IN THE MATTER OF ARBITRATION

BETWEEN

OHIO STATE TROOPERS ASSOCIATION

AND

OHIO STATE HIGHWAY PATROL

Before: Robert G. Stein

Case Number 15-03-20111101-0115-07-15

Grievant: Linda A. Piechnik

Advocate for the EMPLOYER:

Sergeant Corey W. Pennington
Ohio State Highway Patrol
740 E. 17th Ave.
Columbus, Ohio 43211

Advocate for the UNION:

Herschel M. Sigall, Esq.
Elaine N. Silveira, Esq.
Ohio State Troopers Association
6161 Busch Blvd. Suite 130
Columbus, Ohio 43229

INTRODUCTION

This matter came before the arbitrator pursuant to the collective bargaining agreement ("Agreement") between the Ohio Department of Public Safety, Division of the Ohio State Highway Patrol ("OSHP" or "Employer") and the Ohio State Troopers Association ("Union"). The Agreement is effective for calendar years 2009 through 2012 and includes the conduct which is the subject of this grievance.

Robert G. Stein was mutually selected by the parties to impartially arbitrate this matter as a recognized member of a permanent panel of umpires identified in Article 20, Section 20.8 of the Agreement. The hearing was conducted on June 13, 2012 in Columbus, Ohio. The parties mutually agreed to that hearing date, and they were each given a full opportunity to present oral testimony, documentary evidence, and arguments supporting their respective positions. The hearing was not fully recorded via a fully-written transcript and was subsequently closed upon the parties' individual electronic submissions of post-hearing briefs.

The parties have stipulated both that the matter is properly before the arbitrator for a determination on the merits, as well as to the statement of the issue to be resolved. The parties have also agreed to the submission of three (3) joint exhibits.

ISSUE

Was the grievant, Linda Piechnik, demoted for just cause? If not, what shall the remedy be?

BACKGROUND

Linda Piechnik ("Piechnik" or "Grievant") was originally commissioned as an OSHP trooper in November 1995. On July 7, 2004, she was promoted to the rank of sergeant and has most recently been assigned to supervise the newly-hired police officers who serve in the Capitol Operations Section at Post 97 in Columbus. Although the Capitol Operations Section has been assigned with security and law enforcement responsibilities in state owned and leased property since 1933, its presence has become more significant since the September 11, 2001 terrorist attacks. Since that date, the police officers who work in that section have maintained an increased and more highly-visible presence at the Ohio Statehouse, the Vern Riffe Government Center, the Rhodes State Office Tower, and the Ohio Judicial Center. While serving as "the heart of Ohio government," these locations are often the site of protests, rallies and demonstrations, often accompanied by intense media coverage. The members of Post 97 also provide 24/7 coverage for the Governor's mansion in Bexley, as well as his private residence. (Employer Ex. 2)

Piechnik had held the rank of sergeant for over seven (7) years, with her most recent assignment involving the supervision of police officers assigned to work the third or night shift at Post 97. She had served in that specific supervisory capacity for

approximately three (3) years. During their second week on the job, between September 5 and 10, 2011, Piechnik talked to five (5) newly-placed officers about their role in serving in their new positions. Some of those officers were offended when Piechnik commented that their jobs would be more like "overpaid security guards" than traditional police officers. In response to questions about that incident, which was subsequently reported to supervision, "Piechnik stated that she and the police officers were talking about the difference between working here (at Post 97) and at the fairgrounds . . . She added that they were just talking about activity, and that she did not mean for her statement to be derogatory towards them; she was just making a statement of fact. She stated, 'It was nothing we haven't heard every trooper on the road say about us.'" (Employer Ex. 1, p. 3)

> The police officers assigned to the Grievant's shift voiced a complaint to police officer Lieutenant William Moore, stating that Grievant made inappropriate comments to them during a meeting. That information was forwarded to Lieutenant Christopher M. Johnson, Commander of Capital Operations. Lieutenant Johnson then initiated administrative investigation # 2011-0635. As a result of the investigation, it was determined Grievant spoke to newly hired police officers in an unprofessional and derogatory manner when she told them they were "overpaid security guards."

(Employer brief p. 2)

The newly-assigned members at Post 97 also expressed a second concern regarding Piechnik during the same administrative investigation. One of the new officers had an individual conversation at some point with the Grievant. Prior to his training with the OSHP, Officer Joseph Heavener ("Heavener") had served with the New Lexington Police Department. He had been subpoenaed as a prosecuting witness in a criminal jury trial in Perry County scheduled to go forward on a day which he was also scheduled to work the third shift at Post 97.

> If [Heavener] did not work his scheduled tour with the OSHP, he would have been in a "leave without pay" status and subject to discipline. He was in a quandary. He was still early in his probationary period. He told the Sergeant that he had unsuccessfully attempted to change shifts and/or days with other officers.
>
> Having reviewed the facts of the officer's quandary, Sergeant Piechnik told him he should report for duty as scheduled but could grab some sleep, if needed, during his eight-hour scheduled shift. Sergeant Piechnik acknowledged making the statement in her interview during the Administrative investigation.

(Union brief p. 9)

The Grievant was charged with violating the following two (2) Rules and Regulations of the Ohio State Highway Patrol:

- Rule 4501:2-6-03(C)—Responsibility for Orders

> (C) A supervisor or officer in charge shall be held strictly responsible and accountable for all orders and instructions issued to those under the member's command, and for any consequences arising from the discharge of the member's orders and instruction.

- Rule 4501:2-6-02(1)(4)—Conduct Unbecoming an Officer

> (4) A member shall perform his/her duties in a professional, courteous manner.

(Joint Ex. 3e)

Those violations were premised on the Employer's determination "that Sergeant Piechnik granted a subordinate permission to sleep during his assigned shift. Additionally, it was found that Sergeant Piechnik made inappropriate comments to subordinates referring to them as 'overpaid security guards.'" (Joint Ex. 3) The Grievant was given preliminary notice via letter dated October 21, 2011 of the Employer's intent to permanently demote her to a trooper status and to transfer her to another OSHP post. (Joint Ex. 3b) A grievance was filed on the Grievant's behalf on October 29, 2011, asserting that the challenged discipline was imposed without just cause and was not progressive in nature. (Joint Ex. 3) A pre-disciplinary hearing was conducted on October 28, 2011, upholding

the bases for the Grievant's demotion. (Joint Ex. 3c) Piechnik was also transferred to OSHP Post 21 in Delaware to serve as a trooper.

Because the grievance remained unresolved after passing through the preliminary stages of the contractually identified steps in the recognized grievance procedure, it has been submitted to the arbitrator for final and binding resolution.

SUMMARY OF THE EMPLOYER'S POSITION

The Employer notes that the Grievant did not deny her violation of the two (2) OSHP rules either during the investigation or during the arbitral hearing. The Employer also emphasizes that:

> Grievant's poor decision making is a gateway to the creation of bad attitudes, which in turn lead to a plethora of negative consequences for the Division . . . The Arbitrator cannot expect the Employer to retain an employee in a supervisory capacity when they knowingly make such poor decisions This is an eighteen year employee and she should have certainly known better. Especially when performing the job in a supervisory capacity.
>
> Grievant's responsibility as a supervisor was to build up the morale of subordinates, not tear them down. Her justification for making this derogatory statement was "it is something all troopers at the Statehouse have heard road troopers call them before." . . . Grievant's attempt to justify her comment by saying every other officer has heard it before does not make it right. In fact, it was completely wrong. Grievant neglected to fulfill her duties as supervisor. She was clearly unhappy with her assignment and she let her negative attitude overcome her responsibilities. In turn, her derogatory comments made the officers feel their responsibilities were not important. Grievant laid the foundation to create an environment of officers with bad attitudes and a lack of self-worth as it related to their newfound employment."

(Employer brief pp. 2-3, 4-5)

The Employer also emphasizes that the Grievant exercised poor leadership and decision-making when she granted her subordinate Heavener permission to sleep while on duty.

> The fact [that Heavener] did not follow her poorly thought out instructions is insignificant . . . [T]he Police Officer Program at Capitol Operations was in its infancy phase when Greivant made the poor decision to direct a new and impressionable officer to sleep while on duty. Proper supervisory guidance and decision making is critical to the success of the newly established program. Openly directing an employee to sleep on duty creates an atmosphere that leads **all** officers to believe it is acceptable to sleep on duty.
>
> During the Union's advocate's opening statement, he claimed Grievant was going to allow the officer to sleep on his meal break. However, during cross-examination Grievant testified she did not specify or imply a time or location to sleep.

(Employer brief pp. 3-4)

> Perhaps the most important and highly disputed portion of the hearing was when Lieutenant Johnson testified Grievant sent him an e-mail outlining the facts surrounding the officer being subpoenaed to court and sought guidance as to how she should handle the situation. Lieutenant Johnson gave her options to have the officer use personal leave or compensatory time, have the officers trade shifts with one another or have the officer adjust his shift. Grievant chose not to follow any of her commander's guidance. Instead, she made the decision to direct the officer to sleep on duty even though she knew sleeping on duty is a rule violation. The fact that she did not follow guidance from her commander clearly shows her inability to supervise others. This just wasn't a mistake by Grievant. He told her the options she had and she knowingly ignored all of them. Grievant testified the officer did not have any leave, but Lieutenant Johnson, who oversees payroll, testified the officer did have leave accumulated he could have utilized.

(Employer brief pp. 3-4)

Based on these examples of poor decision-making and poor leadership as a supervisor, the Employer insists that a permanent demotion was the appropriate penalty to impose. The Employer claims: "In the position of supervisor, a sergeant should not expect more than one chance at retaining their supervisory capacity when directing subordinates to break the rules . . . Grievant neglected to fulfill her duties as a supervisor. She was clearly unhappy with her assignment and she let her negative attitude overcome her responsibilities. In turn, her derogatory comments made the officers feel their responsibilities were not important. Grievant laid the foundation to create an

environment of officers with bad attitudes and a lack of self-worth as it related to their newfound employment." (Employer brief p. 5

Based on the "lengthy tradition of high standards" maintained by the OSHP, the Employer requests that its disciplinary decision to permanently demote and transfer the Grievant be upheld.

SUMMARY OF THE GRIEVANT'S POSITION

The Union contends that the Grievant's demotion was effectuated without the contractually-required "just cause." The Union specifies: "Many cases presented to the arbitrator are fact-driven. That is, there is a conflict between the Union and the Employer, factually, as to the alleged conduct of the Grievant. This is not one of those cases. Further, this is a case that involves only what Sergeant Piechnik said. No allegations of misconduct relate to her actions beyond speech. As to the speech at issue, the Grievant has at all times acknowledged that she uttered the comments that were the subject of the instant case administrative investigation." (Union brief pp. 2-3)

As to the comment regarding the new Post 27 officers serving as "overpaid security guards," the Union claims that that comment probably resulted from her intent to "ground the newly-hired and newly-assigned officers to the fact that duty at the Statehouse would be different from what they may have experienced prior to becoming members of the Patrol, and definitely different from what they had just observed in a temporary assignment to the Fairgrounds, where surrounding criminal activity was pervasive . . . She was just bringing them back down from the thought that there was going to be a lot of proactive policing on the Statehouse grounds. She wanted them to

understand that their job was primarily to serve as a security force." (Union brief pp. 3-4) The Grievant and the Union insist that her comment was not made with the intent to demean any subordinate assigned to her supervision and was just a statement of fact often uttered by the road troopers about the police officers assigned to Capitol Operations Post 97. The Union insists that the Grievant's statement included herself and was basically true as to the duties and responsibilities performed by the officers assigned to Post 97. The Union notes that Piechnik had just witnessed the Employer replace the troopers who had previously been assigned to the Statehouse with newly-hired staff members classified as police officers, rather than troopers, who are paid substantially less than troopers. The Union maintains: "For the newly-arrived P.O.'s who were assigned to the Statehouse during an after business hours shift, the nature of their duties was decidedly more akin to that of a security officer, as opposed to a field trooper." (Union brief p. 5)

During his administrative investigation interview related to the Grievant's comments, one of the newly-assigned police officers indicated: "After I thought about it for a little bit, maybe it was taken a bit out of context. I think she wasn't trying to tell us that we were going to be security guards, but that our duties were going to be security related." (Union brief p. 6) The Union further claims that, because the police officers' duties included perimeter patrol of building grounds, Piechnik did not intend the new police officers to be aggressive or proactive in their patrols or to seek out and confront trouble. While noting that the Grievant could potentially have demonstrated more sensitivity to the new officers, "they were still in training and learning what was expected of them." (Union brief p. 7)

Regarding the second incident leading to the challenged demotion, the Union first emphasizes that "no officer at any time is alleged to have slept on duty in pay status while under the supervision of Sergeant Piechnik." (Union brief p. 8) Based on the subpoena received by Heavener, he could have been required to both be at the trial for an undetermined period during the day and then still report for his night shift duty at the Statehouse that same day. The Union further explains:

> If he did not work his scheduled ours with the OSHP, he would have been in a "leave without pay" status and subject to discipline. He was in a quandary. He was still in his probationary period. He told the Sergeant that he had unsuccessfully attempted to change shifts and/or days with other officers [and that he had no accrued compensatory or other leave time upon which to draw] . . .
>
> Having reviewed the facts of the officer's quandary, Sergeant Piechnik told him he should report for duty but could grab some sleep, if needed, during his 8 hour scheduled shift. Sergeant Piechnik acknowledged making the statement in her interview during the Administrative Investigation. Her remark was, in fact, inappropriate unaccompanied by additional and limiting language such as "You can use your lunch break to grab a catnap in the break room." Undoubtedly, Sergeant Piechnik would have further defined what Officer Heavener would be permitted had the event of his attendance at trial taken place. It did not.
>
> . . . While her statement may have been "inappropriate" without additional limiting language, it was a statement as to a potential future event that never took place.

(Union brief pp. 9-10) Under a real need to accommodate Heavener's scheduling conflict, the Union insists that the Grievant would have had ample opportunity to further define the actual course of action which Heavener would have been permitted to pursue.

The Union also emphasizes that:

> Linda Piechnik is a good Sergeant . . . Her Annual Performance Evaluations say so, clearly and convincingly. Her Commanding Officer, the very person who conducted the administrative investigation, said so under oath. Not only is she a good Sergeant, she is a good Sergeant under trying circumstances. She is supervising a group of young officers who are not Troopers and who did not receive the weeks of additional training that accompanies graduation from the Patrol Academy . . . Her commanding officer acknowledged that she has always

> been a good supervisor, and the record discloses that in 15 years of service, seven of which as a Sergeant, she has received no evidenced discipline.

(Union brief p. 12)

The Union points out that, as a result of her demotion, the Grievant's hourly wages have decreased by approximately five dollars ($5.00) per hour, including any overtime hours. The Union contends that the use of progressive discipline for the Grievant's "inappropriate" comments would dictate a less severe discipline being utilized, such as a written reprimand or a brief suspension.

DISCUSSION

Unlike the majority of grievances challenging the imposition of discipline against an affected employee, this matter really does not involve any conflict regarding the facts and occurrences leading to the Employer's decision to investigate the two (2) incidents and then to subsequently impose discipline. What is actually in dispute is the validity of the Grievant's permanent demotion and transfer, based on her acknowledgement of having made statements which the Employer found to be violations of the cited OSHP Rules and Regulations.

In the often-cited *Liberty Wire* decision (46 LA 359), Arbitrator Daugherty identified seven questions to be addressed in determining the existence of "just cause." The last of those questions is: "Was the degree of discipline administered by the employer reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his service with the employer?" "In disciplinary cases generally, most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe under the circumstances of the situation." *Escalade Sports*,

Inc. and Int'l Union of Elec., Salaried, Mach. and Furniture Workers, AFL-CIO, Local 848, 01-1 Lab. Arb. Awards (CCH) P 3676 (Allen 2000). The degree of penalty should be in keeping with the seriousness of the offense and any mitigating circumstances. *Capital Airlines*, 25 LA 13. The concept of "just cause" requires the arbitrator to consider alternative disciplinary options. *Escalade Sports*. Arbitral authority to determine the existence or absence of "just cause" necessarily includes a review of the severity of the penalty. If the penalty is found to be excessive, it may be altered or set aside. *Int'l Union, UAW and Its Local 6000 and the State of Mich.*, 90-2 Lab. Arb. Awards (CCH) P 8419 (Frost 1989).

Certainly one mitigating factor to be reviewed in this matter is the Grievant's lengthy tenure with the Employer and served with a "pristine" disciplinary record and with very favorable formal and informal evaluative comments made by her supervisors. Clearly she made mistakes and, by so doing, did not exemplify the ideal or exemplary leadership skills demanded by the Employer. Even though the Grievant erred and exemplified unprofessional conduct deserving of some form of discipline, the arbitrator here finds that the Grievant should not be permanently reduced in rank from sergeant to trooper.

> Excessive punishment has long been a concern in arbitration. Once the misconduct has been proved, the penalty imposed must be fairly warranted and reasonably calculated to eliminate the offensive conduct. The punishment should also be based upon the employee's actual actions and not the possible consequences of those actions.

Lewis County, Wash. and Teamsters, Local 252, 03-2 Lab. Arb. Awards (CCH) P 3491 (Ables 2003). Although the Grievant was deserving of discipline for her "conduct

unbecoming an officer," the appropriate penalty should be one less severe than her actual permanent demotion.

In a 2009 decision, Arbitrator Jerry Sellman cited to a prior decision, *Douglas v. Admin.*, 5 M.S.P.R., 280, 306 (1981), as the source of relevant questions to be answered by an employer in determining the reasonableness of a disciplinary penalty.

> . . .
>
> 3. The employee's past disciplinary record;
>
> 4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.
>
> 5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties;
>
> . . .
>
> 7. Consistency of the penalty with applicable agency table of penalties, which are not to be applied mechanically so that other factors are ignored;
>
> 8. The notoriety of the offense or its impact upon the agency's reputation;
>
> . . .
>
> 10. Potential for the employee's rehabilitation;
>
> 11. Mitigating circumstances surrounding the offense, such as . . . provocation on the part of others involved in this matter; and
>
> 12. The adequacy and effectiveness of alternate sanctions to deter such conduct in the future by the disciplined employee or others.

Defense Supply Ctr. Columbus and American Fed'n of Gov't Employees, Local 1148, 10-1 Lab. Arb, Awards (CCH) P 4863 (Sellman 2009).

Article 19, Section 19.05 of the Agreement, entitled "Progressive Discipline," includes the following language:

> The Employer will follow the principles of progressive discipline. **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 of Removal (Emphasis added)

The "just cause" principle also applies to the level of discipline imposed, as well as to the reason for the challenged discipline. "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). "An employee should not be [demoted] until and unless it is clear that he will not or cannot respond favorably to lesser penalties imposed with progressive severity." *Shop 'N Save Warehouse Foods, Inc. and United Food and Commercial Workers, Local 534*, 03-2 Lab. Arb. Awards (CCH) P 3567 (Heinsz 2003).

> 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 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).

There is no evidence in the record here to demonstrate that the Grievant is incapable of remediation or unwilling to accept an opportunity for correcting her misconduct. Indeed, employees do and will make mistakes. Progressive discipline and

"just cause" recognize this given in the world of work and permit and encourage employees to learn from their mistakes and make positive adjustments. This arbitrator believes that the Grievant would benefit from required enrollment and completion of an course focusing on leadership skills and improved communication organized by as an Employer-based Employee Assistance Program or a similar programs offered by some other local organization at the Employer's expense. Piechnik shall be required to provide the Employer with documentation reflecting her successful completion of such a program as a means of improving her professional performance in a leadership capacity.

The arbitrator here agrees with Arbitrator Platt in his analysis of the devastating and long-term nature of demotion discipline.

> Arbitrators generally support the principle that permanent demotion is an improper form of discipline. Basically, the reason supporting that principle is that the use of a permanent demotion is an indeterminate sentence, which has no terminal point, and it may go far beyond the extent of the penalty actually warranted by the infraction committed. Furthermore, the use of a permanent demotion, if for disciplinary reasons, violates the employee's seniority rights to future promotions, and it may also adversely affect pension or other individual benefits guaranteed by the labor agreement. Other arbitrators have pointed out that the use of a permanent demotion, as a form of discipline, is contrary to the purpose of industrial discipline. That purpose is to use the disciplinary process to correct the faults and behavior of workers, by instituting penalties in progressively harsher degrees, with discharge as the ultimate penalty after all efforts at correction have proven unsuccessful.

Republic Steel Co., 25 LA 733 (Platt).

Another arbitrator found that demotion is typically an appropriate remedy only if an employee is not capable of successfully performing the work assigned. *GAF Broad. Co., Inc., WNCN and Am. Fed'n of Television and Radio Artists, AFL-CIO,* 8602 Lab. Arb. Awards (CCH) P 8377 (Light 1986). In a separate arbitration matter involving a police captain's demotion to patrolman "because of his improper comments" after his

sixteen (16) years of service to a city's police department, an arbitrator found that a suspension, followed by his reinstatement, constituted the appropriate remedy.

> Measures which bear a reasonable relationship to the gravity of the said offense(s) should be utilized . . . [The Grievant's misconduct] did not show that he lacked the ability to perform the work of a police captain on a continuing basis in a competent, qualified manner. . . For demotion to be a proper penalty, it must be related to the disciplined employee's ability to perform on a continuing basis in terms of his competence and qualifications, with discipline which is properly related to the infractions and rules of conduct.

The City of Key West, Fla., 96-2 Lab. Arb. Awards (CCH) P 6304 (Wolfson 1995).

In the instant matter, the Employer has not demonstrated that the Grievant is unqualified or unable to successfully perform as a sergeant and in a leadership capacity in a new assignment. The five (5) new police officers were assigned to replace troopers in the Capitol Operations Post 97 unit with various work experiences and types of earlier training in law enforcement after forty (40) days of field training and then two (2) weeks training at the OSHP Academy. Although the Grievant sought to better define for the new officers the limits of their duties and authority, she failed to demonstrate a professional attitude in doing so. She also sought to accommodate Heavener's potential need to deal with conflicting scheduling needs without first knowing what the actual need might be and what options were actually available to be exercised. Through her answers in both the administrative interview and at the actual hearing in this matter, the Grievant accepted responsibility for her errors in judgment and deserves an opportunity to be reinstated to her prior rank of sergeant at whatever post location the Employer deems to be appropriate.

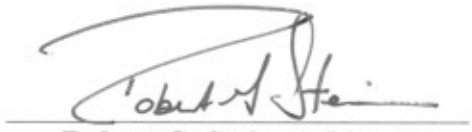
AWARD

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

The Grievant's rank shall be reinstated to that of sergeant within two (2) pay periods from the date of this decision. She shall serve in that capacity either at the Delaware Post or other location determined by the Employer.

Her discipline shall be deemed to be a time-served demotion with no monetary damages awarded, but with her seniority as a sergeant bridged to cover the period of her temporary demotion.

Respectfully submitted to the parties this 4th day of September 2012,



Robert G. Stein, Arbitrator