OPINION AND AWARD

IN THE MATTER OF ARBITRATION

BETWEEN

THE OHIO STATE TROOPERS ASSOCIATION

AND

THE OHIO DEPARTMENT OF PUBLIC SAFETY,
DIVISION OF OHIO STATE HIGHWAY PATROL

Grievance #: DPS-2018-01374-01

Grievant: Trooper Michael Ervin

Date of Hearing: June 25 and June 26, 2018

Place of Hearing: Gahanna, Ohio

Arbitrator: Sherrie Passmore

Date of Award: October 3, 2018

Advocates for the State: Lieutenant Darrell Harris, Lieutenant Cassandra Brewster,

Advocate for OSTA: Elaine N. Silveira, Esq.

INTRODUCTION

This arbitration arises pursuant to the collective bargaining agreement ("Agreement") between the parties, The Ohio Department of Public Safety, Division of State Highway Patrol ("Employer") and The Ohio State Troopers Association ("Union"). Sherrie Passmore was appointed as the Arbitrator under the authority of the Agreement.

A hearing was held on June 25 and June 26, 2018. Both Parties were represented by advocates who had a full opportunity to introduce oral testimony and documentary evidence, cross-examine witnesses, and make arguments. Seventeen witnesses testified during the two-day hearing. Forty-nine exhibits were admitted into evidence, including a seventy-five page administrative investigation report and audio recordings of all witness interviews. The exhibits also included transcripts of twelve of those witness interviews. Post-hearing briefs were electronically filed on or before August 20, 2018.

JOINT STATEMENT OF ISSUE

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

RELEVANT PROVISIONS OF THE AGREEMENT

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 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. Demotions 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.

BACKGROUND

The Grievant, Michael Ervin, was commissioned as an Ohio State Highway Patrol Trooper on January 20, 2008. He was assigned to the Portsmouth Post until he was reassigned to the Jackson Post on February 21, 2018.

Ervin was removed from his employment on April 18, 2018, for violation of OSHP Rules 4501:2-6-02(E)(1), False Statements, Truthfulness, 4501:2-6-02(Y)(1)(2), Compliance to Orders, 4501:2-6-02(J)(1), Sexual Harassment & Discrimination, and 4501:2-6-02(I)(1), Conduct Unbecoming an Officer. The statement of charges read:

> Through administrative investigation #2018-0080, it was found that Trooper Ervin displayed conduct unbecoming an officer and misused LEADS. Additionally, Trooper Ervin sexually harassed a co-worker, talked about events surrounding the administrative investigation after Lieutenant Debord ordered him not to speak about it, and made false statements during the administrative investigation.

The charges, in part, stemmed from Grievant's involvement in an off-duty traffic related incident on January 9. While Grievant was driving his personal vehicle, an oncoming car went left of center. Grievant swerved to miss the vehicle and ran off the road. His vehicle spun around to face in the opposite direction in which he had been driving. He saw the car continue down the road and turn. Ervin drove in that direction and located the

vehicle at Slate Run Pizza. Based on his law enforcement experience, Grievant determined that the driver was drug impaired. He reported the incident to law enforcement and contained the driver. Deputy Jackson from the Scioto County Sheriff's Office (SCSO) arrived and took the driver, Billie Fulk, into custody.

Trooper Norman and Sgt. Robirds subsequently arrived at Slate Run Pizza and Ervin told them what happened. They walked around Ervin's vehicle and determined there was no visible physical damage to the exterior of Ervin's Jeep, but when Ervin went to leave the Jeep did not start. Trooper Norman completed a crash report on the incident. He listed Michael Ervin as a witness, but refused to list him as a subject of the crash because he believed the problem with Grievant's Jeep not starting was pre-existing.

Because of his involvement in the crash, Grievant asked Trooper Norman if the driver who was arrested had insurance. He was told no and that Mr. Fulk was not the owner of the vehicle. Ervin asked whether Norman had any information about the owner of the vehicle. Norman did not.

Since Norman did not have any information about the vehicle owner, Grievant contacted Deputy Staten of the SCSO to see if he knew of anyone associated with a Mr. Fulk on Hard Scrabble Road. Scioto County is a small community and Deputy Staten worked that area. Ervin explained that he had been involved in an off duty crash and wanted to seek restitution for damages to his vehicle. Deputy Staten immediately recognized the name and address as being associated with the Hamiltons. Ervin asked Staten if he could get insurance and/or contact information for him and he agreed to do so.

Shortly thereafter, Staten went to Hamilton residence on Hard Scrabble Road and spoke to Wade Hamilton. Mr. Hamilton is the father of the registered owner of the vehicle.

His daughter was not present. Billie Fulk was his daughter's boyfriend. Mr. Hamilton told Staten his daughter did not have any insurance but that he was willing to talk to Ervin by phone. Hamilton gave Staten his phone number, which Staten passed along to Ervin.

Ervin, while off duty, called Mr. Hamilton the next day, January 10, 2018. He told Ervin that his daughter was in the hospital and had no insurance, but was insistent that if there were any damages he would take care of that. Ervin explained that his Jeep may require a new starter and once he got it fixed and had receipts he would contact him again. Ervin got his Jeep starter fixed the next day, January 11. He spoke to Hamilton again on January 12. At Hamilton's suggestion they agreed to meet at Weaver's Gas Station, near Hamilton's home.

They met as planned. When Ervin arrived in his Jeep, Mr. Hamilton approached him. Grievant showed him a receipt for the starter he purchased from Barbour Auto Parts. Hamilton asked if that was all. Ervin replied he thought his Jeep would also need an alignment but had to not taken it in for that yet. Hamilton asked if $200 would cover his damages. Ervin said it would and accepted $200 from Hamilton. Ervin told his co-workers about receiving this money from Mr. Hamilton to fix his Jeep.

On January 12, 2018, Sgt. Robirds called his Portsmouth Post Commander, Lt. Debord, to report that Trooper Norman told him a Scioto County Sheriff went to the Hamilton residence and "demanded money to fix Trooper Ervin's personal vehicle and that he received the payment." He also reported that Norman had brought to his attention that Ervin had made comments about having problems with his Jeep the week before, the same problems he was now claiming were caused by the crash on January 9. Lieutenant Debord spoke to Trooper Norman about this on January 16. Norman confirmed that he "knew for a

fact that a deputy went to the residence…and demanded money on behalf of Trooper Ervin and that a payment was collected." He also told Debord he thought Ervin had taken payment for pre-existing damages.

On January 19, 2018, Lieutenant Debord and Sgt. Howard went to the Hamilton residence. They parked at the bottom of a hill and only Sgt. Howard went up the hill to talk to Mr. Hamilton. He reported back to Debord that Hamilton confirmed Deputy Staten had come to his house and that he paid him for Ervin's damages. As a result of these reports, an administrative investigation of Ervin was initiated on February 6, 2018.

On January 25, 2018, Wade Hamilton approached Grievant while on duty. Grievant was sitting in his patrol car in a business parking lot and talking to Deputy Staten who was parked next to him. Mr. Hamilton walked up to Grievant's patrol car and asked why Sgt. Howard had been to his house and questioned him about giving Grievant money. He expressed concern that someone thought he had given Ervin a bribe.

On January 26, 2018, Lt. Debord had a meeting with Grievant to issue him a written reprimand unrelated to this matter. That reprimand is the only discipline on Grievant's record. After the reprimand was issued, Grievant asked why Sgt. Howard had gone to the Hamilton residence and not come to him. Debord told him it was because he ordered Howard to do so to determine if money had been exchanged for the damages Erwin claimed to his Jeep. Grievant admitted Hamilton had given him $200 for damages to his Jeep and explained why he did not feel he had done anything wrong. Lt. Debord advised Grievant not to talk about the crash since it may turn into an administrative investigation (AI).

On February 1, 2018 Lt. Debord and Sgt. Richendollar met with Grievant. The purpose of the meeting was to offer him EAP because of the how agitated he had become during the January 26 meeting and because he had mentioned suicide to another trooper. The night before, January 31, Trooper Keating texted Grievant and asked what he was doing. Grievant replied, "not coming to work suicide leave." Keating acknowledged this remark with "LOL [laugh out loud] ok". Grievant did report to work that night. He assured Debord and Richendollar that he would never consider suicide because of his daughter and church. Based on those statements, Debord reported to Captain Roark, Jackson District Commander, in a February 5 memo that he and Sgt. Richendollar "felt comfortable" Ervin was not a threat to himself. He also reported Ervin seemed receptive to seeking counseling. Ervin did contact EAP shortly after the meeting, but was not able to get an appointment until February 12.

On or about February 6, 2018, it was reported to Lt. Debord that Ervin had made some threats about Sgt. Howard. Based on that report, Ervin was called into the Post later that day and notified of a fitness for duty appointment on February 8. His duty weapon and patrol car were retrieved.

Ervin went to the February 8 appointment and was psychologically evaluated by Dr. David Dietz, Clinical Psychologist. Dr. Dietz issued a Fitness for Duty Evaluation on February 9, 2018, finding Ervin was psychologically fit for duty for his position as a State Trooper.

Ervin was notified of Dr. Dietz's report on February 12 and returned to work that night. He kept his appointment with EAP that day. At the conclusion of the appointment, Grievant asked if any follow up was needed and the EAP doctor told him no.

Upon returning to work, Ervin was scheduled for ten straight days. On his first three days back, he was the only unit working the road and there was no supervisor. He started working with other people on his fourth day back. On the ninth day, February 21, 2018, Lt. Debord called Ervin at home and told him to report to the Jackson Post that night. He continued to work at the Jackson Post without incident until his discharge on April 18, 2018. He was reassigned because of a February 16, 2018 IOC from Portsmouth Post employees to Lieutenant Debord. The IOC requested that Ervin be put on administrative leave for safety reasons and reported ten concerns about Ervin's conduct. These concerns included threats, inappropriate sexual contact with employees, and racial language. Those allegations were added to the ongoing administrative investigation of Grievant.

POSITIONS OF THE PARTIES

Position of the Employer

The Employer had just cause to terminate Grievant because it proved the Grievant violated four work rules. His removal was warranted because of the egregiousness of the violations. Those work rules are: 4501:2-6-02(J)(1) - Sexual Harassment and Discrimination, 4501:2-6-02(Y)(1)(2) - Compliance to Orders, 4501:2-6-02(E)(1) - False Statements, Truthfulness, and 4501:02-6-02(I)(1) - Conduct Unbecoming an Officer.

The rule prohibiting sexual harassment and discrimination was violated because Grievant engaged in a pattern of unwelcome sexual conduct and made racial slurs in the workplace, which created a hostile work environment.

The Grievant violated the work rule regarding compliance to orders in two ways. He

failed to follow a direct order that Lieutenant Debord gave him on January 26, 2018, not to discuss the events surrounding the crash that occurred on January 9, 2018 and misused LEADS when he ran his daughter's information and Mr. Fulk's information through the system.

Grievant displayed conduct unbecoming an officer in the following ways:

1. He obtained money from a civilian under false pretenses by using his position as a State Trooper. He used his position to get Deputy Staten to obtain Hamilton's name and phone number for him. Grievant used the information to obtain two hundred dollars from Hamilton for alleged damages to his Jeep.
2. He made threatening comments about Sergeant Howard who is an Assistant Post Commander at the Portsmouth Post.
3. When Grievant met with Lieutenant Debord and Sergeant Robirds on February 6, 2018 and was asked for his weapon, Grievant jumped up quickly, unholstered his weapon, dropped the magazine, jacked the round out, and then flung his gun at Sergeant Robirds.

Grievant was in violation of the rule regarding false statements and truthfulness because he made false statements during the administrative investigation. When asked during his interview with Sergeant Barnes if he repeatedly rubbed his ASP (expandable baton) between the legs and groin area of Trooper Stump, he answered, "No." When asked during his interview with Sergeant Barnes if he pressed his forefingers onto his trousers in order to outline his erect genitals, he answered, "No, and anyone who alleges so is lying."

Grievant should not be returned to duty. He has admitted to making comments

about wanting to cause harm to those in his chain of command. He also displayed hostility by the manner in which he relinquished his gun when he was notified he was being sent for a fitness for duty exam. In the report from that exam, Dr. Dietz stated that Grievant's "self-description indicates significant suspiciousness and hostility in his relations with others" and that his issues were "characterological in nature."

Pursuant to Contract Section 15.05 Unsafe Conditions, fourteen Portsmouth Post Bargaining Unit members submitted an IOC on February 16, 2018 reporting concerns about the Grievant's conduct and behavior. Lieutenant Debord and Sergeant Robirds both testified they would be concerned for the safety of their employees as well as the public if Grievant were brought back to work. Troopers Norman, Keating, Stump, and Lawson also testified they would feel unsafe working with the Grievant if he is returned to duty.

Position of the Union

The Union's position is that the Employer did not have just cause to terminate Grievant under Arbitrator Carol Daugherty's seven tests of just cause. Specifically, the Employer's investigation was not accurate, objective or fair and the Employer did not produce substantial evidence that Grievant violated the rules he was charged with violating. Further the penalty was not reasonably related to either the seriousness of the charged offenses or Ervin's record of past service. All seven tests must be met for an arbitrator to uphold discipline.

In support of its position that the investigation was not fair or objective, the Union alleges the following:

- The investigating officer made up his mind Grievant was guilty before

gathering all the facts.

- Not all employees were interviewed who signed a document saying they witnessed or had knowledge regarding the allegations.
- The investigating officer did not document the conversation he alleges he had with Lt. Debord identifying which of those witnesses to interview and Debord denies having any off the record conversation with the investigator.
- Not all avenues were pursued to obtain relevant information; Grievant's phone records were not requested and Trooper Tina Moore, a witness suggested by Grievant, was not interviewed.
- Witness statements were mischaracterized and incorrectly summarized in the investigative report.
- A captain from an outside agency, who was known to have a dispute with Grievant in the past, was permitted to attend a majority of the investigative interviews.
- The entire administrative investigation, including Grievant's statements made pursuant to Garrity, was passed along to OIS Investigative Officer Sergeant Schlotterbeck. This violated Grievant's Garrity rights.

According to Sgt. Barnes' testimony, the false statements charge relates to whether Ervin gave Deputy Staten LEADS information. This allegation was refuted by Ervin's phone records, which show that Ervin called Deputy Staten prior to running Fulk's information through LEADS. Ervin ran the information to determine whether Fulk posed a danger to

himself and his daughter, did not provide the information to anyone, or use it in anyway. The Employer's representation in its opening statement that Grievant has been charged with violating LEADS is not true and ironic in a case where a trooper is being prosecuted for false statements.

Grievant did not engage in conduct unbecoming an officer. Ervin was not acting in his capacity as an Ohio State Highway Patrol Trooper when he was involved in an off-duty crash. He was not acting in his capacity as a trooper when he met with Wade Hamilton to get restitution for his vehicle. Ervin was entitled to receive compensation for his damaged Jeep. He was not rendered unable to perform his duties or appear at work and did not cause harm to the reputation of the Employer.

With respect to the charge of sexual harassment and discrimination, the Union points to problems with proof and a lack of corroboration. Witnesses varied as to when the alleged harassment occurred. One alleged victim said it took place a year to a year and a half ago and that it has not occurred since he told Ervin to knock it off. Ervin flat out denies the allegation in its entirety. The Employer's EEO Officer, Toby Ferguson, was present during Ervin's second interview, but did not complete any report on the issue/investigation. Had Ervin's action been as egregious as the Employer has suggested, she surely would have done so.

The Union defends the compliance to orders charge on the basis that Lt. Debord never gave Trooper Ervin an order not to talk about an investigation that had not officially begun.

The Union requests that the grievance be granted and that Grievant be restored to his position as a trooper, assigned to the Jackson Patrol Post, with full back pay, including

any pay supplements he is entitled to, seniority, benefits and to be made whole.

DISCUSSION

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

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

This is the burden of proof used by most arbitrators today in misconduct cases. Very few arbitrators overturn discipline or a discharge because not all of Daugherty's seven tests of just cause were met. One of Daugherty's tests is whether the investigation was fair and objective. The Union pointed out many problems with the Employer's investigation and many aspects of the investigation in this case were troubling. An employer should conduct a full and fair investigation. But the failure to do so is normally not a sufficient basis to set aside a discharge if the above elements are proven and due process is satisfied at hearing.

The Grievant's Alleged Misconduct

The Division terminated Grievant for violating 4501:2-6-02(I)(1), Conduct Unbecoming an Officer, 4501:2-6-02(J)(1), Sexual Harassment & Discrimination, 4501:2-6-02(Y)(1)(2), Compliance to Orders, and 4501:2-6-02(E)(1), False Statements, Truthfulness. The charge specifications for these violations were that Grievant "…displayed conduct unbecoming an officer and misused LEADS…sexually harassed a co-worker, talked about

events surrounding the administrative investigation after Lieutenant Debord ordered him not to speak about it, and made false statements during the administrative investigation."

Conduct Unbecoming an Officer

Rule 4501:2-6-02 (I) (1), Conduct Unbecoming an Officer provides:

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

The charge specification for this rule violation was simply that Grievant "displayed conduct unbecoming an officer." No description of the conduct found to be unbecoming was provided. In its post-hearing brief, the Employer argues that Grievant displayed unbecoming conduct in three ways:

1. He obtained money from a civilian under false pretenses by using his position as a State Trooper.

2. He made threatening comments about Sergeant Howard.

3. When Grievant met with Lieutenant Debord and Sergeant Robirds and was notified of a fitness for duty examination, he relinquished his gun in an unbecoming manner.

Only item 1, the conduct related to obtaining money from a civilian, was listed in the Synopsis of the AI Report as part of the allegations and findings. The first indication in the record that the Employer was basing the Rule 4501:2-6-02(I)(1) violation on items 2 and 3

above was in its closing argument. In its opening statement, the Employer only made reference to facts related to item 1. Understandably, the Union only addressed facts related to item 1 in disputing the Rule 4501:2-6-02(I)(1) violation in its closing argument.

Although Grievant was asked questions about items 2 and 3 in the hearing, he was given no notice that conduct was the basis for charging him with this rule violation. Both the AI Synopsis and the Employer's opening statement suggest that item 1 was the only basis for this charge. Fairness and due process demand sufficient notice to allow a Grievant to prepare for and offer a defense to a charge.

The Employer did not prove item 1. Ervin did obtain money from a civilian, Mr. Hamilton, but not under false pretenses. Ervin accepted money from Hamilton for damages he believed were caused to his Jeep as a result of the off duty crash he was involved in on January 9. It's undisputed that Grievant reported he heard something when the driver forced him off the road and that his Jeep would not start after following the driver to Slate Run Pizza. Grievant provided an explanation of how a starter could be damaged by abrupt motion and produced receipts showing that he purchased a new starter shortly after the incident.

The Employer believed, but did not prove, that the damages for which Ervin accepted restitution were pre-existing. It believed this because of conversations other troopers reported having with Grievant about problems with his Jeep prior to his involvement in the off duty crash. Grievant admitted that he had a problem with starting his Jeep in late August/early September 2017. He thought it might be a problem with the starter, but it turned out to be a problem with the ignition actuator. He produced receipts from that time frame showing he had purchased and then returned a starter within a

matter of days and then purchased an ignition actuator pin. Grievant testified that after that repair he had no problems with starting his Jeep until the off duty crash. The Employer did not prove otherwise. There was testimony from Troopers Norman, Keating, and Lewis that they had a conversation with Grievant about a problem with his Jeep a few weeks to a few months before the crash but Lewis testified the only mention of a starter was a comment he made that the problem was NOT the starter. There was also testimony from Sgt. Robirds that Grievant seemed surprised when his Jeep did not start the night of the crash.

In addition to arguing the money was for pre-existing damage, the Employer argued Grievant used his position as a State Trooper to obtain the money. It contends this was proven because Grievant was on duty when he talked to Staten about getting contact information and that Staten provided him the information while he was still on duty. The evidence shows that these calls were made and received on Grievant's personal cell phone and were very brief. It's evident from a review of Staten's phone call to Lieutenant Debord shortly after the incident that he understood Grievant was asking for the contact information in order to be able to try to get restitution for his vehicle as a private citizen.

Grievant was not acting in his capacity as a Trooper when he met with Wade Hamilton to get restitution for the damage caused to his vehicle by Mr. Hamilton's daughter's car. Mr. Hamilton was interviewed on two different occasions by two different Highway Patrol officers, but never raised any issue about compensating Grievant for the damage to his Jeep. There was testimony that there is nothing unlawful or unusual about private citizens working out restitution between them rather than by filing an insurance claim or resort to the courts.

A number of witnesses testified they thought Grievant's actions in collecting money for damages to his Jeep were unethical. The testimony, however, was based on the belief that Grievant had sent Deputy Staten in uniform to collect money for him, collected the money under false pretenses, and/or improperly accessed LEADS to be able to do so. Those beliefs were proven to be incorrect.

Based on the above, I find that the Employer did not carry its burden of proving Grievant displayed unbecoming conduct related to obtaining restitution for damages to his vehicle because of his involvement in an off duty crash.

The Employer also argued that Grievant engaged in unbecoming conduct because he made threatening comments about Sergeant Howard. The Employer did not prove the Grievant made any threats. Threats are statement of intent to do harm. Believing Howard had treated him unfairly, Grievant, in a one-on-one conversation with Trooper Keating, joked about how he could get even with Howard. There was no evidence Grievant intended to take any action. In his AI interview, Trooper Keating stated he just laughed it off at the time. It was only after thinking about Grievant's remarks in the context of other things he had said and knowing Grievant had been under a lot of stress, that he reported the remarks. In response, the Employer understandably sent Grievant to a fitness for duty exam with Dr. David Dietz, a clinical psychologist. During the exam, Grievant discussed the remarks, among other things, and explained that he was merely venting and intended Sergeant Howard no harm. Dr. Dietz was apparently satisfied with that explanation and found that Grievant was psychologically fit for duty.

The Employer was also apparently satisfied that Grievant did not pose a threat to Sgt. Howard or anyone else. Grievant was returned to duty at the Portsmouth Post and

scheduled for the next ten straight days, working both alone and with other troopers. Sgt. Howard testified that if it were found that Grievant had made threats against him as alleged, he would want a protection order. He further testified that at the direction of the Employer he did not seek one.

The third basis on which the Employer argued that Grievant displayed unbecoming conduct was the manner in which he relinquished his gun on February 6 when notified he was being sent for a fitness for duty examination. Grievant was never asked about how he handled his firearm in any of his three administrative interviews. The Employer could have, but did not, charge Grievant with mishandling a firearm. In relinquishing his gun, Grievant testified he kept his finger off the trigger, did not point it at anyone, released the magazine then discharged the round, separated the two, and set them on the table. No one disputed this or testified it was in violation of policy. The Employer's issue was how forcefully Ervin put his gun down and slid it across the table. Lt. Debord, however, testified that it was understandable that Ervin was frustrated when he told Ervin he was taking away his gun. Shortly after the meeting, Lt. Debord sent an email report of the meeting to Captain Roark. He reported that Ervin was agitated but "complied as directed". He did not say anything about the manner in which Grievant turned over his gun or that his actions during the meeting were deserving of discipline.

Based on the above, I find that the Employer did not prove Grievant engaged in conduct that would bring discredit to the division and did not provide Grievant with fair notice of all of the reasons he was charged with and dismissed for the conduct unbecoming violation.

Sexual Harassment and Discrimination

Rule 4501:2-6-02 (J) (1), Sexual Harassment & Discrimination provides:

> No member shall sexually harass any person. 'Sexual harassment' is defined as the unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct or contact, or innuendo of a sexual nature. No member shall, by his/her actions, create an intimidating, hostile, or offensive work environment.

The Employer's EEO Policy, DPS-501.29 amplifies Rule 4501:2-6-02 (J) (1). For the above conduct to constitute sexual harassment, the Policy provides that one of the following criteria be met:

a. Submission to such conduct is made explicitly a term or condition of a person's employment;
b. Submission to or rejection of such conduct by a person is used as the basis for employment decisions and or retaliation affecting such person; or
c. Such conduct has the purpose of interfering with a person's work performance or creating an intimidating, hostile, or offensive work environment.

The charge specification for this rule violation was that Grievant "sexually harassed a coworker" and the Employer argued that this conduct created a hostile work environment. This allegation requires proof that the alleged harassment was so frequent or severe that it created a hostile or offensive work environment. Simple teasing, offhand comments, or isolated incidents that are not very serious are not enough.

Presumably, the co-worker referenced in the charge is Trooper Travis Stump. In the Synopsis of the AI Report submitted to the chain of command, the Answer to the allegation that Ervin created a hostile work environment reads as follows:

> Trooper Travis Stump alleges Ervin has repeatedly, over the years, touched him inappropriately by placing his ASP between his legs and groin and

> genital area. Stump has told Ervin that his actions are unwanted. Trooper Lawson backs up this claim by Stump, saying it last occurred in the Fall of 2017 in the trooper's room at the Post.

The Employer did not prove the above allegations. Trooper Stump testified about the ASP incident. An ASP is an expandable Division issued baton. When asked, "Has the grievant ever physically touched you?" Stump replied, "He has" and went on to describe the incident as follows:

> The incident happened a …at the post one day in the trooper room he just grabbed his asp and he was rubbing me on the backside with it and underneath my legs between my groins.

Stump testified that this incident occurred a year to a year and a half ago. In his AI interview on March 6, 2018, he said the incident was probably a little over a year ago. That places the incident around early 2017. On cross-examination, Stump acknowledged that nothing like that ever happened between him and Grievant after that day other than "maybe occasionally tapping him on the butt or something," but that he had no "specific recollection" of anything else. Stump also testified that he never worked the same shift as Grievant. There was no explanation offered as to why they would have been working together when the alleged incident occurred.

Trooper Lawson testified he saw Grievant inappropriately touch Trooper Stump. His testimony differs significantly from Stump's testimony. Lawson testified that the inappropriate touching took place in the in October 2017 and described it as follows:

> Q. …What did you see the grievant do to Trooper Stump in the fall of 2017 at the troopers' computers?
>
> A. Place his hand on the inside of his left thigh and touch his genital area with his fingers.

Lawson says that he did not see an ASP. He further testified that Stump had told him Grievant inappropriately touched him on more than one occasion, but could not provide any specifics. He went even further in his AI interview and stated that Stump had confided in him that Ervin was "always doing something sexual toward him." Stump, in contrast, testified the only inappropriate touching incident was with an ASP in early 2017. Surely Stump would have recalled and testified that Ervin touched his genital area with his fingers. Stump never mentions Lawson being present, either in his testimony or his AI interview. Rather than corroborating Stump's testimony, Lawson's testimony diminishes it. Grievant denies the ASP incident and the Employer did not produce sufficient and credible evidence that it occurred.

The only other allegation that Grievant sexually harassed Stump was that Grievant made a lewd remark to him during training at Rio Grande on January 24 and 25. Stump testified that during the training he was sitting next to Grievant, with one seat in between, when Grievant said something to the effect of "look at my boner" and pressed his fingers down in a V shape on his trousers to outline an erection. No one else at the training corroborates the incident and Grievant denies it.

Based on the above, I find that the Employer did not prove the two incidents involving Stump by sufficient and credible evidence. Even if sufficient evidence had been produced that the two incidents occurred as described by Stump, they do not constitute a sexually hostile work environment. The alleged incidents may have been inappropriate conduct, but are not proof of a hostile work environment. That requires a showing that the sexually harassing conduct was frequent or very serious nature. There were only two

incidents and they were over a year apart so certainly not frequent. The ASP incident as described by Stump was not of such a serious nature that a one-time incident establishes a hostile work environment. Stump's own conduct indicates he did not consider the incident to be serious. He did not report it for over a year and voluntarily put himself in close contact with Grievant after the incident. He and his wife chose to sit next to Grievant at the criminal patrol ceremony in 2017. He chose to sit next to Grievant, albeit one seat apart, at the Rio Grand training. He even sat next to Grievant at lunch that day after Grievant made the alleged boner comment.

Although the charge specification for this rule violation states that Grievant "sexually harassed a coworker" and the co-worker was presumably Stump based on the AI Synopsis, testimony was presented that Grievant inappropriately touched two other co-workers. The testimony is not credible.

Trooper Norman testified that Grievant grabbed his penis and rubbed it. That was the totality of his testimony about being inappropriately touched. He does not say when or where this happened. He did not say anything about it during the AI investigation. The first time he ever mentioned it was during his testimony on redirect. Such conduct is sufficiently serious that a one-time incident could create a hostile work environment for the alleged victim. However, Grievant denies the allegation and sufficient proof was not presented to prove the conduct occurred. Norman's testimony was so vague as to not be credible. Norman's timing in never bringing the allegation up until his testimony on redirect also casts doubt on the credibility of his testimony.

Lawson testified that Ervin inappropriately touched him four years ago, that he never reported it, and that it never happened again. This was his testimony:

Q. Let's talk about what the grievant did to you physically. Has the grievant ever touched you inappropriately?

A. Yes.

Q. Can you explain the circumstance surrounding it?

A. Just hand to groin area, grazing or slightly touching the genital area, yes.

He did not say where or in what context this occurred, if anyone else was present or provide any other details. Grievant denies it happened. Lawson's testimony was uncorroborated and so vague as to not be credible. It also lacks credibility because of the inconsistencies with Stump's testimony noted above and because he never reported it for four years.

In support of the sexual harassment charge, testimony was also presented that Ervin made some lewd remarks on three occasions:

1. Lieutenant Debord testified in a meeting with Grievant on January 26, 2018, Grievant referred to Sergeant Howard as a "cock sucker." Grievant denies that he referred to Howard by that name but admits he referred to him as "coward Howard dickwad."

2. Trooper Newman testified that one time when he had a 16-year-old female he had arrested in another room and was viewing video of the arrest, Grievant remarked to him, "there you go, you can get some of that". He does not say when this happened and Grievant denies it. Lawson testified Newman told him about the remark and he reported it up the chain of command. There was no evidence any action was taken on the reported remark.

3. In his testimony on redirect, Trooper Norman alleged for the first time that Grievant offered to give Trooper Keating a blow job if he voted for him for

trooper of the year. Keating never mentions this in either his testimony or AI interview. It did not come up at anytime during the investigation. This was a new allegation made for the first time at hearing.

The sum total of these three remarks, even if true and while inappropriate, are not proof that a hostile work environment was created. The remarks were neither frequent or of a serious nature. These three remarks were allegedly made to three separate individuals in one-on-one settings. The remarks do not seem different in kind than the type of banter and joking that goes on privately among troopers. Witnesses acknowledged that happens on occasion and that troopers sometimes use strong adult language on the post. The Union submitted group text messages as evidence of such banter. Keating was part of the group texts.

In its argument in support of a Rule 4501:2-6-02 (J) (1) violation the Employer also points to testimony about alleged racial remarks. While this allegation was investigated, no findings were made that Grievant made such remarks and he was not charged with such conduct. Racially disparaging comments are prohibited by a separate rule of conduct, Rule 4501:2-6-02 (J) (2). I, therefore, have no authority to making findings regarding those allegations.

Compliance to Orders

Rule 4501:2-6-02(Y)(2) Compliance to Orders provides:

> 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.

Grievant was found to have violated this rule for talking about events surrounding

the administrative investigation on the basis that Lieutenant Debord ordered him not to speak about it. The Union disputes that such an order was given and it's the Employer's burden to prove that it did. The Employer did not carry that burden.

Debord allegedly gave this order during a meeting he had with Grievant on January 26, 2018 to issue him a written reprimand. After Debord issued the reprimand, Grievant asked if there was an administrative investigation being conducted related to the January 9th crash he was involved in. He had heard rumors and wanted to assure the Lieutenant his conduct had been above board. Debord acknowledged that an administrative investigation may be initiated, but that there currently was none. The parties generally agree that is what happened up to that point. What was said next is in dispute.

Grievant is unwavering that Lt. Debord never issued him an order at that meeting but only told him it might not be advisable to talk about the events surrounding the January 9th crash. Grievant freely admitted that he talked to several individuals about matters related to the crash just that after the meeting with Debord. He made no attempt to cover that up. His actions suggest that he did not believe he was under an order not to talk.

Debord's testimony and his actions, in contrast, raise doubt that he gave Grievant a clear, direct order. Here's what he said during the investigation:

> Barnes: And you said you advised, did you, are you meaning you gave him an order or you—
>
> Debord: Well I advised him there may be one, and then I advised him that since he brought it up, uh, and that there was a possibility of an AI being started, that he was not to talk to anyone about it from that point forward….

Here's what he testified at hearing:

Q. Did you on the –January 26th meeting with Trooper Ervin, did you say, I'm giving you an order not to talk about this?

A. Yeah. I said—I advised him that it wasn't—because he asked if there was an investigation. I advised him that there wasn't yet; that I had passed it up, so we're waiting for Columbus to make a decision. And I said even though it's not an investigation yet, I'm ordering you not to talk about it with anybody else.

Q. You actually said the word "ordering?

A. Yes.

Q. Did you put it in writing?

A. I don't know. I sent an email over to the district, and I think I said—I think I said I advised him not to talk about it. I don' know if I used the word "ordered" in it or not.

The email Lt. Debord references was Attachment E to the AI report. It is to Captain Roark, is a recap of his meeting with Ervin, and was sent the same day shortly after that meeting. In it he reports that he "advised him…that he is not to talk to anyone about it…" Nowhere in the email does Debord use the word "order" or state that Ervin understood he had been given an order.

Based on the above, I find the Employer did not carry its burden of proving Grievant disobeyed a direct order. Lt. Debord's repeated use of the word "advised" in recounting his conversation with Grievant makes it believable that Grievant could have come away with the impression that Debord was making a suggestion rather than issuing an order.

The Employer also argued Grievant violated the compliance to orders rule because of LEADS searches he ran related to the January 9 crash and his daughter when he reported to duty later that night.

Grievant readily admitted that he ran a LEADS search of Mr. Fulk and the license plate of the vehicle involved in the crash. He testified he believed he was privileged to do so for officer safety purposes and gave examples of situations in which officers run LEAD searches for this purpose. Ervin explained that he had heard that Mr. Fulk had a warrant for his arrest and was legitimately concerned for his and his three-year-old daughter's safety. He ran Mr. Fulk's information to get a better grasp as to what he could potentially be dealing with. Scioto County is a small community and the fact that Michael Ervin was a Trooper was not a secret and he had also identified himself as law enforcement at Slate Run Pizza. Additionally, Ervin testified that an employee of Slate Run Pizza told him that she thought Mr. Fulk was going to hit him. The Employer did not dispute these assertions.

Grievant testified that he ran the search of his daughter later that night in the middle of his shift because the system had become stuck. He explained that when that happens, sometimes typing in different information will reboot the system. He used his daughter's information to do so. His daughter is three years old. Several years earlier he had obtained an ID card for her so that if she was ever lost or kidnapped, her picture and

home address would be available through LEADS. In rebooting the system by running his daughter's information, he did not have access to any information he did not already have.

The only testimony the Employer presented about Grievant's alleged misuse of LEADS to run these searches was conclusory. Lt. Chad Miller testified that Grievant did not have a work related reason to run the vehicle registration through LEADS. He did not address why officer safety would not be a valid work related reason. He testified that Section 5503.101 of the Ohio Revised Code governs access to LEADS. The Section provides that no person shall attempt to gain access to or disseminate information from LEADS

"beyond the scope of the express or implied consent of, the chair of the law enforcement automated data system steering committee". He then testified that Grievant was outside the implied scope because LEADS would not be needed to complete a field sketch or take pictures for the investigative report, the tasks Grievant was asked to complete to assist Trooper Norman, the crash investigator. He did not address whether accessing LEADS for officer safety or to reboot the system would be outside the implied scope. Based on the record, there is no way to determine whether access to LEADS for the purposes Grievant described would be outside the scope.

In addition to not proving Grievant improperly accessed LEADS, the Employer also failed to prove that he disseminated information he obtained from LEADS. The Employer contended that Grievant immediately contacted Deputy Staten after doing the LEADS search and shortly after that Staten went to the Hamilton residence. Because of the timing and he would not have otherwise known to go to the Hamilton residence, the Employer reasoned that Grievant must have given Staten information from LEADS. The evidence disproves that theory. Grievant contacted Staten using his personal cell phone. His phone records demonstrate that the conversation between he and Staten took place twenty minutes prior to Ervin running the information through LEADS. Grievant testified that the only information he gave to Staten was information he had heard while at Slate Run Pizza, the name Fulk and Hard Scrabble Road which Staten immediately associated with the Hamiltons. Staten had been to the Hamilton residence before.

False Statement

Rule 4501:2-6-02(E)(1) False Statement, Truthfulness provides:

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

The specification for this rule violation was that Grievant made false statements during the administrative investigation, but does not indicate what statements Grievant made that the Employer considered untruthful.

The administrative investigator testified that this rule violation related to statements Grievant made about LEADS. His testimony is consistent with the one page synopsis he submitted with his investigative report. The synopsis lists the allegations he was charged with investigating. Allegation 4 is "Ervin was untruthful to investigators during the investigative interviews." His answer to this allegation was:

> The allegation is founded. Trooper Ervin has repeatedly claimed he did not gather information to give to Deputy Staten on duty, or run the LEADS information for personal reasons. Staten said Ervin contacted him around 1 a.m. Ervin ran the license plate and number at 12:42 a.m. Staten arrived at the Hamilton residence at 1:08 a.m. Ervin admitted he sent Staten to the Hamilton residence for personal reasons.

As noted above in the discussion of conduct unbecoming, the Employer did not prove that Grievant gave Deputy Staten information obtained from LEADS or ran LEADS for personal reasons. Accordingly, I cannot find that Grievant's denial of those allegations was untruthful.

In its closing argument submitted after the hearing, the Employer did not contend that the rule violation was related to statements about LEADS. Instead, the Employer argued this violation was proven because of Grievant's denials that he engaged in sexual

harassment. Having found that the Employer did not prove the sexual harassment charge, I cannot find that the Grievant's denials were untruthful.

The Remedy

Grievant's removal was based on finding that he violated four work rules. The Employer did not prove those violations. In discharge cases where none of the misconduct is proven, reinstatement is normally part of the remedy. In this case, the Employer made extensive arguments about why Grievant should not be returned to work.

The Employer presented testimony that co-workers and supervisors would be afraid for their safety and the safety of the public if Grievant were returned to work. Those fears in large part appear to have been based on rumors and speculation about Grievant that started after the January 9 off duty crash.

As of the fall of 2017, many of Grievant's co-workers had thought highly enough of him to vote for him for Trooper of the Year. Ervin got ten out of the twenty-eight votes cast, only three less votes than the winner. Prior to the vote that year, Lt. Debord had texted Ervin and said, "hey, let's try to get you TOY" [Trooper of the Year). The voting criteria includes, "best exemplifies the professional and leadership qualities of a trooper. These include integrity, decisiveness, fairness, judgment, tact, enthusiasm, loyalty, cooperation, and courage."

Grievant's co-workers had submitted their safety concerns in an IOC dated February 16, 2018. The IOC levied ten allegations against Ervin and was signed by fourteen co-workers. The allegations were added to the existing administrative investigation. Some of the allegations did not result in charges against the Grievant. The allegations that did result

in charges were not proven at hearing. Co-workers who testified at the hearing were asked about the IOC. Although the fourteen co-workers signed the IOC representing they had either witnessed or had knowledge of the allegations, only three of them could attest they had personally experienced or witnessed a specific incident related to the allegations.

The week prior to the IOC being submitted, Grievant was sent for a fitness for duty evaluation based on some of the allegations in the IOC. Among other things, the allegations about physical threats and suicide were addressed during the exam and Grievant was psychologically evaluated. Grievant was found to be psychologically fit for duty and returned to work.

Grievant worked at the Portsmouth Post without incident until he was reassigned to the Jackson Post on February 21, 2018 because of the IOC. He worked there without incident until he was terminated on April 18, 2018. He led the Jackson Post in Criminal Patrol activity for the month of March 2018. When he was first reassigned, Jackson Post employees expressed concern for their safety based on rumors they had heard from the Portsmouth Post. Captain Roark met with Jackson Post Lt. Thompson and his sergeants about those concerns. He assured them that Grievant did not pose a safety risk. After that meeting, no Jackson Post employees reported any concerns about Ervin. Lt. Thompson, Sgt. Morgan, and Sgt. Ward of the Jackson Post all testified that they would have no problem working with the Grievant.

Based on the above, I find the Employer did not prove that reinstatement should not be part of the remedy in this case. However, reinstating Grievant to the Portsmouth Post would likely be difficult for all parties concerned. I, therefore, find it appropriate to reinstate Grievant to the Jackson Post as requested by the Union.

AWARD

The Grievance is sustained. The Employer did not prove just cause to remove the Grievant. The Grievant is to be reinstated to his former position as a trooper and assigned to the Jackson Patrol Post, with full back pay, seniority and benefits.

Sherrie J. Passmore
Arbitrator
October 3, 2018