Thomas J. Nowel
Arbitrator and Mediator
Cleveland, Ohio

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT OF THE PARTIES

In The Matter Of a Controversy Between:	)	Grievance No.
	)	15-03-20120802-
The Ohio State Troopers Association	)	0073-04-01
	)	
and	)	ARBITRATION
	)	OPINION AND
Ohio Department of Public Safety, Division	)	AWARD
Of the Ohio State Highway Patrol	)	
	)	Date:
	)	December 12,
Re: David G. Shockey	)	2012

APPEARANCES:
Herschel M. Sigall, Esq. and Elaine N. Silveira, Esq. for the Ohio State Troopers Association; Lieutenant Charles J. Linek, III for the Ohio Department of Public Safety, Division of the Ohio State Highway Patrol; and Aimee Szczerbacki for the Office of Collective Bargaining.

INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the Ohio Department of Public Safety, Division of the Ohio State Highway Patrol and the Ohio State Troopers Association. The parties are in disagreement regarding the termination of David Shockey who had been a State Trooper assigned to the Marion Patrol Post of the Highway Patrol. The Grievant, David Shockey, was terminated on July 25, 2012. Mr. Shockey grieved the termination on July 29, 2012, and the Employer denied the grievance on August 22, 2012. The grievance was appealed to arbitration by the Union on August 23, 2012.

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. Hearing was held on October 10, 2012 at the Office of Collective Bargaining. At hearing, the parties were afforded the opportunity for examination and cross examination of witnesses and for the introduction of exhibits. Witnesses were sworn by the Arbitrator. 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 statement of issue for resolution by the arbitrator. Was the employee removed for just cause? If not, what shall the remedy be?"

WITNESSES

TESTIFYING FOR THE EMPLOYER:
G. Michael Radcliff, Marion City Police Officer
Darren T. Huggins, Investigator
Kevin D. Lytle, City of Marion Fire Department
Lieutenant Lance S. Shearer, OSHP Marion Post Commander

Union rested without calling witnesses.

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.

Section 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 David Shockey reads as follows.

"On 7/25/12 I was terminated from my employment with the Ohio State Highway Patrol for an alleged violation of work rule 4501:2-6-02 (K) (2) Use of Alcohol and 4501:2-6-02 (Y) (2) Compliance To Orders. I maintain that this discipline is without just cause and is not progressive in nature. I request that I be returned to my former position and that I be made whole."

BACKGROUND

The Grievant's employment as a Trooper commenced on July 30, 1999. He had been assigned to the Marion Patrol Post since August 23, 2007. The Grievant had recently been diagnosed with gout, and his condition was determined to be FMLA certified. The Grievant suffered from additional health concerns and is an alcoholic. The Grievant tested positive for alcohol consumption when he reported for work in 2007, and the Employer determined that termination of employment was appropriate. The termination was held in abeyance when the Grievant, Union and Employer entered into a Last Chance Agreement for a period of five years which was later extended to January 13, 2013. The LCA stipulated that the Grievant would

be terminated for future violations of Work Rule 4501:2-6-02 (K) (2), Use of Alcohol.

The Grievant called the Employer on April 30, 2012 and stated that he would be unable to work the following day, May 1, 2012 due to a severe attack of gout. Then the Grievant called the Employer on May 1, 2012 and stated again that he would be unable to work due to the attack of gout. The Grievant's sick leave balance was very low. On May 2, the Grievant walked to a local convenient store to purchase a newspaper around 8:45 or 9:00 am. The store is one block away from his apartment building. While at the store, friends asked him to go to a local bar for drinks. The Grievant complied and became intoxicated. These events occurred at the time the Grievant would otherwise have been working his shift had he not called in sick. The Grievant returned to his apartment and was found by a neighbor to have passed out in the hall. The neighbor called the Marion Police Department. The Grievant was transported to Marion General Hospital and was released later in the afternoon.

Lieutenant Radcliff from the Marion Police Department had accompanied the Grievant to the hospital. He called the Grievant's supervisor, Lieutenant Shearer, and stated that he was aware that the Grievant tested .45, blood alcohol level (BAC). Lieutenant Shearer called the Grievant's home that same afternoon and left a message directing him not to report to work the following day, May 3, 2012 until he procured a Form DPS66 from his physician. Lieutenant Shearer then went to the home of the Grievant to deliver the DPS66 and to take his weapon and badge. Additionally, Trooper Young delivered a DPS66 to the home of the Grievant's

parents late in the day of May 2, 2012. A letter from Major Williams was delivered to the Grievant at his home indicating that the deadline for completion and return of the DPS66 was May 14, 2012. The DPS66 Form is completed by a physician regarding fitness for duty of an employee following sickness or injury. The Grievant indicated that he was unable to schedule an appointment with his physician and therefore requested an examination by a physician of the Employer's choosing to determine if he was fit for duty. Management denied this request. The Grievant requested an extension for the completion of the DPS66, and the Employer agreed to the new date of May 22, 2012. The completed DPS66 was provided to the Employer on May 18, 2012 but was not deemed acceptable due to conflicting statements of the physician and notations that the Grievant's return to duty was restricted. The Grievant had been advised to contact the post each day, and he was reminded that a properly completed DPS66 was still expected by May 22. The Grievant failed to call the Post, and he did not meet the deadline for a new DPS66. The Grievant provided additional completed DPS66 forms which were completed by his physician and which indicated that he could return to his duties with restrictions. These forms were not found to be acceptable by the Employer. Finally on July 2, 2012 the Grievant submitted a DPS66 which was completed by a different physician and which indicated no restrictions. The Employer returned the Grievant to administrative duties. The Employer had commenced an investigation of the Grievant on May 29, 2012.

Following the investigation, which included two comprehensive investigative interviews of the Grievant with a focus on possible abuse of sick leave and

dishonesty, Colonel John Born determined that reasonable and substantial cause existed to establish that the Grievant violated Rules 4501:2 (K) (2), Use of Alcohol and 4501:2-6-02 (Y) (2), Compliance to Orders. In the determination Colonel Born stated the following.

It is charged that Tpr. Shockey failed to comply with directives regarding the timely submission of documentation regarding his ability to work which resulted in him being absent for an extended period of time. It is also charged that Tpr. Shockey was in a state of alcohol intoxication during the hours of requested sick leave on May 2, 2012. Additionally, due to his high level of intoxication, he would not have been able to report to duty on May 3, 2012, without showing evidence of alcohol consumption.

A pre-disciplinary hearing was convened on July 23, 2012, and the Grievant's employment was terminated on July 25, 2012 by Thomas P. Charles, Director of the Ohio Department of Public Safety.

POSITION OF THE EMPLOYER

The Employer states that Lieutenant Shearer called the Grievant and indicated that he should not report for work on May 3, 2012 due to the high level of alcohol in his system, and it was necessary, due to the ingestion of a large quantity of alcohol, to produce a Form DPS66, Medical Appraisal of Work Capacity Form. A letter from Major Williams indicated that the form was to be returned to the Employer no later than May 14, 2012, and failure to comply could result in discipline. Major Williams granted an extension until May 22, 2012. The Grievant produced a number of DPS66 forms which were unacceptable as they contained contradictory information. The Employer argues that the Grievant consistently failed to produce properly completed forms and made no contact with supervision

over a lengthy period of time following Lieutenant Shearer's request to call the post on a daily basis. The Employer states that it has been forced to invoke the Last Chance Agreement because the Grievant was unable to work on May 3, 2012 due to a high concentration of alcohol in his system. The investigation of the Grievant clearly indicates that he was prepared to report for duty on May 3, and he would have still been over the legal limit of alcohol in his system.

The Employer states that the Grievant called in sick on May 1 and May 2 for his 6:00 am shift due to an attack of gout and stated that his foot was swollen twice its normal size. But the Grievant was able to walk one-quarter mile to a convenient store to purchase the newspaper and then proceed to a bar. The Employer questions the truthfulness of the Grievant.

The Employer argues that the Grievant was obviously very intoxicated on May 2. Lieutenant Radcliff, from the Marion Police Department, is a certified alcohol detection instructor, and he stated that the Grievant was very intoxicated when he arrived on the scene and accompanied him to the hospital. Marion City Paramedic Lytle confirmed that the Grievant's blood sugar level was in the normal range which contradicts the assertion that he may have been suffering from a diabetic incident. Lieutenant Radcliff testified that he heard the Grievant state to a physician at the hospital that he was "very drunk and fell down." Lieutenant Radcliff asked the attending nurse what the blood alcohol level registered, and she indicated that the Grievant's level was .450. This is an extremely high level of intoxication, and Lieutenant Radcliff testified that, based on the rate of metabolism, the Grievant would still be intoxicated if he reported for work the following day. He called

Lieutenant Shearer with this information. Clearly the Grievant would have been in violation of the Last Chance Agreement had he reported for duty on May 3, 2012. Further, the Grievant incriminated himself when he refused to release his medical report to the Employer during the investigative interviews.

The Employer argues that the Grievant's pattern of alcohol abuse can no longer be tolerated. He has been on a Last Chance Agreement since 2007, and in 2008 the Grievant again consumed a large quantity of alcohol when he had been scheduled to work. In that instance, he was transported to Marion General Hospital. The Grievant's employment was again terminated, and the Union appealed to arbitration. Arbitrator Stein reinstated the Grievant in this case, but he extended the Last Chance Agreement and stated that the Employer could no longer accept the behavior of the Grievant in the future.

The Employer states that the Union would argue that the Grievant should have been permitted to report to work on May 3, 2012 and then be administered a reasonable suspicion drug/alcohol test. Finding the Grievant over the permissible limit, the Employer could have invoked the Last Chance Agreement. But the Employer argues that it could not permit a Trooper to drive to the Post knowing that he was over the legal limit of alcohol in his system.

The Employer argues that the Grievant failed to provide medical documents required to return to duty and therefore abandoned his position with the Division. He was advised on May 2 that he was required to submit a completed DPS66 in order to return to duty, and Trooper Young delivered the form to the home of the Grievant's parents on May 2. Lieutenant Shearer then delivered the form to the

Grievant on May 3 and stated that any physician of the Grievant's choosing could complete it. Lieutenant Shearer requested that the Grievant call him daily, but he failed to do so. The Grievant was clearly instructed to make the daily call. The Grievant consistently stated that he was unable to get an appointment with a physician, and he was given a deadline of May 14 to return the completed form. At his request, an extension was granted to May 22. It was made clear that failure to produce a completed DPS66 would result in discipline up and including termination of employment. On May 18, the Grievant delivered a completed DPS66 to Lieutenant Shearer, but the document indicated that he could return to work with restrictions and without restrictions. The Employer argues that the contradictory statement was unacceptable. The Grievant failed to produce an acceptable medical release by the May 22 deadline. The Employer states further that the Grievant continued to fail to make the daily call-in as required. The Employer states that the Grievant failed on numerous occasions to produce the completed DPS66, but finally on June 5 he submitted the completed form which again was contradictory and indicated that a return to work was predicated on certain restrictions. The Employer argues that it again could not accept this form, and the Grievant knew that it would be problematic when it was submitted. Finally, on July 2, 2012 the Grievant submitted a DPS66 which was completed correctly and was acceptable. This was sixty days from the time the Grievant was directed to produce the medical statement.

The Employer argues that the Grievant violated the Compliance to Orders rule when he failed to produce the DPS66 in a proper and timely manner. This

violation in itself is grounds for termination. "In most cases an employee is deemed to have abandoned their job after not reporting for three days. The Employer was more than patient with Grievant regarding the submission of the required form." (Employer's post-hearing brief)

The Employer argues that the Grievant's failure to testify at hearing conveys a negative inference. "It is reasonable to conclude that the Grievant's failure to testify in his own defense is a tacit admission of the indefensibility of his actions." (Employer's post-hearing brief) The testimony of the Employer's witnesses therefore is unrefuted.

The Employer states that the termination of the Grievant was not arbitrary and therefore asks that the grievance of David Shockey and the Union be denied in its entirety.

POSITION OF THE UNION

The Union states that the Grievant suffers from a number of physical challenges including peripheral neuropathy, myopathy, diabetic hyperglycemia and inflammatory arthritis. In addition, the Grievant is an alcoholic. The Employer may not terminate an employee for any one of these conditions. The Union argues that the Employer has the right to have an employee examined to determine if he or she is fit for duty, and if not, there are a number of options available to the employee and Employer. The Union states that the Employer does not claim that the Grievant is generally unable to perform the duties of a state trooper, and his evaluations indicate successful service to the Division.

The Union states that the Employer has recognized the Grievant's medical issues regarding gout, which can cause severe pain, and the condition is FMLA certified.

The Union states that the Employer may conduct a blood alcohol test on the Grievant randomly as opposed to the reasonable suspicion standard. Each time he has been tested, no alcohol has been found in his system, but, the Union argues, management would desire to terminate all troopers who suffer from the disease of alcoholism. This is the motivation for the termination of the Grievant.

The Union states that there is no evidence to contradict the assertion that the Grievant was suffering from a severe attack of gout when he called off work on May 1 and May 2. The Grievant broke his abstinence from alcohol during the morning of May 2 and was taken to the hospital in the afternoon, but he did not call-in because he was too drunk to work or to avoid the consequences of the Last Chance Agreement.

The Union argues that any conclusion reached by the Employer, that the Grievant tested .450 for alcohol consumption, is strictly hearsay. There is no direct evidence that this was factual. Lieutenant Radcliff allegedly received this information from a hospital nurse, but that nurse did not testify at hearing. In addition, any such information is protected by HIPPA, and the release of medical test results, without permission of the patient, is a violation of law. The Employer cannot terminate the Grievant based on medical information obtained without his knowledge and permission.

The DPS66 is a medical form which is normally utilized following an extended illness or injury of a trooper. It assists the Employer in determining if an employee is capable of returning to duty based on an analysis of a number of physical capabilities. The Union argues that it is unusual that the Employer required the Grievant to produce this form based on the circumstances of May 2. In any event, Trooper Young reported that the Grievant appeared normal when she delivered the DPS66 on the evening of May 2, and Sergeant Them indicated that he sounded normal when speaking with him on the telephone the same evening. The Union argues that the Employer used the directive to obtain a completed DPS66 as a means of discrediting the Grievant and finding a reason to discipline or terminate him.

The Union states that the Grievant made a good faith effort to obtain a completed DPS66 from a physician. But when he experienced difficulty in scheduling an appointment with his physicians, he requested an examination by the physician at the Highway Patrol Academy. Although supervision was agreeable to this arrangement, it was denied by higher management. The Union argues that the Employer should have welcomed this opportunity, but its real intent was to terminate Trooper Shockey. When the Grievant obtained a completed DPS66 from Dr. Pritula on May 18, it contained a number of restrictions which the Employer was unwilling to accept. The Grievant obtained additional DPS66 forms from his physician, but they contained restrictions which the Employer refused to accept. The Grievant continued in a non-work status with unpaid leave. When a different physician completed the form on July 2 and indicated that the Grievant could return

to work without restrictions, the Employer assigned him to administrative duties, something which could have occurred when earlier physician statements indicated a return to work with restrictions. The Union states that Sergeant Bass indicated, during the investigative interview of the Grievant, that the DPS66 was required due to the reported BAC level of .450. The Union argues that there is no official documentation regarding the BAC level of the Grievant. The Grievant did everything in his power to comply with the Employer's directive to obtain a DPS66.

The Union states that it is uncertain if the Grievant will have the ability to successfully perform the duties of a Trooper in the future based on his physical condition, and the Employer possesses the ability to monitor his performance and make valid conclusions regarding his fitness. The Union argues that, in the instant case, the Employer violated the just cause provision of the Agreement when the Grievant's employment was terminated. The Union requests the reinstatement of the Grievant with no loss of pay or benefits.

DISCUSSION

It must first be understood that the Last Chance Agreement is not the primary issue in this case. There have been references to the LCA in a number of documents related to this case. The parties stipulated in this matter that the question to be answered by the Arbitrator is whether the Grievant was removed for just cause and, if not, what the remedy is.

There is no evidence to contradict the assertion that the Grievant had a gout attack when he called the Post to indicate that he was not able to work on May 1,

2012. This is also true when he called in again on May 1 stating that he was not able to work on May 2 due to a severe case of gout. There is no evidence to suggest that the Grievant called in because he was intoxicated and was attempting to avoid the consequences of the Last Chance Agreement. The Employer argues that he may not have truly had an attack of gout on May 2 because he was able to walk to the convenience store to purchase a newspaper. But the convenience store was across the street from his apartment and not a difficult hike even with a painful and swollen foot. If the Grievant walked home from the bar later that morning, he may have been self-medicated from the alcohol he consumed and felt little or no pain. But there is no evidence that the Grievant called off sick for any reason other than an attack of gout. This case parallels the arbitration case heard by Arbitrator Stein in 2009 (Case No. 15-00-000911-0125-04-01) when he determined that the "Employer failed to prove that the Grievant was intoxicated when he initiated the call to be excused from reporting to his overtime duty assignment…in violation of the Employer's rules." In the instant case, the Grievant was charged with consuming alcohol while on duty because he found himself in a bar during the time he was normally scheduled to work. But, in fact, he was not on duty. The Employer had accepted his request for leave, which was FMLA certified. The Grievant could just have easily consumed alcohol at home while on the approved sick leave. This is not to say that the Grievant should have consumed alcohol at all. While he states that he is a recovering alcoholic, this assertion is dubious as he continues to consume and allows himself to be in situations which encourages consumption.

The Employer then made a decision to prohibit the Grievant from reporting for duty on May 3 because it was anticipated that he would still be under the influence. There was no evidence at hearing that the Grievant tested .450 BAC. The testimony of Lieutenant Radcliff regarding this matter was strictly hearsay, and he stated on cross examination at hearing that he did not know what alcohol test had been administered and did not see written results. He also testified to his lack of knowledge regarding HIPPA. The Union's assertion, that a test result, if it exists, is private based on HIPPA regulations, is accurate. If the Employer possessed a BAC from the hospital, as was suggested to the Grievant during the investigation, it was not produced at hearing. Therefore the decision by the Employer, to prohibit the Grievant from reporting for duty on May 3, was based on speculation or third party information.

In cases where an employee is discharged for substance abuse, sufficient documentation of employee conduct is mandatory to meet the employer's burden of proof, whether it be confirmed medical tests or investigative reports, or actual confiscated contraband. Arbitrators will sustain grievances where the employer fails to provide verifiable evidence. One arbitrator stated that "to discharge a person for suspected but unconfirmed intoxication is to discharge unjustly. (How Arbitration Works, Elkouri & Elkouri, Sixth Edition, Pg. 382)

Likewise, the decision to require the Grievant to produce a completed DPS66 before he could return to work was also based on hearsay information. This is not to say that the Employer acted in an arbitrary manner in not allowing the Grievant to drive to work on May 3. He *may* have been intoxicated and therefore a danger to himself and others on the road and in violation of DUI laws. The Grievant stated that he was prepared to work on May 3. The Employer had the opportunity to drive the

Grievant to work or send a taxi cab if it was critical to determine that he was over the acceptable limit. Trooper Young drove a DPS66 to the home of his parents on May 2, and Lieutenant Shearer did the same late in the day of May 2 and drove to his home on other occasions. The Employer had an opportunity to administer an appropriate test on May 3 to determine if the Grievant was over the limit and in violation of the Last Chance Agreement without allowing him to drive to the Post. In failing to do so, there is no evidence that the Grievant was intoxicated on May 3 when he was scheduled to work following the two day sick leave of absence. Lieutenant Shearer testified that .015 alcohol is metabolized by the body every hour. So it was felt the Grievant would be intoxicated when his shift began at 6:00 am on May 3. But each body is different based on weight and age, and more importantly, the Lieutenant testified that he had not seen a medical report on the Grievant. The Grievant is charged with violation of Rule 4501:2-6-02 (K) (2), Use of Alcohol. The rule states that "A member shall not report for duty or return to duty showing any evidence or effects of alcoholic beverage consumption." The Grievant did not report for duty on May 2 as he was approved for sick leave. The Grievant became intoxicated on May 2, but he was barred from reporting to the Highway Patrol Post on May 3 by order of management. The Rule cannot be applied to the Grievant for his status on May 3.

The Grievant was ordered to have his physician complete a DPS66 before returning to duty, and supervisors placed the form in his hands on two occasions on May 2 and 3. Lieutenant Shearer testified that he instructed the Grievant to have the form completed based on the alcohol consumption of May 2.

During the investigative interview, the Grievant stated that he was unable to immediately schedule an appointment with his physician who is a specialist. He stated that there are very few specialists in Marion, and it is difficult to schedule an appointment on short notice. Management extended the deadline to May 22 for procurement of the medical statement. The Grievant stated during the interview that his physician balked at completing the medical statement without additional tests. This is understandable as the form questions the physician regarding a myriad of issues regarding the ability of the employee to return to work with or without restrictions and the patient's ability to lift and carry, push and pull, do repetitive movements and engage in speaking coherently, hearing properly, tasting, smelling and other capacities. An ethical physician would not immediately answer the numerous queries to the positive based on the Employer or employee's wish to immediately return to regular duty. Evidence indicates that the DPS66 is utilized following extended illness or injury. Dr. Pitula indicated that the Grievant could return to work with restrictions. The Employer refused to accept the medical statement and directed the Grievant to produce a statement which indicated that he could perform all functions of his job without restrictions before he could return to work. But this determination was in the hands of the physician and not the Grievant. The Grievant met the deadline, but the Employer chose not to accept a DPS66 which included restrictions.

The Grievant requested an examination by a physician retained by the Employer at the Academy. Initially supervision indicated that this was a possible option, but higher management refused the Grievant's request. The Union questions

the motivation of the Employer, and the Arbitrator takes note that the Employer declined to accept what appeared to be a valid request and option.

During the May 29 interview, the Grievant stated that he was having difficulty in scheduling appoints with his physician. When questioned regarding his diligence in obtaining a completed DPS66, he indicated that he was making a serious attempt. He stated, "I would have been, trust me, I'm broke, I would have went to work." The Grievant stated that he attempted to schedule an appointment with his therapist in an attempt to obtain a completed DPS66 which met the demands of the Employer. Dr. Pritula had completed a second DPS66 which included restrictions and which the Employer again refused to accept. Finally, the Grievant was able to schedule an appointment with another physician, Dr. Armstrong, who complete the DPS66 and indicated no restrictions. The Grievant provided this statement to the Employer on July 2, 2012.

A great deal of time passed between the Employer's initial directive that the Grievant produce a DPS66, completed by a physician, and July 2. The Grievant has been charged with violation of Rule 4501:2-6-02 (Y) (2) which states "A member shall conform with, and abide by, all rules, regulations, orders and directives established by the superintendent for the operation and administration of the division." There is no evidence that the Grievant purposely disregarded the demand of the Employer to produce a DPS66. He, in fact, provided a number of DPS66 forms, competed by Dr. Pritula, as ordered by the Employer. The Employer chose not to accept the forms on the basis that they appeared to contain conflicting statements based on recommended restrictions. But the Grievant did comply and therefore did

not violate the order of the Employer and Rule 4501:2-6-02 (Y) (2). A key element of the just cause standard requires a thorough and fair investigation. The Employer interviewed the Grievant on two occasions, but there is no evidence that the investigation regarding this aspect of the case went any further. Although the Employer has no right to request medical information regarding an employee from a health care provider, management has the right to make contact with the provider to determine if appointments were scheduled and completed. There is no evidence that this occurred. When the parties agreed to the Last Chance Agreement in 2007, the Employer had the right to know if the Grievant completed the substance abuse program which was outlined in the document, and this certainly occurred. The Employer could have checked with the physician's office in the instant matter to determine compliance on the part of the Grievant. There is no evidence, in the instant case, that the Grievant failed to make a good faith attempt at procuring the DPS66 in a timely manner.

The Employer further charged the Grievant with violation of Rule (Y) (2) on the grounds that he did not make a daily telephone call to the Post as ordered by Lieutenant Shearer. This charge is problematic. Evidence indicates that this was a verbal request of Lieutenant Shearer, one which the Grievant stated, during the investigative interview, that he did not remember. A key element of the just cause standard is a clearly defined rule or order with an understanding of the consequences. There is no evidence that the Grievant understood this as a directive which, if not followed, could result in disciplinary action. If it was important to the Employer that Shockey call the Post on a daily basis, the directive should have been

made in writing stating clearly what was expected and the possible consequences for non-compliance. The just cause standard requires that the Grievant clearly understands the requirement and consequences. The Grievant's claim of lack of memory would then have lacked merit. The Employer had placed its directives regarding the procurement of the DPS66 in writing which included possible consequences. The claim that the Grievant violated policy, when he did not call the Post daily, is not meritorious.

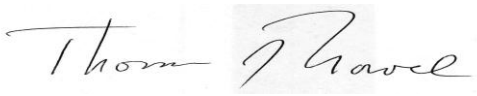
The Employer argues that the failure of the Grievant to testify in his behalf at the arbitration hearing creates an adverse inference, and the Employer's case, therefore, went unrefuted. The Employer states that the arbitration hearing was the time for the Grievant to offer an explanation or evidence regarding his high level of blood alcohol level. The Employer is correct in that it is helpful to an arbitrator to see the Grievant during testimony regarding disciplinary charges. But this does not exempt the Employer from its obligation to prove its case regarding disciplinary action. When the Employer has met its burden, a Grievant and supporting witnesses then have an opportunity to explain the circumstances; convince the arbitrator that the actions of the Grievant were justified; explain why the penalty should be modified. While it is certain that the Grievant was intoxicated on May 2, there is no evidence regarding his blood alcohol level on a day in which he had been granted a sick leave of absence, and evidence indicates that a reasonable effort was made to procure a medical release. The Employer, in the instant case, did not meet its burden.

The Employer did not meet its burden of proof, and, therefore, the termination of the Grievant was not for just cause and was in violation of Section 19.01 of the collective bargaining agreement. The Grievant is to be reinstated to the position of Trooper effective July 25, 2012 with no loss of pay, benefits and seniority less any interim earnings including unemployment compensation. Having arrived at this conclusion, this Arbitrator expresses the same concerns as those of Arbitrator Stein. The Grievant indicates that he is in recovery, but his actions say otherwise. He cannot take the occasional alcoholic beverage, nor can he place himself in situations which lead to consumption. The Grievant has not convinced himself that recovery and complete abstinence is the only option to maintaining employment, and, although the Last Chance Agreement will expire in a short time, he will not maintain employment with the Division of the Ohio State Highway Patrol in the long run unless he makes a sudden change in behavior and sobriety. The actions of the Employer in this matter are understandable given the behavior of the Grievant, but the parties have agreed to the just cause standard. The Employer did not meet that standard in this matter.

AWARD

The termination of the Grievant was not for just cause and was in violation of Section 19.01 of the collective bargaining agreement. The grievance of the Union is sustained. The Grievant is to be reinstated to the position of Trooper effective July 25, 2012 with no loss of pay, benefits and seniority less any interim earnings including unemployment compensation. The Arbitrator retains jurisdiction for thirty days for purposes of remedy only.

Signed and dated this 12th Day of December, 2012 at Cleveland, Ohio.



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Thomas J. Nowel
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that, on this 12th Day of December, 2012, a copy of the foregoing Award was served upon Herschel M. Sigall, Esq. and Elaine N. Silveira, Esq. for the Ohio State Troopers Association; Lieutenant Charles J. Linek, III for the Ohio Department of Public Safety, Division of the Ohio State Highway Patrol; Aimee Szczerbacki for the Office of Collective Bargaining; and Alicyn Carrel for the Office of Collective bargaining, by way of electronic mail.

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Thomas J. Nowel
Arbitrator