

ARBITRATION

BETWEEN

OHIO STATE HIGHWAY PATROL

and

OCB GRIEVANCE NO. 15-03-882103-<sup>0321</sup>  
0043-04-01

FRATERNAL ORDER OF POLICE,  
OHIO LABOR COUNCIL, INC.

Appearances:

For The Patrol:

Sgt, Richard G. Corbin

For The F.O.P.

Paul L. Cox, Chief Counsel

OPINION AND AWARD OF THE ARBITRATOR

FRANK A. KEENAN

PANEL ARBITRATOR

I. THE CONTRACT:

The parties contract provides in relevant part as follows:

19-01 Standard

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

19.05 Progressive Discipline

The following system of progressive discipline will be ordinarily followed:

1. Verbal Reprimand (with appropriate notation in employees 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.

## II. STATEMENT OF THE CASE:

The pertinent facts which gave rise to the discipline of Trooper Tracy S. Keller, which discipline she grieves, are not in dispute. Indeed the parties have stipulated that: "on August 20, 1987, in Franklin Township, Warren County, while off duty, while in the presence of a civilian, ....Grievant (Keller) did smoke a controlled substance, marijuana." The parties further stipulated that with respect to these events "the Grievant was presented with the charges in a letter on January 22, 1988" (See Appendix I). By way of elaboration, the record reflects that on the evening of August 20th, while off duty, the Grievant was drinking and socializing in a tavern with a then Warren County Sheriff's Deputy and a female civilian. The three retired to the home of the Sheriff's Deputy, who produced some marijuana and commenced to smoke it. In his and the civilian female's presence the Grievant took a couple of puffs of a marijuana cigarette. The female civilian reported these events to the Warren County Sheriff in October, 1987, and he in turn informed management at the Patrol.

At the time the Grievant was formally charged, she had no record of discipline.

The record reflects that troopers are disciplined for their own traffic offenses only when an accident occurs as a result of the traffic offense; in these situations the trooper is disciplined for the accident. Moreover, when troopers are disciplined for traffic related matters, typically they receive only a written reprimand for a first offense.

The record also reflects that troopers are with some frequency involved in enforcing the laws proscribing drug use and possession, and that indeed, within the last two years, the Grievant herself has been so involved.

### III. THE PARTIES POSITIONS:

#### a) The F.O.P.'s Position:

The F.O.P. assails the Grievant's discipline on several bases. One contention is that the Patrol simply reacted emotionally, and moreover, "over-reacted" to the underlying circumstances which gave rise to the Grievant's discipline, as is made manifest by its comments in its opening

statement at the arbitration hearing herein concerning the necessity to avoid "corruption of law enforcement officers" and to maintain "a drug free work force". Thus the F.O.P. asserts that "the minor activity of the Grievant does not constitute corruption. The activity took place during her off-day hours and does not threaten the employer's drug free work force."

The F.O.P. takes the position that "due to the severity of the discipline, a ten (10) day suspension, the employer must prove that the Grievant is guilty of serious wrongdoing," but cannot do so. Thus the F.O.P. asserts that using marijuana is only a minor misdemeanor..... Severe discipline in this case is not appropriate. ....The Grievant should have received no time off for this minor infraction.

In a rather unique and inventive argument, the F.O.P. in essence asserts that the Grievant has been treated disparately. Thus the F.O.P. contends that the Grievant's smoking marijuana is the equivalent of a minor traffic offense (also a minor misdemeanor), "yet she has been suspended for ten days when troopers who are found guilty

of traffic offenses are only occasionally given written reprimands. This is extremely unfair." Pointing out that "the principle mission of the ....Patrol is to enforce the traffic laws of ....Ohio ....and to see that the traffic code is obeyed by motorists," the F.O.P. asks: "How much more damaging to the reputation and public image of the Highway Patrol is it when a trooper commits a traffic violation? How much more resentful are members of the public when they hear that a member of the agency charged with enforcing traffic laws, is guilty of breaking one of these laws?"

In addition, the F.O.P. contends that "another aspect of this matter that the arbitrator should consider is that the legislature is really the employer here. It is the legislature that pays the expenses and decides upon the mission of the Highway Patrol and the legislature has decided that this type of marijuana possession is an extremely minor matter. The personal biases of the Highway Patrol should not matter here. The legislature is the management and they have already spoken on the issue of seriousness. ...."

The F.O.P. further contends that the contract at Section 19.05 contractualizes the principles of progressive discipline, but that the Patrol has "ignored the principles of progressive discipline and suspended (the Grievant)....," thereby breaching Section 19.05 of the contract.

The F.O.P. also contends that "the employer's charge that the Grievant brought discredit to the ....Patrol is ludicrous. The employer offered no evidence to support this charge. Their witnesses Lt. Lewis and Captain Kohn testified that it is management's philosophy not to tolerate employees using drugs; that management is concerned with losing the trust of the public and is concerned with the public reputation of the Highway Patrol. The F.O.P. asserts that the actions of the Grievant did not damage the reputation of the Highway Patrol. Furthermore the employer offered no evidence, except for Captain Kohn's personal opinion, to support the allegation."

Asserting the existence of a procedural flaw, the F.O.P. "....objects to the submission of State Exhibit 3, the personal department record of the Grievant. Pursuant to the collective bargaining agreement, Section 17.05,

"All records of disciplinary action will not be utilized by the employer beyond a two-year (2) period if no further disciplinary actions occurs during the two-year (2) period. Records of disciplinary actions and all documents related thereto shall be removed from the personnel file after the two-year (2) period."

States Exhibit 3 is the Grievant's record since 1985. The employer claims that they did not take the 1985 records into consideration when determining the ten (10) day suspension. The F.O.P. questions that if it was not to be considered, why is it still on file? What (sic) was it presented to the Arbitrator?"

So it is that the F.O.P. "requests that the grievance be granted, that the Grievant be reimbursed for the ten (10) days lost pay and that the suspension be expunged from her records."



#### IV. THE PATROL'S POSITION:

It is the Patrol's position that it ".... based the Grievant's suspension on the just cause standard mandated by the collective bargaining agreement. The penalty was considered proportionate to the seriousness of the proven offense and tempered by the Grievant's favorable past disciplinary record."

Contrary to the F.O.P.'s contention to the effect that the Grievant's conduct was innocuous, the Patrol asserts that the conduct constitutes serious wrongdoing, because the Patrol "....strongly believes the rules violated are necessary for the continued effective and efficient operation of the ....agency. ....The philosophy entails a belief that law enforcement officers are held to a higher standard of conduct by the citizens they serve. As a result, it is not possible to maintain the respect and cooperation of the public if employees are willing to enforce laws while on duty, and selectively violate them off duty." It is the Patrol's contention that there is "....a clear nexus between the off duty use of marijuana and the on duty responsibilities of (the Grievant) There can be no question the two activities are not compatible."

The Patrol additionally takes the position that "....troopers are routinely confronted by violators using, in possession of, and sometimes transporting large quantities of illegal drugs. The use of illegal drugs by off duty troopers is a major concern to the Employer and the citizens of the State of Ohio....drug use by on or off duty law enforcement officers is viewed in a very negative manner by the general public. The ten (10) day suspension of the Grievant was for just cause and was directly related to the seriousness of the proven offense."

With respect to the Union urged analogy between the Grievant's conduct and a minor traffic violation the Patrol takes the position that "....any such comparison is totally invalid.

This is simply a weak attempt by the Union to relate criminal penalties with workplace discipline. To imply public reaction would be more critical if it were learned a trooper had been reported for speeding off duty than if that same trooper used marijuana off duty is absurd."

The Patrol emphasizes its belief that "....public knowledge of off duty drug use by troopers could have a very negative impact on the Employer's ability to maintain the support and cooperation of the public. Undoubtedly, there is public knowledge of the circumstances leading to the Grievant's ten (10) day suspension. The law enforcement community in Warren County is aware of the incident, as is the civilian informant, and the ex-deputy sheriff who supplied the marijuana.

The damage to the reputation of the Ohio State Highway Patrol, as a result of this incident, is not easily measured but can not simply be ignored."

With respect to the F.O.P.'s contentions that the Patrol has acted emotionally and has indeed over-reacted, the Patrol asserts that the F.O.P. and the Grievant "....simply do not view smoking marijuana by a law enforcement officer as a serious offense." The Union simply asks the Arbitrator to be swayed by their attempts to minimize Trooper Keller's marijuana use. The Union asks the Arbitrator to substitute their judgement for that of management. In effect the Union asks the Arbitrator to reward the Grievant for her serious violation of both the Employer's rules and the Ohio Revised Code, by reducing the length of the suspension

and granting back-pay."

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

V. THE ISSUE:

The issue is:

"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?"

VI. DISCUSSION AND OPINION:

First addressed is the procedural flaw relied on by the F.O.P. It will be recalled that the F.O.P. asserts that the Patrol violated the expungement provision (Section 17.05) of the parties contract by reviewing the Grievant's disciplinary record since 1985. Assuming for the purposes of analysis of the instant case, and without so deciding, that said expungement provisions have been improperly ignored here, the record is clear that nonetheless nothing adverse in the Grievant's

record influenced the Patrol's determination of the discipline under scrutiny here. This is so because the Grievant's record is devoid of adverse disciplinary action and because it is clear that the Patrol's view of the seriousness of the Grievant's underlying conduct completely dominated its view of the propriety of the quantum of discipline to be meted out for such conduct. Indeed it could be contended that looking to the Grievant's record since 1985 inured to the benefit of the Grievant.

On the merits, the crux of the case lies in the reasonableness of the seriousness with which the Patrol views the Grievant's conduct i.e. off duty use of marijuana. As previously alluded to, the Patrol clearly views the use of marijuana while off duty as a significantly serious matter. Careful consideration persuades me that the Patrol's view is a sound and reasonable one. And this is so due to the rationale espoused by the Patrol, namely, that "....it is not possible to maintain the respect and cooperation of the public if employees are willing to enforce laws while on duty, and selectively violate them off duty." And the public's

respect and cooperation is clearly essential to effective and efficient law enforcement. Moreover, contrary to the Union's contention, the undermining of the public's respect and cooperation is so self-evident a consequence of duplicitous and hypocritical enforcement of the law proscribing marijuana use on the one hand, while incompatibly using it oneself on the other hand, that there is no need to establish such undermining factually by way of expert testimony from, for example, psychologists or sociologists, or by documentary evidence such as scientific studies.<sup>1)</sup> Common sense alone fully warrants such a conclusion,

Given the seriousness of the Grievant's underlying conduct, I am unable to find that suspension for a first offense is either disproportionately severe or at odds with the concepts embodied in Section 19.05. With respect to Section 19.05, it clearly provides for the sidestepping of the "ordinary" progressive scheme therein set forth in the "extra ordinary" circumstance of severe misconduct. Since the finding here is that indeed

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1) The "self evident" nature of this proposition has found judicial sanction. See e.g. Otswald v. City of Omaha, 399 N.W. 2d. 783 (Neb. 1987), cited by the Patrol in its post-hearing brief.

the use of marijuana even while off-duty, by a trooper constitutes severe misconduct, it cannot be found that the Patrol has breached the provisions of Section 19.05.

But what of the F.O.P.'s contention to the effect that the form of discipline here, suspension, is disparate (and must therefore be set aside) in light of the mere imposition of, at worst, a written reprimand, in the like circumstance of a trooper's violation of the traffic laws? Directly to the point, any disparate treatment contention rests on a premise of "like circumstances" and I am not persuaded that a trooper's violation of a traffic law is a "like circumstance" to the voluntary off-duty use of marijuana. Thus, while it is true that the compared offenses are both minor misdemeanors, one is unquestionably voluntary and deliberate (marijuana use), while the other (traffic violation) is often inadvertent or the result of mere negligence. Equally destructive of the view that these two offenses are sufficiently alike to warrant like discipline is the fact that since the driving of a motor vehicle is such a routine,

and likely daily, occurrence, the chances for running afoul the traffic codes are substantially greater; Society has simply not become so permissive as to warrant the conclusion that opportunities for the smoking of marijuana are as frequent as the opportunities to drive a motor vehicle. Then too there is the fact that whereas a traffic offense is typically peculiarly solitary, whereby the perpetrator is solely responsible, the source of the illegal substance of marijuana is more often than not traceable to organized crime. In my view, it is these circumstances, and likely others not immediately coming to mind, which serve to differentiate the two offenses and thereby warrant different discipline when engaged in by a trooper.

The case thus comes down to the issue of the propriety of the duration of the Grievant's disciplinary suspension. In this regard the record is devoid of any missteps on the part of management in determining the duration of the suspension. Thus it is noted that the Grievant's good record of service was fully taken into account. In these circumstances for me to find, were I so inclined, that a two week suspension without pay, rather

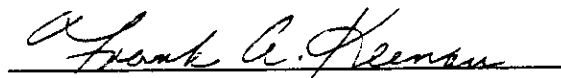


than say, a one week suspension, is too severe, would simply smack of substituting my judgment for that of management's judgment. But as the Patrol points out in its post-hearing brief, such a substitution of judgment is not sanctioned by the "just cause" standard applicable here. Accordingly, the Patrol's discipline of the Grievant is sustained, and this being so, the grievance must be denied.

VII. AWARD:

For the reasons more fully set forth above, the grievance is denied.

DATED: September 22, 1988

A handwritten signature in cursive script, reading "Frank A. Keenan", is written over a horizontal line.

Frank A. Keenan  
Arbitrator

# APPENDIX I

Colonel Jack Walsh  
Superintendent

William M. Denihan  
Director

Ernest F. Celeste  
Governor



FILE NO 00-5-5

Columbus, Ohio 43266-0562  
January 22, 1988

Trooper T. S. Keller  
902 Southline Drive  
Lebanon, Ohio 45036

Dear Trooper Keller:

Notice is hereby given that the Director of Highway Safety, William M. Denihan, intends to suspend you from your employment with the Ohio State Highway Patrol for a period of ten (10) working days for violation of Rules 4501:2-6-02(I) (2) and (3) and (L), of the Rules and Regulations of the Ohio State Highway Patrol, to wit: on August 20, 1987, in Franklin Township, Warren, County, while off-duty you did conduct yourself in a manner which brought discredit to members of the Ohio State Highway Patrol in that while in the presence of a civilian, you did smoke a controlled substance, marijuana, which is in violation of Section 2925.11(D) of the Ohio Criminal Code.

The suspension is based on investigative reports by: Captain D. S. Kohn, and Lieutenant R. G. Lewis.

Major R. K. Hartsell, Hearing Officer, will conduct a pre-suspension hearing on the matter on February 10, 1988, at 1:30 p.m., in Room 306, at the Ohio State Highway Patrol General Headquarters, 660 East Main Street, Columbus, Ohio.

At this pre-suspension hearing, you may substantiate why you believe the proposed suspension is not justified. Should you elect to exercise your right to such a pre-suspension hearing, you may be accompanied by counsel or other representative pursuant to the Rules and Regulations of the Ohio State Highway Patrol. You may also present witnesses on your behalf and question witnesses. The Ohio State Highway Patrol will also have the opportunity to submit evidence and call witnesses to support the proposed action.

Should you decide to exercise your right to have a pre-suspension hearing, you are required to furnish in writing, the names and addresses of all witnesses who will present evidence in matters relevant to the proposed action. The names and addresses must be received by the Hearing Officer at least 72 hours in advance of the hearing.

Those presenting evidence on behalf of the Ohio State Highway Patrol will be:

Captain D. S. Kohn, and Lieutenant R. G. Lewis.

Following the pre-suspension hearing, the Hearing Officer will consider all evidence and testimony. He will then submit a written recommendation to the Director within five days. You shall be provided with a copy of the Hearing Officer's recommendation.

This letter will be the only formal notice of the pre-suspension hearing. Any change of the pre-suspension hearing date shall only be made by the Hearing Officer.

You have the right to waive your pre-suspension hearing and accept the Director's decision. If you elect to waive the pre-suspension hearing, sign the original copy of this notice and forward to the Hearing Officer within 72 hours. Your signature must be witnessed by another person, who must also sign this form.



Colonel Jack Walsh  
Superintendent

I have read this notice and understand my rights. No promises or threats have been made to me, and no pressure or coercion of any kind has been used against me. I am waiving my right to have a pre-suspension hearing and understand that my suspension will be carried out as stated in this notice. Furthermore, I understand that I am not waiving any rights I may have under Section 124.34 of the Ohio Revised Code, and/or the labor agreement of the F.O.P./O.L.C., Inc., and the Ohio State Highway Patrol.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Date