

**CONTRACTUAL
LABOR ARBITRATION PROCEEDINGS**

IN THE MATTER OF)	
ARBITRATION BETWEEN)	
)	
)	
OHIO DEPARTMENT OF PUBLIC)	
SAFETY, DIVISION OF OHIO)	
STATE HIGHWAY PATROL)	DECISION IN
)	DPS-2020-01937-15
)	
-AND-)	EMPLOYMENT
)	REMOVAL/TERMINATION
)	
OHIO STATE TROOPERS ASSOCIATION)	
UNITS 1 & 15)	<u>(JEREMY S. WICKMAN)</u>

<u>CASE NO.:</u>	DPS-2020-01937-15; Trooper Jeremy S. Wickman
<u>GRIEVANCE:</u>	The Grievance, as set forth in Joint-Exhibit 2, challenges the Employment Termination/Removal of Grievant, Jeremy S. Wickman, as lacking “Just Cause”.
<u>AWARD:</u>	The Grievance is Sustained in part; and, Denied in part.
<u>HEARING:</u>	July 30, 2020; Gahanna, Ohio
<u>ARBITRATOR:</u>	David W. Stanton, Esq.

APPEARANCES

FOR THE EMPLOYER

Michael D. Wood, Labor Relations Officer
Jacob Pyles, Staff Lieutenant, 2nd Chair
Chris Haselberger, OCB Representative
Laura Taylor, Sergeant, AIU Investigator
Tiffany Paugh, Former Lab Supervisor
Nicholas Baldaugh, Crime Lab Supervisor
Laurel Hart, Toxicology Crime Lab Director
Toby Chambliss, EEO Officer
Charles J. Linek, III, Office of Personnel

FOR THE UNION

Elaine N. Silveira,
General Counsel
Larry K. Phillips, Staff Rep.,
2nd Chair
Jeremy T. Landis,
Staff Lieutenant, OI Unit
Jeremy S. Wickman, Grievant

ADMINISTRATION

By Email correspondence from the State of Ohio, Office of Collective Bargaining, with copy to Counsel for the OSTA, the undersigned was notified of his mutual selection, from the Parties' Permanent Panel, to serve as Impartial Arbitrator to hear and decide the Employment Removal/Termination Grievance, Case No. DPS-2020-01937-15, of Trooper Jeremy S. Wickman, then in dispute between these Parties. On July 30, 2020, at the Ohio State Troopers Association, 190 W. Johnstown Road, Gahanna, Ohio, a transcribed Arbitration Hearing was conducted wherein each Party was afforded a fair and adequate opportunity to present testimonial and/or documentary evidence supportive of positions advanced; and, where the Grievant appeared and testified. The Evidentiary Record of this Proceeding was closed upon the Arbitrator's receipt of each Party's Post-Hearing Brief, filed in accordance with the arrangements agreed to at the conclusion of the presentation of evidence and subsequently modified by agreement between the Parties. Accordingly, this matter is now ready for final disposition herein.

GRIEVANCE AND QUESTION TO BE RESOLVED

The following Grievance, Joint-Exhibit 2, was filed on or about February 22, 2019, and contains the subject matter for disposition herein as follows:

Ohio Grievance Management DPS-2020-01937-15

GRIEVANCE INFORMATION

Grievance number: DPS-2020-01937-15

* * * * *

Union Contract Article Link: OSTA Articles
Assigned To: Krysten McElfresh

GRIEVANT INFORMATION

Member: Jeremy Wickman
Grievant Name: Jeremy Wickman
State of Ohio User ID: 10069856

* * * * *

Grievant Notification Email: dlellis@dps.ohio.gov
Grievant Union Chapter Name: DPS
Grievant Agency: DPS

* * * * *

Grievant's Union: Ohio State Troopers Association
(OSTA)
Grievant Worksite: ALUM
Grievant's Classification Number: 26713
Grievant's Classification Title: Highway Patrol Sergeant
Grievant Department Description: HP Academy
Grievant Department ID: DPS241200
Grievant Bargaining Unit: 15
Date of Hire: 9/23/2000
Years of Service: 21

GRIEVANT'S SUPERVISOR/UNION REP

Grievant's Supervisor: Lt. R. Zupanc

* * * * *

Union Representative: Larry Phillips

* * * * *

Union Rep Email Address: lphillips@ohiotroopers.org

GRIEVANCE DETAILS

Date Grievance Arose: 5/19/2020
Date of Termination: 5/19/2020
Grievance Type: Discipline
Grievance Sub-type: Termination Suspension/Fine Days
Contract Article Links: 19.01, 19.05,
7 Non-Discrimination, 21.03

* * * * *

STATEMENT OF GRIEVANCE

Statement of Grievance:

On May 19th I was notified that I was being terminated from my position as a Sergeant with the Ohio State Highway Patrol.

Resolution Requested:

To be reinstated to my position as a Sergeant with the Highway Patrol, for the department to be removed from my record and to be made whole for all lost wages and benefits, including but not limited to Holiday Pay and Star Level Fitness Pay.

* * * * *

The stipulated issue(s) for disposition by the Arbitrator are:

Was the Grievant terminated/removed for just cause?

If not, what shall the remedy be?

CITED PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

The following provisions of the Collective Bargaining Agreement, Joint-Exhibit 1, were cited and/or are deemed relevant herein as follows:

ARTICLE 4 MANAGEMENT RIGHTS

The Union agrees that all of the function, rights, powers, responsibilities, and authority of the Employer, in regard to the operation of its work and business and direction of its workforce, which the Employer has not specifically abridged, deleted, granted, or modified by the express and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer.

Accordingly, the Employer retains the rights to:

1. Hire and transfer Employees, suspend, discharge and discipline Employees;

* * * * *

ARTICLE 7 NON-DISCRIMINATION

Neither Party will discriminate for or against any member of the Bargaining Unit on the basis of age, sex, marital status, race, color, creed, national origin, religion, handicap, political affiliation, sexual preference, veteran status, or for the purpose of evading the spirit of this Agreement; except for those positions which are necessarily exempted by bona fide occupational qualifications due to the uniqueness of the job, and a compliance with the existing laws of the United States, the State of Ohio, or Executive Orders of the State of Ohio.

Spouses shall neither supervise, nor evaluate their spouse. The State can continue the practice of assigning spouses to different posts. No Employee shall be directly supervised by a member of his/her immediate family. "Immediate Family" is defined for the purpose of this section to include: spouse or significant other. ("Significant other" as used in this Agreement is defined to mean one who stands in the place of a spouse and who resides with the Employee), child, step-child, grandchild, parent, step-parent, grandparent, great grandparent, brother, sister, step-sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, or legal guardian or other person who stands in the place of a parent.

No Grievance will be processed involving any different dollar value of fringe benefits provided to married or single members of the Bargaining Unit as a result of their being married or single.

The marriage of two members of the Highway Patrol may be considered in the assignments and direction of workforce. If two members of the Highway Patrol marry during the term of this Agreement, the Patrol may assign them to different posts.

Married members of the Highway Patrol will be assigned to adjoining posts.

If at least one of the married members of the Highway Patrol is in Bargaining Unit 15, the spouses will be assigned to adjoining posts when possible, based on available vacancy; otherwise, married members will be assigned to the closest post where an opening exists and will have first opportunity to fill an opening at an adjoining post.

The Employee and the Union hereby state a mutual commitment to Affirmative Action/Equal Employment Opportunity as regards job opportunities within the Agencies covered by the Contract.

The Employer may also undertake action in the form of reasonable accommodation or other action to fulfill or ensure compliance with the Federal Americans with Disabilities Act of 1990 ("ADA"), and corresponding provisions of Chapter 4112 of the Ohio Revised Code, and such actions to fulfill or ensure compliance with the ADA and/or Chapter 4112 shall supersede any conflicting provisions of this Agreement.

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 discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

1. One or more Written Reprimand(s).
2. 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.
3. One or more day(s) Working Suspension(s). If a working suspension is grieved, and the Grievance is denied or partial granted by an Arbitrator, and all appeals are exhausted, whatever portion of the working suspension will be upheld and converted to a fine; the Employee may choose a reduction in leave balance in lieu of a fine levied against him/her.
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.

The deduction of fines from an Employee's wages shall not require the Employee's authorization for the withholding of fines from the Employee's wages.

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ARTICLE 20 GRIEVANCE PROCEDURE

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20.08 Arbitration

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4. Decisions of the Umpire

The Umpire shall render his/her decision as quickly as possible, but in any event, no later than forty-five (45) days after the conclusion of the Hearing, or submission of the closing briefs, unless the Parties agree otherwise. The Umpire shall submit an account for the fees and expenses of Arbitration. The Umpire's decision shall be submitted in writing and shall set forth the findings and conclusions with respect to the issue submitted to Arbitration.

The Umpire's decision shall be final and binding upon the Employer, Union and the Employee(s) involved, provided such decisions conform with the law of Ohio and do not exceed the jurisdiction or authority of the Umpire as set forth in this Article. The Grievance Procedure shall be the exclusive method of resolving Grievances.

The Parties may request that the Umpire, on a case-by-case basis, retain jurisdiction of a specific case. In that, the Parties are using a permanent Umpire, questions or clarifications of awards will normally be submitted to that Umpire without the necessity of a further Grievance or action. This statement, however, does not limit the ability of either Party to exercise any other legal options they may possess.

5. Limitations of the Umpire

Only disputes involving the interpretation, application, or alleged violation of a provision of this Agreement shall be subject to Arbitration.

The Umpire shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall the Umpire impose on either Party a limitation or obligation not specifically required by the language of this Agreement.

* * * * *

By written correspondence dated May 14, 2020 (Joint Exhibit 3 (A)) Captain Gene C. Jarvi, Office of Investigative Services Commander, to Colonel Richard S. Fambro, Superintendent, Ohio State Highway Patrol, following Administrative Investigation #2020-10657, indicated the "Statement of Charges" established "...reasonable and substantial cause exists to establish..." the Grievant was found to have violated the following Rules and Regulations of the Ohio State Highway Patrol:

4501:2-6-02 (I) - CONDUCT UNBECOMING AN OFFICER

A member may be charged with conduct unbecoming an officer in the following situations:

- (1) For conduct, on or off duty, that may bring discredit to the division and/or any of its members or employees. A member shall not engage in any conduct which could reasonably be expected to adversely affect the public's respect, confidence, or trust for Ohio state highway patrol troopers and/or the division.
- (2) For committing any crime, offense or violation of the laws of the United States, the state of Ohio, or any municipality.
- (3) For any improper on-duty association with any individual for purposes other than those necessary for the performance of official duties.
- (4) **A member shall perform his/her duties in a professional, courteous manner.**
(Charged – Emphasis added)

4501:2-6-02 (J) – SEXUAL HARASSMENT AND DISCRIMINATION

- (1) **No member shall sexually harass any person. "Sexual harassment" is defined as the unwelcome sexual advances, request for sexual favors and other verbal or physical conduct or contact, or innuendo of a sexual nature. No member shall, by his/her actions, create an intimidating, hostile, or offensive work environment.**
(Charged – Emphasis added)
- (2) A member shall not make disparaging comments, statements, acts, or discriminate against any person on the basis of age, sex, marital status, race, color, creed, national origin, religion, handicap, political affiliation or sexual preference/orientation.

* * * * *

FACTUAL BACKGROUND

The State of Ohio, Department of Public Safety, Division of the Ohio State Highway Patrol, hereinafter referred to as the "State" and/or the "Employer", is party to a Collective Bargaining Agreement, Joint Exhibit-1, with the Ohio State Troopers Association, Inc., Units 1 and 15, wherein the Parties have memorialized the terms and conditions of Employment for those Employees recognized in Article 5, titled "Union Recognition and Security". Article 4, titled "Management Rights", acknowledges the Employer's contractual and inherent right to,

"...suspend, discharge, and discipline Employees;". The limitation placed upon the Employer with respect to the imposition of disciplinary action is set forth in Article 19, titled "Disciplinary Procedure" at Section 19.01, titled "Standard" wherein it indicates, "[n]o Bargaining Unit Member shall be reduced in pay or position, suspended, or removed except for just cause".

Jeremy S. Wickman was commissioned as a State Trooper on March 9, 2001; was promoted to the rank of Sergeant on March 21, 2011; and, was promoted to Lieutenant on April 27, 2017. In accordance with the evidentiary record involving a case with similarities to the matter before the Arbitrator, he was demoted from the rank of Lieutenant back to Sergeant on October 30, 2018 for violation of OSHP Work Rules 4501:2-6-02(I)(4) titled "Conduct Unbecoming an Officer" and OSHP Work Rule 4501: 2-6-02(J)(1) titled "Sexual Harassment and Discrimination" while he was assigned as Lieutenant to the OSHP Training Academy. Subsequently, he was transferred to the Crime Laboratory whereupon on May 20, 2020 he was removed (Terminated) from employment for violation of the afore-referenced Work Rules which previously led to the October 30, 2018 demotion from the rank of Lieutenant to Sergeant. The charges as levied as indicated, through Administrative Investigation No.: 2020-10657, found on March 5, 2020, Sergeant Wickman showed a sexually graphic photo to a female co-worker on his personally owned cell phone.

The facts and circumstances as set forth in the evidentiary record indicate on the morning of March 5, 2020, the Grievant reported to the Toxicology Lab area of the OSHP Crime Lab and entered the cubical of Criminal Laboratory Supervisor Tiffany Paugh. A conversation began by the Grievant inquiring of Ms. Paugh if she had noticed something different with Supervisor's wrist. Ms. Paugh answered in the affirmative because she had observed her Supervisor did in fact have a bandaged wrist on the day this matter occurred. Following that acknowledgement,

the Grievant attempted to show Paugh a sexually explicit image on his personal cell phone and insisted she "look at this". The image as depicted is not in dispute. Such displayed a bandaged hand with four (4) fingers placed on the top of a male's groin/genital area with a naked penis located in place of the person's thumb. Ms. Paugh testified she felt embarrassed, uncomfortable and did not want to see the image and attempted to shield her eyes and turn away. In fact, she testified she indicated to Sergeant Wickman on several occasions, "NO".

The Grievant insisted and continued with his attempts to show her this image and told her to "just look". After being told NO numerous times, the Grievant finally walked away.

According to Paugh, during the course of the Administrative Investigation, as well as, through her testimony at the Arbitration Hearing, the incident, as described, left her shocked, stunned and dumbfounded that one of her co-workers would have shown her such a sexually explicit image in the workplace. The evidence of record demonstrates she reported the incident to one of her co-workers, Nicholas Baldauf to inform him what had occurred. After discussing this matter with Baldauf, the Grievant informed her Supervisor, Laurel Hart, regarding this incident.

As the record demonstrates, Ms. Hart documented the incident and reported it through the appropriate chain of command. Following Ms. Paugh's reporting this matter to Ms. Hart on the day the incident occurred, the Grievant was met by members of the Administrative Investigation Unit later that afternoon and read his Garrity Rights; and, he was further advised there was not going to be a formal interview at that time. He was asked to produce the sexually explicit photograph in question and following consultation with his Union Staff Representative, he declined. As the record demonstrates, the Administrative Investigation proceeded wherein several individuals were interviewed as a part thereof. The Grievant was interviewed and named numerous other Employees within the Crime Lab relative to allegations of similar misconduct,

including the complainant here, Ms. Paugh. Based thereon, a second separate Administrative Investigation was conducted concurrent with the Grievant's and numerous interviews were conducted involving certain Employees within the Crime Lab.

Based on the Grievant's Administrative Investigation, it was determined he committed the two (2) afore-referenced Rule violations concerning showing the sexually explicit photograph to a co-worker. Based on the Grievant's disciplinary record and him having active discipline of his Demotion in his personnel file for similar type of Work Rule violations, it was determined Removal (Termination of Employment) was the course of action the Employer would take. He was provided the necessary procedural steps pursuant to his contractual rights. His Pre-Disciplinary Meeting was conducted on May 18, 2020 by Captain Kenneth J. Kocab at which the Grievant was read the Charges against him and was represented by OSTA Representative Larry Phillips. Captain Kocab concluded "...just cause exists for discipline". On May 19, 2020 the Grievant was served "notice of Termination" from Thomas J. Stickrath, Director Ohio Department of Public Safety, for the events of March 5, 2020 wherein the Grievant showed a female co-worker a sexually graphic photo.

Additionally, Staff Lieutenant Jeremy Landis testified regarding the Management Review Investigation concerning the OSHP Crime Lab based on the allegations of misconduct raised by the Grievant during his Administrative Interview/Investigation concerning the March 5, 2020 sexually explicit photo incident. He conducted the review at the request of Captain Gene C. Jarvi, Commander of Investigative Services, concerning two (2) issues: the significant back log of pending drug chemistry submissions; and, concerns regarding the interaction and level of cooperation between the two units of the Crime Labs and their respective Supervisors. Approximately forty (40) Employee interviews were conducted and those led to the findings

confirming the existence of initial operational issues as set forth in the Review request. Landis concluded confusion as to “who was in charge” existed and none of the Employees interviewed relayed any allegations of sexual misconduct during the review process. These allegations were raised by the Grievant during his Administrative Investigation regarding nine (9) named OSHP Crime Lab Employees. While that investigation did indeed reveal infractions by these Employees within the Crime Lab, the Employer characterized those as not being as “outlandish” as the showing of an image of a naked penis. The circumstances led to disciplinary action ranging from Written Reprimands, Suspensions, and a recommendation of Termination of co-worker Paugh, who ultimately resigned rather than face Termination.

As previously indicated, the Grievant was afforded his contractually rights relative to the imposition of disciplinary action. Such progressed through the negotiated Grievance Procedure without resolution culminating in the Arbitration before the Undersigned on July 30, 2020. When the Parties' efforts to resolve this matter through the course of the negotiated Grievance Procedure proved unsuccessful, the Employment Removal “Termination” Grievance of Sergeant Jeremy S. Wickman was appealed to Arbitration hereunder.

CONTENTIONS OF THE PARTIES

EMPLOYER CONTENTIONS

The Employer contends the evidence of record clearly establishes the Grievant failed to perform his or her duties in a professional and courteous manner. He acknowledged and admitted he showed the image of a male penis to co-worker Paugh. He indicated he recognized it was inappropriate for the workplace and such occurred while on duty. Witnesses testified such conduct would never be appropriate to show a pornographic image of this type in the workplace. Moreover, the testimony and evidence presented clearly demonstrates the Grievant violated the

Sexual Harassment and Discrimination Rule OSHP Rule 4501:2-6-02(J)(1) in relation thereto. Additionally, EEOC Officer Toby Chambliss testified that in March of 2020 she was the EEO Officer during an Administrative Investigation relating to this matter. She confirmed showing this image of a naked penis in the workplace constituted a violation of the Employer's Sexual Harassment Policy. She indicated during the course of her Investigation of Paugh, she was crying and felt offended, felt sexually harassed and distraught. Chambliss concluded the incident affected Paugh's workplace environment and indicated she did not want to return to work because of the occurrence with the Grievant.

The Employer insists this matter supports the Grievant's pattern of behavior and despite his assertions he was in the midst of a tumultuous divorce and such conduct ran rampant within the Crime Lab is simply no excuse. The Grievant's inappropriate behavior and the active discipline in his file warrant the discipline as imposed. His behavior demonstrates a pattern of misconduct toward women, despite his acknowledged repeated training and notice. He had similar incidents with Melissa Fellure concerning the fondling of pumpkins on her desk. He referred to Lori Pallante as a fat lesbian bitch; numerous incidents toward Trooper Joanie Dodd, including cutting the strings off the bottom of her tactical pants while working at the State Fair; yelling at her about why she was not using a port-a-potty and referring to her girlfriend as her "hot fiancée".

Witnesses indicated during his time at the Training Academy, the Grievant referred to other females as "bitches", "fat lesbian bitches", "whores", "sluts", and "fucking bitches". Based on a totality of that initial investigation, he was Demoted from Lieutenant to Sergeant for violation of the work rules related to Conduct Unbecoming an Officer and Sexual Harassment and Discrimination. During the course of his testimony, he attempted to claim he knew about the

time during which he could submit an Appeal for this Demotion regarding his first discipline; however, he was dealing with a divorce which was distracting. Moreover, during the course of the Investigation, the Grievant took no accountability for his interactions with the various female Officers. According to him, such allegations were simply “supervisor to subordinate” conversations and interactions. He denied rubbing the pumpkins in a suggestive manner and Fellure did not appear to be uncomfortable or offended by him rubbing her pumpkin decorations. During the course of the Interview with Ms. Fellure, she indicated she felt uncomfortable and embarrassed when the Grievant engaged in his conduct. Regardless of the Grievant's failure to file an appeal, such has expired, and the discipline imposed became final. It is part of his disciplinary record and it lends weight to the Grievant's pattern of unprofessional behaviors in the workplace.

According to the testimony of Ms. Paugh regarding this matter, she indicated the photo was sexually explicit and unwanted and she indicated to the Grievant several times, “NO” as he attempted to show her the image. The Union's contention the “meme” shown by the Grievant to Paugh was merely a joke and therefore not pornography was simply unsupported by the testimony of record.

The Employer argues the Grievant was on notice and forewarned both prior to and after his Demotion from Lieutenant to Sergeant regarding training through the EEO including classroom instruction relative to the expectations of the Employer relating to sexual harassment, discrimination and conduct unbecoming an Officer. Such training was described as being created for the Grievant himself and from that the Grievant indicated it was permissible to use the term “free crotch sniff” he found during said training worth mentioning during his testimony. Such somehow demonstrates an excuse for his improper behavior demonstrated in this

workplace. Additionally, not only did he receive formal training, the Grievant signed and acknowledged he understood the Agency's Policy regarding EEO on three (3) separate occasions subsequent to his Demotion.

Additionally, the Union's blame on the work environment within the Crime Lab for the Grievant's behavior is simply misplaced. The Grievant is only a victim of his own decisions and his refusal to change his behavior. He has had plenty of opportunity to learn and abide by the work rules supported by the training he has received; however, he has chosen not to. During the course of the Investigation, the Grievant alleged several instances involving co-workers within the Crime Lab prompting an Administrative Investigation thereof. The Management Review resulted from a significant backlog of pending drug chemistry submissions and concerns regarding the interactions and the level of cooperation between the two units of the Crime Lab and their respective Supervisors.

The Management Review revealed through the course of approximately forty (40) Employee interviews, the existence of the initial operational issues within the Crime Lab. Staff Lieutenant Landis, who conducted the Review, found there was confusion as to who was in charge and none of the Employees interviewed relayed any allegations for sexual misconduct during their Review process. The counter allegations raised by the Grievant during his own Administrative Investigation led to a separate, additional investigation into nine (9) Crime Lab Employees in an attempt to excuse his behavior and deflect attention from himself. The evidence of record demonstrates several Employees did engage in misconduct. In any event, none of those infractions by other Employees were as outlandish as that engaged in by the Grievant when he showed Employee Paugh a naked penis in a meme. Paugh did admit she shared a racially insensitive joke using the "N word" and she may have acted inappropriately by

“dancing suggestively” in the workplace. Even though she was recommended for Termination, she tendered her resignation prior thereto. Despite the Grievant's assertion his relationship with Ms. Paugh was as a “close friend”, Paugh did not describe that relationship in the same way. The Grievant described Ms. Paugh as being “really vulgar” and someone who “wouldn't hold anything back”.

With respect to mitigation as raised by the Union concerning the Grievant's Post-Traumatic Stress Disorder, “PTSD”, the Grievant signed a claim form on March 2, 2020, four (4) days prior to the incident which resulted in his Termination. The Grievant's mentioning of the PTSD is anecdotal at best. At no time during the Administrative Investigation, or the Pre-Disciplinary Process did the Grievant indicate or provide any documentation relating to any diagnosis as a mitigating factor for his actions. To suggest this somehow has an adverse impact on his ability to work is indeed raises the question whether or not the Grievant could return to work and perform his functions and duties with the Ohio State Police. The Grievant's PTSD diagnosis, however unfortunate, in no way excuses his workplace behavior.

With respect to the Union's assertions relative to alleged disparate treatment, the Employer indicates and references various instances where Employees engaged in violations of this nature received disciplinary action for any action of harassment on the basis of sex. Based thereon, Major Linek testified that while the Grievant may have been treated differently, he was not treated disparately from other Employees who have engaged in inappropriate misconduct, because of the egregious nature of his offense and his prior record. Inappropriate conduct of other Employees does not excuse the Grievant's actions or behaviors herein.

The Employer has rendered discipline on different occasions for infractions such as this case which were sexual in nature and those disciplines have, in fact, varied. The Grievant's

attempt herein to utilize the behavior of others as a basis to excuse his own resulted in the investigation of nine (9) co-workers, seven (7) of which received disciplinary action ranging from Written Reprimands to Suspensions and Termination. The Employer simply does not condone sexual misconduct in this workplace and rendered severe discipline even on the first offense when warranted in order to discourage any further incidents.

Despite the numerous prior attempts to correct his behavior, the training he has received in relation thereto and the overwhelming evidence of record, the Grievant was aware of the Employer's policy on such matters and nonetheless, despite these efforts, engaged in egregious conduct of a sexual nature when he showed a sexually explicit image of a naked penis to his co-worker. Simply stated, this Grievant is not a victim of circumstances brought on by other's conduct. The Grievant admitted to showing Paugh the naked image and he was fully on notice of what was expected of him in this workplace. He simply cannot be returned to any supervisory position because he has proven himself incapable of conducting himself in a proper and professional manner. Supervisors have a duty to stop this type of behavior, not participate in it. The Grievant had a chance to redeem himself after his first offense; however, he chose, despite his Demotion, to squander the opportunity to remain employed and committed a second, similar offense.

For these reasons, the Employer requests the Grievance be denied.

UNION CONTENTIONS

The Union contends the Employer has the burden of proof to establish: (1) the discipline imposed was for just cause; and, (2) the level of discipline is commensurate with the offense. The Employer has failed to prove either. Additionally, the Arbitrator must determine whether the Employer has demonstrated by a preponderance of the evidence the Employee has committed

acts warranting discipline and the penalty of Termination is appropriate. The Union contends Grievant's actions did not warrant Termination of his career.

The Union contends the Employer failed to meet its burden of proof to establish just cause to effectuate the Termination of twenty (20) year Employee and veteran of the United States Navy, Sergeant Jeremy Wickman. As the record demonstrates, his Termination was based on what was deemed an inappropriate meme to a co-worker who the Grievant, as he testified, considered to be more than a co-worker. Such meme related to another co-worker wearing a brace on her hand and depicted male genitals protruding from it. The Union concedes it was not appropriate; however, showing that meme does not warrant, or justify, terminating a twenty (20) year career.

The Union emphasizes this matter arose in the Ohio State Highway Patrol Crime Lab, which was at the time experiencing problems with respect to the overall atmosphere exhibited therein. Such resulted in an Administrative Investigation due to multiple allegations of misconduct. The Investigation resulted in numerous Employees receiving disciplinary action for what was determined to be rampant, unprofessional conduct permeating through this workplace.

In support thereof, the Union cites the seven (7) tests of Just Cause suggesting the Arbitrator administer consideration of this matter consistent with those standards. With respect to the Employer's reliance on other matters resulting in similar disciplinary action, the Union contends those relied upon by the Employer simply are not similar in nature. The Alston-Lawler Investigation resulted in Termination for allegedly making inappropriate comments and engaging in unwanted physical contact with a co-worker. The Grievant is not charged with making any unwanted physical contact and only showed an inappropriate meme on one occasion contrary to the many inappropriate comments uttered by Alston. Moreover, Alston had been disciplined

previously for the same work rule violation a year prior in an extremely pervasive and continuing manner. He made unwanted advances and inappropriate sexual comments and gestures toward a co-worker. He was issued a three (3) day suspension for those actions. Here, the Grievant was not charged with any inappropriate physical conduct as was the case with Alston.

Additionally, it cites the case involving Trooper Christopher Appolonio concerning inappropriate comments to another Trooper and disobeying a Direct Order not to discuss the Investigation. It emphasizes this Arbitrator concluded the only allegations found to be credible and worthy of disciplinary action involved his violation of the Order to discuss the Investigation with any co-workers. In that matter, his Termination was converted to a sixty (60) day Suspension. Here, the Grievant admitted to showing one inappropriate meme to a co-worker on a single occasion, which clearly is not similar to the Appolonio matter.

The Employer also referenced two Dispatchers viewing inappropriate material while on the clock. That Investigation resulted in the imposition of a Last Chance Agreement for both Dispatchers.

The Union concedes the Grievant does indeed have a Demotion for what appears to be similar behavior on his record. However, the Demotion while serving as a Lieutenant and not a member of the Bargaining Unit, involved Wickman's alleged disparate treatment of a female co-worker because of her sexual orientation. While Wickman denied any disparate treatment against this Trooper, he would be required to seek redress through the State Personnel Board of Review under the timeline set forth by that Organization. Despite his request for copies of the Investigation and corresponding documentation, such was delayed and did not provide him with ample time to challenge the Demotion since the timeline had lapsed.

The Union concedes the showing of this meme to this co-worker was inappropriate but does not justify Termination of a twenty-year Employee. The Administrative Investigation of the Crime Lab demonstrates the accuser herein was not so naïve; nor was she intrinsically harmed by viewing this meme. She herself had engaged in much more severe actions as demonstrated in the evidentiary record, including inappropriate physical touching of co-workers and using a derogatory racial slur to at least two (2) co-workers.

With respect to the alleged violation of "Conduct Unbecoming an Officer" as relied upon as a basis for the disciplinary action, the Union concedes when the Grievant showed the inappropriate meme to Paugh, he was not performing his duties in a professional and courteous manner. However, one (1) instance simply does not justify Termination. Especially in light of the atmosphere revealed through the Administrative Investigation being less than professional. OSTA Staff Representative, Larry Phillips, testified regarding the approximate forty (40) interviews conducted during the Administrative Investigation wherein he described these interviews as being something he had not experienced within any Division of the Highway Patrol. One interviewee described the Crime Lab as a "high school drama central"; one described it as a "shit show" and another indicated, "this place is fucked up."

Following that Administrative Investigation, seven (7) Employees received disciplinary action based thereon. The complaining witness in this matter, Paugh, was provided a notice of Termination for engaging in unprofessional behavior in the workplace and told a racially-insensitive joke to another Employee resulting in her tendering her resignation. Crime Lab Supervisor Darden, received a three (3) day Suspension for making obscene gestures or statements, using abusive, insulting or inappropriate language and failing to supervise. Crime Lab Supervisor Smith received a one (1) day Suspension for failing to supervise and engaging in

an unprofessional conversation regarding an Employee's genitals and then participated in reviewing his Facebook profile in an attempt to locate a photograph while in the workplace. Criminalists Kestler and Tincher received Written Reprimands for making inappropriate and/or offensive statements and/or engaged in inappropriate behaviors in the workplace. Criminalist Wade received a Written Reprimand for using his cell phone on duty to search social media. Lieutenant Rudy Zupanc received a Written Reprimand for making inappropriate and/or statements and/or engaged in inappropriate behaviors in the workplace. Clearly, the Crime Lab was an atmosphere that ran rampant with inappropriate behavior and in light of the Grievant's decision to share a meme, it concedes as inappropriate, is simply not as egregious as characterized by the Employer.

Moreover, the evidence of record demonstrates the Grievant was diagnosed with Post Traumatic Stress Disorder, "PTSD", for which resulted in his inability to adapt to work environment and for which he has been seeking therapy and been placed on a medicinal regiment to combat this diagnosis.

With respect to the Sexual Harassment and Discrimination Charge, the Grievant was not accused of any unwelcome sexual advances, requests for sexual favors and/or other verbal or physical conduct, contact, or innuendo of a sexual nature. Simply, he showed an inappropriate meme to a co-worker he considered a friend while at the workplace. It was not pornographic as suggested by the Employer. Nor did the Grievant create an intimidating, hostile or offensive work environment. While the Crime Lab could have easily been perceived as an offensive work environment in and of itself, the Administrative Investigation resulting in numerous Employees receiving discipline demonstrates the workplace atmosphere within the Crime Lab. The Grievant did not hold any supervisory role within the Crime Lab since he had no direct reports

beneath him. Showing one meme to a co-worker simply does not constitute harassment. In support thereof, the Union cites prior Arbitration decisions from Arbitrator Sherrie Passmore and Felecia Bernadini.

The record clearly indicates the Crime Lab was in disarray. In December 2019, the Employer determined to conduct a Management Review to determine what was in fact occurring within the troubled Crime Lab. Many Employees were found to be speaking inappropriately and engaging in inappropriate physical contact with others. However, the Grievant never engaged in inappropriate physical contact with any Employees; he did not sexually harass Tiffany Paugh; he showed Ms. Paugh an inappropriate meme one time and one time only. Such did not result in an adverse employment decision. The Parties' Collective Bargaining Agreement recognizes the principle of progressive discipline. The Employer violated those progressive discipline principles since it could have levied a lower level of discipline or even a Demotion rather than Termination. Here, the totality of the evidence, as presented, warrants consideration of reduction of the discipline imposed commensurate with a totality of the circumstances as presented. Moreover, the Union requests any discipline resulting in and including back pay shall include any pay supplements, including Fitness Pay and Holiday Pay, seniority and seniority benefits and otherwise result in a make hole remedy.

DISCUSSION & FINDINGS

The disposition of this matter hinges upon the determination of whether the Employer has established "Just Cause" as required in Article 19 titled, "Disciplinary Procedure" to effectuate the Employment Termination/Removal of the Grievant, Sergeant Jeremy S. Wickman, for the events that occurred on March 5, 2020 in the Toxicology Lab area of the Ohio State Highway Patrol Crime Lab, involving Criminal Laboratory Supervisor Tiffany Paugh, wherein he showed

Ms. Paugh a meme of a naked penis protruding from a bandage consistent with that being worn by a member of Supervision. The record demonstrates the Grievant was charged with violating Rules and Regulations of the Ohio State Highway Patrol 4501:2-6-02(I)(1) titled "Conduct Unbecoming an Officer"; and, 4501:2-6-02(J)(1) "Sexual Harassment and Discrimination".

The Employer argues the Grievant, based on the evidence of record; the thorough Administrative Investigation conducted by Captain Gene C. Jarvi, Office of Investigative Services Commander; the testimony of record; and, the various statements elicited during the course of the Employer's Investigation, clearly establish on the morning of March 5, 2020, the Grievant, despite Ms. Paugh's assertions that he stop, nonetheless showed Ms. Paugh a photographic image displaying a bandaged hand with four (4) fingers placed on top of a male groin area along with a naked penis located in place of the thumb. Paugh indicated this was embarrassing; made her uncomfortable; she simply did not want to see the image; and, requested the Grievant discontinue his efforts to show her that image. She indicated she felt shocked, stunned and dumbfounded a co-worker would show such a sexually explicit image at the workplace. Given the fact the Grievant had been demoted from Lieutenant to Sergeant following events that occurred during his tenure at the Training Academy based on similar Rules infractions, the Employer emphasizes such egregious misconduct here warrants the disciplinary action imposed, i.e., Removal/Termination.

The Union concedes the Grievant, a twenty (20) veteran of the Ohio State Highway Patrol and a veteran of the United States Navy, who suffers from "PTSD", did indeed engage in inappropriate behavior at the workforce by showing Ms. Paugh the meme on a single occasion. However, as it contends, a single incident does not give rise to the termination of this Trooper's career. In support thereof, the Union emphasizes the dysfunctional atmosphere discovered

through a Management Review of the Crime Lab resulting in disciplinary action being levied to seven (7) of the (9) Employees referenced by the Grievant during the course of his own Administrative Investigation. Such, the Union contends, demonstrates the overall “climate” within the Crime Lab was less than desirable with pervasive rampant inappropriate conduct brought to light by the Grievant. While the Union concedes the photo depiction of the naked penis was indeed inappropriate, other instances involving similar misconduct have resulted in the imposition of far less severe disciplinary action. It emphasizes the accuser herein, Ms. Paugh, faced termination and rather than being terminated from her position, instead resigned based on her misconduct established during the course of the Management Review of the Crime Lab. Moreover, her use of a derogatory racial slur to at least two co-workers also supported the Employer's decision to effectuate Termination.

The Parties' Collective Bargaining Agreement, under which the Arbitrator's authority is memorialized and conferred, sets forth in Article 4, titled "Management Rights", the Employer's inherent and contractually recognized right to "...discharge and discipline Employees...". The limitation placed upon that inherent and contractually recognized right is set forth in Article 19, titled "Disciplinary Procedures" at Section 19.01 titled "Standard" which specifically states, "[n]o Bargaining Unit member shall be reduced in pay or position, suspended, or removed, except for Just Cause". This contractually recognized right of Management to effectuate disciplinary action up to and including termination and the attendant limitation placed upon Management to establish the imposition of disciplinary action be for "Just Cause", recognizes the time-honored "Just Cause Standard". Under the Just Cause Standard, the Employer must establish and prove the Grievant was guilty of the wrong-doing which served as the basis for the imposition of the disciplinary action imposed; and, the discipline as imposed, herein

"Removal/Termination", must be commensurate with the nature of the infraction(s) committed while considering both aggravating and/or mitigating circumstances/factor as such relate to fundamental considerations of Due Process and fundamental fairness as required by the Just Cause Standard.

Without a doubt, the conduct engaged in by the Grievant, as conceded to by the Union as being inappropriate, was indeed misplaced in this or any other workplace. It goes without saying in today's work environment dignity and decency for all members of the workforce have been heightened to require the utmost mutual respect while discharging one's duties while at work. Inherent within the Employer-Employee relationship is the reasonable expectation that Employees timely report to work, complete their assigned tasks and adhere to the Rules and Regulations promulgated, implemented and enforced by Management. Attendant therewith is the Employer's obligation to provide a workplace free from violence, hostility, disrespect and sexual misconduct to ensure each and every Employee a peaceful and safe work environment.

Undoubtedly, the conclusions found during the course of the Management Review of the Crime Lab suggests perhaps similar misconduct and inappropriate behavior engaged in by Employees of the Crime Lab was common, pervasive and in many ways, uncontrolled. During the course of the Management Review, it was determined seven (7) of the nine (9) Employees named by the Grievant during the course of his Administrative Investigation received disciplinary action. Importantly, the Grievant's accuser in this matter was recommended for Termination; however, she chose to resign prior to being terminated. Nonetheless, this simply does not excuse the Grievant's conduct herein. Nor is it appropriate to blame others, or any medical condition, for his actions - his choices - especially in light of his nearly 20-year career. His unrelenting and repeated attempts to show this image to Ms. Paugh exemplifies the apparent

disregard for the Employer's mandates with respect to ensuring a safe and appropriate workplace. In light of his previous Demotion, which he did not challenge and must be viewed herein as “active”, the Grievant was on clear and explicit notice further instances of such misconduct would be met with harsh disciplinary action. The question becomes whether in light of *all* facts and circumstances and the manner in which other instances of similar misconduct of a sexually explicit nature have been addressed warrant a different outcome with respect to the discipline imposed – was Removal/Termination appropriate?

The Arbitrator finds problematic the fact that despite there being concerns about the completion of work assignments and supervisory functioning within the Crime Lab, it was not until the Grievant raised these concerns during the course of *his* Administrative Investigation did, as this record suggests, the Employer took action to ascertain for itself what was in fact occurring. While certainly such is a Managerial function and the Employer can investigate when and/or if it deems necessary, such suggests the type of misconduct engaged in could be viewed as being more commonplace and laxly enforced than one would expect and/or desire. Clearly, the instances concluded during the Management Review resulted in seven (7) Employees receiving disciplinary action ranging from Written Reprimands to Suspensions, to the recommended Termination of Ms. Paugh. Where mandates and/or directives have been otherwise laxly enforced, offending Employees should, in most instances, be afforded the opportunity to correct that which is now brought to the attention of Management as running counter to that prescribed in its Rules and Regulations.

For whatever reason, the Grievant believed correctly, or not, his relationship with Ms. Paugh allowed for such interaction – obviously she did not share the same feelings toward the Grievant. The Management Review of the Crime Lab suggests there was apparently an

“atmosphere” where such misconduct occurred unknown and unchecked by Management. While the Employer has the right and obligation to its Employees to correct such misconduct, Employees are entitled to adequate notice of strict compliance and future zero tolerance for such workplace conduct. Despite his years of service and prior Demotion, the Grievant, too, should be afforded that opportunity to correct that now being subject to strict compliance. Disciplinary action is indeed warranted; however, under these circumstances, Removal/Termination simply runs inconsistent with others disciplined for what is viewed as inappropriate and pervasive misconduct, including those activities, sexual in nature, permeating the Crime Lab.

While the Arbitrator is indeed mindful of the Grievant’s prior Demotion and his role in a supervisory capacity, consistency in the administration of disciplinary action is one of the cornerstones under a Just Cause Analysis. Moreover, affected Employees are entitled to clear and explicit notice an otherwise laxly enforced Rule and/or Regulation would be now strictly enforced. Sometimes it takes one event – the sexually explicit meme shown to Ms. Paugh by this Grievant – to raise the awareness of the Employer such misconduct is occurring and must be addressed. The evidence of record compels the determination the conduct engaged in by the Grievant was indeed inappropriate and despite being told “NO” on numerous occasions by Ms. Paugh, the Grievant continued to take affirmative steps to show her this sexually explicit meme. Such unrelenting, unprofessional conduct not only led to, as characterized by Ms. Paugh, an uncomfortable situation, it was also inappropriate for any workplace despite assertions the two involved were more than “co-workers”, i.e., were “friends”. Such reliance is simply inexcusable.

It is also important to note despite the Grievant's assertions regarding his tumultuous divorce that was occurring around the time he was demoted from Lieutenant to Sergeant while serving at the Training Academy, the disciplinary action was not appealed and consequently was

active in his personnel file. That factor, in conjunction with this instance of misconduct, does indeed serve as an aggravating factor. However, the other instances discovered in the Crime Lab as raised, as well as, and more importantly the Grievant's near twenty (20) year tenure with the Ohio State Police, warrant consideration for rehabilitation and mitigation of the penalty as imposed. The Union concedes the Grievant's conduct was indeed inappropriate and seeks leniency with respect to the penalty which is being challenged.

Based on the facts and circumstances supported by the evidentiary record, the Arbitrator concludes the Grievant did indeed engage in the misconduct in violation of the "Conduct Unbecoming an Officer" – he failed to "...perform his duties in a professional manner"; however, the Charge he violated the "Sexual Harassment and Discrimination" Rule when he attempted to show Ms. Paugh the sexually explicit meme on his personal cell phone on March 5, 2020, represents a single incident and given the "work atmosphere" in the Crime Lab, such unfortunate misconduct of a sexual nature, was apparently more commonplace than either known by the Employer or obviously expected.

While the Grievant's prior demotion does indeed serve as an aggravating factor which would eliminate any consideration of any type of monetary, make-whole remedy, his nearly 20 year career; the other instances of "misconduct" (*See*, especially, Dispatchers incident) and the lesser discipline imposed; and, the Employer's lax enforcement of its Rules and Regulations, warrants one final opportunity for rehabilitation and reinstatement. As indicated in the evidentiary record, two (2) of three (3) Dispatchers were involved in misconduct of a sexual nature involving "depictions" (Sims and Wilson watched sexually explicit videos on their cell phones while in the Dispatch Center) served a 3-day Suspension and each received a "Last Chance Agreement" for conduct involving viewing - "sharing" - sexually explicit videos while at

the workplace. Such a remedy herein would seem consistent with consideration of those two instances where sexually explicit “depictions” – videos and a photographic “meme” – were “shared”. Such instances are similar in nature and lend credence to consistency of how such are addressed with respect to their severity and level of discipline for sexually based offenses. While both instances are inappropriate and unprofessional, at this or any other workplace, the viewing of sexually explicit videos could be argued as being more egregious than the sharing a sexually explicit “meme”. Those Employees were placed under a Last Chance Agreement and served a three-day Suspension. While the Grievant’s prior Demotion serves herein to eliminate any consideration of any form of compensation through a make-whole remedy – such is simply unavailable to this Employee – he should, however, be afforded a similar opportunity with respect to conditional reinstatement under a Last Chance Agreement similar to that provided the afore-referenced Dispatchers.

Such is not to suggest the conduct engaged in by the Grievant was not inappropriate and/or egregious, simply others involved in similar misconduct involving the sharing of sexually explicit “depictions” have been afforded a final opportunity to correct such misconduct found to have violated policy, especially where said policy has been otherwise laxly enforced. As a Sergeant, the Grievant must conduct himself in an appropriate and professional manner and not participate in such misconduct. It imposes upon the Grievant the mandate he refrain from any type of misconduct prohibited by the Rule and Regulation that served as the basis for the imposition of his Removal/Termination for a period of two (2) years from the date of this Opinion and Award. The Grievant's Termination shall be reduced to a suspension without back-pay or any other monetary/compensable entitlement. The Grievant shall have his seniority restored as if the Removal/Termination was not effectuated; otherwise, he shall receive no other

make-whole consideration. He shall retain his rank of Sergeant. He shall undergo and complete Training regarding appropriate supervisory expectations, workplace conduct and sensitivity toward the opposite sex. The Arbitrator shall retain jurisdiction for a period of sixty (60) calendar days from the date of this Opinion and Award to assist the Parties with any implementation issues that may arise.

AWARD

The Grievance is Sustained in part; and, Denied in part.

David W. Stanton

David W. Stanton, Esq.
NAA Arbitrator

November 29, 2020
Cincinnati, Ohio