

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: Richard Kelley Jr.

CASE NUMBER: 15-03-930620-050-04-01

ARBITRATOR'S OPINION AND AWARD

Arbitrator: David M. Pincus
Date: December 16, 1993

Appearances

For the Employer

Donald G. Goodman
Mike King
Mike McGuffy
Cody N. Stanley
Rebecca Gilbert
Jeff Kaltman
Heather L. Reese
J. A. Russell
Anne K. Vanscoy
Rick G. Corbin

Major
Lieutenant
Specialist
Detective
Witness
Witness
Office of Collective Bargaining
Sergeant
Second Chair
Advocate

For the Union

Richard Kelley Jr.
Ed Baker
Arthur O. Mullikin Jr.
Larry M. Masenheimer
Donald W. Combs
John H. Burless

Grievant
Staff Representative
Witness
Witness
Witness
Attorney

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 October 28, 1993, in Cincinnati, 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 they would not submit briefs.

STIPULATED ISSUE

Was the Grievant, Richard Kelley Jr., disciplined for just cause in accordance with Section 19.01 and 19.05 of the Labor Agreement (Joint Exhibit 1)? If not, what shall the remedy be?

PERTINENT CONTRACT PROVISIONS

Article 18 - Internal Investigation

18.09 Off Duty Status

Disciplinary action will not be taken against any employee for acts committed while off duty except for just cause?

(Joint Exhibit 1, pg. 26)

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.

(Joint Exhibit 1, pg. 27)

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 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.

(Joint Exhibit 1, pg. 29)

CASE HISTORY¹

Richard Kelley Jr., the Grievant, has served as a Trooper since May 17, 1989. At the time of the disputed incident, the Grievant was stationed at the Hamilton, Ohio Highway Patrol post. The facts, for the most part, are in dispute and involve an off duty incident which took place during the early morning hours of May 15, 1993.

On the morning in question, the Grievant engaged in a confrontation at a Perkin's Restaurant in Covington, Kentucky. He and Arthur D. Mullikin Jr., a friend and compatriot, arrived at Perkin's Restaurant at approximately 3:00 a.m. after retreating at a baseball game and several night club establishments. Several witnesses testified to several purported incidents which eventually led to the Grievant's incarceration.

One incident allegedly took place at the Grievant's table. Cody N. Stanley, an Officer employed by the Covington, Kentucky Police Department, was working a special detail at Perkin's Restaurant. After becoming cognizant of the Grievant's disruptive and abusive behavior, he confronted

¹It should be noted, the Grievant obtained private counsel and agreed to a Waiver of Representation. He released and held harmless The Union/Association from all duties and liabilities of representation arising from his grievance. He, moreover, waived his right to legal and/or other representation and agreed to pay any costs associated with the retention of private counsel.

the Grievant and Mullikin. He asked them to cease from engaging in the inappropriate behavior or leave the establishment. During the course of this exchange, the Grievant identified himself as a State of Ohio Trooper by providing an identification card. Stanley also testified the Grievant denigrated The Covington Police Department.

Another incident took place at the cash register. Other Police Officers arrived while the Grievant and Mullikin were paying their bills. Again, the Employer's version has the Grievant uttering several derogatory statements about the Covington Police Department. He also stated the Police Officers should come to Ohio; he would show them how a real Police Officer performed his duties.

Mike McGuffy, one of the Officers that arrived at the scene, asked the Grievant to leave the restaurant after the disparaging comments. McGuffy and another Officer did not physically escort the Grievant outside the establishment but did "move" him along. As the Grievant exited through two sets of double doors, McGuffy thought the incident had ended; he then returned to the cash register area. McGuffy testified he did not initially follow him outside. While outside of the restaurant, the Grievant purportedly gestured toward McGuffy. He also made some comments stating "I can't wait till you come to Ohio; I'll take care of you when you come to Ohio."

McGuffy walked outside and confronted the Grievant. McGuffy allegedly remarked: "Why don't you just leave, just leave. If you don't leave, I'm going to arrest you. I've had enough. If you don't leave, I'm going to place you under arrest." The Grievant remarked: "You're not going to arrest me." McGuffy attempted to grab his left arm and the Grievant pulled his arm away. Another Officer

attempted to aid McGuffy which caused all three individuals to fall into the mulch. The Grievant resisted being handcuffed, but eventually, with the help of another Officer, the handcuffs were applied.

The Grievant was arrested and incarcerated (Employer Exhibit 1.) He was charged with disorderly conduct, criminal trespass and resisting arrest. The matter was adjudicated and the Grievant agreed to enter a diversion program.

On June 15, 1993, the Grievant was removed from his position as a Highway Patrol Trooper. The removal order contained the following violations of Section 4501:2-6-02:

(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.
- (2) For committing any crime, offense or violation of the laws of the United States, the State of Ohio, or any municipality.

(Joint Exhibit 5, Pg. 7)

(O) Court Action

- (1) A member shall report, in writing, as soon as possible, to their supervisors, any court action instituted against them.

(Joint Exhibit 5, Pg. 8)

On June 20, 1993, the Grievant formally contested the removal decision. He authored a Grievance Report Form which contained the following particulars:

"... was discharged without just cause, and progressive discipline was not used..."

(Joint Exhibit 2)

The Employer denied the Grievance at Level III and Level IV of the Grievance Procedure. On both occasions, emphasis was placed on the off duty misconduct and how it conflicted with announced expectations. Reliance was also placed on the Grievant's lack of emotional control and his inability to diffuse volatile situations.

Neither party raised procedural nor substantive arbitrability claims. 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 remove the Grievant. Article 18.09 indicates when there is just cause, employees will be disciplined for acts committed while off duty. Clearly, the particular circumstances under review evidence off duty demeanor which cannot be condoned, but must be dealt with in a reasonable and fair manner.

Testimony and evidence introduced via several Employer witnesses established the legitimacy of the Employer's action. Jeff Kaltman and Officer Stanley provided consistent testimony regarding the reasons Officer Stanley originally selected the Grievant's table. Kaltman, moreover, corroborated Officer Stanley's allegations regarding the Grievant's misbehavior while the confrontation took place at the Grievant's table.

Even though Mullikin attempted to support the Grievant's version of the events, he failed to be totally persuasive. His recollection seemed to fail him in terms of providing specific details surrounding the disputed incident. He admitted to a discussion dealing with Joey Butafuccho, but he alleged the comments were not directed toward Kaltman.

Allegations surrounding the Grievant's inappropriate behavior at the cash register were also confirmed by Rebecca Gilbert, the manager of Perkin's Restaurant, Officer McGuffy and Officer Stanley. They consistently maintained the Grievant was involved in a loud, derogatory exchange. He uttered negative statements regarding the quality of the Covington Police Department, their attire and disgraceful shoes. These individuals, moreover, expressed their desire to avoid a confrontation and provide the Grievant with an opportunity to exit the premises peacefully and without negative consequences. McGuffy and Stanley, more specifically, attempted to provide the Grievant with professional courtesy based on his standing as an Ohio State Trooper.

Rather than accepting the goodwill gestures offered by these individuals, the Grievant wanted to escalate the situation into a confrontation. He failed to diffuse the situation, and instead, gestured and confronted Officer McGuffy after initially departing from the premises.

The Grievant's off duty misconduct was thought to be in direct conflict with expectations expressed in the Employer's Code of Ethics and Rules and Regulations (Joint Exhibit 5). Major Donald G. Goodman emphasized the import placed on the Department's reputation through individual behavior. The Grievant's behavior, however, demonstrated certain skill deficiencies which precluded his ability to properly complete his duties. He demonstrated a complete lack of personal and emotional control which caused the escalation of a minor incident into a major disturbance. His inappropriate behavior served as a liability to law enforcement in general and to the citizenry of Ohio. The Grievant's total disrespect and insulting behavior toward officers employed by the Covington Police Department was totally inappropriate.

The administered penalty was thought to be properly implemented in accordance with guidelines specified in Article 19.05. The Employer opined discretion was used in regard to the level of discipline imposed, and the termination decision was commensurate with the offense. The incident in dispute was thought to be extremely severe. Also, the Grievant's prior Department Record (Joint Exhibit 4) evidenced a willingness to challenge the Employer's work rules (Joint Exhibit 5) and to follow improper procedures and policies. The termination, moreover, was thought to be proper based on the Grievant's short tenure with the organization.

The Employer opined Article 41 - Employee Assistance Program was not inappropriately applied in this instance. Referrals can be made on a voluntary basis once the Employer becomes cognizant of an existing problem. Article 41.06 requires an employee to seek information and/or

assistance on their own initiative. The Grievant failed to trigger the process and the Employer and its agents are not qualified, nor required, to diagnose an employee's problems.

The Position of the Union

It is the position of the Union that the Employer did not have just cause to remove the Grievant. The Union, moreover, argued in the alternative that the discipline was not commensurate with any proven offense, and as a consequence, was in violation of Article 19.05 - Progressive Discipline.

The Union opined the facts and related evidence easily supported the Grievant's version which conflicted with the one proposed by the Employer's witnesses. Nothing in the record indicates any problems arose at the table once Officer Stanley arrived. Officer Stanley never indicated the Grievant yelled, made any threats, nor attempted to initiate combat. The Grievant's remarks dealing with "coming to Ohio" merely emphasized the professional approach he would have undertaken if confronted with the same set of circumstances. His explanation was viewed as plausible and realistic. Also, the Grievant produced his Ohio State Trooper identification to "diffuse" the situation. He merely attempted to show Officer Stanley that any differences could be worked out.

The Grievant's behavior, moreover, was not deemed to be inappropriate. The Grievant did eventually leave the premises, and he was not charged with any criminal offense for what he had done inside the restaurant. The Grievant admitted he went through the double door and turned and said

something to Officer McGuffy. This behavior or activity should not be viewed as offensive. Officer McGuffy could not hear what the Grievant had to say.

The Employer's theory regarding the Grievant's intention to engage the officers in a fight outside the restaurant was also unpersuasive. The Employer would have the Arbitrator believe that the taunts and gestures were perpetrated to accomplish this devious motive. Any yet, a fight was never initiated by the Grievant once McGuffy and the other officers "stepped outside" the restaurant.

If the Grievant was guilty of failing to diffuse the situation, McGuffy and Stanley were equally negligent. Stanley invited the Grievant to combat when he remarked "want to go out and fight, we'll go out and fight." Also, McGuffy did not have to respond to the Grievant's gestures and eventually follow the Grievant outside the premises. If cooler heads had prevailed, the entire incident could have been avoided.

The Employer's off duty nexus arguments were thought to be misplaced. The off duty misconduct in question does not serve as a valid predictor of the Grievant's future performance as a Trooper. His existing work record and reputation within the Department serve as far more reliable and valid predictors of future work performance.

The administered penalty was not commensurate with the offense because it failed to comply with the Progressive Discipline requirements contained in Article 19.05. The offense in question cannot be equated with other offenses requiring immediate termination. The Grievant, if he engaged in any punishable activity, used poor judgement. This type of offense can be readily handles via progressive discipline approaches because behavior of this sort can be modified and controlled.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, and a complete review of the record, it is my judgement that the Grievant's actions justified discipline. In this instance, however, the dispensed discipline was too severe and must be modified to reflect the severity of the proven offense.

I am convinced the Employer's version of the incident accurately depicts the events as they truly transpired. To conclude otherwise would require a discounting of independent testimony which consistently depicted the Grievant as boisterous, rude, uncooperative and flaunting his standing as an Ohio State Trooper.

The sequence of events was corroborated by several witnesses whose testimony was consistent and highly credible. Kaltman and Stanley confirmed the events leading to the table incident and what transpired after Stanley arrived to quiet the Grievant and his companion. Gilbert, Stanley and McGuffy reliably confirmed the confrontation at the cash register. They also supported the charge surrounding the Grievant's gesture toward Officer McGuffy after he exited the double doors.

In direct conflict with this consistent testimony and evidence, were the internal contradictions offered by the Grievant and Mullikin during the course of their testimony. Mullikin contradicted the Grievant when discussing the Joey Butafuccho statement. Mullikin admitted a conversation regarding this topic took place but that comments were not directed toward Kaltman. The Grievant, however, maintained Mullikin noticed Kaltman's arrival, mentioned it to the Grievant, and the Grievant

responded "Hey Joey." I am convinced the statement was directed toward Kaltman and uttered in a loud and boisterous manner.

Mullikin's recollections surrounding the cash register incident also appears to be self-serving and totally evasive. For the most part, he could not recall any of the conversation that took place even though he was in close proximity of the incident. And yet, he clearly recalled Officer McGuffy calling the Grievant a clown. His credibility was highly tarnished as a consequence of this memory lapse.

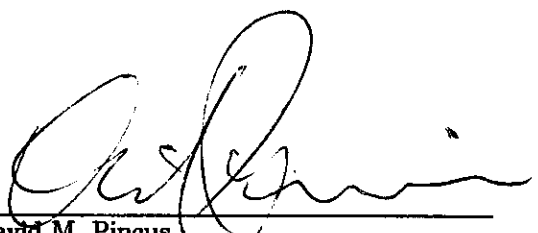
The type of behavior in question cannot be ignored and requires the administration of a severe disciplinary consequence. By accepting an appointment as an Ohio State Trooper, the Grievant tacitly accepted the responsibility of protecting the reputation of the organization, and the related expectations surrounding the import of off duty misconduct. He, moreover, acknowledged he was properly placed on notice regarding these expectations, and especially, the higher standard of conduct accepted and expected by all Ohio State Troopers. The matter in dispute, however, became even more serious when the Grievant exposed his identity as an Ohio State Trooper.

The question remains whether the Employer had just cause to remove the Grievant because of his behavior. In this instance, I believe the behavior in question does not provide the Employer with sufficient reason to deviate from the progressive discipline system. A review of the Grievant's Personal Department Record (Joint Exhibit 4) and the present situation indicate the Employer had just cause to severely discipline the Grievant but did not have just cause to discharge him. The award specific below should convey the seriousness attached to the misconduct he engaged in on May 15, 1993.

AWARD

The grievance is upheld in part and denied in part. The removal order shall be converted to a suspension for the period of time since the Grievant's removal from his position as a State of Ohio Trooper.

December 24, 1993



Dr. David M. Pincus
Arbitrator