

**CONTRACTUAL
LABOR ARBITRATION**

IN THE MATTER OF)	
ARBITRATION BETWEEN:)	
)	
STATE OF OHIO)	
DEPARTMENT OF PUBLIC SAFETY)	
OHIO STATE HIGHWAY PATROL)	
)	
-AND-)	DECISION IN
)	EMPLOYMENT TERMINATION
)	
)	(CHRISTOPHER APPOLLONIO)
)	
OHIO STATE TROOPERS)	
ASSOCIATION, INC.)	
UNITS 1 & 15)	

<u>CASE NO:</u>	DPS-2017-02019-01
<u>GRIEVANCE:</u>	The Grievance protests the Removal/Employment Termination as lacking Just Cause.
<u>HEARING(S):</u>	September 21 & November 9, 2017; Gahanna, Ohio
<u>AWARD:</u>	The Grievance is sustained in part; and, denied in part.
<u>ARBITRATOR:</u>	David W. Stanton, Esq.

APPEARANCES

**FOR THE STATE OF OHIO
OHIO STATE HIGHWAY PATROL**

Darrell G. Harris, Lieutenant/Advocate
Cassandra L. Brewster, Staff Lieutenant
Abigail Ledman, Office of Collective Bargaining
Jennifer A. Delong, Trooper/Complainant
Eric Sharp, Trooper/Polygrapher

Gamel Brimah, Trooper/Polygrapher
Laura C. Taylor, AI Unit
Travis Woodyard, Trooper (Spouse of Jennifer A. Delong)
Gary M. Lewis, Trooper
Richard S. Fambro, Major

FOR THE OHIO STATE TROOPERS ASSOCIATION

Elaine N. Silveira, General Counsel/Advocate
Larry K. Phillips, Staff Representative
Jerry Mendenhall, OSTA President
Christopher Appollonio, Grievant
Brian Perry, Extern
Rod "Toby" Tyler, AI Unit
Ken L. Butler, Polygrapher – Akron Police Department
William D. Evans II, MS, JD, ACP, President Poly-Tech Associates, Inc.
Harry L. Caplinger, PhD, VSA & PSE Examiner
Tina M. Davy, Alum Creek Salvage Facility Secretary
Steve Blamer, Alum Creek Salvage Facility Vehicle Inspector
Levente Berry, Sergeant (OIC – Ohio State Fair Detail)
Nancy Santiago, Sergeant
Mike Akers, Lieutenant Colonel

ADMINISTRATION

By email correspondence from April 12, 2017 from Larry K. Phillips, Staff Representative for the Ohio Troopers Association, with copy to Cassandra L. Brewster, Staff Lieutenant with the State of Ohio, Department of Public Safety, the undersigned was notified of his mutual selection from the Parties' permanent panel to serve as impartial Arbitrator to hear and decide the Employment Termination Grievance of Christopher Appollonio, then in dispute between these Parties. On September 21; and, November 9, 2017, Arbitration proceedings were conducted wherein each Party was afforded a fair and adequate opportunity to present testimonial and/or documentary evidence supportive of positions advanced; and, where, the Grievant appeared and testified in his own behalf. The extensive evidentiary record of this proceeding was subsequently closed upon the Arbitrator's receipt of each Party's Post-Hearing Brief, filed in accordance with the arrangements agreed to at the conclusion of the presentation

of evidence and subsequently modified per agreement between the Parties. Accordingly, this matter is now ready for final disposition herein.

GRIEVANCE & QUESTION TO BE RESOLVED

The following Grievance, as set forth in Joint Exhibit 2, was filed on or about May 24, 2017 and contains the subject matter for disposition herein as follows:

Grievance No.:	DPS-2017-02019-01
Union Contract Article Link:	OSTA Articles
Assigned to:	Krysten McElfresh
Member:	Christopher Appollonio
Grievance Union:	Ohio State Troopers Association
Grievant Worksite:	Alum
Grievant Department Description:	Alum Creek Facility
Grievant's Classification No.:	26711
Grievant's Classification Title:	Highway Patrol Trooper
Bargaining Unit No.:	01
Grievant Union Chapter Name:	DPS2906
Date of Hire:	10/14/1998
Grievant Agency:	DPS
Years of Service:	18
Grievant's Supervisor/Union Rep:	Sergeant R. Shack
Union Representative:	Larry K. Phillips
Union Regional Rep Name:	Nikki Snead
Date Grievance Arose:	5/23/2017

Grievance Type: Discipline

Grievance Subtype: Termination

Date of Termination: 5/23/2017

Statement of Grievance:

On May 23, 2017, I was served termination paperwork for my position as a Trooper with the Ohio State Highway Patrol.

Resolution Requested:

To be reinstated to my position as a State Trooper without loss of seniority and to be made whole for all lost wages, including, but not limited to holiday pay, fitness pay, shift differential, and lost overtime.

Rate of Pay: \$32.12

Submission Date: 5/24/2017

As set forth in the Joint Exhibits provided, the "Statement of Issue" is framed as follows:

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 Grievant terminated for Just Cause? If not, what shall the remedy be?

/s/ Elaine Silveira

/s/ Lieutenant Darrell G. Harris

**CITED PROVISIONS OF THE
COLLECTIVE BARGAINING AGREEMENT**

The following provisions of the Collective Bargaining Agreement, Joint Exhibit-1, were cited and/or are deemed relevant herein as follows:

**ARTICLE 4
MANAGEMENT RIGHTS**

The Union agrees that all of the function, rights, powers, responsibilities, and authority of the Employer, in regard to the operation of its work and business and direction of its workforce, which the Employer has not specifically abridged, deleted, granted, or modified by the express

and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer.

Accordingly, the Employer retains the rights to:

1. Hire and transfer Employees, suspend, discharge and discipline Employees;

ARTICLE 18 ADMINISTRATIVE INVESTIGATION

18.06 Polygraph Machine

No Employee shall be required to take a polygraph examination as a condition of retaining employment, nor shall an Employee be subject to discipline for the refusal to take such a test.

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.

19.05 Progressive Discipline

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

1. One or more Written Reprimand(s).
2. 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.
3. One or more day(s) Working Suspension(s). If a working suspension is Grieved, and the Grievance is denied or partial granted by an Arbitrator, and all appeals are exhausted, whatever portion of the working suspension will be upheld and converted to a fine; the Employee may choose a reduction in leave balance in lieu of a fine levied against him/her.

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 the withholding of fines from the Employee's wages.

ARTICLE 20 GRIEVANCE PROCEDURE

20.08 Arbitration

4. Decisions of the Umpire

The Umpire shall render his/her decision as quickly as possible, but in any event, no later than forty-five (45) days after the conclusion of the Hearing, or submission of the closing briefs, unless the Parties agree otherwise. The Umpire shall submit an account for the fees and expenses of Arbitration. The Umpire's decision shall be submitted in writing and shall set forth the findings and conclusions with respect to the issue submitted to Arbitration.

The Umpire's decision shall be final and binding upon the Employer, Union and the Employee(s) involved, provided such decisions conform with the law of Ohio and do not exceed the jurisdiction or authority of the Umpire as set forth in this Article. The Grievance Procedure shall be the exclusive method of resolving Grievances.

The Parties may request that the Umpire, on a case by case basis, retain jurisdiction of a specific case. In that, the Parties are using a permanent Umpire, questions or clarifications of awards will normally be submitted to that Umpire without the necessity of a further Grievance or action. This statement, however, does not limit the ability of either Party to exercise any other legal options they may possess.

5. Limitations of the Umpire

Only disputes involving the interpretation, application, or alleged violation of a provision of this Agreement shall be subject to Arbitration.

The Umpire shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall the Umpire impose on either Party a limitation or obligation not specifically required by the language of this Agreement.

FACTUAL BACKGROUND

The State of Ohio, Department of Administrative Services, Division of the Ohio State Police, hereinafter referred to as the "State" and/or the "Employer", is party to a Collective Bargaining Agreement, Joint Exhibit-1, with the Ohio State Troopers Association, Inc., Units 1 and 15 wherein the Parties have memorialized the terms and conditions of Employment for those Employees recognized in Article 5, titled "Union Recognition and Security". Article 4, titled "Management Rights", acknowledges the Employer's contractual and inherent right to, "...suspend, discharge, and discipline Employees;". The limitation placed upon the Employer with respect to the imposition of disciplinary action is set forth in Article 19, titled "Disciplinary Procedure" at Section 19.01, titled "Standard" wherein it indicates, "no Bargaining Unit Member shall be reduced in pay or position, suspended, or removed except for just cause".

As the evidence of record demonstrates, Christopher Appollonio, hereinafter referred to as the "Grievant", was commissioned as a State Trooper on April 2, 1991 and was separated from employment effective May 24, 2017 concerning his alleged violation of 4501:2-6-02(E)1, titled "False Statements, Truthfulness"; 4501:2-6-02(Y)1, titled "Compliance to Orders" and 4501:2-6-02(J)(1)(2), titled "Sexual Harassment and Discrimination". The afore-referenced Statement of Charges are set forth as follows:

Through Administrative Investigation No. 2017-0041, it was found Trooper Appollonio made inappropriate comments and engaged in inappropriate physical contact with a female Trooper. Trooper Appollonio was untruthful about his conduct during the investigation. After receiving a direct order not to discuss the investigation, it was found Trooper Appollonio discussed the investigation with a witness. The events in question concerned the following events:

AUGUST 2016 – OHIO STATE FAIR

The Ohio State Fair occurred in August 2016. The alleged victim in this matter, Jennifer A. Delong, a member of the Ohio State Police and a State Trooper, alleges the Grievant and she both worked the Ohio State Fair. The evidence of record demonstrates that on the last night of the Fair, several Units were requested to work past their shifts to provide additional security at closing time. Delong testified the event in question took place at or near Gate 3, which is located on 17th Avenue in front of the Highway Patrol Academy. She alleges a conversation with the Grievant ensued wherein the Grievant initially exchanged pleasantries with Delong and inquired as to what she might be doing after their extended shift ended. Delong testified she responded that she would do the same thing he would do, go home and go to bed because she was extremely tired. This encounter allegedly occurred at a meeting at the end of their shift.

Sergeant Berry, the Officer in Charge, who oversaw the assignments for this Detail, indicated a Unit held over past their regular shift could have been assigned to Gate 3. However, Delong testified, and as is referenced in the Administrative Investigation, Delong indicated there was one person working at Gate 3 – Trooper Demarques Camper. Camper could not recall seeing either the Grievant or Delong at that Gate on the last night of the Fair. Berry indicated there would never be only one person working at Gate 3 and a supplemental Unit would not have been assigned to that Gate. The Grievant testified he never spoke to Delong at Gate 3. However, he indicated he may have seen her in passing walking around the Fairgrounds. The Gate 3 location is adjacent to the Ohio State Highway Patrol Academy parking lot, which was as characterized, well lit with surveillance cameras at various locations. The alleged conversation, as stated to Administrative Investigator, Sergeant Laura Taylor, and gleaned from the Administrative Investigation Report, is set forth as follows:

As they were standing there, Appollonio asked Delong what she was doing once she was off duty and she told him, probably the same thing you're doing. Going home. It has been a long time here at the Fair, I want to go home and relax. He then asked her if she was in a hurry to get home and she just looked at him and said, "of course I'm in a hurry to get home. I'm tired and my feet are killing me." Appollonio responded, "well I was just wondering if you were in a hurry. If you are, don't worry about it, but if not, how about we go over here in the parking lot? I'm parked over here, let's go fuck." Delong said it shocked the hell out of her and she told Appollonio, "this is totally inappropriate. I can't believe you even asked me that. You have no respect for your wife. You know my relationship with Tiffany and I cannot believe you would even say anything to me like that." Appollonio's response was, "Tiffany doesn't give a shit what I do. All she's worried about is making sure the money is at home and everything in her life is running the same." This is excerpted from Management Exhibit A, Page 5 at Paragraph 5.

According to the investigative report, Sergeant Taylor reported that Delong confronted the Grievant about this exchange and instructed him not to say anything like that to her again. Following this description as set forth in the Administrative Report, Sergeant Taylor reported that Delong became upset and began crying. Once she composed herself, she continued and said Appollonio went on to say, "she doesn't give me any pussy at home and she doesn't give a shit where I go and where I get it as long as her life isn't disrupted." She told Appollonio, "this is the end of our conversation. We are not going to be carrying on like this. Don't ever say anything like this ever again. I have never given you any idea that we are ever going to be doing anything like this. I'm married, you are, too, and you are saying anything to me is completely disrespectful to your wife. Appollonio's response was, "it was worth a try." This is excerpted from Management Exhibit A, Page 6, Paragraph 2.

At that point, according to the testimony of Delong, she contacted her fiancé who was later characterized in the Arbitration Hearing as her husband, based on cultural considerations, and who is also a Sergeant with the Highway Patrol, to advise him of this encounter with the Grievant. Delong testified she did not tell the Grievant's wife because of the friendship she had with her. The Grievant's wife is also a Trooper with the Division and long-time friends with Delong.

On cross examination, Delong stated she was not assigned to the same area as the Grievant during the Fair. Berry testified the two were not assigned to the same area during their normal hours, but Delong indicated the afore-referenced conversation with the Grievant took place after normal hours. Those held over after normal hours roamed the East Area and did not

have specific gate assignments. As indicated, Berry was the Officer in Charge of the East Area, which included the Midway and Game Rows from 12 p.m. to 12 a.m. during the 2016 Ohio State Fair. Union Exhibit 8 represents the “2016 Ohio State Fair Supplemental Manpower Matrix” utilized to track Units scheduled to work a high visibility detail at the Fair. Berry testified, referencing that document, that Delong and the Grievant would not have appeared on this Matrix because they were already assigned to the Fair. Union Exhibit 7 provides the Grievant's schedule and “movements” during his regular shift in the East Area of the Fair. Delong was not on these two Rosters because she was not assigned to the East Area during her normal shift and was not classified as a supplemental unit. Both Delong and the Grievant volunteered to stay over to provide high visibility security during the last night of the Fair.

According to the Employer, neither would have appeared on these Rosters for the hours they volunteered to work after their normal shifts. The Grievant insisted he never spoke to Delong at Gate 3. He did indicate he may have spoken to her and seen her in passing walking around the Fairgrounds. The Employer emphasizes that despite the Grievant's denial of asking Delong to have sex with him at the Fair Detail, he admitted to Taylor during his interview he has had previous conversations with Delong regarding oral sex on his Wife's cell phone and in her presence. Such is gleaned from Management Exhibit A, Pages 10, Paragraph 7 and at Page 11, Paragraph 1.

ALUM CREEK SALVAGE FACILITY

On or about January 10, 2017, an alleged event occurred at the Alum Creek Salvage Facility. Trooper Delong testified she had an interview at the Academy regarding a position with the Joint Terrorism Task Force in Columbus. She stopped at the District 6 Salvage Facility (Alum Creek) to work on background investigations prior to her interview. She testified, as was

corroborated by Administrative Professional I, Tina Davy, she sat at the desk next to Davy. At some point after she arrived the Grievant entered the area through the rear door. Delong testified the Grievant approached her left side and rubbed his genitals on her arm in an up and down motion as he was reaching for a donut. She also indicated the Grievant ate that donut in a sexual manner whereupon she told him to stop. She indicated, which was corroborated by the Grievant, he made statements to her about needing work on her breasts and her buttocks. Delong testified the Grievant positioned himself between her and Davy and rubbed his genitals on the backside of her left arm as he reached for the donut. She indicated the donuts were on a ledge in the area to her right.

Union Staff Representative, Larry Phillips, who photographed the Office after this alleged incident, testified it was physically impossible for the Grievant to have rubbed his genitals on Delong's arm due to the closeness of the chairs utilized by Delong and Davy. Union Exhibit 5 is a series of photographs depicting the logistics of the Salvage Office that included sketches of that room. As previously indicated, Tina Davy, Administrative Professional I, who was stationed at the Alum Creek Salvage Office testified she did not witness the Grievant rubbing his genitals on Delong or eating the donut in a suggestive manner. She did indicate the Salvage Office, on the day in question, was extremely busy and she had to get up from her chair several times to retrieve receipts from various customers. Davy did testify that based on the logistics of the chairs and the confined area where those chairs are located; and, that she was present the entire time the Grievant was in the Salvage Office, had the Grievant rubbed his genitals on DeLong's left arm, as alleged, the Grievant's buttocks would have been directly in her face; something she would have recalled. She indicated it was impossible for the chairs to have been arms-length apart because Steve Blamer, Motor Vehicle Inspector, who worked out of

that Office could not have walked behind them to reach his work area. Blamer testified that if in fact Delong's chair was in front of the file cabinet, he could not have moved behind her to reach his work area.

Trooper Gary M. Lewis testified he did not witness anything inappropriate between the Grievant and Delong during his time in the Alum Creek Salvage Office. Moreover, Davy testified she did not hear the Grievant make any comments suggesting Delong have work done to her breasts and/or her buttocks. The Employer insists that given the testimony of Davy, there are obviously things she remembered happening and those she did not even though they could have occurred. During the Arbitration Hearing, the Grievant admitted to giving Delong a hug; he denied eating the donut in a provocative manner as alleged by Delong; and, admitted he did in fact eat a donut in the area described by Delong.

FALSE STATEMENTS/TRUTHFULNESS
POLYGRAPH EXAMINATION
COMPUTER VOICE STRESS ANALYZER (CVSA)

The Employer called Polygraphists, Eric Sharp and Gamel Brimah, who administered the Polygraph Examination to Delong and each concluded she did not show “signs of deception”. As the evidence of record demonstrates, the Employer's decision to terminate the Employment of the Grievant was bolstered by the Polygraph Examination results of Trooper Delong. Trooper Eric Sharp testified he administered the test to Delong. Sharp has been assigned to the Polygraph Unit since 2006 and received his training during a 10-week course located at the Northeast Counter Drug Training Center. He has conducted approximately 1600 examinations and is recognized as a Senior Examiner. Delong was asked very specific questions regarding the allegations, “Did Chris rub his genitals on your arm? Did Chris rub his genital area on your arm in that office? Did Chris ask you if you wanted to fuck at the fair? Did Chris as you if you wanted to fuck at the fair last year?” Delong answered yes to each question and Sharp testified

after examining the Charts, she was found to be truthful on each question asked. No deception was detected and Delong was found to be honest during the Polygraph Examination. Sharp testified he utilized the Bi-Zone/You Phase Examination on Delong. He stated this exam was chosen because of its 93% accuracy rate.

Sergeant Gamel Brimah has been the Supervisor of the Ohio State Highway Patrol's Polygraph Unit since 2013. He received his 10 weeks of Polygraph training from the National Polygraph Academy in 2013 and currently supervises all Officers assigned to the Division's Polygraph Unit. Brimah reviewed the charts associated with Delong's examination and he also determined Delong was truthful on each question asked. The Grievant was given the opportunity to take a Polygraph exam on several occasions, but he refused. The Grievant testified during the Union suggested he not take the polygraph test.

The Union provided testimony from Ken Butler, a Polygraphist, since 2004 with the Akron Police Department, who had conducted nearly 1,500 Polygraph Examinations in his career, reviewed the electronic polygraph file conducted on the Lafayette 5000 machine utilized by Sharp and Brimah in Trooper Delong's Polygraph Exam. During the first test, Butler testified he noticed controlled breathing of about seven (7) breaths per minute instead of the usual 12-20 respirations per minute by a normal individual. The cardio tracing, as testified to by Butler, was synchronized with these respirations indicating potential cuff contact. Based thereon he concluded the chart could not be adequately evaluated. His peer review score sheet was introduced and admitted wherein he concluded the "charts are too unstable to render an opinion".

Moreover, William Evans, a Polygraphist since 1977, testified the Polygraph utilized by the Employer to bolster the decision to terminate the Grievant's employment was unable to be interpreted due to the breathing patterns/cardio results consistent with Butler's findings. He

indicated, as well, that normal breaths per minute were between 12 and 20 and Delong's were in the neighborhood of seven. Such was corroborated by Sharp and Brimah. Evans testified certain movements were noted on the Employer's polygraph charts, but not all of them. Based on the change from the arm cuff to a thumb cuff, he testified that cuff is inherently unstable and simply cannot be deemed reliable, or considered herein.

Evans and Butler were retained to provide testimony regarding the Polygraph Examination conducted by Trooper Sharp. Butler testified about the "charts" and referenced Delong's abnormal breathing during the test. Butler testified Delong's respirations appeared to be a result of controlled breathing. Both testified they were unable to score the charts due to Delong's breathing/cardio being unstable. Evans testified an overly emotional person could create cardio issues. He testified he saw Delong moving her left arm and fingers during the test which can distort blood pressure cuff reading. Evans and Butler also offered testimony regarding the thumb cuff used by Trooper Sharp. The thumb cuff is used in place of the arm cuff. Sharp testified he switched to the thumb cuff because the arm cuff was giving Delong some discomfort. Sharp testified there is a difference in pressure from the arm cuff because the arm cuff is closer to the heart, but he has never heard of it having a negative effect on the test.

Butler also offered testimony regarding scoring tools such as PLE, and Relative Line Length tools. He testified he only uses the tools to score the charts because they are the most accurate. It is not a requirement for those tools to be used when scoring charts; it is a personal choice of the Polygraphist. Trooper Sharp testified that during his 10-week training, he was told not to use the scoring tools due to irregularities. Sergeant Brimah testified it is not the industry standard to use the scoring tools. Both Sergeant Brimah and Trooper Sharp testified they knew or knew of the Grievant and his spouse, Trooper Tiffany Appollonio.

Dr. Harry Caplinger testified he administered the Computer Voice Stress Analyzer, “CVSA” to the Grievant. Caplinger testified he has been an Examiner since 1974, and had four (4) weeks of training to become certified. Caplinger indicated he asked “simple” questions of the Grievant to establish a baseline and only asked the Grievant one question regarding rubbing his genitals on the arm of Delong. Dr. Caplinger asked the Grievant six (6) questions during his test. He asked have you ever had sexual contact with Jennifer Delong? Did you ever intentionally rub your genital area on Jennifer Delong’s arm while she was sitting in a chair? Did you ever ask Jennifer Delong at the Ohio State Fair if she wanted to fuck? Were you being honest when you were interviewed by Sergeant Laura Taylor? Have you ever been attracted to Jennifer Delong? And, have you lied to any of the questions on this test? Butler, when questioned on cross-examination, testified the “voice stress test” has only 40% reliability and is only 17% accurate.

Summarily stated, the Union, after requesting the complete File concerning the Polygraph Examination process and results, called Ken Butler and William D. Evans, Polygraphists, to review the “Charts” and recorded Examination of Delong and then performed a “peer review” of Sharp and Brimah’s findings and conclusions and testified in contradiction to that found by them. The conclusions drawn by the Union's witnesses concerning the Polygraph Examination of Delong conducted by Brimah and Sharp, were reviewed and analyzed and found wanting by Butler and Evans. Each concluded the results were inconclusive based on breathing and cardio irregularities and should not have been relied upon in determining the veracity of Delong concerning the allegations raised by her and the Employer’s assertions about the Grievant’s truthfulness based on Delong’s depiction of the events at issue.

COMPLIANCE TO DIRECT ORDER

Following the Investigation of the events as previously referenced, the Grievant was provided a direct order not to discuss the nature or the extent of any of the content discussed during the Investigation, or advise anyone as to their potential involvement in that process. The Grievant acknowledged he informed Trooper Gary Lewis he would be contacted for an interview. Trooper Lewis corroborated he was in fact approached by the Grievant and advised in that manner; however, he did testify the Grievant did not try to sway his recollections of the incident prior to his interview. The record demonstrates Taylor gave the Grievant a direct order not to discuss the Administrative Investigation with anyone on February 2, 2017 during his initial interview. The Grievant acknowledged that order and indicated he understood the content of the order. Trooper Lewis was a witness to the Investigation and was advised by the Grievant he would in fact be involved.

Following the investigation as conducted, the results as weighed and analyzed concerning the Polygraph Examination of Trooper Delong, the decision to effectuate the removal of the Grievant was confirmed. The Grievant was afforded an opportunity to take a Polygraph Examination on at least two (2) occasions which he declined and, according to the Contract, Employees are not mandated to do so.

Joint Exhibit 3, contains a letter dated May 19, 2017 from Captain Shawn Lee, Columbus District Commander, indicating the Grievant was found to be in violation of Rule 4501:2-6-02(E)1 False Statements, Truthfulness; Rule 4501:2-6-02(Y)1 Compliance to Orders; and, Rule 4501:2-6-02(J)(1)(2) Sexual Harassment and Discrimination and indicating through Administrative Investigation No. 2017-0041 Trooper Appollonio made inappropriate comments

and engaged in inappropriate physical contact with a female Trooper and was untruthful about his conduct during the Administrative Investigation. After being given a direct order not to discuss the investigation, he was found to have discussed the investigation with a witness.

Additionally, the Grievant was advised by Colonel Paul A. Pride, Superintendent of the Ohio Department of Public Safety, it was recommended he be terminated from his employment from the Ohio State Highway Patrol for violations of the afore-referenced rules. Such was based on the Administrative Investigation conducted by Sergeant Laura C. Taylor. As the record demonstrates, the Pre-disciplinary meeting was conducted on or about May 22 at District 6 Headquarters. By letter dated May 23, 2017, the Grievant was advised his Employment was terminated based on the afore-referenced violation of OSHP Rules as a result of Administrative Investigation previously identified. Such prompted the filing of this Grievance - Grievance No. DPS-2017-02019-01 concerning the employment termination of the Grievant, Christopher Appollonio.

When the Parties' efforts to resolve this matter through the course the negotiated Grievance Procedure proved unsuccessful, the employment termination of the Grievant, Christopher Appollonio, was appealed to Arbitration hereunder.

CONTENTIONS OF THE PARTIES

EMPLOYER CONTENTIONS

The Employer insists it has proven the Grievant violated the work rules of Sexual Harassment 4501:2-6-02 (J) (1) (2), Compliance to Orders 4501:2-6-02 (Y) (2) and False Statements, Truthfulness 4501:2-6-02 (E) (1). The Employer's imposed discipline sends a strong message to deter other employees from such behavior and should not be disturbed. *Freeman United Coal Co.*, 82 LA 861, 866 states, "When an employee's misconduct is so severe that continued employment would undermine an employer's ability to function effectively, discharge

will be deemed warranted even if the employee has received no earlier discipline and is unlikely to repeat the offense. In part, such discipline serves the legitimate purpose of deterring other employees from engaging in such conduct.” *Elkouri & Elkouri, How Arbitration Works, Sixth Edition*, page 1136 states, “Preliminary understanding of what is or may be involved in sexual harassment in the workplace is aided by a 1981 report prepared by the Merit Systems Protection Board (MSPB) at the request of congress. The report was based on an extensive survey of the views of federal employees, along with an intensive study of literature and case law on the subject of sexual harassment.” It further states, “The MSPB survey of federal employees indicated general agreement by male and female respondents that the following behaviors, ranked in order of agreement, constitute sexual harassment: (1) letters, phone calls, or materials of sexual nature; (2) pressure for sexual favors; (3) touching, leaning over, cornering, or pinching.”

The Grievant violated not one, but two of the above listed behaviors, numbers two (2) and (3). The Grievant violated those behaviors when he asked the victim, Trooper Delong to have sex with him at the 2016 Ohio State Fair and again when he put his hands on her shoulders, hugged her, and rubbed his genitals on her arm at the salvage facility. The Grievant engaged in a pattern of unwelcomed, sexually-related conduct in the workplace even after being told his advancements were unwanted. Various Arbitrators have held, truthfulness is an essential part of being a Trooper. Arbitrator Susan Grody Ruben wrote, “First it 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. 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.” *See*, Grievance 15-03-20101216-0166-04-01, at page 25.

The Employer emphasizes, the devastation sexual harassment has caused in our country. As in this case, inappropriate comments made by the Grievant turned into unwanted touching and the rubbing of his genitals on the victim, Trooper Jennifer Delong. The Grievant has never apologized and has not shown any remorse for his actions. Trooper Delong testified her home, work, and personal life have been drastically affected by what the Grievant did to her. This Employer has set forth a high standard of conduct for its employees. Policy and Procedure, as well as, reasonable Rules and Regulations provide employees with clear guidelines of what is, and what is not, acceptable in the Division. Not only is sexual harassment illegal, it is used to demean and degrade victims and will not be tolerated by the Ohio State Highway Patrol. The discipline imposed was not arbitrary, capricious or discriminatory.

For these reasons, the Employer requests the Grievance be denied.

UNION CONTENTIONS

The Union Contends the Grievant was an exemplary State Trooper with nearly two (2) decades of unblemished service. The facts and circumstances involve a myriad of allegations levied against the Trooper and only two (2) of those are even remotely accurate. The accuser, Jennifer Delong, advised her significant other, Sergeant Travis Woodyard, another State Trooper, regarding the alleged comments and he instigated by reporting to Staff Lieutenant Neal.

Initially, the Union contends and emphasizes the Grievant adamantly denied the allegation he asked Trooper Delong to "fuck at the fair" in 2016 and that he rubbed his genitals up and down on her arm while in an Office at the Alum Creek Salvage Facility with a witness seated right next to Delong in early 2017. The Union insists there is no independent

corroboration that either of those events took place. There is independent testimony from the witnesses present at the Alum Creek Salvage Office that the rubbing of the genitals did not occur and could not have occurred based on the logistics within the small Office. The Grievant did admit to making a comment about Trooper Delong getting a "butt job", or something along those lines and he did in fact alert Trooper Lewis he would likely be contacted about the Investigation. The Investigation Report indicates, and Trooper Lewis' testimony corroborates, the Grievant's admission that was all that was discussed regarding the investigation would be occurring. There is no evidence to suggest any specifics about the Investigation or the events in question were ever discussed with Trooper Lewis.

The Employer's reliance on the Polygraph Examination administered by its own Employees that concluded that Trooper Delong was not being deceptive, is problematic and cannot be deemed reliable. Based thereon, the Employer decided to terminate a 20-year Employee with an otherwise unblemished record. During the two-day Arbitration Hearing, it was demonstrated by the Union the Polygraph Exam, based on various and sundry reasons, is wholly unreliable and should not be considered as actual evidence in the Arbitrator's decision-making process.

Moreover, the Union emphasizes the disparate manner in which disciplinary action has been issued by the Employer. Sergeant Pam Gowen, received a one-day Suspension for making an inappropriate sexual and derogatory comment toward a subordinate; Lieutenant David Dillon, received a three-day Suspension for making an inappropriate racial comment to his subordinate; and, Captain Herbert Homan, received a Last Chance Agreement, Demotion, and a three-day Suspension for engaging in an inappropriate conversation with a female subordinate nearly 10 years prior.

Based thereon, the Union insists the Employer has not met its burden of proof and persuasion to justify the termination of the Grievant. Based on the “Seven Tests for Just Cause”, the Employer has failed miserably. Indeed, there may be reasonable rules and regulations in place and the Grievant may have been aware of them; however, the Employer's Investigation was neither accurate, nor fair. During the Arbitration Proceeding, it was established there was no substantial, corroborating evidence proving the Grievant violated the rules with which he was charged. It did not apply all rules, regulations and penalties even handedly and without discrimination to all Employees. This penalty was without a doubt not reasonably related to either the seriousness of the proven offenses and/or the Grievant's record of past service. The evidence introduced during the Arbitration Proceeding does not support Trooper Delong's allegations. Post Commander Lieutenant Akers testified he would welcome Trooper Appollonio back without hesitation. This State Trooper deserves an opportunity to continue with an unblemished career he has established and enjoyed. He had no disciplinary record upon which to justify removal and the Employer's reliance on the Polygraph Examination is clearly unsupported by corroborating evidence.

The Union requests the Grievance be sustained; the Grievant be restored to his position as Trooper with full back pay, including any pay supplements to which he is entitled, seniority, and any other benefits to make him whole.

For these reasons, the Union requests the Grievance be sustained.

DISCUSSION AND FINDINGS

The disposition of this matter hinges upon the determination of whether the Employer has established Just Cause as required in Article 19, titled “Disciplinary Procedure”, concerning the allegations raised against the Grievant, Christopher Appollonio and his alleged involvement with

Trooper Jennifer Delong. As set forth in the Parties' Collective Bargaining Agreement, Article 4 recognizes the Employer's right, inherently and contractually recognized to suspend, discharge and discipline employees. The limitation placed upon the Employer in that regard is recognized in Article 19 which memorializes the "standard" for discipline to be that of Just Cause. As recognized therein, inherently and contractually, under a Just Cause standard and analysis, the Employer bears the burden of proof and persuasion to establish the Grievant is guilty of the wrongdoing which served as the basis for the imposition of the disciplinary action at issue and whether the discipline as imposed is commensurate with the nature of the infraction committed. The equities of Just Cause require the Employer establish culpability of the Employee and the evidence as presented be weighed, measured and analyzed in accordance with the contractual mandates as to whether any aggravating and/or mitigating factors exist. In this matter, the Grievant is a nearly 20-year employee with an otherwise unblemished employment record. The *proven* events in question herein essentially are admissions made by the Grievant against his interest, whereas, the others are mere uncorroborated allegations of misconduct.

The Employer emphasizes the Grievant was removed for Just Cause based on his inappropriate conduct of both a physical and verbal manner concerning his interactions with Trooper Jennifer Delong that occurred in August 2016 and January of 2017. It insists that based on the egregious misconduct engaged in by the Grievant, the overwhelming evidence of record warrants separation of his employment. It insists the Polygraph Examination of Delong clearly bolsters its conclusion; her statements were in fact true and accurately depict the main events in question. The Grievant was afforded the opportunity to undergo a Polygraph Examination which he declined. Such, as it emphasizes, clearly suggests the Grievant did indeed engage in the

conduct as alleged by Trooper Delong and such serves as the compelling basis to terminate his employment.

The Union insists there is simply insufficient evidence to conclude the Grievant engaged in the misconduct as alleged by Trooper Delong and, based on other instances where the Employer has instituted disciplinary action based on similar alleged incidents of wrongdoing and misconduct, the events in question herein do not give rise to termination of an 18-year employee with an otherwise unblemished record. Moreover, the Employer's reliance on the Polygraph Examination, based on its commonly recognized unreliability, is simply misplaced. The Union insists Polygraph Exams are inherently unreliable and subject to being manipulated by the individual undergoing the Exam. In this instance, following its receipt of the entire Polygraph Examination results, it retained the services of more experienced Polygraph Examiners who concluded the results were unreliable based on the manipulation of the test by Trooper Delong given her erratic breathing patterns that were inconsistent with normal breathing respirations per minute and numerous movements made by her that had a direct impact on the results rendering the results unreadable as concluded by its experts. It emphasizes the Employer has failed to establish, by corroborating evidence, the events in question rose to the level of termination.

The events in question, as set forth in the extensive evidentiary record, are subject to differing accounts, different levels of severity and, unfortunately, resulting in the termination of an Employee with nearly 20 years of service and an otherwise unblemished personnel record. The likelihood that anyone will ever know what was said during these exchanges will never be definitively determined. Only the two participants in the exchanges know what was said, how it was said, and the intentions based on what was in fact uttered. With respect to the Employer's reliance on the Polygraph Examination results of Trooper Delong, the very existence of the

differing conclusions drawn by those who either conducted the Polygraph Exam or those who conducted the peer review of the Polygraph Exam, clearly establishes and bolsters the inherent unreliability of such tools to ascertain, and glean from the examinee, what is either truthful or subject to deception. It is clear to the Arbitrator the inherent unreliability of the Polygraph Examination renders problematic the overall alleged egregious misconduct of the Grievant and the resulting disciplinary action.

Based on this evidentiary record the alleged victim espouses her version and perceived intent of the alleged statements made by the Grievant to her, as well as, the Grievant's characterization and denial of any malicious intent, or whether the statements were even made as alleged. Given the fact the Polygraph Examination simply cannot be relied upon based on its inherent unreliability, as characterized by all witnesses relative to their involvement in this truth-seeking endeavor, nonetheless results in a "he said - she said" dilemma without corroboration. Mere assertions of alleged misconduct without corroboration are insufficient to sustain the burden of proof required under a Just Cause analysis to meet the equities of Just Cause in assessing disciplinary action. Here, the events that allegedly occurred in August 2016 at the Ohio State Fair, at or near Gate 3, are simply unsupported and lack compelling corroboration that would lead the Arbitrator to the conclusion the Grievant engaged in the comments as alleged by Trooper Delong.

If indeed the Grievant made these comments, reasonable people would conclude they are indeed inappropriate generally, and more importantly, in any workplace. Moreover, whatever comments the Grievant made about his coworker's physical appearance are wholly inappropriate and have no place in today's work environment. Those statements regarding the need for Trooper Delong to "have work done on her breasts and buttocks" are simply repugnant and

inappropriate and have no place in any work environment. The Grievant himself admitted to these statements which do not require corroboration and serve as admission against his interest concerning Delong's allegations against him. Moreover, the manner in which the Employer has issued disciplinary action to other employees concerning similar events/actions or other rule violations, which served as the basis for discipline herein, suggests to the Arbitrator consideration for mitigation of the penalty is warranted. The Employer is required to levy disciplinary action in an even-handed manner and when it does not, such disparities are subject to being raised in subsequent matters.

Moreover, it is clear the Grievant violated a direct order when he informed Trooper Gary Lewis he would in fact be contacted for an interview concerning this Administrative Investigation. While the testimony of record indicates Lewis confirmed the Grievant did not try to influence his recollection of the matter at hand prior to his being called as a witness therein, he nonetheless admittedly violated a direct order.

Given the conclusions drawn, the Employer has failed to establish corroboration based on the sexual proposition allegedly made at the State Fair; and, based on the eyewitness testimony of Tina Davy at the Alum Creek Salvage Office, wherein she indicated it was physically impossible for, nor did she see, the Grievant engage in the conduct alleged by Trooper Delong. Those two instances of misconduct, based on this evidentiary record, have been weighed, measured and have been found wanting for lack of corroboration and therefore cannot serve to support/bolster the Employer's decision to effectuate removal of the Grievant. The Grievant's admissions concerning the inappropriate comments concerning the physical appearance of Trooper Delong, as well as, his admission concerning violation of a direct order not to discuss

the Administrative Investigation with any potential witness are, by his own admissions, found to be established and serve as the basis for the imposition of some level of disciplinary action.

Given the fact the entire list of allegations and charges have not been established based on the lack of corroboration, the penalty of termination shall be rescinded. Indeed, a strong message must be sent to all Employees that compliance with direct orders is tantamount in a law enforcement environment. Moreover, the utterance of inappropriate comments concerning anyone's physical appearance and the need for him/her to take measures to correct their perceived inadequacies, simply cannot be tolerated. Based on these proven, established and corroborated through the admissions of the Grievant, these two instances, while not giving rise to separation of employment, nonetheless establish Just Cause for disciplinary action.

Based thereon and based on the prior instances of other employees deemed to have been in violation of these work rules and regulations, the Grievant's termination shall be modified to reflect a 30-day suspension for each of those two (2) instances found to have been established by compelling, corroborative evidence; namely, the Grievant's admission to his misconduct equaling a 60 calendar-day suspension without pay. The balance of the time from the date and time the Grievant was terminated shall be subject to back pay. The customary "set-offs" including unemployment compensation and any other interim earnings shall be deducted from this back-pay calculation. The Grievant shall be restored to his position as Trooper without loss of seniority or any other contractual entitlement except for 60 calendar-day suspension without pay. The Arbitrator shall retain jurisdiction over this matter for a period of 60 calendar days from the date of this Opinion and Award to assist the Parties with any implementation issues that may arise.

AWARD

The Grievance is sustained in part; and, denied in part.

David W. Stanton

David W. Stanton, Esq.
NAA Arbitrator

January 30, 2018
Cincinnati, Ohio