

IN THE MATTER OF ARBITRATION
BETWEEN
OHIO STATE HIGHWAY PATROL

AND

THE FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC.

UNIT 1

REBECCA J. YOAKAM, GRIEVANT

THOMAS P. MICHAEL, ARBITRATOR
COLUMBUS, OHIO

Grievance No. OCB 89-03-06, Rebecca J. Yoakam

This is a proceeding pursuant to Article 20, Sections 20.06 and 20.07, Grievance Procedure and Arbitration, of the 1986-1988 Contract between the State of Ohio, Ohio State Highway Patrol (hereinafter "Employer") and The Fraternal Order of Police of Ohio, Ohio Labor Council, Inc., Unit 1, (hereinafter "Labor Council").

Pursuant to the Contract, the parties selected Thomas P. Michael as the Arbitrator. A formal hearing was held at the Headquarters Office of the Ohio State Highway Patrol on September 20, 1989. This matter has been submitted to the Arbitrator on the testimony and exhibits offered at the hearing. The parties agreed to the tape recording of the arbitration hearing as well as to publication of this Opinion and Award.

APPEARANCES:

For the Employer:

SERGEANT RICHARD A. CORBIN
Labor Relations
Ohio State Highway Patrol

For the Labor Council:

PAUL L. COX, ESQUIRE
Chief Labor Counsel
Fraternal Order of Police,
Ohio Labor Council Inc.

ISSUE

The parties have agreed that this matter is properly before the Arbitrator for decision. The parties have agreed to the following statement of the issue:

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?

PERTINENT STATUTORY AND CONTRACTUAL PROVISIONS

§4117.08 Subjects appropriate for collective bargaining.

(A) All matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified in this section.

(C) Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and responsibility of each public employer to:

(1) Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;

CONTRACT PROVISIONS

ARTICLE 2 - EFFECT OF AGREEMENT - PAST PRACTICE

This Agreement is a final and complete agreement of all negotiated items that are in effect throughout the term of the Agreement. No verbal statements shall supersede any provisions of this Agreement.

Fringe benefits and other rights granted by the Ohio Revised Code which were in effect on the effective date of this Agreement and which are not specifically provided for or

abridged by this Agreement will continue in effect under conditions upon which they had previously been granted throughout the life of this Agreement unless altered by mutual consent of the Employer and the Labor Council.

ARTICLE 4 - MANAGEMENT RIGHTS

Except to the extent modified by this Agreement, the Employer reserves exclusively all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to the following:

(1) Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;

(2) Direct, supervise, evaluate, or hire employees;

(3) Maintain and improve the efficiency and effectiveness of governmental operations;

(4) Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;

(5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees;

(6) Determine the adequacy of the work force;

(7) Determine the overall mission of the employer as a unit of government;

(8) Effectively manage the work force;

(9) Take actions to carry out the mission of the public employer as a governmental unit;

(10) Determine the location and number of facilities;

(11) Determine and manage its facilities, equipment, operations, programs and services;

(12) Determine and promulgate the standards of quality and work performance to be maintained;

(13) Take all necessary and specific action during emergency operations situations;

(14) Determine the management organization, including

selection, retention, and promotion to positions not within the scope of this agreement.

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.

§19.02 Administrative Leave

Upon verbal notification followed within twenty-four (24) hours by written delineation of the reasons, an employee may be placed upon administrative leave with pay. The employees will not lose any pay, fringe benefits or seniority as the result of administrative leave.

Administrative leave may be instituted as the result of the Highway Patrol's reasonable belief that the employee participated in an event or was in a condition of significant consequence to the Highway Patrol, the employee, or the public. Such administrative leave with pay shall be for the purpose of investigating the event or the condition. Administrative leave with pay shall not be considered discipline and is not subject to the grievance procedure as long as no loss of pay or benefits is incurred by the employee.

§19.03 Length of Suspensions

No suspension without pay of more than ninety (90) days may be given to an employee.

§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 hearing 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.

ARTICLE 20 - GRIEVANCE PROCEDURE

§20.06 Grievance Procedure

The following are the implementation steps and procedures for the handling of grievances:

Preliminary Step:

A member having a complaint shall first attempt to resolve it informally with his or her immediate supervisor at the time the incident giving rise to the grievance occurs. At this step, the grievant may have a Labor Council representative present to represent him/her if the grievant so desires. Within three (3) days from the conclusion of the meeting, the supervisor will advise the grievant of his/her decision and complete a standard form indicating that the preliminary step was conducted. If the member is not satisfied with the result of this informal meeting, he/she may pursue the formal steps which follow.

Step 1 - Post Commander or Equivalent Supervisor or Designee

A member who is not satisfied with the response of the supervisor in the preliminary step, may request a Step 1 hearing. A member having a grievance shall present it to his or her Post Commander or equivalent supervisor within fourteen (14) days of the date on which the grievant knew or reasonably should have had knowledge of the event giving rise to the grievance.

Grievances submitted beyond the fourteen (14) day time limit will not be honored. In addition, if the requirements of the preliminary step have not been attempted, the employer shall have no obligation to process the grievance. The grievance at this step shall be submitted to the Post Commander or equivalent supervisor in writing using a form mutually agreed upon. The grievance forms may be obtained at each facility. On this form the grievant shall specify the article, section or combination thereof of the Agreement which he or she alleges has been violated, and specify the remedy sought. The Post Commander or equivalent supervisor

shall indicate the date and time of his or her receipt of the form. Within five (5) days of the Post Commander's or equivalent supervisor's receipt of the written grievance, he or she shall schedule a meeting with the grievant to discuss the grievance. A Labor Council representative shall attend this meeting. He/she may represent the grievant if requested to do so by that person. The Post Commander or equivalent supervisor shall respond to this grievance by writing his/her answer on the grievance form and returning a copy to the grievant and a copy to the Fraternal Order of Police, Ohio Labor Council, Inc. within nine (9) days of the meeting required above.

Step 2 - District or Section Commander or Equivalent Supervisor or Designee

Should the grievant not be satisfied with the written answer received in Step 1, within ten (10) days after receipt thereof, the grievant, may appeal the grievance to the District or Section Commander or equivalent supervisor and request that the meeting contemplated by this step be scheduled by mailing or otherwise delivering a copy of the grievance form to that supervisor.

Upon receipt of the grievance, the District or Section Commander or equivalent supervisor shall indicate the date and time of his/her receipt on the grievance form and shall schedule a meeting to be held within ten (10) days to discuss the grievance.

A Fraternal Order of Police, Ohio Labor Council representative shall attend this meeting. He/she shall represent the grievant, if such representation is desired by the grievant.

Within seven (7) days of this meeting, the District or Section Commander shall respond to the grievance by writing his or her answer on the form and returning a copy to the grievant, and a copy to the Fraternal Order of Police, Ohio Labor Council, Inc.

Step 3 - Director/Superintendent or His/Her Designee

Should the grievant not be satisfied with the written answer received in Step 2, within ten (10) days after receipt thereof, the grievant may appeal the grievance to the Director/Superintendent or a designee and request that the meeting contemplated by this step be scheduled by mailing or otherwise delivering a copy of the grievance form to the Director/Superintendent or a designee. Upon receipt of the grievance, the Director/Superintendent or a designee shall schedule a meeting to be held within fifteen (15) days to

discuss the grievance.

A Fraternal Order of Police, Ohio Labor Council representative shall attend this meeting. He or she may represent the grievant, if such representation is desired. The Director/Superintendent or a designee shall render their decision in writing and return a copy to the grievant and the Fraternal Order of Police, Ohio Labor Council, Inc. within thirteen (13) days after the meeting with the grievant.

Step 4

If the grievant or the Fraternal Order of Police, Ohio Labor Council, Inc. is not satisfied with the written answer received at Step 3, within ten (10) days after the receipt thereof, the Fraternal Order of Police, Ohio Labor Council may appear to the Director of the Office of Collective Bargaining. The appeal shall be made in writing by mailing a copy of the grievance form to the Director along with any other supporting documentation. No hearing shall be held. The Director of the Office of Collective Bargaining or his/her designee shall review the documents submitted, issue a decision in writing and return copies to the grievant, the Labor Council, and the Director/Superintendent of the Highway Patrol within twenty (20) days of receipt of the appeal.

Step 5

The Fraternal Order of Police, Ohio Labor Council, Inc. is not satisfied with the answer at Step Four, (Step Three in disciplinary cases), it may submit the grievance to arbitration under the provisions of Section 20.07 of this Article, by written notice of its desire to do so, presented to the Director of the Office of Collective Bargaining and a copy to the Director/Superintendent of the Ohio Highway Patrol, within fifteen (15) days after receipt of the decision in Step 4.

ARTICLE 34 - STANDARDS OF PERFORMANCE

The Employer and the Labor Council are committed to providing the highest level of service to the citizens of the State of Ohio. Employees' performance will be measured utilizing standards which account for both law enforcement and administrative duties. Employees will be apprised of the relative standards of performance of their job, based upon the employee's duty assignment, hours of work and other relative criteria, and counseled if the employee does not meet these standards. The Employer shall not establish a quota

system for the issuance of law enforcement violations.

Time spent engaged in activities approved by a supervisor of a non-enforcement nature shall be considered in measuring job performance.

OHIO ADMINISTRATIVE CODE

4501:2-6-02 Performance of Duty and Conduct

(A) A member shall be subject to those sections of the Ohio Revised Code and Administrative Rules not specifically defined in Ohio Revised Code 5503. Said member shall also be subject to any rule herein published in the rules and regulations of the Ohio State Highway Patrol.

(B) Performance of duty

- (1) A member shall carry out all duties completely and without delay, evasion or neglect. A member shall submit all required reports pertaining to all duties without delay and in accordance with procedures established by the superintendent.
- (2) A member while on duty shall not be absent from the post, station or assignment without authorization and shall be available through usual communication channels.
- (3) Members who are off duty shall keep their post advised when they are not available for recall to 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.

* * *

FACTUAL BACKGROUND

Rebecca J. Yoakam, the Grievant, has been employed as a Highway Patrol Trooper since September, 1985. Currently and at all times pertinent to this matter she was assigned to the Delaware Post. On November 26, 1988, at approximately 5:50 p.m., Trooper Yoakam was dispatched to investigate a property damage

crash which had occurred on State Route 31 in northern Union County. The crash involved a collision between an automobile and a deer. At the time the Grievant received the call she was in her patrol car at U.S. Route 42 and Slack Road in Delaware County. She began to drive to the crash site by travelling south on U.S. Route 42, northwest on U.S. Route 33 and north on State Route 31, a distance of approximately 35.9 miles. (Employer's Exhibit A). However, rather than proceeding in an uninterrupted path to the crash scene the Grievant instead arranged to meet with a Delaware County Deputy Sheriff at the L & K Restaurant near the intersection of U.S. Route 42 and 33. By her own accounts she conversed with the deputy sheriff (who happened to be her husband) for at least five minutes. Upon leaving the restaurant parking lot the Grievant struck a post damaging her vehicle. She immediately radioed the accident report to the Delaware Post and also called the Union County Sheriff's Department to request that a deputy sheriff be dispatched to the deer crash scene.

Following an investigation by the Delaware Post the Grievant was charged with a violation of the Rules and Regulations of the Employer, specifically Rules 4501:2-6-02(B)(1) and (4). The Grievant was subsequently assessed a two (2) day suspension and the instant grievance followed. (Joint Exhibit II). The grievance requests reimbursement for the sixteen (16) hours' wages lost due to that suspension.

POSITION OF THE EMPLOYER

The Employer has shown through evidence and testimony that the Grievant's two day suspension was for just cause. The Grievant violated an established work rule. The Grievant's conduct was also in direct conflict with a primary goal of the organization; "Prompt response to vehicle crash calls and the professional investigation of crashes within the jurisdiction of the Patrol." (Employer's Exhibit B).

The testimony of Captain Everhart shows the Grievant violated the applicable work rule. The Grievant arranged to meet a Deputy, to discuss a non-critical topic, after she had been dispatched to investigate a crash. She admitted the route she took to the crash was not the shortest route and in fact was initially in the opposite direction of the crash. The meeting was not critical and did not take precedence over her duty to immediately respond to the traffic crash. The route she chose would have added a drive of an additional eight (8) miles to her response time, plus the time it took to converse with the Deputy, an estimated 10 to 15 minutes.

Immediate and safe response to crash calls is an absolute priority. Troopers can not assume telephoned reports of non-injury accidents are accurate. Often serious injury crashes are reported as non-injury or minor events by excited callers.

One of the key responsibilities of a trooper arriving at the scene of a crash is to protect the scene in the event vehicles, animals, utility poles or other objects are blocking or creating a hazard on the highway. Any delay in response only increases

the potential for additional harm. A non-injury crash scene can instantaneously become the scene of additional damage, injury or death if approaching traffic is not provided with warning.

The Grievant has received thorough training on the Highway Patrol Rules and Regulations and the mission of the organization. The mission of the organization was mandated by the Ohio Revised Code statute that created the Highway Patrol in 1933. The Grievant's cadet training included considerable discussion on the powers and duties of the Division and the importance of immediate response to vehicle crash calls.

The just cause standard for discipline mandated by Article 19 of the collective bargaining agreement has been met. The goal of the Employer's discipline is corrective. The violation of the Rules and Regulations leading to the Grievant's two (2) day suspension demonstrates a serious error in judgment by the Grievant. This coupled with her past record of minor rule infractions establishes a solid just cause foundation for the level of discipline imposed.

POSITION OF THE LABOR COUNCIL

The Employer has failed to demonstrate just cause for the two (2) day suspension of the Grievant, as required by Article 19 of the Contract. Contrary to the stated reasons of the Employer, the testimony and evidence establishes that the true reasons for her discipline were her accident in the restaurant parking lot as well as the fact that the deputy sheriff she was then meeting with was her husband. This is apparent from an examination of

the investigative report of Captain Everhart. (Employer's Exhibit A).

Further, the Employer's major goal of "prompt response to vehicle crash calls" must be measured by the facts of the individual case. The degree of promptness necessary in response to a deer crash with no reported personal injury is less than that required for a personal injury accident. The anticipated short delay in Grievant's response to the deer crash was a result of the concurrent performance of her duty to investigate a dangerous high speed traffic violation which had occurred in the near vicinity of the deer crash scene. In the circumstances of this case the performance of that investigation was of at least equal importance within the meaning of Rule 4501:2-6-02(B)(1).

Additionally while the route the Grievant attempted to take to the crash scene was not the shortest route in terms of distance it was the much faster route considering the time of day and the relative conditions of the highways. The Employer has overreacted in disciplining this Grievant due to her intervening accident and has thereby failed in its burden of proof to establish just cause for this discipline.

OPINION

The Employer bears the contractual burden of proof to establish just cause for the suspension of the Grievant. Two bases have been enunciated by the Employer in support of that disciplinary action: failure to promptly respond by the most direct route and interrupting her response to the deer crash by

conducting a non-critical traffic violation investigation.

The evidence presented at the arbitration hearing supports the charge that Trooper Yoakam failed in her duty to promptly respond to the deer crash due to an error in judgment. However that judgment error was not related to the route the Grievant took to the crash situs. The Employer has failed to prove that the response route suggested by Captain Everhart would have been as fast or faster than that undertaken by the Grievant. The explanation given by Trooper Yoakam for preferring the route she took is at least as plausible as Captain Everhart's speculation on alternate response times.

By the same token this neutral is unwilling to accept the Grievant's argument that a personal meeting to discuss a speeding violation on the previous evening was necessary or of sufficient importance to delay her response to the deer crash. The Grievant has not adequately explained why the same information on the speeding violation could not have been obtained by radio or, in the alternative, why a meeting at the deer crash scene with a deputy sheriff could not have been arranged. However, the evidence also establishes that it is more likely that Trooper Yoakam's conversation at the restaurant parking lot was less than ten minutes in duration as compared to the twelve to fifteen minute duration estimated by Captain Everhart (Employee's Exhibit A-1). The Grievant received the deer crash call at 5:50 p.m. She reported the accident in the restaurant parking lot at 6:14 p.m. During that twenty-four minute hiatus Trooper Yoakam turned her patrol car around, drove eleven miles (Employer's Exhibit

A-2) to the restaurant, parked, met with Deputy Yoakam, returned to the patrol car, struck the post, spoke to a witness regarding her accident and radioed that accident report to the Delaware Post. The testimony is not clear as to whether the Union County Sheriff's Department was asked by Trooper Yoakam to handle the deer crash call before or after she radioed the Delaware Post.

The issue then becomes whether just cause exists for a two-day suspension of the Grievant in light of her previous disciplinary record and the ten minute or less delay in responding to the deer crash. It has not been suggested by the Employer that the Grievant's accident is to be considered as grounds for the disciplinary action taken in this matter. In fact, the evidence discloses that the Grievant has already received a written reprimand for that accident. (Joint Exhibit 2). Nor does Grievant's disciplinary record for purposes of this case disclose any prior suspension although she has received written reprimands. (Employer's Exhibit F). It must also be assumed that in assessing the appropriate degree of discipline the Employer relied, at least in part, on the unsubstantiated finding that the Grievant failed to respond by the fastest route. Therefore some modification to the disciplinary action herein must be made.

AWARD

The grievance is granted in part. The two day suspension assessed by the Employer is reduced to a one-day (eight hour) suspension.


Thomas P. Michael, Arbitrator

Rendered this Twentieth day of
December, 1989, at Columbus,
Franklin County, Ohio.

CERTIFICATE OF SERVICE

I hereby certify that the original has been mailed to Eugene Brundige, Deputy Director, Department of Administrative Services, Office of Collective Bargaining, 65 E. State Street, 16th Floor, Columbus 43215, with copies by regular, U.S. Mail service, postage prepaid, to Ohio State Highway Patrol, Labor Relations Department, 660 E. Main Street, Columbus, Ohio 43205, and Paul L. Cox, Esquire, Chief Labor Counsel, Fraternal Order of Police, Ohio Labor Council, Inc., 3360 E. Livingston Avenue, Columbus, Ohio 43227, this 20th day of December, 1989.


Thomas P. Michael