

Thomas J. Nowel  
Arbitrator and Mediator  
Cleveland, Ohio

IN ARBITRATION PROCEEDINGS PURSUENT TO  
AGREEMENT OF THE PARTIES

In The Matter of a Controversy Between:	)	Grievance No.
	)	15-03-20111209-
The Ohio State Troopers Association	)	0129-04-01
	)	
and	)	ARBITRATION
	)	OPINION AND
Ohio Department of Public Safety, Division	)	AWARD
Of the Ohio State Highway Patrol	)	
	)	Date:
	)	November 21,
Re: Paul E. Gerke	)	2012

APPEARANCES:

Sergeant Corey W. Pennington, for the Ohio Department of Public Safety, Division of the Ohio State Highway Patrol; and Herschel M. Sigall, Esq., Elaine N. Silveira, Esq., Robert F. Cooper and Larry K. Phillips for the Ohio State Troopers Association.

## INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the Ohio Department of Public Safety and the Ohio State Troopers Association. The parties are in disagreement regarding the termination of Paul Gerke who had been a State Trooper assigned to Berea District 10 in the Commercial Motor Vehicle unit. The Grievant, Mr. Gerke, was terminated on December 7, 2011. Mr. Gerke grieved the termination on December 7, 2011, and the Employer denied the grievance on January 25, 2012. The grievance was appealed to arbitration by the Union on January 27, 2012. The parties entered into an Agreement on February 15, 2012 to delay the arbitration of the matter which had been scheduled for hearing on February 22, 2012 (Jt. Exb. 2). In addition to other agreements between the parties, this document included a waiver of “any consideration for back pay and benefits from the original February 22<sup>nd</sup> hearing date, until the date of the subsequent hearing should the Grievant be restored to employment and awarded back pay as a result of the arbitrator’s decision.”

The Arbitrator was selected by the parties, pursuant to Article 20, Section 20.08, of the collective bargaining agreement to conduct a hearing and render a binding arbitration award. The parties then waived the hearing at arbitration and agreed to submit the matter by way of briefs and exhibits to the Arbitrator by October 22, 2012. The parties stipulated that the grievance was properly before the Arbitrator.

## ISSUE

The parties stipulated to the following issue to be decided by the Arbitrator.

“In conformance with Article 20, Section 20.08 of the Collective Bargaining Agreement the parties submit the following issue for resolution by the arbitrator. Was the Grievant discharged for just cause? If not, what shall the remedy be?”

## JOINT STIPULATIONS

1. This grievance is properly before the Arbitrator.
2. The parties agree to submit this case on briefs for a binding decision by the Arbitrator.
3. Andrea Martinson, Executive Secretary to the District 10 Captain received cellular phone bills from the Ohio Turnpike Commission (“OTC”), then, forwarded them to the appropriate post. The post would forward the bill to the appropriate Employee to review and provide payment. The Employee would calculate the minutes used multiplied by the rate per minute and submit payment back to Andrea Martinson for processing. She checked their math and sent the payment. If the payment was not correct, she returned it for the correct payment. She would not review the bill to see if the unit identified all personal calls. She would have no way of knowing which calls were personal.
4. When notified that he did not properly reimburse the OTC for use of his cell phone, Gerke made restitution to the OTC on 12/3/11 in the amount of \$121.90.

## RELEVANT PROVISIONS OF AGREEMENT

### Article 19 – Disciplinary Procedure

#### Section 19.01 Standard

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

#### 19.05 Progressive Discipline

The Employer will follow the principles of progressive discipline. 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.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines from the employee's wages.

## GRIEVANCE

The grievance of Paul Gerke reads as follows.

"On 12-5-11 I was advised that I was to be terminated for false statements and performance of duty. This is without just cause and is not progressive. To be reinstated and to be made whole."

## BACKGROUND

The Grievant, Paul Gerke, commenced his employment as a State Trooper in November, 1992. He had been assigned to Berea District 10 in the Commercial Vehicle Unit since 2002.

In August, 2011, the Employer was considering a new work schedule for the Grievant and Trooper Frank Benett. The change involved new start times for both individuals as proposed by Sergeant J. R. Miller. Trooper Benett was dis-satisfied with the change and contacted Captain C. J. Zurcher directly. Trooper Benett felt that the schedule change was being implemented to allow for the Grievant to have a preferred start time which would facilitate an extra-marital affair. Trooper Benett left a voicemail on August 22, 2011 for the wife of the Grievant insinuating that her husband was having an affair. Captain Zurcher then decided that Benett's start time would not change. Trooper Benett had been a close friend of the Grievant and of members of his family.

The Grievant quickly learned of the voicemail and indicated on August 24, 2011 that he was interested in a transfer away from Benett. Lieutenant Morgan stated to the Grievant that an investigation of Benett's actions would occur, and he

ordered Trooper Benett to have no contact with the Grievant or his wife. The Grievant did not pursue a transfer.

The Grievant was interviewed as a witness over the telephone on August 24, 2011. Then Sergeant C. M. Bass was assigned to investigate the incident. On August 29, 2011, Sergeant Bass interviewed the Grievant in the matter. The Grievant suggested that his relationship with Trooper Benett had deteriorated due to the potential schedule change. They had previously been best friends. Sergeant Bass asked the Grievant if he was having an affair. He stated "I hope not."

Sergeant Bass interviewed Trooper Benett on August 31, 2011. He stated that Sergeant Miller admitted to making the schedule change to accommodate the Grievant. Benett described his conversations with the Grievant's wife and his prior relationship with the Gerke family. He stated to Sergeant Bass that the Grievant sent and received sexually explicit images on his Ohio Turnpike Commission (OTC) cell phone, and that Sergeant Miller had become aware of this activity. Trooper Benett stated that the Grievant was involved in a relationship with Patricia Anderson, a contract worker at the Portage Service Plaza and that he had engaged in inappropriate activity with her during work hours. He stated that Sergeant Miller would not pay attention to his concerns regarding the Grievant.

Trooper Benett stated that the Grievant left work sick when notified that he must take a random drug test. Benett doubted the veracity of the Grievant and thought he may have been involved with marijuana. The Grievant was administered the drug test the following day.

Investigator Bass then obtained the Grievant's cell phone. He accessed the previous thirteen months of the Grievant's cell phone bills on September 1, 2011. In reviewing the billings, Sergeant Bass noticed frequent incoming and outgoing calls to a particular phone number, 330-330-2.... Troopers assigned to the Ohio Turnpike are issued OTC cell phones, and they are permitted personal calls with the requirement to pay for such calls on a monthly basis. Bass noticed that the Grievant made payment for some months but made no payments during other months. Investigator Bass determined that the 330 phone number was that of Patricia Anderson. All thirteen months of telephone records included numerous calls to the Anderson number. The Grievant checked off his personal calls and then made payment at the appropriate rate. Bass determined that for eight of the thirteen monthly billing statements, the Grievant did not check off the Anderson number and made no payment for the calls. He paid for calls to the Anderson number the other five months.

Trooper Benett retired from the Highway Patrol effective September 30, 2011.

Sergeant Bass interviewed Sergeant Miller on September 22, 2011. Miller stated that his proposed schedule changes were designed to allow Troopers to better monitor sleepy commercial drivers during the early morning hours. Miller indicated Benett's unhappiness with the schedule change and stated further that the Grievant was not comfortable with it as well. Miller stated that his relationship with the Grievant was limited to work. The Grievant notified Sergeant Miller of the call Benett made to his wife. Miller stated to Investigator Bass that he was not aware of

a relationship between the Grievant and Patricia Anderson. Miller stated that Benett had not discussed inappropriate behavior of the Grievant with him and also indicated that he was never shown obscene material from the Grievant's cell phone. Miller stated that Trooper Benett had a poor relationship with all of his co-workers.

The Employer determined that the Grievant, Paul Gerke, was now the subject of the internal investigation. Sergeant Bass conducted an investigatory interview of the Grievant on September 28, 2011. The Grievant was accompanied by his Union representative, Dave Hunt, and Sergeant Huggins from the Administrative Investigative Unit was also present.

The Grievant stated that Patricia Anderson was a friend. He stated that they had been involved in the past but were now just friends. He confirmed that the 330 phone number was Anderson's. The Grievant denied kissing Anderson, having sex with her or having her sit on his lap during working hours.

Sergeant Bass questioned the Grievant regarding the use of his OTC cell phone. He stated that he reimburses the state by check and pays an additional monthly fee for unlimited texting. The Grievant stated that he did not know the phone number of his wife. He stated that his calls to Anderson were personal, and he reimbursed the OTC for those calls. The Grievant stated that, if he did not pay for the Anderson calls, it was an oversight and not intentional. He did not intentionally fail to pay for the calls. He signed a statement each month which stated that he was in compliance with the reimbursement policy of the Ohio Turnpike Commission.



The Grievant was questioned regarding obscene images on his OTC cell phone. He stated that he received two such pictures from a relative and showed one to Trooper Benett. He did not forward them to anyone.

The Grievant was asked why he missed his random drug test. He stated that he was ill that day due to a severe headache which was caused by an aneurism. He received permission from supervision to leave work without taking the test. The Grievant denied being in a vehicle while Anderson smoked marijuana. This had nothing to do with his missed drug test and blamed Benett for misinformation.

Sergeant Bass attempted to determine the home address of Patricia Anderson. He found two addresses on Brownlee Avenue in Youngstown, Ohio. Bass submitted both addresses to the automated vehicle locator (AVL) a GPS type of device that tracks the location of highway patrol vehicles. Investigator Bass determined that the Grievant reported off duty on May 16, 2011 and May 31, 2011, but on both occasions his patrol vehicle was located at or near an address on Brownlee Avenue which was a fifteen minute drive from his home address of 192 Wilson Avenue in Niles, Ohio.

Sergeant Bass conducted a second investigatory interview of the Grievant on October 19, 2011. The Grievant was accompanied by his Union representative. The Grievant was questioned regarding the missed drug test. He reiterated that he had a severe headache due to an aneurism, was sick to his stomach and had vomited. He was unable to comply with the order to take the test as he went home due to illness. He did not remember failing to sign off when he arrived at home and did not

remember phone calls later that day. He emphasized the severity of his headache. Bass questioned the Grievant again regarding his relationship with Trooper Benett.

Investigator Bass questioned the Grievant regarding his patrol vehicle being at or near the home of Anderson based on the AVL. The Grievant stated that Troopers are considered "on-duty" when driving a patrol vehicle. The Grievant stated that he always signed off his MCT when he arrived at home. The Grievant stated that he was not certain of the street on which Anderson lived, but, when asked if Brownlee sounded familiar, he stated that it was. The Grievant stated that he had been to the Anderson home twice in his patrol vehicle. He stated it had been a year since he had driven his vehicle to that location.

The Grievant had stated previously that he had never seen Anderson during work hours except in passing at the turnpike plaza. He did not notify the dispatcher that he was at the Anderson home. He stated that he was passing through when he stopped at her house on the two occasions. The Grievant stated that he logged off as if he had arrived at home when he stopped at the Anderson home because he did not want to draw attention to his location. This would have been the time he would have arrived at home in any event. The Grievant reiterated that now his relationship with her was just friendship. The Grievant stated that the only times he logged off the MCT when going to her home were the two incidents discovered by the Employer. Sergeant Bass questioned the Grievant regarding his personal life and affairs including his sessions with a psychologist.

Following the second interview of the Grievant, Sergeant Bass conducted an additional investigation regarding additional incidents of the Grievant signing off as

if at home but being at a difference location. It was determined from the AVL that the Grievant was parked in his patrol vehicle in a parking lot at 146 East Liberty, Girard, Ohio on July 7, 2011, July 26, 2011, September 7, 2011 and September 27, 2011. This location is 5.8 miles from his home. The Grievant was interviewed a third time by Sergeant Bass.

Sergeant Bass conducted an investigatory interview of Patricia Anderson on November 17, 2011 over the telephone. Anderson cooperated with the questioning. She stated that the Grievant stopped at her home numerous times over a period of time but only did so in his patrol vehicle on two occasions. She stated that she lives on Brownlee Avenue and moved from another residence on the same street, Brownlee Avenue. She stated that she never had an intimate relationship when the Grievant was on duty. She admitted that the relationship was continuing.

The Grievant was notified on November 29, 2011 of a pre-disciplinary hearing based on violation of Rule 4501:2-6-02 (E) (1), False Statements, Truthfulness; and Rule 4501:2-6-02(B) (1) (5), Performance of Duty. The notice stated that *it is charged that you failed to properly reimburse the Ohio Turnpike Commission for the use of an issued mobile phone. It is also charged that you falsely indicated the appropriate payments were made. Additionally, you were untruthful during the Administrative Investigation and provided false locations."*

Following the pre-disciplinary hearing, the Grievant's employment was terminated on December 7, 2011.

## POSITION OF THE EMPLOYER

The Employer states that the Grievant was not truthful during the interviews which were conducted following the Benett incident. The Division therefore had just cause to terminate the Grievant. The Employer has a history of terminating Troopers with good records for a first offense of dishonesty. The Grievant told numerous versions of his relationship with Patricia Anderson and his wife's knowledge of the affair. He stated during the investigation that the affair with Anderson was over, but Anderson stated that it was ongoing when interviewed by Sergeant Bass. The Grievant stated that he received obscene photos on his cell phone on two occasions, but records indicate that this occurred many more times. Further, the Grievant was untruthful when he stated to Lieutenant Morgan that he was not involved in an extra marital affair.

The Employer argues that the Grievant failed to reimburse the OTC for eight of thirteen months reviewed for numerous calls made to Patricia Anderson in order to not draw attention to the relationship. The Employer states further that the missed payments were not just an oversight. The Grievant missed every call for eight separate months. For five months the Grievant paid for 117 calls to Anderson, but for eight months he failed to pay for 193 calls. Clearly not an oversight. Although the Grievant stated that he did not know the telephone number for his wife, he made 335 calls to her number on the OTC cell phone and paid for all during the thirteen months which were under review. The Grievant paid the outstanding telephone bills when he learned of his impending termination of employment.

The Employer states that the Grievant was untruthful when he stated that he did not meet Anderson while on duty. The investigation revealed that on two occasions he reported off duty and at his home location when, in fact, he was at the Anderson home. Investigator Bass asked the Grievant if he logged off duty indicating he was home at any other time, and he responded that he had not. The Grievant was again dishonest when it was determined that on four occasions he signed off duty but was at a parking lot which was 5.8 miles from his home.

The Employer argues that one instance of a Trooper falsifying his location is grounds for termination of employment. The Employer uncovered six instances in the case of the Grievant.

The Employer cites a number of arbitration cases which found just cause for the termination of State Troopers for dishonesty. "Instead of parking his patrol car at his home as required and returning to Patricia Anderson's residence in civilian attire, in his own vehicle, while in an off-duty status, he made the decision to stop on his way home because it was convenient for him and unlikely his Employer or spouse would find out" (Employer's post hearing brief).

The Employer states that the Grievant was evasive regarding his knowledge of the location of Anderson's residence because she had moved, but Anderson stated during her interview that she moved from one residence to another on the same street, Brownlee.

The Employer argues that it is a well established principle that law enforcement officers are held to a higher standard than members of the general public. The courts and arbitrators have little tolerance for dishonesty especially

during internal investigations. The Division of the Ohio State Highway Patrol has consistently terminated employees for making false statements and dishonesty. The Grievant has lost the trust of the Division and cannot fulfill his duties to testify in behalf of the Employer in a court of law. This is a routine duty for State Troopers. Troopers are told from the first day of employment that untruthfulness will result in termination of employment. The Grievant clearly was deceptive during the investigation. The Employer asks the Arbitrator to deny the grievance of Paul Gerke and the Union in its entirety.

#### POSITION OF THE UNION

The Union argues that the termination of the Grievant was not for just cause. Although the Employer pursued a number of potential charges against the Grievant, it's case came down to three allegations. Did the Grievant intentionally misidentify personal calls on the OTC cell phone to avoid making payment? Did the Grievant, after logging out from being on duty, stop to visit a female friend? Did the Grievant, after logging out from being on duty, stop at a barber shop on his way home?

Records indicate that the Grievant paid for all personal calls, and when he mistakenly failed to do so from time to time, he paid for the missed calls. This was common practice, and this has never been a reason for discipline. The Employer reviewed one year of travel records and was able to isolate a few instances of the Grievant stopping on the way home after logging off duty.

The Employer attempted to find the Grievant guilty of multiple violations of policy including having sex on duty, being involved with marijuana, transmitting

pornographic photographs, avoiding a random drug test and other charges. None of these allegations were proven. Following all of this, the Employer terminated the Grievant over baseless issues.

The Union states that the Grievant is a 19 year veteran who has never been disciplined during his years of service. He has received state-wide and national recognition for his performance and was selected "Trooper of the Year" on two occasions. The Grievant's personnel file reveals exemplary performance evaluations and high level of quality work.

The Union states that the Grievant was afforded unemployment compensation from the state, and, when his right to this benefit was challenged by the Employer, the Review Commission determined that there had not been just cause to terminate his employment. The Commission determined that the Grievant had not intentionally violated written work rules. The Union argues that an arbitrator must give consideration to the findings of the Unemployment Compensation Review Commission as being relevant evidence.

The Union states that the Grievant had an affair. His friend, Trooper Benett, became angry regarding a shift change that he perceived to favor the Grievant. Benett left a voicemail for the Grievant's wife insinuating that her husband was cheating on her. The Employer opened an investigation into the conduct of Trooper Benett who then accused the Grievant, his former friend, of having an affair during work hours. The Union argues that this shifts the Employer's investigation away from Benett and onto the Grievant. Suddenly the Grievant is being investigated for having inappropriate relations while on duty, intentionally missing a random drug

test and violating OTC cell phone policies. The Union states that these are phony, unfounded allegations. The Employer then determined that the Grievant did not pay for many personal calls to Patricia Anderson, but this was clearly an oversight on the part of the Grievant and not uncommon. When asked to pay for missed personal calls, he always made up the payment. The Grievant was not intentionally avoiding payment for the calls. He had made numerous payments for personal calls to Anderson during a number of monthly billings.

The Employer failed to find fault with the missed random drug test. Evidence indicated that he was legitimately sick on the day in question. He reported to work the following day and took and passed the drug test.

The Union states that there was no evidence that the Grievant smoked marijuana or was with Anderson when she smoked marijuana in a patrol vehicle, and there was no violation of policy when he was sent an obscene photograph on his cell phone from a relative. Unable to find specific policy violations after three investigative interviews, the Employer then questioned the Grievant regarding a small number of stops in his patrol vehicle at the end of the work day before ending at his home, a minor and technical violation of policy. The Employer had no interest in reviewing cell phone records of other Troopers to determine if personal calls were paid timely, and records were not pulled to determine if other Troopers made stops on the way home at the end of the work day. Instead the Grievant was singled out when the Employer was unable to substantiate the earlier charges it had investigated.



The Union argues that the termination of the Grievant was not for just cause. The Employer failed to adhere to the principle of progressive discipline as outlined in the collective bargaining agreement. The Grievant has gained national recognition in commercial fatigued driver enforcement. The Union states that the Grievant should be reinstated to his position as Trooper with no loss of pay and benefits and should be made whole.

## DISCUSSION

The issues surrounding this case are many, marital infidelity, missed drug test, suspicious schedule changes, lost friendship, unpaid cell phone bills, after work stops in patrol vehicle and other matters. After an exhaustive investigation of the Grievant, the Employer charged him with two violations of policy, Rule 4501:2-6-02 (E) (1), False Statements, Truthfulness and Rule 4501:2-6-02 (B) (1) (5), Performance of Duty. The second charge of policy violation is related to the first charge of False Statements, Truthfulness. These rules are as follows:

*4501:2-6-02 (E) (1) False Statements, truthfulness*

*(1) A member shall not make any false statement, verbal or written, or false claims concerning his/her conduct or the conduct of others.*

*4501:2-6-02 (B) (1) Performance of Duty*

*(1) A member shall carry out all duties completely and without delay, evasion or neglect. Members shall report for duty at the time and place specified or scheduled by their supervisor, properly attired, and ready to assume on-duty status.*

*(5) Members who fail to perform their duties because of an error in judgment or otherwise fail to satisfactorily perform a duty of which such member is capable, may be charged with inefficiency. Unsatisfactory performance may be demonstrated by a lack of job-related knowledge, an unwillingness or inability to perform assigned tasks, failure to take required action, or failure to take appropriate action at any time.*

The Employer relied heavily on the investigative interview of Trooper Benett in its determination to conduct an exhaustive investigation of the Grievant. Allegedly Benett and the Grievant were best friends for a period of time. Benett frequently socialized with the Grievant and members of his family and had become a trusted friend of his spouse. Evidence indicates that Benett was aware of the Grievant's extra-marital indiscretions for a lengthy period of time. The fact that he chose the scheduling incident to advise the Grievant's wife of his unfaithfulness casts doubt on his sincerity. In the voice mail he left with the Grievant's wife, he states, "I love ya guys." A strange comment after suggesting the Grievant was unfaithful to her knowing the damage it would do to the marriage and his friendship with Trooper Gerke. As the Employer probed further during the interview of Benett, he revealed more details of his friend's supposed indiscretions including sex acts during working hours, a marijuana incident and obscene photos on an OTC cell phone. But there are no corroborating witness statements by other Troopers or other employees at the turnpike plaza concerning any of the allegations. Why did Benett wait so long to reveal the Grievant's indiscretions or alleged policy violations? At the end of the day, the Employer did not charge the Grievant with policy violations related to information gathered from Trooper Benett whose statements seemed self serving and questionable. Interestingly, he retired shortly after the incident and investigatory interviews.

While the Grievant's actions regarding his illness, when scheduled for a random drug test, seem confusing and barely in conformance with good protocol, there is no evidence to dispute his claim of vomiting and severe headache. The

Employer did not charge him with an abuse of sick leave or purposeful avoidance of the drug test. There was no evidence to dispute the Grievant's explanation for being out of contact when he returned to his home. He took and passed the drug test the following day, and the Grievant had no history of drug abuse or failure of random drug tests.

The Grievant admitted to receiving obscene photographs on his OTC issued cell phone, but there was no evidence that he forwarded or sent the photos to other individuals which would have been violations of policy. It was poor judgment and behavior when he showed the photos to Benett and others, but the Employer did not charge the Grievant with a violation of the cell phone policy in this instance.

The Employer argues that the Grievant was not truthful when questioned regarding details of his relationship with Patricia Anderson, that his story shifted a number of times regarding the extent of the affair and his wife's knowledge of the involvement. It is difficult to understand the Employer's motive in questioning the Grievant so extensively regarding his marriage and relationship with his wife over a series of investigative interviews. This was a difficult subject for the Grievant although he admitted the affair and the difficulty it created for his marriage and his family members. At one point the Employer questioned the Grievant regarding a private conversation with his psychologist. Although this questioning seems out of bounds, the Grievant revealed the content of the conversation. At no time did the Employer infer that it was a violation of policy for a Trooper to have an extra-marital affair. While there seemed to be some inconsistencies with the Grievant's responses, there is no evidence that his statements were dishonest, and, although

Anderson suggested that the relationship was continuing, there is no evidence to disprove the Grievant's assertion that it was only platonic.

The Employer has the burden to prove that the Grievant was dishonest in his responses during the investigative interviews, and this is a heavy burden in light of the Grievant's nineteen years of service and spotless work record. The Grievant admitted to the affair with Anderson. The Employer disputes the Grievant's claim that the two had only been friends over the recent past and contends that the affair was continuing. There is no hard evidence to suggest that this was true. Anderson stated that the Grievant continued to visit with her, but she did not state that there was a continuing sexual relationship. The Grievant had recently assisted Anderson in procuring a job at a state institution. It is only conjecture that the Grievant was still involved in a romantic and sexual relationship with Anderson.

The Grievant failed to reimburse the OTC for many personal telephone calls to Patricia Anderson. The Employer states correctly that he failed to pay for these calls eight of the thirteen months which were reviewed during the investigation. The Employer argues that it is unreasonable to believe that the Grievant accidentally missed eight months of calls to the Anderson number when he paid for all of them for five months. The Employer argues further that the Grievant "untruthfully signed off on saying he did" make payment to the OTC for all of his personal calls. While it is possible that the Grievant purposely avoided paying for the Anderson phone calls, it is also possible that it was careless oversight. He made payments during some months and failed to make payments during other months. The Grievant clearly violated OTC cell phone policy and should have been disciplined for his carelessness

and lack of responsibility, but the OTC cell phone policy is very liberal in its flexibility which allows employees to use them as personal cell phones in an unlimited manner. The policy allows for potential abuse, and the Union suggests that it is common for Troopers to miss monthly payments. Although the Grievant violated the cell phone reimbursement policy of the OTC, it is a stretch to claim that he violated the False statement, truthfulness policy when he did not make payments for eight of the thirteen monthly telephone bills which were reviewed by the Employer in connection with its investigation.

The Grievant stopped at the home of Anderson on two occasions at the end of his work day. He logged off (MCT) which would be an indication that he was at home. His log off time coincided with his usual end of shift time which also would indicate that he had arrived at home. The Employer asked the Grievant, during the second interview, if he had met with Anderson during work hours, and he responded no. Then it was determined that the Grievant had made the two stops at her home at the end of his on-duty time. The Employer argues that the Grievant lied when he responded that he had not met with Anderson during work hours based on the fact that work ends when a Trooper parks the patrol vehicle at his home. The Grievant was splitting hairs because he felt that he had ended his work day when he stopped at the Anderson residence on two occasions. This misstatement is not seen as an intentional untruthful statement. During the third interview, Sergeant Bass moved the questioning from details regarding Ms. Anderson's children to "How many times have you been to her house in your patrol car?" Without hesitation, the Grievant stated that this has occurred twice, a truthful response. Although it is not

completely clear regarding the Division's policy regarding logging off the MCT only when arriving at home, it appears that the Grievant violated policy when he logged off at the end of his work day at the Anderson home. But he was truthful regarding this aspect of the investigation. He admitted that his actions were a mistake.

The Employer argues that the Grievant was dishonest when he stated that he never logged off at the end of his work day at any other locations. It was determined that he parked his patrol vehicle in a parking lot which was over five miles from his home on four separate occasions (possibly a barber shop). But the Employer did not specifically ask this question. As Sergeant Bass continued to question the Grievant regarding his stops at the Anderson residence, he asked, "But prior to that would you log off and go to her house prior to going home?" The Grievant states, "No sir." Bass then asks, "Okay. Anywhere else that you would meet her other than her residence?" Grievant states, "No." Then Bass asks, "That you might have said that you were home and actually had been at another location?" The Grievant states, "No sir. This is, is it." The Employer apparently used this response as proof that the Grievant lied regarding the four stops at the parking lot, but it is clear that the Grievant believed this question was in respect to visits with Anderson. It is difficult to prove that the Grievant was dishonest during the investigative interviews regarding end of work logging off at locations other than at home. He violated policy in this respect but did not violate the false statement rule during the investigation.

The Employer correctly argues that dishonesty on the part of a law enforcement officer is a first time terminable offense regardless of length of service

and exemplary record. The courts in Ohio have stated that police officers are held to a higher standard of conduct than the general public, and arbitrators in Ohio and across the country have sustained terminations for first offense of dishonesty. In the face of this history and precedent, the Employer continues to bear the burden to prove the violation. This is especially true in the case of a long tenured law enforcement officer with an exemplary work record. As reprehensible as the behavior of the Grievant appears regarding his marriage and relationship with Patricia Anderson, there are no Division policies which govern these private acts and relationships. The Grievant clearly violated the cell phone policy when he failed to make full monthly payments for his OTC issued cell phone. Additionally the Grievant violated Division policy when he logged off duty when visiting Anderson's home and when stopping at the parking lot. During the four interviews, there is no solid evidence that the Grievant responded in a dishonest manner and, therefore, did not violate Rule 4501:2-6-02 (E) (1), False statement, truthfulness. If some responses varied from one interview to another, it must be remembered that the first telephone interview occurred on August 24, 2011, the second on August 29, 2011, the third on September 28, 2011, and the fourth and final interview occurred on October 19, 2011. The memory of the Grievant may have varied from one interview to another, and certainly, the relationship with his wife was evolving as she learned of his unfaithfulness and as they engaged each other in counseling.

The Grievant violated Rule 4501:2-6-02 (B) (1) (5) when he failed to make appropriate payments for his OTC issued cell phone and when he logged off at the end of his work day at locations other than his residence.

The grievance of Paul Gerke and the Union is granted in part and denied in part. The Grievant was not discharged for just cause pursuant to Section 19.01 of the Agreement. He did not violate Rule 4501:2-6-02 (E) (1), False statement, truthfulness. He was in violation of Rule 4501:2-6-02 (B) (1) (5) when he failed to make appropriate cell phone payments and when he logged off at the end of his work day at locations other than his residence. The Grievant is hereby reinstated as a Trooper in the Division of the Ohio State Highway Patrol effective October 22, 2012, the day in which the record of hearing was closed in this arbitration case pursuant to Agreement of the parties signed on February 15, 2012 minus a disciplinary suspension of five days pursuant to Section 19.05 of the Agreement. The personnel record of the Grievant will reflect said disciplinary suspension. Back pay is less unemployment compensation and/or other earnings from the date of termination to February 22, 2012 and beginning October 22, 2012 (less five day disciplinary suspension). The Arbitrator retains jurisdiction for thirty days for purposes of remedy only.

#### AWARD

The Grievant is hereby reinstated as a Trooper in the Division of the Ohio State Highway Patrol effective October 22, 2012, the day in which the record of hearing was closed in this arbitration case pursuant to Agreement of the parties signed on February 15, 2012 minus a disciplinary suspension of five days pursuant to Section 19.05 of the Agreement. The personnel record of the Grievant will reflect said disciplinary suspension. Back pay is less unemployment compensation and/or



other earnings from date of termination to February 22, 2012 and beginning October 22, 2012 (less five day disciplinary suspension). The Arbitrator retains jurisdiction for thirty days for purposes of remedy only.

Signed and dated this 21<sup>st</sup> Day of November, 2012 at Cleveland, Ohio.

A handwritten signature in cursive script that reads "Thomas J. Nowel". The signature is written in dark ink on a light-colored background.

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Thomas J. Nowel  
Arbitrator

## CERTIFICATE OF SERVICE

I hereby certify that, on this 21<sup>st</sup> Day of November, 2012, a copy of the foregoing Award was served upon Sergeant Corey W. Pennington, Advocate for the Ohio Department of Public Safety, Division of the Ohio Highway Patrol; Herschel M. Sigall, Esq., and Elaine N. Silveira, Esq., Advocates for the Ohio State Troopers Association; and Alicyn Carrel, Office of Collective Bargaining, by way of electronic mail.

A handwritten signature in cursive script that reads "Thomas J. Nowel". The signature is written in black ink on a light-colored background.

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Thomas J. Nowel  
Arbitrator

