ARBITRATION DECISION #1697

July 22, 2003

In the Matter of:

Ohio Department of Public Safety, Division of State Highway Patrol	)	
and	)	Case No. 15-00-030404-0053-04-01 Marold S. Mills, Grievant
Ohio State Troopers Association	)	

APPEARANCES

For the State:

Charles Linek, Sergeant, Advocate
Andrew Shuman, OCB, Second Chair
Renee Byers, OHP
Cate Kolbash, Human Resource Manager
Jacqueline Williams, Witness
Jeffrey Bernard, Trooper
Robert Bennington, Lieutenant

For the Union:

Herschel M. Sigall, Advocate
Elaine N. Silveira, Second Chair
Dennis Gorski, President
Bob Cooper, Staff Representative
Marold S. Mills, Grievant

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant, Marold Mills, was hired by the Ohio State Highway Patrol in 1998. He was assigned to the Cambridge patrol post in District 7. During his employment he had good evaluations and the only discipline he received was a verbal warning.

The events leading to the grievant's termination began during the early morning hours of January 12, 2003. At that time, he stopped a vehicle for speeding and a marked lane violation. Because the grievant detected an odor of alcohol, he had the driver, Jacqueline Williams, who was a minor, perform field sobriety tests and submit to a portable breath test. When Williams tested .022 on the PBT, he placed her under arrest and transported her to the patrol post at Cambridge.

At the post, the grievant tested Williams on the BAC Datamaster. When he obtained a reading of .016, he cited her for a marked lane violation, underage consumption, and underage DUI. He gave Williams the blue copy of the multi-part citation and a copy of the BAC Datamaster result.

At the end of the grievant's shift on the following night, he prepared a statement of the facts for Williams' case for the Cambridge Municipal Court along with three other DUI cases. The grievant testified that when he saw the .016 on Williams' citation, he believed that he had made a mistake because underage DUI requires a reading of .020 or more so he changed the citation from .016 to .026 and submitted it along with his statement to the trooper serving as the court officer. He stated that he forgot to attach a copy of the BAC Datamaster subject test report and evidence ticket as is required.

Williams appeared in court on January 15, 2003. When the magistrate read the grievant's statement indicating a reading of .026, Williams showed him her copy of the

citation and the BAC Datamaster report indicating .016. Since she did not have an alcohol level of .020, the magistrate dismissed the DUI charge.

When the court officer reported the discrepancy to Lieutenant Robert Bennington, the post commander, he conducted an administrative investigation. He concluded that the grievant had altered court documentation and failed to submit the BAC Datamaster reports that would have exposed his falsification. On March 18, 2003, the grievant was removed for violating Rule 4501:2-6-02(E) -- false statement, truthfulness.

The grievant filed a grievance on March 19, 2003. He charged that he was terminated without just cause in violation of Article 19, Sections 19.01 and 19.05. The grievant asked to be reinstated and made whole.

When the grievance was not resolved, it was appealed to arbitration. The hearing was held on May 20, 2003. The patrol's brief was received on June 16, 2003. The union's brief was received on June 28, 2003.

RELEVANT CONTRACT PROVISIONS

Article 19, Sections 19.01 and 19.05

ISSUE

The issue as agreed to by the parties is:

> Was the grievant removed for just cause? If not, what is the proper remedy?

PATROL POSITION

The patrol argues that the grievant tried to hide his alteration of the citation from the court and from Williams. It reports that Williams testified that the grievant never told her the results of the breath test or that .020 was required for a charge of underage DUI.

The patrol claims that it was the grievant's job to link the test result with the requirements for a violation of the Ohio Revised Code.

The patrol indicates that the grievant acknowledged that when he was writing the statement for the court, he realized the citation showed a test result of .016. It points out that the grievant simply changed the result to .026 without checking the BAC Datamaster evidence ticket. The patrol notes that the grievant also wrote in the statement of facts that Williams tested .026.

The patrol maintains that the grievant's failure to submit the evidence ticket and subject test report from the BAC Datamaster are evidence of his attempt to keep the true test results from the court. It observes that in more than 100 prior DUI's the grievant never wrote the wrong test result on a citation or failed to submit the evidence ticket and subject test reports. The patrol stresses that in the instant case he could not include them because they could not be altered. It rejects the union's claim that it was simply "a temporary disconnect."

The patrol contends that if the grievant believed he made a mistake on the citation, he was obligated to notify Williams and the court. It asserts that he could not contact Williams because she had a copy of the BAC Datamaster test results. The patrol notes that instead of notifying the court, he "hoped everything would slide by and not be recognized." (Patrol Brief, page 4)

The patrol charges that the grievant gave different reasons for changing the citation. It states that at the administrative interview on January 17, 2003, he indicated that he thought that the "1" looked like a "7" so he changed it to a "2" because Williams had tested .022 on the PBT. The patrol indicates that at the criminal interview on January 31, 2003, the grievant was initially unsure why he changed the .016 to .026 but later said

the "1" looked like a "7" so he changed it to a "2". It notes that at the arbitration hearing he acknowledged that the citation said .016 but testified that he believed that it had to be .020 or more for underage DUI so he changed it to .026. The patrol stresses that all the grievant had to do was look at the evidence ticket to see that the actual reading was .016.

The patrol argues that Trooper Jeffrey Bernard's testimony supports its claim that the grievant purposely altered the test result. It points out that Bernard testified that when he asked the grievant what Williams had tested and he responded .018, Bernard asked him how he got an underage DUI out of a .018. The patrol notes that Bernard stated that the grievant simply shrugged his shoulders, shook his head, and walked away.

The patrol acknowledges that there is a "friendly competition" among the troopers for DUI arrests. It charges that the grievant "was looking to claim a third DUI for the night and he did not care how it effected Ms. Williams." (Patrol Brief, page 7)

The patrol argues that other troopers have been removed for false statements. It indicates that in case number 15-00-000112-0008-04-01, May 22, 2000, a canine officer falsified court documents to further the prosecution of a case. The patrol states that the grievant claimed that he was pressured by the Secret Service and the U.S. District Attorney's Office. Arbitrator David Pincus stated:

> Neither can the grievant's lie be excused because of Agent Bianchi's alleged leading and coercive questions to the grievant about the use of his dog. The Ohio State Highway Patrol are the ground troops to protect the citizens of Ohio from crime. They are the sentries that stand guard over law and order. If so little can intimidate the grievant into telling lies about a criminal arrest, then he does not live up to the standards established by the Ohio State Highway Patrol and expected to be upheld by the public.

The patrol relies on case number 15-00-011212-0164-04-01, February 23, 2002, where Arbitrator John Murphy upheld the removal of a trooper for false statements and

conduct unbecoming an officer. It notes that while Arbitrator Murphy did not comment on the charge of conduct unbecoming an officer, he stated:

> This is a truly tragic case. The Grievant did have 4.5 years of service with good performance record and many commendations. On the other hand, this is not simply a case of false statement or statements. The key to this case is the context in which the false statements were made and the impacts of these statements, which reasonably should have been known by the Grievant when he uttered the statements. The impact was devastating to a colleague trooper and particularly to a trooper fresh from the academy and still a probationary employee under the contract. The case is also a series of false statements to facilitate a sexual tryst with a violator with whom the Grievant had an impending court appearance... the Grievant's conduct in this case is blatantly destructive of his employment relationship as a trooper in the Patrol.

The patrol offered case number 15-00-20000919-0130-04-01, May 3, 2001, where a trooper filed a false report to conceal the fact that he was at fault when he crashed his patrol car. It points out that Arbitrator David Pincus was concerned about the impact of the falsification when it became public. The patrol notes that he stated:

> Once the criminal report was filed, the falsification surfaced and subsequent criminal proceedings initiated, the matter no longer retained an internal consumption departmental flavor. It became a matter of public record. Forever made available to any resourceful defense attorney willing to question the Grievant's credibility in any future legal forum. This circumstance would, in fact, inevitably interfere with the successful operation of the Ohio State Highway Patrol, and Grievant's ability to perform his duties.

The patrol cited case number 15-00-980807-0097-04-01, December 23, 1998. It observes that in that case Arbitrator Alan Ruben addressed a grievant's ability to serve as a witness in court. The patrol reports that he stated:

> [The falsification] adversely affected the rights of the innocent party... but also the operation of the justice system as well. It compromised his ability to serve as a witness in any subsequent litigation.

The patrol reports that Arbitrator Ruben added that it would be "difficult for [the grievant's] testimony to withstand cross-examination."

The patrol concludes that the grievant's discipline was commensurate with the offense and was not arbitrary, capricious, or discriminatory. It charges that the grievant engaged in an intentional falsification to bolster his DUI arrests. The patrol indicates that the grievant's action placed Williams in a precarious situation by citing her for underage DUI and exposed it to potential liability for false arrest.

UNION POSITION

The union argues that the grievant did not violate Rule 4501:2-6-02(E). It acknowledges that this rule bars false statements but it claims that "the false statement must be intentionally made with the knowledge that it is false." (Union Brief, page 2) The union maintains that a statement that is not intended to mislead or deceive does not violate the rule even if it is ultimately determined to be false.

The union contends that the issue is whether the grievant knew Williams was innocent of underage DUI or whether he believed her to be guilty. It insists that "an honest appraisal leads to the conclusion...that the grievant was convinced that Williams was guilty of the charges filed against her." (Union Brief, page 8)

The union claims that there are compelling reasons for this conclusion. It states that if the grievant intended to deceive the court or Williams, he would not have given Williams a citation indicating a .016 or a copy of the BAC Datamaster printout with the same result. The union further indicates that the grievant would not have told the dispatcher to record Williams as a DUI with a .018 and would have destroyed the BAC Datamaster printout rather than leave it in an unlocked file cabinet.

The union contends that the grievant had to know that "his every action guaranteed a chain of events designed to bring to light the error of the charge against

Williams." (Union Brief, page 11) It points out that the grievant knew that Williams was required to appear personally at her arraignment; that he gave her a citation and BAC Datamaster printout showing .016; that he knew the trooper assigned to court duty would read his statement of facts with a reference to a .026; and that he was aware that the case file should include the evidence ticket and subject test report.

The union asserts that the grievant had "other things on his mind" as he prepared Williams' case for court. It indicates that less than 48 hours earlier he had reconciled with his wife following months of separation. The union states that the grievant was anxious about the on-going reconciliation.

The union states that it is necessary to consider the grievant's "quality and character." It points out that he has more than five years of service. The union states that the grievant was never suspended and never received even a written reprimand.

The union contends that the grievant's evaluations indicate the kind of trooper he is. It observes that his 2002 evaluation indicates that he is an "exceptional" trooper. The union reports that he was judged to exceed expectations in nearly every category. It notes that the grievant's evaluation stated that he "has established himself as a leader" and that he "maintains a high degree of professionalism." (Union Exhibit 1)

The union maintains that since it seems clear that the grievant had no intent to deceive or defraud the court, the issue is whether his conduct supports termination. It relies on the comments of Arbitrators Tony Sinicropi and George Roumell at a labor arbitration conference where Carroll Dougherty's seven tests for just cause were discussed. The union also cites a Duke Law Review article by Roger Abrams and Dennis Nolan. (No citation supplied.)

The union argues that there are a number of vital components of just cause. It claims that just cause requires the use of progressive discipline and demands that discipline be consistent with like cases. The union states that the standard also mandates that an employer take into account the distinctive facts of an employee's record.

The union maintains that there is nothing in the grievant's record to indicate that there would be any reoccurrence of his offense. It points out that in the administrative investigation the patrol reviewed hundreds of the grievant's DUIs. The union stresses that there was no evidence that the grievant ever altered a citation or erroneously recorded the results of a breath test.

The union maintains that the grievant's return would not harm the patrol. It reports that the grievant contacted the prosecutor about testifying in DUI cases. The union claims that the prosecutor said that "he would welcome [the grievant's] continued participation." (Union Brief, page 15) It observes that the grievant has successfully testified in a number of cases since his termination.

The union asserts that the grievant was an exemplary trooper. It acknowledges that "on one occasion... he acted without his normal attention to detail." (Ibid.) The union maintains that the grievant's offense at most calls for a suspension of limited or moderate duration.

The union concludes that the grievant should be reinstated and made whole for the excessive time he has been off work.

ANALYSIS

The basic facts are not in dispute. The grievant charged Williams with underage DUI. He wrote on the citation that she tested .016 and gave her an evidence ticket and

subject test report with the same indication. The next day, when the grievant was preparing papers for the Cambridge Municipal Court, he changed the citation from .016 to .026 and failed to include the evidence ticket and subject test report in the material for the court.

The patrol and the union offer different interpretations of the events. The patrol claims that it was an intentional falsification to get another DUI that was motivated by the competition between troopers to get the most DUI arrests. The union claims that there was no intentional falsification but that the grievant changed the .016 to .026 because he remembered the PBT reading of .022 and because he believed that he would not have charged Williams with underage DUI unless she tested at least the .020 required by the ORC. It further asserts that the grievant simply forgot to include the evidence ticket and subject test report with the court materials.

The Arbitrator is forced to accept the patrol's version of the events. All of the witnesses acknowledged that there is competition among the troopers to have the most DUI arrests. Bernard stated that he checks the logs and monthly recaps to see who is leading. He indicated that the grievant has the most DUIs but that he would like to lead the post.

Although it might seem reasonable to conclude that neither the grievant nor any other trooper would improperly charge a citizen with a serious offence, the Arbitrator must conclude that the grievant did so. First, when the grievant was preparing the papers for the court and saw the .016 on the citation, it would have been a very simple matter to check the evidence ticket or subject test report to verify the result. In fact, it would have required virtually no effort since both documents were supposed to be included with the court papers.

Second, on the day in question, the grievant was preparing three DUI cases for court in addition to Williams' case. In the other three cases, the evidence tickets and subject test reports were included with the court documents. The Arbitrator cannot accept the union's claim that the grievant simply forgot to include them in Williams' case.

Third, the grievant was very familiar with DUI cases. The patrol checked his last 100 cases and found no errors with respect to alcohol levels. In addition, in every case the evidence tickets and subject test reports were included in the materials.

Fourth, even if the grievant believed that the .016 should have been .026, he did not follow proper procedures. If he wanted to change the citation he was obligated to inform Williams and the court.

While the Arbitrator agrees with the union that the grievant was likely to get caught if he changed the citation, he does not believe that this means that the grievant did not intentionally falsify records. He may have believed that a 20-year-old college student would not have legal representation, which she did not, and that she would miss the distinction in alcohol levels and the requirement for underage DUI under the ORC.

The Arbitrator must also reject the union's claim that there was a "disconnect" because of the grievant's marital problems. The record indicates that the grievant was back with his wife and children so that his problems appeared to be on their way to being resolved. More importantly, when the grievant changed Williams' citation, it was done with some deliberation and thought rather than hastily in emotional turmoil.

There is no question about the seriousness of the grievant's misconduct. It could have resulted in an innocent citizen having a DUI on her record and being forced to pay a significant fine. Beyond that, the grievant's action exposed the patrol to potential

liability for false arrest and led to questions about the other charges against Williams. In fact, the record indicates that she argued in a letter to a Sergeant Bower that in view of the grievant's falsification of her alcohol level, the other charges against her ought to be removed from her record. (Management Exhibit 2, page 27)

Based upon the above analysis, the Arbitrator has no alternative but to deny the grievance.

AWARD

The grievance is denied.

Nels E. Nelson
Arbitrator

July 22, 2003
Russell Township
Geauga County, Ohio