

#1537

IN THE MATTER OF ARBITRATION BETWEEN

OHIO STATE TROOPERS ASSOCIATION Unit 1  
Employee Organization

And

STATE OF OHIO, DEPARTMENT OF PUBLIC SAFETY  
Employer

GRIEVANT Henry A. Kucirek  
Case No. 15-00-20010831-0107-04-01

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**ARBITRATOR'S DECISION AND AWARD**

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Appearances:

For the Employee Organization:

Herschel M. Sigall

Elaine Silveira

Robert Stitt

For the State of Ohio:

Sgt. Charles Linek

Sandra Mendel Furman, Arbitrator  
One Easton Oval Suite 500  
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(614) 416-5611

## INTRODUCTION

This matter was heard before the undersigned on September 21, 2001 in Columbus, Ohio at the Office of Collective Bargaining. Grievant Henry Kucirek and Trooper Pablo Cruz were present as union witnesses. Also present were OSTA President Robert Stitt and Attorney Elaine Silveira. OSTA General Counsel Sigall represented Grievant at the hearing. Sigall, Stitt, and Silveira presented closing arguments.

The State's witnesses were Sgt. Schmutz of the Patrol; Detective Rohner of the Lorain Police Department; and Captain Richard Thomas of the North Ridgeville Police Department. Also present were Renee Macy from central office of the Patrol and Neni Valentine from the Office of Collective Bargaining. Sgt. Linek represented the Patrol, and presented closing argument.

The collective bargaining agreement, the grievance trail, disciplinary record, and Grievant's statement from the Patrol record of investigation were introduced and accepted as Joint Exhibits 1-4. Each side provided additional exhibits in support of their respective position; these are referred to in the discussion below.

There were no procedural arguments presented. Each side was given the opportunity to call witnesses, cross-examine witnesses, and present relevant materials in support of their position. All witnesses were sworn. Post hearing arguments were postmarked by October 5, 2001. The hearing was closed upon receipt of the closing arguments.

## ISSUE:

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

## APPLICABLE CONTRACT SECTIONS:

Article 19

## STATEMENT OF FACTS:

The facts are not disputed. Grievant was terminated from employment on August 16, 2001. The discharge was based on an alleged violation of Rule 4501:2-6-02 (I)(1): Conduct Unbecoming an Officer; for conduct that brings discredit to the division and/or any of its members or employees. The specific act alleged was that on September 27,

2000, Trooper Kucirek provided law enforcement information to a suspect in (sic) ongoing illegal drug investigation. At the time of his termination, he was employed as a Trooper assigned to the Milan, Ohio post. He had worked at the Elyria and Medina posts. He had nine years tenure.

Grievant received a telephone call from Lt. Rohner from the Lorain Police Department on September 27, 2001. The phone call was prompted by the fact that Grievant's number appeared four times on the pen register on Jon Hernandez's phone. Certain allegations concerning Grievant were received as information from a confidential informant, providing another reason for the contact by Rohner. Hernandez was a suspect in an on going drug investigation being conducted by the Lorain P.D. and the F.B.I. When they spoke, Lt. Rohner asked about Grievant's familiarity with Hernandez and his activities. The Lt. explained the phone call to Grievant in the context of an anonymous phone call from a female friend of Hernandez, who purportedly was claiming that he dealt drugs. At no point during the phone call did Lt. Rohner inform Grievant that Hernandez was a target /subject of an on going drug investigation.

In that conversation, Grievant referred to Hernandez in unflattering terms. He advised Lt. Rohner where Hernandez lived, that Hernandez had been asking him about a recent Toledo area drug bust where the arrested individual was Hernandez's "dude", stated the type of vehicle Hernandez was driving, and opined that Hernandez was not currently dealing dope to the best of his knowledge. (Management Ex. 1)

Within ten minutes after the phone call, Grievant relayed to Hernandez the fact that the Lorain P.D. was asking about him and his purported drug dealing. He played the answering machine tape for Hernandez which contained Lt. Rohner's request for Grievant to call him. Grievant denied taping the conversation he had with Rohner. Hernandez took the information that he was being watched to Steve Carrion, a primary target of the Lorain P.D. and F.B.I. investigation. He made contact by use of the cell phone monitored by the police. In that conversation, Hernandez made references to Grievant such as "my person", the "troop" and my "neigh". Hernandez told Carrion that Grievant "blew them off", referring to the Lorain P.D. (Management Ex. 2) Rohner stated at the hearing that after Grievant made contact with Hernandez, it became more difficult to monitor him.

As a result of Grievant's contacts with Hernandez, he became a matter of interest to the Lorain Police Department and the Lorain County Prosecutor's office. Grievant had a second telephone contact with the Lorain Police Department on February 28, 2001. This contact was initiated by Grievant and was made after Hernandez's arrest. The Patrol introduced a taped conversation between Detective Hendershot and Grievant. In it, Grievant explains matters relating to his Mustang, his concerns about being perceived as a dirty cop, and tells about being sick with ulcers from anxiety. <sup>1</sup>(Management Ex. 5)

Chief (then Captain) Thomas of the North Ridgeville Police Department gave Grievant two computer voice stress analyzer (CVSA herein) tests in June 2001, at the request of Lorain County Assistant Prosecutor Rosenbaum. The tests were taken by Grievant under the following options: if he took the test and passed, there would be no criminal prosecution. If he did not take the test, he faced possible criminal indictment. If he took the test and failed, various options would be weighed. The tests as interpreted by Thomas revealed that Grievant was being deceptive in his answers to questions 4, 6, and 10 on Management Ex. 3. The relevant questions for purposes of the instant discharge case were: *Did you intend to hinder Lorain PD's investigation when you told Jon (Hernandez) about it?* and *Have you purposely withheld any information from me concerning these matters?* Captain Thomas urged him to come clean. (After he failed the tests twice, he was given an option to resign his position as an alternative to prosecution.)

Lt. Rohner did not share his information regarding Grievant directly with the Patrol. The Patrol conducted a separate investigation of Grievant. (Management Ex. 4.) As a result of the administrative investigation, the Patrol concluded that Grievant had committed acts unbecoming an officer and removed him from employment.

#### EMPLOYER POSITION

The Patrol maintains that its discharge is for just cause. It states that Grievant has no credibility, due to contradictions between his taped statements and the statements made under oath at the hearing. Although the Patrol supported its contention that Grievant was not credible with the testimony on the CVSA, it notes that it did not rely on

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<sup>1</sup> All matters in the record relating to the insurance claims on the Mustang were not part of the Arbitrator's analysis and decision.

those results in determining the appropriate level of discipline. It cannot maintain a trooper on its force who tipped off a suspected drug dealer on the basis that it was the neighborly thing to do. It argues that a clear nexus exists between the Grievant's off duty conduct in speaking to Hernandez after Rohner's call and his duties as Trooper. It reminds the Arbitrator of Grievant's prior discipline.

#### **UNION POSITION**

OSTA argues that the CVSA is worthless as a tool to assess credibility. It states that Grievant did not obstruct justice, as he had no notice that Hernandez was the subject of an investigation. It points to Grievant's past work with children and seat belts (Union Ex. 2), his love for children; his good evaluations (Union Ex. 1), and his nine year tenure of employment. OSTA states that Grievant's actions were a reflection of his honest intentions to be a good neighbor. The Union maintains that Grievant did nothing supporting any level of discipline.

#### **DECISION AND AWARD**

The Arbitrator is required to determine whether or not Grievant's actions in contacting Hernandez almost immediately after his conversation with Lt. Rohner of the Lorain Police Department constitute grounds for removal. As stated above, the Arbitrator is not considering any evidence concerning a possible arson of Grievant's Mustang car and/or car related insurance claims.

Grievant lived in very close proximity to Hernandez. Grievant knew him for approximately nine years. He variously described Hernandez as a troubled teen, an asshole, a dirtball, someone who called him a f-----g pig, crazy, someone who had in the past dealt a baggy or had a blunt, a liar, and someone who used to hide all the time so the cops would never catch him. Grievant knew that Hernandez's girlfriend claimed that Hernandez was stalking her. Despite these less than flattering descriptions, it is undisputed that Grievant kept company with Hernandez, drank beers with him, let him use his pool table in his basement, knew the details of his relationship with a certain "Doity" and her child, had Grievant buff out one of his cars, let Hernandez come "in and out" and had his cell phone number. Grievant was clearly more than a casual acquaintance of Hernandez.

As a sworn law enforcement officer, Grievant possesses a special status due to his training and oath of office. His discretion and judgment are an integral part of what makes him a valuable asset to his employer. His credibility must be a given, as his fellow officers depend on it and the legal system demands it.

Grievant has always worked in law enforcement. He served as a cadet for the Patrol before he enrolled at the Academy. His evaluations demonstrate that as to his performance in general, he met and sometimes exceeded the standards of the Patrol. He had received a recognition award for his work against auto larceny. However, his department record shows someone who has judgment issues. He was disciplined for distribution of a so-called courtesy card imprinted at personal expense, and for an incident at the training academy wherein he made an obscene gesture to cadets and used foul language. These prior incidents do not add favorably to the impression made by Grievant.

The Union stresses that Lt. Rohner never told Grievant that his neighbor was the target of an ongoing drug investigation. Nor did Rohner tell him that he was being contacted because his phone number appeared on Hernandez's pen list. The Union agrees that Grievant's misconduct would be demonstrated had he been told either of these facts, then called Hernandez. But the Arbitrator has deep reservations about the judgment and reliability of an officer who relays *any* conversation with another law enforcement officer to someone he himself believes to be involved with drugs and living an obviously troubled life style. As the Patrol notes, his past service on the drug interdiction team should have been sufficient notice to Grievant that a report to Hernandez that he was being watched was out of bounds.

It is not the finding of this Arbitrator that Grievant committed any acts rising to the level of criminal behavior. But the Arbitrator finds that Grievant's actions in reporting his contact by Rohner to Hernandez, in the factual context of this matter, constitute conduct unbecoming an officer. This is true even without direct notice by the Lorain P.D. that it was in the midst of an ongoing criminal investigation. Grievant knew or should have known that Rohner was not making a social call about his neighbor. Grievant knew that Grievant had unsavory, illicit behaviors in the present as well as in

the past. There was no reason for Grievant to tell Hernandez about the call; and no credible reason for him to amplify the notice by playing the tape-recorded message.

Grievant's explanations are wanting in credibility: in response to questions from Lt. Waters of the Berea Post and Sgt. Schmutz from the investigative unit, grievant stated:

{Grievant}: His context was...I mean, I've had informants where people say things all the time, but he did...you know, it wasn't, hey, you know, can you do this? W...it wasn't a we've got this, it was a ...a ph...I get phone calls all the time, you know...

{Lt. Waters}: But he discussed possible illegal activity with you.

{Grievant}: He...he asked me if I knew of any, and I...he didn't discuss...I told him uh, that I was unaware of any. He said...he didn't say we've got, you know, him doing...I...I was...that was not the intent of the call.

{Sgt. Schmutz}: If you were unaware of any illegal activity, why would you go immediately to Jonathan and tell him about the call?

{Grievant}: If I saw...like I said, it was to tell him that, you know, it was because of the baby...the baby, and that I thought, you know...

...I was tryin to, you know, if I could stop the police from comin' to the neighborhood or, you know, arrestin' somebody or, you know, if you can avoid some.....if you can handle the problem and be nice to somebody and say hey, quit it or...slow down down this street, you know, instead of havin', you know...that's the neighborly...you know, you...

In each tape-recorded conversation, the Arbitrator found Grievant's voice and conversations to be defensive, nervous, and agitated. The same effect is present in a transcript of his interview with Sgt. Schmutz. He is unresponsive to questions, does not completely answer questions, and gives conflicting information or ambiguous responses.<sup>2</sup> The Arbitrator's perception of Grievant's demeanor did not improve while he was testifying at the arbitration hearing. This pattern of response leads the Arbitrator to conclude that Grievant's explanations as to the reasons for calling Hernandez are not creditworthy.

Even assuming that *he* believed that he was acting in a neighborly fashion to prevent harm to Hernandez, Grievant's own comments about Hernandez make it extremely hard to accept that the contact was in the nature of a friendly warning. The flawed judgment displayed by Grievant is indicative of a fundamental disregard of his

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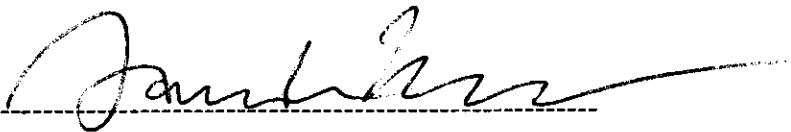
<sup>2</sup> The Arbitrator considered evidence that Grievant was or had sporadically been on various medicines relating to anxiety and that he had been to EAP. This information did not suggest to the Arbitrator that reasons exist to mitigate his conduct, as explained hereinabove.

role as a law enforcement officer. At the time of the arbitration hearing, Grievant stated that he would not do anything differently than he had on September 27, 2000. Grievant's lack of any acknowledgement that he made a serious error of judgment in reporting the Rohner contact to Hernandez further convinced the Arbitrator that Grievant has lost his ability to effectively serve as a member of the Patrol.

Grievant did indisputably provide information to a suspect in a police investigation. This constitutes conduct unbecoming an officer. The Grievant has forfeited the trust of the Patrol by his actions. A sworn law enforcement officer should not have chosen to immediately inform his neighbor that a law enforcement agency was making inquiry on him. The entire context of the relationship between Hernandez and Grievant makes an innocuous interpretation of his actions unsupportable. It is the opinion of this Arbitrator that just cause exists.

**AWARD**

The grievance is denied.

A handwritten signature in black ink, appearing to read 'Sandra Mendel Furman', is written over a horizontal dashed line.

Sandra Mendel Furman, Arbitrator

Issued in Columbus, Ohio on November 1, 2001