

IN THE SUPREME COURT OF OHIO

**OHIO PATROLMEN'S BENEVOLENT
ASSOCIATION**

and

DAVID HILL

Appellants,

vs.

CITY OF FINDLAY

Appellee

**On Appeal from the Cuyahoga County
Court of Appeals, Eighth Appellate
District**

**Court of Appeals
Case No. CA-14-102282**

**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS OHIO
PATROLMEN'S BENEVOLENT ASSOCIATION AND DAVID HILL**

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TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST	1
STATEMENT OF THE CASE AND FACTS.....	3
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	7
<u>PROPOSITION OF LAW NO. 1:</u> Any limitation on an arbitrator’s ability to review and modify disciplinary action under the “just cause” standard must be specifically bargained for by the parties and contained within the four corners of the collective bargaining agreement.	7
<u>PROPOSITION OF LAW NO. 2:</u> A reviewing court exceeds the scope of review afforded to it under R.C. 2711.10 and 2711.11 when it substitutes its findings of fact and interpretation of contract language for that of the arbitrator.....	11
CONCLUSION.....	13
CERTIFICATION OF SERVICE.....	14
APPENDIX	<u>Appx. Page</u>
Journal Entry and Opinion of Cuyahoga County Court of Appeals (8/13/15)	1
Journal Entry of Cuyahoga County Court (11/12/14).....	37
Opinion and Award of Arbitration (8/29/13).....	42

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Board of Educ. of the Findlay School Dist. v. Findlay Educ. Ass’n</i> , 49 Ohio St.3d 129, 551 N.E.2d 186 (1990).....	2
<i>Board of Trustees of Miami Township v. Fraternal Order of Police, OLC, Inc.</i> , 81 Ohio St.3d, 269, 271-72, 690 N.E.2d 1262 (1998).....	1, 2, 8, 11
<i>City of Dayton v. AFSCME, Ohio Council 8</i> , 2 nd Dist. Montgomery No. 21092, 2005-Ohio-6392	9
<i>Goodyear Tire and Rubber Co. v. Local Union No. 200</i> , 42 Ohio St.2d 516, 520, 330 N.E.2d 703 (1975).....	2, 11
<i>Hillsboro v. Fraternal Order of Police, OLC</i> , 52 Ohio St.3d 175, 177, 556 N.E.2d 1186 (1990).....	12
<i>Internatl. Assn. of Firefighters, Local 67 v. Columbus</i> , 95 Ohio St.3d 101, 104, 766 N.E.2d 139 (2002).....	9
<i>Mahoning County Bd. of MRDD v. Mahoning County TMR Educ. Assn.</i> , 22 Ohio St. 3d 80, 83-84, 488 N.E.2d 872 (1986)	2
<i>Ohio Office of Collective Bargaining v. Ohio Civ. Serv. Emps. Assn., Local 11, AFSCME AFL-CIO</i> , 59 Ohio St. 3d 177, 180, 572 N.E.2d 71 (1991).....	8
<i>Summit County Children Srvs. Bd. v. Communications Workers Local 4546</i> , 113 Ohio St.3d 291, 2007-Ohio-1949, 296, 865 N.E.2d 31 (2007).....	8, 9
<i>United Steelworkers of America v. Enterprise Wheel & Car Corp.</i> , 363 U.S. 593, 597, 80 S.Ct. 1358 (1963).....	9
Statutes	
R.C. 2711.10	1, 2, 3, 11
R.C. 2711.11	1, 2, 3, 11
R.C. 2711.16	6

**EXPLANATION OF WHY THIS CASE IS A CASE
OF PUBLIC OR GREAT GENERAL INTEREST**

This case presents issues that are critical to the continued application of the two-part test this court established long ago for “just cause” in *Board of Trustees of Miami Township v. Fraternal Order of Police, OLC, Inc.*, 81 Ohio St.3d, 269, 271-72, 690 N.E.2d 1262 (1998) and to the body of law that has developed concerning a reviewing court’s ability to modify or vacate arbitration awards:

- (1) Can an employer policy that exists separate and apart from a collective bargaining agreement be applied to restrict the arbitrator’s ability to determine an appropriate level of discipline under the “just cause” standard contained in the collective bargaining agreement (hereinafter “CBA”)?
- (2) Does an arbitrator’s reference to the same extraneous policy for guidance on assessing an appropriate level of discipline cause that policy to become part of the collective bargaining agreement and binding upon the parties?
- (3) Does a reviewing court exceed the scope of review afforded to it under R.C. 2711.10 and 2711.11 when it substitutes its interpretation of the CBA’s just cause provision for the arbitrator’s interpretation?

One of the most fundamental protections afforded to employees in any collective bargaining agreement is the guarantee that discipline can only be levied against them for just cause and not on the mere whim of the employer. This court has further distilled the “just cause” standard for disciplinary action into two specific components: “(1) whether a cause for discipline exists and (2) whether the amount of discipline was proper under the circumstances,” finding that the arbitrator’s inquiry into whether there was “just cause” is one that almost always

involves application of these two factors. *Bd. of Trustees of Miami Twp. v. Fraternal Order of Police, OLC, Inc.*, 81 Ohio St. 3d 269, 272, 690 N.E.2d 1262 (1998).

Public policy, in turn, favors arbitration, a process by which parties contractually agree to submit their grievances to neutral third parties for resolution, because arbitration provides the parties with an expedient and inexpensive means for resolving conflicts, while relieving overburdened court dockets. *See Mahoning County Bd. of MRDD v. Mahoning County TMR Educ. Assn.*, 22 Ohio St. 3d 80, 83-84, 488 N.E.2d 872 (1986). For these reasons, and because the arbitration process is agreed upon by the parties, courts must presume that an arbitrator's award is valid. *Board of Educ. of the Findlay School Dist. v. Findlay Educ. Ass'n*, 49 Ohio St.3d 129, 551 N.E.2d 186 (1990), syllabus. It is only when the conditions set forth in Revised Code Sections 2711.10 and 2711.11 exist that a reviewing court may modify or vacate an arbitration award. *See id.* However, under no circumstance is the reviewing court to substitute its findings of fact or interpretation of the CBA for the arbitrator's interpretation. *Goodyear Tire and Rubber Co. v. Local Union No. 200*, 42 Ohio St.2d 516, 520, 330 N.E.2d 703 (1975).

None of the conditions set forth in Revised Code Sections 2711.10 and 2711.11 existed in this case. Here, the court of appeals ruled that despite the CBA's requirement that discipline only be issued for just cause, when the arbitrator referred to an employer-issued disciplinary policy for guidance as to the appropriate level of discipline under the just cause standard, the arbitrator was then bound by the limitations contained in the employer-issued policy on determining the appropriate penalty. The court specifically ruled that application of this extraneous disciplinary policy divested the arbitrator of any ability to review and modify the discipline, and that the arbitrator was bound to the terms contained in that disciplinary policy, specifically, the chief of police's assessment as to the appropriate level of discipline.

This decision improperly broadens the court's review of an arbitration award by allowing the court to substitute its interpretation of a CBA for the arbitrator's interpretation and in doing so, modifying the terms of the CBA. The decision eviscerates the long standing body of law defining the "just cause" standard for disciplinary action by allowing an employer-issued policy, separate and apart from the CBA, to trump the CBA's negotiated just cause provisions by giving the employer an unreviewable right to discipline an employee. This ruling opens the door to employers circumventing their collective bargaining obligations by unilaterally implementing policies and procedures that would supersede the terms contained in negotiated collective bargaining agreements under the guise of "management rights."

Therefore, this case is a case of public or great general interest because it inappropriately expands the judicial scope of review over arbitration awards beyond that presently allowed under Revised Code Sections 2711.10 and 2711.11. This case is also one of public interest because it eviscerates this Court's long-standing definition of just cause for discipline and undermines collective bargaining in general. In order to promote and preserve the integrity of the both collective bargaining and the arbitration process itself, this court must grant jurisdiction to hear this case and review the erroneous decision of the court of appeals.

STATEMENT OF THE CASE AND FACTS

This matter arose when the City of Findlay discharged Sergeant David Hill on January 8, 2013 on the basis of various allegations of misconduct involving a particular female patrol officer, which included violating the department's sexual harassment policy when he made an isolated reference to the female patrol officer as "Whoregan" during roll call and engaged in unwelcome joking of a sexual nature with her; creating a hostile work environment; and failing to stop other officers' harassment of the female officer. Appendix, p. 43, 48-49.

Although the police chief listed various rule violations in his termination letter, the determination to terminate Hill's employment was based on the alleged sexual harassment of the female officer. Appendix, p. 48-49. In determining Hill must be terminated, the chief also cited prior misconduct as helping to form the basis of his decision. *Id.* The prior misconduct included a reprimand for posting a video to Facebook in violation of department policy and a 10-day suspension that was applied from a January 1, 2013 arbitration decision that arose out of Hill's expression of displeasure over recent promotional decisions in front of his subordinates. *Id.*

The union grieved the termination of Hill's employment violating Article 39 of the CBA, which specifically provides:

39.04 Discipline shall be imposed only for just cause. The specific acts for which discipline is being imposed, and the penalty proposed, shall be specified in the Notice of Discipline. The Notice served on the employee shall contain a reference to dates, times and places of events giving rise to the discipline, if possible. *See* Appendix, p. 9.

In addition to the "just cause" language contained in Article 39, the collective bargaining agreement also provides in part for certain management rights:

4.01 Unless expressly provided to the contrary by a specific provision of this Agreement, the Employer reserves and retains, solely and exclusively, all of its statutory and common law rights to manage the operation of its Department of Police. Such rights shall include, but are not limited to, the following: (a) to develop, revise, or eliminate work practices, procedures and rules in the operation of the Department of Police and to maintain discipline . . . (c) to transfer, promote or demote employees, or to lay off, terminate or otherwise to relieve employees from duty for just cause; . . . *See* Appendix, p. 8.

The CBA also contains basic language assuring that bargaining unit members will comply with rules and regulations implemented for operational purposes even though such rules and regulations are not contained within the CBA:

10.01 The Union agrees that its membership shall comply with Police Department and City of Findlay Rules and Regulations, including those relating to working conditions, conduct, and performance. The Employer agrees that Police

Department and City of Findlay Rules and Regulations, which affect working conditions, conduct, and performance shall be subject to the grievance procedure if they violate this Agreement. *See* Appendix, p. 8.

The grievance filed over Hill's termination progressed through the internal grievance procedure, with the city denying the grievance at each step of the process. The arbitration hearing was held on May 8, 2013 and May 21, 2013, with the issue presented for the arbitrator's review being "did the employer have just cause for terminating the sergeant, and if not, what is the remedy?" Appendix, p. 57. The parties' CBA confined the arbitrator's decision-making ability as follows:

41.03 The arbitrator shall have no power or authority to add to, subtract from, or in any other manner alter the specific terms of this Agreement; nor to make any award requiring the commission of any act prohibited by law; nor to make any award that itself is contrary to law or violates any of the terms and conditions of this Agreement. *See* Appendix, p. 26-27.

On or about August 29, 2013, the arbitrator issued his award, granting the union's grievance in part. At the outset, the arbitrator noted that the terms of the collective bargaining agreement required him to determine whether Hill's termination was for just cause. Appendix, p. 57. The arbitrator explained the just cause standard, indicating that it required him to determine not only whether misconduct occurred, but also whether the discipline the employer imposed was appropriate. *Id.*

The arbitrator ultimately concluded the city had just cause to discipline Hill for disrespectful behavior to the female officer by referring to her as "Whoregan" in front of other officers in roll call and for Hill's failure to stop other officers from making inappropriate remarks about her. Appendix, p. 58, 59-60. However, the arbitrator found that the city failed to prove that Hill's conduct violated the city's sexual harassment policy. *Id.* at 61.. With the city having failed to prove the most serious charge of sexual harassment against Hill, the arbitrator determined that termination was excessive discipline for the discourteous conduct. *Id.* at 64.

In the course of considering the appropriate level of discipline under the CBA's just cause standard for the discourteous conduct, the arbitrator acknowledged the prior 10-day suspension Hill received for discourteous treatment of a fellow officer. Appendix, p. 64-65. The arbitrator acknowledged the existence of an employer-issued disciplinary policy that existed separate and apart from the CBA, and he utilized the disciplinary policy and guidelines contained in the attached matrix for guidance in fashioning a remedy for the grievance. *Id.* The matrix contained five steps of escalating discipline based on the severity and frequency of the offenses, starting with an informal counseling or verbal reprimand, and ending with termination at the final step. *Id.* at 39. The matrix also contained a notation stating the police chief had sole discretion to determine the appropriate level of discipline, if more than one discipline level is indicated, based on the facts of the case and history of the employee. *Id.*

Having already concluded that termination was not warranted because the city failed to prove the most serious of its allegations, namely, the sexual harassment, the arbitrator further explained that a severe penalty was necessary in order to impress upon Hill the need to show complete respect for other officers in the department. Appendix, p. 65. The arbitrator ordered Hill to be reinstated to his position as sergeant with no back pay, which ultimately required Hill to serve a five-month unpaid suspension. *Id.*

The city refused to reinstate Hill to his former position of employment. This, in turn, prompted the union to file an application to confirm and enforce the arbitration award pursuant to R.C. 2711.16 asserting that after a full opportunity to present evidence, the arbitrator issued a final and binding decision on the parties pursuant to the terms of their collective bargaining agreement. Appendix, p. 38. The city also filed an application to vacate the arbitration award on or about November 27, 2013, invoking the trial court's jurisdiction under R.C. 2711.16, seeking

vacatur and/or modification of the same arbitration award, alleging that the arbitrator imperfectly executed his award when he reduced Hill's termination to a suspension without pay, exceeding the powers conferred upon him by the parties' collective bargaining agreement. *Id.*

The trial court denied the union's application to confirm or enforce the arbitration award, and granted the city's application to vacate the arbitration award. Appendix, p. 40. In its decision, the trial court incorporated the disciplinary policy and matrix into the CBA by virtue of the fact that a past arbitrator applied it to disciplinary action. *Id.* The trial court concluded that this disciplinary policy and matrix required strict, mechanical application of disciplinary steps, and where a question as to which disciplinary step should apply, the Chief of Police, not the arbitrator had the final say as to which level of discipline was appropriate. *Id.* The trial court concluded the arbitrator exceeded his authority when he determined that the disciplinary policy and matrix should be applied to Hill's case but acted arbitrarily and capriciously by incorrectly applying what the court perceived as the "plain language of the Matrix." *Id.*

The union filed its Notice of Appeal with the Eighth District Court of Appeals. The court of appeals issued its decision on August 13, 2015, affirming the trial court decision. The court held that the just cause standard permitted the arbitrator to interpret the agreement and award the proper remedy. Appendix, p. 26. However, the court inexplicably concluded that once the arbitrator applied the extraneous disciplinary policy as guidance for determining the appropriate level of discipline, the arbitrator lost the ability to modify the disciplinary action imposed and was required to defer to the chief of police's determination of the penalty. *Id.* at 27.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1: Any limitation on an arbitrator's ability to review and modify disciplinary action under the "just cause" standard must be specifically bargained for by the parties and contained within the four corners of the collective bargaining agreement.

The well-established precedent from this court explaining the arbitrator's role when reviewing discipline under a CBA's just cause standard provides for the arbitrator to engage in a two-step analysis: (1) whether a cause for discipline exists; and (2) whether the amount of discipline administered under the circumstances is appropriate. *Board of Trustees of Miami Township v. Fraternal Order of Police, OLC, Inc.*, 81 Ohio St.3d, 269, 271-72, 690 N.E.2d 1262 (1998); *see also Summit County Children Svcs. Bd. v. Communications Workers Local 4546*, 113 Ohio St.3d 291, 2007-Ohio-1949, 296, 865 N.E.2d 31 (2007) (holding that the arbitrator's inquiry into whether there is "good cause . . . almost always involves two factors—whether the misconduct alleged has been proven and whether the discipline imposed for the misconduct was reasonable"). Further, "[a]bsent language in collective bargaining agreement that restricts the arbitrator's power to review, if the arbitrator determines that there was just cause to discipline an employee, the arbitrator is not required to defer to the employer as to the type of discipline imposed." *Board of Trustees of Miami Twp.*, at 271-72.; *but see Ohio Office of Collective Bargaining v. Ohio Civ. Serv. Emps. Assn., Local 11, AFSCME AFL-CIO*, 59 Ohio St. 3d 177, 180, 572 N.E.2d 71 (1991) (language limiting arbitrator's power to modify disciplinary action was contained within four corners of CBA).

In the present case, the court of appeals determined that a disciplinary policy and matrix contained outside the four corners of the CBA limited the arbitrator's ability to modify the discipline imposed on Hill. According to the court, the just cause provisions in the CBA gave the arbitrator the authority to interpret the CBA and award the appropriate remedy. However, without any explanation, the court also concluded that once the arbitrator determined that the extraneous disciplinary policy and matrix should be applied to the case, the arbitrator "did not have the arbitral authority to modify the disciplinary action imposed, which under the discipline

matrix and CBA was within the ‘sole discretion’ of Chief Horne.” Appendix, at p.30. Under the court of appeals’ approach, any time an arbitrator references an employer policy that exists outside the four corners of the agreement, that policy becomes a binding part of the CBA simply by virtue of the fact that the arbitrator referenced it.

This approach directly contradicts long established precedent defining an arbitrator’s power. “[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; . . . He may, of course, look for guidance from other sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.” *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358 (1963); *See Summit County Children Servs. Bd.*, 113 Ohio St.3d at 296 (permitting arbitrator’s the use of Daugherty just cause test to assist with the evaluation of appropriate discipline, even though the test was not stated in the contract, because the test was well-known and widely recognized for determining just cause). However, the employer’s right to make rules extraneous to the contract does not bestow any right to have those extraneous rules relied upon to re-define terms of the CBA or to impose additional requirements not expressly provided for in the CBA. *Internatl. Assn. of Firefighters, Local 67 v. Columbus*, 95 Ohio St.3d 101, 104, 766 N.E.2d 139 (2002). More specifically, where disciplinary rules are concerned, “management’s right to make and enforce workplace rules and regulations does not carry with it an unreviewable right to determine that a violation of those rules warrants discharge for just cause.” *City of Dayton v. AFSCME, Ohio Council 8*, 2nd Dist. Montgomery No. 21092, 2005-Ohio-6392 at ¶19.

In *City of Dayton v. AFSCME, Ohio Council 8*, the court reversed the trial court’s vacatur of an arbitration award that reinstated an employee who was terminated for posting a threatening message on a shared computer system and reduced the penalty to a 30-day suspension. *Id.*

Similar to the present case, the arbitrator also found the grievant engaged in serious misconduct, but that discharge was not the appropriate penalty. *Id.* The trial court vacated the award, finding that civil service and workplace rules, which were incorporated into the collective bargaining agreement by reference, authorized termination for the offense and precluded the arbitrator from modifying the penalty. *Id.* at ¶18. The court of appeals reversed the decision, reasoning that the existence of civil service and work place rules do not preclude an arbitrator from reviewing the degree of discipline, and that any penalty for a violation of rules adopted by management remains subject to the just cause standard in the collective bargaining agreement. *Id.* at ¶19.

Here, the court of appeals redefined the just cause provisions contained in the CBA and bestowed upon the employer an unreviewable right to discipline employees when it found that the arbitrator's reference to the extraneous disciplinary policy bound the parties to the steps of the disciplinary matrix which gave the police chief sole discretion to determine the appropriate level of discipline. This negates an essential component of the just cause provision the parties bargained into the CBA giving an arbitrator authority to review the appropriateness of the discipline. The court of appeals' approach also flies in the face of prior decisions of this court which preclude extraneous rules and policies from redefining terms or imposing additional requirements not expressly provided for in the CBA.

Further, the decision places various provisions of CBA in conflict with each other. Although management has the rights to promulgate rules and regulations for the operation of the department and maintain discipline, its right to terminate any employee is limited to just cause. As stated above, the just cause provision contained in the disciplinary article of the contract implicitly provides the arbitrator with the means to evaluate the reasonableness of the discipline. Further, the CBA expressly precludes the arbitrator from rendering a decision that adds to or

subtracts from the agreement. However, the court of appeals' application of the extraneous disciplinary policy matrix subtracts from the just cause provisions of the agreement in that it takes away the arbitrator's ability to engage in the second prong of the just cause test enunciated in *Board of Trustees of Miami Township*. Specifically, the court's application of the policy subtracts the arbitrator's ability to review the reasonableness of the discipline and fashion a remedy if the discipline is found to be unreasonable, giving the employer an unreviewable right to discipline its employees.

PROPOSITION OF LAW NO. 2: A reviewing court exceeds the scope of review afforded to it under R.C. 2711.10 and 2711.11 when it substitutes its findings of fact and interpretation of contract language for that of the arbitrator.

Even if the employer-issued disciplinary policy and matrix became part of the CBA and binding on the parties once the arbitrator referenced it to review the reasonableness of the discipline, the court of appeals exceeded its scope of review when it substituted its interpretation of the collective bargaining agreement for that of the arbitrator's. R.C. 2711.10(D) specifically sets forth the limited circumstances under which a trial court may vacate an arbitration award, which includes, in relevant part: "[t]he arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter was not made." R.C. 2711.10(D). Therefore, the award will not be set aside except upon a showing of fraud, misconduct or in the event the arbitrator exceeded his authority, and even a grossly erroneous decision is binding in the absence of fraud. *Goodyear Tire & Rubber Co. v. Local Union 200, United Rubber, Cork, Linoleum and Plastic Workers of America*, 42 Ohio St.2d 516, 521, 330 N.E. 2d 703 (1975). As long as the arbitrator has merely "interpreted the contract rather than adding to, subtracting from or altering the language of the contract" the court is required to affirm the arbitrator's decision, because it is the arbitrator's determination for which the parties

bargained. *Hillsboro v. Fraternal Order of Police, OLC*, 52 Ohio St.3d 175, 177, 556 N.E.2d 1186 (1990).

Here, the arbitrator applied the just cause standard provided for in the collective bargaining agreement. He determined, first and foremost, that because the employer failed to prove all of the allegations against Hill, specifically the sexual harassment and hostile work environment allegations, the termination must be set aside.

From there, the arbitrator applied the employer-created disciplinary policy as a guideline to determine a reasonable level of discipline as part of his just cause analysis. The body of the disciplinary policy provides in relevant part: “the employer agrees to the following forms of discipline, in accordance with the guidelines listed in the Disciplinary Matrix.” The policy goes on to list the types of discipline that can be imposed, including: verbal reprimand, written reprimand, suspension without pay, reduction in classification (demotion), and termination. Then, attached to the disciplinary policy is the matrix that provides that an employee who receives disciplinary action will “receive a disciplinary action within the range of the following scale, based upon the indicated discipline level.” Appendix, p. 9-11. The arbitrator, in turn, interpreted the matrix as a guideline which provided for a range of discipline, stating “[u]nder the Matrix, this would mean discipline could range from a 3-10 day suspension up to termination.” *Id.* at 65. The arbitrator ultimately ordered reinstatement with no back pay, causing Hill to serve an approximate five-month unpaid suspension. A lengthy suspension clearly falls within the range of discipline, a suspension and termination, as set forth above.

Even if the discipline policy became a binding part of the CBA, the arbitrator’s interpretation of it was rationally tied to the policy and the CBA itself. Moreover, even if the police chief’s determination of discipline had any binding effect, this would presuppose that the

employer successfully proved all allegations of misconduct, which the city failed to prove in this case. The fact that the reviewing courts might have disagreed with the interpretation of these provisions and application of them to the facts of the case is of no consequence, and a vacatur of the award on that basis was a broadening of the court's review not permitted under the law.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The Ohio Patrolmen's Benevolent Association and David Hill request this court grant jurisdiction and allow this case to be heard so that the important issues presented herein will be reviewed on their merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this foregoing Memorandum in Support of Jurisdiction of Appellants Ohio Patrolmen's Benevolent Association and David Hill has been served by regular U.S. mail this 25th day of September 2015 on the following:

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APPENDIX