

Susan Grody Ruben, Esq.
Labor Arbitrator
30799 Pinetree Road, #226
Cleveland, OH 44124

ARBITRATION PROCEEDING PURSUANT TO
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

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| In the Matter of | ♦ | |
| | ♦ | |
| FOP, OHIO LABOR COUNCIL, INC. | ♦ | |
| | ♦ | Arbitrator's |
| and | ♦ | Opinion and Award |
| | ♦ | |
| STATE OF OHIO, ODNR UNIT 2 | ♦ | |
| | ♦ | |
| Grievance No. DNR-2015-03434-2 | ♦ | |

This Arbitration arises pursuant to the collective bargaining agreement ("the Agreement") between the Parties, FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL, INC. ("the Union") and THE STATE OF OHIO, OHIO DEPARTMENT OF NATURAL RESOURCES, UNIT 2 ("the State") under which Susan Grody Ruben was appointed to serve as sole, impartial Arbitrator. Her Award shall be final and binding pursuant to the Agreement.

Hearing was held March 16, 2016. Both Parties had representatives who had full opportunity to introduce oral testimony and documentary

evidence, cross-examine witnesses, and make argument. Both Parties filed post-hearing briefs on or before April 6, 2016.

APPEARANCES:

On behalf of the Union:

Paul L. Cox, Chief Counsel, FOP, OLC, Inc.

On behalf of the State:

Andrew Shuman, Labor Relations, ODNR

ISSUE

Was the Grievant issued a 3-day working suspension for just cause? If not, what shall the remedy be?

RELEVANT SECTIONS OF THE AGREEMENT

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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.

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FACTS

The Grievant has been employed by the State as a Wildlife Officer for over ten years. His duties included patrolling Lake Erie in an enforcement capacity, looking for infractions such as violations of fishing regulations.

In a written pre-disciplinary notice from the State to the Grievant dated August 5, 2015, the Grievant was informed in pertinent part:

...You are being charged with a violation of the following provisions of the ODNR Disciplinary Policy:

- C(9) – Neglect of Duty – Commission of acts that impair or compromise the ability to carry out his/her duties as a public employee effectively.

These allegations are supported by the following incident/facts:

On June 5, 2015, while off duty, you and two other fishermen were found to have been fishing with too many units of rod and reel in violation of Ohio Administrative Code 1501:31-13-01.¹ This is a rule which you have enforced in the past as a Wildlife Officer.

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¹ Ohio Administrative Code 1501:31-13-01(A)(1) provides:

It shall be unlawful for any person at any time to engage in fishing with more than two hand lines or more than two units of rod and line or a combination of more than one hand line and one rod and line, either in hand or under control.

In a letter dated September 10, 2015 from the State to the Grievant, the Grievant was informed in pertinent part:

As a result of...the pre-disciplinary hearing held on August 11, 2015, a determination was made that just cause exists to impose discipline for your violation of the following provision(s) of the Ohio Department of Natural Resources (ODNR) Disciplinary Policy:

- C(9) – Neglect of Duty – Commission of acts that impair or compromise the ability to carry out his/her duties as a public employee effectively.

Therefore, you are receiving a Three (3) Day Working Suspension from your position as a Wildlife Officer with the Division of Wildlife. You shall serve the aforementioned suspension over the pay period ending on September 19, 2015. During a working suspension, you shall report to work and you will receive wages for the dates of the suspension.

Please note, future violations of the ODNR Disciplinary Policy shall result in progressive discipline up to and including removal.

The instant grievance was filed on September 14, 2015, alleging violation of Article 20.09. The grievance states:

On June 5, 2015 I was fishing on Lake Erie with two friends. After fishing for a few hours the owner of the boat said he was going to change some lines because the fishing was slow. We were approached by another boat that was two State Wildlife officers checking for fishing license compliance. Just before they pulled up we had caught a fish and the owner put the rod back in the water. I was unaware that he put the rod in the water and did not reel another one. Officer Shinko asked to

see the other guys fishing license and said I know you have one Barry. He then said you put me in a tough spot with an extra line in the water. I was not watching or counting rods because we had been fishing for a couple of hours and there were 6 rods in the water. The officers never questioned the other fisherman about how or when the 7th rod went in the water. I did not put the rods in the water and if I would have noticed an extra rod I would have reeled one in.

Resolution Requested: I would like the discipline to be taken away or reduced since I was not in control of three rods or units like the law states. Or made whole.

POSITIONS OF THE PARTIES

State Position

The record establishes just cause for the discipline. As a Wildlife Officer, the Grievant knew the rules, knew there was an extra rod in the water, and knew he was caught by his coworkers ignoring the rules he is sworn to uphold.

The DAS Classification Specification for the Wildlife Officer Series states:

The purpose of the wildlife officer occupation is to enforce, investigate & manage wildlife program rules, laws & operations in order to provide protection for wildlife & fish in department of natural resources districts & other designated lands.

The record shows the Grievant was aware of OAC 1501:31-13-01(A)(1), which prohibits more than two rods per person. The Grievant acknowledged he has issued this citation in the past. While issuance of this citation is discretionary, the two-rod rule remains the law.

The Union acknowledges there were at least seven rods in the water. The Grievant's speculation that the boat operator dropped an extra rod in the water while the Grievant was not looking is not credible. Testimony variously indicated the Grievant was in the stern, the passenger seat, or on the gunnel of the boat. From any of these locations, the Grievant would have had a view of all the rods.

The Grievant's story has continued to change. During the Administrative Investigation, he said he was switching bait and must have forgotten to bring in the other rod. At the hearing, he testified the operator must have put in an extra line.

The immediate impact of the Grievant's conduct is evident in Wildlife Officer Shinko's statement to the Grievant, "You put me in a bad position." Wildlife Officer Hadsell echoed this sentiment when he stated his "heart sank" when he realized the Grievant was on the boat.

Division of Wildlife Chief Law Enforcement Officer Ken Fitz testified the Grievant's conduct impairs the trust among Wildlife Officers and with the public. Wildlife Officers are required to testify in court. The Grievant's credibility and ability to perform his job will be challenged in court due to his selective observance of wildlife laws.

The Union contends because the Grievant was off duty and not in uniform, there was no harm done. Other Wildlife Officers, however, know what happened. And other Wildlife Officers need to be able to trust the Grievant is able to perform his duties when they are working with him.

The conflict between the Grievant's conduct and his duties as a Wildlife Officer is clear. It is a Wildlife Officer's duties to enforce and manage wildlife program rules. The State did not expect the Grievant to make a citizen's arrest of his friends. The State, however, expects the Grievant to behave in a way off duty that does not negatively impact his work environment and his ability to enforce the laws he has sworn to uphold on duty.

This was not the Grievant's first violation of work rules. He has an active written reprimand for Failure of Good Behavior and a speeding incident in a State vehicle, as well as a one-day working suspension for

Failure of Good Behavior. While active discipline is not evidence of the instant violation, it is evidence of the State's past attempts to correct the Grievant's behavior.

The current incident is the Grievant's third offense, which forced the State to consider a higher penalty than if the Grievant had no active discipline. Although removal is recommended for a third offense, the State made the decision not to remove him. Rather, the State used its discretion and issued the next-level suspension in an ongoing attempt to correct the Grievant's behavior. The Union is unable to show the penalty imposed was arbitrary or excessive under the totality of the circumstances.

Union Position

The State charged the Grievant with violating Departmental Work Rule C9: Neglect of Duty – Commission of acts that impair or compromise the ability to carry out his/her duties as a public employee effectively. The State carries the burden of showing how the Grievant violated Rule C9. The State clearly does not believe the Grievant was unable to carry out his duties because it issued the Grievant a three-day working suspension. The

Grievant continued to do his job during his suspension, performing the same tasks.

The disciplinary grid leaves the door open for the application of lesser discipline. More importantly, the Union has never agreed to the disciplinary grid. Article 19 of the Agreement requires just cause and progressive discipline.

The State incorrectly contends it applied progressive discipline. On or about January 22, 2014, the Grievant received a written reprimand for charges unrelated to the current charge. The State then points to a one-day working suspension given to the Grievant later in 2014 for Failure of Good Behavior. But this one-day working suspension was a result of a November 2014 settlement agreement that included the following language:

All parties to this agreement hereby acknowledge and agree that this Agreement is in no way precedent setting. This agreement shall not be introduced, referred to, or in any other way utilized in any subsequent arbitration, litigation, or administrative hearing, except as may be necessary to enforce its terms.

Thus, all that is before the Arbitrator with regard to the Grievant's prior discipline is a written reprimand.

The State overreacted to the situation. The record shows matters such as this are always left to the discretion of the officer on scene.

Generally, this infraction results in a warning to the boat owner. In this instance, no citations were issued. None of the other fisherman were even interviewed. There is therefore no way to know to whom the alleged extra pole belonged, but it did not belong to the Grievant.

Investigator Hadsell said he saw eight poles in the water and that the Grievant was pulling in an extra line. Supervisor Shinko says he saw seven poles in the water and that the boat owner was pulling in the extra line. The Union agrees the Grievant was aware of the rule. The Grievant said if he had seen the extra line, he would have pulled it in. But he had not noticed the extra line and was going about changing his own tackle.

On June 5, 2015, the Grievant was just your average fisherman out with friends on the lake. He wasn't on duty, so he just didn't think to keep an eye on how many poles were going in and out of the water. He had no duty to issue a citation; in fact, he had no authority to do so. During the Grievant's conversation with Supervisor Shinko, the Grievant agreed about the position he had put Supervisor Shinko and Investigator Hadsell. But that was only in hindsight after the extra line had been pointed out. That is

not the same as knowing there was an extra line in the water, having a duty to act, and failing to act.

What occurred is no different from when a State Trooper is speeding and another State Trooper is a passenger in the car. The driver is the guilty party, not the passenger. As shown in the record, on the lake, it is the boat owner/captain who gets cited, not the other fishermen.

The State has not met its burden of proof. It has shown no reason the Grievant is unable to continue working as a Wildlife Officer. It did not introduce any evidence that the Grievant had some duty to act. There was no publicity from this case; the public is unaware it occurred.

The Grievant did not violate ODNR Work Rule C(9). He has not compromised his ability to enforce Ohio law or to fulfill his duties as a Wildlife Officer. The Union requests the Arbitrator sustain the grievance, order the State to return the Grievant to his former position, and make the Grievant whole, including any backpay and benefits that would be due.

ARBITRATOR'S OPINION

The State has the burden of proving it had just cause for the three-day working suspension. Just cause consists of: 1) whether the Grievant did what he is accused of doing; and 2) whether the level of discipline fits the charge under all the circumstances.²

The Charge

The State determined the Grievant violated ODNR Work Rule C(9):

Neglect of Duty – Commission of acts that impair or compromise the ability to carry out his/her duties as a public employee effectively.

The Union is correct that it is the State's burden to prove violation of Rule C(9), rather than proving whether the Grievant violated the two-line rule while fishing off duty. To determine, however, whether the Grievant's conduct on June 5, 2015 "impaired or compromised" his ability to carry out his duties as a Wildlife Officer, it is necessary to first address examine what happened that day.

² See Board of Trustees of Miami Twp. v. FOP, Ohio Labor Council, Inc., 81 Ohio St.3d 269 (1998); see also City of Piqua v. FOP, Ohio Labor Council, 183 Ohio App. 3d 495 (2009).

The Two-line Rule

The two-line rule is found in Ohio Administrative Code 1501:31-13-01(A)(1):

It shall be unlawful for any person at any time to engage in fishing with more than two hand lines or more than two units of rod and line or a combination of more than one hand line and one rod and line, either in hand or under control.

The record is unclear about what exactly occurred on the boat the Grievant was fishing on while off duty on June 5, 2015. The Investigator on the ODNR boat testified at the arbitration that as his boat approached the boat the Grievant was on, he saw the Grievant pulling in an extra line. The Supervisor on the ODNR boat testified that while he was talking to the Grievant, the boat owner was pulling in an extra line. If the boat owner pulled in an extra line, the question is whether that line was “under control” of the Grievant.

Moreover, the record shows if ODNR issues a two-line warning or citation, generally, it is issued to the boat owner or captain. It is undisputed the Grievant was neither the boat owner nor captain on June 5, 2015. So, based on the record evidence, the question remains whether the Grievant violated the two-line rule on June 5, 2015.

The State concedes that it would not have expected the Grievant to make a citizen's arrest once he determined there were more than six lines in the water. The State insists, however, that the Grievant's off-duty presence on a boat with more than six lines in the water "impaired or compromised" his ability to perform his job.

The State's contention is supported by the Grievant's own statements. The Grievant testified at the arbitration that after the ODNR boat pulled alongside the boat the Grievant was on, and Supervisor Shinko said the Grievant had put Supervisor Shinko "in a situation here," the Grievant apparently immediately understood what Supervisor Shinko was saying, and apologized to Supervisor Shinko. If the Grievant was not doing anything wrong, there would have been no reason for him to apologize to Supervisor Shinko.

Even more to the point, during the Administration Investigation, Supervisor Shinko states he said to the Grievant, "You've put me in a bad position, Barry. You know better than this," and the Grievant responded, "I

know. I was switching baits and tackle and I forgot to bring the other pole in.”³

While the record does not definitively show who had “control” of the extra fishing line, the record does sufficiently show that the Grievant put fellow Wildlife Officers in a compromising position by fishing on a boat that was violating the two-line rule. By putting his fellow Wildlife Officers in a compromising position, the Grievant “impaired or compromised” his own “ability to carry out his duties as a public employee effectively,” given the need for trust among Wildlife Officers. The Arbitrator finds this Work Rule C(9) violation to constitute a rational basis for disciplining the Grievant.

The Discipline

The question then becomes whether a three-day working suspension was the appropriate discipline under all the circumstances. The Arbitrator finds it was not due to the status of the Grievant’s previous discipline.

³ The AI report states the Grievant’s memory of what Supervisor Shinko said to him was, “You know this isn’t the position you should be in,” but that the Grievant contended it was the boat owner who put the extra line in the water. The Arbitrator credits Supervisor Shinko’s explanation of the incident, given all the circumstances as set out in this Opinion.

The Grievant's most recent discipline was a one-day suspension contained in a November 2014 settlement agreement. The settlement agreement include the following language:

All parties to this agreement hereby acknowledge and agree that this Agreement is in no way precedent setting. This agreement shall not be introduced, referred to, or in any other way utilized in any subsequent arbitration, litigation, or administrative hearing, except as may be necessary to enforce its terms.

(Underscore added.) While it may not have been the State's intention to exclude the Grievant's one-day suspension from being considered part of his disciplinary record, the language of the settlement agreement is not sufficiently clear to put the Grievant on notice of that. As written, the settlement agreement prohibits the State from using the contents of the settlement agreement "in any...way" in an arbitration.

Accordingly, the only legitimate record evidence of the Grievant's past discipline is that he was given a written reprimand on January 22, 2014. Therefore, consistent with progressive discipline, the Arbitrator modifies the Grievant's three-day working suspension to a one-day working suspension.

AWARD

For the reasons set out above, the grievance is denied in part and granted in part. The State had just cause to discipline the Grievant for violation of Work Rule C(9), but did not have just cause to issue a three-day working suspension. The Grievant's September 10, 2015 three-day working suspension shall be modified to a one-day working suspension.

May 20, 2016

Susan Grody Ruben
Arbitrator