

#1440

**STATE OF OHIO
VOLUNTARY LABOR ARBITRATION PROCEEDING**

In The Matter of Arbitration Between:

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

EMPLOYER,

and

OHIO STATE TROOPERS ASSOCIATION,

UNION.

**GRIEVANT: BRIAN W. COURTNEY (DISCHARGE)
GRIEVANCE NO.: 15-00-000112-0008-04-01**

**Arbitrator's Opinion and Award
Arbitrator: Dr. David M. Pincus
Date: May 22, 2000**

Appearances

**For the Employer
Staff Lt. Robert L. Young**

**Position
Human Resources**

**For the Union
Herschel M. Sigall**

Attorney

I. Joint Statement of the Issue

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

II. Introduction

This is a proceeding pursuant to a negotiated grievance procedure in a labor agreement executed between the Ohio Department of Public Safety, Division of the Ohio Highway Patrol (the Employer), and the Ohio State Troopers Association, Inc. (the Union). 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. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing briefs. The parties have submitted post-hearing briefs in accordance with the guidelines agreed to at the hearing.

III. Pertinent Provisions

Contract Clauses

19.05 Progressive Discipline

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.

Work Rules

4501:2-6-02 Performance of Duty and Conduct

(E) False statements, truthfulness.

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

IV. Case History

The grievant, Brian W. Courtney, has been a state trooper for approximately eight years. He had been a dog handler for the past six years. As a dog handler, the grievant worked with a traffic drug interaction team (TDI team). The TDI team consists of a dog handler, two road troopers, and a sergeant. The TDI team is an acute awareness patrol regarding transportation of drugs on Ohio highways.

On November 4, 1999, Trooper Tracy Arnold, the grievant's partner, clocked a Ford SUV traveling at 72 m.p.h. in a 65 m.p.h. zone on I-75. Trooper Arnold and the grievant were working as a TDI team together that day. The grievant pulled over the SUV, which was occupied by three young black men.

Upon approaching the vehicle, the grievant smelled a strong odor of burnt marijuana. He knew then that he would be conducting a search of the vehicle for drugs. Because his patrol vehicle did not have a back seat available for the suspects, the grievant waited for Trooper Arnold to pull up and he put the suspects in the back of her vehicle.

After the suspects were secured in Trooper Arnold's vehicle, the grievant hand searched the vehicle and discovered small traces of marijuana, in addition to what appeared to be twenty thousand dollars worth of counterfeit payroll checks. The grievant was then called away

momentarily to have his dog check another car that had been stopped on I-75. He returned back to the scene with Trooper Arnold and the SUV within about ten minutes.

Upon arriving at the scene the second time, the grievant elected to walk his drug sniffing dog around to "give the dog credit", so that the dog could be cited as having been utilized in the stop and arrest. On the videotape in Trooper Arnold's car, the grievant can be heard discussing that his dog "Bear" might find some drugs and get credit.

The grievant walked Bear around the car and the dog did "alert" to the marijuana, but no additional marijuana or other drugs were found. The grievant's dog handlers report form lists that his dog was utilized. The grievant did not directly indicate that his dog alerted him to the marijuana and that the dog was the probable cause for the search.

Before the incident ended, two other members of the TDI team, Trooper Beatty and Sergeant Stidham, arrived. Sergeant Stidham noted that the odor of marijuana was still strong when he approached the SUV. Neither the grievant nor Trooper Arnold made any statement to Sergeant Stidham that the events were other than the grievant smelling the burnt marijuana and searching the vehicle on that basis for probable cause.

Trooper Arnold arrested the subjects and transported them to the Toledo Highway Patrol post. She telephoned her sergeant to secure the number of the Treasury Department. The Treasury Department had been suggested by the patrol at a recent inservice training session as a potential avenue to prosecute counterfeit money or counterfeit check cases. Trooper Arnold had very limited experience with working with the Secret Service and the grievant had no prior interaction with them.

Trooper Arnold ultimately contacted Secret Service Agent, Gary Bianchi, to assist with the investigation. Trooper Arnold and the grievant met Bianchi at the Toledo Patrol post.

Agent Bianchi was substantially older than the grievant or Trooper Arnold, and his swagger was forceful, confident and aggressive. Bianchi walked into the post using profanity and declaring that the suspects' "asses were his." He asked that the suspects be cuffed because someone named Rico had "dropped a dime" on them. Later, when the grievant asked Bianchi about Rico, Bianchi said that he had made up the story to secure a confession.

Bianchi asked the grievant to review the events of the stop and search. He did so in the presence of Trooper Arnold, who had already related the events of the stop and search to Bianchi. The grievant told Bianchi that he stopped the vehicle, smelled the burnt marijuana, and searched the vehicle.

Bianchi, in a tone of voice inflecting the solicitation of an acknowledgment, asked the grievant, "You walked the dog first, right?" The grievant answered, "No, I walked the dog after." Bianchi again stated, in a solicitous tone, "You walked the dog first, right?" The grievant again answered, "No." Bianchi persisted, and the grievant ultimately responded that yes he had walked the dog first.

As a result of the grievant's response to Bianchi, and with Trooper Arnold's knowledge, Sergeant Stidham issued an official statewide teletype that related the events of the day in sequence as, "stop ... dog utilized...dog alerted...search." Later, Trooper Arnold directly issued a case narrative in which she released the same sequence of "stop...dog utilized...dog alerted...search."

Approximately a month after Bianchi's investigation, Trooper Arnold and the grievant attended a meeting with the United States attorney, Tom Secor, regarding prosecuting the suspects. Mr. Secor had several problems with litigating the case. One of the main problems was a conflict in the use of the dog for probable cause. Bianchi's affidavit of his interview of the grievant indicated that the dog was used to determine probable cause. Trooper Arnold's report of the investigation, however, indicates that the dog was used subsequent to the probable cause search.

Mr. Secor had also reviewed the videotape of the incident where the grievant is heard asking Trooper Arnold if he should walk his dog Bear to give him credit. Mr. Secor thus asked the grievant if the dog was walked once or twice. The grievant responded that he walked the dog twice.

At this point, the grievant apparently became concerned about his conflicting statements about the dog. He knew he said that the dog was walked twice, even though that was not true. In addition, the grievant was now aware that he was on videotape discussing credit for his dog after the search had been made.

Concerned about the conflicts in his statements, the grievant telephoned Trooper Arnold, who was attending inservice training at the State Trooper Academy. Upon contacting Trooper Arnold, in an attempt to confirm his story about the use of the dog, and in much the same leading way as Bianchi had led him during his interview, the grievant asked Arnold, "I told him that I utilized the dog beforehand?" Trooper Arnold responded in the affirmative. The grievant then asked Trooper Arnold, "We're on the same page, right?" Trooper Arnold indicated that she understood.

The grievant's apparent purpose in contacting Trooper Arnold was to cover any questions by Sergeant Stidham of Trooper Arnold regarding the discrepancies in the grievant's use of the dog.

The suspects were never prosecuted and were released. Mr. Secor's decision not to prosecute the suspects, however, was not based on the grievant's inconsistencies regarding the use of his dog. Racial profiling was raised because the suspects were three black males who were stopped for going only seven miles an hour above the speed limit. The \$25,000 federal jurisdictional amount to prosecute for counterfeit checks was also not met.

The grievant was removed on January 10, 2000 for making false statements about his conduct. Neither Trooper Arnold nor Agent Bianchi were disciplined.

The Merits of the Case

The Employer's Position

The Employer believes the grievant's discharge was for just cause. Section 19.05 of the labor agreement allows the Employer to impart more severe disciplinary action at any point if the rule violation merits more severe discipline. The Employer believes that the only reassurance that an officer's unsanctioned official untruthfulness will not occur again is termination from employment.

In support of its argument, the Employer cites two arbitration opinions wherein troopers were terminated for untruthfulness. Here, similar to those cases, the Employer believes that the grievant lied numerous times and engaged in an attempt to cover up his lies.

According to the Employer, the first lie occurred when the grievant told Agent Bianchi that he walked the dog first as part of his probable

cause. The Employer is unpersuaded that the grievant was intimidated by the "all powerful Feds" into lying to create a case.

The grievant's second lie occurred when he told United States attorney, Tom Secor, that he walked the dog twice during the search. The grievant then lied again when he solicited Trooper Arnold's concurrence while she was attending the Academy that he walked the dog again after the search. The Employer also believes the grievant's attempt to get "credit" for his dog who was not a part of the probable cause was an additional lie.

In summary, the Employer feels strongly that honesty is one of the core values that State Highway Patrol requires its troopers to follow. In this case, the Employer believes that the grievant is a law enforcement officer who was willing to lie to give his dog credit, to conspire to protect other officers, and to enhance the likelihood of prosecution. Under these circumstances, the Employer believes that just cause exists and no substitution of a lesser penalty should be given because of the potential consequences of retention.

The Union's Position

Equity and basic fairness require that the grievant be returned to his job. The grievant admittedly made an error in judgment, but he is a good man, a good citizen, and an outstanding trooper. His annual performance evaluations are excellent and he meets and exceeds expectations in all facets of his performance. His TDI team had been within the top three teams in the state of Ohio since he became a TDI team member.

The grievant's offense is filled with mitigating circumstances that compel a determination that the removal should not be sustained. The

grievant's walking his dog for credit is not unusual because of the competition between dog handlers permitting the use of the dog in the manner in which the grievant conducted the search. In any event, no claim was ever advanced by the grievant directly or by inference that the dog alerted him to the marijuana and that such an alert was the probable cause for the search.

The grievant had no experience with the Treasury Department agents of the Secret Service. He felt intimidated that Agent Bianchi asked him three times in a very leading fashion about whether he used the dog first in the search. Although he knew his statement was untruthful, the grievant felt compelled to provide Agent Bianchi the answer that he was looking for regarding the use of the dog.

The grievant's statement to United States attorney, Tom Secor, was merely in accordance with what the grievant felt Agent Bianchi had set up as part of the case. Mr. Secor's decision not to prosecute the case was not based on whether the dog was used first. The suspects were not prosecuted because of potential racial profiling and the jurisdictional amount of the counterfeit checks was under \$25,000.

Finally, the grievant was the only one disciplined here. Despite their involvement in the matter, Trooper Arnold and Agent Bianchi were not disciplined. This is inequitable treatment under the circumstances and is grounds to reverse the grievant's termination.

The Arbitrator's Opinion and Award

Regarding the Merits of the Grievance

From the evidence and the testimony introduced at the hearing, a complete and impartial review of the record, including pertinent contract

provisions, it is this Arbitrator's opinion that the Employer met its burden to demonstrate that it terminated the grievant for just cause and thus the Union's grievance must be dismissed.

As noted by at least one arbitrator that has addressed dishonest conduct by an Ohio State trooper, a higher standard must be applied upon evaluating a trooper's misconduct. This is because dishonesty by a trooper compromises his ability to serve as a witness in any litigation. Ohio State Troopers Association v. The Ohio State Department of Public Safety Highway Patrol, Case Number 15-00-980807-0097-04-01 (Allan Miles Ruben, 1998). It is against this higher arbitral expectation of honesty for troopers that this Arbitrator reviewed the facts of the just cause for the grievant's discharge.

The Employer's work rule, 4501:2-6-02, Performance of Duty and Conduct, clearly and unequivocally prohibited the grievant from making any false statements about his conduct:

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

In addition, in accordance with the progressive discipline standards of the parties' agreement, the Employer had the management right to impose more severe discipline if the misconduct warranted it:

[M]ore severe discipline (or a combination of disciplinary action) may be imposed at any point if the infraction or violation merits the more severe action.

Neither the fairness nor the application of the Employer's work rule regarding false statements or the Employer's right to impose more

significant progressive discipline under appropriate circumstances was contested by the Union. The Employer's due process burden of just cause has been satisfied. The remaining issue is the merits of the grievant's misconduct.

The grievant admittedly lied about using his dog to determine probable cause to arrest the suspects for the possession of drugs. The grievant arrested the suspects based upon his own sensory perceptions. Upon approaching the suspects' vehicle after the stop, the grievant smelled burnt marijuana and searched and found marijuana particles in plain view. He thus had perfected legal probable cause to arrest the suspects for possession of illegal drugs.

But during a Treasury Department investigation of the suspects' possession of counterfeit payroll checks, the grievant indisputably told Agent Bianchi that he had used his dog to establish probable cause for the suspects' possession of illegal drugs. The grievant's lie was made official on the statewide teletype that related the events of his arrest as, "Stop ... dog utilized ... dog alerted ... search."

Compounding the grievant's lie was his subsequent use of his dog to obtain "credit" for his search after the grievant had already had probable cause. The self-servicing purpose of the grievant's second search was to enhance his competitive status with regard to other dog handlers' performance.

Unfortunately for the grievant, his competitive deception of the use of his dog was captured on videotape. About a month after his interview with Agent Bianchi, the grievant was interviewed by United States Attorney, Tom Secor, regarding the potential prosecution of the suspects. In that interview, the grievant was confronted with the videotape that indicated he

had used the dog again after probable cause had been established. To finesse this discrepancy, the grievant told Secor that he had used the dog twice in the search. The grievant thus concocted a second lie to cover his first lie.

Now aware that he had created an even larger lie than the one that he told Agent Bianchi, which would be more inconsistent with Trooper Arnold's police report of the incident, the grievant telephoned Trooper Arnold, who was participating in an inservice at the Academy. In a highly solicitous fashion, the grievant obtained a confirmation from Trooper Arnold about his use of the dog. He confirmed that Arnold was on the "same page," in case Arnold was ever questioned by their TDI team leader, Sergeant Stidham, about the incident.

The grievant's lies and innuendoes clearly are false statements or false claims concerning his conduct that are prohibited under 4501:2-6-02. The Employer thus established the factual basis of the grievant's having violated that rule. The final question in the analysis is whether mitigating circumstances exist to reduce the grievant's discharge.

Based upon this Arbitrator's review of the record, no mitigating circumstances exist here to reduce the grievant's termination. This Arbitrator was especially troubled by the grievant's failure to come forward with the truth during his interview with United States Attorney, Tom Secor. The grievant had almost a month to recant his lie to Agent Bianchi in the Secor interview. Instead of correcting the record, the grievant chose to fortify his lie with another lie. He knew Secor's interview was about not prosecuting the case against the suspects. He sensed the case was not going to go forward and that he had nothing to lose by lying.

The grievant, moreover, created another lie by telling Secor that the grievant had walked the dog twice. This lie was to cover the grievant's deceptive use of his dog after the search to obtain credit for the drug arrest as a TDI member.

Equally troublesome was the grievant's telephone call after the Secor interview to Trooper Arnold to get his story straight about the second use of his dog. Secor had tipped the grievant off that he had been videotaped using his dog after the initial stop.

The grievant's explanation that he needed to interrupt Trooper Arnold's inservice training to get a clarification from her of what happened is incredible. The grievant had just gone through two interviews with Arnold about the incident. No other reasonable inference can be drawn from the grievant's telephone call to Arnold other than the grievant was trying to get his story straight about walking the dog twice for any further inquiry by TDI leader, Sergeant Stidham. The grievant therefore engaged in a pattern of lies and attempted to corrupt others to do so for his benefit.

The grievant's testimony at the arbitration about his motives for lying are also highly questionable. Although he alleged he was lying to protect Trooper Arnold, the grievant admitted on cross-examination that he had not actually read Trooper Arnold's report and was unaware of any discrepancies. The inference from that admission was that the grievant during the meeting with Secor was only trying to protect Agent Bianchi. The grievant had repeatedly criticized Bianchi as overbearing and coercive and the cause of his lying. The grievant's "protection" of Agent Bianchi is thus implausible.

Neither can the grievant's lie be excused because of Agent Bianchi's alleged leading and coercive questions to the grievant about the use of his

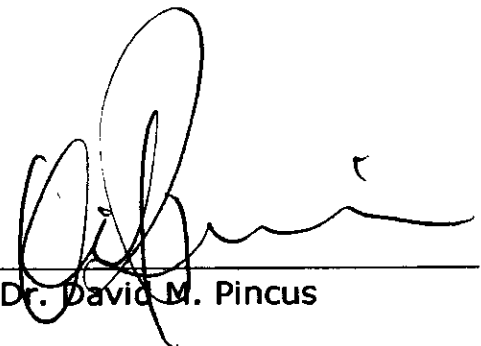
dog. The Ohio State Patrol are the ground troops to protect the citizens of Ohio from crime. They are the sentries that stand guard over law and order. If so little can intimidate the grievant into telling lies about a criminal arrest, then he does not live up to the standards established by the Ohio State Highway Patrol and expected to be upheld by the public.

Finally, although the grievant's work record and performance during his eight years of service is noteworthy, and the grievant may very well be a good person, that is not enough in the face of the grievant's lies. As noted by Arbitrator Ruben, "Sometimes good men do bad things ... but the question is whether the discharge penalty imposed for the grievant's misconduct was unreasonable or excessive." slip. op. p. 27. This Arbitrator believes that the grievant's misconduct was of such a serious nature to overcome his previous record and to constitute adequate grounds for the grievant's termination. No mitigating circumstances exist to reduce the grievant's termination.

Award

The Union's grievance is denied. The Employer met its burden of proof to demonstrate that it terminated the grievant for just cause. The Employer's decision to terminate the grievant is sustained.

May 22, 2000
Moreland Hills, Ohio



Dr. David M. Pincus