

#1474 #1469

OPINION AND AWARD

**IN THE MATTER OF THE ARBITRATION BETWEEN
The Ohio Department of Public Safety/Ohio State Highway Patrol**

-AND-

Ohio State Troopers Association, Inc.

APPEARANCES

For Ohio State Highway Patrol

Kelley L. Foster, OCB Representative
Sergeant Charles M. Linek, Advocate
William G. Thompson, Jr., Lieutenant
Brett M. Godfrey, Trooper
Robert E. Heltzel, Witness
Joseph M. Dragovich, Sergeant
Marc D. Morris, Witness
Renee B. Macy, Labor

For Ohio State Troopers Association

Herschel M. Sigall, Esq., Advocate
Elaine Silveira, Assistant
Robert Stitt, President
Willie Smith, Jr., Grievant
Trooper T.D. Stephens
S. R. Town, Dispatcher
E. S. Clardy, Dispatcher

Case-Specific Data

Grievance No. 15-00-000707-0095-04-01

Hearing Held—October 27, 2000

Case Decided—February 12, 2001

Arbitrator: Robert Brookins, J.D., Ph.D.

Subject: Discharge/Conduct Unbecoming an Officer

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I. Procedural History

The parties to this dispute are the Ohio State Highway Patrol (Warren Post), a branch of the Ohio Department of Public Safety (the Employer or OSHP) and the Ohio State Troopers Association (the Union).¹ On June 28, 2000, the Employer charged Trooper Willie Smith, Jr. (the Grievant) with violating Rule 4501:2-6-02(1)(1), "Conduct Unbecoming an Officer."² On June 29, 2000, the Grievant received notice of a pre-disciplinary hearing to commence on July 3, 2000 at 9:00 a.m. The pre-disciplinary hearing was held as scheduled. On July 3, 2000, the Pre-disciplinary Hearing Officer (Staff Lieutenant T.D. Tornabene) found just cause for disciplining the Grievant for violating "Rule 4501:2-6-02(1)(1), Conduct Unbecoming an Officer . . . making threatening and intimidating comments to both the Public and his co-workers from April through June of 2000."³ That same day, the Director of the Department of Public Safety (LT. Governor Maureen O' Connor) officially removed the Grievant for violation of Rule 4501:2-6-02(1)(1). On July 5, 2000, the Union filed Grievance No. 15-00-000707-0095-04-01 (the Grievance), claiming that the Employer removed the Grievant for other than just cause.⁴ On July 14, 2000, the Union received a Step-Two denial of the Grievance and processed the Grievance to Step-Three, on July 25, 2000.⁵ Unable to resolve the Grievance at the Step-Three level, the Parties mutually selected the Undersigned from their panel of arbitrators to resolve the matter in final and binding arbitration under their Collective Bargaining

¹ Hereinafter referred to collectively as the Parties.

² Joint Exhibit No. 3a.

³ Joint Exhibit No. 3c.

⁴ Joint Exhibit No. 2 at 1.

⁵ Joint Exhibit No. 2 at 5. Note that this document actually reflects that the Union received the Step-Two denial on May 14, 2000, but the Arbitrator suspects that the date was more likely July 14, 2000.

1 Agreement.

2 Accordingly, on October 27, 2000, the Undersigned presided over an arbitral hearing in this
3 matter. During that arbitral hearing, all persons relevant to the resolution of the instant dispute were
4 present, and the Parties had a full and fair opportunity to present any admissible evidence and
5 arguments supporting their positions in this dispute. Specifically, the Parties were permitted to make
6 opening statements and to introduce admissible documentary and testimonial evidence, which were
7 available for relevant objections and cross-examination, respectively. Finally, the parties had a full
8 opportunity either to offer closing arguments or to submit post-hearing briefs and opted for the latter.
9 The Undersigned received the last brief on or about November 28, 2000 and the record was officially
10 closed. Thereafter, the Undersigned notified the parties that computer-related problems would
11 substantially delay the arbitral opinion in this matter.

12 **II. The Facts**
13 **A. Trooper Godfrey's Allegations**

14 During his approximately two years of tenure with the OSHP, the Grievant had become
15 acquainted with Trooper Godfrey, a 22-year veteran. The Grievant and Trooper Godfrey have, for
16 example, discussed matters such as retirement compensation. On occasion, however, Trooper
17 Godfrey had publically traduced the Grievant's father, calling him "an asshole." And after the
18 Grievant was terminated, Trooper Godfrey stated that "The apple does not fall far from the tree."

19 The Grievant's problems in this dispute actually began, on Wednesday, April 26, 2000. That
20 morning, while still off duty, the Grievant visited the Warren Post to check the April 26 line
21 assignments, a daily list of troopers' work assignments that can change within any given twenty-four-
22 hour period. Sergeant Esposito prepares Warren Post's line assignments. The line assignment for

1 April 26, 2000 indicated that the Grievant and Trooper Godfrey had drawn road duty and desk duty,
2 respectively. Road duty entails patrolling the roadways; Desk duty involves serving as temporary
3 dispatcher.

4 After checking the line assignments for April 26, 2000, the Grievant, aware of the
5 changeability of line assignments, asked Sergeant Esposito if line assignments for that day were set.
6 The Grievant explained that he (the Grievant) needed to complete some time-sensitive accident
7 reports, which he could complete only during road duty. Sergeant Esposito apparently implied that
8 the line assignments were set.

9 Later that same day, however, Trooper Godfrey informed Sergeant Esposito that he was
10 having a bad day, did not feel up to working on the desk, and wanted to be excused from desk duty
11 for April 26, 2000. Upon reviewing the records for a replacement for Trooper Godfrey, Sergeant
12 Esposito discovered that the Grievant had drawn fewer hours of desk duty than any other trooper
13 scheduled to work the same shift, on April 26, 2000. Consequently Sergeant Esposito rescheduled
14 the Grievant for desk duty and Trooper Godfrey for road duty.

15 When the Grievant reported for work, on the afternoon of April 26, 2000, he discovered this
16 switch in line assignments and immediately approached Sergeant Esposito to obtain the reason(s)
17 therefor and to remind Sergeant Esposito of the pending, incomplete accident reports. Still, Sergeant
18 Esposito suggested that the Grievant complete the accident reports on his own time, during off-duty
19 hours.

20 On April 26, 2000, the Grievant spent his shift performing desk duty. Apparently, one of a
21 dispatcher's duties is to receive troopers' daily activity reports at the end of their shifts. When
22 Trooper Godfrey submitted his activity report, on the evening of April 26, 2000, the Grievant noticed

1 a change in Trooper Godfrey's behavior. Usually troopers simply approach the dispatcher's desk,
2 submit their reports, and leave. However, Trooper Godfrey stood approximately ten feet from the
3 dispatcher's desk and stared at the Grievant. When the Grievant asked "what's wrong," Trooper
4 Godfrey answered "nothing." Because of Trooper Godfrey's behavior, the Grievant began to suspect
5 that Trooper Godfrey had some problem with him.

6 On April 27, 2000, the Grievant apprised Lieutenant Thompson of the last-minute switch in
7 line assignments and expressed concern with the circumstances surrounding that switch, especially
8 Sergeant Esposito's behavior in and attitude about the entire matter. Specifically, the Grievant noted
9 that situations like the reassignment and the surrounding circumstances evoked suspicions of racism.
10 However, at no time did the Grievant either blame or express anger toward Trooper Godfrey for the
11 reassignment. Lieutenant Thompson suggested that the Grievant discuss the matter with Sergeant
12 Esposito. Given his previous, unavailing discussion with Sergeant Esposito, the Grievant opted to
13 forego Lieutenant Thompson's advice in this instance.

14 On or about April 28, 2000, the Grievant saw Trooper Godfrey conversing with Sergeant
15 [Sara Miller?] in her office and asked Trooper Godfrey if he could speak with him. Trooper Godfrey
16 suggested that they talk in the presence of [Sergeant Miller?], but she suggested that they take it
17 elsewhere. So the Grievant and Trooper Godfrey agreed to go to another room that contained pop
18 machines.

19 There, Trooper Godfrey repeatedly declined the Grievant's offer to have a seat and relax so
20 that they could talk. Nevertheless, the Grievant asked Trooper Godfrey if there was a problem and
21 reassured Trooper Godfrey that he (the Grievant) did not have a problem with him. Trooper Godfrey
22 responded by asking why were they talking then? The conversation left the Grievant puzzled and

1 convinced that somehow a problem had developed between him and Trooper Godfrey.

2 Immediately after the foregoing conversation, Trooper Godfrey went to Lieutenant
3 Thompson's office and made allegations about the Grievant, who happened to walk past Lieutenant
4 Thompson's office and observe Trooper Godfrey talking to Lieutenant Thompson. Nevertheless,
5 the Grievant was unaware of the toxicity of Trooper Godfrey's accusations about him. Trooper
6 Godfrey told Lieutenant Thompson that the Grievant had just threatened and attempted to intimidate
7 him. Specifically, the Grievant had allegedly said that he "would tell his friends not to put a bullet
8 in . . . [Trooper Godfrey] when he stopped them for traffic violations." Trooper Godfrey told
9 Lieutenant Thompson that the Grievant was a "loose cannon" and declared that "he had no further
10 use for . . . [the Grievant]."⁶

11 On April 29, 2000, the Grievant entered the troopers' room and found Trooper Godfrey there.
12 The Grievant asked, "can we talk now?" Trooper Godfrey's response was something akin to "talk
13 about what?" The Grievant again explained that he held no hard feelings against Trooper Godfrey.
14 As the Grievant spoke, Trooper Godfrey seemed nervous, which caused the Grievant to say, "Brett
15 I think you're scared of me. Why won't you talk to me? Would you rather talk outside?"

16 On May 1, 2000, at approximately 8:00 a.m., Trooper Godfrey telephoned Lieutenant
17 Thompson at his home. During that conversation, Trooper Godfrey repeatedly condemned, vilified,
18 and denigrated the Grievant and accused him of posing intimidating questions and of making
19 intimidating statements. Witness the following excerpts from that conversation:

20 [H]ow come you are afraid of me?. [The Grievant] . . . offers to take
21 it out in the parking lot. [the Grievant] . . . is getting in my face. . . .
22 You need to talk to this guy Lieutenant. This guy he's dangerous.

⁶ Employer Exhibit No. 1 at 2.

1 He's a time bomb. . . . [H]e is going to hurt somebody, he's crowding
2 me and getting in my face. He thinks the whole world is after him. .
3 . . But when he said that bullet comment, I thought you needed to
4 know. . . . Then he got into it with Bolen. . . . He's trouble. . . And
5 whether you can see it or not Lt. this guy is going to hurt somebody.
6 . . . This guy scares me, I don't even want to be around the guy. But
7 he's going to hurt somebody, if it's not me its going to be some other
8 trooper, or some violator or something like that. He's capable of
9 getting physical with a unit and pulling out his gun and shooting
10 somebody. . . . I mean if he is not a 79 (mentally disturbed reference)
11 he's close to it. . . . [I]f he goes in here and starts going postal on
12 somebody here, um or something, or if he gets physical or something
13 like that um, and it's been documented we told him, we told him. Or
14 you guys didn't do anything about it, the patrol could be held liable
15 for this guy.¹⁷

16 On May 8, 2000, the Grievant and Lieutenant Thompson conversed. Lieutenant Thompson
17 told the Grievant that their discussion did not constitute an administrative interview.¹⁸ During their
18 discussion, Lieutenant Thompson revealed some of the pestilential statements that Trooper Godfrey
19 had made about the Grievant and told the Grievant to ignore them because both he and the Grievant
20 knew Trooper Godfrey's statements were not true.

21 **B. The Morris/Gushert/Price Encounter**
22 **1. Mr. Marc D. Morris**

23 On May 15, 2000 the Grievant stopped Messrs. Marc D. Morris and Daniel M. Price Jr., both
24 of whom were driving trucks on State Road 11, with Mr. Price trailing Mr. Morris. Mr. Charles E.
25 Gushert was a passenger in Mr. Morris' vehicle. The Grievant parked his cruiser behind Mr. Price's
26 truck, walked past Mr. Price's truck in route to Mr. Morris' truck, asked Mr. Morris for his drivers
27 license, registration, and other papers. Mr. Morris and the Grievant then conversed for a moment

¹⁷ Employer Exhibit No. 1 at 4-13.

¹⁸ The Grievant claimed that he talked to Lieutenant Thompson only on May 8, 2000, but Lieutenant Thompson claimed he interviewed the Grievant a second time.

1 in front of Mr. Morris' truck and walked back to the cruiser. Mr. Morris sat on the passenger side,
2 and the Grievant sat behind the steering wheel where he began writing the citation. The Grievant
3 cited Mr. Morris for speeding (driving 65 miles per hour in a 55 mile-per-hour zone) and failing to
4 have the proper registration. While Mr. Morris was sitting in the cruiser, the radar screen displayed
5 a locked speed of "65." Mr. Morris denied the speeding and seatbelt charges. After receiving his
6 citation, Mr. Morris exited the cruiser, shook the Grievant's hand, but advised the Grievant that he
7 would have to contest the citation, given the associated "points." The Grievant instructed Mr. Morris
8 to return to his truck and to send Mr. Gushert back to the cruiser.

9 **2. Mr. Charles E. Gushert**

10 Mr. Gushert entered the cruiser and sat on the passenger side, and the Grievant proceeded
11 to cite him for seatbelt violation, which Mr. Gushert denied. As the Grievant cited Mr. Gushert, Mr.
12 Morris was making racist remarks on his truck's CB radio about the Grievant. The Grievant
13 overheard Mr. Morris on the cruiser's CB radio, gave Mr. Gushert his citation, and told him to advise
14 Mr. Morris to stop running his mouth on the CB radio. Mr. Gushert returned to the truck and left
15 with Mr. Morris.

16 Mr. Price then entered the cruiser and sat on the passenger side, and referred to Mr. Morris'
17 racist comments, declaring that he (Mr. Price) was not like that. Also, when Mr. Price entered the
18 cruiser the radar screen was quite visible and he observed the 65 mph locked on that screen. Mr.
19 Price's truck was equipped with only a lap belt. The Grievant cited him for speeding and for failing
20 to wear his lap belt, both of which he denied.

1 **3. Messrs. Morris, Gushert, and Price's Complaints**

2 On May 16, Messrs. Morris ^{¶9} and Gushert ^{¶10} lodged complaints against the Grievant with
3 Sergeant Dragovich. Specifically, Mr. Morris claimed that:

4 He [the Grievant] never told me why he stopped me. I asked a couple
5 of times . . . and he did not tell me. He then finally said speed. I then
6 asked if I could see the radar and he said no. He said I'm going to
7 write you this ticket. You should pay the fine, and if you want to
8 fight it, just remember I'll see you again. When he said that I really
9 felt threatened and uncomfortable.^{¶11}

10 Mr. Morris also alleged that the Grievant told Mr. Gushert, "[W]hen you go back to that
11 truck, you tell that guy to stop running his mouth or I'll come up there, pull him out of that truck,
12 take him to jail, and tow his . . . [fucking] truck. And we'll see how he likes that."^{¶12}

13 Mr. Morris admits that he was talking on Channel 19 of his CB radio during the time in
14 question, but denies that he made racial remarks.^{¶13} When Sergeant Dragovich asked Mr. Morris to
15 specify how the Grievant was unprofessional, Mr. Morris merely generalized that "I've been stopped
16 many times and I've never had an encounter like this. I mean never."^{¶14}

17 Mr. Gushert offered the following allegations against the Grievant:

18 I said I did have it [the seatbelt] on, and if you didn't look, how can
19 you write me a ticket. He never answered. He just gave me the ticket
20 and told me to go back up to the truck and tell my partner to stop
21 running his mouth or he was going to pull him out of the truck, take

^{¶9} Employer Exhibit No. 2 at 25-28.

^{¶10} Employer Exhibit No. 2 at 29-30.

^{¶11} Employer Exhibit No. 2 at 26-27.

^{¶12} *Id.*

^{¶13} *Id.*

^{¶14} *id.* at 28.

1 him to jail, and tow his fucking truck.¹⁵

2 On May 22, 2000, Mr. Price lodged a formal complaint against the Grievant to Sergeant
3 Dragovich.¹⁶

4 When the trooper walked by my truck I asked him why he stopped me
5 and he didn't even acknowledge me. . . . He stopped with . . . [Mr.
6 Morris] on the way back [to the cruiser] and asked for my license and
7 registration. I asked if I could step out of the truck and he told me no.
8 He said 'you drive it you can stay in it.' Mr. Gushert also denied that
9 the Grievant told him why he was stopped until he [Mr. Gushert] was
10 in the cruiser."¹⁷

11 Also, Mr. Price claimed that when he asked why he received a speeding citation, the Grievant
12 responded "[T]hat is not your biggest problem right now." Regarding Mr. Morris' racist remarks
13 on the CB radio, Mr. Price denied having heard any such remarks. He said his CB radio was off
14 during the stop because the Grievant had ordered him to switch off his engine. Mr. Price does admit
15 that he saw "65" on the cruiser's radar screen.

16 4. The Involvement of Channel 27

17 Subsequently, Mr. Morris contacted an Ohio television station, Channel 27, and volunteered
18 his version of his May 15 encounter with the Grievant. Channel 27 then contacted Warren Post, but
19 Sergeant Joseph Dragovich directed them to the Ohio State Troopers Public Relations Office, in
20 Columbus, Ohio. On June 21, 2000, Sergeant Dragovich notified the Grievant that Channel 27
21 intended to televise an interview with Mr. Morris who probably would criticize the Grievant. When
22 conversing with Sergeant Dragovich, the Grievant made the following statements:

¹⁵ *Id.* at 29-30.

¹⁶ Employer Exhibit No. 2 at 31-36.

¹⁷ *Id.*

1 [I]f they [presumably, channel 27 and Mr. Morris] were going to do this to him, put his name all over
2 and make him out to be a bad guy, somebody could get shot.”¹⁸

3 The Grievant then explained that: “[T]he next time he stops a car, because of this story he is going
4 to be on edge and if the person he stops recognizes him they will probably be nervous also, which
5 may cause them to do something, which may cause him to draw his weapon, which may cause
6 somebody to get shot.”¹⁹

7 In reference to Trooper Godfrey’s prediction that the Grievant could go postal, the Grievant
8 stated, “something like this could cause somebody to go postal. . .”²⁰ Sergeant Dragovich stressed
9 that the Grievant made a general statement and did not say that he could or would go postal.

10 Finally, when denying that he ever threatened Trooper Godfrey, the Grievant noted, said,
11 “[I]t was not in his nature to threaten people because where he comes from you don’t tell somebody
12 what you are going to do, you just do it.”²¹

13 5. Sergeant Dragovich’s Findings Regarding the Foregoing Allegations

14 In his synopsis²² of the complaints involving the allegations of Messrs Morris, Price, and
15 Gushert, Sergeant Dragovich found the following allegations to be unsubstantiated: (1) The Grievant
16 was unprofessional, causing Messrs Morris, Price, and Gushert to feel threatened and
17 uncomfortable;²³ (2) The Grievant threatened to take further action against Mr. Morris for making
18 racial slurs and running his mouth on the CB about him.²⁴ In contrast, Sergeant Dragovich deemed
19 the following charge by Mr. Gushert and Mr. Price to be established: (1) The Grievant issued Mr.
20 Gushert a citation for a seatbelt violation he was unable to view.²⁵ The Grievant issued Mr. Price

¹⁸ Employer Exhibit No. 2 at 47. Sergeant Dragovich “told . . . [the Grievant that] he should not make such statements and that it is when he says things like this that he gets into trouble.” *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 48.

²² Employer Exhibit No. 2 at 1.

²³ Employer Exhibit No. 2 at 1.

²⁴ *Id.*

²⁵ *Id.*

1 a citation for a seatbelt violation that he was unable to view.”²⁶

2 **6. The Grievant’s Contact with Mr. and Ms. Heltzel**

3 The Grievant’s second problematic public contact occurred when he stopped Robert and
4 Hidie B. Heltzel on US 422, on May 29, 2000. He cited Mr. Heltzel for speeding and failing to wear
5 his seatbelt. In addition, the Grievant issued Ms. Heltzel a warning for wearing her shoulder harness
6 improperly—strapped under her armpit rather than across her chest. Although Mr. Heltzel contested
7 neither of his citations, Ms. Heltzel denied that she was wearing her seatbelt improperly.

8 Furthermore, on May 30, 2000, Mr. Heltzel visited the Warren Post and lodged a complaint
9 against the Grievant with Sergeant Dragovich. Mr. Heltzel claimed that the Grievant was “short and
10 curt with me.”²⁷ Specifically, Mr. Heltzel claimed that the Grievant invited him into the cruiser,
11 cited him, and as he was about to return to his vehicle, the Grievant asked Mr. Heltzel to send Ms.
12 Heltzel back to the cruiser. Following is the essence Mr. Heltzel’s version of that exchange:

13 I asked him why did he want my wife to come back to his vehicle and
14 he said to me, ‘Did you hear what I said?’ I asked him if I could stay
15 back here with her and he stated, ‘She is over eighteen she can handle
16 it herself.’ He then asked, ‘Is there a reason why you do not want your
17 wife back here with me by herself’? . . . This officer was *short and*
18 *curt* with me and this was the first time an officer had asked for the
19 license of a companion of mine.²⁸

20 On June 24, 2000, upon Sergeant Dragovich’s invitation, Ms. Heltzel reported to the Warren
21 Post to make a statement about the Grievant’s conduct on May 29, 2000. She offered the following
22 allegations:

²⁶ *Id.*

²⁷ Employer Exhibit No. 3 at 1.

²⁸ Employer Exhibit No. 3 at 9.

1 He [the Grievant] did not tell us why we were stopped. He asked for
2 my husband's license and registration and for my license. Then he
3 asked my husband to go back to his cruiser. . . ." When Ms. Heltzel
4 sat down in the cruiser, the Grievant said, "Mrs. Heltzel were you or
5 were you not wearing your seatbelt. . . .?" Ms. Heltzel said "yes
6 officer I always wear my seatbelt. . . ." The Grievant then returned
7 Ms. Heltzel's license to her and said, Mr. Heltzel "was bent out of
8 shape over this . . ."²⁹

9 Sergeant Dragovich found the following charge by Mr. and Ms. Heltzel to be substantiated:
10 [The Grievant] . . . did not explain to [Mr. Heltzel] . . . the why he was requesting the
11 [Mr. Heltzel's] . . . passenger [Ms. Heltzel] to come back to the patrol car. . . . nor did
12 . . . [the Grievant] permit [Mr. Heltzel] . . . to remain in the patrol car while he spoke
13 to his wife."³⁰

14 **III. Summaries of the Parties's Arguments**
15 **A. Summary of the Employer's Arguments**

- 16 1. The record contains credible, preponderant evidence that, April through June 2000, the
- 17 Grievant made threatening and intimidating comments to co-workers and to the Public.
- 18 2. The jobs of the Employer's witnesses are not at stake; therefore the testimonies of those
- 19 witnesses are inherently more credible than the Grievant's.
- 20 3. A similar argument applies to Trooper Godfrey's statements. It is reasonable to credit these
- 21 testimonies over the Grievant's.
- 22 4. The duties to which state troopers are sworn—uphold the law, serve and protect the
- 23 public—requires that OSHP hold them to an extraordinarily high standard of conduct.
- 24 5. The Employer risks incurring considerable liability by retaining the Grievant as a state
- 25 trooper.

26 **B. Summary of the Union's Arguments**

- 27 1. The Employer has failed to prove its case.
- 28 2. The Grievant's discharge really rests on Trooper Godfrey's allegations.
- 29 3. Mr. Morris is a proven liar and therefore lacks credibility as a witness.
- 30 4. Lieutenant Thompson's investigation of the Godfrey matter did not convince him that the
- 31 Grievant made the statements that Trooper Godfrey attributed to him.
- 32 5. At the very most, this dispute involves a "training" rather than a disciplinary issue.
- 33 6. The Grievant was a highly productive employee with commendations from the Employer.

²⁹ *Id.* at 10.

³⁰ Employer Exhibit No. 3 at 15.

1 **IV. Relevant Contractual and Regulatory Language**
2 **Conduct Unbecoming an Officer**

3 A member may be charged with conduct unbecoming an Officer in the following situations

- 4 (1) For conduct that may bring discredit to the division and/or any of its members or employees.
5 (2) For committing any crime, offense or violation of the laws of the United States, the state of
6 Ohio, or any municipality.
7 (3) For any improper on-duty association with any individual for purposes other than those
8 necessary for the performance of official duties.

9 **Collective Bargaining Agreement**
10 **Article 19 – DISCIPLINARY PROCEDURE**

11 **19.01 Standard**

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

14 **19.05 Progressive Discipline**

15 The Employer will follow the principles of progressive discipline. Disciplinary action shall
16 be commensurate with the offense. Disciplinary action shall include:

- 17 1. One or more Verbal Reprimand (with appropriate notation in employee's file);
18 2. One or more Written Reprimand;
19 3. One or more day(s) Suspension(s) or a fine not to exceed five (5) days pay, for any
20 form of discipline, to be implemented only after approval from the Office of
21 Collective Bargaining.
22 4. Demotion or Removal.

23 However, more severe discipline (or a combination of disciplinary actions) may be imposed
24 at any point if the infraction or violation merits the more severe action.

25 The Employer, at its discretion, is also free to impose less severe discipline in situations
26 which so warrant.

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

29 **V. The Issue**

30 Was the Grievant, Trooper Willie Smith, Jr., terminated for just cause. If not, what shall the
31 remedy be?

32 **VI. Discussion**

33 The resolution of this case turns entirely on credibility. The Grievant and his accusers offer
34 markedly disharmonious but in some instances facially credible accounts of their encounters, thereby
35 converting this issue of credibility into the proverbial "Gordian knot." Furthermore, the Employer
36 has the burden of persuasion to establish its charges against the Grievant by preponderant evidence

1 in the arbitral record as a whole. Before turning to Trooper Godfrey's allegations, a comment is
2 indicated to complete the analytical framework needed to resolve this dispute.

3 VII. Analytical Framework for Issues of Credibility

4 As a general proposition when assessing issues of credibility, almost all arbitrators examine
5 factors such as "demeanor, [internal and external] consistency of [the witnesses' accounts] . . .
6 corroboration by other evidence. . . ."³¹ If, however, an application of these factors to contradictory
7 accounts of the facts leaves arbitrators in equipoise as to which account is accurate (or more
8 accurate), they will embrace either of two schools of thought to circumvent analytical paralysis.

9 When confronted with seemingly impenetrable issues of credibility, one school of thought
10 "presumes"³² that grievants have more reason to lie and, consequently, resolves doubts against
11 them.³³ As one authority observes: "Where these factors are *equal*, the credibility equation reduces
12 to the question of *motive*. In such a case, the *proper presumption* is against the Grievant since the
13 Grievant has the *most to lose or gain* from the proceeding."³⁴

14 In contrast, when enmeshed in the clutches of equipoise, students of the second school of
15 thought resolve doubts against the party with the burden of persuasion or risk of nonpersuasion on

³¹ FAIRWEATHER'S, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 238 (RAY J. SHCOONHOVEN, ED. IN CHIEF, 3rd ed. 1991).

³² One noted authority has correctly denominated this "presumption as nothing more than "a shorthand method of evaluating credibility." FAIRWEATHER'S, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 238-239 (RAY J. SHCOONHOVEN, ED. IN CHIEF, 3rd ed. 1991) [hereinafter PRACTICE AND PROCEDURE IN LABOR ARBITRATION].

³³ *Id.* (Stating, "[A]ll other factors being equal, conflicts in testimony between grievant and the managerial witness will often be resolved against the grievant"). The Employer in the instant case apparently subscribes to this evidentiary tactic, arguing that witnesses whose jobs are not on the line are automatically more credible than the Grievant.

³⁴ *Id.* at 239. (emphasis added).

1 the issue in question. Thus, one arbitrator opines:

2 Reasonable doubts raised by proof should be resolved in favor of the
3 accused. This may mean that the employer will at times be required,
4 for want of sufficient proof, to withhold or rescind disciplinary action
5 which . . . (otherwise would be) fully deserved [if the truth were
6 clearly discernible], but this kind of result is inherent in any civilized
7 system of justice.”³⁵

8 The Undersigned subscribes to the latter school of thought primarily because, in the case of
9 conflictive evidence, the former school automatically *presumes* a grievant’s mendacity and premises
10 those presumptions on averages in human motivational behavior—Those with the most to lose are
11 also most likely to prevaricate. The problem here is at least twofold: First, these conclusions are
12 premised on little, if any, subsurface examination of exactly which party has the most to lose.
13 Second, and more important, these presumptions of mendacity visit serious violence upon the
14 fundamental—and, really, the only—reason for embracing the burden of persuasion in the first
15 instance: to surmount “decisional irresolution” without compromising objectivity and “rationality.”³⁶
16 Why adopt a burden-of-persuasion approach, in the first instance, only to abandon it at a crossroads
17 of credibility or evidentiary assessment, which, of course is, the precise and *only* moment that the
18 burden of persuasion comes into play? Those who would embrace this practice must somehow
19 bridge a chasmal expanse of illogic inherent in assigning management the burden of persuasion on
20 an issue and subsequently, while struggling against analytical equipoise, resolving doubts of

³⁵ Kroeger Company, 25 L.A. 906, 908 (BNA) (1955 Arb. S). See also, Silgan Containers Corp. v. United Steelworkers of America Local 5163, 1999 WL 1331154 (Brunner, Arb.) (declaring, “If there is doubt [that a grievant has committed the offense causing discipline or discharge] such doubt should be resolved in favor of the employee”).

³⁶ PRACTICE AND PROCEDURE IN LABOR ARBITRATION, *supra* note 2 at 192.

credibility or evidentiary probativeness against the union on that very issue.³⁷

A. Assessment of Trooper Godfrey's Allegations

With these observations in mind, the Arbitrator now begins the process of credibility assessment with the Godfrey allegations of April 27, 2000 and April 29, 2000. Of the foregoing traditional factors,³⁸ internal and external inconsistency are particularly applicable to the instant dispute.

1. Inconsistencies

The Grievant's account of his April 27 conversation with Trooper Godfrey suffers from an internal inconsistency as the following passage depicts:

Question: Did you ask . . . [Trooper Godfrey] if he was *afraid* of you?

Answer: I asked [Trooper Godfrey] . . . are you sure you don't have a problem with me. I *did not ask him if he was afraid of me.*³⁹

Question: Is there anything else you would like to add?

Answer: This is confusing to me. I was trying to keep our friendship, and that is why I asked . . . [Trooper Godfrey] if he was afraid of me. Or if he had any problems with me.⁴⁰

The foregoing passage shows that the Grievant initially denied having asked whether Trooper Godfrey was afraid of him but subsequently admitted having asked that question. As a general proposition and under the facts of this case, there is a substantial difference between asking whether someone has a problem with you and asking whether someone is afraid of you. Although this inconsistency in the Grievant's account is somewhat corrosive to his credibility, it is not fatal thereto.

³⁷ Of course this also applies where the burden of persuasion is assigned to a union.

³⁸ See *supra* note 33 and accompanying text.

³⁹ Employer Exhibit No. 1 at 15.

⁴⁰ *Id.* at 16.

1 Conversely, Trooper Godfrey's account of a witnessed interaction with the Grievant is
2 externally inconsistent and mortally wounds his credibility, when considered in conjunction with
3 the Employer's burden of persuasion and Lieutenant Thompson's investigative conclusions. During
4 his conversation with Lieutenant Thompson, on April 28, 2000, Trooper Godfrey set the stage for
5 the demise of his credibility by offering the following account:

6	Trooper Godfrey	So um Shelley um wanted me to get her to get her a, um which a ma
7		call it, a um milkshake.
8	Lieutenant Thompson	Um-huh
9	Trooper Godfrey	During the shift, I say well, what kind do you want. She says well get
10		me peanut butter. I said, I don't know if they have peanut butter. Um,
11		and she says, well if they don't have peanut butter just get vanilla.
12	Lieutenant Thompson	Um-huh
13	Trooper Godfrey	[The Grievant] . . . says 'How come not chocolate'? And I look at
14		Shelley and she looks at me and like . . . [the Grievant] is serious. ⁴¹

15 On May 30, 2000, Lieutenant Thompson interviewed Ms. Shelley R. Town and thereby closed the
16 credibility trap that Trooper Godfrey set on April 28, 2000. The following excerpts from that
17 interview are instructive:

18	Lieutenant Thompson	What conversation did . . . [the Grievant] . . . [Trooper Godfrey] and
19		yourself have about a milkshake?
20	Ms. Town	I asked . . . [Trooper Godfrey] to get me a milkshake. He asked if .
21		. . . [I] wanted chocolate or vanilla, I said, I do not want either I want
22		peanut butter. [the Grievant] said jokingly, what is wrong with
23		chocolate and I responded that I do not like chocolate I like peanut
24		butter.
25	Lieutenant Thompson	When Willie asked why not chocolate, what do you think he meant
26		by it
27	Ms. Town	He was <i>just joking around</i> . He was <i>being silly</i> , acting like . . . [the
28		Grievant] does.
29	Lieutenant Thompson	Did you construe his statement to mean anything else?
30	Ms. Town	No. It was a <i>joke</i> , we <i>laughed</i> about it.
31	Lieutenant Thompson	Did . . . [Trooper Godfrey] <i>laugh</i> about it?
32	Ms. Town	Yes, he did, <i>we were all laughing</i> about it.
33	Lieutenant Thompson	Was there any other comments or conversation about the chocolate
34		milkshake?

⁴¹ Employer Exhibit No. 1 at 5-6.

Ms. Town's interpretation diametrically opposes Trooper Godfrey's. She takes the Grievant's comments about chocolate as nothing more than playful jest. In deed, Ms. Town noted that even Trooper Godfrey was laughing at the Grievant's comments. In stark contrast, during his conversation with Lieutenant Thompson, Trooper Godfrey suggests that the Grievant's comments could be further evidence of the Grievant's dark, hostile, and perhaps postal proclivities. Trooper Godfrey strongly implies that he and Miss Town were at the very least "put off" or puzzled by the Grievant's comments—"And I look at Shelley and she looks at me and like . . . [the Grievant] is serious. . . ."⁴³ This is not to say that Miss Town is somehow inherently more credible than Trooper Godfrey because she is not visibly invested in the outcome. On the other hand, nothing in the record suggests that she is any less credible. Thus, at the very least, Miss Town's testimony tends to offset Trooper Godfrey's. More important, Ms. Town is the only witness who directly observed and overheard comments by the Grievant that Trooper Godfrey subsequently distorted by wrapping those comments in an ominous garb of latent or patent hostility or aggression. Standing alone, this observation together with the Employer's having the burden of persuasion on this issue tips the scale against Trooper Godfrey's version of this event. In addition, the breadth of difference between Ms. Town's and Trooper Godfrey's accounts falls well without the scope of difference that one might normally attribute to reasonable minds. Given that Trooper Godfrey is so wide of the mark regarding the Grievant's statements here, how reliable are his other accounts of conversations with the

⁴² *Id.* at 22 (emphasis added).

⁴³ Employer Exhibit No. 1 at 5-6.

1 Grievant?

2 The upshot is that either Trooper Godfrey's or Ms. Town's account is inaccurate, and doubts on this
3 issue are resolved against the Employer.

4 Finally, the record reveals another and equally persuasive reason to reject Trooper Godfrey's
5 allegations against the Grievant. Lieutenant Thompson, who investigated the two encounters
6 between the Grievant and Trooper Godfrey, testified that he could not determine which trooper was
7 truthful. Yet, for reasons not revealed in the arbitral record the Employer ignored the first-line
8 investigator's assessments and embraced Trooper Godfrey's account. Viewed in this light, the
9 adoption of Trooper Godfrey's version is truly remarkable. In any event, the arbitral record hardly
10 contains preponderant evidence that the Grievant either accosted, threatened, or intimidated Trooper
11 Godfrey, and the Arbitrator cannot, therefore, sustain that charge.

12 **B. Nature of the Grievant's Encounter with Messrs. Morris, Gushert, and Price**

13 These three gentlemen collectively accuse the Grievant of threatening and intimidating them,
14 on May 15, 2000. After reading the written statements of these gentlemen and reviewing their
15 testimonies, the Arbitrator finds them to be neither individually nor collectively more credible than
16 the Grievant's written statements and testimony. Furthermore, Sergeant Dragovich's investigation
17 of these allegations did not lead him to find that the Grievant intimidated or threatened these
18 gentlemen.

19 Nor are their accounts free from external contradiction. For example, Mr. Morris state that
20 when he sat in the cruiser, the radar screen was not visible to him. Yet, Mr. Price seemed to have
21 no problem viewing from the same passenger seat that Mr. Morris had previously occupied. And
22 nothing in the record suggests that the Grievant moved the screen between the times that Mr. Morris

1 and Mr. Price were sitting in the cruiser. Also, Mr. Morris and Mr. Gushert deny that Mr. Morris
2 was spewing racial slurs over the CB radio while the Grievant cited Mr. Gushert in the cruiser. Yet,
3 Mr. Morris admits talking on the CB radio during this time. Furthermore, Mr. Gushert and the
4 Grievant implicitly agree that whatever Mr. Morris was saying over the CB radio caused the Grievant
5 to instruct Mr. Gushert to tell Mr. Morris to "stop running his mouth," whatever he might have been
6 saying. Why would the Grievant feel compelled to issue that instruction, if Mr. Morris was not
7 saying something confrontational? The issue, therefore, is not so much whether Mr. Morris was
8 making statements that offended the Grievant, but whether the remarks were appropriate or
9 inappropriate, and exactly how did the Grievant respond. On those issues, there is simply a lack of
10 preponderant, credible evidence to support either version of this event. Again, the Employer has the
11 burden of persuasion here and must somehow adduce evidence sufficient to resolve these issues
12 against the Grievant in route to establishing the charge that the Grievant's conduct was unbecoming
13 an officer. The evidence again falls wide of the mark.

14 **C. Assessment of Mr. and Ms. Heltzel's Allegations**

15 In reality, only Mr. Heltzel accused the Grievant of being "short and curt" and his credibility
16 did not go unscathed in this dispute. For example, during the arbitral hearing, before the
17 Undersigned, Mr. Heltzel admitted that he had misrepresented the truth to the Union's investigator,
18 by initially denying that along with his drivers license he gave the Grievant a courtesy card from the
19 Fraternal Order of the Police, ostensibly with the hope to securing some degree of lenity, if not
20 complete exoneration. During cross-examination, however, Mr. Heltzel effected a 180 degree
21 reversal from that position, thereby compromising both his credibility and integrity.

22 Again, Sergeant Dragovich did not find that the Grievant was "short and curt" with Mr.

1 Heltzel. Instead, he found that the Grievant would not tell Mr. Heltzel why he (the Grievant) wanted
2 Ms. Heltzel to come back to the cruiser. Nor would the Grievant allow Mr. Heltzel to sit in the back
3 seat of the cruiser while the Grievant spoke to Ms. Heltzel.⁴⁴

4 The Arbitrator agrees. Mr. Heltzel not only presented an FOP card to the Grievant—most
5 probably for unethical reasons—but also lied about having done it. Under these circumstances, Mr.
6 Heltzel simply is not a credible witness. Therefore, the record shows only that the Grievant denied
7 Mr. Heltzel's request for a rationale and refused to let him sit in the cruiser with Ms. Heltzel.
8 Finally, the Arbitrator finds that the Grievant's explanation for his actions here are not implausible:
9 "[The Grievant] . . . reasoned this [declining to explain or to permit Mr. Heltzel to sit in the cruiser
10 with Ms. Heltzel] would avoid confrontation with the complainant who was noticeably agitated."⁴⁵

11 **D. Impact and Nature of the Grievant's Comments to Sergeant Dragovich**

12 Sergeant Dragovich testified that the Grievant made three troublesome statements. More
13 precisely, Sergeant Dragovich seems to conclude that the Grievant's statements are certainly subject
14 to troublesome interpretation. The issue is how far must one stretch the Grievant's statements to
15 reasonably conclude that they amount to threats or intimidation, or otherwise constitute conduct
16 unbecoming an officer. The Grievant stated that "[I]f they [presumably, channel 27 and Mr. Morris]
17 were going to do this to him, put his name all over and make him out to be a bad guy, that somebody
18 could get shot."⁴⁶ The Grievant explained, however, that, "[T]he next time he stops a car, because
19 of this story he is going to be on edge and if the person he stops recognizes him they will probably

⁴⁴ Employer Exhibit No. 3 at 15.

⁴⁵ *Id.*

⁴⁶ Employer Exhibit No. 2 at 47

1 be nervous also, which may cause them to do something, which may cause him to draw his weapon,
2 which may cause somebody to get shot.”⁴⁷ Since the Grievant clearly did not explicitly threaten to
3 shoot anyone, one must reasonably interpret his statement under the prevailing circumstances. A
4 reasonable interpretation is that the Grievant expressed his fear or concern that the notoriety will
5 exacerbate the already dangerous condition under which state troopers routinely operate. There is
6 an ever present danger of violence when state troopers stop violators single-handedly on dark,
7 deserted roads, sometimes miles from any assistance. It is not unreasonable for a young—or perhaps
8 a not-so-young—trooper to envision this ever present risk as being heightened by televised notoriety
9 and repeated investigations by his own employer. Nor is it unreasonable to think that some future
10 violators may recognize the Grievant and react in some hostile or provocative manner, causing the
11 Grievant to react to their reaction. The Arbitrator fails to understand how it is misconduct
12 unbecoming an officer for a young state trooper to express his honest concern or fear about the
13 possible occurrence of such a situation.

14 Similarly, the Grievant’s reference to understanding how “*someone could go postal*” under
15 the circumstances is also amenable to reasonable interpretation as being yet another expression or
16 manifestation of the anxiety heaped upon the Grievant. The magnitude of stress placed upon him
17 under the circumstances could indeed cause *some* individuals to “snap” and physically threaten or
18 injure their co-workers. Merely to *express the fact* that this magnitude of stress could cause some
19 individuals to “snap” hardly approaches the level of conduct unbecoming an officer and, hence, the
20 basis for discharge. Sergeant Dragovich properly noted that the Grievant did not say he would or
21 remotely could “go postal.” Indeed, the more reasonable implication is that the Grievant used the

⁴⁷ *Id.*

1 term “postal” only because Trooper Godfrey had previously attempted to cast that psychological
2 shadow over the Grievant. Viewed from this perspective, the Grievant’s “postal” statement is no
3 more damning than a person under severe stress saying, “I could understand how this stress might
4 cause someone to have a heart attack or stroke.” Both expressions simply recognize the magnitude
5 of the stress rather than the likelihood of occurrence of the specific consequences expressed therein.

6 Finally, the Grievant apparently sought to emphasize that he did not threaten Trooper
7 Godfrey by pointing out that it was simply not in his (the Grievant’s) nature to *threaten* anyone.
8 Taken in the proper perspective, this is a statement intended to distance the Grievant from the
9 perception that he would have threatened Trooper Godfrey and not to somehow further enmesh him
10 in this web of “you say I say.” Saying that he would act rather than threat is an empty abstraction,
11 aimed at absolutely no one. And it requires a truly affirmative—and thus unreasonable—effort to
12 squeeze the Grievant’s statement into a mold of menace or threat.

13 The upshot here, as the Union correctly argues, is that the evidence in the record does not
14 establish that the Grievant engaged in any misconduct unbecoming an officer. Instead, he issued
15 citations for speeding and seatbelt violations that were ultimately adjudged to be unwarranted, albeit
16 not without some contradiction by at least one other trooper. Again, as the Union correctly argues,
17 if indeed these citations were improvidently issued, then the proper course of action is not to snuff
18 out his career but to afford him more training.

19 **VIII. Penalty Decision**

20 Having found that the Employer failed to prove any of its charges by a preponderance of the
21 evidence in the record as a whole, the Arbitrator can support no penalty in this case. As evidenced
22 by other decisions rendered for these very parties, the Arbitrator remains convinced that state

1 troopers and police officers in general must be held to a higher standard. However, in the final
2 analysis, the Employer must prove that the state trooper in question failed to maintain that standard.
3 It is not enough simply to allege such misconduct. The record establishes no conduct that warrants
4 any quantum of discipline and, therefore, the Grievant's removal in this case was arbitrary,
5 unreasonable, and capricious.

6 IX. The Award

7 For all the foregoing reasons, the Arbitrator holds that the Grievance is **SUSTAINED** in its
8 entirety. Consequently, the Employer shall reinstate the Grievant forthwith and make him *whole* as
9 if his employment was *never* interrupted in the first instance. Finally, the Arbitrator retains
10 jurisdiction over this matter until this award has been fully implemented.

11 Notary Certificate

12 State of Indiana)
13)SS:
14 County of Marion

15 Before me the undersigned, Notary Public for Marion County, State of Indiana, personally appeared
16 Robert Brookins, who swears under oath and under penalty of perjury that the contents of this
17 document are true and accurate and were prepared solely by Robert Brookins who hereby acknowledges the
18 execution of this instrument this 26th day of February, 2001.

19 Signature of Notary Public: Arita Jones

20 Printed Name of Notary Public: Arita Jones

21 My commission expires: May 2, 2007

22 County of Residency: Boone

23 Robert Brookins
24 Robert Brookins