

**Decision and Award in the matter of Arbitration between:**

**The State of Ohio, Department of Public Safety**

**and**

**Ohio State Troopers Association, Inc., Unit 1**

Grievance # 15-03-20100826-132-04-01

Grievant: Trooper Phet Phong

E. William Lewis, Arbitrator

2010 Date of Hearing: October 25,

Date Briefs received: December 1, 2010

Date Decision issued: December 27, 2010

Representing the Union:  
the Employer:

Representing

Hershel M. Sigall, Chief General Counsel  
Ohio State Troopers Association  
Patrol  
6161 Busch Blvd., suite 130  
Seventeenth Ave.  
Columbus, Ohio 43229  
Ohio 43211

Lt. Kevin D. Miller  
Ohio State Highway  
740 East  
Columbus,

By mutual agreement, the Hearing was convened on October 25, 2010, at 9:00am. The Hearing was held at the Office of Collective bargaining, Columbus, Ohio.

In attendance for the Employer:

Lt. Kevin D. Miller	Advocate, OSHP
Ms. Marissa Hartly Labor Counsel	2nd Chair, OCB
Sgt. J. C. Chesser 57(witness)	Dayton Post
Sgt. Jeffrey S. Kramer 57(witness)	Dayton Post
Sgt. Jeremy T. Landis Investigation Unit  (witness)	Administrative
Sgt. Anne Ralston Standards Unit	Sgt., Professional

For the Union:

Mr. Hershel Sigall	Advocate, OSTA
Ms. Elaine Silveira Counsel	Ass't. General

Mr. Larry Phillips

OSTA president

Mr. Phet Phong

Grievant(witness)

Mr. Dave Riley  
Representative

OSTA Staff

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The parties were asked to submit exhibits into the record. The following were submitted as Joint Exhibits:

Joint Exhibit #1  
and The  
2009-2010

CBA--OSTA Unit 1 and 15,  
State of Ohio,

Joint Exhibit #2

Grievance Trail

Joint Exhibit #3  
of:  
Charges, Pre-Discipline  
Officer Letter,  
Last Chance Agree-  
ment, Ohio State  
Record, Ohio State  
Rules & Regulations:  
Performance of Duty and

Discipline Package, composed  
of  
Statement of  
Notice, Meeting  
Termination letter,  
Department  
Highway Patrol  
4501: 2-6-02  
Conduct

The following were submitted as Union Exhibits:

Union Exhibit #1

Phet Phong--Evaluations:

3/27/07-

3/27/08;

3/27/08-3/27/09; 3/27/09-

3/27/10

The following were submitted as Employer Exhibits:

Employer Exhibit #1  
Investigation-2010-0378

Administrative

Trooper Phet Phong

Employer Exhibit #2  
Sgt.

Interview of Tpr. Phet Phong by

J. Landis 7/16/10.

Employer Exhibit #3  
Chesser(Sgt)

E-mail to Lt. Eck, from John

Re: pr. Phong failing

to answer check-

ups.

Employer Exhibit #4  
(Union Objected)  
Phong--Notice

ODJFS--Office of Unemployment  
Compensation-Re: Phet

of Request for

appeal.

**BACKGROUND:**

The State Highway Patrol, a Division of the Ohio Department of Public Safety, hereinafter, known as the Employer/OSP, is responsible for highway safety within the State. The Ohio State Troopers Association, hereinafter, known as the Union/OSTA, represents bargaining unit employees in Units 1 & 15. Unit 1 is primarily composed of Troopers(Tpr.) and Unit 15 is composed of Sergeants(Sgt.). This particular case involves a Trooper assigned to Unit 1.

The grievant, Tpr. Phet Phong, a nine year employee was assigned to Post 57, Dayton, at the time of the alleged incident. On May 21, 2010, at approximately 0500, a Miamisburg Police Officer was dispatched to Tpr.

Phong's location. Trooper Phong did not respond to his Post's numerous attempts at checking-up.

When the Police Officer arrived at Tpr. Phong's location(Miamisburg area), he aroused him and told him to contact his dispatcher. Tpr. Phong was told to meet his supervisor, Sgt. Chesser, at a Shell station at I75 & R725. When they met at approximately 0530, a conversation ensued, concerning Tpr. Phong's failure to respond to Post check-ups.

Sergeant Chesser notified his Post Commander of the incident. An Administrative Investigation(AI) was instituted (EE-1). The AI concluded that Tpr. Phong was asleep on duty on May 11 and 21, 2010. During the investigation the Employer determined that Tpr. Phong was allegedly untruthful to his Shift Sergeant. Therefore, he was charged with violating Rules & Regulations of the Ohio State Highway Patrol, specifically, Rule 4501: 2-6-02(E), False Statement, truthfulness.

Trooper Phong was on a Last Chance Discipline Agreement(LCA), and Rule 4501: 2-6-02(E), was part of the Agreement. Any violation of such would result in his removal from the OSHP. A Pre-disciplinary Hearing was held on August 23, 2010, and the meeting Officer found just cause for discipline. Trooper Phong was notified on August 25, 2010, that he was terminated, for violating the aforementioned Rule.

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A grievance was filed by Tpr. Phong on 8/25/10, claiming that the OSP violated the CBA, specifically, Article 19--Section 19.01 Standard(just cause), and Section 19.05 Progressive Discipline. The Step 2 meeting was held on September 2, 2010, and the OSP denied the grievance. The Union appealed the grievance to Step 3(Arbitration), on September 3, 2010.

By mutual agreement between the parties, the Arbitration Hearing was scheduled for October 25, 2010. The parties stipulated at the Hearing, that there were no procedural issues, and that the grievance was properly before the arbitrator.

### **ISSUE:**

In conformance with Article 20.08 #8, of the CBA, the parties jointly

submitted the following statement of issue:

Was the Grievant terminated in accordance with a last chance agreement he signed on February 19, 2010? If not, what shall the remedy be?

**RELEVANT CONTRACT LANGUAGE:**

**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.

**LAST CHANCE DISCIPLINE AGREEMENT**



**EMPLOYER POSITION:**

The grievant, Phet Phong, was terminated for violating his Last Chance Agreement, he signed on February 19, 2010. Approximately three months later, he violated OSHP Rules and Regulations, specifically, Rule 4501: 2-6-02(E) False Statement; truthfulness. With a LCA in place the level of discipline is outlined in the document. The only onus on the Employer is to prove the cited Rule was violated.

The grievant was an eight year veteran assigned to the Dayton Post. On May 11, 2010, an AI was initiated after the grievant was caught sleeping while on duty. Ten days later (5/21/10), the grievant failed to answer check-ups twice during the same shift; once around 2:30a and then around 5:00a. The instant discipline is a result of the second 5/21 incident(apprx. 5:00a), and the Employer will concentrate on the actions associated with that incident.



The grievant's immediate supervisor, Sgt. Chesser, will testify that for the second time in a shift, the grievant failed to answer check-ups. Based on Tpr. Phong's car AVL, Sgt. Chesser instructed dispatch to contact the local police department. While in route to the grievant's location the check-ups were answered as being ok. However, Sgt. Chesser requested Tpr. Phong to meet-up with him. Sergeant Chesser wanted to meet to determine why the Trooper didn't answer check-ups, according to the Employer.

According to the OSP, during the meeting, Sgt. Chesser specifically asked Tpr. Phong if he was sleeping. The grievant replied, no, and added he was "getting plenty of sleep." Sergeant Chesser, then contacted Miamisburg Police Department(MPD), requesting the responding police officer to inform him if Tpr. Phong was sleeping. MPD's police officer stated that the grievant was sleeping.

The grievant told the AI investigation, that he did not remember what he told Sgt. Chesser, when questioned about lack of response to check-ups. During Tpr. Phong's interview, he did not deny his supervisor's claim, nor did he provide what he had told Sgt. Chesser/OSP. Now that he has been terminated, he remembers the he never told Sgt. Chesser, he was not sleeping.

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By examining the motives of the involved individuals, the arbitrator will have to decide who is truthful. Evidence and testimony will show that Sgt. Chesser has nothing to gain by fabricating his conversation. The grievant has everything to gain.

Honesty is paramount in the law enforcement profession. The grievant, having been given a second chance in February 2010, failed to modify his unacceptable behavior. He lied to his direct supervisor, claims the Employer. Therefore, the OSP requests that the grievance be denied in its entirety.

#### **UNION POSITION:**

The Union states that we are not here to determine whether Tpr. Phong was sleeping, but to determine if he violated his LCA. The Union claims that the Employer triggered the LCA to eliminate arguments involving mitigation, since the grievant was suffering from depression, sleep apnea, and was involved in a possible divorce. While all this may be true, it is not

before us, we are here to determine if Phet Phong was lying, states OSTA.

The alleged lie relates to one of three incidents involving the potential of dosing off on duty. It is impossible to ignore these three incidents. Because the Employer needs to prove, by a preponderance of evidence, that in fact, the grievant lied during conversations and investigation of the three incidents, declares the Union.

The first incident occurred on 5/11/10, when the grievant dosed off while working third shift(11p-7a). This incident was observed by an OSP Sgt., resulting in the opening of an AI. During the AI, he admitted to sleeping and told his Post Commander he was sleeping. On this incident, he readily admitted to sleeping during the closing hours of his shift.

The next incident, on 5/21/10, prior to 3:00a, Tpr. Phong was not responsive to a couple of check-ups. He asserted that he was out of his car and didn't hear the calls, and his allegation during this incident is not being challenged here, per the Union.

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The second incident on 5/21/10, is the one that has triggered the alleged violation of the LCA. Along about 4:53a, Tpr. Phong was not responding to radio check-ups. Because he failed to respond, and considering the earlier response concerns, his supervisor had dispatch contact the local Miamisburg PD, to check on him. The local police officer observes Tpr. Phong sleeping, and knocks on the window, and awakes him. Trooper Phong is told to call his Post supervisor.

There is no doubt in Tpr. Phong's mind, that he is "dead in the water", on this issue, according to the Union. The Miamisburg police officer, said he was sent by Tpr. Phong's supervisor. There is no doubt that the local police officer will confirm sleeping. Therefore, why would Tpr. Phong lie, regarding the incident, notes the Union.

The grievant met Sgt. Chesser at a nearby Shell station, and a conversation ensues, which is at issue, in this case. After the Shell station conversation, Sgt. Chesser writes up an IOC, claiming that Tpr. Phong said he was not sleeping. This IOC got incorporated into the existing AI, on Phong's sleeping. It would be insane for Tpr. Phong to lie regarding this 4:53a

incident. Perhaps, according to the Union, there was some confusion on the grievant's part regarding to what situation Sgt. Chesser was referring.

On 6/9/10, during the initial AI interview of Tpr. Phong, regarding the 5/11 and 5/21 incidents, he is clear that he was sleeping at the incident at 4:53a on 5/21, claims the Union. Also, on a second interview in July, on the same issues, Tpr. Phong clearly states that he was sleeping during two of the three incidents(5/11 & 5/21-4:53a).

The only thing that the Employer has seized upon is Sgt. Chesser's comments regarding Tpr. Phong's alleged denial statement to him regarding sleeping on 5/21 at 4:53a. It is irrational to think that Tpr. Phong lied to Sgt. Chesser, at the Shell station. In both AI interviews, on the record, Tpr. Phong readily admitted sleeping on 5/11 and 5/21 at 4:53a. The only evidence before the arbitrator is Sergeant Chesser's recollection of that conversation.

Sergeant Chesser's recollection of the 5/21 conversation is unrecorded, and is the only evidence before the arbitrator. Opposed to the grievant's

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recollection of the event, substantiated by his recorded statements during the AI. There is no preponderance of evidence to substantiate the Employer's claim that the grievant was lying, claims the Union. It was clear, that on the 5/21 second incident, that he was sleeping, and for him to lie about it doesn't make sense. The Union requests that the grievance be sustained.

## **DISCUSSION AND OPINION:**

On 5/21/10, at approximately 4:54a, after eight to ten check-ups, without response, a Miamisburg Police Officer(MPO) was asked to check-up Tpr. Phong. Trooper Phong was within the area of city, according to the patrol car's AVL. His shift supervisor, Sgt. Chesser, headed towards Tpr. Phong, however, the police officer arrived at his location first. MPO observed Tpr. Phong sleeping, and with a number of window knocks by the officer, he awoke(EE-1). MPO told Tpr. Phong to call his dispatch.

Contact was made by Tpr. Phong with Sgt. Chesser, and they met at the Shell station at I-75 and route 725. The ensuing conversation created the issue at hand. Sgt. Chesser claims that during the conversation (Shell station), he asked Tpr. Phong "did you fall asleep", and he said "no". Were

you tired? Trooper Phong said “no, I am getting plenty of sleep”. after leaving the meet, Sgt. Chesser contacted MPD asking if the police officer’s check-up observed Tpr. Phong sleeping? The officer responded to the question, saying, Tpr. Phong was asleep and that he had to pound on the window to wake him(EE-1, pgs. 19,20). The Post Commander was e-mailed by Sgt. Chesser, and it was decided to incorporate this incident into the already open AI(EE-3).

Sergeant Kramer, had already been assigned to an AI, to investigate Tpr. Phong regarding on duty sleeping, from and earlier incident. As part of the AI, Sgt. Kramer took a statement from Sgt. Chesser on May 25, 2010(EE-1). Although an AI interview of Tpr. Phong was scheduled for 5/26/10, with new incidents it was postponed until 6/9/10. Trooper Phong was interviewed on that date, and when asked whether he was sleeping on 5/21 at approximately 4:53a, he said yes(EE-1). At the Shell station meeting with Sgt. Chesser, did he ask you if you were asleep? Trooper Phong replied “ I can’t remember if he asked or not”.

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This AI was continued by Sgt. Landis of the Administrative Investigation Unit, on July 16, 2010. Tpr. Phong was interviewed regarding the Shell station conversation with Sgt. Chesser(EE-2). During this interview Tpr. Phong remembered the conversation with Sgt. Chesser. However, he stated a number of times, he could not remember what he told the Sgt. about his being asleep, on or about 4:53a on 5/21(EE-3).

This is not a question of whether he was asleep or not. But a question of what Tpr. Phong told Sgt. Chesser, if anything, regarding being asleep on 5/21 at about 4:53a, when they met at the Shell station. Evidence and testimony is clear and convincing, that there was such a meeting at about 5:30a, on 5/21. The topic of the meeting again, according to evidence and testimony, was regarding the incident requiring MPD to check-up Tpr. Phong at approximately 4:53a, that same morning. Trooper Phong, in his interviews identifies Sgt. Chesser inquiring about his activity (sleeping) surrounding the MPD check-up(EE-1,3). In the arbitrator’s opinion, evidence supports the fact that Sgt. Chesser asked Tpr. Phong if he was sleeping(EE-1,2). If Tpr. Phong’s response had been yes, as he admitted regarding the 5/11 sleeping incident, no further activity would have been needed by Sgt. Chesser(EE-1, 2,LCA). By Sgt. Chesser following up the subject with a call to MPD, as to the Trooper’s observed activity(sleeping),

is strong evidence that Tpr. Phong denied sleeping when checked-up by MPD(ME-1).

This is a credibility issue. The Union argues that it made no sense for Tpr. Phong to lie to Sgt. Chesser, having been caught sleeping by MPD. However, in the arbitrator's opinion, it made no sense for Tpr. Phong to be at home, while claiming to be elsewhere. His patrol car was equipped with AVL, which resulted in the LCA. When the arbitrator examines the evidence it shows Tpr. Phong claiming, in two interviews, that he could not remember what he told Sgt. Chesser at the Shell station meet(EE-1,2). Versus, Sgt. Chesser's Statement that he was told by the grievant, that he was not sleeping. However, Tpr. Phong could remember other questions, and his answers during that same conversation. It is highly unlikely, in the arbitrator's opinion, with a topic as critical as this(one's career), not to remember your response. Now, at the arbitration hearing, five months later the grievant remembers clearly telling Sgt. Chesser he had dozed off watching traffic. Which time was he not being truthful? Trooper Phong's

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honesty regarding his work activities is the reason we are here, and for the Last Chance Agreement.

There is, in the arbitrator's opinion, a preponderance of evidence and testimony regarding the credibility of the two conversants, that supports Sgt. Chesser's allegation<sup>1</sup>. This is further exemplified by there being no convincing testimony or evidence submitted, alleging that Sgt. Chesser was "out to get" Tpr. Phong.

**AWARD:**

The grievance is denied.

Respectfully submitted, this 27<sup>th</sup> day of December 2010.

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<sup>1</sup> Evidence in Arbitration, Chp. 9-Credibility of Testimony(pgs.-103, 104,106)

E. William Lewis  
Arbitrator

