

**THE STATE OF OHIO, OHIO DEPARTMENT OF PUBLIC SAFETY
AND OHIO STATE TROOPERS ASSOCIATION
LABOR ARBITRATION PROCEEDING**

IN THE MATTER OF THE ARBITRATION BETWEEN:

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

#1609

-AND-

OHIO STATE TROOPERS ASSOCIATION

GRIEVANT: JENNIFER DELONG

GRIEVANCE NO.: 15-00-20020531-0083-04-01

**ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: FEBRUARY 15, 2003**

APPEARANCES

For the Employer

B.W. Richardson	Trooper
S.W. Whitlatch	Trooper
D.L. Webb	Trooper
Lee A. Darden	Sergeant
Reggie Lumpkins	Lieutenant
Neni Valentine	Office of Collective Bargaining
Renee L. Byers	Advocate

For the Union

Jennifer Delong	Grievant
Betty Tatum	Radio Operator
Bob Stitt	Staff Representative
Wayne McGlone	Staff Representative
Dennis Gorski	President
Elaine N. Silveira	Associate General Counsel
Herschel M. Sigall	General Counsel

INTRODUCTION

This is a proceeding under Article 20 – Grievance Procedure, Section 20.07 –
Grievance Procedure of the Agreement between the Department of Public Safety,

Division of the State Highway Patrol (hereinafter referred to as the "Employer") and Ohio State Troopers Association, Inc. (hereinafter referred to as the "Union") for the period July 1, 2000 to June 30, 2003 (Joint Exhibit 1). The parties selected Dr. David M. Pincus as the Arbitrator.

An arbitration hearing was held on July 18, 2002 at the Office of Collective Bargaining, Columbus, Ohio. At the hearing the parties were allowed to present and introduce documents, testimony and evidence. They were, moreover, allowed to examine and cross-examine witnesses. At the conclusion of the hearing, the parties were asked if they wished to provide post-hearing briefs. Both parties supplied briefs in accordance with guidelines established at the hearing.

PERTINENT CONTRACT PROVISIONS

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.

(Joint Exhibit 1, Pg. 26)

19.05 Progressive Discipline

The Employer will follow the principles of progress 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 merits the more severe action.

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

(Joint Exhibit 1, Pgs. 28-29)

STIPULATED ISSUE

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

STIPULATED FACTS

1. The following A.I.'s resulted in discipline other than termination:

A.I. no. 01-0816 (Sgt. Newburn)
A.I. no. 01-0236 (Tpr. Decker)
A.I. no. 01-0081 (Sgt. Laner)
A.I. no. 01-0586 (Tpr. Croston)
A.I. no. 02-1710 (Sgt. Vierstra)
A.I. no. 02-1406 (Tpr. Smith)

2. No discipline was given to any OSP employee who stated they saw the Grievant sleeping prior to March 18, 2002, but failed to report same to the Employer.

CASE HISTORY

Jennifer Delong, the Grievant, began her career with the Employer on September 1, 2000, when she was commissioned as a Trooper. After three (3) months of field training, the Grievant was assigned to the Statehouse. At the time of the disputed

matter, the Grievant was assigned to the same location, working the third shift from 11:00 p.m. to 7:00 a.m.

On the night of March 18, 2002, the Grievant was "sitting desk" in the radio room. She was filling in for an absent Radio Operator/Dispatcher. In this capacity, the Grievant was required to perform the following functions: watch the monitors, answer the phones, monitor radio traffic and maintain the radio log Form 53B. These duties are critical because all Statehouse activity is monitored continually. An individual performing these duties serves as the link to outside activity and provides assistance whenever necessary.

On or about 3:30 a.m. on March 18, 2002, Trooper Ben Richardson arrived at the Statehouse while off duty. He testified he came to the Statehouse to retrieve some training material for canine "Nitro's" training. The training was scheduled for the following day.

Trooper Richardson reviewed the circumstances leading to the Grievant's removal. He approached the back entrance and was buzzed into the Communication Room, where the Grievant was "sitting desk." He alleged the Grievant was lying on her desk, but was turned away from him. Trooper Richardson noted he knocked on the window several times, but the Grievant was non-responsive. Eventually, he removed the wooden block from the mail slot and told the Grievant to wake up.

The Grievant allowed Trooper Richardson to gain entrance into the Communication Room. He scolded the Grievant for being asleep, and asked who else was working. The Grievant responded that Trooper Webb was in the radio room, while Trooper Whitlatch was in the back squad room office.

Trooper Richardson confronted Trooper Webb in the radio room. He observed Trooper Webb sitting in a chair, with his shirt unbuttoned, with his head back, obviously asleep. As Trooper Richardson woke him up, Trooper Webb replied, "I'm hurting today."

After counseling the Grievant and Trooper Webb, Trooper Richardson left to confront Trooper Whitlatch in the squad room. Trooper Richardson found Trooper Whitlatch reading the Read and Sign book. He reviewed his prior observations involving the other Troopers, and Trooper Whitlatch purportedly replied, "I'm not surprised that they were asleep. I get tired of telling them about it".

Trooper Richardson reported the incident to his supervisor, Sergeant Lee Darden. An administrative investigation was initiated regarding the Grievant's conduct.

On May 23, 2002, the Grievant was removed for two violations of the Rules and Regulations of the Ohio State Highway Patrol: Rule 4501:2-6-02(E), False Statement/Untruthfulness. The Grievant, more specifically, was charged with sleeping on duty, then denying that she was sleeping during the course of the investigative interview after being observed by a fellow trooper (Joint Exhibit 3).

This removal decision was formally contested on May 28, 2002. The grievance contained the following Grievance Facts:

On May 23, 2002, I was unjustly terminated from my position as a Trooper. This is (sic) violation of the principles of progressive discipline was without just cause. During the administrative investigation that preceded the

discipline, a male trooper was not asked the same questions as I had been asked despite the fact that the charge levied against him was the same that was levied against me.

(Joint Exhibit 2)

The grievance was not settled during subsequent stages of the grievance procedure. Neither party raised procedural nor substantive arbitrability issues. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Employer's Position

The Employer opined it had just cause to terminate the Grievant for several rule violations. Clearly, the Grievant was sleeping on duty on March 18, 2002, lied about both the incident in question and other instances where she slept on duty. Also, the Grievant was not treated disparately nor should the failure to discipline other employees for failing to report prior improprieties by the Grievant taint the removal decision. Other attempts to somehow taint observations made in support of removal are easily rebutted.

The Grievant was sleeping on duty on March 18, 2002. Troopers Richardson and Whitlatch provided credible testimony regarding the Grievant's state of alertness. Both engaged in efforts to awaken the Grievant. Trooper Richardson virtually screamed to get her attention. Trooper Whitlatch, moreover, had to pass the Grievant to leave the radio room. This was not accomplished easily because she was fast asleep tucked underneath a blanket. Rather, Trooper Whitlatch had to tap her on her legs to wake her long enough to move her legs out of his way.

The Grievant acknowledged she regularly worked overtime. She also stated it was hard to stay awake at the Statehouse. Within this context, it is highly probable the Grievant was sleeping.

Trooper Richardson's testimony is highly credible regardless of the Union's attempt to minimize and taint its propriety. Pending litigation involving the Grievant and Trooper Richardson was initiated after the events of March 18, 2002. As such, it is totally irrelevant to the present disputed matter. Even though Trooper Richardson arrived during the early morning hours of March 18, 2002, he was not impaired nor intoxicated. Trooper Whitlatch confirmed this conclusion regarding Trooper Richardson's demeanor and actions.

Reliance by the Union on 53B forms used on the morning in question fail to support the Grievant's non-sleeping state. For approximately 35 minutes, between 3:00 a.m. and 3:35 a.m., the Grievant made no entries. This time frame coincides with Trooper Richardson's arrival at the Statehouse. Since a number of plausible alternatives exist for this lack of reported activity, any testimony tendered on the Grievant's behalf is, at best, inconclusive.

The Grievant lied about the March 18, 2002 and other prior incidents when she slept on duty. Again Troopers' Richardson and Whitlatch provided credible and consistent observations regarding her status. By denying her impropriety, she lied during the course of the administrative interview. Once the Grievant was caught in this egregious act, normal progressive discipline typically imposed for similar acts of sleeping on duty no longer became operative. Others admitting to similar acts of misconduct, were justifiably disciplined less rigorously.

The Grievant, moreover, lied about other instances where she was sleeping on duty. This charge was supported by testimony provided by Troopers Whitlach and Webb. Trooper Webb has worked with the Grievant since September of 2001. During this period he has observed the Grievant asleep on numerous occasions. Trooper Webb admitted he never reported any of these incidents, even though he should have done so. Trooper Whitlach, moreover, never reported prior sleeping incidents. He maintained the Grievant slept in other locations other than the radio room.

The Grievant's testimony is riddled with inconsistencies, which should cause one to view testimony provided by Troopers Webb and Whitlach as highly credible. She changed her testimony regarding training she received on how to "sit desk" and other work at the Statehouse.

Just cause in this particular instance is not minimized nor altered because other employees were not disciplined for failing to report other prior instances of sleeping on duty by the Grievant. Admissions surfaced during the administrative investigation involving the disputed matter could not be used to initiate disciplinary actions against these individuals. None of these employees were provided with Union representation nor were they given their Garrity rights.

The Union was unable to support its unequal treatment argument. Several employees were charged with dishonesty, but they had greater seniority than the Grievant and had much more respectable department records. Other employees were not charged with dishonesty and are clearly not similarly situated.

The Union's Position

The Union opined the Employer did not have just cause to remove the Grievant. It maintained the administrative investigation was fatally flawed, proofs regarding the matter asserted failed to reach the level necessary to support termination and the imposed discipline resulted in unequal treatment.

For the following reasons, the administrative investigation was flawed resulting in serious due process violations. Sergeant Darden conducted the interviews, but did not have them transcribed. Rather, he decided to author questions and answers during the course of the interviews. Both Trooper Webb and the Grievant were the focal points of the investigation, and yet, the selected methodology engendered biased responses dominated by selective omissions. Unlike the Grievant, Trooper Webb was never asked whether he had previously slept on duty, even though he admitted to sleeping on duty on the date in question. The record is replete with Trooper Webb's admissions and denials regarding whether he slept on duty on the 18th of March. Still, the Employer did not initiate an equally intense investigation dealing with Trooper Webb's prior conduct.

The Grievant was not asleep on March 18, 2001. The Grievant, under immense pressure, has consistently and relentlessly held firm regarding her non-sleeping status. She might have been inattentive, but she was not asleep.

Objective data supported this view. The Dispatchers Log (53B) (Union Exhibit 1) established that the Grievant performed her dispatch duties efficiently and completely. There were no unsuccessful or delayed attempts to reach the Statehouse Communication Center.

The Employer's witnesses never provided sufficient proof the Grievant was asleep. Observations tendered by these individuals never fully confirmed the Grievant's state of consciousness. They never had any verbal interaction with the Grievant determining whether she was asleep.

Trooper Richardson's testimony failed to provide sufficient proof regarding the Grievant's state of consciousness. It was established the glass partition which separates the public from the Communication Center makes hearing through the glass quite difficult. This condition is especially true when a small pass through is covered by a wooden block.

Trooper Richardson testified it took the Grievant approximately "15 seconds" to acknowledge his presence and buzz him into the Communication Center. He knocked on the glass, waited, knocked on the glass again, waited, and finally called the Grievant. This delay, the Grievant's demeanor in the Communications Center, and her lack of responsiveness led him to believe she was asleep.

Trooper Richardson's testimony, however, was not definitive. The record is unclear on the number of times he attempted to gain the Grievant's attention. It is equally unclear whether he removed the block prior to his first attempt. As such, this situation might have led to a reasonable delay in the Grievant's response. Trooper Richardson, moreover, never saw the Grievant's eyes because she was seated facing the television monitors with her back to the glass partition.

Trooper Richardson's testimony was further discredited by obvious animus toward the Grievant. He was a rebuffed suitor who had been charged by the Grievant as a sexual harasser. This allegation purportedly caused Trooper Richardson to lose a

promotional opportunity and personal problems leading to a separation with his wife. A formal complaint was filed by Trooper Richardson against the Grievant on July 26, 2002 in the Franklin County Court of Common Pleas. In the Complaint, Trooper Richardson alleged the Grievant complained about his sexual harassment "on or about February, 2002." This allegation completely contradicted Trooper Richardson's testimony at the arbitration hearing, where he noted these allegations surfaced after the March 18, 2002 incident. A contradiction of this sort establishes a clear and unequivocal animus damaging Trooper Richardson's version of the events.

Various operational maladies led to the disputed incident which should serve as plausible mitigating factors. At the time of the incident, there was no supervisory presence on third shift. Sergeant Darden, moreover, testified that formal training at the Statehouse was minimal. Any existing protocols were established by bargaining unit members, as individual line assignments were never articulated.

Within this context, Troopers spend an extensive amount of time in the Communications Room. They were often bored and tended to "rest" at this location. In fact, Trooper Whitlach was unable to explain why he was in the Communication Center for two hours on March 18, 2002 nor how he spent five hours in the Communication Center on another occasion.

The record strongly supported an unequal treatment claim. Both the Grievant and Trooper Webb were charged with sleeping on duty. Trooper Webb admitted his guilt while the Grievant continued to deny the allegation. This mere distinction caused the imposition of a one-day suspension for Trooper Webb and removal for the Grievant. Jointly submitted previous administrative investigations dealing with untruthful

allegations further support this argument. Comparable fact patterns have resulted in the imposition of penalties less severe than removal. If any discipline ensues as a consequence of the present disputed matter, progressive discipline principles require a reduced penalty.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, and a complete and impartial review of the record including pertinent contract provisions, it is this Arbitrator's opinion the Employer did not have just cause to remove the Grievant. Rule 4501:2-06-02(B)(1)(5), Performance of Duty/Inefficiency and Rule 4501:2-6-02(E), False Statement/Untruthfulness were cited as charges in support of Removal. The Employer, for the following reasons, failed to present sufficient proof to support the disputed administrative action.

The false statement charge was partially based on other instances of sleeping while on duty. Several witnesses, during the course of administrative hearings, acknowledged the Grievant had slept while on duty prior to the March 18, 2002 incident. Since these individuals corroborated each other's versions, while the Grievant denied these accusations, she was accused of lying.

Mere corroboration without any identifiable context rarely supports a charge of this type. Unlike the specific circumstances surrounding the March 18, 2002 incident, these allegations lack specificity in terms of time, date and circumstances. It, therefore, becomes virtually impossible to challenge the assumptions or predicates used to establish the falsehood in question.

The credibility of those voicing these allegations further tarnished the veracity of these claims. Until the disputed incident, neither Trooper surfaced the Grievant's sleeping tendencies nor their own. Their "concerns" were probably stifled by similar non-activity and self-interest. The Administrative Investigation, moreover, failed to sufficiently probe this particular matter with these Troopers, even though the record strongly suggested such an inquiry advisable.

The remaining charges are clearly intertwined since lying about the March 18, 2002 incident is closely linked with the charge of sleeping while on duty. Obviously, if the Employer is unable to establish the veracity of the sleeping charge, the falsification or lying charge becomes moot.

The Employer failed to establish the Grievant was sleeping on duty on March 18, 2002. Much was made of Trooper Richardson's testimony regarding his observations and involvement on the date in question. His testimony was critical to the Employer's case in chief, but was minimized by clearly established animus toward the Grievant. Trooper Richardson's arrival at approximately 3:30 a.m. appeared dubious at best, and his motive seemed slanted based on related circumstances. Thus, his observations and conclusions were not viewed as probative. Previous to the incident, he courted the Grievant and she rebuffed his overtures and initiated sexual harassment charges. Both protagonists admitted to these events.

Here, the obvious previously specified bias is further compounded by the timing of events as characterized by Trooper Richardson. His credibility as a witness was greatly neutralized by this circumstance and impeaches his testimony.

At the arbitration hearing, Trooper Richardson emphasized these events took place prior to the events of March 18, 2002. Yet, on July 26, 2002, Trooper Richardson filed suit against the Grievant in the Franklin County Court of Common Pleas. The complaint¹ was served on the Grievant one day prior to the parties' formal filing of briefs with the Arbitrator. In the Complaint, the Grievant alleged that on or about February 2002 the Grievant initiated a sexual harassment complaint with her supervisors regarding Trooper Richardson's conduct. He, moreover, maintained this allegation caused him to lose a promotional opportunity and engendered a separation from his wife.

Again, of utmost impart, are the intentionally proffered contradictory dates provided by Trooper Richardson. The date in question served as a critical event necessary for any reasonable analysis of the incident. He attempted to place his conduct in the best light by veiling his underlying motive.

Trooper Whitlach's testimony does not confirm conclusively the Employer's allegation. Having to physically tap the Grievant's legs to gain her attention does not provide the quantum of proof necessary to support removal. Additional interactive evidence would have to be presented to sway the Arbitrator's opinion.

Probably the best evidence of the Grievant's sleeping status on March 18, 2002 is the Dispatch Log (53B) on the date in question. This document supports the view that the Grievant was awake. Nothing in the record clearly suggested the Grievant was not doing her job. Data recorded on the log indicate radio contact and phone traffic

¹ The Union raised the animus claim at the hearing, but was not aware at the time about the complaint's and critical contents. Since the Employer raised no objection to its reference in the Union's brief, nor offer any formal motion to respond to this fact, the Arbitrator views the complaint and its contents a formal part of the record under review.

throughout the night and during the shift in question. Allegations were never raised suggesting that the Statehouse Communications Center was not being run efficiently by the Grievant throughout the course of the shift. All known phone calls were attended to and delays were never documented.

The Employer would like to minimize the import of the Dispatcher's Log (53B) since the Grievant made these entries, and as such, could have been fabrications. It, moreover, focused attention on a thirty-five minute period between 3:00 a.m. and 3:35 a.m. This time period coincides with the approximate time Trooper Richardson arrived at the Statehouse.

It should be remembered the Grievant was never charged with fabrication of log entries. As such, the circumstantial web characterized by the Employer does not establish the necessary inferences.

The Employer's case was hindered by the operational structure at the Statehouse during the disputed period. Without any supervisory presence, identified line assignments and calling and reporting protocols it becomes virtually impossible to challenge the Grievant's operational activities on March 18, 2002. The entry voids alluded to by the Employer could have resulted from certain operational deficiencies, not necessarily the Grievant's state of alertness.

The Union's unequal treatment claim is also supported by the record. Here we have a clear example of a reasonable rule being unreasonably applied. Granted, the Employer has flexibility in imposing penalties based on the circumstances surrounding each matter. The record does not support the Employer's treatment of Trooper Webb and other Troopers as opposed to the Grievant when charged with sleeping violations.

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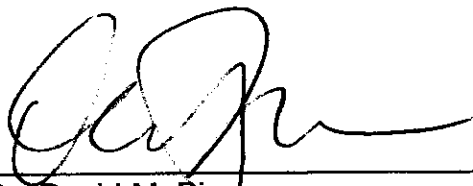
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This conclusion seems obvious even though the Grievant had a one-day suspension on her department record. If the Employer places such great impart on sleeping charges, then it should lay more consistent penalties for like misconduct.

AWARD

The grievance is upheld. The Employer did not have just cause to terminate the Grievant. She shall be made whole for all lost wages and reinstated to her former position.

February 15, 2003
Moreland Hills, OH 44022



Dr. David M. Pingus
Arbitrator