IN THE MATTER OF ARBITRATION

BETWEEN

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

AND

THE OHIO STATE TROOPERS ASSOCIATION

Grievant: Lucas J. Griffiths

Case No. 15-03-20110113-022-04-01

Date of Hearing: May 18, 2011

Place of Hearing: OSTA Office
Columbus, Ohio

APPEARANCES:

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

Witnesses:
Grievant: Lucas J. Griffiths

For the Employer:
Advocate: Kevin D. Miller, Lieutenant
2nd Chair: Charles J. Linek, Office of Collective Bargaining

Witnesses:
Darrell G. Harris, Staff Sergeant
Linda Piechnik, Staff Sergeant
Hugh Fredendall, Staff Sergeant
Rob E. Jackson, Staff Captain

OPINION AND AWARD

Arbitrator: Dwight A. Washington, Esq.

Date of Award: August 5, 2011

INTRODUCTION

The matter before the Arbitrator is a Grievance brought pursuant to the Collective Bargaining Agreement (CBA) in effect March 1, 2009 through February 28, 2012 between the State of Ohio Department of Public Safety, Division of the State Highway Patrol (hereinafter "OSP" or "Employer") and the Ohio State Troopers Association, Inc. ("Union").

The issue before the Arbitrator is whether just cause exists to support the removal of the Grievant, Lucas J. Griffiths ("Griffiths") for violating Ohio State Highway Patrol Rules and Regulations, Rule 4501:2-6-02(E), false statements, truthfulness.

The removal of the Grievant occurred on January 4, 2011 and was appealed in accordance with Article 20, Section 20.08 of the CBA. This matter was heard on May 18, 2011 where both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing briefs were submitted by both parties to the Arbitrator on or about June 24, 2011. This matter is properly before the Arbitrator for resolution.

BACKGROUND

The Grievant was employed as a State Trooper assigned to the State of Ohio Capitol Division at the time of his removal. OSP's Capitol Division provides security services for the Statehouse. On January 4, 2011 the Grievant was removed for making false statements and being untruthful regarding the circumstances surrounding the use of sick leave on August 8, 9 and 10, 2010.

On August 7, 2010, the Grievant called the post and requested time off from work for the next three (3) days because he had injured his back. In the August 7th call, the Grievant stated that "they're sayin" it will probably be three days before he could return to work. The call was originally received by the dispatcher, but then transferred to the on-duty supervisor, Sgt. Linda

Piechnik ("Piechnik") since the Grievant requested more than a one-day call off. Sgt. Piechnik spoke with the Grievant and requested a doctor's note, which was acknowledged by the Grievant. It was Sgt. Piechnik's understanding that medical verification was required since the Grievant's request was considered an extended leave.

August 15th was the next scheduled work day of the Grievant because August 11th and 12th were scheduled time off days, and August 13th and 14th were pre-approved vacation days. The Grievant did not provide a doctor's note and was reminded via email on August 18, 2010 by the post secretary (Management Exhibit (M) 2) to turn in the medical verification.

From August 18th through August 30th, the Grievant failed to provide a doctor's note even though requested by several different supervisors. On August 30th, a note was finally provided from America's Urgent Care ("AUC") by the Grievant (M-1, p. 14). However, the note lacked specificity and failed to contain dates indicating when the Grievant was treated and/or the time off needed by the Grievant to address his back problem.

OSP sought additional clarification by contacting AUC which ultimately produced the second note on or about September 10th from AUC. The note stated the Grievant was seen on August 28th and could return to work on August 29th (M-1, p. 27). Upon learning that the Grievant was first seen by a doctor on August 28th, OSP initiated the investigation to ascertain if the Grievant was untruthful in requesting the sick leave from August 8th-10th.

Sgt. Darrell G. Harris ("Harris") was the investigating officer and concluded that the Grievant was untruthful when he told his supervisor that he was put off from work for August 8th-10th, knowing that he hadn't seen a doctor. (M-1, p. 12). On the other hand, the Union contends that: (1) Grievant never claimed he was examined by a physician when he called off on August 7th; (2) a doctor's note is not required as a condition precedent to obtain three (3) days of

sick leave; and (3) the Grievant in accordance with policy was qualified to request and use his accrued sick leave.

OSP seeks affirmance of Griffiths' removal, whereas the Union seeks reinstatement with back pay and any other appropriate remedy to make the Grievant whole.

ISSUE

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

RELEVANT PORTIONS OF THE CBA AND THE OSP RULES AND REGULATIONS

CBA

Article 48 – Sick Leave
48.03
". . . The Employer may request a statement, from a physician who has examined the employee or the member of the employee's immediate family, be submitted within a reasonable period of time." (In part)

Ohio Department of Public Safety
Policy Number: DPS-501.10
Sick Leave Absence Control

C. Notification of Absence

4. Verification of medical or emergency circumstances may be required.

Ohio Administrative Code 4501:2-06-02(E)
Performance of Duty and Conduct

(E) False Statement, Truthfulness
A member shall not make any false statement, verbal or written, or false claims concerning his/her conduct or the conduct of others.

POSITION OF THE PARTIES

THE EMPLOYER'S POSITION

The Grievant on August 7, 2010 informed the dispatcher as well as Sgt. Piechnik that "they" are saying he needed to be off from work for the next three days due to his back. In the actual recorded conversation with the dispatcher, the Grievant stated " . . . They are saying probably at least . . . well . . . they're saying at least through Tuesday." Sgt. Piechnik requested a doctor's note, which was acknowledged by the Grievant at the end of this conversation. The Grievant did not indicate to Sgt. Piechnik who "they" were, nor that he could not produce a doctor's note.

OSP Policy 510.10 and Section 48.03 of the CBA provide the policies that allowed the Employer to request a doctor's note. At the hearing, several OSP witnesses upon cross examination acknowledged that the Employer did not have the right to require a doctor's note merely because the Grievant requested sick leave greater than one day. The Employer submits that the Grievant's actions regarding the doctor's note provided evidentiary support why he was disciplined, but it is the Grievant's falsification and untruthfulness that is at issue.

Regarding the medical statement(s), the Employer contends that Grievant was untruthful from the outset. A chronology of events even when viewed in the best light for the Grievant, indicates since 1995 the Grievant consulted with a doctor regarding his back. As a result of the condition, he was told by his treating doctor to take a couple of days off and rest if his back trouble occurred again. The Grievant's back would flare up from time to time, and this condition was certified in accord with FMLA regulations.

On November 8, 2010 during the Grievant's third investigatory interview,[1] he contends that, on August 7, 2010, his reference to "they put me off for three days" – referred to medical treatment he received two years ago. (Union Exhibit (U) 1(D), pp. 8-10) and also states that he had not seen a doctor prior to August 7th (U 1(D), p. 9). The Employer submits that during the initial call the Grievant should have been forthright and explained to Sgt. Piechnik that he was relying upon medical advice from several years ago.

Instead of being "honest" with the Employer, upon the Grievant's return on August 15th, he continued to participate in the doctor's statement charade for several weeks. Namely, when requested in writing by the Post secretary on August 18, 2010 (M EX 2), the Grievant did not respond; when reminded of the note by Sgt. Mark Boscy on August 18, 2010, the Grievant did not respond; when requested by Post Commander Lt. Christopher Johnson on August 31, 2010 and Sgt. Fredendall on September 8, 2010, the Grievant did not respond. Finally, Sgt. Fredendall ordered the Grievant to bring a note by Friday, September 10th. When the Grievant failed to produce the requested note, the Employer contacted AUC and was informed, for the first time that the Grievant was not seen on August 7. The second AUC note indicated that the Grievant was seen on August 28, 2010. The Employer commenced an administrative investigation regarding what was perceived as the untruthful statements made by the Grievant on August 7.

During the investigation the Employer discovered that the Grievant's sick leave usage was aligned with other days of permissive leave and scheduled days off. Combined together, the Grievant was off for eight days. The Employer further discovered that the Grievant was **denied**

[1] Other interviews occurred on October 18, 2010 and October 22, 2010. The Grievant was represented by OSTA and each interview was digitally recorded verbatim.

requested leave on August 15, 16 and 17. The Employer submits that the Grievant used the August 8-10 sick leave dates to accomplish what he was otherwise denied.

Another stark example of untruthfulness occurred when Investigator Sgt. Harris during the October 18, 2010 investigatory interview asked the Grievant the following:

Sgt. Harris: Did you go anywhere?

Tpr. Griffiths: Did I go anywhere? **No.**

Sgt. Harris: For your vacation?

Sgt. Harris: Allright, is there anything that you want to add?

Tpr. Griffiths: I don't think so. (U 1(B), p. 19) (emphasis added)

However, during the predisciplinary hearing held on December 29, 2010, it was discovered that the Grievant traveled to the State of Delaware on August 6th and was in Delaware on August 7th when the call-off occurred. The Employer submits that not only did this **new** information provide the impetus for the Grievant's untruthfulness, but also reveals his true character. Simply, the 20 hour car trip required to travel to Delaware on August 6th was never intended to be a "turn around" to enable the Grievant to be on post by August 8th.

The Grievant fabricated a reason for the August 8th-10th call off because he was denied permissive leave for three days. His failure to provide a note dated August 7th was deliberate because the note would indicate he was out of state. The Grievant's deception continued upon his return on August 15th and the Grievant hoped OSP would forget about Sgt. Piechnik's request of August 7, 2010. OSP also summarily dismissed any notion that the Grievant was confused as to what was required of him regarding the note(s). The Grievant is a law school graduate with demonstrative capacity to understand what was required of him.

Finally, the Grievant was charged with making false statements and untruthfulness by providing deceptive information to validate his use of sick leave. OSP, as a leader in the law enforcement profession, handles issues of dishonesty and untruthfulness with extreme urgency. Any perception of loss of public trust by any of its members must be avoided at all costs. The Grievant was untruthful throughout the matter and ". . . has demonstrated a pattern of behavior that is unacceptable for an Ohio State Trooper. If he cannot be forthright with something so trivial as a doctor's note, how can the Employer trust that he will be forthright in more significant matters?" (Employer's Closing Statement, p. 12). The Employer submits that the discipline was commensurate with the offense charged, and the Employer seeks denial of the grievance in its entirety.

THE UNION'S POSITION

The Grievant, a ten (10) year trooper, with only a written reprimand of record, was removed without just cause, and the Employer failed to comply with the principles of progressive discipline.

Secondly, the Grievant followed the process in requesting sick leave on August 7th and his physical condition was such that the use of sick leave for his back injury was appropriate. The Grievant had sufficient accrued unused sick leave and the use for his "lingering" back injury was appropriate[2] - the Employer would be hard pressed to discipline the Grievant for the actual use of sick leave.

Being unable to challenge the Grievant for the actual sick leave use, the Employer charged the Grievant "with lying about the use of his authorized sick leave." (Union's Closing Statement, p. 3). When the Grievant stated that "They're saying it will probably be three days"

[2] The Union points out the Grievant was certified per FMLA due to intermittent and/or episodic flare-up of his condition.

was a reference to past medical advice involving similar flare-ups. Due to past episodes, the Grievant only indicated the amount of time necessary that he anticipated being off from work. Furthermore, the Grievant did not need a medical diagnosis to justify sick leave use; nor did he need prior medical treatment prior to calling off.

The Union, at the hearing, established that no policy or the CBA required a medical statement because the requested sick leave was for an extended period of time. Neither Sgt. Piechnik nor the dispatcher were aware that a doctor's certification authorizing such usage was simply not required.

The Grievant testified, while helping move furniture, he reinjured his back on August 7th. The Grievant was in Delaware at the time of the injury, and, given his familiarity with the pain and discomfort, there was no reason for him to seek medical treatment. In other words, the Grievant was not required to visit a doctor prior to calling the Post on August 7th. The Employer presented no evidence to suggest that the Grievant needed medical treatment prior to using his accrued sick leave.

Granted, during the call-off conversation the Grievant could have used more articulate words such as ". . . doctors in the past have said it will take three days . . ." as opposed to ". . . they're sayin . . ." Nevertheless, it was the dispatcher and Sgt. Piechnik who converted the Grievant's words from what was actually stated into ". . . the doctors are sayin." It was the Employer's spin on the initial conversation that caused the confusion that occurred.

The events that followed his return to work on August 15th all emanated from the wrongful interpretation given to "they're sayin" by the Employer. Then to attach a pure sinister motive to the August 7th call off, because the Employer was unaware that the Grievant was in Delaware when the injury occurred makes no sense. It is undisputed that the additional three

days coupled with scheduled time off and previously approved vacation leave allowed the Grievant to extend his stay in Delaware. The Union submits that this "alleged" motive is simply an unproven theory and has nothing to do with the essential facts of this matter.

Finally, the Grievant did not see a doctor on August 7th and was unable to produce medical certification for the August 8-10, 2010 sick leave use. Therefore, he wasn't insubordinate when ordered to produce a medical verification that didn't exist. The Employer interpreted the Grievant's reason(s) for the call off wrongfully, and set in motion the medical certification events. The Union contends that the Grievant did not provide false or misleading statements to the Employer in this matter, and the grievance should be upheld.

DISCUSSION AND CONCLUSION

The grievance is denied. My reasons are as follows:

The Grievant, a ten-year employee, presented himself as articulate and intelligent. The overall dispute is not one balancing the credibility of opposing witnesses involving their recall of a single event, but whether the Grievant's actions and statements were believable given the charges brought forward by the Employer. In other words, the Grievant is asking this Arbitrator to make the following findings favorable to his position that from August 7th until September 8th: he was not untruthful and/or deceptive in responding to several requests for medical verification that did not exist; that he was not untruthful and/or deceptive when he provided a blank medical statement on August 30th; that he was not untruthful and/or deceptive when he failed to disclose that he was injured in Delaware; and that he was not untruthful and/or deceptive when he stated that he didn't go anywhere on his vacation days. Simply, the Grievant's version of what happened is not believable. Moreover, the verbatim evidence of what

the Grievant said and did, provided through recorded conversations and documents, renders the Union's and Grievant's position untenable.

The evidence supports the Employer's contention that the Grievant engaged in a series of actions that resulted in the Grievant being untruthful regarding the August 7th call off. However, I do concur with the Union that the Grievant had sufficient unused sick leave and a medical excuse is not a condition precedent for extended sick leave when properly used. It is the Grievant's falsification and untruthfulness that is at issue here. The Grievant as a sworn officer is held to a higher standard of conduct, with truthfulness and dependability being the cornerstones of their public persona. Therefore, any conduct which is deceitful and attempts to mislead an employer about the true reason for an officer's absence provides just cause for discharge. See, Safeway Stores, Inc., 93 CA 1147 (Wilkerson, 1989).

Contrary to the Union's position, the Grievant, not the Employer, put into play the notion of medical intervention by stating, "They are saying probably at least . . . well . . . they're saying at least through Tuesday." He spoke in the present tense. The Grievant had the ability to immediately eradicate the medical verification chase on August 7th, by simply stating "I did not go to a doctor" when Sgt. Piechnik made the initial request. The Grievant over the next several weeks had an affirmative duty to come forth and clarify his statement since he was the only one (at that time) who knew what "they're sayin" meant. The Grievant created the impression that he visited a doctor and did nothing to clarify this wrongful notion until the Employer discovered he had not visited AUC until August 28th.

The evidence supports a finding that the Grievant made false statements and was untruthful throughout the investigation. Another violation of OSP Rules and Regulations 4501:2-6-02(E) occurred on October 18, 2010 when the Grievant answered "no" when asked if

he went anywhere on his vacation. (U 1(B), p. 19). However, during the predisciplinary meeting it was discovered the Grievant had indeed traveled to the State of Delaware to visit family and remained there through his scheduled vacation, regular days off and sick leave days.

Given the evidence in the record, the discipline imposed was commensurate with the conduct. OSP met its burden of proof that the Grievant violated Ohio State Highway Patrol Rules and Regulations, Rule 4-5011:2-6-02(E) and that just cause for discharge exists. Finally, the evidence in the record of long service and a minor disciplinary record fails to mitigate against the Grievant's removal or exonerate the Grievant's misconduct in these circumstances.

It is sound public policy that police officers are held to a higher standard of conduct than the general public. *Jones v. Franklin County Sheriff* (1989), 52 Ohio St. 3d 40, 44. As delineated in the Ohio Administrative Code 4501:2-6-07 (B), Ohio State Highway Patrol officers take the following oath: "I do solemnly swear/affirm that I will support the constitution of the United States and the constitution of the state of Ohio, and that I will faithfully, **honestly** and impartially discharge the duties of the office of trooper in the Ohio state highway patrol to the best of my ability, during my continuance in that office." (Emphasis added). In this case, the Grievant did not live up to the higher standard of conduct or the oath of the Ohio State Highway Patrol. He was untruthful during the investigation into the use of his sick leave and misled his employer by implying that he had visited the doctor for his injury, requiring his use of sick leave. Because of these actions, the Grievant's termination is upheld.

The grievance is denied.

Dwight A. Washington, Hearing Officer

Dated: August 5, 2011