#516

OCB - FOP/OLC VOLUNTARY GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration Between: THE STATE OF OHIO Department of Highway Safety State Highway Patrol Lisbon, Ohio Post -and- THE FRATERNAL ORDER OF POLICE Ohio Labor Council, Inc. State Unit 1	* * * * * * * * * * * * *	Case No 15-03(90-09-14)066-04-01 Decision Issued: November 9, 1990

APPEARANCES

FOR THE STATE

Sgt. Richard G. Corbin	Patrol Advocate
Anne K. Arena	Labor Relations Officer
Capt. Stephen A. Lamantia	Witness
Lt. Lawrence R. Meredith	Witness
Sgt. William C. Rensi	Witness

FOR THE UNION

Ellen Davies	FOP/OLC Staff Attorney
Ed Baker	Staff Representative
Mary Ann Simon	Grievant

ISSUE: §19.01: Alcohol Dependency. Removal For Alleged Violation of Last-Chance Agreement.

Jonathan Dworkin, Arbitrator
9461 Vermilion Road
Amherst, Ohio 44001

SUMMARY OF DISPUTE

The grievance protests the discharge of an Ohio State Trooper. Grievant joined the Highway Patrol in 1981; her seniority date was July 2, 1981. She was removed on September 14, 1990 after more than nine years on the job. The principal charge against her related to August 17, 1990 when she allegedly was unfit to report for work because of alcohol intoxication. This was her second discharge; the first, which occurred in December, 1987, was also grounded on substance and/or alcohol dependency which impaired her job performance. It was withdrawn on a last-chance agreement under which Grievant was to correct her problem through an Employee Assistance Program (EAP).

The Union grieved the September 14 action, contending that it lacked just cause. The contention relates to Article 19 of the governing Collective Bargaining Contract. It states in pertinent part:

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.

. . .

§19.05 Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

1. Verbal Reprimands (with appropriate notation in the 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.

The Employer, at its discretion, is also free to impose less severe discipline in situations which so warrant.

In order to meaningfully compare the Patrol's position with the Union's, it is helpful to briefly recount the incident which triggered the removal. On August 17, 1990, the Employee was scheduled on the 11:00 p.m. turn. She telephoned the post dispatcher early that afternoon to report off on sick leave. The reality was that she was not sick. She did have a case of poison ivy for which she obtained medical treatment, but it was not disabling. Moreover, no sick leave was available for her to use; she had exhausted her entire bank of ninety hours in less than a year.

At 5:45 p.m., Grievant called the dispatcher again to find out if her day off had been approved. She was told that the Sergeant had denied the application and indicated that neither compensatory nor holiday leave would be granted. Notwithstanding, the Employee reported off on compensatory time. When the Sergeant learned of this, he decided to investigate. He drove to Grievant's and spoke with

her for about an hour. During the "visit," he assessed her as extremely intoxicated, ordered her not to report for work, and told her that the incident would be reported for probable discipline and possible removal.

These facts, viewed in light of Grievant's record after her reinstatement from the prior discharge, do not present an adequate case for dismissal under the usual just cause standards. Aside from a counseling in June, the record was discipline-free -- there was not even a reprimand. As bad as Grievant's conduct on August 17 might have been, it certainly did not justify an impulsive termination of her nine-year employment history.

In truth, the Employer does not claim that its action was consistent with abstract principles of just cause, and its reliance on strictly contractual prerogatives to discharge employees is negligible. Rather, the Patrol looks to Grievant's 1988 last-chance agreement as the foundation for its action. That agreement provided in pertinent part:

> EMPLOYEE ASSISTANCE PROGRAM
>
> PARTICIPATION AGREEMENT
>
> The Ohio Department of Highway Safety, Division of the Ohio State Highway Patrol, (hereafter the Division), and the employee . . . agree to enter into a contract wherein the employee voluntarily agrees to seek assistance from a Health Care Provider under the Ohio Employee Assistance Program (Ohio E.A.P.), to deal with the problem of alcoholism/substance abuse.

The employee agrees to participate in the plan for a period of up to 365 days. Said plan will be developed by the Health Care Provider. The employee agrees to meet all of the requirements set forth in that plan. The employee also agrees to verification as to whether or not the employee is keeping scheduled appointments and is in compliance with the agreed to plan. Said verification will be made by the Case Monitor assigned in accordance with the employee's health plan contract. The employee agrees the Case Monitor will provide the Division with updates every two weeks.

. . .

The Division agrees that, so long as this contract is complied with in its entirety, the employee's termination shall be held in abeyance. Should the employee violate this contract by failing to be rehabilitated, or by failing to actively participate in the program, the termination will be implemented.

The employee understands and agrees that further occurrences of the problem described in paragraph 1, either during the time encompassed during the E.A.P. treatment or at any future incident, shall result in the immediate implementation of the proposed discipline.

By signing this agreement, the employee and the Fraternal Order of Police, Ohio Labor Council agree to waive any contractual time restrictions regarding the imposition of discipline. The Union and the employee acknowledge the Division is not liable for any pay as the result of this agreement, or the circumstances leading up to it. The Union and the employee acknowledge any pay is provided through disability leave benefits.

The employee, by signing this contract, acknowledges that s/he has received a copy of this contract, has been fully informed of the terms and consequences of it; and hereby voluntarily enters into said contract after having been advised by her representative, who has signed below.

The Division further agrees that if the employee . . . successfully completes the agreed to plan, as certified by

> the Ohio E.A.P., the Division will restore [her] to employment as a Trooper. [Emphasis added.]

In the Employer's judgment, Article 19, its just-cause mandate, and its progressive-discipline standards are irrelevant to this dispute. In 1988, those terms of employment were changed for Grievant. She and her Union executed a binding contract. In it, Grievant promised to follow a treatment program to rehabilitate herself from drug and alcohol dependency. She specifically acknowledged that should she fail to achieve her goal or later revert to substance abuse, the discharge she escaped in December, 1988 would be implemented. She and her Union Representative also conceded, in writing, that the former removal action was not abandoned or withdrawn by the State; it was held "in abeyance" to secure Grievant's continued compliance with the conditions of her reinstatement. The Patrol contends there was ample consideration for all the Employee gave up -- her job was saved so long as her compliance remained constant.

According to the Patrol, Grievant breached the last-chance agreement. Her abstinence from alcohol was short lived. By her own admission, she started drinking three months after completing the rehabilitation program. Her performance deteriorated and, on August 17, the predictable event occurred. She drank so much alcohol that she rendered herself unfit to perform her responsibilities as an Ohio State Trooper. The prescribed consequence was removal -- not necessarily under Article 19, but in accordance with the last-chance

agreement. The Patrol concludes that the last-chance agreement rather than the labor-management contract governs this case.

* * *

The grievance was appealed to arbitration and heard in Columbus, Ohio on September 28, 1990. At the outset, the Representatives of the parties stipulated that the appeal met contractual time limits and was procedurally arbitrable. They agreed that the Arbitrator was authorized to issue a conclusive award on the merits, subject to the following limitations in Article 20 of the Agreement:

> 5. Limitations of the Umpire
>
> Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement shall be subject to arbitration
>
> The umpire shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall the umpire impose on either party a limitation or obligation not specifically required by the language of this Agreement.

FINDINGS ON THE "OTHER CHARGES" AGAINST GRIEVANT; THE ISSUES CLARIFIED

In its opening statement, the Employer claimed that the August 17 incident "was only the latest in series of performance related problems which have arisen as a result of the grievant's continued use of alcohol." It then attempted to demonstrate its point with evidence of the Employee's past omissions and failings:

On May 24, 1990, she failed to report for her 11:00 p.m. shift. The Lieutenant supervising the post telephoned her at 11:05. Grievant told him she did not know she was scheduled. Her shifts had been changed to accommodate inservice training, and she lost track of the days she was supposed to work. The Lieutenant did not doubt the reason for her absence. He offered her an opportunity to report in at midnight and make up the hour by working over onto the day shift. She declined, explaining that she had been out on a date and had consumed "a few beers." She did not feel able to perform safely.[1]

The Lieutenant conducted an investigative interview with Grievant on June 12, 1990 concerning the May 24 absence. His report of the

[1] The Union regards the incident as illustrating Grievant's worth as an employee, not her flaws. It demonstrated her concern for safety and her acute awareness that consuming even a small amount of alcohol was incompatible with her job responsibilities. The Union contends that, if anything, her unwillingness to accept the Lieutenant's offer should have been viewed as a positive reflection on her judgment and dedication.

conference indicates that he accepted the Employee's "excuse," but found it less than exculpating. The report stated in part:

> I believe that [Grievant] did become confused about her time off, but it was her responsibility to report when scheduled. The schedule change was made weeks before this incident and was on the posted schedule. In fact, [Grievant] admitted to me she had seen the schedule change, but it just "didn't register". [Grievant] has been counseled about this incident. She was given a vacation day in lieu of being taken off the payroll.

In his report of the discussion, the Lieutenant expressed earnest concern over the fact that alcohol prevented Grievant from accepting the work offer. He was aware that she had been conditionally reinstated from a discharge and was supposed to be avoiding alcohol. He gave the Employee a stern warning in this regard:

> I explained that if she is an alcoholic and doesn't admit it, she is bent on self destruction. I informed her that I would take whatever disciplinary action necessary if she were involved in any alcohol related incidents while on or off duty. I told her that this would include criminal charges if warranted.

The Lieutenant's concluding comments forecast the events leading to this dispute:

> [Grievant] is out of accrued sick leave. I explained to her that I would not tolerate the abuse of sick leave. I told her not to expect to automatically receive vacation or other accrued time in lieu of sick leave.

Although the counseling was the extent of the Patrol's reaction to the Employee's failure to meet her schedule in May, the incident apparently was not considered closed. The Employer raised it again in this dispute as additional justification for the removal and to demonstrate the extent to which alcohol deteriorated Grievant's performance. Another event was cited for the same purposes. During her tour of duty on July 21, 1990, Grievant was summoned to the scene of an accident. Upon arriving, she observed a vehicle off the road. She saw no damage and determined that an accident report was not necessary. In reality, the vehicle had suffered a great deal of damage. Paint was scraped, a tire was flat, the bumper on one side was torn from its mounting, and the front suspension was extensively and obviously ruined. As a nine-year Trooper, Grievant should have seen what was there and reported it. The fact that she did not confirms, in the Patrol's judgment, that her work had become shoddy and that alcohol was to blame. The Employee was questioned about the accident and her unacceptable performance in an extensive interview with a Lieutenant on August 20, 1990. The interview, which was taped and transcribed, was part of the pre-disciplinary investigation for the removal. The questions and answers about the July incident painfully illustrated Grievant's confusion and frustration:

Q: . . . we still got an internal investigation pending where you went to an accident scene and you flat out did not do your job. I mean, it was there, it was obvious. I don't care how hard it was raining, you can't sit there and tell me that you did not see the damage or that you did not think an accident report had to be made up. You're not going to convince me.

A: I could swear, I could swear till I die I did not see any damage to that car until it was pulled out. I'm not one to brush off accidents.

Q: Okay. But let me ask you this then. It's an accident that you should have seen the damage done. Right?

A: I guess.

Q: What do you mean you guess? You pull up, you get called to an accident scene, you pull up there and you should be able to tell if there's damage. Specifically this car. I've seen the photographs of it. I saw what was there. You know, to me, and you would have to agree, that the damage was there, I mean that you at least should follow through and do an accident investigation. More than you did.

A: Like I said, I like handling accidents and when I got the call I thought it would be perfect, like I told [the Sergeant on shift]. I said a drunk out of a crash, get me out to this for two hours. It's not that I didn't want to handle it. I don't brush off accidents.

Q: Then why didn't you?

A: I just didn't see anything. I really didn't. And he came up and said the tie rod or something, and I said that I don't even know what that is. You know, I looked after it pulled out I thought I don't know, you know . . .

Q: Well it's just . . .

A: It wasn't intentionally to not do an accident.

Q: Okay, but the thing is, the accident was there, it was fairly obvious it was there and you know, for whatever reason you did not do your job.

A: Yea, I screwed up there, but I didn't intentionally not do it just to get out of doing something. Okay, honestly, I like handling accidents. That wasn't the case that night.

* * *

In the Arbitrator's opinion, the Employer's recitation of these episodes and its concentration on Grievant's performance flaws tend more to obscure the issue than reveal it. When the hearing began, the State's position seemed to be that the removal was warranted for Grievant's August 17 violation of the last-chance agreement. If that was the cause, it was needless to pile past (and possibly stale) items of alleged misconduct onto the case. The Employee's past record would have been something to consider if traditional elements of just cause were in question. But that is not what this dispute is apparently about. If this were a routine just-cause controversy, the evidence of prior misconduct would have detracted from the Patrol's position. It would have revealed several glaring departures from disciplinary responsibilities:

First and foremost, Article 19, §19.05 of the Agreement requires the Employer to discipline progressively and correctively. Grievant received only a counseling for not reporting to work in May, no penalty

for inadequately handling the accident in July, and no discipline for what the Patrol characterizes as continually substandard performance. During the arbitration hearing, the FOP Advocate questioned the Post and District Commanders closely on the lack of prior discipline. She asked repeatedly: "If there were problems, why were there no reprimands?" She received a curious answer from the Post Commander. He stated he was new at the post and did not feel that discipline was called for at the time. In general, testimony in response to the Union Advocate's probe indicated that Grievant escaped discipline because supervisors were compassionate and chose to be lenient.

As the Union indicates, the compassion was misplaced. Discipline is as much a responsibility as it is a prerogative of Management. The whole idea behind §19.05 is that timely and fair discipline can save jobs. At a point in the hearing, the FOP advocate faced the District Commander and declared, "You are required under the Contract to discipline!" The Arbitrator agrees; and if this dispute is to be decided on conventional just-cause precepts, the grievance will be sustained. By avoiding the unpleasant task of reprimanding and/or suspending this Employee, the Patrol sent a message that the misconduct and performance flaws were trivial; they soothed Grievant into believing her work was acceptable. They did not use progressive discipline for its contractually explicit purpose to warn Grievant and assist in correcting her inadequacies.

Likewise, an employer whose disciplinary authority is governed by the language these parties placed in Article 19 of their Agreement,

must respond to misconduct with dispatch. It cannot accumulate complaints against an employee, hold them back, and then suddenly merge them into "cause" for discharge. Such an approach stands out as the antithesis of progressive-discipline and just-cause mandates; it will not survive arbitral examination.

If Grievant's past performance merited discipline, it should have been imposed with speed sufficient to make it truly corrective. By the time this removal was issued, the Employee's record (which was unblemished save for the counseling in June) was no longer a legitimate cause for her dismissal. Its only viable purpose would be to demonstrate Grievant's incorrigibility, thereby allowing the Employer to skip the preliminary levels of progressive discipline and move immediately to discharge. In light of the fact that the Employer did not consider the record poor enough to warrant discipline in the past, it is unlikely that the Arbitrator would view it as support for removal in the present.

What is the substance of this dispute? Why was Grievant discharged? If the action was premised on the last-chance agreement, most of the just-cause and progressive-discipline requirements are irrelevant as is the evidence of Grievant's recent performance weaknesses. In such case, the determinant issues are: 1) Was the 1988 last-chance agreement controlling in August, 1990? 2) If the agreement was controlling, did it authorize summary removal for a violation? 3) Did Grievant violate the last-chance agreement in a manner substantive enough to justify the removal?

In the event any of these questions is answered in the negative, the grievance will be sustained entirely or partially. Assuming the last-chance agreement was not a continuing condition of Grievant's employment in August, 1990, or was not violated to the extent that the removal was justified, there will still be the question of whether or not the Employee committed an offense warranting discipline. If it is found that she did, the arbitral examination will revert to a customary just-cause inquiries. The issues will then become: Was Grievant discharged for just cause? If she was not, what should her remedy be?

REVIEW OF FACTS AND CONTENTIONS; ARBITRAL FINDINGS AND OPINION

Last-chance agreements are effective tools for promoting employment security. They benefit both parties: they aid the Union to salvage jobs and the State to salvage employees. They are binding agreements, fully as enforceable as any negotiated understanding interpreting contractual terms and establishing standards of compliance. If they were not, neither party would have reason to review its stand on a discharge. Unenforceable last-chance agreements would be futilities. The Union would be deprived of an important resource for protecting employees; the State would lose the wherewithal to give an employee the "one last chance" the Union so often pleads for at preliminary grievance levels.

At this juncture, the Arbitrator finds it necessary to correct his own inaccuracy. The impression that last-chance agreements are wholly apart from the Collective Bargaining Agreement and completely extinguish just-cause entitlements is incorrect. If it were otherwise, no arbitrator acting in this contractual setting would have authority to decide this case. The reason is that Article 20, §20.08 excludes extra-contractual disputes from arbitration. The provision plainly states:

> **§28.08 Arbitration**
>
> . . .
>
> **5. Limitations of the Umpire**
>
> Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement shall be subject to arbitration. [Emphasis added.]

In view of this language, an arbitrator lacking a special submission stipulation would exceed his/her jurisdiction and abuse his/her office if s/he assumed the power to decide a dispute which did not arise as an alleged misinterpretation, misapplication, or violation of the Agreement.

In the Arbitrator's opinion, last-chance agreements do fit within specific contractual language. They are included in Article 19, §19.01 which makes just cause the touchstone for discipline. "Just cause" is term of art in the sphere of labor-management relations. Aside

from a few universally recognized standards, it is an ill defined concept, largely amorphous and meant to be interpreted on an individual, case-by-case basis. This lack of exactness is not a flaw. It is the indefiniteness that makes just cause a worthy and time honored principle for regulating disciplinary powers. It effectively bans thoughtless, knee-jerk penalties. It forces an employer to judiciously reflect on mitigating factors and an employee's virtues before imposing discipline.

[redacted] It permits him/her to be singled out for what would otherwise be illegitimate disparate treatment. Commonly, last chance agreements subject affected employees to potential penalties more severe and less judicious than could be imposed on anyone else protected by just-cause. The agreement which saved Grievant's job in 1988 is an apt example. It holds a removal "in abeyance" like the proverbial sword of Damocles, ready to fall on the Employee should she fail to be "rehabilitated" from her alcohol dependency, or not follow through her alcohol-treatment regimen.

These are harsh terms, but they were fairly negotiated by both parties. When she signed the agreement, [redacted] She knew that the benefit was conditioned and, if she failed to live up to her promises, she would lose the job again. She was still

entitled to just cause under §19.01, but with a difference. Her last-chance agreement redefined just cause as it applied to her. There were fewer restrictions on Management and more rigorous restrictions on the Employee. Grievant's terms of employment were altered from the norm, but the alterations were freely negotiated and voluntarily accepted. It follows that this dispute falls within the purview of Article 19 and is arbitrable the same as any other controversy over discipline. ~~The only difference is that, in Grievant's case, "just cause" has a unique definition.~~

* * *

Last-chance agreements are negotiated and entitled to arbitral deference. If they were to be lightly dismissed because they vary from the written Agreement, their usefulness would soon disappear. It would be absurd for the Employer to negotiate last-chance conditions for an employee's reinstatement knowing that the conditions were meaningless. And if the Employer lost confidence in the enforceability of last-chance agreements, the Union would lose an extremely significant means for serving its members. The parties would be compelled to take premature, bottom-line approaches to discharges; settlement discussions would become hollow.

It is evident that the negotiators envisioned last-chance compromises when they drafted Article 19. Arbitrators certainly are obliged to honor the negotiators' intent and recognize last-chance

compromises as binding. But they are not obliged to enforce such agreements blindly and uncritically. They should always keep in mind that a last-chance agreement does not entirely extinguish just-cause entitlements; it influences and changes them only as specified. Conventional contractual protections of employment continue to exist to the extent they were not expressly abandoned under the terms of a last-chance agreement.

Before enforcing a last-chance agreement, an arbitrator should scrutinize it to determine what aspects of just cause were retained. Moreover, an arbitrator is not bound by portions of a last-chance agreement which are overtly irrational or destroy more employment entitlements than appropriate to accomplish a reasonable goal. Whenever an employer takes a stand or establishes a policy affecting employment terms, its action is reviewable. This pertains even to the most firmly vested Management Rights. An employer has the prerogative to exercise its rights, but it has an obligation to exercise them reasonably and in keeping with its contractual commitments.

The Arbitrator need not burden this decision with a lengthy application of these standards to the last-chance compromise executed by Grievant and the parties. It was a form agreement, prepared for employees willing to commit to EAP rehabilitation for drug/alcohol impairment in order to save their jobs. The conditions placed on Grievant were reasonable and no more stringent than those accepted by others in similar circumstances. However, the agreement did contain an important omission. It had no termination date. On its face,

it exposed the Employee to summary discharge forever -- so long as she remained an Ohio State Trooper. This aspect of the agreement was manifestly unreasonable. In order to be regarded as reasonable, last chance compromises must terminate within sensible times; to withhold full just-cause treatment from an employee for five, ten, twenty, or thirty years is an model of unreasonableness, so contrary to just cause as to constitute an irrefutable contractual violation.

The lack of a stated date concluding a last-chance agreement does not vitiate the entire compromise, but it does require an arbitrator to interpret the parties' silent intent and discover the missing part. Just-cause principles are guidelines for the decision. The question to be answered is: What amount of time was reasonable for the life of the last-chance agreement, given the individual factors and mitigating circumstances under which the employee entered the compact?

On first review, Grievant's last-chance agreement appears to have remained in effect unreasonably long. It was executed by the Employee and her Union Representatives on October 27, 1988 and finalized by the State on November 15, 1988. Nearly two years passed before it was used to support this removal. Two years seems extraordinarily long for an employee to be kept "under the gun;" too long to weather a critical evaluation of reasonableness. However, Grievant's individual circumstances transform the original impression. She did not work under the last-chance agreement two years. After signing it, she went into full-time treatment for alcohol dependency and was

on disability leave seven months before returning to duty. In other words, she worked under the last-chance agreement scarcely more than a year. Bearing in mind the reason for the last-chance agreement and the gravity of the promises exchanged, the Arbitrator holds that it was still in effect (pursuant to the parties' probable intent) when Grievant committed the act leading to her removal. The last-chance agreement was binding in every relevant respect, and the question remaining is whether or not Grievant violated it.

* * *

The evidence is incontrovertible. Grievant became intoxicated at her home on August 17, 1990 and, as a result, was unfit to report for work that evening. The Employee's testimony in her own behalf was rambling and inconclusive. At one point she stated she was not intoxicated -- at another she admitted she was. She conceded "opening"[2] sixteen beers that afternoon. She candidly acknowledged that she was drinking freely again; she began only two months after successfully completing EAP treatment. The Sergeant who went to her home to check on her condition had a "sneaking suspicion" she might

[2] She seemed to make a distinction between "opening" and "consuming," implying that she drank fewer than sixteen beers.

be drunk.[3] His suspicion was confirmed. The most credible and persuasive evidence is that Grievant did drink to the point that she was unfit for work. [redacted]

The Arbitrator agrees with the Union's argument that Management could have taken a more lenient direction, perhaps referring Grievant for treatment again. But nothing in the last-chance agreement required the Patrol to grant the Employee a third chance. The Arbitrator must follow the last-chance agreement, and finds that it gives him no alternative but to deny the grievance.

AWARD

The grievance is denied.

Decision issued November 9, 1990 at Lorain County, Ohio

Jonathan Dworkin, Arbitrator

[3] The Union contends that going to Grievant's home uninvited constituted "harassment" and discriminatory treatment. The Arbitrator disagrees. By signing the last-chance agreement, the Employee accorded Management a right to monitor her performance under it. Given the fact that Grievant took compensatory leave after being told it was not authorized, the Employer was entitled to pursue reasonable measures to check on her condition. There was nothing blatantly unreasonable about the visit.