

ARBITRATION AWARD SUMMARY

OCB Award Number:

241

OCB Grievance Number:

15-03-880418-0059-04-01

Roger Teague

Union: FOP

Department: OSHP

Arbitrator: Frank Keenan

Management Advocate: Capt. J. M. Demaree

Union Advocate: Paul Cox

Arbitration Date: 9-29-88

Decision Date: 12/16/88 and 1/17/89

Decision: Denied

Hold

Award # 241

ARBITRATION
BETWEEN

THE STATE OF OHIO, OHIO
STATE HIGHWAY PATROL

and

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

Appearances:

For the Patrol:
Capt. J. M. Demaree
Ohio State Highway Patrol
Columbus, Ohio

For the F.O.P.
Paul L. Cox, Esq., General Counsel
F.O.P., O.L.C., Inc.
Columbus, Ohio

OPINION AND AWARD OF THE ARBITRATOR

FRANK A. KEENAN
ARBITRATOR

Statement of the Case:

This case, well presented by the parties' representatives, was heard in Columbus, Ohio, on September 29, 1988. It involves the propriety of a two-day disciplinary suspension of Trooper Roger E. Teague of the Ashland Post.

On March 8, 1988, Trooper Teague received from the Superintendent, Colonel Jack Walsh, a statement of charges against him and notice of the time, place, and procedures to be followed with respect to a "pre-suspension hearing." The charge letter reads in pertinent part as follows:

"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 two (2) working days for violation of Rule 4501:2-6-02 (B) (4) of the Rules and Regulations of the Ohio State Highway Patrol, to wit: on Monday, February 1, 1988, at 1:30 p.m., you failed to appear in Ashland Municipal Court to testify in a contested case. You were duly notified that your appearance in court was required on that date. Your failure to appear resulted in the case being dismissed and caused inconvenience to the defendant, the court, and a Division pilot who was also required to appear."

Rule 4501:2-6-02 (B)(4) referred to in the charge letter, provides as follows:

4501:02-6-02 Performance of Duty And Conduct

. . . .

(B) Performance of Duty

. . . .

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

It is noted that as testified to by Ashland Post Commander Lt. James Molnar, the Patrol has a long-standing policy requiring the arresting officer to appear in court in all cases where the defendant pleads not guilty and contests his/her arrest.

Trooper Teague conceded that he'd been notified to appear in Court on February 1, 1988, but that he simply forgot to do so.^{1/}

It is noted that between the time Trooper Teague was notified and his actual Court date, some four days went by and each of these days was an off-day for Teague, including his Court date of February 1, 1988.

Also of note is the fact that Teague is a particularly prolific ticket writer, averaging approximately 300 per month, whereas 75 or so per month will pass muster. Further in this regard, the record shows that Teague has an error rate of approximately 2%. On two occasions within the last two years Teague has been disciplined for ticket/affidavit errors. On the first occasion (10/13/87) he was issued a verbal reprimand and on the second occasion (2/2/88) he was issued a written reprimand. This second incident resulted in the Court's dismissal of the citation. These incidents and Trooper Teague's forgetting to appear in Court as required on February 1, 1988, which also led to dismissal by the Court of the underlying

^{1/} An inordinate amount of time was spent developing an inference to the effect that certain documents must have been observed by the Grievant and that he therefore knew he had to be in Court. In light of the Grievant's own testimony, these matters need not be considered.

citation, were all viewed by management as "court related errors." The first two incidents were not grieved by Teague. However, Teague did grieve the third incident and such is the subject of this proceeding. Teague's grievance as amended, reads in pertinent part as follows:

". . .

5. Article(s) and Section(s) Grieved: Article 19.01;
7. Grievance involving a suspension (2 days)
6. Statement of Grievance . . . on 4-18-88 Tpr. Teague received a letter informing him of a 2 day suspension without pay effective 04-16-88. This is for an alleged violation of rules and regulation section 4501:2-6-02 (B)(4) inefficiency on duty. It is the opinion of Tpr. R. E. Teague and the Ohio Labor Council representative that Tpr. Teague did not violate above section. Request a Step 3 hearing and review in this matter.
Remedy Requested: That this suspension be overturned and all lost benefits be restored."

It is noted that the record reflects in Patrol Exhibit #7 the following "Past Discipline Relating To Court Cases," Patrol wide, as follows:

Tpr. R. W. Rich	D4, P50 8/8/85 ^{2/}	5-days (Inefficiency) Failure to appear in court (duly notified) 2 cases were dismissed
Tpr. L. K. Phillips (Settled)	D9, P73 2/16/87	3-days (Inefficiency) Failure to appear in court (duly notified)
Tpr. E. A. Daniel (No arb.)	D3, P3 1/31/87	3 days (Inefficiency) Failure to complete statement on DUI arrest
Tpr. E. A. Daniel	D3, P3 3/18/87	4-days (Inefficiency) Wrong information on affidavit and cited to wrong court
Tpr. E. A. Daniel	D3, P3 7/16/87	5-days (Inefficiency) Wrong information - wrong section O.R.C.
Tpr. J. H. Ervin (waived)	D4, P78 11/18/87	2-days (Inefficiency) Failure to appear for three court cases - dismissed - he was duly notified. (Had prior written for same) (No verbal)
Tpr. R. E. Teague	D3, P3 2/1/88	2-days (Inefficiency) Failure to appear in court case - duly notified

^{2/} This matter antedates the effective date of the parties' collective bargaining agreement.

The record also reflects that Trooper Bisesi received a verbal reprimand on 12-8-86 for "inefficiency"; another verbal reprimand on 3-17-87 for inefficiency; and a written reprimand on 3/1/88 for inefficiency. According to the Grievant, following this incident of 3/1/88, Bisesi made another citation error, but had not yet been suspended for such.

By way of elaboration concerning Trooper Daniels, Teague indicated that he and other troopers at the Ashland Post perceived that Trooper Daniels was being discriminated against due to her female sex by way of discipline and that to mask this discrimination he was being disciplined for matters theretofore overlooked.

The Patrol's Position:

The Patrol takes the position that Grievant Teague was properly disciplined by way of a two day suspension. It is the Patrol's position that the Grievant's suspension "was the result of his failure to appear in the Ashland Municipal Court, on a contested court case, after being duly notified. His failure to appear resulted in the case being dismissed by the court. (Therefore) the Employer met the test of 'just cause,' to justify the two-day suspension. "

Pointing to the Grievant's two prior disciplinary actions within the past two years, which it characterizes as attributable to "inefficiency stemming from court related matters," the Patrol contends that the Grievant's two day suspension "was inherently reasonable based on the Grievant's conduct regarding this matter,

while also considering his previous disciplines." In support of this contention the Patrol asserts that "the Grievant's failure to appear (in court) resulted in the case being dismissed, which caused inconvenience to the Court, witnesses, and the defendant, who came from Pennsylvania. His failure to appear unfavorably reflects upon the efficiency of the Grievant as well as the Ohio State Highway Patrol."

It is the Patrol's position that "the 'just cause' standard in this case has been met, and the facts support the reasonableness of management's position."

The Patrol takes the position that "management applied its rules fairly and objectively." Addressing itself to the F.O.P.'s contentions that the Grievant was treated disparately, the Patrol asserts that "a no-show-in-court requires more severe discipline; an officer not showing up in Court is more serious than clerical errors;" and hence severer discipline is called for.

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

The F.O.P.'s Position:

The F.O.P. takes the position that the severity of the discipline for a missed court date here was arbitrary and capricious and grounded on a desire to "cover up" the contemporaneous discipline of female trooper Elizabeth Daniels as not sex based by "getting the guys too." It argues that prior to the Daniels' matter, discipline for court related shortcomings had been lax.

Pointing to the Patrol's failure to punish Trooper Bisesi for a clerical error infraction subsequent to 3/1/88, and the alleged incompleteness of Patrol Exhibit #7, the F.O.P. contends that the Grievant's two day suspension for a missed court date was disparate and therefore not for just cause.

It is the F.O.P.'s contention that the testimony reveals that management determines the severity of the discipline for conceded shortcomings on the basis of the Court's whim as to whether it will dismiss or not the flawed case brought to it, flawed as a result of some conduct/omission on the part of the Trooper being disciplined, and that a determination on such a basis is the antithesis of the 'just cause' standard. The F.O.P. takes the position that management has established an improper criterion for discipline: if, despite a Trooper's error, his/her cases do not get dismissed, no discipline will be administered. It is the F.O.P.'s contention that discipline is justified under the parties' contract and the just cause standard on the basis that its purpose is to correct and change the employee's behavior, and that discipline based on the fortuitous action of a Court, fails to serve that purpose.

It is further the F.O.P.'s contention that the nature of the discipline, a two day suspension, was simply "too severe." The F.O.P. asserts that the Patrol has simply overreached here and that the Grievant's conceded missing of a Court date was unworthy of such severe discipline. It is the F.O.P.'s contention that

Grievant Teague's discipline ought to be only a verbal reprimand "as received by other like situated troopers."

So it is that the F.O.P. urges that the grievance be denied.

The Issue:

As the parties have stipulated, the issue here is:

"Was the (2) two-day suspension (issued to the Grievant) on April 14-15, 1988, as a result of inefficiency, for just cause in accordance with the requirements of Article 19?^{3/}

If not, what shall the remedy be?"

Discussion and Opinion:

First addressed is the contention that the severity of the Grievant's discipline was a function of the necessity to cover up the Patrol's wrongful sexually discriminatory discipline of Trooper Daniels. Having found in the Daniels' case that no such discrimination took place, it follows that no cover-up was necessary, and hence any possible inference that the Grievant's discipline was "cover-up" motivated must fail.

As pointed out in the Daniels' Decision, the "tightening" of the proscription against inefficiency as manifested by troopers' court related shortcomings, was properly grounded in light of the court dismissals which resulted from Daniels' errors. Thus while it was found in the Daniels' case to be improper, under the just cause standard, to link the severity of discipline to the Court's

^{3/} Article 19 is set forth in its entirety, as is Article 7, in Appendix I.

whim as to the dismissability of a flawed citation, (a proposition reiterated here), in the face of the increase in the Court's dismissals, it was not improper to tighten up the rule against inefficiency which the patrol historically has relied upon to enforce the correct writing of citations. Put another way, distinct concepts are called into play here. Thus the objective fact of an increase in court dismissals, warranted a departure from laxity, for as the Patrol pointed out, dismissals hamper the discharge of the Patrol's underlying mission. Ideally, such a departure and tightening up of a rules enforcement is accomplished by a well publicized formal announcement to the effect that henceforth strict enforcement will apply. Strict enforcement can also be effectuated, however, by stricter enforcement in a particular case and this is especially so where, as here, the work force is small, and the case receives ample notoriety, as surely was so with the Daniels' case. Given Daniels' unenviable accumulation of prior discipline, the severity of her discipline conformed with both the progressive discipline principles embodied in the contract, and served to signal to the work force that henceforth court related shortcomings of the kind engaged in by Daniels would be met with stricter enforcement and with severer discipline, inevitably, therefore, leading to more severe discipline for those employees who had garnered a disciplinary record for such offenses. On the other hand court dismissals cannot rightfully support more severe discipline simply because of the fortuitous

consequence of dismissal. Conduct is either permissible or proscribed. If proscribed it warrants evenhanded discipline.

What does a citation error warrant by way of discipline? Part of

the answer lies in the foreseeable consequences of a citation error. One of the foreseeable consequences is court dismissals, an undesirable consequence given the Patrol's mission.

Therefore, all employees committing citation errors deserve the same severity of discipline, taking into account, of course, that discipline can vary in severity from employee to employee given the prior disciplinary history of the particular employee and where he stands on the progressive discipline track. It is simply unreasonable, indeed arbitrary, and hence contrary to the just cause standard, to mete out different degrees of discipline for the same underlying shortcoming, such as citation errors, based solely on whether the foreseeable consequence of such an error in fact comes to pass, which "fact" in turn is based on the fortuity of the Court's exercise of its discretion in such circumstances.

These principles and these distinctions were brought to bear in the Daniels case. They are reiterated here. And here, as in the Daniels case, it's clear that the dismissal of the case for which Grievant Teague failed to appear played a role in management's decision as to the severity of the discipline to be administered. Ordinarily this circumstance would warrant a diminution of the discipline administered, as was done in the Daniels case. However, here the Patrol argues, concededly

belatedly and for the first time at the arbitration hearing, that the Grievant's particular offense, missing a court appearance, is more serious than the court citation error circumstances involved in the Daniels', and other cases, discussed, and that accordingly, the severity of the discipline here is in any event supportable. The Patrol contends that following due notice, as was given here, failure to appear in Court to testify constitutes a fundamental failure to discharge an absolutely necessary function of a Trooper's job, which is inherently more severe and serious a shortcoming than citation errors. And implicit in the Patrol's position is the contention that while specifically a missed Court appearance differs from a citation error, generically a missed Court appearance is properly viewed as a "court related error," thereby logically warranting its consideration on the progressive disciplinary track for court related errors. Also implicit in the Patrol's contentions, and indeed in effect expressly argued, is the contention that given the alleged inherent severity of the conduct of a missed court date, the disparate arguments made must fail. It was not shown that other troopers had committed citation errors followed by a missed court appearance and in this manner the "like circumstances" necessary to make out a disparate treatment contention were not established.

These belated contentions were first made in the Patrol's closing argument, which followed the F.O.P.'s closing argument. Accordingly, the F.O.P. was not accorded an opportunity to respond to these contentions. The due process requirement

imbedded in the just cause concept mandates that such an opportunity be afforded. Accordingly, the case is remanded to the parties for the purpose of briefing the Arbitrator with respect to the substantive impact, if any, of the belatedness of the contention that the missed court appearance is inherently more serious than court citation type errors; the merit of the contention that missed court appearances are more serious; the merit of the contention that if more serious, disparate treatment contentions must fail; and the merit of the contention that notwithstanding their purported greater seriousness, missed court appearances are properly considered on a court related errors progressive discipline track. Briefs on these topics are to be reviewed within fourteen (14) days of the issuance of this Opinion and Award, or such reasonable extension thereof as may be requested and granted.

Award

For the reasons more fully set forth above, the final decision in the case is held in abeyance pending receipt of such briefs as the parties may elect to file, as more fully set forth above.

Dated: December 16, 1988



Frank A. Keenan
Arbitrator

ARBITRATION

BETWEEN

THE STATE OF OHIO, OHIO
STATE HIGHWAY PATROL

and

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

Appearances:

For the Patrol:

Capt. J. M. Demaree
Ohio State Highway Patrol
Columbus, Ohio

For the F.O.P.:

Paul L. Cox, Esq., General Counsel
F.O.P., O.L.C., Inc.
Columbus, Ohio

SUPPLEMENTARY OPINION AND AWARD OF THE ARBITRATOR

FRANK A. KEENAN
ARBITRATOR

I. STATEMENT OF THE CASE:

This case involves the propriety of a two day disciplinary suspension of Trooper Roger E. Teague of the Ashland Post. On December 14, 1988, an Interim Opinion and Award issued in the case. In the Opinion the F.O.P.'s contention that Grievant Teague's discipline was fatally flawed because it was imposed to "cover-up" the alleged sexually discriminatory discipline of Trooper Elizabeth Daniels, was rejected. Also rejected therein was the F.O.P.'s contention to the effect that the Patrol's overall stricter enforcement of discipline for court related errors and the implementation of that policy and its application to Grievant Teague was improper. Judgment was reserved, however, with respect to the F.O.P.'s additional contentions that Grievant Teague was treated disparately and that in any event the discipline meted out was too severe. This reservation was in my opinion necessitated by the Patrol's belated contentions in its final argument (which followed the Patrol's final argument) to the effect that Grievant Teague's

discipline was in any event justified by the fact that the precipitating event, failing to appear in Court as duly scheduled and required, (as he acknowledged), was, while properly considered on a "court related error" progressive discipline track, grounded on court citation errors, nonetheless inherently more serious than such court citation errors, and hence the severity of the discipline administered was fully warranted and not disparate. Having belatedly sought to justify its discipline of the Grievant on this basis, the F.O.P., was afforded in the Interim Opinion the opportunity to respond to these contentions by way of brief. As stated in the Interim Opinion:

"These belated contentions....followed the F.O.P.'s closing argument. Accordingly, the F.O.P. was not accorded an opportunity to respond to these contentions. The due process requirement imbedded in the just cause concept mandates that such an opportunity be afforded. Accordingly, the case is remanded to the parties

for the purpose of briefing the Arbitrator with respect to the substantive impact, if any, of the belatedness of the contention that the missed court appearance is inherently more serious than court citation type errors; the merit of the contention that missed court appearances are more serious; the merit of the contention that if more serious, disparate treatment contentions must fail; and the merit of the contention that notwithstanding their purported greater seriousness, missed court appearances are properly considered on a court related errors progressive discipline track."

Following the issuance of the Interim Opinion both parties filed briefs as therein solicited.

In the F.O.P.'s brief the F.O.P. contends with respect to "the substantive impact, if any, of the belatedness of the contention that the missed court appearance is inherently more serious than court citation type errors", that the Patrol's

contention in this regard "should have transpired prior to the closing argument. To present such allegation during said closing was improper and unethical. This action left the F.O.P. without rebuttal and impinged on the Grievant's right to a fair hearing."

With respect to the issues concerning "the merit of the [Patrol's] contention that missed court appearances are inherently more serious" than court citation type clerical errors, and that, if so, "disparate treatment contentions must fail," the F.O.P. takes the position in its brief that a missed court appearance is not more serious than a court citation clerical error. It is the F.O.P.'s contention that "both offenses are covered under the same rule of inefficiency." The F.O.P. additionally asserts that even if the actions of the Grievant were more serious than clerical errors, "the exemplary disciplinary record of this nineteen year veteran trooper....must be considered. The F.O.P. stands by its allegations that this Grievant was treated disparately due to his testimony in the disciplinary

case of his fellow officer, Trooper Daniel."1)

With respect to the issue of whether
~~"missed court appearances are properly considered~~
on a court related errors progressive discipline
tract, "the F.O.P.affirms that Court appear-
ances should be on a progressive discipline track,
with the contention that the one offense is no
more serious than the other. The Employer confirms
this argument by placing all such offenses under
the broad 'catch all' rule of inefficiency. The
Employer has not proven the Grievant guilty of
a serious wrongdoing therefore it is obvious that
the severity of a two-day suspension is excessive
and unwarranted." So it is that the F.O.P. urges
the Arbitrator to "....reduce the discipline imposed
upon this Grievant."

1) In connection with these issues the
F.O.P. additionally asserted that "the idea that
discipline need only be enforced when a court case
is missed exemplifies the inconsistency which
exists with regard to disciplinary matters. Effect-
ive discipline feeds upon consistency and must
not be dependent upon individual discretion."

In my view these contentions are but
a rehash of like contentions previously made and
disposed of in the interim opinion; see page 10
thereof.

With respect to the issues to be briefed,
the Patrol in its brief takes the position that:

" ' court related errors' include both clerical
mistakes and failure to appear at a court hearing;"
that "both types of offenses are viewed as court
related errors for purposes of progressive discipline;"
and that "failure to appear at court is the more
severe infraction of the two previously mentioned."

it is the Patrol's contention that "for purposes
of discipline, errors made in preparing court re-
lated documents and/or appearing at court fall
into the same category. This is not to say that
the two offenses are given equal weight.

(F)ailure to appear for court in the Ashland area
leads directly to the dismissal of the case. Clerical
errors related to filing affidavits may understand-
ably occur with the frequency of opportunity.

Although there is a much greater opportunity for
error, in instances where an officer has made a
clerical mistake, it may likely be amended before
the case actually comes to trial. Facially and
substantially, failure to appear is the more gross
violation. In other words, where many times clerical
errors can be and are corrected without dismissal
of the case, outcome is automatically fatal for
failure to appear: the case is routinely dismissed."

In further support of its positions the Patrol asserts that the record "establishes that other troopers have been disciplined for court related inefficiencies, and more specifically failure to appear in court. In one of the cases, a two day suspension was imposed. Trooper Teague was actually the third officer to be given a two day suspension for failure to appear in court." It is the Patrol's contention that "this was the third incident in a series of court related inefficiencies for Trooper Teague within less than two years." Accordingly, asserts the Patrol, "this is not a case of disparate impact."

It is the Patrol's contention that it "applied its rules and penalties in an even-handed manner without discrimination and in a manner wholly consistent with the principles inherent in its concept of just cause. The two day suspension was reasonably related to the seriousness of the employee's proven offense and took into consideration the Greivant's record, of both service and discipline, with the....Patrol."

So it is that the Patrol urges that "the greivance must be denied."

II. DISCUSSION & OPINION:

It is noted at the outset that the belatedly raised matters and issues concerning which briefs were solicited from the parties concerned deviations from the parties prearbitral discussion of the case, and hence a preliminary question to be answered is whether these issues are now properly considered, or as heretofore stated in the Interim Opinion, what impact, if any, does the belatedness of these contentions have on the case. In this regard the Elkouris have cogently and correctly observed that "an arbitrator may refuse to confine the parties rigidly to what occurred prior to the arbitration if the deviation from the prearbitral stage does not amount to the addition of new issues, but merely involves a modified line of argument, (or) an additional element closely related to the original issue.... to this extent, new aspects of the dispute may be aired initially at the arbitration stage...."²⁾ Here the keystone to the Patrol's case against the Grievant is the purported inherent greater

²⁾ How Arbitration Works, Elkouri & Elkouri, 4th Edition, 1985, BNA Books, Inc., Washington D.C., p. 234.

seriousness of a missed court date vis a vis a court citation clerical error, a matter not specifically raised until the arbitration state of the grievance proceeding. In my view, however, the pointing out and up, for the first time in arbitration, that the offense triggering the Grievant's challenged discipline (a missed court date) was and is inherently more serious than other similar offenses (court citation errors), simply represents a permissible "modified line of argument." Nor do I find merit in the F.O.P.'s contention to the effect that due process considerations of fairness have not been met and that the belatedness of the Patrol's contention left the F.O.P. "without rebuttal." The short of the matter is that the opportunity to brief these matters accorded to the Grievant the "due process" due him. This is especially so in light of the nature of the modified argument made, namely, that the triggering offense was "inherently" more serious. Thus, if in fact the offense of a missed court date is inherently more serious, it must be found that the Patrol's contention was implicit at all times. In sum therefore I find

no flaw, procedural or substantive, in the belatedness of the contention a missed court appearance is inherently more serious than clerical court citation type errors.

With respect to the merit of the contention that missed court appearances are inherently more serious than clerical court citation type errors I am persuaded that such is so. As the Patrol points out, the occasions for clerical errors are numerous indeed, and considerably more numerous than those occasions upon which a Trooper is required to testify in Court, so that for this reason alone, the former may be regarded as less serious than the latter, and vice versa. But more significantly, in my judgment it must be said that a Trooper's appearance in Court represents one of the most fundamental and elemental of his duties, and a failure to discharge such is simply self-evidently more serious a matter than a clerical error.³⁾

3) Once again the Patrol, and I submit erroneously, seeks to substantiate its characterization of the missed court date here as inherently more serious than clerical court citation errors on the basis of the actual consequences which transpired here when the Grievant missed his court date. For the reasons previously espoused, I find that rationale unfounded.

It is therefore found that indeed a missed court appearance is inherently, and by its very nature, more serious than a clerical court citation error. Yet both shortcomings are clearly "court related". Thus, while specifically a missed court appearance differs from a clerical citation error, generally a missed court appearance is properly viewed as a "court related error", with the consequence that its consideration on a progressive disciplinary track for court related errors is fully warranted.

In addition, the record fails to establish that other Troopers with whom the F.O.P. seeks to compare the Grievant, committed citation errors, followed by a missed court date. Thus it cannot be said that in like circumstances other Troopers escaped the level of discipline imposed on the Grievant. Hence no disparate treatment is made out.

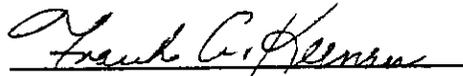
Notwithstanding the Grievant's otherwise good work record and his length of service, I am unable to conclude that his more recent shortcomings lack sufficient severity to support the discipline imposed. As pointed out above, the discipline

triggering event here, a missed court date, represents a fundamental, elemental short coming. The issue posed is therefore answered in the affirmative, and the greivance must therefore be denied.

III. AWARD:

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

DATED: January 17, 1989



Frank A. Keenan
Arbitrator