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

#713

In The Matter of Arbitration
Between:

THE STATE OF OHIO
Department of Highway Safety
State Highway Patrol
Jackson, Ohio Post

-and-

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

* Case No 15 03(91-04-24)048-04-01

* Decision Issued:
* December 31, 1991

APPEARANCES

FOR THE STATE

Captain John Demaree	Patrol Advocate
Elliot Fishman	Legal Counsel
Captain Wendell Webb	Management Representative
Lieutenant R.L. Klier	Jackson Post Commander
Sergeant Maria Stiffler	Jackson, Ohio Police

FOR THE UNION

Deborah Bukovan	FOP/OLC Attorney
Tanya Poteet	FOP/OLC Attorney
Edward F. Baker	Staff Representative
Jim Roberts	Representative
Jack L. Riley	Grievant
Frances Pakush	Witness
Maria Riley	Witness

ISSUE: Article 19 - Discharge for off-duty immorality and failure of good behavior; allegations of rape, attempted kidnapping, and weapon misuse.

Jonathan Dworkin, Arbitrator
9461 Vermilion Road
Amherst, Ohio 44001

SUMMARY OF DISPUTE

A six-year Radio Dispatcher employed by the Ohio State Highway Patrol was discharged for off-duty misconduct. The official charges were "immoral conduct," "dishonesty," and "failure of good behavior," each of which constitutes a statutory ground for discipline of civil-service employees.[1] The allegations behind the charges, if true, exhibited the most despicable misconduct imaginable. They include attempted kidnapping, aggravated menacing (with a loaded .357 magnum revolver), extortion, and rape, all committed against a sixteen-year-old high school student.[2]

The Employee denied every charge, insisting he hardly knew the young woman and her accusations were spurious. He grieved the dismissal and the Union appealed the grievance through the contractual Steps to arbitration. An arbitral hearing was convened in Columbus, Ohio, and the issues were joined. It was stipulated that the submission to arbitration met procedural prerequisites, that the Arbitrator was authorized to issue a conclusive award on the merits of the dispute, and that the determinant question was whether or not Grievant's removal was for just cause. The governing provisions of the Collective

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[1] *Ohio Revised Code* §124.34

[2] The disciplinary notices to Grievant and the Union stated that the purported victim was seventeen years of age. The Employer apparently was unaware that she had not passed her seventeenth birthday when the alleged events occurred. The distinction has almost no relevancy.

Bargaining Agreement between the parties are Article 18, §18.09 and Article 19, §§19.01 and 19.05. They establish that no member of the Bargaining Unit shall be disciplined or removed except for just cause and that, ordinarily, discipline will be progressive:

ARTICLE 18 - INTERNAL INVESTIGATION

. . .

§18.09 Off-Duty Status

Disciplinary action will not be taken against any employee for acts committed while off duty except for just cause.

. . .

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 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 ISSUES

The State's only direct witness was Grievant's seventeen-year-old accuser who claimed to have been the victim of his aggressions. A Jackson, Ohio Police Officer who processed a criminal complaint against Grievant also appeared on behalf of the Patrol, but she was an indirect witness. Although she added meaningful testimony, her information came exclusively from interviews with others. There was no other tangible evidence of Grievant's guilt, and her support of the Employer's case derived from her belief in the complainant's candor. The same finding applies to statements, affidavits, and investigatory reports submitted into evidence. They too depended on the presumption that Grievant's accuser was truthful.

Likewise, the Union's defense to the discharge hinged on the forthrightness of Grievant's denials. Other witnesses were called (the Employee's wife and mother-in-law) mainly to establish alibis. At best, their testimony aided the Employee's; it did not prove it or disprove the young woman's allegations. Ultimately, the dispute resolved into a credibility contest between Grievant and his purported victim. The Arbitrator's task was to try to find reality from grossly inconsistent testimony.

The credibility issue was paramount, but there were other questions the Arbitrator was obliged to consider under the just-cause standard. They included:

1. Grievant had an unblemished work record. His discharge was premised on allegations of off-duty wrongdoing. Although the Agreement acknowledges the Patrol's power to discipline employees for immoral conduct committed off the job, such authority is restricted to circumstances where the violation adversely affects the Employer's reputation or mission, and/or impairs the aggrieved employee's ability to perform his/her job.

2. The progressive-discipline mandate in §19.05 cannot be ignored. It refines the meaning of "just cause," requiring the Patrol to make every reasonable effort to salvage salvageable employees. Assuming Grievant did commit off-duty rape, attempted kidnapping, and aggravated menacing, the Arbitrator must still examine the possibility that progressive rather than terminal discipline should have been applied.

THE EMPLOYER'S EVIDENCE AND CONTENTIONS

The State's chief witness testified at length about a dating foursome that began early in November, 1990, when she and her girlfriend T---- met Grievant at a convenience store in Jackson, Ohio. T---- and Grievant were attracted to one another and began dating. Two nights later, Grievant introduced the witness to a male acquaintance, R------ who worked at a local Sunoco gas station. From then

on, the four "double dated" regularly. The dates consisted mainly of driving to a lake on the border between Jackson and Pike Counties and engaging in sexual intercourse.

According to the witness, this routine continued for approximately three and one-half months, although she was never a willing participant. It was interrupted briefly after two weeks when T---- discovered that Grievant was married. At the same time, the witness attempted to quit her relationship with R------. She did not particularly like him and already had a boyfriend her own age. It was at that point that Grievant allegedly threatened the witness, coercing her to continue giving R------ sex on demand. The threat was that Grievant would use his influence as an employee of the Highway Patrol; he would speak to a local Trooper who, at his bidding, would find reasons to have the witness' driver's license suspended.

The witness testified that she resisted R------ every time but eventually gave in to Grievant's intimidation. In the cold light of reality, the threat appears to have been toothless. It is difficult to believe that it could compel a woman to go on for months in a relationship she detested. But it is a mistake for a fifty-five-year-old Arbitrator to assert his reality to interpret what was or was not enough to influence a sixteen-year-old girl. Her driver's license was important to her, and the chance she could lose it was heightened by the fact that she was already on court probation for truancy. At any rate, she gave in. It seems that T----'s resolve to terminate

her relationship softened as well, because (according to the witness' testimony) she continued going out with Grievant.

The complainant indicated that the relationship was internally monogamous; that is, when the four were together, Grievant was exclusively with T---- and the witness was exclusively with R------. Several times a week they would drive out to the lake in Grievant's pickup truck and have sex. Their "dates" were enhanced by a bottle of bourbon Grievant kept under the front seat; the witness maintained that they also were compelled by occasional physical abuse and a .357 magnum in the glove compartment. An extraordinary aspect of the witness' testimony was her statement that she and T---- were sometimes able to obtain relief from Grievant's and R------'s attentions by paying them money. She said that $100 would buy them a week of being left alone; they secured the money when they could by stealing from their parents.

On February 25, 1991, the one-to-one aspect of the relationships ended. That is the night the witness claims Grievant turned to her instead of T---- and raped her. She said that she was driving to her regular boyfriend's house with T---- when Grievant and R------ came upon them and forced her car into a ditch. The women left their vehicle and joined the men in Grievant's truck. The testimony does not indicate whether they did so willingly or under duress. The four then proceeded to their usual spot. The witness and R------ left the truck (although it was a very cold night) and R------ tried to

remove her clothes. According to her testimony, she fought against him with some success.

At this juncture, there was a noteworthy difference between the statement she gave the Jackson County Sheriff's Department in April, 1991, and what she testified to in the arbitration hearing in August. She told the Officer that the foursome simply switched partners. Her arbitration testimony was more lurid. She said that while she was fighting R------ off, Grievant jumped from the truck with his revolver in his hand, shouting, "Here, bitch, I'll show you what a **real** man can do!" Then he fired the revolver into the air twice, threw her to the ground, and raped her -- all the while holding the weapon to her head. She stopped struggling and submitted because she feared for her life.

Afterwards, they returned to the witness' car, Grievant pulled it from the ditch with his truck, and the women went on their way. No one said anything about the incident for more than a month, then the accuser told her mother. Her mother reported it to the Sheriff, statements were taken, and an investigation commenced.

When the arbitration hearing took place, the rape allegations were still being investigated. No criminal charges had been brought against Grievant on that account. However, the City of Jackson had charged him with a related misdemeanor. According to the State's evidence, when Grievant learned that the complainant and her mother had made statements to the Sheriff, he made threatening telephone

calls, offered a bribe of $100,000 to drop the action, and engaged in other disturbing behavior. On April 4 he purportedly accosted his accuser in a parking lot. When she refused to talk with him or comply with his request to get into his vehicle, he allegedly grabbed her and physically forced her towards the truck. But he backed off when she pulled a .22 pistol from her purse, and she was able to drive away. This was the substance of the attempted kidnapping portion of charges leading to Grievant's dismissal. On the day of the incident, the young woman and her mother filed a criminal affidavit against Grievant. The case was heard on June 19, 1991 in the Jackson County Municipal Court. It seems that the complainant declined to follow through; the judgement was, "Dismissed at complaining witness cost, upon motion of the City."

* * *

As soon as the Patrol learned of the complainant's allegations, it began the process to terminate Grievant's employment. At Step 3 of the grievance, the Employee denied the charges but, according to the Employer, that was to be expected. In the State's judgment, the denials were "self serving, intended to protect his marriage, and his employment."[3] The Patrol pursued the discharge, confident that the allegations against Grievant were true. It continues to

[3] Patrol opening statement.

hold that belief, and concludes that nothing less than removal will suffice to protect the Employer and its public purpose. It explains in its opening statement:

> The issue is one of public trust and the grievant's personal credibility with supervisors, fellow employees and the public. A law enforcement employer cannot be expected to tolerate the behaviors displayed by the grievant. The respect and reputation of the organization is contingent upon the on and off duty behavior of all employees. Without public trust a law enforcement agency cannot fulfill its mission. This is especially critical in a non-metropolitan area where the behavior of public employees is known and scrutinized by a large segment of the local population.

In presenting its case, the Employer anticipated a Union argument tied to Grievant's job classification. Uncompromising behavioral expectations might be appropriate for members of the Patrol directly involved in law-enforcement activities -- the State Troopers -- but Grievant was not a Trooper. He was a Dispatcher whose contact with the public was by telephone. He had a degree of anonymity which could have allowed him to retain his job without doing harm to the Patrol's image.

The State urged that the Arbitrator not adopt the argument, pointing out that it conflicts with a decision of the Ohio Supreme Court, *Warrensville Heights vs Jennings*, 58 Ohio St. 3d 206 (1991). *Jennings* involved the discharge of a municipal police-fire dispatcher for refusing to take a lie-detector test. The dispatcher had been accused of using

drugs, and was ordered to submit to polygraph testing to establish his claim of innocence. After his removal, he applied for unemployment compensation. His claim was granted by the Ohio Bureau of Employment Services on the principle that a public employee's refusal to take a polygraph examination does not constitute just cause for discharge. The decision was confirmed by both the common pleas and appeals courts. The Supreme Court reversed. It noted that a police officer's discharge on the same grounds would have been justified, and a dispatcher could be held to the same standards as any other law-enforcement personnel:

> Although Jennings was not a patrol officer, his position as a dispatcher made him an integral member of the department's law enforcement efforts. It could be expected that the police department would demand that he meet the same high standard of conduct as other officers.[4]

In line with *Jennings*, the State contends that Highway Patrol Dispatchers occupy positions of trust and represent law-enforcement values the same as Troopers. Their conduct, on and off the job, must never impugn the Employer or draw away from its obligations to the people of Ohio. Grievant's actions so severely breached these principles that he literally canceled the employment relationship and made his removal a foregone conclusion. The Employer contends that it

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[4] 58 Ohio St. 3d 206, 211.

had ample just cause for the discharge, and the grievance should be denied.

THE UNION'S EVIDENCE AND CONTENTIONS

Grievant made a single admission. On one occasion, he did embrace T---- at the Sunoco station where his friend worked, but the relationship never materialized. He testified, "I broke it off before it got started. I'm a married man!" Beyond that, he resolutely denied each and every allegation. He said he never dated or went out with either young woman; he never had sex with the complainant or T----; neither of them were ever in his truck; and he never went to the lake with them.

Grievant vigorously countered the allegation that he displayed and fired a .357 magnum to induce submission to his (and his friend's) sexual demands. He said he did not own such a gun -- that he did not own any gun. His wife did have a .38, short barrel police special, but he did not carry or use it, nor did he show it to T---- or his accuser.

The Union directs the Arbitrator's attention to the fact that the charges against Grievant are not vague. They are precise both as to accusations *and the dates when the misconduct allegedly occurred*. It is axiomatic that the Employer bears the evidentiary responsibility in this dispute and, in the Union's view, that means it must prove: 1) Grievant used a gun and physical force to rape the State's witness

on February 25, 1991; 2) Grievant waylaid and attempted to kidnap the witness on April 4, 1991. The Union contends that the charges cannot be proved because Grievant and other witnesses can account for his time on both days. His wife's mother appeared on behalf of the Union and testified that she knew generally of her son-in-law's activities and whereabouts for a period of two and one-half months beginning mid-February. Her knowledge was based on the fact that he lived with her throughout that period. Normally, she lives out of state with her mother, but she keeps a home in Jackson, Ohio to which she regularly returns. When in Jackson, she enjoys having her family close, and her daughter, Grievant, and their baby customarily move in with her. She returned to Jackson in mid-February, 1991, and Grievant stayed with her until early May.

Of course, the mother-in-law did not monitor Grievant's every move for two and one-half months. His work began at 10:00 p.m., and he did not always stay at home until leaving for work. The witness readily admitted that he went out from time to time and her knowledge of where he went was limited to what he told her. But she did claim to know definitely where he was on the critical dates of February 25 and April 4. She testified he was home both days.

On February 25, he was severely ill with bronchitis and walking pneumonia. His wife and baby were also ill and all three required medical attention. They stayed at home on that day until it was time for Grievant to go to work. Grievant's wife backed up her mother's

testimony concerning February 25 and produced receipts for a doctor's visit and prescriptions. They show that Grievant did go to the doctor, was given a shot, and filled prescriptions for a decongestant and an antibiotic. While this evidence supports the alibi defense for the date of the alleged rape, it does not positively prove it. The receipts were dated February 27, not February 25.

The Employee's mother-in-law remembered April 4 because it was the day after a party for her grandchild's (Grievant's child) third birthday. She testified that upon returning from work, he slept all day. The statement was verified by Grievant's wife who maintained she awoke him when she came home from her job shortly after 6:00 p.m. Obviously Grievant could not have been in contact with his accuser on April 4 if his wife and mother-in-law were truthful. The attempted abduction allegedly occurred at 11:00 a.m.

The Union noted a number of discrepancies in the accuser's testimony, particularly the allegation that Grievant was in uniform when he committed the rape on February 25. That could not have been so, according to Union witnesses. Grievant did not wear his uniform to work; he wore street clothes and changed when he arrived at the post. His wife claimed that he began doing that sometime in February to prevent the uniform from becoming dirty when he handled the baby.

The mother-in-law was the Union's chief alibi witness. Her testimony was persuasive initially, but did not hold up well under cross-examination. It turned out to be much less certain than at

first, especially as to times and dates. Even so, the Union insists that the grievance must be sustained. It regards the real strength of its case as consisting of the weaknesses in the Employer's. Aside from Grievant and the accuser, two people could have testified whether or not the rape occurred. According to the accuser, T---- and R------ were there and saw the whole thing. Neither was called. T---- was the accuser's "best friend" yet she would not appear in support of the Patrol's case. When asked to explain T----'s absence, the accuser said, "she's so in love with [Grievant], she won't do anything to hurt him." The Union advocate characterized the assertion as "incredible, even laughable." It is fantastic, according to the Union, that T---- sat in the truck while the Employee raped her best friend and refused to come forward because she "loves Grievant."

The Patrol depended totally on the testimony of an inarticulate seventeen-year old -- testimony that conflicted with previous written statements in significant respects. The Union emphasizes that it was not its obligation to prove Grievant innocent; it was the Employer's obligation to prove his guilt. In the Union's judgment, the evidentiary burden was not met and it follows that the award must reinstate Grievant with full compensation for lost wages and benefits.

OPINION

The evidence contains a good deal of substantive material supporting the Union's allegation that significant -- perhaps fatal discrepancies and inconsistencies tainted the testimony of the State's only direct witness. The contradictions stand out most glaringly when one compares what she said in the arbitration hearing to the sworn affidavit she gave the Jackson County Deputy Sheriff nearly five months earlier. The following are noteworthy:

1. The witness' description of the alleged rape in the hearing was that she and her date R------ left the truck and Grievant and T---- remained inside; that while she was fighting off R------'s advances, the Employee jumped from the truck and raped her. In her statement to the Jackson County Deputy Sheriff on April 1, 1991, she answered questions on that subject differently:

Q: How many times have you had sexual intercourse with [Grievant]?

A: Once.

Q: And have all the other times been with R------?

A: Yes.

Q: What led you to have sex with [Grievant]?

A: He told me because I was fighting with R------ that he wanted to show me what a real man could do.

Q: Has at any time [Grievant] been in any kind of uniform?

A: Yes.

Q: How many times?

A: Once, on February 25.

Q: Why does February 25 Stick out?

A: *Cause that's when we switched.* [Italics added.]

2. The witness said she saw Grievant fire a gun once, on February 25 in conjunction with the rape. Her affidavit contained an important contrast:

Q: Now, have you ever seen any weapons out there [at the lake]?

A: Yes. [Grievant] has a 357 magnum. It's got a silver barrel and it's got a brown handle. R------ has a butterfly knife and it's got a bunch of silver blades with a pearl handle.

Q: Have you ever seen this gun discharged?

A: Yes.

Q: And what were the circumstances that it was discharged?

A: *My friend, T----, got a little drunk on Bourbon and she said to [Grievant] that he wouldn't shoot her and he knew it. And he said, "Would you little ladies want to see it?" It was loaded. And T---- said yes. And he shot up into the air.* [Emphasis added.]

3. With regard to how the February 25 incident began, the witness testified that she and T---- were driving to her boyfriend's when Grievant forced her car off the road. That is not what she told the Deputy. Her statement was that she was returning *from* her boyfriend's home and she stopped her car to *avoid* being run off the road:

Q: How did you guys happen to be out in the area of the lake?

A: I was going home from his [her boyfriend's] house.

Q: And did you stop for them?

A: If I didn't they'd have run us off the road.

Another puzzling aspect of the Employer's case has to do with the dismissal of charges against Grievant by the Jackson County Municipal Court. The prosecution was initiated by an affidavit in which the accuser recounted a singularly brutal, terrifying experience:

> On this date [April 4, 1991] around 11:10 a.m. I went to my GED Classes, held at the FOP lodge in Wood Ave. in Jackson, Ohio. As soon as I arrived [Grievant] pulled into the parking lot. He was driving the brown Ford. He was alone. He drove in real fast, sort of squealing in. By then I had started to leave my car and was half way out. He walked over to my car real fast and grabbed my left arm. He said you're coming with me. I said "no" and he said oh yes you are. He started to jerk me out of the car but I pulled a gun on him. I had the gun in my purse, it's a 25 automatic (Raven). When he saw the gun he backed up, he told me not to shoot him. I said, "If you don't get the fuck away from me I will". He said alright and left loose of my arm and started to back up. Then he turned and ran back to his truck. He went in on the driver's side then reached over like he was going for his glove box. At that point I backed up and left in my car.
>
> Q. Why did you pull the gun on him?
>
> Because he was jerking me out of the car and because why at a friend's house (T----) I had spoke with him on the phone and he told me then that he wanted me to drop the charges of the rape investigation that was going on in Pike Co. I told him that I wasn't backing down. He also said, "do you remember the 357" and I said "yeah" and he said, "do you remember the bullets that was in it" and I said, "yeah" and he said "if you don't stop this shit then you're gonna be eatin one of them". He got mad because I wasn't gonna back down, that's why I was afraid of him today. He told me that I had two days to drop the charges. I thought he was coming to hurt me today. I had this phone conversation yesterday afternoon.

. . .

Q. Do you usually carry a gun around with you?

Ans. No just since he started threatening me.

Q. How long have you been carrying the gun around?

Ans. About one week (off and on) I would have with me during the day and in the evenings I would leave it with my mother.

Q. Has [Grievant] been harassing you in other ways?

Ans. Yes, he's been coming by the house. He'll stop by the driveway and squeal tires. He goes . . . near my house and runs his motor. Since the investigation began he threaten[ed] me on the phone yesterday and what happened this morning.

The affidavit induced the police to serve a summons on Grievant that same day and pursue criminal proceedings. The case was set in the Jackson Court on Monday, April 8, 1991 at 9:00 a.m. Not only was it dismissed without a hearing, it was dismissed at complainant's costs. This was an extraordinary result, and the Arbitrator (who has some experience with Ohio courts) can conceive of only four possible explanations. Either the complainant did not appear when the case was called, or she declined to testify, or she elected to drop the complaint, or her story changed so significantly between April 4 and April 8 that a basis for prosecution no longer existed. It is possible, of course, that the accuser was driven to abandon the complaint by Grievant's threats; if that were so, however, she most certainly would have said so in the arbitration hearing. As

it stood, the dismissal was left unexplained, and it was one more weakness in the Patrol's case.

The Arbitrator is frankly mystified by the fact that T---- and R------ were totally absent from the case. They did not appear and no affidavits or statements were submitted from either of them. Even more remarkable is the fact that neither the municipal nor county law-enforcement agencies obtained statements from them, although they were investigating profoundly serious criminal charges in which R------ and T---- were material witnesses.

The parties had access to the Arbitrator's subpoena powers. They could have compelled R------ and/or T---- to testify and tell whether or not the accuser was raped on February 25. If it happened, R------ and T---- were there and could have told what they saw. If Grievant is totally innocent, as he asserts, and never had other than the most casual contact with the accuser, R------ and T---- knew that as well.

These observations are conspicuous; they do not stem from some brilliant arbitral insight. The parties' Representatives were definitely aware that the absences of T---- and R------ from the hearing magnified the credibility issue, leaving a less than trustworthy basis for the Arbitrator to detect which witness lied, which told the truth, or whether both told partial truths.

The Representatives were also aware of the principle that the failure of a party to offer essential evidence and/or witnesses which

it has the power to produce entitles a trier of facts to presume that the evidence and/or testimony would have been adverse to the party's interests. The Union focuses on this principle. It contends that the State could have called the absent witnesses, especially T---- who was the accuser's "best friend." Its failure to do so, according to the Union, requires the arbitral conclusion that they would have refuted the charges against Grievant.

The Union's position that the Arbitrator should find the shortage of evidence fatal to the State's case is based on the premise that the Employer had the burden of proof. The argument is correct to a point. In a discipline dispute, the Employer does have an <u>initial</u> responsibility to establish a case against an aggrieved employee. But it is not an absolute, immutable, continuing responsibility; rather it is the duty to present evidence sufficient to establish the fact in question (prima facie evidence). Once that is accomplished, it becomes the Union's burden to rebut. Thereafter, the so-called "burden of proof" shifts back and forth; each side must deal with relevant evidence submitted by the other.

The Employer made a prima facie case through the testimony of its direct witness. Admittedly there were sizable holes in the testimony. Some of the inconsistencies were poorly explained; others where ignored altogether. Even so, the testimony was enough to turn the burden of proof over to the Union. The Employer's case suffered from

the failure to present R------ and/or T----; to a lesser extent, so did the Union's.

To complicate matters, the Arbitrator's task was to weigh the evidence. He had neither the duty nor the right to accept either side as true or false summarily. He had no mechanical resources to assess the testimony. His obligation was analytical -- to critically evaluate using his intellect and experience to determine the probabilities.

Frankly, the Arbitrator did not entirely believe any of the direct testimony. It was his judgment that the State's witness exaggerated to a significant degree. Her claim that she was forced to have sex with Grievant was refuted by her earlier statement that the couples switched partners on February 25. The Arbitrator could not determine whether Grievant fired a pistol to impress T---- or rape the witness. These were monumental conflicts. So long as they continued to exist, the Arbitrator had no choice but to find that the State did not prove Grievant culpable on either charge. He also did not believe Grievant's unequivocal denials. To do so, he would have to find that the accuser's prolonged testimony was totally fabricated. It was too intricate and detailed for that -- despite its inconsistencies, it was congruous in too many aspects.

To decide this dispute, the Arbitrator need make no finding on whether or not Grievant carried on a relationship with T----. His employment was not terminated for that. The charges had to do with

his aggressions against the accuser and their nexus to his job. In the Arbitrator's opinion, the evidence establishes a reasonable probability that Grievant did use his connection with the Highway Patrol to coerce the accuser to date and give sex to his friend, R------. Whether or not he was ever in uniform in the young women's presence is immaterial. They knew he was a Patrol official, and he did tell the accuser that he could have a local Trooper lift her driver's license if she did not cooperate. That act alone constituted immoral misconduct and failure of good behavior in violation of state law and implicit Patrol regulations. It might have been sufficient to support his discharge if that had been the Employer's reason for the removal. But it was not. The stated reasons were:

> It is charged that on or about February 25, 1991, while off duty but in uniform, [Grievant] had sex with a 17 year old female in rural Pike County, Ohio. The female was not a willing partner and the sex was performed under duress.
>
> It is also charged that [Grievant] attempted to abduct the same female on or about 11:00 a.m., April 4, 1991, in the City of Jackson, Ohio.
>
> It is further charged that [Grievant] carried a loaded .357 revolver concealed in his pickup truck.
>
> The preceding events represent dishonesty, immoral conduct and demonstrate the failure of good behavior on the part of [Grievant].

The State did not prove the express charges. It did prove that Grievant committed what is known in criminal law as a "lesser included

offense." Its failure to establish the specifics leave the Arbitrator no choice but to award Grievant reinstatement. In view of the Employee's demonstrated culpability for the lesser included offense and its confirmed link to his job, however, there is ample basis to award reinstatement without back pay or benefit restorations, and to convert the removal to a long-term suspension.

AWARD

The grievance is sustained in part. The Employer is directed to reinstate Grievant to his job as Highway Patrol Dispatcher forthwith. The reinstatement shall be without compensation for lost pay or benefits, and the period from the discharge to the reinstatement shall be recorded on Grievant's record as a disciplinary suspension for immoral conduct and failure of good behavior in violation of Ohio Revised Code §124.34.

Decision Issued at Lorain County, Ohio, December 31, 1991.

Jonathan Dworkin, Arbitrator