

2008

SUSAN GRODY RUBEN, Esq.
Arbitrator and Mediator
30799 Pinetree Road, No. 226
Cleveland, OH 44124
216/382-3024

IN ARBITRATION PROCEEDINGS PURSUANT TO
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of

THE OHIO STATE TROOPERS
ASSOCIATION, INC.

and

THE STATE OF OHIO,
DEPARTMENT OF PUBLIC SAFETY

Case No. 15-03-20080825-0108-07-15

Grievant: Sgt. Todd M. Heck

ARBITRATOR'S
OPINION AND AWARD

This Arbitration arises pursuant to the Collective Bargaining Agreement ("Agreement") between THE OHIO STATE TROOPERS ASSOCIATION, INC. ("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 December 8, 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:

RYAN SARNI, Office of Collective Bargaining, 100 East Broad Street, 14th Floor, Columbus, OH 43215.

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

...

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

...

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.

...

...

ARTICLE 21 - WORK RULES

21.01 Copies of Work Rules

The Employer agrees that existing work rules and directives shall be reduced to writing and be made available to affected employees at each work location....The application of such rules and directives is subject to the grievance procedure.

...

...

RELEVANT PROVISIONS OF OHIO STATE HIGHWAY PATROL RULES

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

...

(I) 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.

...

(3) For any improper on-duty association with any individual for purposes other than those necessary for the performance of official duties.

...

4501:2-6-03 COMMAND AND MILITARY COURTESY

(A) Responsibility of command

(1) A member who is in command of any post, district, section, unit, detail or assignment, or part thereof, either on a temporary or permanent basis, shall be held responsible for the efficiency, discipline, performance and welfare of the persons under this command, and for the performance and condition of

all equipment and the effective discharge of the duties and responsibilities of the division within the scope of this command.

...

FACTS

The Grievant has been employed by the Ohio State Highway Patrol since October 14, 1998. He was removed effective August 12, 2008. The August 4, 2008 Statement of Charges letter provides:

It is herewith stated that reasonable and substantial cause exists to establish that Sgt. Todd M. Heck has committed an act or acts in violation of the Rules and Regulations of the Ohio State Highway Patrol, specifically of:

**Rule 4501:2-6-02 (I)(1)&(3) Conduct Unbecoming an Officer
&
Rule 4501:2-6-03 (A) (1) Responsibility of Command**

As a result of administrative investigation 08-0436, it was found Sgt. Heck sent nude photos of himself to a subordinate.¹ It was also found that Sgt. Heck had an improper on-duty association with a subordinate for purposes other than necessary for the performance of his official duties.

The August 12, 2008 termination letter informed the Grievant he had been found to have violated both rules charged.

¹ The Grievant sent photographs of his erect penis to a female trooper who reported to him in the summer of 2007 and the spring of 2008.

The Union filed a grievance on the basis there was no just cause for the termination, including the fact that progressive discipline had not been used. The Step 2 grievance response provides:

...

FACTS

As a result of administrative investigation 08-0436 it was found that Grievant sent nude photos of himself to his subordinate....It was also found that Grievant participated in an improper on-duty association with [the trooper] other than for the performance of his official duties. Grievant was terminated from his employment on August 12, 2008.

UNION CONTENTION

The Union contends the Employer violated Sections 19.01 and 19.05 of the labor agreement. Staff Representative Riley advised the relationship between Grievant and [the trooper] was a mutually consensual relationship....The Union advised the nude photos were sent when Grievant was off-duty and [the trooper] received them when she was off-duty. Several of the phone calls and text messages were also sent off duty. It is the Union's position that the phone calls and text messages that occurred while on duty [do] not rise to the level of termination.

MANAGEMENT POSITION AND FINDING

It is the Employer's contention that a violation of the labor agreement did not occur. A supervisor sending nude photos of himself to a subordinate whether on or off-duty is wholly inappropriate. Grievant, by his own admissions, participated in an improper on-duty

association with [the trooper] for purposes other than for the performance of his official duties. Grievant's actions brought discredit to the Division and as a supervisor he is tasked with the responsibility for the efficiency, discipline, performance and welfare of persons under his command.

Based on the foregoing, there has been no violation of the labor agreement. Grievance denied.

POSITIONS OF THE PARTIES

Employer Position

The Grievant was removed for just cause. The Grievant admitted to having an affair with a subordinate, sending her nude photographs of himself, sending her non-work-related text messages during working hours, and spending more time with her during work hours than he spent with the other troopers under his command.

In a para-military organization such as the Ohio State Highway Patrol, it is imperative supervisors conduct themselves in a professional and authoritative manner. Rank and line of command are integral to the proper function of the Highway Patrol. The Grievant's actions improperly blurred those lines. Moreover, the Grievant's conduct brought discredit to the Division. There were four newspaper articles about the matter, including one in USA Today.

The Grievant violated work rules 4501:2-6-03(A), Responsibility of Command, and 4501:2-6-02(I), Conduct Unbecoming an Officer. The Grievant displayed such poor judgment on multiple occasions that he cannot be trusted to properly carry out his duties as either a sergeant or a trooper.

Union Position

The Employer did not have just cause to remove the Grievant. There is no rule troopers and sergeants cannot date each other. It was an equally undertaken affair. The Grievant applied no leverage in the affair. Indeed, the trooper was more aggressive in the relationship; she paid for the hotel, and brought candles and music to their three off-duty liaisons.

The Grievant was at the head of his class at the Academy. His performance evaluations are exemplary. No one at his post, including the Commander, witnessed any unprofessional conduct by the Grievant toward the trooper. The Grievant was forthright during the investigation.

While the Grievant did transmit the photographs to the trooper, this was bad judgment personally, not professionally. There is no rule that prohibits it. The Grievant should be restored to his position.

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 Misconduct

The Employer charged the Grievant with violating two rules:

- 1. 4501:2-6-02 PERFORMANCE OF DUTY AND
CONDUCT**

...

- (I) 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.**

...

- (3) For any improper on-duty association
with any individual for purposes other
than those necessary for the
performance of official duties[; and]**

2. 4501:2-6-03 COMMAND AND MILITARY COURTESY

(A) Responsibility of command

- (1) A member who is in command of any post, district, section, unit, detail or assignment, or part thereof, either on a temporary or permanent basis, shall be held responsible for the efficiency, discipline, performance and welfare of the persons under this command, and for the performance and condition of all equipment and the effective discharge of the duties and responsibilities of the division within the scope of this command.**

1. Conduct Unbecoming

a. Bringing Discredit to the Division

There is no question the Grievant's conduct brought "discredit to the Division." Detailed newspaper articles appeared in the Columbus Dispatch (two articles), The Delaware Gazette, and USA Today. It cannot be disputed that newspaper articles reporting a sergeant sending nude photos of himself to a subordinate brings discredit to the Division.

b. Improper On-Duty Association

The record is filled with proof the Grievant spent on-duty time associating with the Grievant "for purposes other than those necessary for the performance of official duties." This includes:

- **A handwritten letter from the Grievant to the trooper that begins:**

It is early Tuesday morning and I'm at my detail. I wanted to text/call you so bad tonight, but I knew you were off with the boy. I've been thinking about you constantly. Sunday was incredible. You really went above and beyond with everything. It did not go unnoticed! The candles, the lighting, the music – then there was you. You were absolutely beautiful and sexy....²

- **Text messages from the Grievant to the trooper while the Grievant was on-duty, including:**
 - **I have a SURPRISE 4 U 2nite.**
 - **I am going home...tired. Very HAPPY u took nights. I am not going 2 treat u bad! C u 2morrow - I will ride. B careful.**
 - **What r u doin hottie?**

The Grievant also admits spending more on-duty time with his paramour than with the other troopers under his command.

2. Responsibility of Command

As a sergeant, the Grievant was responsible for:

the efficiency, discipline, performance and welfare of the persons under this command, and for...the

² The Grievant was on-duty when he wrote the letter, and had been off-duty during the "Sunday" liaison.

effective discharge of the duties and responsibilities of the division within the scope of this command.

The Grievant, by having an affair with a subordinate, sending her nude pictures of himself, and personal text messages – some, while she was on-duty, seriously reneged on his responsibility to promote “the efficiency, discipline, performance and welfare” of those under his command.

The Appropriate Penalty

Given the record establishes the Grievant violated Rules 4501:2-6-02(I) – Conduct Unbecoming an Officer and 4501:2-6-03(A) – Responsibility of Command, the question for the Arbitrator becomes whether removal was the appropriate penalty under all the circumstances. Three elements predominate in this analysis: 1) the seriousness of the Grievant’s misconduct; 2) the Grievant’s forthrightness during the investigation; and 3) the Grievant’s excellent department record.

1. The Seriousness of the Misconduct

Law enforcement personnel are legitimately held to an extremely high standard of conduct. They exercise the powers of the State. Citizens are entitled to be policed by individuals who have not committed serious misconduct and exhibited extremely poor judgment in the performance of their duties.

If this were a situation of the Grievant and his subordinate having an off-duty affair, with none of the other facts present here, that would be one thing. But here, we have a situation where the Grievant sent nude photos of himself to his subordinate and then checked with her while she was on-duty to ensure she had received them, wrote love letters to her while he was on duty, inappropriately texted her while on duty, and spent significantly more on-duty time with her than with the other troopers under his command.

Love and lust certainly influence human behavior significantly. But the Grievant, as a member of the Division, had a duty to keep a check on himself. He did not. His behavior toward his subordinate was highly unprofessional and damaging to the Division. This was serious misconduct.

2. The Grievant's Forthrightness during the Investigation

The Grievant was forthcoming during the investigation. He is to be highly commended for that. This is not a case of moderate misconduct being exacerbated by the serious error of lying during an investigation.

3. The Grievant's Excellent Department Record

But for the instant misconduct, the Grievant has an outstanding department record. He excelled at the Academy, and did well on the job. The Grievant has skills and competencies that serve him well.

Conclusion

The Employer contends after displaying poor judgment on multiple occasions, the Grievant cannot be trusted to properly carry out his duties as either a sergeant or a trooper. Sadly, the Arbitrator must agree. Despite the Grievant's forthrightness during the investigation and excellent department record, it cannot be wished away that he repeatedly exercised unprofessional judgment. Though he had much time to reflect on his actions, he continued to behave unprofessionally and injuriously to the Division.³ Hopefully, the Grievant has learned from this terrible experience the point at which personal conduct harms the workplace.

Despite the Union's valiant job in vigorously advocating for the Grievant, 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: February 12, 2009



Susan Grody Ruben, Esq.
Arbitrator

³ For example, he sent nude photos on two separate occasions many months apart.