

**CONTRACTUAL
LABOR ARBITRATION PROCEEDINGS**

IN THE MATTER OF)	
ARBITRATION BETWEEN)	
)	
)	
OHIO DEPARTMENT OF PUBLIC)	
SAFETY, DIVISION OF OHIO)	
STATE HIGHWAY PATROL)	DECISION IN
)	DPS-2019-00812-01
)	
-AND-)	EMPLOYMENT
)	REMOVAL/TERMINATION
)	
OHIO STATE TROOPERS ASSOCIATION)	<u>(TROOPER DAVID L. ELLIS)</u>
UNITS 1 & 15)	

<u>CASE NO.:</u>	DPS-2019-00812-01; Trooper David L. Ellis
<u>GRIEVANCE:</u>	The Grievance, as set forth in Joint-Exhibit 2, challenges the Employment Termination/Removal of Grievant, Trooper David L. Ellis, as lacking "Just Cause".
<u>AWARD:</u>	The Grievance is Sustained in part; and, Denied in part.
<u>HEARING:</u>	April 4, 2019; Gahanna, Ohio
<u>ARBITRATOR:</u>	David W. Stanton, Esq.

APPEARANCES

FOR THE EMPLOYER

Dustin Neely, Lieutenant
Jacob Pyles, Staff Lieutenant
Cullen Jackson, OCB Policy Analyst
Anthony Percy, Administrative Investigation Unit
Kenneth Siler, City of Troy
Greg Powell, Ohio Entertainment Security
Pam Sigler, Security Guard
Randy McElfresh LF - Georgetown Post

FOR THE UNION

Elaine N. Silveira, General
Counsel
Larry K. Phillips, Staff Rep.
Jeremy Mendenhall, OSTA
President
Anthony S. Fox, Sergeant,
Georgetown Post
David L. Ellis, Trooper/Grievant
Kari Root, Observer

ADMINISTRATION

By Email correspondence dated November 14, 2018 from Cassandra Richards, Dispute Resolution & Training Liaison, State of Ohio, Office of Collective Bargaining, with copy to Counsel for the OSTA, the undersigned was notified of his mutual selection, from the Parties' Permanent Panel, to serve as impartial Arbitrator to hear and decide the Employment Removal/Termination Grievance, Case No. DPS-2019-00812-01, of Trooper David Ellis, then in dispute between these Parties. On April 4, 2019, at the Ohio State Troopers Association, 190 W. Johnstown Road, Gahanna, Ohio, an Arbitration Hearing was 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. The Evidentiary Record of this Proceeding was 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 by agreement between the Parties. Accordingly, this matter is now ready for final disposition herein.

GRIEVANCE AND QUESTION TO BE RESOLVED

The following Grievance, Joint-Exhibit 2, was filed on or about February 22, 2019, and contains the subject matter for disposition herein as follows:

Grievance Management DPS-2019-00812-01

GRIEVANCE INFORMATION

Grievance number: DPS-2019-00812-01

* * * * *

Union Contract Article Link: OSTA Articles
Assigned To: Krysten McElfresh

GRIEVANT INFORMATION

Member: David Ellis
Grievant Name: David Ellis
State of Ohio User ID: 10153903

* * * * *

Grievant Notification Email: dlellis@dps.ohio.gov
Grievant Union Chapter Name: DPS2908
Grievant Agency: DPS

* * * * *

Grievant's Union:
Ohio State Troopers Association (OSTA)
Grievant Worksite: HPP08
Grievant's Classification Number: 26711
Grievant's Classification Title: Highway Patrol Trooper
Grievant Department Description: HP Georgetown Post
Grievant Department ID: DPS290808
Grievant Bargaining Unit: 01
Date of Hire: 10/19/2016
Years of Service: 1

GRIEVANT'S SUPERVISOR/UNION REP

Grievant's Supervisor: Sgt. A. Fox
Supervisor's Work Phone: 937/378-6191
Union Regional Rep Name: Sidney Steele
Union Region Rep Notification Email: smsteele@dps.ohio.gov
Union Representative: Larry Phillips

* * * * *

Union Rep Email Address: lphillips@ohiotroopers.org

GRIEVANCE DETAILS

Date Grievance Arose: 2/22/2019
Date of Termination: 2/22/2019
Grievance Type: Discipline
Grievance Sub-type: Termination
Contract Article Rollup: 19.01, 19.05, 18.10

* * * * *

STATEMENT OF GRIEVANCE

Statement of Grievance:

On February 22, 2019 I was notified that I was being terminated from my position as a State Trooper.

Resolution Requested:

To be reinstated to my position as a State Trooper without loss of seniority and for the discipline to be removed from my Department (sic) record. To be made whole for all lost wages and benefits, including but not limited to, shift differential, HPFP pay, and holiday pay.

* * * * *

The stipulated issue(s) for disposition by the Arbitrator is/are:

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

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

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18.10 Off-Duty Status

Disciplinary action will not be taken against any employee for acts committed while off duty except for just cause.

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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.

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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.

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ARTICLE 20

GRIEVANCE PROCEDURE

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20.08 Arbitration

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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.

* * * * *

By written correspondence dated February 15, 2019 (Joint Exhibit 3 (A)) Captain Paul E. Hermes, Wilmington District Commander, to Colonel Paul Pride, Superintendent, Ohio State Highway Patrol, following the Administrative Investigation #2018-0628, indicated the "Statement of Charges" established "...reasonable and substantial cause exists..." the Grievant

was found to have violated the following Rules and Regulations of the Ohio State Highway Patrol:

4501:2-6-02 (I) - CONDUCT UNBECOMING AN OFFICER

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.

4501:2-6-02 (F) – REWARDS, BRIBES, PAYMENT FOR DUTY

(2) A member shall not use or attempt to use his/her official position to secure anything of value that would not ordinarily accrue to the member.

* * * * *

FACTUAL BACKGROUND

The State of Ohio, Department of Public Safety, Division of the Ohio State Highway Patrol, 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, "[n]o Bargaining Unit Member shall be reduced in pay or position, suspended, or removed except for just cause".

Grievant Trooper David L. Ellis had been working for the Employer for approximately two (2) years at the time of the incident in question. According to the Grievant, he reached out to

Kenneth Siler, Director of Recreation for the City of Troy and Manager of Hobart Arena in an effort to shadow and learn about security at Hobart Arena for an upcoming Concert. He claimed he endeavored this to assist a “friend” who desired to open a small-event Venue and was interested in Security aspects/requirements attendant therewith. During his discussions with Siler, Grievant identified himself as a State Trooper; although he wanted to shadow Security for personal reasons. Grievant also indicated to Siler he was involved with Security for the Cincinnati Bengals, at Paul Brown Stadium and he was looking to become involved in hosting Concerts. Siler advised Grievant he would have Greg Powell, Head of Security for Ohio Entertainment Security, contact Grievant.

Powell contacted Grievant, and Grievant also advised him he was a State Trooper and provided Security for the Cincinnati Bengals. Powell offered Grievant the chance to shadow at a larger Venue, but Grievant stated he wanted to shadow at Hobart Arena; Grievant claims this is because a friend of his had discussed wanting to open a Venue of a similar size, and the particular date of this Concert, for which, as he acknowledged, he purchased a ticket, worked with his work schedule. Ultimately, Powell agreed to allow Grievant to shadow. Powell instructed the Grievant to arrive at 5:30 P.M. at a designated door entrance. The Concert was scheduled to begin at 8:00 P.M.

Jamie Swearingen, the Grievant’s “interested friend” was interviewed and indicated he and the Grievant were just “talking” about the Venue idea and he did not want to jeopardize his “contractual relationship” with the Division regarding providing automotive repairs and maintenance as owner of Swearingen Auto Care and Tire in Georgetown. He indicated he and the Grievant “talked” about a “small dirt-track - drag strip and other motor-sport-type events” Venue on property he owned and possibly host a “small music Concert”.

On the night of the Concert, Grievant arrived at the Venue over an hour earlier than Powell instructed. He was not wearing the Employer's insignia or clothing that would have readily identified him as a State Trooper, nor did he arrive in State Police Cruiser; and, except for verifying his identity as a State Trooper, he allegedly kept his Badge in his wallet. The Arena was not yet open to the public, but Grievant entered the Facility through the loading dock area - a restricted area that held Performer Dressing Rooms and Production Office(s). Video Evidence introduced at the Hearing indicates the back of the Arena was open and unsecured whereupon the Grievant is depicted making his way through the Arena.

While there, Grievant spoke with Pamela Sigler, a Security Guard and upon his encounter with her, he advised her he was a State Trooper and he had worked at Paul Brown Stadium. Grievant allegedly showed her his Division-issued Badge, although the Badge is to be used only for "official" purposes. During their conversation, Sigler did not question why Grievant was there, and did not ask him to leave. Siler walked past the two of them twice and also never asked why Grievant was there. According to Grievant, Sigler suggested he go see the Production Office. After speaking with Sigler, Grievant went to into the Production Office and spoke with Jeff Jackson, the Tour Manager for one of the Performers; he did not however, enter any Dressing Rooms. Grievant Advised Jackson he was a State Trooper and there for Security. He allegedly advised him "he was available" if Jackson needed any help. Grievant then left and happened upon one of the Performers, Dillon Carmichael. Grievant advised Carmichael he was a State Trooper and there for Security. He took a picture with Carmichael and posted it on his Instagram account after requesting and obtaining permission from the Performer.

Around 5:30 pm, Powell arrived at the Arena. He found Grievant and took him on his Security rounds. Grievant took a picture of one of the tour buses with his phone. Powell stated he

already had doubts when Grievant turned down shadowing at a larger Venue - the Nutter Center - and that night, he noticed Grievant seemed to be there more as a fan than in a working capacity. Before Powell arrived, Sigler had contacted him and indicated Grievant was in the “restricted area” near the Dressing Rooms – in the “Back of the House”. Powell testified he made phone calls initially to Jon Cross a former ODPS Employee and a Member of the Wright State University Police Department, to “vet” and/or verify the Grievant’s claim about being a State Trooper, and eventually Grievant’s Post Commander, Lieutenant Randy McElfresh was contacted through a series of subsequent calls to inquire about the Grievant. McElfresh was advised about the Grievant’s presence at the Arena. The Grievant’s presence at Hobart Arena that night was subsequently verified. Eventually, after the Grievant apparently left the Arena to purchase food for himself and another Security Guard, he returned and was put on the phone with McElfresh. McElfresh instructed the Grievant to leave the Arena; however, he could remain and watch the Concert if he had a ticket, but Grievant chose to leave.

The Employer performed an Administrative Investigation and found Grievant used his position for personal gain; made untruthful statements to gain access to restricted areas of the Arena; and, to meet one of the Performers. According to the Union, testimony during the Arbitration Hearing differed from that obtained during the Investigation. According to Sergeant Percy, the person in charge of the Investigation, Jackson stated during the Investigation he was seated at his desk when Grievant entered the Production Room; the video from the room disputes that assertion. Ultimately, the Employer determined Grievant was there in a personal capacity, but repeatedly identified himself as a State Trooper to gain access to restricted areas. Grievant also made untruthful claims he was associated with Security at Paul Brown Stadium and the Stadium was looking to become involved in more Concert-type events. The Employer decided

that by identifying himself as a State Trooper coupled with the false statements he made, Grievant brought discredit to the Employer and obtained something of value by doing so: access to restricted areas of a Concert/Event Venue and the opportunity to meet a Performer. The Grievant was Terminated via correspondence dated February 21, 2019 from Ohio Department of Public Safety Director, Thomas J. Stickrath for violation of the above-referenced Rules and Regulations of the Ohio State Highway Patrol.

His Grievance was timely filed and was processed through the negotiated Grievance Procedure. When the Parties' efforts to resolve this matter through the course thereof proved unsuccessful, the Employment Termination Grievance of Trooper David L. Ellis was appealed to Arbitration hereunder.

CONTENTIONS OF THE PARTIES

EMPLOYER CONTENTIONS

According to the Employer, the Grievant's untruthful statements and inappropriate actions brought discredit to the Employer, thereby constituting, "Conduct Unbecoming an Officer" – a violation of 4501:2-6-02 (I) (1) – which indicates: an Employee shall not "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 Grievant made untruthful statements to five (5) different people at the Arena: Siler, Powell, Sigler, Jackson, and Carmichael. Grievant told Siler during their phone call he was a State Trooper and involved in Security at Paul Brown Stadium, which, as he alleged, was interested in holding more Concerts. Grievant misled Siler into believing he was acting on behalf of the Employer in his official capacity. Grievant admitted during the Hearing he had never provided Security for

the Bengals. While Grievant had worked at the Paul Brown Stadium before, it was for educational purposes rather than Security.

Next, when Grievant spoke to Powell, Grievant told him he was a State Trooper. Grievant admitted during the Hearing he told Powell he provided Security for the Bengals, although he did not. When making these misleading statements to Powell, Grievant again used his position, and false claims, to appear legitimate so he could gain access to the Concert. Powell offered Grievant the chance to shadow Security at a larger Venue - the Nutter Center - believing it would be more beneficial to Grievant since Paul Brown Stadium is a large Venue. The suggested Venue, the Nutter Center, has a seating capacity of 10,400 (compared to Hobart Arena's 3,782) and is closer to Grievant's home in Lynchburg, Ohio. However, Grievant stated he would like to shadow Security at Hobart Arena the night of the Concert.

On the night of the concert, the Grievant arrived approximately one (1) hour and fifteen (15) minutes earlier than instructed. He entered through the restricted loading dock area by himself. He then went into the Dressing Room and Production Staff Area and spoke with Sigler, the posted Security Guard. He identified himself as a State Trooper, showed her his badge, and said he worked Security at the Paul Brown Stadium. Sigler did not question Grievant's presence because of the things he told her: he was a State Trooper, there to meet the Head of Security (Sigler's boss) and was associated with the Cincinnati Bengals. After they spoke for a while, Sigler allowed Grievant to go into a Production Office, where he met Jackson.

Jackson stated Grievant said he was there for Security, although he was actually there to shadow Security. According to Jackson, Grievant told him he would "take care of it" if there was anyone that Jackson did not like or anyone who needed to be "put down." Grievant admitted he told Jackson he could help him "tackle somebody." According to the Employer, this statement

was inappropriate for someone representing himself as a State Trooper. Additionally, Grievant would not have had the authority to take such action.

Grievant then spoke with Carmichael, again identifying himself as a State Trooper there for Security. Grievant took a picture of himself with Carmichael and posted it on his Instagram account. While Grievant and the Union claim Grievant did not know who Carmichael was, the Employer disagrees because Grievant is a country music fan, had purchased a ticket to see Carmichael perform, and showed videos of himself singing to Sigler. Grievant had also previously had a conversation with his post commander, McElfresh, about Carmichael. He also followed Carmichael on Instagram. While the Union might argue the Grievant brought embarrassment, rather than discredit, to the Employer, his premeditated and inappropriate actions while identifying himself as a State Trooper served to discredit the Employer. According to Siler, because of Grievant's actions, the Hobart Arena is reviewing their operations to make sure a similar occurrence does not reoccur. Siler stated during the Hearing he would hope a State Trooper would not act the way Grievant did and he believed these types of actions could affect the public's trust of the Employer.

Powell testified the Grievant's actions brought negative attention from the Production Security Staff and his actions were inconsistent with the character of a State Trooper and very inappropriate. Jackson travels the United States touring and said this was one of the "oddest" experiences he has had with someone claiming to be in Law Enforcement. Additionally, Jon Cross, a current Law Enforcement Officer and retired State Trooper, thought Grievant's behavior was so inappropriate he reported it to McElfresh. McElfresh also testified Grievant's actions were not consistent with the character of a State Trooper and his actions could affect the public's trust in the Employer. Even though the rule refers to conduct that "may bring discredit", and

Siler and McElfresh stated Grievant's actions could have affected the public's trust, Jackson and Siler stated his actions did bring discredit to the Employer. Jackson specifically found the actions very inappropriate for a Law Enforcement Officer.

The Employer next turns to the rule that states a "member shall not use or attempt to use his/her official position to secure anything of value that would not ordinarily accrue to the member." The evidence of record, the Investigation conducted, and that adduced at the Arbitration Hearing establish the Grievant violated this rule. The Investigation and testimony at the Hearing revealed Grievant was a "fan of country music". He purchased a ticket to attend the Concert at the Arena, even though this was not required in order to shadow. McElfresh testified he and Grievant had talked about country music before, and Carmichael, one of the performers, specifically. Grievant followed Carmichael on Instagram. He also took a picture with Carmichael and posted it on his Instagram account. Grievant used his position with Employer to gain benefits in this situation. He was able to get backstage access for a Concert where a performer he liked would be playing. According to Siler, Grievant got himself access that was more open than that of the public or even VIP ticket holders. Grievant obtained this access by asserting his position as a State Trooper. Grievant stated he did not want the people working at the Concert to think he was just "Joe Schmo off the street". The Employer takes this admission as proof he used his position as a State Trooper to gain access to the Arena and shadow Security.

The Union presented evidence at the Hearing of Grievant's Performance Review and Supervisor input. While the Employer does not deny this evidence indicates he was a good Trooper, such is irrelevant in this case because Grievant was not disciplined for his performance or on-duty conduct. Here, Grievant was disciplined for what he did while off-duty. His "good work" as a Trooper does not give him the right to discredit the Employer or use the position for

personal gain while off-duty. Grievant repeatedly connected himself to the Employer by telling each person he interacted with he was a State Trooper. Grievant admitted he knew his role as a State Trooper would give him more credibility than the “average citizen”. Grievant also testified he should not have brought the Employer into the situation, and Law Enforcement Officers should not use their positions for personal gain. These statements demonstrate Grievant knew he was using his status as a State Trooper to gain access to backstage of the Concert.

In addition to continuously stating he was a State Trooper, Grievant continuously misled the people he spoke to at the Concert. He told Siler he was involved with Security at Paul Brown Stadium, which was planning to host concert-type events. During the interview, Grievant admitted he has never performed Security for the Cincinnati Bengals. Powell stated Grievant told him he provided Personal Security for the players. Grievant admitted during his interview he did tell Powell this, although he does not work Security for the players. Grievant also told Sigler he worked Security at Paul Brown Stadium, but he only handed out educational materials. Grievant also told Jackson he was there for Security, and if Jackson needed someone “put down”, Grievant would “take care of it”. During his interview, Grievant admitted he was not at the Venue to provide Security but was there to shadow Security. Finally, Grievant was also untruthful to Carmichael when he told him he was there as Security.

The Employer emphasizes Grievant told multiple people multiple times he was a State Trooper who was at the event to perform Security. When asked during his interview if he lied or provided false information to the five (5) aforementioned people, he said yes. These actions caused discredit to the Employer because Siler stated he hoped this type of behavior would not be consistent with the character of a State Trooper. Powell testified Grievant’s actions created a distraction to Security Staff on the night of the Concert. Additionally, Grievant’s presence

brought him negative attention, and a member of the Production Staff was not pleased. The incident caused the Arena to review operations to avoid another occurrence like this in the future. Siler testified Grievant's actions also negatively affected the public's trust or confidence in the Employer. Grievant's actions disrupted Security Operations at the Arena, caused trouble for some of the people he interacted with, and affected public trust. The "conduct unbecoming" rule, according to the Employer, only requires that Grievant's actions while off-duty "may" bring discredit to the Employer; here, Grievant's actions "did" bring discredit to the Employer.

As for the "rewards" rule Grievant violated, he admitted he identified himself as a State Trooper to multiple people because he wanted to appear legitimate. By identifying himself as a State Trooper and falsely claiming he worked Security for the Bengals, he gained the "reward" of gaining unrestricted, backstage access to the Venue and meeting a performer. Evidence demonstrates Grievant is a fan of country music and, specifically, Carmichael, because he follows Carmichael on Instagram and has spoken to McElfresh about him. While his "reward" was not tangible or financial, many people pay for backstage passes or the chance to meet a performer equating to a value from those experiences. Here, Grievant met and took a picture with a performer he evidently liked and followed. This is an example of a non-financial, non-tangible reward, but a reward, nonetheless.

While the Union argues Grievant should not be terminated, the high level of respect for the Employer in the community requires its Law Enforcement Officers to uphold the public's trust and are held accountable. Bringing discredit to this position makes the jobs of other Officers more difficult. Grievant did not simply make a mistake - he participated in a pattern of deception and used his position for personal gain. This pattern of lying and using his position for "legitimacy" demonstrates Grievant is likely to make the same mistake in the future. The

Employer argues it cannot take chances on people who lie and use their positions for power because they may do so again. Here, Grievant violated public trust, and members of the public were affected by his lies and deception. The discipline imposed was not arbitrary, capricious, or discriminatory. Grievant chose to use his position for power and to lie about his Security involvement. Grievant brought discredit to the Employer and put the public's trust in the Employer at risk.

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

UNION CONTENTIONS

The Union contends the Employer has the burden of proof to establish: (1) the discipline imposed was for just cause; and, (2) the level of discipline is commensurate with the offense. The Employer has failed to prove either. Additionally, the Arbitrator must determine whether the Employer has demonstrated by a preponderance of the evidence the Employee has committed acts warranting discipline and the penalty of Termination is appropriate. The Union contends Grievant's actions did not warrant Termination of his career.

The Union cites the "Seven Tests for Just cause": (1) Was the Employer's rule or managerial order reasonably related to the orderly, efficient and safe operation of the business? (2) Did the Employer give any warning as to any possible discipline or consequence that could result from that Employee's action or behavior? (3) Prior to administering discipline, did the Employer conduct an Investigation to determine whether the Employee did in fact violate or disobey a rule or order? (4) Was the Investigation fair and objective? (5) Did this Investigation uncover any substantial proof or evidence the Employee was guilty of violating or disobeying a direct rule or order? (6) Did the Employer apply all rules, orders, and penalties evenhandedly and without discrimination to all Employees? (7) Was the degree of discipline administered

reasonably related to either the seriousness of the Employee's offense or to the record of past service? Arbitral precedent requires all questions must be answered affirmatively for the Arbitrator to uphold the discipline for "Just Cause". According to the Union, questions 5 and 7 are the most probative in this case in establishing Just Cause to Terminate the Grievant.

With respect to whether the rule was reasonably related to the orderly, efficient, and safe operation of the business, the Union states Grievant did not violate a direct order and his actions did not constitute conduct unbecoming an Officer. While he did identify himself as a State Trooper at the Arena, he did not do so in a malicious manner. Grievant told the people he interacted with he worked at Bengals football games to give a frame of reference for what he was asking to do, and he later testified his original understanding of his job duties at the Bengals games was not accurate, which he learned after the incident. Grievant did not intend to bring discredit to the Employer. According to the Union, Jackson told Sergeant Percy he did not have any concerns of dealing with Members of the Division in the future.

With respect to whether the degree of discipline administered was reasonably related to the seriousness of the Employee's offense or to the record of past service, Grievant made a mistake he learned from, and the point of discipline is to allow an Employee to rehabilitate and learn from such mistakes. Grievant had a strong work record according to Evaluations and testimony from Supervisors. Grievant was reportedly a hard worker and always early - arriving to the Arena early did not render him a bad State Trooper or guilty of violating the rules as asserted by the Employer.

The "Conduct Unbecoming an Officer" rule 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 Division." The Union cites Arbitrator Bernardini's standard for whether off-duty conduct can constitute just cause for discipline wherein she held, "has the Employee's off-duty conduct (1) harmed the Company's reputation or product; (2) rendered the Employee unable to perform his duties or appear at work; or, (3) resulted in the refusal, reluctance, or inability of other Employees to work with the Employee whose off-duty conduct is in question. The Union submits none of these factors have been met in this case.

Arbitrator Bernardini also emphasized Employers should not exaggerate what the public might think without evidence to support the claim of harm to its reputation. Here, there was no evidence presented Grievant caused harm to the Employer's reputation; he was never placed on "desk duty" and continued to work on the road following the incident until he was served with the Notice of Termination. McElfresh testified Grievant was a "good Trooper" and he would not have a problem welcoming him back to the Post. Another Supervisor stated Grievant would use this as a learning experience. As such, Grievant did not act in a way constituting conduct unbecoming an Officer as charged.

Next, the Union turns to the "rewards" rule, which also served as a basis to effectuate his Termination of employment, which states: "A Member shall not use or attempt to use his/her official position to secure anything of value that would not ordinarily accrue to the member." Grievant did not secure anything of value not ordinarily available to the public. Grievant bought a ticket to the Concert and requested to shadow Powell while off duty. He entered the Arena through an unsecured and open area. Grievant did not gain anything of monetary value; Powell

advised Sergeant Percy he did not believe Grievant gained monetarily. Accordingly, Grievant did not violate the “Rewards, Bribes, and Payment for Duty” Rule/Regulation.

Based on a totality of the evidence produced, the Employer has not met its burden to justify Termination of Grievant. Further, the penalty was not reasonably related to either the seriousness of the alleged offense(s); Grievant’s work record; and/or, future potential. The Collective Bargaining Agreement is the cornerstone of the discipline process as negotiated between Parties. The Employer violated the principles of progressive discipline as set forth therein. Case law addresses the seriousness of misconduct “does not call for setting aside the principle of progressive discipline.” There is no evidence Grievant damaged his own reputation or that of the Employer. Additionally, McElfresh testified he would welcome Grievant back, since as he testified, he was a good Trooper. There is no evidence Grievant gained any benefit from the incident; he made a mistake, but not a career-ending mistake. Grievant had no disciplinary record to justify Termination.

For these reasons, the Union requests the Grievance be sustained; and, the Grievant be made whole.

DISCUSSION & 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" to effectuate the Employment Termination/Removal of the Grievant, Trooper David L. Ellis, for events that occurred on November 16, 2018 at the Hobart Arena in Troy, Ohio. The Grievant was charged with violating Rules and Regulations of the Ohio State Highway Patrol: 4501: 2-6-02(I)(1) titled "Conduct Unbecoming an Officer"; and, 4501:2-6-02(F)(2) titled "Rewards, Bribes and Payment for Duty".

The Employer asserts the Grievant, based on the evidence of record; the thorough Investigation conducted by Sergeant Anthony T. Percy, with the Administrative Investigation Unit; the testimony of those at the Arbitration Hearing; and, the statements taken, demonstrate the Grievant did not make a “bonehead mistake”, as characterized, but on at least five (5) occasions to five (5) different individuals over the course of various days, he engaged in a pattern of deception and misrepresentation that brought discredit to the Ohio State Highway Patrol. He lied on numerous occasions to numerous individuals and such demonstrates he is willing to deceive and use his position for personal gain. This is a risk the Employer simply cannot undertake and cannot have such an individual in the capacity as a State Trooper in its employ. The public trusts the Employer to ensure the titles of State Trooper and the State Police are not misused and its Members and State Troopers are not to engage in deceptive and misleading conduct. The Grievant violated this trust and members of the public were adversely affected requiring its determination to effectuate his Employment Termination. Its discipline, as imposed, was not arbitrary, capricious, or discriminatory, but resulted from a series of poor and deliberate choices on the part of this individual and his short tenure does not serve to mitigate the penalty as imposed. His lies, deceit and actions under the name of the Ohio State Police brought discredit to this Employer and he obtained a benefit and put the public's trust at risk.

The Union contends the Employer failed to meet its burden of proof to establish the discipline, as imposed, was for Just Cause and the level of the discipline was not commensurate with the nature of the offense. While the Union acknowledges the Grievant may have identified himself as a State Trooper to those he encountered and interacted with at the Hobart Arena on the night of the Concert in question, his actions were not malicious nor nefarious. He acknowledged his experience working the Cincinnati Bengals football games to give a frame of

reference for what he was seeking to undertake at the Hobart Arena. He acknowledged his characterization of his prior experiences at Paul Brown Stadium were not accurate and when he recognized his actions were not in his, or the Division's, best interest, he repeatedly apologized, and it is clear his intention was not to bring discredit to the Division. The Union emphasizes that during the course of the Investigation, Sergeant Percy, with the Administrative Investigation Unit, was advised by Tour Manager of LBC Management, Jeff Jackson, he did not have any concerns dealing with Members of the Division in future matters. The Union also emphasizes the testimony of Sergeant Anthony Fox and Post Commander, Randy McElfresh, who both indicated the Grievant was a "good State Trooper", a hard worker who arrived early and neither indicated his return to his position as a State Trooper would be problematic. The Grievant's actions, it contends, does not constitute malicious activity, or conduct unbecoming as charged, nor did the Grievant receive any reward, bribe, or pay for duty, for which he was charged.

The Parties' Collective Bargaining Agreement, under which the Arbitrator's authority is memorialized and conferred, sets forth in Article 4, titled "Management Rights", the Employer's inherent and contractually recognized right to "...discharge and discipline Employees..." The limitation placed upon that inherent and contractually recognized right is set forth in Article 19, titled "Disciplinary Procedures" at Section 19.01 titled "Standard" which specifically states, "[n]o Bargaining Unit Member shall be reduced in pay or position, suspended, or removed, except for Just Cause". This contractually recognized right of Management to effectuate disciplinary action and the limitation placed upon Management to establish the imposition of disciplinary action be for "Just Cause" recognizes the time honored "Just Cause Standard". Under the Just Cause Standard, the Employer must establish the Grievant was guilty of the wrong doing which served as the basis for the imposition of disciplinary action; and, the

discipline as imposed must be commensurate with the nature of the infraction(s) committed while considering both aggravating and/or mitigating circumstances/factors.

The Record is replete with instances engaged in by the Grievant which, for lack of a better characterization, constitutes a “bonehead” mistake on the part as a State Trooper. The Record demonstrates the Grievant purchased a ticket for the Country Music Concert in question and, according to his "interested friend", Jamie Swearingen, he and the Grievant had engaged in “discussions” entertaining the idea of opening a dirt drag strip, motorsport-type event Venue that may become morphed into hosting small Concert events on property he owned. He was interviewed during the course of the Administrative Investigation and indicated to Sergeant Percy, he did not want to jeopardize his contractual relationship with the Ohio State Highway Patrol for automotive repair and maintenance of the Division's vehicles. He indicated he and the Grievant were just "talking" about these ideas concerning a parcel of property he owned for utilization in this capacity. He did indicate they were simply talking about these ideas and was in no means in partnership with the Grievant in any way. Such, however, suggests there may have been an acknowledged basis for the Grievant’s endeavors regarding “Security”.

The compelling evidence of record, in the opinion of the Arbitrator, is the testimony of Post Commander McElfresh and Sergeant Fox, both of whom oversaw the Grievant's work in his capacity initially as an Intern and ultimately as a State Trooper. The Record demonstrates the Grievant, prior to obtaining the requisite age for becoming a State Trooper, would come and "intern" at this Post in a means to not only learn the personnel, but observe and watch - "to see and be seen" with respect to the day-to-day activities of the Georgetown Post and the State Troopers assigned there. The Record also demonstrates the Grievant completed and graduated the Academy prior to obtaining the requisite age to become a State Trooper. McElfresh indicated

the Grievant experienced a few “operational hiccups” but characterized him as a “good Trooper” eager to learn and went on “ride-a-longs” prior to obtaining the requisite age/Uniform to become a Trooper. He also indicated he had no “operational concerns” regarding the Grievant and he continued to “work the roads” while the Investigation continued. McElfresh also indicated he would not view as problematic the Grievant’s return as a State Trooper to the Georgetown Post.

These factors suggest to the Arbitrator that indeed the Grievant had an unwavering desire to pursue a career as a State Trooper and engage in the endeavors necessary to allow his goals to be achieved. As previously indicated, the compelling testimony of Record comes from Commander McElfresh and Sergeant Fox, wherein the Grievant was characterized as a "good State Trooper", and this “incident - a learning experience - does not hinder his ability as a Trooper”. While compelling and demonstrating the Grievant’s work performance and potential as observed by his Supervisors, such does not, however, serve to excuse the actions he engaged in at the November 16, 2018 Country Music Concert at Hobart Arena.

The Evidentiary Record is replete with testimony and statements from those involved wherein the Grievant engaged in various misrepresentations concerning his endeavors to oversee/shadow "the Security process" at a small Venue like the Hobart Arena. The Grievant on numerous occasions identified himself as a State Trooper and, in fact, exhibited his badge to certain of those people with whom he encountered/interacted at this Venue. The Record also demonstrates the Grievant, while off-duty, received no pay for his actions; did not secure anything of value that was not ordinarily available to the General Public; arrived in his own personal vehicle; was not donning the State Trooper Uniform; and, in no way other than identifying himself as a State Trooper and displaying his badge to establish his “legitimacy”, did he indicate outwardly his status as a State Trooper. The evidence of record also demonstrates that

upon learning the Grievant's intentions may have been something other than what he had indicated to those in charge of Security at this Arena and upon his Commander and Supervisor learning of his presence at this Arena, he was instructed to leave and he immediately did so. He followed his departure from this Arena with phone calls to those with whom he had interacted to apologize for his actions.

The Rules and Charges cited include “Conduct Unbecoming an Officer” and, “Rewards, Bribes and Payment for Duty”. While the evidence of Record suggests the Grievant's endeavors run counter to the overall and general connotation of acceptable conduct of an Ohio State Trooper, the evidence of Record does not indicate the matter resulted in any notoriety other than with those with whom the Grievant interacted with at this Arena. This matter did not rise to the level of something that was documented in a newspaper article or on the local news station. The notoriety of this event did not place the reputation of the Employer in an open and outward display of adverse notoriety. While whatever notoriety this garnered was limited and isolated to small area of the community, it simply cannot be ignored. The Grievant admittedly misrepresented, “exaggerated” his endeavors and the fact he had purchased a ticket for this Concert suggests he may have been seeking something other than what he alleged. His "interested friend" did not suggest he was overtly interested in the same pursuits the Grievant shared; however, he did acknowledge there was some discussion with the Grievant about these potential future plans.

As previously indicated, the notoriety component of bringing discredit to the Division and adversely impacting public trust, was on a small and/or limited scale with respect to this matter. There simply exists no evidence the Grievant's actions and/or interactions with the Hobart Staff, proved to hinder Arena operations or pose a security risk to Hobart Employees or

the scheduled Performers. That, in the opinion of the Arbitrator, serves to diminish the magnitude, if you will, of the misconduct admittedly engaged in by the Grievant.

With respect to the “Rewards, Bribes and Payment for Duty” Rule/Charge, it is common knowledge "fans" of any Performer in the entertainment industry can purchase what are commonly characterized as "back-stage passes" to gain authorized access into the otherwise restricted area(s) in which the Grievant placed himself on the night in question. It is clear that while the Grievant did not receive any type of monetary restitution as suggested by the title of the Rule/Charge, he was “rewarded” with respect to his access into this otherwise restricted area where the Production Offices are located, as well as, the Performer's Dressing Rooms, i.e., “Back of the House”. He happened upon the “Headliner” of the Concert and indicated he was a State Trooper and was there for Security; he requested and was granted permission to have a photograph with this Performer; and, posted same on his Instagram account. While these findings simply cannot be ignored, they do not constitute egregious conduct warranting Termination.

It is clear the evidence of record supports the finding the Grievant did indeed engage in certain misconduct; however, as previously indicated and emphasized herein, the Arbitrator finds compelling the characterization of the Grievant by Post Commander McElfresh and the Grievant’s Supervisor, Sergeant Fox, as an otherwise committed and "good State Trooper". Such characterization, and the afore-referenced notoriety analysis, in the opinion of the Arbitrator, serves to mitigate the penalty as imposed. However, given the misconduct, while not deemed as egregious, a strong message through disciplinary action must be issued to "hit the mark" with respect to deter whatever future violations that may occur. This Record does not suggest this Employee would not “learn from this ‘bonehead’ mistake” if he were afforded the

opportunity to continue his career as a State Trooper. To emphasize this “learning experience” he must realize the magnitude of his actions; and, the Employer must establish such conduct simply cannot be tolerated and will not go unpunished.

Accordingly, the Grievant shall be offered reinstatement to his previous position as a State Trooper and retain his Seniority; he shall be reinstated to the Post and Shift from which he was removed; he shall receive Pension contributions; and, he shall not receive any back-pay for the time lost as a result of his Termination. His Termination shall be reflected as a Suspension without pay from the date of his Termination until seven (7) calendar days from the date of this Opinion and Award. The reinstatement shall be conditioned upon his restriction from engaging in any conduct prohibited by either Rule and/or Regulation of the Ohio State Highway Patrol for which he was charged/Terminated. This conditional reinstatement shall be effective for two (2) years from the date of this Opinion and Award. The Arbitrator shall retain jurisdiction for a period of sixty (60) calendar days 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

July 12, 2019
Cincinnati, Ohio