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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**

**Grievance No. 15-03-20111116-0213-  
04-01**

**Grievant: Steven H. Walsh**

**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 the OHIO DEPARTMENT OF PUBLIC SAFETY, DIVISION OF THE OHIO STATE HIGHWAY PATROL ("the Division") under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. Her decision shall be final and binding pursuant to the Agreement.

Hearing was held January 27, 2012. Both Parties were represented by advocates who had full opportunity to introduce oral testimony and documentary evidence, cross-examine witnesses, and make argument. Post-hearing briefs were timely filed on or before March 2, 2012.

#### APPEARANCES:

On behalf of the Union:

HERSCHEL M. SIGALL, Esq. ELAINE N. SILVEIRA, Esq., Ohio State Troopers Association, Columbus, OH.

On behalf of the Division:

Sgt. COREY W. PENNINGTON, Ohio Department of Public Safety, Division of the Ohio State Highway Patrol, Columbus, OH.

#### ISSUE

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

#### RELEVANT PORTIONS OF THE AGREEMENT

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#### ARTICLE 4 – MANAGEMENT RIGHTS

...

...the Employer retains the rights to: 1) hire and transfer employees, suspend, discharge and discipline employees....

. . .

## 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.

...

### 19.95 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.

...

. . .

## ARTICLE 21 – WORK RULES

### 21.01 Copies of Work Rules

The [E]mployer agrees that existing work rules, and directives shall be reduced to writing and be made available to affected employees at each work location....The application of such rules and directives is subject to the grievance procedure.

...

21.03      Application

All work rules and directives must be applied and interpreted uniformly as to all members....

BACKGROUND OF THE GRIEVANCE

The Grievant was commissioned as a Trooper on December 10, 1999. Until April 2011, he performed well and got along well with his superiors. The Grievant did not get along well with his last Post Commander, who was appointed in April 2011. During the Summer of 2011, the Grievant engaged in fewer enforcement activities than he had in the past. In August 2011, his Post Commander rescinded his privilege to take a patrol car home and use it for his commute. The Grievant was told he could regain the patrol car privilege when his enforcement activities increased.

The Grievant was removed from his employment on November 10, 2011 for alleged rule violations of 4501:2-6-02(E)(1) False Statement, Truthfulness; and 4501:2-6-02(Y)(2) Compliance to Orders. The Statement of Charges provides:

...it was found that Trooper Walsh falsified his functional activity on several occasions during the months of August and September 2011. Additionally, Trooper Walsh failed to utilize his audio-video equipment in accordance with Division policy.

Specifically, an Administrative Investigation was instigated after it was discovered the Grievant had issued only seven tickets during the 2011 Labor

Day weekend. The AI reviewed the Grievant's August-September 2011 enforcement activity and found that during that period, the Grievant recorded on his mobile computer terminal ("MCT") a "warning" to motorists six times, five of which should have been recorded as the lesser activity of "assist" and one of which may have been no contact at all with the motorist.

### POSITIONS OF THE PARTIES

#### Division Position

The Grievant would like the Arbitrator to believe he recorded "warning" instead of "assist" by mistake on the five occasions in question. But the click for "assist" and "warning" are fifty-eight dispositions apart. There are seven disposition options displayed on a page; the dispositions are listed alphabetically. Additionally, the disposition is not automatically sent once the choice is selected. The user has the opportunity to review the captions before submitting the information by hitting the "X-mit" button.

The Grievant has been trained on the MCT and has been using it for seven years. By making the false entries, the Grievant was trying to make a simple "assist" with a stopped vehicle appear as a proactive stop of a vehicle where he issued a "warning." Issuing more warnings would lead supervision to believe the Grievant was attempting to achieve Division goals by making pro-

active traffic stops. Claiming false activity gave the appearance he was doing more than he actually was. It inflated his proactive traffic stop statistics, giving the appearance of a harder working trooper.

It is highly suspicious the Grievant's video camera was not activated during the stops in which the motorists' accounts contradict the dispositions entered by the Grievant. This reflects another poor decision the Grievant made; he violated rule 4501:2-6-02(Y)(2) Compliance to Orders when he failed to activate his video camera. Five of the people said the Grievant did not even get out of his patrol car.

The sixth instance, where the motorist said she was not stopped at all, the Grievant attempts to explain away by testifying he "ran the wrong plate." What he did was self-initiate a false traffic stop, for which he claimed a non-enforcement and a warning to increase his poor level of activity.

The Union contends the Grievant was removed for not writing enough tickets. The Grievant, however, was terminated for violating the Division's False Statement, Truthfulness rule, not for refusing to write tickets. The Division routinely discharges employees who violate the False Statement, Truthfulness rule. Several arbitrators have recognized the Division's strong stance on untruthfulness, among them, this Arbitrator:

Truthfulness on the part of a member of law enforcement is an essential requirement. A State Trooper cannot take it upon

himself to decide when it is important to tell the truth, and when it is not. There is no room in law enforcement for maverick behavior.

...

[I]t must be said law enforcement personnel are legitimately held to an extremely high standard of integrity. Law enforcement personnel have enormous responsibilities – among these is to tell the truth.

*OSTA v. OSHP, Case No. 15-03-20080319-0040-04-01 (LaJoye) (Susan Grody Ruben, 2008).* That case involved a trooper going to his residence during his paid lunch break and sleeping while claiming an MCT status of “stationary patrol.” The Union had contended that selecting the “stationary patrol” icon instead of the “lunch break” icon was not a removable offense. The Arbitrator upheld the removal, stating:

...the argument is that categorizing the time as stationary patrol rather than lunch is not a big deal. But it is. For starters, it involves integrity. It is a lie to indicate you are on stationary patrol when actually, you are lying down in your house. Moreover, the choice goes to an integral function of the Employer and an integral duty of the Grievant – i.e., whether the Grievant was performing an actual duty or on a break.

Here, the Grievant falsely claimed activity in his MCT for stops he made as well as for one stop he never made. Documenting factual information accurately is an integral duty of troopers. The judicial system and the public expect and require a trooper’s documentation to be factual.

The impact of the Grievant's untruthful acts have a deeper importance than the removal of one employee. There are adverse effects on other employees as well. Morale is damaged when hard working individuals begin to feel there are no repercussions for those who violate the Division's cardinal rules.

The Division understands people make mistakes. The Grievant, however, did not make a mistake. Rather, he intentionally falsified activity in an attempt to have his suspended patrol car privileges restored and to remove himself from the scrutiny he was receiving for failing to perform his job duties. He violated the public's trust that is so crucial to performing the job of a trooper. The level of discipline imposed is standard for a violation of this nature.

#### Union Position

It is a given that five or six contacts with motorists were incorrectly reported. However, if the incorrectly reported contacts represented anything other than an intentional attempt to misreport the contacts, the Grievant is not guilty of the alleged falsification that forms the basis of the charges against him.

If the Grievant intentionally falsified a series of contacts with motorists to to “pad” his statistics to make himself look better, his removal should be sustained. If the Division, however, did not prove the Grievant’s conduct was intentional, that conduct does not provide a basis to remove a Trooper with over a decade of discipline-free performance.

The subtext in this case is that this actually was a performance removal, cloaked in the guise of a misconduct removal. The Division actually makes a better case on the Grievant’s failure to meet the Division’s standards of performance than it does on the pretextual reason it gave. In the last few months of the Grievant’s employment, he demonstrated less industriousness than the officers who served with him.

Maybe the problems stemmed from the Grievant’s personality conflict with his new Post Commander. A review of the Grievant’s performance evaluations under previous supervision show a productive employee. Once his new Post Commander was in place, however, the Grievant’s performance evaluation fell off a precipice and became a litany of non-performance. As his new Post Commander persisted in his criticisms, the Grievant dug in his heels, and his performance – especially with regard to enforcement contacts – went down rather than up.

When the new Post Commander denied the Grievant his take-home vehicle, the Division took a major step in its campaign to force the Grievant into greater activity. Although not an act of discipline, it is a powerful bargaining chip in controlling a trooper's activity. It is expensive to lose a take-home vehicle and it is a slap in the face to a twelve-year veteran in front of junior officers at the Post.

Both the Grievant and the Post Commander knew why the Grievant's take-home privileges had been rescinded – he had not been writing enough tickets. And both the Grievant and the Post Commander knew how the Grievant could have his take-home privileges restored – write more tickets. Both the Grievant and the Post Commander knew that the number of “warnings” issued would have no impact on the restoration of the take-home privileges.

The lack of impact of the number of “warnings” the Grievant issued is paramount in considering whether the Grievant's MCT entries were false or were made by mistake. Absent a self-serving motivation to erroneously record the stops, the Grievant's actions are more properly identified as errors rather than as falsifications.

It was understood by troopers and by management what was at issue. What was monitored and enforced was the number of tickets issued. A fellow

trooper testified at the Grievant's arbitration hearing that in mid-September 2011, he lost his take-home vehicle and was told he was being put on a special evaluation schedule due to his low enforcement numbers. That trooper asked his Captain, "So, basically, I need to write more tickets?" to which his Captain responded, "Exactly." That trooper chose to write more speeding tickets where he might have issued "warnings." His take-home vehicle was restored to him.

When the instant Post Commander learned the Grievant had written only seven tickets during the Labor Day weekend, he ordered an investigation of the Grievant's videotapes during that period. There were no videotapes for three of the seven tickets the Grievant issued during the Labor Day weekend. The Post Commander's concern was not whether the Grievant had recorded "assists" or "warnings"; neither made a bit of difference compared to the fact the Grievant had written only seven tickets. The Post Commander's hope was that the three tickets for which there were no videotapes would prove to be nonexistent contacts.

The danger with fabricating tickets is they are filed with the court and court cases are scheduled; copies are filed with the Division. Where a contact does not require a follow-up, as with an "assist" or a "warning," the threat of

discovery is substantially lessened because nothing is filed with the court and there is no copy to give the Division.

When sixty days of the Grievant's videotapes were reviewed, six "warnings" reported by the Grievant had no accompanying videotapes. Those six motorists were each interviewed. Five of the six stated the stops were only "assists." The sixth motorist did not remember being stopped. As the Grievant noted, he might have written down the sixth motorist's license plate incorrectly.

The Post Commander's hope of discovering nonexistent contacts was not realized. So instead, the Post Commander seized upon the fact the contacts were misidentified as "warnings" rather than "assists." The problem with that focus is that it makes no difference that the Grievant accidentally recorded "assists" as "warnings." So the Division introduced the importance of "warnings" rather than "assists" in the Division's Time Efficiency Value ("TEV") measurement of troopers. However, there is no record evidence regarding how "warnings" and "assists" affect an officer's TEV rating.

If the Grievant was not performing satisfactorily, he should have been disciplined. Progressive discipline is in the Agreement so the Division has tools to change the behavior of an employee. Removal, however, is not to be issued for sloppy or lazy performance. It is to be used only for egregious conduct such as lying and falsifying documents.

In this case, there was no reason for the Grievant to lie or falsify his contact records. He was sloppy and should be suspended for a reasonable length of time. The Grievant is a twelve-year veteran with a history of good performance prior to serving under the current Post Commander.

The Grievant cannot win the tug of war he entered into with his Post Commander. He should not think he can win. Suspend him and transfer him. Twelve years is a long time to invest in a career.

The Grievant should be given the message he is subject to the demands of his superiors with regard to his activity level. The Division should be given the message it will fare better when it confronts employee performance directly rather than creating a case based upon a constructed premise.

The Grievant should be given the strong admonition that he must attempt to comply with the direction of his Post Commander irrespective of any personality conflict, or change Posts. The Grievant should be restored to his position and made whole, less any discipline imposed by the Arbitrator.

## OPINION

This case involves the termination of the Grievant's employment for misconduct. As such, the Division has the burden of proving just cause, consisting of whether:

1. The Grievant did what he is accused of doing; and
2. Under all the circumstances, removal was appropriate.

### The Grievant's Alleged Misconduct

The Division charged the Grievant primarily with violating Rule 4501:2-6-02(E)(1):

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.<sup>1</sup>

Specifically, the Statement of Charges provides:

...it was found that Trooper Walsh falsified his functional activity on several occasions during the months of August and September 2011.

The false statement charge centers on the fact the Grievant indicated six times in August and September 2011 that he had given a motorist a "warning," when

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<sup>1</sup> The Division also charged the Grievant with violating Rule 4501:2-6-02(Y)(2) Compliance to Orders. Specifically, the statement of charges provides:

Additionally, Trooper Walsh failed to utilize his audio-video equipment in accordance with Division policy.

The record evidence demonstrates this second charge was considered ancillary to the first. The removal stands or falls on the False Statement charge.

in fact, he had given the motorist only an “assist.”<sup>2</sup>

A “warning” is a higher level of activity than an “assist.” During the period the Grievant reported these six “warnings,” he was being scrutinized by his Post Commander due to the Grievant’s extremely low level of work activity. During the four-day period of the 2011 Labor Day weekend, the Grievant had issued only seven tickets.

The Grievant contends he would have had no reason to record “assists” as “warnings” – that his doing so was merely a data entry error. The record shows it is completely implausible, however, for the Grievant to have made such a mistake so many times.

The MCT in the Grievant’s patrol car has a touch screen with a drop-down menu. Seven disposition options are displayed on each page; the dispositions are listed alphabetically. “Assist” and “warning” are nine screens apart. The Grievant does not contend he did not understand how to make a correct disposition data entry. Nor does he attempt to contend he was confused about the difference between an “assist” and a “warning.” Other

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<sup>2</sup> In fact, the record indicates the Grievant may not have stopped one of the six motorists at all, though that instance could be due to the Grievant’s erroneous reporting of that motorist’s license plate number. It is more likely than not, however, that this sixth stop was not a stop at all, but rather was a complete fabrication. The record shows the Division spoke to the motorist who drove the vehicle with the license plate number reported by the Grievant; she was in the area of the supposed stop and remembered being slowed in traffic that day. She told the Division, however, she had not been stopped by any trooper. During the Administrative Investigation, the Grievant told the Division he had no independent recollection of that stop other than it occurred.

than saying he misreported “assists” as “warnings” by mistake, he has absolutely no explanation for how this could have happened.<sup>3</sup>

Given that the Grievant has absolutely no explanation for how these “mistakes” were made, and given there is no technical explanation for how they could have been made, the Arbitrator concludes the entries in question were falsifications. The record indicates the Grievant was engaged in a work slowdown due to his dislike for his new Post Commander. Reporting “assists” as “warnings” appears to be the Grievant’s attempt to show some level of higher activity.

### The Appropriate Penalty

As stated by this Arbitrator in Case No. 15-03-20080319-0040-04-01

(LaJoye):

Truthfulness on the part of a member of law enforcement is an essential requirement. A State Trooper cannot take it upon himself to decide when it is important to tell the truth, and when it is not. There is no room in law enforcement for maverick behavior.

...

[I]t must be said law enforcement personnel are legitimately held to an extremely high standard of integrity. Law enforcement personnel have enormous responsibilities – among these is to tell the truth.

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<sup>3</sup> The Grievant’s lack of any plausible explanation for his “mistakes” aligns this case with Case No. 15-03-20080319-0040-04-01 (LaJoye) rather than with Case No. 15-03-20110824-0093-04-01 (A. Pennington).

The Grievant failed in an essential and integral way – he misrepresented facts regarding his contacts with motorists. Interacting with the public is at the core of what a State Trooper does. Being forthright with the Division regarding those interactions is a basic and obvious duty.

The Grievant put his dislike of his new Post Commander ahead of his duty to conduct himself honorably. The Grievant had previously been a good officer, and knew better than this. It is not surprising the Division found it necessary to remove the Grievant. It is certainly within the zone of reasonableness that the Division decided to do so.

#### AWARD

For the reasons stated above, the grievance is denied. The Division has carried its burden of proving it had just cause to remove the Grievant.

April 16, 2012

Susan Grody Ruben  
Arbitrator