IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF PUBLIC SAFETY
DIVISION OF HIGHWAY PATROL

AND

THE OHIO STATE TROOPERS ASSOCIATION

Grievant: William P. Elschlager

Case No. 15-03-20100104-0001-07-15

Date of Hearing: January 29, 2010

Place of Hearing: OSTA Office
Columbus, Ohio

APPEARANCES:

For the Union:
Advocate: Herschel M. Sigall, General Counsel
2nd Chair: Elaine N. Silveria, Assistant General Counsel

Witnesses:
Grievant: William P. Elschlager
Chad Cruset – Trooper
Jeffrey Burroughs – Trooper

For the Employer:
Advocate: Ryan Sarni
2nd Chair: Charles J. Linek, Office of Collective Bargaining

Witnesses:
Susan Rance-Locke – Staff Lieutenant
Ray E. Martin – Staff Lieutenant
Ericka A. England - Trooper

OPINION AND AWARD

Arbitrator: Dwight A. Washington, Esq.

Date of Award: March 31, 2010

INTRODUCTION

The matter before the Arbitrator is a Grievance brought pursuant to the Collective Bargaining Agreement (CBA) in effect March 1, 2006 through February 28, 2009 between the State of Ohio Department of Public Safety, Division of the State Highway Patrol (hereinafter "OSP" or "Employer") and the Ohio State Troopers Association, Inc. (Union).

The issue before the Arbitrator is whether just cause exists to support the removal of the Grievant, William P. Elschlager (Elschlager) for violating DPS Work Rule 4501:2-6-02(Y)(1) - Compliance to Orders.

The removal of the Grievant occurred on or about December 30, 2009 and was appealed in accordance with Article 20, Section 20.08 of the CBA. This matter was heard on January 29, 2010 where both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing briefs were submitted by both parties to the Arbitrator on or about February 22, 2010. This matter is properly before the Arbitrator for resolution.

BACKGROUND

The Grievant was removed by OSP for failure to comply with an order given by a supervisor regarding the use of the training tank for the Basic class #122 that was in training at the Ohio State Highway Patrol Academy (Academy). The Grievant was an instructor at the Academy and had attained the rank of sergeant.

On September 7, 2008 a class of Basics, or cadets, was undergoing basic training under the direction of Trooper Ericka England (England), who was the duty officer that day. This Basics class was identified as #122. The training which occurs at the Academy which includes a combination of mental, physical and team building programs. The training is analogous to boot camp in the military services with the goal of preparing the Basics for the myriad of

circumstances they may encounter as Troopers and the re-certification of other troopers through instructional and physical programs. The Grievant was present at the Academy on September 7th to perform office work that was unrelated to Basic class #122 activities.

Basic class #122 finished classes on September 5th but was ordered back to the Academy on that Sunday night due to failures of the class to properly perform tasks associated with their notebooks. England informed the Grievant that a cadet had forgotten to bring his training badge and another cadet had improper attire, both of which prompted the Grievant to toss their rooms and required the cadets to perform several exercises, one of which was called "in and outs." "In and Outs" necessitates the use of the training tank, i.e., pool. The Academy's training tank is used as part of the physical training (P.T.) activities required by the Academy. However, prior to September 7, 2008, OSP Staff Lieutenant (S/Lt.) Ray Martin (Martin) had verbally instructed the training sergeants, including the Grievant, not to use the pool as part of basic squad training until further notice.

According to the Employer, the Grievant disobeyed the direct order by using the pool, and the exercises ordered by the Grievant were also used as a form of behavior modification, which is contrary to OSP's policy. It appears, that the exercise lasted for approximately eight (8) to ten (10) minutes, and the Union submits it was for team building purposes, not P.T. The Union also points out that S/Lt. Martin's order was less than clear. The investigation, opines the Union, indicates that Sgt. Nathan Dickerson (Dickerson) and Sgt. Ronald Raines (Raines) had understandings of S/Lt. Martin's verbal order regarding use of the training pool that differ from one another.

The Union points to the parties' Joint Stipulation No. 3 as indicative of the unusual circumstances of this case, in that the Employer acknowledges that it was "more upset than

usual" with a prior Arbitrator's award which reinstated the Grievant to his former rank on or about October 7, 2009. The Grievant's reinstatement as a result of this award accounts for the lapsed time between the current disciplinary incident (September 7, 2008) and the discipline (December 30, 2009). The Union also believes that the "merger and bar" doctrine and/or fairness required the Employer to merge the September 7, 2008 incident with the prior discipline. The Employer disagrees, in that the incident which led to Grievant's prior discipline occurred on November 17, 2007, almost ten months earlier than the incident presently before this Arbitrator, and the CBA does not require OSP to combine multiple administrative investigations regarding separate incidents.

The Union seeks reinstatement, back pay and a make whole remedy, whereas OSP contends that the Grievant's removal was for just cause and the grievance should be denied.

ISSUE

The parties stipulated to the following as the issue in this matter:

Did the Department of Public Safety remove the Grievant for just cause? If not, what shall the remedy be?

RELEVANT PROVISIONS OF THE CBA AND DPS WORK RULES

ARTICLE 19 – DISCIPLINARY PROCEDURES

19.01 Standard

19.05 Progressive Discipline

19.07 Abeyance Agreements

WORK RULES

Department of Public Safety Work Rule 4501:2-6-02(Y)(1)

COMPLIANCE TO ORDERS

(1) A member shall immediately and completely carry out the lawful orders of a supervisor, or designated officer in charge, which pertain to the discharge of the member's duties.

POSITION OF THE PARTIES

THE EMPLOYER'S POSITION

The Grievant was removed by OSP because he violated Department of Public Safety Work Rule 4501:2-6-02(Y)(1) on September 7, 2008 when he made certain members of Basic class #122 use the pool.

The Employer contends that the sequence of events preceding the use of the pool was as follows:

1. The Basics who normally stay at the Academy on weeknights were ordered to return on Sunday because their class notebooks were lacking in quality.

2. Officer England was the Duty Officer and responsible for the Basics' activities that evening. Officer England discussed that proper attire was lacking for one Basic and another had forgotten his ID badge.

3. The Grievant, who was "off-duty" at the time, became aware of the situation and ". . . decided to ratchet up the situation when he found that a Basic had forgotten his ID badge." (Employer's Opening Statement, p. 2). The Grievant tossed the cadets' dorm rooms and then decided to hide the ID badge once it was delivered to the Academy by the Basic's relative.

4. The Grievant then instructed the Basics to find the ID badge which had been separated into two separate parts and hidden in the Academy. The badge itself was discovered in the gymnasium and the clasp of the badge was retrieved from the pool. The Grievant then instructed the Basics to change into their swim gear where he conducted a P.T. session.

5. The P.T. session required half of the class to do "in and outs"[1] and the other half to do the "dying cockroach."[2] The Grievant made the class alternate back and forth between these exercises for approximately ten minutes.

6. Two weeks prior to September 7, 2008, the Grievant's supervisor, S/Lt. Martin, instructed the sergeants during a staff meeting that the pool was not to be used with the Basics until further notice. S/Lt. Martin had received complaints from others at the Academy who thought the Basics were using the pool an excessive amount of time. Despite S/Lt. Martin's order, the Grievant disobeyed the directive by having the Basics do in and outs.

The discipline of the Grievant took into consideration his twelve years of service and his active discipline record. Prior discipline included: a 245 day suspension for an off duty domestic violence incident; a three (3) day suspension for negligence regarding poor case documentation; a one (1) day fine for excessive force on a suspect where he tased a female seven times; and a one (1) day suspension for an inappropriate remark to a fellow employee.

Finally, the merger and bar doctrine codified in Ohio Administrative Code 124-3-05 indicates that ". . . All incidents which occurred prior to the incident for which a non-oral disciplinary action is being imposed . . . Incident occurring after the incident for which a non-oral disciplinary order, are not merged and may form the basis for subsequent discipline." The current discipline occurred after the domestic violence incident and prior decisions from arbitrators have found that the merger and bar doctrine is inapplicable.

---

[1] In and outs is listed in the Training Tank Physical Training Manual as an exercise which requires the Basic to get in and out of the pool without using his or her knees.

[2] Dying cockroach required the Basic to lie on his or her back with his or her arms and legs extended upward.

THE UNION'S POSITION

The Grievant was an instructor at the OSP Academy and normally works beyond the eight hours each day. It was not abnormal for the Grievant to work from 5:00 a.m. until 8:00 or 9:00 p.m. during the workweek. The "off-duty" status designation by the Employer is inapplicable because approximately 50% of the Grievant's training with the Basics occurs outside of his paid eight hour work day.

Therefore, on September 7, 2008, the Grievant's presence at the Academy was typical; and his rank exceeded Trooper England's regarding any protocol matters that would occur at the Academy. The Grievant became involved with the Basics on September 7 to impress upon them the significance of the ID badge. The badge has profound implications for security to the building and the Academy. To imprint upon Basic class #122 the significance of maintaining control over one's ID badge, the Grievant hid the badge and clasp to foster a team building exercise. The portion of the badge which was recovered from the pool was as a result of one of the Basics entering the pool while the rest of the class observed. It was the Grievant's intent to reinforce the principle that if one person does something, all of the Basics have to participate.

The Union disagrees that the "in and outs" were P.T. P.T is planned events such as swimming laps, etc. that normally take 45 minutes to complete. P.T. exercises are normally scheduled in blocks of time such as cardio training; circuit training; tank P.T. day and long-slow run day. (Management Exhibit (MX) 4). On the other hand, team building exercises occur to develop core values and group responsibility, as opposed to the individual. As a result, the whole group is required to participate in an activity if one of the Basics falls short of his or her responsibilities. Examples included: if one cadet was tardy, all the Basics were required to wait; if one cadet failed to make the bed properly, all had to remake their beds. In short, "When one

recruit screwed up, we all paid the price." (Union Post-Hearing Statement, p. 17). Simply, the eight minute pool exercise was not P.T., but team building.

The Union further points out that the direct order was one of many subjects that was discussed verbally as part of a staff meeting. The direct order was never put in writing, and the sergeants who were present at the staff meeting reached different conclusions regarding what was stated by S/Lt. Martin.

The investigating officer, S/Lt. Susan Rance-Locke (Rance-Locke), indicated in her report that S/Lt. Martin stated that the pool could not be used until further notice from him. Sgt. Dickerson recalled that S/Lt. Martin stated that the pool couldn't be used for P.T. sessions until the following Thursday. Sgt. Raines indicated that S/Lt. Martin stated that the pool could not be used for P.T. sessions. The Grievant recalled S/Lt. Martin stating that the pool could not be used for P.T. sessions during the times that outsiders might misinterpret the use of the pool by the Basics.

The "order" at issue here apparently evolved from the perception of third parties who visited the Academy that the use of the pool was somehow inconsistent with training. Regardless of the rationale for the order, the OSP investigation underscores the proposition that no legitimate direct order could have been given, as evidenced by the different conclusions reached by each of the staff who heard S/Lt. Martin's alleged directive.

The investigation contained written statements from S/Lt. Martin, Sgt. Dickerson and Sgt. Raines. S/Lt. Martin indicated that the directive was stated in an undated staff meeting wherein he ordered no further use of the pool/tank until further notice. However, neither Sgt. Dickerson's nor Sgt. Raines' statements confirm what S/Lt. Martin contends he stated. Additionally, the Grievant's recollection of what was stated is different from S/Lt. Martin, Sgt.

Dickerson and Sgt. Raines. The Union contends that a lack of a written order to verify what S/Lt. Martin actually stated to the training staff makes OSP's reliance upon the memory of those present unreasonable and a major flaw in proving a violation of Work Rule 4501:2-6-02(Y)(1).

The Union points out that the acrimonious relationship between the parties is fueled by an Arbitrator's award which reinstated the Grievant. Joint Stipulation No. 3 acknowledges that OSP was "more upset than usual" when the Grievant's November 2008 termination was overturned. The Union asserts that OSP's failure to successfully remove the Grievant for his off-duty conduct "incensed" the OSP hierarchy, and lead directly to this matter.

The Employer could have merged the pool incident with the prior discipline prior to the discipline being imported, via the Arbitrator's award. Whether the "merger and bar" rule technically applies is secondary to the concept of fairness, which should prevent the Employer from taking a second bite of the apple when it delayed pursuing the pool incident until the issuance of the prior discipline. The Union contends that, in the past, OSP has merged separate acts as grounds for termination and has never terminated a Union member on conduct it was aware of prior to the issuance of an earlier discipline.

The Union seeks reinstatement, back pay, and for the Grievant to be made whole as to all wages and fringe benefits he has suffered.

DISCUSSION AND CONCLUSION

Based upon the sworn testimony at the arbitration hearing, exhibits, and the post hearing statements, the grievance is granted. My reasons are as follows:

The Grievant, a twelve-year employee, was removed by OSP for violating a direct order that prohibited him from using the pool/tank with Basics until further notice from the Employer. The OSP conducted an investigation and concluded that S/Lt. Martin stated to the training staff

that the training pool was not to be used with the Basics for any reason until further notice. S/Lt. Martin testified at the hearing and had previously made the same statement in his taped interview during the investigatory process.

The directive was made by S/Lt. Martin one or two weeks prior to the September 7, 2008 incident. Others present included Sgt. Dickerson and Sgt. Raines. The investigation was conducted by S/Lt. Rance-Locke, who interviewed Sgt. Dickerson on September 25, 2008. Sgt. Dickerson was asked only one question about the pool/tank: "Q: Did you have any question in your mind that you were not to use the training tank for P.T. sessions prior to Thursday, September 11, 2008? A: No."

On October 8, 2008, Sgt. Dickerson was re-interviewed and, when asked what his understanding was of when he could use the training tank with the Basics, he replied:

> ". . . At that given point in time, my understanding was that the tank was not to be used for P.T. The Thursday after the incident happened was going to be the re-start for Basic 122 to use the tank for P.T." (MX 1).

Sgt. Raines was interviewed by S/Lt. Rance-Locke on September 25, 2008 and asked a direct question regarding what S/Lt. Martin told the training staff as follows:

> "Q. Sgt. Raines, in regards to using the training tank what were the exact instructions given to you by S/Lt. Ray Martin in using it for Basics?
>
> A. . . . [S/Lt.] Martin met with the squad and advised us that the decision had been made **to not use the tank for P.T.** It may be an assumption on my part, but the discussion of concern at that point was tank use for P.T. I don't know if he said **not to use it at all** or P.T. alone . . ." (MX 1) (Emphasis added).

Later on in the same interview, Sgt. Raines was asked a second time his understanding of S/Lt. Ray Martin's order:

> "Q. Did you interpret S/Lt. Martin's directive to mean no pool use at all until further notice prior to the first Thursday P.T. session?

A. I didn't give his directive thought about anything else other than what was related to P.T. . . ." (MX 1).

The Grievant was interviewed on September 24, 2008 by S/Lt. Rance-Locke and indicated that he recalled S/Lt. Martin advising the training staff that someone saw the Basics in the pool and thought that the Academy had become a country club and could not do P.T. in the pool during the week day.

Despite a plethora of evidence at the hearing on related and ancillary issues, the central matter before the Arbitrator is whether or not OSP was able to prove guilt or wrongdoing to satisfy "just cause" for discipline issued in this matter. It is well established that the Grievant must obey lawful orders related to his job assignments. Given that the Grievant is a sworn law enforcement officer, the Grievant carries an additional duty because of trust imposed by his public persona, which requires public confidence. City of Cincinnati v. Queen City Lodge No. 69 LEXIS 1522 (1st App. Dis. 2005) (police officers are held to a higher standard of conduct than the general public and are expected to act as examples of model behavior to the community).

On the other hand, OSP is required to issue directives that are clear and unambiguous. The weight of the evidence must indicate that the Grievant had clear notice of what OSP expected of him regarding the training tank. In other words, the clarity and certainty of S/Lt. Martin's order must not be in dispute.

A review of the evidence indicates that the "directive" spoken by S/Lt. Martin was unclear to the training staff based upon "their" understanding of what activity could or could not occur in the training tank. As examples, Sgt. Raines believed the directive only applied to P.T., whereas Sgt. Dickerson in his second interview of October 8, 2008 was of the understanding ". . . that the tank was to be used for P.T. [and that] the Thursday after the incident happened was

going to be the re-start for Basic 122 to use the tank for P.T." (MX 1). Somewhat consistent with the foregoing, the Grievant "understood" that the directive prevented the use of the training tank during regular business hours but that the tank could be used prior to 8:00 a.m. and/or after 5:00 p.m.

However, no evidence was offered by or through the training staff which corroborates S/Lt. Martin's claim that he directed them not to use the pool with Basics for any reason until further notice. The investigative report of S/Lt. Rance-Locke at page 2 contains in its summary that Sgt. Dickerson and Sgt. Raines indicated that S/Lt. Martin advised that there would be no P.T. in the pool until further notice. However, a careful review of their actual written statements fails to indicate that they understood the prohibition to apply "until further notice" and Sgt. Raines stated on September 25, 2008 that ". . . I do not know if he (S/Lt. Martin) said not to use it at **all** or P.T. alone . . ." (MX 1) (Emphasis added).

The parties spent considerable time at the hearing differentiating between P.T. versus team building exercises in an effort to clarify S/Lt. Martin's directive. Suffice it to say, that if the record indicated that an order did occur, the distinction between P.T. or team building would be moot. In other words, the prohibition would have precluded the use of the pool for "any" purpose whether for P.T. and/or team building. Granted, each of the training sergeants recalls something was stated about P.T. and the use of the pool by the Basics. Beyond that, the record does not support that S/Lt. Martin's verbal directive given to the sergeants was clear and unambiguous. This finding is not directed at S/Lt. Martin's credibility, but only underscores the need for verification to eliminate the inconsistencies inherent with individual memories. In short, the evidence failed to support that S/Lt. Martin's verbal directive was a clear and direct order required for a finding of just cause. Lacking just cause, the penalty of discharge was

inappropriate under the circumstances. The next inquiry normally pursued by an Arbitrator would concern itself with whether the remedy was appropriate under the circumstances. Given the import of Joint Stipulation No. 3, it seems that any remedy short of removal by OSP would have been unacceptable under the circumstances. Removal, however, was not reasonable under these circumstances.

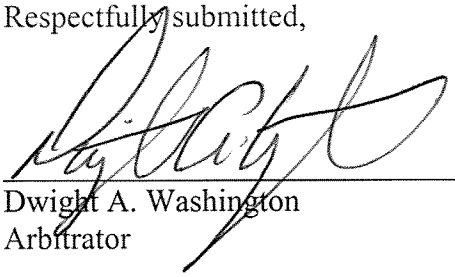
The evidence fails to support any finding that just cause existed to remove the Grievant for violating Rule 4501:2-6-02(Y)(1). Under different circumstances, the Grievant's disciplinary record which consists of: a 245 day suspension; three days' suspension; a one day fine; and a one day suspension for various inappropriate conduct would act as an aggravating factor that would not mitigate against his removal. The Arbitrator reviewed the prior disciplinary record of the Grievant, but, given my finding of no just cause, any additional comments to that end would be superfluous.

Moreover, the Arbitrator agrees with the OSP position on the merger and bar defense raised by the Union and would not have found this discipline subject to any restraints based upon the off-duty removal matter previously heard by Arbitrator Robert G. Stein. Finally, any matter or issue raised by either party not addressed herein is found by the Arbitrator not to be dispositive of the matter.

AWARD

The grievance is granted. The Grievant shall be reinstated and made whole as soon as practical with all back pay, rank and any other economic benefit he would have been entitled but for his removal.

Respectfully submitted,



Dwight A. Washington
Arbitrator

Dated: March 31, 2010

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF PUBLIC SAFETY
DIVISION OF HIGHWAY PATROL

AND

THE OHIO STATE TROOPERS ASSOCIATION

Grievant: William P. Elschlager

Case No. 15-03-20100104-0001-07-15

Date of Hearing: January 29, 2010

Place of Hearing: OSTA Office
Columbus, Ohio

APPEARANCES:

For the Union:
Advocate: Herschel M. Sigall, General Counsel
2nd Chair: Elaine N. Silveria, Assistant General Counsel

Witnesses:
Grievant: William P. Elschlager
Chad Cruset – Trooper
Jeffrey Burroughs – Trooper

For the Employer:
Advocate: Ryan Sarni
2nd Chair: Charles J. Linek, Office of Collective Bargaining

Witnesses:
Susan Rance-Locke – Staff Lieutenant
Ray E. Martin – Staff Lieutenant
Ericka A. England - Trooper

OPINION AND AWARD (SUPPLEMENTAL)

Arbitrator: Dwight A. Washington, Esq.

Date of Award: April 20, 2010

AWARD (SUPPLEMENTAL)

On April 20, 2010 the parties and the Arbitrator had a conference call regarding the actual Post assignment of the Grievant. The parties have a difference of opinion as to the application of the make whole remedy regarding the Grievant's reassignment.

After listening to the positions of both parties, the Award originally issued on March 31, 2010 shall be modified as follows:

The make whole remedy attempts to replicate the Grievant's condition(s) as similarly as possible in all respects as of December 29, 2009. To that extent, The Grievant shall be reassigned to the Post (Georgetown) that he was assigned prior to his removal.

Respectfully submitted,

Dwight A. Washington
Arbitrator

Dated: April 20, 2010