September 21, 1990

In the Matter of Arbitration between	)	
The State of Ohio, Ohio State Patrol	)	15-03-900620-043-04-01
and	)	
The Fraternal Order of Police, Ohio Labor Counsel, Unit 1	)	Award #491

APPEARANCES

For the State:

Richard J. Corbin	Advocate
Captain J. M. Demaree	Management Representative
Captain W. W. Webb	Witness
Rodney D. Sampson	Office of Collective Bargaining
Richard A. Curtis	Ohio State Highway Patrol
Sergeant Christine Stoughton	Ohio State Highway Patrol
Joseph E. Berger	Witness

For the FOB:

Paul L. Cox	Attorney
Renee Engelbach	Paralegal
Chet DeLong	Recruiter
Edward Baker	Staff Representative
Janice Siler	Grievant

Arbitrator:

Patricia Thomas Bittel

BACKGROUND

This matter was heard on August 20, 1990 at the State of Ohio Office of Collective Bargaining before Patricia Thomas Bittel, the impartial Arbitrator mutually selected by the parties in accordance with Article 20 of the Collective Bargaining Agreement.

Grievant was employed in June of 1987 as a Cadet Dispatcher. In March of 1988 she attended the Academy, graduating in September. She completed her coach/pupil period in December of 1988 and resigned as a trooper. From December of 1988 until June of 1990 she worked at the Hamilton post as a dispatcher.

In late December, 1989 management received a letter describing a dark truck which would meet patrol car number 715 on a regular basis at a location described as Countryview Drive in Butler County. The letter, signed by a P. W. Kessell, stated the parties would meet, then leave the area for one to three hours before returning. It was conceded that the number 715 was assigned to Trooper Joseph E. Berger's vehicle and that Grievant has owned a dark gray Mazda pickup.

In mid February of 1990 management received a second letter signed by Kessell which identified the license number of the truck. On March 1, 1990 Lieutenant Vermillion interviewed Trooper Berger. Berger told Vermillion he was meeting Grievant on Countryview Drive in order to discuss

her work-related problems. On March 5, 1990 Grievant was interviewed by Vermillion and gave him the same story.

On March 26, 1990 management received an unsigned letter which stated simply "He's lying." On April 13 Trooper Berger resigned from the Highway Patrol.

On April 18 Sergeant Stoughton interviewed Grievant who at first denied writing the letters, then admitting writing the third letter which said "He's lying." She said she had never met Berger on Countryview Drive but had lied for him during her earlier interview with Vermillion. She claimed he asked her to cover for him by telling management they had been meeting to talk about her problems on the post.

On May 31 Berger met with Captain Wendel Webb and confessed to having had an affair with Grievant. He told Webb they had engaged in sexual intercourse while Grievant was on duty on at least one occasion. Berger told Webb this occurred at the post in the fall of 1987, but was their last sexual encounter. He claimed he was not having an affair with anyone other than Grievant and said the meetings were set up by Grievant's friend, Sandy Brumbaugh.

On June 7, 1990 Webb interviewed Grievant's friend Sandy Brumbaugh who admitted calling the post four or five times to tell Berger to call Grievant. According to Webb's notes, she said Grievant talked about letters several times and each time changed her story, causing Brumbaugh to wonder whether Grievant wrote them herself. The notes indicate Brumbaugh told Webb she was aware Grievant and Berger were

having an affair but did not indicate Grievant ever admitted having sex on post. Webb reported Brumbaugh's statement that Grievant was physically attracted to Berger from the first time she met him and was so upset over the ending of the affair that she attempted suicide.

On June 20, 1990 Grievant was removed from her position for improper sexual conduct while on duty and untruthfulness during the investigation. A grievance was filed the same day stating "I was discharged without just cause; during the investigation the Ohio Highway Patrol did not work within the spirit of the agreement as well as sexual discrimination directed at me, and disciplinary action was instituted two (2) years after an alleged incident." The remedy requested was "that I be reinstated to my former position with back pay and all benefits, and that my record be expunged with regard to the alleged incident."

The parties have referenced the following provisions of the collective bargaining agreement:

> "Article 7 - NON-DISCRIMINATION
> Neither party will discriminate for or against any member of the bargaining unit on the basis of age, sex, marital status, race, color, creed, national origin, religion, handicap, political affiliation, sexual preference; or for the purpose of evading the spirit of this Agreement; except for those positions which are necessarily exempted by bona fide occupational qualifications due to the uniqueness of the job, and in compliance with the existing laws of the United States, the State of Ohio, or Executive Orders of the State of Ohio."
>
> "Section 18.08 - Disciplinary Action
> Disciplinary Action shall be instituted within two (2) years of the occurrence except in the event of an

ongoing criminal investigation or prosecution of the employee."

"Section 19.01 - Standard
No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause."

FACTS IN EVIDENCE

LIEUTENANT COLONEL RICHARD CURTIS testified he was involved in the 1985 negotiations resulting in Article 18.08. He described discussions about the relationship of disciplinary actions to criminal violations. He explained a two year statute of limitations was applicable to criminal violations and recalled the intent of the parties to apply the same standard to disciplinary actions.

He referred to the applicable statute, Section 2901.13 of the Ohio Revised Code, which establishes a two year statute of limitations for misdemeanors. The Section also contains the following provision: "(F) The period of limitations shall not run during any time when the corpus delecti remains undiscovered. 'Corpus delecti' means the body of the crime, explained Curtis, and the statute does not begin to run until after the violation has been discovered. Accordingly, he interpreted the parties' intent in Section 18.08 for the two year limitation period to begin running only after knowledge of the violation existed.

CAPTAIN WENDEL WEBB said he oversees internal investigations as part of his responsibility as Commander of

the Inspection and Standards Section. He stated when the two letters allegedly signed by P. W. Kessell were received, he attempted to contact Kessell but could not locate any such person. No number was listed in the phone book and no return address was on the envelopes, noted Webb.

He asserted an opinion that the letters were written by Grievant. He felt they came "from the inside" because of the language. He said phrases such as "I found this behavior unsatisfactory" and "I felt this matter should be brought to your attention" indicate the author had some familiarity with law enforcement terminology. In addition, he noted a misspelled address on both envelopes. During her interview Grievant was asked to spell the street name and misspelled it the same way, said Webb. Everyone else he interviewed either spelled it correctly or had no idea how it was spelled, he said.

Webb stated he interviewed another dispatcher, Shirley Waits, who said Grievant had received a telephone call from an individual on Countryview Drive complaining that car 715 was meeting someone there. Waits told Webb the call was discussed but not entered into the telephone log or referred to the supervisor, though it is the dispatcher's responsibility to log complaints.

According to Webb, Grievant offered to resign during her interview but he told her not to if she felt she was innocent. Webb said he told Berger the same thing. He reported Grievant denied writing the "He's lying" letter

during two separate interviews before admitting to Sergeant Stoughton that she was the author.

Webb said Berger denied having sex with Grievant during his first interview but did claim to have been meeting her on Countryview Drive to go to the post and discuss problems she was having. After his resignation, Berger sent a letter to management admitting an on-duty affair with Grievant.

After receipt of this letter Webb interviewed Berger again. Webb admitted this second interview with Berger was the only evidence that Grievant had sex while on duty in 1987.

Webb prepared a case synopsis concluding that Berger's name was linked to several women during his career, building a pattern indicative of sexual involvement with Grievant or another woman while on duty. This conclusion was based on the letters regarding his encounters on Countryview Drive, dispatchers' statements that he was receiving calls from an anonymous female, reports that he would leave immediately after such calls, a history of going long periods of time with negligible radio traffic plus Berger's own admission of meeting with Grievant.

Grievant's denial of sexual involvement with Berger was reported in Webb's case synopsis along with her statement that she was covering for him as he was having an on-duty affair with another woman. She claimed Berger had suicidal tendencies and had threatened to crash his control car and

shoot himself. Grievant's claims of sexual harassment were also reported in the case synopsis.

SANDY BRUMBAUGH testified under subpoena that she telephoned the post at Grievant's request less than five times. She stated these calls were to ask Berger to return the call. She said Grievant did not want the person answering the line to know who was calling. She stated her opinion that Grievant thought Berger was a "cute, nice guy" and said Grievant was emotionally upset while the investigation was going on. She denied telling Webb Grievant was attracted to Berger.

JOSEPH BERGER testified he worked as a trooper from September of 1980 to August of 1986 when he was promoted to Sergeant at the Hamilton post. In January of 1990 he became a Lieutenant and in April he resigned.

He said Grievant was employed in June of 1987 at the Hamilton post and their relationship started in the fall of 1987. He claimed she contacted him several times to discuss some of her concerns about her work performance. When she called he would meet with her to discuss her problems and they began to become physically attracted.

He said during their discussions, Grievant asked for advice in handling people and situations, and at one point told him the post commander had sexually harassed her by touching her breast in the stairwell. He said he dealt with the situation by putting her on the day shift so she would be with other employees.

She also spoke with him about feeling insecure and having trouble getting along with other employees. She complained that some troopers used abusive language.

Their meetings were off duty and became more frequent, he said, including at least one instance of sexual intercourse while on duty. He testified this occurred in late 1987 or early 1988.

Upon receipt of the first letter he said he called Grievant to warn her they were likely to be confronted. He said they talked it through to make sure their stories would be the same. He admits asking her to corroborate what he planned to say.

He claimed their relationship ended in the spring or early summer of 1989 at his instance because of his marriage. He said her reaction was emotional and bitter and she told him he would be sorry. He denied threatening to 'get' Grievant but claims not to know what his wife said to her during a phone conversation despite the fact he was present at the time.

Berger claimed Grievant spoke of suicide and had attempted it in the past. He admitted mentioning suicide to Grievant but said this was in order to help her understand the position she was putting him in.

Berger admitted that during the course of the investigation he lied about his relationship with Grievant primarily to protect his family and his marriage. He said

when Webb's investigation expanded, he realized he would face discipline and resigned to protect his family.

He admitted lying to Webb about a prior affair with another trooper and said during his interview he had mixed lies with the truth. He also admitted lying to the Trenton Police Department about a woman in his car who he eventually identified as Grievant. Berger testified that although he had lied before, his testimony at the hearing was the truth.

SERGEANT CHRISTINE STOUGHTON testified she interviewed Grievant who claimed she could not have been the one Berger was meeting because she did not know any of the facts or details of the meetings. Though suicide was discussed during the interview, Stoughton had no explanation for leaving it was out of her report.

GRIEVANT testified that Berger called when the first letter arrived at the post and said he needed her help. She said he wanted her to use her problem with the post commander as the reason for their meetings. She claimed she never met Berger on Countryview Drive and at first did not agree to cover for him. She stated the license plate number in the Kessell letter was not hers.

According to Grievant, Berger told her to go along with his story or it would be her job. She said she lied about meeting Berger because she wanted to keep her job.

She claimed Berger had once put his service revolver under his chin and made suicidal comments. She said he never told her what he was doing on Countryview Drive but he

did receive a number of phone calls from women. Grievant was not sure whether they were from the same women or not.

Grievant contended she was intimidated by Berger. She also said she trusted him more than the others at the post and talked with him about her personal problems. On cross-examination she admitted she thought he was 'cute' but asserted there are other guys at the post who are also 'cute'. She admitted having Brumbaugh call the post and claimed the reason for wanting Berger to call was to coordinate their stories.

According to Grievant, Berger told her if she did not go along with his story he would 'get' her. She admitted having emotional problems in the past but claimed she had never attempted to commit suicide.

FOP CHIEF LEGAL COUNSEL PAUL COX testified the parties' agreement was renegotiated in 1989. The language of Section 18.08 was originally negotiated in 1986 and remained unchanged in 1989 despite a Union proposal to reduce the period of limitations to one year.

He claimed there was extensive talk about the language of Article 18, including the concept of knowledge of an occurrence. He said the language was clear and was intended mean what it said. According to Cox there was no intent to forestall the statute of limitations because of delay in discovering a violation.

ARGUMENTS PRESENTED

By Management

The Patrol maintained proper interpretation of Section 18.08 requires discipline to be within two years of an occurrence after evidence of a rule violation is known to management. It argued this interpretation is based on the intent of the parties and on the necessity to protect the public trust. It contended the Union's interpretation could result in criminals keeping their positions of public trust if their crimes were not discovered in time.

As to the merits of the case, the Patrol argued Grievant's testimony is simply not credible. It pointed out she has wavered between feeling threatened by Berger and feeling concern for him -- incompatible emotions. It further claimed her confessed writing of the "He's lying" letter consciously and purposefully caused the investigation to be continued at a point in time when she claims she was trying to protect Berger. The Patrol argued Berger is now telling the truth and should be credited over Grievant.

Grievant quite plainly attempted manipulation of an internal investigation -- a serious breach of duty, asserted the Patrol. "Clearly, Highway Patrol Dispatchers hold a position of public trust and must be relied on to forward accurate, complete information to their supervisors and the public. The grievant has demonstrated an unwillingness to meet that expectation," argued the Patrol.

By the Union

The Union maintained the contract language means exactly what it says: disciplinary action cannot be taken more than two years after an occurrence. It noted a specific exception "in the event of an ongoing criminal investigation or prosecution of the employee". It concluded management's concern about retaining criminals in positions of public trust has already been addressed.

There was no specific discussion of a discovery rule when the language of Article 18.08 was initially drafted, contended the Union, nor was such a rule discussed in the Fact Finder's report recommending the language.

The parties were fully aware of how to implement a discovery rule and consciously chose to do so in Sections 20.05 and 20.07 -- provisions which establish deadlines for filing grievances based on when the grievant knew or reasonably should/could have known of the event giving rise to the grievance. According to the Union, the clear choice of the parties not to employ such language in Section 18.08 is due to the parties' intent that, except in cases of ongoing criminal investigation or prosecution, the two year limitation is to run strictly from the time of the occurrence.

In the Union's view, management cannot sustain its discharge decision without the sexual conduct. It claimed the allegations of sexual misconduct on duty are both

untimely and unproven because the credibility issues weigh heavily in favor of Grievant.

The Union argued Grievant was the victim of sexual harassment, not only by other officers at the post, but also by Berger, who was her supervisor. It claimed Berger's story of an affair with Grievant was merely a tactic to get his job back. The Union pointed out Berger denied sexual contact until he decided to make a play for his job. Berger's motivation is purely self interest, argued the Union, pointing out he lied to the Trenton police when caught with a woman in his car and lied again during the case investigation.

The Patrol is pursuing this case because it is embarrassed by its decision to promote Berger after getting the first Kessell letter, maintained the FOP.

The Union argued the Arbitrator has authority to modify discipline and advocated such a result. It conceded Grievant lied about sending the "He's lying" letter, maintaining lying does not warrant discharge. It took issue with a prior decision by this Arbitrator, referred to as the Miller case, and asserted the Arbitrator has authority to modify the employer's discipline even if all the facts are as alleged by the employer.

Following the hearing and at the request of the Arbitrator, both parties submitted their records of negotiations involving Section 18.08. The Patrol submitted an affidavit of one Louis Kitchen, member of the State's

negotiating team in 1989, stating he was present during the 1989 negotiations and had "no memory of any discussion on the topic of Section 18.08". The affidavit also stated there was no record of any discussion of 18.08 nor was the section opened during the course of those negotiations. The employer's records of submitted proposals did not indicate any proposed change in 18.08 or contain any notations of discussion of 18.08.

The FOP submitted its pertinent records which included a hand-written note dated November 17, 1988 stating as follows: "18.08 Absolute necessity. Employer only needs one year. No need to go back further. Same as expungement in Article 17." Subsequent notations indicate no change or discussion of Article 18.08 specifically, though Article 18 was discussed in general terms.

DISCUSSION

The language of Article 18.08 specifies that the two-year period of limitations begins running after an "occurrence", except in the case of an on-going criminal investigation or prosecution of the employee. In interpreting a collective bargaining agreement, the words chosen by the parties are to be given their ordinary and usual meaning unless there is evidence the parties intended otherwise.

The word "occurrence" is defined in Webster's New Collegiate Dictionary as: "1: something that takes place, usually unexpectedly and without design; 2: the action or process of happening." Clearly, this term as it is ordinarily and typically understood does not incorporate any concept of knowledge or discovery.

The parties specifically addressed the issue of public trust in 18.08 by making the situation of an on-going criminal investigation or prosecution an exception to their otherwise universally applicable rule. To the extent they wanted their provision to track this statute, they have so specified. They thought about the need to protect the public trust and addressed this need in precise terms.

There is no ambiguity in Section 18.08. The words are plain. "Disciplinary action shall be instituted within two years of the occurrence ...." This interpretation is reinforced by the parties' definitive decision to frame their intent differently under other circumstances. Section 20.05 provides: "Class grievances shall be filed within fourteen (14) days of the date on which any of the like affected grievants knew or reasonably could have had knowledge of the event giving rise to the class grievance." Section 20.07 provides a grievance can be presented within 14 days "of the day on which the Grievant knew or reasonably should have had knowledge of the event giving rise to the grievance."

As counsel for the FOP correctly pointed out, the parties' choice of this language demonstrates they were freely capable of establishing and in fact did choose to establish a discovery rule when and where they wanted one. They did not choose to establish such a rule regarding disciplinary action. It is not for the Arbitrator to draft into the contract provisions the parties did not intend.

The proper interpretation of Section 18.08 can be determined from the four corners of the collective bargaining agreement. Under the parole evidence rule, evidence cannot be admitted to vary or alter the stated terms of a written agreement. In arbitration, this rule is closely related to the arbitrator's jurisdiction to decide disputes of contract interpretation and application.

If the history of negotiations and the unstated intent of parties were permitted to modify the terms of an agreement, there would be little reason for the parties to commit their understanding to writing at all. The parties in this case negotiated at great length, with painstaking care to precisely articulate their understanding. The stability of this understanding would be seriously jeopardized if the Arbitrator were to revive the back-and-forth discussions leading to the chosen language. Section 18.08 is clear. Consideration of outside evidence, including the history of negotiations, is inappropriate.

The allegations against Grievant are two-fold: improper sexual conduct while on duty and untruthfulness during an

administrative investigation. The allegation of improper sexual conduct while on duty is solely and exclusively sourced in the testimony and information provided by Joseph Berger. His original statement was that any sexual conduct by Grievant while on duty occurred in 1987; at hearing he stretched this to early 1988. In any event, her removal letter is dated June 20 of 1990, safely outside the two-year limitation on disciplinary action.

The Patrol is specifically precluded by Section 18.08 from disciplining Grievant for an incident more than two years old. This restriction on the employer's freedom to discipline is neither unduly burdensome nor onerous.

The case against Grievant therefore defaults to her failure to tell the truth during an administrative investigation. This indeed is a serious offense given the public trust of her position. A dispatcher is a person whose very job is to transmit information reliably without alteration. Not only has Grievant admitted to lying for Berger, but she also admitted to lying on her own behalf about the "He's lying" letter.

Grievant's testimony at hearing was also seriously lacking in credibility. Captain Webb has no motivation to conjure untruths or falsely attribute misstatements to Grievant's good friend, Mrs. ~~Stoughton~~ Brumbaugh. Rather he is a professional, trained in investigation methodology. His records indicate Stoughton was aware of Grievant's affair

with Berger. Though hearsay, this evidence is indicative of an affair.

More significantly, trust and fear are diametrically opposed emotional reactions, yet Grievant claimed them both. As management effectively argued, she could not fulfill her stated purpose of covering for Berger while simultaneously attempting to blow his cover with the "He's lying" letter. The high emotional levels evidenced here are consistent with a finding of a romantic relationship.

Grievant characterized their relationship as one of friendly co-workers but admitted she talked openly with him about problems which were personal in nature. There is no indication of any resistance on her part when Berger asked her to lie for him. Her testimony shows she willingly lied for him before receiving any alleged threat. These proven facts also support a finding that the relationship between Berger and Grievant exceeded ordinary friendship or co-worker compatibility.

Grievant's actions belie her words. The Arbitrator finds Grievant has concocted an elaborate denial of her relationship with Berger in an attempt to protect her position. Because her affair with Berger was voluntary and welcome, it does not fall within the realm of sexual harassment.

While Grievant's untruths constituted a serious offense, they fall short of establishing just cause for discharge. The personal and emotional aspects of the

situation must be considered in determining the seriousness of the offense and the capability of Grievant to perform as a dispatcher. A conclusion that Grievant should be discharged for her untruthfulness is not supported by the evidence in this case. Due to the personal and emotional aspects of the situation as well as the fact that this is Grievant's first offense, discharge is unduly severe as a penalty. Grievant's offense is nonetheless quite serious, warranting the maximum suspension of 90 calendar days without pay.

AWARD

The discharge of Grievant in this case was without just cause. She shall be reinstated with retroactive restoration of benefits, seniority and all other attributes of employment. She shall further receive back pay less an amount reflecting a suspension of 90 calendar days, and less any payments received as unemployment compensation or compensation from another employer. The Arbitrator will retain jurisdiction for a period of 30 calendar days in order to resolve and clarify any matters resulting from the remedy ordered in this case.

Respectfully Submitted,

Patricia Thomas Bittel

Patricia Thomas Bittel

Dated: September 21, 1990