

ARBITRATION AWARD SUMMARY

OCB Award Number: 233
OCB Grievance Number: 15-03-880406-0054-04-01
Union: FOP (Cynthia Drake)
Department: OSP
Arbitrator: Harry Dworkin
Management Advocate: Sgt. Rick Corbin
Union Advocate: Paul Cox
Arbitration Date: 10-5-88
Decision Date: 11-14-88
Decision: modified

AWARD OF ARBITRATOR

In the Matter of the Arbitration Between:)

STATE OF OHIO, STATE HIGHWAY PATROL,)
DIVISION OF HIGHWAY SAFETY)
Columbus, Ohio)

-and-)

FRATERNAL ORDER OF POLICE,)
OHIO LABOR COUNCIL, INC.)

HARRY J. DWORKIN,
ARBITRATOR

RE: OCB CASE NO. 15-03-880406-54-04-01

A P P E A R A N C E S

On Behalf of Employer

SGT. RICHARD G. CORBIN
LT. D. L. ANDERSON
CAPT. C. E. IRELAND
SGT. L. R. HOHMAN
ANNE K. ARENA
MERIL PRICE
JOHN ORNOS
RODNEY SAMPSON

Advocate
Management Representative
Management Representative
Management Representative
Management Representative
2nd Chair - OCB
OCB Staff
OCB Staff

On Behalf of Union

PAUL COX, ESQUIRE
ED BAKER
CYNTHIA A. DRAKE
CATHY BROCKMAN

Chief Counsel
Staff Representative
Trooper (Grievant)
Legal Assistant

STATEMENT OF ISSUE

The issue as stipulated by the parties is:

WAS THE GRIEVANT DISCIPLINED FOR "JUST CAUSE"
IN ACCORDANCE WITH ARTICLE 19, SECTION 19.01
AND SECTION 19.05 OF THE COLLECTIVE BARGAINING
AGREEMENT BETWEEN THE PARTIES?

IF NOT, WHAT SHALL THE REMEDY BE?

PRELIMINARY STATEMENT AND BACKGROUND:

The grievance before the Arbitrator protests a three day disciplinary suspension imposed on a member of the Ohio State Highway Patrol, for alleged inefficiency, and failure to follow appropriate procedure while engaged in investigating a one car auto crash on February 1, 1988, on County Road 192, in Paulding, Ohio. The grievant is a trooper assigned to the Van Wert Post. The grievant was charged with a violation of the Divisional Rules regarding performance of duty, particularly Section 4501:2-6-02.

The specific violation charged against the grievant was, that:

"On February 1, 1988, at approximately 8:45 p.m., while in uniform and on duty, you did allow a subject who had been involved in a motor vehicle accident to enter your patrol car which was left unattended with the engine running and drive away from the scene."

The grievant protested the three-day suspension, claiming that the discipline was not for just cause.

The grievant has had 5-1/2 years of service with the State Highway Patrol. She has a favorable work record, with no prior discipline within a two year period prior to the three day suspension imposed on May 16, 1988. The Employer concluded that just cause had been established to warrant discipline, and that the suspension was, in part, "due to the grievant's prior disciplinary record." However, the Employer urges that this statement appearing in the level 3 decision, was not critical to the grievant's suspension. The Employer states that, the penalty was corrective in nature, and fully warranted by reason of the circumstances relating to the grievant's conduct on the evening of February 1, 1988, while investigating a one car accident.

The disciplinary suspension was imposed by reason of the Employer's conclusion that the grievant violated Divisional Rule 4501:2-6-02:

"(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."

Copies of the Divisional Rules have been furnished to State Troopers, including the grievant. In addition, during the training period the grievant was oriented to the rules, and the necessity of the observance of the Rules was underscored, including that discipline may result by reason of failure to observe the Rules.

On Monday, February 1, 1988, the grievant was assigned to investigate a one car accident on County Road 192. She proceeded

to the scene in her patrol car. Upon arriving at the scene of the collision, she located an individual in a nearby residence who represented that he was the driver. A passenger was in a garage receiving first aid. Although the driver exhibited some evidence of injury about his face, he stated that he was not injured, that the marks were of a prior injury. In any event, he declined her offer of medical attention, or hospital treatment.

The driver was observed approximately 1/2 mile from the scene of the accident, where his damaged vehicle was located. The grievant requested that the driver accompany her in her patrol car to the accident scene, to which he consented.

The grievant testified that the driver was in every respect cooperative, and displayed no indication of abhorrent behavior. However, while the two were proceeding to the scene of the crash, she detected an odor of alcohol on the driver's breath. Upon arriving at the scene, both alighted from the patrol car. The driver remained in the area, while the grievant was engaged in taking photographs of the vehicle, and portions of the highway that she deemed pertinent to her investigation. The grievant acknowledged during the course of the arbitration hearing that she did not secure the grievant to the patrol car either with handcuffs, or a security strap with which the vehicle was equipped, nor did she "pat him down" so as to determine if he was armed, and whether he presented a danger to her safety. She did not lock her vehicle, and left the engine running. The Employer concluded that:

"Given the circumstances, the discipline was entirely warranted and would have been imposed on any fellow employee, regardless of race, sex, ethnic origin, etc. As with any case involving unallowable behavior, or any violation of established Rules, the Employer considered the totality of the circumstances prior to determining the disciplinary action to invoke."

While the grievant was engaged in taking snapshots, she observed that the patrol car, with flasher lights on, was moving from the scene. The driver of the patrol car failed to stop, or heed her shouts. The driver drove the patrol car through Paulding County, across the Ohio-Indiana line, where he became involved in a collision with another vehicle following which he was apprehended by Indiana Police.

On the basis of the collection of circumstances as revealed by its investigation, the Employer concluded that the grievant was negligent in her investigation, and in violation of the Divisional Rules which provide a course of conduct while performing State Trooper duties, and designed to effect a maximum degree of efficiency, and security of the officer.

The Employer's conclusions of fact are as set forth in its Step 3 decision:

"The investigation revealed that on Monday, February 1, 1988, the grievant, while investigating an injury accident involving a drinking driver, she failed to secure her patrol car while at the scene. She also allowed the driver to move around freely without keeping him under control. The suspect driver consequently got in the grievant's patrol car and drove away. Other police officers pursued the stolen patrol car into Indiana. The suspect was apprehended after he was involved in an injury accident on the outskirts of Fort Wayne, Indiana."

The Employer concluded further that:

"Had the grievant secured her car while investigating the accident, and/or had the grievant properly secured the suspect, whom she had reason to believe to possibly be under the influence of alcohol, the patrol car would not have been stolen, and the subsequent injury accident would not have occurred."

The Employer contends that it conducted a thorough, fair, and objective investigation of the occurrence, including an interview with the grievant, and her district commander. The findings were reviewed by Major Rice, the Division's Personnel Commander, prior to imposing the three day suspension.

Testimony was adduced through Lt. Darryl Anderson, with 18 years of service, who served as the executive officer and instructor at the Policy Academy for a period of some seven years. He stated that cadets, including the grievant, undergo basic training, and instruction, in the course of which the following matters are stressed:

- (1) safety of all individuals involved, including safety of officer;
- (2) determination of evidence of intoxication, or mentally disturbed, including reaction to potential problems;
- (3) avoidance of "ten deadly errors", including:
 - (a) failure to search;
 - (b) relaxing guard prematurely; and,
- (4) use and security of patrol car;

which basic requirements were adjudged to have been violated by the grievant.

Hearing Officer Lt. Darryl Anderson noted in his findings that:

"...For early on in cadet basic training, troopers are made aware of their responsibilities concerning security of equipment, and suspect security. Certainly, the necessity of maintaining control of a marked patrol car (which, incidentally, is equipped with a loaded 12-gauge shotgun in a pouch on the driver's seat) is so obvious as to be subliminal."

On the basis of the circumstances, the Hearing Officer concluded that the grievant was "inefficient in her operations on February 1, 1988," in the respects charged. In addition:

"...The grievant compounded matters by venturing to a distance from her patrol car that she could not take any action when the intoxicated suspect got into the car. In fact, she was unaware of his activities until he drove away."

POSITION OF EMPLOYER:

The State Highway Patrol pointed out that the grievant told the driver to accompany her back to the accident scene in her patrol car, "but neglected to ask him for identification." The Employer reasons that, had the grievant obtained his identification, and, conducted a check of his driver's license she would have "garnered information from the suspect which would have shown he was driving while under license suspension, which was a fact, and had been arrested for a previous driving while under the influence charge." The grievant's failure in the foregoing respects resulted in a "series of avoidable errors which directly contributed to the theft of the grievant's patrol car." The grievant's behavior in failing to establish and verify his identity, and check his driving record, including a determination

of the level of his intoxication, and subsequent failure to take adequate precautions to insure her personal safety, constituted inefficiency on the part of a trained trooper of a serious degree, and, jeopardized her own safety. Management asserts that:

"...management's basis for discipline is not simply the fact the patrol car was stolen. The grievant was disciplined due to inefficient behavior including her failure to exercise basic officer safety techniques, which directly led to the theft of her patrol car." (Employer brief, page 5)

The Employer points out the grievant's deficiencies in the respects charged, as follow:

"...She simply allowed the suspect to wander about the accident scene without regard to the potential dangers he faced from passing traffic. More critical was the grievant's failure to use training and experience to protect herself from the potential risks an intoxicated person presents to a law enforcement officer. [The Grievant] left the patrol car running with the red emergency lights on and the doors unlocked. The suspect walked over to his damaged vehicle while [the grievant] walked 100 to 150 feet east of the accident scene to take photographs. Then, according to the suspect's statement, he decided he no longer wanted to be at the accident scene. Therefore, he walked back to the patrol car, got in and drove off."

The Employer represents that, after the driver fled the scene of the crash into Indiana, he ran a red light at a busy intersection and collided with a private vehicle, causing injury to three of the occupants. A breathalyzer test was administered after his arrest in Indiana, which "revealed his blood alcohol level was .12%, well above the .10% presumptive level for a charge of Driving While Under the Influence of Alcohol in Ohio."

The State Highway Patrol reasons that, the grievant's inefficient conduct while performing her duties "provided the suspect with the opportunity to steal the patrol car", and to flee the scene. The grievant had received extensive training as to the importance of "maintaining control at emergency scenes," and to avoid being placed in hazardous positions through failure to utilize her training, and experience. The State Highway Patrol claims that:

"...[The Grievant] elected not to investigate the suspect's identity, or the status of his driving record, upon first contacting him. Upon arriving at the scene of the accident, although believing he was intoxicated, [the grievant] allowed him to wander about unattended. [The Grievant] even allowed him to enter his personal vehicle, ignoring the possibility he may have been obtaining a weapon."

The grievant failed to utilize "basic precautions which would have provided herself, the suspect and other involved private citizens with the expected level of control and protection at the scene of an emergency." The seriousness of the grievant's inefficient behavior, and violation of the Rules and Regulations, and consequences and potential hazards created by the grievant's inattention, presented just cause for discipline, and the grievance must therefore be denied.

POSITION OF UNION:

In challenging the just cause basis for imposition of a three day disciplinary suspension, the Union does not dispute in

any significant degree the factual occurrences as outlined by the Employer. The Union does, however, dispute the conclusions advanced by management, including whether her behavior, and conduct at the scene, and the manner she conducted the investigation were in violation of any established rules and policies, or, that her conduct indicated inefficiency to a degree that would warrant a disciplinary suspension consistent with the concept of just cause.

The Union asserts that there are no specific Rules and Regulations in effect that would demonstrate improper conduct on the part of the grievant in the manner she conducted the investigation. The Union queries: "In what respects was her conduct under the circumstances wrong, or at variance with customary standards of conduct?"

The Union reasons that, the fact that a patrol officer's car is stolen, "does not per se constitute a basis for a charge of inefficiency, or misconduct." The F.O.P. points out that the grievant was assigned to investigate an accident during the night season; however, it is customary for patrol officers to exit their vehicles and leave the engine running and unlocked, so as to assure that the battery would not run down, and guard against rendering the patrol car inoperable.

There are no set, specific prescribed procedures that must be observed in investigating a collision. Each case requires the exercise of a "judgment call", on the basis of the attendant circumstances tht confront the investigating officer.

The F.O.P. maintains that the Employer has failed to substantiate the charge of inefficiency on the part of the grievant by the required degree of proof. The total time which elapsed while she was at the scene of the collision was some 13 minutes. During this brief period she performed her responsibilities in accordance with what she "perceived as warranting priority." The driver involved in the crash demonstrated no hostility, nor was any threat of danger perceived. He was at all times affable, cooperative, with no slurred speech. On the basis of all the evidence, and circumstances, the F.O.P. urges that the Employer has failed to demonstrate any violation of a specific rule, or circumstances that would constitute a valid basis for concluding that she was inefficient in the manner she conducted her investigation so as to warrant discipline. In any event, the three day suspension was excessive, and did not conform to the concept of progressive discipline as prescribed by the parties in Article 19:

"§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."

ARBITRATOR'S FINDINGS AND OPINION:

As a preliminary observation the Arbitrator concurs in the Employer's opening statement that, the case "is important to the State of Ohio, and Ohio State Highway Patrol" as well as to the grievant, and Union. While the three-day disciplinary suspension is the second level of progressive discipline prescribed by Section 19.05, the Arbitrator notes that, every level and form of discipline must be supported by the facts, and consistent with "just cause":

"§19.01 Standard

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

The keystone question to be resolved by the Arbitrator is, therefore, whether a review of all of the attendant facts and circumstances establishes that the grievant was inefficient, in violation of established Divisional Rules, and that, her behavior in the respects charged warranted discipline, including whether the penalty was appropriate as compared to a milder form of discipline. The Arbitrator has been made aware that the progressive disciplinary steps that are set forth in the agreement are not absolute; the parties have provided that "more severe discipline may be imposed if the infraction merits more severe action."

The Arbitrator has thoroughly reviewed the evidence, including the testimony of a number of witnesses, all of whom testified with commendable candor, and credibility. The conclusion that the Arbitrator deems warranted on the basis of all

the evidence is, that, a patrol officer performing his duties is required to exercise sound judgment, and discretion as regard priorities, and measures that are indicated on the basis of the attendant circumstances. It must also be acknowledged that, the exercise of sound judgment may vary from situation to situation, and is not governed by any absolute criteria. In event specific rules and regulations, or policies have been established of which troopers are apprised these must be observed; failure to comply with such obligations may subject an employee to appropriate discipline.

In the instant case the Employer has relied, in substantial part, on Rules and Regulations, Section 4, which provides that:

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

While the rule requires that an "error in judgment be avoided", it does not specifically define, or delineate conduct which would be deemed in compliance with, or, in violation of each rule in every factual situation.

The Rules require that troopers satisfactorily perform their duties, and that, failure to observe the Rules may constitute "inefficiency". While the Arbitrator finds no fault with the rule as promulgated, he is faced with a major difficulty in applying the rule with specificity to a given situation. As has been previously pointed out, compliance with the rule must be equated with the exercise of sound judgment. Moreover, the

consequences that follow do not in and of themselves demonstrate inefficiency on the part of a trooper. Perhaps, to borrow from another context, the proper test would be, whether in light of all the attendant circumstances, the trooper conducted herself in a "reasonably prudent" manner.

The grievant testified that during the course of her investigation, and conversation with the driver of the crashed car, she observed nothing that would alert her to any hazard, or danger. The driver was cooperative, responsive, and did not disclose any hostility, or threat. There was no manifestation of slurred speech, lack of coordination, or signs of abnormal behavior. Under these circumstances, she and the driver entered the patrol car and proceeded a short distance to the scene of the accident. The driver was not handcuffed, or secured by equipment attached to the patrol car. There is no requirement that a trooper in all cases handcuff, pat down, or secure a driver involved in a crash, unless circumstances are observed, or apparent, that would indicate that such action was appropriate. The Arbitrator is unable to find from the evidence that the trooper used bad judgment, or disregarded the divisional rules in the foregoing respects. The driver of the vehicle appeared to be rational, physically coordinated, cooperative, and exhibited no combative tendencies.

The evidence indicates further that while driving a distance of 1/2 mile to the scene of the crash, the grievant detected an odor of alcohol on the suspect's breath. She failed to require that he submit to a breathalyzer test so as to determine

the level of his intoxication. The Employer asserts that the grievant neglected to respond to this danger sign:

"2. The grievant failed to investigate the suspect's physical condition although she smelled an odor of an alcoholic beverage on his breath while en route back to the crash scene. The grievant has been trained in a number of tests to determine an individual's state of intoxication. In addition, the grievant has been exposed to training which stressed the unpredictable nature of intoxicated persons. The grievant chose to ignore the suspect's intoxication. The results are self evident."
(Employer brief, page 6).

Here, too, the mere awareness of an alcoholic odor would not in itself, and in all cases, require further determination, unless the individual exhibited some outward signs of being under the influence of alcohol, such as, incoherent speech, belligerent behavior, abnormal gait, or other conduct, which was not manifested in the instant case. The so-called "danger signs" were not of sufficient degree to require that a trooper, in the efficient performance of his/her duties take the precautions that were indicated "after the fact", and which demonstrated that the suspect was potentially hazardous and of an unpredictable disposition. The grievant testified that the driver appeared in all respects normal, and lucid; there was no evidence of slurred speech, there was no impairment exhibited in his walking. He was "totally cooperative, not belligerent or combative, not hostile". There was no advance indication of the danger that was exhibited by his subsequent adverse behavior.

While the grievant allowed the suspect to enter the patrol car without "patting him down", so as to determine whether

he had a weapon concealed on his person, the evidence indicates that securing a person involved in an auto accident, and "patting him down" are not customary when investigating an accident, unless "danger signs" are present that would prompt a "reasonably prudent" trooper to take such precautions.

Testimony was adduced through Sgt. L. R. Hohman, a 23 year veteran, and the Assistant Post Commander who was familiar with the circumstances leading up to the discipline that, the grievant exercised poor judgment in the manner she conducted her investigation, and that she failed to utilize basic precautionary measures, as follow:

- (a) failed to obtain suspects identification;
- (b) odor of alcohol detected - failed to administer breathalyzer test;
- (c) permitted suspect to wander about and have access to the patrol car;
- (d) failed to secure suspect with which patrol car was equipped; and,
- (e) driver allowed access to a 12-gauge shotgun in front seat of patrol car, which presented an obvious danger.

However, Sgt. Hohman acknowledged on cross-examination, that there is no requirement governing the sequence of performing the foregoing responsibilities - or their priority. Appropriate action is judged on the basis of the trooper's training, and the attendant circumstances. It is acknowledged that, a trooper investigating a highway accident is charged with numerous responsibilities, including:

- (a) safety of persons injured;
- (b) sobriety of persons involved;
- (c) taking of pictures - evidence;
- (d) apprehend suspected violators, and security if warranted;
- (e) obtain information from witnesses; and,
- (f) clear roadway of debris.

The sequence in which the foregoing responsibilities, and others, are to be carried out is subject to the exercise of sound judgment, and assessment of the situation.

The Arbitrator concludes, on the basis of a fair evaluation of all the evidence, and consideration of the legitimate rights, and interest of the parties, that, the evidence falls far short of establishing inefficient conduct on the part of the grievant, or failure to observe established rules, practices, and policies.

There is, however, one aspect of the case that causes the Arbitrator's concern. It would appear that, in investigating an automobile accident, an indispensable preliminary requirement would be that the trooper obtain identification of, at least, the driver of the vehicle, and conduct a security check through the communication system that is available for this purpose. Had the grievant performed this basic, preliminary requirement she would have determined the true identity of the driver, including the fact that he was operating under a suspended driver's license, and had a prior conviction for DWI. This information would have alerted her to the necessity of determining his degree of sobriety,

and may have guarded against the consequences that ensued. The Arbitrator concurs in the Employer's argument that:

"1. The grievant failed to ask the suspect for identification upon first coming in contact with him. This routine activity would have shown the suspect's drivers license was under suspension. A wealth of information is available to the trooper on the road through computer checks of an individuals driving record, criminal history file and most important, warrant check." (Employer brief, page 6).

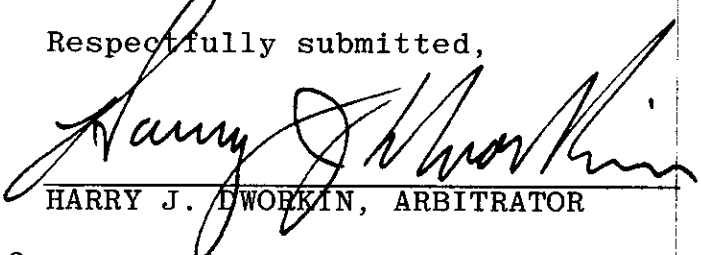
In failing to check the driver's identity, and utilizing the information which such procedure would have disclosed, the grievant failed to comply with regulations of the Ohio State Highway Patrol which provide, in part, as follow:

"(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."

By reason of her dereliction of duty, and inefficient conduct in the foregoing respects, the Arbitrator is persuaded that corrective discipline was warranted at the Step 2 level of the progressive procedure in the form of a written reprimand.

The Arbitrator notes further that, the three day disciplinary penalty included both the charges of inefficient conduct in the respects enumerated, and, "due to the grievant's prior disciplinary record." The grievant had not had any discipline within a two year period prior to the imposition of the suspension. It was therefore inappropriate to consider such prior record in determining the appropriate measure of discipline.

Respectfully submitted,


HARRY J. DWORKIN, ARBITRATOR

A W A R D

I.

The three day disciplinary suspension imposed on the grievant did not conform to the concept of "just cause" in accordance with Article 19, Section 19.01 and Section 19.05, of the agreement;

II.

The evidence indicates that the grievant was inefficient in failing to check the identity of a driver involved in a collision which the grievant was assigned to investigate, and that such failure indicated a measure of inefficiency inasmuch as it failed to disclose information which would have alerted the grievant to potential hazards, and dangers, and warrant the initiation of measures designed to assure security of the trooper's person, and guard against other hazardous consequences;

III.

The grievant's inefficiency in the foregoing respect warranted a written letter of reprimand, which shall be substituted in lieu of the three day disciplinary suspension, together with reimbursement for lost wages and benefits.

AWARD SIGNED, ISSUED AND DATED AT CLEVELAND, CUYAHOGA COUNTY, OHIO, THIS 14th DAY OF NOVEMBER, 1988.


HARRY J. DWORKIN, ARBITRATOR