

**IN THE MATTER OF AN ARBITRATION
BETWEEN**

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

#1641

THE UNION,

**CASE NO: 15-00-021219-0203-04-01
ARBITRATOR: Jerry B. Sellman
DECISION DATED: March 6, 2003
GRIEVANT: DOUGLAS G. SHOCKEY**

AND

**THE OHIO STATE TROOPERS ASSOCIATION,
IUPA/AFL-CIO**

THE EMPLOYER.

APPEARANCES:

FOR THE EMPLOYER:

Renee L. Byers - Ohio State Highway Patrol, Representing the Employer
Richard Corbin - Office of Collective Bargaining, Assisting in the Representation of the Employer
Lt. Reginald Lumpkin - Office of Human Resources, Ohio State Highway Patrol, Assisting in the
Representation of the Employer
Sgt. Bruce M. Elling - Assistant Post Commander for the Findlay Post of the Ohio State Highway
Patrol, Witness
Cpt. Michael Webber - Post Commander of the Findlay Branch of the Ohio State Highway Patrol,
Witness

FOR THE UNION:

Herschel M. Sigall, Esq. - General Counsel, Ohio State Troopers Association IUPA/AFL-CIO,
Representing the Grievant
Elaine N. Silveira - Assistant General Counsel, Ohio State Troopers Association
IUPA/AFL-CIO, Assisting in the Presentation
Edwin C. Richardson - Staff Representative, Ohio State Highway Patrol IUPA/AFL-CIO
Trooper Douglas G. Shockey - Trooper, Ohio State Highway Patrol, Grievant, Witness

I. Nature of the Case:

Discharge; Just Cause Required. This labor arbitration proceeding was conducted pursuant to the provisions of the Collective Bargaining Agreement (hereinafter referred to as the "Agreement") between the Ohio State Troopers Association (hereinafter referred to as the "Union") and the State of Ohio Department of Public Safety, Division of the Ohio State Highway Patrol (hereinafter referred to as the "Employer"). This proceeding concerns a grievance filed by Trooper Douglas G. Shockey (hereinafter referred to as the "Grievant") protesting the decision of the Employer to terminate him effective October 16, 2002. He maintains the Employer lacked just cause to terminate him. The Employer maintains that the Grievant violated Rule 4501:2-6-02(E) of the Rules and Regulations of the Ohio State Highway Patrol when he arrested a female violator for DUI and subsequently falsified a written report to be used by the County Prosecutor at the Harden County Municipal Court. It alleged that he falsified the report by claiming to have seen a female exit a vehicle when evidence on a cruiser videotape brings such statement into question and by claiming to have received six clues from a horizontal gaze nystagmus test when only a portion of the test was administered. The Employer maintains that just cause existed for the discharge.

The issue in this proceeding is as follows:

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

The applicable provisions in this proceeding are as follows:

ARTICLE XIV 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 merits 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.

II. SUMMARY OF THE TESTIMONY AND POSITION OF THE PARTIES:

The Grievant was a Trooper with the Ohio State Highway Patrol. He was commissioned as a Trooper in September 2001 and completed the Coach/Pupil phase of his training on January

1, 2002. After that date the Grievant began to work on patrol alone. On October 16, 2002 the Grievant was terminated by the Employer for allegedly falsifying an official written report to the court concerning an event which occurred on July 21, 2002.

The facts of this case are relatively simple and most of them can be confirmed as a result of recordings on the Grievant's in-car camera video, which video was stipulated as evidence and submitted by both of the parties at the hearing.

On July 21, 2002 at approximately 2:40 A.M., the Grievant stopped a car for a suspected violation of driving under the influence (DUI). The driver of the car was Eric Wilhelm; his girlfriend, Kimberly Holman, was in the passenger seat. The Grievant suspected that the driver was impaired and he administered several tests, including the horizontal gaze nystagmus (HGN) test on Mr. Wilhelm. As a result of the test, the Grievant placed Mr. Wilhelm under arrest for DUI. After arresting Mr. Wilhelm, the Grievant discussed with Ms. Holman what he would do with her, since he was going to be transporting her boyfriend to the Ada Police Department. He indicated that he could tow the vehicle, but he preferred not to do that. As an alternative, she could choose to be evaluated for her fitness to drive. If she was fit to drive the vehicle, she could drive it and follow him to the police station where she could have her boyfriend released to her. Ms. Wilhelm chose to be tested.

The Grievant walked Ms. Holman to the front of her automobile and began the administration of the HGN test. The Grievant performed a portion of the test in about 3 - 4 seconds and concluded from clues from one eye that she would be an impaired driver. He then told her that he would not permit her to drive the car. He commented to her "you're in worse shape than he is."

The Grievant offered Ms. Holman a ride to the Ada Police Department where she could arrange to have someone come and get her, her boyfriend and the car. The Grievant testified at the hearing that whenever possible he chose not to have a violator's car towed as it added an additional expense to what would be a financial burden on the individuals. Further, Ms. Holman was not the violator, but the owner of the car her boyfriend had been driving.

Ms. Holman refused to ride with the Grievant to the Ada Police Station and indicated that she was going to stay with her car. The Grievant asked her how she was going to get home and she indicated, with cell phone in hand, that she was going to call her son who would come and pick her up. The Grievant then moved her car off to the side of the road and gave her the keys to the car. He then left and transported Mr. Wilhelm for processing at the Ada Police Department.

While the Grievant was processing Mr. Wilhelm's DUI paperwork, Ms. Holman arrived. The Grievant testified that he asked Ms. Holman how she got there, and she indicated that her son had dropped her off. The Grievant asked to speak with her son, but Ms. Holman told him that her son had left. The Grievant eventually released Mr. Wilhelm to Ms. Holman. They left the police department while the Grievant was processing paperwork on the arrest. The Grievant indicated that he told Ms. Holman that she had better not be driving and that if he saw her on the road he would stop her and arrest her. The Grievant indicated that she responded that she and her boyfriend would be walking home. The Grievant offered them a ride to Findlay where they were going, but they declined.

After completing his paperwork, the Grievant, still on duty, returned to his cruiser shortly after 4:00am and continued on patrol. While on patrol, he noticed a car that looked exactly like the one he had just stopped previously. He followed the car on a township road and accelerated

to catch up with it. At approximately 4:15 A.M. the car turned off into a private driveway, which was approximately two miles from the police department. The Grievant did not turn on his lights or his in-car video camera until both vehicles were stopped. The first thing that can be seen on the in-car video is the car parked in the driveway and Ms. Holman standing next to the car on the drivers side.

The interpretation of the events which took place hereafter are viewed differently by the Employer and the Union. Their respective positions will be set forth below, but for purposes of the summary, the Arbitrator finds the existence of the following facts:

When the Grievant stepped out of the car with his lights and the camera on, he said: "whoever was driving, come over here real quick." That was the beginning of a series of questions that were directed at both Ms. Holman, as well as Mr. Wilhelm, leaving one to question whether the Grievant had knowledge as to who was driving the car. The Grievant would ask questions such as, "who's going to fess up?". He ended the series of questions by walking to the cruiser and saying, "OK, I'll put it this way, when I look at the tape and find out who was driving, I'm going to come out of the car and place you under arrest and not even worry about the test." Less than a minute after saying this, the recording ends. Subsequently, Ms. Holman was placed under arrest for DUI and was taken to the Ada Police Department. She submitted to a breath test; her final BAC was .137. She was charged with DUI.

The Grievant testified that he clearly saw Ms. Holman exit the vehicle on the drivers side and not her boyfriend. He indicated that the series of questions that were asked after the stop were designed by him to illicit an admission by Ms. Holman that she was the one driving the automobile. He wanted additional evidence to support his personal observation.

In completing the paperwork on Ms. Holman, the Grievant completed an Impaired Driver Report, to which a Statement of Facts was attached. On the Impaired Driver Report, he does not complete the information concerning the Divided Attention Skills and the Horizontal Gaze Nystagmus test. He wrote in his Statement of Facts that the traffic stop was based upon his prior knowledge that the driver was either impaired, under suspension or both¹. He wrote that he could clearly see Ms. Holman exit the vehicle on the driver's side, and not her boyfriend, when the vehicle pulled into a private drive. He further indicated that he performed the horizontal gaze nystagmus test on Ms. Holman and he had received six of six clues at approximately 3:20 A.M.

Subsequent to the arrests, the Grievant's superiors became aware that the Grievant had permitted an intoxicated female passenger to stay in the car of an individual that was arrested for DUI. Based upon this information, it opened an investigation into the incident. Copies of both arrest packets, as well as a videotape from the Grievant's car were examined for purposes of the investigation.

Based upon its review of the videotape, the Citation, and the Statement of Facts, the Employer determined that the Grievant had improperly handled an intoxicated passenger, failed to control the scene at a traffic stop (the second one) and improperly administered field sobriety tests. Based upon this initial determination, it continued with its investigation by interviewing the Grievant.

The Grievant, in his interview, indicated that he could clearly see Ms. Holman exit the driver's side of the car. The videotape does not support that conclusion. When it was activated,

¹Mr. Wilhelm was under suspension for DUI. If he was the driver, he would definitely be DUI and under suspension. He had determined Ms. Holman was impaired at the prior stop.

one could only see Ms. Holman standing on the driver's side of the automobile. The Grievant was questioned as to why he did not appear to know the identity of the driver by the questions he was asking on the videotape. He responded that he knew the driver was Ms. Holman, but he was trying to obtain an admission. He admitted that he did not fully perform the horizontal gaze nystagmus test. He said he actually got three clues from the one eye and assumed all six. He admitted that his statement that he had received six of six clues was not entirely accurate.

At the hearing a twenty-four year employee of the Employer, who is a certified A.D.A.P. Instructor (Advanced Detection, Apprehension, and Prosecutions of Persons under the Influence of Alcohol) testified that it would be virtually impossible to receive all six clues in 3 - 4 seconds. Typically it takes 62 to 64 seconds to take the test. The Grievant admitted himself in his interview that it would take that long to properly conduct the horizontal gaze nystagmus test.

After reviewing the results of the administrative investigation, the Employer approached the Prosecutor with concerns about the pending case against Ms. Holman. Doubts were expressed that the Patrol would be able to prove who was driving the car based upon the in-car video and the Grievant's contradictory statements on the video. Due to these concerns, the Employer testified that the charges against Ms. Holman were dismissed, despite the breathalyzer test which demonstrated that she was over the legal limit to be driving an automobile in Ohio.

The Grievant testified that he had talked to the Prosecutor and she was prepared to go forward on his sworn testimony. Whichever version of the facts is correct, it is clear that the case was dismissed.

Subsequent to the Administrative investigation, the Grievant was terminated on October 16, 2002 for violating Rule 4501, 2-6-02(E), which Rules provides:

A member shall not make any false statements, verbal or written, or false claims concerning his/her conduct or the conduct of others.

The Union maintains that while there were errors in the Statement of Facts sent to the Court, it was prepared following a long and disjointed series of events involving Ms. Holman and the Grievant did not intentionally falsify a document sent to the Court. It points out that the Grievant has been consistent in his testimony that he did observe Ms. Holman exit the vehicle when she was stopped in the private driveway. It maintains that the Grievant's intention of obtaining an admission from Ms. Holman is not only plausible, but was accomplished.

The Union and Grievant admit that six of six clues were not obtained through the horizontal gaze nystagmus test, because only one eye was tested. It maintains, however, that because the Grievant could smell alcohol on Ms. Holman's breath and the distinct nystagmus was at maximum deviation, it was clear to him that she was unfit to drive and was impaired. The Union maintains that the two stops and the obvious errors committed by the Grievant in those stops should have been addressed as a "training issue". While both stops certainly could have been handled better and should have been the subject of counseling or training, the action did not warrant discharge. It maintains that the Grievant is innocent of intentionally falsifying the Statement of Facts in the Holman arrest and it asks for full reinstatement of the Grievant.

The Employer maintains that it has clearly established just cause for discipline and the level of discipline is not unreasonable, arbitrary, capricious or discriminatory. It avers that the very first day that cadets set foot in the Academy, they are taught the Highway Patrol's Core Values, and one of those values is honesty. It maintains that the Grievant knows and understands that law enforcement officers must be truthful in every aspect of their job. Their very credibility

as law enforcement officers rely upon this. It maintains that the Grievant clearly made false statements in his Statement of Facts attached to the Citation and, as a result of those statements, the Prosecutor dismissed the charge against a citizen who tested over the legal limit.

It recognizes that the Grievant is a relatively new Trooper, but the actions of the Grievant in breaching the level of honesty required by Troopers is unacceptable. It maintains that the in-car videotape clearly demonstrates that the Grievant made these false statements. First, the Grievant could not have obtained six of six clues in 3 - 4 seconds. His statement that he had six of six clues would be impossible. Secondly, it maintains that in a period of less than five minutes the Grievant made no less than fifteen statements showing his complete uncertainty as to who was driving the car at the second stop. It points to the first statement that he made as "whoever was driving, come over here real quick, sir." It says that since the question ended with sir, it clearly indicated that he was addressing the male². When he later indicated that the driver would be cited for driving while under suspension, that would have had to have referred to the male driver, since Mr. Wilhelm was the only one that was under an administrative license suspension. It views the Grievant's statement that he tried to obtain an admission from Ms. Holman as nothing more than a thinly veiled excuse, contrived after the fact, in an attempt to save his career. The Employer maintains that the false statements of the Grievant are not confined to the internal records of the department, but became public record when he filed the false report with the Court. It maintains that such action effectively and irrevocably affected his credibility in court and damaged his ability to provide trustworthy testimony. It maintains that because of this, it would take very little for a

² The Arbitrator has viewed the tape several times and does not draw the same conclusion. It appears that "sir" was a second statement, not part of the first.

criminal defense lawyer to effectively negate any future testimony ever offered by the Grievant.

III. DISCUSSION AND OPINION:

The central issue to be determined in this case is whether the Employer had "just cause" to discharge the Grievant. The parties' Agreement, not unlike many others, does not specifically define "just cause." There are a number of arbitration decisions that have developed a well-established and commonly accepted test for determining just cause. One of those is *Enterprise Wire Co.*, 46 LA 359 (Daugherty, 1966). The criteria set forth in that case, and followed by many arbitrators, consists of several elements: 1) whether the Employer promulgated policies prohibiting the Grievant's conduct; 2) whether the Employer communicated those policies to employees including the potential consequences for violation of the policies; 3) whether the Employer's policies reasonably related to the orderly, efficient, and safe operation of the Employer's business; 4) whether the Employer completed a proper investigation, which included interviewing the Grievant; 5) whether, based upon the investigation, the Employer obtained substantial evidence that the Grievant had engaged in the prohibited conduct; 6) whether the Employer applied its policies in a nondiscriminatory manner; and 7) whether the Employer imposed an appropriate penalty. The current thinking in determining the level of discipline appropriate in each case is that discipline should be imposed in gradually increasing degrees, except in cases involving the most extreme breaches of the fundamental understanding. Discharge is imposed only when less severe penalties will not protect the legitimate management interests, for one of several reasons: the employees record shows that the unsatisfactory conduct will continue; the most stringent form of discipline is needed to protect the system of work rules; or

continued employment would inevitably interfere with the successful operation of the business. This Arbitrator has found that when determining whether or not just cause for disciplinary action exists, it is a minimum requirement of the Employer to demonstrate that clear and convincing evidence exists to substantiate the Employer's position. In rendering a decision herein, the Arbitrator must apply these criteria to the facts of this case to determine whether the Employer's burden of proof has been met.

The Arbitrator finds that the offense with which the Employer disciplined the Grievant is one which is cause for discipline under the Agreement and the practices of the party under the Agreement. The Rules and Regulations of the Ohio State Highway Patrol clearly subject the making of false statements or false claims to discipline. Cadets are taught at the Academy that one of the Core Values of the Patrol is honesty. These policies are clearly communicated to them. In this case the Grievant is charged with falsifying an official written report to be used in court relating to the events of an arrest for DUI. Whether or not this activity is subject to discharge as opposed to other forms of discipline depends on other factors which will be discussed below, but it is conduct which constitutes an offense subject to discipline.

The Employer's policies without question reasonably relate to the orderly, efficient and safe operation of the Employer's business. The Ohio Highway Patrol's ability to enforce the laws of Ohio is dependent upon the credibility of its patrol officers. If false reports are entered into the system, whether it be the internal system of the Ohio State Highway Patrol or the courts of Ohio, credibility is either diminished or destroyed and enforcement efforts are severely hampered.

The Arbitrator does not find anything irregular in the investigation of the Grievant, which included interviewing the Grievant.

Based upon the investigation, the Grievant was charged with making two false statements in his written report concerning Ms. Holman. First, the Employer alleges that his statement that he observed Ms. Holman exit the driver's side of the car is inconsistent with the in car video and therefore must be false. Secondly, his statement that he obtained six out of six clues in administering a horizontal gaze nystagmus test is false, because the in car video shows a test being administered in 3 - 4 seconds. It is impossible to properly obtain six out of six clues in 3 - 4 seconds. Upon a review of the videotapes, the investigation reports and the testimony at the hearing, the Arbitrator concludes that there is insufficient evidence to demonstrate that the Grievant was lying when he indicated he saw Ms. Holman exit the driver's side of the car. The evidence clearly demonstrates, however, that the Grievant did not properly perform a full horizontal gaze nystagmus test and his statement that "I performed horizontal gaze nystagmus on the Defendant and received six of six clues at approximately 03:20 hours" is an inaccurate statement and therefore constitutes a false statement. The false statement is a violation of the Employer's work rules concerning performance of duty and conduct.

The Grievant's statement about Ms. Holman exiting the driver's side of the vehicle was not clearly supported by, nor clearly refuted by, the in-car video. The manner in which the stop was conducted was without question below Highway Patrol standards. Nonetheless, it is not that conduct which subjected the Grievant to termination. In viewing the tape, the Arbitrator is of the opinion that it is just as plausible that the Grievant was trying to obtain an admission from Ms. Holman as it is that he was asking a series of questions to determine who was driving. Throughout the investigation, the Grievant never waived on his testimony nor his insistence that he indeed saw Ms. Holman exit the driver's side of the vehicle. This factor, when added to the

inconclusive nature of the tape, results in a finding by the Arbitrator that the Employer did not shoulder its burden of proof in demonstrating that a false statement was made in this regard.

In regard to the written Statement of Facts concerning the performance of the horizontal gaze nystagmus test, it is obvious from the in-car videotape that sufficient time had not existed for the Grievant to actually receive six of six clues. Testimony indicates that it takes between 60 - 64 seconds to administer the test properly; even the Grievant acknowledged this in his interview. The Grievant indicated that after conducting the initial part of the test, based upon the condition of the individual, he assumed six of six. That is not receiving six of six clues.

Evidence exists to demonstrate that Ms. Holman was indeed impaired. While the horizontal gaze nystagmus test was not completed, there certainly were other clues. The Grievant indicated that he detected alcohol on her breath and did comment to her that she was in worse shape than her boyfriend, who was arrested. He also warned her not to drive. A couple of hours after the initial stop a breathalyzer test indicated that she was above the legal limit. The existence of these facts, however, do not justify making false statements on official reports.

The Union argues that while there are errors in the Statement of Facts, it was an error subject to both memory and perception. The Grievant did not consciously attempt to falsify an Ohio Highway Patrol document that was filed as part of court proceedings. It concludes this because the Grievant knew that the tape would be introduced into evidence and his in-court statements would be judged against the tape; the Statement of Facts does give a good overall view of the relevant facts surrounding the arrest; and the only error was stating that the results of a horizontal gaze nystagmus test resulted in six clues instead of three. Based upon the above, read in light of the Grievants personnel file, which discloses only verbal reprimands and an offense

no more serious than failing to properly clean his cruiser once, the Union argues that termination is not appropriate in this case.

The Employer argues that law enforcement officers must be held to the highest standard of honesty and integrity and it cannot tolerate the type of behavior in which the Grievant engaged. There is no dispute that one of the most vital attributes of a law enforcement officer is his credibility. A sworn law enforcement officer regularly testifies in court, and, as such, must have the highest level of integrity. As Arbitrator Pincus in a prior arbitration proceeding noted, "[A] higher standard must be applied upon evaluating a trooper's misconduct . . . It is against this higher arbitral expectation of honesty for troopers that this Arbitrator reviewed the facts of the just cause for the Grievant's discharge." (Arbitrator Pincus, citing Alan Miles Ruben) *Ohio State Troopers Association v. The Ohio Department of Public Safety, Division of the State Highway Patrol and Ohio*, Case No. 15-00-20000112-0008-01-01 (Dr. David M. Pincus, 2000).

Upon a review of all the evidence and consideration of and the credibility of the witnesses, it is the opinion of the Arbitrator that the Grievant should be disciplined, but not terminated. While he did falsely report the results of the HGN test, he did administer the test and did receive several clues. He also had additional evidence available to him (smell of alcohol and slurred speech) to indicate the impairment of Ms. Holman. The BAC tests indicated impairment. Because of the totality of the circumstances, he indicated that he "assumed" the remaining clues. He was fortunate that the case against Ms. Holman was dismissed, for his credibility in the judicial system could have been severely tainted. There is no evidence to indicate that the records were used in the judicial system as such that such a result would occur. The Grievant made one statement and admitted that it was not correct when challenged. He did not engage in a pattern of

conduct to cover up an incident.

If an Employer cannot rely on the honesty or integrity of its officers, its system of work rules cannot work. The continued employment of a dishonest employee would inevitably interfere with the successful operation of the employer, particularly in law enforcement. In this case the Arbitrator is of the opinion that this one instance of transgression, in light of the totality of the circumstances in which it took place, is the type of conduct that can be corrected through proper discipline; but only once.

The Grievant's assumption that Ms. Holman was impaired was ultimately proven to be correct. Notwithstanding this, however, certain procedures must be followed in order to establish evidence to demonstrate probable cause for an arrest. The Grievant had the opportunity on two occasions to accomplish that, but he failed to do so. It appears to the Arbitrator that the Grievant was overreaching in trying to justify probable cause for the arrest, for the breathalyzer test did show that Ms. Holman was impaired. This conduct cannot be tolerated by an Employer, particularly when it is responsible for enforcing laws in the State of Ohio and in order to accomplish that, honesty is absolutely necessary.

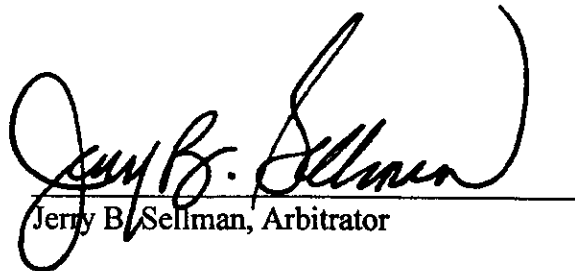
It is clear from the tape that an inexperienced Trooper was trying to do his best to accomplish his job. It was also clear that he became quite frustrated when he was being challenged in his attempt to make an arrest at the second stop. The Arbitrator believes that the conduct of the Grievant, in this instance, can be corrected with appropriate discipline. It did not appear from reviewing the evidence of record, the interviews given with the Grievant and the testimony at the hearing, the Grievant attempted to fabricate his story. What he did do was use a poor choice of words and attempt to be overreaching in supporting the case. These words were

contained in the Statement of Facts given to the Prosecutor to use in court. That is an egregious error.

The Arbitrator believes that the appropriate discipline in this case would be a five day suspension and a written warning that any further violations of the Employer's Core Value of Honesty will result in immediate termination.

IV. AWARD

For all of the reasons and conclusions set forth herein, the Grievance is sustained in part and denied in part. The Arbitrator finds that the Employer did have just cause to discipline the Grievant for violation of its Rules and Regulations, but said discipline is too severe under the circumstances present. The appropriate discipline in this proceeding is a five day suspension with a written warning that any further violations of the Employer's Rules and Regulations surrounding its Core Value of Honesty will subject the Grievant to immediate termination. The Grievant shall be reinstated, subject to a five day suspension, and be made whole for all pay and benefits otherwise lost.


Jerry B. Sellman, Arbitrator