

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

APPEARANCES

For the Employer:

Ryan Sarni, Attorney  
Lt. Charles J. Linek, 2<sup>nd</sup> Chair  
Kathy Gulla, Ohio Department of Public Safety  
Aimee Hage, legal intern  
Lt. Cory Davies, Witness  
Kevin Teaford, Captain, Witness

For the Union:

Herschel M. Sigall, Attorney  
Elaine Silveira, Attorney  
Mark E. McDonald, 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 26, 2009, at the conference facility of the employer 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.

## II. STATEMENT OF FACTS

It appears that the grievant in this matter was removed from his seniority on September 8, 2008 for an alleged violation of the Ohio Department of Public Safety rules, namely rule 4501:2-6-03 (A) and rule 4501:2-6-02 (B)(6). It might be noted that rule 4501:2-6-03 at paragraph (A) reveals the following:

### **“(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 his/her command, for facilities assigned 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.”

Rule 4501:2-6-02 at paragraph (B)(6) revealed the following:

**“(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.”

It might be further noted that the contract of collective bargaining at Article 19.05 reveals the following:

**“19.05 Progressive Discipline**

The Employer will follow the principles of progressive discipline. 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.

The deduction of fines from an employee's wages shall not require the employee's authorization for the withholding of fines from the employee's wages."

After receiving the notice of termination of seniority, the grievant filed a procedurally correct grievance report under date of September 8, 2008. The pertinent facts of that filing reveal the following:

**"Grievance Facts**

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

On Sept. 8, 2008, I was terminated without just cause and in violation of progressive discipline.

Post-It* Fax Note	Date: 9/8/08	# of pages: 1
To: OSTA	From: Sgt. M. E. McDonald	
Co./Dept.: Grievance	Co.: U-4B5 P-76 0-3	
Phone #	Phone #	
Fax #	Fax #	

**Requested Remedy**

To be reinstated as a sergeant and to be made whole with all back pay, vacation, sick leave, personal leave, compensatory time and seniority."

The response by management is found in the file and presented in evidence under a joint exhibit. It revealed the following:

**"Grievant:** Mark E. McDonald  
**Grievance Number:** 15-03-20080910-0120-07-15  
**OSTA Representative:** Bob Cooper  
**Management Representative:** Lt. C. J. Linek  
**Procedural Objection:** None  
**Date of Hearing:** September 19, 2008  
**Date of Response:** September 29, 2008

## **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. Grievant, a sergeant assigned to the Canton post, admitted that Tpr. Maroon told him on April 3<sup>rd</sup> that he had a copy of the answer sheet. Tpr. Maroon gave Grievant a copy of the study guide and answer sheet on April 4<sup>th</sup>. Grievant threw away the answer sheet and failed to take any further action. Grievant was terminated for rule violations of Performance of Duty and Responsibility of Command.

## **UNION CONTENTION**

The Union contends the Employer violated Section 19.01 and 19.05 of the labor agreement. Grievant stated he did not believe the answer sheet Tpr. Maroon said he had could be accurate. It was his belief that each test booklet was different and the answer sheet Tpr. Maroon had was a "worthless piece of paper." He stated he told Tpr. Maroon he needed to get rid of it. Grievant claimed when he received the answer sheet from Tpr. Maroon, he threw it away. He did not intervene on the day of the test because he did not believe the answer sheet to be accurate and he did not want to interrupt the test. Grievant believed this was not an appropriate time to confront Tpr. Maroon. Grievant also claims he did not know the extent Tpr. Maroon had gone to by passing out several copies of the answer sheet.

Grievant had been a sergeant for 15 years and had never been accused of failure to supervise. Grievant claimed he has brought deficiencies to his superiors and subordinates on a regular basis during his career. Grievant claimed the proctor from the Department of Health would at times tell troopers to check an answer to a particular question. At other times he

would tell the whole class an answer to a particular question. 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. Grievant had the responsibility and opportunity to take action a full day before the test was administered. He could have simply ordered Tpr. Maroon to turn over the answer sheet he had in his possession, whether he believed it was accurate or not. Grievant had a second opportunity to intervene when he received a copy of the answer sheet on the morning of the test. Once again he shirked his responsibility because he believed it was not an "opportune time." He also failed to inform his supervisor, S/Lt. Smith, who was there the morning of the examination about Tpr. Maroon's actions.

The labor agreement allows the Employer to bypass progressive discipline, if the violation warrants more severe discipline. The Employer believes the discipline was commensurate with the offense. Based on the foregoing, there has been no violation of the labor agreement. Grievance denied.

/s/

Lt. C. J. Linek  
Training, Selection and Standards  
Ohio State Highway Patrol"

It might be noted that the exact wording of the termination under letter of September 8, 2008, the termination which triggered the grievance, revealed the following:

"September 8, 2008

Sergeant Mark E. McDonald  
740 Redwood Dr.  
Canal Fulton, Oh 44614

Dear Sgt. McDonald:

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 4501:2-6-03(A)(1), Responsibility of Command, and 4501:2-6-02(B)(6), Performance of Duty.

Sincerely,

/s/

Henry Guzman, Director  
Ohio Department of Public Safety”

The record further revealed that the grievant began his employment with the State of Ohio Highway Patrol on November 10, 1982, the last fifteen years serving as a sergeant with a department record that was near perfect. To be exact, the grievant in 2007, received a written reprimand and that was the entire record of discipline for the grievant. The proficiency rating of the grievant was also impeccable during the course of his tenure as a trooper. Upon review of the performance records pertaining to the grievant, the grievant, it is noted, obtained better than average results. That is true in the last performance review of January 11, 2008 in which the grievant was noted to have exceeded the quality of performance. It might be noted that the grievant served at the Canton, Ohio post of the Ohio State Troopers and a proficiency review revealed the following on November 16, 2006:



<b>"Rater Signature"</b> x /s/	<b>Date</b> 11/16/2006
<b>Reviewer Comments:</b> Mark, Thanks for your hard work and dedication to D-3 and the Division. You are a major part of the success at the Canton Post."	

The termination involved in this particular matter involved the dates of April 3, 2008 and April 4, 2008. It is clear that the grievant was not involved in any problems concerning the testing at any prior date and this termination of the grievant was predicated upon those two dates as indicated and alleged violations of the rules as indicated.

It appears that troopers take a yearly examination on a test involving the operation of equipment used for the determination of driver intoxication. The test includes a 50-question multiple choice exam and a practical test on how to use the equipment. It is noted by the parties that there is approximately a 99% passing ratio and the test can be taken over and over again without penalty to the trooper until the trooper passes the examination. It is necessary to pass the examination, both written and practical, in order to be able to test drivers for intoxication. The test is administered by a Department of Health individual and not by the troopers themselves. The test was administered on April 4 at the Canton post of the troopers, the post to which the grievant was assigned.

It appears that the grievant was in need of a study guide for the test on April 3 and asked a

Trooper by the name of Maroon to see to it that he, the grievant, obtained the study guide. There is no discipline attached to having a study guide in order to study for the test, which, in this case, was given on the next day. Maroon said he would obtain one for the sergeant grievant and asked the sergeant grievant if he wanted the answers. The sergeant grievant indicated and stated at hearing that he felt that Maroon, who was known for commentaries that were untrue, was merely "pulling the leg of the grievant." At any rate, that was the total involvement of the grievant on April 3, 2008 concerning this event. On April 4, 2008, the grievant was sitting in his office working before the test was to be taken by the grievant and others and Trooper Maroon placed some papers on the desk of the grievant. The grievant reviewed the papers in due time and found that one of the papers on his desk was a cheat sheet containing the alleged answers of the test to be taken by the grievant. The grievant believed and testified that this cheat sheet was inaccurate because a different test is given every year and having the answers to any one test would not satisfy the need for the current test. The grievant said he crumpled up the sheet and threw it away.

In neither event did the grievant report any inactivity of an improper nature to a superior officer concerning this event. The grievant did not use the sheet. The grievant did not check with anyone else concerning the sheet and the matter just escaped from the grievant's mind altogether thinking that nothing would come of this. It came to pass that the grievant was questioned about this event and questioned as to why he did not take corrective action with Trooper Maroon or report this incident to higher authority. It is on the basis of his failure to report that this termination lies.

Now it might be noted that there were others who took the examination on April 4 just as the grievant. The evidence revealed that there was a incident at the test concerning the use of a cheat sheet and that one of the proctors at the test caught Trooper Maroon using the cheat sheet. The grievant was unaware of this incident, finished the test and went about his business. There were two other sergeants at the post at the time taking the test. These other sergeants were not stationed at the post in Canton as the grievant was and did involve themselves in the use of cheat sheets. Those two sergeants were not suspended, nor terminated from their employment, but their rank of sergeant was taken from them and they continued to be employed as state troopers without the rank of sergeant. The grievant was terminated for his inactivity and that is what this case is all about.

Now it might be noted that the case drew many commentaries from the local media including the Cleveland Plain Dealer, the Canton Repository and other publications. As a result, the Ohio Department of Public Safety, having reviewed the facts, found, in their infinite wisdom, that the grievant should be terminated from his employment at the facility.

The grievant testified. He testified in a forthright professional manner and was apologetic for his inactivity as a result of his two exposures to Trooper Maroon's cheat sheet activity of April 3 and April 4, 2008. The grievant said he thought nothing of the incident because Trooper Maroon always made statements that sometimes were true or untrue and this witness, i.e. the grievant, paid no attention to Trooper Maroon when he talked or spoke. The grievant said he values his employment as a State Trooper and it has been his whole life. The grievant further stated that he has

been remorseful of his failure to report and certainly this would never happen again and wishes to continue his employment as a trooper. It was upon this entire record that this matter rose to arbitration for Opinion and Award.

### III. OPINION AND DISCUSSION

The grievant has over 25 years of service as a state trooper. His department record is impeccable as is his proficiency record. The grievant's refusal to take Trooper Maroon or others seriously about the cheat sheets was an activity that the grievant, at the time, considered appropriate. At the time of hearing, the grievant suggested he now would have taken a different course of action. However, that did not occur and his failure to take a course of action as the rules prescribe did cause his termination of seniority.

It might be noted that management's position as signed off by Lt. C. J. Linek, the answer of which is fully stated hereinabove, noted that the grievant had the responsibility and opportunity to take action a full day before the test was administered. Again the grievant had a second opportunity to intervene on the date of the examination and again did not inform the supervisor. It is that failure of activity on the part of the grievant that must be shown as triggering events for the termination of the grievant's seniority.

I have taken into account the grievant's service record, the grievant's candid testimony at hearing as well as the view of the employer expressed through the mouths of witnesses as they

appeared at hearing for and on behalf of management. I further understand that the Department of Public Safety considers the State Troopers as a paramilitary group. I have read the briefs of the parties, the rules involved, the contract entered into by and between the parties herein and have given due thought to this very important matter.

I must consider the rules of arbitral law. Rules, in order to be proper, must be published, must be reasonable and must be even-handedly applied. Selective discipline may work in some categories of law enforcement but the rules of the workplace demand, among other things, even-handed treatment. The union did not complain of lack of publication of the rule, nor did the union complain of lack of reasonableness of the rule, but the facts of the case clearly underline that even-handed treatment was not given to this grievant in this particular matter.

The facts reveal that there were two other sergeants who were more knowledgeable of the events on April 4. Neither of those two sergeants reported any such activity to their superiors. Neither of these two sergeants disciplined or admonished Trooper Maroon (as they should have.) Neither of these two sergeants were involved in any activity so as to preclude them from being guilty of the same rule as the grievant was guilty of. From all of this, it appears that the grievant, at least, is entitled to the same treatment as the other two sergeants involved. The grievant therefore must be returned to his employment at the employer on a forthwith basis. As a result, the following Award is made.

Arbitrators are not prone to create their own industrial justice. There must be good reason in the record to modify or change the final findings of the employer that the employer failed to consider. In this case, the employer was not even-handed in their treatment of the grievant when they terminated the grievant's seniority and only gave a suspension and demotion to two other sergeants involved in the same cheating episode. The employer explained the difference of discipline on the basis that the Canton post was the home office of the grievant and not so with the others. Cheating and rule breaking pertains to all no matter where you are. Carving out a geographical area does not change the category of sergeant. Furthermore, the two sergeants were in the room where the cheating occurred and heard conversations concerning the cheating. The grievant was not in the same room.

Arbitrators do not create their own industrial justice. There must be good reason to change the discipline of management. There is such good reason in this file. The grievant was not involved in cheating. He simply made a determination that Maroon was telling a falsehood and treated it as such. The grievant was candid about making a wrong decision. He admitted it. There simply is insufficient evidence in the file to such harsh discipline of the grievant under the facts of the case and under the facts of his long and honorable employment as made known in the record.

#### IV. AWARD

The grievant shall be returned to his employment as a State Trooper without loss of rank and without loss of seniority or benefit. The grievant shall be returned without backpay.

A handwritten signature in dark ink, appearing to be 'M. J. Feldman', written over a horizontal line.

Marvin J. Feldman, Arbitrator

Made and entered  
this 11th day  
of May 2009.