

VOLUNTARY ARBITRATION PROCEEDINGS
GRIEVANCE NO.: 15-03-20080912-0132-04-01
TERMINATION OF TROOPER JUSTIN SMITH

THE STATE OF OHIO, OFFICE OF
COLLECTIVE BARGAINING

The Employer

and

THE OHIO STATE TROOPERS
ASSOCIATION

The Union

OPINION AND AWARD

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LICENSED TO PRACTICE LAW IN THE STATE OF OHIO AND COMMONWEALTH OF KENTUCKY

APPEARANCES

For the Employer:

Marissa Hartley, 1st Chair
Lt. Charles J. Linek, 2nd Chair
Kathy Gulla, HRA, Dept. Public Safety
Aimee Hage, legal intern
Chris Zurcher, Staff. Lt., Witness

For the Union:

Herschel M. Sigall, Advocate
Elaine Silveira, Advocate
Justin K. Smith, Grievant
Larry Phillips, Local Union President
Bob Cooper, Staff Representative

I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties, the parties having been unable to resolve this matter prior to the arbitral proceedings. The hearing in this cause was scheduled and conducted on March 5, 2009, at the conference facility of the union in Columbus, Ohio, whereat the parties presented their evidence in both witness and document form. The parties stipulated and agreed that this matter was properly before the arbitrator; that the witnesses should be sworn and sequestered and that post hearing briefs would be filed. It was upon the evidence and argument that this matter was heard and submitted and this Opinion and Award was thereafter rendered.

The parties further stipulated and agreed that the statement of issue was as follows:

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

II. OPERATIVE FACTS

Under letter dated September 8, 2008, the grievant received his termination of seniority letter from the State of Ohio. In full, it stated as follows:

“September 8, 2008

Trooper Justin K. Smith
3607 Clark Street SW
Massillon, OH 44646

Dear Trooper Smith:

You are hereby advised you are being terminated from your employment with the Ohio Department of Public Safety, State Highway Patrol, effective immediately, September 8, 2008.

You are being terminated for violation of OSP Rules & Regulations rules 4501:2-6-02(I)(1), Conduct Unbecoming an Officer, 4501:2-6-02(B)(6), Performance of Duty, and 4501:2-6-02(E), False Statement, Truthfulness.

Sincerely,
/s/
Henry Guzman, Director
Ohio Department of Public Safety"

The rules concerning the allegations of lack of performance of duty, making a false statement and conduct unbecoming an officer are defined as follows by the State of Ohio:

“(B)(6) Performance of Duty

Any member who at any time becomes aware of another employee's impending or actual violations of the rules and regulations, the directives of the Superintendent, or violations of any criminal or civil statutes, shall take immediate action to prevent such violations and then report the violations to a supervisor as soon as possible.

(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.

(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.”

To those allegations, a timely grievance report was filed and the grievance facts on that form revealed the following:

“Grievance Facts

Be specific - Answer Who, What, When, Where and Why

On September 8th, 2008, I was terminated without just cause and violation of progressive discipline.(sic)”

The remedy requested on that filing:

“To be reinstated and to be made whole with all back pay, vacation, sick leave and personal leave.”

This particular case involves a blood alcohol apparatus examination taken annually by the members of the State Highway Patrol and other law enforcement officers who administer breath tests to suspected drunk drivers. The test consists of fifty multiple choice questions as well as a practical exam which requires the individual to actually operate the blood alcohol content machine. It might be noted, from the opening statement of management, that the test has a very high passage rate, in fact over 99% of those who take the exam pass it. Additionally, if someone does fail, the individual is allowed to retake the examination.

The activity of the grievant does not encompass cheating on the exam. The employer admits that the grievant was not involved in using any cheat sheet to take the examination, but rather that the grievant allegedly knew of the event occurring by other troopers and allegedly failed to report it to a superior officer and then allegedly telling an untruth concerning his knowledge. For a moment, it is important to review the operative facts of this particular case.

Many investigations were conducted by the State Highway Patrol, as well as by the Department of Health, who administers the test and the Ohio Inspector General's Office who investigated this matter. The grievant was subjected to five or six such examinations and it was determined that the grievant lied about his activity in this particular matter. The conclusions of the State Highway Patrol triggering such termination of the grievant's seniority revealed the following in a memo concerning this particular matter:

"Evidentiary Summary:

Trooper Smith's 2007 re-certification test matches the answer sheet provided by Trooper Maroon. His 2008 answers do not match the answer sheet provided by Trooper Maroon.

The March 2, 2007 payroll records displayed Trooper Smith was working along with Sergeant Bower, Trooper Maroon, Trooper Bradic and Trooper Worner, the day the answer sheet was created.

Allegation:

- Did obtain, possess and or use answers for the Ohio Department of Health BAC recertification exam.

Findings:

- **Did obtain and possess** the ODH BAC recertification answer sheet by self-confession.

Allegation:

- Failed to immediately report to a supervisor or take action to prevent existing or impending misconduct.

Findings:

- Trooper Smith states he laughed and joked, but **did not** notify with Sergeant Bower about Trooper Maroon making copies of the test sheet. It should be noted that Sergeant Bower denies this notification. He **did not** notify a supervisor he had a copy of the answer sheet for two months in his file.

Allegation:

- Made false statements during the investigation surrounding the Canton Post BAC testing incident.

Findings:

- Trooper Smith stated several times during his interviews with the Staff Lieutenant Davies on April 7, 2008 and the Inspector General's Office on April 17 and May 30, 2008, he had no prior knowledge of the answer sheet being copied or shared. In his interviews on June 23 and July 21, 2008, he admitted knowledge of the copied answer sheet since March 2007. These original statements to Staff Lieutenant Davies and the Inspector General were deemed **untruthful.**

Now it might be noted that the only witness who testified for and on behalf of the employer was a Lieutenant who administered one of the questioning periods involving this matter with the grievant. It might also be noted that there was a multitude of Troopers involved in this alleged

cheating scandal and the use of cheat sheets. The matter found its way into the newspaper in Canton, Ohio and that article questioned the integrity of the Troopers at the Canton Post where this occurred. Let us for a moment review the allegations by the employer as stated above.

The State Highway Patrol, in its investigation as revealed above, stated that in March, 2007, the grievant in this matter was working along with a Sergeant Bower and providing cheat sheets to various members of the patrol who were involved in taking the breathalyzer test. The allegation further states, and the reader may read it in full from above, that the grievant in this particular matter did possess and use exam answers for the Ohio Department of Health BAC recertification exam. The employer further stated that the grievant failed to report the activity to a supervisor, although there is some evidence that the grievant's superior officer, a Sergeant Bower, was notified by the grievant. There is also further allegations that false statements during the investigation surrounding the Canton Post testing incident were made by the grievant.

Many statements, as I indicated, were placed into the record in this particular matter and this arbitrator has reviewed and perused the entire gamut of the proffers of those statements from the record. The evidence, as to all of these points, must be discussed. As I read the record, it appears to me that Trooper Smith was not working along with Sergeant Bower or a Trooper by the name Maroon, nor Trooper Bradic, nor Trooper Warner. That allegation or summary of evidence, as portrayed by the employer, is not founded in the record. There is also a further allegation that the

grievant did obtain, possess and use answers for his own recertification exam. At hearing, the employer acknowledged that the grievant was not involved in any such activity. Any charges in that matter must be held for naught.

There is also an allegation that the grievant failed to immediately report to a supervisor or take action to prevent existing or impending misconduct by others. The record is clear that the grievant did notify a Sergeant Bower of this activity, although Sergeant Bower, in his statement, denies such notification. Sergeant Bower did not testify and his testimony would have been essential to rebut anything the grievant said in that regard to the contrary. The opportunity of cross-examination was not present or made available.

There is also a claim that false statements during the investigation surrounding the Canton Post testing incident were made by the grievant. The grievant explained that he made no false statements and that his first investigation statement was given with the 2008 event in mind and not the 2007 event. The grievant said he never used any cheat sheets and that is buttressed by the present feeling of the employer that such was the case. It was upon these statements, allegations and denials that this matter rose to arbitration for Opinion and Award.

III. OPINION AND DISCUSSION

Termination of seniority of any employer is the capital punishment of the industrial society.

In order to sustain such activity there must be clear, concise and unambiguous evidence. Merely saying a fact is so, does not make it so. There must be proof from the record that, in fact, the activity of the alleged wrongdoer was contrary to rule, statute, or some other basis from which the employer is drawing its authority. In this particular case, I find the evidence to be rather weak and unfounded from the record.


Let us take each fact. The employer, at this point, agrees that the grievant was not involved in any impropriety in taking the 2007 examination or the 2008 examination. Trooper Smith, the grievant in this matter, denies any knowledge of use of any cheat sheet and said that he was not knowledgeable of any such cheat sheet before either exam was given. The grievant further states that he did not possess the answers for the Ohio Department of Health recertification exam and, quite frankly, nothing in the record shows that he had such cheat sheets in his possession before the 2007 exam or 2008 exam. There was some allegation that the cheat sheet was found in the grievant's personnel file and that the grievant shredded it. If such be the case, then the grievant could hardly have had the cheat sheet prior to the 2007 exam and the shredding occurred subsequent to the exam and prior to the April 2008 exam, i.e. some ten months prior to the April 2008 exam. Nothing in the record refutes the grievant's activity in that regard.

Furthermore, the grievant stated that he notified his superior officer, i.e. Sergeant Bower, who through affidavit denies such notification. That evidence, however, is not subject to cross-examination and, while Bower's statement may have been made, the fact is the grievant testified at

open hearing and was available for cross-examination as to his activity. The grievant testified quite frankly, in my opinion, that he did not want any part of any cheating experience, that he told his superior officer and that he himself did not use the cheat sheet in any regards. Based upon all of this evidence and the failure of the record to show proof of the allegations by clear and convincing evidence, this arbitrator has no choice but to place the grievant back to work with full back pay and without loss of benefit or seniority.

IV. AWARD

Grievance is granted. The grievant is placed on active duty and payment of all back wages, benefits and seniority shall be made to the grievant forthwith. The grievant was not terminated from his seniority for just cause.


Marvin J. Feldman, Arbitrator

Made and entered
this 21st day
of April 2009.