A R B I T R A T I O N

O P I N I O N A N D A W A R D

STATE OF OHIO
DEPARTMENT OF HIGHWAY SAFETY
STATE HIGHWAY PATROL

OCB Grievance No. 15-03-890122-10-04-01

and

July 11, 1989

FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC.

ARBITRATOR: DONALD B. LEACH, appointed through the procedures of the Department of Administrative Services, Office of Collective Bargaining, and the Fraternal Order of Police, Ohio Labor Council, Inc.

APPEARANCES: FOR THE STATE OF OHIO:
Sergeant Richard Corbin, Personnel/Labor Relations, Ohio State Highway Patrol, 660 East Main Street, Columbus, Ohio 43266-0562

FOR THE OHIO LABOR COUNCIL, INC.:
Paul L. Cox, Esq., General Counsel, Ohio Labor Council, Inc., 3360 East Livingston Avenue, Columbus, Ohio 43227

I S S U E
(As stipulated)

"Was the Grievant disciplined for just cause in accordance with Article 19, Section 19.01 and Section 19.05 of the Collective Bargaining Agreement between the parties? If not, what shall the remedy be?"

B A C K G R O U N D

Grievant, Patrolman John H. Ervin, has been in the State HIghway Patrol for approximately four years. In that period, he has had several disciplinary actions imposed on him, which will be discussed hereafter.

Under date of December 7, 1988, the Superintendent of the Patrol recommended Grievant's suspension for two days on the following charges:

> "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: from May 13, 1988, through September 13, 1988, while in Patrol uniform, you were observed to be operating a marked Highway Patrol vehicle in an erratic and unsafe manner on six different occasions, in that you were weaving on the roadway, driving off the roadway, and speeding.
>
> *****
>
> Major R. K. Hartsell, Hearing Officer, will conduct a pre-suspension hearing on the matter on December 13, 1988, at 1:30 a.m. in Room 306, at the Ohio State Highway Patrol General Headquarters, 660 East Main Street, Columbus, Ohio."

The report, dated December 15, 1988, of Major Hartsell, who held the pre-disciplinary conference, in pertinent part is:

> "It is the hearing officer's opinion that if the weaving and erratic driving is the result of a physical and/or medical problem, rather than poor sleep habits resulting in a lack of sleep prior to reporting to work, this approach should help to identify a solution to this very serious problem.
>
> While it may be argued, as it was by Mr. Baker, that the possibility of a physical or medical condition contributed to Trooper Ervin's erratic driving, it is felt that such a condition, if indeed it does exist, was not a factor in the incidents involving excessive speed.
>
> Trooper Ervin has previously been disciplined for operating a patrol car at an excessive speed. On March 9, 1988, he was issued a written reprimand by Colonel Jack Walsh for speeding 84 M.P.H. in a 55 M.P.H. zone. That was approximately four months prior to the speeding incidents involved in this hearing.

Therefore, the reporting officer agrees with the recommended suspension. It is also recommended that if Trooper Ervin feels the other instances of erratic driving are related to a medical problem, instead of poor sleep habits, he continue to seek treatment."

Grievance was filed under date of January 22, 1989, as follows:

> "On January 18, 1989 at approx. 1230 hrs I was informed that I would be suspended from my employment with the Ohio State Highway Patrol for a period of 2 working days without pay. Present were Capt. Lamantia, Capt Demery and Lt Colonel Grumney who imposed the 2 day suspension. I'm requesting that I be reimbursed for lost wages and that my record be cleared of all charges."

The Patrol's Level III decision states in conclusion:

> "7. The discipline imposed specifically takes into consideration both the seriousness of the employee's proven offense and his prior disciplinary record.
>
> The grievant was issued a written reprimand on March 9, 1988 for a related violation of the Rules and Regulations, which occurred on January 14, 1988, in that he operated his patrol car at 84 M.P.H. in a 55 M.P.H. zone. Later the same day the speed of his patrol car was checked by radar at 76 M.P.H. on the same section of roadway. Both of these incidents occurred while he was on duty but without justification for the excessive speed. The following is a recap of the grievant's disciplinary record:

DATE	DISCIPLINE	BEHAVIOR
04/22/86	VERBAL REPRIMAND	DROVE PERSONNEL (sic) CAR WITH EXPIRED TAGS
10/14/86	WRITTEN REPRIMAND	FAILED TO APPEAR FOR A COURT CASE
12/28/87	SUSPENSION	FAILED TO APPEAR FOR 3 COURT CASES
03/01/88	VERBAL REPRIMAND	TARDY
03/09/88	WRITTEN REPRIMAND	SPEEDING VIOLATIONS
12/06/88	VERBAL REPRIMAND	CARE OF PATROL CAR

> The grievant's two (2) day suspension is based on a fair and reasonable system of progressive discipline. The grievant was previously disciplined for violation of traffic laws on March 9, 1988. Disciplinary action is designed to correct behavior which

violates established departmental rules. The suspension of the grievant for two (2) days as a result of his latest rules violation is both appropriate and reasonable.

The seven required points to substantiate "just cause" have been proven beyond any standard of doubt by the Employer."

The Finding of that report is:

"After reviewing the information supplied at the Step 3 hearing by both parties, the Hearing Officer finds no violation of the contract.

As pointed out in the management contention, the seven points required to show "just cause" have been met.

The level of discipline imposed upon the grievant was based on the seriousness of the proven offense and the grievant's continued, violation of established rules. The grievant has failed to modify his behavior to conform to expected standards.

Mr. Ed Baker, the union staff representative, contends the grievant's erratic driving habits may be linked to a sleep disorder medical condition. The hearing officer suggested the union approach a more senior day shift unit at the grievant's post and request a voluntary shift change with the grievant.

The Employer has assigned a supervisor to ride with the grievant for a period of two (2) weeks to closely monitor the grievant's driving."

As noted above, Grievant has had a number of disciplinary actions in the course of his employment. The State, however, laid no special stress on any except the March 9, 1988 written reprimand. It was summarized in an exhibit in the arbitration hearing as:

"Issued for speeding (84/55) in a patrol car approaching a crash site on U.S. 422 while enroute to a court case in Trumbull County. Stated that he did not know what road he was on. On the return trip he was again clocked in excess of the limit (76/55) on the same highway. Trooper Ervin advised me later that he was not sure of the highway (U.S. 422). DHQ is located on this route."

Sergeant R. B. Kreft testified that on July 17, 1988 he had followed Grievant while both of them were on duty. His testimony is summarized in his report of the incident, which is:

ARBITRATION AWARD SUMMARY

OCB Award Number: 298

OCB Grievance Number: 15-03-890122-0010 John H. Ervin

Union: FOP

Department: OSHP

Arbitrator: Donald Leach

Management Advocate: Sgt. Richard Corbin

Union Advocate: Paul Cox

Arbitration Date: 6-14-89

Decision Date: 7-12-89

Decision: Granted

"I was working my midnight shift on Monday 7-18-88, a 10P-6A shift. I had gone to the IS-90 EB rest area to check on a report of a possible DWI. The rest area located on I-90 MP 198 in Lake County was checked and no drunk driver was located. I was exiting the rest area going east on I-90 at 2341 hours when in the distance I observed erratic driving of a car traveling east on I-90 about 1 mile in front of me. I accelerated to catch the vehicle. The vehicle was continuously braking with the brake lights coming on and was weaving in both lanes and on the berm. The vehicle was traveling in this manner the minute or two it took me to catch up with it just prior to exiting off the SR 44 ramp. I couldn't believe when I caught up to the car that it was a patrol car. I fell in behind the patrol car and was able to see that it was Trooper John Ervin driving. He was coming to the post at the start of his midnight to eight shift.

Trp. Ervin (sic) driving was good as we ramped onto SR 44 and headed south on SR 44. We traveled approximately 1 mile to the point where SR 44 goes from being a 4 lane divided road to a 2 lane road. At this point the patrol car went totally out of the right lane and onto the berm and almost hit the sign that indicated the 4 lanes ended. I immediately radioed Tpr. Ervin to see what the problem was. He advised that everything was OK and that there was no problem. I followed Trp. Ervin to the post and he drove without any further incident. At the patrol post I contacted Tpr. Ervin and he was sober, no indicated (sic) of any alcohol or drugs. When asked why he was driving so poorly, he stated that some papers had slide off the visor and he was searching for them. I asked if he was tired or sleepy and he said no. Tpr. Ervin said he did not realize he was driving so badly."

Before the last incident, the State had received complaints from citizens concerning Grievant's driving, which he said he had heard and which, he said, had led him to consult his family doctor. The family doctor had then referred him to the specialist whose findings were that he had a sleep disorder the specialist described as narcolepsy.

Another earlier incident of alleged speeding had occurred that was observed by a fellow officer. It was not reported at the time, however, and finally emerged in such form as to be of questionable value. (The officer who reported it was not present at the hearing nor available for cross-examination. His report, therefore, has been disregarded.)

Grievant testified that there had been no incident of erratic driving since the specialist's treatments. He added, however,

that he had not been aware of the earlier incidents. His testimony on that subject, therefore, is not probative.

Grievant had been put on disability leave after his post commander was first informed of his sleep disorder. After his return to work, a sergeant had ridden with him to observe his conduct and driving attentiveness. No lapses or legal violations were noted in the course of that set of observations.

Grievant said his girl friend and family had remarked on, and had kidded him about, his falling asleep but that he had not really taken it seriously until the incident of the fellow officer's observation of speeding mentioned above.

He testified as to the radio call he received from Sergeant Kreft on the occasion reported by the latter. He said he had heard it and had answered.

He acknowledged that, as reported by a citizen, he had once driven about seven miles with his flashing lights activated and, on report of a supervisor, that he had driven several miles with his turn signal flashing.

C O N T R A C T P R O V I S I O N S

ARTICLE 19 - DISCIPLINARY PROCEDURE

§19.01 Standard

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

§19.04 Pre-suspension or Pre-termination Hearing

When the Employer initiates disciplinary action which is covered by this Article, written notice of a pre-disciplinary hearing shall be given to the employee who is the subject of the pending discipline. Written notice shall include a statement of the charges, recommended disciplinary action, a summary of the evidence being brought against the employee and the date, time and place of the hearing. A hearing officer shall be appointed. Said hearing officer shall be a member of the general headquarters staff or district staff, as appointed by the Director of Highway Safety or his/her designee, who is neutral and detached and has not been involved in the incident or investigation giving rise to the discipline.

The employee may waive this hearng if the employee so desires. The hearing shall be scheduled no earlier than three (3)

days following the notice to the employee. Absent any extenuating circumstances, failure to appear at the hearing will result in a waiver of the right to a hearing.

A member who is charged, or his representative, may make a written request for continuance of up to forty-eight (48) hours. Such continuance shall not be unreasonably requested nor denied. A continuance may be longer than forty-eight (48) hours if mutually agreed by the parties.

If either party makes a tape recording or transcript of the hearing, such recording or transcript shall be made available to the other party upon request.

The employee has the right to have a representative of his/her choice present at the hearing. The employee or his/her representative and the Highway Patrol's representative have the right to cross-examine any witnesses at the hearing or have voluntary witnesses present at the hearing to offer testimony provided, however, that the Employer maintains the right to limit the witnesses' testimony to matters relevant to the proposed suspension or termination and to limit redundant testimony. The Employer shall first present the reasons for the proposed disciplinary action. The employee may, but is not required to, give testimony.

After having considered all evidence and testimony presented at the hearing, the hearing officer shall, within five (5) days of the conclusion of the hearing, submit a written recommendation to the Director of Highway Safety,the Superintendent and the employee involved.

The parties understand that this hearing is informal and not a substitute for the grievance and arbitration procedure.

The Director of Highway Safety or his/her designee shall render a decision within a reasonable period of time to accept, reject or modify the recommendations.

The employee shall be notified by the Director of Highway Safety or his/her designee for final disposition of the statement of charges.

§19.05 Progressive Discipline

The following system of progressive discipline will be ordinarily followed:

1. Verbal Reprimand (with appropriate notation in employee's file);
2. Written Reprimand;
3. Suspension;
4. Demotion or Removal.

However, more severe discipline (or a combination of disciplinary actions) may be imposed at any point if the infraction or violation merits the more severe action.

C O N T E N T I O N S O F T H E P A R T I E S

STATE'S POSITION

Grievant's poor driving resulted in complaints from civilians and fellow troopers. There was substantial evidence that the Grievant, in fact, did violate the applicable rules and regulations.

Grievant is well aware that law enforcement officers are not exempt from the traffic laws in non-emergency situations but, notwithstanding, he has been shown to have driven in excess of the posted speed limits when not operating in an emergency. Moreover, his sergeant confirmed that he was weaving off the road, a clear violation.

The discipline he has had has been progressive, from oral through written reprimands for violation of traffic laws.

Grievant's actions have created unnecessary dangers to members of the public using the highways, have brought disrepute on the Patrol and impaired the Patrol's program of encouraging voluntary compliance with the traffic laws by members of the general public.

The facts, as reviewed here, show ample basis of just cause for the discipline involved.

As to the narcolepsy claimed by Grievant to have affected him, such was not shown until after these events and, in fact, nothing was done beforehand to discover or to remedy it.

Grievant cannot have been asleep when he was speeding. To have been asleep under those circumstances could have been suicidal.

It follows that the sleep disorder, which he now claims was the cause of his derelictions, actually was not the cause. Rather, he was morally responsible for the derelictions.

COUNCIL'S POSITION

Four months after the last of the incidents the State complains of, this disciplinary action was initiated. At that time, no specific incident of improper conduct was alleged. Thus, Grievant had no notice of the acts of which he was accused or of what he did and to whom.

The evidence in the arbitration hearing shows that the first improper act, with which he is charged now, occurred on May 15. The incident reported by Sergeant Kreft occurred on July 15. On that basis, only three incidents were discussed in the evidence. (The third of these, the speeding, has been ruled out of the case as discussed above.)

After the pre-disciplinary hearing, the State's position changed to four occasions, occurring between late May and late July, 1988.

It follows from the above that the evidence on which the State relies has never been consistently presented nor is it consistent with the charges made against Grievant.

The Agreement was breached by the State in this case in that it is required to notify Grievant in detail of the charges and to furnish him a summary of the evidence being brought against him. The latter, at least, was not done.

The discipline is supposed to be corrective and the State's witness so agreed. This discipline is not corrective in nature in that it was imposed after the State had learned of Grievant's sleep disorder and of his actions to correct it. The medical treatment was the corrective and Grievant undertook that on his own initiative.

D I S C U S S I O N

A matter not discussed above but one stressed by the Council must be considered at the outset, i. e., that the Grievant, who is black, was treated discriminatorily by the State. That was ruled at the hearing, and is here reiterated, to be unfounded. The argument rested on innuendo. No facts were shown on which any such conclusion could be based.

Another argument urged strongly by the Council is that Grievant was not informed in any detail of the evidence relied on by the State in the pre-disciplinary conference and that that is contrary to the agreement of the parties. It is likely that the procedure here did not comply strictly with the Agreement, although no such determination is made. No objection was shown to have been raised before the arbitration hearing. It is sufficient, therefore, to observe that no damage has been shown to have been done. Grievant has not been put at any disadvantage, as far as the evidence showed. The Council was aware of the nature of the charges and, at least in the arbitration hearing, was well prepared to represent Grievant. In the pre-disciplinary

conference, in contrast, it did not even offer a defense to any charge. It is clear, therefore, that no substantial breach has taken place to the Grievant's disadvantage, even though, it must be observed, a different result might occur where prejudice was created or where the procedural point was raised earlier.

It is true also, as the Council argues, that the offenses involved in this case have changed over the history of the proceedings. That is really not remarkable. As considerations of a matter proceed, different aspects become shown to be unreliable and have to be dropped. Others appear in altered perspectives. Those considerations would appear to be one basis for the pre-disciplinary conference, in fact. The same is true of the Level III hearing.

Generally speaking, it is the arbitration hearing at which the respective parties' positions must become set. Up to that time, it is too much to ask that the position of either must remain in the same form and perspective. Such generalization is subject to the qualification, however, that neither party may be taken by a surprise that could affect the standard of fair hearing. It is true also that the Agreement sets standards of disclosure. They remain unexplored here in light of the fact that Grievant was not prejudiced although a different procedure or timing of the objection may lead to a different result.

The essential issue in this case is the narcolepsy which Grievant suffered and which is attested by the specialist.

At the outset, the State disputes the seriousness of the narcolepsy in that it certainly didn't contribute to his speeding. That must be disregarded.

In the first place, he was reprimanded for having speeded once before. That penalty cannot be increased now. In the second, the incident that allegedly occurred since the reprimand has been ruled to be inadmissible under the circumstances.

The specialist's note setting out his diagnosis leaves something to be desired in that the author was not present for cross-examination nor was it shown directly that Grievant's erratic driving or his lack of awareness of the symptoms were due to the disease. For example, a standard reference book, The Merck Manual, Thirteenth Edition, Merck, Sharp & Dohme Research Laboratories, 1977, fails to list amnesia as a symptom of narcolepsy, while Grievant testified he had no recollection of falling asleep while on duty, lack of recollection being a sort of amnesia. Those factors leave the problem here in a state of some confusion, on which, nonetheless, a conclusion must be reached.

Other evidence lends some support to the specialist's note in that Grievant testified that he has had no driving offenses or complaints about his driving since the treatments for narcolepsy began. The State did not deny those facts or even question them. An inference can then be drawn that the disease did exist and that it affected his driving.

It must be remarked also that, as the State suggests, a suspicion arises that Grievant should have suspected a health problem and have sought treatment much earlier; his girl friend and his family had remarked his tendency to fall asleep; complaints of erratic driving had been made to the State and brought to his attention; he had been reprimanded for violation of traffic laws. It also seems that one falling asleep would fight to stay awake and would thus remember some aspect of the experience when he awoke.

It is true that those facts would lead one ultimately to seek treatment. Immediate response to such factors, however, is not really to be expected. One reluctantly comes to recognize a shortcoming of any sort and a physical one comes into the field of conscious awareness very slowly unless, of course, the onset is rapid and that does not appear to have been the case here.

On balance, the facts imply a probability that Grievant had narcolepsy, sometimes fell into a drowse, at least, drove erratically as a result, has now improved and now shows no symptoms of the disease.

Here, the Grievant initiated action to correct the causes of his misconduct. The State did not. That initiative was taken before the disciplinary action was begun and, indeed, the disease was gotten under control before any action was taken by the State here.

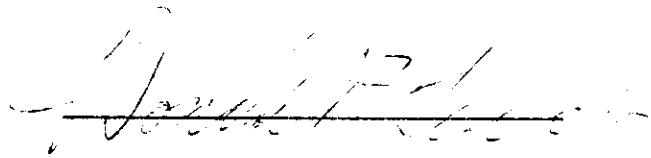
It is difficult to determine the purpose of the discipline in these circumstances. Grievant did the acts complained of, it is true. They stemmed from an illness, and when he learned of the erratic conduct through the reiteration of complaints, he took action to discover and treat the cause and that apparently has been successful. Discipline under those circumstances can serve no purpose except to exact a penalty. That is contrary to the requirements of the Agreement which calls for remedial discipline. Accordingly, the disciplinary suspension of Grievant for two days is not for just cause and must be set aside and the State ordered to reimburse him for the loss of earnings and benefits due to the suspension.

A W A R D

1. Grievance, dated January 22, 1989, of John H. Ervin is hereby upheld.

2. The two day suspension imposed on Grievant is set aside and shall be expunged from his employment record.

3. The State shall pay Grievant the amount of pay he lost as the result of his improper suspension, shall restore any benefits lost, and accrue such rights as he would have had in the absence of the suspension.



Donald B. Leach