IN THE MATTER OF ARBITRATION

BETWEEN

The Department of Highway Safety, Division of State Highway Patrol	)	CASE NOS. 15-03-930210-014-04-01
and	)	
Fraternal Order of Police, Ohio Labor Council, Inc. - Unit 1	)	OPINION AND AWARD

APPEARANCES:

On Behalf of the Employer

Lieutenant Rick Corbin	Advocate
Michael Duco	Chief of Contract Compliance, Office of Collective Bargaining
Ann Vanscoy	Labor Relations Representative, Highway Patrol
Staff Lieutenant R. E. Brooks	Labor Relations, Highway Patrol
Staff Lieutenant M. P. Megison	Office of Training, Highway Patrol
Special Agent Ed Boldt	Federal Bureau of Investigation/ Witness
Jeff Sydenstricker	Witness
Kathy Hidey	Witness

On Behalf of the Union

Paul Cox	General Counsel, FOP/OLC, Inc.
Jim Roberts	Staff Representative, FOP/OLC, Inc.
Ron Zambori	Grievant
Renee Gelbach	Paralegal
June Baldini	Paralegal

LAWRENCE R. LOEB, Arbitrator
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I. STATEMENT OF FACTS

The events which ultimately brought this matter to arbitration began at approximately 8:50 p.m. on the evening of December 30, 1992. At the time, the Grievant, who was employed by the Ohio State Highway Patrol and assigned to the Marietta Post, had only been on active duty for approximately six months. Prior to going on active duty he had undergone twenty-six (26) weeks of training at the Highway Patrol Academy. As part of the curriculum, the Grievant received more than twelve hours of classroom instruction in the area of search and seizure and had also viewed a number of tapes on the subject. In addition, he received between twenty-two (22) and twenty-four (24) hours of instruction concerning vehicle searches.

After graduating from the Academy the Grievant spent the next three months riding with another Officer as part of his training. In the course of working with that individual, the two men made a traffic stop which resulted in the arrest of a female suspect. As part of his learning process, the Grievant was given the responsibility for securing the woman and placing her in the rear seat of the patrol cruiser. When the suspect was removed from the cruiser, someone discovered marijuana scattered in the back seat where the woman had been sitting. As a result, the Grievant was admonished for failing to insure that the suspect had not been carrying contraband at the time he placed her in the vehicle. The episode did not adversely affect the Grievant who completed his training, without any other incidents, and began patrolling by himself. He had been doing so for approximately three months at the time the events which led to his termination unfolded.

On the night in question, the Grievant was patrolling a section of Interstate 77 north of Marietta, Ohio. While he was on duty, he spotted a car going approximately 80 miles an hour in a 65 mile an hour zone and pursued it.

When the car did not respond to his initial efforts to stop it, the Grievant turned on his take down lights, after which the car slowed down, pulled over and stopped with the Grievant's patrol cruiser behind the suspect's car. While the car was slowing down, the Grievant notice the two occupants of the vehicle moving around quite a bit which made him suspicious. As a result, he had both of the occupants, a man and a woman, exit the vehicle. Shortly after they did, the Grievant noticed that both individuals had their pants unbuttoned and unzipped, although they were pulled all the way up. The Grievant shined his flashlight into the passenger compartment of the car and made a quick visual inspection of the area. He did not, however, make any attempt to look under the seats or reach into the vehicle to check any part of the "lunge area."

After looking into the vehicle and finding nothing out of the ordinary, the Grievant turned his attention to the occupants, both of whom indicated to him that they had to urinate. The Grievant asked both individuals if they had any weapons in their possession or any other items which he should know about. In response, the man, who had been driving the car, responded that he had a knife. The Grievant did not take the knife and may not have even patted down the driver before he allowed him to go down the embankment to relieve himself. With the driver down the embankment out of his sight, the Grievant took the female passenger, whose pants he characterized as being "skin tight," to the rear of his vehicle, had her turn around, pulled her pants and her underpants away from her body and shined his flashlight into her pants to see if she was hiding anything. He then had her turn around, pulled her pants out, but did not touch her underpants, and again shined his flashlight into her pants. Satisfied that she was not hiding anything in her pants, he told the woman to sit in the back of his cruiser. The Grievant got into the front driver's seat of the cruiser after which the driver of the other car reappeared and sat in the front passenger seat of the Grievant's cruiser. The Grievant requested that the driver provide him

with certain information, which the driver did. Thereafter, the Grievant told the driver to go and stand by his vehicle.

Seeing what he believed was a suspicious lump over the woman's left breast, the Grievant asked her if she had anything in her pocket. In reply, she reached into her shirt pocket and pulled out a piece of paper and showed it to the Grievant. Not satisfied, he told the woman that he would have to see if there was anything inside her bra. Believing that she had no alternative but to comply, she unbuttoned her blouse and pulled down her left bra cup, covering her left breast with her hand, but exposing the inside of the bra for the Grievant's inspection. Still not satisfied, the Grievant told the woman to remove her hand so that he could see if she was hiding anything behind it. The woman did as she was told, exposing her left breast for the Grievant's inspection. Finding nothing, he told her to get dressed, which she did. He then allowed her to leave the vehicle, telling her to send the driver back to the cruiser and allowed her to go down the embankment to relieve herself. While the driver was in the car, the Grievant issued a citation to him and then allowed the couple to go.

Almost immediately after they headed away from the Grievant's position, the female, who was upset, blurted out what the Grievant had done to her. The driver, who was her boyfriend, became upset and would have gone back to confront the Grievant had the female begged him not to. She did, however, eventually file a complaint with the Patrol, giving a written statement to a Sergeant at the Patrol's New Philadelphia Post in early January, 1993. Shortly thereafter, as part of the Patrol's investigation into the matter, Management interviewed the Grievant about the incident. During the course of that meeting, he denied any wrongdoing. On January 19, 1993, the Grievant was interviewed again, at which time he admitted that he had searched the female pretty much in the manner she described in her statement. In explanation of his actions, the Grievant stated

that his suspicion was aroused by what he felt had been excessive movement in the car as it was being pulled over and that the occupants may have been trying to hide drugs or other contraband. He further indicated that because of his suspicions, he conducted a visible search of the woman's pants to determine if she had stuffed anything into them and had her expose her left breast because of the suspicious lump which he saw while she was sitting in his cruiser.

At the conclusion of its investigation, the Employer, on February 2, 1993, charged the Grievant with violating Rules 4501:2-6-02(B)(5) and (I)(1) of the Ohio State Highway Patrol's Rules and Regulations, which sections provide in pertinent part:

> **4501:2-6-02 PERFORMANCE OF DUTY AND CONDUCT**
>
> (A) A member shall be subject to those sections of the Ohio Revised Code and Administrative Code not specifically defined in Chapter 5503. of the Revised Code. A member shall also be subject to any rule herein published in the rules and regulations of the division, and all provisions of any applicable collective bargaining agreement.
>
> (B) Performance of duty
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> . . .
>
> (5) Members who fail to perform their duties because of an error in judgment or otherwise fail to satisfactorily perform a duty of which such member is capable, may be charged with inefficiency.
>
> . . .
>
> (I) 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.

At the same time, the Grievant received a letter from the Ohio State Highway Patrol informing him that the Director intended to terminate his employment for violating the foregoing sections of the Patrol's Rules and Regulations. Six days later, the Employer conducted a pre-disciplinary hearing at the conclusion of which the hearing officer determined that just cause existed for the Grievant's discharge.

Two days after that, the Union protested Management's action, stating as its reason for doing so that:

> . . . Grievant was terminated without just cause, and progressive discipline was not applied.

In support for its position, the Union cited Article 19, Sections 19.01 and 19.05 of the parties' Collective Bargaining Agreement, which sections provide in pertinent part:

> **ARTICLE 19 - DISCIPLINARY PROCEDURE**
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> **19.01 Standard**
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> No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause.
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> . . .
>
> **19.05 Progressive Discipline**
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> The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:
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> 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.

Management denied the grievance at Step 3, arguing that:

> The grievant is unable to substantiate probable cause or even reasonable suspicion for a search of Ms. ___'s person. The fact he required her to expose her breast and subjected her to visual inspection of other private body areas makes his motives extremely suspect.
>
> The grievant's actions subject Ms. ___ to an embarrassing and unreasonable search. His actions potentially created liability for the employer.
>
> . . .
>
> Law enforcement officers are vested with considerable power over individual members of our society. Abuse of authority should result in serious sanctions. Individual law enforcement officers who violate public trust by exceeding their authority or operate outside the law destroy public trust and support for all law enforcement officers.
>
> The level of discipline imposed in this incident was based on the seriousness of the offense and the short tenure of the grievant. The methods of search employed by the grievant demonstrate a failure to use common sense, a critical need for any law enforcement officer, and a failure to follow proper procedures. The grievant is a very recent graduate of the Highway Patrol Academy. He received training in the area of search and seizure but failed to apply that training.
>
> The employer has an obligation to insure that another citizen is not subjected to similar treatment.

Not satisfied with that response, the Union pursued the matter to arbitration, at which time the parties made reference to the following provisions of their Contract and to Section 2933.32 O.R.C., which sections provide in pertinent part:

ARTICLE 20

GRIEVANCE PROCEDURE

5. Limitations of the Umpire

. . .

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.

20.09 Disciplinary Grievances

. . .

4. Disciplinary arbitration hearings will be conducted as all other arbitrations except that at the conclusion of the hearing, the umpire may issue a bench ruling sustaining or denying the grievance or modifying the discipline imposed or issue a short written decision within five (5) days of the close of the hearing. If a written decision is issued, it shall include only a statement of: (1) the granting of the grievance, or (2) a denial of the grievance or (3) a modification of the discipline imposed, and a short explanation of the reasoning leading to the decision.

OHIO REVISED CODE

§ 2933.32

(A) As used in this section:

. . .

(2) "Strip search" means an inspection of the genitalia, buttocks, breasts, or undergarments of a person that is preceded by the removal or rearrangement of some or all of the person's clothing that directly covers the person's genitalia, buttocks, breasts, or undergarments and that is conducted visually, manually, by means of any instrument, apparatus, or object, or in any other manner while the person is detained or arrested for the alleged commission of a misdemeanor or traffic offense. . . .

(B)(1) Except as authorized by this division, no law enforcement officer, other employee of a law enforcement agency, physician, or registered nurse or licensed practical nurse shall conduct or cause to be conducted a body cavity search or a strip search.

(2) A body cavity search or strip search may be conducted if a law enforcement officer or employee of a law enforcement agency has probable cause to believe that the person is concealing evidence of the commission of a criminal offense, including fruits or tools of a crime, contraband, or a deadly weapon, as defined in section 2923.11 of the Revised Code, that could not otherwise be discovered. In determining probable cause for purposes of this section, a law enforcement officer or employee of a law enforcement agency shall consider the nature of the offense with which the person to be searched is charged, the circumstances of the person's arrest, and, if known, the prior conviction record of the person.

. . .

(5) Unless there is a legitimate medical reason or medical emergency that makes obtaining written authorization impracticable, a body cavity search or strip search shall be conducted only after a law enforcement officer or employee of a law enforcement agency obtains a written authorization for the search from the person in command of the law enforcement agency, or from a person specifically designated by the person in command to give a written authorization for either type of search.

(5) A body cavity search or strip search shall be conducted by a person or persons who are of the same sex as the person who is being searched and the search shall be conducted in a manner and in a location that permits only the person or persons who are physically conducting the search and the person who is being searched to observe the search.

II. POSITION OF THE EMPLOYER

Management insists that it was fully justified in discharging the Grievant for what it considers an outrageous breach not only of the Patrol's rules and regulations, but the woman's Fourth Amendment right to be free from an unreasonable search as well. There was no basis for the Grievant to have

searched the woman and absolutely no justification whatsoever for him to have searched her as he did. None! Certainly, he failed to conduct anything close to a similar search of her male companion yet, according to the Grievant, both individuals were acting suspiciously when he stopped their vehicle. It is not just that the Grievant acted improperly toward the female passenger or that he failed to conduct even the most cursory search of the male passenger which makes his behavior so egregious. It was those incidents coupled with all of the other things that went on as well.

Supposedly, the Grievant's suspicions were first aroused when the two young people made, what the Grievant felt, were too many movements while he was stopping their vehicle. Supposedly, he was also concerned about his safety when he got the couple out of the car, although everything he did belies both of those assertions. He made no attempt to do anything except to shine his flashlight into their vehicle. He did not search the lunge area which he had a right to do nor did he confiscate the male occupant's knife which would have been a logical step if the Grievant was really concerned about his own safety. Finally, he allowed the male occupant to go down the hill out of sight to relieve himself. If, as the Grievant suspected, the couple was trying to hide contraband, then allowing the driver to go down the hill gave the gentleman every opportunity to get rid of any incriminating evidence.

Having done everything wrong up to that point, the Grievant then turned his attention to the female occupant of the vehicle, forcing her to undergo a humiliating search of the most intimate areas of the body. The Grievant was not just some rank amateur whose idea of police work came from television and bad movies. By the time these events took place, he had undergone twenty-six weeks of rigorous training at the Patrol's Academy during which time he received extensive classroom instruction on the subject of search and seizure from an FBI agent who is considered to be an expert in the area and reviewed numerous video

tapes on the same subject. He was also given practical instruction in how to search a motor vehicle. In spite of all of that training, however, the Grievant subjected the young lady to an unreasonable search, one which he had absolutely no justification to undertake.

While the young woman can be forgiven for believing that she had no choice but to go along with the Grievant's orders, the Grievant cannot be forgiven for what he did. He flagrantly violated her right to be free from an unreasonable search. When he did, he opened the Patrol up to huge civil liability. The Union may well argue that the Grievant simply made a mistake, but the nature of the Grievant's actions was anything but a simple error. He totally failed to apply the Patrol's policy on search and seizure, a policy which had repeatedly been drilled into him during his training. Worse, his behavior on December 30, 1992 indicates that he lacked the common sense which a Patrol Officer must have if he or she is to have any hope of properly and safely performing their job. There is absolutely no reason to believe, from the Grievant's actions, that in the future he would exercise his common sense or apply his training any better than he did on December 30, 1992.

The Grievant's actions left the Director no alternative but to discharge him. The Union may claim that the penalty is too harsh. The penalty, though, is commensurate with the Grievant's offense. Having carefully considered the level of discipline which is appropriate for so serious a violation of an individual's constitutional rights and the Patrol's policies, that decision should not and contractually cannot be set aside by the Arbitrator.

III. POSITION OF THE UNION

While the Union takes issue with certain aspects of Management's depiction of the events which occurred on December 30, 1992, it does admit most of what the woman indicated about took place just as she said it did. The

Grievant made a mistake. He was a young trooper with little experience who, just a few months earlier, had been severely chastised for failing to adequately search a female traffic offender. To say that the Grievant was gun shy as a result of that incident is an understatement. He wanted to be a Patrol Officer and wanted very much to do the right thing. Unfortunately, on December 30, 1992, he found himself faced with a very tricky situation. He had observed two individuals in a motor vehicle engaged in what, to him, was clearly suspicious behavior. Management has never questioned the Grievant's characterization of what he saw in the vehicle as he stopped it. It did not because it could not as the type of behavior the Grievant witnessed is the exact type of behavior cadets are repeatedly taught to look for as evidence of wrongdoing.

Management also doesn't take issue with the Grievant having made the traffic stop in the first place. Again, it cannot. No one questioned that the Grievant clocked the other car going 80 miles an hour in a 65 mile an hour zone. The Grievant, in fact, did everything right up until the time he searched the young woman. That was his mistake. It is a mistake he now recognizes, but it was one borne out of ignorance and nervousness, not malice or perversion.

Nothing in the Contract in any way suggests that law enforcement officers in general or members of this Bargaining Unit in particular are immune from making mistakes. Nobody expects them to be perfect, at least no one did up until this case arose. Since then, apparently because the young woman retained an attorney, Management has taken the position that mistakes, even the first one, will not be tolerated. The Contract, however, does not permit Management to take that stand. Rather, it requires that discipline be imposed progressively so that an employee is warned what behavior will not be tolerated and what will happen if he or she continues to engage in prohibited activities. The Grievant, however, was not afforded that right because of Management's rush to terminate him.

It is a hallmark of Management's haste to discharge the Grievant that it argues that the penalty it imposed cannot be modified by the Arbitrator. The Contract, or at least the provision Management cites, does not so state. Instead, pursuant to Articles 19 and 20, the Arbitrator not only has the right but the obligation to review the penalty Management imposes in discipline and discharge cases and to modify that penalty if the punishment does not fit the crime, which is the case in this instance. No one argues that the young woman did not suffer some embarrassment because of what happened on the night in question, but she was not hurt. Nor was what happened to her so terrible as to warrant discharging the Grievant. It was simply a mistake made by a young inexperienced Officer who deserves a second chance.

IV. OPINION

With a few exceptions, the parties are in agreement concerning what took place on the evening of December 30, 1992. Unfortunately, one of the things they disagree about, whether the Grievant patted down the male passenger is of more than passing importance to the outcome of this dispute. The issue of whether or not the Grievant frisked the driver is germane because it is a barometer of the Grievant's state of mind at the time he made the traffic stop, as well as his ability to perform his job. Before turning to that issue, however, it is essential to first review the events as they unfolded up to the point the Grievant approached the male occupant of the vehicle.

The Grievant was on patrol on Interstate 77 north of Marietta when he determined that the couple's vehicle was traveling approximately 15 miles an hour over the speed limit. He gave chase and attempted to stop the vehicle which only began slowing down when he turned on his take down lights. As the vehicle was slowing down and pulling over, the Grievant saw the two occupants of the vehicle moving around in a manner which he believed was suspicious. As a result, when the vehicle was stopped in front of his cruiser, the Grievant had both occupants

of the vehicle, a man and a woman, get out of their car and stand by the side of the road. After they were out of the vehicle, the Grievant made only a cursory inspection of the passenger compartment of the car by shining his light inside the vehicle. He did not otherwise check the lunge area as he had a right to do. Apparently satisfied with the results of his investigation of the car, the Grievant turned his attention to its occupants, both of whom had their pants unbuttoned and unzipped, but up around their waists.

It is at this point that the tale becomes murky. The male occupant testified that the Grievant made no effort to pat him down or to search him in any way. He also stated that in response to a question from the Grievant asking if he had any weapons or other items on his person that the Grievant should know about, he told him that he had a knife. The Grievant admits that the man told him that he had a knife and that he made no effort to secure it. What he wasn't sure about is whether or not he ever patted the male down. The reason the question is so important is if the Grievant did not, it makes his ensuing actions all the more reprehensible. On the other hand, if he did, then at least he might be able to claim that his visual search of the woman's pants and demand that she expose her breast were the equivalent of the pat down search he conducted of her male companion. Whether the Grievant searched the man or not, there are a number of factors which make that claim untenable.

Chief among them is the Grievant's recollection that the woman's pants were, in his words, "skin tight." They were so tight, in fact, that according to his statement, even unbuttoned and unzipped they did not come very far away from her body when he pulled them. If they were that tight, then logically, if there was something in her pants, the object should have left a bulge which would have been readily apparent to the Grievant from an external inspection of the woman's figure. The Grievant, however, did not mention seeing any such bulge or anything

else which would have caused him to pull the woman's pants away from her body and shine his flashlight down into the exposed area. Certainly, there was nothing like the bulge which the Grievant reported seeing over the woman's left breast which led him to make her unbutton her blouse and ultimately expose her breast for his inspection.

For an ordinary member of the public, the situation the Grievant was faced with when he stopped the couple's vehicle on December 30, 1992 would at best have been perplexing and at worst, scary. The Grievant, however, was not an ordinary member of the public. He was an active member of the Highway Patrol who had undergone twenty-six weeks of training at the Patrol's Academy and, from his description, three months of additional on-the-job training. The Grievant maintains that he was never trained to deal with the circumstances he was confronted with on December 30, 1992. The testimony from the Patrol's witnesses indicates otherwise.

The situation the Grievant faced that night, a male officer having to conduct a search of a female suspect, was not a novel one. It has obviously arisen countless times before. Under the circumstances, it is impossible to believe that the issue was never discussed in the course of the Grievant's training. This is especially so as the Legislature has dealt with the problem, defining what constitutes a strip search and declaring when and under what circumstances such a search can be conducted. As provided by the Legislature in Section 2933.32 O.R.C., a strip search is:

> . . . an inspection of the genitalia, buttocks, breasts, or undergarments of a person that is preceded by the removal or rearrangement of some or all of the person's clothing that directly covers the person's genitalia, buttocks, breasts, or undergarments and that is conducted visually . . . while the person is detained . . .

In the face of that definition, there is no other way to characterize the Grievant's actions then that he conducted a strip search of the woman. Nor, given the statutory admonition that such searches can only be conducted if the Officer has probable cause to believe the suspect is concealing evidence, can it be concluded that he had any legal right to do so. His suspicions did not amount to probable cause as that term is understood. Even assuming that he had probable cause to conduct a strip search, he went about it in complete derogation of the law. His assertions notwithstanding, the undersigned has absolutely no hesitation in concluding that the Grievant was told during the course of his training when and under what circumstances a strip search of a woman could be conducted. The undersigned also has no hesitancy in concluding that the Grievant's training included instruction on how and when to search a motor vehicle if he believed there was contraband or weapons hidden inside. The Grievant, however, ignored all such instructions. Even if he did not remember his instructions, common sense should have told him that he could not and should not have proceeded as he did. At a minimum, at a very minimum, his failure to search the lunge area of the car could have been fatal. In addition, letting the driver go down the embankment out of sight in the dark while he turned his attention to the woman both jeopardized the Grievant's safety and gave the man an opportunity to get rid of any contraband the Grievant may have missed.

As the parties recognize, the real issue in this case is not what the Grievant did or did not do, but rather what is the appropriate penalty to apply in the face of the Grievant's actions. Management asserts that if the Arbitrator determines that the Grievant committed the acts he is alleged to, then pursuant to Section 20.05 the Arbitrator has no choice but to ratify the penalty Management imposed. The strength of Management's conviction with regard to this point notwithstanding, neither that section nor any other provision of the parties' Collective Bargaining Agreement limits an arbitrator's authority to

determining whether or not an individual committed the offense he or she may have been charged with. If that is what the Employer intended, then it had an obligation to raise that issue at the bargaining table. If it did, it was rejected. There is nothing expressly stated in the Contract which so circumscribes an arbitrator's authority.

The parties did agree to in Section 19.01 of the Contract that no employee can be disciplined or discharged except for just cause. While those words are not defined anywhere in the parties' Agreement, their use is so widespread and so deeply rooted in the field of labor relations that they have a commonly understood and accepted meaning. At a minimum, the words mean that management can only discipline or discharge an employee if it can establish by clear and convincing evidence that the individual violated a rule which management had a right to enact, which was reasonably calculated to achieve a legitimate purpose and which has been evenhandedly applied. In essence, Management's argument comes down to the proposition that in discipline and discharge cases the arbitrator's authority is limited to determining whether or not the employer met that standard. The flaw in that argument is that the concept of "just cause" goes well beyond that inquiry. Instead, it extends to a review of the penalty management seeks to impose on the grievant to determine if it fits the "crime" he or she is charged with committing. If it did not, then management would be free to act in whatever fashion it desired even if its actions were arbitrary, capricious or discriminating. Such behavior would run counter to the entire thrust of the collective bargaining agreement which is to treat all similarly situated employees equally. The corollary of those principles is that even if the employer can establish that an employee committed an offense which would justify disciplining him, the arbitrator has both the right and the obligation to review the penalty management imposes to determine if

the level of discipline is appropriate for the offense the employee is charged with.

That conclusion is reinforced by the language of Section 20.09 which expressly provides that in the case of disciplinary hearings the arbitrator has authority to modify the penalty Management imposed. Logically, if an arbitrator has authority to modify a penalty in such cases, then he or she should have the same power in all discipline cases, regardless in what forum they are heard.

The Union pinned its hopes on reversing Management's decision to discharge the Grievant on his inexperience, arguing that he simply made a mistake and that he is entitled to a second chance. In addition, it maintained that because the Contract requires that discipline be imposed progressively the Employer cannot simply fire the Grievant without invoking some lessor discipline first. Although the Union argued both points with great conviction, neither is persuasive.

The flaw in the Union's claim that the Contract requires the Employer to impose some lesser disciplinary action before it can discharge an employee is that it ignores the explicit language of Section 19.05 which unequivocally declares that in certain circumstances the nature of the offense the employee commits may be so egregious that it justifies deviating from the progressive discipline system and imposing a much harsher punishment. The practical effect of that language is to permit Management, in an appropriate case, to discharge an employee even if the offense he commits is his first one and even if the employee has been a long-term member of the Highway Patrol. Were it not so, then Management might find itself in the ludicrous position of having to retain an Officer guilty of the most heinous crimes simply because he or she had never been disciplined before in the past.

Equally meritless is the Union's argument that the Grievant should not be discharged because his actions were not the product of malice, but instead arose out of his inexperience. Therefore, the Union reasons that he is entitled to a second chance. At the heart of the argument is the recognition that no one is perfect. Everyone, including law enforcement officers, makes mistakes. However, there are some mistakes which, by their very nature, are so egregious that they demonstrate that the individual is incapable of understanding and carrying out basic responsibilities of his or her job. It is this concept which underlies Section 4501:2-6-02(B)(5) of the Patrol's rules. Pursuant to that provision, an error in judgment may be so great that it constitutes inefficiency for which the employee may be disciplined.

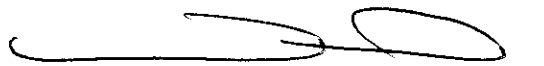
Such is the case in this instance. The Grievant did not make a simple mistake. This is not a case where he failed to correctly calibrate his radar unit or failed to fill out some form which resulted in a traffic arrest being lost. The Grievant totally disregarded all of the training he had been given. In his zealous pursuit of wrongdoing he not only jeopardized his safety, but he also heedlessly victimized a civilian whose only real crime appears to have been that she was a female.

The Union maintains that the Grievant didn't hurt her, which is true. He did humiliate her, though, forcing her to undergo both an illegal and unconstitutional strip search. When he did, he was guilty of conduct unbecoming an officer. Perhaps he was, as he said, not motivated by any prurient interest. Perhaps he was simply over zealous, motivated by a desire to see that no contraband escaped his grasp. Whatever the Grievant's reasons for acting as he did, the fact remains that what he did was totally and utterly unjustified. Further, his disregard for common sense and proper police procedures indicate that the Grievant cannot continue as a member of the Highway Patrol. It was that thought process which led Management to conclude that it had just cause to

discharge the Grievant. The undersigned cannot disagree with that conclusion under the circumstances of this case.

V. DECISION

For the foregoing reasons, the grievance is denied.



LAWRENCE R. LOEB, Arbitrator

June 3 1993
Date