#1889

IN THE MATTER OF ARBITRATION

BETWEEN

OHIO STATE TROOPERS ASSOCIATION, INC., UNIT 15

AND

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

Before: Robert G. Stein
CASE#
15-03-060329-0068-04-01

Grievant:

TROOPER PHILLIP J. LAJOYE

Advocate for the EMPLOYER:

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INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the Last Chance Agreement (herein "LCA") (Joint Exh. 3g), which was signed on January 12, 2006 by Trooper Phillip J. LaJoye (herein "LaJoye" or "Grievant"). The LCA was also concurrently signed by a representative of both the Ohio Department of Public Safety, Division of the Ohio State Highway Patrol (herein "OHP" or "Employer") and the Ohio State Troopers Association, Inc., Unit 15. (herein "Union").

Robert G. Stein was selected by the parties to arbitrate this matter as a member of the panel of permanent umpires, pursuant to Article 20, Section 20.08 of the Collective Bargaining Agreement (herein "Agreement") (Joint Exh.1), which is effective from 2003 through 2006. A hearing on this matter, also identified as case number 15-03-060329-0068-04001, was held on May 23, 2006 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 fully-written transcript, was subsequently closed upon the parties' submissions of post-hearing briefs. The parties each stipulated to the statement of the issue, a series of background facts, and the admission of three joint exhibits.

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

ISSUE

In conformity with the provisions of Article 20, Section 20.08 of the Agreement, the parties jointly submitted the following statement of the issue for resolution by the arbitrator:

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

BACKGROUND

Trooper LaJoye is a sixteen-year veteran of the OHP, having been assigned to the Portsmouth, Ohio Post in District 9 at the time of his termination. On October 2, 2005, LaJoye participated with many other law enforcement officers, representing other federal and local departments, in a "Law Enforcement Blitz" in the area including Scioto County, Ohio. As part of an effort to arrest a long-sought, elusive suspect known as Kyle Colley, who was the subject of multiple outstanding arrest warrants on a variety of charges, LaJoye deployed an electronic restraint

device (herein "Taser") as suspect Colley attempted to pull away on his ATV from the lead cruiser in which the Grievant was a passenger. These events occurred in a private and heavily-wooded area where Colley normally resided. Because the effect of the Taser was minimized by the suspect having physically moved the ATV and thereby caused the prongs of the Taser to be removed, Colley was able to escape from this unsuccessful attempted capture incident but did turn himself in to local authorities within in a few days.

A customary case review automatically resulted from the Grievant's use of force in that October 2, 2005 incident. Even though it was initially determined at the local level by the Portsmouth Post Commander that "Trooper LaJoye did not violate Division rules and regulations" related to the Response to Resistance—Less-Lethal Weapons Policy (Union Exh. 4), the continued review and investigation ultimately resulted in a January 9, 2006 disciplinary notice letter to LaJoye from the state OHP Superintendent, advising LaJoye of a pre-disciplinary meeting and the intended issuance of a LCA for improperly discharging the Taser from the moving patrol car and striking a suspect who was in operation of a motor vehicle. The official statement of charges (Management Exh. 4) asserted the Grievant's violation of Ohio Administrative Code § 4501:2-6-02((B)(5), Performance of Duty and Conduct, which includes the following language:

Members who fail to perform their duties because of an error in judgment or otherwise fail to satisfactorily perform a duty of which such member is capable, may be charged with inefficiency.

The Employer, Union, and Grievant mutually entered into a Last Chance Disciplinary Agreement on January 12, 2006, which includes the following conclusory findings:

> As a result of administrative investigation #05-6564, the Employee was found to have violated Ohio State Highway Patrol Rules and Regulations, specifically: 4501:2-6-02(B)(5) Performance of Duty/Inefficiency. It was found on October 2, 2005 that Trooper LaJoye failed to perform a duty because of an error in judgment or otherwise failed to satisfactorily perform a duty of which he was capable when he discharged a Taser from a moving patrol car striking a suspect who was in operation of a motor vehicle. Due to the Employee's failure to meet behavioral expectations of the Employer, the Director of Public Safety determined that termination was appropriate.
>
> However, the parties hereby agree to provide the Employee with a last chance to correct his behavior. The Employer will hold the termination in abeyance provided that the Employee does not violate the terms of this Agreement. The following are the terms the parties agree to:
>
> 1. If the Employer has any **rule violation of a same or similar nature** related to the cited work rule during the term of this agreement, the Employee will be removed from his employment with the Ohio State Highway Patrol.
>
> 2. Grievance rights related to a removal under this agreement will be limited to a challenge of whether his behavior constitutes a violation of a triggering work rule(s). The level of discipline may not be challenged or made an issue at arbitration.
>
> 3. This agreement is valid for two years
>
> . . . (Emphasis added).

The next significant incident occurred on February 21, 2006, when the Grievant failed to report to the Ohio State Highway Patrol Academy to complete additional in-service qualification training. The basic facts, as stipulated by the parties, are as follows:

> Grievant was originally scheduled for In-Service in May of 2005. His training was cancelled due to an injury. When he came back to duty in 2005 he was never rescheduled to attend the training. In February of 2006, post supervision realized Grievant had not qualified in 2005 and he was scheduled by District to qualify on February 16th. After qualification, Grievant was to report back to the Academy to complete In-Service on February 21, 2006 at 9:00 a.m. The Academy did not notify District or the Portsmouth Post that Grievant was to report on February 21st. The duty schedule at the Portsmouth Post did not contain an entry that Grievant was to report to the Academy on February 21st.

Based on these events, the Grievant was issued a statement of charges on March 24, 2006, advising him that his employment would be terminated as a result of investigation number 06-6879. A grievance (Joint Exh. 2) was filed by LaJoye on March 28, 2005, alleging violation of Article 19 of the Agreement—Disciplinary Procedure. Because the instant grievance remained unresolved after passing through the preliminary stages of the grievance procedure, the matter was advanced to the arbitration level pursuant to the terms of Article 19.

POSITION OF THE UNION

The Union's basic contention is that LaJoye's failure to attend a half-day classroom in-service training session did not trigger the termination

which was being held in abeyance pursuant to the previously-executed LCA. The Union insists that the parties agreed that the termination discipline being held in abeyance would be triggered "only upon subsequent conduct of the same or similar nature as that cited in the abeyance agreement." (Union brief p. 3). The Union argues that the Grievant's purported misconduct or "offense" of failing to report for the required in-service training was not of the same or similar nature as the Taser incident and did not thereby "trigger" a violation of the LCA by the Grievant.

The Union cites to prior LCA's utilized by the OHP and other troopers, contending that all of the abeyance situations arising after a change in Agreement language demonstrate that the "Employer knew, understood, and acted in accordance with the requirement that the 'same or similar' conduct or misbehavior must be present to impose the discipline held in abeyance." (Union brief p. 8). The Union therefore claims that LaJoye's failure to attend the half-day classroom in-service training at the Ohio State Highway Patrol Academy was not a triggering event for his termination under the LCA.

The Union also contends that it was the Employer who actually failed to meet its duty of initially rescheduling the Grievant for his 2005 in-service training after he returned to work in July, 2005. Then, while at the Academy to qualify with his firearms on February 16, 2005, when it was

discovered that the Grievant needed to return five days later to attend a makeup classroom day for his 2005 training, the Academy failed to e-mail or otherwise inform the Grievant's Post that he was required to return for additional training and was thereby "complicit in LaJoye's failure to attend the Academy on February 21, 2005" by failing to properly re-schedule him for his make-up day at the Academy. (Union brief p. 17).

The Union argues that, because the Grievant's failure to participate in the half-day in-service program "did not demonstrate misbehavior of a nature that would constitute a termination," LaJoye should be reinstated with full back pay.

POSITION OF THE EMPLOYER

The Employer basically refutes the Grievant's claims and insists that the Grievant was properly discharged from his employment with the OHP on March 28, 2006 after the Employer determined that the Grievant had committed a violation of Ohio Administrative Code § 4501:2-6-02(B)(5)—Performance of Duty by failing to attend the Academy in-service session on February 21, 2006, based on the terms of the LCA. The Employer insists that: "It was found on October 2, 2005 that Trooper LaJoye failed to perform a duty because of an error in judgment of which he was capable when he discharged a Taser from his moving patrol car striking a suspect who was in operation of a motor vehicle." (Management Exh. 4;

Employer brief p. 2.) Then, the Employer insists, after the Grievant had entered the LCA on January 12, 2006, "an administrative investigation was initiated and the Grievant was charged with a violation of the [same] Performance of Duty Rule for failing to report as directed by a supervisor for In-Service training at the Academy." (Joint Exh. 3; Employer brief p. 2). The Employer insists that discharge of the Grievant was the appropriate level of discipline imposed based on the terms of the LCA "and the state of the Grievant's deportment record." The Employer insists that the two incidents were indeed "of a same or similar nature," as identified in the LCA, because both of the incidents purportedly "are Performance of Duty violations and Grievant was capable of performing these duties in the appropriate manner. He simply chose not to." (Employer brief p. 6).

The Employer contends that Sergeant Miller had noted to the Union and the Grievant "that the Performance of Duty rule on the Last Chance Agreement was very broad" and that the Grievant "would have to keep his nose clean" or "walk the straight and narrow for the next two years." Major Young purportedly had also preliminarily advised the Grievant that there was "'not much room for error' with a performance of duty violation on a last chance agreement." (Employer brief p. 6).

The Employer stresses that the Grievant's disciplinary record indicates a prior one-day suspension, a three-day suspension, and a ten-day suspension with three of the days held in abeyance, a verbal

reprimand, all before he was issued a termination which was ultimately held in abeyance with the execution of the LCA on January 12, 2006. The Employer contends that the next appropriate level of discipline for an additional or subsequent violation "would have to be discharge." (Employer brief p. 8). The Employer insists that the established disciplinary record demonstrates the Grievant's inability and/or unwillingness to change his behavior despite the imposition of successively more severe discipline and that his termination was the next step in the progressive discipline ladder or track based on the Grievant's substandard conduct, no matter how minor the infraction may appear, due to the Grievant's failure to modify or correct his behavior and to perform in accordance with the Employer's work rules, policies, and expectations.

The Employer insists that the Grievant committed a performance of duty violation by failing to report to the in-service training session, as directed by an Academy sergeant, allegedly exemplifying another error in his professional judgment. Therefore, the Employer requests that the instant grievance be denied in its entirety.

DISCUSSION

As identified, *supra*, the issue to be resolved here is whether the Grievant did, in fact, engage in conduct which triggered the termination discipline held in abeyance in the LCA. One arbitration decision defined

a last chance agreement as "a negotiated written agreement with the individual employee, the union, and the employer for the purpose of rehabilitating the employee whose conduct would have otherwise warranted discharge." *Butler Mem'l Hosp. and Pa. Indep. Nurses, a/w Pa. Assoc. of Staff Nurses and Allied Prof'ls,* 05-2 Lab. Arb. Awards (CCH) P 3327 (Hewitt 2005). As noted by that arbitrator, many times the impact of a "last chance" agreement will have sufficient shock value to rehabilitate an errant employee. Employers and unions both find LCA's to be useful as a form of corrective action to save and reform an employee, often at great savings to the employer, where the typical alternative is to find and train a replacement employee.

A "last chance" agreement, as the name suggest, did set forth strict conditions for the continued employment of the Grievant in the wake of his conduct on October 2, 2005. The terms or conditions here were agreed upon in return for the Employer's agreement not to discharge LaJoye immediately. LCA's are universally held to be enforceable against the employee for their specified duration. *LINDE Gases of the Midwest, Inc. and The Oil, Chem. and Atomic Workers Int'l Union, AFL-CIO, Local No. 6-104,* Lab. Arb. Awards (CCH) P 8219 (Nielsen 1989).

Research findings by the arbitrator indicate a resurgence in the use of LCA's as an alternative to discharge, particularly in alcohol and drug abuse cases. They represent a novel means to permit an employee a

"last chance opportunity," subject to the specific terms of the underlying LCA, to demonstrate by his conduct that he is worthy of the confidence owed to him by the employer. *Champion Int'l Corp. and United Paperworkers Int'l Union, Local 1161*, 94-1 Lab. Arb. Awards (CCH) P. 4207 (Howell 1993). They save jobs for the present and optimally lead to the revitalization of an employee's compliant and productive work performance. "Last chance agreements provide unions with an opportunity to save jobs. They stem from legitimate exercises of the common duty to bargain. An employer would have no reason to enter into them if they were illusory or unenforceable." *Johnstown Am. Corp. and United Steelworkers of Am., AFL-CIO, Local 2635*, 9501 Lab. Arb. Awards (CCH) P 5052 (Tharp 1994).

LCA's of the type involved in the instant matter are not part of, or extensions of, the separate Agreement, which controls the employer/employee relationship and defines each party's respective rights and duties. An LCA is an agreement outside of the parties' Agreement, and it is construed and enforced in the same manner as any other contractually-binding written agreement. An LCA stands on its own, accepted and binding on the parties.

> "Just cause" requirements in a negotiated collective bargaining agreement are not completely negated by a last chance agreement; otherwise, unions would be unwilling to sign such agreements. Some of the requirements of "just cause" are still applicable even under a last chance agreement—such as the occurrence of a disciplinary incident, due process, fair investigation,

> proof of guilt, and evenhandedness without discrimination. In other words, the correct application under a last chance agreement is that general "just cause" standards must be measured and conditioned in the context of the specific last chance agreement.

Champion Int'l Corp. A determination of whether "just cause" exists has been identified as being dependent upon a balancing of all of the following factors, weighed against the facts of the individual case, in order to permit an arbitrator to determine whether the Employer's action in disciplining the Grievant was "just" or proper under the specifically identified circumstances.

1. Is there a rule which governs the conduct?
2. Is it a reasonable rule?
3. Was the employee made aware of the rule?
4. Was the employee guilty of an infraction of the rule?
5. Was the infraction a serious breach of the rule?
6. Is the rule consistently enforced?
7. Was there an investigation into the infraction of the rule?
8. Are other employees treated similarly?
9. The length of the employee's service;
10. The type of job involved;
11. The employee's characteristics and overall record; and
12. The presence or absence of supervisory bias.

Pandora Mfg., Inc. and Int'l Union, United Auto., Aerospace, and Agric. Implement Workers of Am., UAW, AFL-CIO, 02-1 Lab. Arb. Awards (CCH) P 3135 (Levine 2002).

The LCA in dispute here is a negotiated instrument which the Grievant did not bargain for himself. The Union had both the right and the duty to represent the Grievant and to bargain the best available terms to save the Grievant's job. The conditions under which an LCA is negotiated

iare by no means equal. One arbitrator noted that LCA negotiations most often should be classified as "collective begging," because the employer holds almost all of the power, and the Union must typically accept a poor deal in order to save the member employee's job. *GATX Terminals, Galena Park and Pasadena Terminals and Oil, Chem. and Atomic Workers Int'l, Local 4-227, AFL-CIO,* 95-1 Lab. Arb. Awards (CCH) p 5136 (Koenig 1994). A downside of LCA's is that they remove job security and the employee's entitlement to both progressive discipline and also the right to grieve subsequent discharge for non-complaint conduct. Yet, one arbitrator noted that:

> There are intrinsic rules for collective bargaining relationships that are universally observed with or without definitive language to support them. No employee can be denied contractual rights; no employee can be singled out for separate treatment; and all employees must be dealt with fairly and equitably. Most important of all (though never expressed in a contract), an employer is prohibited from exercising its reserved powers arbitrarily, capriciously, or discriminatorily.

Johnstown Am. Corp. and United Steelworkers of Am., AFL-CIO, Local 2635, 95-1 Lab. Arb. Awards (CCH) P 5052 (Tharp 1994). Under that view, also adopted by the arbitrator here, the Grievant, by agreeing to the terms of the LCA, did not forfeit the protections against arbitrary treatment and did, in fact, retain the rights to both challenge his dismissal on the basis that he was not guilty of the specifically proscribed conduct and also to demonstrate that his dismissal was arbitrary. *Johnstown Am. Corp.*

> 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.

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

The arbitrator here acknowledges that the Grievant did voluntarily sign the LCA in order to keep his job, so he was bound by the terms of that agreement. The only question before the arbitrator is whether an actual violation of the LCA did, in fact, occur. *Butler Mem'l Hosp.* That determination serves as the threshold inquiry, and a finding that a violation actually did occur would automatically result in the imposition of the penalty specified when the LCA was agreed to by the parties. The question of the appropriate penalty for an employee violation is already settled in the parties' LCA, and the usual constraints, such as progressive discipline and mitigating circumstances, are not considered by either the Employer or the arbitrator.

An LCA should include clear conditions, unambiguous terms, and a realistic opportunity for the employee to accomplish the goal(s) for improvement, specifically including a precise description of what conduct will "trigger" the last chance discharge. The following elements have been identified as critical in the bargaining, construction, and enforcement of LCA's so that they can function fairly and properly:

- Must be precise in identifying the rights and protections taken away;
- The punishment named in the LCA fits the crime committed;
- The employee gives up only what he expressly agrees to give up;
- The employee has a reasonable chance to pay his debt to the employer by performing sustained improved conduct for a reasonable time;
- The LCA does not violate the right of the Union to properly represent the employee if aggrieved;
- The enforcement of the LCA is non-discriminatory;
- The employee must not be placed in double jeopardy by a second levying of discipline for a crime already punished and in the record;
- The validity of the LCA depends on its precise enforcement. If the LCA is violated, the employee should be discharged; and
- **Only specific violations relating to the previous should trigger activation of the LCA to discharge the employee.** (Emphasis added).

GATX Terminals.

Based on the arguments made by the parties in the instant grievance, the arbitrator here finds the last condition cited above to be specifically relevant here. In interpreting the LCA and all other written agreements or contracts, the arbitrator is required to determine the substantial intent of the parties and to give effect to that intent. "Presumptively, the parties' intent is expressed by the natural and ordinary

meaning of the language employed by them . . . to the end that a fair and reasonable interpretation will result." *NSS Enters., Inc. and Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. Local 12,* 114 LA 1458 (2000). When confronted with plain agreement language, which conveys a straightforward course of conduct, arbitrators assume that the parties knew what they were doing when they drafted their document incorporating the specific language and terms eventually adopted. Arbitrators necessarily are reluctant to apply separate standards of interpretation in an attempt to give the language employed any meaning beyond the plain language used to express a distinct idea or thought. *Oak Grove School Dist.*, 85 LA 653, 655 (Concepcion 1985). It is a well-established arbitral principle that, when the language of a negotiated agreement is clear and unequivocal, an arbitrator generally will enforce its plain meaning. *Guernsey County Dist. Pub. Library (Cambridge, Ohio) and The Ohio Ass'n of Pub. Employee/Am. Fed'n of State, County and Mun. Employees, Local 26,* 107 LA 435 (Sergent 1995). An arbitrator cannot ignore clear-cut language, because to do so would usurp the role of the labor organization and the employer. *Rice Food Mkts. and United Food and Commercial Workers Union, Local 455,* 146 LA 726 (Marcus 1996).

Specifically, in the parties' LCA, they agreed that "[i]f the employee has any rule violation **of a same or similar nature relating to the cited work**

rule [§ 4501:2-6-02(B)(5)] during the [two-year] term of this agreement, the Employee will be removed from his employment." Based on a review of the all of the facts, arguments, and exhibits submitted in this grievance, the arbitrator finds that, as determined by the language agreed upon the parties, the "targeting conduct" resulting in a violation of the LCA was required to meet two standards or hurdles before it could be deemed to constitute a violation of the LCA. Not only was the conduct required to be reflective of non-performance of duty/inefficiency, as detailed in the specifically-cited Ohio Administrative Code section, but the proscribed conduct was also required to be "of a same or similar nature" to the behavior of the Grievant in the Taser incident. Certainly, almost any on-the-job conduct or misconduct of the Grievant or any OHP employee could be deemed to be related to the performance or non-performance of a job duty, thereby permitting almost any intentional or unintentional error or oversight to be viewed as an event triggering a violation of the Performance of Duty rule. However, based on the parties' decision to also include the second criteria, that any triggering conduct constituting a rule violation must be "of a same or similar nature," the arbitrator here finds that the Grievant's conduct on February 21, 2006, in failing to report to a required in-service training session was not "of a same or similar nature" to his on-duty conduct of October 2, 2005, which involved a deliberate and intentional decision to utilize one strategy or tactical device in an effort to

temporarily disable an intended arrestee attempting to flee from the scene. Although both choices of action are arguably demonstrating the absence of optimal conduct, the Grievant's neglectful conduct in failing to report to the Academy for the half-day of in-service training is not viewed by this arbitrator here as being "of the same or similar nature" as the on-duty performance conduct of a tactical and specifically intentional nature. The arbitrator certainly recognizes that the Grievant's purported memory lapse concerning his required training and/or his alleged confusion concerning his scheduled work time and days off are not indications of an optimal level of handling work details, such as are generally demanded of OHP troopers, who are clearly held to a recognized high standard both internally and by the general public. But the second error of omission committed by LaJoye is not deemed to be within the "same or similar conduct" criteria established by the parties in the LCA.

The "plain meaning" principle of contract interpretation applies when there is specific language which speaks directly to and defines the outcome of a contested issue. *Beacon Journal Pub. Co. and Graphic Communications Int'l Union, No. 42C*, 00-2 Lab. Arb. Awards (CCH) P 3548 (Ruben 1999). Under the standard rules of interpretation for written agreements, words are to be assigned their plain meaning, unless it is clear that the parties intended to assign a special or colloquial meaning.

L & O Growers Ass'n, 82 LA 814, 815 (Weiss 1984). Determining mutual intent is far from an exact science, but the starting point is to review the actual language chosen by the parties to express their actual intent.

Arbitrators also apply the principle that the parties to a contract are charged with the full knowledge of its provisions and that they did actually intend the full application of the language and terms they chose to include as representing their specific intentions. An arbitrator's decision cannot be based on competing equities or sympathies, but rather on the basis of the contractual terms that the parties themselves have drafted and adopted to govern their relationship. Arbitrators cannot search for inferences and intentions that are not apparent and not supported by contractual language documenting any purported intent.

Based on the plain language included in the LCA, the arbitrator finds that the Grievant's conduct on February 21, 2006, which resulted in his failure to report for required in-service training, did not actually trigger a violation of the LCA. As a result, the OHP did act arbitrarily in effecting the Grievant's discharge based on those circumstances. Because the Employer has failed to meet its burden of proof and has not established that Grievant's conduct did, in fact, constitute a violation of the LCA, the Employer's discharge action was not reasonable under the circumstances, and LaJoye was not discharged for "just cause" under the specific circumstances evidenced here.

AWARD

The grievance is sustained in part. The Grievant's termination is to be reduced to a time-served suspension with no back pay. LaJoye shall be reinstated to his former trooper position within two (2) pay periods from the date of this award and he shall have his seniority fully restored. The Last Chance Agreement executed on January 12, 2006 shall continue to remain in effect, as provided in that document.

Respectfully submitted to the parties on this 26th day of July, 2006.

Robert G. Stein, Arbitrator