#1891

Arbitration Decision and Award in the matter of Arbitration between:

State of Ohio, Department of Public Safety, Unit Two

and

Fraternal Order of Police, Ohio Labor Council, Inc.

Case #'s: 15-00-05728-82-05-02
15-00-05729-83-05-02

Grievants: Mr. Chad Fannin
Mr. Gavin Stanton

E. William Lewis
Arbitrator

Hearing dates:	January 10, 2006
	January 25, 2006
Briefs received:	March 8, 2006
Decision issued:	April 8, 2006

Representing the Employer:	Representing the Union:
Ms. Krista M. Weida, Attorney	Mr. Paul L. Cox, Chief Counsel
Department of Public Safety	FOP/OLC, INC.
1970 West Broad Street	222 East Town Street
Columbus, Ohio 43223	Columbus, Ohio 43215

By mutual agreement, the Hearings were convened on January 10 and 25, 2006, at 10:00am in the Office of Collective Bargaining, Columbus, Ohio.

In attendance for the Employer:

Ms. Krista Weida	Attorney, ODPS
Cpt. C. R. Adams	Troy Police Dept.(witness)
S/Lt. John R. Allard	2nd Chair, ODPS
Ms. Kate Albert	Teacher, (witness)
Ms. Jessie Keyes	OCB
Lt. Kelley P. Hale	Ohio State Patrol (witness)
Mr. Scott A. Pohlman	Deputy Director, OIU(witness)
Lt. Robbin Schmutz	Ohio State Patrol, Toledo(witness)
Ms. Michelle A. Szuhay	Federal Reserve, Law Enforcement Officer (witness)
Ms. Terry Williams	Assistant Agent in Charge, OIU (witness)

In attendance for the Union:

Mr. Paul L. Cox	Chief Counsel, FOP/OLC
Mr. Joel Barden	Sr. Staff Rep., FOP/OLC (witness)
Mr. Stephan Clagg	ODPS-Retired (witness)
Mr. Ed Duvall Jr.	Akron Police Dept.—ODPS, Retired (witness)
Ms. Renee' Engelbach	Para Legal, FOP/OLC

Mr. Chad Fannin	Grievant (witness)
Mr. Gavin Stanton	Grievant (witness)

The the parties were asked to submit exhibits into the record. The following were stipulated to by the parties and submitted as Joint Exhibits:

Joint Exhibit # 1	Agreement, State of Ohio-Fraternal Of Police, Ohio Labor Coincil Inc., Unit 2 (2003-2006)
Joint Exhibit # 2	Discipline Trail: (a) Statement of Charges, (b) Notice of PD meeting, (c) Signed receipt of PD letter, (d) Findings of PD meeting, (e) Letter to Director Morckel, (f) Termination Letters, (g) Signed receipt of discipline letters
Joint Exhibit # 3	Grievance Trail: (a) Grievance Forms, dated July 28, 2005, (b) Waiver of Step 2 Responses, Dated August 2005
Joint Exhibit # 4	Deportment Records
Joint Exhibit # 5	Internal Investigation, Pre-Interview forms
Joint Exhibit # 6	Department of Public Safety Policy-Work Rules for Sworn Personnel 501.02

The following were submitted as Management Exhibits:

Management Exhibit # 1	Administrative Investigation 2005-5698
Management Exhibit # 1A	ODPS—Policy: INV 200.09-HANDLING AND DISPOSITION OF EVIDENCE 2/16/97
Management Exhibit # 2	TROY POLICE DEPARTMENT SUPPLEMENTAL REPORT

Management Exhibit # 3	OIU- MEMORANDUMS TO GRIEVANTS RE- AI 05-5698
Management Exhibit # 4	ODPS- INVESTIGATIVE UNIT, Daily Activity Report of Grievants' , dated: Thurs. Feb. 20, 2003

The following were submitted as Union Exhibits:

Union Exhibit # 1	Deportment Record Report of Toney Storey Dated: 7/22/2005

BACKGROUND:

The State of Ohio, Department of Public Safety, Ohio Investigative Unit (OIU), hereinafter known as the Employer, is an investigative and law enforcement unit focusing on illegal use and distribution of drugs and alcohol. The Fraternal Order of Police, Ohio Labor Council, hereinafter known as the Union, represents the Police Officers (1 & 2), Liquor Control Compliance Officers and Enforcement Agents, assigned to OIU.

The grievant's, Mr. Fannin and Mr. Stanton, were Enforcement Agents assigned to the Dayton, Ohio office at the time of the alleged incidents. Agent Fannin was hired in September 1999, and Agent Stanton was hired in April 2000, as Police Officers, and later promoted to Enforcement Agents. They were both terminated on July 27, 2005, by the Employer, for alleged events surrounding the investigation of a dance club in Troy, Ohio, called Total Xposure. The Ohio Investigative Unit was asked by the Troy Police Department to assist in investigating possible criminal activity at the club. Enforcement Agents Fannin and Stanton were assigned to assist Troy PD with the investigation. As a result of the grievant's associations with a confidential informant used in the Total Xposure investigation, they were accused of committing improprieties. These alleged infractions included supporting underage drinking, sexual activity with the CI, and inappropriate handling of confiscated evidence.

The Employer initiated an Administrative Investigation (AI) #05-5698, on April 11, 2005, as a result of an anonymous letter sent to the Director of Public Safety and the Columbus Dispatch. The letter accused OIU and Enforcement Agents Fannin and Stanton of improprieties. The AI was concluded on July 2, 2005 and the grievants were notified that they were being charged. They were charged with violating ODPS

Work Rules for Sworn Personnel; 501.02 (A)(4) Performance of Duty, and 501.02 (H)(1) Conduct Unbecoming an Officer. To wit: you inappropriately associated with a confidential informant bringing discredit to the Department of Public Safety and the Investigative Unit. You also failed to properly handle confiscated evidence/property, which constituted an error in judgement in the performance of your duties. A Pre-Disciplinary meeting was held on July 26, 2005, and the Meeting Officer found just cause for discipline. The grievants were notified that they were being terminated effective July 27, 2005.

Messrs. Fannin and Stanton filed a grievance on July 28, 2005 claiming the Employer violated ARTICLE 18 ADMINISTRATIVE INVESTIGATION, and ARTICLE 19 DISCIPLINARY PROCEDURE of the Agreement. The alleged violated Sections were identified by the Union as Section 18.02 (1.) Bargaining Unit Member Rights, and Section 19.01 Standard (just cause) and Section 19.05 Progressive Discipline. The grievants requested to be made whole for all lost time and to be returned to the job. On August 12, 2005 the parties agreed to waive the Employer's Step two response and move the grievances directly to arbitration (Step 3).

Both parties had a full and fair opportunity to present evidence and arguments in support of their positions in this matter. Specifically, they were permitted to make opening statements, to introduce admissible documentary evidence, to present witnesses who testified under oath, and to cross-examine the opponent's witnesses. Finally, the parties had a full opportunity either to offer closing arguments or to submit post-hearing briefs; they elected the latter.

The parties jointly stipulated that the grievances were properly before the arbitrator. However, there were Employer procedural violations claimed by the Union. These alleged procedure violations were identified on the Grievance Form and were brought up and argued at the commencement of the Hearing, and they will be first addressed by the arbitrator. Depending on the substantiveness of the claimed procedural violations, the merits of these cases may or may not be considered.

ISSUE:

The issue was stipulated to as follows:

"Were the grievants terminated for just cause? If not, what shall the remedy be?"

EMPLOYER POSITION:

The Employer argues that both grievants were terminated for just cause. They were terminated because of their involvement with events surrounding the Total Xposure, dance club investigation. The Ohio Investigative Unit was asked to assist the Troy Police Department in investigating possible criminal activity at the club. The grievant's provided Troy PD with a lead on a possible confidential informant (CI), and the PD hired the CI (MS. Szuhay) to work as a dancer.

At the request of the CI, a false ID was provided to her. The grievants provided Troy PD with several ID's, and one was picked resembling Ms. Szuhay. No LEADS were run on the ID and it turned out to be a valid ID, of a Ms. Haley Dawson. The valid ID was discovered when the CI used it when she was stopped for a traffic violation, while under cover. Although the providing of a valid ID by the grievants was determined not to be illegal, such practice by the grievants constituted poor judgement, and should not have been done, claims the Employer.

During the Total Xposure investigation, the Troy PD learned that both grievants had prior sexual relations with Ms. Szuhay. Troy PD, therefore, phased Agents Fannin and Stanton out of the investigation because of concerns of conflict of interest, and possibly losing good info by poor decision making, alleges the Employer. Ms. Szuhay would testify to the sexual relationships as well as being provided alcohol by the grievants, for her and her friends, while underage. The Employer also claims that Ms. Szuhay will testify that the grievants went to bars with her and her friends, who were underage. In essence, claims the Employer, Enforcement Agents Fannin and Stanton violated the very laws they have been sworn to uphold.

The acts by the Enforcement Agents have embarrassed the Department and are in violation of Public Safety Policy. They violated Policy # 501.02 (A)(4) Performance of Duty and 501.02 (H)(1) Conduct Unbecoming an Officer. The Employer requested the arbitrator to deny the grievances in their entirety.

UNION POSITION:

The Employer is violating the Collective Bargaining Agreement regarding investigations(Article 18), claims the Union. Before the Employer does an AI they have to specify what they are investigating. They also have to tell the, to be, investigated employee, what was not done. Management failed to tell Agents Fannin

and Stanton what the interviews were to be about, before interviewing them, improper declares the Union. Furthermore, investigators relied on hearsay evidence.

Sergeant Schmutz's pre-interview letter only addresses drivers license of CI, and improper off duty conduct. It does not provide details of the allegations, such as, dates, times and description of what the Employer is talking about. The details provide information about the evidence of this case. Under Articles 18 and 19 you can't do this the way the Employer did it, claims the Union. According to Article 18.02, 1., the notice has to include a statement that the employee is subject of an AI, the nature of the complaint or allegation of misconduct, allowing the employee to know the subject matter of the interview. That kind of information was not given to these employees. The Department, possibly, failed to include the information because they can't figure it out, alleged the Union.

According to the Union, Article 19, Section 19.4, requires the Employer to give written notice of pending discipline, including a statement of charges, recommended disciplinary action, and a summary of the evidence being brought, and there is no summary of evidence. The termination letters, dated July 27, 2005, do not address evidence at all, just the rules violated, charges the Union. The Employer failed to give the Union and the chargee's a statement of evidence during the procedures of these cases. Furthermore, they introduced other things, not part of the charge, to substantiate their case, underage drinking, Cincinnati occurrence, etc., claims the Union.

There were two charges in the final charge (Jt. 2) for which they were terminated July 22, 2005. The arbitrator is restricted to ruling on the two charges and the Employer has to prove at least two things, declares the Union. There is no rule prohibiting the grievants from doing what they did. There is no rule that prohibits what was done with the ID, claims the Union. In addition, states the Union, there is no rule that prohibits sexual activity with another adult, and Ms. Szuhay is not an employee of the Department. The charges are false, claims the Union. The Employer cannot charge two things and come in and prove six other things. The grievants were charged with two violations and they are not true, argues the Union. They did not mishandle the ID evidence, because there is no rule on how to handle ID evidence. Furthermore, the grievants did not have an improper relationship with Ms. Szuhay, declares the Union.

The Employer has the burden of proof, states the Union, however, they don't bring forth any evidence regarding who, when, where, etc. The Employer has the obligation to prove an action occurred by direct evidence, not that someone says it

occurred. They have not brought forward interviewers Stutz and Kunkleman to testify, only in the AI (ME-1), and Williams and Hale did not see the actions. The Union witnesses's are going to tell the arbitrator what happened, and there is no direct evidence to the contrary, except Ms. Szuhay and Ms. Albert.

The cases are a sham, claims the Union, and they request that the grievances be sustained in their entirety.

RELAVENT AGREEMENT PROVISIONS:

ARTICLE 18-ADMINISTRATIVE INVESTIGATION

18.02 Bargaining Unit Members

1. When an employee is to be interviewed or questioned concerning a complaint or an allegation of misconduct, the employee shall be informed of, prior to the interview, the nature of the investigation and whether the employees is the subject of the investigation or a witness in the investigation. Notice shall be provided to the employees who are subjects of the investigations and shall include:
   a. A statement that the employee is a subject of an administrative investigation.
   b. The nature of the complaint or allegation of misconduct so that the employee knows the subject matter of the interview.
   c. Information to the employee that the interview is part of an official administrative investigation and that failure to answer questions, completely and accurately, may lead to disciplinary action, including dismissal.
   d. The time and location of the interview.

18.11 Anonymous Complaints

When an anonymous complaint, where the complaint if true would or could not lead to criminal charges, is made against a member and no corroborative evidence is obtained through a prompt investigation by management, the complaint shall be classified as unfounded. No disciplinary action may be brought as the result of unfounded complaints and no reference to such complaint shall be contained in the employee's official personnel file.

ARTICLE 19- DISCIPLINARY PROCEDURE

19.04 Pre-suspension or Pre-termination Meeting

When the Employer initiates disciplinary action which is covered by this Section, written notice of a pre-disciplinary meeting shall be given to the employee who is the subject of the pending discipline. Written notice shall include a statement of the charges, recommended disciplinary action, a summary of the evidence being brought against the employee and the date, time and place of the meeting. The meeting will be held at a location determined by the Employer. The representative of the Employer shall be a member of the Division Staff or Facility Staff, as appointed by the director of the respective agencies or his/her designee, who is impartial and detached: i.e., not having been involved in the incident or investigation giving rise to the discipline.

4th paragraph.

The employee has the right to have a representative of his/her choice present at the meeting. The employee or his/her representative and the Employer's representative have the right to cross-examine any witnesses at the meeting or have voluntary witnesses present at the meeting to offer testimony, provided however, that the Employer maintains the right to limit the witnesses' testimony to the relevant to the proposed suspension or termination and to limit redundant testimony. The Employer shall first present the reasons for the proposed disciplinary action. The employee may, but is not required to give testimony. After having considered all evidence and testimony at the meeting, the Employer's representative shall, within twenty (20) working days of the conclusion of the meeting, submit a written recommendation to the Employer, the employee and the Labor Council representative involved.

PROCEDURAL ISSUE:

The Union claims that the Employer violated the Collective Bargaining Agreement by failing to follow the procedures outlined in Articles 18 & 19.

This investigation was caused to be initiated by an anonymous letter sent to the Director of DPS, and the Columbus Dispatch. Not only was the nature of the alleged misconduct carried in the Columbus paper, but was also published in the Dayton, Cincinnati and USA Today newspapers. There was widespread knowledge of the Total Xposure law enforcement activity and alleged misconduct. The grievants were aware of the problems early on, as they testified to during the AI interviews (ME-1).

The April memos to the grievants regarding the pending AI (05-5698) scheduled interviews, were specific, in the arbitrator's opinion. The DPS Administrative Investigation (05-5698) was put on hold since there were concerns of possible criminal activity on the part of OIU employees. The criminal investigation regarding the Total Xposure sting was continued by the Ohio State Patrol. The interviews of the involved persons were conducted by Lt. Hale (OSHP) during the months of late April and June 2005. While conducting his investigation, Lt. Hale contacted the grievants requesting an interview, however, after they consulted with their Union Attorney, they declined the interviews (ME-1).

The alleged criminal activity was not pursued and the AI was reactivated. On June 28, 2005 Agents Fannin and Stanton, along with Union Representative Bardon, signed Internal Investigation Pre-interview forms. The AI interviews were conducted by Sgt. Schmutz, and the forms identified the **known** allegations as: "events surrounding the investigation of Total Xposure including the use of an Ohio driver's license for a confidential informant and improper on and off duty conduct." For the Union Representative and the grievants to all be their, indicates to the arbitrator that they were given notice of continuing the AI. The employees had Union representation and they certainly knew the subject matter, either by the widespread newspaper articles, having received the April 15 & 18 memos, and the Pre-Interview form (ME-1&3, Jt. Ex.-5). In these particular cases, it is highly unlikely that the Union and the grievants did not know the subject matter of the AI interviews well in advance, as required in Section 18.02 of Article 18.

The Union further alleged that the Employer violated Article 19, Section 19.04 **Pre-Suspension or Pre-Termination Meeting.** Both grievants have been subjects of AI (05-5698), during which they were interviewed and asked numerous questions regarding their conduct with a Ms. Szuhay (CI) and their activities surrounding the Total Xposure investigation. No evidence was brought forward to indicate to the arbitrator that they were otherwise being investigated that could cause the grievants, or Union, to be confused. The Pre-D notice to the grievants, dated July 22, 2005, states; that they are charged with two specific Rule violations, disciplinary action up to and including removal, and evidence summary of; inappropriate association with a confidential informant and improper handling of confiscated evidence or property. In the arbitrator's opinion, the charges and summary were consistent with the Administrative and criminal investigation's focus, and typical of this Employer's discipline practice.

The Union further argues that when an anonymous complaint (Article 18.11), as initially in these cases, was filed and no corroborative evidence is obtained, the

complaint shall be classified as unfounded. The accusations in the letter were unfounded and no criminal actions were taken, argues the Union. The discipline imposed violates this provision and, therefore, the grievances should be sustained, implores the Union. Although there were no criminal charges brought, the Employer did not consider the allegations unfounded since they reinstated the Administrative Investigation. In fact, the criminal investigation information has been included in Management Exhibit #1, in accordance with Section 18.02, 7. This along with other evidence and testimony will be considered by the arbitrator.

I do find that the Employer was quick to discipline following the Pre-disciplinary meeting (Section 19.05-4th para), however, I do feel that the Employer complied with the spirit of this procedural requirement[1]. Without further substantive procedural violations, this would not be sufficient to deny arbitrability to the substantive issues.

Although the Employer may not have strictly complied with every contractual procedural element, The arbitrator does not find their non-compliance to be substantive or impacting the grievant's opportunity for due process[2]. The Union and grievants were certainly aware of the alleged misconduct, and an Administrative Investigation was conducted, Pre-disciplinary meetings were held, and Union Representation was included. Therefore, the procedural allegations by the Union are not substantive enough to bar arbitration of the merits of the cases.

SUBSTANTIVE ISSUE:

DISCUSSION:

The grievants, Messrs. Fannin and Stanton, were terminated by the Employer on July 27, 2005. They were charged with violating Ohio Department of Public Safety Work Rules for Sworn Personnel; 501.02(A)(4)- Performance of Duty, and 501.02(H)(1)-Conduct Unbecoming an Officer (Jt.-2). 501.02(A)(4)-Performance of Duty reads as follows: Employees who fail to perform assigned duties because of an error in judgement or otherwise fail to perform satisfactorily a duty of which such employee is capable, may be charged with inefficiency. 510.02(H)(1)-Conduct Unbecoming an Officer reads as follows: For conduct that may bring discredit to the Department of Public Safety, its Divisions, or its members. (Jt.-6)

[1] Elkouri & Elkouri, 6th Ed. Pg. 968
[2] Elkouri & Elkouri 6th Ed. Pg. 1255-Loudermill Rule

The alleged actions of misconduct committed by the two Enforcement Agents were identified by the Employer in Pre-disciplinary letters dated July 22, 2005. The Employer alleged that the grievants had inappropriate association with a confidential informant, bringing discredit to the Department of Public Safety and the Investigative Unit. They were also accused of failing to properly handle confiscated evidence/property, which constituted an error in judgement in performance of their duties (Jt.-2).

The Union claims, on behalf of the grievants, that the burden of proof is on the Employer, and they cannot prove that just cause existed for such disciplinary action. Furthermore, argues the Union, the discipline imposed was not progressive as required by the CBA. On the other hand, the Employer claims that the misconduct was egregious enough to merit more severe action, as permitted in Section 19.05 of Article 19. The evidence and testimony was extensive on both parties parts, in support of their positions.

The Employer claims that the grievants had inappropriate contact with a confidential informant, and their activity constituted Conduct Unbecoming an Officer (ME-1). In demonstration of this inappropriate contact the Employer, through evidence and testimony cites a number of incidents(ME-1). These alleged acts of misconduct date back to 1999 and thereafter, according to evidence and testimony. As a result of the Criminal and Administrative Investigations (ME-1), the Employer declares that the following grievant's actions were Unbecoming: (1)-taking Ms. Szuhay and friends to bars when they were underage, and supplying alcohol to them (underage) at their place of residence, (2)-having sexual relations with Ms. Szuhay, possibly, while on duty, (3)-inviting Ms. Szuhay and friend to their Cincinnati hotel room and providing alcohol to them (underage), while the Agents were their on business, and (4)-providing Ms. Szuhay and/or her friend transportation in a State owned vehicle.

The Union argues that the Employer is on a witch hunt, they can't charge two things and come in and prove six other things, says the Union. Further argues the Union, there is not a rule prohibiting sexual activity between two adults, and that Ms. Szuhay was not an employee of the Department. However, in the arbitrator's opinion, the Employer identified alleged misconduct activities were the components making up the charge of Unbecoming an Officer. These alleged activities were identified by various persons during either the criminal and/or administrative investigation of the Total Xposure investigation (ME-1).

The question before the arbitrator is whether the alleged activities of misconduct can be substantiated, by the Employer. Further, if one or all of the allegations are

substantiated, does it or they rise to the level of being Conduct Unbecoming an Officer?

The Total Xposure investigation occurred between October 2002 and April 2003 (ME-1). Approximately one-half way through that activity Ms. Szuhay was hired by Troy PD, as a confidential informant. During the criminal investigation regarding Total Xposure, Ms. Szuhay alleged that the grievants had supplied alcohol to her when she was underage. The alleged underage supplying of alcohol to Ms. Szuhay and friend had to occur before 1/6/01 (Szuhay's 21st birthday) and/or 11/20/01(Ms. Albert's 21st birthday). Ms. Szuhay, through her testimony and evidence, claims that the grievants took her and friends to bars, and brought alcohol to her dorm/residence when she was underage. Ms. Szuhay's allegations were substantiated by witness Albert, her college roomate during 1999 and 2000. Ms. Albert also testified that both Agents took them to bars and brought alcohol to their dorm room when they were underage. On the other hand, the grievants through testimony, denied knowing Ms. Szuhay before late in the year of 2000(Stanton), and early in 2001 (Fannin). Ms. Szuhay also testified that she met the grievants in October 99 when she was working as a CI, for Dayton vice. This testimony is directly contradicted by both grievant's testimony. Both Agents stated that they did not transfer to Dayton until April 2000. Furthermore, Agent Fannin testified that he did not meet Ms. Szuhay until early 2001, when she was working for Dayton vice. This is critical to the arbitrator, since Agent Fannin could not have participated in Szhay's "underage drinking", if he hadn't met her until after she was 21. I understand that it is 2006, and the AI occurred in the late spring and early summer of 2005 and memories may have dimmed. However, the allegation of supporting underage drinking by a Liquor Enforcement Agent, is monumental. The dates alleged by Ms. Szuhay and her roomate do not coincide with the grievant's. The dates cited by the grievants were part of their direct testimony and they were not challenged by the Employer in cross examination. One piece of testimony and evidence is consistent in this matter, and that is that the grievants and Ms. Szuhay agree that they met while she was a CI for Dayton vice. The creditability of Szuhay's and Albert's testimony is impugned, in the arbitrator's opinion.

The second allegation component of the Conduct Unbecoming an Officer was that the agents had sexual relations, possibly while on duty, with the CI, Ms. Szuhay (ME-1). No creditable evidence was presented that the alleged sexual activity occurred while the agents were on duty (ME-1, + polys.). Agent Stanton, in his AI interview and during direct testimony, admits to a sexual relationship. There is also evidence and testimony, although denied by Agent Fannin, that he also had sex with Ms. Szuhay. Other than raising creditability concerns to the arbitrator, the sexual

activities on the part of the grievants and Ms. Szuhay did not appear to be unlawful. Nor, according to all evidence ant testimony, did they occur while she and the grievants were working the Total Xposure investigation. According to Cpt. Adams, Troy PD had some concerns about the rumors of a sexual relationship, but by that time, according to his AI interview, all the necessary liquor issues had been covered.

The third alleged misconduct charge, of inviting Ms. Szuhay and a friend to their Cincinnati hotel room, did occur, in the arbitrator's opinion. However, no creditable evidence proves that there was underage drinking. Agent Storey's testimony (ME-1), during the criminal investigation, places Ms. Szuhay at the room when she would have been 21. Unless her friend, never identified, was underage, Ms. Szuhay was of legal age. Certainly having women friends at an Employer paid for hotel would be inappropriate, especially if they were supposed to be working. However, the grievants on duty status was never established.

The last claimed component of the charge of Unbecoming an Officer was that the grievants provided Ms. Szuhay and friends rides in a State owned vehicle, while on duty. No evidence and testimony charged Agent Fannin with giving rides in a State owned vehicle to Szuhay and friends, however, Ms. Szuhay and Ms. Albert claimed that Agent Stanton provided on duty transportation (ME-1, criminal inv.). Agent Stanton testified that Ms. Szuhay rode in his State car while working with Dayton vice, accompanied by Detective Knight of Dayton vice. The arbitrator is not convinced of the creditability of the claims, nor are these claims significant when one considers the other allegations.

The other charge of inefficiency in Performance of Duty, revolves around the Total Xposure investigation, which the preponderance of evidence and testimony address. Enforcement Agents Fannin and Stanton were accused of mishandling conficated evidence/property.

Evidence and testimony show that Troy PD and the Ohio Investigative Unit, Dayton Office, began investigating the Total Xposure dance club around October 2002, and Troy PD concluded the activity in the spring of 2003. A number of joint meetings were held for planning and operation throughout the activity. The meetings were generally attended by the local Prosecutor, OIU supervision, including Agents Fannin and Stanton, and Troy PD (ME-1).

Sometime during the investigation, late January or early February, a determination was made to insert a confidential informant (Ms. Szuhay). According to the grievant's testimony, Ms. Szuhay's name came from a brainstorming session with

Troy PD, to be the CI. She was interviewed by Troy PD and selected. Ms. Szuhay, among other things, requested a fake ID (drivers license) for security purposes (ME-1). The CI was provided with the requested ID which was secured by Agents Fannin and Stanton from the Dayton OIU office, according to evidence and testimony. While still undercover Ms. Szuhay was stopped for a traffic violation and produced the "fake" ID, for identification (ME-1). She notified Troy PD soon thereafter, and the OSHP was contacted and corrections were made. However, it was determined that Ms. Szuhay's "fake ID" was really a valid drivers license of a Ms. Dawson (ME-1). It was determined by DPS that the grievants had mishandled confiscated evidence/property and they were charged with an error in judgement and inefficiency (Jt. –6).

The Union argues that there was no policy or rule addressing the providing of ID's for undercover work, and no rule or policy was brought forward by the Employer. However, much testimony was given by Employer witnesses regarding the proper handling of property/evidence, such as confiscated ID's. Unrefuted testimony and evidence established that the ID had come from a group of "fake" ID's unsecured, in the Dayton office (ME-1). The consequences of this particular valid ID being put back in circulation in this manner could have been monumental for the actual person.

OPINION:

The Department and OIU, as a result of the anonymous letter and resulting newspaper articles, did receive negative publicity. However, the charge of Behavior Unbecoming and Officer was based on allegations made by Ms. Szuhay and allegedly substantiated by one of her roomates, Ms. Albert. There were no interviews of Ms. Szuhay or Ms. Albert conducted by OIU Administrative Investigators. Lt. Hale, of OSHP, was the only investigative interviewer of Ms. Szuhay and Albert. Lt. Hale was investigating for criminal charges and focused on the Total Xposure activities. Therefore, only two paragraphs of interview notes per interviewee, were devoted to Conduct Unbecoming. A June 6, 2005, taped phone conversation between Agent Stanton and Ms. Szuhay, again conducted through Lt. Hale, was inconclusive, in the arbitrator's opinion. Furthermore, the involuntary polygraphs of the grievants did not substantiate the alleged on duty sexual activity.

Ms. Szuhay's creditability was of concern to the Troy PD and is of concern to the arbitrator. She alleges underage drinking activities (significant) with the grievants, when one of the grievants (Fannin) had not yet met her. The arbitrator must assume that these misconduct charges are substantive, however, not much substantive

attention was paid to the investigation of the allegations. Grievant Stanton does testify that he had an off duty sexual relationship with Ms. Szuhay, and he did provide her some transportation in his State vehicle. The evidence and testimony is not clear and convincing to the arbitrator that many of the alleged misconduct activities occurred, relative to the charge of Conduct Unbecoming an Officer.

What responsibility does the Employer have in the confiscated evidence/property (ID) issue? Evidence and testimony showed that some confiscated evidence and property (ID) was not held in a secure place at the Dayton OIU Office. In addition, no written rule or policy regarding agent use of confiscated ID's was introduced into evidence.

However, as Sworn Officers, the grievants had a common sense duty to protect the security of an innocent citizen. As testified to by Employer witnesses, there were other acceptable and preferred methods for OIU Agents to acquire secured fake ID's. Although I do not consider the Enforcement Agents as "rogue" Agents, they did in the arbitrator's opinion, commit a serious error in judgement in providing an inappropriate ID to Troy PD.

Based on the evidence and testimony the arbitrator is not convinced that the two charged infractions rise to the level of removal. I find the discipline to be excessive[3], and not commensurate the proven offense. However, the arbitrator does not agree with the Union's claim that the violations were not serious or severe enough to allow the Employer to issue strong discipline (Article 19, Section 19.05-Progressive Discipline).

AWARD:

Considering the Enforcement Agents Fannin and Stanton's clean Deportment Record and the evidence and testimony, the arbitrator is reducing the discipline of removal to suspensions.

Enforcement Agent Stanton's suspension is to be for a period of ninety (90) days and he is to be returned to work in his former capacity, as soon as possible, and made whole for benefits and wages lost.

[3] Elkouri & Elkouri, 6th Ed. –review of penalties imposed by management.

Enforcement Agent Fannin's suspension is to be for a period of sixty (60) days and he is to be returned to work in his former capacity, as soon as possible, and made whole for lost benefits and wages.

This concludes the arbitration decision.

Respectfully submitted this 8th day of April 2006.

E. William Lewis
Arbitrator

In the matter of Arbitration Clarification between:

State of Ohio, department of Public safety, Unit Two

And

Fraternal Order of Police, Ohio Labor Council, Inc.

Case #'s: 15-00-05728-82-05-02
15-00-05729-83-05-02

Grievants: Mr. Chad Fannin
Mr. Gavin Stanton

E. William Lewis
Arbitrator

Hearing date: December 4, 2006
Clarification issued: January 11, 2007

Representing the Employer:

Ms. Krista M. Weida, Attorney
Department of Public Safety
1970 West Broad Street
Columbus, Ohio 43223

Representing the Union:

Mr. Paul Cox, Chief Council
FOP/OLC, INC.
222 East Town Street
Columbus, Ohio 43215

By mutual agreement, the hearing was convened on December 4, 2006, at 10:00am. The hearing was held at the Fraternal Order of Police Office, 222 East Town Street.

In attendance for the Employer:

Ms. Krista M. Weida	Attorney, ODPS
S/Lt. John R. Allard	2nd Chair, ODPS
Mr. Joseph Eckstein	Witness, ODPS
Ms. Jesse Keyes	OCB
Mr. Kevin C. Page	Witness, ODPS
Ms. Jenny Tipton	Witness, ODPS

In attendance for the Union:

Mr. Paul L. Cox	Chief Counsel
Mr. Joel Barden	Sr. Staff Rep., FOP/OLC
Ms. Renee Engelbach	Paralegal, FOP/OLC
Mr. Chad Fannin	Grievant
Mr. Gavin Stanton	Grievant

The following exhibits were submitted by the parties:

Joint Exhibit #1	Agreement, State of Ohio-Fraternal Order of Police, Ohio Labor Council, Unit 2 (2003-2006)

The following were submitted as Employer Exhibits:

Employer Exhibit #1	Work sheet showing grievants' suspension time, work verses calendar days
Employer Exhibit #2	PERSONNEL ACTION Sheet Chad Fannin
Employer Exhibit #3	PERSONNEL ACTION Sheet Gavin Stanton
Employer Exhibit #4	Harry Graham, Arbitration Case July 20, 1997 (ODNR/FOP)

The following were submitted as Union Exhibits:

Union Exhibit #1	Court of Appeals of Ohio case addressing tax liability
Union Exhibit #2	Chad Fannin's Daily Activity Reports January 4, 2005 thru July 7, 2005
Union Exhibit #3	Gavin Stanton's Daily Activity Reports-December 28, 2004 thru July 14, 2005

BACKGROUND:

As a result of reinstatement of grievants' Fannin and Stanton, the Union challenged the Employer's attempts to comply with the arbitrator's award. The award in Mr. Fannin's case, was a suspension of sixty days, returned to work in his former capacity, and to be made whole for benefits and wages lost. The same was true for Mr. Stanton, except that the suspension was for ninety days.

The Employer returned both grievants to there former capacity on 5/1/06. However, the Union raised a number of issues regarding the Employer

application of the suspension time and the make whole for wages and benefits. The hearing was held on 12/4/06, and the parties jointly requested that the proceedings be conducted in an informal manner. There were eight issues identified and discussed in an informal setting, and two of them were settled in principle to work-out.

ISSUES AND POSITIONS OF THE EMPLOYER AND UNION:

The following eight issues and positions were identified and numbered by the parties:

Issue #1; Suspension duration
Employer Position: work days (90 and 60)
Union Position: calendar days (90 and 60)

Issue #2: Withdrawal of Public Employees Retirement System contributions and Deferred Compensation amounts.
Union Position: Both grievant's withdrew their Deferred Compensation contributions and paid withdrawal penalties and increased taxes on those amounts. They are requesting compensation for the increased taxes paid and early withdrawal penalty.
Employer Position; That was a voluntary choice on their part, and the Employer can't be held liable for endless decisions of a terminated employee.

Issue #3: Lost holiday pay
Union Position: Both employees are entitled to and additional eight hours pay for Christmas 2005 and New years 2006.
Employer Position: Both employees were paid forty hours for those weeks.

Issue #4: Step increase pay
Union Position: Both grievants are alleging that they are one step below where they should be.
Employer Position: Grievants should be at the proper step, if not, will correct.
Settled in principle, remanded to the Union and Employer to make certain the grievants at the proper step.

Issue #5: Determination of lost overtime.

Union Position: Employees regularly worked Tobacco Grant, at an overtime rate. The should be reimbursed for their lost opportunities.

Employer Position: The State has never calculated overtime, including grants, in back pay awards.

Issues #6: Shift Differential

Union Position: Both grievants got shift differential at $.45/hr., and approximately one-half of their hours worked in previous seven months before termination, they were paid shift differential.

Employer Position: Practice of DPS, not to pay shift differential in back pay awards. Back pay awards are paid as if on an administrative schedule.

Issue #7: Sick Leave cash-out (Article 40, Section 40.05)

Union Position: The grievants were erronously terminated, therefore the 50% of the employer portion should be reinstated

Employer Position: If the grievants pay back the 50% employee portion, the Employer will reinstate 100%, or a commensurate percentage of that paid back by the grievant, if less than 50%.

Issue #8: Uniform Allowance (Article 29)

Union Position: The grievants question whether they were paid their allowance for July 2005.

Employer Position: If not paid, will pay.

Settled in principle. Employer Payroll Representative and Union Representative to resolve.

DISCUSSION AND DECISION:

The remedy requested on the grievance was to be made whole for all lost time and be returned to their job. The clarification request on the eight issues brought before the arbitrator, has in the arbitrator's opinion, exacerbated the requested remedy. There is no evidence that the Employer was malicious in addressing the grievants' workplace behavior, and the Union and Employer have to maintain an on-going labor-management relationship.

An arbitrator, in determining remedies, should not wield his own brand of workplace justice[1]. The remedy guidelines suggested by Elkouri & Elkouri (6th Ed.), in the arbitrator's opinion, take into account the needs of the parties.

1. In form the remedy should be one that would appear to most directly effectuate the intent and purposes of that provision in the labor agreement in connection with which the right was contracted.
2. The party called upon to give the remedy should not be subjected to well-founded surprise by the form, nature, extent and degree of the remedy. What is awarded should be within the realm of conceivable and reasonable remedial expectation by the party in error or by other parties were they to be similarly circumstanced.
3. Remedies that are punitive in monetary or exemplary nature should be avoided, on the ground that parties bargaining collectively in a more or less perpetual relationship should not seek that one or the other partner be punished for a mistake. To seek and to obtain punishment is putting a mortgage on the future happiness of the joint relationship...
4. Remedies that are novel in form should be avoided, again for reasons of unexpectedness or possible well-based surprise. A novel remedy might bring with it unforeseen contractual and other impacts on one or both of the parties and create uncertainty as to what may result from future submissions to arbitration. The concept of the arbitrator having an "arsenal" of forms of relief, with the parties in a position of uncertainty rather than expectation, should be avoided in what is a private litigation seeking to resolve a dispute. Suspense in a private relationship might subvert the efficacy of that relationship.

Considering the above, the arbitrator will address the identified issues.

Issue #1: Length of suspension

The arbitrator's award was for ninety (90) days. The arbitrator understands that the Employer suspends for work days, and need to do so, for clarification purposes. The Employer's Exhibit #1 converts calendar days to work days, 43 for Mr. Fannin and 65 for Mr. Stanton, and that is to be their work-day suspension. In the arbitrator's opinion, this award is in compliance with the intent of the parties, regarding suspensions (Sec. 19.03).

Issue #2: Withdrawal of Public Employee Retirement System & Deferred Compensation contribution amounts.

[1] Elkouri & Elkouri 6th Ed. Pg. 1193

The grievants are requesting compensation for taxes and penalties for their withdrawing Deferred Compensation. These were voluntary choices made by the grievants, and for the arbitrator to award compensation, when not deserving, for taxes paid etc., would be punitive and create further labor-management complicity. PERS contributions and deductions were made for the termination period. The Union's request is denied.

Issue #3: Holiday pay

The grievants' request for sixteen (16) hours of additional holiday pay is denied. The grievants were paid forty (40) hours for those weeks. The Employer's unrefuted claim, of always paying holiday pay on an administrative schedule is sustained.

Issue #4: Step increase pay

The Employer agreed, that if the grievants' are not being paid at the proper step, they will correct. Employer Representative Eckstein and Union Senior Staff Representative Barden, are to investigate and work it out.

Issue #5: Request for lost overtime

Overtime is not generally awarded in back pay remedies, unless it can be shown to be a normal part of an employees work schedule. Neither grievants submitted evidence showed overtime as being anything other than a minimal part of their past work hours and percentage of wages. The Union request is denied.

Issue #6: Shift Differential (Article 57)

There is no evidence (UE-2&3) that either of the grievants' regular work schedule would entitle them to shift differential, in accordance with Article 57. Agent Stanton seldom received shift differential. Agent Fannin received the majority of his shift differential when assigned to work with another Agent, which did not appear to be his normal shift. The request is denied.

Issue #7: Sick Leave Cash-out (Article 40, Section 40.05)

The grievants' received their 50% unused sick leave cash-out. Their request to have the Employer's 50% reinstated is denied. They may, as the Employer stated, have such leave reinstated by returning the lump sum amount, or any portion thereof, and receive a matching portion by the State (Sec. 40.05). The Employer credited the grievants' sick leave accounts equal to the time lost while terminated.

Issue #8: Uniform Allowance (Article 29)

Settled in principle. If the grievants were not paid appropriately for the allowance in 2005, the Employer will correct. The matter is to be worked out between the Employer's Payroll Representative and the Union's Senior Staff Representative.

This concludes the Clarification decision.

Respectfully submitted, this 11th day of January 2007.

E. William Lewis
Arbitrator