#1866

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 # 15-03-050930-142-04-01
Grievant: Shawn T. Bailey

Advocate(s) for the UNION:

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INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement (herein "Agreement") (Joint Exh. 1) between the State of Ohio (herein "Employer") and the Ohio State Troopers Association, Inc., Unit 1 (herein "Union"). That Agreement is effective from calendar year 2003 through 2006 and includes the conduct which is the subject of this grievance. Robert G. Stein was selected by the parties to arbitrate this matter as a member of the panel of permanent umpires, pursuant to Article 20, Section 20.08 of the Agreement.

A hearing on this matter was held on November 30, 2005 in Columbus, Ohio. The parties mutually agreed to that hearing date and location, and they were given a full opportunity to present both oral testimony and documentary evidence supporting their respective positions. The hearing, which was not recorded via a full written transcript, was subsequently closed upon the parties' submissions of post-hearing briefs on December 23, 2005.

The parties have both agreed to the arbitration of this matter. No issues of either procedural or jurisdictional arbitrability have been raised, and the matter is properly before the arbitrator for a determination on the merits.

ISSUE

Was the grievant, Shawn T. Bailey, discharged from his employment for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

Article 4 —Management Rights
Article 19—Disciplinary Procedure
Article 20—Grievance Procedure
Article 31--Residency

BACKGROUND

Shawn T. Bailey (herein "Grievant" or "Bailey") was employed as a trooper for the Ohio State Highway Patrol (herein "OSP") for approximately three and one-half years, which included medical leaves subsequent to four separate back surgeries during that same period after his April 26, 2002 starting date. Lower back injuries had resulted from an on-the-job vehicular accident in which Bailey was involved in October 2002 when his vehicle was struck from behind by another driver while Bailey was attempting to change traffic lanes.

The Grievant was assigned to the West Jefferson Patrol Post in District Six, located in Madison County, and had resided in an apartment in the north Columbus area. In June 2005, he and his wife moved to a new residence which they had purchased in Marion, Ohio, and he had received notice that his second-choice request, to transfer to the

Delaware Post, had been granted. However, the Grievant continued to serve as a member of the West Jefferson Post at the time of the incidents which resulted in his termination on September 23, 2005. Bailey typically worked the third or midnight shift ending at 6:00 a.m. and was normally under the immediate supervision of night-shift supervisor or shift commander Sergeant Jeff Shane, while the general Post Commander was Lieutenant Ken Ward.

The Statement of Charges (Jt. Exh.3) provided to Bailey included the reasons serving as the bases for his termination. It states as follows:

1. If was found that on July 2, 2005 Tpr. Shawn T. Bailey made false and misleading statements [in] reference to his duty status and location and that he used a patrol car for non-work related reasons. Tpr. Bailey also failed to establish living quarters in compliance with Division Policy.

2. On July 13, 2005, Trooper Shawn T. Bailey initiated a motor vehicle pursuit and failed to notify a supervisor in a timely manner. Tpr. Bailey later gave false and/or misleading information to a supervisor regarding the motor vehicle pursuit.

The first offense cited is based on the Grievant's alleged "deceptive acts that were deployed in an attempt to conceal his behavior" involving his use of a state-owned patrol vehicle outside a thirty-mile radius from the West Jefferson Patrol Post. After the Grievant's home address changed to Marion, a distance of almost sixty (60) miles from the West Jefferson Post, he admittedly used the cruiser assigned to him while at work to commute to and from his new Marion residence between ten (10) and fifteen (15) occasions during a six-week period in violation of Ohio

Highway Patrol Policy and also Article 31 of the Agreement. Article 31 includes the following language:

> . . . When the Employer permits commutation in a state-owned vehicle, the following shall apply:
>
> 1. Members who reside within a thirty (30) mile radius of their report-in location may be eligible to commute to and from their residence in a state-owned vehicle.
>
> . . .

Members who reside outside of the above stated parameters are ineligible to commute to and from their residence in a state-owned vehicle.

During an administrative investigation interview conducted by Sergeant Chad Neal on July 2, 2005, Bailey admitted that he had turned off his vehicle's computerized GPS at the point when he passed his former residence and then continued to his new home in Marion. In a separate administrative investigation interview conducted by Sergeant Gary Thompson, Bailey indicated that on weekends he had left the cruiser with a friend at the apartment complex where the Grievant had resided before his move to Marion and then drove the rest of the distance home in his personally-owned pickup truck. Bailey also indicated that he had actually stayed at that friend's apartment on those weekday occasions when he had been required to make court appearances on specific days after concluding his shift assignment at 6:00 a.m.

The second violation identified in the Employer's bases for terminating the Grievant began on July 13, 2005, when Bailey initiated a traffic stop at about 3:00 a.m. because he suspected that a vehicle he

was following on Sullivant Avenue in the City of Columbus might have actually been a stolen vehicle. While maintaining audio contact with the post dispatcher, Bailey utilized his pursuit lights and activated his siren to direct the subject vehicle to pull to the side of the roadway and stop. Bailey did indicate to the dispatcher that the subject vehicle had slowed and then began to pull to the side of the road, where a passenger jumped out of the vehicle, before the driver actually continued on for a distance of 500 feet to one-half mile, turned onto another street, and then traveled about one-quarter mile before pulling over and stopping in front of the driver's residence. In response to Trooper Bailey's directive, the seventeen-year-old female driver, who indicated that she was driving the subject vehicle with the permission of a relative, exited from the vehicle. It was determined that the driver had recently been cited for driving without a valid license and had been directed by her boyfriend/former passenger to continue on without stopping in response to the light and siren indicators. It was ultimately discovered that the vehicle was actually a rental vehicle contracted by the offender's grandmother for which the owner company had applied the wrong registration. Bailey did, in fact, issue two citations to the offender/driver for operation of a vehicle while under suspension and also for a seatbelt violation. (Employer Exh. 3, p. 17) He then released the offender to the custody of her mother, who had come out of their residence and was aware of the citations being issued.

Those events subsequently became the subject of another administrative investigation conducted by Sergeant Neal based on Bailey's failure both to identify the July 13 traffic stop as a "response to resistance/pursuit" and to timely notify a supervisor that he was involved in a pursuit, in alleged violation of Ohio State Patrol Policy 203.20(E). (Employer Exh. 4) That section, entitled "Response to Resistance Investigations," includes the following language:

> An officer shall notify his/her supervisor as soon as possible after responding to resistance to effect an arrest, detention, or mission. A case investigation . . . shall be completed by a supervisor. A computer message shall be directed to the Office of Field Operations, Office of Investigative Services, and Administrative Investigations Unit Commander as soon as the preliminary investigation is complete. Within ten days, the preliminary investigation shall be forwarded, with the computer message, to the Administrative Investigations Unit Commander. Investigations above Level 2 on the Action-Response Continuum shall cause the officer's actions to be reviewed at all commend levels.

Sergeant Neal began his investigation of this incident on July 21, 2005 and interviewed the Grievant on July 26, 2005. (Employer Exh. 3, pp. 1-4) It was concluded that Bailey had failed to timely notify any supervisor that he had been involved in a pursuit.

Based on the administrative investigation results, the Grievant received a notice of a scheduled pre-disciplinary hearing and also his intended termination. That September 15, 2005 communication specifically identified the following violations:

Rule 4501:2-6-02(E)	False Statements, Truthfulness
Rule4501:2-6-05(B)(1)	Use of Equipment

Rule4501:2-6-02(X)(1) Living Quarters
Rule 45401:2-6-02(B)(5) Performance of Duty

By letter dated September 23, 2005 (Joint Exh.3), Bailey was officially notified of his termination effective on that same date.

A grievance (Joint Exh. 2) was filed on behalf of the Grievant on that same date, alleging the Employer's violation of Article 19 of the Agreement. Because the matter remained unresolved in the preliminary stages of the grievance procedure, as identified in Article 20, Section 20.07, the matter was advanced to the arbitration level identified in Section 20.07, Step 4 and Section 20.08. The matter is now properly before the arbitrator for a determination on the merits.

POSITION OF THE UNION

The Union's basic contention is that the Employer violated Article 19 of the Agreement because the Grievant was not terminated for "just cause." It contends that the Grievant was well aware that OSP policy did not provide for non-promotional transferees to use a state-owned cruiser to commute to and from an employee's residence exceeding a distance of thirty (30) miles from the assigned Post. Because he sought a "temporary fix" until his approved transfer to the Delaware Post was actually effectuated, Bailey sought the advice of his shift supervisor, Sergeant Shane. Because Shane was a highly-respected officer and also shift commander of the night shift, the Union urges that Bailey was justified

in trusting Shane's judgment when he indicated to Bailey that "he did not believe that anyone would get upset if Bailey drove to Marion in his take home vehicle a few times, but that he should stop immediately if someone said anything to him about it." (Union brief pp. 13-14) Both parties actually have identified Shane's response to Bailey's query as providing "implied consent." The Union also stresses that the Grievant's continued use of the new Ford Crown Victoria Police Interceptor (CVPI) permitted Bailey to be more comfortable during the many driving hours he served because it was equipped with seats that electronically provided customized support for Bailey's back while he continued to experience significant pain and discomfort while awaiting his fourth back surgery.

The Union points out that the Grievant acted consistently with the advice given to him by Sergeant Shane and relinquished use of the vehicle he had been assigned immediately after Sergeant Thompson raised the issue of Bailey's alleged misuse of the assigned cruiser on July 13, 2005. Subsequently, Bailey commuted to work in a separate vehicle and then used whatever cruiser was available on a daily basis. The Union stresses that the Employer did not attempt to confirm or disaffirm Sergeant Shane's involvement until another administrative investigation was opened on October 5, 2005, well after the Grievant's termination. During an October 7, 2005 interview, Shane admitted that he had knowledge of

Bailey's use of the patrol car outside of the thirty-mile radius. Shane also indicated that Bailey could have believed that Shane had given implied consent to Bailey to continue to drive the cruiser to Marion "a few times." Shane, who was subsequently given a brief suspension for his own violation of OSP policy by providing incorrect information to Bailey, indicated that his advice to Bailey resulted, at least in part, from Shane's own recognition that Bailey was then currently dealing with a new home, new baby, and pending back surgery.

The Union also insists that termination was not merited in view of the Grievant's good work performance (Union Exh. 5) and the absence of any prior disciplinary action involving Bailey. The Union refutes the Employer's charge that "Bailey made false and misleading statements [in] reference to his duty status and location" in the administrative investigative interview conducted by Sergeant Neal on July 2, 2005. Rather, the Union insists that Bailey "was open in admitting that he had driven beyond the thirty-mile limit and used deception to maintain an assigned vehicle by turning off his computerized GPS in route to Marion at that point where he passed his old residence." (Union brief pp. 8-9).

The Union also specifically challenges the Employer's determination that Bailey violated OSP Policy 203.20 by failing to notify a supervisor that he had been involved in a "response to resistance/pursuit" based on his July 13 traffic stop of the young female driver. The Union argues that

Trooper Bailey did not provide any "false or misleading information to a supervisor regarding a motor vehicle pursuit" but rather properly exercised his independent judgment and discretion, as authorized in OSP 200.05, in not viewing the events as an actual episode involving "fleeing and a pursuit" meriting the imposition of any criminal charges or any duty by him to comply with the provisions of OSP 203.20 in the absence of any recognized pursuit and Bailey's assessment that he did not feel that the young offender was attempting to elude him. (Union brief p. 7)

The Union's arguments, as taken directly from its post-hearing brief, are as follows:

THE SECOND CHARGE

The second of the two charges is the easiest to deal with and I would propose to address it before dealing with the use of an assigned patrol vehicle beyond a thirty-mile radius from the Post and the issues surrounding that usage.

The allegations surrounding the July 13th traffic stop speak to actions taken by Trooper Bailey that in actuality constitutes good technical law enforcement. Trooper Bailey engaged in independent decision making, which is specifically supported by OHP policy. As a matter of policy, the individual officer is given the authority to make independent judgments consistent with enforcement. Even with cameras and microphones the OHP and law enforcement in general is better served by not having a Division staffed by uniformed automatons.

The events of July 13, 2005 became the subject of an Administrative Investigation conducted by Sergeant Chad Neal. Sergeant Neal stated in his testimony during the arbitration hearing that it was very unusual for an investigation involving this type of subject matter to be assigned to someone like himself who is part of the AIU Unit of the OHP. A matter of whether or not a Trooper chose to identify a traffic stop, otherwise uneventful, as a response to resistance/pursuit, would under usual circumstances be assigned to a Sergeant from the Trooper's Post. Instead, he drew the assignment from GHQ.

Sergeant Neal concluded the following, as a result of his investigation, "Trooper Bailey failed to notify a supervisor that he was involved in a pursuit. OSP Policy 203.20 clearly states an officer *shall notify his/her supervisor as soon as possible after responding to a resistance to affect an arrest, detention, or mission. A supervisor shall complete a case investigation*." (Emphasis mine)

Sergeant Neal was not asked to investigate whether or not Sergeant Thompson should have initiated and completed a "case investigation" or whether he had actual knowledge of whether or not a case investigation was required to be opened on the basis of the facts surrounding the traffic stop initiated by the Grievant early on the morning of July 13, 2005. Neal started his investigation on July 21, 2005 and interviewed the Grievant on July 26, 2005.

Here is what actually happened related to the stop:

Trooper Bailey was working without supervision on duty during his third shift tour of duty. His Sergeant would normally be Sergeant Shane, but Shane was not on duty that night.

Shortly before 3:00 AM, Trooper Bailey made a traffic stop. Before pulling the vehicle over, a check of the plates on the vehicle he was stopping did not come back as registered to that make and model of car. Trooper Bailey suspected that he might have a stolen vehicle. The stop was on Sullivant Ave. in the city of Columbus. When he turned on his pursuit lights the vehicle slowed and began to pull to the side of the road, but did not come to a complete stop. The vehicle then drove off and continued eastbound on Sullivant Ave.

Trooper Bailey then notified the post that the vehicle was 'taking off' and gave the direction of travel. He activated his siren, but did not call in a pursuit. A passenger in the vehicle jumped out of the car while moving, and Trooper Bailey reported that the passenger had "bailed" to the Post Dispatcher.

The vehicle traveled about one half a mile or less then turned up another street and traveled about a fourth of a mile and stopped.

Trooper Bailey drew his weapon and ordered the driver out of the vehicle. The driver turned out to be a 17 year old girl and the vehicle turned out not to be stolen, but apparently properly in the possession of the driver, with the permission of a relative.

The vehicle had stopped in front of the driver's home and her family came outside but maintained a distance from the events, and then explained to Trooper Bailey that their daughter had recently been cited for driving without a valid license.

The driver said she left the scene of the initial stop when told to do so by her boyfriend and she appeared both scared and confused by the unfolding scene.

Columbus city police along with a fellow Trooper also came to the scene, but were obviously not needed.

Trooper Bailey, could have charged her with fleeing and/or operating under suspension and taken her into custody and to jail. He chose not to do so. He issued the appropriate citations for the registration violation and the driving under suspension, but elected to release her to the custody of her parents.

He then completed the three hours remaining on his tour of duty.

In the administrative investigation interview with Sergeant Neal, the Grievant gave a nearly identical recitation of the facts as I have outlined them above. Sergeant Neal's summary of his investigation does differ in some respects with the actual interview transcript of Trooper Bailey. Sergeant Neal asked him if he contacted Sergeant Thompson when he came back in to the Post. Trooper Bailey told him that he did talk with Sergeant Thompson and that he had given Sergeant Thompson a brief overview of what had happened. (Note) Sergeant Neal added in his summary "*but never advised him (Thompson) of the pursuit*". Trooper Bailey did not make that statement to Neal.

Sergeant Neal in his interview of Trooper Bailey asked the grievant if he told Sergeant Thompson that he had his siren on and he (Bailey) responded "*not at that time.*" (Note) Sergeant Neal stated in his investigation that the response was *"no"*. He was then asked if he told Sergeant Thompson about the passenger jumping out of the vehicle and the grievant said that he had told Thompson about the passenger.

Trooper Bailey was then asked if he was familiar with OSP 203.20, response to Resistance policy and he said, yes. (Note) Sergeant Neal went on in his investigation summary to place another sentence in at this point. He wrote that Trooper Bailey stated that he realized now that he should have reported the incident to a supervisor. *The tape discloses that Trooper Bailey did not make that statement.* I point these discrepancies out not to discredit Sergeant Neal's investigation but to point out that any course of action upon very close inspection and re-inspection will disclose inconsistencies and mistakes.

Sergeant Neal elected, or overlooked, putting in his investigative summary some additional facts that I believe highly germane to the issue. Sergeant Neal left out two questions that he asked Trooper Bailey during his interview. Those two questions shall be addressed later in my brief.

Sergeant Thompson was not scheduled to be at work on the first shift of July 13, 2005. He was asked to change his scheduled shift to the first shift by his Post Lieutenant so that he, Thompson, could follow the grievant and see if he drove his assigned vehicle beyond the thirty-mile limit to his new residence. This was to be a semi covert assignment. The covert nature of the enterprise was compromised when Sergeant Thompson went on his radio to inform the Post that he was in route to the Post at some time around 6:00 AM on the morning of July 13, 2005.

According to the Thompson interview, when Sergeant Thompson arrived at the Post he was informed by the Dispatcher of the traffic stop that Trooper Bailey had called in at three that morning. He saw the notation as to the events as they unfolded as carefully recorded by the Dispatcher in her log. Thompson told Sergeant Neal that he knew that the Dispatcher had contacted both the District Six Staff Lieutenant, who was the duty officer district wide for that night shift, and had in addition paged Lieutenant Ward, the Post Commander. Both had been informed of the events shortly following the 3:00 AM traffic stop by the Grievant.

There is acknowledged evidence of multiple telephone conversations between Trooper Bailey and Sergeant Thompson initiated by Trooper Bailey shortly after 6:00 AM on the 13th. We introduced into evidence at the hearing the Grievant's cell phone records. Any doubt about what Thompson saw as recorded by the Dispatcher is resolved when Thompson reported during his interview with Sergeant Neal that he and Trooper Bailey reviewed the events of the earlier traffic stop. Thompson told Neal that he arrived at work at 5:50 AM and the midnight dispatcher informed him that there was a kind of a pursuit that happened overnight. He went on to say that the dispatcher informed him that Lieutenant Ward had been notified along with the District 6 duty officer. He also said that the dispatcher had made an entry into the CAD system concerning the pursuit.

Actually Sergeant Thompson confirmed substantially what Trooper Bailey has contended all along. He stated that Trooper Bailey told him that it was not really a pursuit. He told him that it involved a 17-year-old female who had a male companion with her. Trooper Bailey had told him that he had a violation on the driver and activated his pursuit lights to make a traffic stop. The vehicle began to pull over, but then accelerated for a short distance stopping at her residence. Trooper Bailey told him that the passenger had bailed out before the car came to a stop. Sergeant Thompson told Sergeant Neal that Trooper Bailey reported to him that he did not file any fleeing charges because he felt the young driver was emotionally upset due to her boyfriend yelling at her not to stop. He did not feel that the female was trying to elude him.

Sergeant Thompson acknowledged that he knew all of the above on the morning of the 13th of July. The responsibility of opening a case investigation is, according to OHP Policy, that of the Sergeant. It is Sergeant Thompson who would face the paper work of opening a case. The responsibility of Trooper Bailey would only be to write up a short statement.

Now, to what it was that Sergeant Neal left out of his investigative summary.

On the tape of his interview of Trooper Bailey, Neal asked Trooper Bailey if Sergeant Thompson gave any indication that he was going to initiate a case investigation. Trooper Bailey told him that Thompson gave no indication that he was considering opening a case. He then asked Trooper Bailey if Sergeant Thompson asked him to write up a statement of the stop. Trooper Bailey told him that Sergeant Thompson made no such request. Neither these questions nor answers appear in Sergeant Neal's investigative report. Perhaps the most interesting part of the case was the testimony of Sergeant Neal at the hearing that it was he, and not Sergeant Thompson, who fulfilled the requirement, as he saw it, of opening a case file on the "pursuit". He opened a case days after he interviewed Sergeant Thompson.

The point is of course that the whole issue is phony and thrown into the mix only to give some additional support to the termination of the grievant. Trooper Bailey testified that he believes in treating people as individuals and that requires electing in some instances not to take the strongest available enforcement action. The OHP Policy says it is the decision of the individual officer. Trooper Bailey, while not "badge heavy" did issue citations without taking custody of the young woman. It would not have been any harder on him to take the young woman into custody. He had three more hours to put in and other than a statement; the casework would be that of the Sergeant.

The Employer has a policy that says just that. It's OSP-200.05. The Policy states as follows:

"The primary objective of the Division is to gain compliance with applicable traffic laws. Each officer must make the decision whether compliance can be accomplished through issuance of a citation, warning, vehicle inspection report, or traffic safety reminder. The decision to take enforcement action rests with the individual officer." (OSP-200.05 Emphasis added)

I think he, Trooper Bailey, did the right thing under the circumstances. Not seeing the event as a "fleeing and a pursuit", so as not to file criminal charges was appropriate under the circumstances. In the last analysis the decision is always with the individual officer.

THE FIRST CHARGE

"It was found that on July 2, 2005 Tpr. Shawn T. Bailey made false and misleading statements in reference to his duty status and location and that he used a patrol car for non-work related reasons. Tpr. Bailey also failed to establish living quarters in compliance with Division Policy."

In his Administrative Investigation Interview, Trooper Bailey said that he drove to his new home in Marion during the July 4th reporting period, which would include July 2, 2005. He also said that he drove to his new home in Marion on ten to fifteen occasions in violation of OHP Policy. He avoided directly lying about driving beyond the thirty miles when Sergeant Thompson on the morning of the 13th asked about his driving to Marion, by saying that on weekends he leaves the cruiser at the apartment of his friend in the complex where he used to live. A statement that, although technically true, was obviously intended to deflect an admission of noncompliance with policy. On July 17, 2005 he encountered Lieutenant Ward at his former apartment complex looking to see if Baily's cruiser was at the complex. It was not. Bailey had already elected to return the cruiser to the Post parking lot and to use a pool car when on duty. The Employer did not call Lieutenant Ward although he was present at the arbitration hearing and Sergeant Thompson was not called and not present due to his stated illness.

Trooper Bailey in his Administrative Investigation Interview, also conducted by Sergeant Neal, was open in admitting that he had driven beyond the thirty mile limit and used deception to maintain an assigned vehicle by turning off his computerized GPS in route to Marion at that point where he passed his old residence. His route to his new home took him by his old residence.

If that were the whole story, it would reflect poorly on Trooper Bailey's "character" and it might support the maximum penalty, albeit an argument could be made that the punishment would not fit the crime. After all, strength of "character" is what the whole "CORE Values" is about. Commitment to CORE Values is an affirmation of the strength of character that represents the very best we could hope to find in those that serve us as Ohio Highway Patrol Troopers.

Arbitrator Stein, in terms of strength of character, Shawn Bailey is at the highest level we could hope to find. If the issue is one of character, this young man reflects strength of character beyond that of his fellow officers. Character, most clearly beyond that of the Shift Supervisor he revered, sought out for advice, and in whom he has the right to be so severely disappointed.

Bailey Committed to the OHP

Shawn Bailey has more dedication to his chosen profession than anyone I have ever met. He had every right to call it a day and secure a disability retirement. He earned the right to pack it in, reflect upon his line of duty injuries, his disability, his continuing and constant pain, and trade in the uniform he loves. He had the right to take a pension and turn to civilian pursuits. Yet, from the day he chose law enforcement, the OHP remains his constant commitment. His work history was simply preparation for his becoming a Trooper. He is a former Marine who became a Deputy Sheriff while waiting for an OHP Academy opening.

A short six months after his graduation from the OHP Academy and his being sworn in as a Trooper, he was seriously injured in the line of duty. He did not know the extent of the injury at the time of that October 2002 automobile accident. His cruiser totaled, he was off work only a matter of a few days. The pain he experienced in his lower back continued and he worked through it while engaging in an exercise and rehabilitation program to strengthen surrounding muscles.

For ten months physical therapy didn't improve the pain. Instead it seemed to be progressively worse. In August of 2003 Ohio Worker's Compensation authorized an MRI. The MRI disclosed that the damage was worse than expected. There were three spinal cord discs that were damaged; L4, L5 and S1. Trooper Bailey worked through the pain. The belt that supported his service weapon, extra ammunition magazines, taser, asp, radio, mace and handcuffs was itself an aggravating factor to the incessant pain. Workers Compensation, moving cautiously authorized a series of Trigger Point injections. The "trigger point" does not refer to the mechanism of delivering the serum; it refers to the point of the pain. The injectable anesthetics are delivered by use of a long needle and according to Trooper Bailey (an expert on pain) it is a very painful procedure. Once a week for six weeks Trooper Bailey underwent the "trigger point" treatment while continuing to work.

The pain did not subside but that level of conservative treatment required by Workers Compensation had been satisfied. In April of 2004 Trooper Bailey underwent an operation to establish more concretely the extent of the damage to his vertebrae. That exploratory operation would serve to meet a level of medical evidence to support the authorization by Workers Compensation of continued or expanded treatment. The operation confirmed the extent of the damage to L4, L5 and S1. Trooper Bailey continued to do his job and struggled with the continuing pain. He maintained a rigorous program of physical exercise, which while painful of itself, strengthened muscles in his back.

In June of 2004, Workers Compensation authorized, on the basis of the April exploratory surgery and its findings, additional surgery. The surgery known as Intradiscal Electro thermal Annuloplasty (IDET) surgery was the next level up in conservative approaches to disc injury as required and authorized by Workers Compensation as it does not involve lengthy hospitalization. The operation involved wrapping a titanium coil around or about his damaged vertebrae. The titanium was then heated to force expansion. Following this procedure he was required to wear a back brace for eight weeks. Throughout the pain that was present from October of 2002 he had continued to maximize his time in uniform and in service. The IDET surgery, although itself painful, did not alleviate the daily pain in his lower back. He returned to prescribed professional physical therapy in addition to trying to maintain his own physical therapy.

In September of 2004 he awoke one morning unable to get out of bed. He was taken to the hospital, and shortly thereafter emergency surgery was performed. This time there was no Workers Compensation pre authorization. This time the surgery was emergency in nature and it was radical. Two metal plates were attached to either side of his vertebrae column. The plates were held together with six four-inch metal screws. Still, less than three months later, Trooper Shawn Bailey had returned to the OHP as a road Trooper. His Commander had earlier prevailed upon him to file for disability retirement with the OSHPRS. He filed, but he elected to furnish no medical evidence that would be necessary to support a determination that he was disabled from effective service as an OHP Trooper. He was adamant that he would, and could, meet the demands of being a Trooper. Remarkably, apparently he did just that. His last evaluation, discloses that the Employer rated him as exceeding expectations in six of nine categories and meeting expectations in the other three categories.

The personal cost of remaining in his profession was high. I asked him about pain levels. He testified that prior to the plates and screws being inserted, his pain level was at a constant 8 to 9 on a scale of 10. He testified that following the radical operation the level went down to a constant 6 to 8 on a scale of 10. Pain of the kind experienced by the grievant is extreme. He was prescribed strong narcotic painkillers. He chose not to take them during the hours he worked. Actually, there was no choice. He could not take the strong narcotic painkiller (Oxycontin) and make the decisions Troopers are called upon to make.

In his medical records, subpoenaed from the Employer's Human Resources Department, you will see references to Shawn Bailey. His Commander says that Bailey's doctor does not see how he could ever return to work following his metal plate surgery. Another member of the staff at HRM makes note of how quickly Shawn is returning to a program of therapy including swimming and says something to the effect that he sure wants to become able to get better.

Now he is fired, and his ability to receive disability, even should he so elect, may well be lost to him. Still, the last question I put to him at the arbitration hearing was 'would you want to come back to work should the arbitrator restore you?" His answer was, yes, it's my job. Still, perhaps the best example of his commitment to his work is the last operation he endured.

In September of 2005, just before his termination, Trooper Bailey underwent another back operation. In most circumstances, he testified, the plates and screws that comprised the September 2004 operation would remain in the patient for the rest of his life. However, in riding in the patrol cruiser, the heavy gun belt he wore would rub up against the plates causing great pain and discomfort. In an attempt to remove the constant interaction between the gun belt and the plates, he chose to have an operation to remove the plates and screws. He hoped that the cadaver bone inserted in his back along with the plates, had grafted sufficiently to support removing the plates. After the operation, the doctor gave him one of the large metal screws taken out of his back. I showed it to him and had it identified at the arbitration hearing.

It is safe to say that Shawn Bailey is not a "shirker", a malingerer, or perhaps even "reasonable" when it comes to wanting to do "his job'; that of being a law enforcement officer. I repeat he has more dedication to his chosen profession than anyone I have ever met.

Family

Shawn and his wife, Carly, were lucky enough to conceive a child. To the best of our knowledge his little girl is a healthy and happy child. Carly Bailey is pursuing a degree in education and is, as I recall, in third or fourth year of study at Ohio State University Marion Campus. While it was possible for her to continue her studies before the baby without help, Shawn and Carly knew that would no longer be true once the baby came. They would need help with the baby to permit Carly to continue her studies. Fortunately Carly's mother and father live in Marion Ohio. Carly's mother would be available to look after the baby and permit Carly to continue to attend OSU at the Marion Branch. They looked for and found a house in Marion within blocks of Carly's parents. They bought the home. Trooper Bailey put in

for a transfer to either Marion or Delaware. Each assignment would permit Bailey to live within 30 miles of his Post. Bailey received notice of the approval of his transfer to his second choice, Delaware.

Shawn took advantage of the "baby leave" provision of the collective bargaining agreement when his daughter was born. He closed on his new house and prepared to move in the same week as his "baby leave" expired. Unlike, promotional transfers, there is no provision for Troopers transferring being given time in which to continue to take home a cruiser while finding suitable housing. In promotional transfers, the successful transferee is given six months in which to continue to keep his assigned vehicle while commuting a greater distance than thirty miles.

While the ability to maintain an assigned vehicle for commuting to and from work is a convenience, and cost saving for most people, it was of far greater significance to Trooper Bailey. The reason was the equipment found in the newer vehicles and the condition of Bailey's back. Trooper Bailey's back, then complete with metal plates and screws was a constant source of pain. The new Ford Crown Victoria Police Interceptors (CVPI) came equipped with seats that electronically provided customized lumbar support to fit the contours of the driver. The older unassigned cruisers were not equipped with the electronic lumbar supports. To some, the difference might have been a minor inconvenience, but to Trooper Bailey it was a matter of major consequence. Bailey had an assigned vehicle before going on leave. He had the seniority to command one once his transfer was accomplished. His problem was what to do in the meantime. Not having a "take home" car meant that he would have to move his considerable gear from car to car and that he would have to make do with a pool vehicle that accelerated the pain he was experiencing. Remember, by this time Trooper Bailey was already trying to get approval for an operation that would remove the plates and screws that were rubbing against his Sam Brown belt while he was driving.

What to do? Of course he knew that the policy accommodated only the promotional transferees. But, the difference was the difference between eight hours of much more intense pain versus eight hours of shift duty with less discomfort. He elected to do what he always did. He took his problem to his shift supervisor. I remember being in the army years ago. The only guy in the world I would have followed anywhere at anytime was my First/Sergeant. For Trooper Shawn Bailey it was Sergeant Jeff Shane. Shane was an "old school" Sergeant with more than twenty years of service. He was the shift commander for the night shift that Shawn had worked almost exclusively. Shane, at the arbitration hearing, openly testified that he was like a "father" to the young Troopers he supervised.

Bailey talked to Sergeant Shane about what he could do about keeping his assigned car until his transfer, already approved, would be finalized. Sergeant Shane, himself the subject of an Administrative Investigation that was undertaken after Trooper Bailey was already fired, acknowledged that Bailey came to him with the question of what he was going to do until his transfer came through. At his Administrative Investigation interview Sergeant Shane also said that he told Bailey that he didn't believe anyone would get upset if he drove to Marion in his take home vehicle a few times, but that he should stop immediately if someone said anything to him about it. Shawn had his answer from the man he respected more than anyone, his shift supervisor.

So, Shawn Bailey received a take home vehicle when he returned from Baby leave. It was a new CVPI equipped with the electronic seats that provided fully customized lumbar support. Bailey used the take home assigned car to make his tour of duty more tolerable. He did not use the vehicle to travel home to Marion for his two days off and he elected to stay at his buddy's apartment on days where he was scheduled into court following his third shift tour of duty. He would sleep following his court appearance up until he was required to report for his next shift. On July 13, 2005 Sergeant Thompson raised the issue of his use of the take home cruiser. Consistent with what Sergeant Shane had advised, he immediately called his wife and was picked up at the Post and for the remainder of his service with the Patrol he used any pool car that was available at the Post when he arrived for duty. More often than not that available vehicle was the old style cruiser without the lumbar support.

<u>July 13th 2005</u>

On August 2, 2005 Trooper Bailey was interviewed by Sergeant Neal as part of the Administrative Investigation surrounding the issue of Trooper Bailey driving his take home cruiser beyond the thirty-mile radius from the Post. Trooper Bailey's interview was taped and the Arbitrator has that interview. It is instructive:

Trooper Bailey was asked if he had a residence outside the 30-mile radius and he answered yes and gave his address as 2279 Lin Hipster Road Marion, Ohio. He was then asked if he had driven a patrol car to that residence and he said yes about 10 to 15 times. Trooper Bailey was then asked if a supervisor had approached him about his residency status and he said yes. He said that Sergeant Thompson did.

He was asked if Sergeant Thompson specifically asked him if he was driving his patrol car to Marion and he said no. He went on to say that Sergeant Thompson had Dispatcher Taylor ascertain his exact location one day when he got

home from court. He said that he responded with a Signal 1-25. Dispatcher Taylor then said per Lieutenant Ward, Sergeant Thompson needs to know your exact location. He then gave her the address of the apartment complex he lived, which was Columbus, Ohio. (This was in fact the location he was at that particular time) Trooper Bailey stated that then he called the post and spoke to Dispatcher Taylor and requested that Sergeant Thompson call him. He said that Sergeant Thompson then called him on his cell phone and he asked him why the concern about his location. Sergeant Thompson gave him no reason, but did say that he was instructed by Lieutenant Ward to do so.

Trooper Bailey then said that he told Sergeant Thompson that he was staying in Columbus on days he had court and would drive to Marion in his personal car leaving the patrol car at the residence. He said Thompson told him that he could not leave the patrol car unattended there and suggested that he leave it on post. Trooper Bailey was then asked what address he was staying at in Columbus. He said that the address was 154 Sanctuary Village. He said that 140 Sanctuary was his old address and he had been staying with a friend that lived a couple doors down. He was then asked how long it took him to get from the Post to that address. He said that it was about 30 to 35 minutes depending on traffic. Sometimes 45 minutes. He went on to answer that he usually had his MDT on when he was in route home. He said that he did not turn the MDT off until he Signaled 1-25. He was then asked what method of operations he used when he would drive to Marion to his home there. He answered by saying that he drove by 154 Sanctuary Village and Signaled 1-25 and then shut off his MDT and then drove on to Marion. He did that approximately 10-15 times. He was then asked when he purchased the home in Marion. He said that it was in June. He was then asked if there was any specific times that he drove to Marion and he said that there was not, but he did remember that he did over the 4th of July weekend. At the end of the interview Trooper Bailey added the following information: Trooper Bailey stated that anytime he was asked directly about his car; he never said that he was not driving to and from Marion. He said that a supervisor had never directly asked him, if he was taking a patrol car to his house in Marion. He said that if he had been asked he would have told them he was.

He was fully truthful about his conduct. He was not forthcoming about two questions he was asked:

He was asked if he had obtained permission from a supervisor to drive his car there and he said no.

He was asked if anyone at the West Jefferson Post had knowledge of him driving his patrol car to Marion and he said no.

In truth, of course, he had asked his supervisor, Sergeant Shane, what he should do. Shane of course knew that he was driving his patrol vehicle to Marion. He protected his Sergeant at the administrative investigation. Interestingly, Sergeant Shane called Bailey after Bailey's interview and asked what the investigator asked about. Bailey told him that the investigator asked if anyone had given him permission or knew about his driving his car to Marion, and that he had said no to both questions.

Surprisingly, Sergeant Shane, the Grievant's shift supervisor, was not interviewed in the course of the Bailey administrative investigation. In testifying at the arbitration hearing, Sergeant Shane stated that after the administrative interview of Bailey, he noticed a difference in Bailey. He seemed withdrawn, and without vitality. He may have testified that he even looked as though he lost weight.

More than "covering" for his Sergeant, he was simply waiting for this man he admired, respected and emulated, to come forward and tell the Employer that he, Sergeant Shane, had given a qualitative approval to Trooper Bailey driving his assigned CVPI to Marion. Bailey was interviewed on August 2, 2005. He was not fired until September 25, 2005. In the interim Trooper Bailey underwent the final surgery that removed the plates and screws from his back. During that time he also waited for his Sergeant Shane to step forward for him, as he would certainly do if the situation were reversed. He waited and at the time of his termination, Sergeant Shane had yet to come forward.

Sergeant Shane never voluntarily came forward.

On October 5, 2005 an administrative investigation was opened on Sergeant Shane. The allegation was that he had knowledge of Trooper Bailey driving his patrol car outside the 30-mile radius. Sergeant Shane was interviewed on October 7, 2005 at 5:08 AM. Sergeant Shane stated that he was Trooper Bailey's supervisor on the midnight shift. He admitted that he had knowledge of Trooper Bailey driving his patrol car outside the 30-mile radius. He stated that he had a conversation with Trooper Bailey while out on the road about him driving outside the 30-mile radius. He stated that the conversation took place around the second or third week of June. He also stated that Trooper Bailey had come to him about the problem of what he was going to do until he got moved to his new house in Marion.

Sergeant Shane was then asked if he gave permission to Trooper Bailey to drive his patrol car and he answered no. Sergeant Shane went on to say that he told Bailey he did not think anyone would get upset if Trooper Bailey took his

car to Marion a few times. He also stated that he told Trooper Bailey that he was not supposed to drive his car outside the radius and he would have to work something out. He then said that he told Trooper Bailey that he would need to stop immediately if someone said anything to him about it. Sergeant Shane, clearly left the inference, if not the direct approval, that it was okay to drive to Marion, but Bailey would need to stop, if anyone said anything to him about it.

Sergeant Shane also stated that it was his belief that Trooper Bailey could have thought that he had implied that it was okay for him to drive to Marion. Sergeant Neal did not place this statement in his summary of his interview with Sergeant Shane. Sergeant Shane stated that he " could have nipped it in the bud and said no". This was left out of the Sergeant Neal summary of the interview of Sergeant Shane. He said that he could have prevented this situation by saying, "Do not drive the car up there, period". He said that he felt sorry for Trooper Bailey with all the things he had going on at that time. He said that Trooper Bailey had just moved, his wife just had a new baby and Trooper Bailey had scheduled back surgery. He went on to say that was the reason he had told Trooper Bailey that he "did not feel anyone would have a fit", if he drove to Marion a few times. He said that his feeling was that Trooper Bailey was going to drive to Marion a few times, but he did not say anything else to Trooper Bailey about it. He also never said anything to anyone else about it until after Bailey had been fired for driving to Marion without permission, and even then only after he became the subject of an administrative investigation.

Sergeant Shane was then asked the following question, which he answered. Sergeant Neal entered neither the question nor the answer in the written investigation.

Do you think he could have believed that you were telling him it was okay to drive to Marion?

Yes, I think he could have taken it as implied that he thought I was telling him that he could drive up there a few times, it was okay.

Sergeant Neal's conclusion was that Sergeant Shane did have knowledge that Trooper Bailey was driving his patrol car outside the 30-mile radius. Sergeant Jeff Shane received a one-day Suspension as discipline. He had no prior deportment.

Trooper Shawn Bailey also had no prior disciplinary record. He was fired.

If the Employer had before it the knowledge it gained on October 7, 2005 from the interview of Sergeant Shane, it would not have fired Trooper Shawn Bailey. Yet armed with the knowledge that this young Trooper had counseled with his supervisor regarding the acceptability of driving his take home car to Marion pending his formal transfer to Delaware, the Employer took no steps to reverse its earlier decision to terminate Trooper Bailey. Actually, the Employer by giving a one-day suspension to Sergeant Shane underscored the disproportionate disciplinary response imposed upon Bailey. There is no other conclusion that can be drawn.

If the issue is "character", I submit that Shawn Bailey, the former Marine who endured four back surgeries, excruciating and ongoing pain to "do his job"; who had faith in his shift supervisor's character to his own detriment; who "treated citizens as individuals", in assessing what enforcement procedures to employ in furtherance of the mission of his department; who elected not to provide the medical documentation to the retirement system that would have guaranteed a disability retirement; and who wants nothing more than to return to his family and the OHP as the Trooper he always wanted to be, has that quality of "character" that the Ohio Highway Patrol seeks in its officers. Admittedly, he has learned from this experience. He will put it to good use. Maybe he will not be able to conclude his full career due to the severity of his injuries. But, he deserves the right to try.

Restore this amazing young man to the position of Ohio Highway Patrol Trooper. That is the remedy we seek and the remedy that the facts of this case merit.

The Union requests that the grievance be sustained and that Bailey be reinstated.

POSITION OF THE EMPLOYER

The Employer basically refutes the Union's claims and asserts that the Grievant's termination was the appropriate discipline imposed in response to the Grievant's "deceptive and untruthful behavior." The Employer insists that "just cause" existed to merit the Grievant's discharge based on his numerous violations of OSP policies and rules. The Employer specifically cited the following examples:

> The Grievant himself has admitted to being dishonest during an administrative investigation when he stated a supervisor was not aware of his actions nor had one given him permission to drive to Marion. He lied repeatedly when he falsely reported his location as out of service at his residence when in fact he was driving to Marion on numerous occasions. He lied when he denied being in pursuit and didn't give an accurate account of the incident . . . The Grievant failed to make notification of the pursuit [of the young female driver] to his supervisor in a timely manner. The Grievant did not return to the Post to personally speak to a sergeant about the incident he was involved in nor did he call the Post without being prompted to do so by a sergeant.

(Employer brief p. 14) The Employer contends "the truthfulness violation is a terminable offense in and of itself" and that "the fact that a supervisor gave the Grievant implied permission to drive outside the thirty-mile radius does not change the underlying issues of dishonesty and deception." (Employer brief pp. 4, 14)

The Employer also stresses that the videotape of the driving incident provides clear evidence that the Grievant was actually involved in a vehicle pursuit. The Employer specifically argues:

> [T]he real reason the Grievant did not want the incident logged as a pursuit was because he failed to do his job because he felt sorry for the suspect. He knew he was inefficient in his duties by not making an arrest for a fleeing suspect. He knew that since he didn't charge the suspect with fleeing he would be intensely questioned if the incident was logged as a pursuit; therefore, his only course of action was to deny that there was a pursuit.

(Employer brief p. 10).

The Employer claims that the Grievant's behavior over a six-week period, including his responses to administrative interview questions which indicated that no supervisor was aware of his driving to Marion and that no one had given him permission to do so, have destroyed or severely tarnished the Grievant's credibility and also his effectiveness as a trooper due to his diminished ability to serve in future cases as a credible witness.

The Employer's arguments, as presented in its post-hearing brief, include the following language:

Argument

I. Why the patrol car issue is not simply an issue of driving a state vehicle outside the 30 mile radius.

In the Union's opening statement, they argued "The Employer would not have terminated the Grievant if they had known all the facts." The fact that a supervisor gave the Grievant implied permission to drive outside the 30 mile radius, does not change the underlying issues of dishonesty and deception. The case at hand does in fact deal with an Employee driving outside the radius; however, the much bigger issue is the deceptive acts that were deployed in an attempt to conceal his behavior. This is not simply a case of an employee who was terminated for driving his cruiser to his residence outside the 30 mile radius as the Union tried to claim. If it had been, we wouldn't be arbitrating a termination case.

Sergeant Neal testified that Thompson told him during his interview that the Grievant had denied driving to Marion on July 13. *See, M-1 CD* This conversation was clearly documented on an e-mail dated July 13, 2005 @ 10:41 AM from Thompson to Ward. *See, M-1 p. 13* This document is perhaps the most significant piece of evidence relating to the Grievant's behavior. The e-mail clearly documents a conversation that was held between Thompson and the Grievant. Not only does it document what the Grievant told Thompson, but it also verifies the phone calls that Thompson states were made on the morning of the 13th. The Grievant testified that he never told Thompson he was staying at the apartment during his work week and driving to Marion in his truck on his time off, yet it was clearly documented by Thompson in this e-mail. If this conversation didn't take place, why would Thompson have documented it in the e-mail? He also documented the conversation where the Grievant denied driving to Marion. The e-mail states "I told him not to be driving to Marion and he stated he hasn't." This is clearly a summary of the conversation Thompson explained in his interview where he acknowledged making the statement "certainly you haven't been driving your patrol car to Marion," to which the Grievant replied "No."

The Grievant testified he was never directly asked by a supervisor if he was driving to Marion. He stated if he had been asked, he would have told the truth. It is ridiculous to think that based on Thompson's question "certainly you haven't been driving your patrol car to Marion," the Grievant was not responding to a question. Clearly, if the Grievant didn't believe it was question, he wouldn't have responded. Nevertheless, the Grievant also denied this conversation took place.

The e-mail also documents the Grievant's failure to update his current address which Sergeant Neal testified is required by patrol policy. Thompson wrote "...He & Carly bought a house in Marion and that is where she is staying. He said he had not told the post of his change of address. I told him to update our records tonite." Neal testified the Grievant told him he moved to Marion the first week of June. This was also acknowledged by the Grievant's testimony. This is evidence of the Grievant's direct violation of the living quarters rule.

One must ask the question, what does Thompson have to gain by not accurately reporting in his e-mail the conversation that took place between himself and the Grievant on July 13th? The simple answer is NOTHING. In fact, Thompson is not even the Grievant's immediate supervisor. There is no reason or testimony indicating Thompson had anything to gain by fabricating a story in an attempt to have the Grievant terminated. It simply does not behoove Thompson to make false statements in his e-mail to the Lieutenant.

Why the Grievant's claim he never told Sergeant Thompson he had driven to Marion a couple times in a cruiser cannot be true.
The Grievant testified he never had a conversation with Thompson in which he acknowledged driving to Marion. He stated the only time the issue was brought up was by Sergeant Neal in the administrative investigation. The Grievant is clearly lying because if he hadn't admitted to driving to Marion, the Employer certainly wouldn't have conducted an investigation. As far as the Employer was concerned, we did not have any information to warrant an investigation after the Grievant denied driving to Marion on the 13th. It wasn't until the Grievant acknowledged his untruthfulness to Thompson and admitted driving to Marion "a couple times" that the Employer initiated an investigation.

III Exactly how many times did the Grievant drive to Marion in a patrol car?

The Union in its opening statement acknowledged "The Grievant did drive to Marion 10-15 times, that's a fact." However, during the Grievant's testimony, the Union tried to insinuate it was much less. The Grievant testified he did not drive the vehicle to Marion on his time off, nor did he drive to Marion when he had court, which he testified was 2-3 times per week. If this were the case, the Grievant could have driven to Marion anywhere between 0 and 6 times during the six week period. We will never know the exact number, whether it was a couple times, 10-15 times as he admitted in his interview, or between 1 and 6 as the Union tried to imply. Clearly, the Grievant's testimony is not consistent with his interview. Again, causing concerns about his credibility. At any rate, the exact number is not important; however, the fact he lied about his actions and engaged in deceptive behavior is.

IV The Disparate Treatment Claim

The Union called Lieutenant Darden in an attempt to justify the Grievant's behavior or to make some sort of a disparate treatment argument. Additionally, Joint exhibit 4 was introduced and will probably be used by the Union to argue it is acceptable for units to drive outside the established radii. In the case of Lieutenant Darden, he made an operational decision to drive his cruiser outside the radius twice. Both incidents were based on a logical thought process. When he was questioned by his Captain, he explained the relevant circumstances and the Captain instructed him to refrain from the practice in the future. In the two cases included with Joint 4, the Superintendent has granted officers exemptions as is his prerogative. Both officers utilized the appropriate channels to secure an exemption as required by patrol policy. To compare either of these instances to the present case would be absurd. Unlike the Grievant, neither Lieutenant Darden nor the officers with exemptions were deceptive or untruthful.

V Sergeant Shane's involvement

The Union attempted to paint a picture of the Grievant as an innocent victim who was trying to cover for his sergeant. You heard testimony from the Grievant stating he was just waiting for his sergeant to come forward and rescue him. Sergeant Shane testified that he had made a mistake by giving implied permission and also failed to come forward with the information he knew. He also stated he was disciplined for his actions. More importantly, Shane testified he did not tell the Grievant to disguise or conceal the fact that he was driving to Marion. Specifically, he did not tell him to shut down his mobile data terminal or falsely signal out of service at his residence and continue driving to Marion. Actually, Shane told him if anyone said something he would have to stop.

Shane testified he had a conversation with the Grievant at approximately 4:30-5:00 a.m. on the date of the interview. (The Grievant's interview was at 5:00 a.m.) *See, M-1 p. 2* He testified he told the Grievant to "tell the truth," to which

the Grievant replied, "I intend to." Shane also testified to a second conversation he had with the Grievant after the interview. Shane stated he asked how it went and what they asked him. Shane explained the Grievant told him they asked him if a supervisor had knowledge of him driving to Marion and the Grievant told them "no."

According to the Grievant, this conversation that Shane spoke so detailed about in his testimony, never occurred. The Grievant explained that Shane never spoke to him before the interview regarding the patrol car issue on August 2nd. The Grievant testified he spoke to Shane prior to the pursuit interview which was on July 21st. If this were the case, Shane's entire testimony would have been incorrect, yet the Union did not cross-examine Shane regarding this important issue? If in fact this was the case, what is the Grievant trying to claim; it was acceptable to lie on the second interview because his sergeant only told him to tell the truth before the first interview? Once again, the Grievant is denying a conversation that took place between himself and a supervisor.

VI The Lieutenant's Statement

As previously stated, the Grievant testified he never told Thompson he was staying at the apartment during the week and driving to Marion on his time off. He further testified that he never told his Lieutenant about his living arrangements either. This was pointed out specifically by the Union, insinuating it was just another incorrect statement made by Thompson. When the Employer's Advocate directed the Grievant's attention to page 8 of management exhibit 1, and recited the portion where Lieutenant Ward stated, "He (the Grievant) stated he had bought a house in Marion and stayed with a friend (154 Sanctuary Village Drive) through the week and went home on his time off days." The Grievant's response was that the Lieutenant's recollection was not correct. The Grievant further testified his Lieutenant did not even tell him why he was at his apartment complex; however, he also stated he didn't ask his Lieutenant either.

The Grievant's explanation of what transpired at his residence simply doesn't make sense. The Grievant expects us to believe his Lieutenant showed up at his residence, did not tell him why he was there, and he didn't inquire as to why he was there either. Then the Grievant claims that everything the Lieutenant wrote in his statement about the contact is incorrect. Once again, the Grievant is claiming another supervisor is incorrect. The same question should be asked of Lieutenant Ward. What does he have to gain by fabricating something the Grievant told him? Again, the simple answer is NOTHING.

VII The pattern of dishonesty continues with the pursuit incident.

In the Union's opening statement they claim the pursuit issue was just a "throw-in." The Union couldn't be further from the truth. If there is one thing that is blatantly obvious to anyone watching the video of the incident, it is the undeniable fact that the Grievant was clearly in a vehicle pursuit. The mere fact the Grievant is trying to deny that speaks volumes about his credibility. The Grievant testified he didn't think it was a pursuit at the time, but upon looking at the tape agrees it may have been. This is an unbelievable and ridiculous statement for a trained Ohio State Highway Patrol Trooper to make.

The Grievant is speaking out of both sides of his mouth. He states he didn't believe it was a pursuit, but yet he claims to have made all the necessary notifications required for one. Sergeant Neal provided testimony regarding how Sergeant Thompson was advised of the pursuit by the dispatcher. The Grievant did not attempt to speak with Thompson until Thompson made contact with him. The Grievant testified he heard Thompson signal in-service on the radio, but failed to return to the post to discuss the event. Sergeant Neal testified to the requirements of an officer when involved in a response to resistance situation, specifically a vehicle pursuit which is a 551 classification. *See, M-4 page 4 paragraph e* Patrol policy specifically places the burden on the officer to contact a supervisor as soon as possible after the incident.

VIII Inconsistencies between what the Grievant told Sergeant Thompson and what actually occurred.

Sergeant Neal testified that during his interview with Thompson the Grievant advised Thompson the pursuit covered only 500 feet and took 30 seconds for the driver to come to a complete stop. When asked by Thompson about the use of his siren, the Grievant replied he beeped his siren once.

The Grievant's testimony regarding the distance of the pursuit varied with the AI and also with what Thompson advised. In fact, the Grievant probably doesn't even recall what he told Thompson about the length of the pursuit. Ultimately, if this issue is indeed a misunderstanding as the Grievant insinuated, there are several other issues that are obviously troublesome. The Grievant left out important details such as taking the violator out at gun-point and erratic driving including the vehicle driving up over the curb. These details would have certainly caused a supervisor to take a

closer look at the incident. The Grievant claims he never told Thompson he beeped the siren once; therefore, once again, we are expected to believe the Grievant is telling the truth and everyone else is lying.

IX Why would the Grievant claim there was not a pursuit?

The Union has insinuated that Thompson bears the responsibility for completing the case investigation and will probably infer that he just didn't want to do the paperwork. It is true that Thompson would be responsible for the report, but the Grievant is the one who clearly tried to hide the fact he was involved in a pursuit from the beginning.

Dispatcher Routte testified the Grievant came to the post and asked her, "Why did you log it as a pursuit?" She advised that she replied "because you said they were not stopping." Dispatcher Routte also testified (during an utterance in the hearing unrelated to any questioning), that she asked "Why didn't you take that girl to jail?" She also advised the Grievant told her the suspect "was on a fast track to nowhere and he felt sorry for her." When cross-examined about whether he told the dispatcher he felt sorry for the suspect the Grievant failed to give a direct answer and was evasive. Eventually he stated he told her he was being compassionate. The Grievant denied making the statement "she was on a fast track to nowhere," and didn't recall the dispatcher asking him about taking the suspect to jail. Once again, the Grievant claims someone else is incorrect.

It is obvious the real reason the Grievant did not want the incident logged as a pursuit was because he failed to do his job because he felt sorry for the suspect. He knew he was inefficient in his duties by not making an arrest for a fleeing suspect. He knew that since he didn't charge the suspect with fleeing he would be intensely questioned if the incident was logged as a pursuit; therefore, his only course of action was to deny that there was a pursuit. This is why he lied to his Sergeant and only provided half of the details while conveniently omitting the most damning ones.

X The Grievant's admissions

Although the Grievant has denied several facts uncovered in the investigation and allegations made by several co-workers, he has admitted to acts that in and of themselves are terminable offenses. The most significant admission the Grievant has made involves the lie he told when questioned in the official administrative investigation. He testified he knew he was untruthful when he told Sergeant Neal a supervisor was not aware of his driving to Marion, nor had one given him permission to do so. He admitted to advising the post he was out of service at his residence, when in fact he was continuing to his residence in Marion. He also admitted the deceptive manner in which he chose to disguise his movements by shutting down his MDT thus, preventing the tracking of his movements.

XI Credibility in the law enforcement profession

As the Employer argued in its opening statement, the law enforcement profession is built upon a solid foundation of honesty and integrity. If these integral qualities are compromised, the profession, not just the specific agency, suffers a loss of public trust. It is for this reason, the Ohio State Highway Patrol takes cases of dishonesty and untruthfulness very seriously. The Ohio State Highway Patrol is a leader in the law enforcement profession and has an outstanding reputation for professionalism and integrity. Our officers are routinely called to testify in official proceedings based solely upon their observations. Judges and magistrates often make their decisions based on the credibility of the witnesses. If a law enforcement officer is found to have issues with their credibility, they have essentially rendered themselves useless in a court of law. When attorney's become aware of these instances, the officer's character is subject to attack each and every time they take the witness stand for the rest of their career. Based on these reasons, the Ohio State Highway Patrol does not take instances of untruthfulness lightly.

Arbitrators have ruled that police officers are held to a higher standard. In *Ohio Civil Service Employees Association v. The Ohio State Highway Patrol, Case Number 15-00-990706-0072-01-09 (Robert G. Stein, 2000),* a radio operator was removed for untruthfulness; specifically, the employee was going to be late for work so he chose to fabricate a story to cover-up his tardiness. Arbitrator Stein wrote, "An employer has the right to expect an employee to be honest. While it is generally accepted by arbitrators that police officers are held to a higher standard of conduct, being dependable and truthful is expected of all employees from the day they fill out their applications for employment." In the cited case, the termination was the result of dishonesty surrounding a single event and involved a radio operator. Arbitrator Stein subsequently upheld the termination of the Grievant. In the present case, we have a commissioned law enforcement officer that has engaged in a pattern of dishonesty and untruthfulness. Surely termination is the appropriate action.

Sergeant Neal testified to the importance of honesty in the Highway Patrol. He testifies that as an instructor in the Academy, it was relayed to cadets that honesty was expected in the Division and dishonesty would lead to removal. Both Sergeants Neal and Shane were asked what one thing in the Highway Patrol would lead to termination; they replied untruthfulness and dishonesty respectively. The Grievant was asked the same question and after some hesitation, he replied "dishonesty." He knew his answer was the nail in his coffin. In fact, during his testimony, the

Grievant stated "I know for a fact that dishonesty is the biggie." He further explained, "I know you would be forgiven (in the Patrol) as long as you tell the truth." The Grievant then acknowledged he lied during an official investigation.

It was no surprise to the Grievant that he would face serious consequences if he were caught being untruthful in the Ohio State Highway Patrol. He had been put on notice since the first day he stepped in the Academy. He was also told the consequences of untruthfulness prior to his interview when he was read the following phrase:
If you refuse to answer questions completely and/or accurately you may be subject to disciplinary action up to and including dismissal. *See M-1 p.5*
Despite the numerous obvious forewarnings, the Grievant chose to commit quite possibly the most egregious rule violation in the Division, dishonesty.

XII Union's issue with the Employer's failure to call Sgt. Thompson

The Union raised the issue during their opening that Sgt. Thompson would not be testifying in an attempt to insinuate some sort of credibility issues with his involvement. In response to this allegation, the Employer interjected the Union was put on notice November 28th that Sgt. Thompson would be unavailable for the hearing due to a back injury. The Union did not raise any objections nor wish to reschedule the hearing for a later date. In accordance with Section 20.08 of the collective bargaining agreement, the parties exchanged witness lists. It is important to note, the Union failed to place Sergeant Thompson on their witness list. If his testimony was crucial to their case they should have placed him on their list. It should also be noted, the Union failed to cross-examine several witnesses on important issues the Grievant stated were either incorrect or simply did not occur. Lieutenant Ward, who was on the Union's list and present for the hearing, was not even called by the Union to testify.

Conclusion

The Employer believes the overwhelming evidence presented in this case clearly proves the Grievant has violated each of the rule violations as charged. Unfortunately for the Grievant, one of the rule violations happens to be a terminable offense. When faced with the pattern of deception and dishonesty that was uncovered during the investigation, the Employer had no choice but to terminate the employment of the Grievant.

The Grievant's actions are not limited to a single event or conversation in which he was untruthful. The Grievant's behavior constituted a pattern that occurred over six weeks. The Grievant lied every time he claimed he was out of service at his residence when in fact he was driving to Marion. He was deceptive every time he shut down his computer to conceal his movements. He lied when he was questioned in an official administrative investigation. He lied to Sgt. Thompson about the details of a pursuit he was involved in. He denied conversations and statements that Sgt. Thompson, Sgt. Shane, Lt. Ward and Dispatcher Routte state occurred. The Grievant expects us to believe everyone else is "incorrect" (as he testified) but yet his recollections are accurate. The simple fact is the Grievant has shown a pattern of deception and lies that he has carried out right through his testimony in the arbitration hearing itself.

The Employer has the burden of proof to show that "just cause" existed for the termination of the Grievant. The first test for "just cause" is whether in fact the Employer proved the Grievant committed the offenses as charged. Regarding rule violation 4501:2-6-02 (E) False Statements/Truthfulness, the Grievant himself has admitted to being dishonest during an administrative investigation when he stated a supervisor was not aware of his actions nor had one given him permission to drive to Marion. He lied repeatedly when he falsely reported his location as out of service at his residence when in fact he was driving to Marion on numerous occasions. He lied when he denied being in a pursuit and didn't give an accurate account of the incident. He lied when he denied the conversation he had with Sergeant Thompson admitting to driving to Marion "a couple times." He lied when he denied telling the dispatcher the suspect was "on a fast track to nowhere." These are several examples of the Grievant's dishonest behavior. Rule 4501:2-6-05 (B)(1) Use of Equipment, evidence was presented detailing how the Grievant radioed his post stating he was 1/25 (out of service at his residence) but yet continued to drive a state vehicle to his residence in Marion. The Grievant was certainly not using Division equipment in the performance of his official duties after he stated he was out of service at home; he was using Division equipment for transportation to a residence outside the acceptable driving radius. Rule 4501:2-6-02 (X)(1) Living Quarters was violated by the Grievant, which was verified through his own admissions. He stated he moved to Marion the first week of June; however, when Sgt. Thompson asked him if he had updated his address at the post nearly six weeks later on July 13th, the Grievant stated he had not. Rule 4501:2-6-02 (B)(5) Performance of Duty-Inefficiency was violated when the Grievant failed to make notification of the pursuit to his supervisor in a timely manner. The Grievant did not return to the Post to personally speak to a sergeant about the incident he was involved in nor did he call the post without being prompted to do so by a sergeant. Thus, the Grievant was inefficient in his actions or lack there of.

The Employer contends that each offense was adequately proven; however, if the Arbitrator were to determine that one or more of the offenses other than the truthfulness rule were not proven, the Employer contends the truthfulness rule violation is a terminable offense in and of itself.

The second test of " just cause" is whether the Employer's action was commensurate with the offense. The Employer contends the Grievant' s ability to testify in court proceedings, which is an essential function of the job, has been severely compromised. Specifically, the Grievant's integrity has been jeopardized in legal proceedings because the Employer has disciplined him for serious issues relating to his veracity. In *Giglio v. United States*, 405 U.S. 150 (1972), the U.S. Supreme Court held that the prosecution must divulge information to the defense when there are known credibility issues associated with a witness. Furthermore, the Court extended the requirements outlined in *Napue v. Illinois*, 360 U.S. 264, 269 (1959), by stating "'*[w]hen the "reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule.*" (Emphasis added). Clearly, divulging issues of credibility to a defense counsel that the trooper, who is testifying to prosecute the defendant, has been disciplined for dishonesty would have a negative impact on the credibility of his testimony. Furthermore, such impact would also affect the Grievant's ability to prosecute future cases. As a public law enforcement entity, the fact that the Grievant is no longer credible in court proceedings brings discredit to the Patrol if we were to continue to employ such individuals.

The courtroom isn't the only place that would be affected by the Grievant's past deceptive and untruthful behavior. The Grievant's ability to interact with post personnel has been severely compromised. The Grievant has lost the respect of his superiors and peers through his statements and false allegations. Even with a transfer to a different post in the State, his reputation will precede him. If the Grievant were to be returned to his employment, all the principles that have been instilled in past and present Ohio State Troopers would be undermined. They have been told that troopers are terminated for dishonesty. The Grievant himself testified to this fact. The only option for the Employer, based on the pattern of egregious acts that have been discovered during the two investigations, is termination.

The discipline imposed was not arbitrary, capricious, or discriminatory in nature; it was commensurate with the offenses charged. The Employer respectfully requests the termination be upheld and the grievance be denied in it's entirety.

Based on the above, the Employer requests that the grievance be denied in its entirety.

DISCUSSION

The identified issue for resolution in the instant matter is the validity of the Grievant's termination. One of the most firmly-established principles of labor relations is that management has a right to direct its work force, as modified through the use of a collective bargaining agreement, which specifies the parties' respective rights and responsibilities. Article 4 of the Agreement, entitled "Management Rights," specifically retains the Employer's right to "[s]uspend, discipline, demote, or discharge for just

cause." In the exercise of that management right, the Employer is governed by the rule of reasonableness, and the exercise of its management rights must be done in the absence of arbitrary, capricious, or unreasonable conduct. *California Edison and Int'l Bhd. of Elec. Workers, Local 47*, 84 LA 1066 (2002).

"While it is not an arbitrator's intention to second-guess management's determination, he does have an obligation to make certain that a management action or determination is reasonably fair." *Ohio Univ. and Am. Fed'n of State, County, and Mun. Employees, Ohio Council 8, Local 1699*, 92 LA 1167 (1989). In the absence of contract language expressly prohibiting the exercise of such power, an arbitrator, by virtue of his authority and duty to fairly and finally settle disputes, has the inherent power to determine the sufficiency of a case and the reasonableness of a disciplinary action or penalty imposed. *CLEO, Inc. (Memphis, Tenn.) and Paper, Allied-Indus. Chem. and Energy Workers Int'l Union, Local 5-1766*, 117 LA 1479 (Curry 2002).

Generally, in an employee termination matter, an arbitrator must determine whether an employer has clearly proved that an employee has committed acts warranting discipline and that the penalty of discharge is appropriate under the circumstances. *Hy-Vee Food Stores, Inc. and Local 147, Int'l Bhd. of Teamsters, Warehousemen, and Helpers of America*, 102 LA 555 (Bergist 1994). If an employer does not meet this

burden, then the arbitrator must decide whether the level of discipline is reasonable. In making that determination, the arbitrator must consider, among other circumstances, the nature of the Grievant's offense(s), the Grievant's previous work record, and whether the Employer has acted consistently with respect to similar previous offenses. *Presource Distrib. Serv., Inc. and Teamsters Local 284,* FMCS No. 96-01624 (1997). Generally, an arbitrator will not substitute his own judgment for that of an employer unless the challenged penalty imposed is deemed excessive, given any mitigating circumstances. *Verizon Wireless and CWA, Local 2236,* 117 LA 589 (Dichler 2002).

> Discharge from one's employment is management's most extreme penalty against an employee. Given its seriousness and finality, the burden of proof generally is held to be on the employer to prove guilt of a wrongdoing in a disciplinary discharge or to justify or show "good cause" for terminating an employee . . . Although the quantum of proof appears variable in discharge cases overall, arbitrators often use the "preponderance of evidence" rule or some similar standard in deciding fact issues before them.

Int'l Assoc. of Machinists and Aerospace Workers Union, Dist. 160 and Intalco Aluminum Corp., 00-1 Lab. Arb. Awards (CCH) P 3608 (Nelson 2000).

The existence of "just cause" is generally recognized as encompassing two basic elements. First, the employer bears the burden of proof to show that the Grievant committed one or more offenses or engaged in misconduct that warranted some form of disciplinary action. The second prong of "just cause" is to determine whether the severity of

the responsive action taken by the employer, in this case termination, was commensurate with the degree of seriousness of the established offense(s). *City of Oklahoma City, Oklahoma and Am. Fed'n of State, County and Mun. Employees, Local 2406*, 02-1 Lab Arb. Awards (CCH) P 3104 (Eisenmenger 2001). The proof must satisfy both the question of a wrongdoing charged against an employee and also the appropriateness of the punishment assessed. "Just cause" requires that the employer's policies and rules be fair and reasonable. "Just cause" also requires that the employer's policies and rules be equally, even-handedly, and consistently applied to all employees. *Int'l Assoc. of Machinists and Aerospace Workers Union, Dist. 160 and Intalco Aluminum Corp.*, Lab. Arb. Awards (CCH) P 3608 (Nelson 2000).

Arbitrators do not lightly interfere with management's decisions in discharge and discipline matters, but that does not mean to suggest that they will sustain an action found to be unjust or unreasonable. The role of an arbitrator is extremely limited in a disciplinary/discharge matter. "An arbitrator must review, not re-determine, the disciplinary action imposed by an employer. Arbitrators are not authorized to make a disciplinary decision on their own, and they should hesitate to substitute their judgment for that of management." *Operating Engineers Local Union No. 3 and Grace Pacific Corp.*, 01-2 Lab. Arb. Awards (CCH) P 3971 (Najita 2001).

> The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved—in other words, where there has been an abuse of discretion. The arbitrator should not substitute his judgment for that of management unless he finds that the penalty is excessive, unreasonable, or that management has abused its discretion.

Operating Engineers Local Union No. 3.

Article 20, Section 20.08(5) of the Agreement entitled, "Limitations of the Umpire," includes the following language specifically limiting the umpire or arbitrator's authority:

> Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement shall be subject to arbitration.
>
> The umpire shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall the umpire impose on either party a limitation or obligation not specifically required by the language of this Agreement.

While one of the most firmly established principles in labor relations is that management has that recognized right to direct its work force, the Union and the Grievant have a reciprocal right or duty to challenge managerial action perceived by them to have been ill-founded. *Minnesota Mining and Mfg. Co. and Local 5-517, Oil, Chem. and Atomic Workers Int'l Union,* 112 LA 1055 (1999). When a grievance involves a challenge to a managerial decision, the burden of proof is initially the Employer's. However, it is incumbent upon the Union to demonstrate that the Employer's challenged action(s) demonstrate a violation of the Employer's duty or the Grievant's rights under the Agreement.

The duty of an arbitrator is simply to determine the truth regarding the material matters of a controversy, as he believes it to be, based upon a full and fair consideration of all of the evidence and the weight to which he honestly believes it is entitled. An arbitrator must, therefore, consider whether conflicting statements ring true, weigh each witness's demeanor while testifying, and use certain guidelines to determine witness credibility—the self-interest or bias of a witness, the presence or absence of corroboration, and the inherent probability of the testimony. *CLEO, Inc.*

> "Just cause" is the contractual principle that regulates an employer's disciplinary authority. It is an amorphous standard, ordinarily open to arbitral interpretation on a case-by-case basis. Before an arbitrator will uphold a penalty, he ordinarily looks to the circumstances of the misconduct, mitigating factors, and whether the aggrieved employee received his/her contractual and legal due process protections.

State of Iowa, Iowa State Penitentiary and Am. Fed'n of State, County and Mun. Employees, AFSCME State Council 61, 01-2 Lab. Arb. Awards (CCH) P 3923 (Dworkin 2001).

In this particular matter, the first dispute exists regarding the Grievant's actual conduct in making the traffic stop. It involves a young driver and the Grievant's alleged failure to fully recognize the episode as a pursuit in response to the resistance by the driver, who failed to immediately come to a complete stop despite the Grievant's use of warning lights and siren. The evidence indicates that the targeted driver

did continue to travel to her home a short distance away before coming to a complete stop and was there subsequently cited by the Grievant for two obvious offenses, driving while under suspension and failing to use a seatbelt. The Grievant made a determination that the minor offender would remain in the custody of her mother, who was present at the scene when the citations were issued, and that the circumstances did not merit the minor offender being taken into custody and being criminally charged with fleeing or avoiding arrest.

The questioning during the subsequent administrative investigation indicated that Bailey's supervisor, Sergeant Shane, was off duty on the July 13 date of the subject incident. Bailey left work before engaging in any conversation with Sergeant Thompson, the day-shift supervisor, who had reported to work about 5:50 a.m. In a subsequent phone conversation, Bailey indicated to Thompson that the earlier episode involving the young female driver "was not really a pursuit" (Management Exh. 3, p. 2) and that "he did not file any fleeing charges because he felt the young driver was emotionally upset due to her boyfriend yelling at her not to stop" and that "he did not feel she way trying to elude him."

As pointed out by the Union in its post-hearing brief (page 8), OSP policy 200.05 is illustrative of the discretion and individual judgment recognized as necessarily employed by the Grievant and other troopers in

carrying out their law enforcement duties. That policy specifically includes the following language:

> The primary objective of the Division is to gain compliance with applicable traffic laws. Each officer must make the decision whether compliance can be accomplished through issuance of a citation, warning, vehicle inspection, or traffic safety reminder. The decision to take enforcement action rests with the individual officer.

Because the OSHP's outstanding reputation is dependent upon the conduct of its individual officers, who consistently must act and react individually in response to illegal conduct, great efforts are made to select and train officers who are able to function both adequately and independently in those types of circumstances and situations. As law enforcement officers, they are required to exhibit sound discretion and good judgment in the performance of their duties, which often involve unpleasant encounters. Arbitrators have found that police departments and law enforcement agencies are paramilitary operations with codes of conduct that are more firm, more focused, and more disciplined than are the rules and regulations that apply to most other types of employment because the officers' conduct is constantly being observed and assessed by citizens, as well as other officers. *City of For Worth, Texas and Combined Law Enforcement Ass'ns of Texas (CLEAT),* 99-2 Lab. Arb. Awards (CCH) P 3191 (Jennings 1999) Law enforcement personnel are expected to work with a high degree of independence and a minimal

amount of supervisory contact in making judgments based on specific circumstances that may quickly change.

Based on a review of all of the evidence in the record and the parties' arguments, the arbitrator finds that it has not been clearly established that Bailey was, in fact, acting in violation of OSP policy when he stopped the youthful offender but failed to issue a criminal citation for fleeing or resisting pursuit. Because Bailey acted with a full awareness of the facts and circumstances evident when he attempted to make the traffic stop and then subsequently confronted the offender, he made timely decisions reflecting his law enforcement training, experience, and discretion. The evidence indicates that Bailey was aware of the offender's emotional immaturity and felt that the issuance of two citations was the appropriate response to the offender's misconduct. The arbitrator agrees with the opinion of another individual involved in a labor-related controversy, who recognized that police officers ought to be given room to exercise sound judgment and prudence, as expected of law enforcement personnel. "There is a public interest in preserving the independent judgment of police officers to make a good-faith judgment." *S.E. Nichols and United Food and Commercial Workers Int'l Union, Local No. 1, AFL-CIO*, 1991-92 NLRB Dec. (CCH) P 16,626 (1991).

Even though Bailey was aware that the traffic stop and citations were already part of the record and that the Post dispatcher had already

provided notice to both the District Six Staff Lieutenant, who was the duty officer district-wide for that night shift, and to Post Commander Lieutenant Ward shortly after the 3:00 a.m. incident, Bailey indicated to Thompson in a subsequent phone conversation that he did not deem the incident to have involved an actual "pursuit in response to resistance." The arbitrator finds that the Grievant did violate OSP Policy 203.20, which required Bailey to personally and timely advise a supervisor that he had been involved in a pursuit, which resulted from the offender's "resistance to affect an arrest, detention, or mission." Even though Bailey chose not to charge the offender criminally for resisting or avoiding arrest, he failed to acknowledge that the incident had already been identified by other OSP personnel as an occurrence under the Policy 203.20 umbrella, requiring him to officially address the events with a supervisor and to at least identify why he viewed the events as not including any actual "pursuit in response to resistance." He had both a right and a duty to address any existing confusion or inaccuracies surrounding the events and was in violation of established policy. However, absent convincing evidence to the contrary, the "misleading" statements allegedly made by the Grievant concerning the actual events of April 13, culminating in the issuance of two citations, appear to have resulted from his partisan analysis of the events and are not deemed to be an attempt to mislead or deceive either his supervisor(s) or the investigator.

The second dispute surrounds the Grievant's use of an OSP cruiser for transportation to and from his new home in Marion in violation of well-established policy. As recognized by both parties, Bailey acted in reliance upon the advice of his immediate supervisor, Shane, who indicated to Bailey that Shane did not think it would be a problem if Bailey drove his assigned cruiser the sixty (60) miles to and from his new home in Marion on a few occasions. However, Shane also stated that Bailey should immediately terminate that practice if questioned by another Post officer or administrator. The record indicates that Shane was ultimately disciplined for rendering that advice when it was determined, after Bailey's termination, that Shane had, in fact, provided improper guidance to Bailey.

Certainly the Employer recognized that Bailey's intent to use the cruiser to provide transportation to and from work was limited to the time remaining before his transfer to the Delaware Post. It can be argued that Bailey was justified in continuing to trust his supervisor, for whom he had a great deal of respect, who indicated that the policy regarding personal use of the cruiser was not a hard and fast rule with no laxity. Yet, Shane certainly did not grant Bailey *carte blanche* approval. Bailey acted in reliance to Shane's advice or "quasi-approval" admittedly on ten (10) to fifteen (15) occasions and could be viewed as having taken advantage of the situation. When questioned about whether he had been advised

by a supervisor that this conduct was permissible, Bailey appears to have acted to protect his supervisor when he denied that he had been given the recognized "implied consent" and improperly permitted his loyalty to his supervisor to cloud his professional judgment.

When a grievance involves a challenge to a managerial decision, the standard of review is whether a challenged action is arbitrary, capricious, or taken in bad faith. *Kankakee (Ill.) School Dist. No. 111 and Serv. Employees Int'l Union, Local 73,* 117 LA 1209 (2002).

> Arbitrary conduct is not rooted in reason or judgment but is irrational under the circumstances. It is whimsical in character and not governed by any objective rule or standard. An action is described as arbitrary when it is without consideration and in disregard of facts and circumstances of a case and without a rational basis, justification, or excuse. The term "capricious" also defines a course of action that is whimsical, changeable, or inconstant.

City of Solon and Ohio Patrolman's Benevolent Ass'n, 114 LA 221 (Oberdank 2000).

After carefully considering all of the evidence included in the record, the arbitrator here recognizes that the Grievant's conduct did, in fact, merit the use of discipline. The Employer argues that discharge was the appropriate remedy based on the severity of the Grievant's misconduct and its repetitive nature. The Union, however, contends that, if the Grievant's misconduct merited the imposition of employee discipline, then progressive discipline should have been applied.

"Progressive discipline" is defined in Ohio Administrative Code § 124-1-02(8) as follows:

> Progressive discipline generally means the act of discharging an employee in graduated increments and progressing through a logical sequence, such as a written reprimand for a first offense, a short suspension for the second offense, and a longer suspension or removal for the third offense. The severity of the offense may negate the use of progressive discipline.

The application of progressive discipline by the Employer in this situation is based on the following Agreement language, included in Article 19, "Disciplinary Procedure:"

> The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:
>
> a. Verbal reprimand;
> b. Written reprimand;
> c. One or more days suspension or a fine not to exceed five (5) days' pay, or any form or discipline, to be implemented only after approval From the Office of Collective Bargaining; and
> d. Demotion or Removal.
>
> However, more severe discipline (or a combination of disciplinary actions) may be imposed at any point if the infraction or violation merits the more severe action.
>
> The Employer, at its discretion, is also free to impose less severe discipline in situations which so warrant.

The "just cause" principle applies to the level of discipline, as well as to the reason for the discipline in dispute. It is the Employer's burden in a discipline and/or discharge case to prove guilt of wrongdoing and to also show "good cause" for the discipline and/or discharge action. That means that there must be some proportionality between the offense and

the punishment imposed, that the Employer must use progressive discipline, except in the most extreme cases, and that the Employer must weigh all mitigating factors, such as the employee's seniority, the magnitude of the offense, and the employee's prior work record. *Lorillard Tobacco Co., Greensboro, N.C. and Bakery, Confectionary and Tobacco Workers Int'l Union, Local 317T,* 00-1 Lab. Arb. Awards (CCH) P3433 (Nolan 2000). The intent of progressive discipline is correction, and most offenses call for warnings to be used before termination is imposed. *City of Bell Gardens (Cal.),* 00-2 Lab. Arb. Awards (CCH) P 3489 (Pool 2000) Here, the Employer's intended commitment to the application of progressive discipline is evidenced by the language of Article 19, quoted *supra*, which indicates that both parties' affirmation that alternative disciplinary choices are intended to be utilized when appropriate. However, there is no evidence that the Employer considered any alternative remedy in response to the Grievant's misconduct.

> Progressive discipline requires that summary discharge will be limited to serious or egregious misbehavior or to repeated offenses. To put it another way, discharge is an appropriate action only if a lesser penalty will not serve the interests of management. A lesser penalty given for the purpose of correcting unacceptable behavior can be of benefit to both management and the employee. The employee is given the opportunity to correct the unacceptable behavior and retain his job. Management, in return, is able to retain a trained and valued employee.

Fresh Fruit and Vegetable Workers UFCW Local 1096, AFL-CIO/CLC and Arroyo Grande Mushroom Farms, 03-2 Lab. Arb. Awards (CCH) P 3516 (Pool 2003).

. The fact than an employee has been determined to have been involved in misconduct does not automatically require a finding that the employee's discharge was for "just cause."

> Under a contract which limits an employer's right of discharge to "just cause," an arbitrator's determination of the required cause depends on more than a consideration of the facts bearing on the employee's guilt or innocence of the misconduct charged. Such a determination calls for an appraisal of the substantiality of the reasons for the action taken and a judgment on whether the discharge penalty is fair and reasonable under all of circumstances and not disproportionate to the offense. Indeed, it is an essential element of "just cause" that the penalty in a discipline case be fair and reasonable and fitting to the circumstances of the case. For although an employee may deserve discipline, no obligation to justice compels the imposition of the extreme penalty in every case or a penalty that is more severe than the nature of the offense requires.

ConocoPhillips, Inc., and Paper, Allied-Industrial, Chem. and Energy Workers Int'l Union AFL-CIO, Local No. 5-857, 04-2 Lab. Arb. Awards (CCH) P 4021 (Shieber 2004). "The concept of progressive discipline requires an employer to demonstrate an honest and serious effort to 'salvage' rather than to 'savage' an employee." *Victory Mkt., Inc.*, 84 LA 354 (1985). The arbitrator here is certainly not intending to convey a message that the Grievant's conduct was acceptable. However, it has not been demonstrated that the Grievant is incapable of continuing to successfully perform as a trooper given an opportunity to modify his conduct. The

penalty imposed should be tailored so that its "sting" is limited to the specific misconduct at hand. *Int'l Union, UAW and Its Local 6000 and The State of Mich.*, 90-2 Lab. Arb. Awards (CCH) P 8419 (Frost 1989).

Arbitrators almost universally agree that there are factors, which if present, may mitigate against the imposition of discharge. *Int'l Union of Operating Eng'rs, Local 18 and Stein, Inc.*, 00-2 Lab. Arb. Awards (CCH) P 3582 (Shanker 2000). It is a serious violation of arbitral standards not to consider an employee's past work or performance record. *City of Houston (Tex.)*, 07-2 Lab. Arb. Awards (CCH) P 8575 (Williams 1986). The record in the instant matter indicates that the Grievant's work performance has met or exceeded the expectations of the evaluators (Union Exh. 5) and that there is an absence of any prior disciplinary actions. Also meriting consideration in the instant matter is the Grievant's commendable attitude and level of performance when faced with the long-term adversity resulting from his severe back problems.

Arbitrators have recognized that Employers must have some latitude in disciplinary situations and should exercise discretion to treat employee misconduct on a case-by-case basis. "Disciplinary actions must reflect the circumstances of each incident and the employment record of the individual employee." *Paper, Allied Indus., Chem., and Energy Workers Int'l Union, AFL-CIO, CLC, Local 8-0784 and Chinet Co.*, 01-1 Lab. Arb. Awards (CCH) P 3819 (Nelson 2000). Employee offenses are

generally divided into the "extremely serious" and "less serious" categories. Less serious offenses call for a less severe penalty, providing the employee with an opportunity to correct the improper conduct. *Whiteway Mfg. Co.*, 85 LA 144 (Cloke 1946). Moreover, in the less serious cases, arbitrators generally apply progressive discipline, exercise leniency, and modify disciplinary penalties imposed by management when there are mitigating factors that indicate that the penalty is too severe. The penalty imposed should be based on evaluating the actual harm resulting from an employee's conduct, rather than on speculation regarding other potential outcomes, to be congruent with progressive discipline and "just cause." *Yolo County Corr. Officers Ass'n. and Yolo County Sheriff-Coroner's Dept., Woodland, Cal.*, 04-1 Lab. Arb. Awards (CCH) P 3687 (Nelson 2003). The punishment imposed should be based upon the employee's actual conduct and not the possible consequences of his actions. *Lewis County, Wash. and Teamsters, Local 252*, 03-2 Lab. Arb. Awards (CCH) P 3491 (Ables 2003). "In disciplinary cases generally, most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe under the circumstances." *Escalade Sports, Inc. and Int'l Union of Elec., Salaried, Mach. and Furniture Workers, AFL-CIO, Local 848*, 0101 Lab. Arb. Awards (CCH) P 3676 (Allen 2000). If a penalty is found to be excessive, it may be altered or set aside. *Int'l*

Union, UAW and Its Local 6000 and State of Mich., 90-2 Lab. Arb. Awards (CCH) P 8419 (Frost 1989).

In the instant matter, the Grievant's conduct justified discipline being imposed. However, the penalty of termination prescribed for the Grievant is the most severe from the range of all options available under Article 19, denies the Grievant any opportunity to correct his behavior, and provides for punishment out of proportion to the character of the offenses cited here. While noting that the Employer has endorsed a policy of progressive discipline with the purpose of correcting employee conduct, the arbitrator finds that the Grievant's summary discharge in response to his misconduct is excessively harsh, does not fit the "crime," and does not fundamentally comport with either progressive discipline or "just cause" in light of the mitigating factors present. The arbitrator finds that the Grievant's conduct was not so egregious as to merit the penalty of discharge and that the Employer abused its discretion in imposing that discipline. Accordingly, the Grievant's discharge will be vacated and converted into a suspension without pay, which has been recognized as providing a permanent deterrent to future misconduct. *City of Houston*, 07-2 Lab. Arb. Awards (CCH) P 8575 (Williams 1986).

AWARD

After having carefully considered all of the evidence in the record submitted by the parties concerning this matter, the arbitrator finds that the grievance is sustained in part and denied in part. The Grievant's discharge shall be reduced to a time served suspension, with his seniority being bridged. The Grievant shall be reinstated to his former position and to the Delaware Post. Said reinstatement shall take place no later than two (2) pay periods from the date of this decision.

Respectfully submitted to the parties this 8th day of February 2006.

Robert G. Stein, Arbitrator