**IN THE MATTER OF THE ARBITRATION BETWEEN;**

**The Ohio State Highway Patrol and The Ohio Department of Public Safety**

**OCB#: 15-03 10100702-111-04-01**

**-and-**

**Grievant: Amanda J. Myers**

**Ohio State Troopers Association**

**ARBITRATOR:** Mollie H. Bowers

**APPEARANCES:**

**For the Patrol/Department:**
Lt. Kevin D. Miller, Advocate
Marissa Hartley, Second Chair, OCB
Sgt. Ann Ralston, The Ohio State Highway Patrol
Lydia Wagner, The Ohio State Highway Patrol
Maj. Kevin Teaford, The Ohio State Highway Patrol
Sgt. Steve M. Mahl, The Ohio State Highway Patrol

**For the Association:**
Elaine N. Silveira, Esq., Attorney
Herschel Sigall, Ohio State Troopers Association Advocate
Larry Phillips, Association President

The Ohio State Troopers Association (the Association) brought this case to arbitration for adjudication of its claim that The Ohio State Highway Patrol and The Ohio Department of Public Safety (the Patrol or the Department) lacked just cause to terminate Amanda J. Myers (the Grievant). The Hearing was held on August 17, 2010, at the Office of Collective Bargaining in Columbus, Ohio. Both parties were present and were represented. They agreed that this case is properly before the Arbitrator. The parties had a full and fair opportunity to present evidence and testimony in support of their case and to cross-examine that presented by the opposing party. At the conclusion of the Hearing, the parties elected to file post-Hearing briefs. These briefs were received timely by the Arbitrator.

## ISSUE

Was the Grievant terminated from her employment with The Ohio State Highway Patrol for just cause. If not, what shall the remedy be?

## BACKGROUND

The significant facts of this case are uncontested. The Grievant was hired on March 20, 2006. She worked as a Highway Patrol Radio Dispatcher at the Batavia Communication Center until her termination just over four years later, on June 29, 2010. Prior to that, the Grievant was employed by the Clermont County Sheriff's Department for six years and became certified there for the Law Enforcement Automated Data System (LEADS). She had no experience with the Ohio Law Enforcement Gateway (OHLEG) until she worked at the Center for the Patrol.

LEADS and OHLEG are somewhat similar in that they both contain confidential information about members of the public that can only be accessed by certain authorized personnel. The information stored in these systems includes things like: contact information (name, address, telephone number); Bureau of Motor Vehicle (BMV) data; Social Security Number; arrest record; etc. Training and testing for certification are required for LEADS. A one-hour training session on OHLEG was provided by Dispatcher Manager Lydia Wagner. The log for this training shows that the Grievant was present, however, she denied receiving any OHLEG training in her interview.

The Patrol first became aware of the circumstances that gave rise to the Grievant's termination when Dispatcher Danny Rymer told his Post Commander, Lieutenant Randy McElfresh, that the Grievant had been misusing OHLEG to obtain information about her boyfriends. Neither of these individuals were presented as witnesses in the instant proceeding. Two audits of OHLEG usage by the Grievant were conducted subsequently. One, for the administrative investigation, found that the Grievant had initiated twenty-two inquires from which thirty-three searches were made. The second audit was

conducted for the criminal investigation. This audit revealed that the Grievant had made a total of forty-four searches from which sixty-six inquiries were made by her during the course of her employment at the Center. These results were provided to the Clermont County Prosecutor's Office where it was determined that criminal charges would be lodged against the Grievant. A determination was made that a concurrent administrative investigation would not jeopardize the potential for prosecution of the Grievant on criminal charges. The Grievant was placed on paid administrative leave pending the outcome of the administrative investigation. The Grievant cooperated fully from the outset of both investigations. She waived her Miranda Rights for the criminal investigation.

This is a case of first impression in that the Grievant was the first employee to be charged criminally for unauthorized access to OHLEG. At the time the charge was preferred, the Ohio Revised Code 2913.04 only identified unauthorized use of LEADS as a criminal violation of the law. OHLEG was not included until June 17, 2010; after the events described here.

The Grievant did not testify at the Hearing. Rather, the Union rested after the Patrol put on its case. On the Grievant's behalf, the Union stated that she acknowledged the acts of accessing OHLEG alleged by the Patrol, and has done so from the earliest administrative interview. It was accepted as fact, therefore, that the Grievant admitted to accessing OHLEG about forty-four times. Also accepted as fact was her explanation that she did so, in part, to make sure that she was not letting men that she was dating who could be a danger to her children into their home. Another fact that the Grievant revealed during the investigation was that she had accessed the OHLEG system, not only at work,

but also from other locations (like her Mother's house, her Father's business, and a friend's residence) to view BMV records and/or criminal records of friends, family members, and co-workers. According to what the Grievant said during the investigation, she had used outside access points "maybe 10 times".

As a result of the criminal investigation, on May 19, 2010, a Clermont County Grand Jury indicted the Grievant for a single count of unauthorized use of property, computer, cable, or telecommunication property or service (Ohio Revised Code 2913.04). This is a fifth degree felony charge. The outcome of the indictment had not been determined at the time of this Hearing.

On June 16, 2010, Col. David W. Dicken, Superintendent, wrote to the Grievant to notify her that her termination was being recommended for violation of Work Rule 501.01(C)(10)(d) Failure of Good Behavior and of Work Rule, for violation of Work Rule 502.01(C)(10)(e) for unauthorized accessing of OHLEG, and for receiving a "single count felony indictment for Unauthorized use of Property: Computer; Cable; or Telecommunication Property or Service, a felony of the fifth degree". (JX-3) Notice of a pre-disciplinary meeting was provided, the process and her right to waive the meeting were explained.

The pre-disciplinary meeting was held on June 21, 2010. The Grievant had Association representation provided by Sgt. Bernard and by Attorney Elaine Silveira. On June 24, 2010, Staff Lt. R.E. Martin, who conducted the meeting, wrote to Thomas J. Stickrath, Director, Department of Public Safety to recount who was present and what had occurred at the meeting. Staff Lt. Martin concluded by stating that he found just cause for the Grievant's termination.

On June 29, 2010, Director Stickrath wrote to the Grievant to advise her that she was being terminated effective immediately. The Work Rule violations and other reasons cited for this action were essentially the same as those set forth in the notice of recommended removal.

The Association responded by timely filing a grievance on June 30, 2010. The facts were stated as, "I was terminated without just cause and in violation of progressive discipline on June 29, 2010". (JX-2) The remedy requested was "To be restored to my position with all benefits, including any holiday overtime, and seniority. To be made whole". (JX-2) The grievance was properly processed through the contractually negotiated procedure. The parties were unable to reach a mutually acceptable resolution of their differences. The matter is now before this Arbitration for decision.

## POSITIONS OF THE PARTIES

**Patrol Position:**

The Patrol is adamant that its Officials had just cause to terminate the Grievant. The facts are undisputed; even by the Grievant. Furthermore, the Patrol asks that a negative inference be drawn from the facts that the Association neither chose to call the Grievant as a witness nor to put on any case at all. The Patrol maintains that these are clear demonstrations that she is culpable as charged and, thus, that the discipline meted out should stand undisturbed..[1]

According to the Patrol, its position is further strengthened by the fact that the Grievant had ample notice that access to OHLEG is restricted strictly to law enforcement purposes and must be done only from computers at Division facilities unless prior

[1] Elkouri and Elkouri, *How Arbitrator Works*, (6th edition, 2003), p. 379 was referenced in support of this claim.

approval is provided by a supervisor. The Grievant had no such approval. She was assigned to read the policy governing such matters on both June 30, 2008 and February 24, 2009. The Grievant also signed an OHLEG user agreement, on December 3, 2006. Again therein were detailed the restrictions on use of OHLEG. Similarly, the Grievant was well aware of the restrictions on using Division computers and internet services for personal reasons. As evidence, she signed two computer compliance agreements in 2006 and one in 2007. The Grievant was assigned to and read the revised Departmental policy that replaced the compliance agreements on May 9, 2008 and March 3, 2009, respectively. The policy was reviewed during roll-call on June 5 or 6, 2009. The Grievant also acknowledged receipt of a copy of the Work Rules which, *inter alia*, explicitly prohibit the use of state property (including computers, etc.) for any reason other than official state business. Finally, records show that the Grievant read the Rules on November 11, 2006, July 10, 2007, May 9, 2008, and December 12, 2008. Therefore, the Patrol contends that Management did everything it could to put the Grievant on notice that behavior of the sort she admits to having engaged in is not only unacceptable, but also that there are negative consequences attached to nonconformance with the explicit prohibitions contained in the Department's Rules and Policies.

Another part of the Patrol's position addressed the Union's allegation that the Grievant was subjected to disparate treatment when discipline was meted out to her. An award by Arbitrator Rhonda Rivera was cited extensively for the Patrol to make the point, first, that after an employer makes a *prima facie* case for just cause discipline, then burden then shifts to the union to provide evidence that other, similarly situated

employees were treated differently.[2] Second, Arbitrator Rivera enumerated steps that must be followed for a union to successfully shoulder its burden of persuasion. In essence, as Arbitrator Rivera wrote:

> . . . in order to prove disparate treatment, a union must confirm the existence of both parts of the equation. It is not enough that an employee was treated differently than others; it must also be established that the circumstances surrounding his/her offense were substantively like those of individuals who received more moderate penalties.[3]

According to the Patrol, none of the eight cases that the Association provided to show disparate treatment filled the requirement of showing **'substantially similar'** circumstances. Each failed in one or more of the following ways: (1) the number of occurrences; (2) the duration of the unauthorized access; (3) the use of multiple locations outside the workplace; (4) the Grievant's short tenure; and (5) the Grievant's indictment on a felony charge. The Patrol therefore urges the Arbitrator to conclude that the instant case is distinct with significant differences from those offered by the Association and, thus, to find that the discipline of termination is appropriate for the offenses proven.

The Patrol also addressed the Association's outrage that the Grievant received a felony indictment, much less that it was used as part of the rationale for the severity of the discipline imposed. According to the Patrol, the Grievant's admitted misconduct violated the Ohio Revised Code 2913.04, Subsection (B) which states:

> No person, in any manner and by any means, including, but not limited to, computer hacking, shall knowingly gain access to, attempt to gain access to, or cause access to be gained to any computer, computer system, computer network, cable service, cable system, telecommunications device, telecommunications service, or information service without the consent of, or beyond

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[2] *Ohio Civil Service Employees Association v. Ohio Department of Mental Health,* Case No. 23-06-891113-0121-01-03 (Rhonda Rivera, 1989)
[3] Id.

> the scope of the express or implied consent of, the owner of the computer, computer system, computer network, cable service, cable system, telecommunications device, telecommunications service, or information service or other person authorized to give consent.

As a result of the proven misconduct the Grievant was charged with a fifth degree felony as specified by the Code. The Association claims that this indictment will not stand because OHLEG was not incorporated into the Code until after the Grievant's misconduct occurred. The Patrol says that this will not overcome the felony charge because her actions still violated the specifications in Subsection (B).

Similarly, the Patrol dismisses the Association's contention that the Grievant can only be terminated for a felony **if** she is actually convicted. Since this has not occurred, the Association maintains that the felony indictment cannot be used to support the Grievant's termination. The Patrol responds that the Association's position is "nonsensical". "It would have been fiscally and morally irresponsible for the Division to continue to employ a law enforcement employee who had already admitted to all the criminal elements of a felony crime." (PPHB, p. 15) The Patrol relied on the Ohio State Supreme Court ruling in *Warrensville Heights v. Jennings,* (1991), 58 Ohio St. 3d 206, to establish that a dispatcher is "an integral member of the department's law enforcement efforts" and, thus, must meet the same high standards as any officers. The 'higher standard' theme was an echo from *Jones v. Franklin City Sheriff* (1990), 52 Ohio St. 3d 40, 43, 555 N.E. 2d 940, 944. In Ohio, moreover, law enforcement officials are especially sensitive to situations where confidential, restricted state information systems are accessed for unauthorized use. A well publicized incident occurred during the 2008 Presidential election campaign where a state Official obtained unauthorized information

about "Joe The Plummer".[4] The Patrol asserts that it cannot obtain, much less maintain public trust in its services if firm action is not taken when its employees engage in criminal activity.

Finally, the Patrol contends that it has shown that the Grievant committed the Work Rule violation - Failure of Good Behavior - as charged. Her conduct led to an enforceable indictment for criminal behavior. She used state time, equipment, and her password to obtain unauthorized information from the OHLEG system for personal gain and for other non-work related reasons. The Patrol says that these are serious charges in their own right. They are elevated to the level of terminable offenses for the reasons described above and because of the potential consequences of returning the Grievant to work and the negative publicity that could be associated therewith. The Patrol therefore asks that this grievance be denied in its entirety.

**Association Position:**

The Association has provided a two-pronged defense of the Grievant. It claims that Patrol Officials violated the collective bargaining Agreement, Article 19, Disciplinary Procedure, Section 19.05, Progressive Discipline and treated the Grievant in a "shockingly different" manner from all others who engaged in similar conduct by terminating her employment. (UPHB, p. 2) The Grievant admits that she "played" with the system, looked at BMV pictures of her parents, siblings, co-workers, and fellow officers, and used OHLEG "on three occasions to check on people she was interested in dating". (UPHB, p. 3) This is not conduct, the Association contends, that either rises to the level of criminal behavior or warrants the harshest discipline possible - - termination.

[4] The Patrol added that this sensitivity has been perpetuated by the fact that confidential information on American Idol contestant, Crystal Bowersox, was obtained more recently without authorization.

It presented a detailed description of eight separate cases of unauthorized access to show how egregious the Grievant's treatment was. Critical points made by those cases were as follows:

- The most severe discipline, meted out in one case, was a five-day suspension;
- Some had printed out the information obtained without authorization and distributed it to others;
- Some had disclosed information to others without printing it out;
- Information had been accessed at the request of a third party;
- Personal benefit had accrued; and
- None of these personnel had been indicted criminally.

All of these differences were used by the Association to assert that the Grievant had been subjected to disparate treatment. The employees in the eight cases cited engaged in serious misconduct, but the discipline of choice usually seemed to be a written reprimand and an occasional one-day suspension. On the other hand, the Grievant's "limited personal access was undertaken for her observation alone and mostly was just to see how it [OHLEG] worked and how accurate it was". (UPHB, p. 3)

Although the outcome of the criminal indictment will ultimately be determined in court, the Association recognizes the part that indictment played in 'justifying' the Patrol's discipline in the instant case. As described at the Hearing, LEADS and OHLEG are different systems. Clearly, OHLEG is not considered to be as important a source of information as LEADS. One hour of training for OHELG versus a lengthy certification process, testing, and recertification for LEADS make that clear. Furthermore, OHLEG was not even identified in the Ohio Revised Code until June 17, 2010, well after the

Grievant accessed OHLEG for personal use. No matter how hard the Patrol might try to convince the Arbitrator otherwise, the Grievant's conduct simply does not qualify as a *per se* violation of the Code. Admittedly, this does not absolve the Grievant of her conduct. It does, however, remove a significant element that the Patrol used to jack up the significance of the Grievant's behavior to a firing offense.

Viewed in the light of what the Grievant did vis-a-vis others found guilty of unauthorized access, the Association argues that her conduct was "benign". (UPHB, p. 13) Her punishment, however, was not benign, nor was it either corrective or progressive. It was punitive in the extreme. Even the Governor did not elect to discipline the cabinet member responsible for unauthorized access of information on "Joe The Plummer". Why then, the Association asks, should the Grievant be singled out for such harsh treatment? There is no justifiable answer. Because there have been breaches before, even serious breaches, the Association maintains that this does not give Patrol Officials license to discipline at will and to any extent. Rather, the Association looks to the arbitral process here to correct and to redress the excessive discipline that has been meted out to the Grievant in the instant case. It asks, as remedy, that the Grievant be reinstated to her former position as Dispatcher, with full seniority and benefits, and to be made whole in every respect.

## DISCUSSION AND ANALYSIS

After careful consideration of the record, the Arbitrator has determined that the Grievant was disciplined for just cause and that the discipline of termination should stand. The record is clear that this matter was fully investigated and that the Grievant was afforded due process rights to representation by the Association and to present her

side of the story both in the investigations and in the pre-disciplinary meeting. Her voluntary admissions against interest provide the proof necessary to substantiate the charge of Failure of Good Behavior in violation of the Patrol's Work Rules. The only matter that remains to be decided, therefore, is whether or not the penalty imposed is appropriate for the offenses committed.

In that regard, it is beyond the scope of the Arbitrator's authority to determine if the criminal indictment against the Grievant should stand. The court is the appropriate forum for resolution of that question. Until that resolution is achieved, the Arbitrator is constrained from finding that the Grievant's criminal indictment is a legitimate consideration in the determination that Patrol Officials made that the Grievant should be terminated from her employment as a Dispatcher.

However, the Arbitrator did credit the other considerations that these Officials used as justification for the discipline meted out. Particular weight was given to the persistent pattern of the Grievant's unauthorized access over a considerable period of time, the multiple locations (including several outside of the workplace) used to access OHLEG, the frivolous reasons the Grievant gave for accessing the system, and the Grievant's short tenure with the Patrol. Nevertheless, the Association maintains that her discipline constituted disparate treatment vis-a-vis eight other cases that it cited. The Arbitrator disagrees for the reasons articulated so well by Arbitrator Rivera. None of the eight cases provide fact patterns and other circumstances that are "substantially similar" to the instant case.

Furthermore, the totality of the Grievant's offense record shows a willful, deliberate, and persistent intent to engage in behavior that she clearly knew, or should

have known, was unacceptable; even egregious under the Work Rules, agreements, and policies that she had been provided with and read. The Grievant's intent was evidenced by her actions. There is nothing in the record to even obliquely suggest that, but for discovery of her misconduct by a co-worker, the Grievant ever intended to quit her wayward, unauthorized accessing of OHLEG for personal reasons.

The fact is that the Grievant got caught and now the Association is grasping for reasons to mitigate the discipline she received. Her voluntary admissions do not support mitigation. The Grievant knew from the investigations that audits had been performed, so there was nothing to be gained from trying to conceal the truth. The Grievant did not have long service with the Patrol so this could not serve as mitigation. This is all the more true because the Grievant engaged in the prohibited behavior for a good portion of her short tenure with the Patrol. The Arbitrator did note that the Grievant had no prior discipline of record.

Nevertheless, when all else fails, progressive discipline is latched onto as a potential life raft in turbulent seas. According to the Association, the Patrol erred by not applying progressive discipline in the Grievant's case. The Arbitrator noted the provision for progressive discipline in Article 19, Section 19.05 of the collective bargaining Agreement. This provision does not, however, mandate that the steps outlined therein **shall** be followed regardless of the nature of the offense. Indeed, the language contained therein states that "Disciplinary action shall be commensurate with the offense". If clear notice that her actions were a serious violation of Work Rules, agreements, and so forth was not a sufficient caution, then what expectations can there be if lesser discipline is substituted in the instant case?

This is all the more a valid question when common sense, even to a lay person, would dictate that the persistent behavior that the Grievant engaged in was not only egregious, but also would place one clearly in jeopardy of termination. The number of times that the Grievant made inappropriate inquiries and the ever widening number of locations from which she accessed OHLEG are evidence that this behavior had become routine. This reality militates against an expectation of rehabilitation and supports the Patrol's position that the Grievant should not be returned to work because she cannot be perceived as a credible member of its workforce. The Arbitrator agrees with the Patrol that, by her actions, the Grievant has destroyed the trust that its Officials, co-workers, and the public must have in a person who occupies the Dispatcher position and who has access to the confidential information stored in OHLEG. It was the Grievant's personal choice to continuously access OHLEG for unauthorized purposes. Now she must live with the consequences.

**AWARD**

The grievance is denied in its entirety.

Date: October 4, 2010 Mollie H. Bowers

Mollie H. Bowers, Arbitrator