ARBITRATION DECISION

June 28, 2011

In the Matter of:

State of Ohio, Department of Mental Health	)	
	)	Case No. 23-06-20090330-0004-05-02
and	)	Guillermo Zarate, Grievant
	)	
Fraternal Order of Police, Ohio Labor Council, Inc.	)	

APPEARANCES

For the Department:

Marlo Cain, Labor Relations Officer
Victor Dandridge, OCB Labor Specialist
Ronald Lawrence, Labor Relations Officer
Ronald Barker, Chief of Police
Johanna Beck, Police Officer
Brian Henry, Workers' Compensation Risk Manager
Robert Short, Former CEO

For the Union:

Paul Cox, Chief Counsel
Renée Engelbach, Paralegal
Joel Barden, Staff Representative
Paul D. Parker, Union Delegate
Guillermo Zarate, Grievant
James C. Peek, Police Officer

Arbitrator:

Nels E. Nelson

BACKGROUND

The instant dispute involves the Ohio Department of Mental Health and the Fraternal Order of Police, Ohio Labor Council, Inc. The department operates Twin Valley Behavioral Healthcare, a hospital for the care and custody of severely ill mental health patients. The department employs eight police officers at the facility who are represented by the FOP.

The grievant is Guillermo Zarate. He completed his basic police training in 1992 and subsequently worked in a number of law enforcement positions until November 3, 2003, when he was hired as a police officer at TVBH.

The events giving rise to the grievance began in early 2008. At that time Johnotre Busby, a Therapeutic Program Worker at TVBH, asked Johanna Beck, a police officer who had worked 20 years at the facility, to check on the status of two traffic offenses. Beck learned from Court View that Busby had two outstanding arrest warrants and advised her to take care of them.

The issue of Busby's warrants arose again on December 16, 2008. On that date, Beck discovered that Court View indicated that Busby had not dealt with the warrants. When she asked the grievant whether Court View was up to date, he called the Clerk of Courts for Franklin County Municipal Court and found out that the warrants were still active.

The grievant and Beck talked to Ron Barker, the chief of police at TVBH. They told him that Busby had two outstanding arrest warrants and that she was not at work that day. Barker testified that he told the grievant and Beck that "we will take care of it tomorrow." The grievant claims that he told them to "do what you have to do."

At 5:30 a.m. on December 17, 2008, the grievant was changing out of his uniform to leave work at 6:00 a.m. when James Peek, a first shift police officer, arrived. They discussed Busby's situation and agreed that Beck, who also worked on the first shift, was responsible for arresting her as soon as she arrived at work.

Beck arrived around 6:00 a.m. as the grievant was preparing to leave. Peek and the grievant told Beck that she would have to arrest Busby but she refused because she felt sorry for her and because she had little experience with making an arrest. Peek responded by telling Beck that he would arrest her for dereliction of duty if she did not arrest Busby.

At some point, the grievant decided to help Beck with the arrest. He put his uniform back on and called Robert Ward, the nursing supervisor, to let him know that they would be arresting Busby. Peek went to the unit to get Busby and the grievant started filling out an arrest information form referred to as a U-10.100. Beck remained at the police department doing paperwork.

When Busby arrived at the department, she was told that she was going to be arrested on two outstanding warrants. She was allowed to make a number of calls and to leave some personal property in her car. Beck then handcuffed Busby and put her in the cruiser for the trip to the Franklin County jail.

En route to the jail, there was an exchange between Beck and the grievant regarding the U-10.100 he had completed. Beck complained to the grievant that he had listed Peek rather than her as one of the arresting and conveying officers. She testified that the grievant responded that it did not matter. The grievant claims that he told her that she could fix it when they got to the jail.

After learning that the Franklin County jail was no longer accepting female prisoners, the grievant and Beck took Busby to the Jackson Pike jail. Upon arrival at the jail, the grievant went outside with a deputy who was locked out of his car and had asked him to help him with his lock-out key. Beck stayed with Busby and signed the warrants as the arresting officer. She also made a number of corrections on the U-10.100 but did not change the entry that showed Peek rather than her as an arresting and conveying officer.

In the meantime, Barker, who was on his way to TVBH, got a call from Robert Short, the TVBH's CEO. Short told him that he had gotten a call telling him that the Columbus Police Department had just arrested a staff member and instructed Barker to find out what had happened. When Barker arrived at the facility and talked to Peek, he told Short that the grievant and Beck had arrested Busby on two traffic warrants.

An administrative investigation began on December 22, 2008, and a pre-disciplinary hearing was held on February 12, 2009. The notice for the hearing stated that the grievant was charged with the following:

> Insubordination: Willful disobedience of a direct order by a supervisor.
>
> Neglect of Duty: Failure to follow the policies, procedures, directives of ODMH, hospitals, C.S.N.
>
> Dishonesty: Falsification of any official document or record.
>
> Unauthorized use/misuse of good or property of the State, Department, client or patient.
>
> Failure of Good Behavior: Other actions that could compromise or impair the ability of the employee to effectively carry out the duties as a public employee; Poor judgment. (Management Exhibit 19)

On February 19, 2009, Karen Woods-Nyce, the Director of Patient Services, who served as the hearing officer, issued her report rejecting the insubordination charge but upholding the other charges.

A second pre-disciplinary hearing was held on March 20, 2009, to consider an additional charge that the grievant had interfered with an official investigation. The department claimed that during the initial investigation the grievant stated that he had accessed the Ohio Law Enforcement Gateway "a couple of times" but a report from the Bureau of Criminal Identification and Investigation indicated that he did 106 OHLEG searches between December 11, 2007, and January 22, 2009. Woods-Nyce concluded that the charge of giving a false statement should be included along with the previous charges and her recommendation for the grievant's removal.

On March 27, 2009, the grievant was notified by Sandra Stephenson, the Director of the Department of Mental Health, that he was being removed. She stated:

> On December 16, 2008 you and a co-worker advised the hospital Chief of Police that an employee had active warrants from Franklin County. The employee was off work that day and scheduled to return to work the following day. The Chief of Police told you and your co-worker; "We'll deal with it tomorrow".
>
> The following morning, December 17, 2008, you and your co-worker arrested the employee and transported her off grounds to the Franklin County Jail. You and your co-workers made the arrest before 7:00 a.m. without properly notifying the chief of Police of your action and without obtaining the proper authorization.
>
> On December 17, 2008 you filled out and turned in a U-10-100, Arrest Information Form pertaining to the arrest of the above mentioned employee that contained falsified information. You listed yourself and Police Officer Peek as the arresting and conveying officers. This was not correct and it had been pointed out to you during the transport of the employee to jail. Layout knowingly submitted the form with falsified information.

> You have misused State of Ohio equipment, hospital computers, to conduct searches on "Court View" on hospital staff without authorization and outside the scope of your duties. You have also used the hospital computer to access OHLEG using another police department's ORI number to conduct searches and pull information outside the scope of your duties and responsibilities as a TVBH police officer.
>
> During the period of September 22, 2008 and December 21, 2008 you searched the internet for a total of 71 hours, 26 minutes and 21 seconds while at work.
>
> During the investigation, you provided false statements when you were asked about accessing OHLEG and the number of searches you conducted while working for TVBH. (Joint Exhibit 2)

Stephenson indicated that the grievant's conduct violated five sections of the department's Standard Guide for Disciplinary Action Penalties.

On the same day, the grievant filed a grievance protesting his removal. He charged that the department violated Article 19, Sections 19.01 and 19.05, of the collective bargaining agreement by terminating him without just cause and without regard to progressive discipline. The grievant asked to be returned to his position and to be made whole.

The grievance was processed pursuant to Article 19. When it was not resolved, it was appealed to arbitration. The arbitration hearing was held on April 27, 2011, and May 11, 2011. Post-hearing briefs were received on June 3, 2011.

ISSUE

The issue as framed by the Arbitrator is:

> Did the grievant's removal violate the collective bargaining agreement? If so, what is the proper remedy?

RELEVANT CONTRACT PROVISIONS

Article 19 – Disciplinary Procedure, Sections 19.01 – Standard, and 19.05 – Progressive Discipline; Article 20 – Grievance Procedure, Section 20.09 – Disciplinary Grievances, Paragraph 3; and Article 42 – Occupational Injury Leave.

DEPARTMENT POSITION

The department argues that there is just cause for the grievant's removal. It charges that the grievant is guilty of neglect of duty by failing to follow the policies, procedures, and directives of TVBH. It points out that Barker's testimony establishes that the grievant did not get his permission before arresting Busby. The department notes that the grievant and Beck were in close proximity to Barker when he told them that "we'll deal with it then." The department observes that Barker and Beck disputed the grievant's testimony that Barker said "we have to do what we have to do."

The department contends that the grievant took the lead role in the arrest. It reports that he called the unit to verify that Busby was at work; confirmed on Court View that the warrants were active; contacted the Franklin County Clerk of Courts to verify the warrants; and completed the arrest form. The department claims that Beck "reluctantly participated to ensure that Ms. Busby was treated with dignity, respect, and for liability purposes since she was the only female officer." (Department Post-Hearing Brief, page 4)

The department disputes the grievant's testimony that once an officer becomes aware of a warrant, it must be executed without delay. It points out that he testified that he verified an active warrant for Sarah Thompson, a correction lieutenant, but did not arrest her because of her position of authority. The department adds that "while it remains true that a warrant should be served without delay considering the details of the

situation, the mere fact remains that the grievant works under the direction of TVBH and is subject to the rules of the department." (Department Post-Hearing Brief, page 5)

The department charges that the grievant violated a number of its policies and procedures. It reports that the General Jurisdiction Policy GC-17, Section B, states that the CEO must be apprised of any criminal conduct and requires an arrest to be reported to the chief of police; Ground Patrol Policy P-19, Section D, indicates that officers are to use arrest as a last resort and requires an arrest to be fully documented; Compliance Policy GC-5, Section B, states that officers are to comply with administrative rules and division policies and procedures; and Professional Conduct and Responsibilities Policy, GC-6, Section L, requires employees and members to report in writing employees who violate the law, ordinances, or department rules or disobey orders.

The department maintains that the grievant engaged in dishonesty. It points out that Beck testified that she told the grievant the U-10.100 inaccurately listed him and Peek as the arresting and conveying officers. The department claims that it was not Becks's responsibility to correct the form because she was "interacting with the Franklin County Sheriff's staff and ensuring that the employee was processed pursuant to their instructions." (Department Post-Hearing Brief, page 7)

The department argues that it is clear the Peek did not arrest Busby. It indicates that he went to the unit to get Busby because the grievant was completing the arrest form and Beck was doing other paperwork. The department notes that Peek testified that "the grievant returned to his police uniform due to his uncertainty with Officer Beck's involvement so that he could execute the arrest." (Department Post-Hearing Brief, pages 7-8)

The department rejects the union's suggestion that the grievant did not have an opportunity to correct the arrest form because he was assisting a deputy who was locked out of his car. It indicates that the grievant did not make this claim until the arbitration hearing. The department asserts that "the grievant was and continues to be dishonest regarding the U-10.100 arrest form." (Department Post-Hearing Brief, page 8)

The department contends the grievant misused goods or other property of TVBH. It states that he used its computers to conduct unauthorized searches on hospital staff on Court View. The department notes that the grievant used Court View to see if Thompson had a warrant; to find out the status of a case involving Kevin Williams, a former employee; and to check on Gill Murphy, a TVBH human resources administrator, and Short. It emphasizes that "the grievant acknowledged that he understood that the department's computers were to be used for business purposes only evidenced by his signature on the Usage, Security and Safety Standards for Computerized Systems and the TVBH internet agreement." (Department Post-Hearing Brief, page 9)

The department maintains that the grievant admitted that he accessed OHLEG inappropriately. It points out that he used his commission from the Shawnee Hills Police Department to access OHLEG 106 times using its computers. The department indicates that his initial claim that he did so for law enforcement purposes was dispelled. It observes that the grievant "verified warrants and checked OHLEG for staff members, family, friends, and patients (HIPPA violations) while working for and using TVBH computers." (Department Post-Hearing Brief, page 10)

The department argues that the grievant also accessed information on the internet that was not relevant to his duties as a police officer. It notes that a report on his

computer usage shows it includes 670 hits on a soccer site where he spent two hours; 2917 hits on autotrader.com where he spent one hour and 22 minutes; 535 hits at adicio where he spent two hours; and 739 hits at a site dealing with government jobs where he spent one hour and 34 minutes. The department states that "these visits along with many others as referenced in the WebTrends Summary Report were not within the scope of the grievant's job duties." (Department Post-hearing Brief, pages 11-12)

The department questions the grievant's claim that others were aware of his OHLEG searches. It acknowledges that Peek testified that the grievant posted OHLEG information on a bulletin board about two years ago but asserts that such was impossible because the grievant was terminated for two years as of March 28, 2011. The department adds that "the search engine tool component contains social security numbers and personal information … [so] management is certain and can reassure [the Arbitrator] that [an OHLEG] report was never posted on the police department bulletin board at TVBH." (Department Post-Hearing Brief, pages 12-13)

The department contends the grievant interfered with an official investigation by giving false statements. It reports that on January 15, 2009, he told Ronald Lawrence, the Labo Reatons Officer who conducted the investigation, that he may have used OHLEG "a couple of times" and provided two specific examples. The department observes that it subsequently got a report from the Bureau of Criminal Investigation and Identification revealing that he had accessed OHLEG 106 times.

The department complains about the grievant's response when he was re-interviewed by Lawrence after he received the BCI & I report. It points out that Lawrence testified that when he advised the grievant that he had information showing

that he had accessed OHLEG more than a couple of times, the grievant claimed that he had taken four or five classes on-line and was unsure how many hits would be recorded and added that he went there to read reports and research law enforcement issues. The department suggests that the grievant was assuming that it had a report regarding his internet usage.

The department challenges the grievant's claim that he told Lawrence he had accessed OHLEG "a few times." It asserts that 106 times is more than "a few times" and adds that the BCI & I report indicates that the grievant accessed OHLEG ten times on one occasion; eight times on four occasions, and six times on another occasion. The department asserts that "the grievant's testimony at the [arbitration] hearing was not credible when he stated that eight (8) or ten (10) is the same as 'a few.'" (Department Post-Hearing Brief, page 13)

The department rejects the union's claim that the grievant performed searches "a couple of times per week." It points out that he did 73 searches on one computer in a six-month period from December 11, 2007 through May 14, 2008, and 33 searches on another computer in a two-month period from October 7, 2008, through December 2, 2008. The department asserts that "the Union's argument that the grievant did a couple or a few OHLEG searches per week has no merit, whatsoever." (Department Post-Hearing Brief, page 15)

The department challenges the grievant's contention that he did not provide false statements. It observes that when Lawrence referred to the BCI & I report and asked the grievant to explain his previous statement that he had accessed OHLEG "a couple of times," the grievant insisted that he answered the questions to the best of his knowledge.

The department stresses that "these facts reveal that the grievant was dishonest and that he provided false statements during the investigatory discipline process." (Department Post-Hearing Brief, page 14)

The department maintains that the grievant engaged in actions that compromised or impaired his ability to carry out his duties and constituted a failure of good behavior. It points out that Short testified that he relies on Barker to consult with him any time an arrest is necessary. The department suggests that the grievant's failure to tell Barker about Busby's arrest establishes that Short "was unable to rely upon [the grievant] as an officer who possesses integrity and honesty." (Department Post-Hearing Brief, page 15)

The department argues that there is no back pay issue to be decided. It observes that Brian Henry, its Workers' Compensation Manager, testified that there is no back pay liability because the grievant has been receiving compensation since he suffered an on-duty injury on January 19, 2009. The department claims that the Arbitrator's authority is limited to determining whether the grievant's removal was justified.

The department contends that the grievant should be held to a higher standard of conduct because he is a police officer. It observes that in his oath of office he swore to support the United States and Ohio constitutions and to honestly discharge his duties. It adds that "he cannot conduct his job duties if his credibility is in question." (Department Post-Hearing Brief, page 16)

The department offers the decision of Arbitrator Robert Stein in case no. 15-03-20060606-0120-04-01 (November 30, 2006) in support of its position.[1] It claims that in the case before Arbitrator Stein, a highway patrolman provided incomplete, inconsistent, contradictory, and evasive answers to questions during an administrative investigation of

[1] The department submitted the Office of Collective Bargaining's summary of the decision.

his conduct. It observes that he upheld the grievant's removal stating that "calculated perjury by a police officer, sworn to uphold the law, and to be familiar with the requirement of providing truthful testimony, falls within the bounds of 'just cause' meriting disciplinary action." (Department Post-Hearing Brief, page 16)

The department concludes that the grievant's removal is appropriate. It acknowledges that he had no discipline on file but observes that his conduct involved poor judgment and dishonesty. The department reminds the Arbitrator that if he finds that dishonesty occurred or false statements were made, under Article 20, Section 20.09, he has no authority to modify the discipline it imposed.

UNION POSITION

The union argues that the grievant did not interfere with an investigation by giving false statements. It indicates that he was initially charged with insubordination but when the hearing officer concluded that there was no direct order given regarding arresting Busby, the charge was changed to interfering with an investigation by giving false statements. The union claims that this "does not change the fact that the grievant did not hear what the Employer believes he heard." (Union Post-Hearing Statement, page 7)

The union contends that the question is whether Barker expected the police officers to wait for him before arresting Busby. It points out that Barker testified at the arbitration hearing that he told the grievant and Beck "we'll deal with it tomorrow after I talk to the CEO" while in his December 23, 2008, statement he reported he said "we'll deal with it then." (Management Exhibit 16, page 1) The union notes that at the arbitration hearing, Beck claimed that Barker told her and the grievant that "he would

handle it" but her December 23, 2008, statement says that he said "we will take care of it on her return to work." (Management Exhibit 14, page 2) It suggests that the statement on the corrective action report that "we will deal with the issue on her return to work" makes sense. (Management Exhibit 19, page 3)

The union maintains that the grievant did not willfully disobey an order. It states that the grievant believed that he and Beck had been directed to arrest Busby when she returned to work on December 17, 2008. The union indicates that in any event, the department's policies and procedures do not require an employee to report an arrest to the chief of police prior to it being made. It claims that they require the chief of police to inform the CEO.

The union rejects the department's charge that the grievant falsified the arrest form when he listed Peek and himself as the arresting and conveying officers. It points out that Peek was the one who got Busby from the unit so "logically there was an expectation that he was making the arrest and that the two of them would convey her to Franklin County." (Union Post-Hearing Brief, page 8)

The union argues that the situation changed when two of Busby's coworkers appeared at the police department. It indicates that they became agitated by Busby's arrest and the grievant decided that they should leave before the situation got out of hand. The union claims that "Officer Beck created the need for a change on the arrest form by deciding to go with [the grievant]." (Ibid.)

The union contends that Beck had an opportunity to correct the arrest form. It points out that when Beck told the grievant about the error, he told her it was "not a big deal" and that she could fix the error when they arrived at the jail. The union reports that

Beck had the form during the transport and could have made the correction but failed to do so. It stresses that this "does not prove falsification on the part of the grievant [and] if anything shows poor judgment on the part of Officer Beck." (Union Post Hearing Brief, page 9)

The union also rejects the charge that the grievant was dishonest regarding the number of times he accessed OHLEG. It acknowledges that during the investigation he said that he accessed OHLEG a couple or a few times but a document from BCI & I showed that he did so 106 times. The union observes that since Lawrence did not specify a time frame, the grievant assumed that he meant within the last week or so. It emphasizes "106 views in a two year period equates to a couple or a few times a week." (Ibid.)

The union suggests that the grievant used the expression "a couple or a few times" in the customary way. It observes, for example, that prior to Lawrence's second interview of the grievant, he told him that he had "a couple of follow-up questions" and then asked 15 or more questions. The union claims that "we all use the terms a couple or a few times in describing how many times we have done something so this is a silly charge." (Ibid.)

The union disputes the charge that the grievant is guilty of neglect of duty by arresting Busby. It reports that item 5 of Section I(E) of GC-6(E) requires police officers to "enforce all federal, state and local laws and ordinances coming within divisional jurisdiction; item 4 of Section I(E) of GC-6) states that "members will at all times take appropriate action to detect and arrest violators of the law;" and Section I(G) of GC-6 states that "all members shall perform their duties as required or directed by law,

department rule, policy or order, or by order of a superior officer." It adds that Beck was the grievant's superior officer so "when Officer Beck told the grievant that the chief wanted him to make the arrest he was obeying the TVBH code of professionals conduct and responsibilities." (Union Post-Hearing Brief, page 12)

The union contends that the ORC required Busby's arrest and transport to jail. It points out that Section 2921.44 of the code requires law enforcement officers to serve a lawful warrant without delay and Section 2935.13 requires a person arrested on a warrant to be transported to jail.

The union maintains that the department offered no evidence that the grievant was inattentive or negligent. It points out that his evaluations show that he was a competent employee who communicated well with the staff and fellow officers. (Union Exhibits 3 and 4) The union notes that he has received positive comments from the nursing staff and a commendation from the former CEO.

The union argues that the arrest form completed by the grievant does not involve falsification of a document. It observes that Beck was aware of the error in the form but submitted it without correcting it. The union accuses the department of charging the grievant with dishonesty because the collective bargaining agreement bars an Arbitrator from modifying discipline once dishonesty is shown.

The union contends that the grievant did not violate Section B of GC-8. It observes that this section states:

> No member shall knowingly falsify any official report or enter or cause to be entered any inaccurate, false or inaccurate, information on records of the department. (Union Post-Hearing Brief, page 13)

The union indicates that Peek brought Busby to the police department and that the grievant expected Peek to go with him to the jail because Beck insisted she did not want to make the arrest. It stresses that the grievant's error "can by no stretch of the imagination support a charge of dishonesty." (Ibid.)

The union discounts the charge that the grievant engaged in the unauthorized or misuse of department equipment. It acknowledges that he used a computer to access OHLEG with his identification number from another police department. The union claims, however, that most of the cases were related to business at TVBH.

The union suggests that the grievant's use of the internet was not inappropriate. It states that the grievant and other officers visited websites such as MSN, WBNS, WCMH, WSYX, Crime Stats, and the Columbus Police to monitor crime in the area. The union claims that "any good police officer knows that the crime in his area must be monitored." (Union Post-Hearing Brief, page 14)

The union maintains that the department's argument that OHLEG was not needed at TVBH is disingenuous. It points out that GC-6, Section I(H), requires employees to maintain sufficient competency to perform their duties and suggests that OHLEG helps them meet this requirement. The union notes that shortly after the grievant was terminated, the department obtained access to OHLEG for training purposes.

The union argues that the department knew about the grievant's use of OHLEG. It observes that on October 13, 2008, the grievant attached a photo from OHLEG to a report he submitted to Barker. The union indicates that he signed the grievant's report and filed it. The union states that on another occasion the grievant obtained a picture of an escapee from Athens Mental Health from OHLEG and posted it on the department's

bulletin board. It stresses that "the Employer's allowance of the continued use of OHLEG affirms its acceptance of its continued use." (Union Post-Hearing Brief, page 17)

The union contends that the grievant cannot be punished for his use of OHLEG. It indicates that Peek testified that when Tilley was the chief of police, the department made use of the grievant's OHLEG registration. The union states that "it is wholly unjust to punish [the grievant] without prior notice that this behavior was unacceptable." (Union Post-Hearing Brief, page 16)

The union maintains that other police officers use Court View the same way as the grievant. It reports that Peek had previously found an employee with an outstanding warrant and advised the employee to take care of it. The union states that the police officers felt that "it was their duty to search the internet for warrants on hospital staff." (Union Post-Hearing Brief, page 17)

The union argues that there is no justification for charging the grievant with failure of good behavior. It asserts that the department appears to claim that he exercised poor judgment in everything he did during his career at TVBH. The union charges that it is Beck whose judgment should be questioned because she created "the whole mess." The union complains that despite this fact, the grievant was terminated while Beck was suspended for five days and placed on a last chance agreement for two years.

The union contends that the grievant is entitled to back pay. It points out that he was injured in an on-duty scuffle with a suspect. The union notes that the grievant sought and received occupational injury leave but complains that the benefit was improperly cut off when he was terminated even though he had used only 390 hours of his 960-hour

entitlement. It asserts that pursuant to the agreement [the grievant] is entitled to 600 hours of O.I.L. that he was denied due to his termination." (Union Post-Hearing Brief, page 18)

The union maintains that Article 19, Section 19.01, which requires just cause, and Article 19, Section 19.05, which calls for progressive discipline, are the sole source for disciplinary action. It claims that the department was unable to prove there was just cause for the grievant's discipline. The union further charges that the department did not show why the grievant, who had no prior discipline, did not receive a written reprimand as provided for in the contract.

The union concludes that the department failed to meet its burden of proof. It asks the Arbitrator to reinstate the grievant with full back pay and benefits, including any amount due as a result of his occupational injury leave.

ANALYSIS

The grievant was removed for five alleged violations of the Standard Guide for Disciplinary Action Penalties. First, the grievant is charged with interfering with an investigation by giving false statements. The record indicates that the grievant initially told Lawrence that he accessed OHLEG a "few times" or a "couple of times." When Lawrence received a report from BCI & I showing that the grievant had accessed OHLEG 106 times between December 11, 2007, and January 22, 2009, he re-interviewed him. At that time, the grievant told Lawrence that he had answered his questions to the best of his ability.

The Arbitrator must reject the union's contention that the grievant did not intend to mislead Lawrence. He acknowledges that people sometimes use the expression "a

couple of times" or "a few times" rather loosely but notes that there is a significant difference between two or three times and 106 times. Furthermore, while the grievant may have accessed OHLEG only a "couple of times" or "a few times" per week, he was not asked how may times per week he logged on to OHLEG. Since the interview was part of an official investigation, the grievant needed to be accurate and clear in his responses to Lawrence's questions. Thus, the Arbitrator has no alternative but to conclude that the grievant, who was facing disciplinary action, was trying to put his behavior in the best possible light and in doing so, gave a false statement to Lawrence about his use of OHLEG.

Second, the department charges the grievant with neglect of duty by failing to follow its policies, procedures, and directives. More specifically, it claims that he violated General Jurisdiction Policy GC-17, Section B, which states that the CEO must be apprised of any criminal conduct and requires an arrest to be reported to the chief of police; Ground Patrol Policy P-19, Section D, which indicates that officers are to use arrest as a last resort and requires an arrest to be fully documented; Compliance Policy GC-5, Section B, which requires officers to comply with administrative rules and division policies and procedures; and Professional Conduct and Responsibilities Policy, GC-6, Section L, which mandates employees to report in writing an employee who violates a law, ordinance, or department rule.

The arbitrator believes that the issue underlying these charges is the department's claim that the grievant failed to get Barker's permission before arresting Busby. Barker testified that when the grievant and Beck told him about her outstanding warrants and

reported that she would be at work the next day, he told them that "we'll deal with it then." The grievant claims that he said "we have to do what we have to do."

Even if Barker's testimony is credited over that of the grievant, the Arbitrator cannot find any basis for discipline. The statement that "we'll deal with it then," can be interpreted to mean that Barker will deal with the matter the next day or it can be understood to mean that the grievant and Beck should arrest Busby when she returned to work.

This conclusion is supported by the statement that Barker gave to Lawrence on December 23, 2008. In his statement, he reported:

> I was also told that Ms. Busby was not on duty that day, but would return to duty on Wednesday 12/17 and replied with words to the effect, "We'll deal with it then." (Meaning I would address the issue.) (Management Exhibit 16)

Barker apparently felt that his statement to the grievant and Beck was not entirely clear so he needed to explain to Lawrence what it meant.

Third, the grievant is accused of falsifying an official document or record. This charge is based on the fact that the arrest form filled out by the grievant lists the grievant and Peek as the arresting and conveying officers when it should have shown the grievant and Beck. It is uncontested that on the way to the jail, Beck complained to the grievant about the error and that it appears that he told her that she could correct it when they got to the jail.

The Arbitrator believes that both the grievant and Beck are responsible for the inaccurate arrest form. One could argue that since the grievant filled out the form, he was responsible for correcting it. On the other hand, it could be argued that Beck should have

made the correction because she had the form and did correct the violation code, the charge, and the case number.

Fourth, the grievant is charged with dishonesty for the unauthorized use or misuse of department property. The department claims that the grievant used its computers to visit numerous websites that were not related to his job; conducted unauthorized searches on hospital patients and staff on Court View; and improperly accessed OHLEG.

The report from WebTrends supports the charge that the grievant accessed many websites not related to his job. For example, it indicates that he visited a soccer website 13 times for a total of more than one hour and 43 minutes; a site related to purchasing automobiles 11 times for a total of more than one hour and 22 minutes; and a site listing government jobs 23 times for more than one hour and 34 minutes. (Management Exhibit 6) This amounts to much more than an occasional, brief visit to a non-work related site and is clearly contrary to the department's computer use policy.

The propriety of the grievant's use of Court View is not as clear. Court View is a public site and there would be occasions where the police officers would properly access the site for information related to their jobs. In fact, the record indicates that Beck used Court View to check on the status of Busby's traffic warrants. There is nothing in the record to suggest that Barker was unaware of this practice or that anyone was instructed not to access Court View on a department computer.

The grievant's use of OHLEG is a different matter. Access to the information on OHLEG is restricted and records are kept of every search done on it. The report from BCI & I indicates that the grievant accessed OHLEG 106 times between December 11, 2007, and January 22, 2009. (Management Exhibit 8) The record indicates that his

searches included employees and patients at TVBH and that he examined a variety of information about the subjects of his searches.

The grievant's use of OHLEG violated the sponsor's Access Policy. Section 5.5 of the policy indicates that access is based on the agency to which the user is assigned at the time of the use. Subsection 5.5.1 states that "OHLEG users who participate through multiple agencies shall log on to OHLEG using the ORI number for the agency for which they are working at the time of access." (Management Exhibit 8) At the time in question, the department did not have access to OHLEG and the grievant was using his ORI number from the Shawnee Hills Police Department, no doubt without its knowledge.

The union claims that Barker and members of the police department knew about the grievant's use of OHLEG. It points out that the grievant testified that on October 13, 2008, he submitted a report to Barker and attached a photo he got from OHLEG. The union notes that Peek stated that he saw a picture from OHLEG of an escapee from the Athens mental health facility the grievant posted on the department's bulletin board. It observes that in neither case was the grievant told that his use of OHLEG was inappropriate.

The Arbitrator must conclude that the grievant's use of OHLEG was inappropriate. It violated the department's policies and procedures and the rules issued by the agency. The misuse of OHLEG can have significant consequences for an agency that allows its misuse.

The final charge against the grievant is that he used poor judgment and engaged in actions that would compromise or impair his ability to carry out his duties. The Arbitrator does not believe that it is necessary to comment on this charge. The notice for

the pre-disciplinary hearing, the hearing officer's report, and the department's post-hearing brief do not provide any facts in support of this charge not related to the other charges against the grievant. The final allegation is based on a combination of all of the grievant's other offenses.

Since the record establishes that the grievant is guilty of some degree of misconduct, the issue becomes the proper penalty. While the Arbitrator recognizes that employers should be granted broad discretion in setting disciplinary standards and determining appropriate penalties, it is understood that part of an Arbitrator's job is to be sure that penalties are not arbitrary, capricious, discriminatory, or unreasonable given all of the circumstances.

In the instant case, the Arbitrator has concluded that the grievant committed a number of offenses. He allowed an arrest form to be submitted that he knew was inaccurate; violated the department's policy regarding the use of the internet/computers; inappropriately accessed and used OHLEG; and gave false statements during an investigation regarding his use of OHLEG.

The grievant's first two offenses do not justify the grievant's removal. First, the submission of the inaccurate arrest form and the misuse of the internet do not provide just cause to terminate an employee with no active discipline in his file. Second, Beck, who shared responsibility for the submission of the inaccurate arrest form, and Peek, who was involved in a number of aspects of Busby's arrest, received five-day suspensions and were placed on last chance agreements for two years. Discharging the grievant for these offenses would constitute disparate treatment.

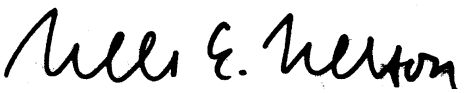
The two remaining charges against the grievant are more serious. As indicated above, the misuse of OHLEG is a serious matter. An individual's use is carefully monitored and an individual's ability to access it can be revoked. In addition, Section 5.6.1 of the sponsor's policy indicates an entire organization can lose its use of OHLEG by virtue of a violation of its policy. (Management Exhibit 8)

The grievant's most serious offense is giving a false statement during an investigation. While every employee must provide honest answers to questions during an investigation, this is especially so for police officers. Their jobs involve conducting investigations and providing statements and testimony. Any doubt regarding their honesty raises questions about their ability to do their job.

The charge of making a false statement is especially significant because of Article 20, Section 20.09(3), of the parties' agreement. In this provision, the parties agreed to limit an Arbitrator's discretion in cases involving dishonesty or making a false statement. Under the contract, these cases are not subject to the usual just cause standard for discipline. Instead, the contract requires that "if the arbitrator finds dishonesty occurred or false statements were made, the arbitrator shall not have the authority to modify the disciplinary action." Given this restriction on the Arbitrator's authority, he has no alternative but to deny the union's request to reduce the discharge penalty imposed by the department and to uphold the grievant's removal.

AWARD

The grievance is denied.



Nels E. Nelson
Arbitrator

June 28, 2011
Russell Township
Geauga County, Ohio