

#1355

ARBITRATION

BETWEEN

OHIO STATE HIGHWAY PATROL

and

Grv. #15-03-980929-0143-04-01

OHIO STATE TROOPERS ASSOCIATION

Appearances:

For the Patrol:

**Lt. Robert J. Young
State Highway Patrol
Columbus, Ohio**

For the Association:

**Herschell M. Sigall, Esq.
General Counsel
Columbus, Ohio**

OPINION AND AWARD OF THE ARBITRATOR

**Frank A. Keenan
Labor Arbitrator**

Statement of the Case:

This case involves the termination of Trooper Edward Mejia Jr. Trooper Mejia's termination became effective September 25, 1998, pursuant to the terms of a letter of that same date to Trooper Mejia from Director Mitchell J. Brown, Department of Public Safety, reading as follows:

"You are hereby advised that your employment with the Department of Public Safety will be terminated at the close of business on Friday, September 25, 1998.

You are being terminated for violation of Rule 4501:2-6-02 (I) (1) and Rule 4501:2-6-02 (E)."

The referenced Rules provide respectively as follows:

"(I) Conduct unbecoming an officer

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

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

* * *

(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.

Academy Commander Thatcher advised Patrol Superintendent Colonel Marshall of a Statement of Charges against Trooper Mejia by letter dated September 21, 1998, and the Superintendent, by letter of the same date notified Trooper Mejia in pertinent part as follows:

"Notice is hereby given that the Director of Public Safety, Mitchell J. Brown, intends to terminate you from your employment with the Ohio State Highway Patrol for violation of Rule 4501:2-6-02 (I)(1), Conduct Unbecoming an Officer and Rule 4501:2-6-02 (E), False Statements, of the Rules and Regulations of the Ohio State Highway Patrol to wit: it is charged that in the early hours of Friday, August 28, 1998, in

the Highway Patrol Academy dormitory, you engaged in sexual activity with a female Trooper. When questioned about this, you gave a false statement to the investigator.

This discipline is based on investigative reports by Sergeant R. Lumpkins. S/Lieutenant T.C. Hook, Meeting Officer, will conduct a pre-discipline meeting on the matter on September 25, 1998 at 8:00 A.M. at the Xenia Patrol Post.

At this pre-discipline meeting, you may substantiate why you believe the proposed discipline is not justified. Should you elect to exercise your right to such a pre-discipline meeting, you may be accompanied by counsel or other representative. You or your representative and the Employers representative have the right to cross-examine any witnesses at the meeting to offer testimony provided, however, the Meeting Officer maintains the right to limit the witnesses testimony to matters relevant to the proposed suspension or termination and to limit redundant testimony. . . . The Ohio State Highway Patrol reserves the right to submit evidence in support of the proposed discipline which you may cross-examine or otherwise rebut.

Following the pre-discipline meeting, the Meeting Officer will consider all evidence and testimony. He will then submit a written recommendation to the Director within five days. You shall be provided with a copy of the Hearing Officers recommendation.

This letter will be the only formal notice of the pre-discipline meeting. . . ."

The pre-disciplinary meeting was held as scheduled before Meeting Officer Lieutenant Hook, who, by letter to Director Brown reiterating the charge against the Grievant, and noting that he had listened to the evidence, reviewed the provided documentation, and considered information brought out during questioning, found that "just cause exists for discipline." Director Brown's termination letter followed. Thereafter, on September 28, 1998, Trooper Mejia, herein the Grievant, grieved his termination, asserting it was "without just cause or following the principles of progressive

discipline" and seeking to be "made whole and reinstated as a Trooper with all back pay and seniority."

The Patrol's second step answer denying the grievance reads in pertinent part as follows:

"The actions by the Grievant make him unfit to hold the position of a State Trooper. As an instructor he played an important role within the Highway Patrol in molding young cadets into state troopers. In this instance the grievant showed a total lack of good judgment on August 28. Although the grievant was off-duty he did bring his Employer into this situation by not only being involved with a fellow trooper, who had just recently completed her Academy training, but by also engaging in sexual intercourse in his Academy dorm room. This conduct alone by the grievant was totally inappropriate and merited serious disciplinary action. The grievant then compounded the serious situation by giving false statements to investigators who were attempting to find out what occurred. As an Academy instructor the grievant preached the importance of "Core Values" on a daily basis. One of these core values is honesty. Honesty by a law enforcement officer is vital. The courts, the citizens of Ohio, and fellow employees expect nothing short of complete and totally honesty from law enforcement officers at all times. The grievant lied in hopes of not getting himself into trouble. By lying he further called his credibility and judgment into question.

There was just cause to terminate the grievant. He has made himself unfit to serve as a state trooper.

There has been no violation of the labor agreement.

The parties have stipulated the issue as follows:

"In conformance with Article 20, Section 20.08 (8) of the Collective Bargaining Agreement the parties submit the following statement of issue for the resolution by the Arbitrator:

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

The Patrol submitted into evidence its Report of Investigation in Case No. 98-0692, directly involving the case at hand, consisting of some sixty-four (64) numbered mostly single spaced pages of summaries of witness interviews and conclusions with

respect thereto, and additional documentation as well. The Patrol also submitted a portion at least of its Report of Investigation in Case No. 95-0533, a case in which the Grievant was involved both as a principal and as a witness. The Association submitted into evidence the Report of Investigation in Case No. 97-0478, consisting of some seventy-seven (77) numbered mostly single spaced pages of summaries of witness interviews and conclusions with respect thereto, and additional documentation as well. At the hearing herein, held December 22, 1998, the Patrol called as an adverse witness, the Grievant; Lt. Robert W. Booker; Major Darryl Anderson; Trooper Sheldon R. Robinson. The Association called as witnesses the Grievant and Lieutenant Susan Rance. In addition, the undersigned, in the company of the advocates, were given a tour of the Academy facilities by Major Anderson. Suffice it to say that what with the documentary evidence submitted, a voluminous record was made. What follows is a summary of the pertinent evidence.^{1/}

Prior to joining the Patrol the Grievant served honorably in the United States Marine Corps. Indeed his service with the Corps can only be characterized as exemplary. By way of illustration,

^{1/} The Administrative Investigation file and Report of Investigation alludes to other potentially disciplinary matters which were not cited as grounds for the Grievant's termination. For example, the Grievant's allegedly inviting some female cadets back to his Academy bedroom, concerning which there is conflicting evidence. This matter and other matters not cited and relied upon in the formal charge against the Grievant, are regarded as irrelevant and out of the case.

while posted to Naples, Italy the Grievant was designated Marine of the Year at Naples. The Grievant graduated with the 120th class from the Patrol's Academy, after which he was assigned as a Trooper at the Xenia post. Xenia was his wife's hometown. At the time of the hearing herein the Grievant was thirty-four (34) years old, and the father of two children, an early teenager and an eleven year old. This posting to Xenia was merited by his high level of performance as a student at the Academy. His service with the Patrol, until the incidents which precipitated his discharge under scrutiny here, was exemplary. His evaluations were consistently excellent. He was also voted by his peers as Trooper of the Year at the Xenia Post at a point in time when he had the minimum number of years of service with the Patrol to be eligible to be considered for such an honor. This was bestowed for his good service as an on-duty Trooper and for his considerable involvement and good service in off-duty community work, such as youth sports coaching and work with the Knights of Columbus.

The record reflects that in 1994, the Grievant had an affair and a sexual relationship with a married female dispatcher at the Xenia Post. The dispatcher's husband was a Trooper assigned to the Dayton Post. It appears that the affair was somewhat short lived. A year or so later the Dispatcher told her husband about the affair. At that time her husband became enraged; called the Xenia Post seeking the transfer out of the Grievant and/or his reassignment to another shift; and aroused concerns for the Dispatcher's personal safety such that Troopers were dispatched to

their home to hopefully calm things down and defuse the situation before it required intervention by the local Police. These circumstances triggered an Administrative Investigation in Case No. 95-0533, conducted by Lt. C. L. Schaffner, during which the Grievant was interviewed. The Grievant elected to be interviewed on 6-20-95 without the presence of a Union representative as offered. He was advised that he was a subject of and witness in an administrative investigation in which "the known allegations are: that approximately one (1) year ago you allegedly had an affair with Dispatcher Y. The purpose of this investigation is to determine any on duty misconduct." Dispatcher Y reported in her interview with Lt. Schaffner that she had had sexual relations off post with the Grievant on three occasions, and the Grievant was so informed. He, however, denied having had any affair with Dispatcher Y. Schaffner advised the Grievant that in his view Y "had nothing to gain and everything to lose" in coming forward with a statement as to her affair with the Grievant, but the Grievant again denied the affair, whereupon as reported by Lt. Schaffner: "I advised him that I would utilize any available resources to obtain the truth of the matter. If he chose to stay with his position that he had not been involved in an affair . . . and I proved beyond a reasonable doubt that it indeed occurred, that he was making a grave mistake." As Lt. Schaffner reported it: "[the Grievant] considered the matter for a few minutes, then requested to confer with his union representative." Union Representative Trooper Gorski was summoned, and he conferred with the Grievant.

Thereafter, upon resumption of the interview of the Grievant he admitted having a sexual relationship and affair with Dispatcher Y, assuring, as Lt. Schaffner reported, that "there was never any physical contact on duty, on post, in a patrol car or during any work shift for either himself or Dispatcher Y."

Lt. Schaffner concluded his Report of Investigation summary of the Grievant's interview as follows:

"At the conclusion of the interview, Tpr. Gorski expressed Tpr. Mejia's concern that he had denied the allegations early in the interview and if that would be held against him. I advised Tpr. Gorski that I understood the initial reaction of denial and that the reasons I asked the question again was to allow him to think over his response and give his final binding answer. I advised that since he took that opportunity to confess to the allegation and tell the truth at that opportunity that I would consider that he had told the truth prior to the conclusion of the interview. Tpr. Mejia's initial denial was made out of fear for the future of his family and when given the opportunity to reconsider his answer, due to the gravity of the situation, he told the truth."

No discipline was imposed on the Grievant concerning his affair with Dispatcher Y or concerning his initial denials of having had an affair in the course of the Administrative Investigation.

Subsequent to the aforesaid Administrative Investigation the Grievant was nonetheless recruited for a temporary assignment to the Patrol's Academy for incoming student cadet troopers. Such an assignment typically represents a pay cut for road patrol troopers such as the Grievant who have greater opportunities to such supplementary pay items as holidays worked and overtime in general than do Troopers assigned to the Academy. At the same time

assignments to the Academy are coveted because they typically enhance one's chances for upward movement in rank at the Patrol. As the Grievant conceded, he saw his assignment to the Academy as a "good idea" and something which "would help my career."

As Major Anderson explained at the hearing herein, the Patrol's Academy's primary mission is to train incoming student cadets to be Patrol Troopers. Special inservice training such as D.U.I. apprehension training is also given at the Academy. The Major explained that the Academy is a stress academy and not an adult education center. Cadet training is a character based education system. Cadets are taught and imbued with certain enumerated Core Values and behaviors deemed necessary to become a successful Trooper. Illustrative of the Core Values expected are honesty; a sense of urgency; self-motivation; and safety. All instructors, temporary and permanent, are expected to portray and display the behaviors identified in the Core Values. Instructors are expected to be role models for the cadets vis-a-vis the identified Core Values. As the tour of the Academy demonstrated, the atmosphere at the Academy is definitely military and reminiscent of basic military training.

Major Anderson acknowledged that it was the Grievant's exceptional service as a Trooper, coupled with the Grievant's personal motivation and desire for a posting as an instructor at the Patrol's Academy, which led to his selection as a temporary instructor at the Academy. Given his successful performance as a temporary instructor, he was awarded a permanent position as an

instructor at the Academy in March of 1998. As a temporary instructor, the Grievant instructed the cadets in the 130th class. Among the cadets in that class were two female cadets, Cadet Trooper X and Cadet Trooper Grabarczyk. As Major Anderson explained, the Grievant's role with the 130th Class was as the "heavy hat"; harshly firm, but professionally fair. The Major likened the Grievant's role with the 130th Class to that of a Drill Instructor in the U.S. Marine Corps.

The events which precipitated the Grievant's termination are essentially uncontested. Thus the record reflects that the 130th Class graduated in early 1998 thereby becoming probationary Troopers. Probationary Troopers return to the Academy after some field experience for additional training and for what the parties refer to as post-graduate training. The 130th Class did so in August 1998. The Grievant played no part in the post-graduate training of the 130th Class. That Class's post-graduate training was to conclude on Friday, August 28th, 1998. On the evening of August 27, 1998, many members of the 130th Class went out to a bar and restaurant to celebrate the conclusion of their post-graduate training, included among them probationary Troopers Grabarczyk and a probationary Trooper. Academy Staff were invited to join them, and Staff members Sgt. Black, Lt. Rance, and the Grievant did so. A smaller group went from the restaurant and bar to a bar. Throughout the evening there was considerable drinking by many including the Grievant and Trooper X. At the bar the Grievant and Trooper X were overtly affectionate kissing and hugging one

another. This display of affection was for all in attendance at the bar, including Trooper Grabarczyk. Grabarczyk and others left the bar too late to reenter the Academy by 11:00 p.m. and had to spend the night at a motel. Still later in the evening the Grievant and Trooper X returned to the Academy. The Grievant was under no curfew or restraints but Trooper X was, and by letting her in to Academy grounds after 11:00 p.m. he was in clear violation of a rule proscribing his doing so. When they got to the building housing their quarters, Trooper X went to the second floor, reserved for females, to use the rest room. She returned to the first floor and went into the Grievant's room with him. There they had sexual relations, following which she returned to her room on the second floor. The following morning Trooper Grabarczyk opened the door to Trooper X's room and believed, erroneously, that the Grievant was in Trooper X's bed. A rumor circulated to that effect, reaching Management, and the Administrative Investigation that led to the Grievant's discharge followed. In the course of the investigation, Trooper Grabarczyk was interviewed. A summary of her interview reads in pertinent part as follows:

Trooper Grabarczyk related that while at [the bar] she observed Trooper Mejia sitting on a bar stool, facing away from the bar with his legs spread, Trooper X was standing between his legs and Trooper Mejia had her right hand on Trooper X's "butt." Trooper Grabarczyk related she went over to them and said "hand patrol," alerting them to what she was seeing. She knew that Trooper X was engaged to be married . . . Trooper Mejia looked at her and put his . . . finger to her lips and said "SHHHHH." Trooper Grabarczyk related she may have called Trooper Mejia a "pig" because she knew he was married and had children. Grabarczyk related she believed their actions to be improper, because both of them are committed to others. She also related it brought disrespect because

the DJ at Shooters announced that "State Troopers" were in the crowd. Trooper Grabarczyk was also offended with Trooper Mejia because "he is supposed to be Mr. Core Values, always preaching to us about living by the Core Values both on and off duty."

Trooper X was also interviewed and ultimately conceded she'd had sex with the Grievant on August 17, 1998, but, being as allegedly drunk as she was, she could not recall where she'd had sex with the Grievant, other than it was not in her room at the Academy. Following the Grievant's admission of having sex with the Grievant, the Grievant was interviewed. He was advised that Trooper X had stated that she'd had sex with him, but the Grievant repeatedly denied having had sex with Trooper X. The following transcript excerpt of the Grievant's interview, RB being interrogator Lt. Robert Booker, and E.M. being the Grievant exemplifies the Grievant's denial:

"RB: . . . after you made that stop to have sex with her before getting here, that you merely dropped her off; and you never accompanied her to the door to see how she was going to get to the door.

EM: I did not have . . . stop to have sex with her, sir. Did not have sex with her. Not . . . not anywhere in the parking lot, not anywhere in this building, sir. The way you talk about bein' honest is the way I talk about bein' honest. I've never worked so hard in my life for this job, and I wouldn't jeopardize it by coming in here and being stupid enough . . . uh, yes, I might've had a lack of judgment and uh, make a . . . (????) remarks or um, told a story and somebody might misunderstood the hand gestures for uh, feelin' her up or whatever; but . . . but I never had my arms around her, and I did not come into this Academy and go upstairs to her room and have sex with her. I did not. Adamantly deny that I did not have sex with her [sic]."

The following day the Grievant was interviewed again. Shortly into the interview he asked for a "time out." When he returned to

the interview, the Grievant related as to how he had had sex with Trooper X in his bedroom at the Academy.

The record reflects that there apparently is no written rule against fraternization, not a written rule against males in female bedrooms at the Academy and vice versa, but that nonetheless such is understood to be proscribed, and the Grievant knew so. Indeed the Grievant conceded that fraternization between staff and attendees was forbidden because such cut into the authority of the Staff member.

Finally it is noted that there had been a prior incident at the Academy in 1997 where two cadets had locked themselves into a bedroom, a matter which became the subject of this Administrative Investigation in Case No. 97-0478, introduced into evidence by the Association as noted hereinabove. The excerpt from the Association's post-hearing brief, summarizing the facts adduced in that investigation, and the characterization of some of those facts, which follows, is essentially correct:

"The employer acknowledged that it has previously examined the charge of being in unauthorized rooms. It acknowledges that two Cadets, for whom no contractual protection requiring "just cause for termination" exist, were the subjects of an Administrative Investigation. The Cadets were both female and the subtext of the Investigation was obviously that they had engaged in sexual contact. The investigation conducted by Lt. Susan Rance found that they had been up after curfew (applicable to students); that although not roommates they had locked themselves in a dormitory room and been unresponsive to attempts to enter; had been in rooms assigned to neither; and had engaged in behavior [i.e., mutual massage] seen as "intimate" by other cadets. Although the Investigation concluded that the charges were true, according to Lt. Rance, somewhere above her level the decision was made not to remove either from their training. Both graduate to serve the Ohio Patrol

as Troopers. We have no reason to believe that their service has not been meritorious."

The record reflects that the two cadets involved did receive written reprimands.

The Patrol's Position:

The Patrol takes the position that, notwithstanding the Grievant's knowledge of the rules and standards of the Patrol, especially those embodied in the Patrol's Core Values philosophy and expectations, such as Honesty, the Grievant had sex with a probationary Trooper in his Academy dorm room, breaking Academy rules in doing so. The Patrol asserts that, thereafter, when asked about his conduct in this regard in an official administrative interview, the Grievant repeatedly lied. The Grievant was well aware of the fact that his behavior that night would lead to serious disciplinary action if found out. Accordingly, argues the Patrol, the Grievant opted to deny and lie about what in fact occurred. Some three years earlier, the Grievant also opted to deny and lie about an extra-marital relationship, asserts the Patrol. The Patrol asserts that the last course of action in both instances for the Grievant was to actually tell the truth. Such an option is not available to a State Trooper; the truth is not optional.

The Patrol points out that its Core Values are not just rhetoric and that one of those Core Values is Honesty. The Grievant fell far short in this area when he continually lied to the Employer about his actions. It is well within the right of the Employer to impose discipline for falsely responding to questions

during an investigation. The reasons for the lies just do not matter. This point is reiterated in the United States Supreme Court's decision in Lachance v. Erickson, 522 U.S. 262; 118 S. Ct. 753 (1998). Lying is incompatible with being a law enforcement officer.

The Grievant put himself in the position he finds himself in. It was his actions and his lies which led to his termination. The Superintendent of the Highway Patrol, with the approval of the Director of Public Safety, determined the grievant had made himself unfit to serve as a state trooper. The integrity and reputation of the Highway Patrol must be maintained. One avenue to assure the good reputation maintained by the Highway Patrol with the public is through disciplinary action. Generally this can be accomplished through various means of discipline far short of termination. However, when the rule violation is serious in nature, termination may be the only alternative available. This idea is supported by the language found in Section 19.05 of the Unit 1 labor agreement. The grievant himself joined the Highway Patrol in part because of the respect our organization enjoys with the citizens of Ohio. In order to maintain that respect, serious rule violations, such as those of the grievant, must be met with severe disciplinary action--in this case, termination.

Just cause for discipline was established, and the level of discipline was not unreasonable, arbitrary, capricious or discriminatory. The Union is seeking clemency for the grievant.

They are simply asking the arbitrator to substitute his judgment for that of the Director of Public Safety.

Based on all the foregoing the Patrol asks that the grievance be denied.

The Association's Position:

The Association concedes that the Grievant and female Probationary Trooper X both had too much to drink at a bar near the Academy on the evening of August 27, 1998, and that the evening culminated with the both of them returning to the Grievant's Academy dorm room where they were sexually intimate with one another. The Association asserts that it can be surmised that because fellow officers saw the Grievant and Probationer X together and had reason to believe they left the bar together, one of the other female troopers falsely indicated that she observed someone in X's dorm room or in bed when she opened X's door early on the morning of Friday, August 28th, and started the false rumor that the Grievant was in X's room. That rumor led to the Administrative Investigation involved here. The Association states that although the Grievant knew that the rumor was not accurate, the underlying supposition that drove the rumor was in fact true. He had been intimate with X. It is amply clear that the Grievant, racked with the guilt of having committed an act of "sin" as viewed by his Church, sought to avoid the threat to his family and his career by trying to answer questions primarily directed at the allegation that he had been in X's room without giving away the actual situation of she having been in his room.

Although the Grievant wrongfully believed he had successfully walked the line of technically answering the questions put to him within the truth of the events of the preceding Thursday night, he was guilt ridden and remorseful. That he thought he was successful in the first interview in deflecting the questions is borne out both by his statements in his second interview and as well the statements of Lieutenant Booker his interrogator. After volunteering the full facts of his intimacy with Trooper X to Lieutenant Booker, the Grievant says "What I've told you up until this point is the truth. I was not in her room. I was at . . . , we were in my room" Booker acknowledges his understanding of the preceding interview was the same as Grievant's by stating ". . . instead of answering questions truthfully, you chose to hide behind semantics." Grievant did not think that he had lied in the first interrogation but it was the guilt of the illicit encounter that drove him to voluntarily come forward to Lt. Booker.

The Association notes that the interrogation of the Grievant involves much questioning about kissing and touching and dancing and potential sexual contact in automobiles and other sites. The interrogators delve into just what Grievant and numerous others ate and drank during their off duty socializing. All of this was done over the objection of the Grievant's union representative, OSTA President Bob Stitt, who challenged the questioning on the grounds that only questions narrow in scope and related to the performance of the Grievant's official duties or his fitness for duty were

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proper or permitted areas of inquiry by the investigators. One has to wonder what the real charge against the Grievant was?

Certainly it is not that he had consensual sex with X and yet one has the feeling that beneath the surface that is indeed the perceived offense. There is not a non-fraternization rule within the Highway Patrol. Whether he had X shared intimacy is their business, the business of their loved ones, and no one else. Yet the concerted interest of Administrative Investigation was: were they holding each other at the bar; was there touching or kissing. Even in interviewing Sheldon Robinson, Lt. Booker forces discussion to the positions in which the couple had sex. If there is no rule against two consenting adults having sex on their own and not on company time, what is the offense alleged.

There is no allegation that their brief intimacy impeded the performance of their mandated duties or the mission of the Highway Patrol. There is no valid assertion that the Grievant violated some rule regarding instructor/student relationship. No, both were equals here. Both simply Troopers. It was the recently gained equality that drove the desire on the part of the relatively new Troopers to their equals to a night of partying. There wasn't even a supervisor/worker problem here. Grievant was simply a Trooper equal in all respects to Trooper X but in no way superior to her in rank or authority. Grievant was not on the second floor that was not permitted to males premised in reality upon rules that attended rigid Cadet training at the Academy.

The violation is that Trooper X was not in her assigned room and was in Grievant's room. The employer managed to find an old "Lesson Plan" for Welcoming/Orientation of Instructors that on the last page states that women and men are not permitted in each other's rooms. They were in his room together. If that is the violation, not some sort of non-fraternization, what took place in the room is inconsequential to all but those enticed by the titillation of sex.

If the employer thought that the Grievant in permitting a fellow Trooper to enter the building after 11:00 PM or having had sex in his room located at the Academy building in some way disqualified him from being an instructor at the Academy, it acted upon that determination. The Grievant was relieved of his assignment as an Instructor. There is no appeal from that action as being an Instructor is simply an assignment and not a position. The Grievant was forced to return to his field position in which he performed so admirably.

The Association additionally asserts that the Employer has previously examined the charge of being in unauthorized rooms, and took no action on an occasion where such was shown.

As for the Grievant's reassignment to the field from the Academy, the Association states that it was Major Anderson's right to set the standard for Academy assignments. It was his right to remove the Grievant and send him back to the field.

However it is a violation of the Collective Bargaining Agreement to terminate this outstanding Trooper from employment

with the State of Ohio. The collective bargaining agreement establishes the doctrine of progressive discipline. The Grievant's outstanding record discloses no prior discipline. The collective bargaining agreement requires termination only for just cause. In essence that the ultimate discipline not be imposed but for the most serious of misfeasance or malfeasance in office. The nature of conduct in the instant case and the prior record of service of the Grievant does not and will not support termination in this case. The Grievant should be permitted to return to his field assignments as a road Trooper. It is a job he has performed with distinction.

Failing to return Grievant to his position would of course impose an incalculable loss to the Grievant and his family. It would erode the strength of the collective bargaining agreement and place the right to continued employment on less firm ground. It would be a loss to the contractual guarantees of progressive discipline and discharge only for just cause. It would further be a loss to the citizens of Ohio who have invested in the training of the Grievant and have had the benefit of the Grievant's exemplary service.

For the foregoing reasons and in the interest of justice and the parties, we ask that the termination of the Grievant be set aside and that he be restored to his position as a Highway Patrol Trooper.

Discussion and Opinion:

It will be recalled that the Rule violations upon which the Patrol grounds its discharge of the Grievant are the proscription against conduct unbecoming a Trooper, more specifically conduct bringing discredit to the Patrol and/or its employees, and the proscription against making any false statement concerning the employee's conduct. On this latter point one might quarrel with the applicability here of the Lachance case cited by the Patrol inasmuch as that decision is construing rights and obligations under the Civil Service Reform Act (5 USCS 1101 et. seq.), a Statute not applicable here, and one that in my judgment simply affords employees both fewer and weaker rights than those available under the contractual just cause standard stipulated to be applicable here. In any event, the point is moot since it is well established in arbitration that pursuant to the just cause standard, law enforcement personnel, such as the Grievant, are held to a higher standard with respect to honesty and truthfulness, including the need to be honest and truthful, as in the Lachance case scenario, with respect to investigations of their own work-related misconduct.

As has been seen the Association seeks to cast the Patrol's case against the Grievant as principally faulting him for having consensual sex with a fellow Trooper, every bit ~~her~~^{his} equal, in the privacy of his room and in the absence of any written rule proscribing such fraternization. This effort is not at all persuasive. The unequivocal fact is that it was well understood by

all at the Academy, including the Grievant, as he so testified, that fraternization and sexual relations on the campus of the Academy were proscribed, and that conduct in contravention of that proscription was serious indeed. Under the just cause standard, written rules proscribing conduct self-evidently improper, need not be formally established; it is to be inferred that an employee's common sense informs him that certain behaviors, such as that involved here, are proscribed and not sanctioned. It is equally clear that such conduct was unbecoming and brought discredit to the Patrol and in particular to the Grievant as its employee. As Trooper Grabarczyk correctly noted, the Grievant's sexual relationship with Trooper X, a probationer Trooper at the Academy for supplemental instruction, and a recent graduate under the tutelage of the Grievant clearly served to undermine the Core Values the Grievant so recently espoused to Trooper X, and others of the 130th Class under his tutelage when they were cadets. Any doubt in the matter is laid to rest by the Grievant's self-declared shame and remorse concerning his conduct. Equally clear is the fact that the Grievant initially dissembled and denied any sexual relations with Trooper X, and repeatedly so, and adamantly so. Accordingly, the "fact" of the Grievant's violation of the Rules he was charged with violating is clearly established. Under the just cause standard, the only question therefore remaining is whether sufficient mitigating circumstances exist to warrant modifying the ultimate disciplinary sanction of discharge which was imposed. For the reasons which follow, I'm constrained to conclude that

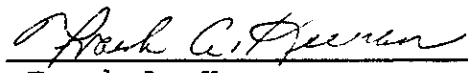
sufficient mitigating circumstances warrant modifying the penalty of discharge to a Last Chance Reinstatement without back pay, but without loss of seniority. One such mitigating circumstance is the context and the "reason," if you will, why the Grievant repeatedly lied when initially questioned in the course of the properly initiated Administrative Investigation, to wit, the intimate sexual nature of the conduct he was being questioned about and the threat disclosure and admission of such posed to his marriage and his family. As has been seen, the Patrol argues that these reasons are of no moment and ought not to be regarded as mitigating. The difficulty with this posture is that it is simply contrary to the stance the Patrol took in the Administrative Investigation in Case No. 95-0533, involving the Grievant's sexual relationship with Dispatcher Y. On that occasion in 1995 the Grievant's Union representative, Trooper Gorski, was assured by the investigator that given the reason the Grievant initially falsely denied his sexual conduct, namely, his fear for the future of his family (as here), and his eventual telling of the truth when given the opportunity (as here), his initial failure to tell the truth would not be held against him. Moreover this assurance to Trooper Gorski was set forth in writing in the official investigation report. And indeed, punctuating the propriety of taking into account the Grievant's fear for the future of his family, and regarding it as mitigating of his initial falsehoods, is the fact that indeed the Patrol took no disciplinary action against the Grievant whatsoever on that occasion, and indeed subsequently elevated him to the

trusted and enviable position as an Academy Instructor. Additionally, one of the strongest mitigating factors in a discharge case under the just cause standard is exemplary service up to the events which precipitate the discharge. In this regard the record amply demonstrates the Grievant's exemplary service. Then too the Grievant's tenure of eight years with the Patrol is also meaningful and mitigating. In my judgment these mitigating factors warrant that the Grievant's discharge be set aside. The fact remains however that his needed services as an Academy instructor are as a practical matter no longer available to the Patrol, the Grievant having breached the trust put in him and necessary for that assignment. And this extra-marital sexual relationship is the second one to have become entangled in his work place. This is serious misconduct. Accordingly the Grievant is to be reinstated without back pay, but without loss of seniority, the time intervening between his termination and reinstatement to be regarded as a disciplinary lay off for the violation of the Rules identified in the charge against him. Moreover, said reinstatement is on a Last Chance basis, and upon the understanding that, henceforth the Grievant is to be scrupulously honest and truthful concerning questions about his conduct in work-related contexts and there are to be no work place issues arising out of his personal sexual conduct. Failure to abide by these understandings shall, upon establishment, warrant the Grievant's immediate discharge.

Award:

For the reasons more fully set forth above, the grievance is sustained in part and denied in part. The Grievant is to be reinstated upon a Last Chance basis as more fully noted hereinabove, without back pay, but without loss of seniority, said period since his discharge to be regarded as a disciplinary lay off.

Dated: March 21, 1999



Frank A. Keenan
Arbitrator