# ARBITRATION SUMMARY AND AWARD LOG

## OCB AWARD NUMBER: 558

OCB GRIEVANCE NUMBER: 15-03-901130-0083-04-01

GRIEVANT NAME: HERNANDEZ, JERRY

UNION: FOP UNIT 1

DEPARTMENT: HIGHWAY PATROL

ARBITRATOR: KEENAN, FRANK

MANAGEMENT ADVOCATE: CORBIN, SGT. RICHARD

2ND CHAIR: COE, ROGER

UNION ADVOCATE: COX, PAUL L.

ARBITRATION DATE: JANUARY 22, 1991

DECISION DATE: FEBRUARY 12, 1991

DECISION: MODIFIED

CONTRACT SECTIONS AND/OR ISSUES: 5 DAY AND 30 DAY SUSPENSIONS FOR CONDUCT UNBECOMING AN OFFICER

HOLDING: NO JUST CAUSE EXISTED FOR THE 5 DAY; GRIEVANT TO BE MADE WHOLE. DISCIPLINE TOO SEVERE ON THE 30 DAY. GRIEVANT TO BE REGARDED AS HAVING SERVED A 4 DAY SUSPENSION FOR THE LATTER VIOLATION AND OTHERWISE MADE WHOLE.

ARB COST: $640.76

ARBITRATION

BETWEEN

#538

OHIO STATE HIGHWAY PATROL

and

O.C.B. GRV. NO. 15-03-901130-083-04-01

FRATERNAL ORDER OF POLICE,
OHIO LABOR COUNCIL, INC.

APPEARANCES:

For the Patrol: Sgt. Richard G. Corbin

For the F.O.P.: Paul L. Cox, Esq., Chief Counsel

OPINION AND AWARD OF THE ARBITRATOR

Frank A. Keenan
Arbitrator

STATEMENT OF THE CASE:

This case, well presented by the parties' advocates was heard in Columbus, Ohio on January 22, 1991. The case involves the discipline, first by way of a five day disciplinary lay off; and second, by a thirty-day disciplinary lay off, of Trooper Jerry Hernandez. These disciplines stem from formal charges brought against Trooper Hernandez in charges dated July 5, 1990, and October 19, 1990, respectively, and reading in pertinent part as follows:

"

July 5, 1990

It is herewith stated that reasonable and substantial cause exists to establish that Trooper Jerry Hernandez, Unit 201, has committed an act or acts in violation of the Ohio State Highway Patrol Rules and Regulations, specifically:

Section 4501:2-6-02(I) (1),(2),(3)
Conduct Unbecoming an Officer

It is charged that on Thursday, May 10, 1990, Trooper Hernandez, while off duty at his home, became involved in a heated verbal argument with his spouse and said argument later escalated into physical violence whereby the officer choked his wife and displayed a revolver in her presence. Later, Mrs. Hernandez reported the incident to the Columbus Grove Police Department. Subsequently, the Putnam County Prosecutor charged Trooper Hernandez with Domestic Violence. On June 4, 1990, the officer was found guilty of the charge. Said conduct was prejudice of good order and discipline, brought discredit to the Ohio State Highway Patrol and is a violation of the laws of the State of Ohio."

"

October 19, 1990

It is herewith stated that reasonable and substantial cause exists to establish that Trooper Jerry Hernandez, Unit 201, has committed an act or acts in violation of the Rules and Regulations of the Ohio State Highway Patrol, specifically of:

- Section 4501:2-6-02 (I) (1),(2)
Conduct Unbecoming an Officer

It is charged that on Saturday, September 8, 1990, Trooper Hernandez, while off-duty and while attending a private

social function, became involved in a physical altercation with law enforcement officers of Allen County, who were attempting to make an arrest of an individual for assaulting a drug task force member.

Already identifiable as an Ohio State Highway Patrol officer, having been known by many people in attendance, Trooper Hernandez verbally identified himself as a State Patrol officer during the altercation. Trooper Hernandez repeated this physical interference after being restrained by others, and with full knowledge a police officer was attempting to effect an arrest. Said conduct neglected the prejudice of good order and discipline, and brought discredit to the Ohio State Highway Patrol."

The Section of the Rules and Regulations cited as violated, provide as follows:

"4501:2-6-02 Performance of Duty and Conduct

. . . .

(I) Conduct unbecoming an officer

A member may be charged with conduct unbecoming an officer in the following situations:

(1) For all disorders and neglects to be prejudice of good order and discipline.
(2) For conduct that brings discredit to the Ohio State Highway Patrol and any of its members.
(3) For committing any crime, offense or violation of the laws of the United States, the State of Ohio, or any municipality.
(4) For any on-duty association with a member of the opposite sex for purposes other than those necessary for the performance of official duties.

Trooper Hernandez grieved these disciplinary suspensions. The grievance of Trooper Hernandez, herein the Grievant, reads in pertinent part:

". . . .

5. Article(s) and Section(s) Grieved: Article 19.01 and Article 19.05

6. Statement of Grievance . . . . I was notified by Colonel T. W. Rice in a letter that I would be

suspended for 35 working days for violation of Rule 4501:2-6-02 I (1) and (2) of the Ohio State Highway Patrol. I was suspended without just cause, and the punishment was not progressive.

7. Remedy Requested: The suspension be nullified and my record expunged."

At this hearing the parties stipulated that the issue in the case is:

"Was the Grievant suspended for just cause as mandated by Article 19, Sections 19.01 and 19.05. If not, what shall the remedy be."

In this regard the cited Article 19 Sections provide as follows:

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

1. 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 of 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."

It is noted at this juncture that the Grievant was commissioned as a Trooper, following six months of Academy training which included instruction in the Patrol's Rules and Regulations, on September 9, 1988. The suspensions challenged here are not his only discipline. Thus his deportment record reflects that on 8-30-89, he received a verbal reprimand for tardiness; that on 9-7-89, he received a written reprimand for a complaint received about him from one R. L. Davis; that on 1-26-90, he received a verbal reprimand for failing to file an affidavit at Court; and on 3-23-90, he received a written reprimand for a patrol car crash, due to losing control on an icy road.

The incidents of May 10th and September 8th, 1990, which are the focus of this proceeding were "fleshed out" at the hearing through the testimony of officer Clyde W. Breitigan, Lima Police Department; Deputy Sheriff Jerry Morris, Allen County Sheriff's Department; and the Grievant; and by documentary evidence. Thus, as to the incident of May 10th, 1990, the Grievant indicated that he'd been drinking alcoholic beverages, albeit he didn't believe he

was under the influence; that he displayed his personal revolver, a .38 (and used as a back up weapon when on duty with the Patrol); that he so used said revolver to threaten his wife.

The Columbus Grove Police Department's Official Report of the May 10th incident was based on information furnished by the Grievant's wife, Dawn Hernandez. It reads in pertinent part:

> ". . . . [Dawn Hernandez] said that he returned home around 10:00 p.m., she asked him where he had been. He told her Dennis Voss's house in Lima. She said that she could smell that he had been drinking and when she asked him he told her that he had been. She then made a comment about him driving after he was drinking and this made him violent and that's when he started throwing her around the house and got on top of her and choked her saying die, die, die. Dawn said that Jerry also ripped the sweatshirt she was wearing at the time.
>
> When Jerry was packing his things to go back to Denny's house he told Dawn that he wanted her sweatshirt that she was wearing because it was ripped. She told him that she was going to keep it for evidence and that is when he pulled out his [unloaded] back up weapon and pointed towards the ceiling and clicked it and told her again to give him the sweatshirt or he would shoot her in the head. She then turned the sweatshirt over to him. . . Dawn said that Jerry said that they were going to get a dissolution and not a divorce. She told him that she had to talk to a lawyer, that she didn't know, and he again pointed his gun at the

ceiling and clicked it again and said we're getting a dissolution, right. She agreed again with Jerry.

. . . .

Dawn was undecided about filing charges because he worked so hard to get his job. I told her to go talk to the prosecutor . . . about charges. . . .

Later . . . I called Jerry's supervisor Sgt. Weber and filled him in on the domestic because of Jerry's misuse of his firearm. The Sgt. told me that his Lt. would get ahold of Chief Miller in the morning about the Report."

Charges of domestic violence were indeed filed against the Grievant and having pled no contest, he was found guilty. All members of the criminal justice system involved with the Grievant's case were aware that he was an Ohio Highway Patrol Trooper. As noted above, he was also charged by the Patrol with conduct unbecoming. The penalty proposed was a five day suspension. The imposition of this penalty was held in abeyance under the terms of a "Proposed Employee Assistance Program Participation Agreement," executed by the Grievant; F.O.P. representative Ed Baker, and Patrol representative Captain Demaree on August 6, 1990. That Agreement provides in pertinent part as follows:

"[Paragraph 1.][1]/ The Ohio Department of Highway Safety and the employee agree to enter into a contract wherein the employee voluntarily agrees to seek assistance from a Health

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[1]/In the original Agreement the paragraphs are not expressly numbered.

Care Provider under the Ohio Employee Assistance Program (Ohio EAP), to deal with the problem of domestic violence.

* * * *

[Paragraph 6] The Highway Patrol agrees that so long as this contract is complied with in its entirety, and there are no similar incidents for two years, and the employee successfully completes the employee assistance program, the discipline recommended . . . . Shall be held in abeyance. Should the employee violate this contract, in any part, the recommended disciplinary procedure will be implemented.

[Paragraph 7] The employee understands and agrees that further occurrence of the problem described in paragraph 1, may result in the immediate implementation of the five day suspension, and/or other discipline. This contract has no effect [sic] on other incidents of any kind which may lead to discipline.

[Paragraph 8] By signing this agreement, the employee and Union agree to waive any contractual time restrictions regarding the imposition of discipline.

* * * *

[Paragraph 10] The Highway Patrol further agrees that if the Employee successfully completes the agreed plan, as certified by the Ohio EAP, . . . the Highway Patrol will review the proposed discipline, and seriously consider modification of the discipline imposed [i.e., a five day disciplinary suspension]."

It was the Grievant's testimony that he understood that another incident of "conduct unbecoming" would trigger his five (5) day disciplinary lay off.[2] The record shows that up to the day of the hearing herein the Grievant has been participating in EAP, as provided for in the Participation Agreement.

This participation involves counseling concerning, as described by the Grievant: his temper coming out; his emotional problems, and "if he has a drinking problem." According to the Grievant, as of the date of the arbitration hearing, he and his wife were "getting along great."

With respect to the incident on September 8, 1990, the record shows that Deputy Brock Douglas, an Allen County Sheriff's Department Deputy and Ohio Highway Patrol Trooper Dennis Voss are roommates. They threw a party on September 8, 1990. Voss and the Grievant were classmates at the Patrol Academy. The Grievant was invited to the party along with his wife. Both attended. Most of the invited guests were law enforcement personnel or employees of other County agencies, such as Greg Gilcrease, a case manager for Allen County Family Resources. Some were Allen County Sheriff's Department Deputies, e.g. Deputy Jerry Morris, some were Ohio State Highway Patrol Troopers, such as the Grievant; and still others were patrolmen from the City of Lima's Police Department. By late evening some juveniles and others had

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[2] As I've stated in other contexts, I look to the parties' advocates, here the F.O.P.'s and the grievant's advocate, for the parties' positions and contentions. Thus, the grievant's testimony in this regard is not taken as a capitulation to the rectitude of the Patrol's official position and contention.

crashed the party and Deputy Douglas called upon the Lima/Allen County Drug Enforcement Agency unit to come out to the party and escort the uninvited off the premises. As officer Clyde Breitigan, one of the undercover and out-of-uniform DEA agents responding to Douglas's request explained, Douglas called upon DEA's personnel because he didn't want uniformed police coming to his aid; it was embarrassing to Douglas that his and Voss's party had gotten out of hand. Breitigan and other DEA agents answered Douglas's call. Upon arriving at the party these agents went about asking the uninvited to leave. All but two did so without resistance. Two such uninvited guests were verbally abusive but did ultimately comply after being escorted out of Douglas's apartment did ultimately comply. Breitigan undertook to escort these uninvited guests. As he was doing so Gilcrease assaulted him. Breitigan sought to restrain Gilcrease and place him under arrest. The Grievant came to Gilcrease's aid. Breitigan claims he showed his badge to the Grievant and identified himself as a law enforcement officer. The Grievant denies such, and asserts that he "didn't know Breitigan was an officer claiming to be on duty," and that Breitigan, with long hair "didn't look like a cop." According to the Grievant he was just trying to break up a fight; he thought Breitigan and his friends were beating up on Gilcrease. Breitigan described the Grievant as "highly intoxicated." Allen County Sheriff's Deputy Jerry Morris described the Grievant as upset and agitated from which he concluded that the Grievant was intoxicated inasmuch as "normal people don't act like that." The Grievant conceded he'd had

about eight drinks. It was further Morris's testimony that he and others had to pull the Grievant off of Breitigan and that he told the Grievant that the situation was under control. Altogether, according to Morris, he and others had to pull the Grievant off of Breitigan three times; "as soon as we went away Hernandez was back at Breitigan." On one of these occasions, claimed Morris, the Grievant "backhanded me in the face and knocked my glasses off." Additionally, Morris indicated that the Grievant's wife was trying to get him to leave and that the Grievant "pushed her to the ground." Asked if he regarded the Grievant's conduct as an assault Morris testified that the Grievant was frustrated and tired of him, Morris, and that it would have been an assault if he'd been working. According to the Grievant, however, his wife was trying to get him out of it; that he pushed her out of the way in order that she not get hurt; that he did not hit his wife; and that she did not fall to the ground. The Grievant also testified that at the time of the incident he didn't realize that Morris was a Deputy Sheriff and he didn't realize that he had knocked Morris's glasses off. In this regard Morris conceded that he didn't identify himself as a law enforcement officer. Morris also testified that he did not hear Breitigan identify himself as a law enforcement officer. It was the Grievant's further testimony that the incident was heated and loud and that a crowd of about 20-25 people (half the party) had gathered. Asked if the incident was attributable to his drinking, the Grievant indicated that a sober Jerry Hernandez probably wouldn't have so conducted himself.

The Allen County Sheriff's Department's Crime Against Person Report, filed by investigating officer Deputy M. A. Murphy, concerning Officer Breitigan's complaint of assault against Gilcrease, reads in pertinent part:

". . . .

At approximately 0045 hrs. . . . Trooper . . . . Hernandez of the Ohio Highway Patrol began questioning the investigator's authority to ask these subjects to leave Deputy Douglas's home and it was noted that Trooper Hernandez was intoxicated and while arguing with Inv[estigator] Rode and Inv. Breitigan, a B/M, later identified Greg Gilcrease ran up to Inv. Breitigan and there struck Inv. Breitigan in the chest and neck area with a hard and violent two hand blow.

Inv. Breitigan struck Gilcrease immediately while also advising Gilcrease that he was under arrest for assault.

Inv. Breitigan and Inv. Rode and Inv. DeVelbiss then became engaged in a violent physical struggle with Gilcrease who was repeatedly advised by the officers that he was under arrest and to cease resisting.

During this struggle Trooper Hernandez on several occasions interfaced with the officers, even after being told several times that the officers were attempting to arrest Greg Gilcrease, and had to [be] physically restrained.

. . . .

Officers Note: The investigators had identified themselves both verbally and with a display of identification card and badge before this incident and arrest occurred. . . ."

The Patrol's Position:

The Patrol takes the position that the EAP Participation Agreement of August 6, 1990, in effect proscribes a repeat of "conduct unbecoming an officer" and that the Grievant's conduct on September 8, 1990, was clearly "conduct unbecoming" and hence violative of the EAP Agreement, with the consequence that the five day suspension theretofore held in abeyance was properly imposed. Moreover, asserts the Patrol, the Grievant's conduct on September 8, 1990, merited the thirty day suspension imposed for this conduct. It is the Patrol's position that on that date the Grievant "interfered with the legal arrest of a civilian by officer . . . . Breitigan." The Patrol asserts that Breitigan made "repeated attempts to inform the grievant of his identity. . . ." The Patrol characterizes the Grievant's conduct on September 8th as "volatile, assaultive, and uncontrolled."

The Patrol contends that there is "a nexus between the grievant's off-duty behavior and his sworn obligations as a law enforcement officer. Common sense alone would define the grievant's conduct as unbecoming an officer. Criminal conduct on the part of law enforcement officers cannot be tolerated. The ability of a law enforcement organization to accomplish its mission is directly linked to the public trust of individual officers. The evidence [shows] the grievant's credibility as a

law enforcement officer is in serious doubt and subject to attack due to his abhorrent off duty behavior.

The employer has imposed discipline after careful consideration of the seriousness of the offense. The Union will ask the arbitrator for leniency in regard to the thirty day suspension. Leniency is synonymous with a request for clemency where just cause exists. The five day suspension should not be an issue due to the grievant's violation of the abeyance agreement. There are common threads in both of the incidents, violent behavior, and the consumption of alcohol to excess." The Patrol also asserts that the incidents of May 10th and September 8th "are clearly related from the nature of his counseling." In a similar vein, the Meeting Officer for the Level III decision on the grievance, the advocate here, Sgt. Corbin, found in the "Findings" section that "the conduct displayed by the grievant, in both of the incidents, was uncontrolled, irrational, and unbecoming a law enforcement officer. The grievant's use of a firearm to threaten his spouse is unconscionable behavior not tolerated by society as a whole. The level of discipline was commensurate with the offenses and supported by thorough, fair administrative investigations. The grievant has in essence been given another opportunity to change his abhorrent behavior. He has been a trooper for less than two years and has received two verbal reprimands, two written reprimands, a five day suspension and now a thirty day suspension. The employer will not tolerate any future similar incidents of conduct unbecoming an officer on or off duty.

The employer has serious concerns about the grievant's ability to cope with the stresses of law enforcement work. The grievant's conduct not only reflects poorly on the organization but also creates potential liability for the State.

The ability of every member of the Highway Patrol to carry out the powers and duties of the organization are negatively impacted by the grievant's criminal conduct."

The Patrol contends that "the just cause standard mandated by Article 19 has been met. The level of discipline was not unreasonable, excessive, or an abuse of management discretion, but instead, was discretionary in favor of the grievant. Any substitution of a lesser penalty would be outside the jurisdiction of the designated authority of the Arbitrator. The grievant is a short term employee with a prior disciplinary record. He should not be given the signal his behavior is tolerated by our system of industrial justice. The grievance must be denied in its entirety."

The F.O.P.'s Position:

The F.O.P. contends that the EAP Assistance Program Participation Agreement (the abeyance agreement) was not violated by the Grievant's conduct on September 8th. It is the F.O.P.'s contention that this September 8th incident doesn't trip the abeyance agreement's contingent imposition of discipline because the Grievant is not accused of or brought up on charges of domestic violence vis a vis the September 8th incident. The charge in re September 8th says nothing concerning domestic violence. It is the F.O.P.'s contention that there is no

connection between the May 10th and September 8th incidents; at best only subsidiary issues, such as the Grievant's drinking are in common. The Grievant's wife's involvement in both instances is different, asserts the F.O.P. The May 10th incident concerns domestic violence; the September 8th incident concerns alleged interference with an arrest--there's no similarity, asserts the F.O.P.

With respect to the incident of September 8th the F.O.P. contends that the Grievant had no reason to believe that Breitigan was involved in making an arrest. As far as the Grievant was concerned, argues the F.O.P., the Grievant simply saw an act of violence against a friend, and he didn't know that Breitigan was a law enforcement officer. According to the F.O.P. Breitigan may have thrown his badge around, but not at the Grievant. The Grievant may well wish he hadn't handled things as he did on September 8th, but, contends the F.O.P., no culpable behavior occurred. In any event, argues the F.O.P., even were the Grievant viewed as culpable, a thirty day suspension is too severe.

It is further the F.O.P.'s contention that the consequences of bad publicity for the Patrol can't be the engine behind discipline; bad publicity for the Patrol is not a reason to discipline.

So it is that the F.O.P. urges that the grievance be sustained.

Discussion and Opinion:

First to be determined is whether the August 6, 1990 EAP Participation/Abeyance Agreement was violated, as contended by the Patrol, or not, as contended by the F.O.P. In turn this determination requires interpreting the terms of said agreement. Undertaking that interpretation it is noted that the very first paragraph identifies "the problem" for which the Grievant voluntarily seeks assistance as one of "domestic violence." Thereafter paragraphs 2, 3, 4, and 5 outline the content and source of the assistance program, and avenues of communication to the Patrol of information concerning the Grievant's compliance. Then in paragraph 6, the crux of the agreement, the contingencies, are set forth. Here the Grievant and the parties agreed that so long as: (1) the abeyance agreement terms are complied with i.e., the schedule of counseling sessions is met, etc.; (2) there are no similar incidents for two years; and (3) the Grievant successfully completes the EAP program, then "the discipline recommended [i.e. a five (5) day disciplinary lay off] shall be held in abeyance." The focus here is on what was meant by the condition and contingency that there be "no similar incidents for two years." The question becomes what was the parties intent by the phrase "similar incidents." Was the reference to the generic "conduct unbecoming," the basis for the underlying disciplinary charge, as asserted by the Patrol or was it to the specific incident of "domestic violence," as contended by the F.O.P. In my judgment the entire context, namely a detailed plan of assistance for the Grievant "to deal with the

problem of domestic violence" strongly indicates that "similar incidents" was intended to refer to incidents of domestic violence. Any doubts in that regard it seems to me are clearly laid to rest in paragraph seven. Thus in this paragraph the parties are spelling out to the Grievant the consequences of his breach of the EAP/Abeyance Agreement and defining his obligation and undertaking, expressly providing that in executing the document he "understands and agrees that further occurrences of the problem described in paragraph 1" may trigger the recommended discipline of a five day suspension. But as has been seen the problem described in paragraph 1 is one of "domestic violence." These terms are terms of art. Descriptive of a criminal offense, it's common knowledge that it's one of the most common type of call police are called upon to make. It's inevitably emotionally charged, fraught with violence, and consequently dangerous. As the terms clearly imply, the setting is the domicile. It has identifiable root causes, as the existence of a specific counseling plan prepared for and being followed by the Grievant manifests. But the setting on September 8th was not the domicile of the Grievant and his wife. And his violent conduct on that date was not focused toward his wife. Thus while I do find that the record amply supports the conclusion that the Grievant was intoxicated, and that being so, I find no reason to discredit Deputy Morris, who was not intoxicated, and who indicated that the Grievant indeed shoved his wife to the ground when she sought to intervene as he scuffled with Officer Breitigan, it is clear that this act of violence toward Dawn Hernandez, his wife, was,

as with that directed toward others (such as Deputy Morris) directed at any who sought to interfere with his own intervention efforts vis a vis Breitigan and Gilcrease. This being so it cannot be found that the Grievant's shoving of his wife on September 8th was born of the complex psycho-emotional forces and the marital relationship which triggered the May 10th domestic violence incident. Accordingly, it can't be found that the incident of September 8th constituted a further occurrence of the problem of "domestic violence," nor can it be found to be a "similar incident" to the incident of May 10th, as these latter terms are utilized in the EAP Participation/Abeyance Agreement. It follows therefore that the transpiring of the contingencies under the EAP Participation/Abeyance Agreement has not occurred, and hence there was no triggering of same to justify the imposition of the recommended disciplinary lay off of five days. The imposition of the 5 day disciplinary lay off for transgression of the EAP Participation/Abeyance Agreement must therefore be rescinded. Furthermore, any discipline for the May 10th incident must be regarded as continuing to be in abeyance. This then brings one to an analysis of the events of September 8th "standing alone."

With respect to the September 8th incident I believe the context is important. Thus this was an "in-house" party thrown by Voss and Douglas, largely for those "in the business." When others uninvited "crashed" the party, Douglas found it necessary to expel them. Clearly he didn't believe he and the party attendees could do so on their own. He called in some plain

clothes DEA agents. As noted above, they successfully bounced the crashers. Being out of uniform, however, their legitimate role was not immediately apparent, as would have been the case were they uniformed officers. Here the F.O.P. seizes upon this somewhat mitigating particular and peculiar circumstance and understandably seeks to bolster it, by putting forth the Grievant's testified to contention that Breitigan, whose arrest of Gilcrease the Grievant is said to have interfered with, simply didn't indicate to the Grievant that he was a law enforcement officer and that he was engaged in arresting Gilcrease, contrary to Breitigan's testimony that indeed he did so indicate to the Grievant. But since it's clear that the Grievant was "highly intoxicated" I am unable to credit his account and find that Breitigan, as he testified, did indicate that he was a law enforcement officer. Moreover, had the Grievant not been so highly intoxicated he would have doubtlessly acted with more caution, as he in essence conceded. Thus while the F.O.P. is correct in contending in essence that the Grievant cannot be disciplined for merely drinking off duty, he can properly be held accountable for those consequences which <u>foreseeably</u> flow from his abuse of alcohol (as opposed to any and all <u>fortuitous</u> consequences). And if one thing is certain fights flow from abuse of alcohol. Moreover, had the Grievant not been intoxicated he would have doubtlessly readily perceived that Gilcrease was being arrested, and that Breitigan, and others were arresting officers, and not mere interlopers. Thus the Grievant must be found to have in fact interfered with an arrest and

further to be culpable in doing so. In light of Breitigan's criminal charges against Gilcrease it is reasonable to infer that it was only as a professional courtesy that Breitigan did not press criminal charges against the Grievant.

The Grievant's September 8th offense of interfering with an arrest and being drunk and disorderly represented a serious matter. Given the party atmosphere and, as previously noted, the somewhat mitigating less-than-crystal clear circumstance of the plain clothes arrest, and the empathy of those who witnessed the Grievant's misconduct (witness, for example, Breitigan's unwillingness to file a criminal complaint against the Grievant), the seriousness of the matter is only slightly less serious than what the Patrol perceived. More significant, however, is the Patrol's incorrect viewpoint that the EAP Participation/Abeyance Agreement was violated, thereby warranting a five day disciplinary lay off, and the recitation of that discipline as part of the chronology of the Grievant's disciplinary record, in its justification for the imposition of a thirty day disciplinary lay off of the Grievant. Thus the record indicates (see the Level III Findings) that in fixing at thirty days the suspension penalty for the Grievant's misconduct for interfering with an arrest and through that conduct, along with his drunkenness and disorderliness, bringing disrepute to the Patrol, the Patrol improperly took into account as legitimate a 5 day disciplinary lay off for the May 10th incident. This impropriety therefore warrants some modification of the penalty in fact meted out.

Indeed, in providing at paragraph 7 of the EAP Participation/Abeyance Agreement that said agreement "has no effect [sic] on other incidents of any kind which may lead to discipline," and by virtue of reading the balance of paragraph 7 in conjunction with the entire EAP Agreement (as previously noted), it appears that the parties intended to take the events of May 10th out of the disciplinary system's track and hence out of consideration as prior discipline or misconduct in the course of administering the contractually recognized system of progressive discipline at least up until such time as the Grievant was in breach of the EAP Participation/Abeyance Agreement, an event found herein to have not yet transpired.

Nor can the severity of the suspension, thirty days, be justified on the basis, as in essence argued by the Patrol, that the incident of September 8th had features in common with the incident of May 10th. Thus in the first place, as just noted in the EAP Participation/Abeyance Agreement, the parties have agreed in essence that, absent certain contingencies not established here, the May 10th incident will simply not be regarded as a disciplinary matter and hence simply cannot logically be compared with other subsequent "disciplinary matters." Moreover, even assuming for the sake of analysis that comparison of the two incidents was somehow permissible and proper, comparison of these incidents concededly reveals that there is a "cause" which is common to both incidents, namely, the Grievant's abuse of alcohol (or perhaps even the existence of alcoholism in the Grievant).

But discipline is administered for conduct, more correctly misconduct, and not for underlying conditions or causes which may well lead to misconduct, such as alcoholism or alcohol abuse. This being so the case devotes to the sole common feature of violence, a matter, at least in the context of the May 10th and September 8th incidents, quite properly characterized as "misconduct." The case thus comes down to the propriety of viewing the incident of September 8th, as a repetition of the misconduct of May 10th (i.e., violence) which, repetition in turn, under well established principles of progressive discipline sanctioned by the parties' Contract, warranted a harsher penalty than that meted out for the first incident involving violence. But, for all the reasons set forth hereinabove, in the absence, as here, of circumstances triggering the recommended discipline of the EAP Participation/Abeyance Agreement, the May 10th incident simply cannot properly be viewed as a prior incident of "violence" which warranted discipline. To the contrary, the parties freely elected to regard the entire incident as non-disciplinary, seeking correction of the Grievant's behavior on that occasion through the mechanisms of counselling and support provided for in an EAP program, as opposed to correction through the disciplinary system. To now regard the incident of May 10th as "disciplinary" and hence supportive of harsher disciplinary action for an arguable repetition thereof on September 8th would clearly be violative of the parties' understandings and

undertakings in the EAP Participation/Abeyance Agreement. Accordingly, the September 8th incident cannot be so regarded.

Where, as here, circumstances dictate some penalty but nonetheless a modification of the severity of the penalty initially administered, it falls upon the Arbitrator to fashion an appropriate penalty. In the instant case I am persuaded that the seriousness of the offense on September 8th warrants as a minimum a disciplinary lay off. Deleting from the case the validity of the 5 day disciplinary lay off, and taking into account the slightly mitigating circumstance alluded to above, and, further, viewing the matter on September 8th as essentially on a par in seriousness with the May 10th incident for which management recommended a five (5) day disciplinary suspension, I believe a four (4) day disciplinary suspension for the Grievant's conduct on September 8, 1990, is fully warranted.

Finally there is the matter of the Patrol's legitimate concern that Grievant not be given a signal, by the modification of the initial disciplinary penalty, that his behavior is tolerated by the applicable system of industrial justice. In light of the severe discipline left to stand, I doubt that the Grievant would conclude that his conduct is somehow "tolerated." Further in this regard, suffice it to say that I envy not the Grievant's position in the event he engages in still further serious misconduct in the face of the already unenviable record of discipline, even as modified herein, over a short period of time. Emphasizing a more positive view, however, I believe it's

important to point out to the Grievant and remind him of, as his wife put it, the hard work he put in to become a member of the highly regarded Patrol. In becoming a Trooper, he passed muster under a highly competitive, closely scrutinized, and rigorous training period, not to mention the competitiveness of the initial selection process. This recent successful experience confirms that he is fully capable of functioning as an effective Trooper and that his superiors have already so concluded. And since he professes to now be getting along well with his wife, I trust that he also appreciates that through counseling he can overcome whatever personal problems led to his past domestic violence difficulties. Furthermore it is clear that he ought to see less of Trooper Voss, and he ought to concentrate on his problems with the abuse of alcohol. It seems to me that the rocky start the Grievant has gotten off to can readily be rectified if he would simply apply the will, determination, and discipline that got him on board with the Patrol to begin with.

Award

For the reasons more fully set forth above, the grievance is sustained in part and denied in part. No just cause existed on the basis of the events of September 8th, 1990, to implement the held-in-abeyance recommended penalty for the events of May 10, 1990, and hence the implementation of that penalty (a five day disciplinary lay off) is rescinded; the Grievant is to be made whole; and the Grievant's records shall so reflect.

Albeit some discipline is warranted under the just cause standard for the Grievant's misconduct on September 8, 1990, the severity of the suspension, in fact imposed, for the reasons noted above, is not sustainable. Accordingly, the Grievant is to be regarded as having served a four (4) day disciplinary suspension for his September 8, 1990 misconduct, and to be otherwise made whole. His records shall duly reflect these modifications.

Dated: February 18, 1991

Frank A. Keenan
Arbitrator