

**IN THE MATTER OF ARBITRATION
BETWEEN**

**OHIO STATE TROOPERS ASSOCIATION Unit 1 and 15
Employee Organization**

And

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

GRIEVANT Robert W. Gatchel Jr.

Case No. 15-03-20090129-017-04-01

Umpire's Decision and Award

Appearances:

**For the Employee Organization:
Elaine Silveira, Esq.**

**For the Patrol:
Marissa Hartley
Office of Collective Bargaining**

UMPIRE

**Sandra Mendel Furman, J.D. 0010057
1119 South Cassingham Road
Columbus, Oh 43209**

INTRODUCTION

This matter was heard before the undersigned on March 2, 2010 in Columbus, Ohio at the Office of Collective Bargaining. Grievant and Denise Blue appeared as union witnesses. Present also were OSTA President Larry Phillips and Staff Representative Dave Riley. Elaine Silveira represented the Union and Grievant at the hearing.

The State's witnesses were Lt. Michael Sharp and. Lt. Cassandra Kocab. Also present was Sgt. Anne Ralston from central office of the Patrol. Marissa Hartley from the Office of Collective Bargaining represented the Patrol.

The contract, grievance trail and disciplinary notices and pre disciplinary papers were introduced and accepted as Joint Exhibits 1-3. The Union introduced six exhibits. The Patrol introduced two exhibits including the AI. The parties' exhibits will be discussed below as relevant.

There were no procedural arguments presented.

Separation of witnesses occurred. Each side was given the opportunity to call witnesses and cross-examine witnesses consistent with the parameters of the parties' collective bargaining agreement and present relevant materials in support of their position. All witnesses were sworn. Post hearing arguments were made at the close of the hearing.

ISSUE:

Was the Grievant disciplined for just cause? If not ,what shall the remedy be?

APPLICABLE CONTRACT SECTION:

Article 19.01

STATEMENT OF FACTS:

Grievant is employed as a Trooper at the Lima post. At the time of the discipline he had over nine years of service.

The Patrol had received reports from a certain employee (Trooper Barnhart) that Gatchel was having sex with Dispatcher Denise Blue while he was on duty. The investigation was conducted by two different investigating officers, each of whom testified at the hearing. The Patrol interviewed several persons

including the two principals Blue and Gatchel. Grievant himself was interviewed two separate times. The interviews were recorded on disc which the Union presented as evidence. The Patrol concluded that there was insufficient substantiation to the claim that Gatchel had sex while on duty with Dispatcher Blue.

After the investigation Grievant was charged with violation of work rule 4501:2-6-02 (I) (1) Conduct unbecoming an officer and 4501: 2-6-02(B) (1) Use of equipment. Grievant received a five (5) day suspension. The specific allegations were:

Gatchel had an improper on-duty association when he met with a dispatcher in a parking lot for purposes other than those for the performance of his duties.

[Gatchel] used the Mobile Computer Terminal (MCT) for non work related purposes.

His notice of department contained the following:

Verbal Reprimand	preventable patrol car crash
Three day fine	negligence
Written reprimand	failure to follow proper procedure
Three day fine	mishandling of an event; improper course of action; negligence
Verbal reprimand	Compliance to Direct orders/policy/procedures

EMPLOYER POSITION

Grievant met with Blue 8-15 times while on duty for non business purposes. These meetings lasted up to fifteen minutes-1/2 hour. Grievant admitted the offenses. This is an improper on duty association.

Grievant used the MCT for non business purposes. 69 messages were tracked recording non business purpose conversations. Grievant admitted that he knew that the MCT was not to be used for any communications except for business related matters.

The grievance should be denied.

UNION POSITION

The Union argues that Grievant was disciplined because the Patrol failed to prove its main contention: that Grievant had sex with Dispatcher Blue while on duty. Since the Patrol spent a great amount of time and resources on that investigation and it came up short, it overreacted and issued a five day suspension. Everyone has non business related conversations on duty. While not permitted many persons have used the intranet for non business purposes. A five day suspension for these incidences is not for just cause. The grievance should be granted.

DECISION AND AWARD

The Patrol conducted an intensive investigation which had the goal of determining whether or not Grievant conducted an on duty affair with another Patrol employee-Blue. There was insufficient evidence to sustain the allegations. Instead Grievant was charged with conduct unbecoming and [mis] use of equipment.

Grievant admitted that he had Blue visit him while sitting in his Patrol car while on duty on multiple occasions in 2007-2008. There is some dispute as to the number of times, but it is clear that there were many visits that occurred on Patrol time. The visits were not work related. There was evidence that others conduct personal relationships on the job engaging in clearly non work related conversations on a daily basis. There was no evidence in the record that anyone else had ever been disciplined for this conduct.

Grievant admitted that he used the Patrol intranet email system via the MCT to exchange multiple non work related correspondences with Blue. The Patrol has a work rule that prohibits non business use of the Patrol's communication system. It is clear that employees do on occasion use this MCT system to communicate non work related matters. There was no evidence as to what type and level of discipline is prescribed for this offense. There was no evidence that anyone else had ever been disciplined for this conduct. A full review of the communications showed some related to dentist appointments, cell phone service, babysitting, general greetings and mundane exchanges of hellos.

A few texts related to traffic stops, number of tickets written and the like. Although the number of exchanges was high, none were lengthy and none included sexual innuendo or content. None contained improper language. Grievant knew that these messages were not work related. He did not contend to the contrary.

What the Patrol is asking is for the arbitrator to sustain a five day suspension for an employee wasting Patrol time by repeatedly engaging in idle and sometimes randy conversations both face to face and electronically with another employee. For reasons discussed below these offenses while unprofessional and against work rules are not proportionate to the discipline issued.

The arbitrator finds that Grievant showed poor judgment in allowing Blue into his patrol car while he was on duty. Whether he did it once or 5 times does not make a minor infraction into a graver offense. What **is** important is that he did not receive a warning about this behavior before he was disciplined.

It is also important to analyze whether or not Grievant engaged in conduct that may bring discredit to the division or its employees. It is possible that citizens passing by a cruiser on SR 15 may have had a brief thought- why is the cruiser parked there? If Blue had been in the front seat, it may have also raised some questions in the minds of passing persons. It is established that it is uncommon if not prohibited for persons to sit in the front of the cruiser. Grievant should have been sensitive to this. He knew that this was not common practice. But he never receive a warning or counseling about this conduct before he received a five day suspension.

The arbitrator finds that Grievant showed poor judgment in using the mobile computer terminal for non work related email while on duty. This clearly constitutes use of equipment not in the performance of official duties. The evidence showed this happened sixty-nine (69) times. The conversations were rather innocuous and brief. The sheer volume *does not in and of itself* make the waste of time and improper use of Patrol resources more egregious. It was apparent several of the conversations had to do with where Grievant was and

whether Blue could/would stop by the SR 15 church parking lot. Making these arrangements on company equipment for non business purposes was improper and without justification or excuse.

Grievant cannot be said to have had no idea that this chatter would/could go unnoticed. Grievant himself did not claim ignorance of the fact he was using public property for non work related purposes. What **is** important is that he did not receive a warning before he was disciplined.

The arbitrator ultimately agrees with the Union position: the Patrol set out to prove one thing, could not and then used the extensive research and investigation to charge Grievant with specific types of behaviors for which no one else of record had received discipline. The conduct the Patrol sought to investigate was sex on the job. The fact that his use of the MCT and the excessive personal conversations were at no point the target of the AI is clear from the two DPS 006 forms. One of the forms was concerned with the truthfulness of statements made in the first interview; he was not charged with falsehoods. The original form merely states "engaged in an improper on duty relationship with Denise S. Blue." This in no way indicates or suggests that use of the MCT or spending too much on duty time talking to her by MCT, text or in person was at issue. The Patrol on the evidence it reviewed failed to make a sexual contact case by internal standards. It is unfair then to discipline Grievant for matters peripheral to the AI without having warned Grievant to cease the conduct.

It violates due process principles to discipline an individual who has not had a warning that certain conduct would likely result in discipline. If Grievant had been counseled or warned before that he was using the MCT improperly then persisted, there is no doubt discipline would be warranted. If Grievant had been warned or advised to discontinue limit or otherwise moderate his interpersonal contacts with Blue or any others, then discipline would be appropriate.¹ But the

¹ The arbitrator's conclusion is reinforced by the fact that Sgt Johnson knew about the allegations and did nothing to investigate. At a minimum, he should have counseled or warned Grievant to shape up and conform to the reasonable work rules.

Patrol clearly set out to investigate Barnhart's allegations: all the cited misconduct was a by product of the main investigation.

None of Grievant's prior offenses were related to use of the intranet, MCT or for meeting and spending time with persons on Patrol time. Although all employees are expected to be conscientious to spend their work time engaged in activities exclusively for the benefit of the employer, this is not workplace reality even according to the investigators.

There is no *per se* rule that misuse of the intranet merits a certain level of discipline. Grievant should have been warned or counseled before a five day suspension was imposed. The Patrol did not contend that a five day was a progressive discipline; the department record makes it clear that each prior offense was considered separately.

This in no way makes Grievant an exemplary employee. His department record speaks for itself. It is neither laudatory nor acceptable.

There is no excuse for violating the work rule about personal use of the MCT after this point. Even if it may be a rule more honored in the breach, it is a reasonable and valid work rule. The Union does not contend to the contrary.

There is no excuse for Grievant having anything more than brief casual personal conversations while on duty. The length and frequency of his chatter with Blue is excessive by any standards. The Patrol does not have a "no personal conversations in or near a cruiser" rule. Grievant's conduct is not excused due to the absence of a rule. Grievant however received no advance warning of the consequences of his excessive visiting with Blue. If his contacts with her were open and notorious enough to spur office gossip and to spark an investigation, it is unclear why no one ever told him to stop or get his act together. Due process requires more.

A long term employee should have known that his on duty contact with Blue non work related was excessive even if it is generally acknowledged that intrapersonal relationships occur at work. Despite the fact he had prior infractions for miscellaneous other rule violations, that does not support a five day suspension for a first time violation of the work rules at issue in this case.

Grievant is on fair notice that he cannot spend excessive time on the job fraternizing or socializing. Grievant is on fair notice that use of the intranet to schedule "meets" or just chat is improper use of company resources. Due to the lack of counseling or verbal reprimands for this type of conduct there is no just cause for a five day suspension.

AWARD

The grievance is granted.

A handwritten signature in black ink, appearing to read 'Sandra Mendel Furman', is written over a horizontal line.

Sandra Mendel Furman, Umpire

Issued in Columbus, Ohio on March 8, 2010