#1124

IN THE MATTER OF THE ARBITRATION BETWEEN:	*	
	*	**Grievance No.:**
State of Ohio Highway Patrol	*	**15-03-951212-**
	*	**0116-04-01**
-and-	*	
	*	**Grievant:**
Fraternal Order of Police/Ohio Labor Council	*	**Michael J. Massey**
	*	

ARBITRATOR: Mollie H. Bowers

APPEARANCES:

For the State:

Richard D. Corbin	Management Representative
Donald T. Henry	Witness
Shelly Haynes	Witness
Cathy L. Davis	Witness
Robert Maxey	Witness

For the FOP:

Paul L. Cox	Chief Counsel
Michael J. Massey	Grievant
Lisa Fox	Witness
Gabriel Frencz	Witness

This case was brought to arbitration by the Fraternal Order of Police/Ohio Labor Council (hereinafter, "the FOP") to protest, as without just cause, the removal of Trooper Michael J. Massey (hereinafter, "the Grievant") and related violation of articles of the current labor contract and the Constitutions of the United States and the State of Ohio by the State of Ohio Highway Patrol (hereinafter, "the State"). The Hearing was held at 11:00 a.m., on February 27, 1996, in the Conference Room of the Sandusky Post, Ohio State Highway Patrol, Sandusky, Ohio. Both parties were represented and agreed this case is properly before the Arbitrator. They had a full and fair opportunity to present evidence and testimony in support of their case and to cross-examine that presented by the opposing party. At the conclusion of the Hearing, the parties presented oral closing argument. The record, in its entirety, has been carefully considered by the Arbitrator in determining what the outcome of this case shall be.

ISSUE

Was the Grievant removed for behavior constituting a violation of a work rule in accordance with the Last Chance Discipline Agreement signed by Grievant on April 28, 1995?

APPLICABLE RULE

4501:2-6-02 PERFORMANCE OF DUTY AND CONDUCT
(B) Performance of Duty
(3) A member, while on duty, shall not be absent from his/her district, post, section, unit, detail or assignment without authorization and shall be available through usual communication channels.
(I) Conduct Unbecoming an officer
(3) For any improper on duty association with any individual for purposes other than those necessary for the performance of official duties.

BACKGROUND

The Grievant, a Highway Patrol Trooper, was terminated on December 12, 1995, for violation of Sections 4501:2-6-02 (B)(3) and (I)(3) of the Rules and Regulations of the Ohio State Highway Patrol. The evidence of record shows the Grievant previously served a 2-day suspension without pay on March 20, 1995, and a 20-day suspension without pay on May 8, 1995.[1] The 20-day suspension was imposed under a "Last Chance Discipline Agreement", in lieu of the Grievant's removal for behavior which constituted conduct unbecoming an officer and improper performance of duty resulting from the demise of a relationship he had with a female companion. That Agreement, signed by the

[1] The parties agree the 2-day suspension has no bearing upon the instant case.

Grievant, and by representatives of both parties, on April 28, 1995, specified that, "... the parties hereby agree to provide Employee a last chance to conform to the Employer's behavioral expectations based on the following details:

> The disciplinary penalty of removal will be held in abeyance assuming compliance with this agreement.
>
> Any future violation of same or similar work rules, whether on or off duty, willresult in Employee's disciplinaryremoval from the Division of State Highway Patrol.
>
> Employee agrees to enter into an Ohio Employee Assistance Program Participation Agreement. FAILURE TO COMPLY WITH AND COMPLETE THE EAP PROGRAM WILL RESULT IN THE GRIEVANT'S DISCIPLINARY REMOVAL FROM THE DIVISION OF STATE HIGHWAY PATROL.
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> Grievance rights related to a removal under this agreement will be limited to a challenge of whether employees's behavior constitutes a violation of a related work rule. The level of discipline may not be challenged or made an issue at arbitration.
>
> This agreement will expire upon the anniversary of employee remaining discipline free for 2 consecutive years.

Both parties acknowledge the Grievant availed himself of the Ohio Employee Assistance Program (EAP) subsequent to signing the "last chance" agreement. No evidence concerning the Grievant's compliance with this Program was introduced into the record.

The incidents which gave rise to the discipline contested in this proceeding occurred on October 6 and 8, 1995. The State charges the Grievant violated the "last chance" agreement by his actions on these dates, as well as, by incorporation, the aforesaid sections of the Rules and Regulations. Specifically,

it is alleged the Grievant, while on duty and in uniform, contacted two individuals to discuss a female acquaintance he had been dating since August, Ms. Catherine L. Davis, and made disparaging comments to both individuals about her.

One of these individuals was Firefighter Donald T. Henry, Perkins Township Fire Department and North Central EMS. He provided signed statements, on October 12 and November 5, 1995, concerning the Grievant's contacts with him on the dates in question. In pertinent part, Mr. Henry's testimony at the Hearing reflected information set forth in his written statements. He testified he had known Ms. Davis professionally for some time, and recently had begun seeing her socially.[2] Mr. Henry said he had never talked to the Grievant prior to the events described herein.

Firefighter Henry claimed the Grievant contacted him at home, by telephone, twice on the evening of October 6, and requested an in person meeting with him on October 8, at 8:30 p.m.[3] During both telephone conversations, Mr. Henry's written statement reflects the Grievant indicated he was "calling from a cellular phone and he was working on the road" and, when they met on the 8th, he "... would stop at the station."(SX-1) At the Hearing, Mr. Henry also said he believed the Grievant was on the

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[2] Among other things, Mr. Henry and Ms. Davis went to paramedic school together.

[3] Mr. Henry did not know how the Grievant obtained his home telephone number since it is unlisted.

road during the first conversation because he could hear "radio traffic" in the background. According to Mr. Henry, he thought each conversation lasted about 45 minutes to one hour, but he acknowledged he did not make any effort to keep track of the time.

Mr. Henry's written statement and testimony were in close agreement that the Grievant "... called her [Cathy] several names, such as Bitch, Whore, and Lying Bitch. He talked down about Cathy's relationship with him and me. He suggested we both drop her and go out together to pick up girls."(SX-1) Mr. Henry testified the Grievant asked him for Shelly Haynes' telephone number, and said he was also going to call Cathy at the "E.R." and then would call him back.[4] Firefighter Henry testified he was "intimidated" by the Grievant because he was a Trooper, because he "felt like [the Grievant] was doing an investigation", and because the Grievant talked to him about how "doggedly" he pursued investigations. According to Mr. Henry, he "went along and agreed with anything [the Grievant] said" because they might have to work together at an accident scene.

At the Hearing, Mr. Henry said the Grievant called back at about 10:00 p.m. He testified the Grievant advised him that he had called Shelly and Cathy, in the latter case, using Mr. Henry's name so she would come to the telephone. According to Firefighter Henry, in this conversation the Grievant said he was

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[4] According to Mr. Henry, he advised the Grievant to call North Central dispatch to get Ms. Haynes' telephone number.

"trying to find out if there was a third male involved" and he continued to use "profanity" when referring to Ms. Davis. Firefighter Henry testified the Grievant said he wanted to meet with him, to show him that Ms. Davis had made entries about when she was available in his appointment book, so he told the Grievant he would be on duty October 8, and the Grievant responded that he would stop by.[5] Mr. Henry gave unrebutted testimony the Grievant had never before come to his place of work while he was on duty at the Perkins Fire Department.

On the 8th, Mr. Henry stated the Grievant came to the Department in his cruiser and in uniform. He said they talked in the kitchen and the fire apparatus areas, Lisa Fox, a Firefighter and EMS, was "washing her car in one of the bays" during this time, and the Grievant

> . . . showed me his calendar when he was with Cathy and that she was seeing both of us and another guy. He basically called her a Lying Bitch and Whore. I felt that he was attempting to paint a bad image of Cathy so I would not date her . . . he appeared very convincing and I didn't disagree with him due to him being a Trooper. (SX-1)

Shelly Haynes is acquainted with Ms. Davis not only through their work at North Central, but also they are such good friends she described them as being "like sisters". She testified she knows Mr. Henry because she had worked with him at another "ER"

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[5] Mr. Henry testified he talked to Ms. Davis after the Grievant's second call, but before she left work at 11:00 p.m. He said he did not go into "specific detail" about his conversations with the Grievant, but told her that they were going to meet on the 8th at the Fire Department. The record is unrebutted that Ms. Davis did not want Mr. Henry to have this meeting with the Grievant.

and at North Central. On November 5, this witness also prepared a written statement about the events in question.(SX-2) Ms. Haynes testified Ms. Davis had been introduced to the Grievant, in August, by a co-worker. Ms. Davis introduced her to the Grievant in September, indicating they were dating but it was "not really serious". According to Ms. Haynes, Ms. Davis told her there were things about the relationship she did not like, such as the Grievant was "smothering, controlling, checked up on her all the time . . . and would show up at the hospital when she was working". At the Hearing, she testified about advising the Grievant, prior to the circumstances discussed here, to "back off" in his pursuit of Ms. Davis. She said he did not heed this advice and, recently, the couple had broken up when the Grievant told Ms. Davis to "get her stuff and get out [of his house]".

According to Ms. Haynes, the Grievant called her at home at about 9:30 or 10:00 p.m. on October 6.[6] She said she knew this was the approximate time because she usually goes to bed at 9:00 p.m. and she had "been in bed for awhile" when the call came. In her November 5, statement, Ms. Haynes recounted the Grievant telling her that he had just gotten off the telephone with Donald Henry and telling him that Cathy had been intimate with him and with other men all at the same time. She also wrote the Grievant

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[6] Ms. Haynes' testimony was unrebutted that she had just moved prior to this call, that her telephone number was not yet published, that the Grievant obtained her number from a Dispatcher at North Central even thought this information is not supposed to be given out, that the Dispatcher thought it was all right to give the Grievant her number because he was a Trooper, and that the Dispatcher was disciplined as a result.

the Grievant advised her that he made an appointment to meet Mr. Henry because "he wanted to let D. Henry know what kind of a girl she [Cathy] was".(SX-2) Ms. Haynes testified she advised the Grievant not to go through with this meeting. She further stated the Grievant "interrogated" her about Ms. Davis for about "twenty minutes". She said she told the Grievant that he had an "unrealistic view of the relationship" and wrote in her statement that she advised him to "stop all of this before he got himself into trouble again because he'd told [me] of his history with the Milan Post".(SX-2) Ms. Haynes wrote additional comments made by the Grievant were that ". . . Cathy was sleeping around with other guys namely Don Henry and Erie County Deputy . . . they [Massey and Davis] had oral sex and did everything except intercourse".(SX-2) According to Ms. Haynes, near the end of the conversation, the Grievant told her that he had to get back to work. Ms. Haynes said she then called Ms. Davis, between 10:00 and 10:30 p.m., before she got off work at 11:00, to alert her about the call from the Grievant.

Like the previous witnesses, Cathy Davis prepared written statements, dated October 12 and 16, 1995, which are in substantial agreement with the testimony provided at the Hearing. Key elements gleaned from both are as follows:

- Ms. Davis broke up with the Grievant on October 3;
- The Grievant called her at the hospital three times on October 6. Ms. Davis answered the first two calls herself. She alleged the Grievant said he knew she was "seeing someone from Perkins, you are doing him", and to "pick up your shit after work", a box would be left under a grill on the Grievant's porch;

- o Ms. Davis then asked nurses to screen her calls;
- o The Grievant came in uniform to the Providence ER, on October 6, and returned her belongings;
- o Ms. Davis testified she received a third call, between 8:30 and 9:30 p.m. on October 6, from a person who purported to be Mr. Henry. When she answered the call, a voice said, "This is Don, but not Don Henry", she knew it was the Grievant, and hung up;
- o Ms. Haynes called her "numerous times on October 6" and, sometime "before 9:00 [maybe 10:00] p.m., she called to advise that the Grievant had called her and was going to to call Mr. Henry;
- o Ms. Davis testified that, as a result of the foregoing events, she asked Security to walk her to her vehicle when she left work. Thereafter, she said she went straight to the Norwalk Police Department to file a complaint; and
- o Ms. Davis said, when she got home, there was a voice mail message from police Dispatcher, Gary Higgins, indicating that an Ohio State Highway Patrol cruiser had been sighted in the area of her residence and inquiring whether she knew the number of the Grievant's cruiser.

It was also Ms. Davis' testimony that, in the course of their relationship, the Grievant told her that he had been transferred and disciplined because of a relationship he had with a Trooper with whom he worked. She said the Grievant told her these measures included counseling, he "BS'd his way through the sessions", and he asked her to go with him, but later told her to "forget it".

Robert Maxey is a Staff Lieutenant, Bucyrus Headquarters, and was assigned to conduct the State Highway Patrol's investigation into the March, 1995, events which resulted in the Grievant's "Last Chance Discipline Agreement". He testified the investigation was initiated as a result of a complaint, filed by

a female Trooper (named and hereinfter, "Trooper X"), about activities the Grievant engaged in after a three year relationship, which included living together, was dissolved by her. S.Lt. Maxey's testimony is unrebutted he found the Grievant would not leave Trooper X "alone". He said the Grievant called Trooper X "night and day", paged her when she was involved in training, left his assigned area to go to another county to see who she was dating one night, and ran a license number through official computers only for the purpose of determining who Trooper X was dating (i.e., a Sergeant on the Ohio State Highway Patrol, hereinater "Sgt. A").

Additionally, S. Lt. Maxey testified he went to the Milan Post where the Grievant was stationed at the time. He found the Grievant called Sgt. A's home, talked to his wife, told her Sgt. A was at Trooper X's house, the calls were made betweem 4:00 and 5:00 a.m. and lasted approximately fifteen minutes, and the Grievant "ranted and raved" about a "married man shouldn't be spending time with another women" and other issues related to children.

In the course of this investigation, Mr. Maxey also found the Grievant called Trooper X's Mother on one or more occasions. In these conversations, Mr. Maxey's testimony is unrebutted the Grievant said he wanted Trooper X "back" and her Mother did not like receiving these calls. He prepared an investigative report, which appears in the record as State exhibit 6, and was the basis for the Grievant's 20-day suspension and "Last Chance Discipline

Agreement" in March of 1995.

Lisa Fox, Firefighter and Paramedic Perkins Fire Department testified she was on duty on October 8, 1995, and was present when the Grievant "stopped by at the Fire House to see Don [Mr. Henry]". This witness said she knew Ms. Davis. Ms. Fox testified the Grievant was at the Perkins Fire Department for "about twenty minutes", he went into the kitchen with Mr. Henry and they were discussing calendars; she could not quote the conversation "verbatim" and did not hear any "unbecoming" comments, but was "certain" they were discussing "dates she [Ms. Davis] was to be with [the Grievant] and certain dates to be with Don [Mr. Henry]". It was also Ms. Fox's testimony that Troopers regularly came by the Perkins Fire Department, said "hi", and then went on about their business.

On cross-examination, Ms. Fox said she was sitting in the day room, watching TV while the Grievant was at the Perkins Fire Department. In response to a question from the Arbitrator, Ms. Fox admitted she also washed her car during that time period.

The Grievant began working as a Trooper on July 3, 1989. He testified about the events leading up to his termination. According to the Grievant, he started dating Ms. Davis, but was "reluctant to get into a serious relationship because of what happened with [Trooper X]".[7] Nevertheless, he said Ms. Davis

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[7] The Grievant's testimony is unrebutted Ms. Davis "stayed overnight sometimes" at his house because it was closer to her work, thus explaining why he had some of her things.

wanted a serious relationship so he aceeded to her wishes until he found "out she's lying so I decided to break off the relationship around October 1".[8] Testimony provided by the Grievant and by Ms. Davis is in agreement she told him that she wanted to see other people. He testified "She became upset that I didn't want to see her anymore" and, on October 1 or 2, "She left and slammed the door" of his house. Thereafter, the Grievant said the only contact he had with Ms. Davis was "to ask her to pick up her stuff" and to deliver these things to her at the hospital "at about 1:15 p.m." on October 6.

In the investigative interview, the Grievant acknowledged calling Ms. Davis at Providence Hospital, on October 6, before he went to work, to let her know he found out she was seeing Mr. Henry.(SX-7) He also stated therein he was on his way to a Task Force meeting in Sandusky when he went to the Hospital to contact Dr. Nescoda regarding damage to the doctor's vehicle incurred a couple of days before. The Grievant acknowledged he was in uniform when he saw Ms. Davis, with Dr. Nescoda, and handed over her belongings, although they did not speak. He maintained he was in unform for a court case following the Task Force meeting (which was not on duty time).

At the Hearing, the Grievant testified he called Mr. Henry on October 6, at 7:00 p.m. from home "before he went to work".

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[8] On cross-examination at the Hearing, the Grievant testified "I [he] was upset about the way it [the break up] came about", Ms. Davis made this decision, and "I just went along with it".(See also, SX-7, p 5).

State exhibit 4 shows the Grievant arrived at work at 7:13 p.m. He said he heard Mr. Henry might be dating Ms. Davis, so he called to find out if this was true. According to the Grievant, this call lasted ten minutes and he told Mr. Henry he had to go to work. In the investigative interview,(SX-7) the Grievant said he called Mr. Henry during a time he may have been on duty. Also in this interview, the Grievant admitted going to North Central EMS to obtain Ms. Haynes' telephone number from a Dispatcher.

It was the Grievant's testimony that, around 9:00 p.m., he stopped at a Subway fast food establishment "to get a sandwich".[9] He said he called "Shelly [Ms. Haynes] to let her know what had happened because she seemed concerned about both of them [apparently, Ms. Davis and the Grievant]". The Grievant testified this conversation lasted fifteen to twenty minutes and he was "more listening to what Shelly had to say". In the investigative interview, the Grievant said he called Ms. Haynes from a pay telephone while watching traffic lights on duty.

At the Hearing, the Grievant testified that, while he was still eating lunch, he also called Mr. Henry again, because he told him earlier he would call him back. The Grievant estimated this call lasted five minutes, during which he told Mr. Henry "I'd take my lunch break [on October 8] and stop by [the Perkins Fire Department] so we could compare calendars". In the

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[9] The Grievant testified "Its not my practice to signal out when I'm taking a lunch break", and he believed this was the practice of most other Troopers at the Sandusky Post.

investigative interview, the Grievant said he believed he talked to Mr. Henry three times on October 6, but did not remember whether he was on duty when these conversations occurred.

With respect to the Daily Phone and Radio Log Supplement (SX-4) for October 6, the Grievant testified he did not know why it showed he was at the Post for three hours and he did not recall a code 1431, meeting with supervisor, that evening.

At the Hearing, the Grievant testified he arranged the meeting with Mr. Henry, on October 8, "so we could compare calendars so he could see I wasn't just making this [his allegations about Ms. Davis] up". The Grievant said this meeting lasted about twenty minutes and he does not recall using profanity, because he does not "normally use that kind of language".

In response to questions from the Arbitrator, the Grievant provided the following information:

- o The cruiser is not equipped with a cellular telephone;
- o The Grievant has a police scanner at his home; and
- o The Troopers have a thirty minute paid meal break, but there is no established time when such break shall be taken.

On redirect, the Grievant testified that Troopers carry a radio, even when on lunch break, so the Post can contact them.(See SX-5 re: check up time)

Lt. Gabriel Frencz is the Sandusky Post Commander and has known the Grievant since 1993 or 1994. He said the Grievant was an "excellent Trooper", his performance was "well above average",

he led the District in DUI, drug and felony arrests, etc.

According to Lt. Frencz it is permissible "occasionally" for a Trooper to make personal telephone calls while on duty. He further stated Troopers should call out code 38 for lunch breaks, most Troopers adhered to this practice, and he would be concerned if he knew the Grievant did not follow it.

It was Lt. Frencz's responsibility to oversee the investigation of events which gave rise to the Grievant's termination. When asked whether he considered these events to be a serious matter, Lt. Frencz responded there "could be some violations of policy and procedure, but I [he] didn't view it as serious". He further testified "Basic common courtesy is expected [of Troopers] while in uniform and on duty". The Arbitrator asked Lt. Frencz to explain the reason(s) the Grievant might have had for being on the Post from 9:28 p.m. to 12:19 a.m. on October 6, 1995.(SX-4) He answered "its possible" for a Trooper to be on Post for an extended period of time and a reason could be for case investigation; "he [the Grievant] had a lot of cases". Lt. Frencz also said the reason "probably should be documented why he [the Grievant] was on Post" and such documentation is the responsibility of both the Dispatcher and the Trooper, "but it [documentation] doesn't happen all the time". He did not know if, during the investigation, anyone tried to find out what the Grievant was doing on Post for three hours on October 6.

POSITIONS OF THE PARTIES

State Position:

The State maintained, in proposing and in deciding to terminate the Grievant, that the behaviors he exhibited constituted violations of the Ohio Administrative Code and of the Rules and Regulsations of the Ohio State Highway Patrol. It contended these behaviors violate the same or similar work rules as outlined in administrative investigation #95-0340, involving Trooper X. The State therefore asserted the Grievant's disciplinary removal is in accordance with the "Last Chance Discipline Agreement" and Article 19 of the collective bargaining Agreement.

According to the State, arbitrators give great deference to "last chance" agreements.[10] It stressed the Grievant received such an opportunity to salvage his job under certain conditions, but he only adhered to those conditions for six months. The State rejected the Union's claim the incidents and the violations giving rise to the instant discipline have to be identical to those upon which the 20-day suspension and the "Last Chance Discipline Agreement" were based. As outlined by the State, the behavior that occurred on October 6 and 8, which was egregious and in violation of the Code, the Rules and Regulations, and the "last chance" agreement was as follows:

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[10] The State referenced an award by Arbitrator Jonathan Dworkin which considered the only other case concerning a "last chance" agreement that went to arbitration.

- o The Grievant behaved as if he was conducting an an investigation; e.g., witnesses said they felt as if they were being interrogated;

- o The Grievant was conducting a "rogue investigation" for at least two days while on State time and in uniform;

- o The Grievant misrepresented the times when calls were made to cover up that he was on duty and in uniform at those times;

- o The Grievant never mentioned eating at the Subway fast food restaurant during the investigation;

- o The Grievant said he did not care if his relationship with Ms. Davis broke up. This explanation is not credible, the State maintained, because the Grievant drove around in a State vehicle, in uniform, on State time making calls to Ms. Haynes, Ms. Davis, and Mr. Henry, meeting the latter, and smearing Ms. Davis' reputation in every contact. The State contended these activities clearly establish nexus between the Grievant's behavior and his employment with the State;

- o The Grievant abused his authority, uniform and position by obtaining Ms. Haynes' home telephone number from a Dispatcher at North Central EMS;

- o The Grievant's behavior, on October 6 and 8, was very similar to that he engaged in in March, 1995, according to S. Lt. Maxey, who testified this behavior was motivated by the Grievant's distress over a relationship that had gone bad;

- o The Grievant was on Post for three hours on October 6, he has no documentation or recollection to explain what he was doing there for this extended period of time, but he did have ample time to make telephone calls to Mr. Henry, Ms. Haynes, and Ms. Davis; and

- o The Grievant is not off duty when he is on a meal break. He is still in uniform and has a marked cruiser, so it is reasonable to expect he must adhere to the higher standard of conduct for Troopers.

In closing, the State contended the Grievant knew from the "last chance" agreement that he would be on a tight leash. The State rejects any effort by the Union to lengthen that leash by

arguing First Amendment free speech rights are involved in the Grievant's conduct.(See. Harper v. Crockett, 868 F. Supp. 1557; 1994 U.S. Dist.) It maintained violation of the "Last Chance Discipline Agreement" has been clearly demonstrated and asked that the Grievant's removal from the Ohio State Highway Patrol be upheld.

Union Position:

The Union artgued the State mischaracterized the nature of this case by using the only fact common to both the March and the October, 1995, incidents, the Grievant's break up with a girlfriend, to evoke the termination provision of the "Last Chance Discipline Agreement". It was the Union's position the Grievant made a substantial effort to avoid doing the things that got him in trouble when his relationship with Trooper X dissolved. The Union therefore asserted the State failed to show the Grievant's conduct here was similar to that in March and, thus, triggered the termination provision of the "last chance" agreement.

The Union rejected the State's premise, just because the Grievant is a Trooper and people knew him as such, these facts color everything he does in an off duty status. According to the Union, the Grievant cannot be held responsible for the impression citizens get, or for the information they provide, when he interacts with them off duty over circumstances of every day life. In this regard, the Union stressed all the behavior alleged against the Grievant occurred while he was either off

duty or on a lunch break. It was also the Union's contention it was "proper" for the Grievant to ask for Ms. Haynes' telephone number and "anyone else" desiring.such information is entitled to it simply by asking.

According to the Union, it is incumbent upon the Arbitrator to determine whether the Grievant did anything serious enough to warrant his termination. The Union answered, "No", and described the circumstances of this case as "almost laughable". As an indication, the Union dissected Mr. Henry's testimony, concluding he had a motive to lie because he was seeing Ms. Davis and because he found out she was seeing another man, his time frames and duration of calls could not be accurate based upon the Daily Phone and Radio Log Supplement, and any off color comments, if made at all by the Grievant, did not "rise to the level of warranting discharge".

The Union also analyzed Ms. Haynes testimony and asserted she had a motive to lie because Ms. Davis was her best friend and because she "was upset because she found out Davis was having sex". The Union further concluded that Mr. Henry, Ms. Haynes, and Ms. Davis entered into a conspiracy to get the Grievant in trouble.

Another defense offered by the Union was that it is the State's burden to show what the Grievant was doing during the three hours he was on Post on October 6. The Union further asserted, even if the Grievant "made a couple of personal calls", this was acceptable according to Lt. Frencz's testimony.

With respect to the meeting between Mr. Henry and the Grievant, on October 8, the Union stressed the credibility of Ms. Fox's testimony because she had no motive to lie. Tat testimony, the Union pointed out, provided no indication whatsoever that Mr. Henry and/or the Grievant raised their voices or that profance language was used.

In sum, the Union maintained the only similarity between the March and October incidents was the break up of a relationship. This is proof, in the Union's view, the Grievant's involvement with the EAP worked and he did not violate the "last chance" agreeement as charged by the State. The Union asked as remedy that the Grievant be reinstated, with full backpay and benefits.

GRIEVANCE RIGHTS

The State maintained, under the "last chance" agreement, grievance rights are restricted solely to a challenge of whether the employee's behavior constituted a violation of a related work rule. It was the State's position significant consideration was afforded the Grievant in April of 1995 -- his job was saved as long as the same or similar behavior did not recur.

According to the Union, the State's burden is to, first, prove the facts of the charge, and then prove the charge is similar to the Grievant's last disciplinary infraction which resulted in the "Last Chance Disciplinary Agreement". The Union asserted that Article 19 of the collective bargaining Agreement must be complied with in that the termination must be imposed for

just cause (19.01) and the discipline must be progressive (19.05).

The "last chance" agreement was signed by the Grievant and by a Union Representative on April 28, and May 18, 1995, respectively. This agreement imposed a 20-day , non-grievable suspension in lieu of the Grievant's termination. By agreeing to this "last chance," the Grievant and the Union weighed the benefit(s) to the employee of having that case follow contractual provisions (Article 19, just cause mandate and its progressive discipline standards) **or** to change the terms of employment by signing the binding "Last Chance Discipline Agreement". It is a fact they opted for the latter.[11] The scope of this arbitration is, therefore, to determine: (1) Was the 1995 "last chance" agreement controlling in October of 1995?; (2) If the agreement was controlling, did it authorize summary removal for a violation?; (3) Did the Grievant violate the same or a similar work rule as that cited in the "last chance" agreement?; and (4) Does the "last chance" agreement specify the employee's grievance rights if violation of that agreement is alleged? In the event any of these questions is answered in the negative, the grievance will be sustained entirely or partially.

"Last chance" agreements benefits both parties. They held the Union to salvage jobs and the State to retain employees.

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[11] If the Union had been correct that principles of progressive discipline must be applied, Article 19.02 requires a suspension prior to removal. The facts are the Grievant served two suspensions, the 20-day suspension approximately five months prior to the instant charge and a 2-day suspension beginning on March 20, 1995.

They are enforceable as is any memorandum of understanding signed by the parties. If this was not the case, then there would be no reason for either party to enter into such an agreement.

When the Grievant signed the "last chance" agreement freely and voluntarily, he gained a new opportunity to perform his job, nothwithstanding his prior conduct, but he also undertook certain requirements which had to be met to continue in that job. When the Union Representative signed the agreement, he was aware the Union was "giving up" some contractual provisions in order to get a "stay" of the Grievant's termination. Neither the Grievant nor the Union can now have it both ways. If an employee receives a "stay" of discipline and fails to comply with specific, agreed upon terms, then management would never enter into a "last chance" agreement if the Grievant/Union could still assert trial by just cause and progressive discipline standards.

The Arbitrator therefore holds the "last chance" agreement: (1) was controlling in October of 1995, based on its expiration date of two consecutive years from the date of execution on April 28, 1995; (2) authorized disciplinary removal for the same or similar work rule violation(s); and (3) specified the grievance rights if the agreement was violated. The Arbitrator shall consider only whether the Grievant's behavior, on October 6 and 8, 1995, constitutes a violation of a related work rule. The level of discipline is not within the scope of her authority to consider.

ANALYSIS OF THE MERITS

It is evident from the record that credibility is central to the outcome of this case. As indicated in the Background, there is significant consistency between the testimony Mr. Henry, Ms. Haynes, and Ms. Davis provided at the Hearing and in their written statements prepared proximate in time to the cited events. All three individuals believed the Grievant was contacting them either in person or by telephone while he was on duty. It is a fact Ms. Davis and Mr. Henry met with the Grievant while he was in uniform and driving his cruiser. With respect to the contact with Ms. Davis, on October 6, the Grievant admitted he was on duty through his testimony he went to the Hospital to see Dr. Nescoda about an accident. Mr. Henry and Ms. Haynes both said the Grievant made profane and disparaging remarks about Ms. Davis while representing himself as a Trooper. Mr. Henry further stated he gave the Grievant deference and agreed to an in-person meeting at the Fire Department because he believed the Grievant was "investigating" and because he did not want bad feelings if they had to work together at an accident scene.

The Union interpreted agreement among the statements and testimony of these witnesses as evidence of a conspiracy concocted because the Grievant had sex with Ms. Davis. The Arbitrator disagrees partly because this allegation is unsupported by evidence. More importantly, as indicated by S. Lt. Maxey's testimony and the facts of record, the Grievant's conduct in October bore the trade marks of his behavior in March, 1995, for which his removal was recommended (e.g., harassing

telephone calls, contacting others and making disparaging remarks, using official time and resources to get information for pursuit of personal ends, etc.) Even if the Union's position is accepted the Grievant's behavior was far less egregious in October, because of the EAP intervention, it holds no weight in determining what the outcome shall be. The plain language of the "Last Chance Discipline Agreement" is, "**Any** future violation of same or similar work rules, whether on or off duty, will result in Employee's disciplinary removal from the Division of State Highway Patrol".(emphasis added)

There are also significant reasons for regarding the Grievant's statements, both oral and written, as not credible and self-serving. For example, he insisted he did not want a serious relationship with Ms. Davis, but when that relationship broke up, he containued to call at her place of work involved two other individuals in his "investigation" of whom she was seeing, and made disparaging comments about her.

Also the Grievant's testimony differed from his written statement in a number of ways. He advised, in writing, that Ms. Davis and he decided to begin dating other people. The mutuality of that decision is not corroborated by any other part of the record, and is belied by the Grievant's territorial behavior to let Mr. Henry know Ms. Davis was still seing him and someone else. Additionally, the Grievant admitted, in his written statement, he may have been on duty when he called Mr. Henry on October 6; an admission he denied in his testimony at the

Hearing. The Hearing was also the first time the Grievant claimed he was on lunch break at 9:00 p.m. when he made calls to Mr. Henry and Ms. Haynes. The Grievant cannot be believed because the telephone calls, by his own admission, lasted more than the thirty minutes of his lunch break **and** the Daily Phone and Radio Log Supplement show he reported into the Post at 9:28 p.m. While the times testified to by Mr. Henry, Ms. Haynes, and Ms. Davis for receipt of calls from the Grievant, on October 6, may not have been precise none were accountable for recording the time and duration of these conversations. In contrast, the Grievant was accountable for his time and his explanation of its use does not match with either his previous accounts or with the Log.

The Grievant and the Union expended considerable effort to create the perception most of the incidents occurred while the Grievant was off duty and, thus, somehow did not count as charged misconduct. Lt. Frencz testimony is uncontroverted that lunch breaks are not considered off duty status because a Trooper is still in uniform and in a marked cruiser. This testimony undermines the Union's argument the Grievant was off duty on a lunch break at Subway, on October 6, and off duty on a lunch break when he met with Mr. Henry at the Perkins Fire Department on October 8. In any case, it is evident from the "Last Chance Discipline Agreement" the Union's effort was expended needlessly in trying to create such a distinction. The "last chance" agreement clearly and unambiguously states, "Any future violation

of same or similar work rules, **whether on or off duty, . . .**"(emphasis added)

As another means of trying to save the Grievant's job, the Union tried to claim it was unimportant whether he made personal telephone calls from the Post, on October 6, because Lt. Frencz permitted such calls. No weight was given this claim because it was an egregious misstatement of Lt. Frencz's testimony that a personal call while at Post might be acceptable "occasionally", and then only to contact "family". There is not one shadow of a doubt that this was the circumstance on October 6.

It is charged the Grievant violated Rule 4501:2-6-02, (I), (3) involving improper, on duty association with any individual for purposes other than those necessary for the performance of official duties. The State provided sufficient credible evidence to support this charge as well as that the Grievant engaged in conduct that "brings discredit to the division and or any of its members of employees". Even if the first call to Mr. Henry, on October 6, was made from the Grievant's home, he was neither off duty or otherwise immune from Rule 4501:2-6-02 at any other time that evening or, on October 8, when he met with Mr. Henry at the Perkins Fire Department. It is also evident that parallel conditions existed with those in March of 1995, regardless of whether they differed in duration and/or degree. Consequently, the Arbitrator finds the Grievant violated "the same or similar work rules" and, thus, is subject to termination under the "Last Chance Discipline Agreement".

In the grievance, the Union cited violations of the

collective bargaining Agreement beginning with Article 7 - Non-Discrimination. At the Hearing no representations were made by the Union concerning this allegation and, thus, it was given no further consideration in this proceeding. Union allegations that 19.01 and 19.05 of the Agreement had been violated have been disposed of previously in this analysis. Again, the Union alleged violation of 19.02 and 19.04 of the Agreement, however, this allegation was not pursued and the Arbitrator has given it no further consideration. The Union's contention regarding violation of 21.03 of the Agreement was dealt with in the discussion of **Grievance Rights** and no violation was found. Section 26.03, Meal Breaks, of the Agreement is not at issue since the Union did not claim the Grievant was denied a meal break or he was not paid for same as set forth in the Agreement. An alleged violation of Section 34 of the Agreement was not pursued by the Union, and the cited standards for performance were not contested. Sections 41.12 and 41.13 of the Agreement, concerning the EAP, are not at issue in this dispute.

The assertion the State violated the Grievant's First AMendment rights was considered by the Arbitrator. Ulings in the Harper v. Crockett case explained that determination of whether a public employee's speech is protected by the First Amendment requires a two-step judicial inquiry.(Shands v. City of Kennett, 993F. 2d 1337, 1342 (8th Cir. 1993)) The threshold issue is whether the employee's speech can be "fairly characterized as constituting speech on a matter of public consern". If the

speech is not a matter of such concern, then the court does not reach the second, "balancing" step of the inquiry. To establish that a public employee's speech is protected by the First Amendment, the employee must make a threshold showing that the speech addressed is a matter of public concern (i.e., a matter of "political, social or other concern to the community").(Connick, supra at 143,146)

It is clear from the record the Grievant's speech focused on a matter personal to him which was not a public concern. His speech did not deal with any public policies of the Ohio State Highway Patrol, but instead with his anger about the demise of his personal relationship with Ms. Davis. The Eighth Circuit ruled:

> As a public safety organization, a fire department, like a police department, has a more significant interest than the typical government employer in regulating the speech activities of its employees in order `to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence in its ability'. Shands v. City of Kennett, 993 F. 2d 1337,1334 (8th Cir. 1993)

Based upon all elements of the foregoing analysis, the Arbitrator concluded the State met its burden of showing the Grievant violated the express conditions of his "Last Chance Discipline Agreement" and, thus should be terminated.

AWARD

The grievance is denied in its entirety.

Date: April 2, 1996 Mollie H. Bowers

Mollie H. Bowers, Arbitrator