Plaintiff's

FILE COPY

ARBITRATION

OPINION AND AWARD

Hearing
2-25-88

STATE OF OHIO
OFFICE OF COLLECTIVE BARGAINING
STATE HIGHWAY PATROL

and

FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC.

OCB Grievance No. 87-2748

April 7, 1988

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

APPEARANCES: FOR THE FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL, INC.: James A. Budzik, Esq., Fraternal Order of Police, Ohio Labor Council, Inc., 3360 E. Livingston Avenue, Columbus, Ohio 43227

FOR THE STATE OF OHIO, OHIO HIGHWAY PATROL: Captain John M. Demaree, Personnel/Labor Relations, Ohio Highway Patrol, 660 East Main Street, Columbus, Ohio 43215

ISSUE

The issue was stipulated as follows:

Was the grievant disciplined for "just cause" in accordance with Article 19, Section 19.01 of the collective bargaining agreement between the parties? If not, what shall the remedy be?

B A C K G R O U N D

Grievant Mary Ann Simon was removed (discharged) as a Trooper by letter dated December 4, effective December 5, 1987, of Mr. William Denihan, Director of Highway Safety. In pertinent part, it is as follows:

> "***Your removal is for violations of the Rules and Regulations governing the State Highway Patrol: Sections 4501:2-6-02 (B) (4), 4501:2-6-02 (E), 4501:2-6-02 (I) and 4501:2-6-05 (B) (3) of the Administrative Code to wit: while operating Ohio State Highway Patrol car #1494, on State Route #14 in Portage County, and in the parking lot of the Ravenna Patrol Post, you were found to be in an intoxicated condition and subsequently charged with violating Section 4511.19A1 O.R.C.
>
> You also made false statements to a superior officer in that you denied operating Patrol car #1494 and you permitted a dispatcher to operate Patrol car #1494 without the authorization of a supervisor.***"

On the latter date, Grievance was filed, as follows:

> "Article 7, Article 19 Section 19.01
> Statement of Grievance (Time & Date, Who, What, Where, How)
> Be Specific: I was discharged effective 12-5-87. This removal was done without just cause.
> Remedy Requested: That I be reinstated with back pay, and my record expunged."

The Step III response of the Employer, in pertinent part, was as follows:

> "The circumstances leading to the termination of the employee are so aggravated that the disciplinary action is inherently reasonable. A law enforcement agency charged with the obligation to provide a Highway Safety function cannot tolerate the type of conduct giving rise to discipline in this case. The grievant's actions undoubtedly brought discredit to the agency. However, the most unacceptable aspect of her conduct was the potential liability her actions created for the agency, the State of Ohio, and most importantly the citizens of this state. Police officers are held to a higher standard of conduct than the average citizen. A marked patrol car represents safety and protection to the citizens using our highways. The agency responsibility rests in maintaining the respect and

trust the public has in the Ohio State Highway Patrol. Therefore, the only reasonable course of action in this case has been followed.

The seven (7) points to substantiate "just cause" have been proved beyond any standard of doubt by the Employer.

Therefore, the grievance must be denied."

The formal proceeding was initiated by letter dated November 9, 1987 of Grievant's Commanding Officer, Captain Lamantia, as follows:

"It is herewith stated that reasonable and substantial cause exists to establish that Trooper Maryann (sic) Simon has committed an act or acts in violation of the Rules and Regulations of the Ohio State Highway Patrol, specifically of:

4501:2-6-02	(B) (4)	- Inefficiency
	(E)	- False Statements
	(I)	- Conduct Unbecoming An Officer
4501:2-6-05	(B) (3)	- Permitting Another Person (Non-Member) to Operate Patrol Equipment

It is charged that on November 5, 1987, at approximately 3:00 p.m., while operating an Ohio State Highway Patrol Car #1494 on State Route #14 in Portage County and in the parking lot of the Ravenna Patrol Post, Trooper Simon was found to be in an intoxicated condition. She was charged with Ohio Revised Code 4511.19A1, Driving a Motor Vehicle While Under the Influence of Alcohol.

It is also charged that Trooper Simon made false statements to a superior officer, to wit; denying that she operated Patrol Car #1494.

It is also charged that Trooper Simon permitted Dispatcher Joyce M. Csokmay to operate Patrol Car #1494, without authorization of a supervisor.

This act is bringing discredit to the Division and is contributing to a lack of good order and discipline necessary to efficiently manage the Division."

The incident leading to Grievant's discharge occurred on November 5, 1987.

She had called in that morning to say she was not well and that she didn't know whether or not she would report for work later that day for her assigned afternoon shift. In the afternoon, Lieutenant Paul Ash, Commander of the Ravenna, Ohio Post, received an inquiry from a local court about an affadivit that was missing from a court file. He started to contact Grievant, whose affadavit it was, when Grievant radioed to signal she was coming in to the Post. He watched for her, saw her turn from the road in the Patrol car assigned her and then into the parking lot, noting that she backed into a space slowly and only after making a correction in steering, and that she remained in the car for an unusually long time. When she emerged from it, he called to ask if she knew where the affadavit was and, on receiving a negative reply, told her to talk to the Dispatcher and make an effort with him to locate it. He was then called to the telephone and was occupied in his office for about a half hour. When he finished there, he walked in to the report room and found Grievant with head bowed. He noted an odor of alcohol in the room and on her breath. He summoned Sergeant Michael Guarnieri, who was also in the building and asked Grievant to take a test for blood alcohol. She refused the first suggestion and then all the other tests offered, including a hospital test with transportation furnished to and from. She did agree to take a test called "gaze nystagmus", a test that, by the expert testimony introduced by the Patrol, has found increasing but not complete acceptance in recent years. It operates on the premise that, as the eye follows a moving object, such as a pen, from side to side of the head, one under the influence of alcohol will show eye twitching in the progress, more pronounced between 45% deflection from a straight ahead axis to the extremities of eye movement toward the sides. The Lieutenant administered the test, following each eye separately, and estimated her blood alcohol to be 1.4%, + or - .1

In the process of all that, she was arrested and charged with violating Section 4511.19 (A) (1), Ohio Revised Code, which forbids one to drive while under the influence of alcohol or drugs. Later on, she appeared in court but was acquitted.

When asked in the interrogation of November 5 about drinking, Grievant first denied it and then said she had had one and a half brandies that day. She was then transported by the Lieutenant and Sergeant to her home, after they had stopped to talk to Grievant's friend, usually referred to as "Joyce", an off duty Dispatcher whom they found in a restaurant-bar about four-tenths of a mile from the Post. They then took Joyce along to Grievant's house. When they arrived there, they saw the auto of the Dispatcher friend parked there. They went into the house with Grievant and obtained her gun, badge and identification, observing in the course of it that she staggered at one time.

The Sergeant said that, on the way to her home, Grievant had hit the peak of her inebriation, head lolling and nodding off to sleep from time to time.

(The foregoing summarizes the testimony of the Lieutenant and Sergeant.)

Captain Stephen Lamantia, commander of the Patrol District in which the Ravenna Post is located, said that he had been concerned about Grievant for some time, that, about a year before, she had telephoned him on a day off for her about her "problems", which were all general in nature and which she would not specify in detail; that her speech being slurred, he drove to her home, was admitted and observed her simply gazing into the fish tank she had there, showing manifestations of drinking. He also noted empty beer cans in the kitchen. He pursuaded her to participate in the State's Employee Assistance Program, designed to help in the solution of employees' personal problems. As he understood it, she had then participated in such program for a few visits and then had stopped. Thereafter, he said, he had urged her again from time to time to renew her participation but she had consistently refused. On the 4th, the day before the incident, he said, he had talked to her and had suggested she should take a leave of absence to get a rest and to try to improve her health. She did undertake to change doctors as a result of that conversation.

Grievant testified that her friend, Joyce, had driven the car to a point quite near the Post on November 5 and that she, Grievant, had then driven it on into the lot. She said that she had had less than two cans of beer in the morning.

As to the Assistance Program participation the year before, she said she had gone to three sessions with a woman who had asked her personal questions about early problems in her life, but had never discussed alcoholism. She said she had started because of stomach problems.

During the period when the charges against her were being investigated in November 1987, she had started the Assistance Program again and had participated, finding the sessions to be helpful and from which she had learned a lot, but that her benefits allowing participation ended with her employment and, so, she had been forced to drop out. She also said that an Assistance Program involving one day a week was all right but that the suggested every day sessions were not.

Grievant acknowledged that she had been drinking on the day in 1986 when the Captain had come to her home and that she recalled his having contacted the Assistance Program for her.

Grievant also said that she had never contacted the Assistance Program herself but that when she restarted it in 1987, Mr. Edward Baker, Staff Representative of the FOP, had done so for her after he had urged her to try the program again.

Mr. Baker testified that he had talked to Lieutenant Anderson in the Personnel Section of the Patrol about the case and had believed an agreement was reached to suspend punishment of Grievant pending the outcome of Grievant's participation in the Assistance Program.

The FOP called Mary Sargent to testify as an expert on treatment for alcoholism. She said that discipline usually starts after treatment but that discipline is suspended during the treatment. About 50% of those participating, to her knowledge, had been helped by it but that they continued to participate through once a week counseling, A. A., etc. Some treatment, she said, requires in-patient work, others could progress as out-patients only. Those who start the program only to avoid discipline usually fail, she said, in that, for success, it is necessary to want the treatment.

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

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:

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

ARTICLE 18 - INTERNAL INVESTIGATION

§18.03 Chemical or Mechanical Tests

Chemical or mechanical tests may be administered to any bargaining unit member to determine their fitness for duty, when such tests are a part of an official internal investigation or when there is probable cause to believe the employee may be unfit for duty.

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 Suspension

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

§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.

ARICLE 41 =- EMPLOYEE ASSISTANCE PROGRAM

§41.04 Employees Covered under E. A. P.

The E. A. P. will be available to members of the bargaining unit and their immediate family (spouse and children). To the extent possible, the services of the E. A. P. will also be made available to employees who are temporarily laid-off, retired, or disabled.

§41.05 Scope of Coverage

Alcoholism, drug abuse, family or marital distress, social and relationship problems, mental or emotional illness, legal problems, financial problems, and related environmental conditions are illnesses or problems that can often be successfully treated or resolved. All employees with these problems or illnesses will receive assistance in locating treatment for these problems, or illnesses.

§41.06 Applicable Provisions

Nothing in this Article is to be interpreted as a waiver of other provisions or procedures contained elsewhere in this agreement.

§41.08 Expenses

Expenses incurred for treatment and hospitalization will be provided under group health insurance programs wherever possible. All payments to third parties for diagnosis or treatment not covered by group health insurance are the responsibility of the individual seeking and/or receiving treatment.

§41.09 Diagnostic Referral, and Case Management Covered by Community Services Centers

The cost of diagnostic, referral and case management services provided by the Community Services Centers wil be covered through third party reimbursement under the State health insurance plans made available to employees or by the individual seeking and/or receiving services.

§41.10 Leave

Leave will b authorized in accordance with the provisions of this Agreement for diagnosis and referral, motivational counseling, individual and group counseling appointments, treatment in a community treatment facility and other recovery services. Any and all provisions involving paid or unpaid leave may be used by employees participating in E. A. P. referrals.

§41.12 Confidentiality

Confidentiality of records shall be maintained at all times within the E. A. P. Information concerning an individual's participation in the program shall not enter his or her personnel file. In cases where the employee and the Employer jointly enter into a voluntary agreement, in which the Employer defers discipline while the employee pursues a treatment program, the employee shall waive confidentiality and the Employer shall receive regular reports as to the employee's continued participation and success in the treatment program.

P A T R O L R U L E S

4501:02-6-01 DEFINITIONS

(B) A member shall be considered "on duty" when:

(2) Acting pursuant to an order from a supervisor or engaged in carrying out any duty required of a member of the Ohio State Highway Patrol.

(3) Operating or being a passenger in motor equipment owned or leased by the State of Ohio.

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

(I) Conduct unbecoming an Officer.

(1) A member may be charged with conduct unbecoming an officer in the following situations.

(2) For all disorders and neglects to the prejudice or (sic) good order and discipline.

(3) For conduct that brings discredit to the Ohio State Highway Patrol and any of its members.

(K) Use of Alcohol

(1) A member shall not consume any kind of alcoholic beverage while on duty unless approved by the superintendent.

(2) A member shall not report for duty or return to duty showing any evidence or effects of alcoholic beverage consumption.

4501:02-6-05 EQUIPMENT

(B) Use of Equipment

(3) A member shall not allow any person to use or operate Patrol Equipment unless:

(A) It is necessary during an emergency condition.

(B) The member has been authorized to do so by a supervisor.

(C) It is necessary part of authorized repairs or maintenance.

4501:02-6-06 INTERNAL DEPARTMENTAL INVESTIGATION

(B) Internal Departmental Investigation

A member who is to be interviewed or questioned concerning the member's performance or fitness for office shall be informed that the interview or questioning is part of an official investigation and that the member is subject to disciplinary action, including dismissal, for failing to answer the questions or participate in any test necessary in the investigation. A member shall be advised that the answers may not be used against him in criminal proceedings, if, during the investigation, it is believed the member has knowledge of or participated in any criminal act which violates the laws of the United States, the State of Ohio, or any of its political subdivisions. The member shall be advised of all rights applicable to any other person under similar conditions.

(C) Investigative Review

If at the conclusion of the investigation it is determined that there is probable cause for the filing of a statement of charges, the district or section commander shall review the facts leading to the charges with said member. The member shall be afforded the opportunity to provide additional facts or witnesses, and also to provide an oral or written statement. If any additional evidence is provided, the report shall be returned for necessary further investigation. When the investigation is finalized, the district or section commander may, with the approval of the superintendent, cause a statement of charges to be filed. If charges are filed, a member will be furnished a copy of such statement of charges, and shall be informed that he/she will receive a written notice of the intended action of the director of the Department of Highway Safety.

Such notice will be given to the employee at least three (3) working days in advance of the pre-suspension or pre-termination hearing and said notice shall contain the following:

(1) Explanation of the charges and type of evidence.

(2) The date, time and place of the pre-suspension or pre-termination hearing.

(3) The right to be accompanied by counsel or other representative of his/her choice.

(A) Said counsel or representative shall act only in an advisory capacity and shall not participate in the presentation of evidence or questioning of witnesses.

(4) The right to cross-examine any witnesses.

(5) The right to have witnesses present to offer relevant testimony on behalf of the member.
(6) The right to waive such hearing and accept the Director's intended disciplinary action.

O H I O E M P L O Y E E A S S I S T A N C E
P R O G R A M

IV. POLICY
Another cornerstone of the Ohio Employee Assistance Program is that participation is completely voluntary. This program is not part of the disciplinary process. No employee or family member can be forced or threatened into joining the program. No record or document sent to a personnel office will indicate that an employee has declined participation, that an employee has been offered the EAP, or is, in fact, a client.

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

PATROL POSITION

Grievant's termination was warranted under the extreme circumstances present here as it would have been with respect to any fellow employee. The circumstances were serious and, indeed, aggravated.

The Patrol is a law enforcement agency whose responsibility cannot be discharged under circumstances disclosed here. Her actions brought discredit to the Patrol and potential liability on its part to her for any mistakes as well as to members of the general public. Police officers necessarily must meet a higher standard of conduct than that of the ordinary citizen.

It is obvious that the Grievant was acting under the influence of alcohol and, in fact, has an alcohol problem. Efforts to assist her in the past have proved fruitless and she has consistently refused to accept treatment for her problem.

It was not until after she was notified she was facing termination that she entered the Assistance Program, having dropped out of it more than a year before. And even in the latest attempt, she dropped out early.

All the foregoing establishes just cause for the termination.

FOP POSITION

The Patrol must bear the burden of showing a serious wrongdoing by Grievant. Even assuming wrongdoing, the discipline imposed was too severe. Discipline must be imposed progressively and here Grievant had had no prior discipline connected with this type of offense.

"Just cause" was not established in terms of the charges made, i. e., inefficiency, making false statements and conduct unbecoming an officer. The Patrol's arrest of Grievant does not demonstrate just cause. She was acquitted of the offense charged. She engaged in no fights nor was she disrespectful to her superiors. In this connection, it must be stressed that she was off duty at the time of all the events charged.

She was also charged with having permitted an off duty Dispatcher to operate a Patrol car. That point was simply not proved.

She was accused of making false statements but there was no hard evidence that that was true. Inconsistent statements do not warrant discharge.

The Patrol failed to abide by the agreement to defer discipline that it entered into between Lieutenant Anderson and Mr. Baker. Even though Grievant agreed to undertake treatment, she was forced to stop because of her termination when the financial support for it was withdrawn.

Some issue was made of prior abuse of sick leave but Grievant was never even reprimanded for that. It is too late now to drag that in.

In terms of penalty, the Supreme Court of Ohio has held that alcoholism is a handicap and not disciplinable in itself. (See Hazlett v. Martin Chevrolet, Inc. 25 O.S. 3rd 279.)

D I S C U S S I O N

It is not necessary to review the evidence in detail in this case. Grievant acknowledged that she drank before her first recourse to the Assistance Program in 1986. Moreover, she acknowledged at the hearing that she had had beer on the day of the incident. She also had told her supervisor on the day in question that she had drunk brandy.

The important and overwhelming evidence by the Lieutenant and Sergeant on duty on November 5th demonstrated, by test and by observation of the two, that she was under the influence when she went to the Post on that day. In fact, she did not deny it, contenting herself with describing a small amount of alcohol she had drunk. Under the evidence, the conclusion that she was inebriated is inescapable. The amount of alcohol imbibed is thus inconsequential. Some individuals have low tolerance, others high. The result is the important thing here, not the amount.

In passing, it must be observed, however, that the charge of actions unbecoming an officer cannot be substantiated on this evidence. She did not bring the Patrol into disrepute in the public eye since, as far as the evidence showed, she did not display her condition to the general public outside of the Patrol Post. Her actions complained of all occurred in the presence of the Lieutenant, Sergeant and Dispatcher friend only.

The other charges, inefficiency, false statements and permitting another to operate Patrol equipment are all really tied to her condition that day. She certainly didn't operate the equipment efficiently as the Lieutenant observed. She made different statements respecting alcohol, i. e., that she hadn't had any and then that she had had one and a half brandies. Strictly speaking, one of them is false. In itself, it may not be serious but the change reflects her condition that day, one statement not jibbing with another because the mind was befogged.

As to permitting another to drive the Patrol car under non-emergency conditions, she said at the hearing that "Joyce" had driven her to a point near the Post. Since Grievant brought the car in, someone had to have driven it to the place where she took over. Thus, there is no doubt that that charge is valid.

The principle charge is that she was in an intoxicated condition while operating a Patrol car on the highway and in the parking lot. The operation in the parking lot is clearly correct. Evidence about operation on the highway is not as direct. The Lieutenant testified, however, that he had seen her drive in from the highway and Grievant admitted that she had driven on a street approaching the Post. The necessary inference then is that that charge is correct.

The other basic charges here really all relate to her condition. One in that condition does tend to vary his or her account of events, is certainly inefficient and probably has another person drive instead of taking risks herself.

As to the criminal charge, she was acquitted, as noted above. The acquittal cannot be questioned. On the other hand, it is well established that an arbitrator is not bound by a finding of another tribunal. In a criminal case, particularly, the charge is a technical one and must be proved under the statutory standards. Most importantly, however, an arbitrator must rule on the basis of the evidence before him and the contractual charges levied. On that basis, as indicated above, the Grievant was shown clearly to have been under the influence and to have operated a Patrol car while in that condition, even if only for a short distance.

All of the valid items charged here occurred while Grievant was on duty. She wasn't working her regular shift, it is true, but under the rule on "duty", she was in charge of and driving a Patrol car and she had been assigned by her superior officer to try to find the missing affadavit for which she was responsible. Thus, under the rule, she was on duty and, under the instruction later, was placed on duty. (See Definitions in the Rules.) It is the former alone, of course, that satisfies the charge levied against her.

Regardless of technicalities, however, it is self-evident that a Trooper ought not to operate an automobile while under the influence. To operate a Patrol car in that condition is clearly impermissible conduct, whether on duty or off.

Intoxication under the circumstances shown is a very serious offense. It is more so when a police officer is involved. As such, the Patrol's basic findings in this case are valid and must be approved.

That raises the question of the appropriateness of the penalty.

In terms of Grievant's history, there is much to support the Patrol's decision to discharge. It had attempted to have Grievant participate in the State's Employee Assistance Program, actually enrolling her in it in 1986 and repeatedly urging resumption of treatment after Grievant withdrew. Since such program is voluntary, as far as the potential patient is concerned, the Patrol could not coerce her. Its role, thus, was confined to urgent advice, all of which was spurned. In that respect, it did not fail in its ordinary duties to foster rejuvenation and could reasonably feel it had done all it could, leaving it no recourse except discharge. While the feeling is reasonable, the Agreement calls for more.

Thus, the matter must be looked at in the broader context of the contractual requirement that discipline must be progressive generally, while it need not be progressive always.

Ordinarily, thus, unless immorality is involved, for example, the progressive type is preferred.

The Grievant did worry about keeping her job and had some recognition that she was running risks of losing it, worries that she communicated to Captain Lamantia. At the same time, it must be recognized that worry and even fear of an event is not as effective as the experience of an actual penalty. If that were not so, mere oral reprimands would always suffice as preliminaries to discharge. Suspension here is an intermediate step.

The salutary effects of realizing actual loss of income as an incentive to correction cannot be denied. A suspension, thus, can sometimes do more than all the words in the world. It cannot be discounted or ignored on the basis of mere judgment that it wouldn't be effective.

The Patrol was aware that she had a problem, otherwise it wouldn't have urged her participation in the Assistance Program so repeatedly. Although there may not have been an earlier manifestation of inebriation within the observation of the superior officers, they knew, as it was testified, that her performance was erratic. Thus, they knew she did a good job when with a Sergeant and a "lousy" job when she was by herself. They believed her problem and her performance were related but they took only ineffective steps, talk, to impress on her that she had to improve her ways, steps that could have involved severe discipline ultimately.

It is also reasonable to believe that the presence of alcohol on her breath and in her conduct could have been detected by greater alertness and resolution on the part of Grievant's superiors. (One can't avoid the odor of alcohol on the breath all the time when one has a drinking problem.)

The result is that Grievant was suddenly confronted with discharge without any prior discipline that might have impressed on her concretely that action on her part was imperative.

Taking these considerations, contractual and factual, into account, Grievant should not have been discharged in this instance. At the same time, it is clear that she committed a serious offense for which punishment was in order. A suspension, thus, is appropriate.

Under the Agreement, suspension is limited to ninety days. The full ninety is in order here to impress on her the seriousness of the offense and of the urgent need for improvement.

To order her back to work after the expiration of the ninety days would be most inappropriate here, however, where an alcoholic condition has been shown and her own safety and that of the general public depends on her sobriety and full attention. To order back pay in the interim between the end of the suspension and this order, however, would be equivalent to a position that she should have been so reinstated. Thus, after the suspension, she should be considered to be on a leave of absence for reasons of health.

Thus, it is rcommended that Grievant participate fully in the Employee Assistance Program and, if and when she can resume her employment as a Trooper, she should then be returned to her job. If she should drop out of the Program or fail to improve, then the termination must be made effective.

Thus, the order here involves a contingency that depends entirely on Grievant's own efforts and conscientious endeavors. If she is incapable of success, she should seek other employment. In the meantime, jurisdiction must be retained to carry the order into effect.

A W A R D

1. Grievance, dated December 5, 1987, of Mary Ann Simon, is hereby granted in part.

2. Grievant's status shall be altered, the separation of employment erased and, in its stead, a ninety day suspension beginning December 5, 1987 shall be substituted.

3. Following the period of suspension, prescribed in the preceding paragraph, Grievant shall be considered to have been placed on leave of absence for reasons of health, which leave of absence shall not exceed one year from the date of the end of the period of suspension.

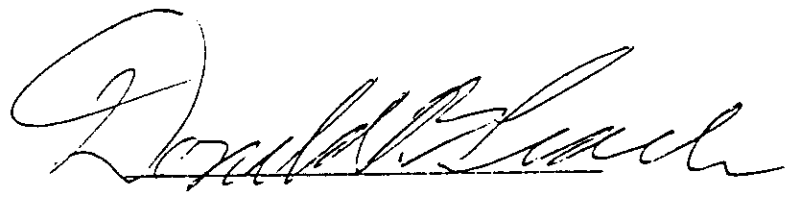
4. If by the end of the year's period prescribed in the preceding paragraph, Grievant fails to submit substantial evidence affording reasonable prognosis of recovery from her condition, she shall be separated from her employment.

5. If the Patrol is officially informed during said period of one year that Grievant has withdrawn or been terminated from the Employee Assistance Program, it is hereby authorized to separate her from employment as of the date of the notice.

6. If Grievant, within the one year period or at its conclusion, submits substantial evidence affording a reasonable prognosis of recovery from her condition, the Patrol shall restore her to employment as a Trooper with seniority and benefits restored to the same extent as they are restored to others in the status of suspension and in the status of leave of absence for health reasons, as applicable respectively.

7. The Grievant is entitled to any benefits and cost of treatment under the Employee Assistance Program as are accorded any other employee on leave of absence for reasons of health and having similar accrued benefit rights.

8. Jurisdiction is reserved to the extent necessary to carry this Award into effect.



Donald B. Leach

DONALD B. LEACH
Attorney-Arbitrator

AWARD 173

148 Berger
Columbus, Ohio 43206

[614] 221-1148

May 11, 1988

Major T. W. Rice, Personnel Commander
Ohio State Highway Patrol
660 East Main Street
Colulmbus, Ohio 43215

Mr. Edward F. Baker, Staff Representative
FOP, Ohio Labor Council, Inc.
3360 East Livingston Avenue
Columbus, Ohio 43227

Re: Arbitration, OCB Grievance No. 87-2748, Ohio Labor Council, Inc., and Ohio State Highway Patrol

Gentlemen:

Under date of May 3, 1988, you have asked two questions arising from my decision dated April 7, 1988 on the above matter. The questions arise under the jurisdiction reserved in that decision, to the extent necessary to carry into effect the Award therein.

Both questions raised in your letter involve the "intention" contained in the decision. (While the first question refers expressly to "clarification" rather than "intention", the meaning is the same in the context.) The discussion here, therefore, must be confined to the decision and does not involve extraneous matters.

The first question is stated as follows:

> "1. Concerning point "2" of your "Award", is the ninety day suspension ninety calendar days or ninety working days?"

The Award ordered a ninety day suspension, beginning December 5, 1987 under paragraph 2. In paragraph 3, the language is "shall be considered to have been placed on leave of absence after the suspension". That language, being past perfect tense, obviously refers to an event, i. e., change of status, retroactively. In other words, the ninety day suspension had expired and Grievant's next status was to be on leave of absence; the effect was necessarily retroactive because, in light of the facts, the suspension had expired sometime before the decision was rendered. The language of paragraph 3, therefore, can only be understood as affecting a status retroactive to a date earlier than the date of the decision.

The facts show that, if the ninety days provided for in paragraph 2 are ninety calendar days, the period of suspension would have ended at the end of March 3, 1988, a date clearly earlier than the date of the decision, April 7. On the other hand, if the suspension referred to working days, as has been suggested orally, the suspension would have run for eighteen weeks, (i. e., 5 normal working days a week x 18 weeks = 90 work days). The eighteen weeks expired then on April 8, the day after the date of the decision and no retroactivity would have been involved.

It follows that the sentence structure of paragraph 3 can only be interpreted as contemplating a ninety calendar day suspension and paragraph 2 must be understood in a consistent manner.

That conclusion is consistent with the third paragraph from the end of the Discussion. Back pay is referred to there and back pay could only apply where a retroactive effect was involved.

Although not pertinent here in light of the phrasing of the question, it is appropriate to observe that, although the Patrol may properly use working days in measuring suspensions, the Agreement, paragraph 19.03, says "No suspension without pay of more than ninety (90) days may be given to an employee". The ordinary meaning of ninety days in that type of context is calendar days. If the parties have a different understanding of the phrase as it has developed in their practice, that fact was not communicated to the arbitrator. He, therefore, gave the language its standard meaning.

The second question is:

> "2. Concerning point "3" of your award, is the grievant eligible for Disability Leave, as outlined in Article 47, or is the "leave of absence for health reasons" intended to be unpaid leave?"

The phrase "leave of absence for health reasons" is a categorical statement, not designed to prescribe the exact form of leave to be granted. Otherwise, the Award would have referred to a precise type of leave. Thus, the Employee Assistance Program (Article 41) refers to leave for that purpose. Likewise Disability Leave (Article 47) appears to be available also. Since no issue was raised, arguments exchanged, views expressed or facts presented on that matter, it would have been inappropriate to prescribe the precise leave to apply. The phrasing, thus, was necessarily general.

That decision constituted the judgment that Grievant should be placed on leave. No discretionary power can remain in any Agency of the State government except the judicial power, to question Grievant's status under a particular program, assuming that she is eligible. No attempt has been made in the decision or is made here to determine the Grievant's basic eligibility for a particular form of leave, as explained above. To do so would require factual and argumentative submissions, a process in carrying out the Award that is different from that in this request for explanation of original intention, i. e., in that type case evidence and argument should be submitted with the question.

On the face of it, the Employee Assistance Program is open to employee members of the bargaining unit (Paragraphs 41.04, 41.05) and she is an employee member by reason of the decision. It covers alcoholism (Paragraph 41.05) and that is the reason for the leave as provided in the decision. Among other things, it is a matter of health, also. It is possible that she might not be acceptable under the program, as not being capable of reformation (such point being a matter of medical judgment) but the evidence clearly pointed to the opposite. Expenses are payable to some extent under paragraph 41.08 and, as ordered in the Award, she is entitled to payment of such expenses, subject, of course, to the stated exceptions.

On the face of it, also, she is eligible for Disability Leave. An employee member of the bargaining unit is eligible if "she is on disability leave or approved leave of absence for medical reasons and would be eligible for sick leave credit xxx except that xxx she is in no pay status" (Paragraph 47.01). She is an employee member of the bargaining unit and, under the decision, is on approved leave of absence for medical reasons (reasons of health). Likewise, she is in "no pay status" as defined in Paragraph 48.01 (expressly applicable in Paragraph 47.01) as ineligible to receive pay. It thus appears that she is entitled to Disability Leave. In that situation, there is no room for any administrative discretion, although for reasons of record keeping, it is reasonable that she furnish pertinent information to the Agency that directly administers such leave.

In both of the above types of leave, the decision and this Opinion have had to rest on those matters that appear on the face. If there are facts or legal issues not immediately known to the arbitrator and hitherto not brought to his attention, it is possible that a different result may be required. If there are such, they should be submitted for consideration in light of facts and arguments submitted by the parties.

It is appropriate to point out that such legal decision is one exclusively within the power of the arbitrator, under the reserved jurisdiction, except, of course, where a court, or the parties by agreement, may decide otherwise. That arises from the submission of the original controversy to the arbitrator, His role includes the power to formulate reasonable remedies. It follows that he cannot discharge his duty to the parties unless he makes such decision as is necessary for the purpose. Ultimately, his decision must be definite enough to be enforced by a court. That definiteness requires his action and no one else may intervene except under the circumstances already mentioned.

It is hoped that the foregoing explains the intentions adequately.

Very truly yours,

Donald B. Leach

DBL: mrm

Copy to:
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Deputy Director, Office of Collective Bargaining
65 East State Street, 16th Floor
Columbus, Ohio 43215

P. S. to Mr. Brundige and Mr. Baker: Enclosed is my statement covering supplemental decision in the above matter.

D. B. L.