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Arbitrator and Mediator
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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.**

and

**THE STATE OF OHIO,
DEPARTMENT OF PUBLIC SAFETY**

Case No. 15-03-20080911-0128-04-01

Grievant: Tpr. Tara L. Worner

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 March 4, 2009 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

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...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.

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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

...

- (6) 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.**

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FACTS

The Grievant has been employed by the Ohio State Highway Patrol since February 23, 2000. She was removed effective September 8, 2008.

The August 25, 2008 Statement of Charges letter provides in pertinent part:

Notice is hereby given that the Director of Public Safety, Henry Guzmán, intends to terminate you from your employment with the Ohio State Highway Patrol for violation of the Rules and Regulations of the Ohio State Highway Patrol, specifically of Rule 4501:2-6-02 (I)(1) Conduct Unbecoming an Officer, Rule 4501:2-6-02(B)(6) Performance of Duty, and Rule 4501:2-6-02(E) False Statement, Truthfulness. As a result of administrative investigation 2008-0367, it was found that you cheated on the BAC recertification exam. You also failed to notify a supervisor that a trooper distributed the answer sheet. It is also charged that you were untruthful during the investigation.

The Union filed a grievance on the basis of violations of Article 19.01 and 19.05, that 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

On April 4, 2008, S/Lt. Joel Smith of District Three Headquarters received a call from Sgt. Bower at the Canton Post. The reason for the call was that some employees were found to be cheating on the BAC recertification exam. An administrative investigation

was initiated and Grievant was accused by her co-workers of receiving a copy of the answer sheet in March of 2007. Grievant took the BAC recertification exam in October of 2007. Grievant's answers on this exam were an exact match to the answers Tpr. Maroon had distributed. Grievant was discharged for rule violations of Conduct Unbecoming an Officer, Performance of Duty and False Statement.

UNION CONTENTION

The Union contends the Employer violated Section[s] 19.01 and 19.05 of the labor agreement. Grievant claimed she did not have or use an answer sheet. Witnesses saw Grievant in the room when Tpr. Maroon was distributing answer sheets but did not say they saw her receive an answer sheet. The Employer had no evidence that she cheated other than she missed questions 30 and 47 which were the same answers that were wrong on the answer sheet Tpr. Maroon had distributed. The Union claimed it is possible she could have missed the same questions even without cheating. Grievant's requested remedy is to be made whole.

MANAGEMENT POSITION AND FINDING

It is the Employer's contention that a violation of the labor agreement did not occur. Tpr. Maroon advised he gave Grievant a copy of the answer sheet in March of 2007. Grievant missed the same two answers on the examination that were incorrect on the "cheat sheet." Grievant also failed to notify a supervisor that Tpr. Maroon was distributing the answer sheets.

The labor agreement allows the Employer to bypass progressive discipline if the violation warrants more severe discipline. 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. She violated work rules by:

- 1. not coming forward immediately when she procured first-hand knowledge Trooper Maroon copied an answer sheet to a blood alcohol content ("BAC") test;**
- 2. using the answer sheet on her own BAC test on October 25, 2007; and**
- 3. lying about both incidents during investigatory interviews.**

On March 2, 2007, Trooper Maroon completed his BAC test and then made a photocopy of his answer sheet. Three individuals state the Grievant was in the room when Trooper Maroon made the photocopy. When questioned whether she was in the room when he made the photocopy, the Grievant was emphatic she was not. That same day, Trooper Maroon give the Grievant a copy of the answer sheet.

The BAC tests are administered by Inspector Craig Yanni of the Ohio Department of Health, Bureau of Alcohol and Drug Testing. Law enforcement personnel statewide must hold a valid permit to operate breath-testing instruments which measure the level of alcohol in a person's body. Permit holders must renew their permit each year by passing the multiple-choice

renewal exam.

On April 4, 2008, Inspector Yanni discovered Trooper Dave Blubaugh copying answers from a cheat sheet during an administration of the BAC test. That discovery led to an Agency-wide investigation. Among the investigation's conclusions were that the Grievant cheated on her BAC test on October 25, 2007.

The Inspector General and Ohio Department of Health reviewed over 22,000 tests administered between 2006 and April 2008. The review was intended to identify other BAC tests exhibiting the same answer pattern Trooper Maroon's cheat sheet contained. That cheat sheet had all but two of the fifty questions correct; the cheat sheet had the wrong answers for questions 30 and 47. Of the tests reviewed, only six had all the answers except questions 30 and 47 correct. Each of those six test-takers were stationed at the Canton Post, including the Grievant. There was a 27/1000 of 1 percent chance of this occurring.

The other five test-takers admitted they cheated on the BAC exam. The Grievant states it a coincidence her answer sheet matches the cheat sheet and the answer sheets of the other cheaters. It is not feasible the Grievant did not cheat on the 2007 test.

The Grievant also lied to investigators during her May 2, 2008 investigatory interview. When asked, "Did you use anything other than your independent recollection to fill in your responses on your answer sheet when you took the October exam?" she answered, "No." However, she later admitted having discussed answers to questions she did not have the answers to with other troopers during the exam.

Had the Grievant exercised discretion and reported Trooper Maroon copied the answer sheet, as she was required, many unfortunate consequences could have been avoided. A trooper is responsible for alerting the proper officials immediately when she understands wrongdoing has taken place. The fact the Grievant did not come forward has resulted in many DUI convictions being put at risk.

The Grievant's failure to come forward resulted in numerous newspaper articles showing the Patrol in an extremely embarrassing light. These articles included front-page, above-the-fold photographs in the Canton Repository.

The Union will argue Inspector Yanni was lax in his enforcements of standards in the test setting. That is irrelevant to this case. The Grievant was terminated for her own misconduct. How Inspector Yanni ran the testing room is not at issue.

Union Position

The Employer did not have just cause to remove the Grievant. It cannot prove the Grievant is guilty of any of the misconduct alleged against her. She never cheated, and she never lied.

Inspector Yanni acknowledges he generally gave out six to eight answers while proctoring. E.g., "Take a good look at number 22." Inspector Yanni answered questions from test-takers during the test, permitted test-takers to ask each other for answers, and did not stay in the test room during the whole test.

The Grievant took her 2007 BAC test in October 2007. Two other troopers also took the test that day; neither of them say the Grievant cheated.

Trooper Maroon says he gave a cheat sheet to the Grievant in March 2007. She immediately threw it away. The Grievant studies each year for her BAC test.

The Employer's entire case is based on the statistically unlikely coincidence the Grievant's answer sheet was the same as the cheat sheet. The Grievant's 2006 answer sheet, however, also got question number 47 wrong. Accordingly, the Employer's case is based on one wrong answer common to both the Grievant's 2007 answer sheet and the cheat sheet.

During the investigation, the Grievant, when asked whether test-takers spoke to each other during the test, answered, "Yes." When asked whether she used anything other than her independent recollection during the test, she thought she was being asked whether she used the cheat sheet, which is why she answered "no" to that investigatory question.

OPINION

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

- 1. The Grievant did what she 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 three rules:

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

...

(B) Performance of Duty

...

- (6) 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

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- (1) For conduct that may bring discredit to the division and/or any of its members or employees.**

...

...

The three alleged rule violations are based on four alleged acts of misconduct:

- 1. that the Grievant accepted a cheat sheet from Trooper Maroon;**
- 2. that she did not come forward with information about cheating;**
- 3. that she cheated during her October 2007 exam; and**
- 4. that she lied during the investigation.**

1. Accepting a copy of the cheat sheet

The record establishes only that the Grievant accepted some papers from Trooper Maroon. The Grievant credibly testified the papers she

accepted from him had the Employer's test guidebook on top of the stack of papers. The Grievant also credibly testified that because she already had a copy of the Employer's guidebook at home, she immediately threw away the stack of papers Trooper Maroon gave her. While it is possible the Grievant may have had an inkling the stack of papers given to her by Trooper Maroon included a cheat sheet, she credibly testified she did not examine the stack before throwing it away.

2. Not coming forward regarding evidence of cheating

The record does not establish the Grievant had actual knowledge of cheating. She credibly testified she did not see Trooper Maroon photocopying the test in March 2007. She credibly testified she threw away the papers Trooper Maroon gave her without looking at them. She was not present when the other five test-takers took their tests.

Without such evidence, it cannot be said the Grievant had actual knowledge of cheating. Thus, she cannot be rightfully accused of failing to come forward with evidence of cheating.

3. Cheating on the test

The only record evidence to support the Employer's allegation that the Grievant cheated is the Employer's statistical analysis. The Employer stated in its closing argument the statistical analysis "makes it impossible the

Grievant did not cheat.”

The record evidence regarding the Employer’s statistical analysis, however, is incomplete. The Employer did not factor in to its analysis the fact the Grievant missed one of the same questions the previous year. This failure to do a more sophisticated statistical analysis makes it impossible for the Employer to prove the Grievant cheated by means of its statistical analysis.

4. Lying during the investigation

When asked during the investigatory interview whether there was any talking among test-takers, the Grievant admitted there was. When asked during the interview whether she used anything other than her independent recollection when she took the test, it is credible, as she testified, that she took that question to mean whether she used a cheat sheet. Thus, when she answered “no” to the independent recollection question, that was not inconsistent with her response that there was talking among test-takers.

Conclusion

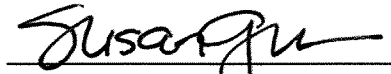
The record does not establish the Grievant committed any of the misconduct she is accused of. Thus, there are no proven rule violations. Accordingly, the Employer did not have just cause to remove the Grievant.

AWARD

For the reasons set out above, the grievance is granted. The Employer did not have just cause to remove the Grievant. The Employer is ordered to expunge from the Grievant's department record any reference to this matter, and to make the Grievant whole.

The Arbitrator reserves jurisdiction through July 31, 2009 as to remedy only.

DATED: May 1, 2009


Susan Grody Ruben, Esq.
Arbitrator