#1367

ARBITRATION

BETWEEN

OHIO DEPARTMENT OF PUBLIC SAFETY,
DIVISION OF THE OHIO HIGHWAY PATROL

And

OCB #15-00-98113-0157-04-01

OHIO STATE TROOPERS ASSOCIATION

APPEARANCES:

For the Patrol: Staff Lt. Robert W. Booker
Columbus, Ohio

For the Association: Herschel M. Sigall, Esq.
Columbus, Ohio

OPINION AND AWARD OF THE ARBITRATOR

Frank A. Keenan
Labor Arbitrator

Statement of the Case:

This case involves the termination of Trooper Maria Bonomolo.

On October 30, 1998, Trooper Maria Bonomolo was served with a Statement of Charges which reads as follows:

> "... [R]easonable and substantial cause exists to establish that Trooper Maria Bonomolo has committed an act or acts in violation of the Rules & Regulations of the Department of Public Safety, Division of State Highway Patrol, specifically of:
>
> Rule: 4501:2-6-02(E) False Statement, Untruthfulness
>
> It is charged that on several occasions between January 21 and October 4, 1998, Trooper Maria Bonomolo was absent from work under false pretenses. When she was questioned about these occasions in the administrative investigation, she was untruthful."

These charges followed an Administrative Investigation which commenced on October 4, 1998, and concluded on October 12, 1998. That investigation reached the following "Conclusions":

"Trooper Bonomolo was on sick leave October 2, 3, and 4, 1998, for her 0600 to 1400 hour shift, due to a sore throat. On October 4, 1998, at 0945 hours, Mrs. Kathy Herte observed Trooper Bonomolo running on Reimer Road. Mrs. Herte's husband, a Medina County Sheriff's Deputy, has previously identified Trooper Bonomolo to her. Mrs. Herte has frequently seen Trooper Bonomolo running on Reimer Road prior to this incident. Trooper Bonomolo was questioned about the incident and denied leaving her house on October 4, 1998. Three additional witnesses were located and established Trooper Bonomolo running on Reimer Road October 4, 1998. Everyone contacted, including residents of the area, have seen Trooper Bonomolo running on a regular basis. Witness descriptions of Trooper Bonomolo and her actions are consistent and credible.

Lifestyles weight room records show Trooper Bonomolo checking in on four occasions while she is on sick leave. On two occasions Trooper Bonomolo checked into the weight room during her assigned shift. One other occasion she checked in 32 minutes prior to the start of her assigned shift. When questioned Trooper Bonomolo stated that she has only been to Lifestyles on one occasion when she did not work-out. This did not occur on any of the sick leave days in question. Trooper Bonomolo stated that all other times that she went to the gym

she engaged in a physical weight lifting work-out. Trooper Bonomolo denies doing any physical activity on the dates that Lifestyles weight room records show she checked in while on sick leave."

After a pre-disciplinary meeting with Trooper Bonomolo on November 6, 1998, Meeting Officer Raubenolt found that "just cause exists for discipline." On that same date, Director Mitchell J. Brown of the Department of Public Safety advised Trooper Bonomolo in writing that her "employment with the Department of Public Safety will be terminated at the close of business on Friday, November 6. You are being terminated for violation of Rule 4501:2-6-02(E)." That Rule provides as follows:

> "(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."

Following her termination, Trooper Bonomolo timely grieved her termination, said grievance reading in pertinent part as follows:

> "... I was terminated for an alleged violation of O.S.H.P. Rule 4501:2-6-02(E), untruthfulness and false statements relating to being allegedly absent from work under false pretenses (sick leave abuse). This termination was without just cause and the principles of progressive discipline were not followed. Also, I was not informed of the specifics of each allegation prior to the adm. Interview.
>
> Requested Remedy:
>
> That I be reinstated to my position and that I receive back pay, benefits and seniority and to be made whole."

Both parties introduced considerable documentary evidence. Additionally, the Patrol called as its witnesses: Kathy Herte, wife of Sergeant Herte, Medina County Sheriff's Office; Doug Ribley, Director of Fitness, Akron General

Lifestyles Center; and Sergeant Herbert B. Homan, Wooster Post, and the Grievant's immediate supervisor at this time of her discharge. The Association called the Grievant as its witness. The Union also introduced a video tape of an arrest and apprehension of a D.U.I. suspect conducted by the Grievant, which arrest and apprehension the Patrol viewed as involving unnecessary force warranting the Grievant's discharge. Thereafter on February 10, 1998, the Grievant was reinstated pursuant to a "Last Chance Discipline Agreement," noted in pertinent part as follows in the Grievant's deportment record: "Date: 021098, A.I. #98-0029 – Termination Remarks: Last Chance ... also w/A.I. #98-0060 2 yr. Period and complete EAP." The record reflects that A.I. #98-0060 involved two allegations; one that the Grievant told Assistant Medina City Prosecutor Sharlene Zee to get a low bond [for her] if she was arrested for murdering Sergeant Lucas; and two, that the Grievant pointed her service weapon at Zee through the door to her office and then entered the room laughing, joking about it. Both allegations were found to be "partially founded," apparently because Zee had no corroborating witnesses and the Grievant denied the allegations. The Grievant's department record also reflects in pertinent part as follows:

> "Date: 100898. Failure or delayed response to crash – suspension – 3 days."
>
> "Date: 032897. Failed to follow instructions of supervisor – written reprimand."
>
> Date: 012497. Untruthfulness/lying supervisor – 1 day – Remarks: did not tell truth about whereabouts of PC while on time off."

The parties entered into a stipulation as to a "Statement of 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 removed from her position of state trooper for just cause? If not, what shall the remedy be?'"

Events which transpired on Sunday, October 4, 1998, precipitated the Grievant's termination. On that date, at approximately 9:45 a.m., one Kathy Herte observed a female jogger, whom she believed to be the Grievant, jogging eastbound on Reimer Road with the flow of traffic. Ms. Herte is a Dispatcher and her husband is a Sergeant with the Medina County Sheriff's Department. Herte indicated that her husband had pointed the Grievant out to her some two years prior thereto, identifying her as an Ohio Highway Patrol Trooper. Herte states that she had to swerve out of the jogger's way. Herte indicated that the jogger wore a black head band, a black and white jacket, and jogging pants. Herte called the Medina County Sheriff's office and inquired as to what side of the highway a jogger should be running on. The Sheriff's dispatcher didn't know the answer to Herte's question and she called the State Highway Patrol's Medina Post, and spoke to Sergeant Lucas. Lucas in turn telephoned Sergeant Homan at the State Highway Patrol's Wooster Post. Lucas reported to Homan that a "complaint" had been lodged involving the Grievant, namely that she was jogging on the wrong side of Reimer Road. Homan, as the Grievant's immediate supervisor, knew the Grievant was out on sick leave. He telephoned Post Commander Strittmater. Strittmater placed a phone call to the Grievant at home and got no answer. He called back in about one-half hour and spoke with the Grievant. She indicated that she'd been in the bathroom gargling when he first

called and that she was still sick and on medication, but anticipated returning to duty the following day. Thereafter, Strittmater initiated an Administrative Investigation to look into the Grievant's possible abuse of sick leave. As part of that investigation, Sgt. Homan conducted a Motor Vehicle Inspection on the following Sunday on Reimer Road. Some fifty-plus vehicles were stopped and asked if they had seen a jogger on the road the preceding Sunday. Three individuals indicated that they had, namely, one couple, Mark and Christine Zahela, and one Pamela Hanna. Hanna indicated that she'd seen a female jogger the previous Sunday at about 11:50 a.m., running westbound in the eastbound lane. The Zahelas indicated that the jogger was running eastbound in the eastbound lane. Mark Zahela indicated that the jogger was wearing "shorts." All those were shown a group picture of several male troopers, the Grievant, one other female trooper, who was light haired, and all those identified the Grievant as the jogger they had seen running on Reimer Road on Sunday, October 4, 1998. The Grievant denied running on Reimer Road on Sunday, October 4, 1998. She conceded that she often jogged along Reimer Road, but never on Sundays. Moreover, asserted the Grievant, she always jogged against the traffic in conformance with the law. The Grievant further indicated that she'd received a serious leg injury at the roadside while on the job; and hence had a healthy respect for traffic hazards while a pedestrian or jogger on a busy roadway.

Sergeant Homan perceived the evidence he'd gathered concerning October 4, 1998, as sufficient to establish that the Grievant had indeed been jogging on Reimer Road on October 4, 1998. Homan indicated that in his view, if

the Grievant was able to go jogging, she was fit for duty. The Grievant testified to the contrary, indicating that she could be jogging, and yet not fit for duty. In this regard, Counsel for the Association argues that the Grievant "could have been jogging without it in any way be[ing] indicative of [Grievant's] fitness for duty. Her regimen of training is so ingrained and so intense that what she in reality feels compelled to do each day is what some might accomplish only with complete health, but what she might attempt while unfit for duty."

As part of his investigation, Sgt. Homan checked the records of the Akron General Lifestyles Center, where the Grievant was a member, to ascertain whether she had used the exercise facilities there on days she was out on sick leave. Director Ribley authenticated the underlying data and explained that a record was generated either by presenting oneself at the facility to enter or by telephonically checking one's membership status. Ribley also testified that the Center's records did not indicate what particular facilities at the Center were utilized by the members. The Grievant indicated at the hearing herein that if she's sick, she sits in the sauna or the whirlpool and engages in less strenuous activity and exercise; that she engaged in some physical activity regardless of how she feels. She also indicated that on one occasion in May, she checked on her membership status by telephone and was not physically at the Lifestyles Center.

Sgt. Homan included in his A.I. Report the following chart, gathering together certain dates on which the Grievant took sick leave; her scheduled shift

hours on said certain dates; the reason for the sick leave; and the check-in date and time at the Lifestyles Center on said dates:

SICK LEAVE DATES	SHIFT TIME	REASON	WEIGHT ROOM CHECK IN DATE/TIME
1/21/98 – 1/23/98	1500 – 2300	Stomach flu	1/21/98 @ 0610 hours & 1/23/98 @ 0609 hrs
5/01/98 – 5/06/98	2200 – 0600	Flu/inner ear-sinus	5/04/98 @ 0528 hours*
7/24/98	0600 – 1400	Sinus infection	7/24/98 @ 0928 hours*
9/11/98 – 9/12/98	0600 – 1400	Dental complication	9/11/98 @ 0528 hours

* Indicates check-in during scheduled shift.

The Grievant indicated that the interviews of her by Sgt. Homan in the file for A.I. #98-0814 are not verbatim, and do not include the entirety of her discussions with Sgt. Homan. Significantly, the Grievant makes no contention that there were inaccuracies in what is set forth in said file. In this regard, given the significance of these interviews to the matter at hand, extensive excerpts therefrom are set forth. These excerpts serve to establish the tone and tenor of the entirety of the interviews, as well as the considerable details therein. The first interview was conducted on 10/5/98, with an OSTA Representative present. The interview was not recorded. The Grievant refused to sign the interview sheets. At the outset, the Grievant was advised that she was "the subject of an administrative investigation," and that "the known allegations are: sick leave abuse for the period 10/2/98 to 10/4/98." At the second interview on 10/12/98,

the Grievant was advised that "the known allegations are sick leave abuse." At both interviews, the Grievant, as she acknowledged, was advised as follows:

> "You are being interviewed as part of an official investigation by the Division. You will be asked questions specifically directed to the performance of your official duties or fitness for office. You are entitled to all the rights and privileges guaranteed by the laws and the constitution of this state and the Constitution of the United States, including the right not to be compelled to incriminate yourself. I further wish to advise you that if you refuse to testify or to answer questions relating to the performance of your official duties or fitness for duty, you will be subject to departmental charges which could result in your dismissal from the Division. If you do answer, neither your statement nor any information or evidence which is gained by reason of such statement can be used against you in subsequent criminal proceeding. However, these statements may be used against you in relation to subsequent departmental charges."

Excerpts from the interview of 10-5-98:

"Q. What is your understanding of acceptable use of sick leave?

A. Sick, death of a family, family emergency.

Q. What is your definition of "sick" as it applies to sick leave?

A. Illness that would prevent you from doing your job.

Q. If you call in sick, but later feel better to the point of being able to perform you duties, do you have an obligation to report to work?

A. If I called in sick, I would not feel comfortable coming in even if I feel better because I might get sick again.

Q. What was the reason you called in sick 10/2/98?

A. I had in-service Mon-Tuesday. I had Redman. The pads were sweaty, people were sneezing and coughing. I started feeling crapy. I was off Wednesday and Thursday. Thursday night my throat hurt to swallow and talk. It kept getting worse.

Q. Did your throat condition improve Saturday or Sunday?

A. No, it got worse.

Q. How would this illness prevent you from working?

A. I used antibiotics from an old illness that made me drowsy. I could not talk. I want to stay in bed and work it out. I did not want to be behind the wheel of a car.

Q. What duties other than talking or driving would you have been prevented from doing?

A. I felt weak, less alert, slower moving.

Q. Would you have been prevented from doing any physical part of the job?

A. Yes, my resistance would have been down.

...

Q. Were you too ill to the point where you stayed at home the entire weekend, Fri/Sat/Sun?

A. Yes.

Q. Did you leave your house anytime?

A. I went to pick up a bottle of ginger ale and some aspirin at the corner store.

Q. Did you engage in any type of physical activity?

A. I walked to the store.

Q. What day did you go to the store?

A. Friday night. ...

Q. Did you leave the house for any reason Sunday?

A. No, sir.

Q. The Medina Post received a call from the Medina County Sheriff's Office. The called turned out to be a question about pedestrians on the roadway. It was prompted by a unit who

say you running on Reimer Road west of S.R. 94, Sunday about 9:30 a.m. Can you address or explain this?

A. I did not take a run Sunday.

Q. Did you work out or run anytime Friday/Saturday or Sunday?

A. Wednesday was the only day.

Q. Is there anything you would like to add or clarify?

A. No."

Excerpts from the interview of 10-12-98:

"Q. In the interview 10/5/98, I asked you a hypothetical question about calling in sick, then feeling better, but not reporting to work. Has this been the case with anytime you have been on sick leave?

A. From what I can recall, anytime I have called in sick I have been sick the whole shift.

Q. If the sick leave that covered more than one day, were you sick the whole time?

A. Yes.

Q. On Jan. 21-23, you reported off with stomach flu. Could you have reported to work anytime during that span of time?

A. No, I had to stay near the bathroom. The fever. I didn't eat.

Q. Could you have done any physical activity during that time?

A. No, I felt weak.

Q. On May 1 – May 6 you called off with a sinus infections. Could you have reported to work anytime during that span?

A. No, sir. I was very dizzy. My equilibrium was off. I was on my back in bed.

Q. Could you have engaged in any physical activity?

A. Not at all, no sir.

Q. On July 24, 1998, you called in with a sinus infection. Could you have reported to work anytime during your shift?

A. No, sir.

Q. Could you have engaged in any physical activity?

A. No, sir.

Q. On 9-11 & 9-12, you called in with dental complications. Could you have reported to work anytime during that time?

A. No, sir. The pain was too much.

Q. Could you have engaged in any physical activity?

A. I felt I had strength. I could have.

Q. Did you engage in any physical activity while on sick leave?

A. No, I was trying to get the oral-jell or sometime relieve the pain.

Q. Did you see a doctor on any of these occasions?

A. May 1, May 6.

Q. What do your workouts consist of?

A. Body build, cardo, lift 3 days a week and run 5-6 days a week.

Q. What do your strength workouts consist of?

A. Mon-Fri whole body, Wednesday is leg day.

Q. What gym do you work out at?

A. Lifestyles, The Firm, Smithville Gym.

Q. What do your running workouts consist of?

A. Between 6-8 miles.

Q. Does the intensity of your workouts permit you to do them while you are on sick leave?

A. Definitely not May 1 – May 6. If I work out when I am sick, it would not be at full intensity so I would just as soon not do it.

Q. On the other days we discussed, did you work out?

A. No.

Q. Have you ever gone to the gym and not worked out?

A. One time I went to sweat out a cold. I sat in a steam room and did not work out. This was the only time.

Q. Where was this at?

A. Lifestyles.

Q. When did you do this?

A. I do not remember.

Q. Were you on sick leave at the time?

A. I cannot remember, I know if was not the sick leave days we discussed.

Q. Do you have anything you would like to add?

A. In the past when I was sick, I was sick. I used to get mad when people abused it. I don't like when people abuse it."

Other matters of note include the fact that the Grievant is an avid exercise enthusiast and body builder. She has received praise, recognition, and encouragement from the Patrol concerning her first place wins in Patrol-wide fitness competitions. She also consistently receives the contractual fitness bonus. Historically, and until most recently, the Grievant's evaluations have been

principally "exceeds expectations." More recently, she has been ruefully rated "meets expectations."

The Association attached to its post-hearing written conclusion and brief a copy of an Appellate Decision from the Ohio Unemployment Compensation Review Commission, in Case No. UCO No. 0800764000, involving a claim by the Grievant for unemployment compensation benefits. That decision recites that initially the Grievant's claim was denied because it was found that "there was sufficient fault on [Grievant's] part to find the discharge justifiable." Upon a re-determination, that "fault" finding was affirmed. A re-determination by the Review Commission was sought by the Grievant. The Review Commission found as follows:

> "FINDINGS OF FACT
>
> Claimant was employed by State Highway Patrol, a division of Ohio Department of Public Safety, for about 12 years. She was a trooper.
>
> When she was assigned to the Medina Post, claimant underwent several administrative investigations resulting in disciplinary actions. After a last chance discipline agreement, she was transferred to the Wooster office.
>
> To stay physically fit, claimant ran six days every week. She also lifted weights at the Health & Fitness Center three days per week. She stopped at the Health & Fitness Center even on days she was off ill and not fit for duty.
>
> Claimant was on sick leave on October 2, October 3 and October 4, 1998, due to a sore throat. She was allegedly seen running on October 4, 1998.
>
> On October 5, 1998, when asked by Sergeant Herbert Homan, claimant denied that she had been running during her sick leave. There is no reliable evidence that she did. There is not even a written statement from anyone allegedly seeing her run.

Claimant's visits to the Health & Fitness Center were checked by Sergeant Herbert Homan. He found that she had been there on January 21, January 23, May 4, July 24, and September 11, 1998, days that she had been off ill. She was interviewed by Sergeant Homan about these visits on October 12, 1998.

By a letter dated October 30, 1998, claimant was notified of the intent to terminate her employment with Ohio State Highway Patrol for violation of rule 4501:2-6-02(E). Specifically, she was charged with absence from work on false pretenses on several occasions between January 21 and October 4, 1998 and for untruthfulness when questioned about the occasions in the administrative investigation.

Following a pre-disciplinary meeting on November 6, 1998, claimant's employment was terminated. The reason was noted as violation of the false statement and truthfulness rule.

Claimant's denial in her testimony of running on October 4, 1998 is believable. She was not off October 2, 1998, October 3, and October 4, 1998 on false pretenses. It appears that she was sufficiently ill to skip going to the Health & Fitness Center for those three days.

ISSUE:

Was claimant discharged for just cause in connection with work?

LAW:

An individual is not disqualified for benefits if the individual was discharged without just cause in connection with work.

REASONING:

The facts do not establish absence by claimant on false pretenses or violation by her of the false statement and truthfulness rule. There does not appear sufficient fault on her part following the last chance discipline agreement to justify her discharge. Therefore, it will be held that she was discharged without just cause in connection with work.

DECISION:

The Administrator's re-determination, dated December 24, 1998, is reversed."

The Patrol, by letter dated March 10, 1999, protested the submission of the Review Commission's Decision, as follows:

"Yesterday I received a copy of the Ohio State Troopers Association closing argument regarding the Bonomolo case. After reading it, I must object to the inclusion of the decision from the unemployment hearing. This hearing was held after the arbitration. The decision cannot be viewed as evidence, it has no relevance to the issue before the arbitrator. Surely, had the decision been available the day of the arbitration, it would not have been admitted into evidence. If it was admitted at least the Employer would have had the opportunity to cross examine the grievant on inconsistencies in her testimony at arbitration and at the unemployment hearing. The standard of review between the two forums is different, and the decision rendered by the Hearing Officer has no persuasive value in the arbitration venue. The inclusion of this decision was totally inappropriate and the Employer would ask that it be excluded.

The Association responded as follows:

"[L]et me respond to the issues raised by the employer. It is my belief that the determination by an appropriate state agency that Maria Bonomolo was not terminated for just cause as to disqualify her from unemployment compensation has relevancy. The case before you arises on the same facts as the case submitted for unemployment benefit qualification determination. The trier of fact in that matter is a state appointed and state qualified hearing officer. I attached the full decision of the hearing officer for review as opposed to simply editorially commenting on that hearing. It is of course my belief that the arbitrator is capable of accepting the reasoning contained in that decision on a "for what it's worth" basis no different than that afforded to some hearsay testimony that might be excluded from a jury proceeding but admitted by a competent jurist.

The inference that in some manner the employer was not given the opportunity to fully present it's case in the unemployment appeal is not compelling. It was Maria Bonomolo that was alone and unrepresented at the unemployment hearing. The employer was represented by Sergeant Holman and Brian Landis. Holman was the individual who conducted the investigation that led to Maria

> Bonomolo's firing. He had the advantage of testifying before you immediately prior to giving testimony at the unemployment hearing. Landis is a representative from the employer's Office of Human Resource Management. If however following the receipt of my letter and the explanations it contains you determine that the decision provided to you by the union is of limited value, or should not be before you, please accept this letter as a formal withdrawal by the union of its submission."

The Parties' Positions:

In their post-hearing written closings and their opening, both parties set forth a rather detailed summary and characterization of the evidence of record which tended to support the conclusionary arguments they make to support the respective result of the arbitration they urge – the Patrol urging the denial of the grievance and the Union the sustaining of the grievance. Their conclusionary arguments follow:

a) The Patrol's Argument:

The Patrol notes that Grievant Trooper Maria Bonomolo was removed for violation of Patrol Rule and Regulation 4501:2-6-01(E), False Statements, Untruthfulness. An eleven year Trooper, the Grievant was removed based on the findings of an administrative investigation coupled with her lengthy department record.

Thus, on October 4, 1998, a complaint was received from one Kathy Herte that the Grievant was observed running that day along Reimer Road and would not yield to traffic. It was found the Grievant was on sick leave that day and the two previous days due to a sore throat. The Grievant is an exercise enthusiast and an avid bodybuilder. She is

also a member of the Akron General Hospital Lifestyles Fitness Center. It was found that not only was the Grievant seen running along Reimer Road on October 4th, she had also checked herself into the fitness center on that same day.

The Grievant's previous use of sick leave and the fitness center's records revealed other occasions in 1998 when the Grievant was at the fitness center when she was on sick leave. The Grievant's claimed illnesses ranged from the stomach flu, sinus, inner ear infection, dental complications and sore throat. The Grievant denied to Sergeant Homan that she was at the fitness center on said dates or that she engaged in physical activity on said dates and denied she was jogging on Reimer Road on October 4, 1998.

The removal of the Grievant brings to a culmination a pattern of behavior ranging from untruthfulness, use of paid time for personal reasons, to prisoner abuse. The Grievant has in the past chosen to evade or deceive supervisors regarding her performance of duty. She has failed to respond favorably to attempts by the Employer to correct her behavior. It will be critically important for you to review and carefully weigh the Grievant's past deportment. It will be evident that this event was finally "the straw that broke the camel's back."

In these cases, the Grievant has failed to fulfill a fundamental aspect of her duties involving honesty and reliability. She has shown the

propensity for deception in these areas and has repeatedly demonstrated an inability to function in a position of public trust.

Based on her prior history, removal was both commensurate and progressive. It is the Employer's position that ample just cause exists to remove the Grievant from the position of State Trooper.

A recurring theme featured by the Union was the "conspiracy theory." According to this theory, the Grievant was the target of Sergeant Lucas and other officers of the Highway Patrol to see evil done to her. As it turned out, any officer who turned her in or any supervisor who disciplined her was part of this conspiracy. Which is likely the case: a convenant of conspirators against a defenseless person or supervisors weary of an employee known for her penchant for lying?

This case has everything to do with the Grievant's false statements to her supervisor about her activities while on sick leave. This case is not about sick leave abuse, nor is it to consider whether a person is too sick to engage in physical activity. However, Article 48 of the labor agreement addresses unauthorized use or abuse of sick leave. If the Grievant had told the truth, we would probably be taking into account those issues. That is not the case of the subject at hand, nor is it open to contemplation in these proceedings.

On September 18, 1987, the Grievant stood in front of witnesses, raised her right hand and gave an oath. That oath was about honesty and fulfilling a commitment to duty. Instead, the Grievant repeatedly had

broken that promise. Can she be returned to duty in a position of trust? Can she be counted on to provide truthful testimony concerning her duties? Can she be trusted to tell the truth in times of conflict.? The answer is no.

And now, the Union would ask the citizens of the State of Ohio to assume the liability of her return to duty. To the contrary, the Patrol urges that the grievance be denied.

b) The Association's Argument:

Trooper Maria Bonomolo has served the Ohio State Highway Patrol with dignity and pride. Her record is indicative of the effort she puts forth in performing her job. Her past evaluations indicate that she was a trooper for others to emulate. Her department record is sparse for an eleven year veteran.

The Employer attempted to catch Trooper Bonomolo abusing sick leave on October 4, 1998. When that attempt proved futile, the Employer needed another angle. Enter Sgt. Homan's investigation into Maria's personal use of her workout facility. Physical exercise is a natural to Maria Bonomolo as brushing one's teeth on a daily basis. It is part of her lifestyle. Because one is sick, one does not avoid brushing his or her teeth; s/he goes forward and completes an essential part of his daily routine. Part of being an Ohio State Highway Patrol Trooper is determining whether you are fit for duty. That determination must take

into account, that on any given day, you could be looking down the barrel of a gun. If a Trooper feels that s/he will not be able to adequately protect themselves, how can s/he protect the public s/he has sworn to protect? Trooper Maria Bonomolo takes her oath to protect the public's welfare seriously and would not endanger the lives of innocent people just so that the Employer would be satisfied that she reported to work.

The Employer, in another desperate attempt to paint Maria as a "trouble maker," attempted to introduce the Last Chance Agreement, herein the LCA. The LCA is irrelevant to the case at hand. Should the Arbitrator restore Trooper Bonomolo to her position as a Trooper, the LCA remains in effect. No attempt was made to terminate Maria under the terms of the LCA. It is a separate track. Maria Bonomolo was faced with a decision that no one should be faced with – accept the termination and grieve it, with the knowledge that she did not commit any offense worthy of termination, or accept the LCA and keep her job. The LCA is an agreement whereby the employee gives up his/her ability to challenge a termination and the employer gives up the termination. Trooper Bonomolo, in an effort to stay afloat financially, signed the LCA. The Employer pointed out that the LCA was based on two Administrative Investigations. The first being based on the videotape, which showed no discernible reason for imposing discipline and the second involving a complaint by an Assistant County Prosecutor, alleging that Trooper Bonomolo pointed her gun at her. The Administrative Investigation (A.I.)

itself, admits that the allegation is ***partially founded***. Yet, the Employer determined that was good enough to hang Trooper Maria Bonomolo with. The Employer wanted to get rid of Trooper Bonomolo and used any means to do so.

Maria Bonomolo was truthful throughout this investigation. The Employer, through Sgt. Homan and Sgt. Lucas, decided not to believe an eleven year veteran and instead rely on uncorroborated and inconsistent statements from witnesses. The Employer decided to ignore the effort and drive of this Trooper because it did not want her to be a Trooper anymore. That is the biggest injustice of them all; the Ohio State Highway Patrol is willing to throw away the work ethic, compassion, enthusiasm and commitment of this Trooper because it has pre-judged Maria Bonomolo.

Trooper Bonomolo cherishes her role as an Ohio State Highway Patrol Trooper. She has represented the Patrol in past competitions with vigor and respect. The Patrol has acknowledged and encouraged her participation in such competitions. Trooper Bonomolo has done her job to the best of her abilities. Throughout this entire process, Trooper Bonomolo has expressed her desire to return to her job as an Ohio State Highway Patrol Trooper. She is asking this Arbitrator to recognize the injustice that has been served upon her and restore her to the position that she has served so well in the past. We ask that the Arbitrator, with the full knowledge of Trooper Bonomolo's past record and experience, restore

Maria Bonomolo to her position and thereby restore her reputation and allow her to perform her job with the same energy and commitment she once did.

Maria Bonomolo was not jogging on October 4, 1998 although she might have been and still not been in violation of sick leave usage policy. Maria Bonomolo attended her fitness center often and faithfully and probably did so when less athletic or health driven people would not have. After all she attempted to ride an exercise bike with one leg in a cast. Whether or not her memory was faulty or whether the notes of the investigator, who had already assumed his conclusion, were faulty really makes no difference. Maria Bonomolo did not commit any act for which she could have or should have been terminated. Although the LCA is not a trigger to her termination nor has the employer attempted to assert that it is, even a fair viewing of the events that resulted in the LCA would disclose that the employer has been less than fair in its' treatment of this officer. As the Hearing Officer in her Unemployment Appeal found following the Hearing in that matter, Maria Bonomolo "was discharged by the Ohio State Highway Patrol without just cause in connection with work" (UCRC Review Commission R99-a0279-000 UI Intrastate) Appendix.

Justice requires that Maria Bonomolo be restored to her position as a Trooper within the Ohio Highway Patrol.

DISCUSSION & OPINION:

First discussed are some arbitral principles which have application here. As has been seen, the Patrol contends that the Grievant's purported untruthfulness in connection with the Administrative Investigation into her possible abuse of sick leave was viewed as the "last straw" in a deteriorating record of conduct, said "last straw" warranting the Grievant's termination. In this regard, the "last straw" rationale for dismissal is well established in arbitration. As the Elkouris note in their learned arbitration treatise, *How Arbitration Works, (5th Edition) at page 926:*

> "Arbitrator Morris J. Kaplan held that although neither the incident at the time of discharge nor any other single incident cited by the employer was sufficient to warrant discharge, the general pattern of the employee's unsatisfactory conduct and performance, as established by a series of incidents over an extended period, was preponderant evidence justifying discharge. *Electronic Corporation of America, 3LA217, 218-20 (1946).* In similar "last straw" situations, other arbitrators have also reached similar results. [Numerous citations omitted.]

Another applicable arbitral principle is the proposition that law enforcement personnel are held to a higher standard of truthfulness than are other employees, including the need to be truthful in connection with inquiries into their own conduct which has an impact on their work. Untruthfulness is a serious matter in law enforcement. Indeed, depending on the circumstances, untruthfulness may well warrant discharge.

Yet another applicable arbitral principle was well articulated by Arbitrator Stein in an unreported *General Electric* decision, quoted with approval by

Arbitrator Roger I. Abrams in General Electric Co., *70 LA 1174, 1176 (1978)*, as follows:

> "[A]n arbitration cannot be made the occasion for the litigation of earlier matters for which no grievances were filed or which were not themselves brought to arbitration when the prior stages of the grievance procedure did not result in agreement."

As Arbitrator Wilber Bothwell put the principle in *McDonnell Douglas Corp., 51 LA 1076, at 1080 (1968):*

> "It is not appropriate ... to put on trial the merits of prior discipline on which no grievance was filed. The Grievant's disciplinary record has already been written."

Applying these arbitral principles to my careful study of the voluminous evidence of record persuades me, for the reasons which follow, that the Patrol has established just cause for the Grievant's termination. Thus, on October 4, 1998, the Grievant was on sick leave, yet there was evidence that she was jogging on Reimer Road. The Association makes some valid points with respect to the quality of this evidence, namely, that the four witnesses who have identified the Grievant as the jogger are inconsistent with respect to precisely what the Grievant was wearing. Additionally, one of the four witnesses, Hanna, puts the Grievant on Reimer Road two-hours later than do the other three witnesses. And these witnesses are not in universal agreement concerning in what direction the jogger was running. Witnesses are notoriously inaccurate as to time and inconsistencies as to the Grievant's attire are unimpressive under the preponderance-of-evidence standard applicable here. Moreover, the Grievant admitted she frequently ran on Reimer Road. Other record evidence establishes that there were other occasions when, although on sick leave, the Grievant went

to her exercise facility. Then too, the Grievant testified that even when ill she would nonetheless exercise to a lesser degree, regarding such milder exercise as "therapy." In my view, an amalgam of all this evidence simply preponderates in favor of a finding that the Grievant was in fact jogging on Reimer Road on Sunday morning, October 4, 1998, and hence when she denied doing so, she was being untruthful.

The Association sought to question the motivation behind Sgt. Lucas' reporting this jogging matter to Sgt. Homan, suggesting that Lucas arbitrarily did so, and that he was simply out to get the Grievant. However, no evidence that Lucas was aware that the Grievant was on sick leave, or any other evidence for that matter, was put in evidence to substantiate that allegation. The Association also appears to suggest that the resulting A.I. lacks legitimacy due to this unproved motivation - a-fruit-of-the-poison tree kind of argument. Since the bad motivation is not proved, this suggested argument is not persuasive. It is particularly unpersuasive in face of the legitimacy of a concern that a law enforcement officer was allegedly running in a manner contrary to the law. This legitimate concern also undermines the significance the Association would attach to Sergeant Lucas' characterization of the Reimer Road jogging matter as a "complaint" instead of an "inquiry."

Turning to the Grievant's statements on October 5 and 12, 1998, in the course of the investigation, it seems to me that any fair reading of same, in the face of the uncontradicted evidence that the Grievant visited her exercise facility on days on which she was on sick leave, leads inexorably to the conclusion that the Patrol reached, namely, that on October 5 and 12, 1998, the Grievant was

dissembling and being untruthful. Any fair reading of those statements readily reveals that the Grievant intended to leave the impression that on any days that she was on sick leave she could not engage in physical activity. For example, when asked if she could do any physical activity on days she was off on sick leave, the Grievant indicated she could not. And to give emphasis to this denial, she indicated that "if I work out when I am sick, it would not be at full intensity, so I would just as soon not do it." Additionally, the Grievant indicated that on only one occasion did she go to her exercise facility and only sit in the steam room and not work out. Hence on all other occasions, she claimed she worked out. Moreover, the Grievant indicated that this one occasion was not on one of the sick leave days under scrutiny here. Yet the record reflects unequivocally that there were occasions when she reported to her gym while on sick leave. And while it is true enough that the records of the gym do not tell us what facilities were used by the Grievant while at the gym, the Grievant has told us that except for one time, when she checks into her exercise facility, she works out. The Association also contends that on October 5th and 12th, the Patrol was not forthcoming enough and that the Grievant could not be expected to accurately remember the vague matters she was being asked about. I find this characterization of the interviews to not be valid. To the contrary, the Patrol brought to the Grievant's attention specific dates on which she was on sick leave and identified for her the specific illness which caused her to be on sick leave. This combination of facts apparently brought full recall to the Grievant because she unhesitatingly and unequivocally responded with what she purportedly did or

did not do on those dates. She gave no indication of any uncertainty about the matters she was being questioned about. In sum, the credible record evidence clearly establishes that the Grievant was untruthful in the course of her October 5th and 12th, 1988 interviews.

At the hearing herein, the Association sought review of the merits of past discipline. Only the "unnecessary force" underlying the Grievant's Last Chance Agreement was meaningfully probed. But, as noted above, the instant arbitration hearing was not a proper forum for re-examination of the merits of such past discipline. The Grievant's past disciplinary record, as noted above, is a given, and the "fact" basis upon which such discipline (having not been successfully challenged through the grievance-arbitration machinery), must now be viewed as established. Assuming for the sake of analysis that the Patrol's willingness to argue the "merits" of said "unnecessary force" allegation might be construed as a "waiver" of the fixedness of past discipline principle alluded to here, at least vis a vis the video evidence upon which the Patrol at least in part relied on, suffice it to say that following my review of the video, I am unable to find that said video evidence fails to support the Patrol's conclusions.

It's true enough, as the Association points out, that the Grievant's deportment record is not "lengthy" in the sense of reaching back over the bulk of the Grievant's service with the Patrol, however, for the relativity recent past it is a most unenviable record. A Last Chance situation represents the most serious form of discipline short of discharge that conceivably can be imposed. Additionally, the Grievant was twice suspended without pay within the viable deportment period,

again, a very advanced and serious form of discipline under progressive discipline concepts. And most significantly, one of these prior disciplinary lay offs was for untruthfulness, the very same and serious misconduct which has been made out here. I'm therefore unable to quarrel with the Patrol's notion that the proven untruthfulness here was simply the "last straw." This is especially so given the inherent seriousness of a Trooper's untruthfulness.

By way of mitigation, the Association points to the Grievant's apparently good service of approximately a decade before she got into the kind of difficulties reflected in her deportment record. The difficulty is that that bank of good service was significantly drawn down when the Patrol converted the Grievant's prior discharge to a Last Chance reinstatement. Furthermore, there is no other evidence of mitigating circumstances, nor has any mitigating circumstance, which the Patrol has in the past given consideration to in like circumstances, been brought to the fore here.

In the interest of fairness to the Grievant and the perception of fairness, the Decision of the Ohio Unemployment Compensation Review Commission is received into evidence. It is clear that the proceedings there were far less plenary than the hearing here. It's well established in arbitration that the findings in such collateral proceedings are not binding. For the reasons noted hereinabove, I reach different conclusions from the Commission. Accordingly, I find the Commission's findings, analysis, and conclusions to be not only not binding, but also unpersuasive as well.

On the basis of all the foregoing, it is found that the Patrol has established just cause for the Grievant's discharge and hence the grievance must be denied.

AWARD:

For the reasons noted hereinabove, the grievance is denied.

May 18, 1999

Frank A. Keenan
Arbitrator