

OCB Award No: 22

OCB Grievance No: 686-0104

Union: FOP

Department: Highway Safety

Arbitrator: Keenan, Frank

Award Date: 8/2/24

ARBITRATION

BETWEEN

STATE OF OHIO DEPARATMENT
OF HIGHWAY SAFETY
STATE HIGHWAY PATROL (Unit #1)

and

GR: O.C.B. #104

FRATERNAL ORDER OF POLICE,
OHIO LABOR COUNCIL, INC.

OPINION AND AWARD OF THE ARBITRATOR

FRANK A. KEENAN
PANEL ARBITRATOR

APPEARANCES:

FOR THE PATROL:

JOHN R. ALEXANDER, ASSISTANT ATTORNEY
GENERAL

FOR THE F.O.P.:

JAMES A. BUDZIK, GENERAL COUNSEL

1. THE CONTRACT:

Relevant contract provisions are excerpted at Appendix I.

2. OHIO STATE HIGHWAY PATROL REGULATIONS:

4501:2-6-01 DEFINITIONS

....

(F) The term "deadly force" means any force which carries a substantial risk that it will proximately result in the death of any person.

* * * *

4501:2-6-02 PERFORMANCE OF DUTY AND CONDUCT

....

(B) Performance of duty

....

(4) Members who fail to perform assigned duties because of an error in judgment or otherwise fail to perform satisfactorily a duty of which such member is capable, may be charged with inefficiency.

(V) Use of Force

- (1) A member shall be justified in using deadly force under the following circumstances:
 - (a) To defend himself/herself from serious injury or death.
 - (b) To defend another person from serious injury or death.
- (2) A member shall only use that force necessary to effect an arrest, detention, or mission.

3. STATEMENT OF THE CASE:

Trooper Vladimir J. Rapella was hired by the Patrol some six (6) years ago. As of August 9, 1986, he was assigned to Unit #937, Post 41, District 7, Steubenville, Ohio. Events on that date led to a two (2) day disciplinary suspension without pay of Trooper Rapella. He formally grieved this suspension on October 22, 1986.

The operative facts in the case are not in dispute. Thus on August 9, 1986, Trooper Rapella, herein the Grievant, was reporting somewhat early for work when he heard on the dispatcher's radio that Trooper S. L. Widder was in pursuit of a traffic violator on U.S. Route 22 east bound. The Grievant got to his patrol car and joined the pursuit. The alleged traffic violator was one Joseph Fadeley. Widder's radio call had also alerted Constable Rick Dornbush of Cross Creek Township who then gave pursuit. When Patrolman Cesaro of the Wintersville Police Department also observed suspect Fadeley on U.S. Route 22, he too gave pursuit. Fadeley was stopped by Widder just inside the city limits of Steubenville, Ohio, and placed under arrest. Widder was assisted in the arrest by Patrolman Cesaro. Fadeley was obstreperous, cursing, and unruly. Cesaro applied a stun gun to Fadeley without effect. Between Cesaro and Widder, Fadeley was subdued, handcuffed with his hands behind his back, and seat-belted into the front passenger side of Widder's patrol car by the time the Grievant arrived. Widder asked the Grievant to stand watch over Fadeley while he proceeded to check out Fadeley's car. The Grievant did so. Fadeley

remained verbally abusive, and according to Constable Dornbush,¹⁾ "....was especially abusive to Trooper Widder and Trooper Rapella, stating 'was going to kick their asses and get a gun and blow their brains out and also their families.' " Fadeley then leaned out of Widder's patrol car and brought up his left leg as if to kick the Grievant who was positioned just outside the passenger side of Widder's patrol car. The passenger side door was open. As Fadeley did so, the Grievant leaning into the patrol car, blocked Fadeley's kick and at the same time struck Fadeley in the face with a closed fist. The Grievant explained his punch as an "instinctive reaction basically to protect myself," and that the punch was "necessary to restrain Fadeley." Shortly thereafter

1) Dornbush did not testify. However, a notarized statement of Dornbush was introduced into evidence by the F.O.P. Under Article 20, Grievance Procedure, Section 20.08, Disciplinary Grievances, subparagraph 6., the parties have provided for an expedited procedure "for all disciplinary grievances except removal/termination," wherein written notarized statements are to "be received by the arbitrator and considered as evidence," after having been exchanged at least 5 days prior to the scheduled hearing. By this provision the parties have expressed a willingness for the arbitrator to rely on certain hearsay evidence. And while the parties, for purposes of this hearing, have agreed not to adhere to the "expedited procedure," since other witnesses have corroborated most of Dornbush's assertions, coupled with the parties willingness to have arbitrators rely on hearsay evidence (albeit in an expedited context), persuades me that reliance on Dornbush's hearsay notarized statement is appropriate in the instant case.

Sergeant Carl Blumenauer, the afternoon shift supervisor at the Steubenville post, arrived on the scene. The Grievant reported to Blumenauer that he had struck Fadeley when the latter tried to kick him. Blumenauer went off to talk with Widder. Shortly thereafter Fadeley again commenced to holler obscenities and again leaned out of patrol car and attempted to kick the Grievant. The Grievant responded as he had previously, including striking Fadeley with a closed fist. When Blumenauer returned to Widder's patrol car, the Grievant reported that he had again struck Fadeley. Blumenauer then directed the Grievant to go to his, Blumenauer's, patrol car, and fill out assault charges against Fadeley. The Grievant did so. As Blumenauer testified, he so directed the Grievant in order to get an affidavit from the Grievant to support assault charges against Fadeley and to get the Grievant away from Fadeley.

According to Dornbush and the Grievant, while the Grievant was at Blumenauer's patrol car filling out assault charges against Fadeley, Dornbush yelled out that Fadeley was kicking at the panel lights and radio in Widder's patrol car. Indeed the scanner was damaged by Fadeley. At that point

Widder and the Grievant approached Widder's patrol car. Widder put Fadeley in a headlock, got him out of the car, and with the Grievant's assistance, Fadeley was put in a Welshit. His legs thus restrained, Fadeley was put in the rear of the patrol car, seat belted, and taken to the Sheriff's office for booking. At the hearing herein it was Sgt. Blumenauer's testimony that Fadeley "was aggressive no matter what state of confinement he was in."

Fadeley was subsequently tried and convicted (he plead no contest) of resisting arrest, eluding, driving while intoxicated, and assault, for which he was cumulatively fined \$350.00, to serve 30 days in jail, and placed on two years probation.

Fadeley made no complaint about being struck by the Grievant. According to Blumenauer, Fadeley had a reddening on his right cheek. Additionally, as testified to by the Grievant, Fadeley had a slight trace of blood "like a pimple" on his forehead. In any event, no medical treatment for Fadeley was deemed necessary. When the Grievant was asked why, after Fadeley's first attempt to kick him, he didn't simply close the passenger side door to Widder's patrol car, the Grievant, after hesitating, replied he failed to do so because he was told to watch Fadeley.

When the Grievant was asked whether or not it was a standard practice to call for the assistance of other officers when other officers are present, the Grievant testified that it "depended on the situation."

When Blumenauer returned to the Steubenville Patrol Post he reported his observations and perceptions of the events surrounding Fadeley's arrest to the Post Commander. At that time Blumenauer reported that personally it went against his grain to punch a suspect when cuffed, but that in any event the force the Grievant used was not excessive to the point of causing any treatable injury. Blumenauer went on to assert that the force used by the Grievant was unnecessary. Nonetheless, Blumenauer did not recommend any discipline. Obviously enough, however, this recommendation was not followed.

The Grievant acknowledged receiving training at the Patrol Academy and in-service training on the use of force. As Lieutenant Robert F. Welsh, a training instructor at the Patrol's Academy, explained, the use of force is touched upon several times throughout a trooper's initial training at the Academy. Lieutenant Welsh described some six methods, in ascending order of severity, by which a trooper is expected,

and trained, to obtain the submission and compliance of law violators. The first method is the uniform itself, which portrays authority and most often suffices to obtain submission. Next is conversation, whereby troopers are trained and expected to obtain submission by talking the suspect into compliance. Third, physical contact may be required, such as a headlock or the like. Fourth, "pain compliance", such as a punch. Fifth, impact weapons, such as a night stick, or mace, may be the required and appropriate method of obtaining submission. And sixth, it may be necessary to resort to the use of a firearm. As Lieutenant Welsh elaborated, the degree of force is to be balanced with the degree of resistance.

Lieutenant Welsh further testified that a punch could also be justified as a measure of self defense. Asked if the handcuffing of a suspect was tantamount to securing the suspect, Welsh responded "absolutely not". With respect to suspects who kick, it was Welsh's testimony that a trooper should secure the suspects legs, by way of, for example, a Welshit, a device invented by Lieutenant Welsh and in use at the Patrol since 1980. As Welsh explained, such is necessary "because a kicker will continue to kick." Welsh suggested that in the Grievant's situation

he ought to have closed the patrol car door and that he ought to have initially backed away from the kicking suspect, in addition to securing his legs.

Captain John Demares, the Executive Officer for the Patrol's Personnel Section testified with respect to four other instances of punishment meted out to troopers for use of excessive force, dating back to August, 1982. At that time Trooper J. D. Brink was suspended five days when he struck a suspect in the face while the suspect was handcuffed. In January, 1984, Trooper G. S. Sewell was terminated when he kicked a handcuffed suspect in the groin. On that occasion the suspect filed a formal complaint alleging "excessive force." In January, 1985, Trooper L. R. Gray was suspended for ten days for "unnecessary force", when he grabbed a violator by the hair. The violator was not handcuffed. Then in July, 1986, Trooper J. E. Ertel was suspended for 20 days when he hit a suspect with an impact weapon two times. It appears the suspect was not handcuffed. However, it further appears that the suspect was being restrained by two officers at the time Ertel struck the suspect.

Finally it is noted that by letter dated January 20, 1987, the O.C.B., on behalf of the Patrol,

gave notice to the F.O.P., pursuant to Article 20, paragraph 20.07, subparagraph 8, of the Contract, that "during the arbitrationmanagement will make an issue of 'intent'...."

4. THE PARTIES' POSITIONS:

a) The Patrol:

The Patrol takes the position, as stated by Hearing Officer Sturtz's recommendation following the pre-suspension hearing conducted pursuant to Article 19, paragraph 19.04, that "the situation.... did not warrant the actions of (the Grievant) strikingFadeley while he was sitting in a Patrol car, hand cuffed behind his back and seat belted in place." It is the Patrol's position that the Grievant, in striking violator Fadeley, "overreacted;" that "there was no need to strike the subject." Accordingly, asserts the Patrol, the Grievant violated "a significant work rule" proscribing unnecessary force, namely, Regulation 4501: 2-6-02 (V) (2).

The Patrol contends that the situation the Grievant faced "tested (the Grievant's) patience

and ability to keep things under control. When faced with a situation which could have been dealt with without force, (the Grievant) elected to use force; inaction or less action would have sufficed." By way of elaboration the Patrol asserts the Grievant had options, such as simply stepping back away from violator Fadeley, or calling for assistance from other officers. The Patrol urges that the circumstances present here demonstrate that the Grievant was "pushed to the limit" by the Grievant's epithets and obstreperousness; and that he "struck out in anger and not in fear."

The Patrol, in support of its discipline of the Grievant, asserts that:

1. The Grievant was forewarned of the consequences that could arise with the use of unnecessary force through training and had knowledge by means of the Divisional Rules and Regulations, specifically Rule 4501: 2-6-02(B) (4) and (V) (2).
2. The training along with the written policy is reasonably related to the orderly, efficient and safe operation of the Ohio State Highway Patrol.
3. A thorough investigation and inquiry was made prior to administering discipline.
4. All parties, whether a witness or participant, were interviewed to determine the facts and obtain substantial evidence.

5. During inquiry and subsequent hearing, substantial evidence was obtained to determine guilt.
6. All rules, orders, and penalties have been applied even handedly and without discrimination.
7. The degree of discipline administered in this case reasonably related to:
 - a. the seriousness of the employee's offense and
 - b. the record of the employee in service with the Ohio State Highway Patrol.

It is the Patrol's position that while reflexive action may account for the Grievant's first striking of Fadeley, there was no reasonable rationale for the second striking.

The Patrol additionally urges that the Arbitrator consider the Patrol's interest in maintaining discipline and the citizenry's interest in ensuring that in law enforcement, only that force necessary to enforce the law be utilized.

So it is that the Patrol urges that the grievance be denied.

b) The F.O.P.'s Position:

The F.O.P. takes the position that ".... the Grievant did not use unnecessary force when he

struck (Fadeley).... ." It is the F.O.P.'s position that the Grievant "....was forced to use necessary force to protect his own safety. Thus (the Grievant) used adequate force by blocking the kicks and striking the suspect to contain him."

The F.O.P. points to an oft cited Second Circuit Court of Appeals case dealing with the "due process" rights of criminal suspects and a law enforcement officer's use of force, to wit, Johnson v. Glick, 481 F. 2d 1028 (CA2, 1973), wherein the Court held that:

"In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and amount of force that was used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."

Each of these standards were met in the Grievant's situation, asserts the F.O.P., and hence "the suspension cannot stand." Specifically, the F.O.P. contends that the Grievant needed to use force because suspect Fadeley was kicking and posing a threat to the Grievant; the amount of force used was not excessive but rather merely sufficient in a good faith effort "to restore discipline and control

over Fadeley" and not to sadistically cause harm to Fadeley; and the injury inflicted was minor. In this regard the F.O.P. points out that Fadeley filed no complaint of police brutality. In sum the F.O.P. asserts that the Grievant "was justified in using an adequate amount of force to contain Fadeley." It is the F.O.P.'s contention that suspect Fadeley "was not physically harmed but rather, physically contained."

Additionally the F.O.P. contends that contrary to the Patrol's assertion that the Grievant acted in anger, there is no record evidence to support such. Thus the F.O.P. points out that there is no testimony to the effect that the Grievant appeared to be in a state of agitation.

It is the F.O.P.'s contention that the case comes down to a matter of judgment and that management is simply substituting its judgment for that of the Grievant, the Trooper on the scene. The F.O.P. contends that management has simply determined that inasmuch as suspect Fadeley was handcuffed, any force utilized was therefore excessive. Such a proposition should not be sustained by the Arbitrator, asserts the F.O.P.

In sum the F.O.P. contends that the Grievant was in compliance with Patrol regulations, and in particular Regulation 4501: 2-6-02 (V) (2).

So it is that the F.O.P. urges that the grievance be sustained.

5. ISSUE:

The issue as stipulated by the parties is as follows:

"Was the Grievant disciplined for just cause in conformance with Article 19, Section 19.01 of the collective bargaining agreement of the parties?"

6. DISCUSSION & OPINION:

To be sure the use by Trooper's of unnecessary force is inimical to the trust and confidence placed in them by Ohio's citizenry, and the Patrol's historic vigilance and enforcement of its regulations prohibiting the use of unnecessary or excessive force

is to be highly commended. In the instant case, however, it is my judgment that the record evidence simply does not support the Patrol's characterization of the Grievant's conduct on August 9, 1986, as amounting to the use of unnecessary or excessive force. With respect to the Grievant's first striking of violator Fadeley, close scrutiny of the record evidence supports the Grievant's assertion that such was reflexive and in self defense. And none of the circumstances surrounding the second striking, which circumstances were merely a repeat of the circumstances surrounding the first striking of violator Fadeley, warrant the conclusion that this second striking was likewise other than reflexive and in self defense. In both instances Fadeley attempted to kick the Grievant and in both instances the Grievant reacted by blocking the kick and reflexively punching Fadeley to subdue him. Given Fadeley obstreperous behavior; Lieutenant Welsh's emphatic testimony to the effect that the constraint of handcuffing, even behind one's back, does not fully restrain a suspect; and the lack of any meaningful injury resulting from the Grievant's punches, I am not persuaded that the Grievant's reliance on "pain compliance" as a method of subduing violator Fadeley constituted resort to force beyond "that force necessary to effect....detention." Given Fadeley's

obstreperousness and physical violence, "pain compliance" was not unjustifiable.

It appears that the Patrol simply presumed that because the violator was restrained, the use of any force was simply unnecessary. Such a proposition even in the abstract is unsound, however, in light of Lieutenant Welsh's emphatic indication that such restraints as imposed on Fadeley simply do not always prove to be effective restraint. And it is especially unsound in light of the particular circumstances present here, namely, violator Fadeley's violent verbal and physical behavior.,

Nonetheless in my view the Patrol properly sensed that something was amiss in the Grievant's behavior. Thus, as Lieutenant Welsh succinctly observed, a kicker will continue to kick, and, given the Grievant's six years of experience on the Patrol I find that after the first kicking episode the Grievant ought to have realized that restraint of the Grievant's legs was required. The Grievant's failure, following the first kicking episode, to restrain violator Fadeley's legs with, for example, the Welshit, which eventually was applied to Fadeley, constituted the kind of error in judgment which the Patrol's Regulations at 4501: 2-6-02 (B) (4) characterize as "inefficiency." This

being so, some form of discipline for this inefficiency is called for. At this juncture it is appropriate to note that as the Elkouris²⁾ have observed in their learned arbitration treatise. "....there is a line of cases in which the (employer's) evidence was held inadequate to establish the offense for which the employee had been disciplined but was held to be adequate to establish a related lesser offense for which an appropriate penalty (either as assessed by the employer or as reduced by the arbitrator) was in order". Such is the situation here, and in my view, a verbal reprimand for inefficiency, in violation of Regulation 4201: 2-6-02 (B) (4), with appropriate notation in the Grievant's file, is warranted and I so direct.

7. AWARD:

The grievance is sustained in part and denied in part. References to the Grievant's use of excessive or unnecessary force on August 9, 1986,

²⁾ How Arbitration Works, Elkouri & Elkouri, Fourth Edition, 1985, BNA Books, Inc., Washington D.C., p. 676-677.

shall be expunged from his record, and he shall be made whole for all losses suffered by virtue of his two day disciplinary suspension for such alleged unnecessary force. The Grievant is, however, regarded as having violated Regulation 4501: 2-6-02 (B) (4) proscribing inefficiency, and accordingly he is to be regarded as having received a verbal warning for such conduct, and an appropriate notation to that effect shall be placed in the Grievant's file.

DATED: 2/24/87

Frank A. Keenan

FRANK A. KEENAN
Panel Arbitrator

19.01 Standard

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

19.02 Administrative Leave

Upon verbal notification followed within twenty-four (24) hours by written delineation of the reasons, an employee may be placed upon administrative leave with pay. The employee will not lose any pay, fringe benefits or seniority as the result of administrative leave. Administrative leave may be instituted as the result of the Highway Patrol's reasonable belief that the employee participated in an event or was in a condition of significant consequence to the Highway Patrol, the employee, or the public. Such administrative leave with pay shall be for the purpose of investigating the event or the condition.

Administrative leave with pay shall not be considered discipline and is not subject to the grievance procedure as long as no loss of pay or benefits is incurred by the employee.

19.03 Length of Suspensions

No suspension without pay of more than ninety (90) days may be given to an employee.

19.04 Pre-suspension or Pre-termination Hearing

When the Employer initiates disciplinary action which is covered by this Article, written notice of a pre-disciplinary hearing shall be given to the employee who is the subject of the pending discipline. Written notice shall include a statement of the charges, recommended disciplinary action, a summary of the evidence being brought against the employee and the date, time and place of the hearing. A hearing officer shall be appointed. Said hearing officer shall be a member of the general headquarters staff or district staff, as appointed by the Director of Highway Safety or his/her designee, who is neutral and detached and has not been involved in the incident or investigation giving rise to the discipline.

The employee may waive this hearing if the employee so desires. The hearing shall be scheduled no earlier than three days following the notice to the employee. Absent any extenuating circumstances, failure to appear at the hearing will result in a waiver of the right to a hearing.

A member who is charged, or his representative, may make a written request for continuance of up to forty-eight (48) hours. Such continuance shall not be unreasonably requested nor denied. A continuance may be longer than forty-eight hours if mutually agreed by the parties.

If either party makes a tape recording or transcript of the hearing, such recording or transcript shall be made available to

The employee has the right to have a representative of his/her choice present at the hearing. The employee or his/her representative and the Highway Patrol's representative have the right to cross examine any witnesses at the hearing or have voluntary witnesses present at the hearing to offer testimony provided, however, that the hearing officer maintains the right to limit the witnesses' testimony to matters relevant to the proposed suspension or termination and to limit redundant testimony. The Employer shall first present the reasons for the proposed disciplinary action. The employee may, but is not required to, give testimony.

After having considered all evidence and testimony presented at the hearing, the hearing officer shall, within five days of the conclusion of the hearing, submit a written recommendation to the Director of Highway Safety, the Superintendent and the employee involved.

The parties understand that this hearing is informal and not a substitute for the grievance and arbitration procedure.

The Director of Highway Safety or his/her designee shall render a decision within a reasonable period of time to accept, reject or modify the recommendations.

The employee shall be notified by the Director of Highway Safety or his/her designee for final disposition of the statement of charges.

19.05 Progressive Discipline

The following system of progressive discipline will be ordinarily followed:

1. Verbal Reprimand (with appropriate notation in employee's file);
2. Written Reprimand;
3. Suspension;
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.

ARTICLE 20 - GRIEVANCE PROCEDURE

20.01

The State of Ohio and the F.O.P. Ohio Labor Council recognize that in the interest of harmonious relations, a procedure is necessary whereby employees can be assured of prompt, impartial

and fair processing of their grievances. Such procedure shall be available to all bargaining unit employees and no reprisals of any kind shall be taken against any employee initiating or participating in the grievance procedure.

20.02 Definitions

- (1) Grievance - The word grievance as used in this Agreement refers to an alleged violation, misinterpretation or misapplication of a specific article or articles, section or sections of this Agreement.
- (2) Disciplinary Grievance - refers to a grievance involving a suspension, removal or a reduction in pay and/or position.
- (3) Day - The word "day" as used in this Article means calendar day and times shall be computed by excluding the first and including the last day, except when the last day falls on a Saturday, a Sunday or a legal holiday, the act may be done on the next succeeding day which is not a Saturday, Sunday or legal holiday.

20.03 Specific Provision

The grievant shall cite on the grievance form the specific article(s), section(s) or combination thereof that the grievant alleges to have been violated. Failure to cite said provision or provisions shall relieve the Employer of any obligation to process the grievance.

20.04 Grievant

A grievance under this procedure may be brought by any bargaining unit member who believes himself/herself to be aggrieved by a specific violation of this Agreement.

Where a group of bargaining unit members desire to file a grievance involving an alleged violation which affects more than one member in the same way the grievance may be filed by the F.O.P. Ohio Labor Council provided that at least one member so affected signs the grievance. Grievances so initiated shall be called class grievances. The title on the grievance shall bear the name of the one affected member plus the designation et al. Class grievances shall be filed within fourteen (14) days of the date on which any of the like affected grievants knew or reasonably should have had knowledge of the event giving rise to the class grievance. Class grievances shall be initiated directly at the third step of the grievance procedure.

The bargaining agent shall not attempt to process as grievances, matters which do not constitute an alleged violation of the Agreement.

20.05 Termination of the Issue

When a decision has been accepted by the appropriate parties at any step of this grievance procedure, it shall be final and no further use of this grievance procedure in regard to that issue shall take place.

20.06

The following are the implementation steps and procedure for the handling of grievances:

Preliminary Step

A member having a complaint shall first attempt to resolve it informally with his or her immediate supervisor at the time the incident giving rise to the grievance occurs. At this step, the grievant may have a Labor Council representative present to represent him/her if the grievant so desires. Within three (3) days from the conclusion of the meeting the supervisor will advise the grievant of his or her decision and complete a standard form indicating that the preliminary step was conducted. If the member is not satisfied with the result of this informal meeting, he or she may pursue the formal steps which follow.

Step 1 - Post Commander or Equivalent Supervisor or Designee

A member who is not satisfied with the response of the supervisor in the preliminary step, may request a Step 1 hearing. A member having a grievance shall present it to his or her Post Commander or equivalent supervisor, within fourteen (14) days of the date on which the grievant knew or reasonably should have had knowledge of the event giving rise to the grievance.

Grievances submitted beyond the fourteen (14) day time limit will not be honored. In addition, if the requirements of the preliminary step have not been attempted, the employer shall have no obligation to process the grievance. The grievance at this step shall be submitted to the Post Commander or equivalent supervisor in writing using a form mutually agreed upon. The grievance forms may be obtained at each facility. On this form the grievant shall specify the article, section or combination thereof of the Agreement which he or she alleges has been violated, and specify the remedy sought. The Post Commander or equivalent supervisor shall indicate the date and time of his or her receipt of the form. Within five (5) days of the Post Commander's or equivalent supervisor's receipt of the written grievance, he or she shall schedule a meeting with the grievant to discuss the grievance. A Labor Council representative shall attend this meeting. He or she may represent the grievant if requested to do so by that person. The Post Commander or equivalent supervisor shall respond to this grievance by writing his or her answer on the grievance form and returning a copy to the grievant and a copy to the F.O.P. Ohio Labor Council within nine (9) days of the meeting required above.

Step 2 - District or Section Commander or Equivalent Supervisor or Designee

Should the grievant not be satisfied with the written answer received in Step 1, within ten (10) days after receipt thereof, the grievant may appeal the grievance to the District or Section Commander or equivalent supervisor and request that the meeting contemplated by this step be scheduled by mailing or otherwise delivering a copy of the grievance form to that supervisor.

Upon receipt of the grievance, the District or Section Commander or equivalent supervisor shall indicate the date and time of his or her receipt on the grievance form and shall schedule a meeting to be held within ten (10) days to discuss the grievance.

An F.O.P. Ohio Labor Council representative shall attend this meeting. He or she may represent the grievant, if such representation is desired by the grievant.

Within seven (7) days of this meeting, the District or Section Commander shall respond to the grievance by writing his or her answer on the form and returning a copy to the grievant, and a copy to the F.O.P. Ohio Labor Council.

Step 3 -Director/Superintendent or His/Her Designee

Should the grievant not be satisfied with the written answer received in Step 2, within ten (10) days after receipt thereof, the grievant may appeal the grievance to the Director/Superintendent or a designee and request that the meeting contemplated by this Step 3 be scheduled by mailing or otherwise delivering a copy of the grievance form to the Director/Superintendent or a designee. Upon receipt of the grievance, the Director/Superintendent or a designee shall schedule a meeting to be held within fifteen (15) days to discuss the grievance.

An F.O.P. Ohio Labor Council representative shall attend this meeting. He or she may represent the grievant, if such representation is desired.

The Director/Superintendent or a designee shall render their decision in writing and return a copy to the grievant and the F.O.P. Ohio Labor Council within thirteen (13) days after the meeting with the grievant.

Step 4

If the grievant or the F.O.P. Ohio Labor Council is not satisfied with the written answer received at Step 3, within ten (10) days after receipt thereof, the F.O.P. Ohio Labor Council may appeal to the Director of the Office of Collective Bargaining. The appeal shall be made in writing by mailing a copy of the grievance form, to the Director along with any other

supporting documentation. No hearing shall be held. The Director of the Office of Collective Bargaining or his/her designee shall review the documents submitted, issue a decision in writing and return copies to the grievant, the Labor Council, and the Director/Superintendent of the Highway Patrol within twenty (20) days of receipt of the appeal.

Step 5

If the F.O.P. Ohio Labor Council is not satisfied with the answer at Step Four (Step Three in disciplinary cases), it may submit the grievance to arbitration under the provisions of Section 20.07 of this article, by written notice of its desire to do so, presented to the Director of the Office of Collective Bargaining and a copy to the Director/Superintendent of the Ohio Highway Patrol, within fifteen (15) days after receipt of the decision in Step Four.

20.07 Arbitration

1. Arbitration Panel

Within thirty (30) days after this Agreement becomes effective, the parties (The Office of Collective Bargaining and the F.O.P. Ohio Labor Council) shall select a panel of arbitrators. The panel shall be assigned cases in rotation order designated by the parties. Each arbitrator shall serve for the duration of this Agreement, unless his/her services are terminated earlier by written notice from either party to the other. The arbitrator shall be notified of his/her termination by a joint letter from the parties. The arbitrator shall conclude his/her services by settling any grievances previously heard. A successor arbitrator shall be selected by the parties.

The panel shall consist of at least six (6) and no more than eight (8) arbitrators. Each party shall propose ten (10) names. Each party shall strike at least six (6) names from the other party's list and may strike as many names as the striking party desires. If fewer than six (6) names are left, the party shall submit a new list with ten (10) additional names on it and the process shall be repeated. The parties may agree to an alternative method of selecting arbitrators.

Should the parties be unable to agree on any of the other details of the arbitration process, all unresolved questions shall jointly be submitted to an arbitrator on the list of arbitrators chosen at random, for resolution, whose decision will be binding on the parties.

Within 60 days of the effective date of this Agreement, the parties will mutually agree on a set of rules of arbitration. Insofar as is practical the rules will be based on the Voluntary Rules of the AAA that are applicable to this contract.

2. Witnesses

The Employer agrees to allow witnesses time off with pay to attend the hearing.

3. Expenses

a. All fees and expenses of the arbitrator will be equally divided between the parties.

b. If one (1) party desires a transcript of the proceedings, the total cost for such transcription shall be paid by the party desiring the transcript. If the other party desires a copy, then the total cost for such transcription shall be shared equally by both parties. The parties agree that normally transcripts will not be requested.

c. All other costs incurred by the parties will be paid by the party incurring the costs.

4. The parties may be represented by their representatives or legal counsel. More than one issue may be submitted at the same time to arbitration, particularly if they are related to each other.

5. Arbitration Decisions

The arbitrator shall render his/her decision as quickly as possible, but in any event, no later than thirty (30) days after the conclusion of the hearing unless the parties agree otherwise. The arbitrator shall submit an account for the fees and expenses of arbitration. The arbitrator's decision shall be submitted in writing and shall set forth the findings and conclusions with respect to the issues submitted to arbitration. The arbitrator's decision shall be final and binding upon the Employer, the F.O.P. Ohio Labor Council and the employee(s) involved, provided such decisions conform with the Law of Ohio and do not exceed the jurisdiction or authority of the arbitrator as set forth in this Article. The grievance procedure shall be the exclusive method of resolving grievances.

6. Arbitrator Limitations

Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of

the terms of this Agreement, impose on either party a limitation or obligation not specifically required by the express language of this Agreement.

7. Subpoena

- a. The arbitrator shall have authority to subpoena witnesses pursuant to Section 2711.06, of the Ohio Revised Code. Upon receiving a request to issue a subpoena(s) the arbitrator shall contact the other party and hear and consider objections to the issuance of said subpoena(s). The arbitrator shall not subpoena persons to offer repetitive testimony.
- b. When the arbitrator determines that so many employees from the same facility have been subpoenaed that would impede the ability of the Employer to carry out its mission or inhibit the Employer's ability to conduct an efficient operation he or she shall make arrangements to take the testimony desired in such manner as will not cause these problems.
- c. Where the intent of the parties is determined to be relevant, no more than one (1) member of either bargaining committee may be called as a witness by a party.

8. Discovery

Five (5) days prior to the start of an arbitration hearing under this Article, the parties shall deliver the names of all witnesses to each other. Where either party will make an issue of "intent", that party will notify the other party ten (10) days prior to the hearing.

9. Issues

Prior to the start of an arbitration under this Article, the Employer and the bargaining agent shall attempt to reduce to writing the issue or issues to be placed before the arbitrator. In cases where such a statement of the question is submitted, the arbitrator's decision shall address itself solely to the issue or issues presented and shall not impose upon either party, any restriction or obligation pertaining to any matter raised in the dispute which is not specifically related to the submitted issue or issues.

20.08 Disciplinary Grievances

1. An employee with a grievance involving a suspension, demotion, or discharge shall file his/her grievance at the Step 3 level within fourteen (14) days of notification of such action.

arbitration by written notice to the Director of the Office of Collective Bargaining with a copy to the Director/Superintendent or designee within ten (10) days of receipt of the Step 3 decision.

3. Unless mutually agreed otherwise, arbitrations involving suspensions, demotions or discharges shall be held within thirty (30) calendar days. In the event the next arbitrator on the rotation list is unable to convene a hearing within thirty (30) days, the parties shall seek an alternate arbitrator by taking the next listed arbitrator on the list who can meet the scheduling requirements.
4. Probationary employees shall not file grievances regarding any disciplinary matter.
5. Disciplinary arbitration hearings will be conducted as all other arbitrations except that at the conclusion of the hearing, the arbitrator may issue a bench ruling sustaining or denying the grievance or modifying the discipline imposed or issue a short written decision within five (5) days of the close of the hearing. If a written decision is issued, it shall include only a statement of (1) the granting of the grievance, or (2) a denial of the grievance or (3) a modification of the discipline imposed, and a short explanation of the reasoning leading to the decision.
6. Expedited Procedure

For all disciplinary grievances except removal/terminations the following procedure shall apply:

- a. The parties agree that there will be only a limited number of witnesses called. Rather, each party will reduce to writing their version of what happened along with the names of any witnesses to the incident(s) giving rise to the discipline or any facts surrounding same. The parties will exchange these written statements at least fifteen (15) days prior to the arbitration hearing.
- b. Each party shall then have the responsibility of collecting written notarized statements from any witnesses they desire. Such witness statements shall be exchanged at least five (5) days prior to the scheduled hearing. These notarized statements shall be received by the arbitrator and considered as evidence. Any party wishing to cross examine on the contents of a notarized statement shall subpoena that person or ask them to voluntarily appear.

- c. On the day of the hearing, the arbitrator shall consider the arguments of the representative of each party, and the written statements and notarized witness statements. Documents may be entered by either side without the necessity of identification by a witness.
 - d. This expedited procedure shall apply to all disciplinary suspensions, demotions and/or reductions.
 - e. Termination/Removal cases may be held pursuant to this procedure at the option of the grievant and the bargaining agent.
7. Verbal reprimands shall not be grievable under this contract.
 8. Written reprimands shall be grievable. They shall be filed directly at level 3 which shall be the final level of review. Written reprimands shall not be subject to arbitration under this Agreement.

20.09 Representation

1. In each step of the grievance procedure outlined in this Article, certain specific representatives are given approval to attend the meetings therein prescribed. It is expected that, in the usual grievance, these plus the appropriate Employer representatives will be the only representatives in attendance at such meetings. However, it is understood by the parties that, in the interest of resolving grievances at the earliest possible step of the grievance procedure, it may be beneficial that other representatives or witnesses, not specifically designated, be in attendance. Therefore, it is intended that either party may bring additional representatives or witnesses to any meeting in the grievance procedure, but only upon advance mutual agreement among parties specifically designated to attend, providing such additional representatives have input which may be beneficial in attempting to bring resolution to the grievance.
2. An employee-grievant and the Labor Council employee representative acting as an Associate in accordance with Article 8 shall be allowed time off with pay from regular duties for attendance at scheduled meetings under the grievance procedure.

An employee-grievant and the Labor Council employee representative acting as an Associate in accordance with Article 8 will not receive overtime pay to engage in grievance activities provided herein; however, grievance meetings at Steps 1 and 2 shall usually be held during normal working hours.

3. Employees shall have the right of F.O.P. Ohio Labor Council representation and/or counsel upon request at each step of the grievance procedure. The F.O.P. Ohio Labor Council shall be the exclusive representative to the employee in all matters pertaining to the enforcement of any rights of the employee under the provisions of the Article.

20.10 Miscellaneous

1. The grievant or the F.O.P. Ohio Labor Council representative and management may mutually agree, at any step, to a short time extension, but such agreements must be in writing and signed by both parties. Any step in the grievance procedure may be skipped by mutual consent, written, and signed by both parties.

Approved leave with pay shall constitute an automatic time extension to the grievant with respect to such days. In the absence of such mutual extensions, the grievance will, at any step where response is not forthcoming within the specified time limits, automatically be considered submitted to the next successive step in the grievance procedure. Should the employee-grievant or F.O.P. Ohio Labor Council fail to comply with the time limits specified herein, the grievance will be considered to have been resolved in favor of the position of the Highway Patrol and that decision will be final.

Except as provided above, grievances must be processed by the Employer whether or not grievants or F.O.P. Ohio Labor Council representatives attend the meetings provided for in this Article in accordance with the time limits set out herein.

2. By mutual consent, the parties may waive a hearing and submit the issue on written materials only, or by mutual consent, may alter any of the procedures set forth in this Article: