#1911

IN THE MATTER OF ARBITRATION

BETWEEN

OHIO STATE TROOPERS ASSOCIATION, INC

AND

OHIO DEPARTMENT OF PUBLIC SAFETY
DIVISION OF THE STATE HIGHWAY PATROL

Before: Robert G. Stein
CASE#
15-00-060606-120-04-01

Grievant:
Anthony McClendon
Termination

Advocate for the EMPLOYER:

Sergeant Kevin D. Miller
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Advocate for the UNION:

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**INTRODUCTION**

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement (herein "Agreement") (Joint Exh. 1) between the Ohio Department of Public Safety, Division of the State Highway Patrol (herein "OSHP" or "Employer") and the Ohio State Troopers Association, Inc. (herein "Union"). That Agreement is effective during the calendar years from 2003 through 2006 and includes the conduct which is the subject of this grievance.

Robert G. Stein was mutually 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 that Agreement. A hearing on this matter, which is identified as grievance number 15-00-0606006-120-04-01, was held on September 13, 2006 in Columbus, Ohio. The parties mutually agreed to that hearing date and location, and they were each provided with 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 by October 13, 2006. The

parties each stipulated to the statement of the issue and to the submission of four 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 Article 20, Section 20.08 of the Agreement, the parties submitted the following statement of issue for resolution by the arbitrator:

> Was the Grievant, Anthony McClendon, terminated from his employment with the Ohio State Highway Patrol for just cause? If not, what shall the remedy be?

**RELEVANT CONTRACT PROVISIONS**

Article 19—Disciplinary Procedure
Article 20—Grievance Procedure

**BACKGROUND**

Anthony McClendon (herein "McClendon" or "Grievant") has had more than twelve (12) years of work experience with the OSHP after his graduation from the OSHP Academy in June 1993. McClendon worked as an instructor at the Academy until 2003, when he was reassigned to the Lancaster Patrol Post, where he had held a sergeant's rank beginning in October 28, 2005 and supervised the afternoon shift there while serving as

Assistant Post Commander. After his allegedly improper conduct occurring at work on April 3, 2006, McClendon "voluntarily [took] a demotion from his prior rank of probationary sergeant to the rank of trooper and was transferred to the Circleville Patrol Post." (Employer brief p. 1). The Grievant's disputed April 3 conduct purportedly involved his verbal interaction with two subordinate employees, Post secretary, Kim LaMoncha (herein "LaMoncha") and Post dispatcher, Kathy Dalton (herein "Dalton") within the dispatch area of the Lancaster Post facility. While conversing about recent individual social activities, McClendon purportedly made the following statement to LaMoncha in Dalton's presence: "I know why you're dating that 27-year-old. It's because he's pounding that pussy."

Although LaMoncha immediately left the Post premises, the very next day she did report the Grievant's alleged statement or conduct to Sergeant Sheldon Robinson as having been offensive to her. A similar report of the Grievant's purportedly inappropriate language was made by Dalton to Sergeant Darrin Blosser. After Sergeant Robinson later relayed the report about McClendon's conduct to the Post Commander, Lieutenant Gary Lewis, Lewis instructed LaMoncha to individually put the Grievant on notice that his comments were offensive to her and that on-the-job discussions regarding her social life should end. LaMoncha made that attempt to comply with Lieutenant Lewis' directive on April 11, 2006 in

her office. Shortly after LaMoncha's statements, McClendon purportedly responded with the following questions: (a) "You mean statements like 'getting your groove on'?" and (b) "Do you want to know why they call me Big Daddy?" That latter incident and those subsequent comments were also reported to Lieutenant Lewis the next day, April 12, 2006, and an administrative investigation was initiated.

The Grievant was interviewed on both April 19 and May 1, 2006 by an OSHP administrative investigator, and McClendon specifically denied making the "pounding the pussy" statement. (Exh. M-1B, Questions 25 and 29; Exh. M-1C, Question 3). In both interviews he also denied making the "getting your groove on" and "Big Daddy" statements. (Exh. M-1B, Questions 31 and 43; Exh. M-IC, Question 9). During a pre-investigative interview preceding a planned polygraph examination for McClendon on May 10, 2006, he indicated to the polygraph examiner in pre-test questioning that his previous conversation with LaMoncha on April 3, 2006 had included his statement, "Don't get pussy-whipped; whip that pussy." Based on that admission, the Grievant was excused by the examiner from completing the actual polygraph examination.

On May 23, 2006, the Grievant was issued a statement of charges (Joint Exh.3) for his alleged violations of the OSHP sexual harassment and false statements/truthfulness rules. Based on the evidence presented at a pre-disciplinary hearing conducted on May 30, 2006, the hearing officer

determined that there was just cause for disciplining the Grievant. On June 1, 2006, McClendon was issued his official notice of termination (Joint Exh. 3), based on the Employer's determination that the Grievant had violated OSHP Rule 4501:2-6-02(J)(1)—Sexual Harassment and also Rule 4501:2-6-02(E)—False Statements/Truthfulness.

In response to the disciplinary notice, the instant grievance (Joint Exh. 2) was filed on June 2, 2006. Because the matter remained unresolved after passing through Steps 2 and 3 of the grievance procedure, as provided in Article 20 of the Agreement, the matter was advanced to the arbitration level, pursuant to Article 20, Section 20.07, Step 4.

**POSITION OF THE EMPLOYER**

The OSHP's basic contention is that its decision to terminate McClendon's employment resulted from his violation of the two sections of the Ohio State Highway Patrol Rules and Regulations related to sexual harassment and false statements/truthfulness. Those sections specifically include the following language:

> 4501:2-6-02(J)(1)--No member shall sexually harass any person. "Sexual harassment" is defined as the unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct or contact, or innuendo of a sexual nature. No member shall, by his/her actions, create an intimidating, hostile, or offensive work environment.
>
> 4501:2-6-02(E)—A member shall not make any false statement, verbal or written, or false claims concerning his/her conduct or the conduct of others.

(Joint Exh. 3). The Employer insists that McClendon did create an offensive work environment by engaging in conversation containing innuendos of a sexual nature with female co-workers. The Employer also claims that McClendon provided false statements during the interviews conducted as a part of the administrative investigation related to his alleged misconduct.

The Employer stresses the absence of any malicious intent or any other ulterior motive demonstrated by either LaMoncha or Dalton in reporting the Grievant's purported misconduct and their unwavering accounts of the Grievant's conduct during the investigation and also while under oath at the arbitration hearing. In contrast, the Employer insists that the Grievant's answers to investigative questions were incomplete, inconsistent, contradictory, and evasive.

The Employer insists that, because the OSHP has an outstanding reputation for honesty and professionalism, an officer deemed to have credibility issues has essentially rendered himself useless in a court of law because his character is likely to be challenged by defendants' attorneys. The Employer claims that McClendon was clearly on notice of the serious consequences of employee dishonesty, especially because "the Grievant was responsible for instilling the core value of honesty into our cadets himself when he taught at the Academy." (Employer brief p. 10). The Employer also points out that Sergeant Neal stressed the consequences of

untruthfulness prior to both interviews he conducted, as did Sergeant Bower prior to the polygraph interview. The Employer also claims that McClendon's dishonesty about his "blatantly sexual" comments demonstrated his most egregious rule violation. (Employer brief p. 11). The Employer claims that the Grievant's "pattern of deception and lies [has been] carried right through his testimony at the arbitration hearing itself." (Employer brief p. 12).

The Employer maintains that its disciplinary action was commensurate with the Grievant's offense because "the Grievant's integrity has been jeopardized in legal proceedings because the Employer has disciplined him for serious issues relating to his veracity" and, as a result, would limit the Grievant's ability to prosecute future cases. (Employer brief pp. 12-13). Based on the absence of any mitigating factors warranting McClendon's reinstatement and his "severely compromised" reputation among other OSHP personnel, the Employer requests that the Union's grievance be denied in its entirety and McClendon's termination be upheld.

**POSITION OF THE UNION**

The Union's basic claim is that McClendon has been improperly subjected to discharge from his employment with the OSHP based on his purported conduct and statements made in the presence of LaMoncha.

Specifically, the Union insists that sixteen (16) days transpired between the alleged incident involving his challenged statements and his being questioned by OSHP administrative investigator, Sergeant Neal, about his "inappropriate statements." The Union claims that, based on the comments made to him by Lieutenant Lewis between April 3 and April 19, 2005, McClendon assumed that the comments or statements being challenged were McClendon's references to "getting her groove on" and "why she calls me Big Daddy" because no specific reference had been made to the "pounding the pussy" alleged statement, either from Sergeant Robinson, who first alerted the Grievant regarding a potential sexual harassment claim, or from LaMoncha herself, with whom McClendon had had numerous conversations and interactions in the interim period following April 3.

The Union argues that, despite the fact that the Grievant had phoned LaMoncha at home on occasions from his work after arriving at the Lancaster Post and assuming his position of sergeant, those calls were each intended to serve a business, rather than personal, need or purpose and were made to obtain answers to work-related questions. (Union brief p. 17). The Union also argues that McClendon's twelve-year tenure with the OSHP was discipline-free. (Union brief p. 19, 23).

The Union also insists that the record clearly and consistently indicates that McClendon has repeatedly indicated that he did not make

any "pounding the pussy" statement in LaMoncha's presence, but rather shared a joke with her and Dalton, which he had heard on a recent television program and which made reference to a statement: "Don't be pussy whipped; whip that pussy." The Union claims that any other version of that language or statement resulted from a misunderstanding by LaMoncha and Dalton.

The Union also claims that the OSHP conducted a "sloppy and incomplete investigation" during which the polygraph examiner individually decided not to conduct the actual polygraph test "because Trooper McClendon [purportedly] admitted to the statements he had made." (Union brief p. 21). That "untrue assertion" was described by the Union as being a part of a "sloppy and incomplete investigation that failed to interview relevant witnesses." (Union brief p. 21). The Union emphasizes that McClendon's admitted statement referring to "getting your groove on" has a validly non-offensive source, a novel entitled How Stella Got Her Groove Back. The Union also insists that comments referring to "getting your groove on" are not considered vulgar or crude in contemporary society. The Union also claims that McClendon's reference to himself as Big Daddy only alludes to his established, long-term nickname, with which LaMoncha and other OSHP employees were already aware. This was stressed by the Union as a reminder that McClendon and LaMoncha had known each other for a longer period

than the Grievant's abbreviated service at the Lancaster Post because both had previously been employed at the OSHP Academy.

The Union requests that the Grievant be reinstated to his former position with no loss of benefits because his purported conduct, in the Union's view, did not constitute sexual harassment and did not create a hostile workplace. The Union insists that McClendon did not falsely deny the alleged "pounding the pussy" statement, which was relied upon by the employer as constituting conduct creating a hostile work environment." (Union brief p. 24).

**DISCUSSION**

Generally, in an employee termination matter an arbitrator must determine whether an employer has sufficiently proved that a discharged employee has committed one or more acts warranting discipline and that the penalty of discharge is appropriate under the specific circumstances. *Hy-Vee Food Stores, Inc. and Local 747, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am.*, 102 LA 555 (Bergist 1994). In making that determination, the arbitrator may consider, among other circumstances, the nature of the Grievant's charged 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. 96-10624 (1997).

When a collective bargaining agreement, such as the Agreement in effect between the parties here to facilitate their cooperative relationship, reserves to the Employer the right to discipline for "just cause," but fails to define what actually does constitute "just cause," it is proper for an arbitrator to look at the Employer's policies, rules, and regulations to determine whether or not the challenged discipline imposed was actually warranted or justified. *E. Assoc. Coal Corp. and United Mine Workers of Am., Dist. 17*, 139 Lab. Arb. Awards (CCH) P 10,604 (1998). An arbitrator must make two determinations in deciding whether an employer has disciplined or discharged an employee for "just cause:" (1) whether a cause of discipline exists; and (2) whether the amount of discipline was proper under the circumstances. *City of Cincinnati v. Queen City Lodge No. 69, Frat. Order of Police*, LEXIS 1522 (1st App. Dist., 2005), citing *Bd. of Trustees of Miami Township v. Frat. Order of Police, Ohio Labor Council, Inc.* (1998), 81 Ohio St. 3d 269, 272, 690 N.E.2d 1262. The Employer bears the burden of proving that the Grievant did commit an offense or did engage in conduct warranting disciplinary action and that the discipline imposed was commensurate with the seriousness of the established offense(s). *City of Oklahoma City, Okla. and Am. Fed'n of State, County, and Mun. Employees, Local 2406*, 02-1 Lab. Arb. Awards (CCH) P 3104 (Eisenmenger 2001).

Certainly, resolution of the instant matter and a determination of the validity of the charges and discipline levied are dependent upon determinations of both witness credibility and which witnesses were providing an accurate account of the relevant facts and events. It is the arbitrator's job to make an objective determination based on all of the facts presented to him, and he must determine the outcome in favor of only one of the parties based on the arguments and evidence submitted. The arbitrator must observe all of the witnesses and determine who among them is providing an accurate report. *Givaudin Corp.*, 80 LA 835, 839 (Deckerman 1983). Because not all of the conflicting testimony can be accurate, the arbitrator must carefully analyze all of the testimony given at hearing in order to resolve the recognized conflicts. In so doing, arbitrators and other triers of fact always attempt to keep in consideration the fact that a witness may be motivated to testify falsely due to some self-interest. Certainly a witness who has been discharged by an employer may have such an interest, but other witnesses may also be biased. In addition to considering questions of self-interest and motivation, it is also of value to consider whether individuals acted in a way that a reasonably prudent person would have under the same circumstances and as events unfolded, thus by their actions confirming what they 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).

One arbitrator identified the following factors as being among those typically considered in determining witness credibility:

- the witness's demeanor while testifying and the manner in which he testifies;
- the character of his testimony;
- the extent of his capacity to perceive, recollect, or communicate in any manner about what he testifies;
- the extent of his opportunity to perceive any matter about which he testifies;
- his character for honesty or veracity or their opposites;
- the existence or non-existence of a bias interest or other motive;
- a statement previously made by him that is inconsistent with his testimony at hearing; and
- whether his testimony is corroborated by other effective testimony.

*Minn. Teamsters Pub. Law Enforcement Employees Union, Local No. 320 and City of Champlin, State of Minn.*, 00-2 Lab. Arb. Awards (CCH) P 3499 (Berquist 2000). Credibility resolution is often the most difficult test for any fact-finder to resolve. This is particularly true when there is only a small number of persons involved in the critical incident of a dispute. Obviously, in those situations only those individuals will ever know for certain what was said or done during their disputed interchange.

The arbitrator here found the testimony of LaMoncha and Dalton to be very credible in establishing that the Grievant's challenged conduct did not constitute "horseplay" or "lunchroom banter" but was definitely sexually charged based on the context and content of his remarks. LaMoncha's testimony and her own conduct subsequently demonstrated that she was offended by the Grievant's comments, which she promptly reported and protested. The testimony of Dalton rose to the level of "probative corroborating evidence" and established that discipline of McClendon for his improper conduct was warranted.

To maintain a productive work environment and also to avoid potential vicarious liability for the Grievant's harassing conduct, the Employer has both the right and the duty to ensure that McClendon and all other OSHP personnel treat all of their colleagues with sensitivity, courtesy, and civility and to preclude the occurrence of hostile environment sexual harassment. The procedure to be utilized to accomplish this result was clearly defined by the United States Supreme Court in *Faragher v. City of Boca Raton* (1998), 524 U.S. 775. When "investigating allegations of sexual harassment, an employer may, after a fair and objective investigation, draw reasonable conclusions and take warranted disciplinary action to address the conduct in question." *Magnetics Int'l, Inc. and United Steelworkers of Am., AFL-CIO, Local 1010,* 00-2 Lab. Arb. Awards (CCH) P 3597 (Frockt 2000). Here, the Employer

conducted a fair, thorough, and timely investigation and then drew reasonable conclusions that McClendon's harassing misconduct did rise to a level meriting the imposition of some discipline.

In the instant controversy, McClendon has been charged with misconduct resulting in "sexual harassment." One definition of that term is "any verbal or physical conduct of a sexual nature or with sexual overtones, unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when . . . (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. *City of Orlando, Fla., Police Dept.*, 98-1 Lab. Arb. Awards (CCH) P 5142 (Sweeny 1998). As recognized by Arbitrator Bell in a separate decision, sexual harassment in the workplace was virtually unrecognized as an arbitral issue thirty (30) years ago. However, as the number of women in the workplace and the variety of positions (including law enforcement) which they have been able to secure has steadily and substantially increased in the interim, sexual harassment has become and has remained as a recognized legal and arbitral issue.

> Employees are being held to a higher standard of assuring the integrity of the workplace against [the occurrence of] sexual harassment . . . Each case must be judged based upon the specific facts and circumstances attendant thereto, including: the nature, character, and severity of the complained of conduct; the workplace setting in which it occurs; whether the conduct was

> malicious and intentional; the effect of the complained of conduct upon those subject to such behavior; the exposure of the employer to liability; and, the appropriateness of the penalty imposed, given the complained-of individual's work and prior disciplinary record . . . In each case, the arbitrator must exercise the utmost care in the analysis of evidence and in making a decision to protect the interests of the employer in safeguarding the dignity of the workplace and the avoidance of liability . . .

*Dayton and Montgomery County (Ohio) Pub. Library and Dist. 1199, Serv. Employees Int'l Union, Dayton and Montgomery County, Library Chapter,* 02-2 Lab. Arb. Awards (CCH) P 3182 (Bell 2002). In 1986, the United States Supreme Court ruled that sexual harassment is actionable under Title VII of the Civil Rights Act of 1964, as amended. *Meritor Savings Bank v. Vinson* (1986), 477 U.S. 57. Specifically, the Court held that employers can be held liable for an employee's sexual harassment of another employee under agency principles. Subsequently, courts have recognized two distinct forms of sexual harassment. One form, hostile work environment sexual harassment, occurs when the challenged behavior or conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive environment." *Graphic Communications, Local 540-M and Commercial Printing Co.*, 01-1 Lab. Arb. Awards (CCH) P 3791 (Statham 2000). That unwelcome conduct may be so severe or pervasive as to change the condition's of a victim's employment and create an intimidating, hostile, or offensive work environment. *Goodyear Tire and Rubber Co. and United Steelworkers of Am., Local Union No. 21*, 03-2 Lab. Arb. Awards (CCH) P

3570 (Kindig 2003). "Harassment" includes behavior or communications that has the effect of intimidating, menacing, or frightening another person through unwelcome words, actions, or physical conduct. *Goodyear Tire and Rubber.*

In recent years, numerous courts and arbitrators have continued to find that sexual harassment will not be tolerated in the workplace and will lead to severe discipline, including discharge, if proven. *FOP Queen City Lodge No. 69 and City of Cincinnati*, 00-1 Lab. Arb. Awards (CCH) P 3340 (Kosanovich 1999), citing to *American Safety Razor Co.*, 110 LA 737, 746 (Hockenberry 1998). A safe and productive workplace is fundamental in providing an environment where all associates can work together toward common goals and objectives while realizing their full potential. A critical element of a safe and productive workplace is the absence of harassing behavior. The United States Supreme Court in *Harris v. Forklift Systems, Inc.* (1993), 510 U.S. 17, held that harassment need not necessarily affect an employee's psychological well-being or lead a complainant to suffer specific injury. The test, the court ruled, was whether or not the environment could "reasonably be perceived as hostile or abusive."

The Grievant's conduct under scrutiny here did not involve a private commercial employer and did not occur in an industrial workplace setting in which coarse "shop talk" is arguably more pervasive and where the sensitivity levels and acceptable conduct levels are typically lessened. In

the instant matter, the OSHP employees were arguably all employed in a work environment demanding reciprocal sensitivity and respect. The Employer's commitment to the prohibition of any employee's conduct having the purpose or effect of unreasonably interfering with an individual's employment or creating an intimidating, hostile, or offensive working environment is clearly established in Rule 4501:2-6-02(J)(1), which prohibits the occurrence of harassing or offensive conduct by any OSHP officer. Unwelcome comments, jokes, remarks, or innuendo made with sexual overtones do constitute sexual harassment and can lead to the creation of an adverse or offensive working environment. *State of Iowa (Dept. of Transp.) and Am. Fed'n of State, County, and Mun. Employees, Iowa Council 61*, 94-2 Lab. Arb. Awards (CCH) P 4442 (Clark 1993).

Based upon a thorough review of all of the evidence submitted by the parties, I find that McClendon's misconduct did constitute hostile work environment sexual harassment and that he did act to create a hostile or offensive work place for his subordinates. He did engage in conduct unbecoming a law enforcement officer and acted in a manner likely to adversely affect LaMoncha, as a member of the OSHP Post over which he served as supervisor at least for the period each day during which their shifts overlapped. McClendon knew, or could reasonably have been expected to know, that his conduct constituted a violation of Rule 4501:2-6-02(J)(1) and would subject him to severe discipline, including potential

discharge. The Employer has established by at least a preponderance of the evidence that the Grievant's harassing conduct did occur and did constitute the contractually-mandated "just cause" to warrant the imposition of a disciplinary penalty.

The OSHP clearly has a legitimate interest in limiting its exposure to civil liability under both state and federal legislation for harassing behavior, in protecting all of its employees from offensive conduct, and in maintaining its public image and integrity. An employer is vicariously liable for hostile environment sexual harassment if it knew, or upon reasonably diligent inquiry should have known, of the harassment claim and failed to take immediate and appropriate action. *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361 (11th Cir., 1999). The purpose of employee discipline is to correct conduct which does not comport with the reasonable standards adopted to protect all persons involved in a work-related relationship. Commitments made by legislatures and courts to eradicate sexually harassing conduct from the workplace have resulted in stringent and severe disciplinary measures by both government and private sector employers in responding to harassing conduct.

Even though the evidence submitted clearly establishes the Grievant's violation of the OSHP sexual harassment rule, the arbitrator is well aware that those who work in law enforcement are often exposed to the unseemly side of life and must be of sufficient constitution to deal with

it. It is McClendon's violation of the second rule, requiring all officers to be truthful and not provide false statements, which is extremely troubling to the arbitrator. Despite consistent evidentiary investigative findings verifying the claims of McClendon's misconduct, he has failed to admit his use of the specific "pounding that pussy" language, thereby violating OHSP Rule 4501:2-6-02(E), prohibiting him from making any "false statement" or "false claims concerning his conduct." Moreover, the Grievant has been given multiple opportunities to respond to full and fair interview questioning regarding his challenged conduct, and has consistently failed to be forthright about having made a mistake or being remorseful for his conduct, thereby seriously compounding the problem and lessening his chances for an opportunity to demonstrate that he can serve effectively as either an OSHP trooper or supervisor. "Certainly calculated perjury by a police officer, sworn to uphold the law and to be familiar with the requirement of providing truthful testimony, falls within the bounds of 'just cause' meriting disciplinary action as set forth in the Agreement." *City of Cincinnati v. Queen City Lodge No. 69, Frat. Order of Police*, LEXIS 1522 (1st App. Dist., 2005).

> It is well-established that police officers are held to a higher standard of conduct and integrity than other employees. Indeed, our society grants police officers special status and credibility because of their position. Law enforcement officers are subject to being called to court, and their testimony is generally given substantial deference. Additionally, a police officer's credibility within the police department and within the community at large are also critical components of the officer's employment. Because

> a police officer's integrity and credibility are so important, it is widely accepted that an officer's dishonesty regarding a significant matter may be grounds for immediate termination without following the usual principles of progressive discipline. ...[A] police officer's integrity is so critical that "you can't get it back once it's gone."

*Vancouver Police Officers Guild and City of Vancouver (Wash.)*, 05-2 Lab. Arb. Awards (CCH) P 3187 (Landau 2005).

When an employee has violated a rule or engaged in conduct meriting disciplinary action, it is primarily the function of management to decide upon the proper penalty. *Graphic Communications, Local 540-M and Commercial Printing Co.*, 01-1 Lab. Arb. Awards (CCH) P 3791 (Statham 2000). "In reviewing the appropriateness of a disciplinary penalty, the arbitrator's role is not to substitute his independent judgment for that of an employer or to second-guess an employer's decision as to the penalty. Rather, the arbitrator's function is to determine whether the penalty imposed was within the employer's reasonable range of discretion and was not discriminatory, unfair, or excessive." *Vancouver Police Officers Guild*.

As in any paramilitary organization, the Employer has numerous and extensive policies and rules addressing a wide range of procedural and conduct situations. Compliance with reasonable OSHP policies and rules is paramount to the success of the law enforcement agency. The progressive discipline policy detailed in Article 19, Section 19.05 specifically includes "removal" as a disciplinary option.

> The Ohio Supreme Court has stated that it is settled public policy that police officers are held to a higher standard of conduct than the general public. Law enforcement officials carry upon their shoulders the cloak of authority of the State. For them to command the respect of the public, it is necessary then for these officers, even when off duty, to comport themselves in a manner that brings credit, not disrespect, upon their department. It is incumbent upon a police officer to keep his or her activities above suspicion, both on and off duty.

*City of Cincinnati v. Queen City Lodge No. 69*, LEXIS 1522 (1st App. Dist., 2005); *Schroeder v. City of Cincinnati*, LEXIS 5125 (1st App. Dist., 1993). The sensitive nature of the police officer's functions and the inherent power of law enforcement positions, in the arbitrator's opinion, easily justify the application of a more stringent standard in the examination and review of employee conduct. "Law enforcement activities must be administered as part of a highly-regimented organization, which cannot permit individual members to circumvent its rules and regulations. The standards of compliance to operating procedures are much higher for police organizations than would be found in the general business community." *H.P.P.U., Local No. 109 and City of Houston (Tex.)*, 95-2 Lab. Arb. Awards (CCH) P 5244 (Overstreet 1994).

The Grievant's failure to admit his misconduct and to accept responsibility and apologize for his offensive behavior, erode the Union's claim that McClendon is deserving of having his grievance sustained. His offensive conduct alone, while serious, was not an offense meriting his termination. However, his subsequent behavior, manifesting a denial of

his credibly-reported misconduct involving his use of crude language with sexual innuendo, and his attempts to manipulate the facts in a vane effort to discount his responsibility, only serves to compound the severity of his rule violations and compound his transgressions. Given the high standard for truthfulness demanded of all law enforcement officers, the conjured and incorrect answers McClendon provided to the OSHP investigators, pre-disciplinary hearing officer, and also to the arbitrator at hearing provide "just cause" for his discharge from the OSHP. The Grievant's own conduct demonstrates that he is not a candidate for continued employment with the OSHP.

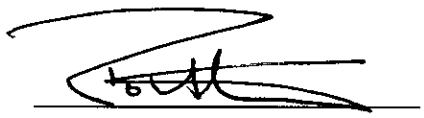
> If an employee has full capability of performing a job, but for reasons of deliberate misconduct and improper attitudes he does not properly carry out his duties, then disciplinary measures which bear a reasonable relationship to the gravity of the offense must be utilized.

*S. Cal. Rapid Transit Dist. and Transit Police Officers Ass'n*, 100 LA 701 (1992). Law enforcement, while not perfect, is a very proud profession that the public relies upon to uphold integrity as a core value. The Employer is within its authority to issue appropriate discipline to meet this expectation.

**AWARD**

The grievance is denied.

Respectfully submitted to the parties this 30th day of November, 2006



**Robert G. Stein, Arbitrator**