IN THE MATTER OF ARBITRATION

BETWEEN

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

AND

THE OHIO STATE TROOPERS ASSOCIATION

Before: Robert G. Stein
Panel Appointment

Demotion: Grievant: Brian S. Vierstra

Advocate(s) for the UNION:

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INTRODUCTION

This matter came on for a hearing before the arbitrator pursuant to the terms of the Collective Bargaining Agreement (herein "Agreement") between the State of Ohio (herein "Employer" or "Department") and Ohio State Troopers Association (herein "Union"). The Agreement is effective from July 1, 2000 to June 30, 2003 and includes the conduct that is the subject of this grievance.

A hearing on the above referenced matter was held September 30, 2003. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions on the merits. The parties submitted post-hearing briefs in lieu of making closing arguments.

Both parties agreed to the arbitration of this matter pursuant to Article 20.

ISSUE

The dispute is defined as follows:

Did the Employer have just cause to demote the Grievant, Brian S. Vierstra, from the position of Sergeant to Trooper? If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE
(As cited by the parties, see Agreement for language)

ARTICLES 19.01, 19.05

BACKGROUND

The parties are in dispute over the demotion of the Grievant from Sergeant to Trooper on June 2, 2002 for violation of Rule 4501: 2-06-02(I)(1)-Conduct Unbecoming an Officer and Rule 4501: 2-6-02 (E) – False Statement, Truthfulness. The Grievant began his employment as a Trooper in November of 1989 and was promoted to Sergeant in January of 1997. Prior to the instant matter, the Grievant had no discipline on his record.

The Grievant in this case is Brian S. Vierstra (herein "Grievant" or "Vierstra"). The demotion of the Grievant came about as a result of his participation in a conversation that took place during the 7:00 a.m. shift change at the Department's Cambridge, Ohio Post. The conversation was held in the Sergeant's office and was between Sergeant Robert Robson (herein "Robson"), who was beginning his day shift, Trooper Jeff Bernard (herein "J. Bernard"), who was beginning his day shift, and the Grievant, who was concluding his 11 p.m. shift. Also present in the office were Troopers Scott Mills (herein "Mills") and Paul Appleman ("Appleman"), both of whom were completing their 11 p.m. shifts. Mills and Appleman were present but they were not participants in the

conversation.

During the exchange of shifts a casual conversation ensued among Robson, J. Bernard, and the Grievant. The conversation turned to the subject of a party that a Post Secretary at the Zanesville Post was going to hold and that J. Bernard's wife, Brandy Bernard (herein "Brandy") was going to attend with her co-worker Jessica Johnson (herein "Jessica'). J. Bernard's wife, Brandy Bernard, works for the Department as a Dispatcher at the Zanesville Post. According to the Employer's investigation the subject of the party was raised by the Grievant, and he asked J. Bernard if he had planned to attend the party. At this point in the conversation, Robson made a teasing remark toward J. Bernard about attending a party with two women, implying the involvement of a "sexual threesome." The Grievant's comments that followed Robson's remark are the reason for his demotion.

According to the Employer's investigation, the Grievant followed up Robson's threesome remark by saying that it would not be J. Bernard going to the party with his wife Brandy and Jessica, but it would be Sergeant Clark Felix (herein "Felix"), who works at the Zanesville Post. Felix is African American (Mx 1). According to Robson, the Grievant then stated, *"You'll see Felix's big, black dick going in and out of Brandy's (Trooper Bernard's wife) pussy" (Mx 1).* According to J. Bernard, the Grievant stated, *"they like to see that black dick going in and out of their*

pussy" (Mx 1). The Grievant denied making remarks as graphic as those described by Robson and J. Bernard, but admitted to saying *"they like to see the black thing in the pink thing."* According to the Employer, the Grievant's comment was a conversation ending remark causing the room to clear out (Mx 1).

According to the Employer's investigation, the Grievant also made a comment regarding *"chocolate marshmallow"* in reference to Brandy and Jessica. The Grievant claimed he made the "chocolate marshmallow" remark after Robson made a remark regarding Brandy and Jessica in lesbian acts. Robson denies making such a remark, and the Employer found no evidence to support the Grievant's claim that it was made. The false statement charge referenced earlier is related to the Grievant's claim that Robson made lesbian references about Brandy and Jessica, and it was used to support the demotion. Trooper Appleman remembered the comments made as being less graphic, consistent with the Grievant's claim. Trooper Mills first stated he remembered hearing the "chocolate marshmallow" remark, but later recanted this claim.

J. Bernard described his first reaction to the comments during his testimony at the hearing. He stated he felt humiliated, embarrassed, offended, and shocked by the Grievant's remarks (See J. Bernard's testimony). He subsequently became angry and emotional (See Robson's testimony). However, he also stated he and Vierstra are good friends on

and off duty, and he found the Grievant's remarks in public to be unusual. Vierstra also stated he and J. Bernard were good friends and he and his wife Stephanie had socialized with J. Bernard and Brandy Bernard (See Vierstra's testimony).

According to the Employer, J. Bernard consulted with Sergeant Robson concerning his anger with the Grievant. Robson told him to talk to Vierstra, and he permitted him to take the remainder of the day off with leave. J. Bernard went home and told his wife about the incident in less specific fashion, and she became upset (See J. Bernard's testimony). According to J. Bernard, Brandy stated Vierstra's wife, Stephanie Vierstra, probably told the Grievant something about Brandy that may have caused Vierstra to make his comments (See J. Bernard's testimony). She was scheduled to work at her Zanesville dispatch job at 3:00 p. m. that afternoon. She eventually reported the remarks to her supervisor at the Zanesville Post, Tony Burke, who in turn reported it to his Post Commander, Barry Donley ("Donley"). Donley reported it to the Cambridge Post Commander, Bob Bennington.

J. Bernard followed the advice of Robson, contacted the Grievant on the same day of the incident, and asked to meet with him. When he contacted the Grievant's house he spoke to Vierstra's wife who got the Grievant out of bed. The Grievant responded to J. Bernard's request, and they met some 20 minutes later at a carry out parking lot (See Vierstra's

and J. Bernard's testimony). The Grievant apologized to J. Bernard, and they shook hands in reconciliation (See Vierstra's and J. Bernard's testimony).

It should also be noted that several months prior to the incident J. Bernard confided in the Grievant about his martial problems. According to Vierstra, J. Bernard suspected his wife of having an affair. J. Bernard also testified he had suspected his wife cheated on him, or may do so, and he was now divorced from her. He stated he subsequently found out she was unfaithful in their marriage. J. Bernard also stated under cross-examination that the portion of Vierstra's comments on the morning of April 13th that alluded to a "black man" bothered him more than if it were a "non-black man."

SUMMARY OF EMPLOYER'S POSITION

The Employer asserts the Grievant did not display professionalism by making graphic sexual and racial remarks about his subordinate's wife. Furthermore, he refused to take responsibility for his actions and made false statements in an attempt to divert attention from his conduct. The specific arguments proffered by the Employer are concisely stated in its closing statement. They read as follows:

> The Grievant, Brian S. Vierstra, was demoted from the position of sergeant on June 2, 2002, for violation of Rule 4501:2-06-02(I)(1) - Conduct Unbecoming an Officer and Rule 4501:2-6-02 (E) – False Statement, Truthfulness. The Grievant had been a sergeant at the Cambridge Post since January 1997. He became the subject of an administrative investigation in April 2002, when he made inappropriate sexual and racial comments about the wife of a trooper and later gave false statements regarding those remarks

and the remarks of others.

During the arbitration hearing, you heard compelling testimony from two extremely honest officers about a conversation that took place in the Sergeant's office of the Cambridge Post on April 13, 2002. Sergeant Chuck Bower of the Patrol's Administrative Investigations Unit testified that during the 7:00 A.M. shift change, Trooper Jeff Bernard, Sergeant Robert Robson, the Grievant and two other officers were in the sergeant's office either beginning or ending their shift. It was during that time, as Trooper Bernard and Sergeant Robson adamantly testified, the Grievant initiated a conversation about a party that Trooper Bernard's wife Brandy, who was also a Dispatcher at the Zanesville Post, was invited to attend. Both Bernard and Robson testified that the Grievant asked Bernard if he had planned to attend. A light hearted conversation continued between Bernard and Robson about Bernard attending the party with his wife and Jessica Johnson of the Zanesville Post. Bernard and Robson **both** testified that during this segment of the conversation, the Grievant stated "It won't be Jeff going, it will be Clark Felix going. They like to see that black dick going in and out of their pussy." Both officers testified that the room became quiet with shock and then cleared.

Trooper Bernard testified that after the comment was made, he was sent to investigate a traffic crash, but later returned to the post because he was extremely upset with the Grievant. So upset, that he even told Robson that he wanted to physically challenge the Grievant. Robson testified that Bernard was so upset that he was in tears with rage. Given the circumstances, this is not unusual. What is unusual is why the Grievant would make such heinous comments about the wife of someone he considered a good friend.

To keep from harboring these feelings and to voice his displeasure about the comments, Bernard requested leave. Robson approved the leave, and Bernard left the post to talk to the Grievant. Bernard emotionally testified that he called the Grievant and requested a meeting at a neutral location because he did not want to alarm or talk about such crude comments in front of the Grievant's wife. A gesture that the Grievant obviously never reciprocated. It is also important to note that the reason for this meeting was to protect the Grievant from being disciplined for his unprofessional behavior. To the end, Bernard was trying to protect a friend. A decision he would later regret as the Grievant would, on several occasions, insult the integrity of Bernard by accusing him of making statements that were simply not true. Bernard met the Grievant at a local carry out and expressed his deep concerns about what the Grievant had said. After rationalizing his actions, the Grievant apologized for the comments and the two parted ways.

Prior to meeting with the Grievant, Bernard testified that he informed his wife of the comments and that she also became very upset. This conversation was initiated after Mrs. Bernard became curious about her husband being home prior to the end of his shift. Bernard went on to testify that his wife was so upset that she reported the incident to her supervisor, Sergeant Tony Burke of the Zanesville Post. The investigation proved that Sergeant Burke reported the incident to the Zanesville Post commander, Lieutenant Barry Donley, who later reported it to the Grievant's post commander, Lieutenant Bob Bennington. (Management #1.) The incident was later reported up the chain of command and an administrative investigation was completed. (Management #1.)

During the investigation by Sergeant Bower, it soon became obvious that the Grievant's interpretation of events greatly differed from Bernard and Robson. Although there were minor differences in the statements given by Bernard and Robson, as would be expected with any interpretation of events, the Grievant's statements were in obvious contrast. Not only did the Grievant deny the allegations reported by **both** Bernard and Robson, he made false allegations about Robson and Bernard as well. In an attempt to cover his own misconduct, and to divert attention to Robson and Bernard, the Grievant first stated that he did not make any such comments and secondly, accused Robson of insinuating that Brandy Bernard and Jessica Johnson were involved in a lesbian affair. Both are simply not true. This was simply the Grievant's continual lack of taking responsibility for his actions. In fact, both Bernard and Robson were re-interviewed and no evidence indicated discrepancies in their statements or wrong doing on their parts.

The Employer believes the case revolves around witness credibility. Again, you heard testimony from three officers regarding the same conversation. Two (Robson and Bernard) remember hearing it one way while one remembers a different conversation. The motives of each officer must be analyzed. Who has the most to lose in this situation? Clearly, it is the Grievant. He is the one who was demoted as a result of his comments. He certainly has the most at stake. It's interesting that the Grievant will admit to making some "version" of the comments heard by Bernard and Robson, but not the explicit statements indicated by them. It is as if he has conjured up in his mind a version of his statement which he believes is generic enough for him to keep his rank. It is especially hard to believe that Bernard and Robson would not

remember hearing the phrase "chocolate marshmallow." It simply is not a term commonly used.

Robson has absolutely nothing to gain in becoming involved in this situation. He is only involved because he was there and heard the comments by the Grievant. There has been no evidence of any hidden motive on the part of Robson. He just gave a statement as to what he heard that morning at shift change. Of the officers in the room who testified, he has the least "personal" interest. Additionally, his wife was **not** the subject of the comments made by the Grievant. His credibility is undisputed.

As for Bernard, it is clear from his testimony that he still has some emotional baggage associated with this incident. Bernard viewed, and testified, that the Grievant was a close friend. Bernard is still scarred by the comments made by the Grievant. The comments obviously hurt Bernard deeply. It is also clear that Bernard was never going to come forward on his own. Why? Because he wanted to protect a friend. He did everything in his power to work things out between them. He was not going to make a story like this up. He simply told the truth when interviewed and he was truthful when he testified. The comments are crystal clear in his mind and he will never forget what the Grievant said that morning.

UNION ARGUMENT

Mr. Arbitrator, the Union brought nothing but smoke screens to the table during this arbitration hearing. These tactics may be new to you, but we've been to this "well" on many occasions. They did, however, support the credibility of management witnesses. I'm sure you would agree that the testimony of Trooper Jeff Bernard was as honest and truthful as you have seen. It was exactly what we would expect from our troopers. When asked challenging questions by the Union's advocate, his testimony was with candor and great honesty. I think you would agree that this is not the type of person that would give false statements about a friend. If the Grievant would be as responsible, this case would not be in front of you today. Even by his own admission, the Grievant testified that he made comments regarding women's preference of seeing the "dark thing in the pink thing" and even made reference to a "chocolate marshmallow."

Mr. Arbitrator, the Union wants you to believe that the conversation at shift change was simply employees "shooting the shit." We are not naïve enough to believe that troopers don't tell inappropriate jokes and stories. This was not one of those occasions. This story was directed at a trooper's wife, an African American sergeant and another highway patrol employee – and it was not a joke. In support of this conclusion, you heard Sergeant Bower, Sergeant Robson and Captain Chris Minter testify that these types of comments were **never** tolerated at a Highway Patrol facility. Captain Minter even testified that he felt the comments rose to the level of creating a hostile work environment.

With the introduction of Union Exhibit #1, Administrative Investigation 02-1926, the Union has attempted to infer that disparate treatment has occurred and that like comments have been investigated resulting in lesser discipline. This, again, is not the case. In a Labor Arbitration between the State of Ohio and OCSEA/AFSCME Local 11, Arbitrator Rhonda Rivera stated that "Where an employer has shown a prima facie case of just cause for an employee's discipline, the allegation of disparate treatment shifts the burden of proof to the Union."[1] The Union has simply failed carry that burden. The Union has brought forth (1) one incident to prove its case of disparate treatment. The Employer submits to you that this is not enough evidence to substantiate a claim of disparate treatment and the Union's burden of proof. Arbitrator Rivera's ruling also supports our claim that "One instance of disparate treatment on an employer's part (unless shown to have been an intentional act) will not suffice." Arbitrator Rivera has further indicated that "To show disparate treatment strong enough to overcome management's decision requires the Union to show by clear and convincing evidence purposeful discrimination."[2] Again, the Union has failed to provide evidence of *purposeful discrimination.*

In regards to the case involving Lieutenant Spinner, the Employer does not feel that it withstands the same or similar incident test. During the investigation it was concluded that Lieutenant Cliff Spinner made inappropriate comments to the cadets of the 139th Academy Class. Those comments were "while you are here at the Academy, your wives, spouses, significant others will be cheating on you." Management felt that these comments were inappropriate and disciplined Lieutenant Spinner with a written reprimand. While addressing the Unions burden of proving discrimination in discipline, Elkouri and Elkouri has referenced Arbitrator Jonathan Dworkins description listed blow:

> ***In order to prove disparate treatment, a union must confirm the existence of both parts of the equation. It is not enough that an employee was treated differently than others; it must also be established that the circumstances surrounding his/her offense were substantively like those of individuals who received more moderate penalties.***[3]

These were not similar comments. They were not directed to any individual cadet and they were not nearly as graphic as those made by the Grievant.

HIGHER STANDARD

Mr. Arbitrator, in the Employer's Case in Chief, you heard Captain Chris Minter and other supervisors testify to the level and standard of conduct for Ohio State Troopers. Captain Minter is a veteran commander with the Highway Patrol and is currently the commander of the Cambridge District. Captain Minter testified that he commands approximately 130 uniform officers and 85 civilian staff members. He also testified that he oversees the performance evaluations and training of those under his command.

Captain Minter, without hesitation, stated that the standard of conduct for Ohio State Troopers is very high when compared to other police agencies in and outside the state of Ohio. Captain Minter based his opinion on his many years of experience working with other police agencies. Captain Minter testified to the *Core Values* of the Highway Patrol. (Management Exhibit #3.) It is those *Core Values* that guide and direct the performance expectation of our officers. Values that have sustained our reputation for decades. Values that the Grievant took little note of on April 13, 2002. He concluded by explaining that this higher standard is expected as a result of the power of our officers to remove the freedom of other citizens. A responsibility that we - and the public - do not take lightly.

In this case, the Grievant did not conform to that higher standard of conduct and the *Core Values* of the Ohio State Highway Patrol. He did not display *Professionalism* by making sexual and racial comments about a subordinates wife and other employees. He also did not display *Honesty* by refusing to take responsibility for his comments and making false accusations about others. As a supervisor, he is not only expected to display the *Core Values* himself, he is required to enforce them throughout his command. The Employer's question, when determining discipline, was how can he ever expect employees at the Cambridge Post, or any other facility, to follow his lead in complying with the very doctrine that guides our organization. How can he lead others when he failed to comply himself. He can not and must not be allowed to hold that position of authority.

SUMMARY

The level of discipline imposed in this case was for just cause in accordance with Article 19 of the labor agreement. Grievant rendered himself unfit to remain in the position of sergeant, a classification that carries with it the burden and responsibility of supervision. Highway Patrol sergeants are individuals that must have the respect of their peers, subordinates and managers in order to carry out the day to day duties of first-line supervision.

Highway Patrol officers in general are trained extensively on appropriate workplace behavior and professionalism. To suggest, as the Union has, that the comments made by grievant are indicative of shop talk in the Ohio Highway Patrol is simply absurd. It is evidence of the Union's hopeless effort of defending the indefensible. The issue before you is whether demotion is the appropriate level of discipline.

The Union tried in vain to suggest disparate treatment has occurred and should result in you substituting your judgment for that of the Employer. It is clear the single incident of lesser discipline being applied to a totally unrelated set of circumstances will not serve to carry the Union's burden to prove disparate treatment. Instead, it is demonstrative of the Union's desperation to come up with some argument in favor of the Grievant's position.

The case must be decided based upon whether the Employer's decision was unreasonable, arbitrary or capricious. Grievant's comments are not appropriate in any work setting. As a manager/supervisor he must retain the respect of his subordinates in order to be effective. That respect is lost. The comments were hurtful at the least, embarrassing and blatantly inappropriate. The attempted cover up story and his admissions to other similar comments demonstrate a complete insensitivity to basic workplace standards. As a supervisor he has crossed the line of no return and simply can not be left in a position of control over those he has so openly and completely offended. Call it what you will, sexual harassment, hostile environment, pornographic, or simply outrageous, the incident can not be tolerated.

The level of discipline is absolutely appropriate and should not result in any modification. To do so damages the ability of the Employer to maintain a workplace standard intended to be a model for others, one that fits with the high expectations of all Highway Patrol employees. The grievance should be denied in its entirety.

SUMMARY OF UNION'S POSITION

The Union's view of this matter addresses several differences in the interpretation of the events of April 13, 2002. Its arguments are concisely stated in its closing argument. They are summarized as follows:

What Probably Really Happened

There is no way to know with certainty what actually happened in the brief incident that sparked the investigation that led to imposition of the serious discipline of a demotion of a career officer. However, using only a reasonable level of the powers of reason and deduction, I think its fair to look at the testimony from the point of view of making sense of the event:

The three men in the Sergeant's Room on April 13, 2002 had worked together for years. Sergeant Robson had spent his whole career at Cambridge. Bernard had but for a few months of his three plus years been working for and with Sergeant Vierstra. As regards, at least, Bernard and Vierstra they were substantially more than co-workers. They were friends. They hunted together: they daily worked out together; they worked on family projects together; they helped each other move to new residences; they talked over the phone often in addition to the many hours they worked together. The shared personal insights and personal problems. They were good friends.

On the morning of April 13th, the three men were not discussing policy or performance. They were just chatting, which is more commonly referred to as "bull shitting". It is illogical to assume that Vierstra's comment about women liking black men was made without any antecedent connection. That simply doesn't make sense although the Administrative Investigation would conclude that they were talking about a party that Bernard and his wife were going to attend and Vierstra out of the blue said it won't be Jeff going with his wife and Jessica it will be Clark Felix.

Far more likely, a scenario similar to that offered by Sergeant Vierstra occurred. Robson acknowledged at the hearing that he offered a comment that was a sexual innuendo intended to be understood as referring to a threesome between Jeff Bernard, his wife Brandy and the Zanesville Post Secretary, Jessica Johnson. Bernard understood the import of the Robson comment as demonstrated by the fact that he testified at the hearing that he "laughed it off". (This is totally absent in the Investigation). Brian Vierstra remembers it as referencing being a marshmallow between Brandy and Jessica. Far more likely, what Robson said was like being like an Oreo cookie. I say far more likely because neither Robson nor Bernard charges Vierstra with any comments about threesomes. Robson admits to intending such a comment when he acknowledges making a bland comment about Jeff, Brandy and Jessica going to the party together. It is only logical that whatever comment Brian Vierstra then made was in fact following Robson alluding to a threesome.

It would have been then that Vierstra logically would have chimed in with the urban legend about the male of the threesome being black because women like black lovers. It wouldn't make sense otherwise. This premise is further substantiated by the testimony of Jessica Johnson who testified at the arbitration hearing that Brandy called her about the incident saying that it concerned something about "a reverse Oreo". Jessica was never interviewed as part of the investigation. Jeff Bernard who at the time was working for Sergeant Robson and Robson himself would rather not remember the conversation precedent to the Vierstra's remark. However, how did it get to Brandy other than from Jeff Bernard? He testified that he went home and talked to his wife. Further his testimony is that he "didn't go into specifics" as to the exact statements. There is no question however but that the charge that Sergeant Vierstra lied when he said that his remarks followed talk of a threesome (the marshmallow reference) is simply not borne out by the evidence. Sergeant Robson confirms the intent of whatever comment he made referencing the two women

and Jeff Bernard and Bernard took that home with him in telling his wife that she was being referred to as part of a "reverse Oreo". Vierstra was telling the truth. It is possible that Robson does not consider a "threesome" necessarily involving lesbian activity as presented to him by Sergeant Bower. To be honest I am not an expert in the area but can imagine it could involve either heterosexual conduct; homosexual conduct, or both.

As to what specifically was said, that seemed to matter enough to Vierstra that I am inclined to accept his recollection. He said he simply doesn't use those words and that anyone who knows him knows that he doesn't use that explicit kind of language. He did openly and almost immediately acknowledge that he made a comment the import of which was the same as the more crude language attributed to him by Robson and Vierstra. Nonetheless Bernard interpreted the incident that morning as specifically referencing his wife. Although, actually, Bernard's recollection is that Vierstra's comment referenced both Jessica Johnson and his wife. I think he was focused on his wife.

I submit that a fair review of the evidence would lead to the conclusion that Bernard was focused on his wife because he was distrustful of his wife. What others might have accepted as another crude joke that is exchanged by and between friends, Bernard interpreted as a potential reality. Bernard testified at the hearing that he and his wife no longer live together and that he has in fact determined that she was unfaithful to him during the marriage.

It would seem obvious that Jeff Bernard went home early on April 13th not to call Brian Vierstra but specifically to talk to his wife. He could have waited until nearly 3:00 PM and gone home and called Vierstra. If he had done so, the issue of his wife asking why he was home and his being compelled (according to him) to tell of the incident in explanation of his being home early would not have been necessary. No, I think logic dictates that he went home to confront his wife with the fact that everyone thinks she is running around or would run around on him. The investigation, although never interviewing her, does report that she called off on April 13th following her husband sharing with her the events of earlier that morning. What probably happened when he got home was more of an accusation that a recitation of the remark Bernard thought he heard. There is also no escaping the conclusion that Bernard was additionally upset at the thought of his wife being with a black man. That too was probably shared with her. In any event, Brandy heard about the reverse Oreo because it was that comment she chose to share with Jessica Johnson. That had to come from Robson because no one even suggests that it came from Vierstra.

Further, I think it is logical to conclude that in fact Vierstra said that women like black men without intending to reference specifically Bernard's wife. The comment followed a "threesome" innuendo that included Brandy and Jessica. If in fact Vierstra then offered that women like to see the dark thing in the pink thing, it could and would be interpreted as including Brandy and Jessica. I think you have to judge Vierstra by what happened at noon of that same day. Did Vierstra intend to cause hurt to Bernard? The facts would indicate that he did not. He was awakened by a call from Bernard. He could have easily elected to brush off the call or at a minimum delay responding to the call. After all nothing required immediate response. However, Bernard was his friend. Because Bernard was his friend he permitted himself to be awakened after a full shift of work. He interrupted his sleep and his rest to dress and meet Jeff Bernard where Bernard requested rather than where it would be convenient for Vierstra.

Vierstra testified that his concern was not his earlier comment but that the comment offended his friend. He face to face told Jeff Bernard (and both agree) that he did not intend for his off hand comment to be taken as specifically directed to Brandy or for that matter to Jessica. He said if what I said offended you, I sincerely apologize. Those are not the actions of a man who was reckless in his conduct. They are the actions of a friend who was worried that his friend was hurt by what he may have said. There was no investigation, nor did any investigation appear on the horizon. Vierstra conduct was simply consistent with his reputation and his office.

Crude Talk, Jokes and Verbal Exchange

In any work environment there is the "ideal" and the "norm". I'm not sure but that the "ideal" is in

reality far short of ideal. If the ideal is too constrained and too formal or stilted, the result is a lessening of effective performance of the organization. I'm certainly not lobbying for crude street language as the common parlance for State Troopers. Troopers are expected to be courteous and respectful in their dealing with the public and with each other. That doesn't mean however that friends can't share a dirty joke or a politically incorrect half joking observation or prejudice.

Law enforcement is a highly stressful vocation. The ability to let off steam and share with brothers and sisters in arms off the record raucous or even lewd commentary is utilized by officers throughout law enforcement. When exchanged by men who by any standard can be identified as close friends, it should not be subject to discipline.

Further, there is no way that any discipline that was issued can be other than disparate treatment. After all the District Captain under oath testified to only one administrative investigation as to inappropriate language during his ten months as District Commander. Interestingly enough the complainant in that case was the same Brandy Bernard. In that case the discipline was a written reprimand. Sergeant Bower, the investigator in the instant case, testified that he may have investigated another case of alleged inappropriate language but he could not identify such a case and none had taken place within the recent years. The fact that such investigations are nearly non-existent is not an indication of the lack of colorful street language in usage between the officers of the Patrol. It is near universal between friends in any walk of life.

It is interesting however that the only other case of inappropriate language presented to Captain Minter other than the one related to Brandy Bernard, resulted in a one day suspension of a Lieutenant. In that case the Lieutenant, Cliff Spinner (a fine officer) was found to have told cadets undergoing six months of in residence training at the Patrol Academy, that they had reason to be worried beyond the rigorous training and education they were being required to experience and overcome. He told them that while they were in essence locked up at the Academy, their loved ones were cheating on them with others.

Did this cause pain to some of the cadets? You bet. In commenting on the Spinner case, Captain Minter was quick to "lower the standard" he had built up to try and justify the severe discipline handed out to Brian Vierstra. Still, in the Spinner case, in the face of overwhelming evidence that the statement of Lieutenant Spinner was both intentional and harmful, Spinner received written reprimand. In the instant case just what the statement actually was is in doubt. Clearly the intent of the statement was not to cause injury to the feelings of a friend as evidenced by the conduct of the Grievant upon learning that his friend's feelings were hurt as a result of the statement.

Further there is the Grievant himself and his record established in years of service. Sergeant Vierstra has a deportment record that is absolutely pristine. There is not a single verbal reprimand. There is not a single written reprimand. There has never been a single day of suspension issued to Brian Vierstra in 13 years of service. He has been singled out as qualifying to be sent to the assessment center for consideration to be promoted to Lieutenant. He successfully attended the assessment center, scored well above the average, and was eligible for promotion to Lieutenant. The discipline issued is grotesquely out of proportion to even the alleged offense, let alone the demonstrated facts of the case.

SUMMARY

Sergeant Brian Vierstra was an excellent shift supervisor. That is not supposition. It is confirmed by his annual performance evaluations that judge both his demonstrated ability for leadership and his performance. Brian Vierstra deportment record was without blemish.
The unjustified action of the Employer has taken from Brian Vierstra nearly six dollars per hour in pay and benefits for each and every hour he has worked since the imposition of the discipline. It threatens to take tens of thousands of dollars from him in retirement benefits. It is patently unjust.

The demotion of Sergeant Vierstra was not for just cause under the collective bargaining agreement. It violates the contractually required principle and practice of progressive discipline. Brian Vierstra must be restored to his former position of Sergeant with no loss of pay or benefit.

DISCUSSION

Generally, an arbitrator will not substitute his own judgment for that of an employer unless the penalty imposed is deemed excessive given any mitigating circumstances. *Verizon Wireless and CWA, Local 2336*, 117 Lab. Arb. 589 (2002).

Although the parties' collective bargaining agreement provides for the possibility of ~~promotion~~ Demotion (Jx 1), the view of many arbitrators is that a demotion of an employee should not be used as a disciplinary measure unless the Employer can demonstrate that the employee is unable to learn from his mistakes by the application of corrective discipline, or is incapable of performing his job (*Weyerhaeuser Co.*, 51 LA 192, 195 Wyythe, 1968; Dewey & Almy Chem. Co., 25 LA 316, 322, Somers, 1955; See also Arbitrators Cerone 91 LA 9, 12-13; Ling in 87 LA 92, 96-99; Leeper in 71 LA 659, 666; Moberly in 55 LA 69, 73; McDermontt 48 LA 667, 68-69; Hale in 24 LA 470, 484. In the words of the Arbitrator, Harry Platt:

> **"I do not believe that permanent demotion is a proper form of discipline where an employee's capabilities are conceded and his performance is generally satisfactory but where his attitudes of the moment are improper. For improper work attitudes...can usually be corrected by suspending or laying off the employee for a reasonable but definite period of time" (*Republic Steel Co.*, 25 LA 733, 735 (1955).**

It should be noted, however, that there may be certain egregious behaviors, such as blatant displays of racial prejudice or sexual harassment that may be sufficient grounds for demotion (Pacific Gas &

Elec. Co., 48 LA 264, 266, Koven, 1966). I do not find the Grievant's conduct rose to this level on April 13, 2002.

The seriousness of the act of demotion is illustrated in Article 19.05 of the collective bargaining agreement (Jx 1). Demotion is placed along side of discharge in the order of progressive discipline. It is also clear from this provision that the parties have contractually committed themselves to the concept of progressive discipline.

Yet, there was no evidence presented to demonstrate why the Employer chose to "give up" on the Grievant. What the Employer is asking this arbitrator to accept is the notion that after fourteen (14) years of highly evaluated, discipline-free performance (including six years as a Sergeant), the Grievant is now unqualified to perform as a Sergeant for the remainder of his career with the Department because of making two or three insensitive, lewd and inappropriate statements.

The Employer's case was convincingly presented, and I found the testimony of J. Bernard and Robson to be credible. The Employer proved with clear and convincing evidence that on the morning of April 13, 2002 the Grievant, for some inexplicable reason, made lewd and suggestive remarks about J. Bernard's then wife, Brandy, as well as Jessica Johnson, and Sergeant Clark Felix. These remarks were offensive, uncalled for, and personally harmful to J. Bernard. Their personal nature went well beyond the category of normal shoptalk.

I found the Grievant's version of his comments to be an attempt to minimize what really was stated, as validated by Robson and J. Bernard. However, it is not completely clear whether the Grievant was dishonest in his accusations regarding comments about "lesbian references" made by Robson. It is possible that the Grievant may have drawn such an inference from Robson's comment regarding a "threesome" that was injected into the conversation on April 13, 2003. However, I find it was more probable that the Grievant was attempting to elevate Robson's sexual innuendo into more than was intended in order to provide justification for his subsequent lewd remarks.

On the other hand, it is also clear from the record that the Grievant's conduct on the morning of April 13th was an aberration. There was no evidence to indicate any propensity for such conduct during his previous eight (8) years as a Trooper and his six (6) years as a Sergeant. In fact, the evidence contained in Union Exhibits 2 and 3 demonstrates Vierstra was considered a valued member of the Department. It is also a matter of record and important from the standpoint of self-realization that the Grievant recognized the impact of his statements and apologized to J. Bernard.

It is also a fact that J. Bernard was not merely the Grievant's subordinate. The Grievant was a good friend of J. Bernard, and he possessed personal knowledge of J. Bernard's family and marriage. He

had a close enough friendship with J. Bernard to know Bernard had fears about his wife's faithfulness as a spouse. This is not an excuse for the Grievant's lapse of judgment, but it represents the context in which this situation needs to be understood.

I find the Employer had just cause to issue discipline, but did not have just cause to impose the severe and permanent penalty of demotion in this case. People who work in law enforcement are held to a higher standard than many other public employees. The Grievant made two separate mistakes in this matter. He had a lapse in judgment and offended a subordinate, and he failed to be completely forthright about his mistakes. These actions warrant an attention-getting suspension. However, the Grievant also demonstrated to J. Bernard he was in error, and his fourteen-year discipline-free record has earned him the right to learn from his mistakes in order to continue what had been a successful career.

AWARD

The grievance is sustained in part and denied in part.

The Grievant's demotion shall be converted to a sixty (60) day suspension, and he shall be reinstated to the position of Sergeant retroactive to the original date of his demotion. His seniority and benefits shall also be restored retroactive to the date of his demotion, and he shall have the right to return to the same assignment. The Grievant shall be paid the difference in pay between what he lost as a result of his demotion, less sixty (60) days of pay.

Respectfully submitted to the parties this _____day of December, 2003

_____

Robert G. Stein, Arbitrator

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Respectfully submitted to the parties this 23rd day of December, 2003

Robert G. Stein, Arbitrator

FROM : CHAPHARTMANSTEIN/RGSTEIN PHONE NO. : 330 676 1199 Dec. 23 2003 02:14PM P2