated he destroyed or shed the court copies of the citation and would turn in the other copies of the citation used by the Division for record keeping.

"The Grievant was charged with violating Ohio State Highway Patrol Rules and Regulations, specifically: 4501:2-6-02 (E) and (I)(1): False Statements and Conduct Unbecoming an Officer. The Grievant was also charged as result of a criminal investigation and is presently awaiting trial.

"The Grievant was removed from his position August 7, 1998. On August 11, 1998 a grievance was filed.

"UNION CONTENTION:



"The Union contends the discipline imposed was neither just, nor commensurate with the alleged offense, in violation of 19.01 and 19.05 of the labor agreement. The Grievant desires to be reinstated, receive all back pay and to be made whole.

"MANAGEMENT CONTENTION AND FINDING:

"Management contends there has been no violation of the labor agreement. The discipline imposed was for just cause and commensurate with the offense.

"The Grievant willfully and purposefully created fictitious traffic citations and falsified arrest information on traffic crash reports and his own arrest recap. He indicated people were charged with violations where they were not, both in traffic stop and vehicle crash situations. This could have adversely affected the end user of traffic crash reports containing fictitious information.

"The Grievant brought discredit to himself as a state trooper and to the Division. Law enforcement officers must be counted on to simply tell the truth, whether it involves the accuracy and truthfulness of their daily reports or any other aspect of their duties. The Division, the courts and the public cannot accept law enforcement officers who lie.

"The grievance is denied."

[Termination for violating Rules and Regulations 4501:2-6-02 B (1)].

"FACTS:

"The Grievant was a Trooper assigned to the Medina post. He had been a trooper four years. The Grievant became the focus of an administrative investigation, (98-0346) when a trooper reported to a supervisor that the Grievant was creating fictitious traffic citations. A preliminary check revealed there were certain citations listed on the Grievant's arrest recap that were not filed with the local courts. Further inquiries revealed copies of the same citation had

been forwarded to the Data Entry Section at General Headquarters.

"On May 6, 1998, Lt. C.C. Robinson, the Medina Post Commander, conducted an administrative investigation (AI) interview with the Grievant. Due to the nature of the evidence obtained, the AI was suspended and a criminal investigation was initiated. The criminal investigation culminated with a presentation of the facts to a Grand Jury.

"On July 8, 1998, the AI resumed and the Grievant was brought in for an AI interview. The Grievant was accompanied by OSTA staff representative Robert Warden. After a reading of the internal investigation pre-interview warnings, the Grievant stated he wished to have his private counsel present whom had advised him not to answer questions. The Grievant was told this was an administrative investigation where he is compelled to answer questions or risk further disciplinary action that may include removal. The Grievant still declined to participate in the interview, despite verbal and written orders to do so. The Grievant's refusal to answer questions resulted in a separate administrative investigation (98-574).

"On July 22, 1998, the Grievant and Mr. Warden were summoned for a second AI interview. The Grievant's private counsel was also present. The Grievant was again read the pre-interview warnings and provided notification from the Employer that further refusals would result in severe penalties. The notification was documented in a reprimand issued for the July 8th refusal just prior to the interview. The Grievant refused to answer questions despite being directly ordered to do so.

"The Grievant was charged with violating Ohio State Highway Patrol Rules and Regulations, specifically: 4501:2-6-02(B) (1) refusing to answer questions relating to his actions while on duty during an administrative investigation. The Grievant was also charged as result of a criminal investigation and is presently awaiting trial.

"The Grievant was removed from his position August 7, 1998. On August 11, 1998 a grievance was filed.

"UNION CONTENTION:

"The Union contends the discipline imposed was neither just, nor commensurate with alleged offense, in violation of 19.01 and 19.05 of the labor agreement. The Grievant desires to be reinstated, received all back pay and to be made whole.

"The Union further contends Employer violated 18.02 of the labor agreement governing bargaining unit member rights whereby information gained during an AI interview cannot be used in a criminal proceeding. The Union contends the Grievant's admissions during his AI interview with Lt. Robinson were used against him to spawn the criminal investigation.

"MANAGEMENT CONTENTION AND FINDING:

"Management contends there has been no violation of the labor agreement. The discipline imposed was for just cause and commensurate with the offense.

"Management contends the administrative and criminal investigations were separate functions. There was no collusion between the two entities. The Division investigator involved in the criminal case acted independently and did not benefit from any admissions made during the AI interview. In fact, the evidence found during the criminal investigation (and later during the administrative investigation) were principally from records retrieved from the work files of the Employer.

"The distinction between the administrative and criminal processes was made clear to the Grievant on both times he refused to answer questions. The Grievant stated he was represented by private counsel and wished to invoke the 5th amendment rights against self-incrimination. That type of protection is not provided for during an AI interview. The Union is well aware of the obligation of an employee to answer work-related questions

during an AI interview. The Grievant was given ample opportunity to answer questions and he was given clear notice of what his refusal to answer would result in. With all of this known to him, he still decided to refuse to answer work-related questions.

"The grievance is denied."

After exhaustion of the internal grievance procedure without resolution of the dispute, the Association timely demanded arbitration.

At the arbitral hearing the Grievant testified that there was "pressure" to increase the number of citations issued, particularly to commercial drivers. He did not intentionally pad his citation activity by giving so-called "cheap citations," that is, multiple citations to the same driver.

Officers were encouraged to "nail" as many operators of commercial vehicles as possible. Troopers did not respect the truck drivers, and Mr. Houston recalled that they were called offensive names while he was at the Academy. But, Trooper Houston acknowledged that commercial vehicles posed a greater risk of accident. While it was expected that twenty percent of his tickets be issued to commercial drivers, he never came close to meeting that goal and normally wrote-up only about three percent. In the course of writing-up the ticket, he would listen to a particularly compelling "sob story" of the driver, have a "change of heart," give the driver a warning and destroy copies of the violator and court copies of the ticket. He knew, however, that having a "change of heart" was not a valid reason to void a ticket.

He turned into the Post the remaining copies, and received "activity credit." The volume of such activity is a factor considered in promotion decisions.

He did not write-up a ticket in some fifteen crash cases, but these never found their way into the Post's recap, and were never counted as part of his activity.

He acknowledged that crash reports were used in Court proceedings as well as by insurance companies in settling claims and making underwriting adjustments, and it was questionable how he would have been able to testify if called as a witness in court proceeding without having actually issued the citations.

With the record in this posture the Arbitrator proceeds to consider his Decision.

#### DECISION

Trooper Timothy K. Houston was removed from the service of the Ohio State Highway Patrol upon two independent charges.

The first basis for discharge was predicated upon his refusal to respond to questions in an Administrative Investigation.

During the course of the resumed Administrative Investigation on July 8th and July 22nd, 1998, the Grievant refused to answer any questions put to him about his preparation of crash reports and the issuance of the citations reflected therein.

The Grievant had been served with an eighteen count indictment arising out of the destruction of the citations

reportedly issued to commercial drivers and the failure to issue citations as stated in specified crash reports. The Grievant was informed that the Administrative Investigation would not deal with any matter within the scope of the then pending prosecution, and that his answers to the questions put to him could not be used against him in any criminal proceeding. Nevertheless, the Grievant, on advice of Counsel, persisted in his refusal to answer. An attempt was made to produce a document providing adequate assurance that the Grievant would be immunized against liability for any inculpatory statements made during the course of the Administrative Investigation interview. However, the document produced at that point by the Department pledged only that statements by Trooper Houston would not "voluntarily" be provided to the Prosecutor's Office. That did not satisfy the Grievant's Counsel who was concerned that the Prosecutor might subpoena the transcript of Mr. Houston's statements. The proffer was therefore rejected.

The Department correctly argues that any self-incriminatory statement made during the course of an Administrative Investigation under threat of disciplinary penalty up to and including discharge, would not be admissible in evidence in any subsequent criminal proceeding.

In Garrity vs. New Jersey, 385 U.S. 493 (1967), the Supreme Court held that the protection against coerced confessions available under the Fourteenth Amendment prohibits the use in subsequent criminal proceedings of inculpatory

statements obtained from public officers under a threat of removal from office.

In the following year Gardner vs. Broderick, Police Commissioner of the City of New York, 392 U.S. 273 (1968) was handed down. There, a unanimous Court reinstated a New York City Patrolman who had been discharged pursuant to a City Charter provision because as a witness in a Grand Jury proceeding investigating alleged bribery and corruption of police officers he had refused to waive his privilege against self-incrimination and to sign a waiver of immunity from prosecution.

In Hobbie vs. City of Medina, 29 Ohio App. 3d 306, 505 N.E. 2d 276 (9th App. Dist. 1985) the Ohio Court of Appeals held that the Constitution of the State of Ohio did not bar the dismissal of a police officer who had been warned that his refusal to undergo a polygraph examination in connection with an otherwise valid internal investigation would result in his discharge, where he was not required to waive his privilege against self-incrimination with respect to the use of his answers or the fruits thereof. The Court held, however, that the employee must first be informed that the questions asked will relate specifically and narrowly to the performance of his official duties; that his answers cannot be used against him in any subsequent criminal prosecution; and that the penalty for refusing to answer is dismissal.

Despite these precedents the Grievant and his Counsel could have had legitimate concerns in light of the

unwillingness of the Department to do more than assure that the statements would not voluntarily be turned over to the Prosecutor. The understandable fear aroused was not that any such use by the Prosecutor would not taint a criminal proceeding and require the reversal of any conviction so gained, but rather that additional effort, expense and jeopardy would attach while opposing or appealing from such use.

Because the Grievant in refusing to answer questions acted in good faith upon advice of his Counsel, and in view of his earlier willingness to come forward voluntarily to respond to questions put to him in critical stages of both the Administrative and Criminal Investigations, the Arbitrator finds that the discharge penalty constituted manifestly excessive discipline. The Grievant's removal from service cannot be based upon his refusal to respond to questioning during the course of the July 22nd Administrative Investigation interview.

The Department would be well advised in the future to inform Troopers who are subject to Administrative Investigations not only that their statements may be used only for purposes of the employment relationship, and may not be used in evidence against them in criminal cases, but also that the Department would resist any compulsory process initiated by a prosecutor to obtain their statements.

The Arbitrator therefore turns to consider the second basis for the Grievant's separation from service - his voiding



of traffic citations and falsification of activity reports to reflect their issuance, and his failure to issue citations to violators as set forth on his crash reports.

The Association's exceptionally able Counsel argues that the progressive discipline principle should have been observed, and the penalty of discharge is too severe for the Grievant's mistakes in destroying the traffic citations supposedly issued to truck drivers because his fault lay in being too "good hearted."

After making a traffic stop of a commercial vehicle, the Grievant was sometimes moved to tear-up the ticket by the driver's "sob story" which usually ran to the effect that the driver would lose his job and be unable to support his family if he received a citation for speeding or other serious traffic violation.

Trooper Houston had at one time in his career driven a truck and was particularly sensitive to the alleged animus of his fellow Officers towards truck drivers. The Department frowned on the voiding of tickets once written, so Trooper Houston simply shredded the copies to be filed in court and handed to the driver.

The Association points out that the Grievant's record was otherwise exemplary. In the space of just four year's service he had been recognized by the Superintendent of the Highway Patrol for having "secured four stolen vehicle recoveries with on-the-spot apprehensions," named as the employee of the month within the Department of Public Safety in January of 1997 by

Governor George Voinovich and received a letter of commendation from the Superintendent of the Highway Patrol and the Director of the Department of Public Safety for his efforts concerned with the shooting death of a fellow Officer.

Among both his colleagues and his superior Officers he was highly regarded. Indeed, he was referred to by one witness as a "role model" for other Troopers.

Trooper Houston voluntarily acknowledged his error in having destroyed the tickets, and although he initially failed to remember that he had not always issued the citations as recorded in his crash reports, he readily admitted doing so when confronted.

It is absolutely clear that his actions were not motivated by any thought of financial or other personal consideration. Had the Post had been more receptive to the practice of voiding tickets once written, he would have not been tempted to have accounted for the citations on his arrest recap forms.

From his review of the record and observation of the demeanor of the Grievant, the Arbitrator finds Mr. Houston to be a decent, intelligent, competent, and dedicated person with unusual potential for leadership. Were the Arbitrator charged with the Departmental responsibility, he might well have opted not to have instituted criminal proceedings and considered the imposition of lesser disciplinary sanction.

But arbitrators do not make those institutional decisions, nor substitute their judgments for the officials who do.

Thus, although the Arbitrator concurs with the Association that Trooper Houston is a "good man," he must also consider that sometimes good men do bad things, and the question before the Arbitrator is not what he would have done were he the Director of the Department of Public Safety but rather whether the discharge penalty imposed for the Grievant's misconduct was unreasonable, excessive or inconsistent with the sanctions imposed for like offenses upon other Officers.

Trooper Houston in effect engaged in a kind of personal nullification of the State's traffic regulations as applied to commercial truck drivers. His duty was to uphold the law, not to violate it.

Moreover, even though the Grievant's offense may have been initially motivated by a compassionate heart, he admittedly reported the arrests to bolster his relatively low number of truck driver citations and thereby promote his own self-interest. It would have been quite a different matter if Trooper Houston had talked first with the stopped commercial driver, and then decided to issue a warning rather than a ticket. He elected not to do that. Instead, he either wrote the ticket before talking with the driver, or wrote the ticket after the operator had driven-on based on information provided

by the driver, then shredded the citation and claimed activity credit for the stop.

Even more troubling is his preparation of a crash report indicating that one or more of the parties was at fault and had been issued a citation when in fact, he had issued no such citation. Unlike the destroyed citations, none of the unissued tickets involved a commercial truck driver.

Crashes, where one or more of the parties is at fault, typically generate insurance claims, and frequently civil litigation, as well criminal proceedings. Trooper Houston's failure to issue traffic citations when he had reason to believe that a party was responsible for the accident adversely affected the rights of the innocent party and his or her insurer to recover, but also the operation of the justice system as well. It compromised his ability to serve as a witness in any subsequent litigation. His now publicly known falsification of citations and crash records would almost certainly impair his credibility before both judge and jury, and make it difficult for his testimony to withstand cross-examination. The Department was not unreasonable in believing that his ability to successfully perform his duties has been irreparably compromised, and restoration of public confidence in the integrity of the Department required the ultimate sanction of discharge.

Nor was this assessment of the seriousness of the Grievant's misconduct at odds with the Department's view of any similar lapses of other Troopers.

The Association contends that the Grievant is the victim of disparate treatment compared to the penalty imposed upon a member of another Bargaining Unit, Sergeant Richard L. Lucas, in 1984 for what the Association asserts was similar misbehavior. Sergeant Richard L. Lucas, a fourteen year veteran Officer had inflated his arrest record by adding on the Post's copies of sixty-seven legitimate citations, in 1992 and seventy-one in the first six months of 1993, fictitious seat belt violations.

Sergeant Lucas admitted the falsification but asserted that his motivation was not personal gain, but, rather to motivate his subordinates to increase their productivity.

Having been found to have been untruthful in recording fictitious activity in his daily log to increase his overall totals, in violation of Rule 4501:2-6-02 (E) he was suspended for five days and demoted from Sergeant to Trooper.

Upon arbitral review, the Grievant was reinstated to the rank of Sergeant, but required to serve the five day suspension.

The Arbitrator pointed out:

"No member of the public was affected. No court record was affected. No claim other than falsely reporting arrests numbers formed the basis of this grievant's activity."


The present case affords no parallel. Not only is the longevity component missing here, but, more importantly, the effect of the violations was not confined to the internal

records of the Department, precisely the opposite is true. Public records affecting individual rights and the judicial process were falsified.

This is one of those unfortunate situations where acknowledgment of fault, and a pledge not to repeat the misconduct cannot undo the harm done, and restore the innocence which has been lost.

For the foregoing reasons, the grievance over Trooper Houston's discharge for violation of Rules 4501:2-6-02 (E) and (I) 1 will be denied.

Respectfully submitted,

  
Alan Miles Ruben  
Arbitrator

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AWARD

The grievance filed by Trooper Timothy K. Houston over his August 7, 1998 discharge for invoking his privilege against self-incrimination and failing to respond to questions put to him in Administrative Investigation interviews, in violation of Rule 4501:2-6-02 (B) (1) is granted.

The grievance filed by Trooper Timothy K. Houston over his August 7, 1998 discharge for falsification of citations and crash reports in violation of Rules 4501:2-6-02 (E) and (I) 1 is denied.

AWARD signed, dated and issued at Cleveland, Ohio this 23rd day of December, 1998.

  
Alan Miles Ruben  
Arbitrator

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