#1864

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO
OHIO DEPARTMENT OF PUBLIC SAFETY

AND

FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC.

Before: Robert G. Stein

CASE# 15-00-050428-05-02

Grievant:
Christopher Jones

Advocate for the EMPLOYER:

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INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement (herein "Agreement") between the State of Ohio, the Ohio Department of Public Safety (herein "Employer" or "DPS") and The Fraternal Order of Police, Ohio Labor Council, Inc., Unit 2 (herein "Union"). That Agreement is effective from calendar years 2003 through 2006 and includes the conduct that is the subject of this grievance. Robert G. Stein was selected by the parties to arbitrate this matter as a member of the panel of permanent arbitrators, pursuant to Article 20, Section 20.08 of the Agreement.

A hearing on this matter was held on November 18, 2005 in Columbus, Ohio. The parties mutually agreed to that hearing date and location, and they were given a full opportunity to present both oral testimony and documentary evidence supporting their respective positions. The hearing, which was not recorded via a full written transcript, was subsequently closed upon the parties' submissions of post-hearing briefs.

The parties have both agreed to the arbitration of this matter. No issues of either procedural or jurisdictional arbitrability have been raised, and the matter is properly before the arbitrator for a determination on the merits.

ISSUE

Was the grievant, Christopher Jones, removed from his position as an Enforcement Agent with the Ohio Investigative Unit for just cause? If not, what should the remedy be?

RELEVANT CONTRACT LANGUAGE

Article 6—Management Rights
Article 19—Disciplinary Procedure
Article 20—Grievance Procedure
Article 21—Work Rules

BACKGROUND

Christopher Jones (herein "Jones" or "Grievant") began his employment with the DPS in December of 1997. He has worked as an undercover plain-clothes Enforcement Officer with the Ohio Investigative Unit (herein "OIU"), which investigates violations of liquor and tobacco laws, as well as food stamp fraud. He was assigned to the Columbus district and had the power to cite liquor permit premises for violations under the auspices of the Ohio Liquor Control Commission.

On February 3, 2005, Jones and his partner, Senior Officer Debra Adkins, had been assigned to handle complaints in the Scioto County area in southern Ohio. Their assignment included surveillance of the Silver Moon, a bar in Portsmouth, Ohio, which had been the subject of prior visits and observed drug deals by other OIU officers on both May 22, 2004 and December 3, 2004. It came about after a complaint had been entered into the OIU database for that business on February 20, 3004 based on

complaints from Portsmouth residents about increasing violence in the vicinity of the Silver Moon. (Union brief p. 3)

While conducting surveillance on the Silver Moon on that February 3 date, the Grievant and his partner, Agent Adkins, were contacted by phone by members of the Portsmouth Drug Task Force, which involved several local Portsmouth agencies combining resources with the Portsmouth Police Department to combat criminal activity. The Grievant and Agent Adkins met with Officers Todd Bryant and Steve Timberlake of the Drug Task Force at a local fire department and agreed to assist the Task Force officers. Assistance had, in fact, been promised to the Portsmouth Police Department both on April 7, 2004 and June 2004 by Assistant Agent-in-Charge Wade Sagraves (herein "Sagraves") of the OIU, who indicated that OIU agents would be assigned to the Portsmouth area when personnel became available after completing other current assignments.

Because Adkins, Bryant, and Timberlake had already made appearances in the Silver Moon that same evening, the four law enforcement officers agreed that the Grievant would go into the bar to make the intended drug purchase using Task Force funds. It was also agreed that the other three officers would act to back up the Grievant and that the Task Force officers would proceed into the bar in advance of the Grievant. (Union brief p. 7) The Grievant and Agent Adkins followed

the Task Force members in driving to the Silver Moon to carry out the agreed-upon plan.

The Grievant individually entered the Silver Moon, made the intended drug purchase, and then called his supervisor, Sagraves, the next morning to report his involvement in the activities at the Silver Moon the preceding night. The Grievant reported to Sagraves that a Task Force officer had also been in the Silver Moon at the time of the drug transaction. Sagraves requested that the Grievant provide a brief written statement summarizing the activities that had occurred at the Silver Moon.

An administrative investigation was begun regarding the Grievant's conduct on February 3, and, as a result, the Grievant was charged with violating both Ohio Department of Public Safety Work Rule 501.02(W)(1), Compliance to Orders, and also Rule 501.02(D), False Statements, Truthfulness. (Joint Exh. 2) Following a pre-disciplinary meeting held on April 22, 2005, the Grievant was officially discharged from his position by the Employer effective April 26, 2005.

A grievance was filed on behalf of the Grievant on April 26, 2005. The parties mutually agreed to waive Step 2 of the grievance procedure, as detailed in Article 20, Section 20.07, and proceeded directly to binding arbitration, as described in Section 20.07, Step 3. The matter is now before the arbitration for a determination of its merits.

SUMMARY OF THE UNION'S POSITION

The Union first contends that the Employer failed to meet its burden of proof to show that the Grievant's discharge was for just cause. The Union claims that the Grievant did not violate Work Rule 501.01(W)(1), Compliance to Orders, (Joint Exh. 4, p. 16) which provides:

> An employee shall immediately and completely carry out the lawful orders of a supervisor, or designated officer in charge, which pertain to the discharge of the employee's duties.

The Grievant's alleged violation of this rule was based on his failure to notify and get the approval of his immediate supervisor, Assistant Agent in Charge Sagraves, prior to engaging in the activities at the Silver Moon. This violation is based on the Grievant's failure to follow the terms of a written memorandum (Employer Exh. 1, p. 36) issued by the Agent in Charge of the Columbus district, SuAnn Cook (herein "Cook"), on November 28, 2003. That memorandum included the following language regarding the investigatory procedure for narcotics activities:

> Effective immediately, Columbus District Agents will adhere to the following procedure:
>
> A. Agents will not purchase any alleged, simulated, illicit or actual drugs, narcotics or controlled substances (including marijuana), without prior approval from a Columbus District Assistant Agent in Charge or Agent in Charge. If you are unable to contact your respective AAIC, contact the other AAIC of the District. If you cannot contact either

> of the AAIC's, contact the AIC. If you are unable to contact either of the AAIC's or the AIC—don't do it.
>
> . . .

The Union insists that neither the Grievant nor his more senior partner, Agent Adkins, realized that they were required to make a phone call based on Cook's memo. The Union avers that, even though the memo itself describes the included contents or language as a "written directive," there was an absence of evidence indicating that it had been actually properly disseminated to all OUI staff members for review at the time of its publication or that it had been submitted to the Union in compliance with the provisions of Article 21, Section 21.01. That section provides, in pertinent part, the following language:

> The Employer agrees that existing work rules, policies, procedures, and directives shall be reduced to writing and be made available to affected employees at each work location. To the extent possible, new work rules and directives shall be provided to the Ohio Labor Council two (2) weeks in advance of their implementation . . . The issuance of work rules and directives is not grievable. The application and availability of such rules and directives is subject to the grievance procedure.

Hearing testimony indicated that neither the Grievant, with eight (8) years of work experience with the Employer, nor Agent Adkins, with sixteen (16) years of experience, had realized that they were required to make an "approval call" to a supervisor before acting to assist the Task Force members in Portsmouth. The Union claims that both the Grievant and Agent Adkins were improperly disciplined for their good-faith efforts

to carry out the mandate of the Employer's Standard Enforcement Guideline (Union Exh. 2), which was identified as being an officially adopted rule of the Ohio Department of Public Safety. The document includes the following language in Section II(C):

> Requests from local police agencies become complaints and take priority over other complaints. We are a specialized law enforcement agency created to address specific problems permitting other agencies to come to us for help. It is our job to comply as promptly as possible.

The Union argues "both Agent Adkins and Agent Jones thought that the Cook memo was only applicable when they were using departmental funds and acting only on behalf of OIU." (Union brief p. 6) In the disputed Silver Moon incident, the Task Force provided the funds used to make the drug purchase. The Union also claims that the Grievant reasonably relied on the judgment of Agent Adkins as the senior officer and person presumed to have the ultimate responsibility for making the disputed phone call. The discipline imposed on Agent Adkins for her failure to make the disputed phone call was a three-day suspension.

The Union also refutes the Employer's finding that the Grievant also violated DPS Rule 501.02(D), entitled "False Statements, Truthfulness." That section provides:

> An employee shall not make any false statements, verbal or written, of false claims relating to the performance of, for fitness for, duty.

The evidence submitted indicated that the Grievant had received a 10-day suspension for erroneous or untruthful deposition testimony he gave regarding his prior education. The Union contends that the Employer has failed to provide sufficient evidence to support the Employer's claim that the Grievant was dishonest about the presence of a Task Force officer in the Silver Moon serving as a backup officer. The Union insists that, when the Grievant and Agent Adkins had met preliminarily with the two Task Force officers at the local fire department before convening again at the Silver Moon, it was clear that the four officers agreed that the Task Force officers would travel separately and in advance of the DPS officers to the Silver Moon and would go into the bar before the Grievant entered. Jones testified at hearing that, at the time of his own arrival at the bar, he believed that one Task Force agent was already in the bar because he actually only saw the one other officer outside of the bar. Agent Adkins, in her own hearing testimony, concurred with the Grievant's statements and noted that it was only after the Grievant had been in the bar for a few minutes that she saw the second agent outside of the Silver Moon.

The Union argues that the Grievant was not aware of the Task Force officer's absence during the drug purchase transaction until sometime after the Grievant made the phone call to Sagraves on the morning after the Silver Moon transaction. Based on these facts, the Union insists that

the Grievant's "error" in believing that one Task Force officer was present inside the Silver Moon at the time of the drug transaction only demonstrates that the Grievant's report to Sagraves, that a second officer was, in fact, inside the bar with the Grievant, demonstrates that the Grievant's misstatement was based on erroneous information but does not constitute a lie or intent to deceive.

The Union insists that none of the Grievant's actions provided a basis for his subsequent discharge. The Union claims that the Employer has failed to demonstrate that there was just cause or a correlation between the seriousness of the Grievant's alleged infraction and the discipline imposed pursuant to Article 19, Section 19.05, which states: 'The employer will follow the rules of progressive discipline. Disciplinary action shall be commensurate with the offense." The Union insists that DPS has failed to prove that the Grievant was dishonest about his conduct on February 3, 2005 or that he made any false statements before or during the administrative investigation leading to his discharge.

The Union's arguments, as taken directly form its post-hearing brief, are as follows:

ARGUMENT

1. The Employer failed to prove that the grievant violated work rule 501.02 (W)(1), Compliance to orders.

According to the Employer the grievant violated this rule when "he engaged in an unauthorized investigation by purchasing narcotics in violation of written orders of his supervisor" (see Employer exhibit 1, letter from Captain Dodd dated April 22, 2005). The charge stems from an incident that occurred in Scioto County on February 3, 2005.

The background information surrounding this event is relative to the incident that occurred. On or about April 7, 2004 the Chief of Police for the City of Portsmouth and one of his officers met with Agent Wade Sagraves of the Ohio Investigative Unit (OIU) concerning illegal activity at a bar called the Silver Moon. That bar is located in Scioto County, Ohio. The chief was assured that he would be given assistance from the OIU as soon as the unit had completed a separate investigation in the City of Ironton. The chief was told to expect assistance in or around June of 2004. The City of Portsmouth received no assistance from OIU. In July of 2004 after receiving numerous complaints from its citizens in the City of Portsmouth about the rising violence in the vicinity of the Silver Moon, the City again contacted OIU for assistance with this establishment. Officer Sagraves told the City he would be able to send help within two weeks. Two weeks having passed, the City says that it again received no assistance from OIU.

Apparently a complaint was entered into the OIU database for the Silver Moon on February 20, 2004. Members of the OIU unit visited the bar and observed drug deals prior to the incident at issue, on May 22, 2004 and again on December 3, 2004. For unknown reasons the information obtained by the unit was not shared with the City of Portsmouth Police Department. On February 3, 2005, the grievant and his partner, Senior Officer Debra Adkins, were assigned to work complaints in the Scioto County area of Ohio. Their assignment included surveillance of the Silver Moon since it had an active complaint pending.

While conducting surveillance on the Silver Moon, Agent Adkins and Agent Jones received a call from the drug task force working in the Scioto County area. The task force consisted of several agencies working in conjunction to battle criminal activity. Officer Bryant and Officer Timberlake of the drug task force met with Agents Adkins and Jones that night and requested their assistance at the Silver Moon. Agent Adkins and Agent Jones were well aware of the commitment of the OIU to aid and assist local law enforcement agencies (code 2000). They agreed to assist the task force in its endeavor that evening as they are required to do under the departmental rules.

The single unidentifiable agent that night was Officer Chris Jones. Agent Adkins had previously made herself known in this bar and the members of the task force had been in and out of the bar on several occasions that evening. The four experienced law enforcement officers determined that the grievant would go in and make the buy while they acted as back up for him. It should be noted that contrary to the Employer's depiction, OIU agents are not expected to call for permission from their supervisor every time they make a move. To do so would not only be impractical it would be impossible. An agent cannot tell a dealer to wait while he calls for permission to make a buy. These operations are fluid situations and must be dealt with in a manner that allows flexibility. This department requires employees to use their best judgment during an investigation. There are no hard and fast rules because it is impossible to anticipate a suspect's actions. The Employer is now second-guessing the judgment of the grievant. They admit that investigations such as this are left to the judgment of its employees. They cannot place the judgment in the hands of their employees and then punish them for using that judgment.

So what occurred on February 3, 2005? The grievant and Senior Agent Adkins followed the task force unit to the bar as agreed and Agent Jones went into the bar to make a buy. Neither Senior Agent Adkins nor Agent Jones called supervisor Sagraves to inform him of what they were doing because they did not realize they were required to make that call. Senior Agent Adkins has been employed with this department for sixteen years. Senior Agent Adkins had a clean deportment record prior to this incident. It is abundantly clear that she would have called her supervisor if in fact that was a requirement of this department.

The Employer is basing its charge upon a memo written by Agent in Charge SuAnn Cook in November of 2003. First, this is a memo not a rule. Second, these employees receive dozens of memos like this on a monthly basis. Third, this memo was not given to the union and it is unclear whether or not this memo was ever disseminated to staff. When questioned about the dissemination of the memo, AIC Cook said that Agent Farmer was there when it was discussed. She did not mention any other agent being present when this was discussed. Fourth, the memo conflicts with the Employer's own rules of conduct. Had the grievant failed to assist the drug task force, a duty of which he was capable, he could have been charged wit inefficiency under the Employer's rules. The Employer's standard enforcement guideline II (c) (union exhibit 2) states that "Requests from local police agencies become complaints and take priority over other complaints. We are a specialized agency created to address specific problems permitting other agencies come to us for help. It is our job to comply as promptly as possible." AAIC Sagraves had promised to aid the City of Portsmouth a year earlier. The fact that no one had responded to the City's request does not shed a good light on the OIU. An even less favorable light is shed when agents finally respond and are punished as the result.

AAIC Sagraves says that when the grievant did call him the next day he said "you are probably going to be mad at me". The Employer somehow interprets this to mean that the grievant knew he was supposed to call before taking any action at the Silver Moon. While this is an imaginative argument it was easily explained by the grievant. The grievant knew that the City of Portsmouth had been in contact with AAIC Sagraves and that AAIC Sagraves had committed the agency to aiding the City. The grievant was afraid that AAIC Sagraves would be irritated because the

agents had moved forward on the case ahead of AAIC Sagraves. The statement had nothing to do with AIC Cook's memo.

The arbitrator should consider the statements made by AAIC Sagraves during his testimony. He placed great emphasis on the fact that the requirement to call was based only upon the Memo. There is a reason for this emphasis. One can only speculate of course that calling in these instances is not a practice in this department but, employees are loath to say that the memo is not generally enforced. No one seems to know what the status of AIC Cook's memo really is. It is unclear whether it is a rule a directive or an order. It appears to simply be a memorandum and was titled as such. There appears to be great confusion as to who this memo applied and how it is to be used. For example both Senior Agent Adkins and Agent Jones thought that the memo was only applicable when they were using departmental funds and acting only on behalf of the OIU. Neither agent thought it was applicable in this situation. In this situation the agents were using task force money and acting only as support for the task force. It was not an OIU case. These agents had no reason to believe they were violating any DPS policy.

DPS rule 501.02 (W)(1) requires an employee to immediately and completely carry out the lawful orders of a supervisor, or designated officer in charge, which pertain to the discharge of the employee's duties. While Senior Agent Adkins says that she did not order the grievant to assist the drug task force, it is clear that she was the senior officer when this incident occurred. Mr. Jones would be expected to follow her lead on this case. If in fact the phone call was supposed to be made it stands to reason that Agent Adkins would be the one to make the call. It is worth noting that Senior Agent Adkins only received a three day suspension as the result of this incident. The grievant did not violate DPS rule 501.02 (W)(1).

2. The Employer failed to prove that the grievant violated rule DPS rule 501.02 (D), False statements, untruthfulness.

The grievant was previously disciplined for violating DPS rule 501.02 (D). That incident involved the level of education that the grievant had received. It had nothing to do with any investigation he was conducting. The underlying details of that discipline are not before the arbitrator. At any rate the parties came to an agreement on the discipline to be invoked and as the result the grievant received a five day suspension.

The Employer believes that if it can tie the prior incident to this incident and thereby show that the grievant is a dishonest individual. It improves its chances in this case. To do that however, the Employer must show that the grievant was dishonest during this incident. The Employer failed to do that. The Employer insists that the grievant lied about being alone in the Silver Moon. In fact the grievant was truthful when he said that another officer was in the bar with him. When Senior Agent Adkins and Agent Jones met the two members of the task force they agreed that the task force would go to the Silver Moon ahead of them. The task force agents implied that they would go into the bar first.

When Agent Jones arrived at the Silver Moon he only saw one task force agent outside. He logically believed that the other agent was already inside the bar. The testimony of Senior Agent Adkins concurs with the statements made by the grievant. Agent Adkins also thought that the second agent was inside the bar when she arrived. She said that it was only after the grievant had been in the bar for a few minutes that she spotted the second agent outside. The grievant left the bar believing that a second agent had been inside with him. When he called AAIC Sagraves he had no idea that he had been in the bar alone. No one told him that was not the case until much later. The bottom line is that the grievant did not violate DPS rule 501.02 (D). The fact that he was mistaken does not means he was lying.

As proof of this alleged untruth the Employer takes issue with the fact that the statement written by the grievant does not say that another officer was inside with him. This is a silly argument. AAIC Sagraves requested that the grievant write a brief statement about what happened on February 3. That is exactly what the grievant did. He sent a brief statement to AAIC Sagraves in the form of an e-mail. The fact that the Employer is relying on such an insignificant issue to prove this charge shows the weakness of this case. A review of the e-mail will show that several details of that night were not discussed in the e-mail. For example the agents were contacted by the task force by telephone before they met and they met at the fire station prior to going to the Silver Moon. The first sentence of the second paragraph (...and having an officer from the task force running back up at the premises.) could be read to imply that an officer was in the bar with him.

This is not the only time an incident such as this has occurred. There was a similar incident in the City of Athens. In that incident the OIU agents thought that the drug task unit was there providing back up for them. It was later determined that the task force was not there. The employees involved in that incident received no discipline.

AIC Cook took offense to the fact that the grievant said he was unable to identify the task force agent who they met on February 3. This incident occurred after 10:00 p.m. in February. The agents were in a car in the dark. Agent Jones had never met them before. He simply could not ID them later. AIC Cook says the grievant should not have involved himself in the task force case. It is unclear what else the grievant could have done however. He was

assigned to work complaints in Scioto County along with Agent Adkins. There was an outstanding complaint for the Silver Moon bar and the Portsmouth Police Department had already requested assistance. Should he have told the senior agent that he was going home? Of course not. The Employer has already admitted that there was no problem with the grievant being in the bar alone. AIC Cook said that it is not unusual for agents to work alone under such circumstances. The problem she says was the lie. The Employer has not and can not show that the grievant lied. The grievant did not violate DPS rule 501.02(D).

3. The Employer failed to follow progressive discipline and terminated the grievant without just cause

In its zest to discipline the grievant, the employer has exploited the language in article 19. The discipline invoked in this case was purely punitive in nature. None of the grievant's actions on February 3 show just cause for the invocation of any form of discipline. Instead of concerning itself with the serious violations that were evident at the Silver Moon bar, violations that the OIU was aware of a year earlier, the Employer concentrated its efforts on disciplining its employees. In effect the Employer has disciplined the grievant for doing his job. He did not go to Scioto County of his own volition. He and his partner were assigned to work complaints in that County on February 3.

Article 19 of the Collective Bargaining Agreement requires the Employer to follow the principles of progressive discipline. In the grievant's case the employer has jumped from a five day suspension to a termination. A jump from a short suspension to a termination can by no stretch of the imagination be considered progressive. Just cause requires that the punishment correlate with the seriousness of the infraction. In truth the Employer failed to prove any infraction and therefore no discipline is warranted. Had the Employer shown reason for discipline a written reprimand in this instance would have put the grievant on notice that he needed to correct his behavior. The collective bargaining agreement required the Employer to follow the principles of progressive discipline. Since progressive discipline is included in the agreement, any other method of discipline is excluded.

The Employer had the burden to show that the discipline meted out in this case was justified. The Employer did not meet its burden. The Employer was not able to prove just cause for the discipline imposed nor did the employer show why the standard of progressive discipline was inapplicable. Evidence supporting both is required by the contract.

The term "just cause" entitles the grievant to certain protections relative to fairness in disciplinary situations. The Employer is not free to discipline on a whim. Instead this term requires the Employer to apply discipline only to the extent that it is commensurate with the offense. The discipline imposed here goes far beyond a proportionate level for an employee with eight-years of service. The purpose of discipline is to correct unacceptable behavior. It is not to be invoked as punishment. The premise behind progressive discipline is that both the Employer and the employee benefit. The Employer is able to maintain a well-trained and productive employee. The employee is given an opportunity to redeem his reputation as an effective police officer. In this case it is clear that termination is unwarranted. A less severe form of discipline would obviously suffice to protect the interests of the Employer. The grievant was terminated from his chosen career. Due to the severity of this form of discipline a high degree of proof is required. The burden to show proof of just cause falls to the Employer.

The Employer provided no evidence to show that its reputation had been harmed by the grievant's conduct. AAIC Sagraves said that working with Agent Jones would not give him a problem in the future. AIC Cook said that the grievant could no longer be trusted however the arbitrator should be aware that AIC Cook had been scorned by this incident. She is obviously irritated by the Portsmouth Police Department and believes that the employees are ignoring her memo. The facts are what they are however, and the facts do not prove that the grievant lied nor do they prove that he violated any to the department's policies.

AIC Cook clearly has a chip on her shoulder with regard to this incident. That is made clear by her statements during her testimony. It is also clear that AIC Cook herself has not been totally honest during this case. For example, AIC Cook points to the requirements in O.A.C. 4301:1-1-61(a), while intentionally ignoring section (b) of that code. According to AIC Cook under O.A.C. 61 (a), the grievant should have immediately cited the establishment once he found a violation. However 61 (b) says that a citation is to be made at the conclusion of the investigation. When these agents left the bar this case was still open. In fact Agent Jones called AAIC Sagraves to find out how he should proceed. Was he to follow up on the case was he to turn it over completely to the task force or continue his involvement with the Silver Moon case. In other words the investigation had not been completed. This omission was not an error. Further the grievant has not been charged with violating O.A.C. section 61(a) or(b). The Employer can not enlarge the charges against the grievant. It is bound by the charges contained in his letter of termination.

The Employer provided no evidence of the grievant's inability to perform his duties. The Employer never suggests that the grievant will not be an acceptable employee if reinstated. There is nothing in evidence to prove that other employees of the department will be reluctant to work with the grievant. Reinstating the grievant will not undermine the Employer's ability to function effectively. The Employer has not been harmed by the grievant's conduct.

This case produced no adverse publicity. It was not featured on the local news nor was it published in any local or national publication. The actions of the grievant have not cast ill repute upon the Employer. No evidence was presented to show that the grievant will have problems enforcing the laws of Ohio. As an employee Mr. Jones was and today remains dedicated to the profession of law enforcement.

The Employer ignored the language in the agreement. The discipline meted out here was neither uniform nor progressive in nature. The Employer can not prove that the grievant was dishonest. It can not prove that the grievant made any false statements. In fact it has been shown that the grievant was being honest when he said there was another officer in the bar. That is the entire basis for the Employer's charge of dishonesty. The Employer thinks he lied about a member of the task force being in the bar. Ultimately it was determined that he thought one of the task force officers had been in the bar with him. Even Agent Adkins thought one of the officers was in the bar with him. He didn't lie. Quite frankly he was, just wrong. Nothing in the agreement prohibits modification of the discipline suffered by the grievant here. The arbitrator has the inherent power and duty to determine the reasonableness of the discipline imposed. The arbitrator has authority to modify the discipline imposed in this case by enforcing the express provisions of the Collective Bargaining Agreement.

For the foregoing reasons the FOP respectfully requests that the Arbitrator sustain the grievance, order the reinstatement of the grievant and make the grievant whole including full back pay and benefits.

Based on the above, the Union requests that the arbitrator sustain the grievance and both reinstate the Grievant to his former position and ensure that he is made whole for his lost wages and benefits.

SUMMARY OF THE EMPLOYER'S POSITION

The Employer basically refutes all of the Union's contentions and insists that the Grievant's termination was the appropriate discipline imposed in response to the Grievant's conduct. DPS insists that the Grievant was required to follow the OIU operating procedure outlined in Cook's memo and that his discharge was merited because he failed to contact any supervisor before making the drug purchase at the Silver Moon. The Employer emphasized that Cook's "directive" was intended to set a standard for all DPS agents to follow because similar past investigations were less than complete. (Employer brief p. 3) The

Employer also insists that it has the reserved management right, pursuant to Article 6 of the Agreement, to establish written directives regarding the performance of job duties. DPS also insists that OIU policies and procedures applied to the Grievant and Agent Adkins on February 3, 2005 because, at that time, both officers were functioning as paid representatives of OIU when they assisted the Task Force officers in their capacity of Enforcement Agents. The Employer maintains that the message in Cook's memo was clear, i.e., that supervisory approval was required prior to the purchase of any narcotics and that timely opportunities existed for making a phone call either before the four (4) officers left the fire station where plans had been made or while the Grievant and Agent Adkins were on their way to the Silver Moon from the fire station. DPS contends that "there is no evidence to show that calling a supervisor prior to purchasing narcotics causes an undue hardship on an agent's ability to fully perform his or her duties." (Employer brief p. 6)

The Employer claims that "[t]he Grievant's history of dishonesty played a significant role in the decision to terminate his employment." (Employer brief p. 7) Evidence indicates that the Grievant was charged with violating DPS Rule 501.02(D), cited *supra*, and was given an ten-day suspension in April, 2004 as a result of the Grievant admitting that he had been untruthful about his own educational record during a deposition. The Employer and the Grievant entered into an abeyance agreement (Jt.

Exh. 5), which has remained in effect for five (5) days of the original 10-day suspension.

The Employer insists that the Grievant was untruthful and inconsistent in his statements about the events of February 3, 2005, especially regarding the presence of a Task Force backup officer in the Silver Moon when the drug purchase was made. When the Grievant first contacted Sagraves, who is actually the Grievant's brother-in-law, on the morning of February 4, 2005, the Grievant indicated that one of the two Task Force officers had been in the Silver Moon with the Grievant at the time of the Grievant's drug purchase, but the Grievant indicated to Sagraves that he did not know or remember the other officer's name. In the written statement that the Grievant authored in response to Sagraves' February 4 request, the Grievant made no mention of a Task Force officer's presence at the time of the Grievant's drug purchase in the Silver Moon. During the administrative investigation, the Grievant told Cook that he believed that the Task Force officer had gone into the Silver Moon very shortly before the Grievant and that he did not know where the Task Force officer was while they were inside the bar. (Employer brief p. 8) The Employer claims that, based on the inconsistencies in the Grievant's report, the Employer cannot trust the Grievant to carry out the requisite duties as an OIU Enforcement Agent. DPS argues that, despite the beneficial outcome of the Grievant's actions to the Portsmouth

community, his employment relationship has been severely and irreparably tarnished based on his purported dishonesty and that his termination was the appropriate discipline based on the nature of the Grievant's past and current misconduct.

The Employer's arguments, as presented in its post-hearing brief, include the following:

ANALYSIS

A. The Grievant failed to follow proper procedure in purchasing narcotics for the Task Force.

The Grievant was charged with violating Work Rule 501.02(W)(1), which states that an "employee shall immediately and completely carry out the lawful orders of a supervisor, or designated officer in charge, which pertain to the discharge of the employee's duties." *See* Joint Exhibit 4, pg. 16. Specifically, the Grievant's supervisor, Agent-In-Charge (AIC) SuAnn Cook, implemented a written directive in November of 2003, setting forth the proper procedure to follow when purchasing any alleged, simulated, illicit or actual drugs, narcotics or controlled substances. *See* Management Exhibit 1, pg. 36. In addition to providing direction on how to purchase such substances, AIC Cook specifically stated that "[a]gents will not purchase . . . narcotics . . . without prior approval from a Columbus District Assistant Agent in Charge or Agent in Charge." AIC Cook even bolded parts of the Directive to emphasize the importance that supervisory approval is necessary. She further concluded that if a supervisor could not be contacted, such purchase should *not* be done. (Emphasis added). AIC Cook testified that the Directive was written because such investigations were less than complete in the past and she wanted a set standard for all of her agents to follow. The Directive was distributed to all agents with union representatives present. The Directive was discussed with the agents and no questions were presented with regard to compliance.

The Grievant admitted that he did not call a supervisor prior to purchasing the narcotics. In an effort to cover up his failure to follow the Directive, the Grievant and the Union contended at the hearing that this Directive did not apply to his actions on the night of February 3, 2005, for several different reasons, all of which contradict each other and are contrary to common sense. First, Agent Adkins, who was also disciplined for the events that night, stated in the administrative investigation that the Directive was only good for 30 days. Such reasoning is absurd. Management has the right to establish written directives regarding the performance of job duties and such right does not expire at the end of a 30-day period. If Management were required to re-issue written directives every 30 days, employees would constantly be confused as to the Employer's expectations and how to perform their job duties. Even though Management has this right, the Department gave Ms. Adkins a chance to prove her contention, but she was unable to cite to or present any authority to support her claim.

Second, at the arbitration hearing, the Grievant, as well as Agent Adkins, stated that this Directive did not apply to the events the night of February 3rd because it was a Task Force case. While it is true that the Task Force initiated the case and provided the funds, there is absolutely no merit to the argument that Ohio Investigative Unit (OIU) policy and procedure does not apply. On that night, the Grievant was working for OIU on his scheduled shift, was paid by OIU for his services, and was wearing OIU issued badge and equipment. The November 2003 Directive even states that cooperating law enforcement agency funds may be used. If the Agents were not required to follow OIU policy or procedure every time they assisted another law enforcement agency, there would simply be no accountability as this happens very frequently. On the night of February 3rd, the Agents were representatives of OIU and assisted the Task Force in the capacity of Enforcement Agents. There is no question that they were to abide by all OIU policy, procedure, and directives—is it their job.

Finally, the Grievant and Agent Adkins argued that the November 2003 directive was not a Department "rule" required to be followed. Management does not understand this argument. The Directive was distributed to all

employee setting forth clear provisions that the procedure outlined was to be followed by all Columbus District Personnel. Furthermore, the Grievant and Agent Adkins contradicted themselves by stating that they did not have to follow the directive because outside funds were used. In other words, according to them, it is a "rule" to follow when outside funds are used, but not a "rule" to be followed in other respects. Nonetheless, as stated above, the Directive specifically addresses OIU funds, as well as funds provided by an outside law enforcement agency. A statement such as this concerns Management. The Grievant, as well as any other agent, is not free to apply OIU policy, procedure, and directives at his own choosing or to his benefit when appropriate. Likewise, the Directive is clear that supervisory approval is required prior to the purchase of narcotics. There is nothing in the Directive to suggest that such procedure only applies in certain circumstances. Following the distribution of the Directive, there were no questions or concerns brought up by any of the employees, including Union representatives at the meeting. The Grievant's contentions are just another attempt to twist the facts in his favor to cover the fact that he did not follow proper procedure.

The Union further attempted to confuse the issue by arguing that another employee had violated the Directive, but was not disciplined. By AAIC Sagraves own admission he agreed, but upon further examination by Management, the situations were not the same. The other employee had called for supervisory permission prior to the purchase, but did not have the appropriate backup. This was the only information presented. Even more important, not only did the Grievant not obtain supervisory permission prior to the purchase, he provided inconsistent statements during the investigation. All of these facts were taken into consideration when determining what, if any, discipline was appropriate. Thus, given the difference in situation and lack of information presented by the Union at the hearing, this testimony should not provide any weight in determining whether the Grievant's termination was appropriate.

Finally, at the hearing, the Union failed to present testimony to support any reason or any circumstance that rendered the Grievant unable to comply with the Directive as set forth by AIC Cook. To the contrary, the evidence at the hearing indicated that there was absolutely no reason to not call a supervisor prior to the purchase of the narcotics. Agent Adkins testified that they were "sitting" on the bar when the Task Force called them for their assistance. They could have called a supervisor at that point. They drove to a nearby firehouse to meet the Task Force officers. They could have called a supervisor on their way. After that, they then spent time in the firehouse to discuss a plan. They could have called a supervisor at that point. The point is that the Grievant had several opportunities to call his supervisor. Furthermore, AIC Cook even testified that there is *never* a reason to proceed with the purchase of narcotics without prior approval. As stated above, if a supervisor cannot be contacted, the narcotics should not be purchased. Therefore, even if something had happened that prevented the Grievant or Agent Adkins from calling, they could have backed out of the purchase. By requiring agents to back out of such purchases, there is essentially no reason to purchase narcotics without obtaining prior permission.

The simple fact is that Management had the right to dictate how the purchase of narcotics was to be completed. Such inherent right was bargained for in the Collective Bargaining Agreement giving the Employer the right and authority to manage and operate its facilities and programs. *See* Joint Exhibit 1, Article 6. Specifically, the parties agreed that Management has the right to determine "the overall methods, process, means, or personnel by which governmental operations are to be conducted." The November 2003 Directive is the type of management right contemplated by Article 6. Furthermore, there is no evidence to show that calling a supervisor prior to purchasing narcotics causes an undue hardship on an agent's ability to fully perform his or her duties, that it is discriminatory in any manner, or that it entails an illegal activity.

B. The Grievant was not honest during the administrative investigation regarding the events of February 3, 2005.

As a result of the Grievant's failure to call a supervisor on the night of February 3rd, an administrative investigation was conducted. Throughout the course of the investigation, the Employer discovered that the Grievant had been untruthful and inconsistent in his statements about the events that night. Before analyzing the Grievant's inconsistencies, the Employer must discuss his past discipline. Specifically, the Grievant was charged with violating Public Safety Work Rule 501.02 (D), False Statements, Truthfulness and given a 10-day suspension in April 2004 as a result of lying during a deposition. As a result, the Grievant and the Employer entered into an Abeyance Agreement, which was still in effect on February 3, 2005. *See* Joint Exhibit 5. Following his admission of lying during the deposition, AAIC Sagraves testified that OIU is now required to notify a prosecutor that the Grievant was found guilty of lying whenever he is testifying in court pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963). In *Brady*, the Court held that a prosecutor has a duty to disclose evidence to a criminal defendant which impacts on issues of culpability and/or penalty, as well as innocence. Along with *Brady,* it is also necessary to discuss *Giglio v. United States*, 405 U.S. 150 (1972). In that case, the Court held that any information known to a government agency is known to all agencies. Thus, the Grievant's dishonesty even affected his credibility outside of the Department.

The Grievant's history of dishonesty played a significant role in the decision to terminate his employment. First, and foremost, termination was the most appropriate and progressive form of discipline following the implementation of the previous 10-day suspension. Any lesser discipline would not have been corrective in nature, as the Grievant still could not be trusted to be truthful following the last 10-day suspension. Furthermore, when the Grievant first contacted AAIC Sagraves the following morning he stated that he had gone into the bar with a Task Force officer, but could not remember his name. Likewise, he said that he did most of the talking and handed over the money. *See* Management Exhibit 2. In his statement, he gave no indication that there was a Task Force Officer that went into the premise with him. *See* Management 1, pg. 40. Upon further investigation, the grievant later told AIC Cook that the Task Force officer went into the premise "seconds" before he entered and that he did not know where the officer was while they were inside the permit premise. Agent Adkins admitted that a Task Force officer did not go into the premise with the Grievant and even Officer Todd Bryant stated that the Grievant had gone in by himself. The Employer does not understand the Grievant's story. He first stated that he did "most" of the talking, but later contends that he did not know where the Task Force Officer was while they were in the premise. The Grievant testified at the arbitration hearing that AAIC Sagraves must have been lying in regards to the notes that AAIC Sagraves had made upon their first contact. To believe the Grievant, you must find that AAIC Sagraves was lying, which the evidence clearly does not support. On the other hand, the Grievant has every reason to lie as his job is at stake and that he has a history of lying in the past. There is no reason for AAIC Sagraves to be untruthful, and there was no testimony presented by the Union to suggest that AAIC Sagraves ever treated the Grievant unfairly or inconsistently with any other employee or that he has a reason to lie about what the Grievant said. In fact, AAIC Sagraves admitted that he was the Grievant's brother-in-law, but testified that it in no way affects his ability to adequately supervise the Grievant. Management can only imagine the turmoil this has caused for AAIC Sagraves within his family.

Likewise, the Grievant stated during his interview that there were only about 15 patrons in the bar at the time he made the purchase. The Employer has a hard time understanding how the Grievant could know the number of people in the bar, but not know where the other officer was with so few people. The Grievant is fabricating his story and has been inconsistent. The Employer simply cannot trust him to be truthful.

Truthfulness and law enforcement go hand in hand. You cannot have one without the other. This issue has been arbitrated numerous times throughout the State of Ohio. Although there are not any specific cases regarding Enforcement Agents, there are cases involving Highway Patrol Troopers in which the same standards apply. Specifically, the Employer firsts directs you to a decision that you rendered in August of 2000. In this case, the Grievant was dishonest about being at home while sick. You held that his story was "not believable" and that there was "too many inconsistencies." You also stated that the Grievant compounded his actions by not being completely truthful. As to progressive discipline you also concluded that "a progressive suspension is suited to an employee who is not correcting his behavior."

Arbitrator Pincus rendered a decision in May 2001, where the Grievant alleged that his patrol car had been damaged when two unknown suspects threw rocks at the vehicle and fled into a cornfield. The Employer removed the Grievant for filing a false report in an attempt to conceal a patrol car crash of his own doing. The Employer believed that the Grievant had irreparably damaged his credibility as a law enforcement officer. Particularly, the Employer stated that his actions affected his credibility in future court proceedings where his testimony would be viewed as untrustworthy. In denying the Grievance, Arbitrator Pincus held that the Grievant's own admissions provided just cause for removal and his attempt to subsequently recant his falsified initial version in no way minimized the conclusion. Arbitrator Pincus also stated that once the criminal report was filed "[i]t became a matter of public record. Forever made available to any resourceful defense attorney willing to question the Grievant's credibility in any future legal forum." Furthermore, the Grievant's actions would "inevitably interfere with the successful operation of the Ohio State Highway Patrol, and the Grievant's ability to perform his duties."

Likewise, Arbitrator Pincus upheld the Employer's termination of a trooper that had made false statements in regard to a probable cause search involving the canine unit. In that arbitration, he stated that a higher standard must be applied when evaluating a trooper's misconduct because dishonesty by a trooper compromises his ability to serve as a witness in any litigation. He further held that the:

> Ohio State Patrol are the ground troops to protect the citizens of Ohio from crime. They are the sentries that stand guard over law and order. If so little can intimidate the grievant into telling lies about a criminal arrest, then he does not live up to the standards established by the Ohio State Highway Patrol and expected to be upheld by the public.

In examining whether there were any mitigating circumstances, he stated that the Grievant may very well be a good person, but it was not enough in the face of his lies. Citing Arbitrator Ruben, Arbitrator Pincus stated that

"[s]ometimes good men do bad things . . . but the question is whether the discharge penalty imposed for the grievant's misconduct was unreasonable or excessive."

Furthermore, the Employer refers you to a 1989 decision rendered by Arbitrator Bittel. Basically, Arbitrator Bittel held that "[g]iven the employer's desire and right to establish and implement high standards for the Patrol, the Arbitrator would exceed her authority to substitute a finding of no just cause in place of the Patrol's view that Grievant's offense warranted discharge." While the Employer admits that the 1989 decision involves other serious violations, the decision deemed untruthfulness to be a serious offense warranting removal.

Similarly, in another decision rendered under the FOP contract, Arbitrator Feldman also denied a grievance filed by a trooper who was discharged, in part, for making false statements. Arbitrator Feldman believed that the ethical rules of conduct required of a trooper had a strong impact on his decision. In upholding the Grievant's removal, the Arbitrator stated that the Grievant acted contrary to the "clear and unambiguous" language of the ethical code that is to be followed by the State Highway Patrol.

Arbitrator Keenan also denied a grievance in May of 1999 filed by a trooper who was removed for making false statements about being absent from work. In this case, the Employer argued that the Grievant had "failed to fulfill a fundamental aspect of her duties involving honesty and reliability." In rendering his decision, Arbitrator Keenan stated that an applicable arbitral principle:

> is the proposition that law enforcement personnel are held to a higher standard of truthfulness than are other employees, including the need to be truthful in connection with inquiries into their own conduct which has an impact on their work. Untruthfulness is a serious matter in law enforcement. Indeed, depending on the circumstances, untruthfulness may well warrant discharge.

Given these arbitration decisions, you must conclude that termination is appropriate. The Grievant has lied before and the Employer gave him a second chance to correct his behavior to no avail. The Grievant choose to be dishonest again, thereby destroying any trust that the Employer had towards his ability to perform his job appropriately. As discussed earlier, the Grievant's credibility in court has already been damaged since he lied during a deposition. He must be held to a higher standard in performing his daily job responsibilities. If the Grievant was willing to lie during a deposition and then lie to his own brother-in-law in the course of performing such duties, the Employer can only imagine what further lies the Grievant may commit. As a law enforcement agency, OIU cannot risk such associated future liability. OIU can no longer rely on the Grievant to do his job and the employment relationship has been tarnished forever. According to AIC Cook, termination was the only appropriate action to take with regard to the Grievant's actions. Therefore, pursuant to Article 20.09 in cases involving termination for dishonesty or making false statements, if you find that dishonesty occurred or false statements were made, the termination may not be modified.

C. Even though the Grievant did a good "deed,"he was not relieved of the duty to follow OIU procedures and to be honest.

The Union tried to rationalize the Grievant's behavior by stating that his narcotics purchase was good for the community. Although the results of the Grievant's actions had a beneficial outcome to the Portsmouth community, it is completely irrelevant to the Grievant's termination. Everything an agent does in his or her professional capacity has a beneficial outcome to the community—that is their job. The Union tried to muddy the waters by presenting a letter of commendation from Chief Horner. *See* Union Exhibit 1. Regardless of what Chief Horner wrote in this letter, he stated to Management during the hearing that he would not allow one of his officers to lie to him or disregard policy. He is not the Grievant's supervisor and has nothing to do with internal directives of OIU. Furthermore, he stated that he wrote the letter once he found out about the termination. The Employer does not understand why Chief Horner would be so concerned about helping out the Grievant, but refused to discuss an administrative matter with our Department upon request. He tried to say that he was told by the Prosecutor that he was not to talk to us, but he received that order after we first made contact and he never informed us of such restriction. Therefore, his testimony provided little guidance on whether termination was the appropriate form of discipline in this case.

D. The Union failed to present any evidence that the Employer singled the Grievant out by imposing the termination.

The Union argued in their opening statement that OIU was "under fire" and that the Grievant was terminated because of outside influences. Likewise, the Union stated that AIC Cook purposefully misrepresented the Grievant with regard to procedure. Although the Union made these allegations, they presented no evidence at the hearing to

substantiate such claims. The Directive is clear regarding the proper procedure to follow when making a narcotics purchase. AIC Cook distributed the Directive to the Grievant in the same manner as every other employee and there were no questions presented as to how it was to be implemented. Likewise, Agent Adkins testified that when AAIC Sagraves delivered the notice of administrative investigation to the Grievant, he told them that the Department was only out to get the Grievant and not her. This is simply not true. Even on rebuttal, AAIC Sagraves said that he made no such mention and that he was overly cautious about what he said because of such possible allegations. Thus, there is not a scintilla of evidence to support such allegations.

IV. CONCLUSION

In closing, you must look at the Grievant's termination as involving more than the events of February 3, 2005. The Grievant not only has a history of being dishonest, he has a history of lying while under oath. He has irreparably damaged his credibility as a law enforcement officer and if he is brought back to work, he will inevitably interfere with the successful operation of OIU. The Grievant's history shows that any discipline less than termination will not correct his behavior. The Employer gave him a second chance before and he has shown that he is unable to perform his job in a reliable and truthful manner.

Management has bargained for the right to manage and facilitate the method in which business is conducted. As stated above, the November 2003 Directive is not discriminative in any manner, does put an agent's safety in jeopardy, and does not restrict an agent from fully performing his or her duties as assigned. All the Grievant was required to do was call prior to the purchase to get supervisory permission. Not only did he fail to do this, he then was dishonest about the events that night. Given his past 10-day suspension, termination is clearly progressive and appropriate. Therefore, the Employer respectfully requests that you deny the grievance in its entirety.

Based on the above arguments, the Employer requests that the instant grievance be denied in its entirety.

DISCUSSION

The U.S. Supreme Court has cautioned that an arbitrator is confined to an interpretation and application of a collective bargaining agreement, and he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from a collective bargaining agreement. *Ohio Office of Collective Bargaining v. Ohio Civil Serv. Employees Ass'n, Local 11, AFSCME, AFL-CIO*, 59 Ohio St.3d 177, 180, 572 N.E.2d 71 (1991), citing *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

> The arbitrator is a creature of the contract between the parties and has only that authority and jurisdiction granted to him. Where the language of a contract is clear and unambiguous, it is his obligation to enforce it and not to apply his own concepts of fairness and justice. When the parties have agreed to include [specific provisions] within the contract and agree to their terms and conditions, the arbitrator must regard it as a contractual undertaking subject to the same treatment as any other provisions of the contract.

NES Equip. Rental, LP and Operating Eng'rs, Local 324, 05-1 Lab. Arb. Awards (CCH) P 3124 (Daniel 2004). Article 20, Section 20.08(5), of the Agreement, entitled "Limitations of the Arbitrator" provides the following language specifically limiting the arbitrator's authority:

> Only disputes involving the interpretation, application or alleged violation of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from, or modify any of the terms of this Agreement, nor shall the arbitrator impose on either party a limitation or obligation not specifically required by the language of this Agreement.

Generally, in an employee termination case, an arbitrator must determine whether an employer has proved clearly and convincingly that a discharged employee has committed an act warranting discipline and that the penalty of discharge is appropriate under the circumstances. *Hy-Vee Food Stores, Inc. and Local 747, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, 102 LA 555 (Bergist 1994). If an employer does not meet this burden, then an arbitrator must decide whether the amount of discipline is reasonable. In making this determination, the arbitrator may consider, among other circumstances, the nature of the Grievant's offense(s), the Grievant's previous work

record, and whether the employer has acted consistently with respect to similar previous offenses. *Presource Distrib. Servs., Inc. and Teamsters Local 284*, FMCS No. 96-01624 (1997). The right of an arbitrator to change or modify penalties found to be improper or too severe is inherent in the arbitrator's power to determine "just cause." This right is also inherent in the arbitrator's authority to finally resolve a dispute. Generally, an arbitrator will not substitute his own judgment for that of an employer unless the challenged penalty imposed is deemed to be excessive, given any mitigating circumstances. *Verizon Wireless and DWQ, Local 2236*, 117 LA 589 (Dichler 2002).

> Discharge from one's employment is management's most extreme penalty against an employee. Given its seriousness and finality, the burden of proof generally is held to be on the employer to prove guilt of a wrongdoing in a disciplinary discharge or to justify or show "good cause" for terminating an employee. This is especially true in cases, like this one, where the parties have agreed that the collective bargaining agreement requires "just cause" for disciplinary action, including discharge.

Int'l Assoc. of Machinists and Aerospace Workers Union, Dist. 160 and Intalco Aluminum Corp., 00-2 Lab. Arb. Awards (CCH) P 3608 (Nelson 2000).

When a collective bargaining agreement reserves to management the right to establish reasonable rules and regulations and the right to discharge for "just cause," but does not define what does constitute "just cause," it is proper for an arbitrator to look at employer policies, rules, statutes, and regulations to determine whether or not a discharge was

actually warranted. *E. Associated Coal Corp. and United Mine Workers of Am., Dist. 17*, 139 Lab. Arb. Awards (CCH) P 10,604 (1998).

> "Just cause" is the contractual principle that regulates an employer's disciplinary authority. It is an amorphous standard; ordinarily open to arbitral interpretation on a case-by-case basis. Before an arbitrator will uphold a penalty, he ordinarily looks to the circumstances of the misconduct, mitigating factors, and whether the aggrieved employee received his/her contractual and legal due process protections.

State of Iowa, Iowa State Penitentiary and Am. Fed'n of State, County and Mun. Employees, AFSCME State Council 61, 01-2 Lab. Arb. Awards (CCH) P 3923 (Dworkin 2001). The evidence provided by the Employer must satisfy both the question of any actual wrongdoing charged against an employee and the appropriateness of the punishment imposed. "Just cause" requires that employer policies and rules be fair and reasonable and that they be equally, even-handedly, and consistently applied to all employees. *Int'l Assoc. of Machinists and Aerospace Workers Union. Dist. 160 and Intalco Aluminum Corp.*, 00-2 Lab. Arb. Awards (CCH) P 3608 (Nelson 2000).

In this discharge matter, a determination of "just cause" hinges on the credibility of witness testimony. It is the role of an arbitrator to observe the witnesses and determine who is telling the truth. *Givaudin Corp.*, 80 LA 835, 839 (Deckerman 1983).

> The arbitrator must look beyond actual testimony and search to expose any bias or motivation for the testimony given. Where there is a conflict in testimony, this does not necessarily mean that any party may be deliberately misrepresenting or falsely testifying.

> Hearings may be replete with good faith conflicting testimony as to what the witnesses thought they heard or saw.

Am. Baking Co., Merita Div. and Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am., Local No. 28, Dist. 65, 87-1 Lab. Arb. Awards (CCH) P 8176 (Statham 1986). In addition to determining the credibility of witnesses, the arbitrator also determines the weight to be accorded the evidence submitted by the parties. *Minn. Teamsters Pub. and Law Enforcement Employees Union, Local No. 320 and City of Champlin, State of Minn.*, 00-2 Lab. Arb. Awards (CCH) P 3499 (Berquist 2000). Because reliability resolution is often the most difficult fact for any fact-finder to resolve, it is proper to take into account the appearance, manner, and demeanor of each witness while testifying, his apparent frankness and intelligence, his capacity for consecutive narration of acts and events, the probability of the story related by him, the advantages he appears to have had for gaining accurate information on the subject, the accuracy or retentiveness of his memory as well as the lapse of time affecting it, and even the intonation of his voice and his positiveness or uncertainty in testifying. *Racing Corp. of West Virginia d/b/a Tri-State Race and Gaming and United Steelworkers of Am., ALF-CIO*, 00-2 Lab. Arb. Awards (CCH) P 3625 (Frockt 2000).

In resolving the conflicts in witnesses' testimony, an arbitrator normally utilizes the same factors that a judge or jury would use is assessing witness credibility. In doing so, arbitrators and other triers of fact always

keep in consideration the fact that a witness may be motivated to testify falsely due to some self-interest. Certainly, a grievant accused of misconduct and facing a severe disciplinary penalty has such an interest, but other witnesses may also. In addition to considering questions of self-interest or motivation, it is also of value to consider whether parties acted in a way that reasonably prudent persons would under the circumstances and as events unfolded, thus by their actions confirming what is alleged to have taken place. *Racing Corp. of W.Va. d/b/a Tri-State Race and Gaming and United Steelworkers of Am., AFL-CIO, Local 14614,* 00-2 Lab. Arb. Awards (CCH) P 3625 (Frockt 2000).

In this particular matter, facts are in dispute regarding the Grievant's conduct in making the drug purchase without first obtaining supervisory approval and the "inconsistency" in his subsequent reports of the incident regarding the presence of a backup Task Force officer. The Arbitrator finds that the Employer has failed to meet its burden of proving that the Grievant lied to any DPS administrator or supervisor about the presence of a Task Force officer to serve as backup at the Silver Moon. There was no proof that the Grievant intentionally went into the bar with the knowledge that the Task Force officer, who volunteered at the preliminary planning meeting to serve as a backup officer, had not carried out that promised or intended act. There is also no evidence of any intent by the Grievant to lie for any personal gain or advantage.

Rather, the arbitrator finds, after a thorough review of all of the evidence in the record, that the Grievant's conduct resulted from his erroneous, yet reasonable, belief that the other Task Force officer would and did, in fact, carry out his promised act of preceding the Grievant into the bar. (Union Exh. 1, p. 5; Employer Exh. 1, p. 12kh) The Grievant's actions, in relying upon the promised conduct of the Task Force officer, certainly did not constitute dishonesty. Moreover, there is no clear or convincing proof that the Grievant was dishonest when he reported to Sagraves on the morning after the Silver Moon incident that backup officer protection had been provided to him. The evidence suggests that at this time the Grievant may not have been aware that the Task Force officer failed to execute his promised appearance as a backup officer. Without definitive evidence to suggest otherwise, it is not unreasonable to surmise that the alleged inconsistency in the statements made or given by the Grievant before and during the Employer's administrative investigation may have resulted from the Grievant's belated discovery that he had erred in believing that the Task Force officer had carried out the intended plan. A mistaken belief that another individual acted as promised does not constitute dishonesty or deception. After conferring with the two Task Force officers, the Grievant had probable cause to believe that criminal acts had been and would continue to be committed, and he had an

objectively reasonable, good faith belief that the Task Force officer would act in the manner that had been discussed and agreed upon.

The Grievant's conduct, coupled with the involvement of Agent Adkins and the Task Force officers, must be acknowledged as having had very positive and favorable results, especially for the citizens of Portsmouth. The circumstances and conditions involved in working as an undercover officer with veteran drug dealers in unfamiliar territory are certainly surrounded by a great deal of anxiety, tension, and risk. Article 58, Section 58.01 of the Agreement actually recognizes that enforcement officers are recognized as engaging in "hazardous duty" work assignments. And, for an officer who may not routinely engage in such dangerous acts of deception involving drug dealers, it is one that requires the full concentration necessary to convincingly play a role while controlling one's nerves. Under those circumstances, it is understandable that the Grievant failed to locate the backup Task Force officer within the bar and did not subsequently recall his name. I do not find that these failures, or the Grievant's statements concerning his undercover assignment rose to a level of intentional dishonesty.

The second basis for the Grievant's discipline, that he failed to follow DPS policy and procedure requiring him to seek supervisory approval before making the actual drug purchase, is viewed by the arbitrator as an act or omission meriting the use of progressive discipline.

However, the arbitrator finds that the circumstances do not merit the use of the most severe discipline of discharge. The determination of whether just cause exists to support a discharge depends on the factual circumstances of each case and is largely an issue for the trier of fact. *Simon v. Lake Geauga Printing* Co. (1982), 69 Ohio St. 2d 41, 45, 430 N.E.2d 468.

Arbitrators generally agree that, once proof of an offense has been established, the determination as to the appropriate penalty generally lies within the discretion of management. *Greene County Dept. of Human Res. and Teamsters Local 957*, FMCS Case No. 97/08895 (Sergent 1997). The "Management Rights" section of the Agreement included in Article 6, reserves to the Employer the right to make disciplinary decisions. That section specifically provides:

> Except to the extent modified by this Agreement, the Employer reserves exclusively all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to, the following:
>
> . . .
>
> B. Direct, supervise, evaluate, or hire employees;
>
> . . .
>
> D. Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;
>
> E. Suspend, discipline, demote, or discharge for just cause, or layoff, transfer, assign, schedule, promote, or retain employees;
>
> . . .

H. Effectively manage the work force;

. . .

Arbitrators do not lightly interfere with management's decisions in discipline and discharge matters, but that does not mean to suggest that they will sustain an action found to be unjust or unreasonable under all circumstances. The role of an arbitrator is extremely limited in a disciplinary discharge matter. "An arbitrator must review, not re-determine, the disciplinary action imposed by an employer. Arbitrators are not authorized to make a disciplinary decision on their own, and they should hesitate to substitute their judgment for that of management. The determination of employee misconduct is properly a function of management." *Operating Eng'rs Local Union No. 3 and Grace Pac. Corp.*, 01-2 Lab. Arb. Awards (CCH) P 3971 (Najita 2001).

When a grievance involves a challenge to a managerial decision, the standard of review is whether a challenged action is arbitrary, capricious, or taken in bad faith. *Kankakee (Ill.) School Dist. No. 111 and Serv. Employees Int'l Union, Local 73,* 117 LA 1209 (2002).

> Arbitrary conduct is not rooted in reason or judgment but is irrational under the circumstances. It is whimsical in character and not governed by any objective rule or standard. An action is described as arbitrary when it is without consideration and in disregard of facts and circumstances of a case and without a rational basis, justification, or excuse. The term "capricious" also defines a course of action that is whimsical, changeable, or inconstant.

City of Solon and Ohio Patrolman's Benevolent Ass'n, 114 LA 221 (Oberdank 2000).

After carefully considering all of the evidence included in the record, the arbitrator concludes that the Grievant's conduct did, in fact, merit the use of discipline based on his failure to comply with the specific policy requiring employees to solicit advance approval from their supervisor before engaging in drug purchase activity. The OIU's undercover work can be very difficult and dangerous, which underscores the need for discipline in its ranks. The Grievant needs to be put on notice that he cannot be cavalier about rules and directives that not only protect the OIU, but are also designed for his own safety. In the same regard, the Employer cannot disregard its contractual obligations under Article 21 to inform the Union of new or changed rules, policies, procedures and directives. The Employer argues that discharge was the appropriate level of discipline based on the severity of the Grievant's misconduct and his prior disciplinary record with the Employer. The Union, however, contends that, if the Grievant's misconduct merited the imposition of employee discipline, then progressive discipline should have been applied. "Progressive discipline" is defined in Ohio Administrative Code § 124-1-02(8) as follows:

> Progressive discipline generally means the act of discharging an employee in graduated increments and progressing through a logical sequence, such as a written reprimand for a first offense, a short suspension for the second offense, and a longer suspension or

removal for the third offense. The severity of the offense may negate the use of progressive discipline.

The application of progressive discipline by the Employer in this situation is based on the application of the following Agreement language, included in Article 19, "Disciplinary Procedure:"

> 19.01 Standard No bargaining unit member shall be reduced in pay or position, suspended or removed except for just cause.
>
> 19.05 Progressive Discipline The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. At the Employer's discretion, disciplinary action shall include:
>
> 1. Verbal Reprimand (with appropriate notation in employee's file);
> 2. Written Reprimand;
> 3. One or more fines in an amount of one (1) to five (5) days' pay for any form of discipline;
> 4. Suspension;
> 5. Leave reduction of one of more day(s);
> 6. Working suspension
> 7. Demotion; and
> 8. Termination.
>
> However, more severe discipline may be imposed at any point if the infraction or violation merits the more severe action.
>
> The Employer, at its discretion, is also free to impose less severe discipline in situations, which so warrant . . .

The "just cause" principle applies to the level of discipline, as well as to the reason for the discipline in dispute. That means that there must be some proportionality between the offense and the punishment imposed. The Employer must use progressive discipline, except in the most extreme cases, and that the Employer must weigh all mitigating factors, such as

the employee's seniority, the magnitude of the offense, and the employee's prior work record. *Lorillard Tobacco Co., Greensboro, N.C. and Bakery, Confectionary and Tobacco Workers Int'l Union, Local 317T,* 00-1 Lab. Arb. Awards (CCH) P3433 (Nolan 2000). The intent of progressive discipline is correction, and most offenses call for warnings to be used before termination is imposed. *City of Bell Gardens (Cal.),* 00-2 Lab. Arb. Awards (CCH) P 3489 (Pool 2000). It is the Employer's burden in a discipline and/or discharge case to prove guilt of wrongdoing and to also show "good cause" for the discipline and/or discharge action. The Work Rules for the sworn personnel of the Ohio Department of Public Safety (Joint Exh. 4, p. 19) actually include the following language in Section (B)(1) of the policy actually entitled "Administrative Investigation:"

> The Department of Public Safety follows a disciplinary procedure which attempts corrective action through a progression of steps designed to help the employee modify unacceptable behavior or job performance before more extreme disciplinary action is taken. The progressive disciplinary process, depending on the nature of misconduct, might involve a series to steps, including verbal reprimand, written reprimand, suspension, and demotion or removal.

Arbitrators almost universally agree that there are factors, which, if present, may mitigate against the imposition of discharge. *Int'l Union of Operating Eng'rs, Local 18 and Stein, Inc.,* 00-2 Lab. Arb. Awards (CCH) P 3582 (Shanker 2000). It is a serious violation of arbitral standards not to consider an employee's past work or performance record. *City of Houston (Tex.),* 07-2 Lab. Arb. Awards (CCH) P 8575 (Williams 1986). An

important factor in the instant matter is that progressive discipline was not utilized or apparently even considered in these circumstances as a viable alternative. Most arbitrators emphasize that the purpose of progressive discipline is not to punish, but rather to correct. Thus, except for the most egregious situations, arbitrators generally insist on progressive discipline in an attempt to correct before the imposition of the ultimate penalty of discharge. This is particularly true in situations, such as the instant matter, where no actual harm has resulted and the Grievant's conduct did produce successful results. There was also considerable conflicting testimony at hearing regarding the actual intent, application, and duration of the provisions in Cook's memorandum addressing the requirement for seeking supervisory pre-approval.

> In evaluating whether the penalty of termination was warranted, a wide range of factors may be considered. These include the grievant's entire work history; prior discipline; compliance with procedural or contractual requirements regarding progressive discipline; and any aggravating or mitigating circumstances.

Communication Workers of Am., AFL-CIO and Quest Communications Int'l, Inc., 01-2 Lab. Arb. Awards (CCH) P 3903 (Landau 2000). Such circumstances in the area of discipline include the nature of the offense and the degree of fault. *Hamilton County Sheriff's Dept. and Frat. Order of Police, Ohio Labor Council, Inc.*, 91-1 Lab. Arb. Awards (CCH) P8158 (Klein 1990).

Arbitrators have recognized that Employers must have some latitude in disciplinary situations and should exercise discretion to treat employee misconduct on a case-by-case basis. "Disciplinary actions must reflect the circumstances of each incident and the employment record of the individual employee." *Paper, Allied Indus., Chem., and Energy Workers Int'l Union, AFL-CIO, CLC, Local 8-0784 and Chinet Co.*, 01-1 Lab. Arb. Awards (CCH) P 3819 (Nelson 2000). Employee offenses are generally divided into the "extremely serious" and "less serious" categories. Less serious offenses call for a less severe penalty, providing the employee with an opportunity to correct the improper conduct. *Whiteway Mfg. Co.*, 85 LA 144 (Cloke 1946). Moreover, in the less serious cases, arbitrators generally apply progressive discipline, exercise leniency, and modify disciplinary penalties imposed by management when there are mitigating facts that indicate that the penalty is too severe.

In the instant matter, the Grievant's conduct justified progressive discipline being imposed. The arbitrator recognizes that the Grievant, as a veteran employee, failed to take the most appropriate course of action by failing to seek either Sagraves' or Cook's approval before ultimately carrying out the plans for executing the drug purchase. His colleague, Agent Adkins, committed the same error and was given a three-day suspension. The penalty of termination prescribed for the Grievant is the most severe from the range of all options available under Article 19. The

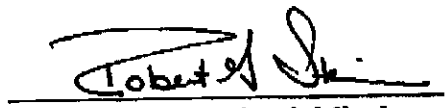
arbitrator finds that the Grievant's discharge in response to this offense is excessive, does not fit the "crime," and does not fundamentally comport with either progressive discipline or "just cause." The penalty imposed should be based on evaluating the actual harm resulting from an employee's conduct, rather than on speculation regarding other potential outcomes, to be congruent with progressive discipline and "just cause." *Yolo County Corr. Officers Ass'n.* The Employer, and most importantly the public it serves, benefited from the Grievant's conduct, which was carried out in a diligent manner to meet the intended outcome. The Portsmouth Police Department was well aware and most appreciative of the successful efforts made by the Grievant and Agent Adkins in response to the on-going violations at the Silver Moon. (Union Exh. 1) An Associated Press newspaper article appearing in the January 23, 2006 edition of The Canton Repository bears the following message: "Drug Dealers Ply Southern Ohio: Columbus Gangs Selling Cocaine in Portsmouth." In this article it states, "We've been told that Portsmouth is like the United Nations for gang members. Down here they don't fight over the deals. There is so much money to be made that it's open territory." The arbitrator sincerely hopes that the Employer and the Grievant can again combine talents in further Code 2000 partnership to curb the flow of narcotics from Columbus dealers in the Portsmouth area.

AWARD

The grievance is granted in part and denied in part.

The arbitrator finds that the Grievant's conduct was not so egregious as to merit the penalty of discharge. Accordingly, the Grievant's discharge will be vacated and converted into a twenty (20) - day suspension without pay. The Grievant's seniority shall be bridged and he shall be made whole for all lost wages and benefits during the period of non-employment subsequent to his April 26, 2005 discharge, excluding the twenty (20) work days included in the imposed suspension period. The salary award should be reduced to reflect any other W-2 income or unemployment compensation attributable to the Grievant for the period between his discharge and his reinstatement.

Respectfully submitted this 26th day of January 2006.



Robert G. Stein, Arbitrator