

Opinion and Award: OSTA v. OSHP (Matthew Johnson, Grievant)

**OPINION AND AWARD**

**IN THE MATTER OF THE ARBITRATION BETWEEN**

**OHIO STATE TROOPERS ASSOCIATION**

**-AND-**

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

**Appearing for OSTA**

Larry Keith Phillips, OSTA President  
Herschel Sigall, OSTA Attorney  
Elaine N. Silvera, OSTA Attorney  
Matthew W. Johnson, Grievant  
P. David Riley, OSTA Staff Representative

**Appearing for Ohio State Highway Patrol**

Jeffrey P. Bernard, Sergeant  
Adam Burkhart, Trooper, Mt. Gilead Post  
Daniel J. Jones, Jr., Trooper  
Jessie R. Keyes, OCB  
Charles J. Linek, Lieutenant, OSP Labor Relations  
Kevin D. Miller, Sergeant, OSP Labor Relations  
Toby J. Smith, Sergeant  
James Thompson, Trooper, Mansfield Post  
Michael D. Vinson, Lieutenant, Post Commander, Mansfield  
Zurcher, Staff Lieutenant District 2

**CASE-SPECIFIC DATA**

**Grievance No.**

15-03-070531-0064-04-15

**Hearings Held**

August 10 & 29, 2007

**Case Decided**

December 29, 2007

**Subject**

Untruthfulness; Conduct Unbecoming an Officer

**Award**

**Grievance Denied**

Arbitrator: Robert Brookins, Professor of Law, J.D., Ph.D.

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## I. The Facts

This disciplinary dispute involves the Ohio Department of Public Safety, Division of the Highway Patrol (“Patrol” or “Employer”) and the Ohio State Troopers Association (“Union”), representing Trooper Matthew Johnson (“Grievant”).<sup>1</sup> Much of this case turns on credibility and, to that extent the essential facts are somewhat disputed. Of course, this factual statement represents the Undersigned’s factual findings based on my review of the arbitral record and consequent credibility assessments. When the instant dispute arose, the Grievant was a Sergeant and an Assistant Post Commander with approximately 8.5 years of tenure, two of which were served as Sergeant. He was hired in April 1999 and was assigned to the Mansfield, Ohio Patrol Post in District 2. The Employer removed the Grievant on May 22, 2007 for allegedly violating Rule 4501:2–6–02 (E) False Statement, Truthfulness and Rule 4501:2–6–02 (I) (1), Conduct Unbecoming an Officer. The two charges arose from distinct transactions of alleged misconduct: Damaging a file cabinet drawer (“File Drawer”); Assisting a civilian to evade a charge of “Operating a Vehicle Impaired (“OVI”); the Employer phrased them as follows:

It was found that on March 2, 2007 you and another Trooper damaged a filing cabinet, and you were *untruthful during the subsequent investigation*. It was also found that, while on duty, you sent a personal e-mail to a person arrested for OVI by your subordinates in an *attempt to hinder the successful prosecution* of the arrest. You were also untruthful during the subsequent investigation.”<sup>2</sup>

The Employer fired the Grievant in large part for allegedly being untruthful about his conduct in both transactions.

### A. File Drawer Incident

The first incident arose on March 2, 2007 when Trooper Burkhart could not locate a taser holster and sought assistance from the Grievant who vainly searched in several places for the holster. Ultimately, the Grievant concluded with some annoyance that the taser holsters probably were in the Post Secretary’s

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<sup>1</sup> Hereinafter collectively referenced as “the Parties.”

<sup>2</sup> Emphasis added.

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1 (“Secretary”) file drawer, which was locked and to which the Grievant had no key. The Grievant reasoned  
2 that either the holsters should have been more available or that he, as the Post Commander, should have had  
3 a key to the file drawer. Trooper Burkhart followed the Grievant into the secretary’s office and stood in the  
4 doorway where he observed the Grievant prying at the top right side of the file drawer. Trooper Burkhart  
5 could not directly observe the Grievant pulling on the file drawer because the Grievant’s body blocked his  
6 view. Nevertheless, Trooper Burkhart heard the right side of the file drawer “pop” as it yielded to the  
7 Grievant’s efforts. After compromising the top right side of the file drawer, the Grievant tried unsuccessfully  
8 to insert his arm into the drawer to retrieve a holster. He could only insert a part of his hand or fingers. Then  
9 the Grievant tried to pry open the left side of the drawer but could not. At that point, the Grievant stood up  
10 and mentioned using a pry bar to gain full access to the file drawer.

11 Trooper Burkhart, a powerfully built gentleman, then offered to pry open the upper left side of the file  
12 drawer if the Grievant agreed to say that he gave Trooper Burkhart permission to break the file drawer. The  
13 Grievant responded with laughter. Trooper Burkhart then successfully forced open the left side of the file  
14 drawer and retrieved the holster. During this time, the Grievant was standing 2-3 feet away and to the left  
15 of Trooper Burkhart. After he retrieved the holster, Trooper Burkhart asked the Grievant what he intended  
16 to do about the damage to the file drawer, and the Grievant said something like, “Screw it. Leave it for the  
17 secretary to find. The file drawer appeared slightly damaged.”<sup>13</sup> Trooper Burkhart retrieved a holster and  
18 commenced his assigned duties for the evening. At the end of his shift, Trooper Burkhart returned to the post  
19 and unsuccessfully sought to realign the file drawer, which would still close and lock, though the two panels  
20 of the drawer were misaligned and sagged slightly when left open.<sup>14</sup> A couple of hours after Trooper  
21 Burkhart had worked on the file drawer, Sergeant Smith arrived, and Trooper Burkhart apprised him of the

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<sup>13</sup> See Management Exhibit 1, at 12, 14.

<sup>14</sup> See Management Exhibit 1, at bottom of 12.

1 foregoing events.

2 The Grievant's account of the file drawer incident differs markedly from Trooper Burkhart's in the  
3 foregoing account. First, the Grievant denied any knowledge that the file drawer was either damaged or  
4 locked. Moreover, he insisted that Trooper Burkhart, alone, damaged the file drawer. The Grievant claimed  
5 that the top left side of the file drawer was unlocked because he jiggled it. Then he tried to insert his hand  
6 to retrieve a holster, but the opening was too small. He then claimed that he stood up and mentioned  
7 something about the shame of needing a pry bar to secure a taser holster. At that point, the Grievant  
8 allegedly walked toward the door of the office as Trooper Burkhart walked past him toward the file drawer.  
9 The Grievant said he then heard a "pop" and turned to observe the file drawer open with Trooper Burkhart  
10 reaching into the file drawer to get a holster. The Grievant stated that having secured a holster Trooper  
11 Burkhart went to work.

## 12 **B. OVI Incident**

13 Trooper Jones, a recent Academy graduate, was serving a sixty-day period working the road under  
14 Trooper Thompson's supervision. On the morning of November 30, 2006, these Troopers stopped Ms.  
15 Brianne Strong for allegedly driving seventy-two miles per hour in a sixty-five mile-per-hour zone. After  
16 stopping Ms. Strong, the Troopers arrested her on an OVI charge. That was Trooper Jones' first OVI arrest.  
17 Also, Ms. Strong was a paralegal for the Grievant's attorney. The Troopers transported Ms. Strong to the  
18 Mansfield Post where she declined to a Breathalyzer test. The Grievant observed Ms. Strong being escorted  
19 into the post but made no attempt to approach her. After the Troopers processed her, Ms. Strong was being  
20 escorted out of the post by Trooper Thompson. She then asked to stop by the Grievant's office where they  
21 briefly spoke. Apparently, Ms. Strong was concerned that the Grievant would notify her boss (Grievant's  
22 attorney) of her arrest. The Grievant assured her that he would not get involved. Approximately two days  
23 later, pursuant to his duties as a supervisor, the Grievant was reviewing Ms. Strong's citation and court-

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1 related documents (“documents”) and observed what he thought to be a mistake in her assigned court date.  
2 He found the documentation in dispatch area’s midnight-shift bin where it should have been. He did not  
3 search for the documentation.

4 While on duty, the Grievant decided to use the Patrol’s Computer to notify Ms. Strong via email of the  
5 presumptive procedural error, which, if extant, could get Ms. Strong’s case dismissed. The Grievant’s email  
6 stated:

7 I hope you don’t charge me to read this. I found a little loophole for you to check into. On the back  
8 of the BMV-2255 form you have, flip it over and read the bottom paragraph real close. It says you  
9 will have an initial appearance within five (5) days. They should have had you go last Weds. Oops  
10 on there (sic) part. This Weds. Makes it 7 or 8 days. I would say it should be thrown out now due  
11 to the length of time it has taken. If you have questions to this call me. Just wait until after 2PM I  
12 will be sleeping. . Hope this helps...

13 Sergeant Matt Johnson  
14 Ohio State Highway Patrol  
15 2221 S. Main St.  
16 Mansfield, OH 44907  
17 419-756-2222”<sup>15</sup>

18 The Grievant knew that the Employer could retrieve the email, and he made no attempt to conceal either  
19 the email or his identity. He claimed that he mentioned the presumptively incorrect court date to Trooper  
20 Thompson who allegedly said: “Who gives a fuck. It doesn’t matter. They are just going to reduce it  
21 anyway.”<sup>16</sup> Trooper Thompson denied this allegation, and the Grievant made no attempt to either to correct  
22 Trooper Jones or to notify any other person or institution of the presumptively erroneous court date. Initially,  
23 the Grievant maintained that he sent the email in his supervisory capacity because, as a supervisor, he had  
24 a duty to ensure the application of fair and equal justice to all. Subsequently, however, he conceded that the  
25 email was an improper channel through which to pursue that laudable goal, and if he had to do it over, he  
26 would not have sent the email to Ms. Strong. The Grievant also realizes that “loophole” was an unfortunate

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<sup>15</sup> Employer Exhibit 2, at 12; Union’s Post-hearing Brief, at 4.

<sup>16</sup> Grievant’s direct testimony before the Undersigned at arbitral hearing . *See also* Union’s Post-hearing Brief, at 4.

term.

The Employer lunched several administrative investigations into the two foregoing events. First, Lieutenant M.D. Vinson investigated the file-drawer incident<sup>\7</sup> and the OVI incident.<sup>\8</sup> Lieutenant Vinson determined that the Grievant damaged the file drawer and was untruthful about that incident during the administrative investigation.<sup>\9</sup> Similarly, Lieutenant Vinson determined that the Grievant improperly sought to undermine the OVI charge against Ms. Strong and was untruthful during the administrative investigation.<sup>\10</sup> The following statement captures the pith of Lieutenant Vinson's investigative report regarding the file drawer:

[The Grievant] . . . indicated the cabinet was not damaged and in fact eluded (sic) that it appeared that someone had dismantled the cabinet. He took no responsibility for damaging the cabinet and tried to distance himself from the incident by indicating once Trooper Burkhardt obtained the holster he left the office. He further tried to shift responsibility from himself by indicating he was not attempting to open the cabinet when Trooper Burkhardt finally was able to get the drawer open. His statement was in direct contradiction to Trooper Burkhardt's statement, as Trooper Burkhardt indicated Sergeant Johnson was pulling on the right side of the drawer and he pulled on the left side of the drawer when it opened. . . .<sup>\11</sup>

Similarly, the essence of Lieutenant Vinson's administrative investigation regarding the OVI arrest is set forth below:

During the course of the investigation, it was revealed that Sergeant Johnson never made an attempt to correct the error or offer direction to the field training officer and the new Trooper to prevent such an error in the future. In fact, Sergeant Johnson indicated his actions to assist the OVI suspect were punitive in nature in response to a statement allegedly made by the arresting officer. Finally, and most significantly, Sergeant Johnson's statements were contradictory to [those of] the other officers interviewed and his responses to questions were questionable at best. Sergeant Johnson attempted to shift responsibility for his actions by attacking the character of a Trooper acting in the capacity

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<sup>\7</sup> Employer Exhibit 1.

<sup>\8</sup> Employer Exhibit 2.

<sup>\9</sup> Employer Exhibit 1, at 4.

<sup>\10</sup> Employer Exhibit 2, at 9. Staff Lieutenant Lumpkins also investigated the Grievant regarding Trooper Neil Laughlin's alleged use of profanity to the Grievant (Employer Exhibit 4). The instant dispute has many tentacles, only a few of which are directly relevant. Lieutenant Lumpkins' administrative investigation is not directly relevant and, hence, warrants no further discussion.

<sup>\11</sup> Employer Exhibit 1, at 1. Union's Post-hearing Brief, at 4.

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1 of a field training officer.<sup>\12</sup>

2 Based on Lieutenant Vinson's investigative reports, Colonel Richard H. Collins dispatched a letter dated  
3 May 17, 2007 notifying the Grievant of his pending removal from the Patrol and scheduling a pre-  
4 disciplinary hearing for May 22, 2007, 12:00 at noon.<sup>\13</sup> On May 22, 2007, Lieutenant Gary Allen, the Pre-  
5 disciplinary Hearing Officer found "just cause for discipline."<sup>\14</sup> Finally, Henry Guzman, Director, Ohio  
6 Department of Public Safety issued a letter dated on May 22, 2007 notifying the Grievant that he was  
7 terminated from his employment with the Patrol effective at the close of business on May 22, 2007.<sup>\15</sup>

8 The Union filed Grievance No. 15-03-070531-0064-04-15 challenging the Grievant's removal. The  
9 Grievance claimed that the Grievant was removed for other than just cause in a nonprogressive manner.<sup>\16</sup>  
10 The Parties reached impasse in the dispute, the Union demanded arbitration, and the Undersigned was  
11 selected to hear and resolve the matter. The Undersigned conducted arbitral hearings in the matter on August  
12 10 and 29, 2007. The Parties agreed that the dispute was free of procedural errors and properly before the  
13 Undersigned. All parties relevant to the resolution of the dispute attended both arbitral hearings. Throughout  
14 both arbitral hearings, the Undersigned afforded the Parties a full and fair opportunity to present admissible  
15 evidence and arguments supporting their positions. Specifically, the Parties made opening statements and  
16 submitted admissible documentary and testimonial evidence. The latter were subject to relevant objections  
17 and cross-examination. At the close of the hearing, the Parties agreed to submit Post-hearing Briefs instead  
18 of oral arguments. The Parties submitted their Post-hearing Briefs as agreed, and the Undersigned closed  
19 the record.

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<sup>\12</sup> Employer Exhibit 2, at 2.

<sup>\13</sup> Joint Exhibit 3, at 2.

<sup>\14</sup> *Id.*, at 3.

<sup>\15</sup> *Id.*, at 4.

<sup>\16</sup> Joint Exhibit 2, at 1.



## II. The Issue

The Parties proffered the following submission agreement: Was the Grievant removed for just cause? If not, what shall the remedy be?

## III. Relevant Contractual and Regulatory Provisions

### Rule 4501:2-6-02 (E)

#### False Statement, Truthfulness

A member shall not make any false statement, verbal or written, or false claims concerning his/her conduct or the conduct of others.<sup>\17</sup>

### Rule 4501:2-6-02 (I) (1)

#### Conduct Unbecoming an Officer

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

1. For conduct that may bring discredit to the division and/or any of its members or employees.<sup>\18</sup>

## IV. Summaries of the Parties' Arguments

### A. Summary of the Union's Arguments

1. Preponderant evidence in the arbitral record as a whole does not support the Patrol's allegations against the Grievant.
2. The Grievant's conduct as established in the arbitral record does not warrant removal.
3. The Grievant was a victim of harassment and disparate treatment intended to force him to transfer to another post, or to create justification for his removal. This treatment ultimately founded the Grievant's removal.
4. The Grievant is innocent of the charges relating to the file drawer.
5. The holster should not have been in the secretary's locked file drawer, and damage to the file drawer was justified under the circumstances of this case given the utility of tasers in protecting Troopers and the public. In a cost-benefit sense, the Grievant rationally elected to risk damaging the file drawer rather than to risk injury to Trooper Burkhart or, perhaps, unnecessary injury to a recalcitrant civilian.
6. The Grievant never sought to conceal his email to Ms. Strong. Instead, he openly and notoriously emailed her from his office in his official position as a Sergeant, using the Patrol's computer and email program. Nor did he otherwise act improperly before or after sending that email. The Grievant did the right thing by notifying Ms. Strong of the alleged incorrect date of arraignment. That act reflected his honest concern about preserving Ms. Strong's right to procedural due process. The Grievant's actions sought to further justice and not prosecution, though his use of "loophole" in that email was ill-advised.
7. Lieutenant Thompson's attitude toward the judicial system relieved the Grievant of any further duty to report the perceived procedural error.
8. Removal in this case contravenes established principles and contractual requirements of progressive

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<sup>\17</sup> Joint Exhibit 3, at 6.

<sup>\18</sup> *Id.* at 7.

discipline.

## B. Summary of the Patrol's Arguments

1. Merely sending the email (without consideration of the file drawer incident) warrants removal because the Grievant tried to sabotage his fellow Troopers. As Assistant Post Commander, the Grievant's duty was to help subordinates correct their errors.
2. The Grievant is not a credible witness, and Trooper Burkhart is more credible than the Grievant.
  - a. Trooper Thompson denied using profanity and denied that the Grievant ever mentioned Ms. Strong's case to him. Trooper Jones' testimony that Trooper Thompson never mentioned the case to him corroborated Trooper Thompson's statement.
  - b. The Grievant gave inconsistent statements to Lieutenant Vinson, first saying that he (Grievant) "asked . . . [Trooper Thompson] specifically why it [the court date] was given the following Wednesday not the Wednesday of."<sup>19</sup> In a subsequent response to Trooper Thompson's denial of that allegation, the Grievant said "Again, that's his word against mine. I know that I said it. It was in passing to qualify as a conversation; maybe it wasn't considered a conversation. It was two statements back and forth."<sup>20</sup>
  - c. During his interviews with Lieutenants Vinson and Zurcher, the Grievant offered inconsistent statements regarding his location while Trooper Burkhart allegedly pried open the file drawer.
  - d. The Grievant also twice changed his story regarding Trooper Laughlin, who, according to the Grievant, used profanity when speaking to him.
3. The Grievant failed in three respects as a Post Commander.
  - a. First, he neglected his supervisory duty to raise the allegedly erroneous court date with Trooper Thompson either verbally or by returning the case documents to him, or both.
  - b. Second, if Trooper Thompson made the "fuck it" statement, the Grievant neglected to report it.
  - c. Third, the Grievant offered Ms. Strong surreptitious legal advice that her attorney used to stymie Ms. Strong's prosecution. The Grievant's conduct eroded his relationship with the prosecutor and the Patrol.
  - d. The Grievant was also inconsistent regarding where he found the documents for Ms. Strong's case.
  - e. Management Exhibit 3 also raises questions about the Grievant's credibility. First the Grievant sought to blame someone else for making a joke at his expense. Later, however, Dispatcher Ross said the Grievant was the source of the joke, and the Grievant was aware that dispatcher Ross had made and distributed a flyer as part of the joke. Dispatcher Ross also stated that the Grievant stood next to her as she made the flyer and said "I don't know that you're doing this." Finally, Dispatcher Ross claimed that the Grievant lied on her with respect to the Cleveland Browns football tickets.
5. Arbitrator Furman supported a removal in a similar case where Trooper Kucirek informed a suspect in an ongoing investigation of a conversation about him. The Grievant's actions were more egregious than Trooper Kucirek's. the Grievant rationale for informing Ms. Strong was:

"Honestly, I was pretty upset from the answer I received from the Trooper and figured if they didn't care enough to do their job properly that's not fair enforcement to the people we arrest."<sup>21</sup>

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<sup>19</sup> Citing Management 2, p. 23

<sup>20</sup> *Id.*

<sup>21</sup> Employer's Post-hearing Brief, at – citing Employer Exhibit 2, at 24.

**V. Analysis and Discussion**  
**A. Evidentiary Considerations**

Because this is a disciplinary dispute, the Employer has the burden of proof or persuasion regarding its charges against the Grievant. To establish those charges, the Employer must adduce *preponderant* evidence in the arbitral record as a whole, showing that *more likely than not* the Grievant engaged in the alleged misconduct. Also, because the Employer has the burden of persuasion, doubts about the existence of any alleged misconduct shall be resolved against the Employer. If the Employer fails adequately to establish the alleged misconduct in the first instance, it cannot prevail, *irrespective* of the strength or weakness of the Union's defenses. Similarly, the Union has the burden of persuasion (preponderant evidence) regarding its allegations and affirmative defenses, doubts about which shall be resolved against the Union.

**B. File Drawer Incident**

For the reasons discussed below, the Arbitrator holds that the Grievant was not forthright regarding the file drawer incident.<sup>122</sup> First, Trooper Burkhart's testimony was more credible and detailed than the Grievant's. During direct examination before the Undersigned, Trooper Burkhart carefully explained the prevailing circumstances and his verbal and nonverbal interactions with the Grievant while they were in the secretary's office seeking access to the file drawer. In contrast, the Grievant offered a relatively superficial account of that event. Because Trooper Burkhart's account contained more substance, it was more vulnerable to careful scrutiny for inconsistencies, gaps, etc., however, upon careful examination of Trooper Burkhart's version of the incident, the Arbitrator found none. Second, commonsense and reason dictate that if Trooper Burkhart wanted to prevaricate, why would he prominently factor himself into the damaging of the file drawer? He, like the Grievant, could have easily shifted (or at least attempted to shift) all blame to

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<sup>122</sup> Observe that in this dispute, the Parties adduced considerable evidence addressing events and issues that are either less than probative of the two charges in question or, in the Arbitrator's view, unnecessary to establish those charges by preponderant evidence. For example, the file drawer issue turns almost solely on the Grievant's and Trooper Burkhart's credibility, which can be accurately assessed from their testimony and commonsense or reason.

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1 the Grievant. Instead, Trooper Burkhart steadfastly shouldered his part in damaging the file drawer and just  
2 as steadfastly placed the Grievant's share at his (Grievant's) feet. For instance, Trooper Burkhart flatly  
3 denied that he and the Grievant ever simultaneously pulled on the file drawer, an account that could have  
4 conflated blame as to which Trooper damaged which part of the file drawer. Instead, Trooper Burkhart  
5 specifically took the blame for damaging the left side of the drawer and blamed the Grievant for damaging  
6 the right side. Third, given the photographs in Management Exhibits 12 and 14, the Grievant's alleged  
7 ignorance of any damage to the file drawer is simply incredible. This assertion alone substantially  
8 undermines his credibility as witness in this dispute. Finally, the Grievant claims that the right side of the  
9 file drawer was unlocked. That assertion flies in the face of the photograph in Management Exhibit 1, at 14,  
10 showing the two panels on the right side of the door separated . Why would they be so if the right side of  
11 the drawer were unlocked? Assuming, arguendo, that Trooper Burkhart singlehandedly pried open the file  
12 drawer, he had no apparent reason to pry on the right if it were indeed unlocked. Contrary to the Grievant's  
13 assertions, more likely than not, the right side was locked. The foregoing reasons and rationale persuade the  
14 Arbitrator that Trooper Burkhart's account of the file drawer incident is more credible. Therefore, the  
15 Arbitrator holds that the Grievant did violate Rule 4501:2-6-02 (E) False Statement, Truthfulness.

**C. OVI Incident**

17 This issue essentially resolved itself when the Grievant admitted that it was wrong for him to have  
18 notified Ms. Strong of the presumptively erroneous court date. During cross-examination at the arbitral  
19 hearing before the Undersigned, the Grievant flatly conceded that, however virtuous, his notification of Ms.  
20 Strong was not the proper avenue through which to achieve fair and equal justice for all. Furthermore, the  
21 Grievant admitted that if given a second chance, he would not alert Ms. Strong of any error, real or imagined,  
22 in her court date. Consequently, the Grievant's admission leaves the Arbitrator little choice but to hold that  
23 he violated Rule 4501:2-6-02 (I)(1), Conduct Unbecoming an Officer.

## VI. Disciplinary Assessment

A preponderance of evidence in the record indicates that more likely than not the Grievant was untruthful regarding the file drawer incident and engaged in conduct unbecoming an officer by notifying Ms. Strong of the perceived error in her court date. Consequently, the Employer has adequately established that the Grievant engaged in both episodes of misconduct alleged in this dispute, thereby warranting some measure of discipline. Assessment of the proper quantum of discipline involves an evaluation of the mitigative and aggravative factors in this dispute and ultimately a determination of whether removal is in bad faith constitutes an abuse of discretion, or is otherwise unreasonable, arbitrary, capricious, or discriminatory under the circumstances of this case.

### A. Mitigative Circumstances

The strongest mitigative factors for the Grievant are his approximate 8.5 years of service with the Patrol and his satisfactory performance record during that tenure, and his relatively rapid rise in rank according to the Union.

### B. Aggravative Circumstances

The major, though not the only, aggravative factor is the Grievant's unmitigated mendacity regarding the file drawer incident. To make matters worse, mendacity, which is never indicated, was clearly unnecessary here, since the Grievant made a rational choice to damage a file drawer rather than to dispatch Trooper Burkhardt without a taser, which he could not readily use without a holster. Instead of prevaricating and shifting all of the blame to Trooper Burkhardt, the Grievant could have shouldered his portion of fault for damaging the file drawer and allowed Trooper Burkhardt to shoulder his portion of blame. Prevarication and scapegoating under these relatively minor circumstances was manifestly indefensible, deeply troubling, and revealing of one's character. With respect to the OVI incident, the Grievant simply exercised poor judgement, and apparently recognized it after the fact. Standing alone, the OVI incident is not, or at least

1 should not be, fatal to a career with the Patrol.

2 **C. Balancing the Aggravative and Mitigative Factors**

3 Nevertheless, assessment of the foregoing aggravating and mitigating factors for *both established*  
4 *offenses* indicates that the Grievant's removal was neither *unreasonable*, arbitrary, capricious,  
5 discriminatory, nor an abuse of discretion. When viewed over both violations, the Grievant's conduct  
6 (misconduct) is clearly inconsistent with and, more likely than not, corrosive to the Patrol's image if not its  
7 operational efficiency as a law enforcement agency. Both advocates performed admirably, and the Union  
8 did a particularly commendable job of defending the Grievant. Unfortunately, however, he *created* a  
9 quagmire whose dimensions would likely outstrip the skills of the ablest advocate.

10 **VII. The Award**

11 For all the following reasons, the Grievance is hereby **Denied**.

12 Respectfully,



Robert Brookins, Professor of Law, Labor Arbitrator, J.D., Ph.D.