

OPINION AND AWARD

In the matter of Arbitration

Between

The Ohio State Troopers Association, Inc.

And

**The State of Ohio, Department of Public Safety,
Ohio State Highway Patrol**

Regarding

**Grievance Number OCB# 15-00-20011105-0141-04-01
(Trooper David G. Keener)**

APPEARANCES:

FOR THE STATE:

**Staff Lt. Kevin Teaford, Advocate
Renee L. Byers Human Resources
Neni Valentine, OCB Representative**

FOR THE UNION:

**Herschel M. Sigall, General Counsel
Elaine N. Silveira, Attorney
Robert K Stitt, President
David G. Keener, Grievant**

An arbitration hearing was conducted December 03, 2001 at the Office of Collective Bargaining, Columbus, Ohio.

The issue in this case is: ***“Was the termination of Trooper David G. Keener for Just Cause? If not, what shall the remedy be?”***

The Troopers Association contends the following sections of the Collective Bargaining Agreement were violated:

ARTICLE 28 – ABSENCE CONTROL POLICY

28.01 Absence Control Policy

The employer shall have an absence control policy that is fair and reasonable and not arbitrary or capricious. To the extent that this policy does not conflict with state law or this contract, the absence control policy shall include, but not be limited to:

1. Report-in procedures.
2. “Ill at work” procedures.
3. Procedures for extended illness.
4. Procedures for emergency requests for personal or vacation leave.
5. Procedures for use of leave without pay when leave times are exhausted.
6. Violation of leave procedures.

28.02 Abuse of Leave

“Abuse of sick leave” is the utilization of sick leave for reasons other than those stated in state law or this contract. The abuse of sick leave shall be grounds for the disapproval of leave time for the time used abusively.

ARTICLE 19 – DISCIPLINARY PROCEDURE

19.01 Standard

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

19.05 Progressive Discipline

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

Disciplinary action shall include:

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

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

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

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

ARTICLE 18 – ADMINISTRATIVE INVESTIGATIONS

18.10 Off –Duty Status

Disciplinary action will not be taken against any employee for acts committed while off duty except for just cause.

In addition the parties jointly provided the arbitrator with the documents comprising the grievance trail and the disciplinary trail. It was noted the arbitrator has a copy of the appropriate Collective Bargaining Agreement

Testimony was offered by a number of witnesses and documentary evidence was offered by both parties.

Both parties were given full opportunity to examine and cross-examine witnesses, pose arguments and present their respective cases. Closing briefs were received within the time period agreed to by the parties.

All testimony and materials, including the viewing of a video tape of stops made by Trooper Kenner, were reviewed and considered by the arbitrator in reaching this decision.

In that this case deals with a matter of discipline, management assumed the burden of proof and presented its case first.

The parties agreed that the case was properly before the Arbitrator for determination.

MANAGEMENT'S POSITION:

Trooper David G. Keener was assigned to the Ashland Post of the Ohio Highway Patrol. In June of 2001 Trooper Keener stopped an eighteen year old female, Julie Deel, driving a pick-up truck on three different occasions during the month of June.

Subsequent to these stops, Mandy Bevan, a friend of Ms. Deel at the time, reported that Ms. Deel had told her, she (Ms. Deel) was having a sexual relationship with the Grievant while he was on duty.

The investigating officer, Sergeant Schmutz, reviewed the video and audio tapes and concluded that the Grievant had failed to activate the audio recording while he was with Ms. Deel even though he routinely activated the audio recording on all other stops.

In a further incident Sergeant Schmutz reported that the Grievant called in sick for his 11:00 p.m. shift on August 2, 2001. Shortly after calling in sick, he left his home and drove to Ms. Deel's

residence. They traveled together to a bar in Mansfield. While at the bar Ms. Deel bought and consumed alcohol and permitted Ms. Deel to buy alcohol for him without taking any action.

Management called Ms. Christine Micky who testified to conversations between her and Ms. Deel that they believed supported the illicit affair theory.

Based upon their investigation, the Director of Highway Safety terminated Trooper Keener on November 1, 2001.

UNION POSITION:

The Ohio State Trooper's Association view of the case is that management failed to prove the violations with which they charged Trooper Keener. They point to the fact that there is no tangible evidence that the grievant had a sexual liaison with Ms. Deel while on duty or in his patrol car.

In addition they called two witnesses who testified that one of them was with Ms. Deel during each of the traffic stops. Sarah Campbell testified that she was with Julie Deel during two of the stops including the first one. She stated that Trooper Keener was totally professional and that nothing improper took place.

Elisha Colosimo testified that she was with Ms. Deel during one of the stops and that it was very short and Ms. Deel did not leave the truck during the stop.

The employee organization also notes that the investigator removed the seat covers from the vehicle and sent them to London for semen testing. The results of these tests were negative.

The union argues that Trooper Keener twice received recognition as "Trooper of the Year" and had an outstanding record prior to this incident.

The union concludes that management failed to prove its case against Trooper Keener and that he should be reinstated and made whole.

DISCUSSION:

The Grievant was charged with violating three Highway Patrol Rules.

Rule 4501:2-6-02 (1)(1)(3), Conduct Unbecoming an Officer

Rule 4501:2-6-02 (Y)(2) Compliance to Orders

Rule 4501:2-6-02 (U), Use of Leaves

Basically there are four infractions with which Trooper Keener is charged:

The first is having sex while on duty with an eighteen year old female.

The second is abusing his sick leave.

The third is permitting an under aged person to purchase and consume alcohol in his presence and to purchase alcohol for him.

The fourth is failure to follow orders by not properly recording his traffic stops which involved Ms. Deel.

While there are sub issues surrounding his decision to issue, or not issue citations, the first four seem to this Arbitrator to be central to this case.

Let us examine them to see if management has proven each by a preponderance of the evidence.

Management clearly believes the story conveyed to them by Ms. Bevan. The problem is there is no direct proof or collaboration of the story. Even if Ms. Deel did say to Ms. Bevan exactly what was reported that does not necessarily make it true. Physical evidence would certainly help support management's case. The examination of the car and the seat covers resulted in a negative finding.

Management then turned to Sergeant Schmutz to prove their case. The investigation appeared to this Arbitrator to be seriously lacking. No mention was made of other witnesses to these traffic stops, and yet a review of the video clearly shows another person in the car during the first stop. While stop number three is less clear, it again appears that someone occupied the second seat in the truck.

Failure to find and identify these witnesses and interview them left the employer in a position of hearing un-refuted testimony from the two women produced by the Union.

Management apparently draws some conclusion from the fact the Grievant was married at the time of these stops, and that the Grievant apparently left his wife to be involved with Ms. Deel.

This Arbitrator disagrees. The Grievant's marital status is one between him and his spouse (or ex-spouse) and not a matter of concern for the employer.

While the theory advanced by management regarding the sexual activities taking place in or around the patrol car, may be totally accurate and true, it is not enough to offer a theory. To deprive a person of his career requires the employer to prove its case. In the

matter of proving the sexual activity taking place on work time and in or about the cruiser, the employer has failed to do so.

Lets us turn to the matter of failing to turn on the audio recorder during the stops of Ms. Deel. Management believes that this act is proof that something clandestine occurred while no recording was taking place.

The union offers evidence that the recording device had failed to work at other times and asserts that such was the case on these occasions.

The Arbitrator, in reviewing the video tape, notes that on all other stops when the audio worked properly, that Trooper Deel clearly pressed something on his belt to apparently activate the recording device. No such action is noted during the three stops involving Ms. Deel.

Combined with the unlikely possibility that the recording device would only fail on the three stops involving Ms. Deel out of all that were recorded on the tape, this Arbitrator believes Trooper Deel did not activate the audio recording. I do not agree that this failure proves what activity was concealed by the failure to record. While the silence could have shielded sexual activity, it could also have

concealed conversation wherein a later meeting was being discussed or arranged. As management noted in their post hearing brief, "We will never know what transpired between the Grievant and Ms. Deel while they sat alone in his patrol car in the early hours of the morning..."

One aspect that is troublesome is why the Grievant would have failed to record the first encounter, if the witnesses are to be believed that Ms. Deel and Trooper Keener did not know each other prior to that meeting.

Let us turn to the matter of sick leave abuse. This Arbitrator believes that if a person is too ill to report to work, that person is also too ill to pick up a female companion and visit a bar. Having noted that belief, this Arbitrator does not see a responsibility to make a determination regarding sick leave abuse except as it relates to the other behavior that evening.

There is no question that the Grievant took an eighteen year old to a bar, allowed her to purchase and consume alcohol, and to purchase alcohol for him. This is a serious violation of the conduct expected of a sworn law enforcement officer.

That fact that his judgment may have been clouded because of his personal relationship with the female only makes his behavior more troublesome.

The employer attempted to prove the Trooper had a sexual liaison with a female in his cruiser. They failed to prove that allegation.

They did prove the alcohol violation and, to my satisfaction, proved that he failed to audio record his stops involving Ms. Deel.

One must also consider the positive work record of a Trooper who seemed on the fast track to a bright and advancing career.

One of the aspects of just cause is to determine if the penalty imposed is commensurate with the proven offenses.

A review of penalties in similar arbitrations yielded few results. Two cases on point were helpful in reaching this decision.

In a very recent case in Cuyahoga Falls, Ohio a police officer's termination was upheld by Arbitrator Tom Coyne, when a female police officer came forward and testified she had engaged in sex with a male officer on two occasions while he was on duty and she was not. In addition this male officer took alcohol to the home of an

eighteen year old he had earlier issued a ticket to, and asked her to date him.¹

Two important distinctions can be drawn between this case and the instant case. The allegation of sexual activity was proven through the testimony of the female officer (who voluntarily took a polygraph). Secondly, the eighteen year old was frightened by the advances of the Police Officer and reported his uninvited advances.

In the second case on point, Arbitrator Daniel sustained the termination of a police officer who provided alcohol to his nineteen year old fiancé.² The officer became intoxicated and struck the female. He was arrested and found guilty of a criminal violation. He also was offered an opportunity to undergo psychological evaluation and the conclusion was that he would not succeed if returned to duty. (If he had successfully passed the psychological evaluation management would have imposed a thirty day suspension.)

¹ 116 LA 545 City of Cuyahoga Falls, Ohio and Fraternal Order of Police, November 16, 2001

² 110 LA 92 in re City of Rogers City, Michigan and Police Officers Labor Council, September 23, 1997

Neither party provided evidence of penalties rendered for similar infractions in the past in this particular unit. Consequently the Arbitrator cannot make a totally informed judgment regarding equal application of rules.

After considering the two cases cited above with their significantly more serious proven infractions, it is my opinion that the proven offenses in this case, while extremely serious, do not support termination. In my opinion just cause does exist to support a lesser penalty.

DECISION, AWARD AND REMEDY:

The grievance is granted in part and denied in part. I find that management failed to prove the aspects of the charges discussed above and succeeded in proving those charges indicated.

Trooper David Keener is ordered returned to duty no later than thirty days following receipt of this award but without back pay.

His record shall be corrected to note a suspension equal to the period of time between November 1, 2001 and the date of his reinstatement.

It is so ordered at London, Ohio this 14th. Day of January, 2002


N. Eugene Brundige, Arbitrator