ARBITRATION AWARD SUMMARY

OCB Award Number: 235

OCB Grievance Number: G87-1745 + G87-2454 Elizabeth A. Daniels

Union: FOP

Department: OSHP

Arbitrator: Frank Keenan

Management Advocate: Lt. Darryl Anderson

Union Advocate: Paul Cox

Arbitration Date: 12-29-87

Decision Date: 12-2-88

Decision: Modified

ARBITRATION

BETWEEN

DEC. 29, '87

THE STATE OF OHIO, OHIO
STATE HIGHWAY PATROL

and

OCB GRIEVANCE NOS. 87-1745 & 87-2454

(Trooper Daniels' Suspensions)

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

Appearances:

For the Patrol:

Lt. Darryl L. Anderson
Ohio State Highway Patrol
Columbus, Ohio

For the F.O.P.'s:

Paul L. Cox, Esq., General Counsel
F.O.P., O.L.C., Inc.
Columbus, Ohio
Cathy B. Perry, Legal Assistant
On the Brief

OPINION AND AWARD OF THE ARBITRATOR

FRANK A. KEENAN
ARBITRATOR

I. THE GRIEVANCES:

The grievances in the case, filed by Trooper Elizabeth A. Daniels on 7/6/87 and 11/10/87, respectively, read in pertinent part as follows:

5. ARTICLE(S) AND SECTION(S) GRIEVED: Article 7, Article 19, Section 19.01.

6. STATEMENT OF GRIEVANCE (TIME & DATE, WHO, WHAT, WHERE, HOW) BE SPECIFIC: Tpr. E.A. Daniels was suspended for four days (EFF. 6-26-87) This was done without just cause(Art. 19, Sec. 19.01) and was discriminatory (Article 7) because of sex and with the apparent attempt to evade the spirit of the agreement.

7. REMEDY REQUESTED: The four day suspension be reversed and all records alluding to this incident be expunged, and the emplolyee be reimbursed for any lost days.

5. ARTICLE(S) AND SECTION(S) GRIEVED: Article 7, Article 19 Section 19.01.

6. STATEMENT OF GRIEVANCE (TIME & DATE, WHO, WHAT, WHERE, HOW) BHE SPECIFIC: Charges were filed concerning an incident occurring 7-16-87 and inc.

on 7-31-87 (attachment). This was in violation of Article 7, and Article 19 Section 19.01.

7. REMEDY REQUESTED: That the five day suspension be overturned and that I receive "5" days back pay with all records being expunged.

II. THE CONTRACT:

The grievances cite Article 7 and Section 19.01 of Article 19. Those provisions provide in relevant part as follows:

ARTICLE 7 - NON-DISCRIMINATION

Neither party will discriminate for or against any member of the bargaining unit on the basis of....sex....; except for those positions which are necessarily exempted by bona fide occupational qualifications due to the uniqueness of the job, and in compliance with the existing laws of the United States, the State of Ohio, or Executive Orders of the State of Ohio. ....

* * * *

ARTICLE 19 - DISCIPLINARY PROCEDURE

Section 19.-1 Standard

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

. . . .

The F.O.P. also relies upon Section 21.02. That section provides as follows:

ARTICLE 21 - WORK RULES

.....

Section 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.

III. STATEMENT OF THE CASE:

The grievances in the case are based on the following Statements of Charges:

Subject: Statement of Charges Against Officer:

Dear Colonel Walsh:

It is herewith stated that reasonable and substantial cause exists to establish that Trooper E.A. Daniel has committed an act in violation of the Rules of the Ohio State Highway Patrol, specifically of:

4501:02-6-02 (B) (4)

It is charged that on or about March 18, 1987 while on duty, Trooper Daniel Filed and affidavit in the wrong court jurisdiction. Trooper Daniel's failure to perform her duties satisfactorily, caused the defendant to make two (2) appearances in court and another court to issue a warrant for failure to appear.

Subject: Statement of Charges Against Officer:

Dear Colonel Walsh:

It is herewith stated that reasonable and substantial cause exists to establish that Trooper E.A. Daniel has committed an act or acts in violation of the Regulations of the Ohio State Highway Patrol, specifically of:

4501:02-6-02 (B) (4)

It is charged that on July 16, 1987 at approximately 6:35 PM, while on duty in Patrol uniform, cited a person for a child restraint violation and advised the defendant that she could attend a safety belt movie and the charge would be dismissed. The woman attended the movie, but the court could not accept the certificate for that charge. Trooper Daniel's error caused inconvenience to the defendant and the court.

It is also charged that on July 31, 1987 at approximately 9:15 PM, while on duty and in Patrol uniform, Trooper Daniel cited a defendant at the Ashland scales for "No Highway Use Tax" and used the wrong Ohio Revised Code section. Because of Trooper Daniel's error, the case was dismissed when called in the Ashland Court.

After following the due process provisions of the contract, a four day disciplinary lay off (commencing June 27, 1987) was imposed for the conduct alleged in the first of the charges and a five day disciplinary lay off (commencing November 11, 1987) was imposed for the conduct alleged in the second of the charges outlined above.

The rationale for the four day disciplinary lay off or suspension is perhaps best articulated

in the pre-suspension hearing report to Director Denihan dated June 11, 1987, from Hearing Officer Major Miller. It reads in pertinent part as follows:

> On Wednesday, June 10, 1987, beginning at 10:00 a.m., this officer conducted a pre-suspension hearing at the Ohio State Patrol General Headquarters, 660 East Main Street, Columbus, Ohio 43266-0562. This hearing was held for the purpose of affording Trooper Elizabeth A. Daniel the opportunity to present evidence and testimony to substantiate why she believes the proposed suspension of four (4) days is not justified.
>
> The hearing was conducted as outline by Article 19.04 of the labor contract.
>
> Trooper Daniel was charged with violating Rule 4501:02-6-02 (B) (4) of the Ohio State Highway Patrol's Rules and Regulations, specifically, Performance of Duty - Inefficiency. The charge states, that on Wednesday, March 18, 1987, Trooper Daniel filed an affidavit in the wrong court jurisdiction. Trooper Daniel's failure to perform her duties satisfactorily, caused the defendant to make two (2) appearances in court and another court to issue a warrant for failure to appear.
>
> Trooper Daniel appeared with Trooper C. Bisesi as her representative. She elected not to give testimony on her behalf and Trooper Bisesi did the questioning of the witnesses.
>
> Captain W. Davies, Lieutenant J. Molnar, and Sergeant T. Dreisbach provided testimony in support of the charges.
>
> Sergeant Dreisbach personally accompanied Trooper Daniel to the defendants residence to serve the warrant for his non-appearance in the Ashland Municipal Court. This is when it was discovered Trooper Daniel had filled out the arrest report

with conflicting information regarding the two courts and filed the charge in Ashland Municipal Court, which was the incorrect court. The defendant had appeared in Wayne County Municipal Court as directed by the citation, but the court had no charge filed, since she had not filed it there.

There was no testimony or evidence provided by Trooper Daniel or Bisesi disputing any of the facts or testimony as given.

Trooper Bisesi's defense basically dealt with the fact the penalty was to severe for the infraction, the supervisor should have discovered the error when checking the report when originally submitted, and the fact other instances have occurred when charges were filed in the wrong courts.

I did not find these defenses supported with proper facts or adequate evidence relevant to Trooper Daniel's case.

In conclusion, after reviewing all the investigative facts and witnesses testimony, this officer agrees the recommended suspension of four (4) days is justified.

Similarly, the rationale for the five day disciplinary lay off or suspension is perhaps best articulated in the pre-suspension hearing report to Director Denihan from Hearing Officer Major Miller. It reads in pertinent part as follows:

On Tuesday, October 20, 1987, beginning at 2:55 p.m., this officer held a pre-suspension hearing at the Ohio State Patrol General Headquarters, 660 East Main Street, Columbus, Ohio 43266-0562. This hearing was for the purpose of affording Trooper Elizabeth A. Daniel the opportunity to present evidence and testimony to substantiate why she believes the proposed suspension of five (5) days is not justified.

This proposed suspension is the result of a statement of charges being filed against Trooper Daniel by her District Commander, Captain W. H. Davies. This charge related to a violation of Rule 4501:02-6-02(B) (4) of the Ohio State Highway Patrol Rules and Regulations, specifically, Performance of Duty - Inefficiency.

The charges state that on Thursday, July 16, 1987, at approximately 6:35 p.m., while on duty in patrol uniform, Trooper Daniel cited a person for a child restraint violation and advised the defendant that she could attend a safety belt movie and the charge would be dismissed. The woman attended the movie, but the court could not accept the certificate for that charge. Trooper Daniel's error caused inconvenience to the defendant and the court.

It is also charged that on Friday, July 31, 1987, at approximately 9:15 p.m., while on duty and in Patrol uniform, Trooper Daniel cited a defendant at the Ashland scales for "No Highway Use Tax" and used the wrong Ohio Revised Code section. Because of Trooper Daniel's error, the case was dismissed when called in the Ashland Court.

Trooper Daniel was represented at the hearing by Mr. James B. Budzik, Attorney for the FOP/OLC, Inc.

Captain W. H. Davies, Lieutenant J. Molnar, and Sergeant A. E. Buccalo provided testimony in support of the charges.

Trooper Daniel elected not to testify on her behalf. Mr. Budzik questioned the witnesses and provided closing remarks.

There was no testimony or evidence provided by Trooper Daniel or Mr. Budzik that directly disputed any of the investigative facts or testimony of the witnesses.

Trooper Daniel and Mr. Budzik's position in defense of the first issue, basically dealt with the fact Trooper Daniel was giving the violator

a break by not charging her for not wearing a seat belt, which she initially intended to do. Prior to changing her mind, she had given the violator a certificate to view the seat belt film, but failed to retrieve it.

Mr. Budzik attempted to indicate there was confusion at this point because the violator had to attend to the children in her car. This made Trooper Daniel forget the certificate, which in turn the violator took to view the seat belt film, but found out from the court after mailing it in, it was not acceptable for a child restraint citation.

The evidence presented, indicated Trooper Daniel should have handled the situation properly under the circumstances, and that she did not efficiently follow through with the decisions she had made.

In the second issue, Mr. Budzik admitted Trooper Daniel had made an error in using the incorrect section of law, however, he felt the proposed penalty was more severe than necessary for the offense she was accused of.

I did not find these defenses supported by proper facts or adequate evidence.

In conclusion, after reviewing all the investigative facts, witnesses testimony, and the progressive disciplinary process relating to previous incidents involving Trooper Daniel, this officer agrees with the recommended suspension of five (5) days as being justified.

The Regulation referred to in the Statement of Charges provides as follows:

> "4501:2-6-02 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."

The chart which follows outlines the Grievant's formal discipline received prior to the suspensions challenged here:

DATE	TYPE OF DISCIPLINE	OFFENSE
11/02/82	2-Day Suspension	Accidential Discharge of shotgun
07/19/83	Formal Reprimand	Failed to maintain communications with post
09/06/83	Counseling	Failed to adequately perform routine duties
09/29/83	Formal Reprimand	False statement to supervisor
03/05/84	Formal Reprimand	Patrol Car Accident
05/10/84	Formal Counseling	Conducted personal business in uniform
06/01/84	Counseling	Damaged equipment Camera
02/25/85	Formal Reprimand	Lost Violator's Operators License
04/11/85	Formal Counseling	Failed to take necessary action when investigating accident
01/13/86	Formal Reprimand	Failed to provide requested report to court
04/08/86	Formal Reprimand	Cited violator into wrong court
04/23/86	Formal Reprimand	Patrol Car accident

DATE	TYPE OF DISCIPLINE	OFFENSE
04/23/86	Formal Reprimand	Cited Violator into wrong Court
07/10/86	Written Reprimand	Failed to appear for Court case
07/23/86	Verbal Reprimand	Disobeyed order, did not leave Patrol Car on Post
05/19/87	3-Day Suspension	Failed to provide statement with D.W.I. Arrest - resulting in dismissal of case
05/19/87	Written Reprimand	Patrol Car accident

Only the written reprimand of 7/10/86; the verbal reprimand of 7/23/86; the three day suspension of 5/19/87; and the written reprimand of 5/19/87, were imposed after the effective date of this the parties first Contract (April 28, 1986).

The record reflects that in addition to this formal discipline, the Grievant, due to perceived performance problems, received various supplementary training. A chart outling such training follows:

DATE	TYPE OF TRAINING
02/21/84 - 02/24/84 (30 hours)	Basic Improvement of Skills in the following areas: Interpersonal Relations Communications Accident Investigation OMVI Enforcement Testifying in Court Firearms - Handling & Use Work Attitude Self Confidence
03-27/84 - 03/29/84 (22 hours)	Advanced Detection, Apprehension & Prosecution of the Impaired Driver - To improve attitude & skill
04/05/84 (8 hours)	Fred Prior Seminar - "How To Work With People" To improve interpersonal communications skills
04/16/84 - 04/20/84 (38 hours)	Basic Accident Investigation To improve skills
09/17/84 - 09/21/84 (38 hours)	Radar Operator's Course To improve skills
05/19/86 - 05/22/86 (30 hours)	Individualized Driving Course To improve driving skills; to instill defensive driving attitude
03/23/87 - 03/27/87 (38 hours)	Firearms, Arrest, & Self-Defense Tactics Course To improve skills To instill positive attitude concerning officer safety
05/11/87 - 05/29/87 (108 hours)	Individualized Training, Basic Improvement in the following areas: Human Relations & Behavior Accident Investigation Patroling Techniques Criminal Investigations Firearms Proficiency Officer Survival Tactics

DATE	TYPE OF TRAINING
06/02/ - 07/05/87	Direct Supervision Sgt. R. L. Ferguson Coach - Pupil Format To improve operational skills, knowledge, and attitudes

At the time of the hearing herein the Grievant was a 6 year veteran as a trooper. All of those years have been spent at the Ashland post, where she serves along with six other troopers.

Most of the record evidence is undisputed. By way of elaboration upon the pre-disciplinary hearing reports set forth above, the record reveals that the Grievant's four day suspension was grounded upon an incident whereby her investigation of an auto accident led her to cite a driverfor a traffic violation , but in doing so she filled out the citation improperly. Thus, while she correctly informed the violator he would have to appear in Wayne County Court, and indicated Wayne County Court on the bottom of the ticket, she incorrectly indicated on the top portion of the ticket that it should be filed in the Ashland Municipal Court. The ticket was in fact filed in the Ashland Municipal Court. The violator appeared in Wayne County Court.

Knowing nothing of said violator's case, the Wayne County Court sent him home. In the meantime the violator's case was called in the Ashland Municipal Court. When the violator didn't appear, a warrant for his arrest issued. It wasn't until the Grievant went to serve the warrant upon the violator that she realized her mistake.

Had the Patrol been unable to serve the warrant on the violator, his name would have been entered into the LEADS system and the Patrol could have been sued. In any event these circumstances led the Court to dismiss the charges.

The Patrol's investigation which led the Grievant's five day suspension included interviews with a Ms. McMichaels whom the Grievant cited on 7/16/87 for violation of the State's "child restraint" law. The Patrol's interviews with McMichaels led the Patrol to believe that the Grievant had allowed McMichaels to believe the fine for the violation of the "child restraint" law could be avoided if McMichaels viewed a safety film intended to educate the public on the benefits of the State's adult seat belt law, a different piece of legislation. McMichaels attended a viewing

of the safety film and sent proof of attendance and her fine to the Court. The Court returned McMichaels fine, advised her the film viewing would not allow her to avoid appearing for the child restraint violation, but upon being advised that she possessed a child restraint device, and evidently coupled with her "misunderstanding" as to the impact of the film viewing on her citations, dismissed the charges against her. The Grievant's version of this incident differs however. According to the Grievant, she first intended to give McMichaels three citations: one for speeding; one for no "child restraint"; and one for not wearing her safety belt. Accordingly, she gave McMichaels a "Buckle Up Ohio" card which advises that upon viewing a safety belt educational film the safety belt charge and fine would be dismissed. McMichaels advised the Grievant that she'd recently been released from the penitentiary and in addition that she'd been cited before for a seat belt violation, and was familiar with the procedure of viewing the educational film. The Grievant then decided to merely cite McMichaels for speeding and the violation of the "child restraint" law, and issue a warning

only for failing to wear a seat belt. The Grievant credibly testified that she expressly told McMichaels she was only giving her a warning for the seat belt violation.

The five day suspension is also grounded upon the Grievant's issuance on July 31, 1987, of a traffic citation, failure to display a proper Highway Use Tax decal,in violation of ORC 5728.04. While the Grievant properly described the offense in the "description of offense" portion of the ticket, she improperly noted the Section violated as ORC 5577.04 elsewhere on the ticket. This error was noted by the presiding judge and the case was dismissed due to the faulty affidavit.

The record also reflects that similar errors have been engaged in by other troopers and that no,or lesser,discipline has been imposed. It appears that often supervisors catch and correct errors in citations and/or that violat ors waive a hearing, pleading guilty and simply pay the fine purportedly due. In this manner no adverse consequences result from ticket writing errors.

It was certainly the perception of certain Ashland post troopers who testified that the Grievant

was treated more harshly than others and that lax and lenient enforcement for lack of care in filling out citations prevailed prior to the Grievant's challenged discipline.

It is noted that Trooper Schaub of the Ashland Post indicated that he'd had four accidents in patrol cars and had never been sent to the Academy for additional driver training.

It is also noted that Trooper Teaque of the Ashland Post indicated that in one day he wrote twenty-eight citations with the wrong court date, but had not been disciplined for that error.

Finally it is noted that Sergeant A. F. Buccalo's report, following his interview with Ms McMichaels, reflects that the Grievant "advised Ms. McMichaels she could attend a seat belt movie.... and they would dismiss the child restraint violation," a matter the Grievant credibly denies, and that, he, Sgt. Buccalo, since McMichaels was "misinformed by Trooper Daniel ....would contact the Law Director and have the (child restraint) charges nollied." Buccalo's report also notes that "McMichael stated that she believed that her three year old daughter weighed over fifty pounds. The daughter was weighed in my presence at the residence and she weighed only 27 pounds. "

IV. THE F.O.P.'S POSITION:

The F.O.P. takes the position that the parties' Agreement "....provides that no member of the bargaining unit will be discrimnated against, ...disciplined without just cause and (that) all work rules and directives will be applied uniformly to all members. (Yet) the Grievant has been disciplined without just cause and is being discriminated against." It is the F.O.P.'s position that "the Grievant is unreasonably scrutinized and discriminated against." In support of this contention it is the F.O.P.'s assertion that "according to Trooper Bisesi, also of the Ashland Post, errors written on citations are common, but that the Grievant is scrutinized to a greater extent than other troopers. Clerical errors that are usually overlooked or corrected become a big issue when....Grievant is involved. Trooper Bisesi further stated that since the Grievant has been the subject of disciplinary action for offences that other troopers weren't previously disciplined for, Management is now more stringent with everyone. ...."

It is the F.O.P.'s additional contention that the Grievant "....has been singled out for the additional training in defensive driving. ....The F.O.P. believes that the Grievant was ordered to receive so much additional training as a form of punishment and that the punishment was discriminatory." In support of this contention the F.O.P. points to the testimony of Trooper Schaub who indicated that he'd had four accidents in patrol cars and had never been sent to the Academy for additional driver training.

With respect to the McMichaels seat belt citation incident which forms part of the basis for the five day suspension, the F.O.P. points out that "there is a discrepancy between Ms. McMichaels statement and that of the Grievant." It is the F.O.P.'s contention in effect that the Patrol's management's crediting of Ms. McMichaels, a convicted felon, was unreasonable, and that without McMichaels version of events, no discipline is warranted for the situation.

With respect to the final incident involving the issuance of a citation to truck driver Dobner for failure to display a highway use sticker,

it is the F.O.P.'s position that"....here again, the Employer disciplined the Grievant without just cause and in a discriminatory manner. Trooper Teague of the Ashland Post testified that clerical errors are made on a daily basis. In fact he stated that in one day he wrote the wrong court date on twenty-eight (28) citations. He has never been disciplined for that error. Yet, the Grievant wrote the wrong section number on a citation, the first time she made this particular error and received a suspension. The Employer obviously does not apply its work rules and directives uniformly to all members."

The F.O.P. contends that "it appears that the trooper whose case gets dismissed is disciplined and the trooper whose case is successfully prosecuted isn't disciplined even though they have made the same clerical error. This practice is unfair, discriminatory and in violation of Articles 7, 19, and 21 of the....Agreement."

In sum it is the Union's position that".... the Grievant is a six (6) year trooper at the Ashland Post. She has been consistently treated unfairly,

disciplined without just cause, and discriminated against. In the instant case the discipline consists of a total of nine (9) days suspension. We ask that the Arbitrator rule that the Employer is in violation of Articles 7, 19, and 21 of the contract, that all records pertaining to these incidents be expunged and award the Grievant back pay for the nine (9) days she was unjustly suspended."

V. THE PATROL'S POSITION:

The Patrol takes the position, referring to the seven criteria for establishing "just cause" for discipline alluded to by Arbitrator Daugherty in his celebrated decision in Enterprise Wire Company, 46 LA 359, 362-365 (1966), that it has established "just cause" for the Grievant's suspensions. By way of elaboration, the Patrol asserts that "there is not dispute of the fact the Grievant had both knowledge of the possible or probable consequences of inefficient action on her part" for she knew of the rule proscribing inefficiency and she'd been warned on the occasion of previous infractions

that further infractions would lead to more severe sanctions.

It is the Patrol's position that "....in order for the Ohio State Highway Patrol to effectively promote highway safety, troopers must properly perform routine enforcement duties in such a manner as to maintain a positive working relationship with the various courts throughout the state. In both incidents in question, the errors of inefficiency committed by the Grievant lead to confusion and the subsequent dismissal of cases in the courts involved.

Additionally, citizens of the state, and the motoring public with which troopers of the Division interact should expect to be properly instructed by the trooper when cited into court. In both instances in question, violators were given wrong or misleading information, which lead to further inconvenience for them. The Division's reputation, in the minds of the citizens involved, was considerably diminished by the inefficiency of the Grievant.

Testimony by Captain Davies indicated that in the March incident, the issuance of the citation into the wrong court, and the resultant warrant for failure to appear, could have placed the Division in a serious position of liability if the warrant had been entered into the state-wide Law Enforcement Advanced Data System."

Emphasizing its investigations and their alleged thoroughness, the Patrol asserts that "the evidence confirmed substantial evidence existed to prove the Grievant had been inefficient, regardless of the standard of proof required."

It is the Patrol's position that "....During the hearing, the Union presented evidence and testimony intended to reflect that other troopers had operated inefficiently in regard to the issuance of citations into court, and had not been similarly disciplined. The Union also indicated, through testimony of its witnesses, that the Employer had discriminated against the Grievant because of her sex. However, the Union has failed to provide any evidence to substantiate its allegations.

While Troopers Teague, Schaub, Bisesi and Bright all testified they had, in the past, committed errors in both filling out and filing

affidavits, none indicated these errors resulted in the dismissal of a court case. Likewise, none indicated these errors resulted in the issuance of a warrant due to the citation being filed in the wrong court.

At the same time, all four of the Union's witnesses indicated they had been disciplined for various inefficiencies related to citations and court duties. Trooper Teague testified that he had received 'four or five disciplines this year'." Accordingly, the Patrol contends that it "....has clearly shown that inefficiencies related to routine interaction with courts lead to discipline if the inefficiency causes an undesirable outcome. The Union failed to show a lack of even-handed application of discipline, although it attempted to by inferring as much. On the other hand, the Employer, through testimony and evidence, clearly has shown discipline results from acts of inefficiency."

Pointing to the Ohio Civil Rights Commission's finding of no probable cause to conclude that the Patrol has discriminated against the Grievant because of her sex, the Patrol asserts that it "has not discriminated against the Grievant

because of her sex. The Employer suspended her in each instance because of just cause."

It is the Patrol's position that "....while the Grievant has been disciplined several times for like inefficiencies, the Employer has also spent a great deal of time and resources in attempting to improve the Grievant's performance. Testimony by Major Hartsell and accompanying evidence clearly show the Employer's good faith attempt to improve her performance, in an attempt to alleviate her propensity for inefficient actions. Major Hartsell testified that the Grievant has received more training than any other trooper in the Division during the last six years. The Union's only attempt to refute this effort by the Employer was to infer the training was part of the Employer's discrimination against the Grievant."

It is the Patrol's contention that it "....clearly and unrefutedly based the amount of discipline on the seriousness of the Grievant's proven offense and the Grievant's past disciplinary record relating to similar violations."

Specifically with respect to the Grievant's four day suspension the Patrol takes the position that"....

The Grievant error in properly completing the routine traffic ticket resulted in confusion and inconvenience for the violator, and the two municipal courts, and placed the Division in a potentially liabilous situation, had the warrant been placed in the statewide criminal data bank. These facts, coupled with the Grievant's past history of inattention to details relating to court-related activities, were the primary considerations in determining a four day suspension was the proper discipline."

In sum the Patrol asserts that "....the Employer, in considering the incident involving the Grievant on March 18, 1987, had "just cause" to suspend the Grievant for four (4) days, based on the inefficiency involved, the possible consequences of the inefficiency, and the Grievant's past disciplinary record.

The Employer, in considering the incidents involving the Grievant on July 16, 1987, and July 31, 1987, had "just cause" to suspend the Grievant for five (5) days, based on the inefficiencies involved, the possible consequences of the inefficiencies, and the Grievant's past disciplinary record.

If the Employer has erred in its disciplinary action, it has erred in favor of the Grievant, who has a long history of inefficiency. The Employer has expended considerable training resources in an attempt to improve the Grievant's performance.

The grievances must be denied."

VI. ISSUE:

Although the parties failed to stipulate the issue, they are nonetheless essentially in agreement that the issue is:

"Were the Grievant's suspensions for 'just cause', and, if not, what is the appropriate remedy?"

VII. DISCUSSION & OPINION:

The issues here are many. In some ways this case brings one back to certain basics. Thus it is noted at the outset that the applicable "just cause" standard is a standard of fairness both substantive and procedural and as such it implicitly proscribes the imposition of arbitrary, capricious, indeed unreasonable disciplinary measures. And it is now well established that discipline dis-

criminatorily based on the alleged offender's sex is discriminatory and therefore by definition arbitrary and caprious and hence proscribed under the just cause standard. Likewise the non-uniform and/or disparate imposition of discipline is unfair, arbitrary, and hence proscribed. Like circumstances call for like discipline.

As has been seen, the F.O.P.'s contention here is essentially five fold: (1) the Grievant was discriminatorily disciplined based on considerations of her female sex; (2) that the Grievant was treated disparately in that she was more severely disciplined than others for the same offenses; (3) that the work rule in effect proscribing inefficiency has been unfairly tightened with respect to all employees, including perforce the Grievant; (4) that it is unfair to administer more severe discipline based solely on the outcome of certain conceded errors; and (5) that the Grievant's five day suspension was based in part on certain unwarranted conclusions vis a vis the McMichaels incident.

Addressing these contentions seriatim, while the Arbitrator is not bound by the OCRC's determination to the effect that no sex discrimination against the Grievant has been shown here,

the decision in that regard by an agency of government entrusted with the task to ferret out such discriminatory motives is certainly worthy of considerable deference. Couple this reality with the record established fact that the Grievant has exhibited considerable difficulty in paying attention to details throughout her career, and the fact that the alleged conduct which forms the basis of the Grievant's suspension, if established, represents yet other instances of unacceptable inattention to detail, and it must be concluded that the evidence falls short of establishing that the Grievant's discipline was discriminatorily motivated.

Nor do I find merit in the contention that the Grievant was treated disparately. This is so principally because while others at the Post may have escaped discipline or received less severe discipline for the same shortcomings, it was not shown that any of them carried the same "baggage," as it were, of past offenses. But one's disciplinary history and recidivism is a most relevant "cirumstance" to be considered in determining whether to administer

formal discipline in the first place, and if so, in what measure. In short, therefore, there was no showing of "like circumstances", with the consequence that there was no need for "like discipline."

With respect to the "tightening" of the proscription against inefficiency as manifested by citation errors, by way of imposing discipline for such errors, whereas in the past perhaps a more lax approach was followed, in my judgment the dismissals which resulted from the Grievant's errors warranted such a tightening. Thus, as the Patrol correctly points out, sound Court relations are essential to the fulfillment of the Patrol's mission, and such relationships are jeopardized where clerical errors in citations warrant dismissal of charges by the Court. Such errors undermine the Court's confidence in the Patrol and thereby impact adversely on the court-patrol relationship. It was not, therefore, unfair of the Patrol to tighten up the sanctions for ticket writing errors, which errors had the potential of harming the accomplishment of the Patrol's mission.

Next addressed is the F.O.P.'s contention to the effect that it is simply unfair to link the severity of discipline to the fortuitous circumstance of a clerical error going undiscovered

by a supervisory employee and winding up in Court, where there, depending on the Court's discretion, it might result in the citation being dismissed. In my judgment this position is essentially meritorious. Concededly, there is much surface appeal to the proposition that adverse consequences of such an error ought to lead to greater punishment, but in my view, close scrutiny of said proposition does not pass muster under the "just cause" standard. In my judgment under the "just cause" standard the forseeable consequences, and not the fortuitous consequences, ought to govern the severity of the discipline, recognizing always, as noted above, that the particular employee's unique disciplinary history, especially vis a vis similar types of offenses, is also a very relevant factor in arriving at the proper level of severity of discipline. And here, a readily forseeable consequence of a clerical error in a citation is the dismissal of the citation in Court. Accordingly, the existence of the error calls for the same level of discipline where the past disciplinary history of the employees

involved, or mitigating factors, are substantially similar. Since here the discipline meted out was in part clearly based on the fortuitous consequences of the faulty citations slipping by Supervisory scrutiny and the respective Courts unwillingness to allow their amendment, and hence their dismissal, the suspensions must be somewhat modified.

Finally there is the matter of the Patrol's conclusions vis a vis the McMichaels incident. Directly to the point, I find these conclusions to be unreasonable and not grounded upon the credible evidence. In my view the evidence supports the conclusion that it was more probable than not that McMichaels was well aware that the viewing of a seat belt film was not exculpatory of the speeding and child restraint citation, but that it was worth a try. Thus McMichaels was a convicted felon, was less than candid in reporting the weight of her baby, and was expressly told she was only receiving a warning for her seat belt violation. Moreover, McMichael had prior experience with the seat belt laws, having been previously cited for violating same. Concededly, retrieval by the Grievant of the Buckle Up Ohio card would have knocked the

slats out from under McMichaels claim of being mislead or confused, but to require retrieval, else risk a finding of "inefficiency", despite the express notice to McMichaels that she was being issued a warning only, and McMichael's prior experience with the seat belt law, would unduly shift responsibility from the violator to the trooper. While in other dircumstances, the failure to retrieve the Buckle Up Card might be viewed as misleading or confusing to the violator, such a conclusion is not warranted in the face of the circumstances present here. Since the Grievant's failure to retrieve the Buckle Up Card cannot be reasonably said to have mislead or confused McMichaels, no basis for inefficiency vis a vis the McMichaels' matter exists. Accordingly, since presumably this incident formed at least one half of the reason for the five day suspension, based as it was on two separate alleged shortcomings, the five day suspension is reasonably reduced to 2½ days.

And where, as here, both the four day and five day suspensions are somewhat flawed by being grounded in part on the improper basis of depending in part on certain fortuitous consequences

of the Grievant's conceded "inefficiency" of writing erroreous citiations, it falls upon the Arbitrator in such a circumstance, to fashion an appropriate remedy. In this regard it, is deemed appropriate that the severity of the suspensions simply be reduced. So it is that the four day suspension is reduced by a day, and the five day suspension by an additional day. Given the Grievant's history of inattention to detail, a disciplinary lay off of three days in lieu of the four day suspension, and a 1½ day disciplinary suspension in lieu of the five day suspension, is found to be appropriate. The Grievant shall therefore be made whole for all wages and benefits lost by virtue of the more severe discipline initially meted out.

VIII. AWARD:

For the reasons more fully set forth above, the grievances are sustained in part and denied in part. Each of the suspensions is reduced as more fully noted above. The Patrol shall undertake the remedy described above as soon as practicable. The Grievant's record shall reflect the

directed modifications to the severity of the discipline and the lack of sufficient factual basis for the McMichaels' matter.

DATED: December 2 , 1988

Frank A. Keenan
Arbitrator