

In the Matter of Arbitration Between:

OHIO DEPARTMENT OF PUBLIC SAFETY
DIVISION OF STATE HIGHWAY PATROL

and

FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL

Re: Grievance 15-03-960408-0033-04-01
McCormick suspension

Hearing held November 20, 1996, in Troy, Ohio

Decision issued December 16, 1996

APPEARANCES

Employer

Staff Lt. Richard G. Corbin, Advocate
Wendy F. Clark, OCB, Second Chair

Union

Paul Cox, Esq., Chief Counsel
Ed Baker, Staff Representative
Tpr. Luther T. McCormick, Grievant

Arbitrator

Douglas E. Ray

07-07-1997
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I. BACKGROUND

Grievant has been an Ohio State Highway Patrol Trooper for approximately four and one half years. He is a member of a bargaining unit represented by the Fraternal Order of Police, Ohio Labor Council, Inc. The unit includes, among other classifications, both troopers and dispatchers of the Ohio State Highway Patrol.

This matter arises out of a two day suspension given Grievant effective April 14, 1996. A grievance protesting the suspension was filed and the matter processed to arbitration.

Testimony at hearing revealed that Grievant had been issued a traffic ticket for stopping in a no stopping /towaway zone in front of the Ameritech Building on First Street in Dayton, Ohio. Initially he had stopped in the no stopping zone next to the curb and let his wife out of the car to go into the building to pay the telephone bill. Other cars, including unattended cars, were also there. He was then requested to leave the no stopping zone by a Dayton Parking Enforcement Aide. The Aide in question testified that Grievant had called her a "white f***ing bitch" as he pulled out into traffic. The other Aide testified that she heard the words "f***ing bitch." Grievant denied that he had made these statements.

After Grievant left the scene, two Dayton police officers arrived on the scene to help the Aides get a vehicle towed from the no stopping zone in question. After

circling the block a number of times, Grievant returned to the no stopping zone and stopped his car again since his wife was coming out of the building. The parking aide whom he had allegedly sworn at then wrote out a ticket and put it on Grievant's car. Grievant then left his car and went to talk to one of the two police officers at the scene to complain about the ticket the Aide had just given him. He felt that it was unfair in part because he thought the other cars in line had not been ticketed. The officer to whom Grievant first spoke testified that Grievant complained loudly about the ticket and flashed his Patrol ID and said he was a State Trooper and "knows what the law is." That officer turned the matter over to another officer who talked further with Grievant at Grievant's car. Grievant testified that he did not identify himself as a Trooper to the first officer and that he mentioned it to the second officer, showing this officer his identification only because the officer had requested it. Grievant obtained from the officers the name and location of the Dayton Police Sergeant who handled complaints about tickets and went to see him. The first parking aide called the sergeant while Grievant was en route and advised him of her charge that Grievant had cursed her. When Grievant arrived to complain about his ticket, the Sergeant inquired of his duty assignment and later made a complaint to the Highway Patrol Post. The ticket was not rescinded.

An investigation was initiated and statements taken from the two parking aides, the two Dayton officers on the scene, the Sergeant and Grievant. As a consequence of this investigation, Grievant was charged with violations of Rule 4501:2-6-02(I)(1), Performance of Duty, and Rule 4501:2-6-02(E), False Statement, Truthfulness, based on charges that he "engaged in conduct that brought discredit to the Division and did make false statements regarding the incident." After a pre-disciplinary meeting, a two day suspension was imposed.

The matter was processed to arbitration by the parties and a hearing held November 20, 1996, in Troy, Ohio, before the undersigned arbitrator. At hearing, the parties stipulated that the matter was properly before the arbitrator.

II. ISSUE

The parties stipulated the issue to be:
Did the Employer have just cause to impose a two day suspension on Grievant in accordance with Sections 19.01 and 19.05? If not, what shall the remedy be?

III. COLLECTIVE BARGAINING AGREEMENT

Among the provisions of the Agreement consulted by the arbitrator are:

Section 18.08, "Off Duty Status," which provides:

Disciplinary action will not be taken against any employee for acts committed while off duty except for just cause.

Section 19.01, "Standard," which provides:

No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause.

Section 19.04 "Pre-suspension or Pre-termination Meeting"

Section 19.05, "Progressive Discipline," which provides in part:

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

1. Verbal Reprimand (with appropriate notation in employee's file);
2. Written Reprimand;
3. A fine not to exceed two (2) days pay;
4. Suspension;
5. 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.....

IV. POSITIONS OF THE PARTIES

The parties made a number of detailed arguments during the course of the hearing. Their positions are only briefly summarized below.

A. The Employer

The Employer argues that the suspension was for just cause and asks that the grievance be denied. The Employer argues that the discipline imposed was appropriate, especially in light of Grievant's prior disciplinary record. In the Employer's view, this is not a case about a parking ticket. Rather, Grievant was disciplined for two major reasons. First, Grievant made a rude and profane comment to a parking aide overheard by her partner, identified himself as a trooper after behaving this way and thus brought the Employer and its reputation into the matter. Second,

Grievant's behavior in the administrative investigation is alleged as a basis for discipline. The Employer asserts that the Grievant did not tell the Employer the truth in the investigation, pointing to various inconsistencies. The Employer argues that it presented three experienced witnesses from the Dayton Police Department and asks the arbitrator to credit their testimony. The Employer asserts that not telling the truth is the more serious violation and that it exercised great discretion in limiting the penalty to a two day suspension. The Employer argues that it is critical that law enforcement officers and their agency have a reputation to truthfulness. The Employer asks that the grievance be denied.

B. The Union

The Union argues that the suspension was not for just cause. The Union argues that this is, in essence, a parking case and that the Employer has overreacted in imposing discipline here. The Union points to inconsistencies in the testimony of Employer witnesses and argues that Grievant has presented credible testimony. The Union notes, for example, support for Grievant's testimony that he was initially unable to leave the curb lane because the parking aides' car was blocking his way out and that he complied with the initial request to leave as soon as he could. When he next stopped, testimony indicated that the first police officer indicated it was OK for him to remain once Grievant gestured that his wife was on her way down. In these circumstances,

argues the Union, anyone would be upset to get a ticket and that it would not be unreasonable to identify oneself as an officer. In light of the disparity in enforcement, Grievant's reaction was justified and understandable.

The Union points to Section 18.08 of the contract and asserts that the Employer has not met its burden of proving a connection between the off duty conduct and the job. The Union asserts that this case has been mostly about a parking ticket that has no connection to Grievant's job and that the Employer has overreacted. The Union asks that Grievant's pay and benefits be restored and the discipline removed from his record.

V. DECISION AND ANALYSIS

In reaching a decision in this matter, the arbitrator has considered the testimony and exhibits presented at hearing, the collective bargaining agreement and the arguments of the parties. The following matters are among those taken into consideration.

1. There is a credibility dispute as to whether Grievant made certain remarks to the parking aide when he moved his car the first time. After reviewing all the evidence, the arbitrator finds it more likely than not that Grievant did call the parking aide a "f***ing bitch" as he pulled out of the no-stopping zone the first time. These words were testified to by both the first Parking Enforcement Aide and her partner and their stories have been consistent from the time they reported them to the Dayton police officers at the

original scene, through the investigation and at the hearing. The charge that he included the word "white" as well is not found established because not confirmed by the Aide's partner. Had Grievant made such remarks to a member of another law enforcement agency while he was on duty or in uniform, they could, by themselves, provide grounds for discipline. (Gender based or, if established, racially based remarks are particularly inappropriate in a law enforcement agency.) This incident, however, occurred off duty and out of uniform.

2. There is a dispute as to whether Grievant told the first police officer with whom he spoke that he was a trooper and showed the officer his identification. Here, the arbitrator credits the testimony of the Dayton police officer who testified at hearing that Grievant did identify himself as a trooper and did pull out his identification. This officer, who had over seven years' experience, seemed a credible witness. He testified, for example, that Grievant's complaint to him was made in a manner that did not allow him to get a word in edgewise. Grievant's later testimony at hearing was sometimes given in a manner consistent with this description. The police officer's testimony was not at all embellished in a way to make Grievant look bad and he even testified that right before Grievant was given a ticket by the Aide, he, the police officer, had responded to Grievant's gesture that his wife was coming by nodding in a manner that indicated it was all right for Grievant to

remain. His testimony did not in any way seem designed to make Grievant look bad.

3. Given these two credibility findings, it appears that Grievant did voluntarily make his patrol status relevant to the abusive remarks incident. Although identifying himself as a trooper in a dispute involving parking rules does not necessarily bring discredit on the Division, it did allow the Dayton police officers to tie the State Highway Patrol to the charge of swearing at a parking aide.

4. As the Union has argued, the traffic ticket itself is questionable in light of the nod by the police officer indicating it was "OK" for Grievant to remain a few moments for his wife to come down. The officer did not know at the time, however, that Grievant had earlier been told to leave that spot. Perhaps the aide would not have given Grievant a ticket but for the cursing incident but the propriety of that ticket is not before the arbitrator.

5. But for the charge that Grievant made false statements concerning his conduct, the arbitrator is not sure that the incident should have led to the discipline imposed. Grievant did not make remarks to the Aide in his capacity as a trooper and identified himself as a trooper to a different officer later on when complaining about the ticket. The matter of the remarks, standing alone, might well have been resolved with an apology rather than discipline.

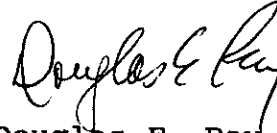
6. As a result of the credibility findings on the cursing incident and the identification issue, however, the

arbitrator finds that Grievant did make false statements to Patrol investigators when he denied these allegations. He was charged with making false statements as part of the charges made against him on March 5, 1996, before his predisciplinary hearing. The false statements Grievant is found to have made to investigators transformed this from an incident that might have been solved with an apology to a problem that could well bring discredit to the Division. Grievant's statements to investigators put his credibility as a Trooper at issue against that of three Dayton police employees. A reputation for credibility is important in law enforcement and equally important in maintaining effective interagency working relationships. Under the circumstances of this case, the arbitrator finds that the Employer has met its burden of showing, by a preponderance of evidence, that Grievant did make false statements to investigators which violated Rule 4501:2-6-02(E), "False Statement, Truthfulness." This part of the Division's rules for Performance of Duty and Conduct provides: "A member shall not make any false statement, verbal or written, or false claims concerning his/her conduct or the conduct of others." Because these statements challenged the credibility of another law enforcement agency, the arbitrator finds that they were harmful to the Employer and warranted the discipline imposed.

VI. AWARD

The grievance is denied.

Respectfully submitted,

A handwritten signature in cursive script that reads "Douglas E. Ray".

Douglas E. Ray
Arbitrator

December 16, 1996

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