

ARBITRATION

In the Matter of Arbitration : Case No. 15-03-91~~0315~~-032-04-01
Between :
THE STATE OF OHIO : GRIEVANCE OF BENJAMIN
And : RICHARDSON
THE FRATERNAL ORDER OF POLICE : DECISION AND AWARD
OHIO LABOR COUNCIL, INC. :
UNIT I, :
:

This matter was heard on April 14, 1993 in Columbus, Ohio.

Appearances:For the State:

Anne K. Van Scoy, Advocate
Teri Decher, OCB
Robert A. Layman, Witness
Major Don G. Goodman, Witness

For the F.O.P.:

Gwen Callender, General Counsel
June Baldini
Benjamin W. Richardson, Grievant
Jim Roberts
Daniel Thomas

I. INTRODUCTION

The State of Ohio Highway Patrol ("Employer") and the Fraternal Order of Police, Ohio Labor Council, Inc. Unit I ("FOP") are parties to a Collective Bargaining Agreement effective February 1, 1992 until February 28, 1994. ARTICLE 20 contains the grievance procedure with multiple grievance steps leading to arbitration. The undersigned was selected as the Arbitrator pursuant to Section 20.08 and the parties stipulated that all procedural steps have been complied with and the matter is properly before this Arbitrator for a decision. Section 20.085 of the Agreement sets forth the limitations upon the Arbitrator. The Arbitrator shall have no power to add to, subtract from or modify any of the terms of the Agreement, nor shall the Arbitrator impose on either party a limitation or obligation not specifically required by the language of the Agreement.

The grievance in this case was filed by Ben Richardson on January 27, 1993. The Grievant alleges that the Employer violated the Collective Bargaining Agreement by issuing the Grievant a ten day disciplinary suspension for misconduct. Specifically, the Grievant alleges that the ten day suspension was without just cause under Section 19.01 of the Agreement, that the suspension was not commensurate with the offense and that the Grievant's conduct did not merit the severity of the discipline. The Employer contends that the discipline was warranted and that the Grievant violated the Collective Bargaining Agreement, work rules and the Code of

Ethics of the Highway Patrol because the Grievant engaged in serious off-duty misconduct.

II. APPLICABLE CONTRACT LANGUAGE

ARTICLE 4 - MANAGEMENT RIGHTS

Except to the extent modified by this Agreement, the Employer reserves exclusively all of the inherent rights and authority to manage and operate its facilities and program. The exclusive rights and authority of management include specifically, but are not limited to the following:

5. Suspend, discipline, demote, or discharge for just cause,;
7. Determine the overall mission of the employer as a unit of government;
8. Effectively manage the work force;
9. Take actions to carry out the mission of the public employer as a governmental unit;
12. Determine and promulgate the standards of quality and work performance to be maintained;

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.

19.04 Pre-suspension or Pre-termination Meeting

When the Employer initiates disciplinary action which is covered by this Article, written notice of a pre-disciplinary meeting shall be given to the employee who is the subject of the pending discipline. Written notice shall include a statement of the charges, recommended disciplinary action, a summary of the evidence being brought against the employee and the date, time and place of the meeting. An impartial representative of the Employer shall be appointed. Said representative shall be a member of the general headquarters staff or district staff, as appointed by the Employer, who is impartial and detached

and has not been involved in the incident or investigation giving rise to the discipline.

The employee may waive this meeting. The meeting shall be scheduled no earlier than three days following the notice to the employee. Absent any extenuating circumstances failure to appear at the meeting will result in a waiver of the right to a hearing.

A member who is charged, or his/her representative, may make a written request for continuance of up to forty-eight (48) hours. Such continuance shall not be unreasonably requested nor denied. A continuance may be longer than forty-eight (48) hours if mutually agreed to by the parties.

If either party makes a tape recording or transcript of the hearing, such recording or transcript shall be made available to the other party upon request.

The employee has the right to have a representative of his/her choice present at the meeting. The employee or his/her representative and the Employer's representative have the right to cross-examine any witnesses at the meeting or have voluntary witnesses present at the meeting to offer testimony provided, however, that the Employer maintains the right to limit the witnesses' testimony to matters relevant to the proposed suspension or termination and to limit redundant testimony. The Employer shall first present the reasons for the proposed disciplinary action. The employee may, but is not required to, give testimony.

After having considered all evidence and testimony presented at the meeting, the meeting officer shall, within five days of the conclusion of the meeting, submit a written recommendation to the Employer and the employee involved.

The parties understand that this meeting is informal and not a substitute for the grievance and arbitration procedure.

The meeting shall render a decision within a reasonable period of time to accept, reject or modify the recommendation.

The employee shall be notified by the Employer for final disposition of the statement of charges.

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.

III. RULES AND REGULATIONS

The Ohio State Highway Patrol has issued a Code of Ethics, an Oath of Office and Regulations. The following provision of the Code of Ethics is applicable to this case:

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

The Regulations provide under Section 4501:2-6-02, Subsection (I) as follows:

Conduct unbecoming an officer.

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

- (1) For conduct that brings discredit to the division and/or any of its members or employees.

IV. ISSUE

The issue for determination is whether or not the Grievant was disciplined for just cause. If a contract violation is found, an appropriate make whole remedy will be issued.

V. FACTS

The facts in this case were thoroughly investigated by the Highway Patrol, and pursuant to the grievance procedure and by the Franklin County Sheriff's Department. Insofar as the Highway Patrol is concerned, a thorough investigation was conducted by Lt. Col. R. A. Curtis and Lt. R. J. Meek. Capt. D. L. Anderson found cause for discipline based upon the investigation and submitted his findings to Col. Thomas W. Rice. Col. Rice notified the Grievant of the discipline and a pre-disciplinary meeting was held before meeting officer Capt. Paul J. Rapp. The meeting officer sustained the discipline and the matter was appealed, pursuant to the Collective Bargaining Agreement to the Office of Collective Bargaining. The findings and discipline were affirmed.

The facts contained in the investigation conducted by the Highway Patrol and by the Franklin County Sheriff's Department substantially corroborate the testimony presented at the hearing before this Arbitrator. The Grievant was a two year trooper with a clean record. However, for years, the Grievant has been subjected to personal and family problems of a substantial nature. The problems were compounded by the existence of ugly racial overtones. The Grievant is a black male who is married to a white female. The Grievant's wife was married to a person named Ben

Stroup and two children were born from that marriage. After Stroup and Grievant's wife divorced, custody of the children was awarded to the wife's parents instead of to either of the parties. Stroup later obtained custody of the children. The situation remained acrimonious after the Grievant and his wife married. There were visitation disputes, child support disputes and continuing hostility between Stroup and the Grievant's family. Added to the custody and visitation disputes was the continuing racial harassment to which the Grievant was subjected. Stroup continuously harassed the Grievant's wife and her family about the racially mixed marriage. The situation became worse after the Grievant and his wife had children. On one occasion, during Christmas time in 1990, the Grievant was at his in-laws with his family for a Christmas dinner. Stroup interrupted the dinner by appearing at the residence and threatening the Grievant with physical harm. The Grievant restrained himself and the matter was resolved by permitting his step-children to leave with Stroup from the in-laws' residence.

The situation continued to boil until September 28th. The Grievant's wife, who was eight and a half months pregnant, received a call from Stroup. Stroup harassed and insulted the Grievant's wife with continuous racial slurs. When the Grievant's wife reported the incident to the Grievant, the Grievant became angered and he proceeded to call Stroup at his place of employment, a Chevrolet dealership where Stroup was the sales manager. The phone

conversation became heated and resulted in Stroup inviting the Grievant to come to the dealership to engage in an altercation.

The Grievant left his home, picked up a friend, and proceeded to go to the Chevrolet dealership to meet with Stroup. The Grievant entered the showroom, but he was immediately directed outside to the parking lot. Stroup eventually came out of the showroom on to the parking lot accompanied with a few other salesmen. Stroup and the Grievant continued their argument and a physical altercation ensued which was eventually broken up. No one was injured but the dealership alleged that an automobile was damaged during the incident.

The Grievant regained his composure and left the premises but, as he exited, he stated to Stroup that he would return after work to meet Stroup and continue the dispute.

VI. POSITION OF THE EMPLOYER

The Grievant's conduct was unbecoming to a State Highway Patrol Officer. The public display discredited the Highway Patrol because the persons who were present were likely to discover that the Grievant was a highway patrol trooper, notwithstanding that he was not in uniform and was unarmed. Further, his misconduct violated ARTICLE IX of the Code of Ethics. Highway Patrol troopers are trained to put aside their emotions and to overcome emotional situations. The Grievant allowed his emotions to overcome his judgment. He never should have sought out Stroup at the Chevrolet dealership. He should have known that a disturbance was likely to result from his appearance at the dealership.

VII. POSITION OF THE F.O.P.

There were mitigating circumstances which, when properly considered, should result in a finding that no discipline should have been issued to the Grievant, or at least some discipline less severe than the issuance of a ten day suspension. The Grievant and his family had been subject to three and a half years of harassment. The Grievant observed that his wife, who was eight and a half months pregnant, was becoming severely disturbed and upset over the continued harassment by Stroup. The grievant did not intend to engage in a physical altercation when he went to the dealership. He advised his friend to stay in the car in order to prevent an altercation from taking place. The disturbance was created entirely by Stroup and the other salesmen who assaulted the Grievant in the parking lot.

There is no evidence that the reputation of the Highway Patrol was damaged. The Grievant was out of uniform and unarmed. Customers and employees of the dealership were not aware that the Grievant was a highway patrol trooper.

The Employer should have followed the principals of progressive discipline because the Grievant had a clean work record with no prior discipline. The severe discipline of a ten day suspension was not warranted under the circumstances. The Grievant, at most, should have received only a verbal reprimand.

VIII. DISCUSSION

Employers are entitled to a certain amount of discretion with respect to the issuance of discipline. Management is entitled to

discipline employees for just cause. Just cause involves the application of work rules, regulations, employment policies and, in this case, a Code of Ethics. Arbitrators should consider whether or not these rules and policies are reasonable and whether or not they are reasonably applied to the circumstances at hand. Arbitrators should refrain from second guessing Management decisions or from applying hindsight to various discipline decisions. A Management decision on discipline should not be disturbed unless the decision is arbitrary, discriminatory, or entirely unreasonable under the existing facts and circumstances.

There is no question that the issuance of some form of discipline was appropriate in this case. The Grievant's circumstances are certainly compelling. His conduct was entirely explainable from a human reaction point of view. Nevertheless, this type of conduct, regardless of the reason, cannot be tolerated by the Highway Patrol. Each trooper agreed to be bound by the work rules, policies and the Code of Ethics when they became employed. The Grievant should have known that his appearance at the dealership and his confrontation with Stroup would result in an altercation or some other public disturbance. This is precisely the type of conduct the Highway Patrol is attempting to prevent through the issuance of its policies and rules. The extent of the damage to the Highway Patrol in this case cannot adequately be measured. It is reasonable to believe, however, that the public would obtain knowledge that an off-duty trooper engaged in this misconduct because of the public nature of the disturbance. Even if the

employees or customers did not become aware that the Grievant was a trooper, the situation resulted in the engagement of the Sheriff's Department, who received a report and later investigated the circumstances. This is precisely the type of negative exposure that the Highway Patrol is trying to prevent with the issuance of its rules and regulations.

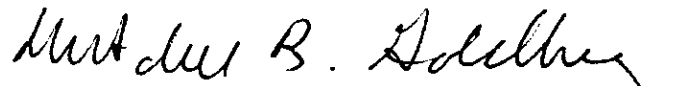
Insofar as the severity of the discipline is concerned, the principals underlying the issuance of progressive discipline are not present in this case. Progressive discipline is normally used to coerce employees to correct repeated minor infractions including but not limited to, poor workmanship, tardiness and absenteeism. It is anticipated that through the issuance of more severe discipline and the notice to employees that more severe discipline will occur unless the behavior is corrected, the situation will ultimately correct itself. Certain infractions, however, require more severe discipline. This would include severe misconduct such as fighting, theft, or missing work over a continuous period without notification to the Employer. The actions and conduct of the Grievant in this case falls into the latter category. The Employer had available to it a wide range of discipline to consider including the consideration of a demotion or removal from service. The Employer investigated the facts in a thorough manner and decided upon the issuance of a ten day suspension. Consideration was given to the mitigating factors presented by the Grievant including the three and a half years of continued racial harassment. The discipline, but for these circumstances, could have been

more severe. It cannot be found that the Employer acted in an arbitrary, discriminatory or an unreasonable manner in reaching its decision and, therefore, its decision will not be disturbed by this Arbitrator.

IX. AWARD

The grievance is denied.

Date: May 11, 1993



Mitchell B. Goldberg, Arbitrator