STATE OF OHIO AND THE FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL, INC.
UNIT 1
LABOR ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, OHIO DEPARTMENT OF PUBLIC SAFETY, DIVISION OF STATE HIGHWAY PATROL

-AND-

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

GRIEVANT: Phillip Vermillion Jr. (suspension)

CASE NUMBER: 15-03-921006-083-04-01

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: June 9, 1993

APPEARANCES:

For the Employer:	
John M. Demaree	Captain
Teri Decker	Second Chair
Rick Corbin	Advocate
For the Union:	
Phillip Vermillion Jr.	Grievant
Renee Engelbach	Paralegal
Paul Cox	Chief Counsel

INTRODUCTION

This is a proceeding under Article 20, entitled Grievance Procedure of the Agreement between The State of Ohio, Ohio Department of Public Safety, hereinafter referred to as the Employer, and The Fraternal Order of Police, Ohio Labor Council, Inc., Unit 1, hereinafter referred to as the Union, for the period February 1, 1992 to February 28, 1994 (Joint Exhibit 1).

The arbitration hearing was held on May 14, 1993 at the office of Collective Bargaining, Columbus, Ohio. The Parties had selected David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would not submit briefs.

STIPULATED ISSUE

Was there just cause to impose the disciplines? If not, what shall the remedy be?

CASE HISTORY

Phillip Vermillion Jr., the Grievant, has served as a Radio Dispatcher I at the Piqua, Ohio Highway Patrol post since October 9, 1990. The facts, for the most part, are not in dispute and involve two off duty incidents dealing with alcohol-related misconduct.

On May 2, 1991, while driving in the City of Wilmington, Ohio, the Grievant was arrested for driving under the influence of alcohol while off duty. Plea bargaining resulted in a reduced or amended charge of reckless operation (Employer Exhibit 1).

This incident resulted in an investigation by the Employer of a rule violation involving improper off duty behavior. An initial ten (10) day suspension was imposed; but was modified in light of a mutually agreed to Employer Assistance Program Participation Agreement (Joint Exhibit 4). The Agreement (Joint Exhibit 4) was entered into on July 11, 1991 and contained the following relevant particulars:

> The Ohio Department of Highway Safety and the employee agree to enter into a contract wherein the employee voluntarily agrees to seek assistance from a Health Care Provider under the Ohio Employee Assistance Program (Ohio EAP), to deal with the problem of alcohol-related, unacceptable behavior.
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> ***
>
> The Highway Patrol agrees that so long as this contract is complied within its entirety, five days of the ten day suspension recommended for this employee pursuant to the letter dated, June 28, 1991, shall be held in abeyance. Should the employee violate this contract, in any part, the remainder of the ten day suspension will be implemented.
>
> The employee understands and agrees that further occurrences of the problem described in paragraph 1, may result in the immediate implementation of the discipline held in abeyance. The subsequent occurrence will be treated separately in accordance with the principles of progressive discipline.
>
> By signing this agreement, the employee and the Union agree to waive any contractual time restrictions regarding the imposition of discipline.

> Employee by signing this contract acknowledges that he has received a copy of this contract, and has been fully informed of the terms and consequences of it, hereby voluntarily enters into said contract after having been advised by his representative, if applicable.
>
> ***
>
> (Joint Exhibit 4)

A second incident took place on May 22, 1992, again, the incident took place in Wilmington, Ohio. A female of the Grievant's acquaintance filed a complaint of assault. She alleged the Grievant assaulted her and physically damaged her apartment and its contents. Shortly thereafter, the Grievant was stopped while riding in a vehicle by an officer of the Wilmington Police Department. The Grievant was cited for possessing an open container of an alcoholic beverage in a motor vehicle. He posted and subsequently forfeited a fifty dollar ($50.00) bond (Employer Exhibit 2). It should also be noted the person driving the vehicle in which the Grievant was a passenger was charged with driving under the influence.

After an administrative investigation on August 21, 1992, the Grievant was suspended for twenty-five (25) working days. A suspension for a period of twenty (20) working days was assessed for the May 22, 1992 incident. The Grievant's actions were viewed as a violation of Section 124.34 of the Ohio Revised Code - Failure of Good Behavior. In addition, a suspension for a period of five (5) working days was imposed on the basis of the terms contained in the Participation Agreement (Joint Exhibit 4). The five (5) day suspension was imposed, after it had been held in abeyance, because the Grievant engaged in similar alcohol-related misconduct (Joint Exhibit 3).

On October 6, 1992, the Grievant formally contested the administered discipline. His grievance contained the following Statement of Grievance:

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I was suspended for 25 working days without just cause. Article 19.03 states calendar days and I was suspended for 25 working days. 18.09 states disciplinary action will not be taken against any employee for acts committed while on off-duty status except for just cause, just cause was not shown. Request this grievance be filed at step three.

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(Joint Exhibit 2)

The Parities were unable to settle the disputed grievance. Neither the Employer nor the Union raised procedural and substantive arbitrability concerns. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer that it had just cause to suspend the Grievant for twenty (20) working days for his off duty misconduct on May 20, 1992. This resultant misconduct, moreover, caused the proper and just imposition of a five (5) working day suspension based on the violation of the Participation Agreement (Joint Exhibit 4).

Section 18.09 was discussed in support of the administered twenty (20) working day suspension. This provision was thought to clearly evidence the Parties intent regarding discipline for off duty misconduct. All bargaining unit members are covered by this provision as long as just cause can be established. Also, the Participation Agreement (Joint Exhibit 4), and its agreed to particulars, evince a clear understanding that the Employer has a right to administer discipline for alcohol-related off duty misconduct. Neither the Grievant nor the Union contested the five (5) day working day suspension.

In addition to the contractually based obligations, the Employer sought support for its

interpretation in a recent Ohio Supreme Court decision[1] dealing with the appropriate standard for off duty misconduct engaged in by dispatchers. The court affirmed law enforcement dispatchers could be held to the same high standard as sworn officers; even if the misconduct takes place while off duty. These individuals serve as integral members of a police department's law enforcement efforts.

The record clearly discloses the Grievant engaged in alcoholic related misconduct on May 20, 1992. He freely admitted to drinking the night in question, and being caught with an open alcoholic container while a passenger in a moving motor vehicle.

This misconduct, even though engaged during an off duty episode, required the imposition of severe discipline. A clear nexus exists between the misconduct in question and one of the Employer's primary missions. The State Highway Patrol has an absolute interest in removing drunk drivers from the highways. An inordinate amount of man hours and other forms of financial investments are spent on a yearly basis to dissuade and incarcerate drunk drivers. As such, nexus in this instance adequately justified the level of the administered penalty.

The Employer opined that even though Dispatchers need to be held to a high standard of off duty behavior, a common standard for Troopers and Dispatchers did not exist. As such, a higher standard does, in fact, exist for Troopers engaged in off duty misconduct. The particular grievance under review clearly indicates a different standard exists for Dispatchers and Troopers. It also evinces a proper use of discretion, and was administered in a reasonable fashion.

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[1]Warrensville Hts. v. Jennings (1991), 58 Ohio St. 3d. 206.

The second incident clearly falls within the prohibition contained in the Participation Agreement (Joint Exhibit 4). Both incidents dealt with alcohol-related misconduct. As such, the imposition of the five (5) working day suspension was proper and just. The Parties, themselves, agreed to hold a five (5) working day suspension in abeyance; which underscores they anticipated the potential for future similar misconduct.

The Grievant acknowledged he was placed on proper notice concerning the possible consequences associated with future similar misconduct. He was aware the five (5) day working day suspension would be imposed for future similar misconduct. He, moreover, was notified a subsequent occurrence would be treated separately in accordance with the principles of progressive discipline. A major suspension, in this instance, was deemed proper as a consequence of the Grievant's unwillingness to alter his behavior after the first incident. This unexcusable behavior, moreover, took place after extensive participation in an Employee Assistance Program. Hopefully, a major suspension will more firmly reinforce the notion that future similar behavior will not be tolerated. In fact, at the hearing, the Grievant testified he was not surprised about the imposition of the five (5) working day suspension. Nor did he fail to anticipate that the second incident would be dealt with separately as a distinct disciplinary offense.

The Position of the Union

The Union opined both suspensions were not for just cause because they were too severe and unreasonable. The twenty (20) working day suspension was improper because adequate nexus was not established, which caused the improper imposition of the five (5) working day suspension contained in the Participation Agreement (Joint Exhibit 4).

The Union alleged Section 18.09 was misapplied which caused the twenty (20) working day suspension to be defective. The Employer failed to establish a proper nexus between the misconduct engaged in on May 22, 1992 and the Grievant's normal work responsibilities. Without a proper nexus just cause cannot be realized; a necessary precursor to proper discipline. The Grievant's misconduct took place off duty and resulted in a minor misdemeanor violation. This charge, on its face, is not ultra serious and fails to evince any true connection to anything the Grievant does while working.

The Employer's reliance on Warrensville Hts. v Jennings[2] was thought to be inappropriate in this instance. The case dealt with an attempt to contest the payment of unemployment compensation because an employee had been fired for just cause. In the Union's judgement, the just cause standard applicable in an unemployment compensation hearing cannot be equated with the standard contained in Sections 18.09 and 19.01. The context and the need to investigate potential drug-related criminal activity caused the implementation of a higher standard for off duty misconduct. But, the dispatcher in the cited case was not removed for his potential off duty misconduct; the court had to determine whether he was properly removed because he failed to follow a direct order. For these and other related reasons, the Union emphasized the principles referenced were improperly applied to the present fact situation.

The Employer's higher standard for off duty misconduct, as it relates to Dispatchers, was also challenged by the Union. The Employer never really documented the existence of an explicit differentiating standard; the only real principle proposed dealt with differing judgements based on job status differences and differing circumstances.

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[2]Supra Note 1.

Another Section 18.09 violation was raised by the Union. The twenty five (25) working day suspension was thought to be severe and excessive. The Union urged the conversion of the suspension to calendar days because a modification of this sort would include a number of non-working days.

A number of arguments were raised dealing with the application of the Participation Agreement (Joint Exhibit 4). This document applies to situations dealing with driving under the influence and/or reckless operation of a vehicle. Here, the Grievant was not cited for either type of violation. As such, the similar incidence clause should not be invoked for the particular incident in dispute. One could, moreover, argue the Grievant had learned his lesson because he was not charged with driving under the influence. He was not drinking and driving; an activity which would have resulted in criminal prosecution and potential job loss. Finally, the fact the Grievant expected to be cited the second time and envisioned an investigation into his affairs does not justify the administered penalties. A conclusion of this sort merely misreads the proposed evidence.

THE ARBITRATOR'S OPINION AND AWARD

For the evidence and testimony introduced at the hearing, and a complete review of the record, it is my judgement that the Grievant's actions on May 20, 1992 justified discipline. In this instance, however, the dispensed discipline was too severe and must be modified to reflect the severity of the proven offense. The five (5) working day suspension imposed as a consequence of the Participation Agreement (Joint Exhibit 4) was properly imposed and was implemented for just and proper cause.

The Grievant's actions on May 20, 1992 reflect a clear breach of the terms mutually

agreed to by the Parties and codified in the Participation Agreement (Joint Exhibit 4). He engaged in "alcohol-related unacceptable behavior." Nothing in this document requires an identical or similar occurrence to trigger imposition of the five (5) day suspension which was held in abeyance. Even though one cannot readily equate an "open container" violation with driving under the influence or reckless operation violations, an equivalent violation is unanticipated or required as evidenced by the conditions negotiated by the Parties. Any alcohol-related misconduct can serve as the triggering event. As such, a nexus analysis involving the triggering event also seems inappropriate as it relates to the particulars negotiated by the Parties. A nexus requirement was never negotiated by the Parties nor anticipated as a precondition to the implementation of the "alcohol-related" particular.

Generally speaking, illegal activity and non-criminal kinds of off-premises misconduct cannot be a cause of discipline unless the activity in question has a link between the conduct and the employment relationship. Typically, off-premises criminal activity justifies discharge or other forms of discipline when: behavior harms company's reputation or product; behavior renders employee unable to perform his duties or appear at work, in which case (discipline) would be based on inefficiency or excessive absenteeism; and behavior leads to refusal, reluctance or inability of other employees to work with him[3]. This Arbitrator, like most arbitrators, has previously held that discipline is justified, even if no actual adverse impact has actually been substantiated, if there is a strong likelihood of harm to the Employer's business,

[3]W.E. Caldwell Co., 28 LA 434 (Kellelman, 1957); City of Shawnee, 11 LA 93 (Allen, 1988).

or if the Grievant's misconduct is very closely related to the nature of his/her job[4].

Here, in my judgement, the Grievant's alcohol-related misconduct on May 20, 1992 is very closely related to the nature of his job as a Dispatcher. Whether the Employer has an explicit off duty standard for Troopers as opposed to Dispatchers, and whether the standard differs according to job status, is not actually relevant in this particular instance. A fixed standard is virtually impossible to articulate because special circumstances are so intricately intertwined in any determination of this sort. This conclusion reflects the Parties' intent as evidenced by language contained in Section 18.09. Off duty misconduct may result in discipline as long as just cause is established. Obviously, this provision contemplates some standard which must be evaluated on a case by case basis in terms of reasonableness and consistency.

A nexus was established by the Employer because the Grievant's misconduct is closely related to the nature of his job. One of the Employer's primary missions is the prevention and the incarceration of those involved in illegal alcohol-related misconduct. Even though Dispatchers do not perform the same duties as sworn officers, they do perform an important function and serve as integral members of the Division's law enforcement efforts. They dispense pertinent information and coordinate responses during emergency situations. The pattern of misconduct engaged in by the Grievant raises some doubt whether his off duty misconduct may some day spill over onto his daily work activities. Such an unfortunate potential circumstance needs to be avoided; and failure to level discipline in this instance would be unconsciousable and unadvisable.

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[4]Inspiration Consolidated Copper Co., 60 LA 173 (Gentile, 1973); Iowa State Penitentiary, 89 LA 956 (Hill, 1987); Great Scot Food Stores, Inc., 73 LA 147 (Porter, 1979).

Even though discipline needs to be dispensed for the off duty misconduct related to the most recent incident, the Employer's administered penalty appears to be excessive. The Parties, as evinced by Section 19.05, have agreed to follow the principles of progressive discipline by providing that "disciplinary action shall be commensurate with the offense." Here, the imposed discipline seems excessive based on the penalty imposed relating to the initial incident. The Participation Agreement (Joint Exhibit 4) resulted in a ten (10) day suspension for a driving under the influence violation, which was eventually reduced to a reckless operation charge. A most serious violation requiring a considerable penalty. And yet, the Employer doubled the penalty for a lesser misdemeanor offense. I am unwilling to condone the Grievant's actions. I am also unwilling to condone the imposition of such a severe penalty; even though the Grievant must understand that this type of off duty misconduct cannot be condoned.

The Union's severity argument based on the imposition of working days rather than calendar days was not properly substantiated. Just because Section 19.03 references a cap on suspension durations in terms of calendar days, it does not limit the implementation of discipline in terms of this standard. The record fails to establish a different practice limiting the Employer's discretion in this disciplinary area. Also, the Union did not provide any evidence that the Grievant was somehow treated differently from other similarly situated employees.

AWARD

The grievance is upheld in part and denied in part. The five (5) working day suspension was properly imposed and was for just cause. The twenty (20) working day suspension was improper in terms of duration but some lesser form of discipline was properly supported by the

record. The Employer is directed to convert the twenty (20) working day suspension to a fifteen (15) working day suspension. The Grievant shall be compensated for five (5) working days he would have received but for the suspension in question. In addition, the Grievant shall receive all seniority and other benefits he would have earned but for the incident in question. Also, the twenty (20) working day suspension shall be expunged and the fifteen (15) working day suspension shall be substituted and submitted to the Grievant's personal file.

June 9, 1993

Dr. David M. Pineus
Arbitrator