

IN THE MATTER OF AN ARBITRATION
BETWEEN

#1702

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

THE EMPLOYER,

CASE NO: 15-00-030131-0023-04-01

Arbitrator: Jerry B. Sellman

AND

DECISION DATED: August 1, 2003

GRIEVANT: BRODY K. SHEPPARD

THE OHIO STATE TROOPERS ASSOCIATION,
IUPA/AFL-CIO

THE UNION.

APPEARANCES:

FOR THE EMPLOYER:

Lt. Reginald Lumpkin - Office of Human Resources, Ohio State Highway Patrol, Representing
the Employer

Ms. Patricia Dye - Washington County Coordinator for the Victim's Information Program, Witness

Lt. Mary A. Pfeiffer - Ohio State Highway Patrol, Marietta Post Commander, Witness

Sgt. Cassandra Brewster - Ohio State Highway Patrol, Administrative Investigation Unit, Witness

Sgt. Brian Reigle - Ohio State Highway Patrol, Office of Investigative Services, 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

Wayne McGlone - Staff Representative, Ohio State Highway Patrol, IUPA/AFL-CIO

Dennis Gorski - Staff Representative, Ohio State Highway Patrol, IUPA/AFL-CIO

Ruth Tebay - Employee of Marietta Municipal Court, Witness

Jenette Cordray - Secretary to Morgan County Prosecutor, Witness

Trooper Brody K. Sheppard - Trooper, Ohio State Highway Patrol, Grievant, Witness

I. Nature of the Case:

Termination; 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, Inc. Unit 1 (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 Brody K. Sheppard (hereinafter referred to as the "Grievant") protesting the decision of the Employer to terminate him effective January 23, 2003. He maintains the Employer lacked just cause to terminate him. The Employer maintains that the Grievant violated Rule 4501:2-6-02(I)(1)(3) of the Rules and Regulations of the Ohio State Highway Patrol by engaging in conduct unbecoming an officer. The Employer maintains that between November 2000 and October 2002, the Grievant engaged in inappropriate and unwanted contact with a female employee of the Washington County Court. The Employer alleges that the Grievant's conduct brought discredit to the Division and further constituted improper on-duty association with an individual for purposes other than that necessary for the performance of official duties. The Employer maintains that just cause existed for the discharge. The Grievant maintains that, while he did have contact with the particular female employee identified, his conduct involved nothing more than friendly interaction and conversation.

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 19 DISCIPLINARY PROCEDURE

19.01 Standard

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

19.05 Progressive Discipline

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

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

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

OHIO STATE HIGHWAY PATROL RULES AND REGULATIONS

Rule 4501:2-6-02(I)(1) and (3) - Conduct Unbecoming An Officer

A member may be discharged with conduct unbecoming an officer in the following situations:

- (1) For conduct that may bring discredit to the division and/or any of its members or employees.
- ...
- (3) For any improper on-duty association with any individual for purposes other than those necessary for the performance of official duties.

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

The Grievant was a Trooper with the Ohio State Highway Patrol for four (4) years prior to his termination. On January 23, 2003 the Grievant was terminated by the Employer for allegedly engaging in improper conduct with a female employee of the Washington County Court, which conduct constituted improper on-duty associations with an individual for purposes other than those necessary for the performance of his official duties.

The termination was the result of an investigation undertaken by the Ohio State Highway Patrol, which investigation was initiated by a telephone call from the Washington County Prosecutor/Law Director. On or about October 16, 2002, Lt. Mary Pfeifer, the Commander of the Marietta Post of the Ohio State Highway Patrol, received a call from the Washington County Law Director who requested an appointment to discuss a situation wherein a Trooper was allegedly causing problems with one of the court's employees. A meeting was scheduled for later that same day.

At the meeting in Marietta, the Washington County Law Director stated that a court employee with the Victims of Crimes/Domestic Violence Division, Patricia Dye, (hereinafter referred to as "Ms. Dye"), spoke to him initially about six (6) months ago about unwanted contact by a

trooper operating out of the Marietta Post. The trooper was identified as Brody K. Sheppard, the Grievant in this proceeding. The Law Director stated that Ms. Dye confided in him that the Grievant had contacted her in her office (located across the street from the Court), called her, left messages on her answering machine and wrote notes to her. It was also stated by Ms. Dye that the Grievant had approached her while she was working in the courtroom and interfered with her work. The County Law Director indicated that he had observed the Grievant across the street three or four times and sitting in Court with Ms. Dye three or four times. He advised that he had also been contacted by officers of the Marietta Police Department inquiring about the relationship between the Grievant and Ms. Dye.

Subsequent to their conversation, the Law Director introduced the Marietta Post Commander to Ms. Dye. At that time, Ms. Dye was reluctant to talk to the Post Commander, but did answer several of her questions. She indicated that she was not interested in filing any complaint against the Grievant, but basically wanted him to cease all contact with her.

Evidence revealed that even though the Grievant had contact with various court personnel at the Marietta Municipal Court in Washington County for some time, due to his assigned duties in Washington County, he did not meet Ms. Dye until November 2000. In November 2000, while making a routine traffic stop, the Grievant arrested Ms. Dye's son and daughter for underage consumption. The Grievant called Ms. Dye about the incident from the jail so that her children could be released into her custody. When she arrived at the jail to pick up her children, she met the Grievant who explained the circumstances and released her children to her. Through their conversations, he became aware of Ms. Dye's position with the Court for the first time.

After the arraignment of Ms. Dye's children, the Grievant was at the Marietta Municipal

Court and stopped by to ask Ms. Dye how her kids were. She found nothing unusual and/or out of the ordinary about this first encounter.

Ms. Dye's position as the Coordinator for the Victim's Information Program requires her to monitor court cases by sitting in the courtroom at the Marietta Municipal Court. She usually arrives at court around 8:30 in the morning to listen to arraignments. She stated that the Grievant began to come into the courtroom and sit next to her for no particular reason. In addition to sitting next to her, she indicated that he would say: "Did you miss me?" or "Do you love me?" She also stated that he would put his arm around her shoulder while she was sitting in court. Her assigned position in Court was at a table where there were two chairs. She often would be sitting in the chair to the left of a victim would be in the chair at the right. If there was no chair available, the Grievant would move one next to her.

While she did not recall how many times the Grievant entered the courtroom and sat next to her, it was at least three to six times between November 2000 and July 2002. Ms. Dye testified that she never had law enforcement officers sit next to her, only the Grievant. The only people who would normally sit next to her were victims of crime. Ms. Dye also stated that Grievant had visited her in her office on a number of occasions, which was in a building across the street from the Marietta Municipal Court. Ms. Dye testified that the Grievant also made a number of phone calls to her asking her out to lunch or just saying, "It's me." He also called and invited her to meet him at the 2001 and 2002 Ohio State Fair where he was working. He said he would show her a good time. He also wrote notes to her while he was in the courtroom. She indicated she told the Grievant to leave her alone, but he continued to seek her out. After a number of months the Grievant stopped contacting her.

On July 14, 2002, Ms. Dye's son was arrested a second time. This time her son was charged with driving under the influence, having an open container in the car and no turn signal. Ms. Dye testified that after this event, the contact with the Grievant started again.

Ms. Dye stated that while she was on her way to work a couple of weeks after the incident with her son, the Grievant passed her in his patrol car. He applied his brakes, turned around and followed her into Marietta. She stated that after she parked her car and was walking toward her office, the Grievant drove up to her with his window down and indicated he wanted to talk to her. She indicated that he said, "I want to talk to you - don't be mad at me." When she ignored him he reached out of the window with his hand and grabbed her on the arm and told her to get into the car. She indicated she did not want to talk to him, pulled away and went on to her office.

After gathering her documentation for Court that day, she headed to the Municipal Court across the street. When she reached the bottom of the steps in her office building, the Grievant met her and again said he wanted to talk. She did not stop, but kept walking out of the building toward the courthouse. The Grievant followed her. When they reached the courthouse steps, an argument ensued. Ms. Dye and the Grievant's version of the altercation varied. Ms. Dye stated that the Grievant said he was sorry about the arrest and wanted to try to help reduce some of the charges. He didn't want her to be mad at him, and all he wanted to do was talk about the situation. She indicated that all she wanted him to do was leave her alone and she shoved him and cursed at him. She believed her son did have a turn signal on and there was no reason to stop him. She testified that he told her that she could get in trouble for "hitting" a uniformed officer.

The Grievant denied that he had any conversation with Ms. Dye while in the patrol car, nor did he reach out and grab her arm. In addition, he indicated that his first conversation with her that

morning was on the courthouse steps and she was the one that was the aggressor, pushed him and called him names for allegedly arresting her son without any probable cause (her son disputes that the turn signal was not on). He denies that he told her that she could get into trouble for “hitting” him. He further denied that he had any conversation with her about getting any charges thrown out. He does believe, however, that he may have indicated to her that her son should talk to his attorney about pleading to lesser charges.

At the time of the altercation, the Washington County Law Director was in the building. It was unclear from the record whether he saw or just heard it, but he asked Ms. Dye if there was any problem. She said no and went on into the courtroom. The Grievant shortly thereafter entered the courtroom and sat next to her and, according to Ms. Dye, indicated that he would help her get some of the charges dropped if he could.

Investigators on behalf of the Ohio Highway Patrol indicated that, after the investigation was initiated, Ms. Dye was a very reluctant witness. She did not volunteer information and she was not interested in participating in the investigation. She did not want the Grievant to lose his job; she only wanted him to leave her alone.

The bulk of the investigation was assigned to Sgt. Cassandra Brewster, an eight (8) year veteran of the Administrative Investigation Unit of the Ohio State Highway Patrol. She conducted a number of taped interviews with court personnel, Ms. Dye and the Grievant.

Ms. Dye was interviewed first. In addition to the information set forth above, Ms. Dye indicated that after the arrest of her son, the Grievant stopped by her office once, removed items on top of her refrigerator and sat on top of it. Because her office is small, sitting on top of the refrigerator effectively blocks her in behind the desk. She indicated the only way she was able to get

rid of him was by mentioning to one of her co-workers, who was walking by, that she wanted to introduce the co-worker to the Grievant. He then shortly thereafter left.

After the tape recorder was shut off, Ms. Dye indicated to Sgt. Brewster that there were other events that occurred, but if asked later, she would not be willing to testify about them. She stated to Sgt. Brewster that the Grievant had, on one occasion when he was in the courtroom with her, placed his hand on her leg under her skirt and moved his hand up to her thigh. Sgt. Brewster asked further questions concerning this, and, in response to her questions, Ms. Dye indicated that the Grievant had placed his hand on her at least twice. Once in the Courtroom as indicated, and once while he was in her office.¹

At the Arbitration Hearing, Ms. Dye testified that the sequence of the touching incidences were as follows. First, he often put his arm on her shoulder when he entered the courtroom. When the Grievant stopped by her office sometime after the arrest of her son and sat on her refrigerator, he placed his hand on her thigh (on outside of her skirt). After the incident in the office, several days later the Grievant ran into her in the hallway outside the courtroom. He said something to her and she said "speak louder". The Grievant then placed his hands on her waist and asked if she was wearing a wire. In the process of apparently checking for a wire he touched her skin around the waist, because her blouse was not tucked in. The final touching occurred when the Grievant entered the courtroom at a later date. This was the time he placed his hand on her thigh under her skirt.

The Grievant admitted that he had come into contact with Ms. Dye at least ten (10) to thirteen (13) times since November 2000. He indicated that she never asked him to stay away and

¹While it did not come out in the interview, during the polygraph examination of Ms. Dye, she indicated that there was one additional time of physical touching. The Grievant had placed his hands on her waist in the hallway of the courtroom and asked if she was wearing a wire.

his recollection of most of these contacts were cordial. She was angry when he encountered her on the courthouse steps after the arrest of her son. He emphatically denied that he ever put his arm around her, touched her on the thigh, or engaged in any physical contact other than to perhaps pat her on the back in a friendly gesture. He denies ever asking her out to lunch, writing her notes or asking her to the Ohio State Fair, which she indicated he had done in both 2001 and 2002. The Grievant submitted daily log reports and pay records to support his position that there were only two occasions that he was at the Marietta Municipal Court where contact with Ms. Dye could have taken place after the arrest of her son.

During the course of the investigation, Ms. Dye continued to be a reluctant witness. She supplied only bits of information at a time when questioned by the Administrative Investigation Unit. She did not want to testify at a hearing and she would not consent to submit to a polygraph examination.

Ms. Dye testified that her attitude about taking a polygraph examination to prove that she was truthful changed after a suppression hearing concerning her son. At the suppression hearing the Grievant began to testify that Ms. Dye had approached him about the case. The Judge stopped the Grievant from further testifying on this issue, but Ms. Dye believed that her reputation was damaged. She had to further cooperate with the Ohio State Highway Patrol in order to protect her reputation with the court. Ms. Dye agreed to take a polygraph examination in regard to her statements regarding the Grievant's conduct.

On December 18, 2002, Ms. Dye submitted to a polygraph examination administered by Sgt. Brian Reigle of the Ohio State Highway Patrol. The purpose of the examination was to determine if Ms. Dye told the complete truth when she made allegations that the Grievant had put his hand

under her skirt and touched her thigh. Following a pre-test interview, Ms. Dye was examined on the polygraph, using standard polygraph technique and procedure. The examination consisted of four (4) separate tests. After the pre-examination interview, Ms. Dye was asked four (4) pertinent questions and her answers were as follows:

- Q. While in uniform, did Brody Sheppard slide his hand up your skirt?**
A. Yes.
Q. While in uniform, did Brody Sheppard touch your thigh under your skirt?
A. Yes.
Q. While in uniform, did Brody Sheppard place his hand on your thigh?
A. Yes.
Q. While in uniform, did Brody Sheppard slide his hand up your skirt?
A. Yes.

After examining the results of the polygraph readout, Sgt. Reigle concluded that no deception was indicated on her answers to the pertinent questions. He believed her to be truthful.

Article 18, Section 18.06 of the parties' Collective Bargaining Agreement provides that the Employer shall not use a polygraph machine to investigate the truth of statements made by a member of the Union without that member's consent. It further provides, however, the following:

"...if a Complainant/Witness Statement is at variance with a statement provided by a Bargaining Unit Member, and the Complainant/Witness takes a polygraph test, then the Bargaining Unit Member shall, upon the Employer's request, take a polygraph test."

Since the statements of Ms. Dye were at a variance with those of the Grievant, and since Ms. Dye did undergo a polygraph examination, the Grievant was required to take a polygraph examination at the direction of the Employer.

On December 23, 2002, the Grievant submitted to a polygraph examination. The purpose of the examination was to determine if the Grievant had told the complete truth when he denied the

allegations that he had put his hand under Ms. Dye's skirt and touched her bare thigh. Following the pre-test interview, the Grievant was examined on the polygraph using standard polygraph technique and procedure. His test consisted of four (4) separate tests. The procedure utilized for Ms. Dye was substantially the same utilized for Mr. Sheppard, as revealed by a tape recording of the pre-test interviews and polygraph examinations. The following are the pertinent questions asked of the Grievant during his polygraph examination followed by his answers to them:

- Q. While in uniform, did you slide your hand up under Patty Dye's skirt?**
A. No.
Q. While in uniform, did you touch Patty Dye's bare thigh under her skirt?
A. No.
Q. While in uniform, did you place your hand on Patty Dye's bare thigh?
A. No.
Q. While in uniform, did you run your hand up under Patty Dye's skirt?
A. No.

After careful examination and interpretation of the polygraph tracings, it was the opinion of Sgt. Reigle that deception was indicated on the Grievant's answers to the pertinent questions. He believed the Grievant was not being truthful.

In addition to the interviews and exams of Ms. Dye and the Grievant, the investigation included an interview of a number of court employees. First, as mentioned previously, the Washington County Law Director stated that he observed the Grievant across the street on three or four occasions and observed the Grievant sitting in court with Ms. Dye three or four times. He had also been contacted by two members of the Marietta Police Department concerning rumors about the Grievant and Ms. Dye.

The Bailiff of the Marietta Municipal Court indicated that he saw the Grievant follow Ms. Dye from the courthouse to her office on one occasion and he was there for about three (3) hours. He

had observed the Grievant in the courtroom attending two video arraignments next to Ms. Dye and also observed the Grievant pat Ms. Dye on the back in the courtroom. He witnessed Ms. Dye acting annoyed or irritated with the Grievant's presence in the courtroom. The Bailiff stated that the Grievant had been in the courtroom when there was no official reason for him to be there. He further stated that Ms. Dye had brought her problems about the Grievant to his attention, which problems included the Grievant calling Ms. Dye's office and asking her to meet him at the Ohio State Fair when he was working there. The Bailiff stated that the Grievant had personally asked him if he knew Ms. Dye very well. That conversation had taken place a while ago, but at least within the last year. That would have been sometime in 2002.

The Clerk of Courts of the Marietta Municipal Court indicated that the Grievant's behavior with the female deputy clerks in the office had often interrupted their ability to get work done. She indicated that there were times when the Grievant would leave the Clerk's area around 8:00 in the morning, but there were other times he would stick around for an additional hour or two.

Several other Deputy Clerks and the Filing Clerks were interviewed. Several indicated that the Grievant was at the Clerk's Office at least one time a month and stayed at least until 9:00 a.m. The Grievant was looked upon as being a very outgoing and friendly individual and did flirt with many of them, but did not engage in any unwanted contact with them. The Grievant often answered phones in the Clerk's office.

The Assistant Law Director was also interviewed and she stated that Ms. Dye told her that the Grievant was always seeking her out to hug her and talk to her.

Position Of The Employer

The Employer maintains that it had just cause to terminate the employment relationship of the Grievant premised upon a clear violation of Ohio State Highway Patrol Rules and Regulations Rule 4501:2-6-02(I)(1) and (3), Conduct Unbecoming An Officer. It argues that the Grievant regularly went to the Marietta Municipal Court and engaged in improper on-duty associations with court personnel for purposes other than necessary for the performance of official duties. The Grievant not only spent an excessive amount of time at the Court and interacted with female employees in an unprofessional manner, but he engaged in unwanted conduct and egregious behavior with the Washington County Victims/Witness Advocate, Ms. Dye.

The Employer maintains that the evidence clearly demonstrates that the Grievant flirted and interacted with female employees of the Marietta Municipal Court while in uniform and while either on duty or perceived to be on duty by those members of the Court. While the Grievant admitted being friendly with female court personnel, primarily Clerks and Deputy Clerks of the Court, he denied that it was other than during the course of performing official duties at the court at infrequent intervals. Even though the Grievant submitted radio logs from the Marietta Post indicating that he routinely left the court either before or after 8:00 a.m., the testimony of various clerks indicates that he was often at the Clerk's Office for one or two hours after they arrived at 8:00 or 8:30. The Grievant would make himself at home in the clerks' area and would sit at their desks and answer the Court telephone. The Marietta Post's "Subpoena Book", which contained dates that troopers from the Post were subpoenaed into court, had been destroyed during the course of the investigation and could not be used to support or challenge the number of times the Grievant was at the Marietta courthouse.

While the above conduct, once discovered by the Employer, would be sufficient to subject the Grievant to some form of discipline, it was the conduct with Ms. Dye which warranted the severity of termination. The Grievant admitted having contact with Ms. Dye ten to thirteen times in and around the Marietta Municipal Court while both were at work. Both testified that the Grievant had been in the office of Ms. Dye. To the personal knowledge of the Marietta Municipal Court Bailiff, Gary Turner, he stated that he had seen the Grievant sit next to Ms. Dye in the courtroom during video arraignments and he had observed the Grievant following Ms. Dye to her office. The Washington County Law Director observed the Grievant at Ms. Dye's office and sitting in court three or four times with Ms. Dye. The Grievant had absolutely no official business or reason to be visiting Ms. Dye's office or sitting in the Courtroom next to her. In addition to ongoing, unwanted contact, Ms. Dye indicated that the Grievant had telephoned her and asked her out to lunch and out to the state fair. When he did have contact with her, he engaged in inappropriate conversation by asking her "Do you love me?" and "Do you miss me?" "Do you hate me?" His conduct became further egregious when he touched her thigh while in her office and placed his hand on Ms. Dye's bare leg and moved up the outside of her leg under her skirt while in the courtroom.

While no one observed the leg touching events, nor overheard any telephone conversations, the Employer believes that Ms. Dye's version of the facts should be believed and are most credible for three reasons. First, Ms. Dye has been a reluctant witness all along and she did not initiate the filing of a complaint with the Highway Patrol. It was a telephone call from the Washington County Law Director to the Post Commander and a subsequent interview with her that prompted the Employer's investigation. Ms. Dye never sought to have the Grievant disciplined or terminated, but basically had requested that he stay away from her. Secondly, other witnesses corroborated Ms.

Dye's statements that the contacts were unwanted. And finally, the results of the polygraph examination indicated that Ms. Dye was truthful and the Grievant was deceptive.

The Employer maintains that the polygraph examination was administered fairly and properly by an experienced polygraph examiner. It was not flawed as alleged by the Union's Advocate. It argues that if the polygraph examiner wanted to sabotage the process to validate the results of the polygraph exam of Ms. Dye, he could have accomplished that by just saying that the results for the Grievant were inconclusive. He did not do that. He is a professional polygraph operator and to him the results were clear. It argues that the results of the polygraph are just another weight to be added to the scale of credibility in favor of Ms. Dye. Further, the inclusion of the contractual language found in Section 18.06 permitting polygraph examinations implies the inclusion of the polygraph test results as evidence in any subsequent arbitration proceeding.

The Employer finally argues that the Grievant violated not only Ms. Dye's trust, but also the public trust associated with the position of an Ohio State Highway Patrol Trooper. The Grievant's conduct caused a great deal of embarrassment to Ms. Dye and brought discredit to and mistrust of the members of the Division. It argues, therefore, the Director of Public Safety made the correct decision to terminate the Grievant from his position as a Highway Patrol Trooper.

Position Of The Union

The Union argues that the Grievant's conduct was nothing more than that which was designed to foster good public relations with court personnel. The Grievant is an outgoing and friendly individual, as was noted by the various female witnesses interviewed, and did not engage in any conduct that could be considered to be improper on-duty association with any individual, let alone

Ms. Dye.

The Union argues that the charges against the Grievant were manufactured and uncorroborated and the subsequent investigation was so flawed as to deny the Grievant substantive and procedural due process. It believes that Ms. Dye manufactured the incidences in order to obtain a reduction in the charges that were brought against her son in July 2002. Since Ms. Dye acknowledged, upon cross-examination, that at the time of her son's DUI arrest, her son had just obtained work out of state that required that he be a licensed driver, it was clear that if DUI charges were proven against her son, he would lose his license. The Grievant testified that Ms. Dye told him that she was committed to seeing to it that her son was not convicted of DUI.

In addition to what it considers a clear motive on behalf of Ms. Dye, the Union characterizes the charges against the Grievant as vague and unsubstantiated. In the letter of termination to the Grievant it is indicated that, "between November 2000 and October 2002, you engaged in inappropriate and unwanted contact with a female employee of the Washington County Court". Normally, an Administrative Investigation conducted by the Employer would identify the time and dates of the alleged wrongful conduct. In the instant case, the Administrative Investigation failed to identify any times and dates. It failed to identify times and dates, because the Complainant could not, did not and would not identify within any degree of clarity the times and dates the Grievant allegedly engaged in the action with which he is charged.

While it is uncontroverted that the Grievant and Ms. Dye had contact over a two (2) year period, the Union challenges the allegations that overt, improper conduct (the physical touching of her leg) took place at all. The alleged events took place between July 14, 2002 and October 2, 2002 and the Grievant did not visit the Marietta Municipal Court but a few times during the period. (Ms.

Dye acknowledged that no overt, improper conduct took place prior to the arrest of her son for DUI). Based upon radio logs of the Grievant, he could have only made contact with Ms. Dye on July 29, 2002 or August 7, 2002. The Union, therefore, challenges the credibility of Ms. Dye on this issue. Without any personal witnesses as to the personal touching, reliance must be based upon the results of the polygraph examination. The Union avers that the Employer "rigged the testing procedure and intentionally skewed whatever efficacy the test might have under optimum circumstances." While the Union recognizes that the Employer had the right to require the Grievant to undergo a polygraph examination, and the examination results could be admitted in arbitration, the examinations administered in the instant case were so flawed and manipulated that the Arbitrator should give them no weight. It believes that the examination of Ms. Dye was little more than a procedural condition precedent to examining Brody Sheppard and he was set up in the examination to fail.

In regard to the three (3) alleged incidences of physical touching, the Union entreats the Arbitrator to examine the circumstances in which they were alleged to have occurred. The first improper touching took place in Ms. Dye's office. No dates were given. The second alleged touching took place in the hall outside the courtroom when the Grievant was allegedly checking to see if Ms. Dye was wearing a wire. The Union points out that cameras cover all activity in the area outside the courtroom and, should such contact have occurred, it would have been in full view of the cameras. The third touching occurred when the Grievant allegedly put his hand on Ms. Dye's thigh in the courtroom. Here the Union also points out that there are court cameras that would ostensibly disclose such conduct. As mentioned earlier, the Union argues that Grievant's radio logs do not indicate that sufficient opportunities existed for the Grievant to be in Marietta such that occurrence

could have happened. Based upon the lack of corroborative evidence and flawed polygraph examinations, the Union argues that the Employer did not present sufficient evidence to support the charges against 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 offenses with which the Employer disciplined the Grievant are cause for discipline under the Agreement and the practices of the parties under the Agreement. The Rules and Regulations of the Ohio State Highway Patrol clearly subject patrol officers to discipline for Conduct Unbecoming an Officer. In this case, the Grievant is charged with improper on-duty association with individuals for purposes other than those necessary for the performance of official duties. *See*, 4501:2-6-02 (I)(1) and (3) of the Ohio State Highway Patrol Rules and Regulations.

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 troopers properly conducting themselves with the public.

In general, the Arbitrator does not find anything irregular in the investigation of the Grievant. The major objection of the Union to the investigation in this proceeding dealt with the administration of polygraph examinations. The Arbitrator will discuss this issue below.

Based upon the investigation, the Grievant is charged with engaging in inappropriate and unwanted contact with Ms. Dye, a female employee of the Washington County Court, between November 2000 and October 2002. While the Employer argued that the Grievant's flirtatious

conduct and ongoing presence at the Marietta Municipal Court, primarily the Clerk's Office, was grounds for discipline it was his specific contact and conduct in relation to Ms. Dye that was the subject of his termination. As a result, the issue is whether the Employer presented clear and convincing evidence to substantiate the improper relationship with Ms. Dye.

The Employer presented clear and convincing evidence that the Grievant had numerous contacts with Ms. Dye, a Washington County Court employee, over a period of two (2) years. Court employees witnessed the Grievant with Ms. Dye in the courtroom and in and about the courthouse. Witnesses observed the Grievant walking to Ms. Dye's office across the street from the courthouse. The Grievant, himself, admitted having contact with Ms. Dye at least ten to thirteen times over the course of two (2) years. That contact began shortly after the arrest of her two teenage children in November 2000. It stopped at some unspecified point in time and then resumed after the arrest of her son on July 14, 2002.

The Grievant has been observed sitting next to Ms. Dye in the courtroom when she was performing her duties as the Coordinator for the Victim's Information Program. The Grievant did not have any official business, which would have required or justified him to be sitting next to her in the courtroom. The Bailiff witnessed the Grievant "pat" Ms. Dye on the back while she was performing her duties in court. The Bailiff witnessed an annoyed reaction of Ms. Dye to the Grievant's presence in the courtroom. It is unclear from the record (because of conflicting testimony) whether anyone observed Ms. Dye push the Grievant on the courthouse steps, but both admitted that it did occur and at least the verbal altercation was overheard.

Evidence is inconclusive as to the specific dates that any of these events occurred, but they did occur during the time frame in question. The Grievant presented radio logs indicating that

subsequent to July 14, 2002 there were only two occasions on which he was at the Marietta Municipal Court. These were the only opportunities for the alleged unwanted physical contact to have occurred. The Arbitrator does not find the radio logs to be a credible source of evidence. The radio logs are not consistent with statements of court employees that place the Grievant at the courthouse on numerous occasions until 9:00 a.m. The Grievant's shift was 11 p.m. to 7 a.m. In most instances, with a few exceptions, the radio logs show that the Grievant signed off at his home before or shortly after 8:00 a.m. The witnesses that were interviewed placed the frequency of the Grievant's visits to the Clerk of Court's office at least once a month, if not more, and placed him in the courthouse at least until 9:00 a.m. The Arbitrator must conclude, therefore, that the Grievant was at the Marietta Municipal Courthouse on numerous occasions and radio logs are not helpful in determining the Grievant's activity at the courthouse. The radio logs are inconsistent with the testimony of more than ten (10) witnesses. The Arbitrator, therefore, gives little value to the radio logs as evidence that the Grievant was rarely at the Marietta Municipal Court.

The evidence clearly demonstrates that the Grievant had many opportunities to meet with court employees for purposes other than those necessary for the performance of his official duties. Since he was in uniform at the end of the shift and was either perceived or known to be on duty by court officials, his conduct must be considered on-duty. This association was clearly with individuals for purposes other than those necessary for the performance of official duties. While the Grievant testified that he was only at the Marietta Municipal Court conducting official duties, such conclusion is not supported by the evidence. While it is not these occasions that gave rise to the termination, the existence of such occurrences provide evidence of the Grievant's gregarious, non-business related interaction with court employees.

There existed no business reason for the Grievant to be meeting with Ms. Dye in the courtroom or in her office. Evidence indicates that when those meetings occurred between Ms. Dye and the Grievant, he was in uniform and it was at the end of his shift. Both Ms. Dye and the Grievant admit that they never met on a social level or outside the environment of the Marietta Municipal Court, which environment included her personal office.

The real issue in this proceeding is whether or not the Grievant's contacts with Ms. Dye constituted improper on-duty associations. They did. There is no question that those contacts constituted an on-duty association with an individual for purposes other than those necessary for the performance of official duties. Troopers engage in friendly conversation with the public all the time. Said conversations may not be necessary for the performance of official duties, but they certainly aid in fostering a good relationship with the patrol. There is nothing wrong or improper about that. It is improper, however, to engage in consistent, unwanted associations outside the performance of official duties while on-duty.

The type of conduct alleged to have been exhibited by the Grievant falls into two basic categories: improper associations and improper touching. The Arbitrator will examine both categories.

Based upon an examination all of the evidence, including the testimony of the witnesses and the interviews of the various court personnel, in particular the statements of the Washington County Law Director and the Marietta Municipal Court Bailiff, the Arbitrator must conclude that the association with Ms. Dye was initiated by the Grievant and unwanted by Ms. Dye. The Arbitrator does not find it likely that Ms. Dye would invite an officer who arrested her children into the courtroom or to her office. The Grievant had no business reason to be in the courtroom with Ms.

Dye nor in her office under the circumstances set forth in this case. Ms. Dye's testimony on this issue is more credible than the Grievant's. Further, as the arresting officer with a pending court matter, the Grievant should have limited his contact with Ms. Dye and not discuss the case. Even if the Arbitrator were to assume for one moment that Ms. Dye never communicated to the Grievant that she did not want him in the courtroom or in her office, the cloak of authority exhibited by an officer in uniform is a compelling force which places members of the public at a disadvantage. It is one thing to casually talk to individuals in a friendly manner in passing while on duty; it is quite another to repeatedly seek them out for no justifiable business reason. This alone is improper conduct and subject to discipline.

The secondary issue deals with the alleged touching of Ms. Dye. While the Grievant has categorically denied this, the Arbitrator finds that the more credible evidence indicates that these events did occur. First, there is the testimony of Ms. Dye. She is not a typical Complainant. She did not initiate the charges against the Grievant, nor did she initially even mention any physical contact. When these events were divulged, through repeated probing by members of the Administrative Investigation Unit, her demeanor was one of relinquishing information which she preferred to keep confidential. Had Ms. Dye been an aggressor in this case, perhaps her credibility would have been diminished. The fact that she was so hesitant about providing information about the relationship lends greater credibility to her testimony.

In regard to the polygraph examinations, the Arbitrator finds that the results of those examinations are admissible in the Arbitration Hearing. The parties' mutually agreed to Collective Bargaining Agreement gives the Employer the right to use a polygraph examination as an investigative tool and the granting of that right includes the ability to use the results in the

investigation and subsequent hearing. The Arbitrator believes, however, that any evidence submitted concerning polygraph examinations only constitutes an additional factor to be considered in weighing the evidence; it should not be considered conclusive and it is subject to challenge. I would agree with the conclusion of experts referred to by the Union, including the opinion of James K. Murphy, a special agent with the Federal Bureau of Investigation, that polygraph examinations are useful diagnostic tools when considered with other available information. That it is how it is viewed by the Arbitrator in this proceeding.

The fact that Ms. Dye did not show deception on the polygraph examination gave additional weight to her credibility.

The Union argued that the polygraph examination of both of the witnesses was manipulated. First, it concludes that both the environment, as well as the questions presented to Ms. Dye, were supportive of finding her to be truthful. Likewise, it maintains that the environment and questions presented to the Grievant were designed to find deception. The Arbitrator has reviewed the taped pre-interviews and the examination itself. Based upon that examination, I find the questions presented and the procedures used to be fairly consistent in both examinations. The Arbitrator does not find that the procedures employed by the polygraph examiner varied to any substantial degree between that utilized with Ms. Dye and that utilized with the Grievant.

There are a variety of factors that could affect the results of a polygraph examination. Those factors have been identified as the training and education of the polygraph examiner, the conditions under which the examination was given, the choice of questions utilized, the physical condition of the person being tested, the emotional state of the person being tested, and whether or not the individual being tested has been sensitized to the issues under investigation. The final factor is obviously the

subjectivity of the polygraph examiner in reviewing the results of the polygraph. The Union representative properly and astutely challenged each one of these factors. However, the Arbitrator, after considering the arguments relating to these factors, is not persuaded that the results of either examination should be totally rejected.

When considering all of the facts and circumstances of this case, including the testimony of all parties and the statements made by all court personnel interviewed, the Arbitrator finds the testimony of Ms. Dye to be more credible than that of the Grievant in regard to the nature of the contact between the two individuals. The Arbitrator finds that the repeated associations with Ms. Dye were for non-business reasons and were unwelcome. The Arbitrator finds that the more credible evidence is that unwanted physical touching of Ms. Dye did occur on at least two occasions; first in Ms. Dye's office and secondly in the courtroom. All of these contacts lumped together constitute improper on-duty association.

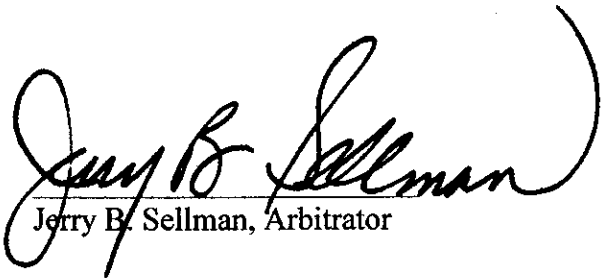
In considering the appropriateness of the discipline given to the Grievant, the Arbitrator searched the record for mitigating circumstances which would impact the finding of just cause for termination. Based upon the Grievant's department record, his total denial of any improper conduct in this case and the need to protect the Employer's system of work rules, the Arbitrator does not find any mitigating circumstances sufficient to challenge the decision of the Employer to terminate the Grievant. Based upon these findings, the Arbitrator concludes that the Employer did have just cause to terminate the Grievant.

Initially it would appear that the discipline of termination is harsh under the circumstances set forth herein. The Employer is justified in taking such action, however, in order to protect not only its credibility, but its effectiveness in enforcing the laws of the State of Ohio and protecting its system

of work rules. As mentioned previously in this decision, when an officer in uniform is either performing his or her professional and official duties or is perceived by the public as performing his or her professional and official duties, the cloak of authority which is a part of his or her position carries with it a great responsibility to prevent and avoid any improper conduct with the public. It does not appear from the evidence that the Grievant intended to develop a social relationship with Ms. Dye, nor does it appear that the physical touching of Ms. Dye was sexually related. Giving the benefit of any doubt to the Grievant, it would appear that his contact with Ms. Dye, as it relates to their “meetings”, was an effort to be accepted and liked. It is clear from the record that the Grievant was a very outgoing and “touchy-feelly” type of person. When Ms. Dye, a court employee, became upset with him because of the arrests of her children, the Grievant may have been trying to turn a negative into a positive. Unfortunately, Ms. Dye did not want the contact, was uncomfortable with his repeated associations, and was unable through her rudeness to make that known to the Grievant. As it relates to the physical touching, based upon what other witnesses observed of the Grievant, he would often pat employees on the back. Again, giving the benefit of the doubt to the Grievant, it is more likely than not that a pat on the back and the placement of a hand on Ms. Dye’s leg was done in the process of trying to gain some type of approval or forgiveness for the arrest of her children. Even under these circumstances, however, a male officer in uniform has no right to touch a female employee. This holds true, *a fortiori*, when the individual being touched considers it unwanted and offensive. Regardless of the intent of the officer, if the contact is unwanted and has no bearing to the performance of official duties, such conduct is a violation of the Ohio State Highway Patrol Rules and Regulations. For that reason, termination is proper in this case.

IV. AWARD

For all of the reasons and conclusions set forth herein, the Grievance is denied.



Jerry B. Sellman, Arbitrator