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**IN ARBITRATION PROCEEDINGS PURSUANT TO THE
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES**

In the Matter of

**OHIO STATE TROOPERS
ASSOCIATION,**

and

**OHIO DEPARTMENT OF PUBLIC SAFETY,
DIVISION OF STATE HIGHWAY PATROL**

Grievance # 15-03-20101216-0166-04-01

Grievant: Matthew D. Kohus

**ARBITRATOR'S
OPINION AND AWARD**

This Arbitration arises pursuant to the collective bargaining agreement (“the Agreement”) between the Parties, OHIO STATE TROOPER’S ASSOCIATION (“the Union”) and OHIO DEPARTMENT OF PUBLIC SAFETY, DIVISION OF HIGHWAY PATROL (“the State”) under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. The Parties agreed there are no procedural or jurisdictional impediments to a final and binding decision by the Arbitrator pursuant to the Agreement.

Hearing was held February 18 and 25, 2011 in Columbus, Ohio. Both Parties were represented by counsel who had full opportunity for the examination and cross-examination of witnesses, the introduction of exhibits, and for argument. Post-hearing briefs were submitted in a timely manner on April 11, 2011.

APPEARANCES:

On behalf of the Union:

HERSCHEL M. SIGALL, Esq., ELAINE N. SILVEIRA, Esq., PAUL DAVID REILY, LARRY K. PHILLIPS, and WAYNE McGLONE, Ohio State Troopers Association

On behalf of the Employer:

S/LT. CHARLES J. LINEK, Professional Standards Section, Ohio State Highway Patrol

ISSUE

Did the Employer have just cause to terminate the Grievant's employment? If not, what is the appropriate remedy?

RELEVANT PORTION OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT

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ARTICLE 4 – MANAGEMENT RIGHTS

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...the Employer retains the rights to: 1) hire and transfer employees, suspend, discharge and discipline employees;

...

ARTICLE 7 – NON-DISCRIMINATION

Neither party will discriminate for or against any member of the bargaining unit on the basis of age, sex, marital status, race, color, creed, national origin, religion, handicap, political affiliation, sexual preference, veteran status, or for the purpose of evading the spirit of this Agreement; except for those positions which are necessarily exempted by

bona fide occupational qualifications due to the uniqueness of the job, and in compliance with the existing laws of the United States, the State of Ohio, or Executive Orders of the State of Ohio.

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ARTICLE 18 – ADMINISTRATIVE INVESTIGATION

18.01 Purpose

The parties recognize that the State has the right to expect that a professional standard of conduct be adhered to by all Highway Patrol personnel regardless of rank or assignment. Since administrative investigations may be undertaken to inquire into complaints of misconduct by bargaining unit employees, the State reserves the right to conduct such investigations to uncover the facts in each case while protecting the rights and dignity of accused personnel. In the course of any administrative investigation, all investigative methods employed will be consistent with the law.

18.02 Bargaining Unit Member Rights

1. When an employee is to be interviewed or questioned concerning a complaint or allegation of misconduct, the employee will be informed of, prior to the interview, the nature of the investigation and whether the employee is the subject of the investigation or a witness in the investigation. If the employee is the subject of investigation, the employee will also be informed of the specifics of each complaint or allegation against him/her.

...

3. Prior to an interview or questioning which might reasonably lead to disciplinary action, the employee shall be advised of his/her rights to Union representation and, if the employee so requests, the Union representative shall be provided before the interview and investigation proceeds. This right of representation shall apply except for unusual situations in which the interview or questioning must take place immediately. No interview or questioning will occur until the employee has a reasonable opportunity to secure such representation. The first available Union representative will serve as the employee's representative. This right does not extend to performance evaluation interviews or meetings the purpose of which is solely to inform the employee of intended disciplinary action. The role of the Union representative at such interview or questioning will be to serve as the employee's representative. Notwithstanding Ohio Revised Code (ORC) 9.84, employees who are interviewed or testify during an investigation have no right to private attorney, unless authorized by the Union.

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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.

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19.04 Pre-suspension or Pre-termination Meeting

When the Employer initiates disciplinary action which is covered by this Article, written notice of a pre-disciplinary meeting shall be given to the employee who is the subject of the pending discipline. Written notice shall include a statement of the charges, recommended disciplinary action, a summary of the evidence being brought against the employee and the date, time and place of the meeting. An impartial representative of the Employer shall be appointed. Said representative shall be a member of the general headquarters staff or district staff as appointed by the Employer, who is impartial and detached and has not been involved in the incident or investigation giving rise to the discipline. Prior to the meeting, the Union will be provided with a copy of the administrative investigation.

The employee may waive this meeting. The meeting shall be scheduled no earlier than three days following the notice to the employee. Absent any extenuating circumstances, failure to appear at the meeting will result in a waiver of the right to a meeting.

A member who is charged, or his/her representative, may make a written request for continuance of up to forty-eight (48) hours. Such continuance shall not be unreasonably requested or denied. A continuance may be longer than forty-eight (48) hours if mutually agreed by the parties but in no case longer than sixty (60) days.

If either party makes a tape recording or transcript of the hearing, such recording or transcript shall be made available to the other party upon request.

The employee has the right to have a representative of his/her choice present in accordance with Section 8.02 at the meeting. The Employer shall first present the reasons for the proposed disciplinary action. The employee may, but is not required to, give testimony.

After having considered all evidence and testimony presented at the meeting, the meeting officer shall, within five (5) days of the conclusion of the meeting, submit a written recommendation to the Employer and the employee involved.

The parties understand that this meeting is informal and not a substitute for the grievance and arbitration procedure.

The Employer shall render a decision within a reasonable period of time to accept, reject or modify the recommendations.

The employee shall be notified by the Employer for final disposition of the statement of charges.

19.05 Progressive Discipline

The Employer will follow the principles of progressive disciplines. 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.

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FACTS

On September 6, 2010, the Grievant, a State Trooper, was the first officer on the scene in a traffic stop involving two speeding cars.¹ Back at the Post, after having the opportunity to view the dash-cam videos, the Grievant wrote the following Statement:

...While on stationary patrol at milepost 85 on Interstate 75, I checked two vehicles traveling southbound in the left lane at 81 mph at 1904 hours. I pulled out to catch up to them to initiate a traffic stop after they had

¹ The Grievant did not initiate the traffic stop. The first car came to a sudden stop after seeing the Grievant in his patrol car, stationary in the median. The second car came to a sudden stop after seeing the first car stop.

passed. Before I could activate my overhead lights and initiate a traffic stop, the lead car came to a screeching stop in the high speed lane of the interstate. The second vehicle swerved into the right lane, nearly missing the first violator's vehicle that was stopped. The second violator then swerved back into the high speed lane and also came to a screeching stop in the middle of the high speed lane. I then activated my overhead lights and advised Trooper J.L. Morris Unit 1787 to respond to my location to deal with the second vehicle that was stopped in the interstate. I then exited my patrol car and approached the first violator's vehicle on the driver's side. I threw my hands up and yelled ahead to the driver of the second vehicle, asking him what he was doing. The driver of the second vehicle exited his vehicle and started walking back towards my location. I again asked him what he was doing. The driver of the first vehicle yelled out to me and stated that he was seeing what she was doing. I told her that he is stopped in the middle of the interstate. I asked the violator for her driver's license. She did not make any effort to provide me with her identification. She stated that she wanted to know why she was being stopped. I informed her that they were both traveling 81 miles per hour. She started to argue and stated that she disagreed. She stated that she felt as if I was going to strike her with my patrol car, as I was leaving my stationary patrol in the median crossover. I ordered her to give me her driver's license. I then yelled up to the driver of the first vehicle to move his vehicle off of the interstate. He just looked blankly at me. At this point, vehicles were swerving to avoid striking myself and the violator's [sic] vehicles. Traffic was extremely heavy and the location where we were stopped was extremely hazardous. I then yelled to the second violator to move his vehicle. He slowly turned around and started walking back to his vehicle. I then ordered him to step it up because there was about to be a crash. The second violator then ran to his vehicle.

Trooper J.L. Morris Unit 1787 then arrived on scene and made contact with the second vehicle. I continued to order the female violator and she argued with me, still making no attempt to locate or provide her identification to me. Finally after several minutes, she provided me with her identification. I then ordered her to move her vehicle down into the median. She still refused to comply with my orders. I told her again to move her vehicle down into the median before we got struck. She then asked what the median was. I ordered her to pull her vehicle down into the "grass." I then returned to my patrol car to begin writing the traffic citation. The female violator still had not moved her vehicle down into the median. I then got on the loud speaker and ordered her several more times to move her vehicle. She then pulled up approximately five feet and stopped. A short time later, the female violator exited her vehicle and started walking up towards Trooper J.L. Morris. I then exited my patrol car and started walking to catch up to the suspect. I then radioed Trooper J.L. Morris to advise him that the female suspect was walking towards him and to stop her. Trooper J.L. Morris then exited his patrol car and stopped the female suspect. I caught up to her and ordered several times to return to her vehicle. She would not comply. I ordered her again to return to her vehicle before she

got struck. She replied that she wanted to speak with her brother. I then grabbed ahold of her arm in an attempt to lead her back to her vehicle. She pulled away and yelled for me to get off of her. Again I ordered her to return to her vehicle. She then started to slowly walk back towards her vehicle while she was dialing someone on her cell phone. She stopped several times before reaching her vehicle and I continued to order her to get back in her vehicle.

When I reached her vehicle, the suspect would not get into the driver's seat. I again ordered her to get in the car, and she replied that I could just write her the ticket while she stood outside of her vehicle. Again I ordered her to get in her vehicle. She then opened the driver's door and sat down, leaving her legs dangling outside. I told her to close the door. She still would not comply with my orders. She then snatched the door out of my hands and closed it halfway, while keeping her legs out. The suspect was in a laying position while keeping her feet out of the door jam. I then observed the suspect reach back behind her back where she was leaning. I then grabbed ahold of the suspect's left wrist and ordered her to get out of the vehicle, fearing she may be possibly attempting to locate a weapon. She refused to exit her vehicle.

When I grabbed ahold of her left wrist, the suspect then began resisting. She started yelling and continued to reach behind her back. While I had ahold of her left wrist, I radioed for Trooper J.L. Morris to come back to my location. The suspect continued to resist and was non[sic] compliant. Trooper J.L. Morris arrived back at my location, as well as Trooper S.M. Aker Unit 8. The suspect would not exit her vehicle, so I pulled the suspect out of the driver's side of the vehicle, placing her on the ground in the median.

The suspect then became extremely combative. After several seconds, she was forcibly placed into handcuffs. I then escorted the suspect to my patrol car and placed her in the rear seat. Sergeant P.R. Weber was called to respond to my location.

The suspect then started to hyperventilate while she was seated in my patrol car. I asked her several times if she needed medical attention and she would not answer. A short time later, Sergeant P.R. Weber arrived on scene. I told Sergeant P.R. Weber what had taken place. I was then advised to return to the OSP Piqua Post to complete a statement.

An investigation of the Grievant's conduct of the traffic stop ensued. On September 26, 2010, Sergeant Aller told the Grievant "some kind of investigation" was underway, and the Grievant would be told more the following day. On September 27,

2010, Lieutenant Payer told the Grievant the AI is about “professionalism” and “the totality of the traffic stop.”

On October 6, 2010, the Grievant was sent to a one-on-one two-hour training on communication skills at the Academy conducted by Sergeant Stought. Sergeant Stought told the Grievant nothing he might say during the training would later be used against him; the State called Sergeant Stought as a witness at the arbitration hearing.

The grievance dated October 18, 2010 provides in pertinent part:

Grievance Facts....

On or about September 6, 2010, while working my scheduled shift, I made a traffic stop of a violator for traveling at a high-rate of speed in excess of the posted limit on I-75 SB near milepost 85. At the outset, the violator repeatedly refused to comply with my lawful orders (R.C. 2921.331(A)), repeatedly attempted to take charge of the traffic stop, was disorderly (R.C. 2917.11(A)(5)), twice attempted to assault me, and resisted arrest (R.C. 2921.33(A)). From the beginning, I believed that the violator’s actions placed my life, the violator’s life, and others in immediate danger. The OSHP case no. for this matter is: 10-010066-0555. The case includes my statement, as well as the statements of OSHP Units #1787 and #8. I was ordered by Sgt. Paul Weber (#1360) to charge the violator with obstructing (R.C. 2921.31) and speed (R.C.4511.21(D)(2)), and nothing else, even though I believed and wanted to charge the violator with R.C. 4511.21(D)(2), 4511.68(16), 4511.22(A), and/or 4511.45(a)(1), and R.C. 2921.331(A), 2917.11(5), and 2921.33(A). Subsequent to the violator’s arrest, I was contacted by my post commander and ordered to report to the OSHP Academy on October 6, 2010 at 1300 hrs. as a result of my arrest of the violator on September 6, 2010.

In essence, I was disciplined without ever having been afforded my constitutional rights, or my CBA rights. The true issue with the violator’s conduct was that it presented a clear and present danger to my safety and the safety of others. The OSHP, however, is using the incident as another means to discriminate against me because of my disability, as well as to harass and retaliate against me for filing federal discrimination complaints and a lawsuit, as well as unfair labor practice charges, against them. Specifically, the OSHP has breached CBA Articles 19, 18, and 7, and in addition to filing this grievance, I intend to file federal complaints for discrimination, retaliation, and harassment. I also plan to take legal action against those OSHP officials who have denied me my constitutional due process rights in this matter. Accordingly, a second lawsuit will be prepared and filed in due course. Another important matter pertaining to this issue is that I have learned from the Miami County Prosecutor’s Office

that one or more OSHP officials called and had the criminal charge against the violator improperly dismissed on or about October 1, 2010. Even though I was the arresting officer, the dismissal was never discussed with me. Worse yet, each OSHP official that I have questioned about the charge being dismissed has lied to me about the facts. The violator is allegedly the daughter of a high-ranking police official. This matter should be promptly reported to ODPS Director Stickrath pursuant to Policy No. DPS-100.01, Sec. (B) and (C) for possible violations of R.C. 2921.31, 2921.32, or other Chapter 2921 violations by OSHP officials who had the criminal charge improperly dismissed. A PUBLIC RECORDS REQUEST (R.C. 149.43) is also attached hereto.

Requested Remedy

Removal of all disciplinary action and administrative investigation from my personnel file and records since the CBA was violated. I hereby request ODPS Director Stickrath to contact the Ohio IG, and/or appoint a special prosecutor, to investigate all alleged wrong-doing and the improper dismissal of the violator's criminal charge.

On October 19, 2010, Sergeant Landis told the Grievant he did not have a Form 36 with him, and "don't quote me," but the charges being considered related to professionalism and unnecessary use of force. In an Inter-Office Communication dated October 20, 2010 from Lieutenant Neal to the Grievant, given to the Grievant October 22, 2010, the Grievant was informed in pertinent part:

On September 16, 2010, an administrative investigation 2010-0705, was initiated to investigate allegations of unprofessionalism and inappropriate force used during a traffic stop.

The Grievant's investigatory interview took place October 29, 2010. At the beginning of the interview, Sergeant Landis read from a DPS Form 36 – Internal Investigation Pre-Interview – dated and timed October 29, 2010 at 9:55am that stated in pertinent part:

You are the subject of an administrative investigation. The known allegations are:

You were unprofessional and used an unnecessary amount of force, resulting in a custodial arrest during a traffic stop September 6, 2010.

During the October 29, 2010 investigatory interview, many topics arising from the Labor Day traffic stop were covered. Among the Grievant's responses during the interview were repeated assertions that he thought Ms. Cornelius had a gun in her car.

Toward the end of the October 29, 2010 investigatory interview, at approximately 11:12am, Sergeant Landis stated in pertinent part:

We're doing another DPS-36. You are the subject of an administrative investigation and the allegation here is that you've made untruthful statements during the course of this investigation.

The AI concluded in pertinent part:

...

[The Grievant] was not professional when dealing with both [Ms.] and [Mr.] Cornelius....

Throughout the course of this investigation, [the Grievant] made statements, sent an e-mail, filed a grievance, and filed multiple court documents through the courts. Within those statements and documents, there were several questionable statements made by [the Grievant] that were contradicted by his superior officers. Those discrepancies are summarized by the following:

[The Grievant] wrote in his initial statement...that he reached into [Ms. Cornelius'] car and pulled her out, because she reached behind her back. He said that he feared that she may have been reaching for a weapon. [The Grievant] said that he reached in and grabbed [her] left wrist. [Sgt.] Weber said that he never saw [the Grievant] react as if [Ms. Cornelius] was reaching for a gun. He said that [she] was on the phone trying to call her mother. [Sgt.] Weber said that when [Ms. Cornelius] tried to pull her door closed with her left hand, it bounced off her legs that were still outside the vehicle. [Sgt.] Weber said that [the Grievant] placed his ticket book on top of [Ms. Cornelius'] car, and he immediately attempted to pull her from the vehicle. [The Grievant] never gave verbal commands for [Ms. Cornelius] to show him her hands, nor did he retreat to provide distance as he had been trained.

...

A Pre-Disciplinary Hearing took place; the Grievant and his Union representative were not permitted to cross-examine any of the State's witnesses. The State concluded it would remove the Grievant from employment. The State removed the Grievant from

employment effective December 22, 2011 for alleged rule violations of 4501:2-6-02(E) False Statement, Truthfulness; 4501:2-6-02(V) Use of Force and Firearms; and 4501:2-6-02(B)(1) Performance of Duty. The Statement of Charges provides in pertinent part:

It was found that Tpr. Kohus made untruthful statements during the administrative investigation and additionally made false claims in associated court documents. It was also found that he behaved in an unprofessional manner during the traffic stop and infringed upon the rights of the driver.

PARTIES' POSITIONS

State's Position

In his Statement written after the incident, the Grievant wrote in pertinent part:

...I then observed the suspect reach behind her back where she was leaning. I then grabbed ahold of the suspect's left wrist and ordered her to get out of the vehicle, fearing she may be possibly attempting to locate a weapon.

Absent from this claim was any indication via the Grievant's actions that would indicate he thought she was reaching for a weapon or a gun. Immediately after Ms. Cornelius pulled her car door from the Grievant's grasp, the Grievant told her to exit the vehicle. The Grievant placed his pinch book on the roof of Ms. Cornelius' car and pulled on Ms. Cornelius' arm. The Grievant testified at the arbitration hearing when he placed his pinch book on the roof of the car, Ms. Cornelius reached back. This was when the Grievant allegedly thought Ms. Cornelius was possibly reaching for a weapon. Yet, the video – which the Grievant had an opportunity to see before writing his Statement – depicted the Grievant at this point releasing his grasp of Ms. Cornelius' arm and removing a set of handcuffs from his belt which he placed on the roof with the pinch book.

It made no sense for the Grievant to remove handcuffs from his belt if he thought Ms. Cornelius was reaching for a weapon. A trooper trained in Red Handled Gun

Exercises, as the Grievant had been, would have drawn his weapon, retreated for cover, and/or yelled verbal commands if he thought the suspect was reaching for a weapon. The Grievant did none of these.

If the Grievant truly thought Ms. Cornelius was reaching for a possible weapon, he would not have taken the time to place items on the roof of her car. He would not have used his other hand to call over Trooper Morris and he would not have waited until Trooper Aker arrived before removing Ms. Cornelius from the alleged threat inside her car. Even after he threw her to the ground, he did not ask her what she had been reaching for. He never asked her if she had a gun or other weapon in the car. He did not instruct the other troopers to search Ms. Cornelius or her car for the alleged weapon. The only order the Grievant gave was to Ms. Cornelius to release her cell phone. The dash-cam video contains no evidence the Grievant thought Ms. Cornelius was reaching for a weapon. It is obvious the Grievant concocted the story of the possible weapon to justify his mistreatment of Ms. Cornelius.

Sergeant Weber testified the Grievant told him at the Post he "...just didn't know what to do. She would not listen." Sergeant Weber also testified the Grievant never mentioned he thought Ms. Cornelius had reached for a weapon. The first time Sergeant Weber became aware the Grievant stated Ms. Cornelius was reaching for a weapon was when he read the Grievant's Statement. Additionally, Sergeant Stought, the Academy instructor assigned to re-train the Grievant, asked the Grievant what he was putting Ms. Cornelius under arrest for; the Grievant said he did not know.

Arbitrator Nelson heard a case between these Parties in 2005 where an officer used deadly force and then claimed he had seen a shadow of a gun as justification for his use of force. Like the instant case, there was no videotape evidence to support the officer's claim. Arbitrator Nelson wrote in pertinent part:

...The patrol argues that the grievant violated [Policy 4501:2-6-02(E) – False Statement, Truthfulness] by concocting a story about [the suspect] pointing a gun at [a cub trooper] and shooting [the suspect] to excuse [the grievant's] violation of the policy regarding the use of deadly force.

The patrol pointed to a number of action by the grievant that were not consistent with his story. It points out that the grievant claims he saw [the suspect] threaten [the cub trooper] with a gun but he did not yell “gun” to warn [the cub trooper] and the other three troopers at the scene and did not seek cover but stood in the roadway firing at [the suspect] as he fled. The patrol notes that the grievant stated that he thought [the cub trooper] had been shot but he did not check on his condition before pursuing [the two suspects]. It adds that when the brief pursuit ended, the grievant did not immediately attempt to locate the gun he testified that he had seen aimed at [the cub trooper].

Case No. 15-00-050214-0015-04-01. In that case, Arbitrator Nelson was forced to conclude the Grievant had not been truthful. Likewise, the State has shown in the instant case the Grievant concocted a story to justify his behavior.

From examining the totality of the traffic stop and the Grievant's rationale for the arrest of Ms. Cornelius, there is only one possible conclusion. The Grievant was upset from the start of the traffic stop. He was upset Ms. Cornelius was parked partially on the road. He was upset when Ms. Cornelius questioned him about the speed. He was upset when she did not understand what the “median” was. He was upset when she went to talk to her brother, despite having permission from Trooper Morris to do so. He was upset when she pulled away from his grasp and did not immediately go back to her car. He was upset when she did not immediately sit in the car and was upset when she failed to place her feet in her car. However, the Grievant never admitted to any frustration or being upset. He described himself only as having a sense of urgency, conducting a professional traffic stop, and being “amped up.”

The Grievant removed Ms. Cornelius from her car because she would not place her feet in her car. The Grievant's reactions never indicated he thought she was

reaching for a weapon. The Arbitrator must conclude the Grievant concocted a story to justify his use of force.

Additionally, Sergeant Aller told the Grievant on September 26, 2010 there was going to be an AI regarding the Grievant's unprofessionalism during a traffic stop. The Grievant responded as if he knew which incident would be the subject of the AI. During the AI, however, Sergeant Landis asked the Grievant about being notified on September 26, 2010 of the AI. The Grievant stated then that Sergeant Aller "never approached me about an administrative investigation at all." On September 27, 2010, Lieutenant Payer told the Grievant, "I had to have Sergeant Aller let you know – that, as a result of that incident out there on 75, they're going to initiate an AI." The Grievant responded, "OK." At the arbitration, the Grievant testified -- contrary to what he said during the AI -- that Sergeant Aller *had* mentioned the investigation to him.

Lieutenant Payer advised the Grievant "professionalism" and "the totality of the traffic stop" were the subjects of the AI. For the Grievant to claim he was never told any of the allegations is absurd. The Grievant knew a response to resistance case was completed because he filled out a statement for the case. Totality of the traffic stop would include his professionalism or lack thereof, the use of force, and the unlawful arrest. For the Union to insinuate Lieutenant Payer was untruthful because he used the phrase "use of force" when referring to "the totality of the traffic stop" was purely an attempt to rehabilitate the Grievant's lack of credibility.

When Sergeant Landis met with the Grievant and his Union representative on October 19, 2010, Sergeant Landis could not locate the DPS 36 Pre-interview Form he had filled out, but he advised the Grievant the charges were unprofessionalism, failure to de-escalate the situation, unnecessary use of force, and unnecessary arrest. The

Grievant then paraphrased the charges, saying, “OK, so professionalism and unnecessary use of force?”²

The State consistently discharges officers who make false statements. As reflected in the record, troopers are told from their time as cadets at the Academy a violation of the False Statement, Truthfulness rule will get them fired. Not telling the truth after being sworn in by the Arbitrator violates OSHP core values and code of ethics. Making false statements under oath is incompatible with being a sworn law enforcement officer. The State has lost all trust in the Grievant; the employer/employee relationship cannot be repaired. As Arbitrator Brookins wrote in pertinent part in a 1999 case between these Parties:

The Grievant’s misrepresentation of material facts were intentional, untenable, and very likely inimical to his ability to perform certain duties in the future. Beyond that, as a general proposition, his misconduct has eroded OSHP’s confidence in his ability to serve as a state trooper.

Case No. 15-00-9901-0006-04-01. This Arbitrator stated the following in a 2008 case between these Parties about a law enforcement officer’s veracity:

First, it must be said law enforcement personnel are legitimately held to an extremely high standard of integrity. Law enforcement personnel have enormous responsibilities – among these is to tell the truth. Truthfulness on the part of a member of law enforcement is an essential requirement. A State Trooper cannot take it upon himself to decide when it is important to tell the truth, and when it is not. There is no room in law enforcement for maverick behavior.

² The Union also claims the Grievant was disparately denied the right to cross-examine witnesses at his Pre-disciplinary Hearing. Section 19.04 of the Parties’ Agreement, however, does not provide for cross-examination at pre-disciplinary hearings. Moreover, How Arbitration Works notes:

The predisciplinary meeting is not an evidentiary hearing. The employee does not have the right to counsel at a predisciplinary meeting or a right to present or cross-examine witnesses.

(Sixth Ed., 2003), p. 1258.

Case No. 15-03-20080319-0040-04-01. Moreover, the lie in that case – the trooper’s representation he was on stationary patrol rather than on his lunch break – pales in comparison to the lies submitted by the Grievant in the instant case.

A routine duty of a trooper is to testify in court. Defense attorneys subpoena troopers’ personnel files. Arbitrator Alan Miles Ruben, in a 1998 case between the Parties, explained the relationship between a trooper’s falsification and testifying in court:

[Falsification not only] adversely affected the rights of the innocent party...but also the operation of the justice system as well. It compromised his ability to serve as a witness in any subsequent litigation.

Case No. 15-00-980807-0097-04-01.

The State’s decision to remove the Grievant was not arbitrary, capricious, or discriminatory. The State requests the Arbitrator to deny the grievance in its entirety.

Union’s Position

During the Labor Day incident, the Grievant found it necessary to remove Ms. Cornelius from her car. As he placed his “pinch book” on the roof of her car, he saw her reach with her right hand toward an area of her car covered with trash and unobservable to the Grievant. The Grievant elected to act immediately and forcefully removed her from her car. Officer safety demands action where there is perceived threat of a weapon. The Grievant had already determined it was necessary to remove Ms. Cornelius from her car; when he saw what he perceived to be a furtive movement, he acted immediately. Nine out of ten times, such furtive actions do not involve weapons. It is the tenth time that gets officers killed.

For Sergeant Weber to testify the Grievant never told him why he removed Ms. Cornelius from her car defies reason. It would have been one of Sergeant Weber’s first

questions as a supervisor responding to the scene of a “resisting incident.” Moreover, Sergeant Weber is misleading in testifying he never found a weapon in Ms. Cornelius’ car. Her car was never searched and/or inventoried and/or towed. All Sergeant Weber did, following taking charge of the scene, was take photographs of the outside of Ms. Cornelius’ vehicle. As a result, Sergeant Weber could have no knowledge whatsoever whether there was a weapon inside Ms. Cornelius’ car. Indeed, Sergeant Weber order the Grievant to leave the scene and go directly to the Post to start his written statement. The Grievant was not given the opportunity to complete his arrest of Ms. Cornelius and his investigation of the incident – including searching Ms. Cornelius’ car, before Sergeant Weber inserted himself and took over the scene.

The Grievant was directed, as were the other troopers at the scene, to go to the Post and prepare statements. The Grievant’s statement included references to the conduct of Ms. Cornelius that would support the charges the Grievant intended to file.

Internal investigations often are conducted to find evidence in support of a predetermined truth. In this case, the investigation was conducted for the purpose of finding the Grievant was unprofessional in his actions toward Ms. Cornelius, and that he physically abused her by pushing and/or shoving her.

It is amply clear the Grievant never received formal notice of the specific charges if the AI as is required prior to receiving the Form #36 that sets out the specific charges. The Grievant’s Lieutenant testified he gave the Grievant specific notice in a September 27, 2010 meeting. The Grievant, however, had recorded that meeting. The recording shows the Lieutenant made no such comments.

Not only was the Grievant denied the procedural due process of knowing the specific charges he faced as is prescribed by the Parties’ Agreement, his denial of due process extended to his Pre-disciplinary Hearing as well. The State gave notice to the

Grievant of a hearing where he would not be permitted to cross-examine the witnesses against him. The State has given notice to others prior to pre-disciplinary hearings that contained the specific right to cross-examine witnesses.

Having determined to fire the Grievant, the State was faced with a serious problem. It had no grounds that would support his termination based upon the events at the traffic stop. So it seized upon the fact that in an attempt to secure judicial protection from an AI interview for which he had not been granted sufficient time to secure counsel, he asked for an injunction preventing the AI interview from going forward. He did a great job in presenting his case and filed appropriate affidavits. The State scrutinized the Grievant's filings and determined his claim that he did not have notice of the charges of the AI was a "false statement." The State used that to bootstrap the other charges of inappropriate conduct with Ms. Cornelius into grounds for termination. There is not a doubt in the world the Grievant's affidavits were technically and factually correct. The allegations of false statements in the court filings are without merit and do not serve the reputation of the State favorably.

Who is the Grievant and is he to be believed? The Arbitrator saw him on the witness stand and had the opportunity to judge him. He answered all questions directly and openly. This young man is a "truth teller." He cannot be bullied or trapped because he is open, truthful, and direct in his answers. He has no secret agenda. He was told by a former sergeant he [the Grievant] should keep his "mike" open in his dealings with the State because it had an agenda when it came to the Grievant. The Grievant did so and it paid dividends as it destroyed his Lieutenant's testimony intended to prove the Grievant made false statements in his court affidavits. Indeed, it was the Lieutenant who made false statements under oath at the arbitration hearing.

Is the Grievant a good trooper? The Grievant's supervisor for three years testified the Grievant was a good trooper. Despite being on probation for nearly four years, the Grievant's department record shows him to be a good trooper. There is no discipline in his file, not even a written reprimand. His annual performance review is positive. He has never received a written complaint by a member of the public; rather, he has scores of commendation letters from citizens and citizen organizations. If a trooper is badge-heavy or arrogant, there will be complaints in his jacket. Oftentimes, there are complaints just from misunderstood actions or from misperceptions on the part of someone who is being charged with an infraction or a crime.

The Grievant was never "untruthful" about anything related to this case. The State's accusations against the Grievant for "untruthfulness" are entirely baseless. The State is being disingenuous; i.e., each State witness added far more detail to their testimony compared to their initial incident and AI statements, which is what the State is attempting to charge the Grievant with doing. Though there was much dissembling at the arbitration hearing, none of it was from the Grievant.

The Grievant was perceived as a problem. He used an attorney in the past when faced with an AI; he had filed an unfair labor practice with SERB against OSHP that was well-drafted and appeared to have merit. The Grievant was going to continue to press his case and he was going to do his job in a manner that prevented the State from getting rid of him for just cause.

Then came the Cornelius traffic stop; the State clearly decided on a preemptive strike. It would fire him; what did it risk. Like Woody Hayes used to say, "when you pass the football there are only three possibilities, two of which are not good." Here, the State determined if it fired the Grievant, only three outcomes are possible, two of which are good. Either the termination would be upheld or the termination might be converted to a

suspension, both good. A suspension could be used as baseline discipline for further discipline.

Only one outcome of a removal would be unsuccessful in the State's view – the termination is set aside, the Grievant is reinstated with no loss of pay or benefits, and the Award references the strong opprobrium of the Arbitrator. Perhaps this third outcome would move goalposts back a little, and convince the State to let the Grievant to do his job. The Grievant is a high quality law enforcement officer who has chosen this work as his profession. The people in a position to judge the quality of his work know him to be a good trooper. The Arbitrator has had the opportunity to judge the Grievant's veracity and watch him in the midst of a dangerous situation not of his making.

This third choice is the choice of justice in this case. Even viewed under the State's microscope, the Grievant has done nothing wrong. He should be reinstated with full backpay and no loss of benefits.

ARBITRATOR'S OPINION

This is an extremely hard-fought, multi-factor case. At stake is the Grievant's continuation in his chosen career, pitted against the State's need and right to have a highway patrol force that follows all of its rules at all times.³

The State removed the Grievant from employment based on its belief he had been untruthful and unprofessional with regard to the Labor Day traffic stop. The Grievant and the Union hotly contested both of these charges.

False Statement, Truthfulness – OSHP Rule No. 4501:2-6-02(E)

The Statement of Charges provides in pertinent part:

³ Does the Arbitrator think all State troopers follow all the rules at all times? No. But she has jurisdiction over only the instant case.

It was found that Tpr. Kohus made untruthful statements during the administrative investigation and additionally made false claims in associated court documents.

The AI

Whether the Grievant Thought Ms. Cornelius Had a Gun

One of the statements the Grievant made during the AI was he pulled Ms. Cornelius out of her car because she had reached toward the back of her car with her right hand, leading the Grievant to think she might have a gun. But, the record clearly shows the first time the Grievant stated to anyone he thought Ms. Cornelius might have a gun was in the written statement he made at the Post immediately following the incident. He told no one on the scene – i.e., fellow troopers – that he thought Ms. Cornelius might have a gun. In the Statement he wrote back at the Post, he stated in pertinent part:

When I reached her vehicle, the suspect would not get into the driver's seat. I again ordered her to get in the car, and she replied that I could just write her the ticket while she stood outside of her vehicle. Again I ordered her to get in her vehicle. She then opened the driver's door and sat down, leaving her legs dangling outside. I told her to close the door. She still would not comply with my orders. She then snatched the door out of my hands and closed it halfway, while keeping her legs out. The suspect was in a laying position while keeping her feet out of the door jam. *I then observed the suspect reach back behind her back where she was leaning. I then grabbed ahold of the suspect's left wrist and ordered her to get out of the vehicle, fearing she may be possibly attempting to locate a weapon.* She refused to exit her vehicle.

(Emphasis added.)

During his AI interview, the Grievant repeated his assertion that he thought Ms. Cornelius might have a gun in her car:

Sgt. Landis: We'll go through the whole thing. What did you set on top the car?

The Grievant: My ticket book.

Sgt: And what is it you're about to do?

Gt: She is laying across the seats and reaching back with her right hand and I grabbed her by the left wrist.

...

Sgt: So you set your ticket book up on top the car, correct?

Gt: When she reached for something with her hand, yes I did.

Sgt: You put your hands on her at this point, why?

Gt: Because she was reaching for something in the center of the vehicle.

Sgt: Did you give her any verbal commands?

Gt: I didn't see any reason to it was --

Sgt: Do you recall in training if there is a gun present or someone has their hands in a position you can't see them that you are told, show me your hands.

Gt: I think that is more in a laid back situation. This needed to be acted upon immediately for my safety.

Sgt: And for what reason was that?

Gt: If she had a gun it would only take her a split second to grab the gun and shoot.

Sgt: OK.

Gt: There would have been no way for me to react.

Sgt: Where were her hands that made you reach in and grab her?

Gt: Her right hand was moving back towards the center of the vehicle.

Sgt: With the cell phone still in it?

Gt: I don't remember what she did with the cell phone if she placed it down or if she threw it what she did with it but I saw her right hand go towards the center of the vehicle.

Sgt: Would it be safer at that point to give her verbal commands to see her hands?

Gt: I didn't have time. I just reacted.

Sgt. Would it have been safer for you to react and back away and give yourself more distance?

Gt: I didn't believe so at the time.

Sgt: You didn't believe so? You thought it would be safer to reach in and grab her.

Gt: Right.

...

Sgt: When you reached in the car and you grabbed her, ok, because you said her hand went into a direction you didn't feel comfortable with it going.

Gt: OK.

...

Sgt: Was [Ms. Cornelius] searched prior to going in the back of the [patrol car]?

Gt: No, she was not. Not by me, she was not.

Sgt: Any reason you didn't search her?

Gt: I was pretty much, I guess for a lack of a better term a little shaken up with what was going on and I put her in the back and I just separated myself from her and I was going to allow one of the other troopers to deal with her since we just had a confrontation. I wouldn't have gotten anywhere with her anyway.

Sgt: OK, but you were in fear that she may be reaching for a gun is what you just told me is the reason why you reached in and grabbed her.

Gt: Correct.

Sgt: So you have that fear in your mind and you're still not going to search her before you put her in the patrol car?

Gt: I removed her from the vehicle where I thought the threat was and her jeans were tight on her and I

thought it best just to separate myself from her once she was secured.

Sgt: Did anyone search her?

Gt: Like I said, that was the last contact I had with her.

...

Sgt: If you hit this then I still missed it, but when you reached in and grabbed her, I am correct in saying that she was not under arrest at that point?

Gt: No, I was separating and removing her from the vehicle.

Sgt: So your intent was to remove her from the vehicle?

Gt: And the possible threat of a weapon or whatever else she was doing, yes.

The problem with believing the Grievant thought Ms. Cornelius may have had a gun is that there are numerous objective markers to the contrary. First, if the Grievant thought Ms. Cornelius may have been reaching for a gun, he was trained to order her to show him her hands. He did not do so. Instead, the Grievant pulled Ms. Cornelius out of her car immediately after she reached back for something. Second, if the Grievant thought Ms. Cornelius may have had a gun in her car, he was trained to back away from her car. He did not do so. Rather, he stayed right next to Ms. Cornelius. Third, if the Grievant thought Ms. Cornelius may have had a gun, he was trained to yell “gun!” to the other troopers on the scene. He did not do so; nor did he at any time during the incident alert his fellow troopers Ms. Cornelius may have had a gun. Fourth, if the Grievant thought Ms. Cornelius may have had a gun, he was trained to search her before putting her in his patrol car. He did not do so; nor did he request any of his fellow troopers on the scene to search her.⁴

⁴ The Grievant did say in his AI interview that:

The Arbitrator is confident the Grievant would never knowingly put his fellow troopers in danger. This, combined with the other objective markers listed above, convince the Arbitrator the Grievant was not telling the truth when he wrote and said he thought Ms. Cornelius may have had a gun. Rather, the record shows that after watching the dash-cam videos at the Post, the Grievant concluded he needed a solid reason for having pulled Ms. Cornelius out of the car. He came up with the story about a possible gun, and he stuck with that untruth during the AI.

As various arbitrators for these Parties have written, truthfulness is an essential part of being a trooper. This Arbitrator has written:

First, it must be said law enforcement personnel are legitimately held to an extremely high standard of integrity. Law enforcement personnel have enormous responsibilities – among these is to tell the truth. Truthfulness on the part of a member of law enforcement is an essential requirement. A State Trooper cannot take it upon himself to decide when it is important to tell the truth, and when it is not. There is no room in law enforcement for maverick behavior.

Case No. 15-03-20080319-0040-04-01 (2008).

Making a false statement is a terminable offense for a trooper. Violation of False Statement, Truthfulness -- OSHP Rule No. 4501:2-6-02(E) – was one of the charges underlying the Grievant’s removal. That being the case, there is no need for the Arbitrator to analyze additional elements of the removal.⁵

I removed her from the vehicle where I thought the threat was and her jeans were tight on her and I thought it best just to separate myself from her once she was secured.

Arguendo, this statement is consistent with the Grievant thinking Ms. Cornelius may have had a gun. It seems highly unlikely, however, for the Grievant to have believed a cursory look at tight jeans without an obvious gun bulge was sufficient to adequately protect himself and his fellow troopers on the scene. If, indeed, the Grievant believed such a cursory look was sufficient, then he certainly failed to competently handle the situation, a terminable offense of its own.

⁵ It should be said, however, that the State violated Article 18.02(1) by its delayed and vague notice given to the Grievant “of the specifics of each complaint or allegation against him.” “Professionalism” and “the

AWARD

For the reasons set out above, the State had just cause to remove the Grievant. The grievance is denied.

DATED: June 23, 2011

Susan Grody Ruben
Susan Grody Ruben, Esq.
Arbitrator

totality of the traffic stop” – told to the Grievant on September 27, 2010 – does not satisfy Article 18.02(1). This violation, however, is not dispositive under the circumstances of this case. The Grievant’s statements regarding a gun began immediately after the incident and carried through the AI. These statements were not caused by the State’s violation.

Also, there is no question that on Labor Day 2010, the Grievant was faced with an extremely rude, unnecessarily hostile, and histrionic speed violator. That said, the characteristics of the driver do not excuse the Grievant’s conduct.