OHIO DEPARTMENT OF HIGHWAY SAFETY
DIVISION OF STATE HIGHWAY PATROL

and

FRATERNAL ORDER OF POLICE,
OHIO LABOR COUNCIL, INC.
BARGAINING UNIT 1

Re: Grievance 15-03-920906-076-04-01

Hearing held February 8, 1993 in Columbus, Ohio

Decision issued February 23, 1993, in Sylvania, Ohio

APPEARANCES

State
Lt. Richard G. Corbin, Advocate
Anne K. Van Scoy, Labor Relations Officer
Pat Mogur, OCB

Union
Gwen Callender, General Counsel
Ed Baker, Staff Representative
Tpr. Henry Korb, Grievant

Arbitrator
Douglas E. Ray

I. BACKGROUND

Grievant is a 20 year employee of the State Highway Patrol, assigned to the Hamilton Post. He is in a bargaining unit represented by the F.O.P./O.L.C., which is party to a collective bargaining agreement with the State of Ohio.

This case concerns a 15 day suspension given Grievant based on his actions in early May, 1993. Grievant had completed an accident report on a one car crash he had investigated. His supervisor, Sgt. P., reviewed the report and attached stick on notes requesting additional information and a change in one of the codes. Grievant responded to some of the written inquiries on the notes with the words, "who cares?" When Sgt. P. asked Grievant about his response and attempted to explain his request for changes, Grievant responded in a somewhat angry manner and used profanity. His responses included the response "I am not fucking changing it" and he slammed his hand down on the reports table as well. Another trooper was present in the room and witnessed the exchange.

Grievant remained upset, referring to a recent low evaluation among other things as Sgt. P. attempted to discuss the matter with him. Sgt. P. agreed to continue the discussion in the privacy of the garage. While in the garage, Grievant complained about a number of things in an angry manner and walked toward the sergeant. Grievant then

smashed his hand into a wooden door, fracturing it seriously enough to require him to be off work for four weeks.

A 15 day suspension was imposed and served from 8/19/92 to 9/9/92. A grievance was filed 9/6/92 and processed through the steps of the grievance procedure until it reached arbitration. An arbitration hearing was held February 8, 1993, in Columbus, Ohio. The parties stipulated that the matter was properly before the arbitrator.

II. ISSUE

Was the Grievant disciplined for just cause in accordance with Article 19, Sections 19.01 and 19.05, and, if not, what shall the remedy be?

III. CONTRACT AND RULE PROVISIONS

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

Section 19.05 states that the Employer will follow principles of progressive discipline and that disciplinary action shall be commensurate with the offense. A system of progression from verbal and written reprimand, suspension and demotion or removal is set up and the contract states that more severe discipline may be imposed "if the infraction or violation merits the more severe action."

A number of rules were cited at hearing. Among them was 4501:2-6-03 (D) (3) which, under the heading of "military courtesy and respect for rank," provides that "(3)

a member shall not act or speak in an insubordinate manner to any supervisor."

IV. POSITIONS OF THE PARTIES

The parties made a number of detailed arguments at hearing. They are only briefly summarized below.

A. The State

The State argues that Grievant was properly disciplined and asks that the grievance be denied. The State points out that there is little dispute over what happened. Grievant admits that he spoke the words in question and did the actions complained of. The State argues that the incident warrants discipline for a number of reasons. It argues that Grievant was upset over his grading on a leadership potential evaluation and suggests he was looking for a fight. The sergeant, by contrast, was merely engaged in the routine process of attempting to improve an official report. The State argues that there is no excuse for Grievant's actions and that Grievant's behavior was insubordinate. The State argues that such behavior is serious, especially in a quasi-military organization where respect for rank is necessary and that such an outburst can create tension in a Post and impair its mission. The State notes that Grievant is a 20 year veteran who is familiar with the rules and need for discipline.

The State further argues that the degree of discipline was proper, noting that the progressive discipline section of the contract specifically allows the Employer to impose

more severe discipline where the action warrants it. Here, the State argues that it could have imposed a suspension of up to 90 days but took into account Grievant's long service and good disciplinary record in setting the penalty at 15 days.

With regard to the Union's arguments of disparate treatment, the State notes that it requested examples of specific instances and received none and argues that the Union has failed to specifically prove disparate treatment at hearing. The State also argues that if Grievant were frustrated by evaluations or other treatment, there are established procedures to allow his complaints to be heard.

In summary, the State argues that Grievant was insubordinate and brought discredit on the organization and that the grievance should be denied in its entirety.

B. The Union

The Union argues that the State violates both 19.01 and 19.05 in imposing discipline for what was, in essence, a minor disagreement. The Union stresses Grievant's spotless record and argues that the State's reaction was inappropriate. With regard to charges of inefficiency, the Union presented a number of witnesses who testified that the OH-2 form on which corrections were requested here was not even required for a one car accident. The Union asserts that there is no basis for charges of inefficiency.

With regard to allegations of discredit to the Division, the Union points out that no members of the public

observed or were affected by any of the events involved here and that no member of the division thought there was a discredit. The Union argues that the State has failed to prove insubordination. The Union points to a legal dictionary definition of insubordination and notes that Sgt. P. did not give Grievant a direct order, without which there could be no insubordination. The Union further argues that the State violated the progressive discipline sections of the contract.

The Union also alleges that Grievant is a victim of disparate treatment and that the discipline imposed here is part of a pattern of discrimination imposed on Grievant due to the central role he has played in Union organization and administration. The Union presented the testimony of a number of highly respected bargaining unit members who testified that they had perceived such a pattern in training opportunities, evaluation and general treatment of Grievant. The Union further pointed to testimony indicating that profanity often occurred and was not punished in others and that anger or profanity had been shown by a captain and a lieutenant without disciplinary action. The Union further stresses that Lt. B., who investigated the case, did not appear as a witness to explain why a 15 day suspension was imposed and argued that its evidence established that Lt. B. had, in the past, treated Grievant in a discriminatory manner.

With regard to the incident in the garage which resulted in Grievant injuring his hand, the Union notes that Sgt. P. wanted to let Grievant "vent" his feelings and that the incident did not involve insubordination.

In summary, the Union argues that the discipline was unjustified. It asks that the grievance be sustained and that the Grievant be reimbursed for the 15 days' pay lost.

V. DECISION AND ANALYSIS

This is a difficult case. It was hard fought on both sides, with the Union presenting eight witnesses. Both sides made thorough arguments. The arbitrator has reviewed the arguments of the parties, the collective bargaining agreement, the testimony of witnesses, and the exhibits introduced at hearing in reaching the decisions which follow.

1. The arbitrator believes that the State has established a basis for some discipline. The arbitrator is convinced that an incident of insubordination occurred on May 4, 1992 in the exchanges between Grievant and his supervisor. This holding is not based on the mere existence of profanity in the exchanges. The arbitrator understands that profanity is sometimes used by many people and that the incident in question was not overheard or observed by the public. Nor is this ruling based on the fact that Grievant did not agree with Sgt. P. over what information was necessary on the report. One can discuss matters without necessarily being engaged in insubordination.

The arbitrator does believe, however, that Grievant stepped over an important line when he said to Sgt. P. something to the effect of "I'm not going to change it, and who cares anyway" combined with his later loudly expressed statement with his hand firmly slapping the table that "I'm not fucking changing it." Other profanity was used as well. In the circumstances, the arbitrator believes that Grievant's actions violated Rule 4501:2-6-03 (D) (3), "A member shall not act or speak in an insubordinate manner to any supervisor." From the circumstances, from the tone, from the volume and the actions accompanying the words, Grievant did not show "military courtesy and respect for rank." Such actions could easily constitute insubordination in an industrial job. In a quasi-military organization where military type courtesy and respect are needed, these actions went over the line.

It is important that these were not joking phrases used in a friendly moment. Grievant admitted he was angry. It is also important that he was not improperly provoked by Sgt. P. The Sergeant was not yelling at him, swearing at him or impugning his character or competence. Sgt. P. testified that the Post had been criticized for not having complete enough reports and he was trying to explain to Grievant what information he wanted. He was calm throughout. Whether Grievant was right or wrong about whether such information was usually needed in such a report is not material. His supervisor wanted to discuss it with

him and Grievant reacted in "an insubordinate manner," in the words of the Rule.

2. Despite the above finding, the arbitrator does not believe that he can uphold the entire 15 day suspension. The reason for this is that the arbitrator finds that the Grievant was suspended on the basis of more charges than the one found proven. The July 16 Statement of Charges, the July 22 Notice of Suspension and the August 22 report of the disciplinary hearing Meeting Officer all make clear that, in addition to being charged with insubordination for loudly refusing to make corrections to the report and swearing at the sergeant, Grievant was charged with "inefficiency" in failing to fully and completely investigate a traffic crash on May 2, 1992. Further, striking the wooden door and breaking his hand appears to be part of the charge of insubordination.

The arbitrator finds that the charge of inefficiency in failing to fully and completely investigate a traffic crash has not been proven. The arbitrator credits the testimony of Union witnesses as to the accepted method of investigating one car auto crashes and the accepted method for completing forms. Grievant was within these parameters. The fact that Sgt. P. wanted additional information so that Post reports would be more complete does not at all establish that Grievant's investigation was in any way improper. It is not unusual for supervisors to want additional information.

The arbitrator further finds that the continuance of the discussion in the garage during which Grievant became upset and smashed his fist into a wooden door is not grounds for discipline under the particular circumstances of this case. Sgt. P. testified that he agreed to go out to the garage at Grievant's suggestion. He gave no order that Grievant was to sit down or stop talking. Quite to the contrary, he testified that he wanted to give Grievant a chance to "vent" his feelings and that his goal was to try to let Grievant talk and calm down. Sgt. P. seemed to be acting like a competent and caring supervisor. It would not be appropriate, however, to effectively encourage Grievant to express his frustrations and then have the Department punish Grievant for having done so in the garage. From testimony, it did not appear that he threatened Sgt. P. and it appeared that his frustration and remarks in the garage were directed to how he had been treated by the Department and other supervisors, not Sgt. P. Indeed, Grievant said to Sgt. P. shortly after he hurt his hand, "It wasn't you," and the Sergeant stated on cross examination that he believed that. The arbitrator does not believe that Grievant hurt his hand on purpose in an effort to get back at the Department.

3. The Union has argued that this is a case of disparate treatment in that others, including high ranking officers, have used profanity or lost their tempers without suffering discipline and that other troopers have used profanity and have disagreed with their supervisors. The arbitrator does

not find disparate treatment sufficient to invalidate all discipline here. There was no testimony of individuals loudly confronting supervisors in quite the manner used here. Use of profanity, standing alone, would be a different case.

4. The Union has argued that Grievant has been singled out due to his leadership role in Union activities and that this discipline and the extent of the penalty are part of a pattern of discrimination against him. This arbitrator does not have jurisdiction over allegations concerning leadership evaluations or training opportunities. If there was specific evidence that other troopers not so involved in the Union had committed similarly insubordinate actions with lesser or no punishment, then the arbitrator would uphold the accusation. In the absence of directly comparable proof, however, the arbitrator is unable to make a finding on this issue.

The arbitrator recognizes that a number of long term and highly respected bargaining unit members took the witness stand to share their belief that Grievant has not been treated fairly for some time. Absent direct evidence related to this case, however, the arbitrator cannot act.

The Union did provide evidence that Lt. B., who conducted the investigation that led to the 15 day suspension, had apparently singled out Grievant for a written study of his work habits. The matter was apparently dropped, however, when Grievant and Lt. B. discussed the

matter and Grievant convinced Lt. B. that his time had been spent on work related matters. Standing alone, this does not establish bias or hostility toward Grievant. By contrast, the Union did seem to establish that Lt. R. had hostility toward Grievant. Lt. R., however, had nothing to do with the investigation, the findings or the recommendation of the 15 day suspension. Thus, whether or not he was hostile toward Grievant, he was not involved in this discipline.

5. The Union argues that a suspension violated the contractual agreement for progressive discipline. The arbitrator finds, however, that there was insubordination serious enough to allow the Employer to impose a suspension. Section 19.05 allows more severe discipline if warranted by the infraction.

6. The length of the suspension is another matter. Just as the Union did not present evidence of insubordination cases in which lighter or no penalties were imposed, the State did not present evidence of insubordination cases in which heavier or similar penalties were involved. Perhaps there are few insubordination cases with which to compare. As noted above, the arbitrator reads the Statement of Charges and Notice of Discipline as being based on alleged inefficiency in investigation as well as on insubordination. If a person is charged with two or three things, and only one is proven, it stands to reason that the discipline imposed might have been lighter had this been known at the

outset. Lt. B., who did the original investigation, did not testify aand thus there was no testimony to why 15 days was the chosen penalty. Although the State argues that it has already factored in Grievant's good disciplinary record and long service in setting the penalty, the arbitrator does not believe that it factored in the possibility that some of its charges would be found unsupported. For this reason, the arbitrator believes that the suspension must be reduced from a 15 day suspension to a 5 day suspension and Grievant made whole for his losses.

7. In summary, the arbitrator finds that the State has established just cause for a 5 day suspension. It is very important in an organization like the State Highway Patrol that people not react to supervisors in the manner in which Grievant reacted to Sgt. P. The arbitrator understands that Grievant has a good record with the State, that he reacted out of frustration, and that he is a person highly valued by the Union. Nonetheless, the arbitrator believes that to not uphold some kind of suspension here would send an inappropriate message.

By the same token, the arbitrator finds that charges of inefficiency against Grievant were unfounded and that there is not just cause for the 15 day suspension served. The suspension is to be converted to a 5 day suspension and the Grievant made whole.

VI. AWARD

The grievance is granted in part. The 15 day suspension is to be converted to a 5 day suspension and Grievant made whole for the 10 days.

February 23, 1993

Sylvania, Ohio, County of Lucas

Douglas E. Ray, Arbitrator