IN THE MATTER OF ARBITRATION

BETWEEN

OHIO STATE TROOPERS ASSOCIATION, INC.
UNITS 1 AND 15

AND

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

Before: Robert G. Stein

Grievance No. 15-03-20110323-053-04-01
Grievant: Tyler Brown, Discharge

Advocate for the EMPLOYER:

Lt. Kevin D. Miller
Ohio State Highway Patrol
740 E. 17th Ave.
Columbus, Ohio 43211

Advocates for the UNION:

Herschel M. Sigall, Esq.
Elaine N. Silvera, Esq.
Jeremy Mendenhall
Larry K. Phillips
6161 Busch Blvd., Suite 130
Columbus, Ohio 43229

INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement ("Agreement") (Joint Ex. 1) between the Ohio State Troopers Association, Inc., Unit 1 and 15 ("Union") and The State of Ohio, Ohio Department of Public Safety, Division of the State Highway Patrol ("Employer" or "OSHP"). The Agreement is effective for calendar years 2009 through 2012 and included the conduct which is the subject of the grievance under review herein.

Robert G. Stein was mutually selected by the parties to arbitrate this matter, pursuant to Article 20, Section 20.08 of the Agreement, as a member of a recognized permanent panel of umpires. A hearing was conducted on November 22, 2011 regarding grievance number 15-03-20110323-053-04-01. The parties mutually agreed on that hearing date, and they were each provided with a full opportunity to make an opening statement, present sworn testimony and documentary evidence, cross-examine adverse witnesses, and then present closing arguments in post-hearing briefs.

The hearing was not recorded via a written transcript and was deemed closed upon the arbitrator's receipt of the post-hearing briefs from both parties. The parties have stipulated to the fact that the instant matter is properly before the arbitrator for a determination on the merits. The parties have also agreed to the issue to be resolved and also to the submission of three (3) joint exhibits.

ISSUE

Did the Employer have just cause to terminate the Grievant? If not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 19—Disciplinary Procedure
Article 20—Grievance Procedure

BACKGROUND

Tyler Brown ("Brown" or "Grievant") has served as a trooper for the OSHP for approximately four (4) years. He had been assigned to the Gallipolis Patrol Post in the Jackson District, where he most recently worked the night from 11:00 p.m. to 7:00 a.m.

On April 26, 2011, Brown submitted permissive leave requests for his planned annual vacation with his wife and children in Myrtle Beach, South Carolina. Well before leaving his home and making the drive of approximately nine (9) hours to that destination on Thursday, May 26, 2011, the Grievant was aware of the following status of his schedule for the upcoming ten (10) days:

- Wednesday, May 25—regular day off
- Thursday, May 26—regular day off
- Friday, May 27—approved leave
- Saturday, May 28—approved leave
- Sunday, May 29—approved leave
- Monday, May 30—approved leave
- Tuesday, May 31—approved leave
- Wednesday, June 1—leave denied and scheduled to work
- Thursday, June 2—regular day off
- Friday, June 3—regular day off

The Grievant was aware that he could delay his return from Myrtle Beach and potentially extend his vacation by two (2) full days if he was able to switch days off with another trooper. Brown was the only trooper scheduled to work the midnight shift on June 1, 2011. In advance of his departure to Myrtle Beach, Brown asked Trooper Jordan, who worked the same shift, to switch days off with him and to work Brown's assigned shift on June 1st. (Employer Ex. 1, p.11) Brown's next evidenced effort to seek assistance in covering his shift on June 1 was via a text message sent to Trooper Pullins on May 29 at 8:12 p.m. Pullins' reply on May 30, indicated that Trooper Pullins could not comply with Brown's request to exchange days off, That response was then followed by an unanswered text message sent to Trooper Jordan at 9:30 a.m. on May 30, containing a similar request to have Jordan cover Brown's assigned shift on June 1. (Employer Ex. M, pp. 11, 13) After having been made aware of Brown's communications with Pullins and Jordan, Sergeant Call phoned Brown at approximately 9:30 a.m. on May 30, directing Brown to report to work as scheduled to begin at 11:00 p.m. on May 31.

The Grievant's next communication with his assigned post was on May 31 at 9:25 p.m., which was only ninety (90) minutes before he had been assigned to report for duty. That contact involved Brown sending a text message to the on-duty supervisor, Sergeant Jacks, informing him that Brown would need to use sick leave because he had not been feeling well. Brown responded to the directive included in Sergeant Jacks' text reply, and Brown called Sergeant Jacks, advised the latter of his symptoms, and Sergeant Jacks that he had gone to a physician and had obtained a form from the doctor based on Brown's report to the physician related to a headache, vomiting, and the passing of two (2) kidney stones. Two (2) off-duty officers were then summoned and worked overtime hours replacing Brown for the shift assignment he missed. Brown indicated

that he ultimately left Myrtle Beach on the night of June 2 to return to Ohio and then did report to work for his assigned shift on June 3.

Pursuant to Article 19, Section 19.04 of the Agreement, S/Lieutenant Barry Donley conducted a pre-disciplinary hearing and issued a finding that no just cause existed for discipline. (Joint Ex. 3) Pursuant to that same Agreement section, the Employer exercised its right to reject the hearing officer's finding. A last chance agreement was recommended by the Employer's Human Relations Department and reviewed as appropriate by Major Williams and Lt. Colonel Daniel Holcum. However, Captain Carl Roark, as the Jackson District Commander, recommended to Colonel John Born, as Superintendent of the OSHP, that Brown be fired for his purported violation of the OSHP Rules and Regulations, specifically Rule 4501: 2-6-02(E)(1)(3)—False Statement, Truthfulness. (Joint Ex. 3). The Employer's termination letter indicated to Brown that "it was found that you were untruthful when reporting off duty on sick leave." (Joint Ex. 3)

As a result of receiving notice on or about August 11, 2011 of his immediate termination for making false statements, a grievance was filed by the Union on the Grievant's behalf that same day. (Joint Ex. 2) That grievance alleged violations of Agreement Section 19.01 (application of the "just cause" standard) and also Section 19.05 (progressive discipline). Because the matter remained unresolved after passing through the preliminary stages of the grievance procedure, as identified in Article 20 of the Agreement, the matter has been submitted to the arbitrator for final and binding resolution.

SUMMARY OF THE EMPLOYER'S POSITION

The Employer initially emphasized that Colonel Born had the recognized prerogative pursuant to Section 19.04 of the Agreement not to share the same opinion as the original grievance meeting officer's finding. The Employer asserts the following:

> The Employer concedes that a doctor's note normally holds a significant amount of weight when determining the legitimacy of an absence; however, it does not trump the ability of the Employer to use common sense and weigh all of the evidence before them. The facts and evidence in the instant case overwhelmingly indicate the Grievant had no desire or plan to return from his vacation for the one day he could not secure leave. He simply went to the Urgent Care and made up bogus symptoms and piggybacked on his past medical condition.

(Employer brief p. 4) The Employer also emphasizes that Brown's communication with Pullins from Myrtle Beach indicated that Brown did not know which day he actually needed to return for his regular duty. The Employer argues: "It is simply not logical for someone to go on vacation and not know which day they need to return for work." (Employer brief p. 4) The Employer also contends: "The most telling evidence that revealed he had absolutely no intention of returning for his shift was demonstrated by the conversation he had with Sergeant Call the day before he was scheduled to work. Sergeant Call told him that nobody was able to switch with him and he should have taken care of this before he left. He then told the Grievant that he needed to report for his shift. The Grievant responded empathetically, 'I am at the beach!' . . . Additionally, there was no mention of any illness to Sergeant Call, despite the Grievant allegedly being at a pain level of 7 or 9." (Employer brief p. 4)

The Employer questions the credibility of the actual information that Brown had shared with the treating physician at the urgent care facility and also his testimony indicating that he told his wife before 4:00 a.m. on May 31 that he needed to go to the hospital because he was vomiting and in significant pain after passing two (2) kidney stones, but he delayed going for

treatment until at least 11:00 a.m. that same day. In support of its claim that "the Grievant fabricated an illness and associated it with a known condition to extend his annual vacation," the Employer points out: "He began suffering from a pain level of 7 or 8 on Sunday morning, yet he failed to seek medical treatment until two days later, which just happened to be the date he was scheduled to return from his vacation." Employer brief pp. 15, 17)

Although the Employer is cognizant of the Grievant's past history of dealing with kidney stones, the Employer claims that when the physician noted the Grievant's then-current condition, "the doctor was treating symptoms based on what he was told by the Grievant. (Employer brief p. 10, Employer Ex. 1) The Employer contends: "It is blatantly clear the Grievant is attempting to piggyback fabricated conditions with a known medical condition for which the Grievant has been treated in the past. He thought if he stated he passed a kidney stone and had residual effects, the Employer would not question him. Testimony from several witnesses revealed it was common knowledge that he suffered from kidney stones." (Employer brief p. 11)

The Employer also argues that "[a]nother significant issue that lends credence to the Employer's argument is the leave without pay (LWOP) entry that went unchallenged by the Grievant after Brown was denied eight (8) hours of sick leave pay for his absence. "It simply is not logical that someone with a legitimate excuse and leave time available would not challenge the fact they lost eight hours of pay." (Employer brief p. 12)

The Employer also notes that, despite the fact that the physician's medical form was issued at around noon on May 31, the Grievant delayed informing his supervisor that he would not be reporting for work until approximately ninety (90) minutes before his shift was scheduled to begin. (Employer Ex. 1)

Based on the evidence, testimony, and arguments it has presented, the Employer requests that the Union's grievance be denied in its entirety.

SUMMARY OF THE UNION'S POSITION

The Union maintains that the Employer has failed to meet its burden of proof to sustain its claim that it had a valid "just cause" basis for terminating the Grievant's employment. "The whole premise of the Employer's case is that (1) the Employer knew Tyler's circumstances and determined to teach Tyler a lesson about planning ahead, and (2) that Tyler was going to do whatever he had to do to remain out of state on vacation." (Union brief p. 2) The Union asserts that the basic issue in this matter is: "Did this trooper lie about his being sick and unfit for duty when he called off on May 31, 2011?" (Union brief p. 4) The Union insists that that specific question was addressed first internally by S/Lieutenant Barry Donley, who conducted a pre-disciplinary hearing and then determined: "I find no just cause exists for discipline." (Union brief pp. 4-5) The Union argues:

> When the Employer disregarded its own hearing officer's decision, it sent the matter on for determination of punishment. The three command officers who reviewed the case did not recommend termination. The Colonel overruled their recommendation of an LCA, and ordered that Tyler Brown be fired . . .
>
> Following his firing, Tyler Brown filed for unemployment compensation asserting that there was no "just cause" for his termination. The Employer contested his application for benefits. Tyler was awarded unemployment benefits in a determination that declared, "The employer failed to establish negligence or willful disregard of the rule on the part of the claimant . . . After a review of the facts, this agency finds that the claimant was discharged without just cause under Section 4141.29(D)(2)(a) Ohio Revised Code." . . .
>
> The Employer appealed that determination alleging "the claimant was removed for just cause due to the violation of the work rule and requests a reversal on the determination to allow benefits." On appeal, the Director of the Office of Unemployment Compensation "affirmed" the initial determination, finding specifically, "A review of the

original facts plus those submitted in the appeal does not support a change in the original determination.

(Union brief p. 5; Union Ex. 4)

The Union also notes the following factors in supporting the Union's position and Brown's grievance.

- "The Employer offers no evidence that Brown has a history of feigning illness or of misrepresenting the facts of any situation, medical or otherwise."

- "[H]is employment history establishes that Tyler Brown has a pristine disciplinary record."

- Brown has been honored by his receipt of the ACE award, which acknowledged his recording of five (5) or more auto larceny recoveries in a year and restoration of the stolen vehicles to their rightful owners.

- Brown received the Criminal Patrol Award, which is given to troopers who show proficiency in discovering, opening and pursuing criminal cases other than simple driving violations. Trooper Brown "used traffic enforcement to arrest criminals," many of whom were involved in drug-related violations.

- While under cross-examination at the hearing on this matter, witness Sergeant Kelly indicated "that he 'never' knew of an instance where Tyler lied or misrepresented the facts."

- "Based upon the frequency of his kidney stone attacks and its impact on his work, Tyler submitted medical certification in support of an FMLA determination [in his favor]."

- "Although in the instant case Tyler had a sick leave balance at the time he called off work on June 1, 2011, even if he had exhausted his sick leave he would have been protected from any discipline pursuant to ODPS Policy No. DPS-501.10, which in Section F(3) specifically declares an employee using sick leave for FMLA related reasons 'shall not be subject to discipline' . . ."

- "The record established that Tyler Brown had more than a score of bouts with kidney stones. In some instances these attacks occasioned extended disability leave. On some occasions these attacks required medical intervention such as extracorporeal shock wave lithotripsy which uses shock waves to break kidney stones into tiny pieces that are then passed in the urine. On some occasions (such as his kidney stone attack only two days before our arbitration) a stent was required."

(Union brief pp. 7-10; Union Ex. 2, 3)

Based upon the above assertions, the Union requests that the Grievant be reinstated with no loss of seniority and be made whole for his loss of wages in benefits.

DISCUSSION

In an employee termination matter, an arbitrator must determine whether an employer has proved that a discharged employee has committed an act warranting discipline and that the penalty of discharge is appropriate under the circumstances. *Hy-Vee Food Stores, Inc. and Local 747, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am.,* 102 LA 555 (Bergist 1994). In making this determination, the arbitrator may consider, among other circumstances, the nature of the Grievant's offense(s), the Grievant's previous work record, and whether the employer has acted consistently with respect to similar previous offenses. *Presource Distrib. Servs., Inc. and Teamsters Local 284,* FMCS No. 96-10624 (1997).

> "Just cause" is a contractual principle that regulates an employer's disciplinary authority. It is an amorphous standard, ordinarily open to arbitral interpretation on a case-by-case basis. Before an arbitrator will uphold a penalty, he ordinarily looks to the circumstances of the misconduct, any mitigating factors, and whether the aggrieved employee received his/her contractual and legal due process protections.

State of Iowa, Iowa State Penitentiary and Am. Fed'n of State, County, and Mun. Employees, AFSCME State Council 61, Lab. Arb. Awards (CCH) P 3923 (Dworkin 2001). One arbitrator defined "just cause" as "that cause which, given the totality of circumstances, enables an impartial observer to determine that the adverse action taken against an employee is, in all respects, a reasonable assertion of authority designed to meet legitimate management objectives." *Gallatin Homes,* 81 LA 919 (Cerone 1985).

In most employee disciplinary matters, the initial burden of proof in a disciplinary matter lies with the Employer to demonstrate through sufficient evidence the validity of its decision to

impose the challenged discipline. This arbitrator and many of his colleagues have recognized a higher level of evidence for offenses involving alleged moral turpitude, such as dishonesty, reflected in an employee's work performance. "The appropriate standard of proof in cases where moral turpitude, such as theft and dishonesty is involved, is clear and convincing evidence. *Fed. Signal Corp. and Int'l Bhd. of Elec. Workers, Local 134*, 11-1 Lab. Arb. Awards (CCH) P 5253 (Wolff 2010), citing to *Grant Hosp*., 88 LA 587 (1986), *Tower Auto. Prods Co*., 115 LA 1077 (2011), *Chicago Transit Auth.*, 98-1 Lab. Arb. Awards (CCH) P 5084 (Wolff 1998), *City of Kankakee*, 97 LA 564 (1991); see also *United Parcel Serv*., 121 LA 207. 224 (2004; *S. Cal. Carton Co*., 88 LA 591, 93 (1986); *BP Exploration (Alaska), Inc. and USW Local 4959*, 09-1 Lab. Arb. Awards (CCH) P 4544 (Landau 2009). This higher standard of proof is justified due to the impact that a termination, or even any discipline based on dishonesty, potentially has on the affected employee. That negative impact or stigma resulting from a discharge based on an employee's purported dishonesty is very significant to the future employment of any worker, but it is especially limiting in the case of any law enforcement officer, such as the Grievant. An employer disciplined for dishonest conduct also carries a blemished reputation in his dealings with his family, friends, and his work and social communities.

"Presuming that something occurred is quite different from finding that it occurred based upon clear and convincing evidence." *Teamsters, Local 117 and King County, Wash., Dept. of Transp., Road Serv. Div*., 01-1 Lab. Arb. Awards (CCH) P 3707 (Axon 2001). In its brief, the Employer made at least four (4) references to its own reliance on circumstantial evidence as the basis for its decision to terminate the Grievant's employment. "In using circumstantial evidence, arbitrators must use extreme caution to avoid hasty or false deductions." *Fed'n of Pub.*

Employees (AFL-CIO) and Broward County (Fla.), 98-2 Lab. Arb. Awards (CCH) P 5196 (Richard 1998).

> The use of circumstantial evidence is generally acceptable in the arbitration process to prove misconduct and "just cause" for discharge. However, since circumstantial evidence is offered in the absence of actual direct evidence or observation of misconduct, it must be carefully scrutinized. **Circumstantial evidence must clearly and convincingly lead to the conclusion advanced by a party and exclude any other reasonable explanation**. (Emphasis added)

(Coca-Cola Enters., Inc. and Teamsters Local 406, 10-2 Lab. Arb. Awards (CCH) P 4999 (Daniel 2010). "The question is not whether circumstantial evidence is valid, but what does it mean or prove." *Chauffeurs, Teamsters, Warehousemen and Helpers Local Union 160 and Marigold Food, Inc*., 97-1 Lab. Arb. Awards (CCH) P 3127 (Berquist 1996). In its view, the Employer has met its burden of submitting a web of circumstantial evidence which attempts to establish by a preponderance of the evidence that the Grievant committed an intolerable single offense which constitutes "just cause" for his termination. However, it has been recognized that "[c]ircumstantial evidence must always be carefully evaluated, and if the evidence merely proves an opportunity to commit an offense, such proof is insufficient grounds upon which to predicate any disciplinary action," especially a termination such as in this case. *Health Care and Ret. Corp. of Am d/b/a Heartland of Beckley and Nat'l Unions of Hosp. and Health Care Employees, Dist. 1199,WV, KY,OH, AFL-CIO*, 87-1 Lab. Arb. Awards (CCH) P 8130 (Duff 1986).

> In considering circumstantial evidence as the basis for a principal finding or conclusion, the arbitrator must exercise extreme care so that, by due deliberation and careful judgment, the arbitrator may avoid making hasty or false deductions. If the evidence producing the chain of circumstances pointing to guilt is weak and inconclusive, no probability of fact may be inferred from the combined circumstances.

Pacific Bell and Communications Workers of Am., 89-2 Lab. Arb. Awards (CCH) P 8428 (Blinn 1989), citing to *S. Penn Oil Co.*, 29 LA 718, 722 (Duff 2957).

This arbitrator does recognize that acts of deliberate dishonesty are among the most serious forms of employee misconduct because employer-employee trust is significantly impaired. This is particularly the case when it involves a law enforcement officer. The arbitrator also does not regard any discharge lightly, especially a discharge for dishonesty, but will not uphold the Grievant's discharge if the alleged misconduct was not credibly and substantially established by the record in this proceeding, The evidence in this case certainly creates a great deal of suspicion regarding the Grievant's conduct. However, the arbitrator here finds that the circumstantial nature of the evidence presented was insufficient to support a decisive finding that the Grievant was not ill and was guilty of the offense of dishonesty or untruthfulness charged against him. The Employer has failed to adduce clear and convincing evidence of Brown's alleged dishonesty.

The arbitrator, however, does not find that the Grievant was without some responsibility or culpability for his conduct in failing to timely advise his superiors of his medical diagnosis, the prescribed Vicodin for his consumption, and his inability to report for his scheduled duty beginning at 11:00 p.m. on May 31, 2011. Brown was aware of those circumstances almost twelve (12) hours before his scheduled return to work, and it would have taken him nine (9) hours to drive to work from his location in Myrtle Beach. Therefore, he had a recognized duty to inform his supervisor about his planned absence as early as the circumstances dictated. If he was incapable of informing his supervisor he could have had his wife act on his behalf in meeting his work obligation, so that the OSHP personnel in charge of staffing would be provided with more reasonable time for procuring a replacement for him.

AWARD

The Union's grievance is granted in part and denied in part.

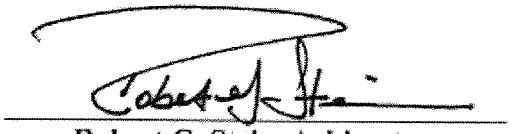
The termination imposed by the Employer shall be vacated, and the Grievant shall be reinstated to his former position within two (2) pay periods from the date of this decision. He shall be made whole for all lost wages, minus the unemployment compensation he has received and any other reportable W-2 earned income. He shall be wholly compensated for all applicable benefits foregone and his seniority shall be bridged. All references to the original termination of the Grievant shall be expunged from all Employer personnel records.

Based on the Grievant's negligence and irresponsibility in failing to timely advise his superiors about his intent to remain in South Carolina, thereby precluding his ability to appear for his scheduled shift, the Employer shall issue a written warning pursuant to Article 19. Section 19.05 to Brown as the progressive discipline deemed appropriate based on that conduct.

The arbitrator shall retain jurisdiction over the implementation of this Award for a period of sixty (60) calendar days.

In accordance with Article 20, Section 20.0(3), the arbitrator's fees and expenses shall be equally divided between the parties.

Respectfully submitted to the parties this 13th day of February, 2012.



Robert G. Stein, Arbitrator