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IN ARBITRATION PROCEEDINGS PURSUANT TO THE

COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of **OHIO STATE TROOPERS ASSOCIATION,** **and** **OHIO DEPARTMENT OF PUBLIC SAFETY, DIVISION OF STATE HIGHWAY PATROL** **Grievance # 15-03-20110307-048-04-01** **Grievant: Jason R. Fantone**	**ARBITRATOR'S OPINION AND AWARD**

This Arbitration arises pursuant to the collective bargaining agreement ("the Agreement") between the Parties, OHIO STATE TROOPER'S ASSOCIATION ("the Union") and OHIO DEPARTMENT OF PUBLIC SAFETY, DIVISION OF HIGHWAY PATROL ("the State," "the Patrol," or "the Division") under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. The Parties agreed there are no procedural or jurisdictional impediments to a final and binding decision by the Arbitrator pursuant to the Agreement.

Hearing was held September 9, 2011 in Columbus, Ohio. Both Parties were represented by advocates who had full opportunity for the examination and cross-examination of witnesses, the introduction of exhibits, and for argument. Post-hearing briefs were mailed by both Parties on October 21, 2011.

APPEARANCES:

On behalf of the Union:

HERSCHEL M. SIGALL, Esq., ELAINE N. SILVEIRA, Esq., ROBERT COOPER, and LARRY K. PHILLIPS, Ohio State Troopers Association

On behalf of the Employer:

LT. KEVIN D. MILLER, Professional Standards Section, Ohio State Highway Patrol

ISSUE

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

RELEVANT PORTION OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT

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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 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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FACTS

The Grievant, a Trooper with approximately seven years of service at the time of his termination, was scheduled to work the 11pm-7am shift at the Canfield Post on January 1-2, 2011. He asked and was granted off the second half of that shift so he could tailgate and attend the Browns-Steelers game at Browns Stadium on Sunday, January 2, 2011 with a fellow Trooper.

A few months previously, the Grievant's family physician had given him a prescription for 20 mg of Lexapro, an antidepressant. The Grievant did not like taking the medication. At the time of attending the Browns game, he had been weaning himself off the medication, cutting himself down to a dose of 10 mg.

When the Grievant came home from work at approximately 3:30am January 2, 2011, he took 10 mg of Lexapro before going to bed. He awoke at approximately 7:30am. In preparing to leave for the game, he contemplated what to do with his next dose of Lexapro. He and his fellow Trooper had made tentative plans to spend Sunday night in Cleveland. The Grievant knew if he skipped that next dose, he would get a headache. He was embarrassed to have his fellow Trooper know he was taking an antidepressant, however, so did not want to take the pill with him. Impulsively, at approximately 8:30am, he took 20 mg of Lexapro.[1]

While tailgating, the Grievant drank approximately five beers and a swig or two of Jack Daniels. After entering the stadium, the Grievant bought a beer, which he accidently dropped on the ground. Upon reaching his seat, he noticed his vision was blurred and he was having trouble focusing.

[1] The State opines the Grievant deliberately took the extra dose of Lexapro Sunday morning to multiply the effect of the alcohol he knew he would be drinking at Browns Stadium. Other than the Grievant having been trained as a Trooper regarding the interactions generally between drugs and alcohol, there is no evidence in the record to support this theory.

The Grievant knew his brother-in-law, a Mahoning County Deputy Sheriff with whom he had a good relationship, was working security at the game. At some point during the game, he thought he saw his brother-in-law with another Deputy. The Grievant threw a peanut or two at the officer he thought was his brother-in-law. It was not his brother-in-law. The two Deputies approached the Grievant and his fellow Trooper, asking who threw the peanut. The Grievant took responsibility, but became verbally belligerent. The two Deputies led the Grievant and his fellow Trooper out to the corridor. The Grievant grew increasingly agitated and was cuffed. The Grievant's brother-in-law was called; he arrived as the Grievant was being taken on a Stadium elevator to the holding area in the basement of the Stadium. The Grievant's brother-in-law tried to calm the Grievant down; the Grievant did not even recognize his brother-in-law and remained agitated.

The Grievant was placed in a holding cell. He needed to go to the bathroom. He kicked open the door of the holding cell. Something – either a piece of the door lock or something from the floor of the holding cell – scattered across the floor of the holding area. The Grievant was arrested for disorderly conduct and locked up for the night. A charge of felony vandalism for the damage to the door was added. The Grievant bonded out of jail the next morning. Eventually, he was permitted to plead to misdemeanor disorderly conduct, pay approximately $600 in restitution for damage to the door, and enter a first-offender pre-trial diversion program. He successfully completed the program, resulting in his criminal record being expunged and sealed.

The story of the drunk Trooper at the Browns game being arrested, charged, diverted, and eventually getting the charges dismissed hit the newspapers and TV news. The Grievant's employment was terminated for having brought discredit to the Division. The Grievant's termination letter dated February 28, 2011 provides:

You are hereby advised you are being terminated from your employment with the Ohio Department of Public Safety, Ohio State Highway Patrol, effective immediately upon issuance, Monday, February 28, 2011, for violation of OSHP Rules and Regulations' Rule 4501:2-6-02(I)(1), Conduct Unbecoming an Officer.

Specifically, as a result of Administrative Investigation # 2011-0026, it was found that you brought discredit to the Division during an incident that occurred at the Cleveland Browns Stadium on January 2, 2011.

PARTIES' POSITIONS

State's Position

The Arbitrator is to determine whether the Grievant's behavior was unbecoming of an Ohio State Trooper. If the Arbitrator determines it was, she must then decide if the State abused its discretion by discharging the Grievant for the embarrassment, loss of respect, trust, and confidence in the Division as a result of four months of negative media coverage. The State contends the Grievant's behavior must be met with severe consequences.

The Grievant's behavior damaged the State's reputation instantaneously when news of that behavior was announced by the media. However, the State's strong stance against such behavior was made known when the Grievant was discharged for his felonious behavior. The State cannot unring the bell. However, it can take swift action in these cases to demonstrate the organization will not condone illegal behavior from an employee who routines arrests the citizenry for the very same behavior. Additionally, the State's imposed discipline sends a strong message to deter other employees from such behavior. Freeman United Coal Co., 82 LA 861, 866, states when an employee's misconduct is so severe that continued employment would undermine an employer's ability to function effectively, discharge will be deemed warranted even if the employee has received no earlier discipline and is unlikely to repeat the offense. In part, such

discipline serves the legitimate purpose of deterring other employees from engaging in such conduct.

One of the core responsibilities of Ohio State Troopers is to deter, detect, and arrest impaired drivers. Impairment is caused by drugs (illicit and prescribed) and/or alcohol. The Grievant is attempting to use the very excuse typically given by arrestees – "the alcohol and drugs made me do it." This excuse is unacceptable when used by the citizenry and certainly is not acceptable for a highly-trained Ohio State Trooper. Certain infractions are fatal flaws in the law enforcement profession. The Grievant has committed a fatal flaw and must now face the consequences.

The Grievant ignored various side effects he was experiencing from his anti-depressant medication. He ignored these warning signs and consumed three times his regular dose before going drinking at a Browns game. As an Ohio State Trooper, the Grievant is extremely well-versed on the effects of mixing alcohol and prescription drugs. He testified he was hesitant to take anti-depressants because "in my experience with the Patrol, it could be dangerous." It is common knowledge in law enforcement that anti-depressants are abused by combining them with alcohol to increase the effects of alcohol. The Grievant also acknowledged ignoring the warning bottle on his medication bottle – "I didn't have a lot of respect for that, almost all medications state not to take alcohol."

The Grievant testified he normally took his pill after completing his work shift. He stated he had been taking only a half dose – 10 mg – in an attempt to wean himself off the medication. On the day of the incident, he took a half dose at 3:30am, slept until 7:30am, and took a whole dose – 20 mg – at 8:30am. He says he took the second dose because "If I would miss a dose, I would get a headache." The Grievant's actions did not remedy the alleged problem. He would have still missed his dose the next morning if he

spent the night in Cleveland as planned. If he thought he would get an extra five hours of medicine by taking it at 8:30am, he should not have taken it at 3:30am. His rationale that his body would somehow stockpile medication for the next day if he took an additional dose is absurd. A logical explanation is the Grievant purposely took the extra medication because he intended to enhance the effects of the alcohol he intended on consuming at the game.

The Grievant testified that on the morning of the incident, he didn't want to put the pill bottle or the pill in his pocket because he didn't want his colleague and friend with whom he was attending the game to know he was taking the medication. So he "poured a glass of water and took the pill." This was a deliberate and conscious act. Moreover, he had already told a coworker he was taking an anti-depressant. Furthermore, a single pill or even the whole pill bottle in the Grievant's pocket would not have been noticeable under bulky winter clothing.

Regarding the holding cell door, during the internal investigation and his arbitration hearing, the Grievant claimed he did not damage the door or its lock. Yet during the criminal proceedings, he signed an admission of guilt statement, acknowledged he damaged the door, and agreed to pay restitution. He has perjured himself in one of these situations. As stated by this Arbitrator in Case No. 15-03-20080319-040-04-01, "Truthfulness on the part of a member of law enforcement is an essential requirement. A State Trooper cannot take it upon himself to decide when it is important to tell the truth and when it is not. There is no room in law enforcement for maverick behavior." Whether or not the Grievant damaged the door, his behavior on the day of the incident, his arrest, and extensive media coverage which brought discredit to the Division is sufficient to justify termination. There is nothing in the charges or termination letter referring to a broken door.

The Patrol does not and cannot employ felons for obvious reasons. While the Grievant was not convicted of a felony, he was charged with one and admitted all the elements of the crime. This certainly supports the rule violation that he brought discredit to the Division. The public expects Troopers to stop felonious behavior and apprehend those who engage in such behavior. They do not expect Troopers to exhibit that sort of behavior themselves. The Grievant's felonious behavior was broadcast in several television media markets, including the metropolitan areas of Youngstown and Cleveland. Additionally, details of the incident appeared in the Cleveland Plain Dealer. The Grievant was identified as an Ohio State Trooper in each media story; each time the story was broadcast, it cast the Division in a negative light.

Law enforcement officers' off-duty behavior has been addressed by the Ohio Supreme Court. In Jones v. Franklin Cty. Sheriff (1990), 52 Ohio St. 40, the Court outlined the higher expectations placed on police officers than on the public. In that case, a police officer engaged in off-duty vigilante justice in an attempt to retrieve her sister's stolen purse. The Court stated, "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….Since both the public and police officers themselves hold the police officer in a position of honor and respect, it is incumbent upon a police officer to keep his or her activities above suspicion both on and off duty."

The Grievant was taught in the Academy his behavior both on- and off-duty must be exemplary because law enforcement officers are held to a higher standard than the public. The Grievant acknowledged this in his testimony. Despite this, he chose to place

himself in a position to cause significant discredit to his own reputation as well as the reputation of the Division. The Grievant brought discredit to the Division the second he identified himself as a Trooper at Browns stadium. And if bystanders were unaware of the Grievant's Trooper status, they certainly became aware of it when they watched the local news and learned the Grievant was an Ohio State Trooper and was arrested for throwing peanuts and damaging a holding cell at the stadium. The Grievant's behavior put the Division in a negative light in front of Mahoning County Deputies, the Cleveland Police Department, Tenable Security, the Cuyahoga County Sheriff's Department, the Richland County Sheriff's Department, the Cuyahoga County Court Clerk's Office, the Cuyahoga County Prosecutor, the Cuyahoga County Probation Department, and the Cuyahoga County Office of the Grand Jury. The Grievant himself agreed the incident brought discredit to the Division.

The Union attempts to parallel this matter with a violation of the State's Drug-Free Workplace Policy in an attempt to mitigate the imposed discipline. The Union contends if the Grievant had been on-duty, he would receive a last chance agreement. The State believes this is an apples to oranges comparison. The intent of the Drug-Free Workplace Policy is to address alcohol/drug abuse detected in the workplace either via random testing or reasonable suspicion through observations. The Policy is not intended to protect employee misbehavior due to impairment from discipline. The Grievant was not discharged because he was intoxicated/impaired. He was discharged due to his behavior and to the discredit his behavior brought to himself and the Division.

The fact the Grievant was arrested, charged, and admitted a felony violation elevates the Grievant's misconduct to arguably the highest level. The Union typically contends a charge does not constitute a conviction and that anyone can be charged with a crime even if s/he is innocent. The Grievant, however, is not innocent in this case as

demonstrated by his signed admission of guilt. The media coverage, which lasted four months, included the fact the Grievant entered a Diversion Program to avoid a felony conviction. In essence, the Grievant is a felon who doesn't have the paper trail to document the incident. The Patrol cannot employ these types of individuals.

An argument for mitigation would be much stronger had the Grievant's arrest been unrelated to interaction with law enforcement, and when approached by officers he was respectful and compliant. The entire incident involved fellow law enforcement officers; the Grievant's serious misconduct was directed toward them.

The State does not dispute the Grievant's satisfactory work record. His clear deportment record also speaks for itself. As held by Arbitrator Alan Miles Ruben in Case No. 15-00-980807-0097/98-04-01, "although the Arbitrator concurs with the Association that Trooper Houston is a 'good man,' he must also consider that sometimes good men do bad things….the question before the Arbitrator is not what he would have done were he the Director of Public Safety but rather whether the discharge penalty imposed for the Grievant's misconduct was unreasonable, excessive or inconsistent with the sanctions imposed for like offenses upon other Officers." The State maintains it has historically taken a strong stance on off-duty behavior that is unbecoming of an officer and that which damages the Division's reputation. In the instant case, the scope of the media coverage, the abusive and disrespectful behavior directed toward fellow law enforcement, the violent behavior while in custody, the admission to a felony offense and admittance into a Diversion Program is unprecedented.

The Grievant made unwise decisions that led to his behavior. His actions fell significantly short of the expectations of an Ohio State Trooper. His behavior was consistent with those whom he routinely arrested prior to his termination. Because of his poor choices, his reputation has been tarnished; he can no longer adequately

represent and carry on the mission and objectives of the Patrol. Some actions and behaviors are fatal flaws when it comes to law enforcement officers. The Grievant's misconduct was so egregious, mitigation is not warranted.

Union's Position

The Grievant is an exceptional trooper. In his performance evaluation conducted three months before the January 2011 incident, the Grievant "exceeded expectations" in six of eight areas and was marked as "far exceeding" in another area. The evaluation commentary most germane to this matter is that concerning his interactions with the public and with his fellow officers:

> **Trooper Fantone interacts well with the public in a variety of conditions, showing understanding and sensitivity. He has a very good working relationship with his peers and supervisors. Trooper Fantone always has a positive attitude and it can be infectious to those around him….**
>
> **Trooper Fantone promotes a positive image of the Highway Patrol through his appearance, positive attitude, and demeanor. Trooper Fantone is well respected by the other Law Enforcement Officers in Mahoning County and his credibility within the court system is above reproach….**

The Grievant is a past "Trooper of the Year"; a winner of the OHP Criminal Patrol Award; a member of the Criminal Patrol Team; a member of the Strategic Response Team; selected to attend SWAT school; offered a position at the OSHP Academy as an Academy Instructor; identified for promotion and scheduled to attend the Assessment Center, antecedent to promotion.

The Grievant's family physician prescribed an anti-depressant. Due to side effects, the Grievant, at the time of the incident, had cut his dosage from 20 mg to 10mg in the process of weaning himself off the drug. The Grievant testified his doctor did not discuss the interaction of the drug with alcohol, but that the pill bottle contained the

standard warning the drug should not be taken with alcohol. The Grievant normally would take the drug immediately before going to sleep. As to alcohol, it was uncommon for him to occasionally drink moderately following his shift when the following day would be a day off. He had never experienced serious negative effects from drinking while taking the drug.

The Grievant had made plans with a fellow Trooper to attend a Browns game. The Grievant had asked for and received a half-shift off from his scheduled shift that began Saturday night at 11pm on January 1, 2011. He took half a pill when he arrived home at approximately 3:30am. He slept a few hours, then took a whole pill at approximately 8am before leaving for the game with his fellow Trooper. The Grievant testified he didn't want to be seen taking a pill, didn't want to carry the pill bottle, and didn't want to put a loose pill in his pocket. The Grievant drove to the game; he and his fellow Trooper were either going to spend the night in Cleveland or the fellow Trooper was going to drive them home.

The Grievant and his fellow Trooper arrived at a tailgate area adjacent to the stadium at approximately 10:30am. They each had a swig of Jack Daniels and 4-5 beers before the start of the game. As they walked to the stadium, the Grievant's fellow Trooper noticed unusual behavior by the Grievant. Normally not an effusive personality, the Grievant put his arm around his fellow Trooper. Upon entering the stadium, the Grievant bought a beer and it dropped to the ground. The two took their seats. The Grievant's vision is blurry and is having trouble focusing. The Grievant was eating peanuts. He saw uniformed Deputies below his seating area. Thinking one of them was his brother-in-law, a Mahoning County deputy the Grievant knew was working security at the game, the Grievant threw one or two peanuts, one of which hit one of the Deputies. The Deputies came to the Grievant's seat and asked, "who threw the peanut?" The

Deputies told the Grievant and his fellow Trooper to come with them.

The Grievant identified himself as a Trooper. The Grievant was verbally profane and abusive toward the Deputies, but he was not overtly threatening or physically abusive. The Deputies cuffed the Grievant; he did not resist. The Deputies took the Grievant to a holding room at the stadium. The Grievant's brother-in-law was contacted and caught up with the Grievant and the Deputies as the Grievant was on the elevator to the holding cell. The Grievant did not recognize his brother-in-law and proceeded to verbally abuse him. The Grievant's fellow Trooper testified the Grievant was acting unlike himself.

While in the holding cell, the Grievant needed to go to the bathroom. The Grievant kicked open the door of the holding cell. Something, either part of the lock assembly on the door or something on the floor of the holding cell, scattered across the floor. The kicking of the door prompted the Cleveland police to charge the Grievant with vandalism and disorderly conduct. The charge was subsequently amended to a felony vandalism based upon a determination the damage to the door exceeded $500.00. The Grievant was held overnight and bonded out the next morning. The Grievant entered a pre-trial diversion program and successfully completed the program. On August 9, 2011, the Court of Common Pleas of Cuyahoga County ordered "that the case be dismissed with prejudice, defendant's motion for expungement of record is granted." The court ordered the record sealed.

What happened to the Grievant was not a product of his being drunk. The evidence supports a determination he was not drunk. The alcohol, interacting with an expanded dose of the anti-depressant, caused the irrational behavior that resulted in the Grievant being charged criminally and in the reporting of these charges to the media.

Deputies have a protocol for dealing with drunks and their behavior at Browns games. Obnoxious drunks are taken to a holding cell and released after the game. There are scores of such custodial encounters. Some particularly obnoxious or aggressive drunks are charged with disorderly conduct and taken to jail for booking and release. The Deputies treated the Grievant as if he were an obnoxious drunk. The evidence is clear, however, the Grievant was not drunk. He had for a period time lost contact with reality. He suffered a blackout. He did not recognize loved ones. He did not react logically or in his best interest.

If in fact the Grievant had been drunk, he would not have been fired. If he were charged with off-duty DUI, he would not have been fired. If he was under the influence of alcohol while on-duty, he would not have been fired. Indeed, he could not have been fired under those circumstances because Appendix C of the Parties' Agreement incorporates a Drug Free Workplace Policy that provides in pertinent part:

> **On the first occasion in which any employee who is determined to be under the influence of, or using alcohol or any other drugs, while on duty, as confirmed by testing pursuant to this policy, the employee shall be given the opportunity to enter a substance abuse program….No disciplinary action shall be taken against the employee provided he/she successfully completes the program. Last chance agreements shall not be effective for longer than five (5) years.**

The arbitration case of Trooper David Shockey is instructive. He was terminated on the grounds he called off sick to avoid reporting in under the influence of alcohol. Trooper Shockey previously had been determined to be on duty under the influence and had been, pursuant to the Agreement, given a Last Chance Agreement. Trooper Shockey was restored to duty over 2-1/2 years ago; he continues to effectively serve as a Trooper.

As to the media coverage the State asserts brought discredit to the Division, the coverage was inaccurate and probably was malevolently inspired. The <u>Plain Dealer</u> headline declared, "State trooper accused of drunken, disorderly conduct destroys

holding cell at Browns Stadium." The headline is egregious in its distortion. Photographs of the holding cell door taken immediately following the incident are in the record. The door is intact; the strike plate firmly affixed. The door was still operational. Furthermore, the Mahoning County Lieutenant who cuffed the Grievant and took him to the holding cell knew the Grievant had twice arrested a Mahoning County Deputy for DUI. Indeed, the Grievant told him so at the time of the incident, clearly not the act of a rational man. The Grievant was known to these people; it is safe to conclude he was not popular.

In the case of Trooper Craig Franklin and Sergeant Eric Wlodarsky, the former who, while on-duty, made a KKK-like costume out of office supplies and wore it while in his Trooper uniform, and the latter who took a photo of the spectacle and emailed the photo to others, the State initially put them on a Last Chance Agreements, rather than terminating them. The photo and an accompanying story were broadcast by the media statewide and beyond. Both these Troopers remain valued members of the Patrol; one has received commendation for his outstanding actions.

Another case involving media exposure was the termination of Sergeant William Elschlager. Sgt. Elschlager was terminated following being charged with assaulting his girlfriend and holding her temporarily imprisoned. His pictures appeared in print media and his arraignment was videotaped and carried by numerous television stations. While the State contended Sgt. Elschlager had brought discredit to the Division, the arbitrator restored him to duty. That case was decided over two years ago; Trooper Elschlager continues to serve the people of Ohio.

Additionally, there were the Canton termination cases involving an alleged cheating scandal related to a BAC recertification examination. There was significant media exposure. The Union position in all the arbitrated cases was that the Troopers

were innocent of cheating. The arbitrators agreed with the Union and restored all the Troopers and Sergeants to their positions. The point relevant to the instant case is the Union had not taken the case of Trooper Todd Bradic, who had acknowledged he cheated on the test. However, the State elected, without mediation or arbitration, to rehire Trooper Bradic, despite the earlier media exposure. All of these Troopers and Sergeants restored to duty have performed admirably and continue in their careers to the benefit of the people of Ohio and the Division.

There also is the arbitration case involving the termination of Trooper Eleazar Rivera. Trooper Rivera had gone to a Browns game and afterwards to a "men's club." When he returned home, he and his wife engaged in an argument over his lateness and his sobriety. Trooper Rivera struck his wife twice with a closed fist. He was arrested for domestic violence; the story made the papers and other media broadcasts. The State contended the arrest and media coverage brought discredit to the Division. Trooper Rivera pled to the criminal charge of disorderly conduct; by doing so, he escaped the firearms disability that would have accompanied a plea to domestic violence. Trooper Rivera was remorseful and committed to dealing with his behavior. He was a highly-decorated Trooper with a pristine disciplinary record. The Union introduced evidence at the arbitration of two other cases, Trooper Orssie Bumpus and Trooper George Biskup. Both of those cases had involved domestic violence. Moreover, Trooper Biskup had been arrested while on duty in uniform. The State in both instances elected not to pursue termination. Trooper Bumpus received a three-day suspension; Trooper Biskup received a ten-day suspension. The arbitrator restored Trooper Rivera to his position without backpay, noting, "the record defines the Grievant as a Trooper with multiple awards reflecting the recognition of his peers and management, superior performance evaluations…and a blemish free conduct record from the Patrol." The State has

subsequently promoted Rivera to Assistant Post Commander.

If the Grievant is guilty of anything, it is of electing to take the second dose of Lexapro before heading out to the Browns game. The evidence establishes the Grievant's subsequent actions would not have happened but for that additional dose. The Grievant's accredited alcohol counselor testified based on the facts given to her by the Grievant, he had experienced a blackout caused by the additional dose of Lexapro combined with the alcohol. The Grievant's brother-in-law testified the Grievant had behaved irrationally at the Stadium – "I didn't know him."

What happened to the Grievant was the result of an accidental overdose of medication and must be treated as such. The Grievant was not a disorderly drunk; he was a blackout victim of an overdose enhanced by alcohol. The Agreement provides for progressive discipline. That provision is not just boilerplate.

It is important to identify the actual actions of the Grievant as opposed to the media reports contained in the Administrative Investigation. The Grievant threw a couple peanuts at a uniformed officer he thought was his brother-in-law. When confronted, he was verbally profane and verbally abusive. Later, he kicked at a door to the holding cell. Even in his altered state of consciousness, he did not threaten to assault anyone, he did not physically touch or strike anyone, he did not offer resistance to being cuffed. He did not destroy the holding cell.

Following the events of January 2, 2011, the Grievant sought counseling and continues to consult a professional counselor. He has elected to cease medicating by use of drugs or alcohol. There is every reason to believe that when restored to his treasured career as a Trooper he would once again demonstrate himself to be an exceptional Trooper. Under the progressive discipline provisions of the Agreement, the Grievant should face no more than a three- or five-day suspension. His seniority and lost

benefits should be restored.

ARBITRATOR'S OPINION

This is a very serious and difficult case. Both sides have powerful arguments supporting their positions. The State firmly believes it is justified in having terminated the Grievant's employment for having brought discredit to the Division. The Union points to the Grievant's exemplary record and the involuntary nature of his troubles at Browns Stadium on January 2, 2011. The Arbitrator is charged with weighing the evidence to determine whether the State has carried its burden of having had just cause for terminating the Grievant's employment. Essentially, just cause consists of two elements in this context: 1) did the Grievant bring discredit to the Division; and 2) is termination appropriate under all the circumstances.

1. <u>The Grievant's Misconduct and the Discredit it Brought to the Division</u>

This portion of the analysis need not be labored – even the Grievant admits he brought discredit to the Division.

After taking 30 mg of Lexapro during the half-day leading up to the Browns game, and downing five beers and some Jack Daniels, the Grievant, upon being confronted after throwing peanuts at a Deputy he thought was his brother-in-law, became verbally abusive and out of control. The Grievant was taken to a holding cell in the basement of the Stadium. The Grievant needed to go to the bathroom and kicked the holding cell door open, which damaged the door.

Cleveland Police arrested the Grievant, charging him with disorderly conduct and felony vandalism. He spent one night in jail and bonded out the next morning. In the meantime, the story hit the newspapers and television news. The Grievant was identified

by the media as a drunken Ohio State Trooper who destroyed a cell door. There were intermittent reports in the media over a period of four months. This certainly brought discredit to the Division.

2. Whether Termination is Appropriate under All the Circumstances

The more difficult question is whether termination should be the remedy for the Grievant having brought discredit to the Division. After careful thought and analysis, the Arbitrator concludes termination was an improper remedy in this matter. The Arbitrator reaches this conclusion for two reasons: a) the record demonstrates the Grievant did not intend to make an ass of himself at the Browns game; and b) some Troopers who have engaged in equal or worse misconduct that brought discredit to the Division have received lesser penalties or have been returned to work via arbitration.

a. The Non-Volitional Nature of the Grievant's Misconduct

The Grievant's January 2, 2011 debacle started with a discrete volitional act – he took 20 mg of Lexapro after having taken 10 mg approximately five hours earlier. His prescription was for 20 mg every twenty-four hours.

The State contends the Grievant intentionally took an extra dose of Lexapro to enhance the effect of the alcohol he knew he'd be drinking later at the Stadium. Other than the fact the Grievant, as a Trooper, had received training on drug and alcohol interactions generally, there is no record evidence to support this theory. Indeed the record suggests the contrary – that the Grievant took an extra pill to avoid a headache and to keep the fact of his taking an antidepressant private from his Trooper colleague.

The State contends the Grievant would have known taking an extra dose of Lexapro on Sunday would not stave off a missed-dose headache on Monday. It also

points out the Grievant previously had told another Trooper colleague about the antidepressant. The Arbitrator is not convinced by either of those theories. First, there is no record evidence the Grievant knew an extra dose on Sunday would have no effect on a Monday missed-dose headache. Second, just because the Grievant shared private information with one colleague does not mean he would feel comfortable sharing that information with another colleague.

The record is clear the Grievant was not acting like himself at the Stadium. He did not even recognize his own brother-in-law. Neither his brother-in-law nor the Trooper colleague he attended the game with had ever seen him behave like this. The evidence indicates the enhanced dosage of Lexapro combined with the alcohol the Grievant drank while tailgating combined to make him extremely agitated to the point where he was not in touch with reality. The Grievant had drunk alcohol previously while taking Lexapro with no ill effects. Though the Grievant chose to take the extra dose of Lexapro, he did not know when he did so that the elevated level of Lexapro in his system would interact extremely poorly with the alcohol he drank at the game. This lack of intent to bring discredit to the Division mitigates against termination.

b. <u>Lesser Penalties Received by Other Troopers</u>

The Union has brought forth a number of cases where Troopers engaged in misconduct that brought discredit to the Division, yet were not terminated. Trooper Craig Franklin, while on-duty, made a KKK-like costume out of office supplies and wore it while in uniform. Sergeant Eric Wlodarsky, rather than disciplining Trooper Franklin, took a photo of this disgraceful example of racism and emailed it to others. The photo, identified as being of an Ohio State Trooper, was published by the media nationally and internationally. Neither Trooper Franklin nor Sergeant Wlodarsky were initially

terminated for bringing enormous discredit to the Division. See Case No. 15-03-20080507-0061/62-04-01. Trooper Orssie Bumpus received a three-day suspension for domestic violence. See Case No. 15-00-001115-0154-07-15. Trooper George Biskup received a ten-day suspension for domestic violence while in uniform. See id..

These lesser penalties meted out to other Troopers and even a Sergeant for bringing discredit to the Division equal to if not worse than that caused by the Grievant convince the Arbitrator the State did not have just cause to terminate the Grievant's employment.

AWARD

For the reasons set out above, the grievance is granted in part and denied in part. The State had just cause to discipline the Grievant; it did not have just cause to terminate the Grievant. The termination is to be converted into a ninety-calendar-day unpaid suspension. The Grievant is to be reinstated to his position with backpay, seniority, and benefits restored but for the period of the ninety-day suspension.

DATED: December 9, 2011

Susan Grody Ruben

Susan Grody Ruben, Esq.
Arbitrator