

IN THE MATTER OF ARBITRATION
BETWEEN
OHIO STATE TROOPERS ASSOCIATION
AND
STATE OF OHIO
DEPARTMENT OF PUBLIC SAFETY
DIVISION OF HIGHWAY PATROL

Before: Robert G. Stein
CASE# 15-00-20081113-0165-07-15

Grievant: William P. Elschlager (termination)

Principal Advocate(s) for the EMPLOYER:

Lieutenant C.J. Linek, Esq.
Ohio Department of Public Safety,
Division of the State Highway Patrol

Principal Advocate(s) 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 Ex. 1) between the Ohio Department of Public Safety, Division of the State Highway Patrol (herein "OSP" or "Employer") and the Ohio State Troopers Association, Inc., Unit 1 & 15 (herein "Union"). That Agreement is effective during the calendar years from 2006 through 2009 and includes the conduct which is the subject of this grievance, number 15-03-081113-0165-07-15.

Robert G. Stein was mutually selected by the parties to arbitrate this matter as a member of a panel of permanent umpires, pursuant to Article 20, Section 20.08 of the Agreement. A hearing was held on July 9, 2009 at the Union's office, located at 6161 Busch Boulevard, Suite 130 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 was subsequently concluded upon the parties' presentations of post-hearing briefs by August 7, 2009. The parties have stipulated to the statement of the issue, 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

The parties framed and stipulated to the following as a statement of the issue to be resolved:

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

RELEVANT CONTRACT PROVISIONS

Article 4—Management Rights
Article 19—Disciplinary Procedure
Article 20—Grievance Procedure

BACKGROUND

William P. Elschlager ("Elschlager" or "Grievant") was commissioned as a state trooper on July 25, 1997. By 2008, he had attained the rank of sergeant and was involved in the training of other troopers through his instructional involvement at the OSP Academy as both a police and defensive tactics instructor.

On November 17, 2007, he and his girlfriend/roommate, Stephanie Orewiler ("Orewiler"), visited the residence in Powell, Ohio of Elschlager's immediate supervisor, Lieutenant Steve Rine, to watch the Ohio

State/Michigan football game with Mr. and Mrs. Rine. During the game, Elschlager and Orewiler each consumed some of several bottles of wine. After leaving the Rine residence in the pickup truck owned and driven by Elschlager to travel to an eatery for a birthday dinner, Orewiler expressed her displeasure at having spent her birthday in the manner just described and her disappointment that she had not received an engagement ring from Elschlager on that occasion as a result of their relationship lasting more than two (2) years.

Evidence and witness testimony indicated that, at some point in expressing her disappointment and dismay, Orewiler slapped or hit Elschlager somewhere about the face and then attempted to exit the vehicle while it continued in motion. Elschlager admittedly tried to hold onto her body and/or clothing to preclude her exiting from the moving vehicle. When the vehicle did come to a stop, Orewiler ran into an undeveloped wooded area containing a creek. She used her cell phone to call her brother and communicated with him in a crying and loud fashion until the phone lost its battery power. In response to Orewiler's unwillingness to voluntarily return to Elschlager's vehicle, he carried her there and then basically locked her in the covered bed or cargo area of the truck, which was covered with a hard plastic tonneau and had a tailgate that could not be released from the interior of the truck bed. Elschlager took that course of action because Orewiler had resisted

Elschlager's efforts to have her sit again in the cab of Elschlager's Chevrolet Avalanche.

With Orewiler in the truck's bed, Elschlager drove approximately 2.7 miles to a commercial shopping area before Orewiler was permitted to exit. In response to her alleged screaming, Elschlager purportedly struck and attempted to restrain Orewiler before she ran shirtless into a nearby Starbucks coffee shop, where an employee called 911 for assistance. Three (3) deputies for the Delaware County Sheriff's Department responded to the scene. Based on their investigation, the Grievant was charged with domestic violence, assault, unlawful restraint, and disorderly conduct after being arrested and incarcerated in the Delaware County Jail.

Based on the results of an internal administrative investigation, Elschlager was advised by a letter dated November 4, 2008 of a pre-disciplinary meeting, based on the decision of the Director of the Ohio Department of Public Safety to terminate the Grievant's employment. (Joint Ex. 3). That hearing was conducted on November 7, 2008, and the hearing office concluded that "just cause" existed for disciplining the grievant, based on the following findings:

Sergeant Elschlager was charged with violation of Rule 4501:2-6-02(E) [False Statement, Truthfulness] and Rule 4501:2-6-02(I)(1) [Conduct Unbecoming an Officer]. Sergeant Elschlager was charged with bringing discredit to the Division when he was involved in a domestic violence incident with his girlfriend and

locked her in the trunk of his pick-up. It was also found that he was untruthful about the incident.

(Joint Ex. 3). In response to the subsequent November 13, 2008 letter providing the Grievant with official notice of his termination, a grievance was filed by the Union on the Grievant's behalf. (Joint Ex. 2) Because the matter remained unresolved at Step 2 of the grievance procedure, the Union requested that the matter be submitted to the arbitrator for final and binding resolution, pursuant to Article 20, Section 20.07(C) of the Agreement. The grievance specifically claims that the Employer violated Sections 19.01 and 19.05 of the "Disciplinary Procedure" article, which deal respectively with the application of the "just cause" standard for the imposition of discipline and the use of progressive discipline, involving the application of verbal reprimands, written reprimands, suspensions, and demotions or removals.

SUMMARY OF THE EMPLOYER'S POSITION

The Employer's basic or underlying contention is that its decision to terminate the Grievant's employment did not constitute a violation of any terms of the Agreement because that Grievant's purported conduct in violating the identified rules provided a "just cause" basis for that specific discipline. The Employer also insists that the Grievant's discharge was the appropriate and reasonable discipline to have been imposed based on the prior Grievant's disciplinary history, which includes a verbal reprimand,

a one-day fine, a one-day suspension, and a three-day fine. (Employer's opening statement; Employer's brief p. 7)

In its opening statement for the arbitration hearing, the Employer asserts that "[t]here is no doubt that Grievant restrained Stephanie [Orewiler] against her will" by locking her in the back of his pick-up truck from which she had no way to escape.

The Employer also specifically contends:

According to Stephanie, Grievant struck and slapped her several times. It is the Employer's contention that Grievant is being untruthful about what occurred based on Stephanie's injuries and her statement that she was struck several times. Grievant brought great discredit to the Division by his misbehavior.

(Joint Ex. 2) The Employer insists that the evidence demonstrates that this was not the first occasion in which Elschlager demonstrated abusive conduct in dealing with a woman. Amanda Datemasch ("Datemasch") contacted the OSP after reading about the Grievant's arrest in a local newspaper and reported that she had been the subject of the Grievant's abusive conduct when they were living together in 1999-2001. In response to questioning during the administrative investigation of the more recent Elschlager/Orewiler incident, Datemasch described how Elschlager had forced her into a position so that he handcuffed her hands behind her. She then described how the Grievant also tied her legs together before tying her hands and feet together behind her back for approximately fifteen (15) minutes in February 2001. The Employer claims that this

conduct is another example of the Grievant's unlawfully restraining a woman. The Employer also argues that "Amanda related that Grievant had thrown her across the room onto the floor in the past and had stalked her when she was out with friends." (Employer brief p. 3)

The Employer also noted that Elschlager had been suspended on March 1, 2006 for his "verbal confrontation" or "inappropriate remark" after he thought a female OSP dispatcher had hung up prematurely on him. After driving twenty (20) minutes to the OSP Communications Center, he was met by two dispatcher supervisors, who had been directed by their own supervisor not to allow the Grievant to enter the building. The dispatcher supervisors reported that Elschlager indicated that he would not tolerate the dispatcher hanging up on him and was reported to have said "Tell her if she ever does that again, I'll kill her." (Employer brief p. 4; Employer Ex. 3; Joint Ex. 3)

The Employer also alludes to "another example of Grievant's hostility toward women," which occurred on April, 2006. A vehicle pursuit of a suspect by the Grievant resulted in a foot chase, and then Elschlager used his Taser three (3) times before the suspect he was chasing fell to the ground. After he advised the OSP post via radio transmission that he had the woman suspect in custody, he was purportedly concerned that the woman might have had a weapon because the woman's arms were under her body. Because Elschlager recycled the Taser an additional four

(4) times until the arrestee complied with his orders, he was subsequently issued a one-day fine for "us[ing] excessive force to effect the arrest of a fleeing/resisting suspect." (Employer brief p. 4; Employer Ex. 4; Joint Ex. 3)

The Employer stresses that, even in the absence of a criminal conviction, the evidence in the instant matter indicates that Elschlager had unlawfully restrained Orewiler by locking her in the cargo area of his truck and then purportedly assaulting her after she was released from the truck at the parking lot. The Employer specifically refutes the Union's contention that Orewiler's alleged suicidal conduct resulted from the Paxil and/or other medications she was taking. Instead, the Employer avers that Orewiler's conduct resulted from her attempts to avoid Elschlager's continued abuse and to obtain help.

Although Orewiler did not testify at the actual arbitration hearing, the Employer stresses that her original incriminating statements to the reporting deputies regarding her injuries and her accusations about Elschlager's conduct were corroborated in three (3) different court proceedings, including those surrounding the issuance of a temporary protection order issued against the Grievant. (Employer Ex. 1(D))

Based on these claims, the Employer petitions that the Union's grievance be denied in its entirety.

SUMMARY OF THE UNION'S POSITION

The Union basically contends that the Employer has failed to meet its burden of establishing with substantial evidence that the Grievant did actually engage in the conduct alleged and reported by Orewiler on November 17, 2007. Specifically, the Union insists that the Grievant "loved this woman who was experiencing unprecedented self-destructive behavior" by attempting to leave his moving vehicle and that Elschlager "did his best to keep her from serious and possible fatal injury." (Union brief p. 14)

The Union also notes the Grievant's own version of his continuing conduct in response to Orewiler's unwillingness to return to the passenger seat in his truck.

When she would not go into the passenger side of the vehicle, Bill put her in the back of the Avalanche. It was warmer than the outside and prevented her from additional self-destructive actions while he could find a place not as dangerous as a SR 750 to try and have her reach her senses. He drove for a minute or so to a shopping center where he let her out and again told her he would take her to her friend's house that lived in Columbus if she wanted or he would take her back to the Rine's house. Her response was to kick and flail at him while she "screamed that [Elschlager] was hurting her." Bill was holding on to her when she successfully bolted, tearing off her shirt in the process. She then, unrestrained, ran into the coffee shop. She arrived without her shirt, shoes, and outerwear. She looked as though she had been the subject of a rape and that is what those in Starbucks initially thought happened.

(Union brief pp. 15-16)

The Union also insists that the Delaware County Grand Jury concluded that the charges levied against Elschlager would not be

subject to prosecution as a result of the "no bill" grand jury vote. Specifically, the Union provided the following explanation of how Orewiler sustained the "black eye and numerous scratches and bruises elsewhere on her body:"

She developed a black eye and numerous scratches and bruises elsewhere on her body. Bill has consistently, stated, written, and testified that he did not intentionally cause any of her injuries. He grabbed her to try and restrain her from leaving the truck; he fended her off after being struck; struggled with her at the creek bed and on the way back to the truck; struggled with her in trying to get her to reenter the passenger compartment; struggled with her in placing her in the bed of the truck. She fell from the truck when it came to a stop; obviously fell during her run through the woods as she was found on her hands and knees in the creek; could have been injured in the short time she was in the truck bed while kicking and according to her written statement "I kept banging on the side of the truck." In short, there are many ways in which she could have sustained the injuries that were the subject of the photographs that would not involve an intentional assault.

(Union brief p. 16)

The Union requests that its grievance be sustained and that Elschlager be reinstated to his position within the OSP without loss of either benefits or seniority because his off-duty conduct was purportedly "rational, reasonable, and intended to protect the safety of Stephanie Orewiler." (Union brief p. 21) The Union insists that Elschlager "was an exemplary officer who had been cleared by a grand jury." (Union brief p. 19)

DISCUSSION

The identified issue for resolution in the instant matter is the validity of the Grievant's termination. As noted both by this arbitrator previously, 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 does not meet 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 para-military organization, the Employer has numerous and extensive policies and rules addressing a wide range of procedural and conduct situations. Compliance with OSP 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. 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). 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).

Section 19.01 specifically includes the following language regarding the bilaterally-accepted standard for the imposition of discipline: "No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause."

"Just cause" is the contractual principle that regulates an employer's disciplinary authority. It is an amorphous standard, ordinarily open to arbitral interpretation on a case-by-case basis. Before an arbitrator will uphold a penalty, he ordinarily looks to the circumstances of the misconduct, mitigating factors, and whether the aggrieved employee received his/her contractual and legal due process protections.

State of Iowa, Iowa State Penitentiary and Am. Fed'n of State, County and Mun. Employees, AFSCME State Council 61, 01-2 Lab. Arb. Awards (CCH) P 3923 (Dworkin 2001).

Despite the fact that Elschlager was not formally prosecuted for violating a state or federal law, there is substantial evidence that his “unbecoming conduct” does demonstrate his violation of the OSP rules. Special prosecutor Mary Lynn Caswell indicated that the misdemeanor disorderly conduct charge had to be “no billed” due to a technicality, based on the felony charges being tagged or combined with the misdemeanor charges, which should have been filed separately. Significantly, proof that a grand jury returned a no-bill of indictment is viewed as *prima facie* proof of the termination of a prosecution. *Froehlich v. Ohio Dept. of Mental Health* (2007), 114 Ohio St.3d 286, 289, 871 N.E.2d 1159, citing to *Zello v. Glover*, 59 S.W.2d 277 (Tex. Civ. App. 1933).

The grand jury, in its inquest of criminal offenses, and in its finding and prosecution of indictments to the court of common pleas, does not exercise a judicial function. It only acts as the formal and constitutional accuser of crime and those it believes to be probably guilty thereof.

State v. Doerfler v. Price (1920), 101 Ohio St. 59, 128 N.E. 173. “Grand juries, as they are now constituted, frequently return ‘no bills,’ when succeeding grand juries find sufficient reason to return true bills.” *Id.* Most significantly, the “no bill” returned by the grand jury was not an exoneration or condonation of the Grievant’s conduct. As noted on page four of the Employer’s administrative investigation report, “[a] ‘no bill’ means that there is not enough supporting evidence to go forward on a felony, but it does not mean that there is not probable cause.” The presentation of

evidence to the grand jury did not constitute an actual prosecution of either the felony or misdemeanor charges. It is important to note, however, that while the evidence presented to the grand jury may not have been sufficient to meet the criminal law standard of "proof beyond a reasonable doubt," that more demanding standard is not applicable in this arbitral review of the Employer's application and enforcement of reasonable and well-published OSP rules and regulations.

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 conduct which occurred while the Grievant was off duty and away from the workplace.

This type of misconduct is universally recognized by arbitrators as falling within a special category of offenses which are governed by rules and standards that are different from those that apply to offenses that occur when an employee is on duty . . . The pivotal factor in off-duty misconduct cases is the nexus between the employee conduct and the employer's legitimate interest in an effective operation . . . An employer can impose discipline for off-duty conduct by establishing the conduct's relevance or notoriety. Off-duty conduct is relevant when the conduct relates to and harms the employer's interest. Off-duty conduct is notorious when it becomes so widely-known and is so deplorable that it harms the employer's interests.

Bd. of Regents, State Univ. of Fla., Fla. Int'l Univ., and Fla. Police Benevolent Ass'n, Inc., Law Enforcement Bargaining Unit, 00-1 Lab. Arb. Awards (CCH) P 3388 (Sergent 1999). In this specific case, the negative newspaper and

television coverage regarding the Grievant's original arrest under the identified charges brought discredit and adverse notoriety to both Elschlager individually and also to the OSP secondarily and vicariously. "Employers may properly be concerned when the private actions of an employee inevitably involve it in an unflattering light." *Bd. of Regents, State Univ. of Fla.* As noted in the 2001 arbitration decision from Sandra Mendel Furman, which was submitted by the Union to this arbitrator and involved this same two parties in a prior after the termination of OSP Sergeant Eleazar Rivera, "the Arbitrator cannot ignore that there is obviously an adverse effect on the Patrol's image when one of its Troopers makes the newspaper in this fashion . . . It is clearly a challenge to the effectiveness of a law enforcement officer to become personally involved in the criminal process, regardless of the outcome."

Also, as was noted in that same prior arbitration decision, Trooper Rivera, much like the Grievant, was an experienced and highly-trained trooper who failed to exercise good judgment and to utilize other more acceptable and non-aggressive options once it became apparent that he was dealing with a female who was upset. Clearly, Elschlager had superior training, technique, and size as clear advantages over Orewiler. It is also significant that the Grievant worked as a sergeant and also in an instructional capacity, and, as such, his leadership capacity with other troopers and students was likely impaired by reports of the Grievant's

conduct leading to his initial arrest. The OSP's rules prohibit each trooper from engaging in unlawful or improper conduct off the job which would affect his relationship to his job, his co-workers, and his reputation and his good will in the community.

Although the test administered by the deputies who reported in response to the 911 call made by a Starbucks employee indicated that Orewiler had a determined 0.10 blood alcohol level, no similar test was conducted to determine what concentration of alcohol was present in Elschlager or how his judgment might have been impaired at the time when he exercised poor judgment in responding to Orewiler. The Employer's administrative investigation indicated that Orewiler had told a victim's advocate representative that Elschlager and Rine had drunk four (4) bottles of wine between then during the football game. Despite the fact that Orewiler was not individually interviewed during the Employer's subsequent investigation of the November 17 incident and did not actually testify at the hearing on this matter, Orewiler did sign the original criminal complaint and had made documented statements to the responding deputies that evening regarding the Grievant's abusive conduct. Photographs of Orewiler clearly show her bruised eyes, bruises on her arms, and various scratches. Those conditions did not exist at the time she left the Rines' home, and the only person with whom Orewiler had contact in the intervening time between the conclusion of the

football game and the subsequent 911 call was the Grievant. Orewiler also maintained that she had been the victim of the Grievant's misconduct, which led to a November 19, 2009 hearing prior to the issuance of the temporary protection order. Based on the evidence submitted, the Employer did have "just cause" to discipline the Grievant despite the Grievant's denial of any wrongdoing and his claim that Orewiler sustained her injuries as a result of falling out of his truck, running through the woods, falling into the creek, and falling off the truck's tailgate.

In order to function properly and carry out their missions, a police force must be well-disciplined and guided by rules and regulations that regulate their members. The police force must be a highly-regimented organization that cannot tolerate or allow individual members to circumvent their rules and regulations. The standards for 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).

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). Those standards are also specifically recognized in Article 27, Section 27.1 of the Agreement, which states: "The Employer will follow a policy of progressive and corrective discipline that takes into consideration the nature and severity of the offense."

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-CIO, 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).

As noted above, the Grievant's conduct clearly justified discipline being imposed. The key aggravating factor is the Grievant's "unbecoming conduct" when he failed to respond appropriately to the Orewiler's purportedly uncooperative or defiant conduct. As a veteran officer with special skills and knowledge related to the use of defensive tactics, the Grievant was once again unable to demonstrate that he could respond to perceived threats or combativeness in an acceptable and professional manner. The Employer understandably and legitimately does not want to assume vicarious liability for any further similar errors in judgment and performance by Elschlager. Another notable aggravating factor is the Grievant's disciplinary record, which reflects four (4) prior disciplinary incidents, all within an approximate two-year period. Two of those incidents demonstrate the Grievant's inappropriate conduct in response to what he seemingly deemed to be "non-compliant" behavior by females. Another aggravating factor is the Grievant's unwillingness to accept any personal responsibility for the injuries incurred by Orewiler.

This arbitrator agrees with the majority of his colleagues, who have recognized that the primary purpose of workplace discipline is not to punish, but rather to correct errant behavior and to utilize progressive discipline as a tool to bring about positive change in employee performance so that a veteran employee will have an opportunity to

benefit from continued employment. *Interstate Brands and Gen. Teamsters Local 406*, 97 LA 675 (Ellman 1991).

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 in Article 19 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). (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). In addition to the parties' contractual commitment to progressive discipline, mitigating factors such as the Grievant's tenure and performance reviews should reasonably be considered.

AWARD

The Union's grievance is granted in part and denied in part.

The Grievant's termination should be vacated and modified to a time-served suspension without back pay or benefits. The Grievant's seniority should be bridged back to the date of his termination.

The Grievant shall be reinstated within two (2) pay periods after he presents documentation to the OSP post commander that he has made an appointment with the appropriate office of the Employer's Employee Assistance Program ("EAP") and intends to participate and complete their recommended program(s), e.g., counseling, anger management, sensitivity training, etc. The referral to EAP shall also include communication by the Employer to the EAP regarding issues it believes need to be addressed. The Grievant's continued employment will be based on his continuing involvement and ultimate completion of all recommended assistance programs to the satisfaction of the EAP personnel. The Employer should be provided with periodic updates regarding the Grievant's continued participation and satisfactory completion of all recommended program(s) through the EAP. Failure to comply with the program requirements placed upon the Grievant by the EAP, shall result in his immediate termination from employment.

Based on the serious nature of the Grievant's rule violation and the impact of the discipline recognized here, it is imperative that Elschlager recognize this to be a last chance opportunity for him to perform satisfactorily for the OSP. As an experienced and highly-trained trooper and leader, Elschlager needs to exemplify that he can abide by the same conduct and laws that he enforces against the general public. The demands on a trooper are extraordinary, yet, the OSP owes a great responsibility to the public to ensure that only the best individual troopers are working and exercising good judgment in carrying out their duties.

Respectfully submitted to the parties this 7th day of October 2009,



Robert G. Stein, Arbitrator