

OPINION AND AWARD

In the Matter of Arbitration

Between

Ohio State Troopers Association

And

Ohio Department of Public Safety

Case Designation:

DPS-2016-03963-1

Date of Hearing: October 30, 2018

Date of Briefs: November 28, 2018

Date of Award: January 14, 2019

APPEARANCES

**For the Union**

Elaine Silveira, Esq., Ohio State Troopers Association, Advocate  
Larry Phillips, Ohio State Troopers Association, Staff Representative  
Bruce Elling, Ohio State Troopers Association, Staff Representative

**For the Employer**

Lieutenant Darrell G. Harris, Ohio State Patrol, Advocate  
Lieutenant Jacob Pyles, Ohio State Patrol, Second Chair  
Cullen Jackson, Esq. Ohio Office of Collective Bargaining  
Mariah Halleck, Ohio Office of Collective Bargaining

**Witnesses**

Adam Foster, Grievant  
Captain Charles J. Linek III, Ohio State Patrol  
Staff Lieutenant Kenneth Ward, Ohio State Patrol  
Sergeant Dustin Neely, Ohio State Patrol  
Trooper Kara Kavaliauskas, Ohio State Patrol  
Trooper DeMarques Camper, Ohio State Patrol

An arbitration hearing was conducted on October 30, 2018, at the Ohio Office of Collective Bargaining in Columbus, Ohio.

At the hearing, the parties submitted the 2012-2015 Collective Bargaining Agreement between the State of Ohio and the Ohio State Troopers Association, Inc., Unit 1 and 15 as Joint Exhibit 1 (J1); the grievance trail including the electronic grievance, step 2 response, and intent to arbitrate as Joint Exhibit 2 (J2); and the disciplinary trail including the statement of charges, pre-disciplinary notice, discipline letter, applicable OSHP rules and regulations, and the Grievant's department record as Joint Exhibit 3 (J3). In addition, the Employer introduced three exhibits: Administrative Investigation #2016-0240 as Management Exhibit A (M.E.A), Criminal Report of Investigation as Management Exhibit B (M.E.B) and Arbitration Award #15-00-981201-0167-04-01 as Management Exhibit C (M.E.C). The Union introduced two exhibits: Administrative Investigation #2011-0177 as Union Exhibit 1 (U1), and the Grievant's annual performance evaluations for 2014 and 2015 as Union Exhibit 2 (U2). All exhibits were accepted into the record.

The parties submitted a joint statement of the issue before the arbitrator. "Was the Grievant terminated for just cause? If not, what shall the remedy be?"

Both parties timely submitted post hearing briefs. All materials were reviewed and considered by the Arbitrator in reaching this decision. Both parties were given full opportunity to examine and cross examine witnesses, pose arguments, and present their respective cases.

The parties agreed that the matter was properly before the arbitrator for determination.

#### **RELEVANT CONTRACT PROVISION:**

Negotiated agreement between Ohio State Troopers Association, Inc. Unit 1 & 15 and The State of Ohio effective July 1, 2012 – June 30, 2015

### **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.

#### **19.02 Administrative Leave**

Upon verbal notification followed within twenty-four (24) hours by written delineation of the reasons, an employee may be placed upon administrative leave with pay at his/her regular rate. The employees will not lose any pay, fringe benefits or seniority as the result of administrative leave. Administrative leave may be instituted as the result of the Employer's reasonable belief that the employee participated in an event or was in a condition of significant consequence to the Highway Patrol, the employee, or the public. Such administrative leave with pay shall be for the purpose of investigating the event or the condition.

Administrative leave with pay shall not be considered discipline and is not subject to the grievance procedure as long as no loss of pay or benefits is incurred by the employee.

#### **19.03 Length of Suspension**

No suspension without pay of more than ninety (90) calendar days may be given to an employee.

**19.04 Pre-suspension or Pre-termination Meeting**

When the Employer initiates disciplinary action which is covered by this Article, written notice of a pre-disciplinary meeting shall be given to the employee who is the subject of the pending discipline. Written notice shall include a statement of the charges, recommended disciplinary action, a summary of the evidence being brought against the employee and the date, time and place of the meeting. An impartial representative of the Employer shall be appointed. Said representative shall be a member of the general headquarters staff or district staff as appointed by the Employer, who is impartial and detached and has not been involved in the incident or investigation giving rise to the discipline. Prior to the meeting, the Union will be provided with a copy of the administrative investigation.

The employee may waive this meeting. The meeting shall be scheduled no earlier than three days following the notice to the employee. Absent any extenuating circumstances, failure to appear at the meeting will result in a waiver of the right to a meeting.

A member who is charged, or his/her representative, may make a written request for continuance of up to forty-eight (48) hours. Such continuance shall not be unreasonably requested nor denied. A continuance may be longer than forty-eight (48) hours if mutually agreed by the parties but in no case longer than sixty (60) days.

If either party makes a tape recording or transcript of the hearing, such recording or transcript shall be made available to the other party upon request.

The employee has the right to have a representative of his/her choice present in accordance with Section 8.02 at the meeting. The Employer shall first present the reasons for the proposed disciplinary action. The employee may, but is not required to, give testimony.

After having considered all evidence and testimony present at the meeting, the meeting officer shall, within five (5) days of the conclusion of the meeting, submit a written recommendation to the Employer and the employee involved.

The parties understand that this meeting is informal and not a substitute for the grievance and arbitration procedure.

The Employer shall render a decision within a reasonable period of time to accept, reject or modify the recommendations.

The employee shall be notified by the Employer for final disposition of statement of charges.

**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. 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.

**19.06 Suspension Options and Implementation Procedures**

If a bargaining unit employee receives discipline which includes lost wages, the Employer may offer or the Employee may request the following forms of corrective action:

1. Actually having the employee serve the designated number of days suspended without pay; or pay the designated fine; or
2. By deducting the employee's accrued personal leave, vacation or compensatory leave banks of hours or a combination of any of these banks, under such terms as might be mutually agreed to by the Employer, the employee and the Union.

#### **19.07 Abeyance Agreements**

The parties agree that it may sometimes be in the best interest of the parties to participate in the negotiation of discipline abeyance agreements, including Last Chance Agreements. The parties further agree that such agreements should be entered into under the spirit of the collective bargaining agreement. Abeyance agreements entered into pursuant to Appendix C are not subject to this Section.

Abeyance agreements, including Last Chance Agreements, shall be two (2) years in duration and shall be signed by a representative of the Employer, the Union, and the Employee.

Violations of any cited work rule may cause the abeyance agreement to be invoked during the life of the agreement, pursuant to the three conditions stated below. A violation of the work rules within Performance of Duty 4501:2-6-02(B) must be of a same or similar nature to cause the abeyance agreement to be invoked. A non-sworn employee charged with a violation of work rule 501.01(C)(10)(b), Neglect of Duty, must be of a same or similar nature to cause the abeyance agreement to be invoked.

1. Grievance rights related to a discipline action under the agreement will be limited to a challenge of whether his/her behavior constitutes a violation of a triggering work rule(s). The level of discipline may not be challenged or made an issue at arbitration.
2. The Employee retains all rights to the grievance procedure provided in the labor agreement for violations not include within the abeyance agreement. If the Employee abides by the agreement, and the agreement is not invoked within two years of the signing, the agreement will become void and no active record of it will remain.
3. The parties agree the agreement is non-precedent setting and will not be used in any unrelated hearing, grievance, arbitration, or negotiation. The agreement may be used by either party to enforce its provisions.

### **BACKGROUND**

The Grievant, Adam Foster, was terminated from his position as an Ohio State Trooper on September 24, 2016 after having served with the Ohio State Highway Patrol for almost nine years. At the time of his termination he was assigned to the Swanton Post and serving temporarily as an instructor at the Patrol's Training Academy. It was reported that he had been asked to take a permanent assignment as an Academy instructor. The Grievant's performance evaluations for 2014 and 2015 indicate that he met all established performance expectations and was a valued member of the Swanton Post (U2). At the time of his termination, the Grievant had no prior discipline in his personnel record (J3).

The circumstances leading to the Grievant's termination are reported as follows. On April 13, 2016 Troopers Kara Kavaliauskas and DeMarques Camper, at the Academy for annual in-service training, were relaxing in the Grievant's dormitory room at the Academy talking and watching TV. The Grievant and Trooper Kavaliauskas were drinking beer. Trooper Camper was in the dorm room for approximately 30-40 minutes at which point he left. While the Grievant and Trooper Kavaliauskas were alone in the Grievant's room they talked about the use of defensive tactics and the need for female troopers to get involved in RedMan – a training program involving controlled fight scenarios. The Grievant offered to

show Trooper Kavaliauskas various moves and holds, and they began to play fight. When the two stopped wrestling, Trooper Kavaliauskas repositioned herself on the dormitory bed she had been sitting on and the two continued to talk. It is reported by Trooper Kavaliauskas that the Grievant continued to make physical contact with her by touching her leg, which she resisted. The Grievant reported that Trooper Kavaliauskas continued to engage him in a physical interaction by talking about her hands and legs which he touched without encountering resistance from her. Trooper Kavaliauskas reported that the Grievant grabbed the back of her neck and used his other arm under her legs to lift her up and carry her to his bed where he proceeded to get on top of her. Trooper Kavaliauskas described the Grievant as having her in a half-mount with his left arm behind her neck and his right leg across her legs. The Grievant reported that he carried Trooper Kavaliauskas to his bed without her resistance and without the use of any particular holds. He reports he laid beside her on the bed and that they French Kissed three or four times. Trooper Kavaliauskas reported that she resisted the Grievant and tried to get out from underneath him as he kissed her on her neck and attempted to kiss her on her lips. Trooper Kavaliauskas further reported that she told him to "knock it off" several times while she struggled to get away from him. Trooper Kavaliauskas described being prevented from getting off the bed. Trooper Kavaliauskas reported that she was finally able to get away, at which point she left the Grievant's room. The Grievant reported that he did not restrain Trooper Kavaliauskas; they simply wrestled around and engaged in consensual kissing and tickling. The Grievant acknowledged that he may have pulled Trooper Kavaliauskas back to the bed but it was in the context of consensual wrestling. The Grievant reported that Trooper Kavaliauskas returned his kisses and when they stopped he said to Trooper Kavaliauskas that it had been nice and that they should do it again, to which Trooper Kavaliauskas replied "Yeah, just not at the Academy."

The next day, April 14, 2016 Trooper Kavaliauskas reported the incident to her Post Supervisor, Sergeant Posada. Also on the morning of April 14, 2016 Trooper Kavaliauskas had breakfast with Trooper Camper and reported to him what had happened between her and the Grievant after Trooper Camper had left the room. Trooper Camper reported that Trooper Kavaliauskas had a look of "bewilderment" about the incident. It was reported by both Troopers Kavaliauskas and Camper that Trooper Kavaliauskas stayed close to Trooper Camper all day on April 14 in order to avoid finding herself alone with the Grievant.

The State Patrol initiated an administrative investigation into the matter, which was deferred in favor of a criminal investigation by the Patrol's Office of Investigative Services. The investigation proceeded from April 19 through August 22, 2016. The case was delivered to the Columbus City Prosecutor on August 29, 2016. On September 9, 2016 the Grievant was served with a summons for Unlawful Restraint, a third degree misdemeanor. The Grievant was ordered to appear for arraignment on September 23, 2016. On September 15, 2016 after reviewing the criminal investigation, the Patrol proceeded with its administrative process. A pre-disciplinary meeting was convened on September 22, 2016. The Grievant was charged administratively with violations of Ohio State Highway Patrol Rule 4501:2-6-02(I)(1)(2) Conduct Unbecoming an Officer, and Rule 4501:2-6-02(Y)(2) Compliance to Orders.

- Rule 4501:2-6-02 (I) Conduct Unbecoming an Officer states: "A member may be charged with conduct unbecoming an officer in the following situations:

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

(2) For committing any crime, offense or violation of the laws of the United States, the state of Ohio, or any municipality."

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

(2) "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."

Following the pre-disciplinary meeting the Grievant was terminated. A grievance was filed on September 23, 2016 alleging that the Grievant had been terminated without just cause and in violation of the contractual progressive discipline provision. The Grievant pled not guilty at his arraignment and his criminal trial was held May 30 – June 2, 2017. The Grievant, and Troopers Kavaliauskas and Camper all testified during the trial. The jury returned a not guilty verdict on June 2, 2017.

#### **POSITION OF THE UNION**

The Employer has failed to meet its burden of proof to show that the discipline was for just cause and/or commensurate with the offense. Furthermore, the Union argues that the Employer has failed in its due process duty. Specifically, the Employer did not undertake an administrative investigation of the incident, instead it relied on the Patrol's criminal investigation. In so doing the full details of the incident were not available for discovery throughout the administrative process. The Grievant's termination was based on a sketchy single-page, three-sentence summary of the allegations and an attached copy of the criminal complaint (M.E.A). Thus, the administrative investigation was neither fair nor objective as required by the seven tests of just cause. The Union argues that it is entirely unclear what facts the Employer relied upon in September of 2016 when making its decision to terminate the Grievant.

The Grievant has denied the allegations against him and maintains that everything that happened between himself and Trooper Kavaliauskas on the night of April 13, 2016 in his Academy dormitory room was consensual. The only evidence against the Grievant is the testimony of Trooper Kavaliauskas, which makes this case a classic "he said – she said" situation. This being the case, the Employer has not met its burden to show by a preponderance of evidence that the alleged misconduct occurred. Both the Grievant and Trooper Kavaliauskas have acknowledged that they violated Academy rules by being together in the dorm room and drinking beer. However, Trooper Kavaliauskas received a written reprimand for violation of these rules. Given the lack of evidence it is impossible to determine which version of the incident is the truth; and under these circumstances the Grievant's termination is not justified.

Finally the Union argues that the Employer has not been consistent in its handling of cases involving a criminal allegation. To support its assertion, the Union points to the case of Captain Combest

who was charged with a first degree misdemeanor stemming from a domestic violence charge. In the Combest case, Captain Combest was allowed to continue to work in an administrative assignment until his criminal case went to trial. When Captain Combest was found not guilty by the jury, the Employer closed the administrative case and took no disciplinary action against the Captain. The difference between the way the Grievant has been treated and the way a high ranking officer charged with a more serious crime was treated is glaringly unfair.

Given the Grievant's tenure, clean department record, excellent performance evaluations and the lack of actual evidence of the alleged misconduct it is clear that the discipline is unwarranted. The Union asks that the grievance be granted and the Grievant returned to his position with the Patrol and made whole in pay and benefits.

#### **POSITION OF THE EMPLOYER**

The Grievant has violated the Employer's rules of conduct, and admitted as much in his interview statement. The fact that the Grievant was found not guilty in a criminal trial is not relevant to the administrative rules with which the Grievant was charged. Females are not permitted in dormitory rooms assigned to males. Trooper Kavaliauskas is a female and was in the Grievant's dormitory room. Alcohol is not permitted in the Academy dormitory rooms. The Grievant and Trooper Kavaliauskas both acknowledge drinking beer while in the Grievant's room on the evening of April 13, 2016 when the incident occurred. Both the Grievant and Trooper Kavaliauskas acknowledge that they knew the Academy rules prohibiting opposite sex individuals in dormitory rooms and consuming alcohol.

In his statement to Sgt. Neely during his investigatory interview the Grievant stated that he kissed Trooper Kavaliauskas on the lips and he, "did not know if she was okay with it at first." The Grievant also stated that he pulled Trooper Kavaliauskas back into him on the bed in order to continue wrestling. These statements by the Grievant do not support the Grievant's claim that his conduct with Trooper Kavaliauskas was consensual. Although a Trooper at the time of the incident, the Grievant was serving as a temporary instructor at the Academy and as such was in a position of trust and authority. Rather than living up to his leadership position as a mentor and role model the Grievant took advantage of his position.

The Union's claim that the Grievant has been treated in a disparate manner is without merit. The case the Union relies on as a comparator is different in key ways. The case involving Captain Combest did not occur on State property and the victim was not a State employee. Furthermore, the fact that the Grievant's misconduct took place at the Academy during his assignment as an instructor calls into question whether the Grievant could be considered to have been on duty at the time of his misconduct. In a 1999 OSTA/State of Ohio case Arbitrator Pincus found that, "Anytime a member of this bargaining unit engages the Employer's equipment, while 'off duty' at a work location, he/she is faced with the strong possibility of having that behavior, if inappropriate, converted to an act of on duty misconduct." *Ohio State Troopers Association v. State of Ohio, Department of Public Safety*, Case # 15-00-981201-0167-04-01 (M.E.C).

The Grievant was aware of the Academy rules and he acknowledges having broken the rules by having Trooper Kavaliauskas in his room and consuming alcohol. The Grievant's own description of his conduct with Trooper Kavaliauskas belies his claim that his conduct was consensual. The misconduct took place on State premises with another State employee creating circumstances that can be construed as having taken place while the Grievant was 'on duty.' These factors aggravate the misconduct and also distinguish it from the Combest case which the Union seeks to use as a comparator. Based on all of these factors the Employer seeks to have the grievance denied and the discipline upheld in its entirety.

### **DISCUSSION**

There are three fundamental elements of every disciplinary case: evidence, notice and reasonableness. In this case the Grievant is charged with conduct unbecoming an officer and failure to comply with orders, stemming from an incident of alleged non-consensual sexual contact and a related misdemeanor charge of unlawful restraint. Of the three disciplinary elements, this case is decided on that of evidence. If proven, there is no question of adequate notice. In today's societal context – and by this I mean in the United States of America, in our present day workplace, among educated professionals – there can be no legitimate question as to whether employees are on notice that any degree, or type, of sexual contact requires full and explicit consent. If proven, there is no question of reasonableness in the penalty. Given the enormity of the breach of trust inherent in the alleged misconduct and the significant liabilities it creates, an Employer is well within its rights to summarily discharge a tenured employee heretofore in good standing.

#### The Disciplinary Element of Evidence: Burden and Quantum

Arbitration is an adversarial proceeding and as such one or the other party has a burden to prove its case. In matters of workplace discipline it is a long-established standard (and undisputed by the parties in this case) that the burden is on the Employer to establish a prima facie case of the elements of the alleged misconduct. In this case the elements of the alleged misconduct that must be established are the date, time and location of the incident, the extent of the physical contact between the two employees, whether any sexual contact was consensual, and whether the Grievant restrained a coworker without consent.

Through the use of interviews with the Grievant and Troopers Kavaliauskas and Camper, available building surveillance camera footage, and records of text messages the Employer has been able to establish that on the night of April 13, 2016 into the early hours of April 14, 2016 the Grievant and Trooper Kavaliauskas were together in the Grievant's Academy dormitory room. Trooper Camper was present with the Grievant and Trooper Kavaliauskas in the Grievant's dormitory room for approximately 30-40 minutes starting at about 7:30PM. Through interview statements the Employer has also established that the Grievant and Trooper Kavaliauskas were drinking beer while in the Grievant's dormitory room on the night of April 13, 2016. With this, the Employer has established that the Grievant failed to comply with rules prohibiting the consumption of alcohol at the Academy and prohibiting females from being in dormitory rooms assigned to males. The Grievant has acknowledged notice of the Academy rules. The hearing record suggests that adherence to these Academy rules by troopers may be



lax; however, there is nothing in the record that suggests that the Employer's enforcement of the rules is lax in known situations.

The Grievant's and Trooper Kavaliauskas' interview statements corroborate each other on the details of their private interaction in the Grievant's dormitory room up to the point where their contact became sexual. They acknowledge that they sat on the beds, that they watched TV, that they talked and drank beer, and engaged in the practice of RedMan defensive tactics which involved physical holds and takedowns. What further transpired between the two in the privacy of the Grievant's dormitory room is in dispute. The Grievant states that Trooper Kavaliauskas continued to engage him in physical contact after they stopped the RedMan exercises by talking about issues pertaining to her hands and legs, which he touched while she spoke. The Grievant goes on to state that he initiated kissing with Trooper Kavaliauskas and that she consented by engaging in French kissing with him and that they wrestled some while lying on his bed. Trooper Kavaliauskas states that after they stopped the RedMan exercises the Grievant picked her up, placed her on his bed, got on top of her in a half-mount, and proceeded to kiss her four or five times while she struggled to get out from under him and repeatedly told him to "knock it off." There is no independent evidence to support or refute either version of events.

In this case, neither the Grievant nor Trooper Kavaliauskas is more, or less, credible than the other. Therefore there is no basis to attribute greater weight to the testimony of one over the other. There was a time, early in the history of labor arbitration, when some arbitrators tended to believe that a grievant (having a vested interest in the case outcome) had more reason to prevaricate. However, such presumptions have been set aside as the field of labor arbitration has matured. Today most arbitrators appreciate that human motivation is extremely complex and that each witness' testimony, including a Grievant's, must be assessed in relation to all other relevant evidence. In the case at hand, the Grievant cannot be deemed less credible than Trooper Kavaliauskas (the opposing witness) simply due to his status as the Grievant. To do so would result in relieving the Employer of its burden to affirmatively establish the credibility of its case against the Grievant. When opposing witnesses cannot be determined to be one more credible than the other by virtue of independent corroborating evidence, the Employer has the burden to either discredit the Grievant or affirmatively establish the greater credibility of its own witness. In the case at hand, neither obstacle has been successfully hurdled.

In labor arbitration there is widespread recognition that the arbitrator's authority in a just cause determination includes selection of the required quantum of proof, unless it is prescribed by the parties in their labor agreement. It is also widely held among arbitrators that discharges for allegations that rise to the level of criminal activity and/or allegations that are stigmatizing require more than a mere preponderance of evidence such as used in other types of discipline cases. The particulars of the case at hand are just such a case. Discharge for engaging in non-consensual sexual activity with a coworker and unlawful restraint of a coworker would indeed be highly stigmatizing and career-limiting (if not actually career-ending), most especially in the field of law enforcement. This being the case, the quantum of proof applied in determining just cause in this matter is that of clear and convincing rather than that of preponderance.

The arbitration record includes two statements made by the Grievant during his investigatory interview, which the Employer argues tip the weight of evidence in favor of discharge because they are evidence that the Grievant acted without Trooper Kavaliauskas' consent. One of the statements made by the Grievant is that he kissed Trooper Kavaliauskas and that he "did not know if she was okay with it at first." The other statement made by the Grievant when he was asked if he prevented Trooper Kavaliauskas from getting off of the bed was that he "pulled her back into him on the bed." These statements by the Grievant indicate that he was the initiator of the sexual contact, but do not clarify the extent of Trooper Kavaliauskas' consent at that point in time. These statements made by the Grievant are not admissions in the legal sense of the word, but are laden with their own subjectivity and therefore cannot be judged to sufficiently tip the scales against the Grievant and in favor of Trooper Kavaliauskas' claim of non-consensual conduct.

Whereas it is expected that the parties will show partiality in their respective assessments of the strength of their evidence and the credibility of their witnesses; as a neutral and trier of fact, the arbitrator can show no such partiality, preference, bias or inclination. The known facts in this case are scant at best, and there is no independent evidence in the record that would serve to undermine the credibility of the Grievant or enhance the credibility of Trooper Kavaliauskas. There are no reasonable inferences or conclusions that can be drawn from what is known that would definitively resolve the disputed aspects of what actually happened between the Grievant and his coworker. Whereas it is right that the Employer should show the utmost concern for an employee who alleges sexual misconduct by a coworker; as a neutral and trier of fact, the arbitrator's primary concern must be for the integrity of the labor agreement and the standard of just cause incorporated within. It is fundamental to a just cause determination that the Employer meet its burden to prove the charges against the accused employee. Failure to do so must result in a finding against the Employer. Whereas the actions of which Trooper Kavaliauskas accuses the Grievant are grave; as a neutral and trier of fact, the arbitrator must uphold the fundamental presumption of innocence when discharge (the economic equivalent of capital punishment) hangs in the balance.

#### The Investigation and Disparate Treatment

In addition to whether there is a sufficiency of evidence to support the discharge, the Union points to an insufficient administrative investigation and disparate treatment as further failings by the Employer in its handling of this case.

The alleged misconduct was not subject to an administrative investigation. Rather, the matter was referred to the Office of Investigative Services (OIS) due to the possible criminality of the allegation. A criminal investigation was undertaken by the Employer. This being the case, the full investigatory record was not made available to the Grievant or Union until the criminal case was concluded – eight months after the Grievant was terminated. At the pre-disciplinary meeting in September 2016, the Union was provided with an administrative investigation cover sheet, which very briefly summarized the alleged misconduct. This cover sheet was attached to a copy of the criminal complaint filed in Franklin County Municipal Court. The Union's claim is that the absence of a full investigatory record at the time of the pre-disciplinary meeting impaired its ability to represent the Grievant through the disciplinary

process. The Union claims that without access to a full investigatory record the Union and Grievant were unable to know whether there had been a full and fair investigation which is fundamental to the seven tests of just cause.

Although perhaps not ideal from the Union's perspective, I do not find that the Employer's reliance on a criminal investigation rather than an administrative investigation violated the labor agreement or substantively undermined due process in the administration of discipline. The fundamental nature of the charge against the Grievant and the extent of the evidence against him were known by the Grievant from the time he consented to be interviewed in August 2016. Any disadvantage the Union may have suffered as a result of not having the full investigatory file at the time of the disciplinary action was ultimately remedied through the grievance and arbitration process. The criminal investigation file was closed and became available as of June 2017. The arbitration hearing was in October 2018 providing ample time and opportunity for the Union to prepare its case.

The Union also claims that disparate treatment is at play in this case. The Union bases its claim on the case involving Captain Combest. Combest was charged with a first degree misdemeanor of assault stemming from a domestic violence incident. In that case, Combest was not discharged, but was permit to continue working in an administrative position while his criminal case worked its way through the court system. When Combest was found not guilty by a jury the Employer closed the investigation and issued no discipline.

In order to successfully show disparate treatment the comparator case(s) must be the same in all relevant aspects. It is not enough to show that an employee was treated differently than some other employee. The circumstances surrounding the case(s) must be substantially the same. The Combest case is different enough from the Grievant's case that it cannot be considered an appropriate comparator. The Combest incident did not take place on the Employer's property, nor did it involve a coworker.

### Summary

The Grievant has acknowledged that he was aware of the Academy rules prohibiting the consumption of alcohol and prohibiting the opposite sex from being in an assigned dormitory room. Nevertheless, the Grievant has also acknowledged that on the night of April 13, 2016 he entertained Trooper Kavaliauskas, a female, in his dormitory room and that they drank beer together. Beyond these acknowledgements, the Grievant denies the central allegation that he restrained Trooper Kavaliauskas and kissed her several times without her consent. There is no independent evidence in the record to corroborate either version of events. This being the case, the burden is on the Employer to either discredit the Grievant or affirmatively establish their opposing witness' greater credibility. The Employer has not successfully met this burden. The two key statements made by the Grievant during his investigatory interview are not admissions in the legal sense of the word; they are subjective recollections. The statements confirm that the Grievant was the initiator of the sexual contact, but do not clarify with any certainty what was in Trooper Kavaliauskas' mind at the time; thus they do not clarify the central issue of consent. Any person who would restrain another person and impose sexual contact without the other's consent has no place in law enforcement. However, when a job (and

possibly an entire career) hangs in the balance due to the stigmatizing nature of the allegation the standard of proof is more than that of preponderance which is used in typical grievance cases. The evidence in this case does not reach a clear and convincing level, nor in fact for this arbitrator does it even tip enough to meet the preponderance standard.

#### **AWARD**

For the reasons herein stated the grievance is denied in part and sustained in part. The Grievant is reinstated to his position as a Trooper with the Ohio State Highway Patrol. The termination will be converted to a five (5) day suspension and the Grievant restored in seniority, benefits and back pay for time-off that extends beyond the 5-day suspension, less earnings during the period of termination.

Respectfully submitted at Columbus, Ohio, January 14, 2019.

A handwritten signature in black ink, appearing to read "Felicia Bernardini". The signature is written in a cursive, flowing style.

Felicia Bernardini, Arbitrator