

#1830

ARBITRATION DECISION

July 6, 2005

In the Matter of:

Ohio Department of Public Safety,)	
Division of State Highway Patrol)	
)	Case No. 15-00-050214-0015-04-01
and)	Jeffre T. Dickens, Grievant
)	
Ohio State Troopers Association)	

APPEARANCES

For the Patrol:

Sergeant Charles Linek, Advocate
Andrew Schuman, OCB, Second Chair
Kenneth R. Couch, OCB
Lieutenant Colonel Michael Finamore, OHP Academy
Staff Lieutenant Reginald Lumpkins, Administrative Investigations
Captain Kevin D. Teaford, Human Resources
Trooper Thomas Vaculik, Swanton Patrol Post
Staff Lieutenant Shawn Lee, OHP Academy

For the Union:

Herschel M. Sigall, Advocate
Elaine N. Silveira, Second Chair
Dennis Gorski, President
Wayne E. McGlone, Staff Representative
Jeffre Dickens, Grievant
Bob Stitt, Staff Representative
Sergeant Charles Lamberts, Swanton Patrol Post
Brenden Gillen, U.S. Drug Enforcement Agency
Thomas Matuszak, Assistant County Prosecutor, Lucas County

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant is Jeffre Dickens. He has bachelors' degrees in marketing and criminology from the University of Toledo. The grievant completed the Ohio Highway Patrol Academy and was commissioned as an Ohio Highway Patrol Trooper on February 10, 1997. For most of his career he has been assigned to the Swanton Patrol Post on the Ohio Turnpike. In January 2005, the grievant was serving as a field training officer for Tom Vaculik, who had recently graduated from the Academy and had completed 39 of his 60 days of field training.

The events leading to the grievant's discharge occurred on January 12, 2005. On that date, there was dense fog on the Ohio Turnpike and the grievant and Vaculik were issuing warnings to drivers who were not using their headlights. Vaculik was driving and the grievant was riding in the passenger's seat.

At approximately 9:51 a.m., Vaculik stopped a GMC Yukon Denali with Michigan license plates. The grievant went to the passenger side of the vehicle and Vaculik followed behind him. As the grievant talked to the driver, he observed that the driver was nervous and made an unsolicited comment about visiting his sister in Cleveland and that the passenger stared straight ahead without ever looking at him. He told the driver that he would be given a warning and would be sent on his way.

The grievant and Vaculik returned to their patrol car. The grievant told Vaculik that he was concerned about the criminal indicators he had observed and immediately used his cell telephone to request a canine unit to come to the scene to do a sniff-around. After calling for a canine unit, the grievant learned from the dispatcher that the driver, Ray Tillet, was the registered owner of the vehicle.

While Vaculik was writing the warning, Tillet got out of his vehicle and approached the patrol car. The grievant instructed Vaculik to get out of the car and tell Tillet

to return to his vehicle. Tillet complied with Vaculik's order and Vaculik got back into the patrol car. The grievant then told Vaculik that he felt that Tillet had targeted them. At that point, the grievant received the criminal history he had requested for Tillet and learned that Tillet had prior arrests as a drug courier and for weapons violations.

In a few minutes three canine units arrived – Troopers Stacy Arnold, Alejo Romero, and Ryan Stewart. Vaculik told Tillet and his passenger, Ray Jones, that a dog would do a sniff-around and instructed them to roll up their windows. Trooper Arnold's K-9, Ringo, who was used for the sniff-around, alerted by the driver's door.

Since this provided the grievant with probable cause to search Tillet's vehicle, the grievant told Vaculik to tell Tillet and Jones that their vehicle was going to be searched and to bring them back to the patrol car. Vaculik exited the patrol car and went to the passenger's window. The grievant followed him, taking a position between the two vehicles. As Vaculik was explaining to Tillet and Jones that their vehicle was going to be searched, Tillet exclaimed, "this is bull shit," and then put the car in drive and sped away. The grievant, who was still standing behind Tillet's vehicle, drew his service weapon and fired five rounds at the back window of the vehicle.

The grievant testified that he fired at Tillet in response to a threat to Vaculik. He stated that he saw the silhouette of a gun pointed at Vaculik. The grievant claimed that he observed Vaculik's knees buckle and he thought that Vaculik had been shot. He indicated that there was no doubt in his mind that Vaculik was in a life-threatening situation.

The patrol disputes the grievant's testimony. It contends that the videotape from the camera in the grievant's patrol car does not show Tillet pointing a gun at Vaculik. The patrol points out that Vaculik testified that he saw Tillet take his right hand from his lap, put the vehicle in drive, and return his hand to his lap. It notes that Vaculik indicated

he knew that Tillet was about to take off so he backed away from the vehicle. The patrol stresses that Vaculik, who was standing by the open passenger's side window, stated that he did not see a gun or see Tillet point at him.

The grievant and Vaculik returned to their patrol car and pursued Tillet and Jones with Troopers Arnold, Romero, and Ryan following them. At some point a box, which was later discovered to contain ten pounds of marijuana, was thrown from Tillet's vehicle. After 2.1 miles, Tillet pulled over. The videotapes reveal that Tillet and Jones exited their vehicle and were ordered to the ground. The grievant tells Tillet, "you fucking move and I'll blow your fucking head off." He also asks Tillet, "why would you take off?"

The incident was the subject of two investigations. Sergeant M.L. Rogols conducted the criminal investigation. Staff Lieutenant Reginald Lumpkins did the administrative investigation. Lumpkins submitted the results of his investigation to Major R.J. Young.

On February 5, 2005, the grievant was notified that he was being charged with violating Rule 4501:2-6-02-(V)(1), Use of Force and Firearms, and Rule 4501:2-6-02(E), False Statement, Truthfulness, for using an unreasonable amount of force against a violator and subsequently being untruthful about the events. A pre-disciplinary meeting was held on February 5, 2005, before Captain Clarke Kiner, who concluded that there was just cause for discipline. On February 10, 2005, the grievant was notified by Kenneth Morckel, the Director of Public Safety, that he was being terminated effective that day.

The grievant filed a grievance on the same day he was terminated. He charged that he was discharged without just cause and that the patrol failed to use progressive discipline. The grievant also complained that he was forced to cancel two days of

vacation and to forfeit a deposit at a ski resort. He asked to be returned to work as a trooper and made whole, including the deposit he lost on his ski vacation.

When the grievance was not resolved, it was appealed to arbitration. The arbitration hearing was held on April 13 and 18 and May 6, 2005. Post-hearing briefs were received on June 4, 2005.

ISSUES

The issues as agreed to by the parties are:

- 1) Was the grievant removed for just cause? If not, what shall the remedy be?
- 2) Did the Employer violate Section 43.04F of the labor agreement by not reimbursing Grievant for a \$200.00 deposit when he was ordered back from vacation? If so, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 19, Section 19.01 - Standard and Section 19.05 - Progressive Discipline and Article 43, Section 43.4(F).

PATROL POSITION

The patrol argues that the grievant was charged with violating Rule 45:2-6-02(E), False Statement/Truthfulness, because of his claim that Tillet had a gun. It points out that Vaculik testified that as he was standing by the open passenger-side window, he saw that Tillet's left hand was on the steering wheel and his right hand was on his lap. The patrol notes that Vaculik stated that Tillet moved his right hand to the gearshift, placed the vehicle in drive, and dropped his hand back to his lap. It stresses that Vaculik stated that if Tillet had pointed a gun at him, he would have seen it.

The patrol disputes the grievant's testimony that he checked on Vaculik's condition before they began to pursue Tillet. It acknowledges that the grievant claims

that he asked Vaculik whether he was hurting and looked him over but notes that the videotapes from his car and Arnold's car do not support his claim. The patrol asserts that the grievant did not check on Vaculik's well-being until after the pursuit was concluded and Tillet was handcuffed.

The patrol charges that the grievant's testimony is inconsistent as to who had the alleged gun and at whom it was pointed. It reports that the grievant initially told Sergeant Charles Lamberts and Staff Lieutenant M.R. Morgan that Tillet had the gun and pointed it at Vaculik. The patrol claims that when Rogols arrived at the scene, the grievant told him that the passenger had the gun and that he pointed it at him. It observes that at the formal interview he told Rogols that Tillet was the one with the gun and that he pointed it at Vaculik.

The patrol argues that the grievant also changed his testimony regarding where Tillet got the alleged gun. It indicates that the grievant told Lamberts and Morgan that the gun came from the driver's side door panel. The patrol states that when Lumpkins asked him about it, he asserted that Tillet appeared to have been sitting on the alleged gun.

The patrol contends that the grievant's actions were not consistent with the viewing of a gun. It maintains that if the grievant saw a gun, he should have yelled, "gun," to warn Vaculik and the other troopers. The patrol states that the grievant should have retreated and taken cover rather than standing in a wide-open area. It adds that if a gun was present, the grievant should have done a tactical reload of his weapon during the pursuit.

The patrol questions the grievant's actions after Tillet pulled over. It points out that the grievant showed no concern for locating the alleged gun. The patrol notes that

when the grievant questioned Tillet, he did not ask about a gun but asked why he had fled.

The patrol asserts that it wanted to believe the grievant. It observes that Lieutenant Colonel Michael Finamore testified that he scrutinized the videotapes of the incident more closely than in any other case he could remember. The patrol reports that it conducted a skirmish line search of the turnpike's median and berm to try to locate the alleged gun. It acknowledges that the investigation was not formally reviewed by the Response to Resistance Committee but stresses that everyone from the designated Section had the opportunity to review the investigation and videotapes except for the peer trooper.

The patrol questions the grievant's credibility. It indicates that his credibility was undermined by the leading questions he was asked on direct examination. The patrol complains that on cross-examination the grievant was "very evasive and often skirted the actual questions asked." (Patrol Brief, page 8) It adds that the letter from Trooper G.R. Hasty, for whom the grievant had served as a field-training officer, is suspect because the "facts" in the letter came directly from the grievant.

The patrol characterizes the grievant's claim of disparate treatment as "preposterous." It point out that in the Kehoe incident one of the suspects fired several rounds at the officers and in the other incident Trooper Harker fired one round at the tires of the suspects' Chevy Suburban as one of them fled in the vehicle. The patrol stresses that while the officers in these incidents fired at the tires of the suspects' vehicles, the grievant acknowledged that he was shooting at Tillet.

The patrol argues that even if the Arbitrator believes that the grievant saw the shadow of a gun, he would not have been justified in firing his weapon at Tillet. It observes that Tillet was leaving the scene and Vaculik was running back to the patrol car

before the grievant fired his weapon. The patrol emphasizes that once Tillet fled, he was no longer a threat and there was no justification for the use of deadly force.

The patrol charges that the grievant continued to use excessive force after the pursuit. It reports that when Tillet exited his vehicle and lay down on the ground, the grievant yelled, “you fucking move and I’ll blow your fucking head off.” The patrol notes that even though Tillet was complying with the grievant’s commands, the grievant stood on the back of Tillet’s neck or the trapezoid area of his back and said, “I’ll break your god damn neck.” It observes that Finamore testified that stepping on Tillet’s neck was against policy and would not be acceptable for any law enforcement officer.

The patrol rejects the grievant’s claim that he was concerned about Vaculik getting out of the patrol car to make the approach to Tillet’s vehicle in the fog. It states that if such were the case, he would have told Vaculik to remain in the patrol car. The patrol adds that the videotape shows that Vaculik joined the grievant at Tillet’s vehicle only a few seconds later.

The patrol questions the grievant’s testimony that he had concerns about officer safety. It points out that the grievant stated that when Tillet approached the patrol car, it was a “huge” danger sign and put him in a very poor officer safety position. The patrol stresses that despite these claims, the grievant did not immediately jump out of the patrol car when Tillet approached.

The patrol contends that the grievant’s claims about the presence of criminal indicators and being targeted by Tillet do not match his behavior. It observes that when the grievant sent Vaculik to tell Tillet and Jones that a K-9 would be walked around their vehicle, he is seen on the videotape yawning and looking back at the other officers rather than watching Vaculik. The patrol also notes that after the K-9 alerted on the vehicle, the grievant sent Vaculik by himself to remove Tillet and Jones from the vehicle.

The patrol challenges the importance attached by the union to Tillet's criminal record. It acknowledges that a signal 61 (for weapons) and a signal 86 (for drugs) were issued by the dispatcher. The patrol claims that "these signals do not automatically indicate that the subject is currently carrying a weapon or drugs" or that the grievant "has a right to execute [Tillet and Jones]." (Patrol Brief, page 12)

The patrol argues that discharging the grievant is "a matter of public policy." It charges that he violated its rules regarding the use of force and truthfulness. The patrol asserts that an employee who violates these rules cannot be salvaged because too much is at stake.

The patrol objects to the testimony of Thomas Matuszak, a Lucas County Assistant Prosecutor. It complains that he was called by the union as a rebuttal witness but he was actually called to testify that the discipline imposed on the grievant was too harsh. The patrol claims that Matuszak's judgment should not be substituted for that of the Arbitrator.

The patrol rejects the suggestion that it fired the grievant because he was engaged in racial profiling. It points out that Lumpkins testified that initially there were concerns regarding this possibility but the issue was dropped and the investigation focused on the grievant's use of excessive force and his veracity. The patrol notes that it stipulated that it had a program to identify employees who have an inordinate number of stops of certain racial groups and that the grievant was never flagged.

The patrol maintains that one of the most disturbing aspects of the case is the grievant's testimony that if the same situation arose again, he would not do anything differently. It claims that this shows that the grievant "will continue to operate according to his agenda regardless of the Highway Patrol's policy and procedures." (Patrol Brief, pages 13-14) The patrol states that it "cannot take the risk of trying to rehabilitate a

trooper that makes such an egregious error, especially when the trooper finds no wrongdoing with his own behavior.” (Patrol Brief, page 14)

The patrol suggests that the issue is not whether the grievant was a “good man.” It acknowledges that he was selected as the District 10 Trooper of the Year. The patrol adds, however, that in Ohio State Troopers Association and State of Ohio, Department of Public Safety Highway Patrol; Case Nos. 15-00-980807-0097-04-01 and 15-00-980807-0099-04-01; December 23, 1998, Arbitrator Alan Ruben recognized that “sometimes good men do bad things, and that the question before the Arbitrator is not what he would have done were he the Director of the Department of Public Safety but rather whether the discharge penalty imposed for the Grievant’s misconduct was unreasonable, excessive or inconsistent with the sanctions imposed for like offenses upon other Officers.” (Ibid.)

The patrol concludes that the grievant can no longer be vested with the power of lethal force. It claims that it imposed the only reasonable level of discipline for the violations and that the discipline imposed was not arbitrary, capricious, or discriminatory. The patrol asks the Arbitrator to deny the grievance in its entirety.

UNION POSITION

The union argues that the case ultimately rests on Ohio Highway Patrol Policy 203.20 which prohibits troopers from using deadly force except to defend themselves or others from serious injury or death. It states that the grievant had reasonable cause to believe that deadly force was necessary to defend another person. The union further indicates that since the use of deadly force was necessary, the grievant was not untruthful in describing the process by which he reached that conclusion.

The union maintains that it is the Arbitrator’s job to evaluate the testimony and evidence to determine whether the grievant fired his weapon in defense of Vaculik. It

claims that it is not his job to determine if Tillet intended to shoot Vaculik or even if he had a firearm. The union stresses that the Arbitrator's only task "is to determine if [the grievant] had 'reasonable cause to believe' that he fired his weapon in defense of a perceived threat from Tillet to Trooper Vaculik." (Union Brief, page 3)

The union contends that the grievant's character supports the reliability of his testimony. It points out that the grievant is an eight-year veteran of the OHP; is married to a life flight paramedic; and holds two undergraduate degrees from the University of Toledo. The union notes that he was elected by his fellow officers as Trooper of the Year in 2002 and 2004 and received the Criminal Patrol and "Ace" awards in 2003.

The union emphasizes that in 2004 the grievant was selected by District Headquarters as District Trooper of the Year. It indicates that he was subsequently recommended by the District Commander for State Trooper of the Year. The union observes that Captain R.L. Ferguson stated in his recommendation that the grievant "can always be counted upon for factual reporting and does not rationalize or attempt to shed responsibility." (Joint Exhibit 4)

The union reports that the grievant's frequent selection to serve as a field training officer is evidence of his quality. It observes that since 2000 he has served as a field training officer for six graduates of the OHP Academy. The union notes that several of his "cubs" provided statements regarding his character.

The union rejects the patrol's premise that the grievant fired at Tillet because he was fleeing and then fabricated a story of a gun to justify his action. It points out that this premise supposes that the grievant would act contrary to every indicator in his record and choose to try to kill a subject in front of other troopers who would serve as witnesses to his act. The union characterizes the patrol's premise as "just plain foolish."

The union argues that Tillet's claim that he did not have a weapon and was no threat to Vaculik should not be believed. It reports that Tillet's criminal record includes charges of unlawful use of a weapon, battery, aggravated assault with a firearm, transporting marijuana from Texas to Chicago, smuggling 1,300 pounds of marijuana and, under the alias of Dennis Williams, transporting over 2,000 pounds of cocaine. The union observes that while Tillet claimed that he had no drugs when he was stopped, a box containing 10 pounds of marijuana was thrown from his car.

The union acknowledges that Vaculik did not see a gun but suggests a number of reasons that might explain why he did not see a gun. It points out that he was assigned to watch Jones and, as he was trained, focused on Jones's hands. The union notes that the grievant wrote in Vaculik's Training Guide nearly every day that he was working with Vaculik on his observation skills and that he stated in his 20-day evaluation that Vaculik needed to improve these skills.

The union indicates that the erroneous conclusion that the grievant fired at Tillet without justification is driven in part by a mistake by Rogols. It observes that he claims that the grievant initially told him that it was Jones who had a gun and that Jones pointed the gun at him. The union reports that Rogols acknowledged his claim is based on a two-minute conversation with the grievant at the scene of the incident. The union emphasizes that prior to speaking to Rogols, the grievant told Lamberts and Morgan that Tillet had pointed a gun at Vaculik. It adds that at the official interview with Rogols, the grievant insisted that he had always stated that Tillet had the gun and that Tillet pointed it at Vaculik.

The union argues that the patrol's erroneous conclusion that the grievant fired at Tillet without justification was the result of Lumpkins' belief that the grievant was racially profiling. It claims that his belief led him to find many of the grievant's actions

to be suspicious. The union charges that it did not matter that all of the alleged suspicious activities were clearly explainable. It indicates that it believes that Lumpkins is convinced that “but for the fact that Tillet was black, [the grievant] would not have fired his weapon.” (Union Brief, page 12)

The union contends that the whole case is based on the Ohio Highway Patrol’s Response to Resistance policy. It points out that the policy requires an investigation where deadly force is used. The union notes that the process culminates in the results of the investigation being sent to a Response to Resistance Review Committee, which reviews the investigation and makes recommendations regarding discipline.

The union charges that the policy was not followed in the instant case. It observes that the Response to Resistance Report was signed long after the grievant’s termination and still has only one signature on it. The union questions Finamore’s claim that he verbally brought the matter to the attention of all of the members of the committee and that they concurred that the grievant should be terminated.

The union disputes the patrol’s claims about the Kehoe and West Jefferson incidents. It acknowledges that Finamore and Staff Lieutenant Shawn Lee testified that the troopers in those cases shot at the tires of the vehicles of fleeing suspects. The union claims, however, that in the tape of the Kehoe incident, Trooper Harker admits that he fired at one of the Kehoe brothers and indicates that he hit him between the shoulder blades.¹ It charges that the patrol “will and has bent its policies and its past actions to fit its election to fire [the grievant].” (Union Brief, page 14)

The union suggests that the case involving Trooper Ray Flowers, which was cited by Finamore, is not parallel to the case before the Arbitrator. It states that in that case an unarmed subject fled on foot from a traffic stop. The union reports that Flowers dropped

¹ The union speculates that Kehoe was not killed or wounded because he was wearing a bulletproof vest.

to a stationary position and fired at the suspect. It stresses that even though Flower's supervisor ordered him to stop firing, he continued firing and hit the suspect in the back and killed him.

The union suggests that the purpose of Finamore's testimony was "to change the issue from was there reasonable cause to believe that Tillet had a gun in his hand to 'it doesn't matter because Tillet was in the process of fleeing and the use of deadly force is prohibited to stop a fleeing subject.'" (Union Brief, page 15) It states that to accomplish this, Finamore claimed that the West Jefferson incident did not involve the use of deadly force because someone yelled, "shoot the tires" and that the Kehoe incident was not germane because Harker shot at the tires on the suspect's vehicle. The union asserts that "the fact that [the grievant] fired without regard or notice of the movement of the Tillet vehicle because he saw the threat to his Cub, doesn't seem to phase [Finamore], even though the policy says that you can in fact use deadly force on a fleeing subject if at the same time the subject is a threat to cause serious injury or death to yourself or others." (Ibid.)

The union offers an account of what probably happened On January 12, 2005. It maintains that Tillet was awaiting trial in New Mexico and was subject to 20 years in prison if he was caught with drugs in Ohio. The union suggests that this motivated him to flee so that he could dispose of the marijuana and the gun and perhaps even to escape entirely. It asserts that Tillet pointed a gun at Vaculik and would have shot him if he had interfered with his escape.

The union suggests that Tillet's plan was successful. It claims that Tillet or Jones threw the marijuana and the gun from their vehicle and then pulled over to surrender. The union adds that Tillet was allowed to wash his hands so that any contact with a gun would be negated.

The union argues that it does not matter whether its probable scenario is correct. It contends that the issue is whether the Arbitrator believes that the grievant saw a gun. The union maintains that if the grievant “had a reasonably based belief that [Tillet] was threatening [Vaculik] with a weapon ... As such he had the right, duty and obligation to act in defense of [Vaculik].” (Union Brief, page 19)

The union concludes that the grievant did not violate Ohio Highway Patrol Policy and was treated differently than others who violated the policy against the use of deadly force. It asks the Arbitrator to return the grievant to work.

ANALYSIS

The events giving rise to the instant dispute are clear. On January 12, 2005, the grievant and Vaculik stopped Tillet and Jones for driving in the fog without headlights. When the grievant detected a number of criminal indicators, he called a K-9 unit to do a sniff-around. The K-9 alerted at the driver’s door, providing reasonable cause for a search. When Vaculik told Tillet that his vehicle was going to be searched, Tillet exclaimed, “this is bull shit,” and put his vehicle in drive and sped away. As Vaculik moved back from the vehicle, the grievant fired five rounds at Tillet. The grievant indicated that he saw Tillet point a gun at Vaculik and thought that Vaculik had been shot.

The grievant and Vaculik rushed back to their patrol car and took off after Tillet and Jones. A brief pursuit ensued, during which Tillet and/or Jones threw a box containing 20 pounds of marijuana from their vehicle. After 2.1 miles, Tillet and Jones pulled over and surrendered. An administrative investigation was conducted and on February 5, 2005, the grievant was directed to appear at a pre-disciplinary hearing, which

resulted in him having to forfeit a deposit he had made on a ski vacation. On February 10, 2005, the grievant was terminated and the instant grievance was filed.

Just Cause for Termination - The parties stipulated that there are two issues before the Arbitrator. The first issue is the whether there was just cause to terminate the grievant. The patrol charged the grievant with violating Ohio State Highway Patrol Policy 4501:2-6-02(V)(1). It restricts the use of force to that "reasonable to effect an arrest, detention, or mission." OSHP Policy 203.30 deals more specifically with the use of deadly force. Section C states:

An officer must have a reasonable belief that deadly force is necessary to protect life before s/he resorts to the use of deadly force. Officers shall be justified in using deadly force only under the following circumstances:

1. To defend themselves from serious physical injury or death; or
2. To defend another person from serious physical injury or death.

Deadly force will not be used against a fleeing felon unless the situation meets these criteria.

The Arbitrator must agree with the patrol that the grievant's use of deadly force was not justified. First, in order to use deadly force a trooper must have a reasonable belief that it is necessary to protect life or prevent serious physical injury. The original videotape and an enhanced version of the tape, including a close-up of the back window of Tillet's vehicle, contain no suggestion of Tillet's arm pointed at Vaculik or the shadow of a gun, even when they are viewed repeatedly in slow motion.

Second, the policy regarding the use of deadly force explicitly places the same limit on the use of deadly force on a fleeing felon, i.e., troopers can use deadly force only to prevent serious physical injury to themselves or other people. In the instant case, a careful review of the videotapes reveals that the grievant did not fire the first round until Vaculik had backed away from Tillet's vehicle and the vehicle was pulling away.

Furthermore, he continued to fire after the vehicle was a number of yards away and there was no possible threat to him or Vaculik.

The patrol also charged the grievant with violating Policy 4501:2-6-02(E). This policy states “a member shall not make any false statement, verbal or written, or false claims concerning his/her conduct or the conduct of others.” The patrol argues that the grievant violated this policy by concocting a story about Tillet pointing a gun at Vaculik and shooting him to excuse his violation of the policy regarding the use of deadly force.

The patrol pointed to a number of actions by the grievant that were not consistent with his story. It points out that the grievant claims he saw Tillet threaten Vaculik with a gun but he did not yell “gun” to warn Vaculik and the other three troopers at the scene and did not seek cover but stood in the roadway firing at Tillet as he fled. The patrol notes that the grievant stated that he thought Vaculik had been shot but he did not check on his condition before pursuing Tillet and Jones.² It adds that when the brief pursuit ended, the grievant did not immediately attempt to locate the gun he testified that he had seen aimed at Vaculik.

While the Arbitrator is forced to conclude that the grievant was not truthful, he recognizes that this conclusion is not consistent with the grievant’s record. The grievant was highly regarded by his peers and supervisors as indicated by his selection as District Trooper of the Year on two occasions and his nomination for State Trooper of the Year in 2004. However, the Arbitrator has learned through experience that good people sometimes do bad things for inexplicable reasons.

The union’s concern that the Response to Resistance form was not properly signed must be dismissed. Finamore testified that the incident was discussed with all the members of the committee except the peer representative and that they agreed the

² Although Vaculik was wearing a bulletproof vest, he may well have been injured if Tillet had shot him at close range.

grievant's response to resistance was not reasonable. Furthermore, the administrative and criminal investigations guaranteed that the incident was thoroughly investigated.

The remaining issue is the proper penalty. While the collective bargaining agreement calls for progressive discipline, termination is appropriate for the most severe violations. In the instant case, the grievant's violation of the policy regarding the use of deadly force and his apparent dishonesty in the succeeding investigation, are among the offenses that may merit immediate discharge.

The Arbitrator must reject the union's charge that the grievant is being treated differently than the troopers who used deadly force in the West Jefferson and Kehoe incidents. In West Jefferson the troopers shot at the tires of the suspect's vehicle when he tried to flee in a stolen truck. This is clearly different from the instant case where the grievant testified that he was shooting at Tillet. In fact, the back window of Tillet's vehicle was broken out at approximately head height on the driver's side.

The Kehoe incident, which took place in Wilmington, Ohio, was also radically different from the instant case. In that instance, Trooper Harold Harker and Clinton County Deputy Sheriff Bob Gates exchanged shots with the Kehoe brothers. There is no question that both of their lives were at risk and that the use of deadly force was justified. It is noteworthy that Gates did not shoot at Shane Kehoe when he fled even though Shane had fired numerous rounds at him.

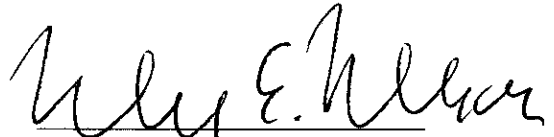
Loss of Deposit - The second issue is based on the charge made in the grievance that the patrol violated Article 43, Section 43.4(F), of the contract. The grievant complains that he was forced to return to work for a pre-disciplinary hearing resulting in him having to forfeit a deposit on a ski trip. He asked to be paid for the lost deposit.

The Arbitrator cannot grant the grievant's request. Although the parties stipulated that this was an issue to be decided by the Arbitrator, there was no testimony or evidence offered at the hearing regarding the issue. Furthermore, the parties' post-hearing briefs did not address the issue.

Based on the above analysis, the Arbitrator must deny the grievance and uphold the grievant's discharge and deny the grievant's request to be reimbursed for the loss of his deposit on a ski vacation.

AWARD

The grievance is denied.


Nels E. Nelson
Arbitrator

July 6, 2005
Russell Township
Geauga County, Ohio