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IN ARBITRATION PROCEEDINGS PURSUANT TO
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of

THE OHIO STATE TROOPERS
ASSOCIATION, INC., UNIT 1

and

THE STATE OF OHIO,
DEPARTMENT OF PUBLIC SAFETY

Case No. 15-03-20080319-0040-04-01

Grievant: Trooper Phillip J. LaJoye

ARBITRATOR'S

OPINION AND AWARD

This Arbitration arises pursuant to the Collective Bargaining Agreement ("Agreement") between THE OHIO STATE TROOPERS ASSOCIATION, INC., UNIT 1("the Union") and THE STATE OF OHIO, DEPARTMENT OF PUBLIC SAFETY ("the Employer"). SUSAN GRODY RUBEN was selected to serve as sole, impartial Arbitrator; her decision shall be final and binding pursuant to the Agreement.

Hearing was held August 12 and 13, 2008 in Columbus, Ohio. The Parties were afforded full opportunity for the examination and cross-examination of witnesses, the introduction of exhibits, and for argument.

APPEARANCES:

On behalf of the Union:

HERSCHEL SIGALL, Esq., Ohio State Troopers Association, 6161 Busch Boulevard, Suite 130, Columbus, OH 43229.

On behalf of the Employer:

MARISSA HARTLEY, Esq., Office of Collective Bargaining, 100 East Broad Street, 14th Floor, Columbus, OH 43215.

STIPULATED ISSUE

Was the Grievant removed for just cause? If not, what shall the remedy be?

RELEVANT PROVISIONS OF COLLECTIVE BARGAINING AGREEMENT

July 1, 2006 - June 30, 2009

. . .

ARTICLE 4 - MANAGEMENT RIGHTS

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...the Employer retains the rights to: 1) hire and transfer employees, suspend, discharge and discipline employees;....

...

ARTICLE 18 – ADMINISTRATIVE INVESTIGATION

18.01 Purpose

The parties recognize that the State has the right to expect that a professional standard of conduct be adhered to by all Highway Patrol personnel regardless of rank or assignment. Since administrative investigations may be undertaken to inquire into complaints of misconduct by bargaining unit employees, the State reserves the right to conduct such investigations to uncover the facts in each case while protecting the rights and dignity of accused personnel. In the course of any administrative investigation, all investigative methods employed will be consistent with the law.

...

ARTICLE 19 – DISCIPLINARY PROCEDURE

19.01 Standard

No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause.

...

19.05 Progressive Discipline

The Employer will follow the principles of progressive disciplines. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

- 1. One or more Verbal Reprimand (with appropriate notation in employee's file);**
- 2. One or more Written Reprimand;**
- 3. One or more day(s) Suspension(s) or a fine not to exceed five (5) days pay for any form of discipline, to be implemented only after**

approval from the Office of Collective Bargaining.

4. 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.

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...

RELEVANT PROVISIONS OF OHIO STATE HIGHWAY PATROL RULES

4501:2-6-02 PERFORMANCE OF DUTY AND CONDUCT

...

(B) Performance of Duty

- (1) A member shall carry out all duties completely and without delay, evasion or neglect. A member shall perform his/her duties in a professional, courteous manner.**

...

...

(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.

...

FACTS

The Grievant has been employed as a trooper since 1987. He was removed effective March 13, 2008. The termination letter provides:

You are hereby advised you are being terminated from your employment with the Department of Public Safety, Ohio State Highway Patrol, effective immediately, March 13, 2008, for violation of the Rules and Regulations of the Ohio State Highway Patrol, specifically of Rules 4501:2-6-02(E), False Statement, Truthfulness, and 4501:2-6-02(B)(1), Performance of Duty.

Specifically it is charged that on May 30, 2007, you evaded your duties by being at your residence for an extended period of time, and falsely documenting on your Mobile Computer Terminal (MCT) that you were on stationary patrol.

The Grievant's relevant department history in the record is as follows:

- 1/05/05: Written reprimand for 1 hour/9 minutes tardy**
- 1/23/05: 1-day suspension for failure to report off sick**
- 1/24/05: 3-day suspension for failure to properly investigate crash**
- 5/20/05: 10-day suspension for failure to properly investigate crash; 3 days held in abeyance**
- 10/03/05: Verbal reprimand for preventable patrol car crash**
- 1/12/06: Removal for failure to follow proper procedure; modified to a last chance agreement**

8/05/06: Removal for failure to report to duty; modified to a 92-day suspension by Arbitrator Stein; last chance agreement still in effect

1/02/07 Written reprimand for preventable patrol car crash

The Grievant was counseled May 10, 2007 regarding not leaving his assigned patrol area to go to his home for lunch. The record is unclear whether the Grievant's assigned patrol area on May 30, 2007 encompassed his home. The Grievant testified it was, and that he was at his home for 30-35 minutes. The Employer testified it was not, and that the Grievant was at his home for 82 minutes.

The Grievant testified he laid down during the period he was at home on May 30, 2007 because he was not feeling well. The Grievant admits, and the documentary evidence shows, that Grievant entered code SP – stationary patrol – for the period of time he was at home lying down.

POSITIONS OF THE PARTIES

Employer Position

The Grievant was removed for just cause. The Employer strictly limited the discipline to the events of May 30, 2007. The Employer met its burden of proof by substantiating the charges against the Grievant.

The Employer proved the Grievant violated work rule 4501:2-6-02(B)(1) Performance of Duty when he was at home while on duty for an extended period of time – 82 minutes. During that time, he was outside his patrol car and outside his line assignment. In fact, the Grievant admitted to being inside his home lying down during that time.

The Employer also proved the Grievant violated work rule 4501:2-6-02(E) False Statements when he falsified his status on his MCT by indicating he was on stationary patrol when he was actually inside his home napping on duty.

The Union's only defense is that technology cannot be trusted. Specifically, the Union contends the AVL reading is not reliable because it does not update when the trooper does not change the status reading. The Union did not substantiate its position. Rather, record evidence shows unit status and AVL/GPS are two different things. Just because a trooper has marked himself as Stationary Patrol or Signal 38 or any other status on his MCT, does not mean the AVL stops tracking the vehicle. The AVL tracks the vehicle at least every five minutes.

The Employer is not contending the AVL never malfunctions; however, when it does malfunction, it is obvious from the AVL report. Sgt. Kocab testified she did find some irregularities in the Grievant's AVL reports during

her investigation. She also testified, however, that she set the irregularities aside; i.e., those instances were not the basis for the Grievant's removal.

Union Position

The Employer did not have just cause to remove the Grievant. Indeed, the Grievant is an exemplary trooper who came to work very sick on May 30, 2007 due to his concern for his fellow officer being on the road alone. As permitted, he went home for his 30-minute lunch break so he could lie down. His home was in his line assignment for that day.

The Employer did not demonstrate the Grievant was at his house for 82 minutes. The Employer's investigation embraced bad science as proof of the length of time the Grievant spent at his home. The Employer displayed a lack of knowledge regarding the features of the MCT/CAD and AVL system. It was content to act upon its lack of knowledge in creating an erroneous technical premise to attack the Grievant.

When the Grievant arrived at his home, he elected to use a drop-down box on his MCT that indicated "stationary patrol." He could have used Signal 38 (lunch) to indicate his stationary status, but he did not. There was no question as to where he was because his GPS clearly indicates he was home; he was not hiding his location.

He may have selected stationary patrol because he was sick and was not going to be eating. At the time, the icon selected would not have seemed too important a decision. There was no falsification in the sense of the Grievant intentionally misleading the Employer in furtherance of a plan to evade his duties.

The parameters of usage for the drop-down box "Stationary Patrol" was not well understood by the Grievant; nor had the Employer elected to explain its usage to troopers in the field. The Employer had never issued a directive on the use of stationary patrol.

Less than one month after the Grievant elected to designate the time at his house as stationary patrol, the Employer issued a directive on the subject, which defines stationary patrol as "the positioning of a patrol car in a conspicuous location to permit motorists to readily observe the patrol car and the officer...." OSP 200.06. If there is an issue in this case, it is a training issue, and not a disciplinary issue.

OPINION

This case involves the termination of the Grievant's employment for misconduct. As such, the Employer has the burden of proving just cause, consisting of whether:

- 1. The Grievant did what he is accused of doing;
and**
- 2. Under all the circumstances, removal was
appropriate.**

The Grievant's Alleged Misconduct

The Employer charged the Grievant with violating two rules:

- 1. Performance of Duty**

A member shall carry out all duties completely and without delay, evasion or neglect. A member shall perform his/her duties in a professional, courteous manner; and

- 2. 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.

Evasion of Duty

The evasion of duty charge centers on the Employer's claim the Grievant: 1) went outside his assigned area to his home; and 2) stayed there for 82 minutes. While this may well be what happened, the Employer cannot sustain its burden of proof on either element.

While the parameters of an assigned area should be a simple element to prove, the Employer's written documentation of this fact is not dispositive. Given the oral testimony on this fact is contradictory, the Arbitrator cannot make a finding the Grievant's home was outside his assigned area on May

30, 2007.

Nor can the Arbitrator make a finding the Grievant remained at his home that day for 82 minutes. The written documentation did not clearly establish this fact, and the oral testimony was predictably contradictory.

False Claim

The false claim charge centers on the fact the Grievant entered code “SP” – stationary patrol – for the period of time he was at his home lying down. The Grievant has admitted this, perhaps because the written documentation definitively shows this to be the case.

The Union admirably tries in various ways to explain away this false claim. The Grievant testified he selected stationary patrol rather than Signal 38 – lunch – because he was sick and was not going to be eating. The Arbitrator finds this defense to be unavailing. The lunch period is essentially an on-duty paid break period. Whether or not an employee puts food in his mouth does not turn a lunch period into a stationary patrol.

Alternatively, the Union contends the icon selected by the Grievant would not have seemed too important a decision at the time. This defense has initial appeal. How can one click of one icon over another be so important? But here, it was. The Grievant has not claimed he mistakenly chose SP over Signal 38 – i.e., that he just “pushed the wrong button.”

Rather, the argument is that categorizing the time as stationary patrol rather than lunch is not a big deal. But it is. For starters, it involves integrity. It is a lie to indicate you are on stationary patrol when actually, you are lying down in your house. Moreover, the choice goes to an integral function of the Employer and an integral duty of the Grievant – i.e., whether the Grievant was performing an actual duty or on a break.

Alternatively, the Union states the drop-down box for stationary patrol was not well understood by the Grievant because the Employer had not explained the meaning of stationary patrol to the Grievant or other field troopers, further supported by the fact that a few weeks after May 30, 2007 – the day the Grievant entered SP instead of Signal 38 – the Employer issued a directive that defined stationary patrol. This is poppycock. Ask any Ohio State Trooper whether stationary patrol includes lying down at home. Indeed, ask a 12-year-old. The term “stationary patrol” has a plain meaning known to all that certainly does not include lying down at your house. The fact the Employer issued a directive June 27, 2007 defining stationary patrol as “the positioning of a patrol car in a conspicuous location to permit motorists to readily observe the patrol car and the officer....” does nothing to change the easily-comprehended plain meaning of the term “stationary patrol.”

The Appropriate Penalty

Given the Employer established the Grievant violated Rule 4501:2-6-02(E) – False Statement, Truthfulness – the question for the Arbitrator becomes whether removal was the appropriate penalty under all the circumstances. Three elements predominate in this analysis: 1) the relative seriousness of the Grievant’s false statement; 2) whether the failure of the Employer to establish the Grievant’s violation of the Performance of Duty charge negates a removal based exclusively on a False Statement charge; and 3) to what extent the Grievant’s department record mitigates or exacerbates the violation.

1. The Relative Seriousness of the False Statement

First, it must be said law enforcement personnel are legitimately held to an extremely high standard of integrity. Law enforcement personnel have enormous responsibilities – among these is to tell the truth.

Second, the Grievant’s false statement – i.e., indicating he was on stationary patrol when he was home lying down – has potential safety consequences. It is incumbent upon field officers to give accurate information to dispatch so dispatch can deploy personnel effectively.

2. Whether Proving Only One of the Two Charges Supports Removal

As concluded above, the Employer has been unable to carry its burden of proving the Grievant violated Rule 4501:2-6-02(B)(1) – Performance of Duty. That leaves the question whether the Grievant’s violation of Rule 4501:2-6-02(E) – False Statement, Truthfulness – supports removal on its own.

Truthfulness on the part of a member of law enforcement is an essential requirement. A State Trooper cannot take it upon himself to decide when it is important to tell the truth, and when it is not. There is no room in law enforcement for maverick behavior.

3. The Grievant’s Department Record

The Grievant has a seriously flawed department record. In the 18 months leading up to his May 30, 2007 removal incident, the Grievant was put on a last chance agreement for failure to follow proper procedure, and he received a 92-day suspension for failure to report to duty.¹ These serious disciplines followed a 1-day, a 3-day, and a 10-day suspension (with 3 days held in abeyance) the Grievant had received in 2005.

¹ **The Arbitrator notes the record indicates the Grievant’s last chance agreement was still in effect at the time of the instant removal incident; the record indicates, however, the last chance agreement was not relied upon by the Employer as a basis for the removal. Accordingly, the Arbitrator’s analysis is not based on the last chance agreement.**

These previous serious disciplines weigh heavily in the analysis of whether removal is the appropriate penalty. Progressive discipline is for the purpose of rehabilitating an employee – to correct behavior that does not comply with workplace standards. Progressive discipline is fair – it puts an employee on notice his conduct is not acceptable. The Grievant, unfortunately, appears not to have learned enough from his previous disciplines. Rather, he continued to not conform with the rules.

Despite the Union's valiant job in turning over every rock and exploring every theory, ultimately, it was the Grievant's own behavior that prevents him from being reinstated.

AWARD

For the reasons set out above, the grievance is denied. The Employer had just cause to remove the Grievant.

DATED: November 11, 2008


Susan Grody Ruben, Esq.
Arbitrator