CONTRACTUAL GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration Between:	*	
THE STATE OF OHIO Department of Public Safety State Highway Patrol	*	Grievance Nos. 88-313 & 314
	*	Arb File No. 88.10.14F
-and-	*	
THE FRATERNAL ORDER OF POLICE Ohio Labor Council, Inc. State Unit I	*	Decision Issued April 7, 1989

APPEARANCES

FOR THE STATE

Lieutenant D. L. Anderson	State Highway Patrol Advocate
Captain J. M. Demaree	Executive Officer, Personnel
John Tornes	Office of Collective Bargaining
Michele Faiella	Office of Collective Bargaining
Anne K. Arena	Labor Relations Officer
Captain Don Goodman	District Commander (Cambridge)
Lieutenant M. E. Quinn	Post Commander
W. D. Peters	Patrol Sergeant
Glen G. Baker	Patrol Sergeant (Retired)
Ernest Roe, Jr.	Witness

FOR THE FOP

Deborah Bukovan	FOP/OLC Attorney
Edward F. Baker	Staff Representative
Trooper D.K. West	Grievant
Trooper W. Michael Nelson	Grievant

ISSUES: Article 19 -- Whether or not suspensions of ninety calendar days were contractually permissible.

Jonathan Dworkin, Arbitrator
P.O. Box 236 - 9461 Vermilion Road
Amherst, Ohio 44001

BACKGROUND OF DISPUTE

The grievances protest discipline imposed upon two Ohio State Troopers for negligent performance of duty. Each Grievant received a suspension of ninety scheduled workdays. Both had satisfactory records and the penalties were markedly severe. But the State contends they were justified. A factor inextricable from the disciplinary decision was that, due to Grievants' negligence, an innocent person was killed and another was severely injured.

Grievants were disciplined because they failed to place fuzees, lights, or other devices to warn motorists that a highway was blocked by an accident. On January 10, 1988, shortly after 9:00 p.m., a tractor-trailer exiting a truck stop lost its brakes. The truck rolled across State Route 285, a north-south highway which intersects Interstate 70 in east-central Ohio. It was headed for an embankment and the driver, who was unable to stop his rig, jumped from the cab. He rolled over the embankment and was injured. The tractor hit the guardrail on the east side of Route 285 and came to a stop. Its position was such that the trailer entirely blocked the road.

Both Grievants were dispatched to the scene. The first to arrive parked on the north side of the semi. He left his "bubble"

lights running, turned his headlights on high beam, and went to the aid of the injured driver. When the second Grievant arrived a few minutes later, he parked behind the other cruiser. At that point, no fuzees were lit, but it is probable that the lighting on the north side of the accident scene was sufficient. No lights or warning signals of any kind were on the south side. The second Trooper also looked to the injured person. The night was cold and one of Grievants' primary responsibilities was to assure that he was covered and stayed warm until the ambulance arrived. Upon determining that the truck driver's needs were being met, the second Grievant returned to his cruiser to start the paper work. Apparently recognizing that lighting was needed on the south side of the accident, he drove around the blockage, parked facing north, and trained his spotlight on the trailer.

For a brief period of time, both sides of the accident were lit, although recommended methods were not used. From the time they were Cadets, Grievants and all other State Troopers were provided with repeated instructions on protecting the scene of an accident. A study unit they received more than once is entitled, "Keeping The Accident Scene From Getting Worse." It states in pertinent part:

I. INTRODUCTION

A. PROTECT THE SCENE.

1. WANTING TO ASSIST INJURED FIRST IS UNDERSTANDABLE.

2. HOWEVER, LOCATION OF THE ACCIDENT.

A. HILLCREST

B. CURVE

C. OVERPASS - UNDERPASS

3. MAY REQUIRE PUTTING OUT WARNING DEVICES FIRST.

4. EVEN BEFORE ASSISTING THE INJURED.

5. ASK YOURSELF THIS QUESTION.

A. "WHAT ONE THING, IF LEFT UNDONE WOULD CAUSE THE SCENE TO BECOME WORSE?"

B. HOW TO PROTECT THE SCENE.

1. USE OF FLARES AND FUZEES.

A. MUST BE PLACED FAR ENOUGH IN ADVANCE FOR ADEQUATE WARNING.

A video tape, viewed by Grievants and all other Troopers, demonstrates proper methods for handling accidents. Voice-over instruction on the tape reminds officers of the urgency of protecting the scene:

> "Generally, your first concern upon arrival at a traffic accident is to protect the scene."

. . .

> "Whenever possible, make other traffic aware of the hazard in [as] far in advance as possible by placing out fuzees or traffic cones."

Arguably, the scene of this accident was adequately protected while cruisers lighted the areas both north and south of the trailer. The protection was short-lived, however. The wrecker arrived and parked north of the accident. The Trooper on the south side decided that his presence was no longer needed. His shift had ended or was about to end, and he desired to go home. He checked with the other Grievant, obtained approval to leave, and then radioed the post to report that he was returning. He left without anyone's objection.

The removal of one of the cruisers created an extreme hazard which neither Grievant perceived. The bright lights of the cruiser north of the accident were all that were visible to northbound traffic. They created an optical illusion of a vehicle approaching from the north. The night was dark, and the bright lights actually obscured the trailer from northbound traffic, making it virtually invisible to approaching motorists. A vehicle traveling north at approximately thirty to forty miles per hour narrowly missed collision. The driver appeared in the arbitration hearing and testified that he did not see the trailer until he was less than one hundred feet from it. The danger was extreme.

Shortly after 10:00 p.m., an automobile approached the accident scene from the south. According to estimates derived from accident reconstruction, the automobile was traveling at or close to the legal speed limit -- fifty miles per hour. The driver probably did not see the obstruction until he was about four seconds from impact (320 feet). Skid marks indicate that he braked thirty-three feet from the trailer; far too short a distance to avoid collision. The vehicle skidded under the trailer, partially shearing its roof. The driver was injured; his passenger was killed instantly.

The Patrol spent two and one-half months investigating the accident. Both Grievants gave statements, neither of which was particularly exculpating. The Troopers each received a suspension of ninety working days, commencing April 7, 1988. The lengths of the suspensions attest to the Patrol's belief that the Troopers' misconduct was the severest imaginable, short of dischargeable offenses. It is noteworthy that Article 19, §19.03 of the Collective Bargaining Agreement states that no disciplinary suspension may be longer than ninety days.

Section 19.04 of the Agreement provides the right to a pre-disciplinary hearing conducted by a designee of the Director of Highway Safety "who is neutral and detached and has not been involved in the incident or investigation giving rise to the discipline." Hearings were conducted on May 3, 1988 before Lieutenant D. L.

Anderson of the Highway Patrol Personnel and Labor Relations Office. Lieutenant Anderson upheld the suspensions, stating:

> A ninety day suspension without pay is the maximum allowable under the collective bargaining agreement. The tragic results of the [Grievants'] error in judgment and neglect of duty are self evident. There can be no more appropriate use of a maximum disciplinary suspension than to correct the behavior which led to such a regrettable outcome.

These grievances were commenced at Step 3 and appealed through the subsequent levels of the contractual grievance procedure to arbitration. A hearing convened in Columbus, Ohio on October 14, 1988. At the outset, the Employer stipulated that the dispute was timely and procedurally arbitrable. The parties jointly agreed that the arbitrator had authority to issue a conclusive award resolving the merits of both complaints. Arbitrable jurisdiction is more specifically defined and limited by the following language in Article 20, §20.07-6 of the Agreement:

> Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall the arbitrator impose on either party a limitation or obligation not specifically required by the language of this Agreement.

SECTION 19.03 - CALENDAR VERSUS WORKING DAYS; PRELIMINARY ARBITRAL FINDINGS AND CONCLUSIONS

As indicated, Article 19, §19.03 of the Agreement limits the permissible length of disciplinary suspensions to ninety days. It states:

> §19.03 Length of Suspensions
>
> No suspension without pay of more than ninety (90) days may be given to an employee.

The Employer believed that it met the limitations of §19.03 by suspending Grievants a total of eighteen weeks. It reasoned that the contractual provision permitted disciplinary layoffs to encompass eighteen calendar weeks consisting of five scheduled workdays each. The Union strenuously disagreed, contending that calendar days, not working days, were contemplated by the negotiators when they adopted the ninety-day restriction. In the Union's view, Grievants were actually suspended one hundred twenty-six days and are entitled to recover lost wages and benefits for at least thirty-six of those days even if it is determined that their suspensions were fully justified.

While the Patrol insists that the disciplinary impositions were proper, it urges that it is beyond the arbitrator's legitimate scope of authority to interpret and apply §19.03. Its position is premised on the fact that neither of the written grievances specified that provision in its statement of complaint. Both grievances, as originally submitted, relied on Article 7 (Non-Discrimination) and Article 19, §19.01 (Just Cause). The Patrol points out that arbitrators are limited to resolving "grievances;" and a "grievance" is defined in Article 20, §20.02 as "an alleged violation, misinterpretation or misapplication of a specific article or articles, section or sections of this Agreement." That definition is amplified by §20.03 which provides that an aggrieved employee must set forth the specific articles and sections s/he relies upon at his/her peril. The Section states:

> The grievant shall cite on the grievance form the specific article(s), section(s) or combination thereof that the grievant alleges to have been violated. Failure to cite said provision or provisions shall relieve the Employer of any obligation to process the grievance.

Section 20.02 dovetails with §20.07, Subsection 9, which confines arbitrators to deciding the precise issue(s) referred to them. The provision states:

9. Issues

> Prior to the start of an arbitration under this Article, the Employer and the Fraternal Order of Police, Ohio Labor Council, Inc. shall attempt to reduce to writing, the issue or issues to be placed before the arbitrator. In cases where such a statement of the question is submitted, the arbitrator's decision shall address itself solely to the issue or issues presented and shall not impose upon either party any restriction or obligation pertaining to any matter raised in the dispute which is not specifically related to the submitted issue or issues.

The parties agreed, in writing, to an issue statement for this dispute. It referred to §19.01, the just-cause requirement, and §19.05, the progressive-discipline standard. It made no mention of §19.03. The Patrol's conclusion is direct and straightforward: since the written grievances did not mention the working-day calendar-day disagreement, the Union waived its right to claim that §19.03 was misinterpreted. It is not entitled to be recognized or resolved in this award.

* * *

The Patrol's argument is provocative. It accurately calls attention to the fact that Grievants and the Union were obligated to give the Employer advance notice, in the written grievances, of every Article and Section of the Agreement upon which they relied.

Their failure to refer to §19.03 technically relieved the Employer of responsibility to deal with that provision in processing the grievances. However, §19.03 is a unique limitation on the Employer's disciplinary authority which does not stand independently. It is interwoven with §19.01 which states that no member of the Bargaining Unit may be disciplined except for just cause. Just cause is an unusually ill-defined principle. When the phrase is included in a collective bargaining agreement without refinement or explanation, it grants arbitrators extraordinary latitude. It licenses them to use their moral and intellectual resources and beliefs in deciding cases. It allows them, indeed it encourages them, to apply their individual concepts of justice and fairness to a dispute.

Sometimes, contracting parties are properly apprehensive about granting arbitrators such unrestricted power to decide what is abstractly just or unjust. They find ways to circumscribe arbitral authority by predefining aspects of just cause. By way of example, bilaterally negotiated rules in a labor-management contract which state that certain discipline shall apply to certain violations, significantly curtail an arbitrator's authority to rule that the contractual penalty does not comport with just cause. An example more familiar to these parties appears in the Agreement between the State of Ohio and the Ohio Civil Service Employees Association. Article 24, §24.01 of that Agreement begins precisely the same as

Article 19, §19.01 of the Agreement governing this dispute. It states that no employee can be disciplined except for just cause. But it contains an extra provision which unqualifiably restricts arbitral authority. It states in part:

> In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

The Arbitrator regards §19.03 as similar. It is a bilateral statement that no suspension exceeding ninety days is or can be in compliance with the just-cause mandate. Ninety days is the limit; but did the negotiators mean calendar days or working days? If, as the Union contends, they meant calendar days, it follows that Grievants' suspensions of one hundred twenty-six calendar days violated both §19.03 and §19.01. A suspension of more than ninety days automatically would have breached the just-cause standard because the parties explicitly agreed that no suspension of such length could be supported by just cause.

It is concluded, therefore, that the references in the written grievances to §19.01 was sufficient to incorporate the negotiated refinement of just cause in §19.03.

THE PATROL'S ARGUMENTS

1. Section 19.03 sanctions the ninety calendar-day suspensions. The Employer maintains that it has routinely issued working-day suspensions without Union protest. Always in the past, the Bargaining Unit accepted the logical and reasonable assumption that disciplinary suspensions were designed to deprive employees of working time and wages; that calendar-day suspensions incorporating scheduled days off would not meet that purpose. To support its argument, the Patrol introduced two examples of recent disciplinary suspensions -- one for ten working days, another for twenty working days. In neither circumstance did the Union argue that working-day suspensions were contractually prohibited. The Patrol reasons that both bargaining teams knew of this long-standing practice when they negotiated Article 19, §19.03. The Union Committee must have understood that the Employer intended to continue its practice of basing discipline on working days. This mutual knowledge was a backdrop for the negotiations and, if the Union wanted to change the practice, it most certainly would have attempted to do so in its proposals. All that the Union proposed on the subject was to set a ninety-day maximum on disciplinary layoffs. The Employer concludes, therefore, that what it agreed to and what it was asked to agree to was that no suspension would exceed ninety working days.

The Patrol points out that an Award incorporating the Union's interpretation of §19.03 would effectively grant Grievants wage recoveries for approximately twenty-five working days. Such an award, it is argued, would impermissibly substitute the Arbitrator's concept of fairness and justice for Management's. The Employer emphasizes that this discipline was not imposed arbitrarily or thoughtlessly. It derived from thorough investigation consuming the better part of two and one-half months. Grievants' voluntary statements were carefully considered. The proposed suspensions were filtered through impartial hearings. Several layers of Management reviewed the proposals, and all agreed that they were proper and just. In its post-hearing brief, the Employer summarizes these arguments, as follows:

> A 90 calendar day suspension is equivalent to a 65 working day suspension. Consequently, by the Union's own admission, they are asking the arbitrator to substitute his judgment for the Employer's and reduce the suspension by 25 working days.
>
> It is a well-established [tenet] of arbitration that an arbitrator should not substitute his judgment for the Employer's if the Employer proves just cause.
>
> In the case at hand, the Employer has demonstrated, through both evidence and testimony, that the discipline was given only after a thorough, unbiased and objective investigation was made. The Union could present no evidence of any discrimination, unfairness, nor of any arbitrary or capricious action on the part of the Employer. [pp 6-7]

2. The discipline was for just cause. The simple fact is that Grievants "forgot" or negligently failed to perform the most fundamental of their responsibilities. Before they became State Troopers, they underwent comprehensive educational programs as Cadets. Their education did not end when they graduated. As Troopers, they continued to receive periodic instruction focusing in large part on safety. Without doubt, Grievants fully understood that they were to protect the scene of the accident, even before attending to the injured truck driver. It would have taken only a few seconds for them to place warning flares on the south side of the trailer. Even if the first Officer to arrive felt compelled to make certain the truck driver was safe, the second Trooper could have lit fuzees. Instead, he used valuable time, during which he could have prevented the fatality, to look over the area and begin writing his report. He temporarily provided lighting by driving his cruiser south of the trailer, but then he left, and the south side was wholly unprotected. He left with the permission and consent of the other Officer who was in charge.

The outcome of Grievants' disregard for their responsibilities was tragic. In the Employer's words, it "was the worst imaginable." No one could disagree with the statement. But for the lack of flares, fuzees, or other acceptable means for protecting the scene,

a woman probably would not have lost her life. The crash was preventable, and it would have been prevented had Grievants exercised minimal care to protect northbound vehicles on Route 285.

The Patrol argues that the suspensions issued to Grievants were entirely appropriate. They certainly do not shock the sensibilities of any reasonable person who measures the discipline against the result of Grievants' misconduct. The Patrol urges, therefore, that the grievances be denied.

THE UNION'S ARGUMENTS

The Union contends that the one hundred twenty-six calendar-day suspensions were shockingly harsh; that they violated any reasonable interpretation of just cause. The Union denies that its negotiators agreed in §19.03 to license suspensions of up to ninety working days. But it maintains that these suspensions were patently unjust regardless of whether the contractual formula means working days or calendar days. The Union does not argue that Grievants were innocent of wrongdoing. It admits that they made a mistake and tragedy resulted. It contends, however, that the Employer's fixation on the result rather than the misconduct flies in the face of just cause.

Just cause, as the Union interprets the phrase, requires that discipline be issued to correct misconduct, not to punish employees. The Union reasonably points out that if the death had not occurred and a Sergeant or other supervisory employee had noticed that the south side of the accident was dark, s/he might have admonished Grievants. At most, suspensions of a day or two might have been issued. But no one would have considered issuing the most severe penalty possible (short of dismissal).

The Union urges that the penalties, if any, should have been responsive to the nature of Grievants' misconduct, regardless of the result. Grievants were negligent, but their misconduct was not willful or deliberate. They did not knowingly violate orders or safety regulations. If anything, the unforeseen injury of a driver and the death of his passenger were punishment enough. Grievants will never forget what happened. Their misconduct was corrected by the tragedy long before suspensions were issued. Of all Troopers in every post in the State of Ohio, no one will be more likely than Grievants to take the necessary precautions to protect the scene of an accident in the future.

The Union requests that the Arbitrator look carefully to the fundamental purpose of the just-cause restriction on Management's disciplinary authority. If he does, it is argued, he will find that the suspensions were designed to punish Grievants for the death, not

to correct them for the oversight. The Union urges that the Agreement and the understandings it reflects, not the Patrol's fixation on retribution, should govern this controversy.

OPINION

The Employer's interpretation of Article 19, §19.03 is innovative. But it is at variance with understandings common throughout the management-labor community. When a company suspends an employee for thirty, sixty, or ninety days, it ordinarily means that the employee will be on a disciplinary layoff for that number of calendar days. Rarely, if ever, does a ninety-day suspension encompass one hundred twenty-six days.

The uniqueness of the Patrol's argument meant that it was charged with the burden of establishing that the negotiating intent behind §19.03 conformed to its interpretation. In the main, the Patrol attempted to meet its burden with arguments. In its brief, for example, it stated:

> The State of Ohio invariably suspends for working days, not calendar days. The Union has been aware of this practice since the inception of the contract and has never previously argued against the State's practice. [p 3; emphasis in original.]

The argument might have been persuasive if it had been supported by

records of long-term, working-day suspensions. But the evidence introduced by the Employer fell short of such support. It consisted of disciplinary memorandums covering two relatively short-term suspensions of Patrol employees. One was for ten working days, the other was for twenty. Neither was for more than ninety calendar days.

According to the record, this is the first occasion in which the scope of §19.03 has been directly in issue. It was peripherally in issue in one prior case heard by Arbitrator Donald B. Leach. The dispute involved an employee who was discharged for a number of violations, including operating her cruiser, on duty, while under the influence of alcohol. Arbitrator Leach sustained the grievance in part. He reduced the discharge to a ninety-day suspension (pursuant to §19.03) and placed the grievant on medical leave of absence for one year following the end of her suspension.

The decision was issued on April 7, 1988. On May 3, the parties jointly wrote Arbitrator Leach, requesting clarification of two issues. One of the questions was whether the ninety-day suspension contemplated calendar days or working days. The arbitrator responded that the question was moot because the grievant's suspension had ended under either formula. Nevertheless, he gave clarification in a kind of dictum. He stated:

> Although not pertinent here in light of the phrasing of the question, it is appropriate to ob-

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

Arbitrator Leach's comment comports with this Arbitrator's interpretation of §19.03. Of course, the Patrol is at liberty to issue working-day suspensions. But such discipline must meet two criteria: 1) it must be consistent with just cause and 2) no suspension can be longer than ninety calendar days. As a matter of necessity, therefore, the grievances will be sustained, at least to the extent that the one hundred twenty-six-day suspensions will be reduced to not more than ninety calendar days.

* * *

The Arbitrator's interpretation of Article 19, §19.03 is not dispositive of this controversy. Regardless of whether Grievants' suspensions were for ninety calendar days or ninety working days, the fact is that the penalties violated just cause in either case. The Union's contention that the nature of the misconduct, not the result, should be controlling is persuasive. The Patrol does not

deny that the discipline would have been far more lenient if no one had been injured and no one had been killed. On the other hand, the impact of the result cannot be wholly ignored. Results often play significant part in discipline throughout industry. An employee whose negligence wrecks an assembly line can expect more severe treatment than an employee who commits the same negligence without impact. The precept that discipline is to correct rather than to punish works well in the abstract -- as an intellectual model -- but it is not realistic. Punishment is an unavoidable aspect of most discipline even though arbitrators may say that it is not. A careful reading of the decisions of such arbitrators reveals their inability to separate misconduct from its impact and develop awards based on "perfect justice."

The best that Grievants can hope for is that the Arbitrator will realize that the Patrol was too much influenced by the result of their negligence and gave too little attention to the fact that, discounting the injury and death, their misconduct was not all that serious. The Arbitrator's statement that Grievants' negligence "was not all that serious," should not be misinterpreted. The events that took place on Route 285 on January 10, 1988 should not be minimized. While Grievants' failure to protect the scene of the accident might have been ordinary negligence if committed by a lay person, it was gross misconduct when committed by two fully-trained State Troopers.

The problem with the Patrol's decision is that it concentrated entirely on the result, almost to the exclusion of a reasonable consideration of the nature of the misconduct. Before deciding that Grievants' inaction warranted the longest suspensions possible, the Patrol had to ask itself a pivotal question: "Were Grievants' offenses the most serious they could have committed and still retain their jobs?" The answer to this question must be "no." Grievants tried to do what they were supposed to -- to care for the injured truck driver and remove the obstruction from the highway. They performed almost all of their obligations. They neglected only a piece of them. They miscalculated the invisibility of the trailer for northbound traffic and were misled by the fact that Route 285 was hardly traveled at that time of night. Their error was fatal, but not deliberate.

The discipline imposed by the Patrol left no room for dealing with more severe misconduct which undoubtedly has and will occur. It was excessive. Accordingly, Grievants' suspensions will be modified to sixty calendar days each. The Employees will receive lost wages and benefits for the portions of their suspensions that exceeded sixty calendar days.

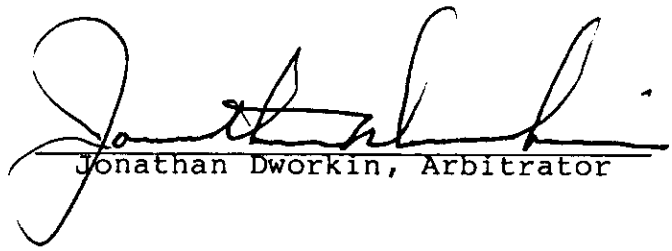
AWARD

The grievances are sustained in part and denied in part. The suspensions imposed on Grievants are hereby reduced from ninety work-days each to sixty calendar days each. The Patrol is directed to make Grievants whole for losses of straight-time wages and benefits attributable to the portions of their suspensions which exceeded sixty calendar days.

In complying with the make-whole wage remedy, the Patrol may deduct outside earnings and allowances received by either Grievant during the period of his suspension which exceeded sixty calendar days. Grievants and the Union shall, upon request, make full disclosure of such earnings and/or allowances.

The Arbitrator hereby reserves jurisdiction for clarification of the scope and extent of the remedy due Grievants. Should a dispute arise concerning this subject either party may invoke the reserve jurisdiction by providing appropriate notice to the Arbitrator and the other party.

Decision Issued:
April 7, 1989



Jonathan Dworkin, Arbitrator