

ARBITRATION

BETWEEN

THE OHIO STATE HIGHWAY PATROL

and

OCB GRV. #15-03-901009-0069-04-01
(Trooper Tamara L. Getz's
Suspension)

FRATERNAL ORDER OF POLICE,
OHIO LABOR COUNCIL, INC.

#525

APPEARANCES:

For the Company: Sgt. Richard G. Corbin
Personnel/Labor Relations
Patrol Headquarters
Columbus, Ohio

For the F.O.P.: Ellen Davies, Esq.
General Counsel
F.O.P., O.L.C., Inc.
Columbus, Ohio

OPINION AND AWARD OF THE ARBITRATOR

Frank A. Keenan
Labor Arbitrator

Statement of the Case:

The Grievant in the case, Trooper Tamara L. Getz, has been employed by the Patrol since December 1986. She has been a Trooper for the Patrol for approximately one year. Until the suspension challenged here, the Grievant had received no discipline. Most of the critical facts which gave rise to the case were stipulated by the parties. Thus the parties stipulated that:

Trooper T. L. Getz, Unit 1480, was refueling her patrol car on June 22, 1990, at the Bellefontaine patrol post. She propped the gas nozzle dispensing lever open, and left the nozzle unattended. The nozzle's automatic shut-off mechanism failed to activate; gas spilled onto the parking area of the post.

The exact amount of fuel could not be measured, however Trooper Getz estimated it to be approximately 1/2 gallon.

An administrative investigation followed the incident. Trooper Getz was afforded all of her due process rights.

Trooper Getz was trained in the correct method of filling her gas tank. During the coach-pupil training period, Trooper Getz was specifically instructed by Trooper F. H. Faulder (her coach) not to prop open the nozzle with the gas cap.

Trooper Getz received a two day suspension as a result of the spill. A grievance was filed as a result of that suspension. That grievance is the basis for today's arbitration. There are no procedural errors to this point.

Trooper D. A. Miller spilled 40 gallons of gasoline on October 17, 1984, and received a two day suspension. "[Miller's spill antedated the parties' collective bargaining relationship.]

Following Trooper Miller's gas spill the following gas spills have occurred: 3 gallons - 8/13/86; 30 gallons - 2/24/87; 1 gallon - 7/6/87; 2 gallons - 11/18/87; 2 gallons - 7/14/88; 2

gallons - 7/14/88; 6 gallons - 2/6/89; 5 gallons - 5/1/89; and 1/2 gallon - 6/22/90, this last instance being that involving the Grievant. In each instance the Patrol employee responsible for the gasoline spill received a two day disciplinary suspension.

The Statement of Charges which led to the Grievant's disciplinary suspension read in pertinent part as follows:

Rule: 4501:2-6-02 (B)(4) PERFORMANCE OF DUTY

It is charged that on June 22, 1990, at approximately 4:45 a.m., while in Patrol uniform, Trooper Getz did fail to perform her assigned duties satisfactorily. To wit: While refueling a Patrol car at the Bellefontaine Post, she did prop open the fuel release lever of the fuel hose by means of the vehicle fuel cap. In doing so, the nozzle failed to shut off the pump, thus allowing one-half gallon of fuel to spill onto the pavement.

In that regard Rule 4501:2-6-02 (B)(4) provides as follows:

"4501:2-6-02 PERFORMANCE OF DUTY AND CONDUCT

· · ·
(B) Performance of 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.

In support of its case the Patrol called as a witness one Harry Barber, a Hazardous Materials Coordinator from the Ohio State Fire Marshall's Office. Mr. Barber was qualified as an expert and he testified at considerable length as to the properties of gasoline and the fire, explosion, and the cumulative pollution hazards attendant upon gasoline spills. Suffice it to say that Mr. Barber presented a persuasive case for the Patrol to exert every reasonable effort to avoid such spills.

It is also noted that on cross-examination Mr. Barber conceded that "to an extent, the amount of gasoline spilled is related to the danger created." Still further evidence of the propriety of Patrol efforts to eliminate spills is the Patrol's fiscal evidence to the effect that as of October 16, 1990, cost for the Patrol "for the removal of the contaminated soil around our tanks is now over \$108,000.00."

It was the Grievant's testimony that she propped open the gas nozzle dispensing lever with the gas cap in order to retrieve from the front seat of the car some paper work, which she would then bring into the Post with her when she completed filling the patrol car's tank. It was not her intention to do any paper work while the gas pump was pumping. The Grievant also pointed out that she immediately shut off the pump as it began to spill over; cleaned up the spill with a broom and some water; and reported to her immediate supervisor that indeed she had spilled approximately 1/2 gallon of gasoline.

In her grievance the Grievant asserts that:

5. . . . Article 19.01 - Disciplinary Standard
Article 19.05 - Progressive Discipline
- "6. . . . On June 22, 1990 at approximately 0445 hours I spilled 1/2 gallon of gas in the parking lot of the Bellefontaine Post P-46. There was no damage and the only loss was the 1/2 gallon of gas.
7. Remedy Requested: I believed I should pay for the gas lost and possibly a verbal reprimand or a written reprimand"

In this regard the parties' Contract provides in the cited provisions, as follows:

"ARTICLE 19 - DISCIPLINARY PROCEDURE

Section 19.01 Standard

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

Section 19.05 Progressive Discipline

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

1. Verbal Reprimands (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.

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

The Patrol's Position:

The Patrol's position, gleaned from its Level III decision; opening statement; and closing statement is that the Grievant "failed to follow proper procedures while refueling a patrol car "and was negligent." The Patrol contends that "the level of discipline is directly related to the seriousness of the rule violation." It is the Patrol's contention that it "considers employee negligence which results in the spillage of fuel as a serious violation of the rules There is great potential for expensive property damage and/or personal injury or death. . . . [These] potential deadly consequences of failing to follow established procedures while refueling establishes a solid just

cause foundation for a two (2) day suspension." It is the Patrol's position that while Article 19, Section 19.05 mandates progressive discipline it also allows for more severe discipline if the infraction or violation merits the more severe action, and such is merited here.

It is the Patrol's contention that "the amount of gasoline spilled is not the key issue. The Employer does not simply use results oriented discipline based upon the amount of damage or loss suffered through employee negligence to determine the level of discipline. The totality of the circumstances is considered. The Union and the Grievant would prefer to overlook the potential immediate hazards associated with gas spills and are probably unaware of the long term environmental damage.

. . . . [G]asoline spills create an immediate hazard [and] contribute to long term contamination of surrounding soil and ground water [C]lean ups are very costly. It is important to remember the Employer has fifty-six (56) locations with refueling stations.

The Employer has consistently imposed two-day suspensions in an effort to correct behaviors which result in gasoline spills. . . . The Employer has gone to great effort to teach safe procedures and educate employees on the inherent hazardous properties of gasoline. . . . The Union will request the Arbitrator substitute a lesser penalty based on the amount of fuel spilled. Any substitution would be a disservice to all parties involved. The hazards of fuel spills and the importance

of stressing the seriousness of unsafe practices establish just cause for the level of discipline imposed. There should be no substitution."

So it is that the Patrol urges that the grievance "be denied."

The F.O.P.'s Position:

The F.O.P.'s position, gleaned from its Level III contentions; its opening statement; and closing argument is that "the discipline was imposed without just cause because the discipline imposed was not commensurate with the offense." This being so, argues the F.O.P., the Grievant ought to be "allowed to reimburse the Employer for the fuel spilled and a verbal or written reprimand be substituted for the two (2) day suspension."

By way of elaboration, the F.O.P. contends that the Grievant's negligence was "very slight" comprised of but a "moment of inattention."

It is the F.O.P.'s position that "the labor contract between the parties provides that no employee will be disciplined without just cause. It further provides that the principles of progressive discipline will be followed and that disciplinary action shall be commensurate with the offense. However, the Patrol has failed to comply with its contract in the matter of gas spillages: there is no disciplinary schedule for spillages of varying amounts. A two day suspension is simply not discipline commensurate with the offense." The F.O.P. characterizes the discipline imposed as "outrageous." In support

thereof the F.O.P. asserts that "in almost four years with the Highway Patrol, [the Grievant] had never before been disciplined. Her record was spotless - and yet a moment of negligence resulted in a two day suspension." Additionally the F.O.P. points to witness Barber's concession to the effect that the amount of danger in an incident of gasoline spillage is related to the amount of gasoline spilled. The F.O.P argues by analogy that being one to two minutes late is simply not as serious as being two hours late.

So it is that the F.O.P. "requests that the discipline be modified to a reprimand, in keeping with the extent to which negligence resulted in waste and danger."

THE ISSUE:

The stipulated issue is:

"Was the grievant disciplined for just cause in accordance with Article 19, Section 19.01 and Section 19.05 of the collective bargaining agreement. If not, what shall the remedy be?"

Discussion and Opinion:

At the outset I accept the parties mutual characterization of the Grievant's conduct as "negligence." She failed to live up to the procedures and standard of care expected and concededly imparted to her, by the Patrol's management, for the refueling of patrol cars. And as intimated above, the Patrol has made the case for regarding any gasoline spillage as a "serious" matter. This is so because of the foreseeable potential safety (and contamination) hazards involved. As the undersigned has indicated in other contexts involving employee negligence under

this Contract, and its predecessor, it is the foreseeable consequences, not the fortuitous consequences, which must be looked to in assessing the appropriate level of discipline. In my judgment, also relevant in setting the level of discipline, is whether or not less severe discipline has generally succeeded in correcting employee short-falls from appropriate expectations, in addition to whether lesser levels of discipline have been inadequate vis a vis the specific Grievant, (the latter a factor not coming into play here, since the spillage under scrutiny was the Grievant's first). Then, too, we have here a factor of the cumulative impact of all gasoline spillages and the potential and actual costs to the Patrol in correcting them. An amalgam then of all these factors supports the conclusion that commencing discipline at the suspension level thereby by-passing verbal and written reprimands is supportable. This is certainly so here where the nub of the Grievant's negligence lies in her use of the gas cap to prop open the gas lever, a procedure she concedes she was specifically instructed was proscribed. Having said all this, however, the fact remains that the conduct involved was negligence and there are simply different degrees and graduations of negligence. Under the "just cause" concept and standard applicable here, a standard whose essence is fairness, simple negligence clearly warrants less of a sanction than does for example gross negligence. And while I fully agree with the Patrol's pronouncement that it ought not, and does not "use results oriented discipline based upon the amount of damage or

loss [i.e., spillage] suffered through employee negligence to determine the level of discipline," it seems to me clear that the amount of the spillage is some indication of the degree of negligence involved. Thus, a very small amount of spillage is indicative, as the F.O.P. in essence contends, of slight negligence, for the reason that the confining of the spillage to a small amount gives rise to the inference that the negligent employee was close by; had in the forefront of their mind the possibility of a spillage; and was prepared to quickly intervene. Indeed in the instant case one need not merely infer these factors, for the Grievant credibly testified that she improperly propped open the gas pump lever but momentarily for the sole purpose of going to the very nearby front seat of the patrol car to retrieve some paperwork, and that she immediately corrected the situation when she realized the patrol car's gas tank was overflowing. By way of contrast, a large spill, such as the 30 gallon spill of 2/24/87, or the 7 to 10 gallon spill of 9/19/89, gives rise to the inference that something more than slight negligence was involved: that the large amount of the spill was due to the fact that the negligent employee had strayed far from the vehicle involved; was inattentive to the possibility of a spill; or was not prepared to cope with a spill. But these differences in the degree of negligence warrant differences in the discipline meted out; fairness and hence just cause, so mandate. Clearly, the less the degree of negligence, the less severe the discipline to be imposed. Here the Patrol's across-

the-board approach for all gas spills, which simply disregards as of any significance the amount of gasoline spilled, cannot be sanctioned, for such an approach fails to recognize the connection between the amount of gasoline spilled and the degree of negligence involved, thereby failing to accord, as required by the just cause standard, proper recognition to the varying degrees of negligence, and in particular, to the slight degree of negligence present here.


Additionally, in the instant case, the record failed to indicate any account being taken by Management of the Grievant's spotless disciplinary record in assessing the penalty for her concededly negligent conduct at a two day disciplinary suspension. This apparently stemmed from its penchant for regarding all gas spillages as supporting a two day suspension, an approach found hereinabove to be improper. But the just cause standard requires that such an account be taken in assessing the penalty warranted.

In light of all the foregoing I find that the record will only support a one (1) day disciplinary suspension. This quantum of discipline serves to recognize the shortcomings in the Patrol's determination and imposition of a two (2) day suspension, while at the same time recognizing the propriety of severe discipline for gas spills, even first offenses.

Award

For the reasons more fully set forth above, the grievance is sustained in part and denied in part. The Grievant's two (2) day suspension is reduced to a one (1) day suspension. The Grievant is to be made whole for the difference, and her records are to be reformed to correct the modification fashioned.

Dated: November 26, 1990



Frank A. Keenan
Arbitrator