

#1746

IN THE MATTER OF ARBITRATION

BETWEEN

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

AND

THE OHIO STATE TROOPERS ASSOCIATION

**Before: Robert G. Stein
Panel Appointment**

**Termination: Grievant: Robert L. Burd
15-00-030528-0072-04-01**

Advocate(s) for the UNION:

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INTRODUCTION

This matter came on for a hearing before the arbitrator pursuant to the terms of the Collective Bargaining Agreement (herein "Agreement") between the State of Ohio (herein "Employer" or "Department") and Ohio State Troopers Association (herein "Union"). The Agreement is effective from July 1, 2000 to June 30, 2003 and includes the conduct that is the subject of this grievance.

A hearing on the above referenced matter was held 10/28/03 and 1/4/03. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions on the merits. The parties submitted post-hearing briefs in lieu of making closing arguments.

Both parties agreed to the arbitration of this matter pursuant to Article 20.08.

ISSUE

The dispute is defined as follows:

Did the Employer have just cause to terminate the Grievant, Robert L. Burd? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

(As cited by the parties, see Agreement for language)

BACKGROUND

The parties are in dispute over the termination of State Highway Trooper Robert L. Burd, ("Grievant" or "B. Burd"). B. Burd was terminated from his employment with the Ohio State Highway Patrol ("Employer" or "Patrol") on May 20, 2003 for the alleged violation of Patrol Rule 4501:2-6-02(l) (1)(2), Conduct Unbecoming an Officer. The Grievant graduated from the OHP Academy on June 25, 1993 and has served his entire tenure with the Patrol at the Findlay Post. He resides in Hardin County, Ohio.

By way of background, the Grievant's family, and in particular his father, also Robert Burd, and his half-brothers, Rob (Robert L. Burd, Jr., herein "Rob") and Shane Burd (herein "Shane"), have earned a reputation in Hardin County, Ohio as drinkers and bar brawlers. The Grievant also has a half-sister, Tina Burd (full sister to Shane and Rob), who has not been included in the negative drinker/brawler "story line" for which the Burds appear to have become associated in Hardin County, Ohio (Management Ex. 1, p. 242).

As a matter of the general public perception, it is not known whether the Grievant is set apart from his brothers and father, or is by virtue of his first and last name, one who must work at removing himself from the deeds of his father and male siblings. A reasonable inference

from the evidence and testimony in this case would suggest the latter is the case. However, the record is clear that at work he has an excellent performance record and received the honor of being named Findlay Post Trooper of the Year for the three (3) consecutive years prior to his termination (Union Exs. 3-7). At the time of his termination, he had no discipline as well as no deportments on his record (Union Ex. 8). It is noted that in November of 1998, while off-duty, the Grievant was accused of not taking proper action at the scene of an altercation that allegedly involved one of his half-brothers. However, an arbitrator found him to innocent of the charges and the discipline was removed from his record.

The incident that is the central focus of this matter took place during the early morning hours of July 1, 2002 outside of a bar, The Finish Line, in Kenton, Ohio. The Finish Line has a reputation as a bar where it is not uncommon for fights to occur on a regular basis (See testimony of witness L. Hite, Tr. 101). The Grievant was off-duty at the time and was at the Finish Line with his girlfriend, Ashley Houser, on the evening of June 30, 2002.

Shortly before closing (between 1:00 a. m. and 2:00 a. m.) a fight or several fights broke out in the parking lot adjacent to the Finish Line (Management Ex. 2). There was a great deal of yelling, arguing, and fighting among various individuals, including Rob and Shane Burd. According to the Employer, the Grievant became embroiled in some of

these physical confrontations and ended up pushing/punching Lisa Hite, and punching Haven Lawrence (See Management Ex. 1 and testimony of management witnesses). The Grievant does not deny his involvement in the fracas; however, he claims he was attempting to stop the fighting and was not a willing combatant. The Employer also investigated subsequent conduct of the Grievant following the July 1, 2002 incident that involved accusations by people (involved in the July 1st fights) who claim the Grievant behaved in an intimidating or threatening manner toward them in August of 2002 and March of 2003. The Employer also cited an incident that allegedly occurred on September of 2003 involving Lisa Hite, and there was testimony concerning it (See Tr. 92). However, it is noted this incident came after the Grievant was terminated and was not used as a basis for the Employer's decision.

After the investigation of the incident was concluded, the Grievant was terminated from his employment, and he filed a grievance, which is the subject of this arbitration. Paralleling the administrative action of the Employer was an ongoing criminal investigation conducted by the Hardin County Sheriff's Department and the County Prosecutor. The conduct and outcome of that investigation are separate proceedings and have no bearing on the issue as defined by the parties upon which this arbitrator is being asked to render a ruling.

SUMMARY OF EMPLOYER'S POSITION

The Employer argues the Grievant is to be held to a higher standard due to his position as a State Highway Patrol Trooper. It contends that on July 1, 2002 and on the subsequent dates of August 17, 2002 and March of 2003, the Grievant engaged in conduct unbecoming an officer of the Patrol. The Employer claims that although the Grievant has a decent on-duty record, his off-duty record is reprehensible and reflects poorly on the Patrol. The specific arguments proffered by the Employer are stated in its closing statement. They read as follows:

Intimidation

Since the fight at the Finish Line bar, there have been several instances of witness intimidation. The frequency and amount of these meetings cannot be reduced to mere coincidences. The first such incident occurred at the Texas Roadhouse restaurant in Lima. This occurred on August 17, 2002. He and his wife went to eat dinner at the Roadhouse restaurant. As they were being led by the host/hostess to their table, Jessica Reed noticed Grievant and his girlfriend at the restaurant as well. Jessica advised Josh that she saw the Grievant staring at them as they passed. Josh testified that he and his wife waited for some time after they were finished eating in the hope that Grievant would leave before them. They grew tired of waiting and decided to leave even though Grievant was still there. As they left the restaurant and passed Grievant's table, he and his girlfriend stood up to leave. Once outside Grievant initiated contact with the Reeds by calling Reed by name, walking in their direction, and asking why they had gone to the newspapers (Management 1 p. 265). He asked him why he had gone to the papers, referring to the newspaper article. Reed advised they had not gone to the paper that the newspaper had come to them for the interview. Grievant was upset that Josh Reed had given an interview to a local newspaper. The Reeds told Grievant to forget about it and that it was over. Grievant responded that "It was not over and that there was a lot of shit going on." (Management 1 p. 130) Grievant's girlfriend then piped in and warned the Reeds not to get comfortable anytime soon. Mr. Reed believed these actions to be a threat. He believed that when the administrative investigation and criminal case are finished that there would be trouble again. (Management 1, p. 81) He believes Grievant is capable of retaliation. Grievant readily admits to initiating the conversation with the Reeds at the Roadhouse.

What is important to realize from this conversation is that Grievant was the initiator of the contact. Had he just walked to his vehicle and kept his comments to himself, the interaction with the Reeds would have never occurred. When examining the newspaper article (Management 1 p. 265-266), it is clear that Josh Reed never mentioned Grievant's name. Either Grievant's accusations are misplaced or his intimidation tactics are on behalf of his brothers.

Grievant also accused the Reeds of antagonizing he and Ashley as they were leaving the restaurant by making some sort of gestures. However, neither one could identify or describe these

alleged "gestures." They could not describe the gestures as offensive, profane, or as some sort of acknowledgement. The Union expects you to assume that these unknown gestures provoked Grievant in some way. Absent from the investigation is any mention from Grievant that the Reeds were allegedly making gestures. To end the confrontation that Grievant initiated with the Reeds, Ashley Hauser testified that she pulled him away backwards by the belt. Grievant's statement also shows that Ashley pulled him by his belt. This fact alone provides more proof that the contact between the parties was threatening or intimidating in some way. Both Josh and Jessica Reed understood and testified that Grievant's actions that night were threatening. Josh Reed had already been beaten severely once during the fight at the Finish Line. Now he had been confronted by the Grievant, a well-known Ohio State Trooper, and told that the July 1st incident "was not over." This statement was clearly a veiled threat from an aggressive individual who could not walk away from the situation; in fact, he had to be physically pulled away by his girlfriend.

The next incident of intimidation occurred with Haven Lawrence. Mr. Lawrence testified that he was traveling home on Township Road 192 when he saw the Grievant in a marked patrol car turn around and follow him. He testified that he did not take the most direct route home and traversed different streets to see if Grievant was following him. Grievant followed him all the way to his house and then sat in the middle of the street watching him for approximately 35-40 seconds until Lawrence walked into the house. It was not until the vehicle behind Grievant sounded the horn that he pulled away from his watch of Haven Lawrence. As Mr. Lawrence explained during his testimony, this end of town is not an area where you normally see the Alger police, not to mention the State Highway Patrol. The patrol does not have jurisdiction in the village of Alger. Grievant testified that he believed Grievant followed him in order to scare him. This was not the only time Lawrence witnessed Grievant in his neighborhood. Lawrence also testified that on another occasion Grievant was parked in the same area watching his house. A relative of Lawrence approached Grievant (Management 1 p. 152), and Grievant stated that he was watching for a Jack Scott who sometimes stays at the house next to Lawrence. According to Grievant during direct examination, he did have a conversation with Lawrence's cousin. His reason for being in the neighborhood was to watch for the Jack Scott subject because he knew the Sheriff's Office had an active warrant for his arrest.

Grievant's lame excuse for being in the neighborhood is highly unusual and suspect at best. The Highway Patrol creates line assignments for troopers on a daily basis. These assignments are composed of different interstates, state routes and U.S. routes. Line assignments are created in accordance with the number of crashes on a particular roadway and the amount of traffic. The village of Alger is not in the patrol's jurisdiction or on a dedicated line assignment. Alger has their own police force to handle crime in the area. The alleged crime committed by Jack Scott did not occur on state property or within the jurisdiction of the Highway Patrol. In fact, the Highway Patrol does not have police powers on private property in Alger, Ohio. The alleged warrant on Jack Scott that Grievant referred to belongs to the Sheriff's Department. Grievant was not assisting a particular deputy with the serving of an alleged warrant. The Sheriff's Department in all likelihood was not aware Grievant was conducting his own surveillance. Clearly, the only reason Grievant was in the area was an attempt to intimidate Haven Lawrence and his wife. In fact, during the interview with Sgt. Rogols (Management 1 p. 235), Grievant denies knowing a subject by the name of Scott.

In July of 2003, Grievant attended a party hosted by Rodney Bryant at the local golf course clubhouse in Kenton. Jimmy and Lisa Hites were also in attendance at the party. After Grievant's brothers and sister showed up, Mr. Hites thought it would be a good idea to leave the party. He left just prior to his wife and climbed into the driver's seat of their car. His wife, Lisa, testified that as she was saying her good-byes she noticed Grievant "sneaking" around the perimeter of the room in order to exit without being seen. She was able to exit the building and arrive at the car before Grievant. Both Mr. and Mrs. Hites testified that Grievant passed their car on the passenger's side and placed his face close to the windshield when uttering intimidating and threatening comments. He stated, "It's not gonna happen tonight, but it will happen, I guarantee you, you got my word, it will happen." Grievant then walked to his vehicle, which was parked immediately behind the Hite's vehicle and appeared to be writing something down. As he was heading back to the clubhouse, Grievant brushed past Lisa Hites and stated (Management 1 p. 175), "His time is coming and it ain't gonna happen tonight, but his time is comin'." It is important to keep in mind that Lisa Hites had reported to the Sheriff's Office that Grievant had struck her on July

1, 2002.

Rodney Bryant, the host of the party, testified that Grievant assured him there would be "no trouble" between him and the Hites at the party. Bryant testified on cross-examination that he thought this to mean that there would not be a fight. Grievant would have you believe that he was talking about a lawsuit when he threatened Mr. Hites at the golf course. Taken in the context that it was said, it does not make sense that Grievant would be talking about a lawsuit. He was obviously referring to some type of physical harm. Bryant did not rush out of the clubhouse because he was concerned that the "problem" between Grievant and Jimmy Hites was a possible lawsuit. Jimmy Hites did not remain locked in his car because he was worried about Grievant attacking him with a lawsuit. When Grievant confirmed his promise to Mr. Bryant before returning to the clubhouse he was not talking about a lawsuit. Grievant made a threat to Mr. Hites. There is no other interpretation. Additionally, Grievant openly admitted to Sgt. Rogols (Management 1, p. 238) that he could understand how the Hites could perceive his comment as a threat.

Furthermore, during the taped phone conversation between Mr. Hites and Grievant, (Management 1, p. 282) he admits again to the threatening remarks he stated to Mr. Hites. Mr. Hites states, *"I was threatened. I was told and you know it, I was looked at in the window of my vehicle and I was told that, and then my wife was even told in her ear as I could hear that...that it wasn't going to happen today. But, it's going to happen. Oh, yes. It's going to happen. That ...those were your exact words."* Grievant responds by saying, *"I ain't...I'm not denying that."*

It is extremely important to compare the consistencies in the two separate incidents of the Grievant intimidating the Hites and the Reeds. In both situations, Grievant just happened to leave an establishment as the other parties left. The Grievant was the person that initiated the contacts while the other parties were minding their own business. The other parties were leaving, in both cases to avoid the Grievant. The Grievant immediately made comments in reference to the July 1st incident at the Finish Line Bar. He made it clear that the matter was not over and there would be further repercussions. In spite of these consistencies in these acts of intimidation, the Grievant wants you to believe he is the victim of misunderstandings and the ill feelings of others.

The next intimidating remark occurred after Grievant was removed from his employment; however, it is still relevant to the case because it continues the pattern of behavior established by the Grievant. Lisa Hites testified that she was at the Hardin County fair walking with her son when she noticed Grievant with a group of friends. As she walked past the Grievant, he looked directly at her and stated, *"She better get out of here or she's going to get her ass kicked."* All Grievant could do was deny that it happened. Given that Grievant had previously punched Lisa Hites in the chest the night of the bar fight, there was good reason to believe he would carry through on this threat. What is even more disturbing is that Grievant has already been indicted on one count of felony witness intimidation and has grieved the fact that he was fired, yet still continues the intimidation of people that were at the Finish Line Bar.

If you examine each act of intimidation or threat made by the Grievant, you can see that he either initiated or could have easily avoided the contact with those involved. At the Texas Roadhouse he could have avoided leaving at the same time that the Reeds left. He could have not said anything to Josh Reed about going to the newspaper. The night at Rodney Bryant's party he could have waited until the Hites left before sneaking outside to engage them in conversation. He could have avoided following Haven Lawrence home and could have further avoided sitting on his house while claiming to be looking for an alleged Jack Scott. All of these acts of intimidation by the Grievant can not be reduced to mere coincidences. Grievant had an agenda. The agenda was to intimidate the witnesses in order to clear his name and protect his brothers.

The Fight

Witnesses viewed the fight from several different vantagepoints. Witnesses viewed different portions of the fight based on what time they exited the bar. One thing that is clear from the testimony of the Employer's witnesses is that Grievant was an aggressor and combatant in the fight. He was not the calming force as suggested by the Union.

According to Mr. and Mrs. Hites and Ms. Hoag, Grievant punched Haven Lawrence in the face, there is no doubt about it. Haven testified that when he stood up after being pummeled by

Shane, Grievant punched him in the face. He testified that he did not actually see Grievant punch him in the face, but after he was hit Grievant was the one standing in front of him. His statements to the Hardin County deputies, Detective Alexander and Sgt. Rogols are all consistent in the fact that Grievant hit him in the eye. He never accused anyone else and even denied that it could have been Shane Burd that hit him after he stood up.

Mrs. Hites gave several statements to different authorities. However, her statements related to Grievant punching her in the chest are clear. She stated that he punched her (not a shove) in the chest. She stated her chest was bruised and her neck was sore from the whiplash effect of the punch. Supporting Mrs. Hites' accusation that Grievant hit her are the statements by Cherise Hoag. All of Mrs. Hoag's statements and her testimony support the fact that she saw Grievant hit Lisa Hites in the chest.

Grievant's statement to Sgt. Rogols explains his actions when he saw the fight. He stated, (Management 1, p. 223) "I ran up, I was at full sprint and I guess I grabbed as many as I could in the crowd and shoved. And four or five people just went flying. And then I just turned around, grabbed another person off top of my brother, picked him up and threw him off." On direct examination, Grievant claimed that he pulled people off of the pile in order to separate. On cross-examination he quickly denied that he "threw" anyone off of the pile until he was faced with his statement on page 223 that contradicts his testimony. Grievant stated that when he saw the fight he ran at the pile with his arms out and head down in order to remove as many people as possible. He went as far to admit on cross-examination that he charged at the pile of people like a "bull." Grievant also described on direct examination during the arbitral hearing that there was no force when he was separating combatants. He stated that he "made contact and then pushed" them away. None of the above actions describe a calm, cool, collected person as described by Union witnesses. The Grievant expects you to believe that he ran at a full sprint, charging like a "bull" and then stopped and gently separated people. Grievant is attempting to downplay his actions to paint himself in a better light, as peacemaker instead of fully involved combatant. Obviously Grievant's calm cool demeanor during the hearing is the result of hours of detailed preparation by the Union. The Union advocate testified many times that Grievant has quite a knack for remembering the minute details. However, when you look at the statement Grievant gave to Sgt. Rogols (Management 1, p. 223) he states, "I guess I grabbed as many as I could in the crowd and shoved." He also states in his written statement (Management 1, p. 318) that "I am not sure what happened after that." Interestingly, the Union advocate did a majority of the testimony in this area. He asked leading questions on direct and went as far as to utter a response for Grievant on cross-examination. One would have to wonder why the Union has such grave concern over letting the witness answer the questions for himself.

Credibility

It is clear the reports taken by Deputy Varian and Sgt. Lee are biased and do not reflect information taken from all the witnesses involved. Sgt. Lee only interviewed the members of the Burd family and Ian Patton. His other information came from Deputy Varian. Sgt. Lee also testified at first that there was no blood on Grievant's shirt and then later said there was a speck of blood. Deputy Varian reported that he did not see any blood on Grievant. According to Grievant, his shirt was so full of blood he took it off and stood outside the hospital without a shirt on. Other witnesses, to include the Reeds said Grievant changed his clothes before arriving at the hospital.

Deputy Varian's report is again only a theory as to what happened based on the statements he received or viewed (Management 1, p. 316). He stated he only took statements from Tim Devore, Cherise Hoag and Lisa Hites. Both Hoag and Hites witnessed Grievant punching or hitting others but there is no mention of this information in his report. Deputy Varian also testified that Haven Lawrence called him and recanted the statement he gave about Grievant punching him. However, Deputy Varian failed to document this alleged information anywhere. One could presume that the Grievant is automatically believed over other witnesses because of his status in the law enforcement community.

The bias of three of the Union witnesses is even more apparent then the bias shown by the deputies. Tina Burd, Grievant's brother, was evasive and reluctant to answer questions on cross-examination. Detective Alexander called and spoke to Tina Burd about what had occurred at the

Finish Line Bar. He wanted to interview her to collect additional facts for the case. It was at that time that Ms. Burd told Detective Alexander that she had been in the ladies restroom and only came out after the altercation was over. She stated that she did not see any of the fighting. (Management 1, p. 340) On July 2, 2002 Ms. Burd contacted Detective Alexander and advised that she wanted to make a statement. She did this because she wanted to clear Grievant's name. She stated she was by Grievant's side the whole time and that he did not hit or kick anyone. Ms. Burd was questioned on cross-examination whether Grievant could have hit or kicked anyone before she exited the bar. Her response was that it was not possible because "Bob is not that way." The willingness on the part of Ms. Burd to deny the possibility of Grievant hitting anyone before her arrival outside shows her completely biased testimony regarding the Grievant. This witness's credibility was lacking from the day she talked to Alexander and continued during her testimony at the arbitral hearing. She has shown that she is willing to say whatever is needed to aid her brother, Bob.

Ashley Hauser, now Grievant's ex-fiancée, also testified that it was not possible that Grievant could have struck anyone while she was still in the bar. She responded to the question by stating "absolutely not." That is "not his character." This blanket denial by Ms. Hauser shows her bias for the Grievant. Coupled with this statement and her past relationship with Grievant, the arbitrator may automatically infer some level of bias. The level of bias only increases when you take into account that she is "possibly" interested in getting back together with him. Remember, they only broke up after attending the county fair together in September of 2003. Since she is possibly interested in pursuing a relationship, she has a vested interest in the outcome of the arbitration and his criminal case. Certainly a husband without a felony record and employed is a much more attractive proposition than Grievant's current state of affairs.

Donald Hauser's testimony is littered with inconsistencies. Some of these inconsistencies deal with Grievant's testimony and some deal directly with his own testimony and interview with Detective Alexander. During the interview with Detective Alexander, he was asked how long Grievant was outside before he and his wife exited the building. According to the summary, Mr. Hauser first stated thirty seconds, then said fifteen to twenty seconds and ultimately reduced it to five to ten seconds (Management 1, p. 358). During cross-examination, Mr. Hauser denied making any such statement even when he was referred to Detective Alexander's typed summary. Management Exhibit 3 impeached his credibility regarding this issue. Mr. Hauser was also adamant that Grievant "never punched anyone." He stated during his testimony at the hearing and to Detective Alexander that Grievant was never out of his sight the whole night. This is simply not true. Grievant was out of his sight when he exited the bar. Grievant was out of his sight when he (Mr. Hauser) "rescued" his daughter. He also did not see Grievant when he chased his brothers across the street. Again, like Ashley and Tina, Mr. Hauser was asked if Grievant could have hit anyone when he was out of sight. Mr. Hauser's response was "no way."

Mr. Hauser's testimony also differs from Grievant's interview with Sgt. Rogols when characterizing how Grievant separated or removed people from the pile. In his interview Grievant admitted to "throwing" people off of the pile. Mr. Hauser described Grievant as pushing people aside "gently." This characterization differs dramatically from Grievant's testimony of running at a full sprint with his head down like a bull. Mr. Hauser also testified that his perception of Grievant's character has not changed. He stated that both Grievant and his daughter know his feelings about the broken engagement. One can only speculate that Mr. Hauser's loyalty to Grievant is similar to that of his daughters. If his testimony can help Grievant get his job back, then Ashley and Grievant would get back together.

There is also a vast difference between Don and Deb Hauser's recollection of events. Deb Hauser states on two occasions that she and Don walked directly across the street when they came out of the bar. She also indicated that she did not see any punches thrown by anyone at any time. This would indicate that the fight was over by the time they exited the bar, which completely contradicts her husbands "eye witness" account of the brawl.

In March of 2003, Grievant attempted to use his influence as a trooper and threatened to file a complaint against Detective Alexander for improper pressure and conduct regarding Alexander's insistence that charges be filed against Grievant. (Management 1, p. 39) Grievant also talked to Terry Price, the father of Jessica Reed in order to smooth things over with him and

minimize his involvement. (Management 1, p. 43-44) Grievant also visited a man by the name of Kenny Howard because he heard that this man was "going to whoop him" because of his involvement in the fight. Grievant went to his house and had a conversation with Mr. Howard. According to Mr. Howard, Grievant admitted to punching Tim Rosorfer, a woman, and Josh Reed. He also told Mr. Howard that he did not get enough of Rosorfer and would get him at some other date and time (Management 1, p. 191-193).

Although Grievant has a decent on-duty record, his off-duty behavior is reprehensible. The first thing Grievant should have done the night of the fight at the Finish Line Bar was call the police. Instead Grievant joins the melee in order to protect his brothers. Shane, who he described as 5'10", 265 lbs and solid, probably did not need his protection. Consequently, if you compare the injuries sustained by Josh Reed to the lack of injuries sustained by Shane Burd, you come to the quick conclusion that help was not needed.

A troubling aspect of this case is that several people in Hardin County know Grievant is a trooper whether he is in or out of uniform. Grievant readily admits this fact to Sgt. Rogols. The newspaper article in the *Kenton Times* reflects poorly on the Ohio State Highway Patrol. Grievant's actions during and subsequent to the fight have made several people very nervous or scared of troopers in general. Another troubling aspect of the case is that Grievant admitted during the arbitration that there is nothing he could have done differently. Considering Grievant admitted to Sgt. Rogols that he could see how what he said to the Hites could be perceived as a threat, there is a lot he could have done differently. He also admits that if he wanted somebody threatened (Management 1, p. 239) "I'd have my brothers do it." These are the same brothers that have a reputation "throughout the county as being scrappers (Management 1, p. 242)." This should raise a huge red flag. Here we have a trooper who has admitted that he will get his brothers to do his dirty work if needed. Why? In order to protect him from losing his job as a state trooper. The **only** answer one can expect from a sworn state trooper is that he or she would not threaten members of the general public. Grievant, however, might choose to call upon his brothers, the "scrappers" to inflict bodily harm if he is crossed. Grievant's off duty behavior has made him unfit to serve in the capacity as a law enforcement officer. The Employer would be skirting its duty as a law enforcement agency if it allowed the continued employment of Grievant. One who is responsible for upholding the law in his daily work can not be excused and allowed to violate those same laws in his off-duty hours. As a law enforcement officer, Grievant is held to a higher standard of conduct than the general public. His actions have tarnished the long-standing professional image of the Ohio State Highway Patrol. The future employment of this thug as a trooper will only prove to the citizens of Hardin County that police officers are above the law. That police officers don't have to abide by the rules with which the rest of society must comply.

The discipline imposed was commensurate with the offense. It was not arbitrary capricious or discriminatory. The Employer will ask that the grievance be denied in its entirety.

SUMMARY OF UNION'S POSITION

The Union's view of this matter portrays the Grievant as a victim of the sullied reputations of his father and half-brothers, Rob and Shane, in Hardin County. It contends that in the early morning hours of July 1, 2002, the Grievant was attempting to break up the fight(s) involving his brothers and other patrons of the Finish Line. The Union rejects the accusation that the Grievant then engaged in intimidation of witnesses to the Finish Line

incident. The Union's closing argument is taken directly from its brief and is as follows:

Allegation #1

The first of the three allegations is that Trooper Burd was "involved" in a fight. Here again the allegation may be true without that truth having any impact upon whether Trooper Burd's conduct merits any discipline let alone the maximum discipline of termination.

In fleshing out the allegation the word "involved" requires definition. The Employer's charge has to be interpreted to allege that Trooper Burd either instigated, initiated, or voluntarily and actively participated as a combatant in an off duty fight at the bar.

While we do not contest the allegation that Trooper Burd was "involved" in the fight the Employer must meet the burden of proving that such "involvement" was actively undertaken, at a minimum, as an instigator or initiator of the violence, or as a voluntary combatant. A review of the evidence will put the Employer's charge to the test.

It is the Union's belief that the evidence does not support a determination that Bob Burd instigated, initiated, or voluntarily and actively participated as a combatant in the fight. To the contrary, the weight of the evidence discloses that Trooper Burd's "involvement" was driven by his attempt to stop the fighting, separate the combatants and prevent additional fights from breaking out.

Allegation #2

The other allegation contained in the Statement of Charges is that Trooper Burd intimidated persons that witnessed the altercation. Investigator Rogols testified that his view of the offense of witness intimidation is premised upon whether or not an individual feels threatened or intimidated by the conduct or statements of another. Rogols wholly dismisses whether the conduct or statements were intended to threaten or intimidate, or whether such statements would have been perceived by an ordinary citizen as intended to threaten or intimidate that individual from stating what he/she believed to be factual as to events witnessed by such person.

Investigator Rogols told Trooper Burd during his investigative interview of Trooper Burd that Burd in saying that for him "its not over" could be taken by the Reeds or the Hites as a threat of physical harm. It is all too clear that Bob Burd was stating in clear terms, what has been so painfully demonstrated. It wasn't over as evidenced by the Patrol's Administrative Investigation that culminated in his termination.

The Employer's charge of intimidation does not contain even the hint of an allegation that Trooper Burd communicated directly, indirectly or even inferentially, that anyone, witness or participant, should change, adjust, or shade their recollection or statements regarding the events of the fight at the Finish Line on June 29, 2002. So, in this charge as well, it is not contested but that Bob Burd said "its not over" more than once in conversation with participants in the events of June 29th. That fact does not remotely constitute actionable disciplinary conduct. To buttress the charge, the Employer offers that Trooper Burd had tangential contact with Haven Lawrence while on duty. We will review that evidence confident that it does not buttress the Employer's charge as to intimidation.

In his Administrative Investigation summary, Investigator Rogols declared that the charge of intimidation he found to be substantiated was in part present by the simple reputation of Trooper Burd's brothers as fighters or scrappers. The reputation of Trooper Burd's brothers according to Rogols summary is that they "don't put up with anything". Rogols AI reported that this reputation "fuels the associated fears of the 'victims'". In the Employer's AI, Trooper Burd was apparently found guilty of his brothers' reputation.

THE INVESTIGATION

Before reviewing the testimony of the witnesses to the events of June 29, 2003, I think it productive to review the Administrative Investigation conducted by the Employer. To say that the Rogols investigation was "flawed" would be an undeserved kindness. It is, after all, the Administrative Investigation that is presented to the Superintendent of the OHP. It is the Administrative Investigation upon which he, in consultation with other command staff, must rely in making a decision as to the imposition of discipline in any case. The AI must be a fair and balanced inquiry if the system is to work. Due process must be substantive as well as merely procedural. The Rogols document is an investigation in name only. By the fifth day following his being directed to conduct an investigation he had taken on the mantle of a prosecutor.

On December 4, 2002 Rogols met with District Commander, Captain Collins and was assigned the investigation. Shortly thereafter, Investigator Rogols met with Detective Alexander who had been investigating the Finish Line incident for months and who had already threatened to prosecute Trooper Burd for what Alexander alleged was acting like an attorney during an interview scheduled for July 2, 2003. At that time, Trooper Burd voluntarily submitted to a full interview, but told Alexander that his brothers had legal counsel and would refuse to be separately interviewed.

Alexander told Rogols of a 1998 incident involving a bar fight. In his AI Rogols writes that Alexander told him of "a previous incident where Trooper Burd and his brothers were allegedly involved in a bar fight in Upper Sandusky". Two days later District Captain Collins provided Investigator Rogols with a letter received four months earlier from a Ms. Stephanie King. Ms. King is the niece of retired Captain Robert Welsh, District Two Commander. Her brother, the nephew of Captain Welsh, had been injured in a fight outside a bar in Upper Sandusky (within District Two).

Rogols included in his AI the entire September, 2002 letter of Ms. King in which she allegedly lodges a complaint against Trooper Burd for "Employee Misconduct". While she was not present and had no knowledge of the events at the Finish Line, she charges (and Rogols reproduces) that Trooper Burd "was involved in the brutal beating of Josh Reed and his wife Jessica Reed, at the Finish Line bar in Kenton, Ohio ..." She then recites that Trooper Burd "was also involved in the brutal beating of my brother Jon Hawkins, which occurred on November 8, 1998, behind the TNT Sports Bar in Upper Sandusky. Trooper Burd was also accompanied by his brothers Bob and Shane during this violent assault". Ms. King went on to demand that the 1998 case be re-examined "with an eye towards uncovering the truth and putting a stop to the reign or (sic) terror being inflicted upon the citizenry by the Trooper Burd family."

Rogols elected to put (in bold print) this entire document, unrelated to his investigation, inflammatory and filled with known false statements, in his Administrative Investigation. Rogols noted in his Administrative Investigation summary, that Ms. King was sent correspondence informing her "as a result of her Complaint...this investigation is being conducted".

Then, inexplicably, Rogols elected to confirm Ms. King's charges. He stated in the AI that he requested and received the 1999 Administrative Investigation of Trooper Burd surrounding that incident. Rogols writes "In summary Trooper Burd and his brother Rob, were involved in a "physical altercation" while off duty on November 8, 1998. Subsequently, Jonathan P. Hawkins was seriously

injured, was hospitalized and at one point in a comma (sic)." Then Rogols gratuitously added that the Wyandotte County Prosecutor "considered filing obstruction charges" against Trooper Burd. He concluded by writing "Ultimately however, no charges of any kind were ever filed against Trooper Burd or his brother Rob". Actually, the AI in the 1999 case stated it a little differently than Rogols. Sergeant Williams, the investigator in that case noted, "evidence did not support either charge" being filed. (See page 396)

Incredibly, Rogols then closed this attack upon Trooper Burd with feigned equanimity by stating that the Administrative Investigative Unit that provided the AI did not provide him with any documentation as to discipline that was given to Trooper Burd and that since the discipline would exceed the normal retention period on the record of Trooper Burd it "will not be reported in his narrative".

Rogols corrupted the investigative process and poisoned the water for any reviewing authority. All of the above appeared within the first few pages of the Rogols "investigation". No one reading the foregoing could suspect that the following unchallenged information was available to Investigator Rogols:

- a. Trooper Burd was not a participant in the fight that took place in 1998 at the TNT Sports Bar in Upper Sandusky.
- b. Trooper Burd was not even a witness to the fight but learned of it after the fact.
- c. The same Ms. King (then Ms. Hawkins) made raised a similar complaint in 1998. The AI conducted at that time concluded that Bob Burd had not witnessed the fight.
- d. Burd was suspended for three days for allegedly failing to take sufficient action to summon the authorities after he discovered the injured Mr. Hawkins following the fight.
- e. The Union took the suspension to arbitration. Arbitrator Phillip Sheridan found that Trooper Burd's conduct was not disciplinarily actionable. As a result of that Arbitration, Trooper Burd had his entire suspension set aside and he was made whole. (See Union #1)

The above facts were known, should have been known, or were readily available to Investigator Rogols. The Rogols Administrative Investigative Summary at the very best manipulates the facts horribly and at worst distorts, twists and misstates the facts so as to have the reader conclude that Trooper Burd had engaged in a brutal beating underscoring the "reign of terror" alleged by Stephanie King.

Actually, of course, what should have happened was that Ms. King's complaint, not based upon first hand knowledge as to the Finish Line and having already been investigated and having been taken to final and binding arbitration, had no relevance or probative value to the Rogols AI. It did not belong in the Administrative Investigation at all.

Selective Fact Selection

Investigator Rogols took the statements taken by Dennis Alexander and then selected, which individuals he would choose to interview in conducting his AI. His method of determining whom to interview as to the events at Finish Line was illogical at best and useful only in reaching a predetermined conclusion. Under either construct it is indefensible as an investigative procedure. Rogols said he elected to interview anyone who directly referenced Trooper Burd in their statements to Detective Dennis Alexander. Since people giving statements about a fight don't reference those who were not combatants or seen as noncombatants, the people interviewed by Rogols were primarily those who charged Trooper Burd with being a combatant. Many of these "witnesses"

were directly involved in the fight themselves. Thus, missing from his investigation were any number of non-combatant witnesses:

- 1) He did not interview Ian Patton, sober and present next to Trooper Burd throughout the incident. (See pg. 335 of Employer #1)
- 2) He did not interview Donn Houser, sober and present in close proximity to Trooper Burd throughout the incident. (See pg. 357 of Employer #1)
- 3) He did not interview Jamie Hare although Hare, a friend of Josh Reed who saw the whole incident related to Reed and stayed with him once he was injured in the fight. Hare was not solicited by Dennis Alexander but volunteered to come into the Sheriff's office to give a statement. (See pg. 342 of Employer #1)
- 4) He did not interview Mike Mullins. Detective Alexander interviewed Mullins. The summary of that interview states "Mike says that he saw a pile of people on the ground and saw Shane Burd pulling people off the pile while some people were hitting Shane in the head. Mike says that he saw Bob Burd about thirty feet away with his arm out shouting for people to stay out of it". (See pg. 311 of Employer #1)
- 5) He did not interview Ashley Houser who was present and sober for part of the incident and for the incidents involving the allegations of "witness intimidation".
- 6) He did not interview Tina Burd who, also sober, witnessed events prior to the start of the fight and was present during Trooper Burd's actions to prevent a fight from resuming.

* It should be noted that both Hare and Patton were independent witnesses. Both are remarkable for their absence in Rogols' investigation. We heard the testimony of Patton and it clearly supports a determination that Bob Burd didn't hit anyone. He also testified that Josh Reed started the fight when he punched Rob Burd.

Hare confirmed that the fight started when his friend Reed hit Rob Burd, who then wrestled him to the ground. He also states that Shane Burd later hit Reed. Most importantly to the Rogols investigation Hare also stated according to Detective Alexander's summary, "he did not see Bob Burd hit anyone and that Bob was not near where Josh and Rob were first fighting." Rogols did not interview Hare even though he met the strange test offered by Rogols that he chose to interview only those who directly referenced Trooper Burd.

More Selectivity

In his AI summary, Rogols directly references conversations with Sheriff's Detective Alexander but does not reference having contact with Sheriff's Deputy Elvis Varian who was the first law enforcement to respond to the incident at the Finish Line. We learned from Deputy Varian's testimony that he had contact with Rogols and that he told Rogols that Haven Lawrence, after telling Varian at the scene that Bob Burd hit him, later recanted that statement and said he did not see who hit him. Rogols not only doesn't mention the conversation with Varian, he omits the fact of the Lawrence recantation of his initial statement to Varian.

Investigator Rogols knew that Cherise Hoag's written statements were in conflict but didn't include that observation in his Administrative Investigation.

THE INCIDENT

We will never know exactly what happened in the parking lot of the Finish Line on June 29, 2002 sometime around 1:30 AM to 2:00 AM. The sequence of events is colored by the perception of the witnesses and the speed of the evolving events. It is agreed that the entire incident lasted no longer than eight to ten minutes. The perception of the witnesses is further clouded in some circumstances by alcohol or by antecedent animus by and between some of the parties.

I would submit that the following comes close to representing what actually evolved on June 28th and into the morning of June 29, 2002.

Bob Burd and his fiancée Ashley Houser had tentative arrangements to go out with Bob's sister Tina. After dinner and a brief stop at the Moose Lodge they all went to the Finish Line Bar & Grill where there was music, a DJ and dancing. They arrived between 10:00 and 10:30 PM. Although they did not have plans to meet Bob's brothers, Shane Burd and Rob Burd were already at the Finish Line. At around 11:00 PM Donn and Deb Houser, Ashley's father and stepmother arrived. Mrs. Houser had earlier that evening been involved in attending a high school reunion and hoped to find Bob and Ashley.

The place was hot, packed, loud, and smoke filled. Ashley's parents had not previously met either Tina Burd or Bob's brothers Shane and Rob. Introductions were made and primarily the patrons milled about although Bob and Ashley and Donn Houser and Deb Houser were able to dance.

Sometime around 1:30 AM, Rob Burd was walking out the back door when (whether preceded by limited conversation or not), Rob Burd was punched by Josh Reed. Bob saw the fight start and immediately exited the building followed closely by Donn Houser and Ian Patton.

A group of people had already surrounded Josh Reed and Rob Burd as they struggled on the ground. The people were yelling and some were kicking one or the other of the two men on the ground. Bob yelled for people to move back and moved some back by pushing them back. Bob helped pull people away from the two on the ground. Shortly thereafter Shane Burd got in a confrontation with Haven Lawrence and punched Lawrence hard enough to knock him down.

Bob put a bear hug on Shane in an attempt to restrain him. Smaller fights were then breaking out among different small groups in the area of the parking lot and the bar had emptied out into the parking lot. Tina Burd, Deb and Ashley Houser arrived outside about this time. Bob seeing the situation further deteriorate then asked Ashley to go find the owner and have him call the police. Duane Richardson (the bar owner) came out to the parking lot to announce that the bar was closed and the police were on the way.

Ian Patton was standing near Bob along with Donn and Deb Houser, Ashley and Tina Burd. Tim Rostofer was taunting Shane Burd and ran across the back parking lot with Shane in close pursuit. Bob, continuing to attempt to reign in his hot-tempered brother, ran after Shane along with Patton. They reached Shane in time to pull Shane off of Tim Rostofer. After returning to the parking lot Sheriff's Deputy Varian arrived.

Bob greeted Deputy Varian and Varian began to try to quiet the crowd. Bob moved the group of people he was with (Tina, Ashley, Donn, Deb, Shane and Rob) across the street away from the taunting crowd. There were several loud, angry small groups still in the parking lot. Deputy Victoria Dorman (a plain clothes child support officer) then arrived on the scene. Sgt. Ron Lee arrived several minutes later and after conferring with Deputy Varian began to take a statement from Bob Burd.

At about this time a man named Robert Ellis came from behind Deputy Varian and punched Tim Devore in the face. What prompted that assault is unknown. Tina Burd wiped up what blood she could off Rob, put him in her car and took him to the Kenton Hospital. Bob, Shane and Ashley followed in Bob's car. Donn and Deb Houser went home. Kenton Police officer Mark Coffman came to the Hospital and spoke with Bob while standing outside. On the following Monday, July 1, 2002, the Sheriff's Office surprisingly took the investigation of the case from Deputy Varian and Sergeant Lee and assigned it to Detective Alexander. On Sunday 06/30/03, Trooper Burd called his post to inform his supervisor of the previous evening's events, however the post was already aware as Hardin County Sheriff's Department Lt. David Dyer called Trooper Burd's post and informed the post that Bob had been "involved" in the bar fight with his brothers.

While certainly but an outline of the incident, the above represents a consistent and coherent factual recollection of a number of witnesses with different vantage points and different time exposure to the incident. Among these witnesses are Donn Houser, Ian Patton, Ashley Houser, Tina Burd, Deputy Elvis Varian, Sergeant Ron Lee, and of course Bob Burd. Trooper Burd's recollection is tested by lengthy interviews the transcripts of which are attached to this document.

For the purposes of this case the important element of a factual recitation of the incident is that Trooper Bob Burd did not participate as a combatant in the fight. He was, according to two eye witnesses, who witnessed the incident from the beginning at least as it relates to Trooper Burd's becoming aware of it are clear in stating that Bob Burd did not hit or strike anyone and was engaged in attempting to restore order to the events in the parking lot.

The opposing evidence, adopted by the Employer, is neither consistent nor in some cases coherent. The witnesses were not unbiased. They either were direct participants as combatants (and victims according to their testimony) or the friends or loved ones of the combatants. They worked together and had ample opportunity to prepare their initial statements while gathered together at the home of one of the witnesses.

Haven Lawrence's statement was that he observed no fight prior to his being accosted by Shane Burd. He stated that Shane threw him to the ground, sat on him and was punching him in the face. He states that his friend Jimmy Hites pulled Shane off of him and "I stood up and Bob Burd hit me on a dead run in the left eye". "I went down and Bob and Shane proceeded to kick me..." From his statement it is amply clear that he was looking at Bob Burd who hit him in the left eye. Lawrence, however admitted to Deputy Varian that in fact he did not see who hit him. If he did not see who hit him his whole statement about Trooper Burd is compromised. Further impeaching his statement is his testimony at the arbitration hearing. He testified that he had "six or eight" Rum and Cokes and that his wife called her mother because they were too drunk to drive. His testimony places Lisa Hites as being pushed by Bob Burd when she intervened. He also testified that he Josh Reed was not with him at the time of his fight.

Jessica Reed's written but unsigned statement (pg. 327), says "Shane Burd followed us out the door & started running his mouth to our friend Haven Lawrence and Josh tried to stop them from getting into a fight and Shane Burd started punching Josh and had him on the ground. I tried to get Shane off my husband and Shane punched me in the face." "Josh just got up and wanted his hat & Bob Burd and Shane Burd attacked him again and had him on the ground" In a interview summary of Jessica of a July 1, 2002 interview, Detective Alexander hears a different story. According to Alexander Jessica told him, "She did see Bob Burd hitting someone but she is not sure who it was". Contrary to her statement that she saw Shane Burd "started punching Josh", Alexander reports her as telling him that she was inside the bar when the fight started and "when she came back out Shane Burd was on top of Josh beating him." Jessica Reed was subpoenaed by the Employer but was not called as a witness at the arbitration hearing.

Lisa Hites initial statement declares "I walked out of the bar to go home and Bob and Shane were hitting people and had people on the ground...Haven and Tim were on the ground getting hit by Shane and Bob". "Shane and Bob think they own this town". "Shane and Bob hit me and & pushed me to the ground and told me I had one coming & my husband had one coming Bob and his wife threatened me-my husband". The next day she wrote "I jumped on Bob's back to get him off of Haven, he pushed me off then punched me in the chest. I looked to the right and seen Shane, Bob and more chasing Tim Rostorfer and beat him to the ground". At the hearing she testified that no fight had started when she exited the bar. She testified that she heard Shane ask Haven if he was Rostorfer and hit Lawrence. She testified that Rostorfer ran because that's what Rostorfer does. She testified that her first statement was untrue. She noted that she didn't swear to the first statement although she wrote it. All in all she was a pretty poor witness with conflicting inconsistent statements.

How about Mr. Rostorfer? It's a take you pick situation. On June 30, 2002 he wrote a "sworn" statement. He stated that he, Lawrence, Jessica, his girl friend Brandy, Jimmy and Lisa Hites, Josh and Jessica Reed all walked out of the bar. He states that when he got out of the bar

Haven Lawrence was already fighting with Shane. "Then Shane's brother Bob jump Haven and started to hit and kick him. I got in the middle and tried to get them off..they jumped on me. Shane and I was fighting and his two brothers, Tr Bob and Rob, started kicking me in the head and ribs..." On July 5, 2002 Rostorfer was interviewed by Detective Alexander. He stated he didn't "get in the middle" but that Jimmy Hites tried to get Shane off of Haven. He says the Bob Burd was not hitting anyone but he saw him exit the bar and that "walked over and reached down". He says that when Shane saw him he came after him. "Tim says that he hit Shane twice and then covered up because he was getting kicked by others." He stated that "he did not see anyone except himself and Haven get hit." Alexander noted that Rostorfer knows and described each of the Burd brothers correctly.

Cherise Hoag, the fiancée of a man named Tim Devore was also a selected witness for the Employer. She testified that there was "bad blood" between her fiancée and "the Burds". On July 12, 2002 Detective Alexander interviewed Cherise Hoag. She told Alexander that "Shane, Rob and Bob all walked out (the bar) just ahead of her." She heard Shane ask Haven Lawrence who Tim Rostorfer was and then hit Haven and jump on him. "Just a few feet away one of the Burd brothers hit Josh Reed from behind as he was talking to Rob Burd". That would have had to be Bob Burd according to her. Meanwhile, she saw Bob Burd standing by Shane who was beating Haven. He, according to Cherise, told Lisa to "stay out of it" and then hit Lisa in the chest. Alexander notes "Cherise says that she only saw Bob Burd hit Lisa Heights" (sic). By the time that Investigator Rogols interviewed Cherise Hoag the following March and wrote in his summary of his interview; "...Ms. Hoag identified Trooper Burd as a participant in the bar fight and called him an 'instigator' and a 'participant'. According to Ms. Hoag, for the first five (5) minutes of the fight Trooper Burd 'just sat back drinking and laughing at everybody'. Then he 'got involved' and, combined with his brothers, went 'from one person to the next' and 'hit people from every which way". At the arbitration hearing Ms. Hoag took a middle course in her testimony. She testified that she saw Trooper Burd hit someone but didn't know who that someone was. She testified that she later learned that the individual was Haven Lawrence.

Interestingly, Cherise also says that a number of times in the past Trooper Burd has pulled her over having activated the flashing lights on his cruiser. On these occasions he has spoken with her for up to a few hours at a time. On each occasion, she testified she had someone with her. The thought of any Trooper pulling over a woman with a passenger in the car and talking for hours is consistent with Ms. Hoag's other testimony. It is quite imaginative to say the least.

Jimmy Hites was interviewed by Investigator Rogols together with his wife Lisa. Rogols claimed it was because they were "afraid". Hites denied requesting that they be interviewed together. Hites testified at the arbitration hearing that he saw what appeared to him to be a shove by Trooper Burd to his wife. Lisa had stated she had been "punched". Actually she said she received a kind of "whiplash" and was "messed up for a week". Interestingly enough, Lisa Hites did not seek medical treatment. Hites claims he saw Trooper Burd strike Haven Lawrence. He also testified to having consumed 11 or 12 beers before such observation. Interestingly, neither Detective Alexander nor Investigator Rogols asked Lisa or Jimmy how much they had to drink immediately before the incident.

Finally, there is Josh Reed. He initially declined to give a statement to Sheriff's deputies. On July 1, 2002 he was interviewed. The summary states "...just as they were leaving Shane Burd came up to Haven Lawrence and shoved him and Haven started to get upset. Josh says that he grabbed Haven and said 'come on lets go he's just a pussy'. Josh says that at this point Rob Burd said 'are you calling Shane a pussy?' and hit Josh. Josh says that he hit Rob back. Josh says that he may have stumbled and gone to one knee and Jamie Hare got him out of there." Josh then states with regard to Trooper Burd " he did not see Bob Burd hit anyone and Bob did not hit him". At the arbitration hearing Reed testified that Rob Burd came up behind him and hit him and then he hit Rob.

With this patchwork of self-contradicting evidence woven by friends who even initially had time to review and construct mutually supportive stories of the incident, the Employer must make its case. It is not simply that one witness contradicts another. That is forgivable and understandable

based upon perception. However, the same witness gives different statements as to material facts the conclusion to be drawn by the investigator is clear. The witness is not to be considered credible. In subsequent trial, witnesses who have given "prior inconsistent statements" are impeached. In cases where witnesses give wholly different testimony, the inference is that they are or at least were lying. In either case the testimony is not credible.

THE CONTRAST

The testimony of Donn Houser as to his sober and focused observation that Trooper Burd did nothing but try to prevent violence is compelling. The testimony of Ian Patton that he was also within immediate contact with Bob Burd during the entire incident and that Trooper Burd acted only to break up the fight and prevent further violence, is compelling. Patton, as a private investigator is trained to carefully observe his surroundings. His testimony is that he elected to stay close to Trooper Burd as much as a safety measure as anything else. Donn Houser testified that "Patrolman Bob" as he refers to what was then his daughter's fiancée was never out of his sight and that he was not a combatant. Tina Burd and Ashley Houser both noted Bob, consistent with his nature, was calm and measured during a chaotic time. Both openly stated that it is not Bob's nature to initiate a fight or engage in a fight for fighting sake. "That's not Bob", say both. Tina, a Deputy Sheriff, in her own right says that Bob is different from his raucous and rough half brothers. He is the reason she has entered the field of law enforcement. Ashley, a full time honor college senior and full time bank supervisor is no longer engaged to Bob. The stress of the charges has taken a toll. Although no longer his fiancée, she is filled with respect for the man. She testified that he sent her to find the bar owner to call the cops, because he "needed help".

Robert Leo Burd

Of course the primary issue is whether or not Trooper Bob Burd merits belief when he testified that he did not initiate, instigate or engage as a combatant in the fight at the bar. I would submit Mr. Arbitrator that he is a remarkable and honorable man for whom his personal integrity and reputation is paramount. I knew of his early background and I forced him to share that background with the "trier of fact" in this case. I did so not to invoke any sympathy as he truly neither needs nor would tolerate any. I did so to make more clear the underlying tenets of this mans character.

Robert L. Burd was born out of wedlock. His father legally acknowledged his paternity but no more. Bob's mother named him Robert, the same name as his father. His father had the reputation for being a drinker and a brawler. He was known as a "bar fighter". Mind you, not a criminal, but a person who had difficulty holding a job and who was "rough as a cob".

His father had no contact with Bob. To underscore his disdain for Bob's mother and for Bob, he apparently elected to name a subsequent child born of one of his marriages, Robert L. Burd, Jr. Bob was an additional Robert but not a Junior. Bob's mother, only 16 at his birth had great difficulty raising her young son. He was taken by children's services more than once and sent to foster care.

As an early teen he was in foster care when his mother was killed in an automobile accident. The county pressed his father to take custody. Bob went to live with his father. He discovered an abusive home. As a 16 year old he asked the parents of his high school sweetheart if he could come live with them. They agreed. When Bob graduated high school he married that girl and worked two jobs. Bob wanted more than anything the respect of the community that his birth both by its nature and by its heritage was denied to him. He chose to become a law enforcement officer. Indeed, a State Highway Patrol Trooper.

Bob was orphaned at an early age. He is understandably drawn to family. He loves his half brothers although they took a very different path. Rob (Robert Jr.) and his brother Shane grew to emulate their father. The reputation for brawling once held by the father was readily adopted by the sons. Neither has what would be considered permanent employment. Although, much as their father, neither are criminals, they are in fact brawlers and bar fighters. That is their reputation

and they apparently do not shrink from it. While loving his brothers, Bob has consciously elected not to socialize with them. He sees them at the gym and rarely on other occasions. Interestingly, Tina, Bob's half sister and full sister to Shane and Rob has consciously elected to follow the example of Bob. She too loves her brothers but recognizes that they are rolling stones with a penchant for brawling. Tina openly and honestly speaks of the shortcomings of her other two brothers and extols the virtues of Bob.

However, to find out the most about the character of a person who has chosen law enforcement as a career, you have to go to the men and women who share with him the stress of the job and the life and death decisions that accompany wearing the badge. What do the men and women who work with Bob really think of him as an officer and as a human being? Their respect and admiration for Bob is documented as only rarely ever seen. Trooper Robert Leo Burd has been selected by his fellow officers "Trooper of the Year" for the past three consecutive years.

His selection is an unprecedented honor. On what basis have they made this selection? Here is what they (his fellow officers) have declared about Trooper Burd:

1. He has demonstrated an amount of knowledge of the Patrol beyond his years of service.
2. He has the ability to make good sense decisions.
3. He accepts new challenges with enthusiastic approach.
4. He does not take the easy way out.
5. He is considered a Post leader among his co-workers.
6. His enthusiasm makes work fun for himself and those around him.
7. His fellow officers know that they can depend on him to do everything he can to help them.
8. He has shown the ability to make excellent and sound decisions.
9. He is always willing to make that extra effort to help others in their time of need.
10. He wants to make a difference in other's lives. His caring attitude shows the citizens of Ohio why the OHP is an elite organization.
11. He is approachable and outgoing and an effective communicator.
12. He waits until he has heard all the evidence before rendering a decision.
13. *His open style of communications is most evident through the non-existent complaints from the public through officer-violator contacts. Bob has never had a complaint logged against him during his entire OHP career.
14. He strives to be the best he can be and motivates his fellow officers in this regard.
15. His professionalism and dedication make him one of the "Best of the Best". He exemplifies a professional.

This is what his fellow officers think of Trooper Burd in selecting him their Trooper of the Year for the past three consecutive years. While opposing counsel attempted to minimize that award, the truth is there is no higher goal in the Patrol than to command the respect, admiration, trust, and affection of your fellow officers.

It is this self made man who has earned his station in life in the face of imposing obstacles that would have crushed lesser men that is the best witness in his own defense of these scurrilous charges that have been brought against him. It is Trooper Burd, with a career record of no citizen complaints ever having been filed against him, that is the best witness in his own defense.

His training and the performance of his job have involved avoiding violence and he has been called upon by sister agencies to help break up fights at bars. His actions on June 29, 2002 were no different than other times when in uniform he was confronted with a fight. Separate the combatants and calm the situation. He testified to the obvious. He had no concern as to the ability of his brothers to take care of themselves. His concern was as to the damage to others they might do. While he hadn't planned to be with his brothers on the night of the incident, he is not prohibited from off duty contact with either Shane or Rob. He had as well knowledge that Shane worked at the Finish Line as a bouncer. The job of a bouncer is to prevent fights and to remove the fighters quickly and efficiently. If being with his brothers at any bar was most probably going to be a peaceful event, it would be at the Finish Line.

It defies logic that Bob Burd would run around punching people on a special night where his fiancée's parents were with them. A night where Donn Houser, a dairy farmer, danced with his daughter for the first time. The Housers are genteel people. Does anyone remotely believe that he would pick such a night with the Housers present to instigate, initiate, or voluntarily and actively participate as a combatant in an off duty fight? Logic requires answering that question in the negative.

Does anyone think that it is accidental that no pictures were taken of Trooper Burd's hands when with him present pictures were taken of his brothers' hands and knuckles? Each showed significant injuries. Detective Alexander noted that he "observed no injuries to Robert L. Burd". That is an exceptional piece of evidence that seemingly went unnoticed by Investigator Rogols.

Bob Burd had his telephone conversation with Jimmy Hites tapped by the authorities in an attempt to secure incriminating admissions from him. He was examined and re-examined in extensive interviews. He was asked to provide a polygraph examination. He complied in all respects. There were no incriminating statements. There has only been the refrain from Trooper Burd that "the lies have got to stop". Can anyone review the conflicting statements of the Employer's witnesses and not fully understand the plea that the lying stop. Can anyone see the incessant drive to find this fine young man and excellent Trooper guilty of baseless charges without fully understanding his statement to the Jimmy and Lisa Hites that for me "it's not over."

It defies logic that Bob Burd would choose to even inferentially threaten the Hites or the Reeds or Haven Lawrence. Even if, he wanted to intimidate these people, would he do it himself when according to Investigator Rogols, it is Trooper Burd's brothers that compel fear. No, there is no allegation that either of these two allegedly menacing figures have had any contact, let alone threatening contact, with these people who the Employer would submit were threatened and intimidated by Trooper Burd. Actually, Detective Alexander had never even considered investigating a criminal case for intimidation. That one was all the work of Trooper Investigator Rogols who then convinced the prosecutor to file on this charge.

Summary

Mr. Arbitrator restore this man to his earned position within his community. It is not just a job to Bob Burd. It is not just an exemplary career. It is a way of life. This man lives the CORE values of the Patrol. He chose them as a means to state his worth as a person and his triumph over adversity. Bob Burd is not guilty of the substantive charges against him. His off duty conduct is not subject to the valid imposition of any discipline, much less the most severe discipline of termination. The Employer has not met its burden under the collective bargaining agreement. It has not, because it cannot, demonstrate by a preponderance of the evidence that Trooper Robert Burd was a combatant in an off duty fight. It has not demonstrated, even to any measurable degree, that Trooper Burd intended to intimidate any witness or that he threatened a witness.

It has however extracted from Trooper Burd, stoic though he may be, an emotional toll of pain and suffering. That loss cannot be compensated by this arbitration. However, he can and should be made whole, consistent with the agreed time limitation, for any losses he has incurred as a result of his termination without just cause. The Union requests that you restore him to his position with no loss of benefits or seniority as of the date of his termination. Equity requires such an action and simple justice compels it.

DISCUSSION

"The arbitration process affords a neutral party an opportunity to review all of the evidence under the bright light of cross-examination, as

opposed to the sometimes dim lights of a pre-termination hearing." *City of El Paso, Texas and El Paso Mun. Police Officers' Ass'n*, 110 LA 411 (Moore, 1998). The contractual right of the Department to discipline or discharge the Grievant for just or proper cause requires the arbitrator to make two determinations: (1) whether a just cause for discipline exists and, if so, (2) whether the amount of discipline is proper under the circumstances. *CLEO, Inc. and Paper, Allied-Industrial, Chemical, and Energy Workers Int'l Union, Local 5-1766.*, 117 LA 1479 (Curry, 2002). In the absence of contract language expressly prohibiting such power, an arbitrator, by virtue of his authority and duty to fairly and finally settle and adjust disputes before him, has the inherent power to determine the sufficiency of the cause and the reasonableness of the penalty imposed. Ibid.

The basic issue to be decided in this matter is whether the Department was justified in terminating the Grievant based on the just cause requirement in Article 19.01 of the Agreement. Because of the significant conflicting testimony given at hearing and referred to in the parties' post-hearing briefs, it is necessary for this arbitrator to make credibility determinations regarding which testimony more accurately reflects the events that occurred on June 30-July 1, 2002. There are no infallible methods to determine credibility, but certain guidelines are helpful. These guidelines include the self-interest or bias of the witnesses'

testimony, the presence or absence of corroboration, and the inherent probability of the testimony. The following observation has been made to guide arbitrators in resolving credibility issues:

In determining where the preponderance of evidence lies with respect to any material point, the arbitrator will take into consideration whether the witness speaks from first-hand information or whether his testimony is largely based on hearsay or rumor. The duty of an arbitrator is simply to determine the truth respecting material matters in controversy, as he believes it to be, based upon a full and fair consideration of the entire record and according to each witness, and each piece of documentary evidence, and the weight, if any, to which he honestly believes it is entitled. An arbitrator must consider whether conflicting statements ring true or sound false. He will also weigh each witness's demeanor while on the stand.

Andrew William Meat Co., 8 LA 518 (Cheney, 1947). An arbitrator's duty is to make a determination as to whom is telling the truth, if it is possible to do so. Another arbitrator has recognized the responsibility placed upon arbitrators in making decisions on the merits in matters that have been submitted to them involving blatant credibility issues as follows:

A decision to believe or disbelieve certain testimony is usually based on a number of considerations. Many of these are obvious and well-recognized—the bias, interest, or prejudice of a witness, the appearance and demeanor of the witness, the plausibility of the testimony, the consistency of the testimony within itself and with other testimony, and the consistency of the testimony with common sense, experience, and observation. Other factors are often described as intuition or are explained by the conclusion that certain testimony has or lacks a "ring of truth."

Associated Grocers of Alabama, Inc. and United Wholesale and Warehouse Employees, Local 261, 76 LA 1245 (Mills, 1981). The credibility

of witnesses is extremely important in disciplinary action grievances and when the Grievant, as here, has been accused of committing crimes.

The impact of termination is devastating and carries with it a stigma that likely lingers forever with a terminated employee. His future employment opportunities are severely limited. He must always explain his reasons for losing his job. He immediately loses his present income, and most likely any future income may be curtailed by the damage done to his reputation at work, at home, and in the community.

Hayes-Albion Corp., Harvard Indus. and UAW, Local 474, Region 1-C, 117 LA 1177 (Allen, 2002).

The grievance here represents very distinct and competing positions between the acknowledged right of the Department to take severe disciplinary acts when merited (Article 19, Section 5) and the right of the Grievant to demand the requisite evidence of his guilt. The Department bears the burden of proving that the Grievant committed an offense meriting his termination. There must be evidence to substantiate, corroborate, verify, uphold, and establish the Grievant's actual criminal conduct. In the Grievant's case, the preponderance of the credible evidence does not prove that the Grievant either instigated, initiated, or voluntarily and actively participated in the fight at the bar's parking lot while he was off duty.

Unfortunately, many of the witnesses testifying at the arbitration hearing and/or whose experiences were included in the administrative investigation completed regarding the 2002 bar incident cannot be

viewed as providing credible or competent evidence. The individual witnesses who actually were at the bar and in the parking lot on the night of the incident leading to the Grievant's termination were questionably sober enough to have given reliable reports to the police at 1:30 or 2:00 a.m. after having spent hours at the bar. Also some witnesses had actually been involved in the physical confrontation, resulting in a biased perspective. The evidence also indicated that at least a portion of the subsequent incidents that involved alleged "witness intimidation" by the Grievant transpired in circumstances in which the witnesses had drunk significant amounts of alcohol, again putting their credibility in question.

Management witness Cherise Hoag, who claims she was not drinking alcohol on June 30-July 1, 2002 due to her status as designated driver, stated unequivocally that following the incident at the Finish Line she *"...had about 10 drunks in her house"*(Tr. 148-149, 166). These included management witness Jimmy Hites, and Lisa Hites. Jimmy Hites (who only weighs about 160 lbs) admitted to drinking around eleven (11) beers in what appeared to be about a five (5) hour span of time, and Lisa Hites admitted to having four (4) or five (5) drinks, although her husband Jimmy stated she only had a beer or two at the most (Tr. 7, 28, 29, 36, 81, 166-167). It was estimated that Haven Lawrence, the person the Grievant is accused of hitting, had approximately six (6) to eight (8) mixed drinks prior to the incident (Tr. 35, and testimony of Haven Lawrence).

Other questions regarding witness credibility were also part of the record. Under cross-examination at the arbitration hearing, Lisa Hite discredited her previous statement (Management Ex. 1, p. 329) made to the police shortly after the incident as being untrue (Tr. 124). In admitting she was untruthful, she also stated under cross-examination, *"I just threw everything in there"* (Tr. 124). It is noteworthy that the phrase, *"I had one coming and my husband (Jimmy Hites) had one coming,"* in the statement that Lisa Hites admitted in the hearing was not truthful, does not appear in her second statement (Management Ex. 1, p. 330). However, it later appears in her and her husband's recounting of what the Grievant stated to them in their encounter in March of 2003 outside the golf clubhouse.

Prior to this chance meeting, Jimmy Hite had consumed what reasonably can be considered a substantial amount of alcohol, (7 and 8 drinks) in a relatively short (two and one-half hour) timeframe. According to Lisa Hite's response to the question of whether her husband had a lot to drink, she stated, *"Maybe yes, He wasn't really drunk, but he was drunk, yes"* (Tr. 58, 136). Again, this undermines the reliability of his statements and testimony.

It is also noted that in Lisa Hite's second statement (Management Ex. 1, p. 330), which she testified under oath, was the truthful one because she swore to it (Tr. 128) (9, 330), she stated, *"I jumped on Bob's back to get*

him off of Haven." She never included the Grievant punching Haven Lawrence. As stated above, the sobriety of the witnesses, including the one who was allegedly hit by the Grievant, Haven Lawrence is a major factor in evaluating reliability. Furthermore, according to the testimony of Deputy Elvis Presley Varian, Lawrence first told him the Grievant hit him and then called him back on the telephone and admitted he saw the Grievant standing in front of him and assumed he punched him. The Union's witnesses, including Ian Patton (who was the only other witness who stated he was not drinking the night of June 30th) did not see the Grievant hit anyone, but did see him engaged in the fracas in an attempt to push the crowd back (including Lisa Hite) and pull bodies off one another.

Josh Reed's testimony regarding the meeting between him and his wife and the Grievant and Ashley Houser at the Texas Roadhouse in Lima, Ohio, does not provide substantial proof of intimidation by the Grievant. When analyzing what was said, it appears the only statement that can be reasonably construed as intimidation is the one uttered by Ashley Houser to Reed's wife. According to Reed's testimony the statement was *"...there was a lot of shit going down right now and not to get too comfortable any time soon"* (Tr. 191,192).

The circumstances surrounding Haven Lawrence's claim of the Grievant watching him and his house from his police cruiser are not clear.

The Employer claims the Grievant had no reason to be in this area. The Grievant claims he was watching a suspect who lived nearby. This defense appears flimsy, yet it is the only piece of evidence the Employer can point to as supportive of its arguments. Without other supporting evidence, it is insufficient to meet a clear and convincing standard of proof necessary to sustain the Grievant's discharge.

The credibility of witness testimony is also impaired by the long-term reputation of the Grievant's family in Hardin County and the past confrontations and experiences that individual witnesses have shared with other members of the Grievant's family. Furthermore, the Burds' reputation creates an expectation that is easily fulfilled, even with minimal substantiation. Rob and Shane's reputation for violence places the Grievant in a particularly vulnerable position. For example, many of the management witnesses made their first statements to law enforcement officials after they rode together from the Finish Line to Cherise Hoag's house and in transit discussed what happened (Tr. 32). Several of these people knew Shane and Rob Burd and already had a perspective from which they could evaluate what they believe they saw and experienced. This mutual sharing of observations by several people under the influence of alcohol, prior to making official statements, raises a concern about the independent validity of their observations of the fight(s) at the bar.

The Grievant's alleged oral threats cannot be evaluated in a vacuum, but should be examined in the factual context in which they arose. Words alone do not necessarily make statements inappropriate or in violation of acceptable employee conduct, but must be viewed in the context in which they are used, the manner in which they are used, and the general environment or circumstances existing at the time. *Emery Indus., Inc.*, 72 LA 110 (Gentile, 1979).

A determination of whether just cause for employee discipline exists under Article 19.01 of the Agreement necessarily depends upon the unique factual considerations of a situation. Fairness requires that the employer, as decision-maker, especially in discipline and discharge matters, evaluate the complete evidentiary record, rather than a filtered version. To justify termination of employment, the Grievant's misconduct must have a nexus to his on-the-job activity. *City of Muskegon Heights Police Dept. and Teamsters, Local 214*, 88 LA 675 (Girolamo, 1987).

No evidence was provided that would lead to the conclusion that the Grievant is prone to improper conduct while performing his law enforcement duties. To the contrary, the record indicates that the Grievant had a previously unblemished record. No prior complaints had been made regarding the Grievant's performance as a trooper in his entire ten-year career and, most significantly, he was chosen by his peers

as Trooper of the Year for the prior three consecutive years, an indication of his ability to capture their respect and admiration (Union Ex. 3-8).

Despite his record of consistently outstanding performance and a record void of any prior rule, policy, or criminal violations, a decision was made that the Grievant's actions, as alleged by some witnesses and denied by others, were so serious that termination was the appropriate penalty. Where there are mitigating circumstances, arbitrators consider the employee's prior disciplinary record in determining whether discharge is appropriate. *United Materials, Inc.*, 12 LA 1099 (Corbett, 1984). No effort appears to have been made to apply any progressive discipline as provided in Article 19.05 of the Agreement in consideration of the Grievant's past performance record and the fact that the Grievant's alleged misconduct occurred while he was off duty and not in uniform. The other alternative levels of discipline available in Article 19.05 include reprimands, suspensions, and fines.

Disciplinary action should be commensurate with the seriousness of the offense and with due consideration of the employee's prior performance record. The arbitrator finds that the Department has failed to provide sufficient credible evidence and testimony to sustain its burden of proving that it had a good and sufficient reason for the discipline rendered. Taking into consideration the Grievant's exemplary work history, the length of his service, and the totality of the circumstances in this

matter, the arbitrator finds that the Department did not have just cause to terminate the Grievant's employment.

The inability of the Employer to sustain its case in this matter does not eviscerate the underlying problems faced by the Grievant as he returns to duty. What remains is the dilemma of building upon a distinguished career while dealing with the complexity of associating with siblings who engage in frequent bar brawling. From the evidence contained in Union Exhibit 1 (3 day suspension) it appears this is the second time that the Grievant's mere association with his brothers' penchant for violent behavior places his own career at great risk. In the instant matter, the Grievant became engaged in a brawl, and it was not proven he was a willing participant. Yet, in a brawl there is sometimes a fine and uncertain line between antagonists and protagonists.

Having a distinguished career and a higher standard to adhere to as a State Highway Patrol Officer, the Grievant has a great deal to protect. Associating with people who routinely engage in bar brawling is dangerous enough; when those people are family members, it is a formula for disaster. When the Grievant chose to socialize with his brothers in a bar where fights are frequent, it was just a matter of time before the Grievant was placed in the no-win situation of choosing between family loyalty and common sense. An error in judgment almost cost the Grievant his career. Unless the Grievant is willing to remove himself from harm's

way in the future, and is careful of the situations he places himself in, it will be just a matter of time before sibling support spells ruin. The Grievant's recent experience of unemployment, the loss of substantial income, and getting involved in a situation that threatened to end his hard earned career has hopefully caused him to seriously evaluate the nature and place of his association with his siblings in the future.

AWARD

The grievance is sustained with the following conditions:

All record of the discipline shall be removed from the Grievant's personnel record.

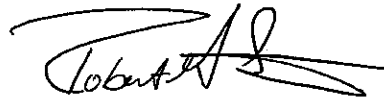
He is to return to his former classification, and to the salary level that he would have reached had he not been terminated.

He is to return to work within two (2) pay periods from the date of this Award and shall be paid one-half of his back pay and benefits (less the period of time stipulated by the parties to be exempt from such calculations). The unpaid period of time shall be considered an approved unpaid leave. In addition, all the Grievant's seniority shall be restored and he is to be returned to his former shift and Post assignment, unless otherwise agreed to by the parties.

It is also recommended that the Grievant seek professional advice, possibly through EAP, to successfully determine how he can balance his personal need to have a relationship with his half brothers, while steering clear of their involvement with bar brawling and the like.

The Grievant is to avoid intentional contact with the individuals involved as witnesses for the Employer in this matter, unless such contact is necessary to properly carry out his job duties.

Respectfully submitted to the parties this 26th of January, 2004.

A handwritten signature in black ink, appearing to read "Robert G. Stein", with a stylized flourish at the end.

Robert G. Stein, Arbitrator