IN THE MATTER OF ARBITRATION

BETWEEN

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

AND

THE OHIO STATE TROOPERS ASSOCIATION

Grievant: Kamal Z. Nelson

Case No. 15-03-110329-0056-04-01

APPEARANCES:

For the Union:
Advocate: Herschel M. Sigall, General Counsel

For the Employer:
Advocate: Charles J. Linek, Office of Collective Bargaining

OPINION AND AWARD

Arbitrator: Dwight A. Washington, Esq.

Date of Award: November 3, 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 Greivant, Kamal Z. Nelson ("Nelson"), for violating Ohio State Highway Patrol Rules and Regulations Rules 4501:2-6-02(E), False Statements, Truthfulness; 4501:2-6-02(I)(1)((3) Conduct Unbecoming an Officer; and 4501:2-6-05(B)(1) Use of Equipment.

The removal of the Grievant occurred on March 24, 2011 and was appealed in accordance with Article 20, Section 20.08 of the CBA. This matter was submitted by written statements and joint exhibits. The parties waived the hearing and, on September 30, 2011, submitted briefs to the Arbitrator. This matter is properly before the Arbitrator for resolution.

BACKGROUND

Kamal Z. Nelson ("Grievant") was employed as a state trooper assigned to the Marion Patrol Post at the time of his removal. The Grievant was commissioned as a trooper on September 1, 2000 and has eleven (11) years of service.

The Grievant's work record contained no discipline at time of removal, and he was well regarded by his peers and the public due in part to his professionalism and courteous manner in which he discharged his duties.

On October 21, 2009, the Grievant and another patrol officer responded to an accident involving Courtney Myers ("Courtney"). Lisa Myers ("Lisa"), Courtney's mother, was following her and witnessed the accident. As part of the on-scene investigation, the Grievant

obtained a witness statement from Lisa, which included among other things, a cell phone number.

On December 29, 2010, Rodney Myers ("Rodney") appeared at the Marion Patrol Post and alleged to Lt. C. A. Jones that the Grievant and Rodney's wife (Lisa) were involved in a relationship that occurred after the October 21, 2009 accident. Ongoing contact occurred between Lisa and the Grievant, and, in June 2010, the Grievant's wife and mother-in-law visited the Myers family business (B&J Extinguisher Service) in downtown Marion, Ohio. During that visit, accusations were made that Lisa and the Grievant were having an affair. The Grievant was not present during this meeting. However, later the same day, the Grievant and his wife returned and met with Lisa and Rodney where both (Lisa and Grievant) parties claimed that they were only friends. Rodney indicated that he met with the Grievant several days later and instructed him to stay away from the business and avoid all future contacts with Lisa.

However, between September 2010 and December 2010, Lisa and the Grievant stayed in contact with each other primarily via cell phone calls. Rodney provided cell records which contained thirty calls between them, of which three calls occurred while the Grievant was on duty. As a result of Rodney's allegations, the Employer initiated an administrative investigation.

In December 2010, the Grievant was informed of the allegations made by Rodney and was given a direct order by Lt. C. A. Jones on January 3, 2011 to have no further contact with Lisa. On March 11, 2011 during the fourth investigatory interview, the Grievant admitted that on March 8th, 2011, he and Lisa had talked in the parking lot at a local branch of the Ohio State University.

Also during the fourth interview, the Grievant admitted that some hugging and kissing between them had occurred while he was on duty. The Grievant estimated that this occurred about twenty-five times at B&J Extinguisher Service.

The Grievant was interviewed on four separate occasions and, based primarily upon his truthful responses to questions involving contact with Lisa while on duty; his use of equipment unrelated to official business while on duty; and the Grievant's additional interaction with Lisa after being directed to avoid further contact with her.

The Grievant was removed (JX 3) on March 24, 2011 for violation of the following Ohio State Highway Patrol (OSHP) Rules and Regulations: Rule 4501:2-6-02(E), False Statement, Truthfulness; Rule 4501:2-6-02(1)(1)(3), Conduct Unbecoming an Officer; and Rule 4501:2-6-05(B)(1), Use of Equipment.

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

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.

(I) Conduct Unbecoming an Officer
(3) For any improper on-duty association with any individual for purposes other than those necessary for the performance of official duties.

(B) Use of Equipment
(1) A member shall not use division equipment except in the performance of official duties.

POSITION OF THE PARTIES

THE EMPLOYER'S POSITION

The Grievant was a trooper for over ten years but was removed when the administrative investigation established that he was involved "in an improper on-duty association with Mrs. Lisa Myers which has brought discredit to the Division. Additionally, he was dishonest when questioned about the incident. Tpr. Nelson also used Division equipment for non-work purposes." (Employer's Brief, p. 2).

Regarding the improper **on duty** association with Lisa, the Employer established the following regarding the Grievant's behavior:

(1) Utilized information, i.e., Lisa's cell number from the crash report to initiate and stay in contact with Lisa because he liked her.

(2) Three (3) cell phone calls between September 15, 2010 and December 23, 2010 were made to Lisa while on duty.

(3) Visited B&J Extinguisher Service on at least twenty-five occasions after the crash until ordered to stay away from Lisa by Rodney in June 2010.

(4) Engaged in hugging and kissing with Lisa at least twenty-five times at B&J Extinguisher Service.

(5) Had at least five (5) planned meetings with Lisa between June 2010 and December 23, 2010 and one unplanned meeting on March 8, 2011.

Regarding providing false or untruthful statements, the Employer established the following:

(1) The Grievant initially indicated that the reason he maintained contact with Lisa and not Courtney was because Lisa was normally at the business and Courtney

traveled a lot for the business. However, the Grievant later admitted that he maintained contact with Lisa because of the flirtation which occurred initially at the crash scene and that he "liked her."

(2) The Grievant initially indicated that he and Lisa were only friends and no physical contact had occurred. (JX 4(B), Time 22:45). However, in a subsequent interview, the Grievant admitted that hugging and kissing had occurred while on duty. (JX 4(E)).

(3) The Grievant initially indicated that he and Lisa would just see each other out "east" and would pull over and talk with each other. When asked if they were planned meetings, the Grievant said the meetings were not planned. (JX 4(E)). However, during a subsequent interview, the Grievant admitted that he met Lisa on at least five (5) occasions out east at the Tri-Rivers Vocational School (JX 4(E)).

Regarding the use of equipment for other than official business, the Employer submits the following unrefuted evidence:

(1) The Grievant used his patrol car to visit Lisa at least twenty-five times while on duty.

(2) The Grievant used his patrol car to meet Lisa on five (5) occasions at Tri-Rivers Vocational School between October 2009 and December 2010.

(3) On one occasion, November 15, 2010, while off duty, the Grievant drove to B&J and deactivated his Computer Aided Dispatch (CAD) system. However, the AVC (Audio Vehicle Locator) verified that the vehicle was at that location before the Grievant signed off the CAD system.

The Employer submits it met the burden of proof for the rules charged and the Union will seek a modification of the discipline because of disparate treatment. The Union contends that Lt. Matt Warren and Lt. Lee A. Darden were similarly situated as the Grievant, but were treated differently. The Employer disagrees.

Lt. Warren was charged with dishonesty, but the administrative investigation could not substantiate the charges. The Employer admits that it could not meet the proof necessary to support the charge of dishonesty. Lt. Warren was disciplined but not removed.

Lt. Darden, former Post Commander, admitted his relationship with a subordinate co-employee, the Post secretary which lasted for four years. The investigation did not reveal any on-duty conduct, other than they shared personal conversations behind closed doors.[1] Lt. Darden was demoted as Post Commander, reassigned, and placed on a Last Chance Agreement ("LCA"). As a result of the demotion, Lt. Darden's pay was reduced $20,000.00 annually. The Employer submits that the Grievant and Lt. Darden's situations are vastly different.

Lastly, the Employer submits for consideration the matter involving S/Lt. Roger Norris, who was charged with the same violations as the Grievant due to an incident which occurred with an underage female while on duty. There the administrative investigation found that S/Lt. Norris was observed in a secluded area in a state vehicle for purposes other than official duties. Moreover, he was found to have been untruthful regarding the events, and disobeyed an order by continuing to make contact with the female when directed not to do so. S/Lt. Norris was terminated, similar to the Grievant, which indicates that the Employer treats its exempt employees similar to its non-exempt employees.

[1] The Post Commander's office had windows that allowed visibility into the office at all times.

The expectations of the public require that troopers' behavior be held to a standard that untruthful and/or false statements alone are grounds for removal. The Employer submits that the behavior of the Grievant violated the public trust, and removal was appropriate.

THE UNION'S POSITION

The Union submits that the Grievant was an exceptional trooper with eleven years of distinguished service highlighted by his selection as a member of the Honor Guard and a Field Recruiter for the Patrol. The Grievant was engaged in community efforts regarding children with Big Brothers and was highly regarded by the public due to the courteous manner in which he dispatched his duties as a Trooper.

The Grievant contends the flirtatious nature exhibited by Lisa at the crash scene, initiated the phone contacts with Lisa over the pretext of checking up on Courtney and/or securing additional information about the crash. The contacts between the parties also included texts and Facebook. There is no debate that from October 2009 through July 2010 the Grievant and Lisa became close friends and shared personal information between them.

Upon concerns raised by the Grievant's wife and mother-in-law, the Grievant, his wife, Lisa and Rodney all met to sort things out. The Grievant and Lisa maintained that they were only friends and nothing more. Rodney subsequently met with the Grievant and told him to cease any contact with Lisa and visits to B&J after July 2010. The contact did not cease, as supported by the Grievant's cell phone records.

Rodney's complaint was filed with the Post Commander on December 29, 2010 and, on January 3, 2011, the Grievant was issued an order by Lt. Jones to have no further contact with Lisa. Other than the March 8, 2011 incident where Lisa was driving behind the Grievant and they parked their cars to talk, no other evidence exists that the Grievant violated the January 3,

2011 directive. Moreover, no evidence exists that after July 2010 the Grievant visited Lisa at B&J.

With respect to providing untruthful statements, the Grievant has responded to the question posed by a Union staff representative in the first interview when he stated ". . .that he had had no physical contact such as hand holding, or kissing with Lisa while on duty . . ." (Union Brief, p. 7). During the fourth interview, the Grievant voluntarily amended his earlier statement by acknowledging they had hugged and kissed while he was on duty. He changed this answer without any compulsion to do so.

The evidence indicates that the Grievant's actual on-duty contact time was minimal, at best, and when ordered to cease contact, he complied other than on March 8, 2011 when Lisa initiated contact.

The Grievant was experiencing challenges in his own marriage due to his wife's behavior having been adjudged a sexual predator as a result of having sexual relations with someone under her supervision. The attraction to Lisa was sparked, in part, by his own marital woes.

Furthermore, the Union argues Employer did not apply progressive discipline, and other employees of higher rank were not removed who engaged in comparable behavior.

The Union points out that Lt. Darden, at the time of his demotion due to the inappropriate relationship with his Post secretary, had a five-day suspension on record due to allowing an unauthorized person to use his free parking pass. Lt. Darden was untruthful when questioned about the relationship with his secretary by the District staff before coming clean during the administrative investigation. The Employer is not governed by a CBA governing discipline of lieutenants, but, given the similarities of both cases, the Union asserts the discipline issued should have been comparable.

Another example involves Lt. Warren, who was charged with failure to supervise his subordinates, inefficiency in his duties, and being untruthful. The untruthful allegation involved a statement made during the morning briefing with other staff officers, whereupon Lt. Warren made an untruthful statement about being informed to cancel a wanted bulletin on a person. The investigation disclosed that Lt. Warren had not spoken with anyone in authority about canceling the production of the bulletin. Nevertheless, Lt. Warren only received a written warning for failure to properly supervise and the allegation of untruthfulness was dropped as a charge.

The Grievant had an exemplary eleven year career with the OSHP and his personal life should not be the determinative factor whether or not his behavior warranted removal. The Employer has acted inconsistent with exempt employees similarly situated as the Grievant, and seeks reinstatement with no more than a ten-day suspension.

DISCUSSION AND CONCLUSIONS

The evidence of the events that lead up to the Grievant's discharge is unique in that no one either involved, or who might provide any evidentiary value, testified. The parties jointly elected to submit this matter to the Arbitrator upon written briefs and joint exhibits alone, and waived the hearing. To that extent, this matter is ripe for resolution.

The Grievant was charged with three separate allegations by the Employer regarding conduct which began in October 2009 and continued until March 2011. The parties do not dispute the material facts regarding how the relationship commenced between the Grievant and Lisa. The Grievant, while investigating the crash scene involving Courtney, allowed himself to be lured ". . . as a moth to a flame . . ." by Lisa (Union Brief, p. 6).

The Grievant started having ongoing contacts with Lisa via Facebook, texts, cell phone and personal visits. The facts indicate that some of the cell calls and visits occurred while the

Grievant was on duty. The Union characterized the on-duty visits as minimal, whereas the Employer points out at least twenty-five on-duty visits occurred between October 2009 and July 2010. Some of the visits occurred in conjunction with the Grievant having to perform official business at the Courts Building which was located adjacent to B&J's business. During each of the four interviews, the Grievant cooperated to the best extent possible. In listening to each interview, this Arbitrator concurs with the various investigators who opine that the Grievant was cooperating at each stage of the investigation. The Grievant's apparent willingness to cooperate was a good thing. Unfortunately, the conflicting statements he made over the course of the four interviews failed to disprove the charges levied by the Employer.

In fact, the stipulated Administrative Investigation (JX 4) conducted by the Employer was thorough and provided the grounds for the issuance of discipline according to the Employer. I concur. It is unrefuted that the Grievant was involved in an improper relationship while on duty and used equipment for non-work related purposes on numerous occasions. Regarding the dishonesty/false statements specification, the evidence is clear that certain material responses provided by the Grievant (i.e., hugging, kissing), changed from his initial investigatory interview to his fourth interview. Furthermore, the cumulative actions of the Grievant from October 2009 to March 2011 certainly brought discredit to the Division.

Therefore, I find that the record contains reliable and credible evidence for the issuance of discipline. In other words, just cause for discipline was established by the Employer. However, the Union contends that even if discipline was appropriate the Employer has been more lenient with other employees who were similarly situated. The Union raised the disparate treatment defense and provided several examples of comparable employees.

The employees were Lt. Warren and former Post Commander Lt. Darden. As accurately pointed out by the Employer, when the allegation of disparate treatment is raised, the burden of proof rests with the Union. The disparate treatment analysis contained in the Employer's brief cites Arbitrator Rhonda Rivera and provides in part:

> ". . . the Union must, at a minimum, provide evidence that other employees in a similar situation to Grievant were treated differently. Showing a 'similar situation' involves showing a number of important factors:
>
> Step 1. The Union must show that other employees have (a) committed the same or a very closely analogous offense and (b) have received different discipline.
>
> Step 2. Once the proof of employees with similar offenses being disciplined differently has been shown, the question becomes do relevant factors exist (aggravating or mitigating) which rationally and fairly explain the different treatment.
>
> These factors include, but are not limited to, the following:
>
> a. The degree of the employee's fault
> b. The employee's length of service
> c. The employee's prior discipline
>
> Factored into this appraisal must be some recognition that absolute homogeneity of discipline in a work force is impossible."

She further explained:

> "In order to prove disparate treatment, a union must confirm the existence of both parts of the equation. It is not enough that an employee was treated differently than others; it must also be established that the circumstances surrounding his/her offense were substantively like those of individuals who received more moderate penalties."[2] (Employer's Brief, p. 8).

A review of Lt. Warren's (JX 6) administrative investigation report fails to provide the close analogous offense requirement necessary in Step 1. The Employer concluded that Lt. Warren's untruthfulness resulted from a misunderstanding, and the alleged untruthful statement(s) could not be validated during the administrative investigation. "Consequently Lt. Warren was issued a written reprimand for violating the Responsibility of Command Rule for his failure to supervise his subordinate and his inefficiency in the performance of his duties

[2] Ohio Civil Service Employees Association v. Ohio Department of Mental Health, Case number 23-06-891113-0121-01-03 (Rhonda Rivera, 1989)

surrounding **other issues** identified in the investigation (emphasis added). See, Joint Document Seven." (Employer's Brief, p. 9).

On the other hand, former Post Commander Lt. Darden's situation found by the Employer during the Administrative Investigation is as follows:

1. Admitted to a 3-1/2 – 4 year full-blown sexual relationship with his secretary.
2. When initially questioned by the District Staff about the relationship, he was untruthful and provided a false statement.
3. Subsequently he admitted the relationship during the administrative investigation.
4. Disobeyed an Order by having further contact(s) with the secretary when directed to cease all contacts.
5. Had a five (5) day suspension on his deportment record for conduct unbecoming, on duty conduct/discredit to the division, and unauthorized use of issued equipment.
6. At the conclusion of the Administrative Investigation, the Employer found a violation of Rule 4501:2-6-02(I)(3) Conduct Unbecoming an Officer; Rule 4501:2-6-02(X)(1) Compliance to Orders; and Rule 4501:2-6-02(E) False Statement, Truthfulness.
7. "Through Administrative Investigation 10-0906, it was found that Lieutenant Darden had an inappropriate relationship with his Secretary Dawn Forsythe. Lieutenant Darden was also untruthful when questioned about his relationship with her by his District Staff. Additionally, he was untruthful during the administrative investigation when questioned about his contacts with her. It was also found that he disobeyed a direct order from his District Commander

prohibiting any contact with Mrs. Forsythe during the investigation. The Director of Public Safety determined that termination from employment was appropriate." (JX 9).

8. However, the termination was held in abeyance and the parties entered into a Last Chance Agreement (LCA) dated January 3, 2011. (JX 9).

9. The LCA demoted Post Commander Darden to a lieutenant; he was transferred to a different Post; and the term of the LCA was two years from date of execution.

10. As a result of the demotion, Lt Darden's annual salary was reduced by $20,000.00.

I find that Lt. Darden and the Grievant were similarly situated and committed analogous offenses. The Employer opines that Lt. Darden's behavior is vastly different because no on-duty association occurred and no evidence exists that any physical contact occurred between Lt. Darden and the secretary. The facts indicated that while on duty Lt. Darden and his secretary traveled to many meetings and regularly held closed door meetings among themselves where personal conversations occurred. Although the record is silent as to any actual on-duty physical contact, the admissions by both Lt. Darden and his secretary of their "full blown" intimate relationship, makes it possible but not probable that they were able to confine their emotions to only the off-duty hours. Moreover, with a window as part of Lt. Darden's office exterior, it is certainly not surprising that the other Post employees did not witness any physical contact between them while in the office. The office layout required that Lt. Darden and his secretary act in a professional manner at all times which apparently was the case. The Grievant's situation is similar in every material respect with Lt. Darden's. A close review of the briefs and exhibits fails to explain the difference in the discipline to Lt. Darden as opposed to the Grievant. The

Union met its burden of proof and satisfied the criteria referenced by Arbitrator Rivera, cited above. Finally, Lt. Darden's deportment record contained a recent five (5) day suspension regarding behavior involving on-duty conduct that brought discredit to the Division and involved unauthorized use of equipment. Lt. Darden's existing deportment record at the time of his discipline served as an aggravating factor, in comparison to the exemplary work record of the Grievant.

Simply, the stipulated record of the parties indicates that the Employer treated the Grievant differently than Lt. Darden, and the record fails to explain the basis of the different treatment.

Therefore, the Grievance is granted, in part as follows:

1. The Grievant shall be reinstated, subject to entering into a two (2) year Last Chance Agreement ("LCA") between the parties regarding all of the conduct contained in the Grievant's March 24, 2011 removal order. (JX 3). The effective date of the LCA shall be the first date of Grievant's reinstatement.
2. The Grievant shall be suspended without pay for fifteen (15) days.
3. The remainder of the Grievant's back pay amount shall be reduced in a like manner (percentage) as was Lt. Darden's. Example: if the $20,000.00 reduction of Lt. Darden's pay resulted in his annual salary being reduced by 20%, the same percentage reduction shall apply to the Grievant's back pay amount.
4. The Grievant shall be entitled to no other remedy except for continuous service for seniority purposes consistent with Article 36 of the CBA.

5. The Arbitrator shall retain custody for sixty days, in the event any issues arise regarding the implementation of this Award.

Respectfully submitted, this 3rd day of November, 2011.

Dwight A. Washington, Esq.
Hearing Officer