

A R B I T R A T I O N  
O P I N I O N   A N D   A W A R D

STATE OF OHIO  
DEPARTMENT OF LIQUOR CONTROL

and

Date April 13, 1987

FRATERNAL ORDER OF POLICE  
OHIO LABOR COUNCIL, INC.

ARBITRATOR:     DONALD B. LEACH, appointed through the procedures  
                  of the Ohio Department of Administrative Services,  
                  Office of Collective Bargaining

APPEARANCES:    FOR THE DEPARTMENT OF LIQUOR CONTROL:  
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I S S U E

Did the Employer violate the Agreement in imposing  
suspension and reduction in pay in various disciplinary actions  
respecting the six Grievants included herein and, if so, what  
should the remedy be.

## B A C K G R O U N D

This matter is a sort of class Grievance, involving six individuals, Andrew Evans, Donald Johnson, Charles Shoopman, Robert Flick, James Ingle and Brett Meyers. Each was an Investigator in the Department, stationed in the Department's Cincinnati District. They were all charged with the duty of enforcing the liquor laws of the State, primarily those connected with Liquor permit holders selling separate drinks to customers in restaurants, lounges and bars. All worked under the direct supervision of a Mr. Costner, Assistant in charge of the Cincinnati District of the Department.

By the undisputed testimony, it appeared that Mr. Costner had required each of them, on occasion, to falsify the daily activity reports and bi-weekly expense account statements. Mr. Costner conducted investigations with one or two of them from time to time as an Investigator, a part of his duties. On those occasions, he filed a report and listed expenses for himself and required the other or others with him to list the same activities and comparable expenses even though, from time to time, the investigations reported were not made and the expenses listed were not incurred.

Again the undisputed testimony was that each Grievant was threatened, overtly or by clear implication, with reprisals should any of the individuals fail to do as Mr. Costner required, such threats including regular assignment to areas inconvenient for them, regular work periods at onerous hours, discipline, etc. Each acceded to Mr. Costner's requirements in one respect or another and filed false reports and claimed false expenses. (Each was paid by the State for the improper expenses each so claimed.) The particular facts are different in each case and those separate sets of facts will be discussed below.

A fellow Investigator also filed false reports and expenses as instructed by Mr. Costner but reported the facts to higher officials in the Department and an internal investigation was initiated. The investigation was confined to the period from March 14 through June 18, 1986. In the course of it, each of the Grievants was interviewed by authorized agents in the internal investigation section of the Department. The primary purpose of the interviews was to collect evidence respecting Mr. Costner but each Grievant was also warned generally about possible discipline due to his own improprieties.

As a result of the internal investigation, Mr. Costner resigned and discipline, in varying degrees, was imposed on the Grievants individually. Each Grievant has protested the discipline imposed on him and the resulting Grievances are the subject of this matter.

One of the members of the internal investigation team, Mr. Clapp, who interviewed each of the Grievants, testified that he (or his teammate in his presence) gave the so-called "Garrity warning" to each of the Grievants which he explained as notifying an employee that he must answer the questions but the answers could not be used in any criminal action against him. In addition, each was assured by one of the team members that, on the authority of their supervisor, he would not be severely punished, that each might be looking at a mere reprimand but would not be discharged or given massive days off, in a suspension, i. e., thirty to sixty or more days.

A portion of a taped interview of the team with Mr. Evans was played at the hearing, which may be considered to be typical. (The entire tape and the full tapes of the interviews of the five other Grievants were listened to by the Arbitrator after the hearing.) Based on the tape, the Grievant was asked if he wanted an FOP representative to be present, which offer was specifically refused. He was then read the "Garrity warning", which, in substance, is as represented by Mr. Clapp. Grievant was warned that he must answer truthfully and that failure to do so could result in his discharge. He was also warned formally that he might be disciplined, up to and including discharge in connection with the evidence he might be asked to reveal. Thereafter, however, on the basis of assurances of Mr. Clapp's superiors, the Grievant was told that he would not really face severe discipline as a result of his evidence that day, i. e., not a thirty, sixty or ninety day suspension.

Grievant Evans, employed in 1981, testified and, in effect, acknowledged the accuracy of the portion of the tape played at the hearing.

He attested the requirements Mr. Costner had made respecting false reports and expense amounts, stating that he had worked with Mr. Costner about six times during the period of the investigation, for which occasions, Mr. Costner prepared the daily reports, giving them to Grievant with instruction to file after copying in his own hand. He testified also, as others did, that Mr. Costner said there was no reason any one should lose money and that he should put liquor buys (one of the means of investigation) in for every day.

(For clarity, it should be noted that the Department's limit on daily liquor purchases did not always cover the daily total actually expended for the purpose and that false expenses on other days were represented by Mr. Costner as a means of recouping such losses. From the testimony, it also appeared that Mr. Costner was paid at a higher rate of pay for hours he spent in investigation. Thus, some claimed purchases were listed as made after he and a Grievant had actually stopped work for the day. No allegation was made, however, that any of the Grievants had made claim for any extra hours on the occasions when false reports were filed and, so, they were paid for the regular forty.)

Grievant further testified on a type of event which was unique among the six Grievants. He said that he had told the internal investigators of an incident with which they had no prior knowledge, concerning liquor he, in the company of Mr. Costner, had confiscated. (He said he told the internal investigators about the incident before the taped interview started.) They had confiscated several cases of wine held by a bootlegger. By standard procedure, the wine was to be transported immediately to the Department headquarters for sequestering as evidence. Instead, Mr. Costner insisted that Grievant take a case himself, and that Mr. Costner retained one for himself. Mr. Evans said that he had kept the wine untouched in his basement and had produced it at the internal investigation proceeding where he had turned it over in kind to the investigators.

Mr. Evans testified that the chief of the Cincinnati district had instructed him, when he was first assigned to the District, that differences were to be settled outside his office and that he didn't want to hear complaints. Under those circumstances, Mr. Evans felt that there was no alternative but to do as ordered by Mr. Costner. The latter instructed him further that he was to stay away from Columbus and the Columbus people (meaning those assigned to Department headquarters) except for his appearances before the Liquor Commission, the office of which is some distance from the Department headquarters.

The Departmental finding was that he had committed four offenses, two false liquor purchases and one false claim for a breakfast and one theft of a case of wine. Except for the theft of wine, he was found in each of the others to be in violation of Articles 15, 16, 24 and 25 of the "Management Guidelines for Employee Behavior". As to the conversion of the wine, he was found to be in violation of Articles 24 and 25 of the "Guidelines". The text of each of the Articles violated was recited in relation to each finding.

Mr. Evans was suspended for thirty-five working days and reduced in pay.

Except for the wine, each of the other Grievants was given the "Garrity warning" and the same information as Mr. Evans. (The taped interviews did not reflect any assurance respecting penalty but, according to other evidence, it appears to have been given them to the same extent as to Mr. Evans.) Each acknowledged false liquor purchases while in the company of Mr. Costner.

Mr. Shoopman, employed in 1982, was found to be in violation of the same four Articles of the "Guidelines" in connection with one false liquor purchase. He was suspended for six working days.

The one incident with which he was charged was also charged against Mr. Johnson who, at that time, was in training under Mr. Shoopman's direction.

Mr. Shoopman avoided more infractions by obtaining transfer of his activities to the vicinity of Sydney in the northern part of the District.

Mr. Johnson, employed in October, 1985, was transferred with Mr. Shoopman and thus also avoided further false reporting. He was suspended for three working days under the same Article of the Rules.

Grievant Flick, assigned to the District seven years before, was held to be in violation on five different days, sometimes involving more than one false report of liquor purchases. These also were deemed violations of the same provisions. He was suspended for ten working days.

Mr. Flick laid stress on the inadequate amount allowed by the Department for liquor purchases and maintained that the false reports of purchases did not result in reimbursement of more than he actually spent on legitimate purchases he had reported. Unlike the other experienced Investigators, he said that he had never protested having to make the false reports.

Grievant James Ingle, made Investigator in 1982, was found to be in violation on four separate days and was suspended for six working days. Again, the same provisions of the Rules were found to have been violated.

Mr. Ingle had immediate supervision of Mr. Meyers, at least during part of the period of investigation, for field training purposes.

Mr. Meyers became Investigator in October 1985. He was found to have been in violation on two separate days and was suspended for three working days under the same provisions.

Before the formal actions were taken against the Grievants, as summarized above, a Disciplinary Review Conference was held. The format of the notice of such hearing may be illustrated in the case of Mr. Meyers, which is as follows:

"The Department is scheduling this conference to determine if you have committed acts that are in violation of an acceptable standard of behavior as provided for in Ohio Revised Code Section 124.34. Specifically, our information indicates that:

1. Your activity report of March 21, 1986, indicates that you visited the Metro Lounge and the Slammers Lounge in Cincinnati, Ohio, when, it is alleged, these visits did not take place nor were the \$2.50 in liquor buys attributed to these visits and claimed in your expense voucher actually made.

You are alleged to be in violation of Articles 15, 16, 24, and 25 of the Department's "Management Guidelines for Employee Behavior" which state:

Article 15: "An employee shall not make any false or untrue statements in any report either verbal or written."

Article 16: "An employee shall not claim reimbursement or an expense account for any obligation incurred officially, unless same is incurred by him in full prior to making the claim, and is supported by a bonafide receipt when so required by the Department. The amount claimed for reimbursement shall be for the actual amount expended in accordance with rules from state Budget and Management and allowable changes by the Director."

Article 24: "An employee shall diligently, completely, and without delay carry out the orders of his designated superiors pertaining to the discharge of his duties as an employee of the Department of Liquor Control and shall conform with and abide by the Rules, Regulations, and Orders of the Department."

Article 25: "An employee shall not, at any time, use or attempt to use his official position, badge, or credentials for personal or financial gain."

2. Your activity report of March 27, 1986, indicates that you visited Alexander's Bar and the Coleman Lanes in Butler County, Ohio, when, it is alleged, these visits did not take place nor were the \$4.50 in liquor buys attributed to these visits and claimed in your expense voucher actually made.

You are alleged to be in violation of Articles 15, 16, 24, and 25 of the Department's "Management Guidelines for Employee Behavior".

In accordance with departmental practice and the recent contractual agreement between the department and your bargaining unit, you may be accompanied by a representative of your bargaining unit at this conference. You will be given an opportunity to present your witnesses and documentation on your behalf, as well as cross examine witnesses of the Department."

In each hearing, the Grievant was represented by the FOP. In each, the Grievant declined to add to or retract anything he had said at the earlier taped interview. Each asked for a copy of the tape pertaining to his case which was denied at that time. (Later it was furnished by letter, noting that that transmittal was taken in compliance with Article 18 of the Agreement.)

Testimony of one of the internal investigators was taken at the disciplinary conference. The Chairman of the conference, in a later written report, summarized the charges, supporting testimony and other pertinent actions at the conference and then, after consideration of the handling of other related offenses by the Department, recommended a specific discipline for the Grievant involved in that matter.

Again, his method may be illustrated in connection with Mr. Meyers:

"My rationale for recommending a six (6) day suspension, is that this Department has given employees five (5) day suspensions for violating Departmental rules and procedures when they had received no monetary gain from those violations, but rather, committed minor acts of negligence. Although the monetary gain is slight, there is still a monetary gain which was acquired through an intentional act, however, the investigator's tenure with the Department was less than six (6) months. Therefore, it was determined that these violations merit three (3) days suspension for each charge."

The discipline actually imposed sometimes varied from the discipline recommended. For example, in the case of Mr. Ingle, the conference chairman recommended a twenty-two day suspension, consisting of five days for each of four offenses, plus two for one when he was a field training officer with Mr. Meyers. Mr. Ingle actually received only six.

The disciplinary notices were issued under separate dates from September 5 to 12, most being issued on the latter date.

Grievances were filed promptly. Mr. Evans alleged the actions were arbitrary, capricious and without just cause; Mr. Shoopman, that the penalty was excessive in that he was following his supervisor's orders and had the same offense as another (Mr. Johnson) who received only half the penalty; Mr. Flick, that the action was arbitrary, capricious, without just cause and inconsistent with his dealings with the internal investigators; Mr. Johnson, that the penalty was excessive in light of assurance by internal investigators that no action would be taken against him; Mr. Ingle, that the action was arbitrary, capricious, without just cause and inconsistent with his dealings with the internal investigators; and Mr. Meyers, that he had followed the directions of his supervisor and the penalty was "overly excessive".

The grievances were processed through the grievance procedure and heard together, as a type of class grievance, on February 17, 1987. Briefs were to be filed to be postmarked no later than March 16, 1987.

## C O N T R A C T P R O V I S I O N S

### ARTICLE 18 - INTERNAL INVESTIGATION

#### 18.02 Bargaining Unit Member Rights

1. When an employee is to be interviewed or questioned concerning a complaint or allegation of misconduct, the employee will be informed of, prior to the interview, the nature of the investigation and whether the employee is the subject of the investigation or a witness in the investigation. If the employee is the subject of investigation, the employee will also be informed of each complaint or allegation against him/her.
2. The Employer will make reasonable efforts to conduct interviews during an employee's regularly scheduled working hours. In any event, employees will be in on-duty paid status for the duration of all interviews.
3. Prior to an interview or questioning which might reasonably lead to disciplinary action, the employee will, upon request, be given an opportunity to arrange to have a Fraternal Order of Police Ohio Labor Council representative present during the interview or questioning. Except for situations in which the interview or questioning must take place immediately, no interview or questioning will occur until the employee has a reasonable opportunity to secure such representation. This right does not extend to performance evaluation interviews or meetings the purpose of which is solely to inform the employee of intended disciplinary action. The role of the Fraternal Order of Police, Ohio Labor Council representative at such interview or questioning will be to serve as the employee's representative.
4. An employee who is to be interviewed, questioned, or tested concerning the employee's performance or fitness for office shall be informed that the interview, questioning or test is part of an official investigation and that the employee is subject to disciplinary action, including dismissal, for failing to answer the questions. The employee will be advised that the answers may not be used against him/her in criminal proceedings. If, during the investigation, it is believed the member has knowledge of, or has participated in, any act which violates the criminal laws of the United States, the State of Ohio or any of its political subdivisions, the employee shall be advised of all constitutional and other legal rights applicable.
5. The interview shall be conducted in a professional manner, with questions posed by one investigator at a time. No threats or promises will be made to induce an answer to a question. Reasonable breaks for necessities will be permitted and questioning will not exceed fifty (50) minutes without a ten (10) minute break unless waived by the employee. If a tape recording or transcript of the interview or questioning is made,



the party making such recording shall advise the other party of such recording or transcription prior to the start of the interview or questioning. A copy of the tape recording or transcript will be provided upon request of either party.

#### ARTICLE 19 - DISCIPLINARY PROCEDURE

##### 19.01 Standard

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

##### 19.04 Pre-suspension or Pre-termination Conference

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 conference. The conference will be held at a location determined by the Employer. The representative of the Employer at this conference shall be a member of the Division Staff or Facility staff, as appointed by the director of the respective agencies or his/her designee, who is neutral and detached; i. e., not having been involved in the incident or investigation giving rise to the discipline.\*\*\*

The employee has the right to have a representative of his/her choice present at the conference. The employee or his/her representative and the Employer's representative have the right to cross-examine any witnesses at the conference or have voluntary witnesses present at the conference to offer testimony, provided however, that the Employer 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 conference, the Employer's representative shall, within ten (10) working days of the conclusion of the conference, submit a written recommendation to the appointing authority, the employee and the Labor Council representative involved. The parties understand that this conference is informal and not a substitute for the grievance and arbitration procedure. The appointing authority shall render a decision within a reasonable period of time to accept, reject, or modify the recommendation.

The employee and the Labor Council representative shall be notified by the appointing authority of the final disposition of the statement of charges.

#### 19.05 Progressive Discipline

The following system of progressive discipline will be ordinarily followed. However, more severe discipline may be imposed at any point if the infraction or violation merits the more severe action.

1. Verbal Reprimand (with appropriate notation in employee's file)
2. Written Reprimand
3. Suspension
4. Demotion or Removal

#### ARTICLE 21 - WORK RULES

##### 21.02 Application

All work rules and directives must be applied and interpreted uniformly as to all members. Work rules or directives cannot violate this Agreement. In the event that a conflict exists or arises between a work rule and the provisions of this Agreement, the provisions of this Agreement shall prevail.

## C O N T E N T I O N S O F T H E P A R T I E S

### DEPARTMENT POSITION

Each of the Grievants is guilty of the offenses with which he is charged. The question here can only be the penalty and the possible violation of a prior understanding between respective Grievants and the internal investigators.

### FOP POSITION

Two sets of issues are involved:

1. Compliance by the Department of all of the contractual provisions pertaining to the imposition of penalties.
2. Just cause for the disciplines and, if none, the appropriate remedy.

The Department violated the procedures on discipline by making promises to induce answers by Grievants at the internal investigation interviews. They were promised no more than a reprimand if they cooperated in the investigation. Mr. Evans was promised that no excessive suspension, i. e., thirty days, would be imposed.

Other promises and assurances were made to the other Grievants. That violated Section 18.02 which forbids threats or promises to induce an answer to a question.

The Department breached the Agreement when it made promises to the Grievants and then it failed to comply with its promises.

Section 19.04 requires the Department to notify of the amount of discipline recommended which is to be included in the pre-disciplinary hearing. The notices in these cases omitted that item. That failure constituted a due process violation. The contractual provision is intended to give intended recipients of discipline knowledge of the alleged error and the recommended penalty. Moreover, the Chairman thereby was given too much uninformed discretion.

The Grievants and the FOP were denied access to the tapes and the written statements of the Grievants at the preliminary disciplinary hearing to their prejudice. That violated Section 18.02 which requires copies of such materials to be provided on request, request by the FOP having been made in each case. The FOP was seriously hampered in representing the Grievants by having been denied access to them.

As to the merits of the matter, the most salient factor is that their supervisor instructed them to file the false reports they made. All were put in fear of failure to do as they were instructed.

In Mr. Evans' case, no demotion was imposed on him but, instead, he was reduced in pay to a lower step in the same grade. The various steps, however, are a part of the wage structure and apply automatically as a result of years of service in a position. That was a complete disregard of the Agreement.

Just cause was simply not shown in these cases. There was no showing that any of them profited in any respect in that the extra money they were paid was actually expended in the line of their duties.

Discipline is not appropriate in that they merely followed orders.

The various disciplines imposed varied. No reason was advanced as to any reason for the disparate penalties meted out. Article 21.02, however, mandates that work rules must be applied and interpreted uniformly. Here, penalties have been unequal and inconsistent for the same offense, falsification of reports. Indeed, one investigator in the same District committed the same offense as Grievants and received no discipline. He cooperated with the Department in this matter and Grievants did likewise. His treatment was completely different from theirs.

Here the Grievants' testimony was given in connection with the investigation of the supervisor. It was given voluntarily. The Department then turned around and used the evidence against Grievants, punishing them severely.

The Agreement requires the use of progressive discipline, beginning with reprimand. Here the infractions were not intentional or negligent but were done under the supervisor's instruction.

There had been no prior discipline against any of the Grievants. Accordingly, they should have received reprimands at most in these cases. Because of the taking of the wine, it is possible that Mr. Evans would be subject to some discipline beyond the reprimand that is all that is proper for the other five.

## D I S C U S S I O N

At the outset, several procedural violations of the Agreement are alleged by the FOP. One of those must be dealt with separately. The others may be discussed as a group.

It is argued that promises were made to induce the Grievants to answer the investigators' questions, promises respecting the punishment they could receive, i. e., that none of them would receive more than suspension and that no suspension would be as much as thirty days.

Assurances were given each that no so-called massive suspensions, i. e., thirty days or more, would be given. That was attested by an affidavit of one of the investigators, which affidavit was admitted without objection.

In the interviews, each Grievant was told, under the so-called Garrity warning, that he was being questioned on matters that involved possible discipline against him, including discharge. They were told, also, that they must answer truthfully and fully the investigators' questions and that failure to do so would be basis for discipline up to discharge. They were assured, however, that nothing they said could be used as evidence in a criminal proceeding against them. After that, each was told, according to the affidavit, that the matter had been discussed with officials of the Department and that each could be assured that the Department was not interested in penalizing him severely, so that massive suspension would not ensue. The primary purpose of the questions was to determine the actions of Mr. Costner and the evidence to be given would be so directed but that, in the course of the questioning, they would be involving themselves in matters of their own misconduct.

None of the Grievants volunteered to appear. Each was ordered to do so and told that he must answer.

It appears that, literally, there were threats and promises made. They were made in connection with an overall investigation and were all designed to inform the Grievants of the legal penalties and the Department's intentions respecting Mr. Costner and the Grievants.

Each of the interviews with the Grievants was taped. Nothing appeared from them to indicate that the Grievants gave evidence in exchange for a promise to go easy on them. Each appeared willing to relate his own activities while in Mr. Costner's company.

There was bona fide business purpose in giving assurances about the penalty to be imposed. In one sense, each Grievant could prepare himself for the imposition of penalty. In a more important one, the general threat of possible discharge would affect morale adversely and potentially lead to resignation of employees who generally did good work or to work performance that was not conscientiously done and even to some possible padding of accounts on the basis that one might as well be hanged for two offenses as one. Thus, the Department faced risks in leaving possible penalties unexplored and, by the same token, the Grievants could count on some discipline but not loss of jobs or long periods of suspension. With that assurance, they could continue their work with a confidence in their future economic well-being.

In summary, promises and threats were made but they were no different than is standard in law enforcement generally and there was nothing in them that promised or threatened informal or underhanded measures. Moreover, there was no indication that they were misled into giving evidence by any such threat or promise.

Within the meaning of the contractual provision would be promises of promotion, assignment to easy work or threat of assignment to unusually dangerous, demeaning or unusual work or to regular work hours that were onerous. That type of threat or promise would clearly violate the Agreement. Threats and promises respecting open lawful and reasonable consequences could hardly be considered to violate the provision. To do so would hamstring the Department in policing itself and, as to the employees affected, would needlessly undermine morale.

Under these circumstances, it cannot be held that the Department violated Paragraph 18.02 5. of the Agreement insofar as it forbids threats and promises.

The FOP alleges also that its representation of the Grievants was improperly impaired and in some respects the Grievants were deprived of due process (1) in the notice of Departmental hearing there was failure to state the disciplinary action proposed

to be taken and (2) failure before or at the time of the disciplinary hearing to give the Grievants or the FOP access to the tapes of the interviews.

There is no question but that the penalties were not stated in the notices of the Departmental hearing. Likewise, there is no question but that the Grievants and the FOP were expressly denied access to the interview tapes at or before that time. The error of the denial of access to the tapes was recognized afterward by the Department and copies were forwarded.

Neither violation of the Agreement should have occurred. No doubt the Department will correct its procedures hereafter to bring them into line with the contractual requirements.

In this case, however, it cannot be said that the Grievants were prejudiced to their disadvantage by those violations. They already knew they were subject to some period of suspension, information they received in the interviews. The exact period can hardly be of great moment at that stage of the matter. Indeed, the first recommendation made respecting the suspensions was made by the Chairman of that hearing and, in fact, most of the suspensions he recommended were reduced by the Director of the Department.

By the time of the arbitration hearing, the Grievants and the FOP had copies of the tapes and the disciplines imposed on the different Grievants. Neither it nor they were ultimately prejudiced by anything the Department did before that. In those respects, their due process rights were not affected. Likewise, it was not shown that the Department's failures before the arbitration hearing, while unfortunate and technically improper, actually hampered the Grievants or the FOP in the preliminary steps. For example, the Department seemed determined to impose suspensions on them and, as appears hereafter, it had basis to do so. The FOP's representation of them at the pre-disciplinary hearings was not materially prejudiced.

Finally, it must be noted that due process does not necessarily apply to every step in all proceedings, only to the extent that fundamental rights are breached at the time in a prejudicial manner. Generally, however, only one hearing need accord fully with due process principles. In this case, that occurred in the arbitration hearing by which time any prior shortcomings had ceased to be material and the defense of the Grievants was not impaired in any way.

The merits of these disciplines are opposed by the FOP on the basis that they lacked just cause and were, in fact, unequal in terms of the contractual requirements.

The Grievants are said not to have acted on their own in these matters but to have acted on direct orders of Mr. Costner; they were obligated to follow his orders and, thus, they cannot be held responsible.

That argument overlooks the fact that one of the Investigators in the District did as he was ordered but reported the facts to the Department. It was that report which prompted the investigation. The Grievants also could have reported Mr. Costner's activities to the Department but did not.

It was said by some of the Grievants that they didn't know how to proceed in that they had been forbidden to contact anyone in Columbus, i. e., Departmental headquarters. They did come to Columbus from time to time to testify before the Board of Liquor Control. That was a few miles from the Departmental headquarters but easily accessible from the Board location. They could have written the Department or telephoned, either when in Columbus or by long distance. There were a number of things they could have done about the matter, but they failed to do anything.

There is always risk in "blowing the whistle" on a supervisor. There was a risk, however, in making false reports of daily activities and in claiming reimbursement for false liquor purchases. They chose the latter course. That choice made them fellows with Mr. Costner in illegal conduct.

Defense of coercion is sometimes appropriate. Here the coercion did not actually deprive them of choice. Most said they were troubled by the situation but they chose to abide the discomfort. They are responsible adults and cannot take refuge in a supervisor's orders that they know to be illegal. Legal standards apply to all, supervisors and subordinates equally.

To absolve Grievants on the basis alleged would open the way for widespread corruption in government and in business. Individuals could engage in corruption and be absolved because it was dangerous for them to do anything about it.

The actions of the Grievants are emotionally understandable. They feared for their jobs, their futures and where married, the well-being of their loved ones. They might well have been reluctant to take an immediate risk of jeopardizing those things. They preferred the more remote danger of possible penalty. Such would be understandable at least, if not justifiable. What is difficult to understand, however, is unwillingness to accept penalty for the transgressions that they undertook. Most will accept the medicine when they are uncovered. To do so is mature and is more understandable, even.

It was also said that the Grievants did not profit in fact from the false reports of liquor purchases because they had actually spent the money for that purpose but were prevented from obtaining reimbursement because of the Department's maximum daily allowance for purchases. The fact of the matter, however, was that they were obtaining reimbursements by falsifications. If the Department allowed only so much, payment of more through other

devices was improper and illegal. It constituted obtaining money through falsified records. They were not entitled to more than the maximum daily amount and they obtained more than was permitted. There is no difference between that and claiming money falsely by complete fabrication.

It is argued that by imposing different periods of suspension on the different Grievants, the Department violated Section 21.02 of the Agreement which requires work rules to be applied and interpreted uniformly. Uniform application of a rule does not imply uniform degrees of the same penalty. All were treated uniformly in being suspended. The periods of suspension here varied with circumstances and degree of culpability. That is appropriate where differences occur in circumstances and in individuals. For example, two people may be guilty of the same offense at the same time, it being the first time for one and the second for the other. The repetition of the same offense warrants a more severe degree of discipline than does the first offense of the type. By the same token, one who is found to have committed more separate offenses, all of which are discovered at one time, would clearly appear to warrant more severe discipline than one who committed but one or two separate ones of the same type. Other differences can also apply as will be noted hereafter.

It was also said that no justification was given for the differences. It is apparent on the face of the matter, however, that those who were new as Investigators, and were undergoing training at the time, received shorter suspensions than others. Likewise, the Field Training Officers received more severe discipline because it was incumbent on them to guide the trainee correctly. To engage in improper actions in the trainee's presence was not conduct becoming to a trainer. That fact did lessen the trainee's offense and worsen the trainer's. Mr. Flick received more than any, aside from Mr. Evans. He evidenced no concern about what he had done. He had never protested to Mr. Costner and from what he said, he felt he was really entitled to the expense money, a false report being merely a technical price to pay to satisfy his own feelings of justice. His case warrants greater severity to impress on him the moral necessity of complying with Departmental rules.

It is said that Mr. Martin, the Investigator who reported the entire matter to the Department, received no discipline, even though he too had falsified records. Where one voluntarily calls his own misdeed to his superior's attention, he occupies a different moral position than one who confesses after evidence of his own culpability appears. In the latter case, it is an admission or a confession which only helps to convict. Mr. Martin benefitted the Department. In absolving him of penalty, the Department acted in accordance with general standards as having conferred a benefit instead of confessing a misdeed after it was discovered.



It is hardly a violation of the contractual provision to distinguish completely between Mr. Martin and the Grievants.

Finally, it is argued that the Department actually broke the promise it had made to the Grievants. That is premised on the testimony of five of the Grievants that they were promised reprimand only. The Investigators, one by stipulated affidavit and the other in testimony, stated the contrary. The one tape that did contain discussion of penalty showed that assurance of less than massive suspension was made. No doubt, the possibility of reprimand was included in other conversations. There is strong possibility that the five Grievants seized on that at the time and failed to hear the rest of the discussion. In any event, the evidence on the discussion of penalty is inadequate to demonstrate that the Department broke its promises to those five.

It is said also that reprimand was the only discipline contractually possible under the progressive discipline provisions of the Agreement, this being the first disciplinary breach by any of the Grievants. Section 19.05 of the Agreement does set out reprimand as the first step in discipline but it also provides that more severe discipline may be imposed if the infraction merits more severe action. What has been said above demonstrates that the infractions were extremely serious. They involved unlawful claims for money. Morally, that is fraud or theft, extremely serious offenses. More than reprimand was certainly warranted.

A somewhat different problem is presented in the case of Grievant Evans. The tape of his interview contained assurance that he would not receive massive discipline. Yet, in fact, he was suspended for thirty-five days, a massive amount in terms of the definition given by the Investigators. He was also reduced in pay, a type of action not even mentioned to him.

His actions varied from those of the others in one particular. He accepted wine improperly from Mr. Costner, wine that had been confiscated for the Department.

The Investigators knew of the wine before they made assurances to him about the maximum penalty. Thus, the actual discipline far exceeded the amount he was led to believe might be imposed.

Apparently, some difference of quality was felt to exist between the misappropriation of wine and the false claims for expense reimbursement. If there is, no reason was given to support a difference. In common view, theft of money and property are equally rejected as immoral and illegal.

Mr. Evans made full restitution of the wine, in its original form, and seems to have done so on his own initiative in that the Investigators were unaware of any incident involving the wine until Mr. Evans told them of it. In making restitution in kind,

Mr. Evans did more than any of the others who, as far as the evidence showed, made no offer to reimburse the Department for the money it had authorized to be paid them on the basis of false expense accounts. (As far as appears, Mr. Evans didn't offer to pay the Department back either.)

While Mr. Evans revealed the incident of the wine on his own volition, he is in a different position than Mr. Martin. Mr. Evans was already implicated when he was called for investigation. His action was no more than a confession of a companion defalcation.

Under all these circumstances, it is clearly improper to impose such disproportionate discipline on Mr. Evans. Giving recognition to the Department's feeling about misappropriating confiscated liquor, it is unfair and unequal to impose substantially greater discipline on him than that meted out to the others. Some greater discipline may be in order on those grounds, but not the amount or types imposed. To allow more borders on inequality in application of penalty.

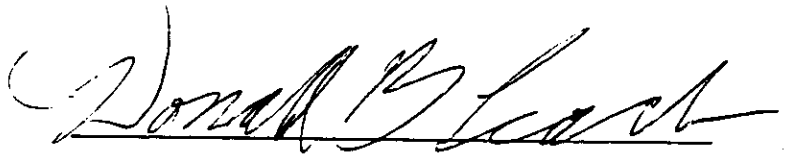
Accordingly, the suspension period for Mr. Evans reasonably may be set at fifteen working days and the wage reduction must be revoked. That length of suspension is then the greatest of the six but it is in keeping with the type of discipline imposed on others, being greater than theirs because of the misappropriation of the wine.

In all other respects, no fault or impropriety by the Department can be found and the actions of the Department respecting the other five are upheld.

#### A W A R D

1. Grievances of Donald Johnson, Charles Shoopman, Robert Flick, James Ingle and Britt Meyers, respecting suspensions of various lengths imposed on them by the Department, are hereby denied.
2. , Grievance of Andrew Evans, respecting the suspension and reduction in pay imposed on him by the Department, is hereby granted in part.
3. The suspension of Grievant Evans is hereby reduced to fifteen working days and the reduction in pay is hereby disapproved.
4. Grievant Evans shall be paid for any loss of earnings he incurred in the course of the last twenty work days of his suspension; Mr. Evans shall be paid the difference between the rate of pay

he received and the rate of pay he would have received thereafter had he not been reduced in pay; and Mr. Evans' future rate of pay shall be restored to the level he would receive if the reduction had not occurred.

A handwritten signature in cursive script, reading "Donald B. Leach". The signature is written in dark ink and is positioned above a horizontal line.

Donald B. Leach