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# 15-03-080821-04-01

Grievant: Tawanna Young (termination)

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INTRODUCTION

This matter came on for hearing before the arbitrator in response to a grievance (Joint Exh. 2) filed by The Ohio State Troopers Association ("Union" or "OSTA") on behalf of Tawanna Young ("Young" or "Grievant"). That grievance, number 15-03-20080821-0107-04-01, challenges the termination of Young's employment by the State of Ohio, Department of Public Safety, Division of Highway Patrol ("Employer" or "OSP").

Robert G. Stein was mutually selected by the parties to arbitrate this matter as a member of the panel of permanent umpires, pursuant to Article 20 of the parties' Collective Bargaining Agreement ("Agreement") (Joint Exh. 1), which applies to the facts and conduct under review here. A hearing on the matter was held on December 18, 2008 and January 6, 2009 at the OSTA offices located in Columbus, Ohio. The parties mutually agreed to those hearing dates and location, and they were each provided with a full opportunity to present both oral testimony and documentary evidence supporting their respective positions. The two-day hearing, which was not recorded via a fully-written transcript, was subsequently closed upon the parties' submissions of closing statements.

The parties each stipulated to the statement of the issue and the admission of three joint exhibits. The parties have also both agreed to the arbitration of this matter. No issues of either procedural or jurisdictional

arbitrability have been raised, and the matter is now properly before the arbitrator for a determination on the merits.

ISSUE

Was the Grievant terminated by the Employer for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

Article 19—Disciplinary Procedure
Article 20—Grievance Procedure

BACKGROUND

Young has served for five and one-half (5 ½) years as a trooper at the Delaware post of the OSP following her graduation from the OSP's training academy. Most recently, she was one (1) of the five (5) individual troopers assigned to work during the 10:00 p.m. to 6:00 a.m. shift there. Her direct supervisor on that shift was Sergeant Todd Heck ("Heck").

In March 2007, Delaware Post Commander Lieutenant Heidi Marshall directed Heck to ride along with Young in the OSP cruiser after Marshall had received a complaint regarding a prior DUI stop or arrest made by Young. During the subsequent several months, the shared "ride time" involving Heck and Young totaled 136 hours. (Employer Exh. 1, p.5) During that same time period, a reciprocally-recognized romantic

relationship developed between Heck and Young, as admitted by both of those individuals.

While on duty on April 11, 2008, Young showed two photographs of male genitalia to Dispatcher Kristi Jones ("Jones"), as well as to Mark Murphy, a maintenance worker at the Delaware post. (Employer Exh. 2) Young identified Heck as being the subject of the photos and later indicated that Heck had transmitted the photos to her electronically via cell phone, first in August 2007 and then again in early 2008 after Young acquired a new cell phone. After Jones then contacted Sergeant Kevin Knapp to report the Grievant's conduct on April 11, 2008, an administrative investigation was initiated by the Employer.

That investigation also revealed that the Grievant had on one occasion while on duty surreptitiously attempted to record the conversation between Heck and Dispatcher Laura Hurlbert ("Hurlbert") while they were purportedly sexually active while on duty. Young had admittedly removed a microphone pack from a cruiser, which was not then currently in service, and then placed the microphone in the shredder in the dispatcher area, without the knowledge or consent of either Heck or Hurlbert, before Young left for her own road duty that night. No actual evidence of this incident was submitted because the Grievant has claimed that she destroyed the actual tape.

As a result of the administrative investigation into these incidents, a pre-disciplinary hearing was conducted on August 8, 2008. Based on the hearing officer's recommendation that "just cause" did exist to merit the imposition of discipline against Young, the latter was officially terminated on August 12, 2008 for violating OSP Rules and Regulations and Ohio Admin. Code §§ 4501:2-6-02(E) and 4501:2-6-02(I)I(1) and (2). (Joint Exhs. 3B, 3C, and 3D)

A grievance was filed by the Union on behalf of the Grievant on August 18, 2008, alleging that the Employer had violated Sections 19.01 and 19.05 of the Agreement in effecting her challenged termination. (Joint Exh. 2) Because the matter remained unresolved after progressing through the preliminary stages of the grievance procedure, the matter has been submitted to the arbitrator for final and binding resolution.

SUMMARY OF THE EMPLOYER'S POSITION

The Employer insists that it has "conclusively proved that the Grievant violated the Conduct Unbecoming an Officer work rule when she showed the pictures of [Heck's genitalia] to her co-workers and when she surreptitiously recorded two co-workers without their consent or knowledge." (Employer closing statement p. 2) Ohio Admin. Code § 4501:2-6-02(I) provides the following prohibitions for OSP troopers:

(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 of employees

(2) For committing any crime, offense or violation of the laws of the United States, the State of Ohio, or any municipality

The Employer also contends that "the Employer also proved that the Grievant was not truthful during her administrative investigation with regard to the nature of her relationship with Sergeant Heck." (Employer closing p. 2) The Employer further claims that the arbitration hearing testimony of Heck refuted the statements made by Young during her administrative investigation that her relationship with Heck was fostered "due to [Heck's] threats of her not making it through the promotional process" without Heck's assistance. (Employer's closing p. 7) The Employer contends that, because the Grievant was allegedly untruthful about the extent of her involvement in the relationship she had with Heck, she also violated Ohio Admin. Code § 4501:2-6-02(E). That section includes the following language:

(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.

The Employer argues that the Grievant committed the violative conduct "[w]hen the [consensual] relationship with Heck started to fall

apart, [and] the Grievant became jealous and angry with the situation." (Employer closing p. 2)

The Employer refutes the Union's disparate treatment claim by asserting that the lieutenant at the Delaware post, who was not the recipient of similar discipline compared to the Grievant, was not similarly-situated to the Grievant because the other employee cited in comparison was not charged with the commission of the same or similar violations and the two (2) officers were not of similar rankings within the OSP. The Employer claims that the Union has failed to meet its burden of proof to substantiate its disparate treatment claim.

Based on these assertions, the Employer requests that the Union's grievance be denied in its entirety.

SUMMARY OF THE UNION'S POSITION

The Union avers that Young's answers to questions posed to her during the Employer's administrative interviews demonstrate that "[s]he did not view [her allegedly romantic relationship with Heck] as a consensual relationship. She felt pressured to engage in this conduct with Sgt. Heck because he was her supervisor." (Union closing p. 4) The Union contends that the investigative interviews demonstrate that other Delaware post employees, such as Post Commander Heidi Marshall, Sgt. Kevin Knapp, Sgt. Smith, maintenance repair worker Mark Murphy, and

Trooper Joe Glascox, were aware that "Sgt. Heck was riding with Tpr. Young a lot; so much so that rumors began floating that they were having an affair." (Union closing pp. 10-11; Employer Exh. 1 p. 1) Although that group included two (2) Delaware post supervisors and the post commander, the Union contends that none of the supervisors intervened to at least curtail the ride time shared by the Grievant and Heck, which was well above the average time devoted by other mentors/supervisors.

The Union's basic contention is that the Employer failed to meet its evidentiary burden of establishing that it had "just cause" to justify the Grievant's termination. The Union claims that the Employer relied upon a flawed investigation, which was purportedly not objectively nor comprehensively conducted and was, as a result, biased in its conclusions regarding Young. Even though the Grievant admittedly "should have brought Sgt. Heck's inappropriate advances to her Lieutenant's attention at the beginning," the Union contends that the Grievant's mistakes in participating in the off-duty relationship with Heck and in failing to promptly report Heck's conduct should not be used to deny her the opportunity to continue her otherwise unblemished career with the OSP. (Union closing pp. 17-18)

Based on these contentions, the Union requests that its grievance be granted in its entirety and that Young be restored to her position as a trooper with full back pay, seniority, and benefits.

DISCUSSION

One of the most firmly-established principles of labor relations is that management has a right to direct its work force, normally through the use of a collective bargaining agreement, which specifies the parties' respective rights and responsibilities. In the exercise of its recognized management right to discipline employees, the Employer is governed by the rule of reasonableness, and the exercise of that right 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).

The identified issue for resolution in the instant matter is the validity of the Grievant's termination. As noted both by this arbitrator previously and also by the Union in its closing statement in this matter, in an employee termination matter, an arbitrator generally 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.

"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 and 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).

As in any paramilitary organization, the Employer has numerous and extensive policies and rules addressing a wide range of procedural and conduct situations. Compliance with OSP policies and rules is paramount to the success of the law enforcement agency.

> The Ohio Supreme Court has stated that it is settled public policy that police officers are held to a higher standard of conduct than the general public. Law enforcement officials carry upon their shoulders the cloak of authority of the State. For them to command the respect of the public, it is necessary then for these officers, even when off duty, to comport themselves in a manner that brings credit, not disrespect, upon their department. It is incumbent upon a police officer to keep his or her activities above suspicion, both on and off duty.

City of Cincinnati v. Queen City Lodge No. 69, LEXIS 1522 (1st App. Dist., 2005); *Schroeder v. City of Cincinnati*, LEXIS 5125 (1st App. Dist., 1993). The sensitive nature of a law enforcement officer's functions and the inherent power of law enforcement positions, in the arbitrator's opinion, easily justify the application of a more stringent standard in the examination and

review of employee conduct. "Law enforcement activities must be administered as part of a highly-regimented organization, which cannot permit individual members to circumvent its rules and regulations. The standards of compliance to operating procedures are much higher for police organizations than would be found in the general business community." *H.P.P.U., Local No. 109 and City of Houston (Tex.)*, 95-2 Lab. Arb. Awards (CCH) P 5244 (Overstreet 1994). 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).

Based on a thorough review of the evidence submitted in this matter, the testimony of various witnesses at hearing, and the arguments raised by the parties, the arbitrator here finds that the Employer has not met its burden of demonstrating that it did have "just cause" to terminate the Grievant's employment with the OSP.

> "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 matter, the facts establish that the Grievant was involved in two (2) violations of trooper conduct pursuant to § 4501:2-6-02(I)(1), (2). She did share offensive photographs with other employees at the Delaware post, and she admittedly did attempt to surreptitiously tape record Heck's and Hurlbert's conversation without their permission or knowledge. As a fully-trained trooper with over five (5) years of experience, Young is deemed to have been being fully cognizant that her conduct was prohibited and that she acted in violation of well-known restrictions. Both of those incidents involved on-duty misconduct which had the potential and realized impact of disrupting the workplace and diminishing the efficiency and effectiveness of the workplace. That is the specific type of misconduct which is deserving of serious discipline in view of the Grievant's training generally as a law enforcement officer and also specifically dealing with the legal procurement and maintenance of evidence.

A very serious concern, which unfortunately led to the disciplining of both Heck and Young, is the more egregious conduct of Heck, who was permitted to misuse or abuse his authority and superior officer position to

his own advantage by turning the supervisor/employee relationship into a consensual social/romantic one. At least initially, the Grievant was more vulnerable as she had no ability to limit the extensive ride time which Heck, as her superior officer, shared with the Grievant as his subordinate. Heck was permitted to use his superior position and to compromise the OSP chain of command by his self-serving abuse of his supervisor's directive that Heck should share some drive time with the Grievant to improve Young's performance in DUI situations. No evidence was presented to justify his use of almost one month of paid work time as a passenger in Young's vehicle on the midnight shift or to demonstrate that it was done in the best interests of the OSP. These points are stressed, not to either excuse the Grievant or to defend her conduct in ultimately becoming a willing participant in the bilateral relationship. However, as a sergeant serving in a higher-ranking capacity, Heck was subject to a higher standard of conduct because he served as a model or mentor for other troopers and also as a supervisor for other on-site employees. Conduct which might be excused in the case of a less-experienced and lower-ranking officer cannot be ignored in Heck's case. *City of Thief River Falls, Minn.*, 88-1 Lab. Arb. Awards (CCH) P 8111 (Ver Ploeg 1987). Because he was a superior officer, Heck's conduct must be held to a higher standard and his offenses deemed to be more egregious because he used his superior position in rank and as a supervisor to create the on-

duty circumstances and situations for a non-professional relationship with Young to develop for his personal gain or benefit. Nevertheless, the Grievant must be held personally and individually accountable for her own violations and errors in judgment resulting from the offensive photographs and taping incident in which she voluntarily and willingly chose to act in violation of existing OSP rules and regulations.

The arbitrator does find, however, that the Employer has failed to demonstrate that Young's conduct did constitute a violation of § 4501:2-6-02(E), based on her purported untruthfulness during the administrative investigation and the giving of false information or statements regarding her individual involvement in the relationship with Heck. Although much attention was paid by the parties to the determination of the number and content of text messages sent to and by the Grievant and the number and duration of cell phone calls made on Young's cell phones, a determination regarding what each participant contributed to the on-going Heck/Young relationship is not really relevant to the arbitrator's determination here. The degree of involvement or participation by the Grievant in off-duty conduct is not subject to arbitral review here because there has been no showing regarding the impact that either the initiation or receipt of the electronic communications had in directly impacting the workplace and individual job performance by the participants. Therefore,

no violations may be justifiably based upon the claims and evidence which have been presented here.

When an employee has violated a rule or engaged in conduct meriting disciplinary action, it is primarily the function of management to decide upon the proper penalty. *Graphic Communications, Local 540-M and Commercial Printing Co.*, 01-1 Lab. Arb. Awards (CCH) P 3791 (Statham 2000). "In reviewing the appropriateness of a disciplinary penalty, the arbitrator's role is not to substitute his independent judgment for that of an employer or to second-guess an employer's decision as to the penalty. Rather, the arbitrator's function is to determine whether the penalty imposed was within the employer's reasonable range of discretion and was not discriminatory, unfair, or excessive." *Vancouver Police Officers Guild and City of Vancouver*, 05-2 Lab. Arb. Awards (CCH) P 3187 (Landau 2005).

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, Section 19.05, which indicates both parties' affirmation that alternative disciplinary choices are intended to be utilized when appropriate and that "[t}he Employer will follow the principles of progressive discipline." However, there is no evidence here 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 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 with new supervision. 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 had been acceptable and that there is an absence of any prior disciplinary actions.

Most arbitrators emphasize that the purpose of workplace discipline is not to punish, but rather to correct errant behavior. Arbitrators assume that parties intentionally make a choice to include progressive discipline in a collective bargaining agreement and to then specifically utilize it as a tool to bring about positive change in employee performance and to rehabilitate so that a disciplined employee may enjoy continued employment. *Interstate Brands and Gen. Teamsters Local 406*, 97 LA 675 (Ellman 1992). Except for the most egregious situations, arbitrators generally insist upon progressive discipline in an effort to bring about correction, particularly where the employee's work record is favorable and free of prior infractions. *Int'l Union of Operating Eng'rs, Local 19 and Stein, Inc.*, 00-2 Lab. Arb. Awards (CCH) P 3582 (Shanker 2000).

> In evaluating whether the penalty of termination was warranted, a wide range of factors may be considered. These

> include the grievant's entire work history; prior discipline; compliance with procedural or contractual requirements regarding progressive discipline; and any aggravating or mitigating circumstances.

Communication Workers of Am., AFL-CIO and Quest Communications Int'l, Inc., 01-2 Lab. Arb. Awards (CCH) P 3903 (Landau 2000). Such circumstances in the area of discipline include the nature of the offense(s) and the degree of fault. *Hamilton County Sheriff's Dept. and Frat. Order of Police, Ohio Labor Council, Inc.*, 91-1 Lab. Arb. Awards (CCH) P8158 (Klein 1990). "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). Based on the discipline-free prior record of the Grievant as a recognized mitigating factor, the arbitrator finds that suspension, rather than termination, is the proper discipline in this matter.

Finally, in response to the Union's claim that the Grievant was the victim of disparate treatment and the recipient of more severe discipline for her identified misconduct than other OSP employees, this arbitrator finds that the Union has failed to provide sufficient probative evidence to support that claim. A grievant must produce sufficient evidence to furnish

a reasonable basis for sustaining a claim. *Kata v. Second Nat'l Bank of Warren*, 26 Ohio St.2d, paragraph 2 of syllabus, 273 N.E.2d 292 (1971). Arbitrators have specifically recognized that the Union or Grievant has the burden of proving that the Grievant was treated in a disparate, discriminatory, or unequal manner. *San Diego Transit Corp. and Int'l Bhd. of Elec. Workers, Local 465*, 03-2 Lab. Arb. Awards (CCH) P 3542 (Prayzich 2003).

> In order to prove disparate treatment, a Union must confirm the existence of both parts of the equation. It is not enough that an employee was treated differently than others; it must also be established that the circumstances surrounding his/her offense were substantially like those of individuals who received more moderate penalties.

Genie Co., 97 LA 542, 549 (Dworkin 1991). The term "disparate treatment" is typically defined as "unlike treatment under like circumstances." *Capital Cement Corp. and Bhd. of Boilermakers Local Lodge D208, AFL-CIO*, Lab. Arb. Awards (CCH) P 3053 (Sergent 2000). The underlying principle of prohibited disparate treatment is that "like employees who commit like offenses under like circumstances should be treated in a like manner." *Fed'n of Pub. Employee (AFL-CIO) and School Be. of Broward County (Fla.)*, 98-2 Lab. Arb. Awards (CCH) P 5196 (Richard 1997). Such circumstances in the realm of discipline include the nature of the offense, the degree of fault, and the mitigating and aggravating circumstances. *Hamilton County Sheriff's Dept. and Fraternal Order of Police, Ohio Labor Council, Inc.*, 9-01 Lab. Arb. Awards (CCH) P 8158 (Klein 1990).

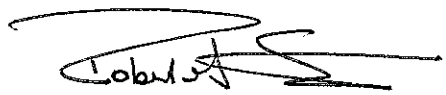
Under the circumstances demonstrated by the evidence submitted in this matter, the arbitrator here concludes that sufficient evidence was **not** presented to indicate that Heidi Marshall or any other OSP employee was ever disciplined under "like circumstances," as compared to the Grievant. The charges levied were for violations of different work rules and involved individuals of differing ranks and length of service. (Employer closing pp. 10-11) Therefore, the arbitrator here concludes that the Union has failed to provide sufficient probative evidence to demonstrate that the Grievant did, in fact, receive harsher or disparate treatment when compared to any other **similarly-situated** OSP employee. There has not been an adequate showing that any other OSP employee received "unlike treatment under like circumstances." *Kroger Co. and United Food and Commercial Workers Union, Local No. 1993*, 99-2 Lab. Arb. Awards (CCH) P 3230 (Sergent 1990). "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). The Union has failed to prove that the Grievant's discipline was discriminatory or disparate in any fashion.

AWARD

The Union's grievance is granted in part and denied in part.

The Grievant's termination shall be vacated, and she shall be reinstated as a trooper to the Delaware post or to another post by mutual agreement of the Union and the Employer within two (2) pay periods from the date of this Award. Her absence from work shall be viewed as a suspension of six (6) pay periods. Her seniority shall be bridged, and she shall be awarded back pay and benefits, minus her period of suspension and any W-2 income or unemployment compensation received from the date of termination to the date of this Award.

Respectfully submitted this 20th day of March 2008,



Robert G. Stein, NAA Arbitrator