

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 557

OCB GRIEVANCE NUMBER: 15-03-901019-0075-04-01

GRIEVANT NAME: PETERSON, ROBERT

UNION: FOP 1

DEPARTMENT: HIGHWAY PATROL

ARBITRATOR: BITTEL, PATRICIA THOMAS

MANAGEMENT ADVOCATE: CAPT. J. M. DEMAREE

2ND CHAIR: ANN ARENA/PAUL KIRSCHNER

UNION ADVOCATE: DAVIS, ELLEN

ARBITRATION DATE: JANUARY 16, 1991

DECISION DATE: FEBRUARY 15, 1991

DECISION: MODIFIED

CONTRACT SECTIONS

AND/OR ISSUES: REMOVAL FOR FALSIFICATION AND CONDUCT  
UNBECOMING AN OFFICER (CALLED IN SICK WITH  
"FLU" AFTER DRINKING & CONVICTED OF DRIVING  
UNDER THE INFLUENCE)

HOLDING: NEXUS OF THE OFFENSE TO THE JOB IS OBVIOUS. HIS OFFENSE,  
STANDING ALONE, COULD WELL BE JUST CAUSE FOR DISCHARGE.  
HOWEVER, OFFENSE IS MITIGATED BY PARTICIPATION IN REHAB  
PROGRAM WITH GOOD CHANCE OF SUCCESS. DISCHARGE, THEREFORE,  
MODIFIED TO A 90 DAY SUSPENSION; BALANCE OF TIME OFF AS  
MEDICAL LEAVE. REINSTATEMENT SUBJECT TO STATEMENT BY A  
PSYCHOLOGIST THAT HE IS CAPABLE OF RETURNING TO DUTY;  
CONTINUING THRU 1991 TO PARTICIPATE IN AA OR SIMILAR PROGRAM.

ARB COST: \$634.12

February 15, 1991

# 557

In the Matter of Arbitration	)	
between	)	
The Ohio State Highway Patrol	)	15-03-901019-075-
and	)	04-01
The Fraternal Order of Police	)	Grievant:
Ohio Labor Council, Inc.	)	Robert Peterson

APPEARANCES

For the FOP:

Ellen Davis	General Counsel
Robert J. Peterson	Grievant
Ed Baker	Staff Representative
Terry Moore	Associate

For the Patrol:

Capt. J. M. Demaree	Advocate
Larry Banaszak	Lieutenant
Ralph Ehrhart	Lieutenant
Kimberly S. Lemley	Patrol Officer
Wendell W. Webb	Captain
Paul Kirschner	Contract Compliance Officer
Anne Arena	Second Chair

Arbitrator:

Patricia Thomas Bittel

## BACKGROUND

This matter was heard on January 16, 1991 at the offices of the Fraternal Order of Police in Columbus, Ohio before Arbitrator Patricia Thomas Bittel, mutually selected by the parties in accordance with Article 20, Section 20.08 of the Collective Bargaining Agreement.

The facts of this case are not in controversy. Grievant was commissioned as a Highway Patrol Trooper in September of 1988 and assigned to the Bucyrus post. In September of 1990 he was scheduled to work the shift running from midnight to 8 a.m.

On Sunday, September 22 after getting off from work, he spent the day golfing and drinking beer with friends. He telephoned the post that evening and reported himself off sick with the flu. He subsequently went out drinking and in the early morning hours was stopped by a police officer for erratic driving. He was subsequently arrested and convicted for driving while under the influence of alcohol. A breath test conducted at the time showed a B.A.C. of .18 per cent. Following his plea of no contest and resulting conviction, Grievant received a fine of \$350 plus court costs, five days in jail and a 90-day driver's license suspension.

On October 19, 1990 he was notified that he was being terminated for violating the rules and regulations of the Ohio State Highway Patrol. A grievance was filed protesting discharge without just cause and claiming Grievant was

attending an Employee Assistance Program [EAP], and was discharged without the opportunity for recovery. The remedy requested was reinstatement with imposition of a lesser penalty.

Section 41.04 of the Collective Bargaining Agreement, entitled Scope of Coverage, states as follows in pertinent part:

"Alcoholism ... legal problems ... are illnesses or problems that can often be successfully treated or resolved. All employees with these problems or illnesses will receive assistance in locating treatment for these problems or illnesses."

Section 41.05 states:

"Nothing in this Article is to be interpreted as a waiver of other provisions or procedures contained elsewhere in this agreement."

Article 19.01 requires that "No bargaining unit member shall be reduced in pay or position, suspended or removed except for just cause." Section 19.05 states:

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

1. A Verbal Reprimand (with appropriate notation in Employee's file;
2. Written Reprimand;
3. Suspension;
4. Demotion or Removal.

However, more severe discipline (or a combination of disciplinary actions) may be imposed at any point if the infraction or violation merits the more severe action.

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

The parties have stipulated to the following issue:  
"Was the Grievant disciplined for just cause in accordance with Article 19, Section 19.01 and Section 19.05 of the Collective Bargaining Agreement? If not, what shall the remedy be?"

#### EVIDENCE PRESENTED

The Grievant testified his permanent shift was from midnight until 8 a.m. and said he worked his regular shift ending on the morning of September 22. He stated he went home, changed clothes, then went to Mt. Vernon and spent the day golfing and drinking beer. During the course of the day he said he consumed approximately eight beers. He said when the golf game ended at about 3:30 or 4:00 p.m., his golfing friend dropped him off at his parents' house for a brief visit after which he went to a friend's house and took a nap.

Approximately half an hour after he awoke, he said he called into work and spoke with a dispatcher as no supervisor was available. He said he advised the post he would be unable to come to work that evening due to illness, and identified his illness as the flu. Following this phone call he said he drank another beer, then went with his friend to a bar where he consumed five or six beers within a three hour period and ran into his cousin. Grievant said

he, his friend and the cousin left the bar at approximately 2:30 a.m. and returned to the friend's apartment.

Grievant said he did not drive at this point, but later, when the cousin needed a ride home, he said he decided to drive. Grievant explained he was stopped by a Mt. Vernon police officer, given some roadside coordination tests and placed under arrest.

While at the police station, Grievant said he was permitted to make a number of phone calls. He said he called his supervisor at the post to make sure he heard of the incident from Grievant himself. He said he also attempted to make contact with his Union representative to get advice about taking the B.A.C. test. He stated he took the test and scored .181 per cent, almost twice the limit. He said he subsequently pled no contest to the charges and was sentenced.

Grievant testified he has been extensively trained regarding the sections of the law he violated and has also been trained in identifying DUI's and in operating the B.A.C. machine. He stated he has arrested just short of 200 people for DUI in his career as a trooper, and confirmed that one of the Patrol's goals is to take the drunk driver off the road.

Grievant stated that prior to this incident he had not called in sick when he had been drinking nor had he used any vacation time or personal leave because of drinking. He claimed he had never lied before this and could not recall a

time when alcohol had interfered with his work habits. He stated he had already served his three day jail sentence and claimed he had not had a drink since the incident. He testified he is an alcoholic currently undergoing psychotherapeutic treatment for his problems. He admitted his treating doctor was found through the EAP on the recommendation of the Union. He stated he does not attend Alcoholics Anonymous because his doctor has not recommended it. On his doctor's recommendation he said he does plan to attend group sessions and feels they will be similar. He stated he felt the experience of having been arrested for DUI would make him stronger as an officer in future cases.

On examination by the Arbitrator Grievant stated his relationships with his "drinking buddies" had changed -- he said he was either not seeing them any more or had advised them he was not drinking. He asserted he has non-drinking friends and has been spending time with them. He said he has neither seen nor spoken to his cousin and had not kept up his relationship with the friend whose apartment he visited on September 22-23.

Grievant presented two letters from the psychologist treating him. The first one, dated October 12, 1990 tentatively diagnosed him as "someone who is in the beginning stages of alcohol dependence". The letter also remarked that Grievant is "still 'trying on' the idea of an alcohol problem, but has been very cooperative and open to the help he is receiving". The letter noted a concern that

when Grievant does drink "he has the potential to get himself into difficulties, such as the one he is currently struggling with".

The second letter presented was dated January 15, 1991, the day prior to the hearing. It stated the following in pertinent part:

"[Grievant] has remained abstinent from alcohol throughout the entire treatment period, and he presently maintains with some confidence that he is not going to drink again. This was a difficult step for him, and he has been reluctant to make such a 'forever' commitment."

The letter also indicates the tentative diagnosis of alcohol dependence was changed to "alcohol abuse", "suggesting a less pervasive pattern of use and less reliance on the substance". The psychologist did say "he is a person at risk for the development of alcohol dependence". The letter finally says that the problems which may underlie his drinking problem are being dealt with and he seems to be making progress; "Given his increased motivation, I am hopeful that he will make some meaningful changes that will help him to avoid future difficulties."

Grievant's arresting officer, Kimberly Lemley, testified she has served as a police officer in Mt. Vernon for almost 11 years. She stated on September 23 of 1990 she noticed Grievant's driving while he was within city limits. She said he was traveling eastbound left of the center line and she turned and followed him. She said when she pulled



behind him, he was stopped at a four-way stop intersection with his rear tire completely over the yellow line. She said he turned north and she saw him go over the center line and back several times. At one point his rear wheels left the travel portion of the road, she said, and he almost struck a parked car. She then put her lights on and stopped him, she said.

According to Officer Lemley, Grievant exited his car immediately and met her half way. She noticed his eyes were bloodshot and glassy and noted a moderate odor of alcohol about his person. She asked for his driver's license and when he opened his wallet he commented that he did not know whether he should give her "this". She said when she asked what he meant, he showed her his trooper identification.

She stated she asked him to perform the heel to toe test which he did awkwardly, having trouble maintaining his balance. During the nose touch she said he swayed right to left and his left hand touched his upper lip. His right hand had to readjust but did touch his nose, she said. She also asked him to do the one leg stand and noted Grievant had trouble keeping balance. At this point, she said, she placed him under arrest.

While at the police station, she allowed Grievant to make four to six telephone calls and administered the B.A.C. test, she said, stating she is licensed to operate the machine.

In her opinion, the arrest of an officer destroys the credibility of that officer. She said she would personally have difficulty working with an officer who had been arrested for DUI. She stated that at least one citizen called in and wanted to know why there was not more publicity about who had been arrested.' As far as she knew, however, Grievant's passenger was the only citizen who had observed the situation.

Lemley claimed it was her opinion that Grievant's rapport in a court of law would be negatively impacted by his conviction. She said she thought his credibility when testifying would be affected because he would be charging others with something he himself had done. He and his agency could be seen as hypocritical, she said.

Lieutenant Ralph Ehrhart testified he had been with the Highway Patrol for 24 years and had been at the Bucyrus post for 11 years. As Post Commander he reviewed the statistics which established that for the year 1990, the Patrol totalled 29,106 DUI arrests, 325 of which were made by the Bucyrus post. Grievant was personally responsible for 91 arrests in 1990, said Ehrhart, making him "high man" at the post.

Ehrhart stated there were approximately 15-20 DUI cases pending at the time of Grievant's arrest. He said these cases had to be disposed of as he did not consider Grievant capable of testifying. Ehrhart further stated that drinking is not a legitimate sick leave excuse.'

Captain Wendell Webb, Commander of Inspections and Standards with 28 1/2 years' service, testified that he reviewed Grievant's administrative investigation report when it came in. In his analysis it is particularly important to view Grievant's offense seriously because of the ever increasing movement to get the drunk driver off the road. He described this as the most critical issue the Patrol deals with.

Webb said the Toledo Blade has decided to do a story on drinking cases within the Patrol and has been doing an extensive file inspection. He said two reporters spent three months reviewing his files and reproduced a copy of Grievant's administrative investigation in the course of their review. He stated his understanding is that the reporters have not finished their investigation and are still in the process of calling and interviewing the persons whose names have been found in the records. Webb felt certain the intention of the reporters is to do an extensive series, though nothing has been published to date.

#### ARGUMENTS OF THE PARTIES

The Ohio State Highway Patrol stringently maintained that Grievant's actions were in direct conflict with the primary purpose of the organization -- ensuring traffic safety and enforcing the DUI law. It argued troopers are

held to a higher standard than the general public and asserted Grievant violated the trust placed in him, critically impairing his ability to function. It argued Grievant's conduct brought discredit to the organization and claimed the professional reputation of the Patrol is at stake. It pointed out the Mt. Vernon News printed an article publishing Grievant's name and DUI charge.

The Employer points out Grievant did not seek treatment or help until the Union intervened and argues this was simply a strategy to get sympathy from the Arbitrator. It does not see much value in Grievant's admission of wrongdoing and claimed he had no alternative.

The Patrol argues progressive discipline is not necessary in this case. It refers to a prior arbitration decision involving Trooper Simon and distinguishes it from the case at hand. No one observed Simon driving, it points out; no B.A.C. test was given and no publicity resulted from the incident, it notes. Grievant Simon was reinstated.

The Patrol references How Arbitration Works by Elkouri and Elkouri in support of the principle that off premises conduct is appropriately disciplined where there is job nexus, as in this case. It described the nexus saying the behavior harmed the Patrol's reputation and work product, and also harmed Grievant's ability to work efficiently. It argued the serious nature of his off-duty arrest and conviction, compounded by his sick leave abuse and untruthfulness establishes a solid foundation for

termination. It references a decision by this Arbitrator regarding limitations on an Arbitrator's freedom to second-guess the Employer.

#### ARGUMENTS OF THE UNION

The Union points out Grievant has been totally honest about the entire event, the only exception being his call about the flu. He has made no attempt to evade the charges, claims the Union, and has worked hard to effect a change in his life.

There is no proof that his conviction would impact his credibility, states the Union, noting his offense involved no immorality. In the Union's view progressive discipline was warranted under Article 19.05 as interpreted and confirmed by the Simon award. In its view progressive discipline should be used in all alcohol-related incidents.

No effort was made to allow Grievant to recover, argues the Union, noting the EAP policy provides in pertinent part: "If it appears that personal problems may be causing the employee's unsatisfactory job performance ... the supervisor should inform the employee of the Ohio EAP and assist him/her in locating services and in contacting the designated service center." The Union maintains this policy was not complied with in Grievant's case.

It distinguishes this case from Calvin Sharp's decision in the discharge of Brian Roese, pointing out there was wide publicity in Roese's case where there was virtually none in Grievant's. The Union maintains the arbitrator's mission is to consider the appropriateness of the remedy and argues that because alcoholism is a disease, Grievant deserves reinstatement with an opportunity for treatment.

#### DISCUSSION

Grievant is essentially disciplined for two offenses, falsification and conduct unbecoming an officer. The two offenses are inextricably related; both stem from the fact that on the day in question Grievant was abusing alcohol.

The Arbitrator is persuaded that Management is quite correct in perceiving a DUI conviction of a state trooper as an extremely serious offense. As pointed out, this flies directly in the face of the very mission of the organization in promoting highway traffic safety. The nexus of the offense to the job is obvious. The trooper is employed to uphold the letter of the law and to enforce it by arresting violators and participating in their conviction. The organization would be totally unworthy of respect and entirely ineffective were its officers to flaunt or disregard the laws they are commissioned to enforce.

As Management has pointed out, this case bears great similarity to the Roesse case wherein the same concerns regarding the mission of the Patrol, its reputation, the credibility of the trooper and the ability of other officers to work with the Grievant were points in focus. The Roesse offense itself was analogous. Roesse was charged with DUI, pled no contest and was convicted for the offense. There are two major differences, however, between the Roesse case and the case at bar: the degree of publicity resulting from the incident and the commitment of the Grievant herein to a program of treatment for alcohol abuse.

It is a well-established precept at arbitration that the issue of just cause incorporates an analysis of whether the penalty is commensurate with the offense. Indeed the parties' Agreement specifically requires this analysis. A disciplinary penalty is not commensurate with the offense where Management has failed to give mitigating circumstances their proper weight.

Management has referred to the Miller decision where the Union argued Grievant Miller's outstanding record of performance warranted his reinstatement. The Arbitrator found the Grievant had committed an offense so serious that just cause was not defeated by his employment record. The Union's argument was in essence a plea for clemency. However, as indicated in the decision, once just cause has been established, the Arbitrator has no jurisdiction over such a plea.

The Union argues here that Grievant's offense is mitigated because he suffers from a treatable medical condition for which he is receiving help and making successful progress. The Arbitrator has examined a vast number of articles and arbitration decisions involving abuse of alcohol in the employment context. Alcoholism is widely recognized as a treatable disease. As a result, a number of arbitral decisions have seen the opportunity for rehabilitation as a moral responsibility, a reason to mitigate discipline or even as an element of just cause. The critical point of distinction between the vast majority of cases and the case under consideration here is the DUI conviction of an officer of the law.

Management's situation in this case is relatively unique. It is entirely justified in requiring its troopers to abide by the laws that they enforce. Even small incidences of "looking the other way" or applying a double standard not only disdain the law itself but also abuse the public trust. For this reason the Arbitrator is persuaded by Management's view that Grievant's offense must be viewed from the perspective of the criticality of the Highway Patrol's mission.

Alcoholism as a disease is generally recognized as both progressive and terminal. This is to say that the disease progresses inexorably towards death unless arrested through abstinence. Grievant has not been diagnosed as an alcoholic per se. Rather he has been diagnosed as an alcohol abuser



who is at risk of becoming dependent upon alcohol. Regardless of the diagnosis, Grievant has taken it upon himself to directly deal with his "problem" through a dedicated and consistent program of treatment.

The Union has maintained Grievant's case is analogous to that of Trooper Simon who was reinstated following an acquittal for DUI where there was no publicity. Her offense consisted of driving to work and coming on the job while intoxicated. To a large degree her offense is similar to that of the Grievant in this case. The Arbitrator in Simon felt progressive discipline was warranted. However, given the importance of Management's latitude in upholding the fundamental mission of the Patrol, this Arbitrator feels that the appropriateness of progressive discipline for alcohol-related offenses should be decided on a case by case basis with a view to the circumstances of the alcohol use, the opportunities, if any, given for rehabilitation, the likelihood the individual will benefit from treatment and the factual background of the case.

Management's position in this case is that Grievant should have no second chance. This position is juxtaposed against the Grievant's genuine efforts: he has consciously avoided alcohol since the incident; he has virtually severed all relationships with "drinking friends"; he has assiduously pursued a program of rehabilitation with variable progress but no regression; he has cultivated

social relationships with non-drinking friends. His current progress is enhanced by increased motivation.

From this scenario it appears evident that Grievant has not wavered in his sincere and committed effort to follow a program of treatment, to maintain sobriety and to take control of his life. Management failed to give these distinctive and crucial mitigating factors adequate weight when it terminated Grievant.

Management is correct in stating that law enforcement personnel are held to a higher standard than the general public. The Ohio State Highway Patrol cannot be expected to endure further injury to its reputation or its mission from Grievant's abuse of alcohol. While the Department has failed to show just cause for discharging Grievant without giving him a second chance, it has clearly shown grounds for making his continued employment conditional on demonstrated fitness for duty.

#### AWARD

Grievant's offense, standing alone, could well be just cause for discharge. However, his offense is mitigated by his sincere and consistent participation in a program of rehabilitation with a good chance of success.

Grievant's discharge shall be modified to a suspension of 90 calendar days. The remainder of the time he spent

away from work due to his discharge shall be changed to a medical leave of absence. His reinstatement shall be subject to the following conditions:

1) Grievant shall provide to Management a written professional opinion by his treating psychologist that he is capable of assuming his duties. At Management's option his reinstatement may also be conditioned upon an examination by a doctor/counselor, identified by agreement of the parties, the examination to be at Management's expense.

2) During the remainder of the calendar year 1991, Grievant shall certify on a monthly basis that he is continuing to participate in his current program, Alcoholics Anonymous or a program approved by Management.

Respectfully Submitted,

  
Patricia Thomas Bittel

February 15, 1991