

#161

AWARD OF ARBITRATOR

In the Matter of the Arbitration Between:)
)
THE STATE OF OHIO, DEPARTMENT OF)
HIGHWAY SAFETY, STATE HIGHWAY PATROL)
Columbus, Ohio)
)
-and-)
)
FRATERNAL ORDER OF POLICE,)
OHIO LABOR COUNCIL, INC.)

HARRY J. DWORKIN,
ARBITRATOR

RE: OCB CASE NO. 87-243
(Three Day Suspension
for Error in Judgment)

A P P E A R A N C E S

On Behalf of Employer

CAPT. J. M. DEMAREE	Advocate
LT. D. L. ANDERSON	Management Representative
LT. K. T. WOCHRMYER	Mansfield Post Commander
SGT. R. M. PARILLA	Mansfield Post Assistant Commander

On Behalf of Union

PAUL L. COX	Chief Legal Counsel
CATHY PERRY	Legal Assistant
ED BAKER	Staff Representative
DICK A. MILLER	Trooper
KEVIN A. TITLER	Trooper (Grievant)

THE ISSUE

WAS THE GRIEVANT DISCIPLINED FOR "JUST CAUSE" IN
CONFORMANCE WITH ARTICLE 19, SECTION 19.01 OF THE
COLLECTIVE BARGAINING AGREEMENT OF THE PARTIES?

IF NOT, WHAT SHALL THE REMEDY BE?

PRELIMINARY STATEMENT AND BACKGROUND:

The dispute is chiefly concerned with the issue of "just

just cause. In addition to challenging the basis for imposition of discipline, the F.O.P. has urged that in any event, in light of the totality of the circumstances, the three day suspension was punitive in effect, and excessive.

There is no serious conflict as regards the occurrence that gave rise to the decision to impose discipline. The grievant is a nine year veteran of the State Highway Patrol. During his entire career he has been assigned to the Mansfield Post, in Richland County, Ohio. Other than the instant discipline, the grievant has had a very favorable work record. There is no evidence of any prior infractions, or conduct that resulted in discipline.

The incident that prompted an investigation, and culminated in a decision to impose a three day suspension occurred on May 30, 1987, on State Route 39 while the grievant was on patrol duty. The grievant's assignment on the afternoon in question was to check for traffic violators, and to issue citations where the circumstances warranted. In the course of the grievant's activity on the afternoon in question, he stopped a driver for exceeding the speed limit, and issued him a citation. However, a few minutes after the traffic violator had been released, the grievant discovered that he had left his driver's license on the front seat of the patrol car. It appears further that, the grievant realized that in operating a vehicle without a driver's license, the individual would be subject to a further violation. The grievant thereupon decided to overtake the driver for the ostensible purpose of returning his driver's license, and thereby protecting him against the possibility of a further violation. Other alternatives that were available to the grievant were, to mail the driver's license to the individual's address which was known to the grievant inasmuch as it was recorded on a copy of

post notifying the driver that he could retrieve his driver's license at the patrol post. However, the grievant elected to pursue the driver for the purpose indicated.

The evidence indicates that upon commencing his pursuit of the driver, the grievant turned on his red pursuit lights as well as his headlights. He pursued the driver along State Route 39 for a distance of some three miles, at which point he was involved in a collision with another vehicle that was in the process of making a left turn. The evidence clearly establishes that while in pursuit of the driver the grievant did not activate his siren, and, he was travelling at a rate of speed in excess of the normal speed limit.

State Route 39 is a four lane highway, with two marked lanes of traffic in each direction, divided by a clearly visible, double yellow line. Pursuant to state statute a vehicle, other than an emergency vehicle, is prohibited from crossing a double yellow line, and is required to comply with reasonable speed limits.

After the grievant had been traveling a distance of some three miles, in an attempt to overtake the vehicle he observed a van stopped in the inside lane of the northbound traffic, the direction in which the grievant was travelling. The grievant testified that the van had no directional signals on, and , he assumed that the van had stopped in order to permit the patrol car to pass on the left side. The grievant crossed the double yellow line in an attempt to pass the stopped van. At that point the van made a left turn intending to enter a private driveway on the westerly side of the highway and, a collision occurred between the two vehicles. The driver of the van sustained some minor injuries; both vehicles were damaged.

The State Highway Patrol conducted a thorough investiga-

that the grievant had "displayed poor judgment" and violated both the state statute, and existing Rules and Policy in that; (a) he attempted to pursue a vehicle, and in doing so, failed to activate his siren thereby denying to him the status of an emergency vehicle; (b) he crossed the double yellow line and was involved in a collision which resulted in both minor injuries and property damage, and had the potential for more serious consequences. The State Highway Patrol concluded that the grievant's infractions in the respects indicated warranted a substantial measure of corrective discipline, which resulted in the imposition of a three day suspension.

The grievant, and Union, deemed the discipline unwarranted, and the penalty excessive. The Union charged that the State Highway Patrol failed to observe the standards of progressive discipline as set forth in Section 19.05; that the degree of discipline was at variance with past practice, and constituted disparate treatment. The Union charge that; "this suspension is without just cause and is inconsistent with the discipline imposed on other troopers for the same or similar violations." Relief is requested in the form of an award declaring that the suspension was not for just cause, and that the grievant be reimbursed for his lost wages.

APPLICABLE PROVISIONS OF THE AGREEMENT:

ARTICLE 4 - MANAGEMENT RIGHTS

Except to the extent modified by this Agreement, the Employer reserves exclusively all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to the following:

- (1) Determine matters of inherent managerial policy which include, but are not limited to

utilization of technology, and organizational structure;

- (3) Maintain and improve the efficiency and effectiveness of governmental operations;

- (5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote or retain employees;

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.

19.03 Length of Suspensions

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

19.04 Pre-suspension or Pre-termination Hearing

When the Employer initiates disciplinary action which is covered by this article, written notice of a pre-disciplinary hearing shall be given to the employee who is the subject of the pending discipline. Written notice shall include a statement of the charges, recommending 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.

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. Suspensions;

However more severe discipline (or a combination of disciplinary actions) may be imposed at any point if the infraction or violation merits the more severe action.

ARTICLE 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.

In addition to the provisions appearing in the collective bargaining agreement, there are in effect Rules and Policies drafted and promulgated by the State Highway Patrol pursuant to its express, and reserved managerial authority entitled, "Administrative - Operations and Policy", including provisions that deal with the operation of patrol cars:

Safety is our first consideration in patrol car driving. We are most visible to the public when operating a patrol car and going about our duties. We all must portray the leadership role that is expected of us as members of the division, not only by displaying safe driving habits, but in fuel conservation. Each member is expected to apply common sense rules to driving which will insure the safe operation of a patrol car and conserve as much energy as possible under the circumstances.

It is impossible to formulate a rigid set of rules to govern the operations of the State Highway Patrol motor vehicles when so many variables exist. However, certain guidelines must be established to insure uniform statewide operations and a clear understanding of what is expected of each patrol driver. These guidelines, or simple "do's" and "don'ts", are as follows:

4. All traffic laws, signs and signals will be obeyed except when operating under emergency conditions.

5. ***

Please remember no duty is so important and no call so urgent that we cannot proceed with caution and arrive safely.

The use of emergency equipment while in pursuit or "clocking" a violator is not mandatory unless existing traffic, road or weather conditions render it reasonable and prudent to use such equipment.

Patrol cars will not be driven across or through the medial strips on divided highways except in extreme emergencies. The marked crossovers will be used to change directions.

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

(B) Performance of Duty

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

In addition to the above the parties, during the course of the arbitration hearing cited the following provisions of the Ohio Revised Code:

4511.03 Emergency vehicles to proceed cautiously past red or stop signal.

The driver of any emergency vehicle or public safety vehicle, when responding to an emergency call, upon approaching a red or stop signal or any stop sign shall slow down as necessary for safety to traffic, but may proceed cautiously past such red or stop sign or signal with due regard for the safety of all persons using the street or highway.

The prima-facie speed limitations set forth in Section 4511.21 of the Revised Code do not apply to emergency vehicles or public safety vehicles when they are responding to emergency calls and are equipped with and displaying at least one flashing, rotating, or oscillating light visible under normal atmospheric conditions from a distance of five hundred feet to the front of the vehicle and when the drivers thereof sound audible signals by bell, siren, or exhaust whistle. This section does not relieve the driver of an emergency vehicle or public safety vehicle from the duty to drive with due regard for the safety of all persons using the street or highway.

4511.45 ***

This section does not relieve the driver of a public safety vehicle from the duty to drive with due regard for the safety of all persons and property upon the highway.

4513.21 Horns, sirens, and warning devices.

...Every emergency vehicle shall be equipped with a siren, whistle, or bell. Any vehicle may be equipped with a theft alarm signal device which shall be so arranged that it cannot be used as an ordinary warning signal. Every emergency vehicle shall be equipped with a siren, whistle, or bell, capable of emitting sound audible under normal conditions from a distance of not less than five hundred feet and of a type approved by the director highway safety. Such equipment shall not be used except when such vehicle is operated in response to an emergency call or is in the immediate pursuit of an actual or suspected violator of the law, in which case the driver of the emergency vehicle shall sound such equipment when it is necessary to warn pedestrians and other drivers of the approach thereof.

POSITION OF STATE HIGHWAY PATROL:

The State Highway Patrol points out that the grievant had other means available to him to return a driver's license, including mailing same, or calling by telephone. The grievant

Highway Patrol did not base its discipline on the grievant's choice of methods; rather, the discipline was imposed on the ground that the grievant was involved in a traffic accident and, the "totality of circumstances" indicated that he exercised poor judgment, and violated both the state statute and applicable Rules and Policies.

The State Highway Patrol concluded that the grievant, while attempting to pursue the driver, and while proceeding north on S.R. 39 at a speed in excess of the normal speed limit, failed to activate his siren, as well as his flasher lights. The grievant proceeded to cross the double yellow line in order to pass another northbound vehicle which was in the process of making a left hand turn into a private driveway, and resulted in a collision. The State Highway Patrol concluded that the grievant displayed poor judgment, and violated both the state statute, and applicable rules governing the operation of patrol vehicles.

The grievant had been adequately informed while undergoing training as a cadet concerning his obligation to comply with the Division's Rules and Regulations, and had received a copy of this document. Moreover, as a nine year veteran the grievant had extensive experience in operating a patrol car, and had been fully apprised of his obligations and responsibilities. Other officers had been disciplined for errors in judgment upon being involved in vehicle accidents.

The State Highway Patrol reasons that:

"...In order for the Ohio State Highway Patrol to effectively promote highway safety, troopers must obey the same laws which they are sworn to uphold." (Employer brief, page 11).

Pursuant to an extensive and thorough investigation, it was determined that the grievant was at fault in the accident, and that his behavior warranted discipline.

As regards the Union's claim that the three day suspension

troopers found to have operated their vehicles in an inefficient manner, and involved in patrol car accidents were not similarly disciplined, the State Highway Patrol responds as follows:

"...The fact that other trooper's who were involved in similar incidents were responding to valid emergency situations would tend to make a clear cut distinction between the types of discipline imposed.

The fact the Employer does suspend employees for inefficiencies related to patrol car accidents was clearly substantiated by both testimony of Lieutenant D. L. Anderson, Sergeant R. M. Parilla, and Stat's Exhibit G.3. The Union has attempted to water down the seriousness of the grievant's accident through it's introduction of evidence, namely Union Exhibit 2, wherein they list numerous accidents that resulted in lesser discipline that that imposed on the grievant. What the Union failed to point out was the fact each case is evaluated individually through a series of commands to determine the degree of negligence prior to the imposition of discipline. No two accidents are the same and it would therefore be somewhat presumptuous to have one set penalty for all situations. The totality of the circumstances must be weighed in each case, as was done in the case at hand." (Employer brief, pages 13 & 14).

The State Highway Patrol concludes that based on the "totality of circumstances" relating to the grievant's behavior, and involvement in a collision with another vehicle, the three day suspension was warranted, and for just cause. The evidence establishes "gross error in judgment" in the manner in which the grievant operated his vehicle while in pursuit of another driver. The grievant had taken an oath to "enforce the traffic laws of the state and to promote highway safety and should not have considered the course of action taken by [him] on the evening of May 30, 1987." In light of the seriousness of the grievant's offense, his total disregard for highway safety, and the inherent potential for serious consequences resulting from such behavior, just cause clearly existed for discipline:

"The grievant's total disregard for the safety of himself, his equipment, and other motoring public

POSITION OF FRATERNAL ORDER OF POLICE:

The text of the grievance acknowledges that a two vehicle accident occurred on May 30, 1987, on S.R. 39, in Richland County, between the grievant's patrol car and another vehicle. However, the grievance alleges that the three day suspension was excessive under the circumstances, particularly since, "this is my first chargeable accident during my [nine year] career." The grievance states further that, "past practice shows clearly that this [discipline] is excessive." Relief is requested in the form of expungement of the discipline, together with reimbursement for lost pay.

The Union has maintained throughout that the three day suspension is at variance with Section 19.05, which sets forth a progressive system of discipline that "ordinarily" will be applied. Section 19.05 sets forth that, the initial disciplinary measures are, (1) verbal reprimand, and (2) written reprimand, prior to consideration of a suspension, or more severe discipline. The Union maintains that the three day suspension meted out to the grievant for his first offense, did not comport with the concept of just cause, and was at variance with past practice.

The Union does not dispute that there are in effect a set of Rules and Regulations, contained in management's promulgated "Administrative - Operations and Policy". However, Section 21.02, governing "Application" requires that the Employer apply and interpret all work rules and directives "uniformly as to all members, and consistent with provisions of the agreement", including the requirement of "just cause" (Section 19.01), and the contractually mandated progressive system of discipline.

The Union has thoroughly assessed the circumstances relating to the grievant's involvement in an on-duty accident and

whatsoever. In any event, the three day suspension was violative of the provisions of the agreement (Section 19.05 - Progressive Discipline), and was excessive. Should the Arbitrator determine that some discipline was warranted, in light of the grievant's exemplary past record of performance during his nine year career with the State Highway Patrol, a verbal reprimand would have been appropriate, and in no event more than a written reprimand.

The Union points out that:

"...The grievant was attempting to catch up to the violator to return the driver's license and had his pursuit lights and headlights on. Several vehicles had pulled over to let the patrol car pass. A van driven by Carol Linn was stopped in the left lane. The grievant did not see any turn signals on the van so he assumed it had stopped to let him pass. With his pursuit lights on and while blowing his horn, the grievant attempted to pass the van on the left, going left on a double yellow line. At this point, the van turned left and an accident occurred. There was damage done to both vehicles and minor injuries to the driver of the van..." (Union brief, page 2)

The grievant represented before the Arbitrator that in a addition to having his pursuit flasher light on, he blew his horn as he approached the van that appeared to be stopped in the highway. Inasmuch as the grievant had activated his flasher light, and sounded his horn, he complied with the Administrative Rules and Regulations, and was operating a legally characterized "emergency vehicle". Moreover, the grievant was attempting to restore a driver's license to one who had previously been stopped for a traffic violation and therefore, he was engaged in a proper objective, as distinguished from being on a "frolic of his own".

"...The grievant decided it would be better to return the driver's license immediately because the violator lived 25 miles from the Post and he should not drive without his driver's license.

The grievant had his pursuit lights on and blew his horn as he attempted to pass the van. The

The F.O.P. points out that "this is the first time that the grievant has been involved in a chargeable accident", during his career spanning nine years. His record is unblemished; he received no other discipline for driving infractions "and should not have been disciplined this time."

The Union maintains that, in imposing a three day disciplinary suspension management itself failed to apply the Rules and Regulations in a uniform and consistent manner. Pursuant to evidence adduced by the Union, a number of troopers have been involved in patrol car accidents at the Mansfield Post over the last three years; however, "none of these other troopers received a suspension. Most only received a written reprimand." In some instances the collisions were of a far more serious nature, as compared to the occurrence involving the grievant. The F.O.P. concludes as follows:

"The employer is in violation of Sections 19.01, 19.05 and 21.02 of the collective bargaining agreement. The grievant was suspended for three (3) days for a violation of policy. This suspension is without just cause and is inconsistent with the discipline imposed on other troopers for the same or similar violations. The F.O.P. asks that the arbitrator rule that the employer has violated the collective bargaining agreement, that the suspension be overturned and that the grievant be reimbursed the three (3) days of lost wages." (Union brief, page 5).

ARBITRATOR'S FINDINGS AND OPINION:

The parties have recognized the right of the State Highway Patrol to manage and operate its facilities and programs. The "Management Rights" clause encompasses the right to promulgate reasonable rules and regulations for the purpose of "maintaining and improving the efficiency and effectiveness of governmental operations", and subject further that such rules and regulations

Section 21.02, they must be applied and interpreted "uniformly as to all members."

Pursuant to both its contractual, and inherent authority, the State Highway Patrol has promulgated the "Administrative - Operations and Policy" governing the operation of patrol cars by troopers. Included in the safety rule is the requirement that, "each member is expected to apply common sense rules to driving which will insure the safe operation of a patrol car and conserve as much energy as possible under the circumstances." The rule goes on to state that: "It is impossible to formulate a rigid set of rules to govern the operations of the State Highway Patrol motor vehicles when so many variables exist." The Rules and Regulations governing patrol car operation limits the speed of a patrol car, other than emergency vehicles, to a speed "not to exceed 55 mph." Further, "all traffic laws, signs and signals will be obeyed except when operating under emergency conditions."

The requirement that state troopers observe the Rules and Regulations is not disputed by the F.O.P., or any of its members. The Rules make reference to the use of emergency equipment "while in pursuit or clocking a violator," which is not "mandatory unless existing traffic, road, or weather conditions render it reasonable and prudent to use such equipment."

The Arbitrator has carefully reviewed the Rules and Regulations governing operation of patrol cars and must conclude that they are in all respects reasonable, and the purpose and object therein expressed, and sought to be achieved, namely, "the safe operation of a patrol car" are reasonable and well within the legitimate and recognized authority of management.

The aforesaid Rules and Regulations are to be read, construed, and applied in pari materia with the applicable traffic laws as prescribed by the Ohio Legislature. Included among these

The statute provides that speed limitations applicable to the operation of vehicles generally,

"do not apply to emergency vehicles...when they are responding to emergency calls and are equipped with and displaying at least one flashing light...and when the driver's...sound audible signals by bells, siren, or exhaust whistle."

There is an overriding provision in the Traffic Code to the effect that, operators of emergency vehicles are not relieved "from the duty to drive with due regard for the safety of all persons using the street or highway."

On the basis of the facts adduced by the evidence before the Arbitrator it must be concluded that, in pursuing a traffic violator for the purpose of returning his driver's license the patrol car operated by the grievant did not qualify as an emergency vehicle as defined by state law. Although the grievant was engaged in a legitimate purpose, he was not responding to an emergency call, nor was his vehicle operating both the flasher light, and siren (although it is disputed as to whether he was sounding his horn). The fact is, that, while the grievant was in "hot pursuit" of another vehicle, he mistakenly concluded that a van ahead in his lane of travel had stopped for the purpose of permitting him to pass. The grievant thereupon crossed the double yellow line. His action was an unsafe maneuver under the circumstances, and in violation of state law. His driving error resulted in a collision with the van, and caused minor injuries, and property damage to both vehicles.

On the basis of all of the circumstances the conclusion is warranted that the grievant violated both the applicable Rules and Regulations governing patrol car operation, and state statutes. The Arbitrator is persuaded from the evidence that the grievant thereby rendered himself subject to an appropriate

Arbitrator finds that the Employer fully complied with the requirements of Section 19.04 of the agreement in that, prior to imposing discipline the pre-disciplinary procedure was followed, including a written notice and statement of the charges, and a hearing before a hearing officer.

In the judgment of the Arbitrator the crux of the dispute which remains to be resolved is, whether, the three day suspension by way of discipline was warranted, consistent with just cause, and in conformity with the requirement of uniform interpretation and application of disciplinary policies, rules and regulations. The Arbitrator has heretofore noted that the evidence clearly warranted the imposition of some measure of discipline.

The Arbitrator acknowledges that it is difficult to draw a precise line as to the measure of discipline deemed appropriate in any given situation; nevertheless, in each case the "totality of circumstances" must be assessed, evaluated, and considered, with the overriding purpose of conforming to the principle of "just cause". The parties have contractually mandated that progressive discipline "will be ordinarily followed", (Section 19.05), and have provided that a verbal reprimand, and written reprimand, should "ordinarily" be considered prior to consideration of a suspension. The clear intent, and purpose as expressed in Section 19.05, is to utilize corrective measures, rather than punitive measures; that discipline should be designed to correct an employee's demonstrated deficiencies, and rehabilitate him except in extraordinary cases where it would appear that a more severe measure of discipline would be appropriate.

In the instant case the Arbitrator is persuaded that the three day suspension was excessive, and failed to take into consideration certain mitigating circumstances that indicate that a lesser measure of corrective discipline would be appropriate.

is a nine year service officer, without any prior blemish appearing on his personnel file. He had never previously been involved in a motor vehicle accident of any kind. It is clear that he is not "accident prone", or disposed to disregard rules and regulations. In the instant case, the grievant made a mistake, an error in judgment. The State Highway Patrol was warranted in concluding that he conducted himself in an inefficient manner, in violation of applicable rules. He exercised poor judgment in attempting to pass the stopped van under the circumstances that existed, and of which he should have been aware. The grievant was not operating an "emergency vehicle" so as to be exempt from compliance with the traffic laws.

The Arbitrator is persuaded, however, that in imposing a three day suspension the Employer was itself in violation of the recognized standard of progressive discipline as mandated by the agreement. The grievant had an excellent work record. He had received commendations from his superiors for exemplary performance, including service as a driving instructor at the Academy School.

Finally, there is evidence before the Arbitrator to the effect that, other officers have been involved in as serious, or even more serious vehicle accidents, and were assessed lesser forms of discipline, including oral and written reprimands.

The Arbitrator concludes that the three day suspension should be converted to a one day suspension, together with a written reprimand, and that the grievant should be reimbursed for two days loss in earnings. In determining that a one day suspension would be appropriate, the Arbitrator feels that management should be accorded the right to impose the maximum measure of corrective discipline consistent with the "totality of the circumstances", and in accordance with the principle of just cause.

Respectfully submitted,

A W A R D

I.

The evidence establishes that the State Highway Patrol had just cause for imposing a measure of corrective discipline by reason of the grievant's failure to observe established Rules and Regulations governing the safe operation of a patrol car on the public highway, and that he operated his vehicle at a speed in excess of the reasonable speed limits, and crossed a double yellow line although the grievant's patrol car did not qualify as an emergency vehicle;

II.

In light of the totality of the circumstances the grievant rendered himself subject to corrective discipline consistent with "just cause" and the progressive disciplinary procedure mandated by the agreement;

III.

On the basis of the evidence indicating that the grievant exercised poor judgment in the foregoing respects, and was directly responsible for the collision, and, in view of the grievant's exemplary work record during his nine years of service, his behavior warranted a corrective measure of progressive discipline in the form of a one day suspension, coupled with a written warning; the grievant's personnel file will so indicate, together with reimbursement for two days of lost earnings.

AWARD SIGNED, ISSUED AND DATED AT CLEVELAND, CUYAHOGA COUNTY, OHIO, THIS 9th DAY OF MARCH, 1988.


HARRY J. DWORKIN, ARBITRATOR