#1369

THE STATE OF OHIO, OHIO DEPARTMENT OF PUBLIC SAFETY, DIVISION OF THE STATE HIGHWAY PATROL AND OHIO STATE TROOPERS ASSOCIATION VOLUNTARY LABOR ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN:

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

-AND-

OHIO STATE TROOPERS ASSOCIATION

GRIEVANT: THOMAS A. SMITH II
GRIEVANCE NO.: 15-00-981201-0167-04-01

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: JUNE 7, 1999

APPEARANCES:

For the Employer:

Michelle Scott	Observer
Regina Russell	Radio Dispatcher
Paul A. Pride	Shift Supervisor
Heather L. Reese	Second Chair
Robert W. Booker	Co-Advocate
Robert J. Young	Advocate

For the Union

Thomas A. Smith II	Grievant
Shawn A. Cunningham	Trooper
Troy S. Johnson	Trooper
Elizabeth A. Holcomb	Witness
Bob Stitt	President
Herschell M. Sigall	Advocate

INTRODUCTION

This is a proceeding under Article 20, Grievance Procedure, Section 20.07, Step 4-Arbitration, of the Agreement between the State of Ohio, Ohio Department of Public Safety, Division of the State Highway Patrol (hereinafter referred to as the "Employer")

and the Ohio State Troopers Association, Inc. Unit 1 (hereinafter referred to as the "Union") for the period July 1, 1997 to June 30, 2000 (Joint Exhibit 1).

The arbitration hearing was held on February 24, 1999, at the Office of Collective Bargaining, Columbus, Ohio. The parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. Procedural and substantive arbitrability issues were not raised by either party.

At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing briefs. The parties submitted briefs in accordance with guidelines established at the hearing.

STIPULATED ISSUE

Was the violation documented is AI #98-0844 a same or similar event which should trigger the last chance agreement signed by the Grievant on 09/16/97? If not, what shall the remedy be?

PERTINENT CONTRACT PROVISIONS

ARTICLE 19 – DISCIPLINARY PROCEDURE

19.0 Standard
No bargaining unit member shall be reduced in pay or position, suspended, or renewed except for just cause.

(Joint Exhibit 1, Pgs. 27)

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19.05 Progressive Discipline
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.

The deduction of fines from an employee's wages shall not require the employee's authorization for the withholding of fines from the employee's wages.

19.06 Suspension Options and Implementation Procedures

A. If a bargaining unit employee receives discipline which includes lost wages, the Employer may offer or the Employee may request the following forms of corrective action:
   1. Actually having the employee serve the designated number of days suspended without pay; or pay the designated fine; or
   2. By deducting the employee's accrued personal leave, vacation or compensatory leave banks of hours or a combination of any of these banks, under such terms as might be mutually agreed to by the Employer, the employee and the Union.

(Joint Exhibit 1, Pgs. 29-30)

CASE HISTORY

Thomas A. Smith II, the Grievant, has been a Trooper for approximately five years. His most recent appointment, in this capacity, was at the Gallapolis Post.

The facts, for the most part, are not in dispute. On September 16, 1997, the Grievant entered into a Last Chance Agreement, which contains the following particulars:

LAST CHANCE DISCIPLINE AGREEMENT

> This agreement is mutually entered into by the State of Ohio, Department of Public Safety, Division of Highway Patrol (the Employer), the Ohio State Troopers Association (Union) and Trooper T.A. Smith, (Employee) and represents full and final understanding and good faith commitment to the following details.
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> The employer has found just cause to terminate the employee as a result of the activities documented in administrative investigation #97-0324 for

violation of Highway Patrol Rules and Regulations, specifically 4501:2-6-02 (B) (5), Performance of Duty, Inefficiency. The employer agrees to hold the termination in abeyance provided the employee does not violate same or similar rules within two years of the date of signing this agreement.

If the employee is charged and found in violation of same or similar rules and regulations within the two-year period, the employee will be terminated. The employer and the union agree the severity of the discipline will not constitute a grievable matter.

The employee acknowledges that he has received a copy of this agreement and has been fully informed of the terms and consequences of it and hereby voluntarily enters into said agreement after having been advised by his union representative.

This agreement is non-precedent setting and will not be used in any unrelated administrative hearing, grievance, arbitration, or negotiation. The agreement may be used by either party to enforce its provisions.

(Joint Exhibit 3)

The record indicates the triggering event leading to this agreement involved on duty inefficiency. It is uncontroverted the Grievant failed to investigate or report an injury crash, and failed to protect the scene of the same crash. By failing to properly place flares or other warning devices, another crash took place.

The events giving rise to the present dispute took place during the evening of October 21, 1998. The Grievant and Curt Cunningham, a fellow off-duty Trooper, socialized the evening in question. They and a third friend purchased some beer and returned to Cunningham's residence where they continued to socialize. The Grievant and Cunningham decided to visit Libby Holcomb, the Grievant's cousin. Since the Troopers made a conscious decision not to drive because they were consuming alcohol, their friend drove them to Libby's residence.

Upon arriving at Libby's, Janelle, a friend of Libby's joined the other individuals for a night of fun and merriment. During the course of the evening, the Grievant and Cunningham decided it would be fun to run breath tests on the individuals who had been drinking.

The Grievant admitted he called the post and spoke to Trooper Pack, who was sitting in as a Dispatcher. He notified Pack that he would be coming to the Post later. He also asked him whether a supervisor was present. Pack responded that a supervisor was not at the post.

Witnesses acknowledged the Grievant was rowdy, playful and hyper, once he and his friends arrived at the post. While Cunningham was conversing with Dispatcher Regina Russell, the Grievant bear-hugged Cunningham, causing him to fall from a chair. The Grievant did, indeed, eventually conduct three breath tests. None of these tests were administered in accordance with Ohio Department of Health Rules and the Employer's regulations (Employer Exhibit 4). Cunningham scored a .08, the Grievant scored a .17, while Janelle tested either .10 or .11.

There is some disagreement concerning the reasons which caused Trooper Troy Johnson to arrive on the scene. After a brief conversation, it was determined that it was time for the Grievant and his friends to leave the Post.

The following afternoon, Russell, notified Lieutenant R.E. Grau, Gallipolis Post Commander, of the incident. An investigation ensued leading to the Grievant's removal.

On November 18, 1998, a removal order (Joint Exhibit 3) was forwarded to the Grievant. It contained the following Statement of Charges:

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It is herewith stated that reasonable and substantial cause exists to establish that Trooper Thomas A. Smith II has committed an act or acts in violation of the Rules and Regulations of the Department of Public Safety, Division of State Highway Patrol, specifically of:

Rule: 4501:2-6-02(I)(1), Conduct Unbecoming an Officer
4501:2-6-02(B)(5), Inefficiency

It is charged that on October 22, 1998, Trooper Thomas A. Smith II, while off duty and intoxicated, telephoned and then came on the premises of the Gallipolis Post of the Highway Patrol. He behaved in a rowdy, profane, and inappropriate manner in the presence of co-workers and others.

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(Joint Exhibit 3)

On November 30, 1998, a grievance was filed contesting the previously stated removal decision. It contained the following Grievance Facts:

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On November 23, 1998, I was terminated for alleged violation of OSAP rules and regulations Section 1. 4501:2-6-02(I)(1), conduct unbecoming an officer and 2. 4501:2-6-02(B)(5), inefficiency. This termination was without just cause, and the principles of progressive discipline were not followed.

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(Joint Exhibit 2)

The parties were unable to settle the dispute in subsequent portions of the grievance procedure. Neither party raised substantive nor procedural arbitrability issues. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Employer's Position

The Employer argued that it properly removed the Grievant for inefficiency and conduct unbecoming an officer. Either rule violation justified the Grievant's removal based on his prior disciplinary record and the documented violations of work rules.

The Grievant was operating under a Last Chance Agreement (Joint Exhibit 3) for inefficiency. He was properly removed because of certain same or similar rule violations within a two-year period.

The Employer asserted the Grievant was inefficient even though he was off duty. Once the Grievant came to the Post and conducted the tests, he created "a duty" even though he was not working. He failed to run the tests correctly, and thus, was viewed as inefficiently performing a duty of which he was capable.

Inefficient conduct was unmistakingly evinced by Sergeant Paul Pride when he testified about the proper operation of a BAC Datamaster; the machine used to run breath tests. Any operator must complete an operational checklist and complete an HEA2650 form (Employer Exhibit 3). It must be completed and retained on all subjects tested, and each time a test is run. The form is completed when the machine is calibrated, training takes place, and when subjects refuse to take the test. Failure to complete the form directly conflicts with Highway Patrol Policy 9-303-09 (Employer Exhibit 4) and Department of Health guidelines (Employer Exhibit 3).

Proper compliance is critical for chain of evidence purposes. Normally, defense attorneys cannot attack the validity or reliability of the machine and related test results.

As such, they typically contest the record-keeping protocols so that breath test results are ruled inadmissible.

The Grievant's inefficient conduct caused the Employer to engage in certain corrective actions. Sergeant D.R. Holcomb had to complete the appropriate forms and enter them into the Datamaster logbook (Employer Exhibit 2).

The record clearly discloses that the Grievant was adequately imposed to follow the well-documented procedures. As a certified senior operator (Employer Exhibit 1), he knew how to run and calibrate the machine and complete the proper forms. And yet, the Grievant admitted he ran the tests and failed to fill out the proper forms, even though he knew completion of the paperwork was required.

The personal use of state-owned equipment for breath testing is not a normal occurrence. The Grievant never admitted he had engaged in this conduct in the past. Sergeant Price and Dispatcher Russell had never seen anyone perform tests on themselves, or any other person, while off duty.

Trooper Shawn Cunningham's incident did not support an unequal treatment allegation, Post supervisors never became aware of his actions. The Union, moreover, never established that Trooper Shawn Cunningham failed to complete the paperwork required by policy and regulations (Employer Exhibits 3 and 4).

The behavior engaged in by the Grievant clearly justified the charge of conduct unbecoming an officer, a violation of work rule 4501:2-6-02(1)(1). The Grievant and other witnesses variously characterized his behavior as hyper, rambunctious, crazy, and rowdy. Trooper Johnson, moreover, observed the Grievant bear hug Trooper Cunningham, bringing him to the floor out of his chair. The Grievant also admitted

making certain statements while in the BAC testing room. He was showing off and made disparaging statements about a phantom citizen and his attorney.

The Grievant's drunken state solidified his conduct as unbecoming. He was clearly drunk, and yet, coherent enough to ascertain whether a supervisor was at the Post.

Dispatcher Russell's testimony was viewed as credible and persuasive. She called Trooper Johnson because the group was becoming unruly. She held no animus toward the Grievant, but merely reported her observations.

The behavior in question was highly offensive when one considers the location of these altercations, a highway patrol post. The Grievant brought two civilians, one under the influence, who had the run of the patrol post. Troopers do not normally "hang out" at the Post while off duty and in a drunken condition. Nothing in the record supports the view that off duty visits are routine.

His behavior did not reinforce the professional reputation of the Patrol. The work rule in question does not require proof that the Grievant brought discredit to the Highway Patrol, nor does it require any "public" knowledge of any discrediting behavior.

The Employer insisted the removal decision was not excessive, but reasonable. The Grievant's disciplinary record (Joint Exhibit 3) discloses a variety of disciplinary actions, both on and off duty.

Attempts to mitigate the penalty were also considered to be unpersuasive. References made to the Grievant's disability were never properly linked to his disciplinary problems. Also, his EAP involvement, on the surface, seems

commendable, but the timing appears suspect. This rehabilitative effort was initiated shortly after the Employer started the administrative investigation.

The Union's Position

The Union opined that the Grievant's conduct did not violate the Last Chance Agreement. The alleged conduct dealt with off duty misbehavior, while the last chance conduct specified inefficiency on duty. Clearly, one could not view the off duty conduct as any same or similar rule violation. As such, the termination was improperly administered.

The charge of inefficiency was frivolous for another reason. The Grievant was placed in a no win situation. Even if the Grievant wanted to complete the disputed form, he could not do so since it was not designed for unofficial testing. If he had made an attempt, he could have been disciplined for wrongfully initiating the attempt or inefficient for having incompletely filling out the form.

Off duty visits to the post were not uncommon. Galilia County is predominantly rural, causing law enforcement personnel to socialize at their own and other facilities. Libby testified she had visited the Post on prior occasions. In fact, the record indicates that off duty breath testing had never been prohibited prior to the incident in question. Others have engaged in similar activity. Sergeant Pride remarked he had heard rumors that other troopers had tested themselves. Trooper Shawn Cunningham testified that he had tested himself at the Post after a social outing with his wife.

The Union argued in the alternative, regarding the conduct unbecoming an officer charge. The alleged misconduct did not "bring discredit to the division and/or any of its members or employees." The public was never informed about the off duty misconduct,

nor was it somehow impacted by the misconduct in question. None of the civilians present, felt their perception of the Patrol was somehow diminished.

The record, moreover, failed to support the charge. Dispatcher Russell's testimony was inconsistent which reduced her credibility. She provided two versions regarding Trooper Johnson's arrival. During the investigation, she remarked that she became concerned and frightened when she realized the Grievant and his entourage were arriving. She called Trooper Johnson to the Post. At the hearing, however, she stated she did not summon Trooper Johnson because of any stated concern, rather she called Trooper Johnson because "Tom wanted to talk to him."

Libby's testimony did not square with the Dispatcher's perceptions and expectations. Libby noted Dispatcher Russell demonstrated no fear or anxiety at the Post. She engaged in friendly banter and failed to demonstrate any fear.

She did, indeed, have a reason to misjudge and overstate the Grievant's conduct. The Grievant had been uncommunicative with her on a prior occasion following a car accident. She also heard rumors that the Grievant intentionally refused to relieve her.

Several mitigating circumstances were introduced in an attempt to modify the proposed penalty. Sergeant Pride noted the Grievant did an excellent job when performing his duties.

The Grievant suffers from Graves disease, which causes restlessness and hyper behavior. He was diagnosed as having this disability in May of 1997, but was medicated improperly until November of 1998. The Employer was properly notified of

the Grievant's condition. This malady caused the Grievant to be placed on disability leave for an extended period of time.

The Grievant has recognized that he has an alcohol problem, which has caused some of his disciplinary problems. As such, he has sought EAP counseling to limit the possibility of future work-related difficulties.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, a complete review of the record including pertinent contract provisions, it is this Arbitrator's opinion that the Grievant did, indeed, violate the Last Chance Agreement (Joint Exhibit 3). As such, his conduct violated "same or similar rules within two years of the date of the signing this agreement." Termination serves as the agreed to result; an outcome supported by the record.

The stipulated issue provides the Arbitrator with a narrow analytical opportunity. It requires an evidentiary determination dealing with the prior rule violation, as specified in the Last Chance Agreement (Joint Exhibit 3), as it relates to the present facts under dispute. Once a determination is made that the Last Chance Agreement (Joint Exhibit 3) was, indeed violated, the parties' stipulated issue precludes any actual just cause analysis. Mitigating and aggravating circumstances cannot be considered because a modified disciplinary outcome has been precluded by the parties' agreements.

Highway Patrol Rules and Regulations 4501:2-6-02(B)(5), Performance of Duty, Inefficiency states in pertinent part:

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> Members who fail to perform their duties because of an error in judgment or otherwise fail to satisfactorily perform a duty, which such member is capable, may be charged with inefficiency.

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(Joint Exhibit 3)

In my opinion, the Grievant's failure to comply with admitted record keeping protocols specified in the BAC Datamaster Operator's Manual, Policy 9-303.09 (Employer Exhibit 4), caused unsatisfactory performance of a duty, which he was clearly capable. The Grievant acknowledged that he was certified as a senior operator on the BAC Datamaster. He was, therefore, well aware of the calibration, operation guidelines and record keeping responsibilities associated with this evidentiary breath testing equipment.

The Grievant's inefficient conduct was engaged in while on duty. Any time a member of this bargaining unit engages the Employer's equipment, while "off duty" at a work location, he/she is faced with the strong possibility of having that behavior, if inappropriate, converted to an act of on duty misconduct. An alternative outcome appears nonsensical; for a variety of improprieties could be veiled by this distinction within this particular fact-pattern. For example, assume a Trooper returns to work while off duty, departs in his/her cruiser without permission, and gets into an accident. The public never becomes aware of the incident, but the Trooper reports the accident to his/her supervisor. Is he/she now somehow insulated from a charge of on duty misconduct because the accident took place off-duty? I think not, and neither should the parties.

The Grievant's conduct, here, is deemed as on duty inefficient behavior. He placed himself in harms way when he came to the Post and decided to operate the evidentiary breath testing equipment. Once he decided to travel down this path, he became obligated to run and document the tests in accordance with acknowledged protocols. A non-trivial requirement when one considers the nature of the equipment, the evidentiary import attached to recorded results, and potential legal ramifications if proper guidelines are not adhered to.

The Union's attempt to place the Grievant in a "no win" situation regarding the record keeping allegation is not viewed as persuasive. The record fails to support any substantial distinction regarding record keeping differences for unofficial testing, official testing, calibration or training purposes. Neither the Grievant, nor any other witness, testified on that proper forms could not be completed under these "personal use" circumstances.

AWARD

The grievance is denied.

6/7/99

Moreland Hills

Dr. David M. Pincus
Arbitrator