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

In the Matter of

OHIO STATE TROOPERS ASSOCIATION

and

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

Grievant: Amy Pennington

Case No. 15-03-20110824-0093-04-01

**ARBITRATOR'S
OPINION AND AWARD**

This Arbitration arises pursuant to the collective bargaining agreement (“the Agreement”) between the Parties, THE OHIO STATE TROOPERS ASSOCIATION (“the Union”) and OHIO DEPARTMENT OF PUBLIC SAFETY, DIVISION OF THE OHIO STATE HIGHWAY PATROL (“the State”) under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. Hearing was held December 16, 2011. The Parties presented oral testimony, documentary evidence, and argument. Both Parties submitted post-hearing briefs.

APPEARANCES:

On behalf of the Union:

ELAINE N. SILVEIRA, Esq. and HERSCHEL M. SIGALL, Esq., Ohio State Troopers Association, 6161 Busch Boulevard, Suite 130, Columbus, Ohio 43229.

On behalf of the State:

SGT. COREY W. PENNINGTON, Ohio State Highway Patrol, 740 E. 17th Avenue, Columbus, Ohio 43211.

ISSUE

Was the Grievant discharged for just cause? If not, what shall the remedy be?

RELEVANT SECTIONS OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT

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ARTICLE 19 – DISCIPLINARY PROCEDURE

19.01 Standard

No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause.

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19.05 Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

- 1. One or more Verbal Reprimand (with appropriate notation in employee's file);**
- 2. One or more Written Reprimand;**

3. One or more day(s) Suspension(s) or a fine not to exceed five (5) days pay, for any form of discipline, to be implemented only after approval from the Office of Collective Bargaining.

4. Demotion or Removal.

However, more severe discipline (or a combination of disciplinary actions) may be imposed at any point if the infraction or violation merits the more severe action.

The Employer, at its discretion, is also free to impose less severe discipline in situations which so warrant.

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TERMINATION LETTER TO THE GRIEVANT

August 18, 2011

You are hereby advised you are being terminated from your employment with the Department of Public Safety, Ohio State Highway patrol, effective immediately upon issuance on August 18, 2011 for violation of OSHP Rules and Regulation Rule 4501:2-6-02(B)(1) Performance of Duty and Rule 4501:2-6-02(E)(1) False statement, Truthfulness.

Specifically, as a result of Administrative Investigation # 2011-0449, it was found that you neglected to properly document evidence during several crash investigations. Additionally, she falsified the crash reports by indicating the vehicle(s) were moved and there was no evidence at the scene.

PARTIES' POSITIONS

State Position

The State had just cause to terminate the Grievant's employment based on her crash report rule violations of 4501:2-6-02(E)(1) False Statement, Truthfulness and 4501:2-6-02(B)(1)(5) Performance of Duty. The Grievant had the knowledge, skills, and abilities to complete a thorough and accurate crash report. The Grievant did not put the

required effort forward to complete a quality report, but instead did the minimum to save time. She took shortcuts to get by. Unfortunately, her repeated shortcut violated the State's false statement, truthfulness rule, and she lost her job.

Sergeant Scales testified he never told the Grievant to document "vehicle moved prior to arrival, no evidence at scene" when it was not true. To the contrary, he told her there is very rarely no evidence at the scene of a crash and that you will almost always have evidence to document.

The Grievant would like the Arbitrator to believe the Grievant used her shortcut language on each crash report she completed without a field sketch because she thought that was what she was supposed to put. This is a false statement because she did not use her shortcut language in all of her crash reports that did not have a field sketch.

The Grievant stated in her initial Administration Investigation interview that through trial and error, she learned that in order to get a crash without a field sketch approved, she had to write "vehicle moved prior to arrival, no evidence at scene." During her follow-up AI interview, she changed her story and said her previous statement was an exaggeration. It is unreasonable to think the Grievant would exaggerate her story, knowing the seriousness of the charges against her. She changed her story because she was fully aware of the discipline imposed for false statements.

At the arbitration hearing, the Grievant testified on cross-examination it takes 20 minute to complete a simple deer crash report and from 1 hour to several days to complete a detailed crash investigation report. She then contradicted herself by testifying not taking measurements and not making a diagram of the scene did not save her any time, again proving her lack of veracity. Sgt. Scales testified it does take more time to a complete a crash report with a field sketch.

In order to bolster its argument that Sgt. Scales had told the Grievant to falsify crash reports, the Union attempted to convince the Arbitrator it would make no sense for the Grievant to take photographs of a crash scene and then lie about the crash.

However, Sgt. Wright testified it is not common practice for supervisors to review crash scene photographs along with their crash reports. He stated that in order to view crash photos, he had to go to the secretary's office and log into a different computer to view the crash photographs. The Grievant knew it was not the common practice of supervisors to check photographs routinely; over time, she became comfortable that documenting untruths would go unnoticed. But it is imperative that a supervisor be able to trust troopers will document true and accurate information on crash reports.

The Grievant testified her shortcut language was a mistake. Looking at the crash scene photographs of the crash reports where she wrote this language, however, it simply is not plausible for a reasonable person to mistakenly write "Vehicle moved prior to arrival, no evidence at scene."

During her unemployment insurance compensation hearing, the Grievant testified:

I have put other reasons on the report, I have put the terrain, I've put officer safety, I've put all kinds, equipment failure, and it has been strongly discouraged every time I put something else on there to, not put that on there. So through time, I've kind of developed to put that on there.

At the arbitration, the Grievant testified she did not make this statement, which is yet another false statement. Her testimony at the UI hearing proves her intent was to mislead supervision by writing whatever it took to get a crash report approved instead of taking the extra time to do it right and actually document the evidence at the scene.

The Grievant's rationalizations are consistent with Sykes' and Matza's denial of responsibility theory (Gresham Sykes and David Matza, "Techniques of Neutralization: Theory of Delinquency," in American Sociological Review, 22(6), pp. 667-68, (1957)). This

theory describes a person feeling a “victim of circumstance” or “place in situations out of their control.” (Id.) The Grievant testified it was not her intent to deceive. She stated it did not register to her what she was doing and she made a mistake.

The Union attempted to downplay the Grievant’s false statements in her reports by questioning her supervisors’ decisions to approve the reports. The State concedes that correcting the reports prior to approval was an option, but second-guessing Lt. McElfresh’s decision to send the matter to AI does not change the fact the Grievant falsified several official documents. The Grievant premeditatedly falsified crash reports with the intent to deceive her supervisors for the purpose of getting mediocre reports approved.

While discussing crash report 13-0629-13 during the AI, the Grievant stated she had intended to do a field sketch but her laser wasn’t working. Sgt. Wright testified at the arbitration it is a trooper’s responsibility to ensure, prior to going out on shift, that all equipment is operational. Additionally, Sgt. Scales testified an accurate diagram can be completed after vehicles have been moved. There was nothing preventing the Grievant from returning to the scene with operational equipment. Instead, she elected to save time and falsely document “Vehicle moved prior to arrival, no evidence at scene.”

The Union contends this situation could have been handled as a training issue. Redirecting blame is a common practice, as described by Sykes’ and Matza’s condemnation of the condemner theory. (Id.) The theory explains offenders “shift blame to those who are opposed to their behavior.” (Id.)

The disciplinary grid lists the sole penalty for a first offense of false reporting or falsification of documents is removal. The State routinely discharges employees who violate the False Statement, Truthfulness rule. The need for law enforcement officers to be honest at all times has been thoroughly documented between these Parties and is a

highly-supported standard. See Case No. 15-03-20080319-0040-04-01 (S.G. Ruben, 2008); Case No. 15-03-20110323-0053-04-01 (Lewis, 2011); Case No. 15-03-20110113-022-04-01 (Washington, 2011); Case No. 15-00-9901-0006-04-01 (Brookins, 1999); and Case No. 15-00-980807-0097-04-01 (A.M. Ruben, 1998).

It is simple to dispel the Grievant's testimony that she thought the shortcut language was what she had to put to get a crash report approved. What she had to do was complete a thorough and accurate diagram. There are hundreds of troopers that have received identical crash investigation training; they are not including this false language in their reports. The Grievant testified Sgt. Scales told her to write these false statements. If that is so, the Grievant had a duty to report this to her post commander; she did not.

The discipline imposed was not arbitrary or discriminatory. It was in fact routine for a violation of this nature and commensurate with the disciplinary grid. The Grievance should be denied in its entirety.

Union Position

The State did not have just cause to terminate the Grievant's employment. This is simply not a disciplinary case. There was no intention to shirk duty; no intent to lie or misstate facts. This case arises on a mistake that could have and should have been corrected before it got out of hand as it did.

The Grievant testified she had been under the incorrect impression, based on a conversation with Sgt. Scales, that she needed to include in her crash reports the language, "Vehicles moved prior to arrival, no evidence at scene" whenever she did not complete a field sketch. The Grievant handled crash reports in the manner she believed

she had been instructed for 5 years. For 5 years, her reports were reviewed by her supervisors. Yet no one ever told the Grievant, prior to the instant AI, that the language she was using was incorrect and unnecessary. If ever there was an example of conduct being a training issue as opposed to a disciplinary issue, this is the case.

When Sgt. Hamilton informed the Grievant the shortcut language was inappropriate, she stopped using it. Sgt. Hamilton testified that when he instructed the Grievant to do something, he never had to tell her twice.

Why didn't Sgt. Wright have a similar conversation with the Grievant when he discovered errors in her crash reports? It is a safe bet he did not simply call her to task as a training issue because his post commander, Lt. McElfresh, didn't want it handled in that manner. Why did Lt. McElfresh advise Sgt. Wright to approve the Grievant's incorrect crash reports? Perhaps that is answered by the testimony of S/Lt. Rhodes, who stated Lt. McElfresh had a "problem" with the Grievant.

The Grievant did not believe she was doing anything wrong. There is no intent to deceive that would support discipline, let alone removal. There was only a lack of understanding of what was required to be documented following a crash.

It was the Grievant who took the crash photographs that disclosed the shortcut language was inaccurate or incomplete. Taking a look at the first charge against the Grievant – that she failed to properly document evidence during several crash investigations – testimony clearly established the Grievant did, in fact, properly document evidence. She took photographs of every crash scene and included those photographs in her crash reports. She wrote descriptions of the crash scenes. Sgt. Scales and others testified a field sketch is not the only way to document a scene.

As to the second charge of false statements and truthfulness, the question of what is a false statement must be addressed. Is a false statement a lie? A lie is defined

as “to make an untrue statement with intent to deceive.” ([Merriam-Webster Dictionary, www.merriam-webster.com/dictionary/lie](http://www.merriam-webster.com/dictionary/lie)). The Grievant had no intent to deceive. The only reason she included an inaccurate statement in her crash reports was because she thought that was what she was supposed to do. The AI backs the Union’s contention the Grievant had no intention to deceive when it clearly states the Grievant “misunderstood the direction Sgt. Scales gave her five years ago by thinking it was required to document vehicle(s) moved from final rest and no evidence at scene anytime a field sketch is not completed.”

Every management witness, with the exception of Sgt. Wright, testified that when he reviewed a crash report that was incorrect, he either fixed it himself or sent it back to the trooper for editing. Sgt. Wright testified he approved the Grievant’s crash reports, even though he knew they were inaccurate, because Lt. McElfresh told him to. Why did this happen -- because Lt. McElfresh wanted to get rid of the Grievant and thought he’d stumbled on the magic mechanism to do so. The State should be ashamed at the manner in which it treated the Grievant.

This is a case about a mistake in the preparation of crash reports, an administrative mistake. The Grievant’s mistake was that she misunderstood the direction of a supervisor 5 years ago. She should not have indicated that vehicles were moved and no evidence at scene when such a statement was at odds with the obvious evidence she provided by way of her crash scene photographs.

The Grievant included the language at issue because she thought that was the way it was to be done. When instructed otherwise, she adjusted her method of filling out crash reports. What the Grievant did not do was lie, knowingly issue a false statement, or intentionally elect to subvert what she knew to be the Rules or Orders of the State.

The State also made a mistake. The State's mistake was to create a disciplinary issue where none existed. Its mistake was to conduct an investigation and fire this trooper, rather than simply correct her mistake and permit her to continue to serve the people of Ohio.

The Grievant deserves the opportunity to continue her nearly-unblemished and promising career. Her grievance should be granted in its entirety; she should be restored to her position with full back pay, seniority, and benefits.

ARBITRATOR'S OPINION

The Parties have diametrically opposed interpretations of the facts in this matter. The State contends the Grievant intentionally lied in crash reports for the purpose of saving time. The Union contends the Grievant misunderstood the directions of a supervisor and thought she was supposed to include certain stock language in crash reports when she did not do field sketches.

The State has the burden of proving its interpretation is correct. In its attempt to do so, it relies primarily on the fact that the language the Grievant used in some of her crash reports -- "Vehicles moved prior to arrival, no evidence at scene" -- was false. To bolster its interpretation, it also points out various inconsistencies in the Grievant's AI statements, UI hearing testimony, and arbitration testimony.

To support its contention the Grievant had no intent to deceive, the Union relies primarily on the fact the Grievant contemporaneously submitted photographs of the crash investigations in question showing that the vehicles and other evidence were indeed still at the scenes.

The State contends the Grievant's submission of crash scene photographs does not undercut her intent to deceive because the Grievant knew her supervisors rarely reviewed crash scene photographs; rather, they regularly reviewed only the crash reports. While the record evidence indicates supervisors rarely reviewed crash scene photographs, and despite the assertion in the State's brief that the Grievant knew it was not the common practice of supervisors to check photographs routinely, there is no record evidence regarding the Grievant's awareness one way or the other of supervisors' reviews of crash photographs.

No, it doesn't make any sense to write in a crash report that the vehicle was moved prior to arrival and there was no evidence at the scene, if indeed the vehicle was there as the Grievant's own submitted photographs showed was the case. But on the record evidence, the State cannot carry its burden of proving the Grievant's intent to deceive when she included that language in her reports.

The Grievant's use of the stock language strikes the Arbitrator as a performance issue, rather than as evidence of misconduct. Indeed, the Grievant credibly testified that if "someone had brought it to my attention earlier, I'd absolutely not would've used them." She further credibly testified she included the language "because I thought it was required."

AWARD

For the reasons set out above, the termination was not for just cause. The grievance is granted. The Grievant is to be reinstated and made whole, included but not limited to back pay, seniority, and benefits.

The Arbitrator will retain jurisdiction until May 1, 2012 as to remedy only.

DATED: February 28, 2012

Susan Grody Ruben
Susan Grody Ruben, Esq.
Arbitrator