IN THE MATTER OF ARBITRATION

BETWEEN

The Ohio State Highway Patrol	)	CASE NO. 15-03-930304-0020-040-01
	)	
	)	GRIEVANT: JAMES YOUNG
and	)	
	)	
	)	OPINION AND AWARD
The Fraternal Order of Police, Ohio Labor Council, Inc.	)	
	)	

APPEARANCES:

On Behalf of the Employer

Lt. R. G. Corbin	Advocate
Cpt. J. L. Demaree	Management's Representative
Pat Morgan	Office of Collective Bargaining
Ann Brihl	Witness
John Charles	Witness
Sgt. Bruce Powers	Witness
Stephen A. Douglas, Ph.D.	Witness

On Behalf of the Union

Paul L. Cox	Chief Counsel, FOP/OLC
Ed Baker	FOP/OLC Representative
Renee Engelbach	Paralegal
Jim Roberts	FOP/OLC Representative
James W. Young	Grievant

LAWRENCE R. LOEB, Arbitrator
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I. STATEMENT OF FACTS

Late in the evening of November 25, 1992, the Grievant, who had been employed by the State of Ohio as a Highway Patrol Officer for approximately seven years, entered an Italian restaurant in Tiffin, Ohio. He was off duty at the time and had been drinking for some period before he walked into the establishment. The Grievant sat at the bar, ordered a drink and after a short period of time began to walk around the bar area of the establishment, stopping to talk to the people in each of the booths located there. Initially, the bartender thought that the Grievant was familiar with all of the people in the bar. At some point, though, she changed her opinion, coming to believe that the Grievant was drunk and that he didn't know anybody he was talking to. Still, the Grievant was quiet and no one complained. However, after he sat back down he began to make unwanted advances toward the bartender, at one point grabbing her and trying to pull her over to where he was sitting. The woman was upset by the Grievant's behavior and told the owner who, in turn, had words with the Grievant, telling him to finish his drink and leave the bar. The Grievant had already called the owner a "faggot" when they first talked and did it again when the owner told him he would have to leave after finishing his drink. At that point, the owner lost his patience, came around the bar and told the Grievant he would have to leave or he would call the police. In response, the Grievant indicated that he was the police, which surprised the bartender because he did not look like a State Trooper or any police officer that he was aware of. Worried that the Grievant might have a weapon on him, the owner retreated and called the local police and request assistance.

The owner eventually got the Grievant out the door, but not without some effort. Once outside, the Grievant turned around and slammed his fist on the door, but left the establishment. After the Grievant left, the owner and the

bartender were discussing the incident, and especially the Grievant's claim that he was a police officer, when one of the restaurant employees who knew the Grievant confirmed that he was a Patrol Officer. The employee then left the bar, apparently to see if the Grievant needed any assistance. In the meantime, an Officer from the Tiffin Police Department responded to the owner's call. He, in turn, ran into his Supervisor and explained the situation to him. The Supervisor indicated that he would attempt to find the Grievant and left. Shortly thereafter, he saw the Grievant and the restaurant employee walking through the town. He stopped the Grievant, questioned him and asked permission to search him. Finding no weapon he released the Grievant, telling him that he should not be driving because he had had too much to drink.

This was the fourth such incident the Grievant had been involved in since December 1, 1988. Prior to that time, his record indicates only one other disciplinary action, a written reprimand issued September 12, 1988 as a result of being involved in a preventable Patrol car crash. On December 1, 1988, he received a second written reprimand for being intoxicated and disorderly in a bar, thereby bringing discredit on the Patrol and its membership. On August 15, 1989, he was given a two-day suspension as a result of an incident which occurred two months earlier when the Grievant, his stepbrother and a police officer were drinking in a bar. At the time he received the two-day suspension, the Grievant had already received a verbal reprimand for being twenty-five minutes late for work the day after the incident which resulted in the suspension being meted out to him.

Between October 15, 1989 and April 10, 1992, the Grievant received three other written reprimands, a verbal reprimand and a one-day suspension, none of which apparently had anything directly to do with alcohol. On April 10, 1992, though, the Employer suspended the Grievant for three days for drinking in a bar

while off duty, confronting another patron and then being injured when the patron punched him.

Concerned about the Grievant's behavior, Management ordered him to report to a psychologist on June 1, 1992. Prior to his first visit to the psychologist, the Grievant sent an interoffice communication to the Patrol's Department of Personnel demanding to know why he was being sent to the psychologist and who had made the decision that he had to go. The tenor of the note, as well as the Grievant's words, indicate that he was not happy about having to obey the order. He had three meetings with that individual and missed one appointment for which he received another three-day suspension on November 19, 1992. On November 30, 1992, the psychologist issued a report in which he declared:

> At your request I have seen Trooper James Young three time since 6-1-92. He has undergone psychological evaluation, counseling, and a structured program to examine personal relationships, professional relationships, self esteem, and interpersonal communication skills. Trooper Young seemed very guarded and only interested in attending as it was required. He has denied any alcohol problem or other conditions that might shed light on his past performance. He seems interested only in the issue of his back pain. Any gains in psychological functioning that might have been achieved seem minimal. I see no reason to continue with further sessions. (sic)

The psychologist was not part of the Employee Assistance Program mentioned in Article 41 of the Contract and which declares in pertinent part:

> **ARTICLE 41 - EMPLOYEE ASSISTANCE PROGRAM**
>
> **41.03 Employees Covered Under E.A.P.**
>
> The E.A.P. will be available to members of the bargaining unit and their immediate family (spouse and children). To the extent possible, the services of the E.A.P. will also be made available to employees who are temporarily laid-off, retired, or disabled.

41.04 Scope of Coverage

Alcoholism, drug abuse, family or marital distress, social and relationship problems, mental or emotional illness, legal problems, financial problems, and related environmental conditions are illnesses or problems that can often be successfully treated or resolved. All employees with these problems or illnesses will receive assistance in locating treatment for these problems or illnesses.

41.05 Applicable Provisions

Nothing in this Article is to be interpreted as a waiver of other provisions or procedures contained elsewhere in this agreement.

41.06 Referrals

It is expected that through employee awareness and educational programs, employees will seek information and/or assistance on their own initiative. Such requests will be processed as voluntary and informal rather than formal referrals.

. . .

41.10 Formal and Voluntary Referrals

The services of the Ohio E.A.P. Central Office shall be provided for employees and their families who voluntarily refer themselves for assistance, or accept assistance through informal referral, as well as those employees for whom formal referrals are necessary.

. . .

41.13 Diagnosis of Bargaining Unit Member Problems

It is recognized that supervisory and management personnel are not qualified to diagnose an employee's problem. They may make referrals to the E.A.P. Likewise, the Fraternal Order of Police, Ohio Labor Council officers, Associates, and members of the bargaining committee are not qualified to diagnose a member's problem, within the context of the E.A.P. They may also make referrals.

It was against this background that Management decided to terminate the Grievant's employment for violation of Rule 4501:2-6-02(I)(1) of the Patrol's Rules, which rule specifically provides:

> (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.

The Union, relying upon Sections 19.01 and 19.05 of the parties' Collective Bargaining Agreement, protested Management's action alleging that Management did not have just cause to discharge the Grievant. The specific provisions the Union cited on the grievance form provide in pertinent part:

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

The back pain referred to in the psychologist's letter arose from an automobile accident the Grievant was involved in on July 3, 1988. He received treatment as a result of the injuries sustained in that accident off and on since

that time and had been seen by a number of medical practitioners and had participated in a pain management center program from September 28 to November 20, 1992. As part of the treatment program which he went through, a psychological evaluation was completed which found that the Grievant reported experiencing depression and anxiety associated with the pain, but failed to mention any problems associated with alcohol. On December 2, 1992, he began meeting with a psychologist of his own choosing and was eventually seen by that person for 13, 1½-hour counseling sessions. On May 26, 1993, the psychologist issued a report in which he stated:

> Initially, Mr. Young was highly motivated to work with pain management and issues regarding anger and was rather ambivalent regarding the issue of his alcohol abuse. The first couple of weeks, he attended a minimal amount of AA meetings but followed through on reading three books (one of which was the AA Big Book) and listening to two audio tapes (two of which were on methods of dealing with anger and two on pain management). During this time he indicated that he was not drinking but still was unsure as to whether he was alcohol dependent. In the beginning of January 1993 his attitude toward alcohol as a problem in his life appeared to have changed dramatically. He greatly increased his number of AA meetings and indicated that he might need inpatient treatment. After finishing a week of inpatient treatment at Freedom Hall in Crestline, Ohio, he continued to increase his participation in AA. On our session dated 4-13-93, Mr. Young indicated that he was attending 7 meetings a week (was able to clearly summarize major topics of leads and also had signed slips), had become active in a home group in AA . . . program. Mr. Young was initially very hesitant to attend AA due to beliefs about the type of people that would be there and the possibility that he would run into some people that he had had altercations with as a State Highway patrolmen. Therefore, initially there were certain meetings which he was hesitant to attend. At our last meeting he was attending all of these meetings and indicated that his views and concerns appeared to be unfounded. In working with Mr. Young I feel that he was in denial of the problem of alcohol usage until the beginning of January 1993. He

> tended to justify his use of alcohol and at times of pain medications for his back injury. This injury at times would generate a great deal of anxiety with him due to the fact that he worried about the possibility of having to physically control someone and therefore injuring his back. (sic)

The Union made the Patrol aware of the Grievant's treatment, as well as his attendance at AA meetings, but to no avail. As a result, it pursued this matter to arbitration.

II. POSITION OF THE EMPLOYER

The facts in this matter are not in dispute. Certainly the Grievant can't contradict them because he has repeatedly maintained that he has no recollection of the events of the evening in question. Taking the Grievant's statement at face value, there can be only one explanation for his loss of memory, alcohol. It is obvious that the Grievant had a serious problem with alcohol for some time and certainly his record evidences the severe nature of the problem. He was disciplined thirteen times for various offenses prior to this incident. While he is now trying to say that all of those prior disciplinary episodes resulted from back pain growing out of a 1988 accident, the real cause of every one of those episodes is obvious alcohol. The Grievant's attempt to shift the blame away from alcohol is endemic of his behavior since he began being disciplined in early 1988. While he may not have recognized that he had a problem with alcohol everyone else did.

Management attempted to alter the Grievant's behavior through the progressive discipline system, but nothing it did had the slightest effect on him. The Patrol even went so far as to send the Grievant to a psychologist for help. It was not contractually obligated to do so, but it took the step anyway hoping to assist the Grievant. The effort, however, was fruitless. The Grievant refused to recognize that he had a problem and, instead, was hostile and

defensive. As a result, the psychologist broke off contact with the Grievant. As a result, when the most recent incident occurred, the Patrol realized that it had no choice but to terminate the Grievant's employment.

The Grievant might well argue that he is being subjected to a higher standard than an ordinary citizen or even that the Patrol is applying a double standard in this case. Either or both allegations are true. The Patrol does expect its officers to live up to a higher standard of conduct than the ordinary citizen. One of the Patrol's duties, in fact a major component of its mission, is to enforce the laws relating to alcohol. It is difficult enough to do under the best of circumstances, but almost impossible when an officer engages in the same kind of prohibited conduct the Patrol is supposed to prevent. More than that, when the Grievant or any officer, for that matter, becomes publicly intoxicated and acts as the Grievant did he brings disrespect not only on himself but to every member of the Patrol as well.

For those reasons, Management had to act. In the face of the Grievant's past record, it concluded that it had to discharge the Grievant. The decision was neither arbitrary nor discriminatory. Rather, it was a sane, rational response considering the Grievant's record and his failure to even admit that he had a problem much less do anything about it. It is probably true that alcoholics have to bottom out before they recognize that they have a problem. However, the employer does not have to sit back and wait for the Grievant or any other employee to bottom out. Rather, it has an obligation to other members of the Patrol and to the public at large to take appropriate action when an employee breaks the rules as the Grievant did.

Now, of course, the Grievant claims that he bottomed out, that he saw the error of his ways and that he has obtained treatment and is, in effect, "a new person." Nothing that has taken place after his discharge, though, should be taken into consideration. This is especially so as the psychologist the Grievant

saw indicated that the only reason he believed the Grievant was present was to save his job. Thus, even assuming that the Grievant's post discharge behavior should be taken into consideration, the record is clear that the Grievant is simply manipulating the situation and that he has still not come to grips with his alcoholism. There is, in short, no reason to overturn this discharge.

III. POSITION OF THE UNION

Management, for whatever reason, has decided that the Grievant's behavior on the night in question constitutes an extremely serious incident. In spite of Management's efforts to characterize it as such, it wasn't. Essentially, the Grievant got drunk while he was off duty. Clearly, he should not have done what he did, but he had a problem. He suffered from a disease, alcoholism. Just as clearly, his behavior did not come anywhere close to that of the individuals mentioned in the arbitration awards cited by the Employer. This is not to say that the Grievant's behavior should be overlooked, but rather that it must be put into its proper perspective. Further, it must be recognized for what it was, a product of a disease that is treatable.

Management reluctantly recognized that alcoholism is an invidious disease characterized by denial. It also recognized that only when there is a bottoming out does the victim come to accept that he has a problem and seeks help. The Grievant reached that point after the incident in question. As soon as he realized that he reached the critical stage, he sought treatment and he has steadfastly continued to take the steps necessary to insure his future sobriety.

The question before the Arbitrator is not did the Grievant commit the offense charged, but, rather, what is the appropriate penalty to be meted out in the circumstances? In essence, Management has asked for capital punishment. There is no justification for such a harsh response. Certainly, it is not warranted by the Contract which calls for Management to impose discipline in a

progressive manner. There is, however, nothing progressive about going from a three day suspension to a discharge. By the same token, the Grievant cannot expect to continue to engage in the type of behavior he exhibited in November, 1992 forever. In other cases, Management has given employees a last chance. The Grievant is entitled to that, especially given that what he actually did pales in comparison with the penalty Management wishes to impose.

IV. OPINION

Since there is no factual dispute as to what occurred on the night in question, the only issue to decide is whether or not Management was justified in discharging the Grievant or if it overstepped its authority when it did so. For the Patrol, the decision of what to do about the Grievant appears to have been simple. The November incident was the fourth time in four years he had been involved in an alcohol related off duty incident. In and of itself, that was bad enough. However, from Management's point of view, the Grievant compounded his crime by announcing that he was a police officer and later was identified as a member of the Patrol. This, Management argues, held the Patrol and all of its other officers up to disrespect since they are charged with enforcing the same laws the Grievant broke. Finally, the Grievant's conduct indicated to Management that in spite of repeated attempts to modify his behavior through the imposition of lesser disciplinary actions, he had learned nothing. Thus, in spite of twelve earlier disciplinary actions, the Grievant still, on November 19, 1992, got drunk in public and engaged in obnoxious and offensive behavior.

In deciding if the Patrol acted appropriately in this instance, it is necessary to deal with the Union's claim that Management is overreacting, creating a mountain out of what is really a molehill. The basis for the Union's claim is its view that the Grievant really did not commit any serious offense while he was intoxicated and that the sum total of his offense amounted to being drunk. The undersigned cannot agree with that assessment. Certainly, it is true

that the Grievant wasn't involved in an auto accident. Nor did he become violent or engage in any of the other type of disgusting behavior which all too often accompanies intoxication. The Grievant was drunk, though, and he chose to exhibit his intoxication in public. Further, even though he did not become violent, the record leaves no doubt that the Grievant's behavior was obnoxious and that if he did not get into a fight, he only avoided that conclusion by mere happenstance since he acted aggressively towards the restaurant owner.

While such behavior may simply be ignored when committed by an ordinary citizen, the Grievant was not just an ordinary citizen. He was a member of the Ohio State Highway Patrol charged with enforcing all of the laws of the State, including those dealing with intoxication. As a result, the Grievant, as well as every other member of the Patrol, must be held to a higher standard than an ordinary citizen. To take any other approach would be to create a double standard whereby members of the Patrol enforce laws to which they themselves are immune. Such a situation would obviously lower the public's esteem for the Patrol thereby making its job of law enforcement more difficult. Under the circumstances, the Patrol was justified in treating this as a serious offense, especially when the Grievant's identity became known.

The question remains, though, whether Management had just cause to discharge the Grievant because of his behavior. Had this been the Grievant's first such offense the answer would be easy. In that case, the relatively minor nature of the Grievant's misconduct would not have provided the Patrol with reason to radically deviate from the progressive discipline system outlined in Article 19 of the Contract. However, as all are well aware, this was not the Grievant's first offense nor his second, but rather the fourth such incident he was involved in over four years.

Management obviously had an idea that the Grievant was suffering from alcoholism because it sent him to a contract psychologist in June, 1992. Five months later, the psychologist sent a report to the Patrol in which he specifically pointed out that the Grievant had failed to discuss any problems with alcohol. The psychologist's letter also mentioned that the Grievant was "guarded" and only attended because he had to. Considering the communication the Grievant sent to his superiors when he was initially ordered to visit the psychologist, those conclusions are not remarkable. What is unclear is if the Patrol ever responded to the Grievant's June, 1992 memo and, if it did, what its response was. Considering the psychologist's remarks, it seems apparent that if there was a response, it failed to assuage the Grievant who viewed the order to see the psychologist as a threat to his employment with the Patrol.

What Management did not do, however, in spite of the fact that it obviously suspected the Grievant was an alcoholic was to refer him to the Employee Assistance Program (EAP). Unlike many labor agreements, the Contract covering these parties specifically deals with the Employee Assistance Program (EAP). Thus, in Article 41 of the Contract the parties provided that the EAP will be available to members of the Bargaining Unit. More importantly, for the purposes of this discussion, they also agreed in Section 41.05 that alcoholism is an illness that can often be successfully treated and, therefore, they provided:

> All employees with these problems or illnesses <u>will</u> receive assistance in locating treatment for these problems or illnesses. (Emphasis added)

What Article 41 doesn't say is whether or not Management has a concomitant obligation to take the first step where it believes the employee suffers from alcoholism and is, therefore, in need of the services provided by the EAP. Under normal circumstances, the Employer should not have that burden since to require the Patrol to act first would effectively preclude it from disciplining any

employee who might be suspected of suffering from alcoholism if Management did not take the step of first trying to get them to go through the EAP.

In this case, that rule does not apply. Management recognized that the Grievant had a problem and sent him to a psychologist. The record leads the Arbitrator to conclude, though, that the situation was never explained to the Grievant who, not surprisingly, reacted with hostility and grudging compliance. The result is that any opportunity which existed to benefit the Grievant was lost. It is not even clear if the psychologist's opinion that the Grievant was an alcoholic was ever conveyed to the Grievant prior to the incident in question occurring. Having chosen to route the Grievant through the psychologist as opposed to the Employee Assistance Program under the circumstance which it did, the Employer cannot now use the Grievant's failure to respond to the psychologist as a basis for its decision to terminate him and it most especially cannot point to his failure to respond as proof that it was justified in doing so.

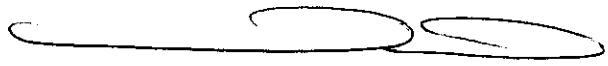
It is clear that the Grievant had a problem with alcohol, one which, frankly, given the Grievant's record, the Employer treated fairly lightly. The Patrol had a right to act to try to modify the Grievant's behavior through the discipline process. But it did not have a right to mislead the Grievant which is the net effect of what took place in this case. With the discharge hanging over his head, the Grievant has seemingly made a good faith effort to deal with his problem. In most cases, post discharge behavior will not justify overturning an employer's decision to discipline an employee. In this case, set against the background of the Employer's actions, the Grievant's efforts cannot be overlooked.

The result is that while the Employer had a right to move against the Grievant, it did not, in this situation because of the special facts of this case, have just cause to discharge him. This does not mean, though, that the Grievant should again receive a slap on the wrist as he has so many times in the

past or that his conduct can be overlooked. Rather, the Grievant should be aware both of the seriousness of his situation and that this constitutes his last chance.

V. DECISION

For the foregoing reasons, the grievance is sustained in part and denied in part. The Grievant's discharge should be modified to a suspension of ninety (90) calendar days. The remaining time he spent away from work shall be charged to medical leave of absence.



LAWRENCE R. LOEB, Arbitrator

9/2/93
Date