

#1820

IN THE MATTER OF ARBITRATION
BETWEEN
OHIO STATE TROOPERS ASSOCIATION
AND
STATE OF OHIO, DEPARTMENT OF PUBLIC SAFETY
DIVISION OF HIGHWAY PATROL

Before: Robert G. Stein
Case # 15-00-040603-0055-04-01
Grievant: Penny Beaty

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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, Department of Public Safety (herein "Employer" or "Patrol") and the Ohio State Troopers Association, (hereinafter "Union").

The hearing was held February 15, 2005, and the parties submitted written closing arguments in lieu of making oral arguments. A delay occurred in the receipt of the written closings, due to the fact they were sent to the arbitrator's former address. A hard copy of both written closings was eventually received, and the hearing was closed March 28, 2005. Both parties agreed to the arbitration of this matter pursuant to the Grievance Procedure contained in the Collective Bargaining Agreement.

ISSUE

The Arbitrator defines the issue as follows:

Did the Employer violate Article 7 of the Collective Bargaining Agreement when it ordered the Grievant to attend training at the Academy when performance deficiencies were noted? If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

For reference see grievance and parties' briefs

BACKGROUND

The Grievant in this matter is Trooper Penny Beaty, who has been employed with the Ohio State Highway Patrol since May of 1995. She graduated from the Highway Patrol Academy in November of 1995. During the past decade of service with the Employer, the Grievant has had different assignments. She initially worked in road patrol at the Findlay Post. She then sought and received an assignment on what is now called the Criminal Patrol Team, formerly referred to as the Drug Intervention Team. In October of 2001 she successfully sought and secured the assignment of Canine Trooper (dog handler) for District #1. In June of 2003 she was reassigned to District #2 as the Canine Trooper. She worked in conjunction with other members of the Criminal Patrol Team in its effort to interdict the flow of drugs in Ohio. After approximately five (5) months on this assignment, the Grievant's dog was put out of service for biting another Trooper. The Grievant did not receive another canine although she was initially informed that this would be the case. During the period when the Grievant was waiting for another canine to be trained, the Employer became aware of several performance and officer safety issues involving the grievant. These performance concerns led to another

Trooper receiving the position of Canine Trooper. The Grievant was eventually transferred from her position with the Criminal Patrol Team to the Ashland Post on March 28, 2004, where she is currently a Road Patrol Trooper.

In November of 2001 the Grievant was placed on an Early Intervention Program in order to address noted performance deficiencies. The Grievant also received a written reprimand in October 2003 for failing to take enforcement action and failing to secure evidence. In April of 2004 the Grievant received a one (1) day suspension for failing to conduct a thorough pat-down search of a violator whom she had stopped, during which a subsequent search revealed the presence of a .45 caliber hand gun in the violator's waistband. Additionally, jail personnel subsequently found 106 grams of marijuana in the violator's coat sleeve when they took him into custody. In June of 2004 the Grievant received a three (3) day suspension for conducting an improper search without probable cause. The suspension was grieved and the grievance was denied by the Arbitrator in December of 2004. After three (3) administrative investigations had been conducted, the Employer determined that the Grievant needed to attend the Academy for retraining.

The central focus of this dispute is over the Employer's actions in ordering the Grievant back to the Academy for three (3) weeks of refresher training, which according to the Employer, was to ensure that

the Grievant properly follows all operational and safety procedures of the Employer and to correct documented deficiencies in her work. The Grievant and the Union argue the Employer's actions constitute discrimination and harassment of the Grievant based upon her gender. The Grievant subsequently filed the instant grievance in response to the Employer's actions. For the record, the Grievant also filed an EEO complaint with the Department of Administrative Services following an investigation in which there was a no probable cause finding.

UNION'S POSITION

The Union and the Grievant clearly feel that the actions of the Employer in assigning the Grievant to the Academy for remedial training constitute discrimination for the precise purpose of evading the spirit and operation of the Collective Bargaining Agreement in violation of Article 7.

The Union's arguments are detailed in its closing statement and are as follows:

"The Grievance

The issue before this Arbitrator is whether or not the Employer violated the Article #7 of the CBA in its actions Ordering her to "Specialized Training" at the Academy as part of a process known as the Early Intervention Program. The training was allegedly to teach and review "Search and Seizure Issues". The Union asserts that in fact the implementation of the "training" was a façade for a program of disparate, and disciplinary treatment. The Union asserts that Penny Beaty was, specifically by the conduct of the Employer allegedly pursuant to the Early Intervention Program (EIP), singled out for an ongoing program of harassment designed not to train but to degrade, and drive her to resignation.

Article 7 of the CBA states:

Neither party will discriminate for or against any member of the bargaining unit on the basis of age, sex, marital status, race, color, creed, national origin, religion, handicap, political affiliation, sexual preference, veteran status, or for the purpose of evading the spirit of this Agreement; ...(emphasis mine)

The Union asserts, and the evidence, really permits no other conclusion, but that the Grievant was removed from Road Patrol, Ordered to the Academy, and kept from a return to her assignment, not by action of any Early Intervention Program or Committee acting in her best interest, but because she incurred the anger and displeasure of Highway Patrol Major James Walker. It was Walker, who absent any valid evidence, concluded, with the verbal support of Lieutenant Dick Miller (her Post Commander for little more than one month), that Trooper Beaty was racially profiling her traffic stops; singling out minorities. Walker believed her to be racist and that she had a problem with "people of color". He directed that she be immediately taken to the Academy, prohibited from working as a Road Trooper and that she remain at the Academy for an open ended period of time

These actions, taken under cover of the Early Intervention Program, can only be interpreted as being designed to drive her to resignation. Penny Beaty is no racist. She does not and did not engage in racial profiling in her traffic stops and no investigation, or inquiry has ever materialized that lends credence to such a damning allegation. What Trooper Penny Beaty is however, is a person with strength of character. She was not easily broken. After a second week at the Academy, forced to take a course in self-defense with 25 male participants, a course she had already successfully completed less than a year earlier, she was asked to critique the course. What she wrote back then illuminates her character. She wrote, "They gave us the courage to fight and never quit!" (Emphasis mine.)

Penny Beaty is a special person. She deserved better at the hands of her male supervision. There can be no doubt but that the treatment she received violated the spirit of the collective bargaining agreement; singled her out for disparate treatment; effectively disciplined her while evading the procedural and substantive elements of imposing discipline; labeled her with racist behavior; and confronted her with open ended and continuing harassment.

Trooper Beaty was removed from her assignment as a Road Trooper on May 6, 2004 and did not return to road assignment until June 29, 2004, a period of nearly two months. During her three weeks at the Academy she was forced to drive her own vehicle back and forth from her home or remain overnight at the Academy without additional compensation for the additional hours. She was denied compensation for the expenses incurred in travel to and from the Academy other than mileage to the Academy on Monday and home on Friday.

She was denied the opportunity to work voluntary overtime assignments as well as denied the opportunity to work off duty, or extra duty, assignments. After three weeks of ongoing and unexplained daily assignment to the Academy in Columbus, she still remained in limbo. There was no executive decision to terminate her stay at the Academy based upon completion of some sort designed course work. In fact during her third week at the Academy she was directed to simply take classes along with recently hired cadets. She was required to take classes with blue uniformed new cadets at the Academy while standing out like a sore thumb as an obvious screw up in her OHP gray and black uniform.

It is clear that had it not been for a proposal from Captain Bistor, she would have remained in that limbo. Captain Bistor testified at our hearing that he figured out a way that she could leave the Academy, without returning to a road assignment. It was his thought to assign her to the Medina OHP salvage facility. By doing so, he testified he was

still acting in accord with orders given to him that she not be returned to the road. So it was that after three weeks of assignment to the Academy in Columbus, she found herself working with vehicles previously wrecked (totaled) and seeking to be re-titled. During her assignment to the salvage facility she was denied her patrol vehicle, and once again denied the opportunity for overtime. She was never told when this punishment tour would end.

Actually during the first three weeks, when she was assigned to the Academy, the Academy staff, given the task of keeping her, did not know from week to week whether they would have to come up with some arguable program for her for an additional week. The psychological beating she received would have driven most from their job. Instead, Penny Beaty had the courage to "fight and never quit".

As background to the instant grievance, Trooper Beaty had been experiencing conduct on the part of the Employer prior to the May 6, 2004 meeting with Major Walker that is troublesome and alarming. While Penny Beaty readily admitted her mistake in performance in initially missing a weapon in a search, and did not contest the discipline that followed, she had also experienced earlier unexplained conduct on the part of the Employer. After being promised a new dog and promised to remain the dog handler, she learned that she would not get the dog and that a male Trooper was to be assigned as Canine Trooper instead. The rationale for this decision was the missed weapon.

Note, she did not challenge that action by way of a civil rights complaint or grieve it. She took it and went on. Five days later she was removed from Criminal Patrol and Ordered to transfer to a Post assignment. She did not contest that action, but took it and moved to the Ashland Post. On March 18, 2005 she was denied access to her personnel file. Her response was to write her then District Captain and formally request a copy of her file. At her first day in Ashland, her Post Commander told her that he had been receiving disparaging comments about her from her former District Command. Trooper Beaty received a performance evaluation that concluded her performance "unsatisfactory" without supporting documentation as to why she had been downgraded. Again she remained within channels and sought a review of that performance evaluation and successfully fought to have it changed to satisfactory because indeed there was no evidence to support the "unsatisfactory" designation.

While all this was going on, she was advised by me to document by way of a diary the events she was experiencing and she did. My point is that Trooper Beaty had been experiencing a series of questionable actions on the part of her Employer, but nothing like the blatant discriminatory actions levied against her on May 6, 2004, marking her a racist, and punishing her by a continuing program of harassment that the Employer subsequently sought to justify as being part of a program designated "Early Intervention".

May 6, 2004

On this date Penny Beaty was ordered to appear before Major James Walker. Her Post Commander Lieutenant Miller drove her to the meeting. It was the second time she had been called before Major Walker. The first time was on April 22, 2004 and I invite the reading of Penny's notes taken of that meeting. Walker was low key and did not make much of the "missed weapon" although that was the reason given Penny why she lost her dog handler's position. He told her not to speak to anyone about the substance of the meeting and that he would know if she did. On the way back to Ashland, Lieutenant Miller told her that he had received calls prior to the trip to Columbus for the Walker meeting telling him that she would be terminated on the spot and that he hadn't wanted to be the one that had to transport her to Columbus.

On May 6, 2004, Miller once again transported Penny to an ordered meeting with Major Walker. This time Penny sat outside while Miller and Captain Bistor met with Walker for about an hour before calling her in. This meeting did not turn out to be about search and seizure procedures or whether "the plain odor of cocaine" was valid cause for a search. There was an investigation underway as to a search incident to Penny's smelling cocaine. She had worked drug interdiction and criminal patrol for years and believed that she had the credentials to smell cocaine.

This meeting was not about the EIP recommendations that included a meeting with Major Walker. This meeting and the meeting that took place for an hour with Miller and Bistor while Penny sat in the hall was about Major Walker's perception, helped along by a willing Lieutenant Miller who had supervised Penny for about a little over one month, that Penny was singling out and stopping minority motorists and by racial profiling exposing them to impermissible discriminatory conduct.

It should be noted that Walker had only the most tangential contact with Penny Beaty's record as it related to stopping violators of any color. It should be further noted that the Patrol has a system that scores the percentage of stops of different races and raises a flag if there are minority stops greater than a certain percentage. Penny Beaty's stops were not over weighted by race and no flag was ever raised. The Patrol's program has a letter sent out to officers who are stopping what it determines to be an inordinate number of members of one race. No letter ever issued to Penny Beaty.

An angry Major Walker confronted Beaty when finally she appeared before him. This is in part what Penny wrote of that meeting following its conclusion:

"Upon going into Major Walker's office, he told me to sit down. His tone was not pleasant and he displayed a displeased look on his face....He then stated that I was abusing people's civil rights and accused me of being a racist and asked me if I had something against people of color....He then told me I didn't deserve to wear the black and gray uniform and if he had his way I would be fired. He then told me I would be going to the academy as a student and he didn't care how long I as there. He didn't care if I was there 2 weeks or 4 weeks. He then told me that if he were me he would be looking for another form of employment. He then told me to get up, get my hat and get to the academy. While out in the hallway, Lt. Miller advised that I was getting another administrative investigation for not collecting trace amounts of marijuana residue...."

The above is what Penny wrote of her recollections of the meeting with Walker and its immediate aftermath. There was minor discussion of whether she could (or should) initiate a search based upon the "clear odor of cocaine", Walker had said, "Give me a break" indicating that such a premise was near laughable. Penny responded that prosecutors had advised her that it was permissible to search a vehicle based upon the clear odor of cocaine. That was the extent of the discussion as it related to search and seizure. The anger and the sentence delivered and undoubtedly discussed with Captain Bistor and Lt. Miller before Penny was called in, was premised upon Walker's conclusion that Penny was racially profiling her stops.

How close is Penny's recollection to the recollections of others present? I would judge it to be "right on". You, Mr. Arbitrator have to judge the veracity of the witnesses. I think your evaluation of Penny Beaty will be that she is a truthful, open and honest

witness. Her recollections were put down on paper (electronic) at the time of the incidents. Months later, Staff Lieutenant Munk was given the assignment of investigating the grievance filed by Penny in this case.

While it is not easy for a subordinate officer to investigate allegations of impropriety by a senior superior officer, he actually did a pretty credible job. Of course he does not press the witnesses and surely not his Major in any manner like he might normally do, and he concludes favorably to the Major. Still, if you read between the lines, he leaves a pretty clear body of evidence that supports what Penny alleges happened on May 6, 2004. He states in his AI summary "The allegation in the grievance is that during a meeting, Major Walker threatened Trooper Beaty's employment and called her a racist". Munk recites that Penny's allegation is that she "has not been allowed to work the road. She said she is being told that this is part of the Early Intervention Program, but no one else has had this happen to them. ..." Munk determined that the grievance was unfounded, but his summary lends credence to Trooper Beaty's recollection of the events of the meeting of May 6, 2004. Munk notes that Captain Bistor remembers that Major Walker did ask Beaty if she had a problem with people of color. Bistor did recall Walker saying that if she didn't get back to basics she may be looking for another job and he (Major Walker) would support her termination. Bistor apparently told Munk that while the tone of the meeting did not involve Walker yelling, the tone was "a little higher than normal conversation", and that it was stern. According to the Munk Summary, Captain Bistor offered Munk no explanation of who made the decision to send Beaty to the Academy and said the decision must have been made prior to the meeting.

According to S/Lt. Munk, Lieutenant Miller remembered that Walker did ask if Penny had a problem with people of color. Miller told Munk, according to Munk, that after the meeting he was instructed (by Walker) to take the Grievant to the Academy for some specialized training. S/Lt. Munk took a statement from Major Walker. In that statement Major Walker says that he was informed by Lt. Col. Reitz that Trooper Beaty "was coming to see him prior to going to the Academy for some retraining in areas of search and seizure." Interestingly enough Walker admitted that he was made to "wonder if Trooper Beaty was racially profiling. According to Munk, Walker, said, "he made it clear that if her behavior continues ...he would be the first to support her termination."

All things considered, there seems to be a general agreement as to the content of the meeting with Major Walker. The meeting was nearly completely dominated by Major Walker. Captain Bistor testified he said nothing during the time Penny was sitting in front of the Major's desk. Actually Captain Bistor, present during the May 6, 2004 Walker meeting both before and after Penny was permitted in, testified that her racial profiling was discussed prior to her entering and further testified that he had not seen any tape of stops made by Penny. Lieutenant Miller had spoken earlier, before Penny came in, and was apparently silent during Penny's presence. Penny herself had been told by Miller to say nothing, sit and take it. (Although she did finally respond to the outrageous claim that she was racially motivated in her traffic stops). The content of Major Walker's directions to Beaty was predicated upon his concern/belief that Beaty was racially profiling her stops. No one can say who ordered her to the Academy although Walker admits he transmitted the direction to Beaty. Beaty is very clear who told her and what he said. All agree that her presence before Walker was presented as part of the Early Intervention Program of the Employer.

It is unchallenged that the Early Intervention Program as it related to Penny Beaty did not in any way involve the issue or allegation of racial profiling or racist behavior on her part. Remember that S/Lt. Munk testified that that his investigation concluded that

Penny had been entered into the EIP as a referral from Major Goldstein due to her perceived problems on search and seizure operations.

In fact we know exactly what the Early Intervention Program dealt with regarding Penny Beaty. We also know that she was referred to the program according to S/Lt. Munk, not on the basis of an automatic flag related to the number of Administrative Investigations during a period of time, but by Major Goldstein. Whether Goldstein conferred with Walker before the referral is unknown.

Management Exhibit #2 is the minutes of the action of the Early Intervention Program in question. It cites Penny's referral which included a "non chargeable complaint and an allegation of an improper search premised upon the "plain smell of cocaine or crack cocaine", later proven to be non chargeable. Actually, it also recites an AI conducted upon her alleging an improper relationship with her male Sergeant.

There is no mention of racial profiling or racist conduct. On April 28, 2004 the Committee met and recommended a course of action in furtherance of early intervention. Those recommendations included increased supervisory ride time with Trooper Beaty; increased in car tape reviews; meetings with Walker, Bistor and Miller all scheduled for May 6, 2004 and "comparing Beaty's mileage with other shift units to ensure she is not sitting stationary". Each action recommended is specifically and separately set forth in the document that was signed by a Lt. Col, and two present Majors none of whom testified at the hearing. The evidence establishes beyond doubt that it was not the Early Intervention Committee that ordered Beaty sent to the Academy for training, let alone for three weeks of assorted training followed by weeks of assignment working off the road at a salvage facility. We know what the Committee did. It is recorded in writing and is in evidence.

The Employer has based the fact that its actions were not disciplinary and undertaken as part of the "treatment plan" recommended by the Early Intervention Program. The evidence does not remotely support that assertion. It actually makes a joke of that assertion. No one, not Walker, not Bistor, not Goldstein, not even a Lt. Col. Finnamore, who was rushed in to the hearing for high level support, claimed to be the source of the order that Beaty be treated in the manner she was treated. To the contrary, no one who signed off at the meeting of the Early Intervention Committee was foolish enough to testify that what the plain language of Management Exhibit 2, was not in fact the action of the Committee.

Staff Lieutenant Munk did testify, and he was a signatory to the action plan of the Early Intervention Committee. His testimony was that the decision to send and keep Penny Beaty at the Academy for three weeks represented a new plan not in writing. He was not part of that decision. Munk testified that he never inquired as to Penny Beaty being sent to the salvage facility following three weeks at the Academy.

Trooper Beaty testified that it was an angry Major Walker that said to her she was going to go to the academy right now and stay for two or four weeks or longer. His anger was related to his wrong-headed belief that her conduct was racist driven and that she was racially profiling minorities. It is a charge that no one other than Walker has ever made and one that no one dare make on the basis of her career and her beliefs. To saddle her with that charge and punish her for that alleged conduct was treating her differently than any other Trooper and at variance with the procedures for discipline as outlined in the CBA. Further it is a perversion of the Early Intervention Program to use it as a cover for the illicit implementation of discipline. The program as identified in Management Exhibit #6 states that "The Early Intervention Program is a method to serve

Division employees in a proactive manner assisting them in maintaining a high level of conduct of performance. Actions taken by the Division are intended to be a positive effort toward this goal." Part of the Early Intervention Committee includes a Union representative. Can you imagine a Union representative agreeing to the imposition of discipline under the guise of early intervention?

Penny Beaty alleges that what happened to her has happened to no other Trooper. The facts bear her out. Penny while serving out her open-ended assignment to the salvage facility filed an EEO Complaint. She alleged that she was at that time still prevented from return to road duty and that no male troopers had been ordered to undergo extended stays at the Academy for additional training. HRM Officer and Attorney, Renee Byers, was called upon to investigate the Complaint and respond to the Complaint. Without interviewing or speaking to the Complainant, nor to Lt. Miller, nor taking any written statements, she concluded that Penny's allegations were unfounded. It was the 15th such complaint she had investigated with the same conclusion reached.

Union Exhibit #1 is her response to the EEO Complaint. In that response she reports that far from being treated differently, "Numerous other (male) troopers have been ordered to return to the Academy for additional training". Byers did not list the length of such training ordered for each. The Union secured further explanation of the Byers statement in Union #8. It sets forth that since 2001 there have been a total of ten troopers (excluding the one who was coming off an extended disability leave and required to be re-qualified) ordered to additional specialized training. They were in fact all male. Six of the ten received one (1) day of specialized training. Two of the ten received 2 days and the longest ordered training was for Trooper Gramada who received 6 days. Of the ten, two were ordered to receive additional training in search and seizure, as allegedly was the Grievant. Trooper Chismar received one (1) day of training. Trooper Sheppard received (1) one day of training on Search and Seizure as well as Professional Operations. The Grievant was ordered 'open ended' to the Academy for what turned out to be three weeks.

She was sent by an angry Major. The OHP is a military driven organization. What the Major directs the Captain approves and the S/Lt. instructs the Lieutenant to carry out through the Sergeants. S/Lt. Lee, the Director of Operations of the Academy learned there would be a second week when the word came from the adjoining office deep into the first week of Penny's stay at the Academy. The Academy staff didn't know how long she would be there or what they were to do with her. The Academy staff found out there would be a second week near the end of the first week. That resulted in putting Beaty in a pre-scheduled class covering FAST (firearms, arrest, and Self Defense Tactics). It is not a required class for road troopers and it is a class she had taken less than a year prior.

Much of the self-defense and the arrest procedures involve grappling with a potential violator and for that reason the sexes are usually separated for the classes. Penny was Ordered to attend the class and was the only female in a class of twenty-five or more attendees. Of course, once again she made the most of it and recorded that great critique line that it reinforced her commitment to have the courage "to fight and never quit."

S/Lt. Lee (Academy Director of Operations) was told Penny was coming by his Captain, given tape of but one traffic stop made by the Grievant, and some paper work. He acknowledged that Penny wasn't told of an extension in her ordered training until the end of her first week. He himself didn't know of an extension until near the end of the first week. He then seized upon the fact that a FAST school was scheduled for the following week as a place to put Penny. Lee testified that he gave a pre-test on search and seizure

to Penny Beaty upon her arrival at the Academy and that she did very good on the test. Penny herself was not given the results of the pre-test and did not the results until the day of our arbitration hearing. She scored an 80%, which S/Lt. Lee continued to say was very good even upon re direct by the Employers counsel. Lee volunteered that Penny did much better than Trooper Chismar had done and Chismar received but one day of training following his taking the test. Lee testified that Penny Beaty throughout her time at the Academy was cooperative and displayed a positive attitude. By the time of the third ordered week of specialized training, all pretenses were dropped as to crafting some sort of training specialized for Penny Beaty. Beaty was simply assigned to sit in classes being taught to the recruits (cadets).

Captain Bistor testified that he received instructions from someone, he thought could have been the Commander of HRM that Penny would not be allowed to return to road patrol even after her third week at the Academy. He testified that he authored a proposal whereby she would be permitted to work at the Medina Ohio Salvage Facility after her three weeks driving back and forth to the Academy at her own expense. He was given the OK and Penny was ordered to go to the salvage facility to work on automobiles initially identified as total losses, being re-titled following repair. Penny went to the Medina salvage facility, put on the coveralls and spent the next month driving to and from the facility. On June 18, 2004 while still ordered to remain at the salvage facility she filed an EEO Complaint with the Department of Administrative Services. A matter of days after the 18th the Complaint was served upon the OHP. On June 29, 2004 Penny was returned to road patrol. On October 23, 2004 the Review of her annual evaluation she had requested was completed resulting in her earlier evaluation that had been marked as "below standards" be elevated to "meets standards".

The Employer has and will state that Penny Beaty had missed a gun on a search and subsequently lost an arbitration case following the imposition of a three-day suspension. The Employer submitted the copy of the decision in the three-day suspension case by Arbitrator Green to this Arbitrator. Without commenting on the quality of the reasoning of the arbitrator in upholding the suspension, I would point out the following. Major Walker spoke of the traffic stop that was the subject of the three-day suspension. The subject of the stop was a black male. The issue had nothing to do with the race of the driver or Penny's stop of the driver. She was given a three day suspension assertedly for conducting a 'probable cause' search after requesting a "voluntary" search from the driver and being told he would not consent. As you can read in the decision the issue was whether or not Penny having told the driver before requesting the voluntary search that she observed what she believed to be "blunt" residue in his vehicle, could rely upon her earlier observations to conduct a "probable cause" search. That was the issue. It was however that traffic stop that set the Major off. The "plain smell of cocaine", also referenced by Major Walker in a scoffing manner, related to another stop where Penny conducted a probable cause search. Scoff or not, that investigation resulted in a determination that Penny was justified in the search on the issue of smelling the odor of cocaine. After all she had spent years in drug interdiction.

What happened to Penny was disparate treatment. No other trooper, male or female has been exposed to that kind of harassment. She as a female was ordered to take a FAST course with all males. Women are given the opportunity to take the course with women. The facts are in evidence. The history of such ordered specialized training is in evidence. Search and Seizure training was limited to one day when previously ordered. The facts are in evidence. Any argument that she was experiencing training, vanished in the second and third weeks at the Academy. The degradation of sitting in classes fully uniformed as an OHP Trooper with the blue clad Cadets, is palpable.

Article #7 declares: Neither party will discriminate for or against any member of the bargaining unit on the basis of age, sex, marital status, race, color, creed, national origin, religion, handicap, political affiliation, sexual preference, veteran status, or for the purpose of evading the spirit of this Agreement; (emphasis mine)..."

Can there be any doubt but that the actions taken against Trooper Penny Beaty constitute discrimination against Penny Beaty and were specifically undertaken for the precise purpose of evading the spirit and operation of the collective bargaining agreement.

The Employer must be called to task for this violation and this injustice to Penny Beaty. She should be made whole for all expenses related to her having been ordered to spend three weeks driving to and from the Academy and all expenses related to her having to report to the Medina salvage facility. She has to be made whole for any lost overtime opportunity she might have been eligible for absent the order of the Employer that she not work the road or be eligible for overtime. The Employer must be ordered to cease and desist from further harassment of this Trooper under any false façade or cover, and the Arbitrator should retain jurisdiction until compliance of the award is effected.

Honestly, to do any less would compound the injury to Trooper Beaty, who surrounded by powerful men of authority had the strength of character to stand up for her rights while obeying orders she knew were driven by false premises and assumptions."

EMPLOYER'S POSITION

The Employer cites the Grievant's performance problems as the basis for its actions. The Employer asserts the Grievant's deficiencies had to be properly addressed and that individualized training at the Academy was an appropriate place to conduct such training. The Employer denies any disparate treatment of the Grievant and further asserts that its actions are not unprecedented. It points out that other Troopers have received remedial training at the Academy. The Employer's arguments are outlined in its closing statement and are as follows:

II. ARGUMENTS

A. Did the Employer make threatening comments to the Grievant in

such a way to intimidate her?

The Grievant claims that while she was meeting with Major Walker, he made several threatening comments towards her. Allegedly, Major Walker accused her of being a "racist" and twice asked her if she had something against people of "color." Also, the Grievant claims that Major Walker told her that "she didn't deserve to wear the black and gray uniform," and if it were up to him, she would be fired. The Grievant also stated that Major Walker said to her "plain smell of cocaine, give me a break" and that she would be sent to the Academy immediately and that she should look for other employment. The Employer denies that any such statements were made and indeed takes such allegations very seriously. In fact, as a result of this Grievance, an administrative investigation was conducted into Major Walker's actions. See Management Exhibit 5.

During the investigative interview, Major Walker stated that he received notification that the Grievant would be coming to meet with him prior to going to the Academy for retraining. At this meeting, Major Walker and the Grievant discussed the Grievant's performance issues and the Major admitted that he told her that if her behavior continued in this manner, he would be the first to support her termination. He never said if it were up to him, she would be terminated. As to calling the Grievant a racist, Major Walker never made such a comment. He did bring to her attention the stated performance issues and inquired as to whether she was racially profiling, in which she responded no and that she was not a "racist." Likewise, as Captain Bistor testified at the arbitration hearing, he was in this meeting with the Major and the Grievant and never heard the Major call her a "racist." Captain Bistor testified however, that the Major did question whether she had a problem with "people of color" in reference to stops she had involving minorities and asked her whether she was racially profiling. Given the nature of the Grievant's duties and the mission of the Department, asking whether the Grievant is racially profiling is clearly an appropriate line of questioning from the Major. When asked if Major Walker discussed the Grievant losing her job, Captain Bistor testified that the Major simply stated that (paraphrasing) "if she continued down this path, he would support her termination." This statement is nothing more than putting the Grievant on notice that her behavior is unacceptable and will not be tolerated in the future. Major Walker even stated in his investigation report that he specifically told the Grievant that he was not threatening her with termination. This is simply a case of the Grievant's own insecurity and misinterpretation of the comments made during her meeting with Major Walker. It was in no way an attempt to threaten her job.

The Grievant also alleged that Staff Lieutenant Lee told her that the reason she was at the Academy for training was because he was "babysitting" her. There is no merit to this allegation and it is completely absurd. Staff Lieutenant Lee testified that he made no such comments and that he was simply trying to develop an individualized training plan to best suit her needs.

B. Did the Employer discriminate against the Grievant by sending her to the Academy for individualized training?

The Grievant further claims that she was sent to the Training Academy for a period of three weeks because she was being discriminated against, particularly for the fact that she is a female. Under the Collective Bargaining Agreement (CBA), Article 7

prevents discrimination against any member of the bargaining unit on the basis of "age, sex, marital status, race, color, creed, national origin, religion, handicap, political affiliation, sexual preference, veteran status, or for the purpose of evading the spirit of the Agreement." Likewise, Article 3 provides that the Agreement is "meant to conform to and should be interpreted in conformance with . . . all applicable federal laws . . ." Therefore, in examining whether the Employer has discriminated against the Grievant, the Employer refers the Arbitrator to a United States Supreme Court decision, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In *McDonnell Douglas*, the Court held that under a Title VII discrimination case, the complainant must carry the initial burden to establish a prima facie case of discrimination. *Id.* at 802. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment action. *Id.* The complainant then has the opportunity to show that the action was a pretext for discrimination. *Id.* at 803. Thus, although this grievance is being adjudicated pursuant to the CBA's grievance procedure, the test established in *McDonnell Douglas* is a guiding tool for determining whether the Employer discriminated against the Grievant.

In this case, the Grievant has clearly failed to prove that the decision to send her to the Academy for individualized training was for any other reason than to correct performance issues. The Grievant had the burden to prove sex discrimination and failed to bring forth any evidence to support such contention—simply saying she was a victim of discrimination does not support such allegations.

The Grievant claims that she has been the only trooper sent to the Academy for three weeks for training. Staff Lieutenant Lee, Director of Operations at the Academy, testified that he was directed to set up the individualized training schedule for the Grievant. He made such decisions based on tapes, administrative investigations, and the

Early Intervention Plan packet, which was co-developed by the Union, that was provided to him. More importantly he stated that it is very common to re-train troopers to correct any deficiencies. In fact, since 2001, eleven (11) troopers were sent to the Academy for additional training, including one female. See Union Exhibit 1, pg. 000115. Although there has only been one female, this in no way indicates that discrimination was the determining factor to send the Grievant. In fact, the Grievant has been the only trooper, male or female, since 2001 that the Employer has initiated three administrative investigations for improper search violations. See Management Exhibit 3. Thus, the decision to send the Grievant to training was an individualized one that depended on her particular situation and performance deficiencies.

Likewise, these deficiencies were considered when her training was extended beyond the first week. Staff Lieutenant Lee also testified that he not only tried to tailor the training to the Grievant's needs, but also wanted to involve her in classes that he thought would interest her. In response to the Grievant's claim that she had to take the "FAST" school again, specifically an all male class, Staff Lieutenant Lee responded that there are three types of FAST schools: Open FAST (both male and female), Female FAST, and Advanced FAST. He testified that it was the "luck of the draw" that a FAST class was being conducted during her tenure at the Academy. He further stated that it was just coincidence that there were no other females present, although there could have been as it was an "Open FAST" class. It was never intended to humiliate the Grievant. More importantly, the class was scheduled the previous December. In fact, the Grievant, upon critiquing the class afterward, gave the class an excellent rating and stated that she

recognized her weaknesses and it took away any "complacent feelings that may have been present." Additionally, nowhere on the critique form did the Grievant state that she was uncomfortable being the only female in an all male class. See Management Exhibit 7.

The Union also claims that the Grievant did well on her entrance examination for search and seizure upon the start of her training. First, the Employer notes that it is customary to have troopers take such examinations in order to gauge their individual performance level to develop an individualized training program. Second, the Employer agrees with the Union that the Grievant did well and commends her on her performance. However, as Staff Lieutenant Lee testified at the hearing, possession of the knowledge is only half of the performance requirement. Being able to apply that knowledge is equally important. Therefore, even though the Grievant performed well on the written test, her performance deficiencies in search and seizure necessitated the need for her to undergo additional training.

Furthermore, there is no evidence that there was a concerted effort to "punish" or discriminate against the Grievant. Lieutenant Colonel Finamore testified that although he was not in the direct chain of command that directed the Grievant to the Academy, he reviewed the Grievant's administrative investigations, along with the Early Intervention Review Committee's findings and had to ultimately agree with such decision. Even though the Early Intervention Committee's findings do not state that she needed "individualized training" or the specific length, testimony provided at the hearing showed that this was the intended result. Specifically, Lieutenant Colonel Finamore testified that it was a "fluid document" as to the length of training." See Management Exhibit 2. Also, Management Exhibit 2 shows that as part of the Committee's recommendation, the Grievant was to attend a meeting at the Academy with Captain Bistor, Captain Strimatter, and Lieutenant Miller. Again, although this document does not specifically

say that the Grievant was to attend training at the Academy, it is inferred that this meeting at the Academy was in reference to the subsequent training. After this meeting, Staff Lieutenant Lee testified that he then developed her training curriculum.

Likewise, it was Staff Lieutenant Lee's decision to develop the training, but not determine that she be there or the length of such training. Even though the decision to send a trooper to the Academy for additional training is usually given with more notice and is the preferred way of doing business, giving short notice, as in this case, does happen periodically. It solely depends on the facts of a particular case. Lieutenant Colonel Finamore testified that he used to be assigned to the Training Academy and that it was not uncommon to have troopers return to the Academy for training. Such training is not used as a punishment and a person's race or gender is not a determining factor. The Grievant was sent because she failed to locate a firearm and drugs and because of her search and seizure operations. Thus, the decisions made in regard to the Grievant rested within different individuals, including the Early Intervention Review Committee, and were not made in a conspired effort to discriminate. The Employer also notes that since the Grievant has received the additional training at the Academy, there has been no administrative investigations initiated with regard to her performance. Thus, it appears the training was successful in completing the Employer's intended goal.

Finally, the Grievant claimed that she was not paid mileage while she attended the training at the Academy. Again, the Employer did not act in an inconsistent or discriminatory manner with regard to the Grievant. S/Lt. Lee testified that lodging is provided if needed by the trainee, but in this case, the Grievant did not want to stay at

the Academy because she needed to take care of her dog at home. Additionally, when a trainee attends the Academy for a lengthy period of time, daily commute privileges are

not paid unless the trainee lives within a 30 mile radius of the Academy. Therefore, the Grievant has not provided any evidence to prove that she was discriminated against in this manner.

The Employer also refers the Arbitrator to a September 1999 arbitration award rendered by Robert Brookins. See the attached award for grievance #'s 15-00-980503-0061-04-01 and 15-00-980503-0062-04-01. Although Arbitrator Brookins' decision involved discrimination under the Age Discrimination in Employment Act, the analytical theories are basically the same. In the 1999 arbitration decision, the Grievant's filed grievances after they were not selected for the helicopter pilot training program alleging age discrimination. In denying the Grievance, Arbitrator Brookins stated, in part, that "suspicion is not proof" and looked to testimony provided by the Employer's witnesses that age played no role in the decision to find that the Union's evidence lacked the "requisite inferential strength." See pg. 17. He also held that "the Employer needs only to introduce admissible evidence of a legitimate basis for its decision." In this regard, he found that the Employer presented an "alternative and perhaps equally persuasive explanation" for the employment action. Likewise, he stated the "reasonableness and potential viability of this competing explanation at least weakens the inference that the committee merely cloaked age discrimination." See pg. 18.

Similar to the 1999 arbitration, the facts in this case also warrant a finding that discrimination did not occur. Mere suspicion is not enough to prove that the Employer discriminated against the Grievant when she was sent back to the Training Academy. The testimony on behalf of the Employer provided no indication that any decisions were the result of the Grievant being a female. As stated by Arbitrator Brookins, the Employer in this case brought forth "admissible evidence of a legitimate basis for its decision." The

Early Intervention Committee saw deficiencies in her performance and wanted to help the Grievant correct those problems so she would not endanger herself or the public in completing her job duties. Several administrative investigations were initiated against the Grievant regarding these performance issues and a decision was made to send her to the Training Academy, including recommendations from the Early Intervention Committee, co-developed by the Union. While at the Academy, the Grievant underwent several training classes, to specifically include issues involving search and seizure. Staff Lieutenant Lee specially designed a training program to fit the Grievant's needs after examining tapes, administrative investigations, and the Early Intervention Plan.

Thus, in making this decision because of her performance deficiencies, the Employer has shown that there is a non-discriminatory explanation for its action. Therefore, the Grievant's allegations lack the "requisite inferential strength" to support a claim that the Employer's decision was based on the Grievant's sex. This is simply a case of the Employer exercising its right to "manage and operate its facilities and programs" pursuant to Article 4 of the CBA. As Lieutenant Colonel Finamore testified, there is a great amount of liability associated with the Grievant's behavior and that most lawsuits against the Department involve unlawful stops.

CONCLUSION

In closing, the Employer asks the Arbitrator to carefully consider the Grievant's performance issues and the need that serious and appropriate action be taken to correct such deficiencies. Such action involved a period of individualized training at the Academy specifically tailored to the Grievant. Threatening comments were never made

to the Grievant that she should be terminated for her actions or that she was a racist. Major Walker was only putting her on notice that if her actions continued as they had in the past, that termination would be supported *in the future*. Likewise, he questioned whether she was racially profiling, which is an acceptable line of questioning given the nature of her duties and position of his authority. In the end, the Grievant provided no evidence that the Employer discriminated against her in any manner. In fact, the Employer was able to provide a credible and legitimate explanation for their actions. It is the duty of the Employer to provide appropriate and professional public safety services, and in order to fulfill that mission, it was necessary to send the Grievant to training. Therefore, the Employer respectfully requests that this grievance be denied in its entirety.

DISCUSSION

The evidence and facts in this case support the Employer's assertion that the Grievant exhibited some performance problems during year six (6), 2001, of her career in the Patrol, with subsequent errors in performance occurring in 2003 and 2004. The search and seizure performance problems are particularly troubling given the potential consequences to the Grievant and others in not locating a weapon on a suspect or in missing vital evidence. In addition, the legal liability the Department is exposed to when improper searches occur is significant in terms of its performance and reputation. Yet, police enforcement is not a failsafe activity. It requires judgment and intuitive decision making that may result in incorrect courses of action. When such errors are exposed, corrective action via retraining and other means is expected.

Article 7 of the Agreement is the focus of this dispute and in pertinent part the language that the Union claims is being violated is as follows:

"Neither party will discriminate for or against any member of the bargaining unit on the basis of age, sex, martial status, race, color, creed, national origin, religion, handicap, political affiliation, sexual preference, veteran status, or for the purpose of evading the spirit of this Agreement;..."

The last and most harsh corrective action taken against the Grievant occurred in June of 2004. It was a three (3) day suspension and entailed an improper search. The corrective action sustained the rigors of the grievance process, including arbitration. Arbitrator Greene found that just cause existed for the three (3) day suspension. This evidence, combined with previous evidence of problems the Grievant had in properly conducting searches, particularly where a weapon and illegal drugs were not found, provide a substantial basis for the Employer's actions in this case. It also appears from Management Exhibit 3 that other officers have been disciplined for search related improprieties.

It is also a matter of record that during the course of the Grievant's performance problems, the Early Intervention Review Committee (in which the Union had involvement) recommended that among other things the Grievant return to the Academy for a meeting with Captain Bistor, Captain Stritmatter, and Lieutenant Miller (Management Exh. 2). Beyond what the Early Intervention Committee Recommended, the

Employer made the additional determination to send the Grievant to the Academy. Her stay at the Academy ended up being three (3) weeks, although as the Union points out the length of this retraining was "open ended" and was not made clear to the Grievant. A reasonable person would find the Employer could and should have been more deliberate in its planning for the appropriate Academy training for the Grievant, and said planning should have been clearly communicated to the Grievant.

While I find there was more than sufficient rationale for the Employer to be concerned with the Grievant's performance problems, clearly, the "ball was dropped" in informing Trooper Beaty as to the length and content of her retraining.

A basic level of respect demands more than what management provided in this situation. Yet, this vaguely communicated and awkwardly managed directive that sent the Grievant to the Academy does not establish a prima facie case of discrimination. From Union Exhibit 5, it appears that the topics of Search and Seizure were covered in the first week of Academy training (May 10-14, 2004). Week two (2) of the training was a F.A.S.T. course that was revised just prior to the Grievant's May 17-21st training. The Union asserts that this training was not required of Road Troopers and that sitting in a class with blue clad Cadets was degrading. Yet, in her evaluation of the class the Grievant appeared to benefit from its content and indicated that in the areas of safety and survival it helped

her to better understand her weaknesses and what she needed to work on (Management Exh. 7). Week three (3) of the Grievant's training was listed as individualized training. She missed the first two (2) days, but attended a portion of the training, which covered interviews, interrogations, professional traffic stops, and bias awareness. Clearly, the second topic relates to some of the Employer's concerns with the Grievant's past performance problems. In the aggregate the training the Grievant went through at the Academy, although questionably planned and executed, had positive impact on her understanding of the expectations inherent in her position as a Trooper.

The Union also pointed out in Union Exhibit 8 that other Troopers were not required to attend retraining at the Academy as long as the Grievant. However, one Trooper, "Williams" attended 20 days. Furthermore, the Employer made the unrefuted argument and salient point that since 2001 no other Trooper, male or female, other than the Grievant has been the subject of three (3) administrative investigations for improper searches (See Employer closing, p. 8).

The conversation between the Grievant and Major James Walker, particularly on May 6, 2004, appears to serve as a backdrop for much of the Grievant's concerns in this matter. Taken alone, the Grievant's characterization of what occurred in this meeting and the accusatory tone Major Walker reportedly took is truly disturbing both personally and

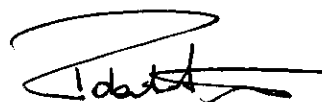
professionally. However, what the Grievant stated happened and what other witnesses (e.g. Captain Bistor, Major Walker) claimed occurred varies in perceived content, tone, and meaning. Was Major Walker being blunt and frank with the Grievant in an effort to make an impact upon her, or was he particularly harsh on her because of her gender? There is insufficient evidence to make a determination as to what happened in these meetings between Major Walker, the Grievant, and others. The same can be said for the controversy raised regarding mileage reimbursement for the Academy Training. It is unclear what was told to the Grievant and to what extent her personal need to care for her dog impacted her ability to stay at the Academy.

Based upon the totality of the evidence I do not find the Employer violated Article 7 of the Agreement in this particular case.

AWARD

The grievance is denied.

Respectfully submitted to the parties this 11th day of May, 2004.

A handwritten signature in black ink, appearing to read 'Robert G. Stein', written over a horizontal line.

Robert G. Stein, Arbitrator