IN THE MATTER OF ARBITRATION

BETWEEN

FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC.
UNIT 2

AND

STATE OF OHIO/DEPARTMENT OF PUBLIC SAFETY

Before: Robert G. Stein

CASE# 15-00-20090409-0046-05-02

Grievance: Termination

Grievant: James Gaal

Principal Advocate for the EMPLOYER:

Kathleen S. Gulla, LRM
Ohio Department of Public Safety
Division of Human Resources
1970 West Broad Street
Columbus OH 43218-2081

Advocate for the UNION:

Paul Cox, General Counsel
FOP/OLC, Inc.
222 East Town Street
Columbus OH 43215

INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement ("Agreement") (Joint Exh. 1) between The State of Ohio ("Employer") and The Fraternal Order of Police, Ohio Labor Council, Inc., Unit 2 ("Union"). That Agreement is effective for calendar years 2006 through 2009 and includes the conduct which is the subject of the grievance under review here, identified as number 15-00-20090409-0046-05-02.

Robert G. Stein was mutually selected by the parties to arbitrate this matter as a member of a permanent panel of arbitrators, as recognized in Article 20, Section 20.08 of the Agreement. A hearing was held on August 19, 2009 at the Office of Collective Bargaining for the State, located at 100 East Broad Street in Columbus, Ohio. The parties mutually agreed to that hearing date and location, and they were each provided with a full opportunity to present oral testimony, documentary evidence, and arguments supporting their respective positions.

The hearing was not recorded via a fully-written transcript, and the parties elected to close their individual representations at the conclusion of the actual hearing The parties have stipulated to the submission of three (3) joint exhibits and also to the fact that the matter is properly before the arbitrator for a determination on the merits.

ISSUE

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

RELEVANT CONTRACT PROVISIONS

Article 19—Disciplinary Procedure
Article 20—Grievance Procedure

BACKGROUND

James Gaal ("Gaal" or "Grievant") began his employment as an enforcement agent in the Liquor Control Division of the Ohio Department of Public Safety ("ODPS") on December 10, 2007.

On January 20, 2009, Gaal was in a conference room in the Toledo District Office of ODPS with several coworkers as they watched the inauguration ceremonies for President Barack Obama. While President Obama was delivering his inaugural address, Gaal asked: "Has anyone heard the joke going around about white people reporting for cotton-picking lessons?" Among the persons who heard Gaal's comment was Assistant Agent in Charge, Shawn Tatter ("Tatter"). Although Tatter left the room shortly after Gaal's statement, Tatter did approach Gaal later that same day at Gaal's work station and advised Gaal that those types of comments were offensive to others and were not appropriate in their workplace.

On the next day, January 21, 2009, Gaal's work duties required him to be at the Lima Police Vice or PACE Unit building to discuss an on-going illegal sales investigation. ODPC Agents Gaal, Tatter, Brian Sargent, Christopher Traxler, and Sarah Valasek were there, in addition to four (4) or five (5) officers from the Lima City Police Department. At the conclusion of the joint meeting, the ODPS officers gathered in a hallway leading to the exit and near the restrooms. After entering and subsequently leaving the restroom area, Gaal engaged in a conversation with Sargent and Tatter regarding the error the Chief Justice of the U.S. Supreme Court had made the previous day in administering the presidential oath to the new president. Gaal basically stated, "I guess he is the head 'nigga' in charge."

Later that same day, Tatter, as the Grievant's immediate supervisor, contacted Agent in Charge Raymond Rodriguez via telephone to inform the latter of the Grievant's comment at the Lima location. On January 27, 2009, the agent in charge of the ODPS's Middletown District was directed to perform an administrative investigation regarding the Grievant's conduct. Gaal was subsequently charged with violating the following two (2) sections of the ODPS 501.02 Work Rules (Employer Exh. 2), included in the subsection entitled "Performance of Duty and Conduct:"

- H. CONDUCT UNBECOMING AN OFFICER—An employee may be charged with conduct unbecoming an officer in the following situations:

1. For conduct that may bring discredit to the Department of Public Safety, its Divisions, or its members.

. . .

- I. SEXUAL HARASSMENT AND DISCRIMINATION

. . .

2. An employee shall not make disparaging comments, statements, or gestures regarding other employees or the public, based on race, religion, color, national origin or sex.

The Employer determined that the appropriate discipline to be imposed against Gaal was termination. After a pre-disciplinary hearing was conducted on March 25, 2009, and on April 8, 2009, Gaal received a letter officially informing him of his immediate discharge (Joint Exh. 2). A grievance was then filed on the Grievant's behalf on that same date. (Joint Exh. 3). Because the parties mutually agreed to waive step two of the Article 20 grievance procedure and proceed directly to arbitration, the matter has been submitted to this arbitrator for final and binding resolution.

SUMMARY OF THE EMPLOYER'S POSITION

The Employer insists that it did have a "just cause" basis for imposing the challenged termination discipline against Gaal, especially in view of the warning he had been provided by Tatter after the first incident involving his inappropriate comment on January 20. The Employer also noted that the Grievant's conduct demonstrated his non-compliance

with the principles and concepts promoted in the prior community diversity and sensitivity training, a program lasting twenty-four (24) hours, which had been provided to Gaal and all of his work colleagues.

The Employer argues that, as a trained law enforcement officer, Gaal is held to a higher standard of conduct than other employees and displayed purportedly racist and/or bigoted conduct, which demonstrated his insensitivity and poor judgment. The Employer avers that the discipline imposed was reasonably related to the seriousness of his admitted offenses or misconduct. The Employer requests that the Union's grievance be denied in its entirety.

SUMMARY OF THE UNION'S POSITION

Although neither the Union nor the Grievant dispute that the Grievant did make the statements or comments identified above, they both argue that Gaal's conduct did not merit his termination. The Union contends that the two (2) incidents serving as the basis for the Employer's disciplinary action occurred within Gaal's work environment and did not involve any negative community repercussions. The Union also insists that the Grievant's "jokes," although admittedly inappropriate, were purportedly not made in such a manner as to insult or cause distress to anyone and were repeated by Gaal from other Internet or media sources.

Based on the nature of the Grievant's conduct and the progressive discipline provisions included in Article 19, Section 19.5 of the Agreement, the Union insists that termination was not the appropriate level of discipline to have been meted out against Gaal and that a less severe penalty was more appropriate, based on the absence of previous discipline in the Grievant's brief tenure with ODPS. Section 19.5 includes the following provisions:

> **19.05 Progressive Discipline**
>
> The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. At the Employer's discretion, disciplinary action shall include:
>
> 1. Verbal Reprimand (with appropriate notation in employee's file);
> 2. Written Reprimand;
> 3. One or more fines in an amount of one (1) to five (5) days' pay for any form of discipline. The first time fine for an employee shall not exceed three (3) days' pay;
> 4. Suspension;
> 5. Leave reduction of one or more day(s);
> 6. Working suspension;
> 7. Demotion;
> 8. Termination.
>
> However, more severe discipline may be imposed at any point if the infraction or violation merits the more severe action.
>
> The Employer, at its discretion, is also free to impose less severe discipline in situations which so warrant.

The Union requests that its grievance be sustained, that the Grievant be reinstated, and that he be made whole for his lost hours of service.

DISCUSSION

The identified issue for resolution in the instant matter is the validity of the Grievant's termination. In an employee termination matter, an arbitrator generally must determine whether an employer has clearly proved that an employee has committed acts warranting discipline and that the penalty of discharge is appropriate under the circumstances. *Hy-Vee Food Stores, Inc. and Local 147, Int'l Bhd. of Teamsters, Warehousemen, and Helpers of America*, 102 LA 555 (Bergist 1994). If an employer meets this burden, then the arbitrator must decide whether the level of discipline is reasonable.

"While it is not an arbitrator's intention to second-guess management's determination, he does have an obligation to make certain that a management action or determination is reasonably fair." *Ohio Univ. and Am. Fed'n of State, County, and Mun. Employees, Ohio Council 8, Local 1699*, 92 LA 1167 (1989). In the absence of contract language expressly prohibiting the exercise of such power, an arbitrator, by virtue of his authority and duty to fairly and finally settle disputes, has the inherent power to determine the sufficiency of a case and the reasonableness of a disciplinary action and penalty imposed. *CLEO, Inc. (Memphis, Tenn.) and Paper, Allied-Indus. Chem. And Energy Workers Int'l Union, Local 5-1766*, 117 LA 1479 (Curry 2002).

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 ODPS policies and rules is paramount to the success of the law enforcement agency.

> 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 a law enforcement 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." *H.P.P.U., Local No. 109 and City of Houston (Tex.),* 95-2 Lab. Arb. Awards (CCH) P 5244 (Overstreet 1994). Arbitrators have found that police departments and law enforcement agencies are para-military operations with codes of conduct that are more firm, more focused, and more disciplined than are the rules and regulations that apply to most other

types of employment because the officers' conduct is constantly being observed and assessed by citizens, as well as other officers. *City of For Worth, Texas and Combined Law Enforcement Ass'ns of Texas (CLEAT),* 99-2 Lab. Arb. Awards (CCH) P 3191 (Jennings 1999). Law enforcement officers are held to a higher standard of conduct than members of the general public, both on-duty and off-duty, and are expected to act as examples of model behavior to the community. *Portland [Or.] Police Commanding Officers Ass'n and City of Portland, Portland Police Bureau*, 05-1 Lab. Arb. Awards (CCH) P 3173 (Reeves 2005).

Based on a thorough review of the evidence submitted in this matter, the testimony of various witnesses at hearing, and the arguments raised by the parties, the arbitrator here finds that the Employer has met its burden of demonstrating that it did have "just cause" to discipline the Grievant for his "unbecoming conduct" and "racist comments," which exemplified his unprofessional behavior and his failure to respect the opinions and sensitivities of other persons regarding racial and political matters. Such conduct is clearly antagonistic to the Employer's efforts to promote morale and harmony in the workplace. It clearly does not matter that, as the Grievant indicated, he was attempting to replicate the comments he had heard from other sources. He is individually responsible for his own conduct and his failure to exemplify proper regard for those who were involuntarily subjected to his commentary. Disparaging and

bigoted comments made in a work environment have potential long-term negative impact and disruptive effects that may impair the effectiveness and efficiency of on-going working relationships. Significantly in the case, Saal's conduct manifested a repeated and unacceptable exercise of the same intolerable disdain or lack of respect for the varied interests and views of his colleagues after he had been specifically informed by his supervisor that such conduct was not appropriate or tolerable.

* * * * * * * * * * * * *

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). The "just cause" principle also applies to the level of discipline imposed, as well as to the reason for the challenged discipline. That means that there must be some proportionality between the offense and the punishment imposed, that the Employer must use progressive discipline, except in extreme cases, and that the Employer must weigh all mitigating and aggravating factors, such as the employee's seniority, the magnitude of the offense(s), and the employee's past work and disciplinary record. *Lorillard Tobacco Co., Greensboro, N.C. and Bakery, Confectionery*

and Tobacco Workers Int'l Union, Local 317T, 00-1 Lab. Arb. Awards (CCH) P 3433 (Nolan 2000).

It is the Employer's burden in a disciplinary matter to prove both the employee's guilt of wrongdoing and to also show "good cause" for the discipline which was actually imposed. *San Diego Transit Corp. and Int'l Bhd. of Elec. Workers, Local 465*, 03-2 Lab. Arb. Awards (CCH) P 3542 (Prayzich 2003). "Disciplinary actions must reflect the circumstances of each incident and the employment record of the individual employee." *Paper, Allied Indus., Chem., and Energy Workers Int'l Union, AFL-ClO, Local 8-0784 and Chinet Co.,* 01-1 Lab. Arb. Awards (CCH) P 3819 (Nelson 2000).

> Circumstances that must be taken into account when determining the appropriate discipline to be imposed include the nature of the offense, the degree of fault or culpability, and the mitigating and aggravating factors.

S.B. Thomas, 92 LA 1055, 1058 (Chandler 1989).

In this matter, the parties intentionally chose to include progressive discipline in their Agreement in Article 19, Section 19.05 and to specifically utilize it as a tool to bring about positive change or rehabilitation in employee performance so that an experienced and willing employee will have an opportunity to reform and then to benefit from continued employment. *Interstate Brands and Gen. Teamsters Local 406,* 97 LA 675 (Ellman 1991).

> **The concept of "just cause" requires reasonable proportionality between the offense and the penalty**. The seriousness of the offense will very depending on such factors as:

> the nature and consequences of the employee's offense (the magnitude of the actual or potential harm); the degree of knowledge the employee had about the rules and penalties (the clarity or absence of rules); the frequency of the offense; the impact of the degree of punishment on other employees; and the practices of the parties in similar cases. Furthermore, the **discipline for all but the most serious offenses must be imposed in gradually increasing levels, i.e., progressive discipline.** The primary objective is to correct rather than to punish. **Thus, for most offenses, employers should use one or more warnings before suspensions, and suspensions before discharge**. Finally, the penalty should take into account any mitigating or aggravating factors, such as the employee's past employment record.

AFSCME Local 327 and Housing and Community Servs. Agency of Lane County, 06-1 Lab. Arb. Awards (CCH) P 3389 (Reeves 2005) (Emphasis added). "The concept of progressive discipline requires an employer to demonstrate an honest and serious effort to 'salvage' rather than to 'savage' an employee." *Victory Mkt., Inc*., 84 LA 354 (1985).

Although the Grievant's conduct was repetitive in nature, it was his first documented misconduct after the completion of his probationary work period. It is also not clear from the evidence reviewed here how severe or explicit the first admonishment or warning was, which was given to Gaal by his supervisor, Tackett, after the first occurrence on January 20. The arbitrator is certainly not intending to convey a message that the Grievant's conduct was either excusable or acceptable. However, the penalty imposed should be tailored so that its "sting" is limited to the specific misconduct at hand. *Int'l Union, UAW and Its Local 8000 and The State of Mich.,* 90-2 Lab. Arb. Awards (CCH) P 8419 (Frost 1989). In this

matter, the parties intentionally chose to include progressive discipline in their Agreement and to specifically utilize it as a tool to bring about positive change or rehabilitation in employee performance so that an experienced and willing employee will have an opportunity to reform and then to benefit from continued employment. *Interstate Brands and Gen. Teamsters Local 406*, 97 LA 675 (Ellman 1991).

To conclude that a person who holds prejudicial opinions cannot change or become more sensitive to differences among people is simply to deny what progress has been made in society at large. The Grievant should consider the discipline he received in this matter to be a clear warning that he needs to conduct himself in an appropriate manner.

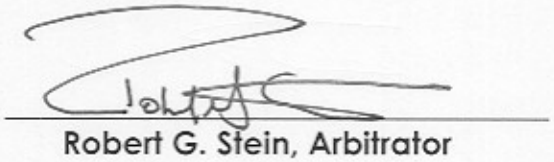
AWARD

The grievance is granted in part and denied in part.

The Grievant's termination should be vacated and modified to a three (3) day suspension. He shall be reinstated to his previous position within two (2) pay periods from the date of this decision with his back pay and benefits less his time of suspension. His seniority shall be bridged.

Additionally, The Grievant is required to attend a class on discrimination in the workplace within six (6) months from the date of this Award.

Respectfully submitted to the parties this 1st day of October 2009,



Robert G. Stein, Arbitrator