

#50

ARBITRATION AWARD SUMMARY

OCB AWARD NO.: 50

OCB GRIEVANCE NO.: 86-246
86-715

UNION: FOPCI

DEPARTMENT: Highway Patrol

ARBITRATOR: Samuel S. Perry

AWARD DATE: 8/5/20

STATE OF OHIO
OFFICE OF COLLECTIVE BARGAINING

- and -

FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC.

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration)	
)	
Between)	<u>OPINION AND DECISION</u>
)	
FRATERNAL ORDER OF POLICE)	OCB Case No(s): 86-246
OHIO LABOR COUNCIL, INC.)	86-715
)	
- and -)	James E. Ertel, Jr. Grievant
)	
OHIO STATE HIGHWAY PATROL)	

SAMUEL S. PERRY, IMPARTIAL ARBITRATOR

The Impartial Arbitrator, Samuel S. Perry, a member of the Panel of Arbitrators for this Contract (Joint Exhibit # 1) was mutually selected by the Parties to hear and decide this matter.

Oral hearings were held on Monday, January 5, 1987 and Tuesday, January 20, 1987.

The following appearances were made for each of the Parties:
(January 5, 1987)

FOR THE UNION:

<u>NAME</u>	<u>POSITION</u>
Paul L. Cox	Executive Director
Edward F. Baker, Sr.	State Secretary
James E. Ertel, Jr.	Grievant

FOR THE PATROL:

<u>NAME</u>	<u>POSITION</u>
Deborah Piperni O'Neill	Legal Counsel
Thomas W. Rice	Major-Personnel
John M. Demoree	Captain-Personnel
Darryl L. Anderson	Lieutenant-Personnel
Peter Coccia	Labor Relations
Roy Lewis	Lieutenant
Phillip L. Vermillion	Lieutenant
Clarke M. Kiner	Sergeant
Raymond L. Yingling	Major-Operations
Dennis C. Bueno	Captain-District Commander
Dennis M. Nelson	Trooper
Mark J. Duvelius	Deputy Sheriff
Bob W. Phillips	Trooper
Clarke M. Kiner	Sergeant

(January 20, 1987)

FOR THE UNION:

<u>NAME</u>	<u>POSITION</u>
Paul L. Cox	Executive Director
Edward F. Baker, Sr.	State Secretary
James E. Ertel, Jr.	Grievant
Tracy S. Keller	Trooper

FOR THE PATROL:

<u>NAME</u>	<u>POSITION</u>
Deborah Piperni O'Neill	Legal Counsel
Phillip L. Vermillion	Lieutenant
Robert F. Welsh	Lieutenant
Dennis C. Bueno	Captain-District Commander
Raymond L. Yingling	Major-Operations
Thomas W. Rice	Major-Personnel
Darryl L. Anderson	Lieutenant-Personnel

The Parties agreed that the matter was properly before the Arbitrator for a decision on the merits.

The Parties requested a separation of witnesses and that the oath be administered to each person called to testify. The oath was administered to all persons called to testify en masse or individually as they were called to testify.

The Union requested two (2) copies of this Opinion and Award and the Patrol requested two (2) copies of this Opinion and Award.

At the conclusion of the second oral hearing, each Party stated they would file a post-hearing brief. The oral proceedings in this matter were concluded on January 20, 1987

The Arbitrator received the post-hearing brief of the Patrol on March 23, 1987 and the post-hearing brief on the Union was received on March 25, 1987.

The Arbitrator declared the hearing closed as of March 25, 1987 and pursuant to Article 20, Section 20-07 of the Agreement (Joint Exhibit #1) the Arbitrator make a request to the Parties for their written consent to render his Opinion and Decision within sixty (60) days from March 25, 1987.

THE GRIEVANCE(S):

Two (2) Grievances were filed in this case.

Grievance No. 86-246 -- Joint Exhibit # 2(A) 11 Pages
Grievance No. 86-716 -- Joint Exhibit # 2(B) 10 Pages

SEE NEXT TWENTY-ONE (21) PAGES

Joint Exhibit 2 (A)
Joint Exhibit 2 (B)



Ohio Department of Administrative Services

375 S. HIGH STREET, 17TH FLOOR
COLUMBUS, OHIO 43266-0585

OFFICE OF COLLECTIVE BARGAINING

October 3, 1986

Trooper J. E. Ertel
917 Tracy Place
Mason, Ohio 45040

RE: Step 4 Grievance Review
OCB Grievance #G86-246
Department of Highway Safety
Highway Patrol (#58)

Dear Trooper Ertel:

The above grievance is denied for the reasons cited at Step 3.

Sincerely,

Edward H. Seidler
Deputy Director

EHS:ME:ga

cc: Major Thomas Rice, Labor Relations Coordinator
Department of Highway Safety

Paul Cox, Attorney
FOP/OLC

Edward Baker, Staff Representative
FOP/OLC

RECEIVED
1986 OCT -7 AM 10:57

JOINT
EXHIBIT

2(A)

STATE HIGHWAY PATROL

STATE OF OHIO

Colonel Jack Walsh
Superintendent

DEPARTMENT OF HIGHWAY SAFETY
William W. Denihan
Director



FILE NO. 00-5-10

Columbus, Ohio 43266-0562
September 10, 1986

Trooper J. E. Ertel
917 Tracy Place
Mason, Ohio 45040

RE: Grievance No. 53

Dear Trooper Ertel:

Attached you will find my Level III decision regarding the above numbered grievance.

Very truly yours,

T. W. Rice

T. W. Rice
Major, Personnel
Ohio State Highway Patrol

TUR/slb

Attachment

cc: Ed Seidler, Director the Office of Collective Bargaining
Peter Coccia, ODHS Labor Relations
Ed Baker, FOP/OLC, Inc., Staff Representative
Paul Cox, FOP/OLC, Attorney
File

JOINT
EXHIBIT

2(A)

A Level III Grievance Hearing was held on September 2, 1988, in Columbus, Ohio regarding grievance number 18, Trooper James E. Ertel with the following persons present:

MANAGEMENT

LABOR

T. W. Rice, Major/Personnel/ Tpr. James E. Ertel, Griev.
Labor Relations/Hearing Officer Mr. Ed Baker, Staff Repres.
Capt. John Demaree
Peter Coccia

The parties agreed we were properly constituted and there were no procedural objections.

The Union stated the remedy sought was that stated on the grievance. That the grievant(s) was a member of FOP/OLC at the time of the alleged incident giving rise to the grievance and further, that the grievant's home address is correctly stated on the grievance form.

UNION CONTENTION

The union contends that no charges be served, and no disciplinary action be taken, as a result of the Patrol Administration failing to follow the procedures outlined in the contract.

MANAGEMENTS CONTENTION

JOINT
EXHIBIT

2(A)

It is managements contention that this was a review of circumstances in order to determine the facts surrounding the incident. Reviews of this type involving incidents where several troopers are involved have been held for several years as a normal practice. Prior to the review, which involved Major R. L. Yingling, Captain D. C. Bueno, Lt. P. L. Vermillion, Sgt. D. W. Keiter, Sgt. J. M. Kiner, Tpr. J. E. Ertel, Jr., Tpr. B. W. Phillips, Tpr. T. S. Keller, Tpr. D. M. Nelson, and Tpr. L. H. Lawhorn, Labor Council Associate, it was not certain if disciplinary charges were going to be filed.

The review was held in accordance with Article 18, Section 18.02(3) which states:

"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 an Ohio Labor Council representative present during the interviewing or questioning".

"The role of the Ohio Labor Council representative at such interview or questioning will be to serve as the employee's representative".

Article 18, Section 18.02(1), being grieved states:

"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

purpose 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 the investigation, the employee will also be informed of each complaint or allegation against him/her".

In keeping with the contract language, all employees at, and prior to, the review were informed that the review was for the purpose of gathering facts surrounding the incident.

It should be pointed out that during the initial review of the incident, it was uncertain as to who was the subject of, or a witness to, the incident. Considering all officers involved, it was not only unknown who exactly was the subject or witness in the incident, but it would have been presumptuous to assume any one individual or individuals were more at fault than the other at this point.

Trooper Lauhorn, the Labor Council Associate, requested that individuals involved be advised of any possible disciplinary action prior to terminating the interview session. This request was complied with, when at the end of the review, each officer was informed of the possible consequences of their involvement. This included a critique of the good and bad points of the incident and advising Trooper Ertel that possible disciplinary action would be taken against him.

Trooper Lauhorn made no other statements or requests before, during or after the interview. He was asked for his input during the interview, however, he refused comment unless asked a specific question.

It is felt that the employer followed the guidelines of the labor agreement in trying to determine the facts of this unfortunate incident and therefore the grievance is found to be without basis.

FINDING

The hearing officer, after considering all evidence presented, including witnesses testimony, finds that the employer did not violate the terms or conditions of the contract when it conducted a review of the incident.

Since this review was conducted for the purpose of ascertaining facts surrounding the incident, a determination as to right or wrong prior to such a review would have been an injustice to those involved.

Each individual at the review was afforded the opportunity to relate his/her version of the incident. It was only after all individuals had related details of the event, that a chronological sequence could be pieced together in order to come to a final determination as to what actually happened.

JOINT
EXHIBIT

2(A)

Due to the complex nature of this incident, it would only seem reasonable and proper that management attempt to gather all facts prior to the consideration of any disciplinary action.

It is felt that, for management to have assumed negligence prior to such a review would have been improper and not in keeping with the best interests of the individuals involved or the Highway Patrol.

Thomas W. Rice

Thomas W. Rice, Major
Personnel Commander

9/10/86

Date

JOINT
EXHIBIT

2(A)

GRIEVANCE SIGN-IN FORM
STEP III HEARING

Grievance Number =58

Grievant Name Trooper James E. Ertel

Date September 3, 1986

Location GHQ-Personnel

	NAME	AGENCY
1.	<u>Ed Baker</u>	<u>FOP/OLC Rep</u>
2.	<u>Tim Ertel</u>	<u>OSP [Signature]</u>
3.	<u>Capt. James Demaree</u>	<u>OSP-Pers.</u>
4.	<u> </u>	<u> </u>
5.	<u> </u>	<u> </u>
6.	<u> </u>	<u> </u>
7.	<u> </u>	<u> </u>
8.	<u> </u>	<u> </u>
9.	<u> </u>	<u> </u>
10.	<u> </u>	<u> </u>

JOINT
EXHIBIT

Z(A)

STATE OF OHIO
OFFICE OF COLLECTIVE BARGAINING

- and -

FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC.

In the Matter of the Arbitration)	
)	
Between)	
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FRATERNAL ORDER OF POLICE)	OCB Case No(s): 86-246
OHIO LABOR COUNCIL, INC.)	86-715
)	
- and -)	
)	
OHIO STATE HIGHWAY PATROL)	

DECISION

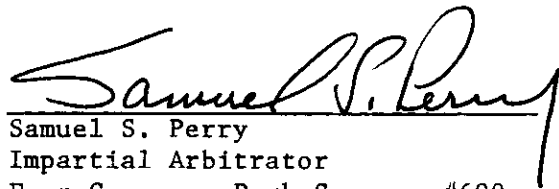
The undersigned Arbitrator, having been duly appointed by the Parties, in accordance with the Agreement entered into by and between the Parties, effective April 24, 1986, and having duly heard the allegations and proofs of the Parties, Decides as follows:

The Grievance (Joint Exhibit #2(A)-Case No. 86-246) filed herein by James E. Ertel, Jr., is DENIED.

The Grievance (Joint Exhibit #2(B)-Case No. 86-715) filed herein by James E. Ertel, Jr., is SUSTAINED.

The suspension is revoked and the Grievant shall be reimbursed twenty (20) days lost pay.

Opinion rendered Award signed, Issued and Dated at Beachwood, Cuyahoga County, Ohio, this 20th day of May, 1987.


Samuel S. Perry
Impartial Arbitrator
Four Commerce Park Square, #600
23200 Chagrin Blvd.
Beachwood, OH 44122
216/292-8220

THE ISSUE(S)

The issues as framed by the Patrol:

Grievance No. 86-246

Did Management comply with Article 18, Section 18.02 when advising the Grievant of his rights, while conducting an incident briefing session at the Wilmington District Headquarters on July 24, 1986? If not, what shall the remedy be?

Grievance No. 86-715

Did Management have just cause to suspend the Grievant for 20 working days as the result of the Grievant using excessive force and committing an error of judgment while assisting with the arrest of a suspect on July 20, 1986? If not, what shall the remedy be?

PERTINENT PROVISIONS OF THE AGREEMENT (Joint Exhibit # 1):

ARTICLE 18 - INTERNAL INVESTIGATION

18.01

The parties recognize that the State has the right to expect that a professional standard of conduct be adhered to by all Highway Patrol personnel regardless of rank or assignment. Since internal investigations may be undertaken to inquire into complaints of misconduct by bargaining unit employees, the State reserves the right to conduct such investigations to uncover the facts in each case while protecting the rights and dignity of accused personnel. In the course of any internal investigation, all investigative methods employed will be consistent with the law.

18.02

- (1) When an employee is to be interviewed or questioned concerning a complaint or allegation of misconduct, the employee will be informed or, 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 the investigation, the employee will also be informed of each complaint or allegation against him/her.
- (2) The Highway Patrol 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 an Ohio Labor Council representative present during the interviewing 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 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.

...

18.06

When an internal investigation leads to disciplinary action, the procedures for notification to the employee contained in Article 19 shall be followed.

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 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 other party upon request.

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 with 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.

FACTS AND BACKGROUND

This arbitration proceeding was necessitated by the Grievant's protest about his suspension by the Patrol because of his behavior during the pursuit and capture of a rape suspect.

The Grievant, Trooper James E. Ertel, Jr., is a nine year veteran of the Ohio State Patrol force (which will be hereinafter referred to as the Patrol). He is a member of the bargaining unit known as the Fraternal Order of Police/Ohio Labor Council which will be hereinafter referred to as the Union. The Union and the Patrol last executed a binding contract on April 28, 1986. That contract will be hereinafter referred to as the Agreement.

A Trooper riding his regular route happened upon a seemingly vacant automobile that was parked on an exit ramp. As the Trooper prepared to investigate the situation, the victim ran back to the Patrol cruiser reporting that she had been raped by a man in that car. Before the Trooper reached the car, the suspect drove off. Thus began the chase.

The suspect drove at excessive speeds, eluded several traps and made several direction changes up and down the highway. The Grievant was one participant in the high speed vehicular chase that ended when the suspect lost control of his car in a wooded area off the highway. The Grievant unsuccessfully attempted to pin the suspect's car into the wooded area. When the Grievant exited his car to accost the suspect, he noticed the car wheels moving toward him, so the Grievant fired three shots into those wheels. Another patrol car arrived that succeeded in blocking the suspect's vehicle. Even though he was soon surrounded by police cars and police officers, the suspect did not willingly surrender. He began looking around as though

searching for another escape route so the Grievant jumped up on the hood and struck the windshield with his flashlight to get the suspect's attention.

About the same time, other officers pulled the suspect from his car. He continued to vigorously resist arrest. He fought with the officers in a struggle that included much wrestling and a few fist blows. Three officers were attempting to handcuff the suspect when the Grievant tried to help subdue the suspect by hitting him with the flashlight used to hit the windshield. Although the Grievant testified that he was aiming to hit the suspect on a shoulder, the suspect was, in fact, hit in the head. Finally, he was handcuffed and subdued. It was discovered that the suspect suffered several injuries during the struggle.

The disciplinary action against the Grievant was taken because of the "hood" stunt and because of his uses of the flashlight.

UNION POSITION

-Grievance I- (86-246)

The Union contends that the Patrol violated Section 18.02 of the Agreement by failing to inform the Grievant, before the commencement of the July 24, 1986 investigatory meeting, that he would be disciplined because of his behavior on July 20, 1986.

-Grievance II- (86-715)

The Union contends that the Patrol did not have just cause to suspend the Grievant for twenty (20) days because he did not use excessive force to effect an arrest nor did he commit any errors in judgment while making that arrest.

PATROL POSITION

-Grievance I- (86-246)

The Patrol contends that the Agreement was not breached because Management did inform all Troopers present that the meeting on July 12, 1986 was part of an official investigation. Furthermore, those Troopers were reminded, in accordance with Sec. 18.02 of the Agreement, that failing to answer questions could lead to disciplinary action.

-Grievance II- (86-715)

The Patrol contends that the Grievant was properly disciplined for his use of excessive force and other errors in judgment committed during the arrest of the rape suspect on July 20, 1986.

DISCUSSION AND OPINION

These grievances are based on the Patrol's decision to discipline the Grievant after his participation in the capture of a rape suspect. His first complaint alleges that the Patrol breached the Agreement at Section 18.02. The Union argued that the Patrol violated the Agreement by failing to forewarn the Grievant that he was the subject of the investigation into this matter that was held on July 24, 1986. The Patrol is also accused of failing to notify the Grievant that disciplinary charges might be filed against him as a result of said meeting.

Article Eighteen at Section 18.02(1) states that whenever an employee is to be interviewed or questioned concerning a COMPLAINT OR ALLEGATION OF MISCONDUCT, the employee is to be informed as to the nature of the investigation and his status as a subject or witness of that investigation BEFORE the start of the interview (emphasis added). Section 18.02(3) says that prior to an interview or questioning which might reasonably lead to disciplinary

OHIO STATE HIGHWAY PATROL - EMPLOYEE GRIEVANCE FORM

1. GRIEVANT'S NAME James E Ertel et al UNIT # 49 POST 83 DIST. 8
2. BARGAINING UNIT # 1 3. DISCIPLINARY GRIEVANCE? No (IF SO, BEGIN AT STEP 3)
4. IMMEDIATE SUPERVISOR AT TIME OF INCIDENT Major R.L.Yingling U- 692 P- XX GHQ
5. ARTICLE(S) AND SECTION(S) GRIEVED: Article 18 Internal Investigation 18.02 (1)
6. STATEMENT OF GRIEVANCE (TIME & DATE, WHO, WHAT, WHERE, HOW) BE SPECIFIC: 0900 to 1215
072486 Major R.L.Yingling failed to advise me that I was a subject to an investigation
and that disciplinary charges would be brought against me until after an interview was
complete. He advised that it was a review of a car chase where shots were fired,
patrol cars were damaged and the suspect was injured while resisting arrest. Tpr
L.H.Lawhorn requested that if it became apparent that anyone in the interview,
(Continued on HP22)
7. REMEDY REQUESTED: That no charges be served, and no disciplinary action be taken, as a result of
the Patrol Administration failing to follow the procedures outlined in the
Contract.
8. GRIEVANT'S SIGNATURE Tpr. J. Ertel DATE: 2/21/86

*** PRELIMINARY STEP ***

IMMEDIATE SUPERVISOR CONTACTED _____ NAME _____ DATE _____

REPRESENTATIVE (IF ANY): _____ DATE OF REPLY: ____/____/____

COMMENTS BY GRIEVANT: _____

GRIEVANT'S SIGNATURE: _____ DATE: ____/____/____

*** STEP ONE REVIEW ***

9. DATE GRIEVANCE RECEIVED ____/____/____ RECEIVED BY _____
10. STEP ONE MEETING DATE: ____/____/____ TIME: _____ M. PLACE: _____
11. MEETING OFFICER: _____ UNIT # _____
12. REPRESENTATIVE AND/OR COUNSEL AT MEETING: _____
13. DATE OF REPLY: ____/____/____ REPLY: _____
- POST COMMANDER, EQUIV. SUPV. OR DESIGNEE'S SIGNATURE: _____
14. EMPLOYEE REVIEW: ____/____/____ AGREE: YES NO REQUEST STEP 2 REVIEW: YES NO
15. COMMENTS BY GRIEVANT: _____
- _____
- GRIEVANT'S SIGNATURE: _____ DATE: ____/____/____
16. STEP ONE HOURS REP. HRS. _____ GRIEVANT HRS. _____ POST CMDR. HRS. _____

*** STEP TWO REVIEW ***

17. DATE GRIEVANCE RECEIVED: ____/____/____ RECEIVED BY: _____
18. STEP TWO MEETING DATE: ____/____/____ TIME: _____ M. PLACE: _____
19. MEETING OFFICER: _____
20. REPRESENTATIVE AND/OR COUNSEL AT MEETING: _____
21. DATE OF REPLY: ____/____/____ REPLY: _____

COMMANDER'S SIGNATURE _____

JOINT
EXHIBIT

OVER

2(A)

*** STEP TWO REVIEW (CONTINUED) ***

22. REVIEW BY EMPLOYEE: DATE: ___/___/___ . AGREE: YES NO REQ. STEP 3 REVIEW: YES NO
23. COMMENTS BY GRIEVANT: _____
- _____
- GRIEVANT'S SIGNATURE: _____ DATE: ___/___/___
24. STEP TWO HOURS. REP. HRS. _____ GRIEVANT HRS. _____ DIST. CMDR. HRS. _____

*** STEP THREE REVIEW ***

25. DATE GRIEVANCE RECEIVED 8/1/86 RECEIVED BY Major J. W. Rice
26. STEP THREE MEETING DATE: 9/3/86 TIME: _____ M. PLACE: Columbus, Oh
27. MEETING OFFICER Major J. W. Rice
28. REPRESENTATIVE AND/OR COUNSEL AT MEETING: _____
29. DATE OF REPLY: 9/10/86 REPLY: (See attached)
- DIRECTOR/SUPERINTENDENT OR DESIGNEE'S SIGNATURE: _____
30. REVIEW BY EMPLOYEE AND/OR REPRESENTATIVE: DATE: ___/___/___ . AGREE: YES NO
REQ. STEP 4 REVIEW: YES NO
31. COMMENTS BY GRIEVANT OR REPRESENTATIVE: _____
- _____
- GRIEVANT'S OR REPRESENTATIVE'S SIGNATURE: _____ DATE: ___/___/___
32. STEP THREE HOURS REP. HRS. _____ GRIEVANT HRS. _____ DESIGNEE HRS. _____
- 1986 AUG 31 AM 8 25
RECEIVED
HIGHWAY PATROL

*** STEP THREE DISCIPLINARY GRIEVANCE REVIEW ***

33. REVIEW BY O.L.C. REPRESENTATIVE: DATE: ___/___/___ . AGREE YES NO
REQ. STEP 5 (ARBITRATION) REVIEW: YES NO
34. DATE REQUEST FOR ARBITRATION FILED: ___/___/___
35. COMMENTS BY REPRESENTATIVE: _____
36. REPRESENTATIVE'S SIGNATURE: _____ DATE: ___/___/___

*** STEP FOUR REVIEW ***

37. DATE GRIEVANCE MAILED TO THE OFFICE OF COLLECTIVE BARGAINING: ___/___/___
38. DATE GRIEVANCE RECEIVED AT THE OFFICE OF COLLECTIVE BARGAINING: ___/___/___
39. STEP FOUR REVIEW DATE: ___/___/___ DIR. OF O.C.B. OR DESIGNEE: _____
40. DATE OF REPLY: ___/___/___ . REPLY: _____
- DIRECTOR OF O.C.B. OR DESIGNEE'S SIGNATURE: _____
41. DATE REVIEWED BY O.L.C. REPRESENTATIVE: DATE: ___/___/___ . AGREE: YES NO
REQUEST ARBITRATION: YES NO
42. DATE REQUEST FOR ARBITRATION FILED: ___/___/___
43. COMMENTS BY REPRESENTATIVE: _____
- REPRESENTATIVE'S SIGNATURE: _____ DATE: ___/___/___
44. RESPONSE TIME EXTENSIONS: (INITIALED BY REPRESENTATIVES OF MANAGEMENT & OLC)
- | | DATE | FOP/OLC | MANAGEMENT |
|---|-----------------------------------|--------------------|------------|
| STEP: <u>3</u> EXTENDED TO: <u>9/29</u> | SIGNATURE: <u>Edmund J. Baker</u> | <u>[Signature]</u> | |
| STEP: <u>3</u> EXTENDED TO: <u>9/3</u> | SIGNATURE: _____ | <u>[Signature]</u> | |
| STEP: _____ EXTENDED TO: _____ | SIGNATURE: _____ | | |

JOINT
EXHIBIT

2(A)



STATE HIGHWAY PATROL
INTER-OFFICE COMMUNICATION

Date 072486

To Attention

From James E Ertel

Subject Continuation of Statement of Grievance

would become a subject or witness to the investigation that they be advised at that time. Major Yingling stated that they would be advised.

After the interview was complete Major Yingling stated that there had been several things that I had done wrong and that disciplinary action would be taken against me.

Place of interview Wilmington DHQ

Officers in attendance

Major R.Y.Yingling

Capt D.C.Bueno

Lt P.L.Vermillion

Sgt D.W.Keiter

Sgt C.M.Kiner

Tpr J.E.Ertel Jr

Tpr B.W.Phillips

Tpr T.S.Keller

Tpr D.M.Nelson

Tpr L.H.Lawhorn Labor Council Associate

JOINT
EXHIBIT

2 (A)

STEP III GRIEVANCE HEARING FORMAT

This Step III Grievance Hearing has been set in accordance with Article 20 of the contract agreement between FOP/OLC, Inc., and the State of Ohio, Ohio State Highway Patrol.

I am _____, hearing officer.

This grievance hearing is now convened at _____, (Time) _____, for the purpose of hearing all the facts (Date) and witness testimony relating to grievance number _____ as submitted by _____ relative to alleged violations of Article _____, Section _____; Article _____, Section _____, of the labor agreement.

PS Form 3811, Dec. 1980

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

<p>SENDER: Complete items 1, 2, 3 and 4. Add your address in "RETURN TO" space on reverse.</p>	
<p>(CONSULT POSTMASTER FOR FEES)</p>	
<p>1. The following service is requested (check one).</p> <p><input type="checkbox"/> Show to whom and date delivered —¢</p> <p><input type="checkbox"/> Show to whom, date, and address of delivery .. —¢</p>	
<p>2. <input type="checkbox"/> RESTRICTED DELIVERY (The restricted delivery fee is charged in addition to the return receipt fee.) —¢</p>	
<p>TOTAL \$ _____</p>	
<p>3. ARTICLE ADDRESSED TO: <i>Inspector J. E. Entel</i> <i>917 Tracy Place</i> <i>Mason, Ohio 45040</i></p>	
<p>4. TYPE OF SERVICE:</p> <p><input type="checkbox"/> REGISTERED <input type="checkbox"/> INSURED</p> <p><input type="checkbox"/> CERTIFIED <input type="checkbox"/> COD</p> <p><input type="checkbox"/> EXPRESS MAIL</p>	<p>ARTICLE NUMBER <i>2085-808-808</i></p>
<p>(Always obtain signature of addressee or agent)</p>	
<p>I have received the article described above.</p> <p>SIGNATURE <input type="checkbox"/> Addressee <input type="checkbox"/> Authorized agent</p> <p><i>Rayle Entel</i></p>	
<p>5. DATE OF DELIVERY <i>9-13-84</i></p>	<p>POSTMARK </p>
<p>6. ADDRESSEE'S ADDRESS (Only if requested)</p>	
<p>7. UNABLE TO DELIVER BECAUSE:</p>	<p>7a. EMPLOYEE'S INITIALS <i>9/13 BK</i></p>

JOINT
EXHIBIT
2(A)

STEP III COVER LETTER GRIEVANCE ANSWER FORM

TPR. JAMES E. ERTOL, Grievant
917 TRACY PLACE, Street Address
MASON, OHIO, City, State
45040, Zip Code

RE: Grievance No. _____

Dear _____:

Attached you will find my Step III decision regarding the above numbered grievance.

Sincerely,

Attachment

cc: _____

File

JOINT
EXHIBIT

2(A)



FRATERNAL ORDER OF POLICE

4222 E. BROAD ST.
COLUMBUS, OHIO 43213-1216
614-235-3800

OHIO LABOR COUNCIL, INC.

#715

November 21, 1986

Mr. Edward Seidler
Office of Collective Bargaining
375 S. High Street, 17th Floor
Columbus, Ohio 43215

RE: Grievance of James Ertel
Grievance #95

Dear Mr. Seidler:

Please be advised that the F.O.P. hereby submits the above-referenced grievance to you for Step 4 consideration. Enclosed is a copy of the grievance and supporting documentation. The Step 3 grievance was received in this office on November 19, 1986.

Thank you for your consideration and courtesy in this matter.

Sincerely,

Edward F. Baker
Staff Representative

Enclosures

JOINT
EXHIBIT
2(B)

STATE HIGHWAY PATROL

STATE OF OHIO
Richard F. Celeste
Governor

Colonel Jack Walsh
Superintendent



DEPARTMENT OF HIGHWAY SAFETY
William M. Denihan
Director

FILE NO. 20-5-10

Columbus, Ohio 43266-0562
November 13, 1986

Trooper James Ertel
917 Tracy Place
Mason, Ohio 45040

RE: Grievance No. 95

Dear Trooper Ertel:

Attached you will find my Level III decision regarding the above numbered grievance.

Very truly yours,

Maj. T.W. Rice

T. W. Rice
Major, Personnel
Ohio State Highway Patrol

TWR/slb

Attachment

cc: Ed Seidler, Director the Office of Collective Bargaining
Peter Coccia, ODHS Labor Relations
Ed Baker, FOP/OLC, Inc., Staff Representative
Paul Cox, FOP/OLC, Attorney
File

JOINT
EXHIBIT

Z(B)

A level III Grievance Hearing was held on November 6, 1986, in Columbus, Ohio regarding grievance number 95, Grievant Trooper James Ertel, with the following persons present:

MANAGEMENT

T. W. Rice, Major/Personnel/
Labor Relations/Hearing Officer
Capt. John Demaree
Lt. D. L. Anderson
Peter Coccia

LABOR

Tpr. James Ertel, Griev.
Mr. Ed Baker, Staff Repres.

The parties agreed we were properly constituted and there were no procedural objections.

The Union stated the remedy sought was that stated on the grievance. That the grievant(s) was a member of FOP/OLC at the time of the alleged incident giving rise to the grievance and further, that the grievant's home address is correctly stated on the grievance form.

UNION CONTENTION

The union believes the grievants suspension, based on facts presented at a pre-suspension hearing on August 26, 1986, did not provide just cause for the subsequent 20 working day suspension.

MANAGEMENT'S CONTENTION

It is managements contention that the employer did have "just cause" to suspend the grievant and by so doing, did not act in an arbitrary, capricious, unreasonable, or discriminatory manner.

It is felt that the degree of discipline administered by the employer in this particular case was reasonably related to the seriousness of the employee's proven offense.

Prior to the imposition of discipline the grievant was afforded a pre-suspension hearing as outlined in Article 19, Section 19.04, of the labor agreement between the FOP/OLC, Inc. and the Ohio State Highway Patrol. At said hearing, which was conducted on August 26, 1986, the grievant was represented by a member of the FOP/OLC, Inc. He was given the opportunity to present witnesses in his behalf and cross examine the state's witnesses.

After reviewing all the facts and witnesses testimony, the hearing officer upheld the proposed disciplinary action, (copy attached).

JOINT
EXHIBIT

2(B)

Management further contends that the test for just and proper cause has been established in this particular case by meeting the following criteria:

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 the 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 proven offense and
 - b. the record of the employee in his service with the Ohio State Highway Patrol.

Considering the aforementioned factors, it is felt that management clearly met the test of "just cause" in this case.

JOINT
EXHIBIT

2(B)

FINDING

Based on the evidence presented at the pre-suspension hearing held on August 26, 1986, the employer did show "just cause" to suspend the grievant for 20 working days. This "just cause" was proven based on the seven points outlined in management's contention above.

There is no violation of Article 19 of the labor agreement which states "no bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause."

Maj. Thomas W. Rice

Thomas W. Rice, Major
Personnel Commander

11/18/86

Date

JOINT
EXHIBIT

2(B)

GRIEVANCE SIGN-IN FORM
STEP III HEARING

Grievance Number #95

Grievant Name Trooper James Ertel

Date November 6, 1986

Location GHQ-Columbus

	NAME	AGENCY
1.	<u>Edward J. Baker</u>	<u>TOP/OLC</u>
2.	<u>James J. Baker</u>	<u>TROOPER / R. S. H. E.</u>
3.	<u>Capt. J. J. Baker</u>	<u>OSP - Person</u>
4.	<u>in to Baker</u>	<u>OSP PERSONNEL</u>
5.	<u> </u>	<u> </u>
6.	<u> </u>	<u> </u>
7.	<u> </u>	<u> </u>
8.	<u> </u>	<u> </u>
9.	<u> </u>	<u> </u>
10.	<u> </u>	<u> </u>

JOINT
EXHIBIT

2(B)

-95-

OHIO STATE HIGHWAY PATROL - EMPLOYEE GRIEVANCE FORM

- GRIEVANT'S NAME James Ertel UNIT # 49 POST 83 DIST. 8
- BARGAINING UNIT # 13 DISCIPLINARY GRIEVANCE? NO YES (IF SO, BEGIN AT STEP 3)
- IMMEDIATE SUPERVISOR AT TIME OF INCIDENT Major R. L. Yingling U- 692 P- D-GHQ
- ARTICLE(S) AND SECTION(S) GRIEVED: Article 19 Section 19.01
- STATEMENT OF GRIEVANCE (TIME & DATE, WHO, WHAT, WHERE, HOW) BE SPECIFIC:
Trooper J.E. Ertel was suspended for 20 working days September 4, 1986 in
Violation of section 19.01. As Trooper Ertel was, suspended for just cause.
- REMEDY REQUESTED: That the suspension be revoked, and Trooper be reimbursed
20 days pay.
- GRIEVANT'S SIGNATURE [Signature] DATE: 9/19/86

* PRELIMINARY STEP *

- IMMEDIATE SUPERVISOR CONTACTED _____ NAME _____ DATE SEP 24 1986
- REPRESENTATIVE (IF ANY): _____ DATE OF REPLY: 9/29/86
- COMMENTS BY GRIEVANT: _____
- GRIEVANT'S SIGNATURE: _____ DATE: 9/29/86

* STEP ONE REVIEW *

- DATE GRIEVANCE RECEIVED 9/19/86 RECEIVED BY _____
- STEP ONE MEETING DATE: 9/29/86 TIME: _____ .M. PLACE: _____
- MEETING OFFICER: _____ UNIT # _____
- REPRESENTATIVE AND/OR COUNSEL AT MEETING: _____
- DATE OF REPLY: 9/29/86 REPLY: _____
- POST COMMANDER, EQUIV. SUPV. OR DESIGNEE'S SIGNATURE: _____
- EMPLOYEE REVIEW: 9/29/86 AGREE: YES NO REQUEST STEP 2 REVIEW: YES NO
- COMMENTS BY GRIEVANT: _____
- GRIEVANT'S SIGNATURE: _____ DATE: 9/29/86
- STEP ONE HOURS REP. HRS. _____ GRIEVANT HRS. _____ POST CMDR. HRS. _____

* STEP TWO REVIEW *

- DATE GRIEVANCE RECEIVED: 9/19/86 RECEIVED BY: _____
- STEP TWO MEETING DATE: 9/29/86 TIME: _____ .M. PLACE: _____
- MEETING OFFICER: _____
- REPRESENTATIVE AND/OR COUNSEL AT MEETING: _____
- DATE OF REPLY: 9/29/86 REPLY: _____
- COMMANDER'S SIGNATURE: _____

OVER

JOINT
EXHIBIT

2(B)

action, that employee can ask for and be given the opportunity to have an Ohio Labor Council representative present. At Section 18.06, the Agreement states that the procedures in Article Nineteen are to be followed if and when an internal investigation does lead to disciplinary action.

Testimony at the hearings revealed that all Troopers present at the July 24, 1986 meeting were told that their failure to answer questions at this official investigation would subject them to possible disciplinary action. That verbal reminder was given in conformance with the rules found in Section 18.02(4) of the Agreement. Additionally, a Union Representative was present and he requested the Patrol to immediately inform individual Troopers who would be disciplined as a result of the findings of the meeting that they would, in fact, be disciplined.

It is the ruling of this Arbitrator that the meeting on July 24, 1986 was purely an internal investigatory meeting. No complaints or allegations of misconduct had been filed with the Patrol before this meeting. No individual Trooper present was the subject of the investigation. No Trooper present failed to answer any questions. The investigation was for the routine purpose of ascertaining the events of the night of July 20, 1986. There appears to have been no way for the Patrol management to have known in advance that any one Trooper's behavior had in fact been unprofessional or unacceptable according to Patrol standards. The Patrol was attempting to obtain a complete scenario of what happened that night. The Grievant was not disciplined under this provision (Article 18) of the Agreement.

The second grievance is based on the investigation and subsequent charges that were filed against the Grievant in accordance with Article Nineteen of the Agreement. The Patrol suspended him from duties for twenty (20) days because of their perception that the Grievant acted improperly during the

pursuit and arrest of the rape suspect. The Patrol argues that all actions taken by them were proper because of the nature and severity of the infractions committed by the Grievant. Furthermore, the Patrol contends that the Grievant's behavior endangered himself and others in addition to being in direct contradiction to the rules of the Patrol and the training received by all Troopers. The Patrol charged that jumping on the suspect's hood and using his flashlight to hit the windshield and the head of the suspect were forbidden actions under the rules, regulations and teachings of the Patrol. Notice procedures in Article Nineteen were followed by the Patrol.

The issue in the second grievance is whether the Patrol had "just cause" to suspend the Grievant. Much of the testimony at the hearings dealt with the propriety of Trooper Ertel's "dangerous" behavior.

It is reasonable to believe that the Grievant's action of firing shots into the wheels of the suspect's car was justified because he thought his life was in immediate danger. That action is not a subject of this hearing.

It is the Arbitrator's understanding that perception about danger is a subjective, introspective phenomenon. In other words, danger is in the mind of the beholder. The Patrol wants the Arbitrator to use objective, impartial standards to determine whether the Grievant's action were proper. It should be noted that no concrete standards or rules were offered into evidence as guidelines to assist the Arbitrator in that determination.

Jumping up on the hood and hitting the windshield were both actions that could have turned out differently had the suspect been armed with a gun. He could have shot the Grievant before any other officer could have prevented it. Fortunately, for the Trooper, the suspect did not have a firearm. It is known that the pursuing Troopers knew that the suspect was allegedly armed but it is not clear that they knew what weapon he had.

The Patrol alleges that the Grievant committed an "error in judgment" in jumping on the suspect's hood. Regulation 4501:2-6-02(B)(4) states that members (of the force) who fail to perform assigned duties because of an error in judgment or otherwise fail to perform satisfactorily a duty of which a member is capable, may be charged with inefficiency. (emphasis added.) An error in judgment is not the same thing as poor judgment. Poor judgment connotes foolishness or foolhardiness but an error in judgment is a more deliberate and calculated act or omission. This Grievant was not charged with inefficiency. He was capable of and did assist in stopping the criminal activity of the suspect. His most immediate "assigned duty" was to apprehend this criminal suspect. That was done largely through the contributions of the Grievant.

The Arbitrator agrees that jumping up on the suspect's hood under the circumstances was foolish, and even dangerous to the Grievant's health, but such behavior is not specifically outlawed by the Agreement nor is it expressly forbidden in the training manual. Furthermore, it is easy to see that in the excitement of the capture that a Trooper might react instantly to do whatever he could to apprehend this extremely elusive person. This portion of the Grievance will be upheld because jumping on the hood is not punishable under the totality of the circumstances of this incident.

While the suspect and the other officers were wrestling, the Grievant came down from the hood and reached over the officer's shoulders. He hit the suspect two or three times with his flashlight. The dilemma here is whether that bodily assault with the flashlight constituted assault with a deadly weapon with intent to kill or maim.

In Company Exhibit No. 67, it is stated at Section I(A)(2)(b) that a good flashlight is a necessity and it can be a great equalizer if used properly.

Section I(A)(3) addresses the controversy about using flashlights to hit people in the head. It is further stated that the hands and arms should be the primary target. (Emphasis added.) That document does not say that they should be the only target. It goes on further to say that flashlights and batons can not be used as offensive weapons to make a suspect submit who is merely resisting arrest.

The issue at hand calls for a discussion of the word "force" as used in this Agreement and training manuals. Regulation 4501:2-6-02(V) states at Subsection (1) that a member shall be justified in using deadly force under the following circumstances: (a) to defend himself/herself from serious injury or death or (b) to defend another person from serious injury or death. Subsection (2) states that a member SHALL ONLY USE THAT FORCE NECESSARY TO EFFECT AN ARREST, detention or mission. (emphasis added.) A review of Joint Exhibit No. 3 reveals that deadly force means any force that carries a substantial risk that it will proximately result in the death of a person.

On the one hand it can be readily said that no deadly force was needed here because no one was in actual danger at the time of the head-hitting incident. On the other hand, it cannot be said that the ineffective touchings with the flashlight were any more vicious or harmful to the suspect than the fist fight with Trooper Phillips. It is not the intent of the Arbitrator to undermine the seriousness of hitting the suspect in the head but the actual effect was negligible on the suspect. The Grievant was not trying to kill or maim the suspect. He was trying to subdue a ferocious arrest resister. There was no evidence to indicate that the Grievant acted wantonly or maliciously in hitting the suspect with the flashlight. That action was a risky stance, not because the flashlight was "non-issue" equipment as alleged by the Patrol, but because of the increased chance that he could have hit another officer in

the face in those cramped quarters. It is the ruling of this Arbitrator that the Grievant did not use any more force than necessary in this instance.

There was a lot of testimony about the intended and permissible uses of flashlights. There is rarely any justification for using a flashlight in an aggressive manner. Defensive or protective uses of flashlights and batons are recommended whenever necessary to save oneself or others from a life-threatening situation. The Grievant's behavior must be viewed in light of the total picture. Although it can be argued that no Trooper was in actual danger, the potential was there because of the unbuckled and drawn guns that could have been grabbed by the actively resisting suspect. The Grievant exhibited evidence of proper training, when he shot the tires instead of the suspect, when the suspect appeared about to run him down. Although it was the belief of one officer that the suspect was struck after he was handcuffed, the majority of the testimony indicates otherwise. In the Investigatory Report (Company Exhibit No. 64), the suspect, himself, states that he was struck in the head three times before he was completely cuffed. (see Statement of Aug. 11, 1986). This Arbitrator is not recommending the use of flashlights in this manner but a close look at this particular incident leads one to the conclusion that the Grievant did not act irresponsibly under the circumstances. There was a lot of noise and confusion going on. The complete apprehension of the suspect occurred very quickly once he was stopped in his car. There was no time for cool, calculated determinations of the best course of action. The officers involved had to act on instinct. No officer used any more force than necessary to subdue and effect the arrest of this suspect.

It is the ruling of this Arbitrator that the Patrol acted in a discriminatory manner by charging only the Grievant with misconduct. He was not the only source of the injuries sustained by the suspect. In fact, there was no causal connection shown between the use of the flashlight and the injuries sustained by the suspect. His facial injuries could have easily occurred at any point of the struggle. There was no record of damage to the back of the suspect's head where he was struck by the Grievant. Nor was there any evidence of skull or brain damage sustained by the suspect.

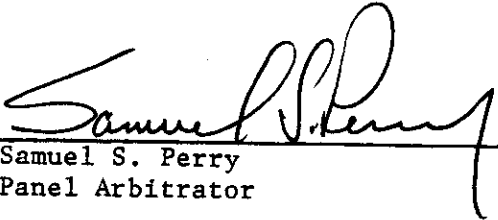
The Patrol repeatedly referred to the flashlight used by the Grievant as "non-issue" equipment. Testimony revealed that such heavy duty flashlights were not expressly forbidden as personal or Patrol equipment until August of 1986. An employer can not retroactively punish an employee for the use of equipment that was not illegal at the time of the offending incident.

Suspensions require "just cause". A review of the oral testimony and a thorough search of the agreement and the Training Manual and the Rules available to the Arbitrator all failed to reveal explicit or written prohibitions against the actions of the Grievant.

If it was the intent of the Patrol to set an example with the Grievant's suspension, that was improper behavior on their part under the terms of the Agreement. If the intent of the Investigatory meeting was to educate the Troopers as to acceptable behavior under the circumstances described herein, the proper route would have involved written directives to all Troopers warning them that any subsequent uses of flashlights would result in severe disciplinary action.

In conclusion, it is the ruling of this Arbitrator that the first grievance be denied because the Patrol did not violate the Agreement in conducting the investigatory session that produced the information that was the basis of the suspension decision.

It is the further ruling of this Arbitrator that the second grievance must be upheld because the Grievant was not suspended for "just cause" as required by the Agreement. The proper remedy is reimbursement of all lost wages.



Samuel S. Perry
Panel Arbitrator