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ARBITRATION PROCEEDING PURSUANT TO COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of	◆	
	◆	
THE OHIO STATE TROOPERS ASSOCIATION	◆	
and	◆	**ARBITRATOR'S OPINION and AWARD**
STATE OF OHIO, OHIO DEPARTMENT OF PUBLIC SAFETY, DIVISION OF THE OHIO STATE HIGHWAY PATROL	◆	
	◆	
Grievant: Jason Delcol	◆	
Case No. DPS-2015-50673-1	◆	

This Arbitration arises pursuant to the collective bargaining agreement ("the Agreement") between the Parties, THE OHIO STATE TROOPERS ASSOCIATION ("the Union") and the STATE OF OHIO ("the State," "the Department," or "the Division") under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. Her decision

shall be finding and binding pursuant to the Agreement. The record indicates no procedural impediments to a final and binding Award.

Hearing was held March 4, 2015. Both Parties were represented by advocates who had full opportunity to examine and cross-examine witnesses and introduce documentary evidence. Both Parties filed timely post-hearing briefs.

APPEARANCES:

On behalf of the Union:

ELAINE N. SILVEIRA, Esq. and HERSCHEL M. SIGALL, Esq., The Ohio State Troopers Association

On behalf of the State:

LT. JACOB D. PYLES, Ohio State Highway Patrol

STIPULATED ISSUE

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

RELEVANT PORTIONS OF THE AGREEMENT

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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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FACTS

The Grievant has been employed by the State as a Trooper since 2001. In 2009, he was seriously injured in an on-duty vehicle crash. As a result of the crash, he has back and leg pain that has continued to this day. He has had surgery to diminish the pain, but it is still necessary for him to take prescribed pain medication. [redacted] **it for the Grievant in 2011.**

In May 2012, the Grievant's supervisor, Sgt. Grewal, drove him to a drug test. According to the Grievant, during that ride, he told Sgt. Grewal that [redacted] to which Sgt. Grewal replied, "If you have a prescription for it, you're ok." Sgt. Grewal did not testify at the arbitration. During the 2014 administrative investigation of this matter, Sgt. Grewal stated he did not recall taking the Grievant to a drug test in May 2012.

On July 27, 2012, the State, the Union, and the Grievant signed a "Last Chance Discipline Abeyance Agreement" that provides in pertinent part:

> **...**
>
> **The employee must not violate any Departmental rule or policy relating to drug or alcohol use, or the terms of this agreement. The length of this agreement shall be: five (5) years.**
>
> **...**
>
> **If the employee violates rule 4501:2-6-02(L) Use of Narcotics[1] during the term of this agreement, the employee will be**

[1] Ohio State Highway Patrol Rule 4501:2-6-02(L) Use of Narcotics and Controlled Substances provides:

> A member shall not use any narcotic or any other controlled substance except as prescribed by a physician. The member shall notify a supervisor, prior to reporting for duty or operating any division equipment, that the member is taking a prescribed narcotic or controlled substance. A member

> **discharged. If the employee violates rule 4501:2-6-02(I)(3) within two years of signing the agreement, the employee will be discharged.**
>
> **...Grievance rights related to a termination under this agreement will be limited to a challenge of whether his behavior constitutes a violation of a triggering work rule(s). The level of discipline may not be challenged or made an issue at arbitration.**
> **...**

On August 18, 2014, the federal Drug Enforcement Agency ("DEA") reclassified [redacted] to a controlled substance. Neither the Grievant's [redacted] informed him of this change.

In a letter dated January 13, 2015 from Ohio Department of Public Safety Director John Born, the Grievant's employment was terminated because he:

> **failed to inform supervision or the Academy physician of your use of a controlled substance, violating your Last Chance Agreement.**

On January 14, 2015, the Union filed the instant grievance regarding the termination.

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shall report any potential side effects that may affect fitness for duty to a supervisor.

POSITIONS OF THE PARTIES

State Position

The Grievant voluntarily and knowingly entered into a Last Chance Agreement. The terms of the Last Chance Agreement were clearly written. The Grievant knew if he violated Rule 4501:2-6-02(L) Use of Narcotics and Controlled Substances, he would be terminated.

In *Ohio State Troopers Association v. Ohio Department of Public Safety, Division of Highway Patrol,* Case No. 15-03-20100820-129-04-01 (Wallace-Curry, 2010), the arbitrator upheld the termination of an employee for violating his last chance agreement. She explained:

> **...While such a violation normally may not be cause to discharge a trooper, the Grievant was working under a Last Chance Agreement....Consequently, once a violation of the rule is established, the LCA mandates that the Grievant be removed from employment. The Arbitrator has no power to mitigate the discipline to which the Grievant, the Union and the Employer agreed.**

The Grievant's violation of Rule 4501:2-6-02(L) Use of Narcotics and Controlled Substances is focused around his failure to notify the Division [redacted] a Schedule IV DEA-controlled substance. The Grievant claims he told Sgt. Grewal he was taking [redacted] while Sgt. Grewal was taking him to a drug test in 2012.

Sgt. Grewal, when interviewed, said it was possible he took the Grievant to a drug test, but he didn't remember it. When questioned further, Sgt. Grewal said if the Grievant had notified him he was taking [redacted] he would have told the Grievant to write an IOC.

If in fact the Grievant told Sgt. Grewal he was using [redacted] as the Grievant alleges, Sgt. Grewal had no responsibility for doing anything with that information because [redacted] was not a controlled substance in 2012. Once [redacted] became a controlled substance in August 2014, however, the Grievant was required to notify the Division he had been prescribed and was taking [redacted]

Lt. Knapp testified he has been the Delaware Post Commander for four years. During that time, none of the sergeants at the Post ever notified him of the Grievant's [redacted] usage. Investigatory interviews with Sgts. Freeman, Curry, Skaggs, and Coriell each elicited the statement that the Grievant had never informed them he was taking [redacted]

On July 25, 2012, two days before he signed the Last Chance Agreement, the Grievant wrote an IOC listing his prescribed medications; he did not list [redacted] which he had been taking since 2011. The

Grievant claims he "tried" to list "everything" he was taking, but he was going through personal issues at the time.

The Grievant's excuse for leaving [redacted] off the IOC is not believable. It is apparent the Grievant intentionally left [redacted] off the IOC. If he had included it, the fact that [redacted] became a controlled substance in August 2014 would be irrelevant because the Grievant would have fulfilled his duty to notify the Division.

The Grievant says he did not know [redacted] was a controlled substance until he looked it up on his cellphone after Staff Lt. Neal notified him of the administrative investigation. The Grievant says he found a December 2014 news article stating the DEA had classified [redacted] as a controlled substance on August 18, 2014.

Throughout the administrative investigation, there is a noticeable pattern of the Grievant not taking his Last Chance Agreement or his [redacted] usage seriously. The Grievant did not even read the work rules and Department policies relating to prescription drugs and narcotics. A reasonable person would have gone above and beyond to comply with the Last Chance Agreement; the Grievant did not.

Some of the side effects of [redacted] The Grievant said [redacted] made him tired. The State and the public expect troopers to be fit for duty when they are operating a patrol car and carrying a gun. Rule 4501:2-6-02(L) Use of Narcotics and Controlled Substances states in part, "A member shall report any potential side effects that may affect fitness for duty to a supervisor." This is why it is so important that the Grievant left off [redacted] from the IOC he drafted on July 25, 2012.

When the Grievant's Union Representative asked the Grievant if his pharmacy notified him [redacted] was now a controlled substance, the Grievant responded that he "didn't ask anyone." The Grievant knew his employment hinged on whether he notified the Division if he was taking a controlled substance. Yet he "didn't ask anyone" if [redacted] was a controlled substance.

During the administrative investigation, Lt. Bush asked the Grievant whose responsibility it was for knowing whether the Grievant was taking a controlled substance. The Grievant replied, "Mine." Also during the

administrative investigation, the Grievant admitted that taking [redacted] after August 2014 was a violation of the Last Chance Agreement.

The Grievant violated his Last Chance Agreement on August 18, 2014, and continued doing so until he stopped taking [redacted] in December 2014. The Grievant's claim that he told Sgt. Grewal in 2012 he was taking [redacted]s highly suspect. Sgt. Grewal did not remember the car ride or the conversation.

The discipline imposed was not arbitrary, capricious, or discriminatory. The Grievant clearly violated Rule 4501:2-6-02(L) Use of Narcotics and Controlled Substances and in turn, violated his Last Chance Agreement. The State requests the Arbitrator to uphold the Division's high standards by denying the grievance.

<u>Union Position</u>

The termination provision of the Last Chance Agreement was not triggered by the actions of the Grievant. The Grievant never engaged in any action, or failed to take any action, that would justify any discipline.

The State contends that pursuant to the Last Chance Agreement, the Grievant was required to inform his supervisor of any narcotic

medication he was taking. Since July 2011, the Grievant had been taking a prescription drug that was a non-narcotic; therefore, he was not required to report it. The State takes the position that when the DEA decided in August 2014 to amend its Schedule IV controlled drug list by adding this prescribed medication, [redacted] the Grievant, at that point, was required to notify his supervisor he was taking [redacted]

The State does not allege that the Grievant knew [redacted] had been reclassified by the DEA to a Schedule IV narcotic. Nor does the State allege the Grievant's doctor or pharmacy told him about the reclassification. It is the State's position that the Last Chance Agreement required the Grievant to inform his supervisor of his [redacted] use irrespective of the Grievant's reliance upon the fact that for three years, even before the Last Chance Agreement, he had been prescribed [redacted]

The State also took the position at the arbitration hearing that had the Grievant informed his supervisor he was taking [redacted] at any time before the August 18, 2014 DEA reclassification, he would have met the

requirement to inform his supervisor. That fact alone is dispositive of this case.

Prior to the imposition of the Last Chance Agreement, the Grievant told his supervisor, Sgt. Grewal, that he was taking[redacted] The Grievant is clear and precise in his memory of the conversation that took place while he and Sgt. Grewal were traveling to a drug test. During the administrative investigation, Sgt. Grewal said he did not recall taking the Grievant to a drug test, though the record shows that occurred. The administrative investigative officer testified he believes the Grievant to be truthful. According to the State's position at the hearing, the Grievant's conversation with Sgt. Grewal meets the disclosure requirement.

The Grievant's use of[redacted]did not affect him negatively at work. His coworkers noticed no lack of performance. His supervisors saw no indications of negative performance. The Division's own physician, Dr. Roman Kovach, stated during the administrative investigation that he did not have a problem with the Grievant's[redacted]use.

The Grievant's supervisors found him to be an excellent Trooper. His immediate supervisor testified the Grievant was "a low maintenance Trooper." The Grievant's evaluations are fine and the commentary

praiseworthy. The Grievant's awards, including the coveted ACE Award, mark him with distinction.

This case comes down to the question of whether the Grievant reasonably should have known a drug he had been taking for three years was reclassified by the DEA as a controlled substance narcotic. The Union submits the Grievant had no cause to suspect this would happen. Moreover, the Grievant informed his supervisor in 2012 that he was taking[redacted]

OPINION

The stipulated issue, whether the termination was for just cause, governs what is before the Arbitrator. Just cause in this context consists of whether the Grievant did what he is accused of doing, and if he did, whether removal is an appropriate discipline under all the circumstances.[2]

The record shows the Grievant was severely injured in an on-duty vehicle crash in 2009. [redacted] **In December 2014, the Grievant had**[redacted]**that lessened his pain somewhat.**

[2] As seen below, even if the grievance were analyzed on narrower "last chance" grounds, the outcome would be the same as it is under the broader just cause standard.

At one point after the injury, the Grievant's [redacted] a narcotic, for his pain. The Grievant took the [redacted] for a period of time. Sometime in 2011, being concerned about the possibility of narcotic addiction, the Grievant asked [redacted] In 2011, when he began taking it, [redacted] was neither a narcotic nor a DEA-classified controlled substance.

In May 2012, the Grievant was scheduled for a drug test. Sgt. Grewal, who did not testify at the arbitration, drove the Grievant to the drug test. The Grievant stated during the administrative investigation and testified at the arbitration that on the way to the drug test, he told Sgt. Grewal he was taking [redacted] According to the Grievant, Sgt. Grewal replied, "If you have a prescription for it, you're ok." Sgt. Grewal stated during the administrative investigation that he did not remember taking the Grievant to the drug test.

The Arbitrator found the Grievant's testimony regarding his 2012 conversation with Sgt. Grewal credible. Moreover, Sgt. Grewal did not testify, which gives the Arbitrator little or no basis to find the [redacted] conversation did not take place.

Ohio State Highway Patrol Rule 4501:2-6-02(L) Use of Narcotics and Controlled Substances, the rule the Grievant is accused of violating, provides:

> **A member shall not use any narcotic or any other controlled substance except as prescribed by a physician. The member shall notify a supervisor, prior to reporting for duty or operating any division equipment, that the member is taking a prescribed narcotic or controlled substance. A member shall report any potential side effects that may affect fitness for duty to a supervisor.**

Rule 4501:2-6-02(L) does not require that such notification be in writing. Accordingly, the Arbitrator having found that the Grievant informed Sgt. Grewal in May 2012 about the [redacted]use, the Arbitrator finds the Grievant has not violated his Last Chance Agreement. Under the same analysis, the State did not have just cause for terminating the Grievant's employment.

AWARD

For the reasons stated above, the grievance is granted.

The State is unable to prove on the record that it had just cause to remove the Grievant or that the Grievant violated his Last Chance Agreement.

The Grievant is to be reinstated to his former position, and is to be made whole, including but not limited to: backpay, seniority, and benefits.

The Arbitrator shall retain jurisdiction over the remedy only, through July 10, 2015.

May 8, 2015 *Susan Grody Ruben*
Arbitrator