

1545
DR. DAVID M. PINCUS
Arbitrator
4026 Ellendale Road
Moreland Hills, Ohio 44022

January 8, 2002

Mr. Mike Duco
Chief of Arbitration Services
106 North High Street
Columbus, Ohio 43215-3019

-and-

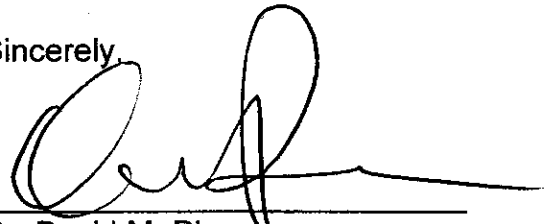
Mr. Herschel Siegel
Ohio State Troopers Association
6161 Busch Blvd., Suite 220
Columbus, Ohio 43229-2553

Re: The State of Ohio, Ohio Department of Public Safety, Division
of the State Highway Patrol and Ohio State Troopers Association
Grievant: Timothy R. Downing
Grievance No.: 15-00-20010709-0081-04-01

Dear Mike and Herschel:

Enclosed please find the Opinion and Award dealing with the above captioned matter. I have also enclosed an Arbitrator's Invoice for services rendered.

Sincerely,

A handwritten signature in black ink, appearing to be 'D. Pincus', written over a horizontal line.

Dr. David M. Pincus
Arbitrator

#1545

STATE OF OHIO, OHIO DEPARTMENT OF PUBLIC
SAFETY DIVISION OF THE STATE HIGHWAY PATROL
AND OHIO STATE TROOPER'S ASSOCIATION

IN THE MATTER OF THE ARBITRATION BETWEEN:

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

-AND-

OHIO STATE TROOPER'S ASSOCIATION

GRIEVANT: TIMOTHY R. DOWNING
OCB CASE NO.: 15-00-20010709-0081-04-01

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
JANUARY 10, 2002

APPEARANCES

For the Employer

Rick Corbin
Robert J. Young
Larry Banaszak
Megan Rockas
Lori Stine
Beth A. Lewis
Charles J. Linek

Major
Captain
Lieutenant
Trooper
Cadet Dispatcher
Office of Collective Bargaining
Advocate

For the Union

Bob Still
Elaine Silveira
Darrell Thomas
Timothy R. Downing
Herschel M. Sigall

President
Second Chair
Staff Representative
Grievant
Advocate

INTRODUCTION

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

and The Ohio State Troopers Association, Inc. Unit 1 (hereinafter referred to as the "Union") for the period July 1, 2001 to June 30, 2004 (Joint Exhibit 1).

The arbitration hearing was held on November 6, 2001, at the Office of Collective Bargaining, Columbus, Ohio. The parties had selected Dr. David M. Pincus as the Arbitrator.

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

At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing briefs. The parties submitted briefs in accordance with guidelines established at the hearing. Briefs were postmarked to the Arbitrator on or before November 27, 2001.

STIPULATED ISSUE

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

PERTINENT CONTRACT PROVISIONS

19.0 Standard

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

CASE HISTORY

Timothy R. Downing, the Grievant, had been a Trooper for approximately eight (8) years prior to his removal. He was selected to be a Temporary Instructor at the Highway Patrol Academy. The Grievant began this assignment on March 5, 2001, and

was expected to continue through September 28, 2001, when the 137th Academy class graduated.

The Academy is a highly intimidating environment, which extensively uses a variety of techniques to modify cadets' attitudes while upgrading and developing their skills. It is a highly stressful environment both physically and mentally, where cadets are kept occupied from early morning until late at night.

An instructor's role is critical to the behavioral modifications process. He/she serves as a role model and is responsible for changing and correcting cadet's behavior. Instructors, whether permanent or temporary, have a great deal of supervisory and disciplinary authority over cadets. In fact, the Rules and Regulations Manual for the 137th cadet class states:

- J. Orders from a Staff Officer or Instructor will be accepted as orders from the Academy Commandant.

(Employer Exhibit 3, Pg. 13)

Whether on or off duty, instructors are asked to stress the Core Values, which are the foundation of the Ohio State Highway Patrol. These values include: Honesty, sense of urgency, attention to detail, team-oriented, professionalism, adaptability, self-discipline, performance driven and officer safety. Instructors, moreover, are expected to remain professional even if off duty.

The facts for the most part are very much in dispute involving two separate, but related incidents. The incidents took place in the "old" xerox room, a basement storage facility, between Megan Rockas, a Cadet, and the Grievant. Both individuals admitted

to some form of sexual contact on both occasions, but disagreed regarding the circumstances, and whether consensual transgressions had taken place.

The disputed matters came to the Employer's attention in a circuitous fashion. Lori Stine, the Grievant's fellow Cadet, was informed by the Grievant about the incidents. She, in turn, advised her boyfriend, a Detective working for the Employer. The provided information resulted in an administrative investigation leading to the Grievant's termination.

On July 6, 2001, the Grievant was terminated from his position as a State Highway Patrol Trooper with the Department of Public Safety. He was charged with violation of Rule 4501:2-6-02 (I) (1) (3) of the Rules and Regulations of the Ohio State Highway Patrol. These rules state in pertinent part:

(I) Conduct unbecoming an officer:

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

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

- (2) For any improper on-duty association with any individual for purposes other than those necessary for the performance of official duties.

(Joint Exhibit 3)

On July 7, 2001, the Grievant protested the Employer's decision by filing a grievance. The Grievance Facts portion of the grievance specifies:

On July 6, 2001, I was terminated from my position as an

Ohio State Trooper without just cause and the discipline was not progressive.

(Joint Exhibit 2)

The parties were unable to resolve the disputed matter. Neither party raised substantive nor procedural arbitrability concerns. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Employer's Position

It is the position of the Employer that it did have just cause to terminate the Grievant for behaving inappropriately and for engaging in sexual contact with a Cadet Trainee. The Grievant's actions throughout these episodes, and his inconsistent testimony and candor, raise sufficient proof that he is guilty as charged.

During the earliest stage of this relationship the Grievant set the tone for what subsequently ensued. He testified Rockas approached him and asked why he had not told the class about himself? Rockas then began to list personal information dealing with his family and experiences. Although these matters are not to be discussed by any Cadet with an Instructor, the Grievant never reported the incident nor advised Rockas about the impropriety of her questions.

The first incident took place on or about May 24, 2001, in the basement of the Academy in the "old xerox room." The room in question serves as a supply room or storeroom. It contains pamphlets and other materials distributed for educational purposes. There are two stairwells with one blocked so that one stairwell serves as the exit and entry point.

On the day in question, the Grievant approached Trooper McClendon, the Duty Officer, about a work detail he needed to complete. He needed notebooks compiled for in-service training, which is held twice per week. Approximately 340 copies of various educational material had to be collated.

Rockas testified the Grievant assigned her to the detail in the xerox room of the Academy's basement. She was alone and engaged in the assigned activity when the Grievant arrived in the basement. He made several comments that were totally inappropriate, comments dealing with her hair, skin and eyes. The Grievant also engaged in inappropriate behavior by touching the back of her hand. The Grievant never kissed her during this first incident.

The Grievant's view of the first incident seems less than credible, and therefore, Rockas should be believed. If a kiss took place, the Grievant had to cooperate and actively participate. His posture and location during the incident preclude any other interpretation.

Temporary and Permanent Instructors are primarily responsible for correcting Cadets' behaviors and serving as role models. Yet, if either the Grievant's or Rocka's versions are to be believe, then the Grievant should have notified a supervisor after the incident. Rocka's purported activity, if affirmed, would have resulted in her immediate removal from the Academy. The Grievant had the authority and responsibility to discipline Rockas, but he did not. Clearly, he was a willing and leading participant and engaged in behavior viewed as totally inappropriate.

The second incident took place the evening of May 31, 2001. Lori Stine, a Cadet at the time of the dispute, was copying notebooks for McClendon in the classroom

across from the library. Rockas entered the room between 6:30 p.m. and 7:30 p.m., and asked whether she needed help. The Grievant, who was off duty at the time, asked if she had finished the detail she had previously undertaken in the "old xerox room." Rockas left the room and was followed shortly thereafter by the Grievant.

While working on her assignment in the storeroom, the Grievant arrived at the same location. Rockas testified the Grievant tried to kiss her and made contact with her. She raised her hands toward his chest in an attempt to thwart his advance. The Grievant then placed one hand on her left shoulder, and took her hand and placed it near his genital area. Rockas moved his hand and the Grievant asked if she would kiss his penis. He, then, exposed his penis, and with his other hand lowered Rockas toward his genital area. Rockas placed her mouth on his penis for a few seconds, and when he removed his hand, Rockas stepped away from him.

Rockas did not report the incident because she was afraid of losing her job. She did, however, converse with Stine shortly after the incident.

The Union's arguments seem to conflict. The Union would have the Arbitrator view the last encounter as totally consensual, and at the same time color the incident as an attack perpetrated by Rockas. Clearly, the Union cannot have it both ways. Either action, however, is improper and worthy of termination.

The Grievant's testimony is laden with a rash of inconsistencies. After the first incident the Grievant stated he avoided being alone with Rockas. Yet, he did not act as if this was his true intention. He asked her about her work assignment and followed her to the storeroom.

The various versions regarding the second incident make no sense. The Grievant never attempted to escape a sexual assault. His actions were not defensive but collaborative; he could have gotten away, but did not want to.

Grievant provided testimony at the arbitration hearing inconsistent with prior statements. During the investigation the Grievant identified three separate incidents, while referencing two incidents at the hearing. At the hearing, the Grievant maintained he never told Rockas about going to a hotel room during an upcoming liberty. During the investigation, however, a transcript (Employer Exhibit 5) indicated a differing view of the situation. He had some discussion with Rockas concerning this topic.

Several unequal treatment claims were properly rebutted by the record. The Employer had no reason to treat the Grievant similarly to Rockas; they were not similarly situated. Rockas was not disciplined because of the tremendous status difference between a Cadet and an Instructor. In a quasi-military environment, Cadets are to follow orders and do not question instructors.

A prior arbitration award (Employer Exhibit 1) fails to establish unequal treatment. This particular case can be readily distinguished. The case involved two Troopers who, after drinking alcohol in a social setting, returned to the Academy and engaged in consensual sex. Both individuals were terminated by the Employer, but the Trooper was reinstated with a last chance remedy; with the female probationary employee removed and unable to press the matter to the arbitration stage.

Here, the protagonists were not in a social relationship. Rockas did not have an opportunity to leave the Academy. She was, moreover, limited by status constraints thrust upon her by the Grievant's behavior.

The Grievant's inappropriate behavior is not mitigated by his "duty" status. The Grievant was acting inappropriately while off duty at the Academy, which converts his inappropriate behavior to on duty misconduct.

Prior work performance should not be viewed as a plausible mitigating factor. These episodes were so deeply appalling that a second chance is considered unjustified. He violated the Employer's core values and trust. As an instructor, he had certain critical responsibilities commensurate with his role and authority, which he dreadfully accomplished.

The Union's Position

The Union opined that the consensual and brief sexual contact between the Grievant and Rockas did not constitute behavior warranting termination.

Stine's testimony clearly established that the encounter was not coerced, and that the Grievant was the aggressor. Rockas confided in Stine and her version indicated she was never coerced. Rockas told her she was attracted to the Grievant prior to the disputed incident. After the incident, Rockas did not appear scared, but seemed to glow in her conquest.

Rockas was totally unpersuasive and untruthful in her review of the disputed incident. She changed her version on two occasions during the administrative interview. Her version, moreover, was contested by the Grievant and corroborated by Stine, an impartial observer.

The Grievant's testimony, on the other hand, was consistent throughout the process and the arbitration hearing. This consistency was remarkable considering his admission of engaging in impermissible conduct.

Termination is obviously unwarranted based on the Grievant's record of performance, and contribution to the Employer's mission. During his years of service, he has received numerous awards with a nearly non-existent disciplinary record.

Disciplinary outcomes related to an antecedent arbitration case (Employer Exhibit 1) of consensual sexual contact should apply to the present proceeding. Any other determination would constitute disparate treatment. In that case, a female probationary employee was terminated, but had no appeal rights. She eventually sued the Employer, and that suit is pending. The Trooper, who had been a Temporary Instructor, was reinstated without back pay. One of the mitigating factors considered by the arbitrator was the Grievant's exemplary work record.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, an impartial review of the record and pertinent contract provisions, it is this Arbitrator's opinion that the Employer had just cause to terminate the Grievant. The record establishes beyond any doubt that the Grievant violated the Rules and Regulations of the Ohio State Highway Patrol, specifically of: Rule 4501:2-6-02 (I) (1) (3), Conduct Unbecoming an Officer (Joint Exhibit 3). The Grievant was not "attacked" by Rockas on either incidents in dispute, but rather, as the record clearly indicates, was a willing participant who enabled these perilous events; events which violated the Employer's core values, the very integrity of the institution, and the Grievant's own professional standards. Attempts to justify what transpired were radically jettisoned by the Grievant's lack of credibility. Unequal treatment claims and other attempts to mitigate the removal were equally unpersuasive.

The Grievant's own actions and admissions depict a series of circumstances entirely within his control. But circumstances wielded in a manner which maximized his authority and power over Rockas. This should not minimize Rockas' role in the disputed affair, because the Arbitrator believes she played a critical and willing role once the Grievant configured the circumstances to his advantage.

The Grievant, at the hearing, clearly acknowledged his familiarity with the Academy's non-fraternization policy, as well as knowledge and understanding of what forms of conduct constitute conduct unbecoming an officer. Yet, with full knowledge and acceptance of these principles, his conduct breached the very trust the Employer had placed in him as an Instructor.

Lines of authority, differentiating Instructor-Cadet relationships, were breached early on by the Grievant. Rockas had no business discussing personal information with the Grievant. He neither corrected her conduct nor reported the incident to his supervisor. If he had, the geometry of the relationship might have retained the proper perspective rather than the faulty course which ultimately ensued.

Both individuals admit that inappropriate conduct transpired during the first incident in the storeroom. Whether mere unprofessional comments, kissing, or inappropriate touching took place is immaterial to this analysis. Any of the conduct described was inappropriate. If Rockas had indeed been the initiator, she should have been disciplined and her supervisor notified.

The Grievant's conduct is viewed as extremely calculating. The Arbitrator is led to believe the Grievant, rather than the Duty Officer, made this storeroom assignment.

It was a way for Rockas to eliminate certain "gigs" or critical incident slips¹ accumulated during her stay at the Academy. Nothing in the record suggests that a Duty Officer assigned Rockas these special duties in the Academy's basement. Based on the Grievant's prior conversation with Rockas he should have known or anticipated the possibility of some uninvited, or even, invited exchange. He placed himself and Rockas in a potentially perilous situation, and now must suffer the consequences of his poor judgment.

In my view, after this brief prior episode, the Grievant utilized his role as an Instructor to further his amorous goals, which led to the second incident. While off duty, although at the Academy, in sweat pants and other leisure garb, the Grievant asked Rockas whether she finished the assignment in the storeroom. She had not, and returned to the basement storeroom, followed shortly thereafter by the Grievant.

These actions further muddy the Grievant's credibility because available alternatives could have prevented what transpired in the storeroom. He should have gone to the Duty Officer and had him/her make the assignment, as well as follow-up on Rockas' progress. Rather than removing himself from a potentially fatal situation, he configured the situation to meet other self-serving objectives. Stine corroborated Rockas' version that the Grievant arrived at the storeroom after her departure. Stine remembered the Grievant leaving the classroom after giving Rockas the assignment and her earlier departure. The Grievant was never surprised by Rockas because he knew where she was going and followed her to the basement storeroom.

¹ Cadets who engage in undesirable behavior can eliminate "gigs" associated with critical incidents. These "gigs" need to be accounted for in order to receive liberty. The "gigs" can be eliminated by performing a detail in the evening or writing an assigned essay.

The activities engaged in at the basement storeroom are, in my view, examples of on-duty misconduct. By assigning Rockas the duty, and acting in his capacity as Instructor at the Academy, the Grievant, while "off duty" converted his acts to forms of on duty misconduct.

The prior review establishes that what occurred during the second incident was to some degree orchestrated by the Grievant, which resulted in the sexual aftermath. In no way do these incidents indicate the Grievant was victimized, but rather, he served as a willing participant to this unauthorized sexual escapade. Again, if the Grievant's version is to be believed, then he should have reported the event, but he failed to do so.

These findings, moreover, are further bolstered by a series of contradictions and inconsistencies raised by the Grievant's testimony. They clearly injured the Grievant's credibility regarding the entire episode.

The height disparity between Rockas and the Grievant lends some disrepute to his version of events surrounding the first incident. During direct examination, the Grievant stated that he was at parade rest with his hands behind his back when Rockas kissed him. On cross-examination, however, he states he was leaning back against the shelves when Rockas, the aggressor, kissed him. These differing versions regarding posture and location raise some concern, but even more disconcerting is Rockas' ability to perform this act without the Grievant's willing participation. Rockas is approximately one foot shorter than the Grievant, which would require his acquiescence and participation if a kiss took place.

The Grievant stated he tried to escape Rockas' advances during the second incident. His stance and posture cannot be characterized as defensive. He noted he

had one hand on top of a shelf and his other hand on his hip while he was looking away. Even with the noted height and weight disparity, the Grievant maintained he was unable to ward Rockas off. Also, the "assault" could not have been severely traumatic considering the Grievant allowed her to pull his sweatpants, shorts and underwear down before she placed his penis in her mouth. The Grievant had sufficient opportunity to ward Rockas off if he had wanted to, but his orchestrations came to fruition with certain unintended consequences attached.

Another contradiction surfaces when one analyzes the Grievant's responses regarding liberty status. At the hearing, the Grievant was asked the following:

Q: and did you suggest getting a hotel with her?

A: No, I did not.

Q: did you discuss meeting her on liberty?

A: No, I did not.

During the disciplinary interview his response dramatically differed:

RT: Did you and Rockas ever agree to meet on a Wednesday during liberty at a hotel or anything?

TD: We had discussed that, but it never...happened.

The Grievant's attempt to reconcile this contradiction seems incredulous. Even though he remarked he was not aware of any other transcription errors, he noted his remarks regarding liberty were inaccurate.

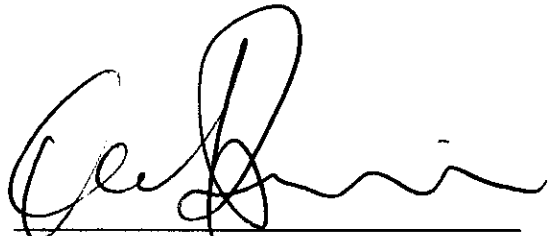
The Union's unequal treatment claim is unpersuasive. The Employer has treated similarly situated Instructors in a like manner; all have been removed notwithstanding reversals initiated by arbitrators. But this particular case can be readily distinguished on other grounds. Here, unlike Arbitrator Keenan's case (Employer Exhibit 1), the

relationship in question, and resultant misconduct, were between a Cadet and an Instructor at the Academy. Instructors in this environment, whether temporary or permanent, enjoy a great deal of power and authority over cadets in terms of training requirements and potential future employment. These status differences place greater responsibilities on instructors in terms of conforming to accepted work rules, and moreover, justify differing levels of administered discipline. It is well established that employers have the authority to discipline supervisors at higher levels than other employees.² Instructors at the Academy are the Cadets' supervisors, and one would expect a higher level of loyalty, responsibility and restraint.

AWARD

The grievance is denied.

January 10, 2002
Moreland Hills, Ohio



Dr. David M. Pincus
Arbitrator

² Meijer Inc. 103 LA 269 (Daniel 1999); Cyprus Bagdat Copper Corp. 99 LA 841 (White, 1983)