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IN ARBITRATION PROCEEDINGS PURSUANT TO

COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of

THE OHIO STATE TROOPERS ASSOCIATION, INC., UNIT 1

and

THE STATE OF OHIO, DEPARTMENT OF PUBLIC SAFETY

Case No. 15-03-20080507-0061/62-04-01
Grievants: Eric E. Wlodarsky and Craig T. Franklin

ARBITRATOR'S

OPINION AND AWARD

This Arbitration arises pursuant to the Collective Bargaining Agreement between THE OHIO STATE TROOPERS ASSOCIATION, INC., UNITS 1 and 15 ("the Union") and THE STATE OF OHIO, DEPARTMENT OF PUBLIC SAFETY ("the Department"). SUSAN GRODY RUBEN was selected to serve as sole, impartial Arbitrator; her decision shall be final and binding pursuant to the Agreement.

Hearing was held September 4, 2008 in Columbus, Ohio. The Parties were afforded full opportunity for the examination and cross-examination of witnesses, the introduction of exhibits, and for argument.

APPEARANCES:

On behalf of the Union:

HERSCHEL SIGALL, Esq., Ohio State Troopers Association, 6161 Busch Boulevard, Suite 130, Columbus, OH 43229.

On behalf of the Department:

MICHAEL P. DUCO, Deputy Director, Office of Collective Bargaining, 100 East Broad Street, 14th Floor, Columbus, OH 43215.

STIPULATED ISSUES

1. **Are the Last Chance Agreements which the Department entered into with Sergeant Wlodarsky and Trooper Franklin void as a matter of public policy?**

2. **If the Last Chance Agreements are void as a matter of public policy, did the Department have just cause to remove Sergeant Wlodarsky and Trooper Franklin?**

3. **If the Department did not have just cause to remove Sergeant Wlodarsky and Trooper Franklin, what shall the remedy be?**

RELEVANT PROVISIONS OF COLLECTIVE BARGAINING AGREEMENT
July 1, 2006 - June 30, 2009

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ARTICLE 4 - MANAGEMENT RIGHTS

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...the Employer retains the rights to: 1) hire and transfer employees, suspend, discharge and discipline employees;....

. . .

ARTICLE 18 – ADMINISTRATIVE INVESTIGATION

18.01 Purpose

The parties recognize that the State has the right to expect that a professional standard of conduct be adhered to by all Highway Patrol personnel regardless of rank or assignment. Since administrative investigations may be undertaken to inquire into complaints of misconduct by bargaining unit employees, the State reserves the right to conduct such investigations to uncover the facts in each case while protecting the rights and dignity of accused personnel. In the course of any administrative investigation, all investigative methods employed will be consistent with the law.

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ARTICLE 19 – DISCIPLINARY PROCEDURE

19.01 Standard

No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause.

...

19.05 Progressive Discipline

The Employer will follow the principles of progressive disciplines. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

1. **One or more Verbal Reprimand (with appropriate notation in employee's file);**

2. **One or more Written Reprimand;**

3. **One or more day(s) Suspension(s) or a fine not to exceed five (5) days pay for any form of discipline, to be implemented only after approval from the Office of Collective Bargaining.**

4. **Demotion or Removal.**

However, more severe discipline (or a combination of disciplinary actions) may be imposed at any point if the infraction or violation merits the more severe action.

The Employer, at its discretion, is also free to impose less severe discipline in situations which so warrant.

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19.07 Abeyance Agreements

The parties agree that it may sometimes be in the best interest of the parties to participate in the negotiation of discipline abeyance agreements, including Last Chance Agreements. The parties further agree that such agreements should be entered into under the spirit of the collective bargaining agreement....

Abeyance agreements, including Last Chance Agreements, shall be two (2) years in duration and shall be signed by a representative of the Employer, the Union, and the Employee.

Violations of any cited work rule may cause the abeyance agreement to be invoked during the life of the agreement, pursuant to the three conditions stated below. A violation of the work rules within Performance of Duty 4501:2-6-02(B) must be of a same or similar nature to cause the abeyance agreement to be invoked.

1. **Grievance rights related to a discipline action under the agreement will be limited to a challenge of whether his/her behavior constitutes a violation of a triggering work rule(s). The level of discipline may not be challenged or made an issue at arbitration.**

2. **The Employee retains all rights to the grievance procedure provided in the labor agreement for violations not included within the abeyance agreement. If the Employee abides by the agreement, and the agreement is not invoked within two years of the signing, the agreement will become void and no active record of it will remain.**

3. **The parties agree the agreement is non-precedent setting and will not be used in any unrelated hearing, grievance, arbitration, or negotiation. The agreement may be used by either to enforce its provisions.**

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STIPULATED FACTS

1. **On January 20, 2008, Trooper Craig T. Franklin, Sergeant Eric E. Wlodarsky, Trooper Richard Dietz, and Dispatcher Heidi Malloy were on duty at the Sandusky Post discussing Martin Luther King Day.**

2. **Trooper Franklin obtained material, made a white cone for a hat, a white paper mask with eyeholes on the front face, and a white covering for the shoulders and chest. He wore the outfit. He was in uniform.**

3. **Sergeant Wlodarsky took a picture of Trooper Franklin with his camera phone and forwarded the image to Sergeant Jason Demuth.**

4. **The incident lasted one to two minutes.**

5. **Sergeant Wlodarsky did not report Trooper Franklin's conduct and did not speak to the trooper at the time about his inappropriate conduct.**

6. **Sergeant Wlodarsky was charged with violation of Rules 4501:2-6-02(I)(1) Conduct Unbecoming an Officer and 4501:2-6-03(A)(1) Responsibility for Command.**

7. **Trooper Franklin was charged with violation of Rule 4501:2-6-02(I)(1) Conduct Unbecoming an Officer.**

8. **Sergeant Demuth was charged with violation of Rules 4501:2-6-02(B)(6) Performance of Duty and 4501:2-6-02(I)(1) Conduct Unbecoming an Officer.**

9. **On April 3, 2008, the Parties entered into a Discipline Abeyance Agreement with Sergeant Demuth and Last Chance Agreements with Trooper Franklin and Sergeant Wlodarsky.**

10. **Pursuant to his Last Chance Agreement, Sergeant Wlodarsky was demoted to Trooper, transferred to the Norwalk Post, and was required to participate in diversity awareness training.**

11. **Pursuant to his Last Chance Agreement, Trooper Franklin was suspended for five days, and required to participate in diversity awareness training.**

12. **Sergeant Demuth was suspended two days, but they were held in abeyance.**

13. **Sergeant Wlodarsky and Trooper Franklin served the penalties contained in their Last Chance Agreements.**

14. **On May 2, 2008, after new pre-disciplinary meetings had been conducted, both Trooper Franklin and Sergeant Wlodarsky were terminated from employment for the incident that took place on January 20, 2008.**

15. **Trooper Franklin's tenure date is January 17, 1990.**

16. **Sergeant Wlodarsky's tenure date is April 13, 1998.**

OPINION

Two concepts must be made clear at the outset:

1. **Racism of any kind is abhorrent.**

2. **Labor arbitrators have limited jurisdiction. By law, they must base their awards on the agreements between the parties.**

The Underlying Conduct

As is undisputed, and as reported by the national and even international media, on the day before Martin Luther King, Jr. Day 2008, Trooper Franklin, while in uniform and on duty, dressed up in a KKK-looking outfit he had made out of office supplies. Sergeant Wlodarsky, instead of disciplining Trooper Franklin, took a picture of him with his camera phone and forwarded the picture to Sergeant Demuth.

Whether or not the Grievants subjectively believed such conduct was racist, objectively, it was. It also is clear it is totally unacceptable for

working members of law enforcement to engage in such conduct.

Labor Arbitrators' Limited Jurisdiction

As written by John Adams and repeated by many others, we live in "a government of laws, not of men."[1] In the context of this case, that means neither the Governor nor the Arbitrator can properly ignore the Last Chance Agreements signed by the Grievants, the Union, and the Department. In other words, neither the Governor's nor the Arbitrator's opinions regarding the Grievants' conduct can form the basis for an enforceable arbitration award. Rather, the Parties' contracts are the ONLY basis upon which the Arbitrator can base an award. As held by the U.S. Supreme Court and Ohio Supreme Court, arbitrators' awards must "draw their essence" from the agreements. Steelworkers v. Enterprise Car, 363 U.S. 593, 597 (1960)("Steelworkers"); Mahoning County Board of Mental Retardation and Developmental Disabilities v. Mahoning County, (1986), 22 Ohio St.3d 80. Arbitrators are prohibited from "dispensing their own brand of industrial

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[1] See, e.g., Cooper v. Aaron (1958) 358 U.S. 1, 23:

> The historic phrase "a government of laws and not of men" epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights...he was...reject[ing] in positive terms of rule by fiat, whether by the fiat of governmental or private power....

justice." Steelworkers, supra, at 597.[2]

The General Enforceability of Last Chance Agreements

Under Ohio law, last chance agreements in the collective bargaining context are generally enforceable. See, e.g., Scott v. City of Cleveland (2008) 176 OhioApp3d 138; Fouty v. Ohio Department of Youth Services (2006) 167 OhioApp3d 508; DePalma v. City of Lima (2003) 155 OhioApp3d 81; Kirch v. Ohio Bureau of Workers' Compensation (2003) 154 OhioApp3d 651; Pickett v. Unemployment Compensation Board of Review (1989) 55 OhioApp3d 68.

The Last Chance Agreements under review here were signed by the Grievants, the Union, and the Department. Moreover, Article 19 of the Parties' Collective Bargaining Agreement expressly provides for last chance agreements.

The Ohio Supreme Court Ruling on Public Policy Review

In Southwest Ohio Regional Transit Authority v. Amalgamated Transit Union, Local 627, (2001) 91 Ohio St. 3d 108 ("SORTA"), the Ohio Supreme Court ruled that voidness based on public policy grounds must be based upon

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[2] See How Arbitration Works, 6th Ed., American Bar Association Section of Labor and Employment Law/Bureau of National Affairs, (2003), "Legal Status of Arbitration,"pp. 51-54; and "State and Local Government Arbitration," pp. 1338-1346.

an actual law:

> **In *W.R. Grace & Co. v. Local 759, International Union of Rubber, Cork, Linoleum & Plastic Workers of America* (1983), 461 U.S. 757, 766...the United States Supreme Court held if the interpretation of a CBA violates public policy, the resulting award is unenforceable. However, the *Grace* court also cautioned that the public policy "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"**

See also, Eastern Associated Coal Corp. v. United Mine Workers of America, District 17 (2000) 531 U.S. 57 ("Eastern Coal") (the public policy must be "explicit").

As further pointed out by the Ohio Supreme Court in SORTA, the question of voidness goes to the agreement itself, not to the underlying misconduct:

> **[T]he question to be answered is not whether [the Grievant's misconduct] itself violates public policy, but whether the agreement to reinstate him does so.**

SORTA, supra, *quoting* Eastern Coal, supra, at 62-63.

Accordingly, the analysis the Arbitrator is required by law to follow is not whether the wearing of a KKK-like costume by an on-duty law enforcement officer violates public policy, but whether the Last Chance Agreements reinstating the Grievants violate public policy as stated in an

explicit law. There being no explicit Ohio law that prohibits reinstatement under these circumstances, the Last Chance Agreements that did so cannot be found to be void as against public policy.

AWARD

For the reasons set out above, because the Last Chance Agreements are not void as a matter of public policy, the grievances are sustained.

1. **The Last Chance Agreements are hereby reinstated.**

2. **The Grievants are to be reinstated subject to their Last Chance Agreements within 30 calendar days of this Award.**

3. **The Grievants are to be made whole, and thus are to receive full backpay and benefits, subject to:**

   a. **the Last Chance Agreements, and**

   b. **any unemployment benefits received.**

4. **The Last Chance Agreements shall stay in force, pursuant to their terms and pursuant to the Collective Bargaining Agreement, for a period of 24 months, which the Arbitrator deems to be 24 intermittent months of active employment.**

DATED: November 4, 2008

Susan Grody Ruben, Esq.
Arbitrator

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ARBITRATOR'S

SUPPLEMENTAL AWARD

The Arbitrator supplements her November 4, 2008 Award in this matter by adding to Section 3(b):

and any interim earnings.

Section 3 of the Award reads in its entirety:

3. The Grievants are to be made whole, and thus are to receive full backpay and benefits, subject to:

a. the Last Chance Agreements, and

b. any unemployment benefits received and any interim earnings.

DATED: November 5, 2008

Susan Grody Ruben, Esq.
Arbitrator