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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. 15-03-20111223-0132-07-15

Grievant: Jeffrey D. Hauenstein

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 March 8, 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 April 9, 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

. . .

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....

. . .

ARTICLE 26 – HOURS OF WORK AND WORK SCHEDULES

...

26.05 Meal Breaks

...

Sergeants assigned to field posts and sergeants as investigators shall receive a paid meal break, not to exceed one-half hour, during each tour of duty. Sergeants shall be subject to emergency calls during his meal break.

...

. . .

BACKGROUND OF THE GRIEVANCE

The Grievant was commissioned as a Trooper on November 12, 1993. At the time of his removal, he had been a Sergeant for approximately 14 years. He was removed from his employment on December 21, 2011 for alleged rule violations of 4501:2-6-02(E)(1) False Statement, Truthfulness; and 4501:2-6-02(I)(3) Conduct Unbecoming an Officer. The Statement of Charges provides:

> Through administrative investigation #2011-0685, it was found that Sergeant Hauenstein engaged in a sexual encounter during his paid meal break. He was untruthful when questioned about his behavior in the subsequent administrative investigation.

Specifically, an Administrative Investigation was instigated once the Grievant's girlfriend's estranged husband filed a citizen's complaint alleging the Grievant was having an affair with the citizen's estranged wife, with some conduct of the affair allegedly taking place while the Grievant was on duty. The AI Complaint Synopsis of the citizen's complaint provides:

> Allegation: The complainant made several allegations in a letter to GHQ that indicated Sergeant Hauenstein and his wife were having an extra-marital affair while in the scope of his employment. He alleged that…
>
> 1. Sergeant Hauenstein has made personal calls from the Division phone as part of his affair.
> 2. Sergeant Hauenstein sent text messages and Facebook posts during court.[1]
> 3. Sergeant Hauenstein sent text messages and Facebook posts while on duty.
> 4. Sergeant Hauenstein and the complainant's wife had a sexual encounter during a lunch break from[sic] Sergeant Hauenstein's on duty time.
> 5. Sergeant Hauenstein texted the complainant unwarranted threats of arrest in an abuse of authority.
>
> Answer: The complaint is Unfounded in part and is Founded in part, as described below…
>
> 1. Founded. The investigation revealed that while the vast majority of the calls between Hauenstein and the complainant['s estranged wife] were not on-duty, there were 9 documented phone calls that totaled 76 minutes of time during a 9 day time frame that did take place on-duty.

[1] The Grievant's duties included working as a court officer; the citizen's estranged wife worked at the court as a deputy clerk.

2. Unfounded. Phone records and actual "on the record" time of court sessions could not be compared. Court personnel, to include the judge, dispute this.
3. Founded. During a 16-day time frame of phone records, there were 135 text messages received by and 122 text messages sent by Sergeant Hauenstein during his "on-duty" time. Some were admitted to have occurred while Hauenstein was operating his patrol car.
4. Founded. The preponderance of CAD history, GPS data and what were thought to be completely private at the time Facebook® messages indicate a sexual encounter occurred on August 25, 2011 during Sergeant Hauenstein's paid lunch break while in an on-duty status.
5. Founded. In an August 16 text message to the complainant Sergeant Hauenstein advised that he would have the complainant arrested or arrest him himself.

Conclusion: The investigation did support the allegation of Sergeant Hauenstein and Mrs. [P] admittedly met for lunch at his residence on August 25, 2011 where a sexual encounter took place. CAD history, GPS data and Facebook® messages, along with witness reaction and statements provided amount to a preponderance of the evidence that a sexual encounter did occur. As to the other allegations, some phone calls and text messages occurred in an on-duty status, the majority of their communication did not. Court personnel dispute any claims of inappropriate conduct at the court, to include when "in session." The threats of arrest were verified by text message content provided by the complainant, but mitigated by Hauenstein as being dependent upon the complainant's threatening actions, which never materialized.

POSITIONS OF THE PARTIES

Division Position

Through the AI, it was found the Grievant did participate on August 25, 2011 in a sexual encounter during his paid, on-duty meal break. He then raved of this guilty pleasure in a Facebook post that stated:

> You know what the true definition of HOT is? It's when you come home from work and the end of your comforter is pulled out from the footboard because your girlfriend grabbed it while she was having an orgasm at lunchtime!!!! That's HOT!!!!!

When questioned in the AI about the sexual encounter, the Grievant initially claimed he did not recall. When pressed further, the Grievant claimed he was baiting his girlfriend's estranged husband, as the Grievant knew the husband was hacking into his estranged wife's Facebook posts. The AI revealed, however, the Grievant did not learn of the hacking until October 1, 2011.

When asked a second time during the AI if he recalled the August 25, 2011 sexual encounter, the Grievant responded:

> No I don't recall and I can, I can honestly say I know there wasn't one because for 18 years I've never had sex in uniform. And, for 18 years I have never got a blow job in uniform. I've never had sex in uniform, I've never had anyone in my patrol car for 18 years and I was married for 14 years of it. And you know, that's why it is so easy to answer as no we didn't have sex on August 25th. Because I've never had sex in uniform.

The Grievant was asked during the AI to explain his August 25, 2011 Facebook post. He responded:

> She may have had an orgasm that day; we have done it in the past when I'm off duty during her lunch. Umm she has an hour lunch umm; she may have umm you know it depends. It doesn't take me; you know for a significant other to have an orgasm and [laughter from Grievant] well, it's the truth.

During the AI, the Grievant was asked four times if he had an on-duty sexual encounter with his girlfriend during his shift. He denied an encounter took place. He did not say (as later claimed in the Step Two proceeding and at the arbitration) that he watched his girlfriend masturbate, nor did he make any other admission.

The Grievant's girlfriend stated during the AI that it was possible she and the Grievant had performed a sexual act on August 25, 2011 during the Grievant's lunch break and that they have performed sexual acts during lunch breaks in the past. Clearly, the Grievant and his girlfriend were involved in a sexual encounter on August 25, 2011 because a sexual encounter encompasses any and all involvement relating to sex. The Grievant denied in the AI that he was involved in a sexual encounter on August 25, 2011 because he was fully aware if he admitted it, he would be removed. He made the decision to "roll the dice" and lie.

The Union contends the Grievant was not given the opportunity to explain his side of the story during the AI, specifically, that the AI investigator cut him off before he could provide an investigation. If anyone cut off the Grievant, it

was the Union Representative. Additionally, during the pre-disciplinary meeting, the Grievant elected to speak through his Union Representative, who denied any sexual encounter took place on August 25, 2011.

The Union also contends employees can do anything they want during their on-duty meal break as long as they can respond to calls. It is not reasonable, however, to believe an on-duty sexual encounter is acceptable if you are at your home. Article 26.05 of the Agreement defines the time as a "paid meal break," not a sex break. The language does not allow for interpretation that includes items of personal benefit such as watching a significant other masturbate.

The intent of the paid meal break is to give the trooper an opportunity to take in sustenance. The reason the meal break is paid is because the trooper may be called to respond to an emergency during that time. Ohio taxpayers would find it unacceptable for a sergeant, a leader of troopers, to watch a sexual act while being paid, and so does the Division. The Division routinely discharges employees for sex on duty or watching pornography on duty.

Arbitrator Pincus held:

> Any time a member of this bargaining unit engages the Employer's equipment, while "off duty" at a work location, he/she is faced with the strong possibility of having that behavior, if inappropriate, converted to an act of on-duty misconduct.

OSTA v. DPS, Div. of SHP, Case No. 15-00-981201-0167-04-01 (1999). In that case, a grievant was off-duty and used the BAC machine to test himself; he was disciplined. That case relates to this one because the Grievant was using the Division's equipment while involved in an inappropriate sexual encounter.

In a second case heard by Arbitrator Pincus, a grievant's termination was upheld for being involved in a sexual encounter while off-duty but while at the Patrol Academy. Arbitrator Pincus held:

> Rather than removing himself from a potentially fatal situation, he configured the situation to meet other self-serving objectives.

OSTA v. DPS, Div. of SHP, Case No. 15-00-20010709-0081-04-01 (2002).

In the instant case, the Grievant was on-duty, in uniform, and driving a marked patrol car. Similar to Arbitrator Pincus' 2002 case, the Grievant was involved in a sexual encounter and did not remove himself from the situation. He watched a married woman masturbate and then served his ego by making a Facebook post about the sexual encounter. If off-duty troopers can create on-duty status based on their actions as in Arbitrator Pincus' two cited cases, an on-duty trooper on a paid meal break certainly should be held to high on-duty standards.

The instant case involves a sergeant who was given the responsibility to lead by example. Quality leadership and ethics foster growth and respect in an organization. The Grievant failed to demonstrate the leadership and ethics

expected of him. There is no room in public service for rogue, self-serving behavior. Sneaking around when no one is looking and being involved in events of personal interests and self-fulfillment while on-duty have no place in public service.

The Grievant created a fable to conceal the true story of his participation in a terminable sexual encounter while on-duty. For nearly three months, the Grievant denied any wrongdoing. During the Step Two grievance hearing, however, he changed his story and admitted to having a sexual encounter. The record proves the Grievant had several opportunities to explain his actions, but he did not. The lies are many; the Grievant's portrayals of truth are merely skewed forms of his lies. The need for law enforcement officers to be honest at all times has been thoroughly documented in numerous decisions. Many arbitrators, including this one, have recognized and upheld the Division's strong stance on untruthfulness.

The Division has a well-known, highly-regarded tradition of high standards. Citizens are guaranteed troopers will display honesty, integrity, and diligence. Citizens understand our reputable organization would not allow a person to participate in a sexual encounter on-duty, lie about it, and retain his job. Troopers are members of tight-knit, family-oriented communities. Their decisions do not just impact themselves, but the entire community they serve.

The Division met its burden of proving a sexual encounter did occur during the Grievant's August 25, 2011 on-duty paid meal break and that he was untruthful during the AI. The Grievant's girlfriend's admission that a sexual encounter occurred on August 25, 2011, along with the Grievant's Facebook entry, clearly revealed a sexual encounter took place while Grievant was in an on-duty status. This supported the Conduct Unbecoming charge. That charge was further supported when the Grievant admitted he watched his girlfriend masturbate during his paid lunch break. As a result of the Grievant's involvement in the August 25, 2011 sexual encounter and his lack of veracity during the AI and the pre-disciplinary hearing, he was removed from the Division.

If the Arbitrator believes Ohio's citizens would expect the continued employment of a trooper who was involved in an on-duty sexual encounter with a married woman and then lied about that sexual encounter, the Arbitrator should reinstate the Grievant. Reinstatement, however, would have a negative effect on the Division. It would prevent the Division from holding its employees accountable for their on-duty actions during their paid meal break. It also would negate the Division's ability to hold its employees accountable pursuant to the disciplinary grid. From the time an employee enters the Patrol Academy, they are taught untruthfulness will always result in termination. Reinstatement

of the Grievant will make employees believe they can violate the core value of honesty and be reinstated through arbitration.

The Division routinely imposes termination for a violation of its False Statement, Untruthfulness rule. This is thoroughly documented in an abundance of cases and has been authenticated in the disciplinary grid since April 2011. The Division also imposes termination for sex on duty, which includes sexual acts or sexual encounters.

During the AI, the Grievant was arrogant and boastful. He was deceptive throughout the entire process. He demonstrated his lack of character and self-serving attitude at the arbitration hearing when he provided details of the August 25, 2011 sexual encounter. He has rendered himself unfit to serve as a public servant and has tarnished his ability to act as a role model for subordinates. Removal is the standard for violations of this nature.

Union Position

The Grievant did not engage in a "sexual encounter" during his August 25, 2011 paid lunch break. Nor was the Grievant untruthful when questioned about his conduct during his August 25, 2011 paid lunch break. Additionally, the Union does not accept the proposition that engaging in a "sexual encounter" during a paid lunch break amounts to Conduct Unbecoming.

The paid lunch break is a contractual benefit, arguably in lieu of additional wages. The parameters of the paid lunch break are set out in Article 26.05:

> Sergeants assigned to field posts and sergeants as investigators shall receive a paid meal break, not to exceed one-half hour, during each tour of duty. Sergeants shall be subject to emergency calls during his meal break.

Both the AI investigating officer and the Grievant's commanding officer testified at the arbitration hearing regarding the freedom of action available to Troopers during a paid meal break. Both testified that so long as a Trooper remains ready, willing, and able to respond to a call, Troopers are free to treat the paid meal break as their own.

A Trooper's obligation is to be in a position to respond immediately if emergency circumstances arise. It is not the activity engaged in by the Trooper during the paid meal break that determines whether a Trooper has engaged in misconduct; it is whether engaging in the activity allows the Trooper to immediately respond if called to an emergency. Approaching the issue on the basis of permissible and impermissible activity would involve a list drawn up by some sort of Employer Morality Review Board. It would be a bad idea.

At the arbitration hearing, the Union examined supervisory witnesses regarding whether Troopers are free to go home during their paid meal break; whether they could watch television, read, close their eyes to rest, watch porn,

shower. The supervisory witnesses had a problem only with showering – because it could put a Trooper in a position where he/she could not respond fast enough if called to an emergency.

It is undisputed the Grievant notified the Post on August 25, 2011 he was leaving his on-patrol status and was going #38 – paid meal break. His Post Commander testified many of the Troopers at the Post go home for lunch. The Grievant's time at home was less than thirty minutes. He was in full compliance with the requirements of proper usage of the paid meal break.

The AI investigator acknowledged at the arbitration hearing that he did not define "sexual encounter" in his questions to the Grievant; nor was the term defined for the Grievant's girlfriend when she was questioned. The AI investigator took the position it was incumbent upon the Grievant and his girlfriend to ask what was meant by the term. Segen's Medical Dictionary defines "sexual encounter" as "any act between two or more persons involving sexual contact with the genitalia and/or oral mucosa." (Farlex, Inc., 2011.) Defined or not, the Division was pursuing an investigation of conduct that required sexual contact between the participants.

When it became clear to the Division that the Grievant had properly reported his August 25, 2011 paid meal break and it did not exceed thirty minutes in duration, the only question remaining for the investigator would

have been, “Were you at all times ready to respond immediately to an emergency call?” The AI investigator never asked this question. The record is clear, however, that the Grievant did not remove any part of his uniform during his August 25, 2011 paid meal break.

It is clear from the record no “sexual encounter” took place during the Grievant’s August 25, 2011 paid meal break. The Grievant’s girlfriend, however, was forced to reveal to the Division an act of auto-eroticism viewed by her boyfriend during his paid meal break. There was no sexual contact between the Grievant and his girlfriend during his August 25, 2011 paid meal break. The Conduct Unbecoming charge is not sustained by the facts.

Having established no “sexual encounter” took place, the Union nonetheless strenuously points out that a sexual encounter is not impermissible conduct during a paid lunch break. If a sexual encounter is accomplished in a manner and condition of dress that does not impact upon the Trooper’s potential immediate response to an emergency call, it is not the business of the Division to explore sexual conduct during a paid meal break.

The Grievant was charged with lying during the AI. His alleged lie was that he had not engaged in a “sexual encounter” during his August 25, 2011 paid meal break. The AI investigator concluded the Grievant had lied when the Grievant allegedly boasted in an AI interview that “it doesn’t take much for his

significant others to have an orgasm." Though the AI investigator did not have the interview transcribed, the Union did. The Grievant actually said, "it doesn't take me, you know, for a significant other to have an orgasm." The AI investigator's false characterization of what the Grievant said deprived whoever makes the final decisions on termination of the Grievant's actual statement that all but declares the Grievant's girlfriend achieved orgasm without the Grievant's interaction.

The Division's conclusion of the Grievant's Conduct Unbecoming is thus manufactured – first, by cloaking the meaning of "sexual encounter" to expand the activity under examination, and second, by falsifying the evidence by changing a key response of the Grievant.

This case turns on whether the Grievant engaged in impermissible conduct during his August 25, 2011 paid meal break and then lied about it during the AI. It is amply clear the Grievant engaged in nothing improper during his August 25, 2011 paid meal break and never lied about that conduct.

The Grievant must be restored to his position as a Sergeant at the Van Wert Post, with no break in service or seniority. He must be made whole as to wages and benefits. The Union requests the Arbitrator to retain jurisdiction for a sufficient period of time to guarantee the Award is fully implemented.

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

Conduct Unbecoming

The Division charged the Grievant with violating Rule 4501:2-6-02(I)(3):

> A member may be charged with conduct unbecoming an officer in the following situations:
>
> (1) For conduct, on or off duty, that may bring discredit to the division and/or any of its members or employees. A member shall not engage in any conduct which could reasonably be expected to adversely affect the Public's respect, confidence, or trust for Ohio state highway patrol troopers and/or the division.
>
> ...

Specifically, the Statement of Charges provides the Grievant:

> ...engaged in a sexual encounter during his paid meal break.

The Division has proven that the Grievant, during his August 25, 2011 paid meal break at his home, watched his girlfriend masturbate. As best as can be discerned from the record, the Grievant did not participate in any way other than watching. Later that day, the Grievant sent a Facebook email to his

girlfriend telling her how "hot" it was to watch her. The Grievant did not "post" his comment on his Facebook page. The Grievant's girlfriend's estranged husband obtained the email and used it in various ways, including as part of his citizen's complaint to the Division that the Grievant was conducting himself inappropriately while on duty.

During the AI, the Grievant said "I don't recall" having had a "sexual encounter" during the August 25, 2011 paid meal break; "I've never had sex in uniform"; "I never got a blow job in uniform"; "that's why it is so easy to answer as no we didn't have sex on August 25th. Because I've never had sex in uniform." After the removal, at the Step Two grievance proceeding and at the arbitration hearing, the Grievant described the masturbation scene. The Division's post-hearing brief bases the Conduct Unbecoming charge on the proven masturbation scenario.

According to the Statement of Charges, the Conduct Unbecoming charge is based on the fact that in the AI, "it was found that Sergeant Hauenstein engaged in a sexual encounter during his paid meal break." Thus, due to what the Division has been able to prove in the record, the Arbitrator is charged with determining whether the Grievant's proven masturbation-watching conduct during his paid meal break constitutes a "sexual encounter" that would support a Conduct Unbecoming charge. The Arbitrator finds it does not.

A sexual encounter suggests physical contact. The Division was unable to carry its burden of proving there was any physical contact between the Grievant and his girlfriend during the Grievant's August 25, 2011 paid meal period. If the Division was intent on determining whether the Grievant observed a sexual act during his August 25, 2011 paid meal break, it was incumbent upon the Division to ask that question, or at least to clarify its terms, rather than asking whether the Grievant had engaged in a "sexual encounter."

Division witnesses testified a Trooper's obligation during a paid meal break is to be ready, willing, and able to respond immediately to an emergency call. The Division was unable to prove the Grievant violated this obligation.[2]

False Statement

The Division also charged the Grievant 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.

Specifically, the Statement of Charges provides the Grievant:

[2] Arbitrator Pincus' 2002 case is not analogous. It involved the removal of a Trooper who, while a temporary instructor at the Patrol Academy, engaged in direct sexual contact in an Academy storeroom with a cadet under his command. Such activity is not analogous to the instant matter, which did not involve direct sexual contact, did not involve a subordinate individual, and did not take place at a Division facility.

> ...was untruthful when questioned about his behavior in the... administrative investigation.

The false statement charge centers on the following portions of the AI interview on October 25, 2011:

> Investigator: Did you meet Mrs. [P] during the [week of August 22, 2011]?
>
> Grievant: I may have...I very well met her either [Monday or Thursday]...I believe I met her one of the days...I may have ran by my house for 38. It's very possible.
>
> Investigator: ...so you may have been at your residence...on Thursday August 25th you think you may have stopped by your residence....
>
> Grievant: ...Yeah, there's a very possibility. I may have stopped by there.
>
> Investigator: ...[T]he complainant provided some information...through Facebook that...indicates a sex a sexual encounter may have taken place at your residence with [Mrs. P] on August 25th....
>
> Grievant: And that's a Thursday?
>
> Investigator: Thursday.
>
> Grievant: OK.
>
> Investigator: During your lunch period, did it?
>
> Union Representative: I want to get an objection on the record to that question, sir, just to make it formal...it's the Union's position that that question, that type of question is overstepping the employer's bounds...and that they have no, the employer has no right to inquire what's going on in his house while he's there on his lunch break.

Investigator: OK, so your objection is so noted, I'll go ahead and ask you to answer the question.

Grievant: Uh, that specific day I don't recall. I will tell you, though, that, you know me well enough that you know how I can push peoples' buttons and manipulate them. [Mr. P] doesn't play poker very well. Every stage of this divorce we have been able to bait him and call him out. Uh, there's been Facebook messages sent to bait him to see if he's tracking, ah, the message you have, um, actually he's referred to that several times. I'm sure it's the same one because of the fact that he's basing his child custody on that one Facebook message. Um, all that has been acquired through him hacking into [Mrs. P's] accounts. Um, the same as our phone messages. She's been on my family plan since July. We discovered he was hacking into her Facebook account August 5th when she moved her furniture out of his house into her new place. Uh, she set up a new account, he hacked into her bank account and got her password. Then he was retrieving messages off of that, and then just the beginning of this month [October], is when we finally, he finally showed his hand that he definitely had been tracking her through Facebook and me through Facebook for the last month. So we changed all of her security settings and email accounts after that. And her and I have since been off of Facebook. We both closed our accounts....

Investigator: ...[W]hen did you determine that he was tracking you in Facebook?

Grievant: Well, we knew he received a message that she sent to me on August uh 4th, about once the divorce was over and stuff like that and her and I um enjoying our lives together, he intercepted that message. So she knew that he was in her account. He had a keystroke program at their home. Um, she changed her account then. Well then he started saying how he had all this stuff on us about being adulterers. Um, it was sometime in October. She had actually blocked him way back in September, Facebook blocked him as did I. Um, but he was still receiving, he had set up her account in a way where everything she did he was being emailed. Every message, every request, every

wall posting, and he admits to that and actually his sister admitted that she knew it as well. And we discovered it sometime in the beginning of uh I believe this month [October] or the end of September. And we went in and changed all the security settings and we have since closed Facebook.

...

Investigator: ...[Going] back to...the question regarding August 25th you don't recall um regarding the sexual encounter, and again your objection is duly noted....

Grievant: No, I don't recall and I can, I can honestly say I know there wasn't one because for 18 years I've never had sex in uniform. And for 18 years I never got a blow job in uniform. I've never had sex in uniform, I've never had anyone in my patrol car for 18 years I and was married for 14 years of it. And you know, that's why it is so easy to answer as no we didn't have sex on August 25th. Because I've never had sex in uniform.

Investigator: OK.

...

Investigator: ...[o]n August 25th...the Facebook message regarding the true definition of hot, and when you come home from work and find that the evidence that your girlfriend has had an orgasm at lunch time. That's hot. That was, can you restate the purpose behind that message again? Just to clarify.

Grievant: She may have had an orgasm that day.; Um, we have done it when I'm off duty um duty her lunch. She has an hour lunch. Uh she may have, you know, it doesn't take me, you know for a significant other to have an orgasm. And, well it's the truth and, basically like I said.

Union Representative: Careful Jeff this is all public record.

...

Grievant: And like I said we have done things to bait him.

...

Investigator: ...August 25th you were on duty stopped by your residence and then went to the Post, um but your assertion is that you've not had sex during your lunch break during a work shift?

Grievant: Yes, my assertion is that I've never had sex on duty for 18 plus years. So it's not hard to remember a specific day when it's never happened in my career.

Investigator: You understand my question because this certainly makes it appear to include you know obviously our cars are GPS equipped and all that.

Grievant: Right.

Investigator: I mean you were at your residence at lunchtime on August 25th and this would certainly indicate that a sexual encounter took place. Your assertion is it didn't.

Grievant: My assertion is I've never had sex on duty yes.

Investigator: All right.

Grievant: I'm not saying that I wasn't at my house August 25th, on the way to the Post. I'm not saying that at all or that that's, my Facebook message to [Mrs. P]. But I stand steadfast that that's my assertion that I have never had sex on duty.

Investigator: ...[A]gain to clarify one more time you didn't have on that date, you uh, you say you didn't have a sexual encounter with um [Mrs. P] during your work shift?

Grievant: No.

The false statement charge also relates to the following portion of the AI interview with the Grievant on November 14, 2011:

> Grievant: [October 1 is] when we found out that [Mr. P] had been hacking into [Mrs. P's] Facebook account the last few months.

The Division's False Statement charge is based on: 1) the Grievant's AI denial that a sexual encounter took place during his August 25, 2011 paid meal break; and 2) the Grievant's claim that he sent his August 25, 2011 "hot" Facebook email to his girlfriend for the purpose of "baiting" her estranged husband.

The Grievant's Denial that a Sexual Encounter Took Place

As set out above, during the AI, the Grievant denied having sex on August 25. He also stated he had never gotten a "blow job in uniform." He did not deny watching his girlfriend masturbate in his bed during his paid meal break; he was not asked that specific question. As to whether he had a "sexual encounter" that day, he answered, "Uh, that specific day I don't recall" and "No, I don't recall and I can, I can honestly say I know there wasn't one because for 18 years I've never had sex in uniform."

So one question for the Arbitrator is whether two months after the day in question, the Grievant remembered what happened that day during his paid meal break. Given that the AI Investigator made reference to the August 25 Facebook message that "indicates a sex a sexual encounter may have taken place at your residence with [Mrs. P] on August 25th," the Arbitrator finds the Grievant was not telling the truth when he said in the AI "I don't recall."

When the Grievant Learned His Girlfriend's Estranged Husband Had Hacked Into Her Facebook Account

The significance of when the Grievant learned of the Facebook hacking is that the Grievant referred to this knowledge to support his October 25, 2011 AI interview explanation of the August 25, 2011 "hot" Facebook email. I.e., the Grievant suggested the email may not have been referring to an actual sexual incident, but rather was being used as "bait" to have his girlfriend's estranged husband's hacking revealed.

The Grievant stated in his October 25, 2011 AI interview that he and his girlfriend learned on August 5, 2011 that her estranged husband had hacked her Facebook account:

> We discovered he was hacking into her Facebook account August 5th when she moved her furniture out of his house into her new place. Uh, she set up a new account, he hacked into her bank account and got her password. Then he was retrieving messages off of that, and then just the beginning of this month [October], is when we finally, he finally showed his hand that he definitely had been tracking her through Facebook and me through Facebook for the last month.

The October confirmation is reflected in the Grievant's October 1, 2011 text message to his girlfriend's estranged husband:

> Fuck you asshole, we got proof of your little hacking tricks and your sister just dimed your ass out. I'll be having my deputy friend seizing your comp[uter] and talking to the pros[ecutor] on Monday....game on douche!

When asked about the October 1, 2011 text message in his November 14, 2011 AI interview, the Grievant said:

> That's when we found out he had been hacking into her Facebook account the last few months.

The Division took the Grievant's November 14, 2011 AI interview statement as contradictory to his October 25, 2011 AI interview statement that he knew by the time of the August 25, 2011 "hot" Facebook email that his girlfriend's estranged husband had hacked into her Facebook account. While the two AI statements are not entirely consistent, they can be reasonably aligned – i.e., in August, the Grievant and his girlfriend suspected the hacking; in October, they became certain of the hacking.

Conclusion Regarding False Statement Charge

The Grievant was untruthful when he stated in his October 25, 2011 AI interview, "I don't recall" what took place August 25th. By saying he did not recall, he did not answer AI questions completely or accurately.

The Grievant's inconsistent statements regarding when he knew his girlfriend's estranged husband had been hacking into her Facebook account do not rise to the level of untruthfulness, given there is a reasonable way to align the statements.

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.

As set out above, the Arbitrator has determined the Grievant was untruthful when he claimed in his October 25, 2011 AI interview "I don't recall" what happened during his August 25, 2011 paid meal break. The Arbitrator does have serious concerns about the questions asked of the Grievant in the October 25, 2011 AI interview. The Division should analyze whether the appropriate field of inquiry in a situation such as this is whether a Trooper was at all times ready, willing, and able during their paid meal break to respond to emergency calls.

This concern about the questions, however, does not absolve the Grievant's absolute duty to tell the truth in an AI interview. The Grievant made the choice to say "I don't recall," rather than give a complete and accurate

accounting of what occurred during his August 25, 2011 paid meal period. By making this choice, he did not follow the basic tenet of "work now, grieve later." I.e., he took it upon himself to determine what was an appropriate question. As an employee of a law enforcement unit such as the Division, the Grievant does not have the luxury of deciding for himself which questions in an AI are appropriate and which are not.

While the Grievant has an excellent deportment record, he knew, as do all Troopers, that honesty and integrity are essential in the Division. Troopers are told from their first days in the Patrol Academy that lack of truthfulness results in removal.

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.

June 3, 2012

Susan Grody Ruben
Arbitrator