ROBERT BROOKINS
LABOR ARBITRATOR ◆ PROFESSOR OF LAW ◆ J.D. ◆ PH. D.

June 30, 1999

Ms. Leslie Jenkins
Arbitrator Scheduler
Division of Human Resources
Office of Collective Bargaining
106 N. High Street, 7th Floor
Columbus, OH 43215-3009

Grievance:	15-00-9901-006-04-01
Grievant:	Brian Hewison
Union:	OSTA
Employer:	Ohio State Highway Patrol

Dear Ms. Jenkins:

Please find the enclosed the Arbitrator's official, notarized opinion and award in the above-referenced matter. Thanks for the opportunity to serve you.

Sincerely,

Robert Brookins

Robert Brookins

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#1379

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
The Ohio Department of Public Safety, Division of State Highway Patrol
-AND-
Ohio State Troopers Association, Unit 1

FOR DIVISION OF STATE HIGHWAY PATROL

RICHARD G. CORBIN, CAPTAIN/ADVOCATE
ROBERT BOOKER, OSP CO-ADVOCATE
HEATHER REESE, OCB OBSERVER
RHONDA BELL, OCB SECOND CHAIR
EDWARD WATERS, SERGEANT
MIKE SHEPARD, DETECTIVE SERGEANT, WITNESS

FOR OSTA

HERSCHEL M. SIGALL, ESQ., ADVOCATE
ROBERT STITT, OSTA PRESIDENT
ELAINE SILVEIRA, OSTA ASSISTANT
BRIAN W. HEWISON, GRIEVANT
ROBIN MASTERS, WITNESS
STEPHANIE CAMPBELL, WITNESS
DOROTHY MASTERS, WITNESS

GRIEVANCE #
15-00-9901-006-04-01

HEARING HELD
APRIL 9, 1999

CASE DECIDED
JUNE 27, 1999

ARBITRATOR: ROBERT BROOKINS, J.D., PH.D.
SUBJECT: REMOVAL—FALSIFICATION, TRUTHFULNESS

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I. Preliminary Statement

A hearing on this matter was held at the Office of Collective Bargaining, in Columbus, Ohio, and before the Undersigned, whom the parties mutually selected from their permanent panel pursuant to the procedures of their Collective-Bargaining Agreement.[1] The hearing began on April 9, 1999 at 9:00 a.m. The parties stipulated that the matter was properly before the Undersigned and presented one issue on the merits as set forth below.

Both parties had a full and fair opportunity to present evidence and arguments in support of their positions in this matter. Specifically, they were permitted to make opening statements, to introduce admissible documentary evidence, to present witnesses who testified under oath, and to cross-examine the opponent's witnesses. Finally, the parties had a full opportunity either to offer closing arguments or to submit post-hearing briefs; they elected the latter.

II The Facts

On August 8, 1994, the Ohio State Highway Patrol, a division of the Ohio Department of Public Safety (OSHP), employed Mr. Brien K. Hewison (the Grievant) as a state trooper. During his approximate five-year tenure there, OSHP disciplined the Grievant four times[2] before terminating him, on January 13, 1999. Specifically, OSHP removed the Grievant for violating Rule 4501-2-6-02(E) (False Statement Truthfulness)[3], alleging that he provided false statements to criminal investigators from the Guernsey County Sheriff's Office during an interview in a criminal investigation (criminal interview).[4] OSHP launched the investigation after Ms. Amanda Ritterbeck accused the Grievant of entering her apartment between 2 and 3:00 a.m., on December 18-19, 1998 and raping her on the floor of her apartment.

Ultimately, the Grievant admitted knowing Ms. Ritterbeck and having consensual sexual intercourse with her on two or three occasions. Yet, he steadfastly denies that he raped Ms. Ritterbeck and offers a

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1 Joint exhibit 1.

2 Joint exhibit 4.

3 Joint exhibit 5 at 7.

4 Joint exhibit 3.

somewhat different account of his interaction with her on the evening of December 18, 1998. He claims that he, Mr. Robin Masters (a close friend) and Stephanie Campbell (Mr. Masters' friend) arrived at the Deer Creek Lounge, in Deer Creek, Ohio between 8:00 and 8:30 p.m., on December 18, 1998. According to the Grievant, Ms. Ritterbeck subsequently approached him and displayed an interest in having sexual relations with him that night. He told her that he did not have his car. She then took him to an open room on the balcony above the dance floor of the Deer Creek Lounge where they had consensual sexual relations on the floor. The Grievant says that, after approximately fifteen to twenty minutes, he and Ms. Ritterbeck rejoined the crowd downstairs in the dance area. Then, according to the Grievant, he and Ms. Ritterbeck parted company and socialized with their respective friends. The Grievant and his friends remained at the Deer Creek Lounge until it closed. Finally, he recalls that he, Mr. Masters, and Ms. Campbell left the lounge together. Ms Campbell then drove the Grievant and Mr. Masters to Mr. Masters' mother's home where the Grievant and Mr. Masters remained until the next day.

After Ms. Ritterbeck reported that the Grievant raped her, the Guernsey County Sheriff's Office (Sheriff's Office) began to investigate her allegations. On December 21, 1998, Detective Mike Shepard, from the Sheriff's Office, telephoned the Grievant and asked him some questions about Ms. Amanda Ritterbeck. The Grievant initially denied knowing Ms. Ritterbeck, but approximately forty-five minutes later he voluntarily reported to the Sheriff's Office to make a voluntary statement. At that time, Detective Shepard gave the Grievant a more detailed description of Ms. Ritterbeck, after which the Grievant said he knew her only as "Mandy." Then, the Grievant offered a voluntary statement describing his relationship with Ms. Ritterbeck.[5]

On or about December 23, 1998, OSHP learned that the Grievant had allegedly raped a former girlfriend (Ms. Ritterbeck) and initiated an administrative investigation to determine the veracity of the allegation.[6] On December 30, 1998, Sergeant E. P. Waters and Staff Lieutenant R. J. Keys conducted an administrative interview with the Grievant, during which the Grievant made statements that contradicted his earlier statements in the criminal interview with Detective Shepard. Those contradictions ultimately caused OSHP to remove the Grievant for violating Rule 4501-2-6-02(E) by making false statements to authorities during a criminal investigation.

The Union challenged the Grievant's removal, the parties were unable to resolve the matter, and selected the Undersigned to determine whether the Grievant was removed for just cause.

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5 Joint exhibit 6.

6 Joint exhibit 4 at 14.

III. THE STIPULATED ISSUE

Did the Employer have just cause to remove the Grievant from his position of state trooper? If not, what shall the remedy be?

IV. SUMMARIES OF PARTIES' ARGUMENTS

A. EMPLOYER'S ARGUMENTS

1. The Grievant intentionally offered false information during a criminal investigation.
2. This type of behavior is wholly unacceptable for a member of OSHP. The Grievant received adequate notice and training regarding the high ethical and moral standards of OSHP.
3. The Grievant was apprised of the existence of a nexus between off-duty misconduct, the image of OSHP, and the impact of off-duty misconduct on OSHP's ability to accomplish its mission.
4. Discharge is the appropriate penalty, given the Grievant's position of trust as a member of the Ohio Highway Patrol.

B. UNION'S ARGUMENTS

1. A central issue in this dispute is whether the Grievant raped Ms. Ritterbeck on December 18, 1998, and evidence presented during the arbitral hearing rebuts that allegation.
2. Beyond the allegation of rape, this dispute becomes merely a matter of a few inconsistent statements on collateral issues, made by a young man trying to defend himself against false allegations of rape while attempting to protect personal off-duty conduct(that he later regretted) from view.
   a. The Grievant gave an inconsistent answer only regarding the collateral issue of how many times he and Ms. Ritterbeck had sex. His skill at limiting his answers to the scope of posed questions is not a proper basis for removal.
   b. The remaining, albeit irrelevant, issues are whether the sex with Ms. Ritterbeck on December 18, 1998 occurred in a room at a motel or in a room above the dance floor and whether the area above the dance floor is reasonably analogous to a room in a motel.
2. The Grievant is free to behave recklessly off duty.
3. The off-duty conduct was private and OSHP violated the Grievant's right to privacy.
4. His prior disciplinary record is "modest at best." In reality, the Grievant was fired because his reckless conduct offended his superiors.

V. Relevant Contractual Provisions

Article 4 – Management's Rights[7]

Accept to the extent modified by this Agreement, the Employer reserves exclusively all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to the following:

* * * *

3. Maintain and improve efficiency and effectiveness of governmental operations;

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[7] Joint exhibit 1.

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5. Suspend, discipline, demote, or discharge for just cause or lay off, transfer, assign, schedule, promote, or retain employees.

Article 19 – Disciplinary Procedure[8]

19.01 standard

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

* * * *

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 Witten 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 an employee's authorization for the withholding of fines from the employee's wages.

VI. EMPLOYER PROMULGATED RULES REGULATIONS[9]

* * * *

4501-2-6-02 PERFORMANCE OF DUTY AND CONDUCT.

(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.

* * * *

(I) Conduct Unbecoming an Officer

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

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

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[8] Joint exhibit 1.

[9] Joint exhibit 4.

VII. CODE OF ETHICS • CODE OF OFFICE • REGULATIONS • OHIO STATE HIGHWAY PATROL[10]

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IX

They [members of the Ohio State Patrol] shall so conduct their private and public life that the public will regard them as examples of stability, fidelity and morality.

VIII. Discussion

A. Status of the Rape Issue in this Dispute

The Union insists that a central issue in this dispute is whether the Grievant raped Ms. Ritterbeck. According to the Union, false allegations of rape are the factual and proximate cause of disciplinary action that subsequently befell the Grievant in this matter. Specifically, the Union correctly contends that OSHP initiated its administrative interview to determine if the Grievant raped Ms. Ritterbeck and not to assess his veracity in the criminal interview with the Sheriff's Office. Also, from the Union's perspective, evidence in the arbitral record establishes that the Grievant could not have raped Ms. Ritterbeck on December 18, 1998 because he was elsewhere when she claimed he raped her in her apartment. Finally, the Union notes that the Grievant had the right not to participate in the criminal interview at all and to decline to volunteer information that might incriminate him. In contrast, the core of OSHP's position is that the Grievant's falsifications during a criminal interview (and not Ms. Ritterbeck's allegation of rape) were the basis for removing the Grievant.

Manifestly, Ms. Ritterbeck's allegation of rape directly triggered both the criminal and administrative investigations and interviews. It is, therefore, reasonable to conclude that but for the allegation of rape, the instant dispute would be nonexistent. In short, the rape allegation factually (and perhaps proximately) triggered this dispute which, in turn, precipitated the Grievant's removal.

Nevertheless, this acknowledgment does not necessarily centralize the issue of rape in this dispute. First, there is no logically discernable link between Ms. Ritterbeck's allegation and the Grievant's subsequent decision to intentionally mislead criminal investigators. At most, the allegation of rape was merely a vehicle for (or a condition precedent to) OSHP's falsification charge against the Grievant, but sequence does not necessarily establish causation. The central issue here is not the veracity of the allegation that Ms. Ritterbeck leveled against the Grievant but the charge on which OSHP relied to remove him. OSHP charged the Grievant with rendering false information in a criminal interview; therefore, OSHP's case must stand or fall

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[10] Joint exhibit 5.

on that charge and no other. The falsification issue is ultimately the outcome determinative issue. Even if preponderant evidence in the record clearly exonerated the Grievant of the rape charge, the falsification charge would remain undiminished and, thus, demand full and independent consideration.

B. Grievant's Veracity During the Interviews

OSHP argues, here, that the Grievant deliberately gave several false statements during his criminal interview with Detective Shepard and Detective Sergeant Davis. The Union, on the other hand, contends that in both the administrative and criminal interviews the Grievant simply and properly limited his answers to what he perceived to be the scope of the questions asked. He attempted to establish that he did not rape Ms. Ritterbeck and to conceal the existence and nature of his private sexual relations with her at the Deer Creek Lounge on December 18, 1998.

Before examining the Grievant's statements in the administrative and criminal interviews, a few observations about the proper standard are indicated. Rule 4501-2-6-02 states that, "[A] member shall not make any false statement, verbal or written, or false claims concerning his/her conduct or the conduct of others." On its face, this rule would seem to condemn falsifications born out of confusion or even honest mistakes. Surely OSHP did not intend for Rule 4501-2-6-02 to cover such mistakes, lest the Rule falls prey to the just cause provision of the Collective-Bargaining Agreement. Even a brief review of arbitral literature reveals that the vast majority of arbitrators look to the materiality of falsifications or misrepresentations to determine if such misconduct is actionable or for just cause.[11] Therefore, in determining whether the Grievant violated Rule 4501-2-6-02, the Arbitrator will determine whether he intentionally falsified or misrepresented a material fact, i.e., a fact that would have influenced the investigation in some significant way.

Careful comparison of the Grievant's statements in the criminal and administrative interview reveals unexplained and virtually inexplicable contradictions in several areas. The discussion below assesses these contradictions and concludes that some of them were material and stemmed from an intent to mislead rather than from some other innocuous reason or purpose.

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[11] *See, e.g.*, Anacona Brass v. UAW, Local 1078, 46 LA 559, 1965) (Altieri, Arb.) (stating, "Certainly not every omission in or falsification of an employment application would justify a subsequent discharge. The nature of the falsification and its continuing materiality to the employment of the individual must be taken into consideration"). Champion Boxed Beef v. United Food and Commercial Workers, Local no. 7, 1991 WL 693145 (Winograd, Arb.) (applying the materiality standard to determine whether the Grievant's falsification of his employment application was material to his ability to work and "whether the facts which Grievant failed to disclose were relevant to the Company's decision to terminate his employment"); Friedrich Air Conditioning And Refrigeration Co. v. Int Union of Electrical Workers, Local 780, 94 Lab. Arb. (BNA) 249 (March 20, 1990) (Nicholas, Arb.) (Relying on the materiality standard to determine discipline was justified where the Grievant withheld information about a prior back injury.)

1. When Did the Grievant Last Have Sex with Ms. Ritterbeck?

Here, the Grievant literally "digs a hole" for himself. During the criminal interview, Detective Sergeant Davis asked the Grievant, "When was the *last time* you had sex with her [Ms. Ritterbeck], rough idea." The Grievant answered, "Last month or so. . . . It would have been last month because I don't remember being down at Deer Creek during December. . . ."[12] Yet, on December 30, during the administrative interview, the Grievant unequivocally admitted to Sergeant Waters that he had sexual relations with Ms. Ritterbeck in the Deer Creek Lounge on December 18, 1998.[13] In other words, the Grievant had actually engaged in sex with Ms. Ritterbeck merely three days before he told Detective Sergeant Davis that he last had sex with Ms. Ritterbeck in November 1998. Moreover, during the administrative interview, the Grievant recalled many details about the December 18 sexual episode. His detailed recollection tends to enhance the credibility of that answer relative to the answer he gave in the criminal interview.

Finally, a DNA test was performed on a vaginal swab taken from Ms. Ritterbeck shortly after the alleged rape. The DNA test was positive, thereby affording some basis for inferring that the Grievant and Ms. Ritterbeck had engaged in sexual intercourse around the time of the alleged rape. Although the positive test results do not establish exactly where, when, or how the Grievant and Ms. Ritterbeck had sex or whether it was consensual, the results clearly indicate that November 1998 was not the last time he and Ms. Ritterbeck had sexual intercourse.

Another question is whether the Grievant deliberately offered the false answer. Absent some acceptable or reasonable explanation for the Grievant's answer, the Arbitrator must conclude that the Grievant intended to mislead Detective Sergeant Davis regarding the last time the Grievant had sex with Ms. Ritterbeck. Unfortunately, the arbitral record is bereft of acceptable explanations for the Grievant's representation on this point in the criminal interview. First, nothing before or during the Grievant's exchange with Detective Sergeant Davis could reasonably have caused the Grievant to believe that Detective Sergeant Davis' question focused only on times prior to December 18. The question was sufficiently broad to encompass sex acts that occurred one hour (let alone three days) before the criminal interview. It is difficult to understand how any one of ordinary intelligence could have misunderstood the scope of the question, "when was the last time you had sex with her?" The scope is clear and the question, simple and direct. As the Union concedes, during the criminal interview, the Grievant was obliged to answer only the questions asked. In this instance, he flagrantly circumvented that obligation with an answer that is simply

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[12] Joint exhibit 6 at 3.

[13] Joint exhibit 7 at 8.

irreconcilable with his answer in the administrative interview. As a result, the Arbitrator finds that the Grievant intentionally gave false information during a criminal investigation.

Furthermore, the misrepresentation pertained to a material fact. One need not tarry on this point. The factor that triggered the criminal interview in the first instance was that the Grievant allegedly raped Ms. Ritterbeck. Consequently, few facts could be more material to the investigation than when the Grievant last had sexual relations with her.

2. Where the Grievant Last had Sex with Ms. Ritterbeck

Detective Sergeant Davis asked the Grievant, "where was the last time you had sex with her [Ms. Ritterbeck] at?" The Grievant answered, "that was in my car." Yet, during the administrative interview, he admitted having sex with Ms. Ritterbeck, on December 18, 1998, in an open balcony above the dance floor in the Deer Creek Lounge. The question that Detective Sergeant Davis asked the Grievant was simple and straightforward. Only an unduly cramped interpretation would limit the scope of that question to the period before December 18. Nor was there semantic confusion involving synonyms, as when the Grievant was asked about his last date with Ms. Ritterbeck. [14]

The Grievant's contradictions raise at least two difficulties. First, it offends logic and common sense to think that he forgot that he had Employer exhibit with Ms. Ritterbeck on December 18, in the Deer Creek Lounge. Second, the Grievant's answers to subsequent questions, during the criminal interview, establish that he was indeed well aware of his December 18 intimacy with Ms. Ritterbeck when he stated that he last had sex with her in his car. Detective Shepard asked him, "Have you talked to her at all since then [late November]?" The Grievant said, "No, Just . . . Just . . . I see her at Deer Creek Friday night . . . . She said she was there with her . . . guy she's seeing best friend, so she told them that I was her cousin." The Grievant clearly recalled: (1) seeing Ms. Ritterbeck at the Deer Creek Lounge on December 18; (2) who accompanied her there; (3) and her description of her relationship with that person. Given this fact, it is entirely reasonable to conclude that he remembered having had sex with her on December 18 in the Deer Creek Lounge. Yet, equipped with this knowledge and confronted with Detective Sergeant Davis's open-ended, straightforward question, the Grievant failed to mention the December 18 sexual interaction. Such affirmative concealment of a fact clearly bracketed by a criminal investigator's question is simply untenable. Again, one is left with the virtually inescapable conclusion that the Grievant's claim that he last had sex with Ms. Ritterbeck in his car was a deliberate attempt to mislead Detective Sergeant Davis on this point. Finally, this fact misrepresented the date and time of their last sexual intercourse, which is undeniably material to the object

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[14] *See infra* p. 13-14.

of the criminal investigation—determining whether sufficient evidence existed to charge the Grievant with raping his former sex partner.

The location of their last sexual encounter is or could be a critical piece to the "puzzle." Determining that the Grievant last had sex with Ms. Ritterbeck in his car a month ago might very well focus the investigation in a different direction than determining that the last sexual intercourse occurred in the Deer Creek Lounge on the evening of the alleged rape. The direction of the investigation might, in turn, at least influence—if not outright determine—its length, success, or both.

3. Where, in the Deer Creek Lounge, Did the Grievant and Ms. Ritterbeck Have Sex on December 18, 1998?

Here the issue is whether the Grievant and Ms. Ritterbeck had sex in a private room, on December 18, 1998. During the administrative interview, Sergeant Waters asked the Grievant, "Did you have sex with her inside the bar?" The Grievant answered, "No. A Room." Staff Lieutenant Keys then asked, "In that Hotel?" The Grievant answered, "Yeah, there's a hotel room. Hotel and everything there." A few more questions and answers established that the Grievant had sex twice in the Deer Creek Lounge with Ms. Ritterbeck: once in a hotel room two months earlier (approximately October 21, 1998) and once on December 18, 1998. Then Sergeant Waters asks, "And what time did you have sex with her?" The Grievant answered, "It was probably about . . . I'm gonna say between 12 and 1, somewhere in that area. . . ." At this point, the Grievant volunteered that the December 18 sexual intercourse occurred "in a *private room*" where Ms. Ritterbeck took him.

This revelation triggered more probing questions from Staff Lieutenant Keys: "Who's (sic) private room were you in?" The Grievant explained, "Its just a . . . it's just a private room, like you get a room upstairs. A few questions and answers later, the Grievant admitted, "It's uh . . . it's upstairs. It's just a big room upstairs. Staff Lieutenant Keys then asked, "It's not a hotel room then, you're saying?" The Grievant says, "Right. Its just a big room." After several more probing questions and answers, the Grievant admitted, "there's no door on . . . [the room]. It's upstairs. You just walk up steps." Sergeant Waters asked, "So anyone else coulda walked in and. . . ." The Grievant said, "Yeah, anybody could come up."

It is not clear that the Grievant intentionally misrepresented the character of the room. Characterizing the room as "private" was not entirely erroneous. Being upstairs and above the dance-floor, the room afforded some degree of privacy or seclusion away from the crowd, although less than what most might desire for sexual relations. Thus, no clear and convincing evidence establishes that the Grievant intended to misrepresent the truth or flatly misrepresented it on this point. Instead, he apparently tried to exaggerate the degree of privacy that the room afforded, probably to spare himself the inevitable

embarrassment of revealing where and how he and Ms. Ritterbeck had sex.

Nevertheless, one should note that he was unduly evasive in an administrative interview where he lacked the right to limit his answers as he might have in a criminal interview. But for their ever-sharper, probing questions, the administrative investigators would not have extracted what may be the unvarnished truth from the Grievant on this point.

Finally, regarding the materiality of any misrepresentation the Grievant might have made here, it is unclear how the degree of privacy of the room in which the sexual relation occurred advances a determination of whether the Grievant raped Ms. Ritterbeck. The lack of an obvious nexus between these two factors obliges the Arbitrator to find that even if the Grievant had intentionally and wholly misrepresented the degree of privacy in the room, that misrepresentation would not necessarily have been obviously material in this particular instance.

4. The Number of Times the Grievant and Ms. Ritterbeck had Sex

During the criminal interview, Detective Shepard asked the Grievant, "You dated her before?" The Grievant said, "Yeah, I seen her probably two other times prior to that." Since an earlier line of questioning focused on where the Grievant was on December 18, 1998, the phrase "prior to that" presumably refers to December 18, when the Grievant was at the Deer Creek Lounge. Next, Detective Shepard asked, "Okay, during those dates did you have sex with her?" The Grievant answered, "Yes." And Detective Shepard asked, "both times?" The Grievant said, "yes." Later, during the same interview, the Grievant said he last had sex with Ms. Ritterbeck in his car.

In contrast, during the administrative interview, he admitted that he had sex with Ms. Ritterbeck twice. Thus, Sergeant Waters asked, "What did you have sex with her in the bar?" The Grievant said, "no a room." Staff Lieutenant Keys then asked, "When did that occur?" The Grievant said, "A couple of months ago." Later the Grievant admitted that he had sex with Ms. Ritterbeck a second time on December 18, 1998 on the upstairs balcony floor of the Deer Creek Lounge. These passages establish that the Grievant had sex with Ms. Ritterbeck three times: twice in the Deer Creek Lounge and once in his car. Yet, he told Detective Shepard that he had sex only twice with Ms. Ritterbeck.

It is unlikely that, during the criminal interview, the Grievant forgot that he had sex with Ms. Ritterbeck on the balcony floor and that, during the administrative interview, he could not recall having had sexual intercourse with her in his car. The probability that he forgot that he had sexual relations with Ms. Ritterbeck on either of those occasions is slim to none; the probability that he forgot the December 18 episode during the criminal interview and the episode in his car during the administrative interview also taxes credulity. Moreover, unlike the issue of how much seclusion constitutes "privacy," there is no interpretative

leeway here.[15] Of course one could imagine a situation in which sexual intercourse had occurred so many times that one could not reasonably be expected to keep track. That, however, is not this case. The Grievant had sexual intercourse with Ms. Ritterbeck either two or three times, and nothing in the record suggests why he have difficulty recalling exactly how many. These facts and reasoning persuade the Arbitrator that, at least in the criminal interview, the Grievant intentionally misrepresented the number of times he had sex with Ms. Ritterbeck.

The materiality of this misrepresented fact to the purpose of the criminal investigation is also relatively clear. Either understating or overstating the number of times that sexual intercourse occurred between the Grievant and Ms. Ritterbeck could respectively narrow or broaden the scope of the investigation, though it would not necessarily be probative of the allegation of rape. Also, this type of misrepresentation could affect the length of the investigation and, hence, the resources expended therein.

5. Whether the Grievant Ever "Dated" Ms. Ritterbeck

Detective Shepard asked the Grievant, "Okay, how serious were you with Amanda? The Grievant answered, "It wasn't serious, just dates." The Grievant elected to use the term "dates." Moreover, it is clear from the interchanges between Detective Shepard and the Grievant that Detective Shepard relied on the Grievant's representation that he had dated Ms. Ritterbeck. For example, Detective Shepard later asked, "[I]f you haven't . . . *dated* her since late November. . . .?"[16] During the subsequent administrative interview, Staff Lieutenant Keys asked the Grievant, "Did . . . um, you never took her out on a date?" The Grievant, in rather stark contrast, answered, "No, no dates." Furthermore, he then emphasized his answer by saying, "Yes I had sex with her; but no dates."[17] The question here is whether one can reasonably reconcile the apparently different statements "It wasn't serious, just dates" with "No, no dates." One can reasonably interpret the question "You never *took her out* on a date" to mean has the Grievant ever had an engagement with Ms. Ritterbeck to go out together socially.[18] The record does not show that he had such an engagement. Instead, he had sex with Ms. Ritterbeck in his car, in a hotel in the Deer Creek Lounge, and on the balcony floor of

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[15] *See supra* p. 1.

[16] (Emphasis added).

[17] Joint exhibit 7 at 6.

[18] A "date" is traditionally defined as, "An appointment, especially an engagement to go out socially with a member of the opposite sex. . . ." The AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 475 (3rd ed. 1973).

that lounge. So, in the strict sense of the term "date," the Grievant never dated Ms. Ritterbeck.[19]

That explains his answer to Sergeant Waters' question, but not necessarily his answer to Detective Shepard's. Can one reasonably construe any of the Grievant's sexual encounters with Ms. Ritterbeck to be "dates?" Certainly they are not "dates" in the traditional sense.[20] Nevertheless, reasonable minds could differ as to whether purely sexual encounters fall within the semantic perimeters of a "date." Although the Grievant's contradiction in this respect is puzzling and, together with other stumbles, may present some cumulative difficulty for his credibility, a comparison of the statements and the context in which they were given does not clearly and convincingly reflect an intent to deceive. Because OSHP has the burden of proof, the Grievant should receive the benefit of the doubt in instances like this. Therefore, the Arbitrator concludes that the Grievant did not intend to give a false statement in this instance. Although there is a conceivable link, it is not entirely clear how an accurate determination of whether the Grievant and Ms. Ritterbeck had traditional dates will further the success of the criminal investigation.[21]

6. Whether the Grievant Drove Ms. Ritterbeck Home

During both the criminal and administrative interviews, the Grievant mentioned that he, Mr. Masters, and another individual drove Ms. Ritterbeck to her apartment and let her out there in the parking lot. The issue is whether the Grievant drove the vehicle that took Ms. Ritterbeck to her apartment. In this respect, Detective Shepard asked the Grievant, "Brian have you ever been to her place, to her apartment?" The Grievant said, "Not inside. . . . but I know we dropped her off out front. *I wasn't driving.*"[22] Subsequently, in the administrative interview, however, Staff Lieutenant Keys asked the Grievant, "So you left the bar, being Deer Creek?" The Grievant answered, "Yeah. A couple months ago." Then Staff Lieutenant Keys asked, "A couple months ago and took uh, Mandy home?" The Grievant said, "Yeah." Keys asked, "Were you driving?" This time the Grievant answered, "Yeah." Staff Lieutenant Keys then asked "What were you driving?" The Grievant answered, "My car, my Mustang. Yellow 94' Mustang."

Although the Grievant was forthright about having taken Ms. Ritterbeck home, the clarity of his recollection in the subsequent administrative interview sharply contrasts with that in the earlier criminal interview. Furthermore, nothing in the record explains either the existence of the opposing responses or the

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19 *See supra* note 13.

20 *See supra* note 14.

21 The vexing rise in the number of "date rapes" only emphasizes this point. Rapes can and do occur irrespective of whether the victim was on a date with her rapist.

22 (emphasis added).

depth of the Grievants recalled in the administrative interview as compared to that in the criminal interview where he simply denied driving Ms. Ritterbeck home. The clarity with which the Grievant recalled driving Ms. Ritterbeck home on December 30, 1998 precludes the Arbitrator from concluding that he was somehow unaware of that fact, during the criminal interview on December 21. Thus, the finding here is that the Grievant intentionally misrepresented a fact when he denied having driven Ms. Ritterbeck home.

The materiality of this misrepresented fact is weak, however. The alleged rape occurred at least a week or more after the Grievant drove Ms. Ritterbeck to her apartment. It is difficult to understand how knowledge of whether the Grievant actually drove the car that evening would assist the investigation. The Arbitrator, therefore, holds that whether the Grievant drove the car is not readily material to the success of the criminal investigation.

7. Whether the Grievant Left Deer Creek Lounge with Ms. Ritterbeck Other than to Drive Her Home.

In the administrative interview, Sergeant Waters asked the Grievant, " did you ever leave the bar with her at any time?" The Grievant responded, "On which night?" Sergeant Waters clarified, "at any time uh, during your friendship/relationship with her?" The Grievant replied, "One time, I d . . . we dropped her off at her house . . . or at her apartment in the parking lot." In contrast, during the criminal interview, Detective Sergeant Davis asked him, "Where was the last time you had sex with her at?" The Grievant responded, "That was in my car."

Absent another reasonable explanation, which is not apparent in the record, one can safely conclude that the Grievant must have left the bar when he had sex with Ms. Ritterbeck in his automobile. It simply cannot be that the Grievant took Ms. Ritterbeck home on one occasion, had sex with her in his car on another occasion, and, yet, left Deer Creek Lounge with her only once. The record reveals nothing ambiguous about Sergeant Waters' question, the surrounding circumstances or what is meant by "in the Deer Creek Lounge." In fact, based on the record, this is another either/or situation: the Grievant either left the bar to have sex in his automobile with Ms. Ritterbeck, or he did not. Nor does the record offer justification for (or the reason that), on December 12, the Grievant would recall having sex in his car but forget about it on December 30. Obviously, he might have been embarrassed to inform his colleagues that he had sex in his car outside of a lounge. Yet, while embarrassment alone might be a reason, it is hardly an excuse or justification for misrepresenting a fact. The record does not reveal whether the Grievant actually had sex in his car with Ms. Ritterbeck. However, he said he did and later neglected to mention it. The sensible and logical conclusion is that the Grievant did not forget, but simply intended to mislead either the criminal or the administrative investigators, or both, on this point. The foregoing discussion reveals that the Grievant intentionally misrepresented several material facts during the criminal interview with Detective Shepard and Detective

Sergeant Davis.

C. Off-Duty Misconduct as the Basis for Removing the Grievant

The Union argues that OSHP wrongfully disciplined the Grievant for private, off-duty misconduct without linking thatmisconduct to the Grievant's job performance. Although this argument has other problems, it implicitly questions whether OSHP has just cause to discipline the Grievant for off-duty misconduct that has not specifically undermined his job performance.

OSHP has that authority. Arbitrators have long held that employers lack just cause to discipline an employee for misconduct on his own time and off the employer's premises, unless there is a nexus linking the off-duty misconduct to the employer's business interests or operations.[23] The impact of themisconduct upon the employer's business interest may be actual or may have created a discernible risk to the business interests. Thus, employers need not stay their disciplinary hand until an employee's misconduct actually subverts their business interests. "Business interest" can include an agency's reputation, the morale or well-being of its employees, a Grievant's ability to perform his regular duties, or any other significant aspect of an employer's business interest or mission.[24] Therefore, contrary to the implications of the Union's argument, the "business interest" to which an employee's misconduct is linked need not be the employee's specific job performance.

An even more fundamental fatal flaw in the Union's argument is that the off-duty misconduct for which the Grievant was disciplined was his "reckless" sexual conduct with Ms. Ritterbeck. OSHP officially charged the Grievant with giving false information during a criminal investigation and not with off-duty, "reckless" sexual conduct. Consequently, this aspect of the Union's argument is wide of the mark.

If, on the other hand, the Union is suggesting that the Grievant's misrepresentations during the interviews constitute the off-duty misconduct for which there is either no (or an insufficient) nexus, the Arbitrator still disagrees. The Union urges that because the record does not establish that the Grievant's off-duty misconduct has actually compromised his job performance, OSHP failed to establish the requisite nexus needed to show just cause for removing the Grievant.

In this case, the Union's argues for the application of an unduly attenuated nexus. OSHP need not demonstrate an actual diminution in the Grievant's job performance to establish the requisite nexus where both commonsense and logic strongly suggest that the established misconduct is very likely to adversely

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[23] Conoco, Inc. v. Oil, Chemical and Atomic Workers Intl., Local 4-555, FMCS NO. 96-20968-6 1997, WL 177796 (February 7, 1997)(Howell, Arb.).

[24] *See, e.g.,* Conoco, Inc. v. Oil, Chemical And Atomic Workers Intl Union, Local 4-555, 1997 WL177796 (Howell, Arb.) (Stating, "If the employer's reputation is harmed, if other employees are reluctant or unable to work with the disciplined employee, if the employee cannot continue to perform his/her duties or if other injurious effects befall the employer then the employer is usually held to be able to invoke discipline").

affect the Grievant's future job performance, even if it has not presently done so. In fact, OSHP correctly points out the requirement that state troopers display a high degree of moral and ethical integrity at all times, a requirement which comes with the position. One needs little foresight to predict future prosecutorial reluctance to put the Grievant on witness stands where probing cross-examinations (with or without discovery of his personnel files) are very likely either to force the Grievant to perjure himself or to reveal fissures in his veracity and character. The only alternative would be to avoid having him testify, which will affect his ability to execute a job requirement and, thus, reduce his usefulness as an employee. Nor does it help, in this case, to stress that eventually everyone makes false statements to some degree about something. Given the nature of their positions, state troopers do not have that luxury in official criminal investigations.

Even without a nexus between the Grievant's future job performance and his misrepresentations, the record establishes a sufficient nexus between his lack of veracity in an official investigation and the ability of OSHP to accomplish parts of its mission. First, knowing retention of a trooper who has offered false statements in a criminal investigation is unlikely to engender and preserve public trust in OSHP. Yet OSHP needs that trust in order to efficiently and effectively accomplish certain aspects of its mission. Moreover, OSHP must have confidence in the integrity and veracity of its state troopers. However, the Grievant's behavior during the criminal interview is inconsistent with trust, confidence or respect, especially if the Grievant happens to have a vested interest in an outcome associated with a particular issue? Clearly the continued employment of employees who have substantially compromised (if not destroyed) their credibility both in and out of court does not help OSHP to accomplish any aspect of its mission.

Also, proper notice is not a problem here for OSHP. The record reveals that OSHP fully apprised the Grievant of its professional and ethical standards[25] and of the nexus between off-duty misconduct and the requirements of the Grievant's position as a state trooper.[26] Furthermore, during the arbitral hearing, the Grievant acknowledged having received this training. Therefore, in the instant case, whether the Grievant's misrepresentation of material facts occurred while he was either off duty or on duty does not affect the just-cause component of the disciplinary decision.

Finally, the Arbitrator must consider the Union's point that the Grievant need not have participated in the criminal interview if he wished not to do so. The Grievant's decision to participate in the criminal interview has absolutely no relationship to his duty, as a state trooper, to be truthful, once he decided to participate therein. The duty to be honest and truthful stems from his position as a state trooper who is subject to Rule 4501-2-6-02(E).

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[25] Joint exhibit 4.

[26] Employer exhibit 2.

D. The Grievant's Constitutional Right to Privacy

The Union also argues that OSHP violated the Grievant's constitutional right to privacy. However, the Union offered no standards by which to judge where the Grievant's privacy rights begin and his professional responsibilities end. Presumably, the subject matter of the privacy rights to which the Union refers is the Grievant's sexual relationship with Ms. Ritterbeck. As pointed out earlier, however, OSHP did not discipline the Grievant for where, when, or how he had sex with Ms. Ritterbeck. OSHP disciplined him for being untruthful in a criminal interview about his relationship (sexual or otherwise) with Ms. Ritterbeck. Since the sexual relations are not a basis for the discipline, the Grievant's right to privacy regarding those relations is largely irrelevant. Therefore, the Arbitrator can find no merit in the Union's argument on this point.

Secondarily, even if the Grievant's constitutional right to privacy was a legitimate issue in this dispute, it is not clear OSHP violated that right. Generally, one has a constitutional right to privacy only where there is a reasonable expectation of privacy in the first instance.[27] At least two reasons militate against the proposition that the Grievant had a reasonable expectation of privacy regarding his sexual relations with Ms. Ritterbeck. First, her allegations of rape placed their sexual encounters squarely under the cross hairs of a criminal investigation in which the Grievant was the prime suspect. Consequently, Ms. Ritterbeck effectively lifted the veil of privacy that would ordinarily envelop those activities, both for her as the victim and for the Grievant as the accused. Second, it is at least debatable that one has a reasonable expectation of privacy while having sexual intercourse either in a car outside of a lounge or on the floor of an open, upstairs room in the Deer Creek Lounge.

E. OSHP's Duty to Advise the Grievant of His Rights During an Administrative Interview

Here, the Union argues that OSHP had a duty to advise the Grievant of his rights before subjecting him to an administrative interview. But the Union does not specify the rights of which the Grievant allegedly should have been apprised. Nor are there any guidelines in the arbitral record that establish the dimensions of such a duty on the part of OSHP. This is not to say that such a duty does not exist. However, without guidance in determining the scope or perimeters of the alleged duty or the corresponding right, the Arbitrator is unable to address it in this case.

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[27] *See, e.g.,* Minnesota v. Carter, 119 Sup. Ct 469, 479 (Dec 1, 1998) (stating, "The settled rule is that the requisite connection is an *expectation of privacy* that society recognizes as *reasonable*. The application of that rule involves consideration of the *kind of place* in which the individual claims the privacy interest and what expectations of privacy are *traditional* and *well recognized*." (Kennedy, J., concurring) (citing Katz v. United States, 389 U.S. 347, 360 (1967)) (emphasis added); and O'Connor v. Ortega, 107 Sup. Ct. 1493, 1493 (1987) (generally embracing the "reasonable expectation" standard and stating, "Given the great variety of environments in the public sector, the question whether an employee has a *reasonable expectation* of privacy must be addressed on a case-by-case basis") (emphasis added).

F. Penalty Assessment

Evidence in the record clearly and convincingly establishes that the Grievant, a state trooper, intentionally gave false information to investigators during a criminal interview, and act which violates Rule 4501-2-6-02(E) of OSHP's standards of conduct for state troopers. As a result, some measure of discipline is warranted. The remaining issue is whether removal is a proper measure of discipline under the facts of this case or is overkill and, thus, arbitrary, capricious or unreasonable. In other words, was the Grievant removed for just cause? In assessing this issue, the Arbitrator must examine the mitigating and aggravating circumstances in this dispute.

1. Mitigating Circumstances

The most salient mitigating circumstance is the Grievant's approximately five-year tenure with OSHP. Also, the Union emphasized the Grievant's youth, presumably implying that he needs time to mature into a less "reckless," level-headed individual of sound and sober judgement. The difficulty is that this observation applies more to the circumstances under which the Grievant and Ms. Ritterbeck had sex, which, as discussed above, were not the basis for disciplining the Grievant in the first instance. Neither reason nor evidence in the record suggests how the Grievant's youth somehow factored into his decision to deliberately misrepresent material facts in a criminal interview. Even if his youth were a factor in that decision, youth would not be a proper basis for either forgiving or discounting a state trooper's intentionally misrepresenting material facts in an official investigation. Any leeway normally afforded to youth must, in this case, yield to the nature of the Grievant's position and accompanying responsibilities. Because he was a law enforcement officer, OSHP had reason to hold him to the standard reflected in Rule 4501-2-6-02(E).

2. Aggravating Circumstances

The aggravating circumstances include the nature of the Grievant's misconduct in this case and the type of disciplinary record he has accumulated during his tenure with OSHP. Enough has been said throughout this opinion to clarify that the Grievant's misrepresentations of material facts were intentional, untenable, and very likely inimical to his ability to perform certain duties in the future. Beyond that, as a general proposition, hismisconduct has eroded OSHP's confidence in his ability to serve as a state trooper.

The Grievant's disciplinary record is unflattering to say the least, having been disciplined on four other separate occasions during his approximate five-year tenure with OSHP. Following is a list of the measures of discipline imposed, the reasons therefor, the dates of imposition, and the nature of the underlying misconduct.

Date Discipline Imposed	Measure of Discipline Imposed	Formal Violation	Nature of Incident
September 15, 1998	Verbal Reprimand	Preventable Patrol Vehicle Crash	Backed SP767 into a pole in parking lot.
May 11, 1998	Written Reprimand	Off-Duty Conduct: Discredit to Division	Made threatening remarks at crash scene while off duty.
November 21, 1997	Three-day Suspension	Off-Duty Conduct: Discredit to Division	Made remarks about a police department during a disturbance at an establishment.
July 24, 1997	Written Reprimand	Off-Duty Conduct: Discredit to Division	Alleged to have made menacing threats to another person.

There is no doubt but that the Grievant has failed to contour his off-duty misconduct as OSHP requires for state troopers. Nor is there any doubt that OSHP has progressively disciplined the Grievant in an effort to rehabilitate him in this area. Adding even more weight to this aspect of the Grievant's disciplinary record is that, in the instant case, the off-duty misconduct is at least as serious as that described in the chart above, suggesting a certain immunity to progressive discipline. Removal in this case is, therefore, neither arbitrary, capricious, nor unreasonable. As regrettable as it is to uphold a termination of a young man with what could have been a promising career in public service, under these circumstances, the Arbitrator has little choice but to uphold the removal as being for just cause.

X. The Award

For all of the foregoing reasons, the grievance is hereby **DENIED**.

Notary Certificate

State of Indiana)

)SS:

County of Marion

Before me the undersigned, Notary Public for Marion County, State of Indiana, personally appeared Robert Brookins, and acknowledged the execution of this instrument this 26 day of June, 1999.

Signature of Notary Public: Kimberly R Relford

Printed Name of Notary Public: Kimberly Relford

My commission expires: April 22, 2000

County of Residency: Marion

Robert Brookins

Robert Brookins, Labor Arbitrator