

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

-AND-

OHIO STATE TROOPERS ASSOCIATION

GRIEVANT: PHILLIP J. LAJOYE
GRIEVANCE NO.: 15-00-021003-0145-04-01

#1644

**ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: March 28, 2003**

APPEARANCES

For the Employer

Robert J. Young
Robert J. Woodford
Lisa J. Taylor
Renee Byers
Nemi Valentine
Charles J. Linek

Captain
Post Commander
Captain
Second Chair
Office of Collective Bargaining
Advocate

For the Union

Phillip LaJoye
Dennis Gorski
Elaine N. Silveira
Wayne McGlone
Don Edgington
Becky Wheeler
Herschel M. Sigall

Grievant
President
Second Chair
Witness
Trooper
Dispatcher
Advocate

INTRODUCTION

This is a proceeding under Article 20 – Grievance Procedure, Section 20.07 – Grievance Procedure of the Agreement between the Ohio 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"). The parties had selected Dr. David M. Pincus as the Arbitrator.

An arbitration hearing was held on January 21, 2003 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 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.

(Joint Exhibit 1, Pgs. 28-29)

STIPULATED ISSUE

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

CASE HISTORY

Philip LaJoye, the Grievant was assigned to the Portsmouth Post, a facility in Pike County. This Post is located in District 9. The Grievant, a Trooper, worked the first shift (8:00a.m. to 4:00p.m.).

The facts, for the most part, are not in dispute. On August 10, 2002, the Grievant traveled to the Pike Community Hospital to complete a crash report investigation. At approximately 3:55 p.m., the investigation was concluded and the Grievant contacted a supervisor at the Post. He asked if he could proceed directly from the hospital to his home without first traveling to the Post. Permission was granted and he left the hospital just before 4:00 p.m.

The Grievant proceeded on S.R. 104 with his lights and siren activated while traveling at a speed exceeding 75 mph. Just outside the Village of Jasper on S.R. 104, Captain Lisa Taylor, the District 9 Commander, was fueling her motorcycle. The cruiser passed her location, turned right on S.R. 32, and lights and sirens were turned off.

Captain Taylor contacted the Post attempting to determine which emergency the Trooper was responding to. The Dispatcher indicated nothing was happening, and that the Grievant was the only unit not on post. She then asked the Dispatcher to contact

the Grievant and ask for his location. The Grievant responded he was at "Piketon" which did not correspond to his actual location.

Captain Taylor subsequently contacted Sergeant Litteral, the afternoon shift supervisor. He tried to clarify the situation by having the Grievant call the Post. The Grievant deceived Sergeant Litteral by denying that he was on S.R. 104 in Jasper.

On August 12, 2003, prior to the onset of an Administrative Investigation, the Grievant contacted his Post Commander, Lieutenant Woodford. The Grievant told Lieutenant Woodford that he gave a false location when contacted by the Dispatcher.

An Administrative Investigation was, indeed, initiated on August 20, 2002. During the course of the interview, the Grievant admitted to being untruthful about his location, traveling at speeds exceeding 75 mph with lights and siren activated, and thought he saw Captain Taylor at the gas station in the Village of Jasper.

On September 26, 2002, the Grievant was terminated for violation of several rules. The termination order specified acts in violation of Rule 4501:2-6-02(E) False Statement, Truthfulness and Rule 4501:2-6-05(D)(1) Motor Vehicle Operation (Joint Exhibit 3).

On September 27, 2002, the Grievant formally protested his termination. The Grievance Facts section contained the following relevant particulars:

On Thursday, September 27, 2002, I received notice from the patrol that September 27, 2002, was my termination from employment date. The termination was the discipline issued out of an Administrative Investigation that resulted from an incident that occurred on August 10, 2002. The discipline is not justified and is non-progressive. The discipline is also discriminatory because it is disparate treatment.

(Joint Exhibit 2)

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

The Employer opined it had just cause to terminate the Grievant for the previously mentioned rule violations. The Grievant was untruthful about his location, and operated his patrol car outside division guidelines. The Union failed to meet the burden necessary to establish disparate treatment. Finally, the Grievant's false statements have damaged his credibility as a law enforcement officer.

The Grievant made untruthful statements about his location to the Dispatcher and his Sergeant. Even though he could have recanted his initial response when he spoke to Sergeant Litteral, he continued to adamantly deny the accusations.

Throughout the Administrative Investigation and the grievance procedure, the Grievant provided different excuses to rationalize his behavior. These ever-changing justifications raise significant doubt concerning the Grievant's honesty. During the Administrative Investigation, the Grievant justified his lapse of judgment on "anguish in my personal life that I'm currently going through." He, moreover, noted he was speeding because he had not seen his boys in two days. At the arbitration hearing, however, a new justification emerged. The Grievant stated he was in a hurry to get home so that he could get into his personal car and search the town in order to catch his wife with another man.

The Union failed to prove its disparate treatment argument. The Union, more specifically, was unable to produce any comparable cases of a sworn officer illegally

racing home in a marked patrol car to visit his children or to catch his wife in an extramarital affair. If this burden was somehow met, the Union failed to present a case of another Trooper lying repeatedly to conceal his misdeeds.

The Grievant's false statements have compromised his ability to serve as a witness in any subsequent litigation. This concern was underscored recently when the Employer received a subpoena for the Grievant's personnel records. These records, if the Grievant is returned to work, would discredit his honesty in any future litigation setting.

Letters (Union Exhibit 7) sent by public officials in support of the Grievant's reinstatement should be given little weight. These documents were submitted without authentication by the authors. Also, some of the letters were addressed to the Patrol's General Headquarters, but were only seen for the first time at the arbitration hearing.

The Union's Position

The Union argued the Employer did not have just cause to remove the Grievant. Progressive discipline principles were violated, work rules and policies were inconsistently applied and other forms of mitigation require the Grievant's reinstatement.

Fairness in disciplinary impositions requires particular due process considerations. Key to this concept is the principle of progressive discipline which was clearly violated in this instance. Even if the identified charges were proven, they are not the sort demanding the Grievant's immediate termination. The charges, more specifically, suggest misconduct of a lesser degree requiring the imposition of less severe penalties.

The Grievant's explanation for his misconduct minimizes the probability of similar subsequent misbehavior. His erratic behavior was totally a consequence of a fractured relationship involving his wife. A relationship stressed by an extramarital affair causing the Grievant a substantial amount of anguish and turpitude. He desperately wanted to reunite his family, and thought this goal could only be accomplished if he confronted his wife about her infidelities.

The Grievant's misconduct was an exception to demonstrated prior conduct and his department record. He had never engaged in misconduct of this sort. His department record, moreover, does not support the claim that termination was the appropriate penalty. The record reflects only verbal or written reprimands with the exception of a May 10, 2001 Abeyance Agreement for a one (1) day suspension for personal use of a phone while on duty. Coupling the department record with the present charges should lead to a less serious disciplinary outcome. Progressive discipline and the existing circumstances require this conclusion.

The imposed penalty is easily understandable based on Captain Taylor's personal animus toward the Grievant. In late December of 2001, the Grievant returned home while still in uniform. He heard a full scale pursuit and got involved by going to his vehicle removing his "stop sticks," positioning them at the side of the road, and initiating a "controlled" stop of the vehicle being pursued. The front tires of the vehicle were, in fact, punctured. The Grievant engaged in the pursuit and eventually captured the fleeing subject.

Rather than congratulating the Grievant for his bravery, Captain Taylor initiated an Administrative Investigation for exposing the Employer for untold liability. She

specifically charged the Grievant with failing to gain prior approval for and participation in the pursuit, and for initiating the "stop" procedure.

Although the Administrative Investigation failed to support probable cause for any discipline, Captain Taylor retaliated against the Grievant. She investigated whether the Grievant lived within thirty (30) air miles of the Post. By using GPS technology, it was determined the Grievant lived slightly beyond the thirty (30) mile standard. As a consequence, he lost his vehicle privileges.

Since his family owned one personal vehicle at the time, the Grievant wanted to limit the impact of the decision. He petitioned Lieutenant Woodford, the Post Commander, for permission to ride to and from work with a co-worker, Trooper Edgington. The request was rejected by District Headquarters.

In April of 2002, Captain Taylor initiated an "early intervention" at District Headquarters. The Grievant had been tardy for work on one occasion resulting in the intervention. At the meeting, Captain Taylor told the Grievant that within the year he would no longer be working for the State Highway Patrol.

Within this context, it becomes easy to understand how the previously discussed animus promoted his misconduct. He was absolutely certain Captain Taylor would view his misconduct as justification for removal. And yet, he admitted to the events of August 10, 2002, prior to the Administrative Investigation.

The Grievant's misconduct does not compromise his effectiveness as a Trooper. Clearly, the Grievant's credibility as a witness has not been permanently compromised and progressive discipline principles must be applied.

A series of statements submitted by local officials within the justice system, qualify the Grievant as an asset rather than a liability who would interfere with the successful operation of the enterprise. These statements reflect glowing professional and personal admiration for the Grievant.

Especially interesting is a statement written by Robert Rosenberger, Esq., the very person alleged to be planning to subpoena the Grievant and his department record. His statement gave the Grievant a remarkable vote of confidence.

Others have been known to speed without an official reason for speeding. Dispatcher Becky Wheeler reviewed an incident involving her Post Commander, Lieutenant Woodford. On a trip with Lieutenant Woodford, he traveled at speeds approaching 130 mph without an official reason. At the arbitration hearing, Lieutenant Woodford acknowledged the event, but maintained he was only speeding at 80 mph.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony adduced at the hearing, a complete review of the record including pertinent contract provisions and the parties' briefs, it is this Arbitrator's opinion that the Employer had just cause to discipline the Grievant, but did not have just cause to impose removal. This finding is primarily based on several due process considerations, length of service, and animus concerns.

Clearly, the record supports violation of Rule 4501:2-6-02(E) False Statement and Truthfulness and Rule 4501:2-6-05(D)(1) Motor Vehicle Operation. The Grievant most definitely lied to the Dispatcher and Sergeant Litteral prior to recanting his position by providing truthful admissions to Post Commander Woodford. He, moreover, operated his vehicle outside division guidelines. These violations, within the present

context, are viewed by the Arbitrator as malum prohibitum rather than malum in se offenses. The latter category of misconduct deals with extremely serious offenses, bad in itself, which usually justify summary discharge without the necessity of prior warnings or attempts at corrective discipline. The former category of misconduct deals with less serious infractions, those that are bad because prohibited, which call not for discharge, but for some milder penalty aimed at correction.

Here, the offenses in question are not so serious that the employer-employee relationship cannot survive it or because corrective measures could not be expected to have much effect. The Arbitrator is convinced the Grievant can and will correct his behavior and heed the lesser discipline, and take the actions necessary to avoid future harsher consequences. The record supports this conclusion.

Section 19.05 contains language which anticipates the Arbitrator's proposed application and reflects the parties' unambiguous intent. It requires that disciplinary action shall be commensurate with the offense. Previously discussed distinctions support the view that here discipline was improperly imposed. The provision, moreover, require a series of potential disciplinary stages in non-termination situations. The Grievant's active department records fails to support a termination decision. At the time of removal, the Grievant had a one (1) day suspension, which was being held in abeyance, and a number of prior verbal and written warnings. Escalating the Grievant to the removal stage, even if the disputed offenses have been proven to be accurate, seems unreasonable and punitive rather than corrective. Imposition of less severe discipline, when warranted, has also been agreed to contractually, by the parties and should have been applied in this instance.

Mitigation is deemed appropriate for a number of other reasons. Not all falsification should be viewed in a common light. There are degrees of misconduct involving the same offense where the totality of circumstances can lead to alternative discipline impositions. The Grievant did admit to his misconduct prior to the Administrative Investigation. His conduct, moreover, is easily distinguished from the misconduct engaged in by other Troopers. In Lockett, Ohio State Troopers Association v. The Ohio State Department of Public Safety, Division of the State Highway Patrol, Case Number 15-00-000919-0130-04-01 (Pincus, 2001), the Trooper involved a member of the general public whose conduct triggered a criminal report prior to his attempt to recant. Lockett's years of service was minimal when compared against the Grievant's record. In another related case, Ohio State Troopers Association v. The Ohio State Department of Public Safety, Division of the State Highway Patrol, Case Number 15-00-000112-0008-04-01 (Pincus, 2001), the Trooper's conduct involved a United States Attorney and did not involve a recantation scenario, and attempted to corrupt others to do so for his benefit.

The Arbitrator does not condone the Grievant's conduct, but views his behavior as understandable under the circumstances. He provided a consistent rationale for his actions once he decided to be forthcoming. He was not evasive as characterized by the Employer, but provided credible justifications even if the detail was lacking during various stages of the investigation. The Grievant discussed the stressful personal problems which led to his misconduct.

His less than positive relationship with Captain Taylor also resulted in his fearful perception and partially resultant misconduct. The record reflects a degree of patterned

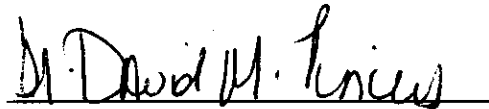
provocation, over a relatively short period of time, which led to the falsifications requiring discipline. Virtually all of these allegations were un rebutted and in isolation, would not cause any mitigation consequences. When these circumstances are reviewed in their totality, the Grievant was justified in fearing a retaliatory response would predictably result if Captain Taylor was somehow involved.

The Arbitrator, moreover, is unconvinced continued employment would inevitably interfere with the successful operation of the Division. Numerous officials within the justice system provided glowing testimonies regarding the Grievant's credible and professional demeanor. These statements were highly persuasive and dissuade any lingering thoughts regarding the reinstatement of this long-term individual.

AWARD

The grievance is sustained in part and denied in part. He shall be reinstated to his former position and shift with the termination modified to a ten (10) day suspension and compensated for any difference in pay between the suspension and removal decision. He shall, moreover, have his seniority with all other related benefits restored.

March 28, 2003
Moreland Hills, OH 44022


Dr. David M. Pincus
Arbitrator