

ARBITRATION AWARD SUMMARY

OCB Award Number: 363
Grievance Number: 15-03-890918-0144 Keith Miller
Union: FOP
Department: OSHP
Arbitrator: Patricia Bittel
Management Advocate: Sgt. Richard Corbin
Union Advocate: Ellen Davies
Arbitration Date: 12-15-89
Decision Date: 1-15-89
Decision: Denied

In the Matter of Arbitration)	
between)	
)	
The Ohio State Highway Patrol)	
)	
and)	Case No. 89-918
)	
The Fraternal Order of Police)	
)	
)	

State of Ohio Office of Collective Bargaining

January 15, 1990

APPEARANCES

For the Highway Patrol:

Sgt. Richard G. Corbin	Advocate
Anne Arena	Observer
Captain C. E. Ireland	Captain
Branwen Thomas	Witness
Julia Clark	Witness
Robert W. Booker Jr.	Sergeant

For the FOP:

Ellen Davies	Advocate
Keith R. Miller	Grievant
Ben Williams	Witness
Robert A. Pyzik	Sylvania Prosecutor's Office

ARBITRATOR:

Patricia Thomas Bittel

BACKGROUND

This case involves the September, 1989 termination of a trooper in the Ohio State Highway Patrol for conduct unbecoming an officer, improper use of equipment and false statements. The specific charges against Grievant as articulated in the notification letter were as follows:

"On July 9, 1989 while in Patrol uniform, and on duty, you transported two female persons in an Ohio State Highway Patrol car when it was not part of your official duties.

It is also charged that on July 29, 1989 at approximately 4:50 a.m., while in Patrol uniform and on duty, you were involved in the act of fellatio with a female person for purposes other than those necessary for the performance of your official duties.

It is also charged on another occasion, while in Patrol uniform and on duty, you did associate with a female person in that you placed her on the trunk lid of your patrol car and sexually fondled said person.

It is also charged that on August 30, 1989 while on duty at the Findlay District Headquarters, during an interview with Sergeant Robert Booker, you made false verbal statements regarding allegations of misconduct relative to an administrative investigation."

The Patrol deemed this conduct to violate three of its Rules and Regulations. Grievant's termination became final following a pre-termination hearing.

On September 18, 1989 Grievant protested his termination, claiming Article 19:01 of the Collective Bargaining Agreement was breached because his dismissal lacked just cause. Article 19.01 states "no bargaining unit

member shall be reduced in pay or position, suspended, or removed except for just cause".

The grievance was fully processed culminating in the instant arbitration case. The parties have stipulated to arbitrability and have framed the issue as follows:

"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."

Article 19.05 describes a four-step progressive disciplinary procedure, providing "disciplinary action shall be commensurate with the offense," and "more severe discipline ... may be imposed at any point if the infraction or violation merits the more severe action". Pursuant to the parties' request, witnesses were sequestered during the hearing.

CONTENTIONS OF THE HIGHWAY PATROL

Grievant was employed as a trooper January 12, 1979 and was most recently assigned to the Toledo Post in Lucas County. On August 23, 1989, Branwen Mary Thomas, a 19 year old female from the Toledo area, reported to the Grievant's Post Commander that she had been involved in sexual activity with him while he was on duty. Her first report to the State Highway Patrol included an allegation that she had

been raped by the Grievant. She later recanted this allegation, conceding the sexual conduct was consensual.

Grievant was interviewed with Union representation; the interview was tape recorded, transcribed and admitted into evidence. The statements elicited during the interview were synonymous with his testimony at hearing. Grievant stated he first met Ms. Thomas at the Speed Way where he routinely stopped for coffee during his midnight shift. Ms. Thomas explained at hearing that her room-mate, Julie Clark worked at Speed Way, and she frequently joined Ms. Clark there after her shift at a nearby pizza place.

According to Grievant, the second time he encountered Ms. Thomas, he gave her a ride to her car in his Patrol car; Ms. Clark was also a passenger. He acknowledged Ms. Thomas gave him her phone number but denied ever calling her.

Grievant stated on two occasions, he encountered Ms. Thomas while on duty and they agreed to go to a more secluded area where sexual conduct took place. During the interview Grievant initially denied having fellatio with Ms. Thomas. Toward the end of the interview as well as at the hearing he admitted acts of fellatio on two occasions. Grievant also admitted that on one occasion she was on the trunk of his Patrol car as he fingered her vagina. They were about to have intercourse when a truck came around and they disengaged, he said. At the hearing, Grievant claimed he avoided her after this because of concerns about his health, his marriage and his job.

There were variations in the statements given by Grievant and Ms. Thomas regarding the number of encounters, whether Grievant telephoned her and whether sexual intercourse took place. She definitively claimed they were having sexual intercourse on the trunk of his car when the truck came around, and also asserted there were several other encounters in secluded places while he was on duty.

The discipline given to Grievant was based on his admissions, and the additional allegations in Ms. Thomas' statement were not referenced in the charges against him. Clearly then, a determination of the just cause of termination in this case does not require a determination of credibility issues. Rather, the just cause of the employer's termination decision stands or falls on the perceived seriousness of Grievant's offense.

According to the Patrol, the termination of Grievant for sexual misconduct was covered in the area newspaper, the Toledo Blade. The Patrol presented evidence that its Public Relations function received numerous contacts and telephone calls from local radio and television stations regarding the case. It claimed Grievant's conduct and the publicity it aroused were extremely damaging to the image of the State Highway Patrol. It asserted his conduct violated three of the Highway Patrol Rules and Regulations: misuse of patrol equipment, truthfulness and conduct unbecoming an officer. The text of these regulations is as follows:

4501:2-6-05(B) (2) "A member shall not transport passengers in Patrol motor equipment unless it is part of their duties or when directed to do so by a supervisor."

4501:2-6-02(E) "A member shall not make any false statement, verbal or written, or false claims relating to the performance of, or fitness for duty."

4501:2-6-02(I) "A member may be charged with conduct unbecoming an officer in the following situations: (4) For any on-duty association with a member of the opposite sex for purposes other than those necessary for the performance of official duties."

The Highway Patrol emphasized the sexual liaisons occurred while Grievant was on duty, in uniform, in a marked patrol car and in active pay status. It maintained he had prior knowledge of the prohibitions against on-duty sexual conduct, and common sense alone would mandate such activity could not be tolerated by any employer.

"The Grievant's premeditated pattern of abhorrent behavior was simply intolerable," it argued. Citizens of any community are alert to transgressions of a moral nature on the part of law enforcement officers, explained the Patrol; law enforcement officers are unquestionably held to a higher standard of conduct than could be tolerated elsewhere. The Highway Patrol maintained the law enforcement community relies on public support to carry out its mission, and such support would quickly evaporate if conduct such as Grievant's could be tolerated.

Grievant's overall past character is not at issue, asserted the Patrol, arguing he was terminated based on the

seriousness of his offense. It also pointed out he received a verbal reprimand in August of 1989 for conduct unbecoming an officer. Grievant's record described the offense: "Did have association with a member of the opposite sex for purposes other than those necessary for the performance of his official duties." At hearing the incident was described as one of excessive inessential conversation; there was no claim of sexual activity on that occasion.

The Highway Patrol maintains there can be no question but that just cause exists in this case, and perceives the Union's position as a request for clemency rather than an attack on just cause. It argued the issue before the Arbitrator is only just cause, and the Arbitrator is not in a position to entertain any plea for clemency. It provides an award from another arbitrator in support of the contention that clemency is inappropriate in an arbitration setting.

"The Grievant's blatant and repeated misconduct is an offense to every tax paying citizen of the state of Ohio," argues the Highway Patrol, "To tolerate this type of behavior by applying less severe discipline would destroy the public trust in the organization and the system of justice adopted by our industrial relation system."

CONTENTIONS OF THE UNION

The Union maintained Grievant was one of the best troopers in the entire force. It argued he was cooperative throughout the investigation and told the truth by the end of his first interview.

Grievant himself expressed deep and sincere regret for his mistake and was quite adamant he would not make that error again. He testified as to the importance of both his family and his church, and stated he had apologized to everyone involved. He said he realized the seriousness of his offense and admitted to the damage he had caused the reputation of the organization. He stated the relationship with Ms. Thomas was purely physical and had terminated prior to her decision to report him to the post.

Two character witnesses testified on his behalf. Robert Pyzik from the Sylvania Prosecutor's Office testified he had known Grievant since 1980 or 1983, both professionally and later as a friend. He stated Grievant was an excellent witness with almost 100% success rate with his DUI arrests. He testified to Grievant's reputation for honesty and stated he was an asset to the Highway Patrol.

According to Pyzik, Grievant's absence is detrimental not only to the Ohio State Highway Patrol, but also to the motoring public. He said he had been contacted on numerous occasions by persons stating they needed Grievant back on

the job. He confirmed that Grievant is remorseful and understands he has hurt both himself and his family.

A second character witness, Ben Williams, is a school teacher and basketball coach in the Toledo system. He testified he has known Grievant prior to the time he joined the Highway Patrol. He described him as a very fine man who had endured a deeply disturbing incident. Williams said he would "stake his life on it" that Grievant would not make the same mistake again.

The FOP pointed out the relationship with Branwen Thomas did not entail any neglected duties or traffic violations. It noted Grievant was District 1 Trooper of the Year in 1988. Due to this honor, Captain Ireland prepared a compilation of letters of thanks and commendations given Grievant, as well as a synopsis of his strong attributes. The 67 page document described not only his excellent performance on the job, but also his personal attributes in terms of community involvement, family loyalty and pleasant personality.

The FOP perceived Grievant's offense primarily as one of paid time spent in the non-performance of duties. It argued he is quite credible in his promise not to make the same mistake. In the Union's view the Ohio State Highway Patrol can and should put the situation behind them as Grievant's family has done, and allow him to effectively continue contributing to the Patrol in the admirable way he has done in the past.

DISCUSSION

Because the discipline given in this case arises directly from Grievant's admissions during his interview, the differences in the statements of Grievant and Ms. Thomas do not have to be resolved. Grievant has fully confessed to having sexual contact with Branwen Thomas while on duty. He admitted giving Ms. Thomas and Ms. Clark a gratuitous ride in his Patrol car. He also admitted his initial untruthfulness during the interview. These are the specific items with which he has been charged. The stipulated issue before the Arbitrator is whether Grievant's discipline was for just cause.

The Highway Patrol argued the integrity of the organization has been severely damaged because the expectations of the general public has high expectations of troopers based on public trust.

This argument is well taken. "Respect for a law enforcement officer approaching one's car is synonymous with trust of that person, and likewise the officer's ability to do his job is dependent upon that trust. For this reason it simply cannot be said that damage to public image, and therefore public trust, is unimportant."

The FOP's argument that Grievant's offense boils down to a short-term distraction from his work cannot be credited. Were Grievant simply taking an extended coffee

break rather than attending to his duties, the nature of the offense would be entirely different. It is in fact the moral nature of his offense which, in the eyes of the Highway Patrol, renders it so serious.

Precedent to the Ohio State Highway Patrol Regulations is its Code of Ethics containing a series of ten standards which Highway Patrol members attempt to attain. The ninth of these states they shall so conduct their private and public life that the public will regard them as examples of stability, fidelity and morality.

While this Code is not a Regulation, it sets forth the standard or the expectation of the employer for its troopers. It is indeed the moral nature of the offense which brought about the publicity in the Toledo Blade and the inquiries from local radio stations. It is also this breach of morality which caused the admitted damage to the reputation of the organization as well as impairment of public confidence.

It is a given that Grievant breached the Regulations cited by the Highway Patrol. The seriousness of his offense cannot be overlooked because the very nature of the offense violates the most fundamental of expectations of professionalism. The repeated nature of Grievant's offense aggravates the seriousness of his misdeeds. This is not a one-time mistake; it is a pattern of conduct that continued over a period of time.

The FOP would have Grievant's stellar record militate against a finding of just cause. His record is unquestionably one of which he can be quite proud. Clearly the Grievant in this case was a trooper of high value to the organization who contributed more than his share.

His record is extraordinary. Letter after memo after note, from persons he has stopped, organizations he has spoken to, the general community and families he has helped -- all commend his work as being exemplary. The Arbitrator is convinced Grievant is a praiseworthy individual who suffered a lapse of both integrity and common sense in the face of temptation. His record indicates he is a friendly and personable individual. His mistake was a very human one and his remorse is as deep as it is sincere. The fact remains, however, that his mistake was extremely serious. Only if the Patrol's view of the seriousness of his offense lacks rationality and fairness can the Arbitrator overturn the discharge for lack of just cause.

// The determination of the issue of just cause does not call for the Arbitrator's independent decision as to what the appropriate discipline should be, or whether the Grievant, due to personal worth, deserves to have his job back. The duty of the Arbitrator is not to second guess the employer and then readjust the discipline to fit his or her view of the facts. The question is not whether the Grievant would perform well upon reinstatement. Rather the Arbitrator's function is only to render a decision as to

whether the employer had just and sufficient reason for the discipline selected." Both the contractual terms cited by the FOP and issue framed by the parties restrict the Arbitrator to a determination of just cause.

As the employer pointed out, a plea for leniency is synonymous with a request for clemency where just cause exists. Such requests fall outside the jurisdiction of the designated authority of an Arbitrator.


The question of just cause goes directly and exclusively to the nature of the offense. The Highway Patrol deemed Grievant's offense so serious as to warrant discharge. It is for the Patrol, and not for an Arbitrator, to decide whether the cost of losing Grievant as an employee is worth the price.

Grievant's offense was serious enough both in terms of his breach of existing regulations and in terms of professionalism in general, that his past performance simply cannot serve to defeat the just cause of the employer's decision. Given the employer's desire and right to establish and implement high standards for the Patrol, the Arbitrator would exceed her authority to substitute a finding of no just cause in place of the Patrol's view that Grievant's offense warranted discharge.

AWARD

The grievance is denied. The Ohio State Highway Patrol had just cause in terminating Grievant from his position as trooper.

Respectfully Submitted,


Patricia Thomas Bittel,
Arbitrator

Dated: January 15, 1990