ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 621

OCB GRIEVANCE NUMBER: 15-03-910103-0012-04-01

GRIEVANT NAME: ESPOSITO, SAMUEL M.

UNION: FOP 1

DEPARTMENT: HIGHWAY PATROL

ARBITRATOR: DWORKIN, JONATHAN

MANAGEMENT ADVOCATE: DEMAREE, CAPT. JOHN

2ND CHAIR: KIRSCHNER, PAUL

UNION ADVOCATE: COX, PAUL

ARBITRATION DATE: MARCH 28, 1991

DECISION DATE: JUNE 30, 1991

DECISION: MODIFIED

CONTRACT SECTIONS AND/OR ISSUES: ART. 19 - DISCIPLINE: 20 DAY SUSPENSION FOR CONDUCT UNBECOMING AN OFFICER AND UNAUTHORIZED ABSENCES FROM DUTY.

HOLDING: "THE ARBITRATOR FINDS THAT THE 20 DAY SUSPENSION WAS INORDINATELY HARSH. IT EXCEEDED THE GOAL OF CORRECTION BY A WIDE EXPANSE." TROOPER IS A 19 YEAR EMPLOYEE WITH EXEMPLARY SERVICE. GRIEVANT IS TO BE ISSUED A VERBAL REPRIMAND FOR "CONDUCT UNBECOMING AN OFFICER" AND A 3 DAY SUSPENSION FOR "ABSENCE FROM ASSIGNMENT WITHOUT AUTHORIZATION." EMPLOYEE TO OTHERWISE BE MADE WHOLE.

ARB COST: $1,050.75

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
Ashtabula, Ohio Post

-and-

THE FRATERNAL ORDER OF POLICE
Ohio Labor Council, Inc.
State Unit 1

*

#621

Case No 15-03(91-01-03)012-04-01

Decision Issued:
June 30, 1991

APPEARANCES

FOR THE STATE

Captain John Demaree	Patrol Advocate
Anne K. Arena	Labor Relations Officer
Captain Stephen A. Lamantia	District 4 Commander
Lieutenant Thomas R. Derr	Ashtabula Post Commander

FOR THE UNION

Paul Cox	FOP/OLC Chief Counsel
Edward F. Baker	Staff Representative
Renee Engelbach	FOP Paralegal
Samuel M. Esposito	Grievant

ISSUE: Article 19 - Discipline. Whether or not twenty-day suspension for conduct unbecoming an officer and unauthorized absences from duty assignment was consistent with contractual safeguards.

Jonathan Dworkin, Arbitrator
9461 Vermilion Road
Amherst, Ohio 44001

SUMMARY OF DISPUTE

The grievance protests the twenty-day disciplinary suspension of an Ohio State Trooper charged with personal misconduct and unauthorized absences from his assigned duty. The allegations relate to the Trooper's romantic liaison with a woman not his wife, the resulting scandal in portions of the small-town community where he lived and worked, and the expressed uneasiness of fellow Troopers who were distressed that Grievant was breaking up his home.

The Employer's first hint of Grievant's extra-marital activities was an anonymous letter to the Post Commander in August, 1990. It said:

> Dear Sir
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> You should be aware of the activities of [Grievant]. He is using tax-payer money time and gas to meet his girl-friend at the Andover McDonalds and other various spots in the southern part of the county. I'm sure if you monitor his where abouts you will find this to be very true. I live in Andover and have seen him many times. I work very hard to pay his wages and feel this should be **stopped immediately**.[1]
>
> I could have called a TV or newspaper.[2]

The Post Commander showed the letter to Grievant who readily admitted taking a coffee break with a woman and a third person at

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[1] The words, "stopped immediately" were triple underlined in the handwritten letter.

[2] There were three anonymous letters. The writer has not been identified, but there was speculation during the hearing that he might be a former lover of the woman in question -- a local police officer.

McDonald's. He explained that he ran into her at a used car lot in Andover and invited her and the auto dealer for coffee. No disciplinary action was initiated for the impromptu meeting although the Commander informally cautioned the Trooper to be circumspect in his behavior. The letter was also shared with the District Commander. He directed the Post Officer to conduct an inquiry to determine if there were grounds for an investigation.

Another anonymous letter arrived one month and ten days later. It stated:

> To Whom it May Concern:
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> As a taxpayer, it is appalling when troopers frequent women's home while on duty. [Grievant] has been going to the home of [at this point, the letter identified the woman by name and address] for months several times a week in a state vehicle. He is also seen at the hospital regularly while on duty. Someone needs to investigate troopers accountability.[3]

On September 27, 1990, Grievant and his Lieutenant met with the District Commander. The discussion was much more intense than after the first letter. Once again, the Trooper was candid and forthcoming. He stated he had been seeing the woman for four months and, during that period, visited her thirty to forty times while on duty. He claimed his visits lasted five to twenty minutes, for a cup of coffee or something to eat. From time to time, he also stopped in at her place of employment -- a medical center emergency room -- while on his way to work. He acknowledged that, even though his shift had

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[3] The grammatical errors are in the original text.

not yet begun on those occasions, he was technically "on duty" because he was in uniform.

Grievant told his Lieutenant that he visited the woman only when his line assignment[4] was in the immediate vicinity of her home. He did concede a surface violation of rules. When he went to the woman's home, he did not sign off by radioing the Post to report his location. He was not out of communication with the Post, however, because he carried his MRE (Mobile Radio Extension). The MRE is a portable radio which monitors the cruiser radio. If messages had come in while he was at the house, Grievant would have heard them.

Grievant concluded his statement to the Supervisors by conceding his actions were inconsistent with his obligation to live up to the image of a Trooper. He said he had ended the visits a month earlier, in August; the Patrol's subsequent investigation confirmed the assertion. Nevertheless, another anonymous letter arrived at the Post in mid-November. It was similar to the one that preceded it, except it contained explicit threats that the writer would go to the media if s/he did not receive satisfaction:

> To Whom it May Concern:
>
> Unfortunately it appears no one has investigated troopers accountability. [Grievant] continues to frequent the home of [the woman] while on duty. It is obvious this is his residence at times while still married to someone else; but patronizing in a state vehicle on duty is unethical and uncalled for. It is questionable the stability and credibility of the State Highway Patrol and especially [Grievant] to allow this to continue. Maybe the state department and Channel 3 News need to be notified if this

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[4] A "line assignment" is a specific area, road, or highway where a Trooper is assigned to work during a shift.

can not be corrected locally. This has been going on for over 6 months.

The Patrol gave little notice to the third letter; when it arrived, a searching investigation of Grievant's conduct was already underway. Comments from several of Grievant's fellow Officers added impetus to the undertaking. They expressed concern that people in the area were gossiping about the affair and laughing at the Patrol. They were not so much worried about their own reputations as Troopers as they were anxious to help correct the situation and put Grievant's disintegrating marriage back together.

One of the Patrol's investigatory objectives was to discover how much time the Employee spent with his girlfriend when he was supposed to be on duty. Some of the woman's neighbors were interviewed; all had observed a State Highway Patrol cruiser in the woman's driveway. One claimed to have seen it only five times, another stated she saw it at least twice per week over a period of three to four months. There was general (although not unanimous) consensus among the neighbors that the car was sometimes parked in the driveway an hour or more. A modicum of support for the neighbors' allegations derived from an inspection of radio logs covering the relevant period. Nineteen separate gaps in Grievant's activity were uncovered -- periods ranging from thirty minutes to three hours when no arrests were made, no tickets issued, no vehicle registration checks made, no other police work documented. A detraction from this evidence was that only eight of the gaps occurred on days when Grievant's line assignment was in the vicinity of the woman's home, and several of them took place during

the period when the Patrol itself acknowledges the on-duty visits had ceased.

Grievant submitted to three interviews during the investigation. He confirmed that he had associated with his girlfriend, on duty, many times between May and August, 1990; he admitted that on one occasion while visiting at the Medical Center, in uniform, he kissed her in the parking lot. At all times relevant to the investigation and this dispute, he was consciously aware of the published and distributed work regulations of the Highway Patrol. Among those regulations are the following:

> (D) Conduct unbecoming and officer
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> A member may be charged with conduct unbecoming an officer in the following situations:
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> . . .
>
> (2) For conduct that brings discredit to the Ohio State Highway Patrol and any of its members.
>
> . . .
>
> (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. [Emphasis added.]

Supervision regarded Grievant's on-duty liaison with a member of the opposite sex as a plain violation of the Rule and adequate cause for discipline. Additionally, the investigation uncovered evidence of a violation of the Rule prohibiting unauthorized absences from a Trooper's duty post. Section B2 of the Rules provides:

(B) Performance of duty

. . .

(2) A member while on duty shall not be absent from the post, station or assignment without authorization and shall be available through usual communication channels.

It was apparent to the Employer that Grievant breached the Rule if he left his cruiser for an hour or more without notifying the Post.

Grievant was suspended twenty working days (four weeks) and this grievance resulted. It was appealed to arbitration and heard in Columbus, Ohio on March 28, 1991. At the outset, the parties agreed that the appeal was procedurally proper and that the Arbitrator was authorized to issue a conclusive award on the merits of the grievance. Arbitral jurisdiction is more specifically defined and limited by the following language in Article 20, §20.08 of the governing Collective Bargaining 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.

The issue is whether or not Grievant's suspension was for just cause and otherwise conformed to the contractual restrictions on

Management's disciplinary authority. The controlling language of the Agreement states:

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 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 FOP's challenge to the discipline rests primarily on two contentions: 1) Grievant did not commit an actionable offense. He did nothing different from what other Troopers frequently do when their line assignments are adjacent to their homes -- they go home for lunch or stop to have coffee with their wives/husbands. The distinction is that Grievant stopped for lunch and/or coffee with

his girlfriend and that, in the FOP's judgment, was none of the Employer's business. 2) If Grievant did commit an act for which discipline was warranted (a proposition the FOP vigorously denies) the twenty-day suspension was far too harsh to comport with just cause. The alleged misconduct was minor and easily correctable. It should have been handled in accordance with the contractually mandated progressive-discipline policy.

THE PATROL'S EVIDENCE AND ARGUMENTS

The Employer's case rests largely on Grievant's own admissions. He did not deny or try to cover up his on- and off-duty relationship. He admitted stopping at his girlfriend's home perhaps forty times from May to August, visiting at her workplace, and kissing her in the parking lot. But he disavowed the suggestion that sexual improprieties occurred, and on-duty sexual misconduct was an unspoken yet obvious reason for the discipline. This fact is clear in the following excerpt from the Patrol's five page (typed, single-space) pre-discipline investigatory report:

> [Grievant] agreed the neighbors around the [woman's] residence would support his statement that he was there between 20 and 40 occasions. [Grievant said he has been living at [his girlfriend's home] since last Friday, September 28, 1990, and can be contacted by phone at . . . . [Grievant] said he has never parked his patrol car [there] overnight and the neighbors would give the same answer.
>
> [The investigator] related to [Grievant] that it was difficult to believe that he visited [his girlfriend] that many times on duty without an intimate relationship developing. [Grievant] was encouraged to say something that would

convince us that a sexual contact did not occur. He stated that it was during the summer and her kids were there. He did not do anything on duty and he had nothing to hide.

The investigation produced evidence markedly inconsistent with Grievant's general declaration that his on-duty visits to his girlfriend were during coffee and lunch breaks and did not detract from the performance of his duties. As indicated, neighbors were interviewed. Their statements depicted the on-duty visits as hours long. One of the statements, taken on November 15, 1990, was summarized by the investigator as follows:

> Mr. L____ is superintendent of Grand Valley Schools located in the southern part of Ashtabula County. Mrs. L____ is a housewife. They do not know [Grievant]. They do know [his girlfriend] and report that she has had several male companions. They started seeing an OSP patrol car parked in the [girlfriend's] driveway last May, 1990. They have not seen a patrol car parked there for about two months. They relate the patrol car was at the residence at least two times a week and possibly more. It would stop between 0800 HRS and 1500 HRS for up to two to three hours at a time, averaging about one hour. [Grievant] and [his girlfriend were never observed caressing. They were seldom outside and always by themselves. * * * Mr. and Mrs. L_____ related that [Grievant's] actions were uncalled for - and that they expect public employees to be on the job.

Another neighboring family was interviewed the same day. According to the investigator, the statements added the following:

> The S_____s do not know [Grievant] They both have seen a patrol car parked at the [woman's] residence at least a half dozen times. The first time was in late Spring of 1990 and the last time was less than three months ago.

> Usually around noon each time. The S_____s recall one time the patrol car was there for over an hour. They said [the woman's] 12 year old son was outside washing the patrol car while [Grievant] was inside the house. The only time they have observed [Grievant] and [the woman] together was in the front yard, and [Grievant] was in civilian dress with his personal car.

The third interview was with an attorney who resides in the neighborhood. It was by telephone. He was the only witness who had met Grievant, but they were not really acquainted. He commented only that he had seen the patrol car at the woman's home several times during the summer of 1990. He did not indicate how long it was there.

After gathering and reviewing the evidence, the Patrol was persuaded that Grievant had committed severe breaches of his employment obligations and commensurately severe discipline was warranted. It was convinced that, while supposedly on duty, he consorted with a member of the opposite sex and routinely abandoned his duty assignment. He had acted notoriously, disgracing his uniform, his fellow Troopers, and the Ohio State Highway Patrol. Were he a newer Officer without a splendid personnel record, he might have been discharged. The Employer maintains it acted leniently under the circumstances, gave full consideration to Grievant's work history, and applied only a twenty-day suspension. The Patrol concludes that its disciplinary decision was not arbitrary, capricious, or discriminatory, and implores the Arbitrator not to substitute his judgment for Management's. It asks that the grievance be denied.

THE FOP'S EVIDENCE AND ARGUMENTS

Just cause is the overriding principle governing all discipline under the Agreement. The FOP reasons that the first and most fundamental element of just cause is an offense. Before an employee can be disciplined, s/he must engage in some act of commission or omission which violates the Employer's rules or legitimate expectations. And, when discipline is challenged in arbitration, the Employer's rudimentary responsibility is to prove the occurrence of misconduct justifying the penalty. These precepts, in the FOP's judgment, mark the critical flaw in the Patrol's case. The evidence proved that Grievant carried on an extra-marital affair, visited his girlfriend's home for coffee and lunch breaks when his line assignment was nearby, and occasionally stopped to see her at the Medical Center on his way to work. No investigation was needed to establish those facts; Grievant freely admitted them. The FOP insists that none of Grievant's conduct was substantively different from what other Troopers do every day, and it challenges the Employer -- "Prove he violated the rules."[5]

The FOP calls attention to the fact that the investigation of Grievant's conduct was driven by the worst possible force -- anonymous hate mail. A coward, willing to make charges, unwilling to sign his/her name, and obviously motivated by personal malice towards this Trooper wrote scurrilous letters to the Post. The Patrol fell into the trap and did the writer's bidding. It severely disciplined the victim. The FOP asks: "What did Grievant do to merit the discipline?"

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[5] FOP opening statement.

After dissecting and examining the allegations, the Union concludes that he did nothing wrong.

The FOP's examination starts with the accusation that Grievant discredited the Patrol through his on-duty "association with a member of the opposite sex for purposes other than those necessary for the performance of official duties." To begin with, the FOP contends that the regulation is hopelessly unenforceable because it fails to distinguish between permissible and impermissible contacts. If it is to be interpreted strictly according to its words, it means that a Trooper cannot give a lunch order to a waitress or waiter, cannot stop for coffee with his daughter, her son, mother, father, grandparents, wife, husband. A fact, alleged by the FOP and confirmed by the Patrol, is that Troopers do take coffee breaks with friends and families, they do go home for lunch when their residences are near their line assignments. The District Commander who disciplined Grievant conceded the fact, and the former Post Commander stated in the pre-disciplinary conference that it was not unusual for a Trooper to go off line, a quarter mile or more, for breaks and lunch with spouses or friends. He also admitted that no one has ever been disciplined for not calling in breaks although it is common practice not to do so.[6]

The FOP maintains that the Post Commander's statement vitiated the second charge against Grievant -- abandoning his assignment. In this regard, it is important to observe that the Trooper was never

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[6] This information derived from the testimony of the FOP Representative who attended the pre-disciplinary conference. It was not rebutted. Unfortunately, from the Patrol's perspective, the former Post Commander is no longer a State employee and was unavailable to testify in the arbitration hearing.

out of contact with the Post. Whenever he was not in his cruiser, he carried his MRE with him; at no time were communication channels interrupted or broken. Whatever Grievant did, the same thing is being done daily by Troopers throughout the State. The only contrast is that Grievant took coffee breaks with his girlfriend rather than his wife.

It is apparent to the FOP that Grievant's discipline had little to do with his on-duty conduct. It was the product of Supervision's moral outrage over his open (and honest) violation of marriage vows. During the investigation, the Patrol made every possible effort to implicate Grievant in on-duty sexual activity. Had it been successful, the case against the Trooper would have had substance. But Grievant repeatedly denied that speculation. As he explained, it was summer, school was out, and his girlfriend's two children (ages eleven and twelve) were home. He indicated decisively that having sex when children might be present was contrary to <u>his</u> moral values.

There was no legitimate reason, in the FOP's view, for Supervision to disbelieve Grievant. He had honestly admitted the substance of practically every allegation against him. Moreover, his record amply demonstrated his dedication to his job and its Code of Ethics. He had served the Patrol nineteen years without discipline, and he had served it well. According to what his Post Commander said in the pre-disciplinary hearing, he was always a good Employee; and neither the quality nor quantity of his performance deteriorated during the summer of 1990. They remained consistently high.

The Union must acknowledge a prominent weakness in its defense that Grievant was innocent of wrongdoing. Disinterested neighbors of the Trooper's girlfriend gave signed statements that they had seen

the Highway Patrol cruiser in her driveway for more than an hour. They were interviewed twice, on November 15, 1990 and again on March 22, 1991 (to prepare for arbitration). The first interviews were conducted by the former Post Commander who was not available to testify; the second were performed by the current Post Commander. He appeared in the arbitration and gave testimony verifying the later statements.

It is axiomatic that if Grievant, while on-duty, called upon his girlfriend for an hour or more at a time, he violated his job responsibilities. Article 26 of the Agreement addresses authorized breaks. It provides in part:

ARTICLE 26 - HOURS OF WORK AND WORK SCHEDULES

. . .

§26.03 Meal Breaks

Employees shall receive a paid meal break, not to exceed one-half hour, during each tour of duty. Troopers shall be subject to emergency calls during this meal break.

The Arbitrator presumes that Troopers also have discretion to take short coffee breaks during their tours. The Agreement does not so state, but the evidence confirms that they routinely do it, Management knows it, and no one is ever disciplined for it. It is obvious, however, that whatever indulgence exists in this regard, it does not license a Trooper to make social visits lasting an hour or hours. If Grievant indeed stopped at his girlfriend's as long as the neighbors

said he did, he most certainly breached his obligations and Patrol Rules.

The FOP attacks the witness statements. First and foremost, it contends that the sworn statement of a nineteen-year Ohio State Trooper that he never visited more than thirty minutes at a time should be accepted over conflicting assertions of casual observers. While the FOP concedes that the neighbors probably held no malice for Grievant, it maintains that their statements were not trustworthy; their recall was undoubtedly influenced by the circumstances of the interviews. It must have been an impressive experience for them. A uniformed Highway Patrol Lieutenant, undoubtedly driving a cruiser with police flashers, appeared at their doorways and asked them to assist in an internal investigation. They probably felt a sense of importance and were anxious to help as much as they could. In these circumstances, according to the FOP, they became allies -- not truly disinterested observers.

To reinforce its point, the FOP calls attention to material discrepancies between the first and second interviews. In response to the question, "Approximately how long each time would you say that the Patrol car was in the driveway," Mrs. L____ said, " . . . up to two to three hours at a time, averaging about one hour." That was her testimony in November, 1990. When asked the same question in March, 1991, however, she answered, "Approximately an hour, sometimes it would be five to ten minutes." Similarly, Mrs. S_____ stated in November that she had observed Grievant's cruiser from late spring to July, 1990. In March she said it was "From late spring to May, 1990."

The FOP argues that the eyewitnesses were guessing. How did they know the car was there for one, two, or three hours? Did they stand by their windows observing it each time? Did they watch the clock, recording or memorizing the times of arrival and departure? Clearly, they did not. The FOP concludes that evidence is too soft and unconvincing to support the twenty-day penalty; or for that matter, any discipline at all. It demands an award expunging the suspension and restoring any losses Grievant was caused to suffer.

OPINION

Just as the neighbor's statements contained conflicts, so did Grievant's. In a meeting with the District Commander in August, 1990, he said he stopped at his girlfriend's home several times a week for five to ten minutes. On September 20, 1990, he was interviewed by the former Post Commander and gave the following answers:

Q: What was the duration of your visits?

A: 15-20 minutes at the most.

Q: What was the longest visit?

A: 20 minutes.

Q: What was the shortest?

A: 5 minutes.

In the arbitration hearing on March 28, 1991, he was asked the question again. He said the visits ranged from ten to thirty minutes.

The Arbitrator agrees with the FOP that the statement of a Trooper, given voluntarily under oath, is entitled to significant weight. But that does not mean it must always be believed, or that a trier of facts, such as an arbitrator, must suspend his/her judgment. The probability is that neither the Employee nor the neighbors knew for sure how much time the visits took. All of them speculated but, unlike the neighbors, Grievant's lower estimates were motivated. The Trooper knew he was under the disciplinary gun and most assuredly would draw a lengthy suspension if he admitted spending more than his thirty-minute lunch breaks and an occasional coffee break with his girlfriend. He knew or should have known that such action was in violation of strict Rules; it was equivalent to abandonment of duty.

The evidence convinces the Arbitrator that while some of Grievant's breaks -- probably most of them -- conformed to reasonable time frames, others did not. The neighbors interviewed, including a school superintendent and an attorney contacted by telephone, agreed that on one or more occasions Grievant's cruiser was in the driveway at least an hour. It may not have been exactly an hour; it could have been more or less. But the Trooper's statement in September, 1990 that it was never longer than twenty minutes, and his testimony in arbitration that it was never longer than a half hour are not credible. The finding is that Grievant did breach the rule prohibiting unauthorized absence from duty, and his misconduct justified a disciplinary response.

The remaining portion of this controversy -- whether or not the manner in which Grievant carried on his extra-marital affair gave rise to justifiable discipline -- is more puzzling and difficult.

The Arbitrator assumes that family tensions, broken homes, and the like are not unheard of among members of the Ohio State Highway Patrol. It is well documented that disturbed family life and divorces are two of the more prominent hazards of police careers, and it is improbable that State Troopers are immune. The difference in Grievant's case is that the personal problem was accompanied with astonishing lack of judgment. He pursued the affair during workhours, in uniform, and used a Patrol cruiser to facilitate contacts. It is not what he did so much as how and when he did it that opened his conduct to censure. He drew attention to himself, his uniform, and his affair. In making these determinations, the Arbitrator gives absolutely no weight to the anonymous letters. As contended by the FOP, they were the products of cowardice and the tools of a private vendetta. No Trooper should have to face discipline based solely on slanderous, unsigned documents. It was Grievant's own admissions, not the letters, which imparted significance to the Employer's concern over his behavior.

The Arbitrator also places scant reliance on the rule against on-duty contact with the opposite sex. It is an anachronism, practically impossible to obey. When asked how he administers this confused and confusing regulation, the District Commander answered, "I interpret it according to circumstances." That answer confirmed that the rule cannot be enforced fairly and non-discriminatorily. In this Arbitrator's opinion, it is a nullity. But that fact does not tie the Patrol's hands or prevent it from issuing discipline for a Trooper's improper on-duty contact with the opposite sex. With or without a rule, the Employer clearly has that authority.

The real issue in this controversy is whether and to what extent the Patrol was empowered to discipline Grievant for the way in which he conducted his private life. Arbitral decisions on this subject are legion. It is generally recognized that an employer is not entitled to invade an employee's private business unless the conduct pours over into the workplace, adversely influencing the employee's job or the employer's mission and effectiveness.

The line between what is and is not an employer's legitimate concern is not cleanly discernable in every case. It depends in large part upon the nature of the business and the employee's participation in it. A sweeper in a large plant, for example, is given more personal leeway than a salesperson whose job is to uphold a company image -- or an individual invested with public trust.

Highway Patrol Troopers are especially vulnerable to intrusions into their private lives. They stand out as quintessential police officers; their uniform represents public service, social commitment, pride, and integrity. Their Code of Ethics states as much:

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> They shall so conduct their private and public life that the public will regard them as examples of stability, fidelity and morality.

For some unexplained reason, Grievant chose not to keep his personal life personal. He merged it with his working life and thereby authorized the Patrol to interfere. He parked his cruiser in his paramour's driveway for long periods of time, in daylight, for all the world to see. While in uniform, he saw her at her workplace.

One morning he openly kissed her in the Medical Center parking lot. His actions flew in the face of the Code of Ethics, his status as a Trooper, and common sense. But his salvation occurred months before the discipline was imposed; when he ended the visits and admitted to the District Commander that he had been wrong. All the evidence points to the fact that by late August, 1990, Grievant came to his senses, was chastened, and had adjusted his conduct.

Grievant's self-correction is of significance to this dispute and the underlying philosophy of "discipline for just cause." Unless misconduct is so violent or blatantly destructive of the employment relationship as to authorize summary discharge, the predominant goal of discipline for just cause is to correct behavior and restore an employee to a state of productivity and compliance with rules. The amount of discipline which can be justified is only that which will be likely to effect these purposes. Just cause is exceeded when a penalty is markedly greater than necessary and stands out as punitive rather than corrective. The Agreement between these parties underscores this precept in Article 19, §19.05 which requires the Employer to follow the principles of progressive discipline and mandates that penalties be commensurate with offenses.

What was the commensurate penalty for Grievant's foolishness in mixing his work life and private life? He had already admitted the wrong and corrected his own behavior. Moreover, the evidence establishes that, luckily, his conduct did not have a truly adverse impact on the Patrol -- he stopped in time. Added to those factors were his nineteen years of exemplary service. In these circumstances, the most the Patrol was contractually authorized to do was impose a verbal reprimand to confirm that reemergence of such on-duty activity

would not be tolerated. A more severe penalty most clearly would have been outside the bounds of just cause.

Grievant's prolonged times away from his job between May and August is a different matter. It was serious misconduct which earned more than a "slap on the wrist." Its seriousness was exacerbated by the fact that Grievant was enjoying his girlfriend's company at times when he knew he was expected and trusted to be on his line assignment protecting safety and lives. But was a four-week suspension in keeping with just cause and/or commensurate discipline?

In the arbitration, the District Commander was asked why he chose a twenty-day suspension rather than something smaller (or larger). His answer was surprising. He said: "He got the twenty-day suspension because he was twenty to forty times not working for the State of Ohio when he was paid by the State of Ohio to be an Ohio State Trooper, on duty and in uniform, working traffic." The reasoning is overtly flawed. First, the evidence does not confirm that Grievant left his post on twenty occasions longer than permitted. Thus, even if the Arbitrator were to accept the Commander's rationale, it would not justify so long a suspension. Second, neither just cause nor commensurate principles sanction discipline on an eye-for-an-eye, tooth-for-a-tooth basis. That may be biblical justice, but it is not industrial justice. Just cause, which controls all discipline issued by the Patrol -- even commensurate discipline -- does not allow retaliation, vengeance, or retribution. It allows for only a <u>corrective</u> penalty.

The Arbitrator finds that the twenty-day suspension was inordinately harsh. It exceeded the goal of correction by a wide expanse. The Patrol was contractually obliged to measure the seriousness of

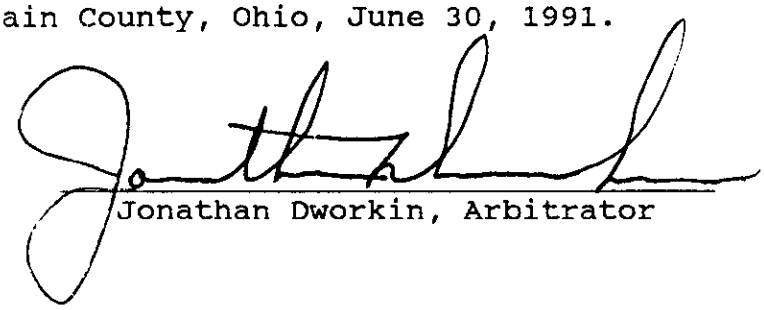
the misconduct against the Employee's record and answer the question: What amount of discipline will demonstrate Management's disapproval of Grievant's behavior, correspond with the seriousness of the offense, and restore this individual to the productive, reliable Trooper he once was? Had the matter been dealt with that way, it is doubtful that the suspension would have been longer than three days. In the Arbitrator's opinion, that is all just cause will tolerate.

AWARD

The grievance is sustained in part and denied in part. The Patrol is authorized to issue Grievant a verbal reprimand for "Conduct Unbecoming an Officer," and a three-day disciplinary suspension for "Absence from Assignment Without Authorization."

Except as modified, the twenty-day suspension shall be set aside, expunged from Patrol records, and the Employee shall be made whole for resulting wage and benefit losses.

Decision Issued at Lorain County, Ohio, June 30, 1991.



Jonathan Dworkin, Arbitrator