#971

IN THE MATTER OF ARBITRATION

BETWEEN

The State of Ohio	)	CASE NO. 15-03-931021-119-04-01
	)	
	)	GRIEVANT: SCOTT WHITLATCH
and	)	
	)	
	)	OPINION AND AWARD
The Fraternal Order of Police Ohio Labor Council, Inc., Unit 1	)	

APPEARANCES:

On Behalf of the State

Lt. Rick G. Corbin	Advocate
Ann Van Scoy	Second Chair
Lt. John Shore	Witness
Lt. Randy Meek	Witness
Officer Jay Strait	Witness
Lt. Michael Megison	Witness

On Behalf of the Union

Kay Cremeans	General Counsel
Ed Baker	FOP/OLC Staff Representative
Patrolman Scott Whitlatch	Grievant

LAWRENCE R. LOEB, Arbitrator
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I. STATEMENT OF FACTS

The Grievant, who had been hired by the Patrol in January, 1992, completed his training in late June of that year and was subsequently assigned to the Mt. Gilead Post. In the last six months of the year he made twelve DUI arrests. In 1993 he made 37. In three instances he charged the driver with DUI without having the benefit of a blood alcohol test and in three other cases arrested the drivers even though they tested below the .10 statutory presumption. While to a layman the Grievant's DUI arrest record may seem staggering, it is not unremarkable as the Patrol made 26,749 DUI arrests in 1992, the lowest number in twelve years.

On September 11, 1993, at approximately 2:50 a.m., the Grievant, who was off duty at the time, approached a DUI checkpoint in Worthington, Ohio. In keeping with the procedures utilized by the Worthington Police Department, the Grievant's vehicle had been selected at random as he was driving along High Street. As he approached the checkpoint, his car was stopped and the Grievant was told to pull into an area of the street marked off by traffic cones. He did so without hitting any of the cones and exited his car after being ordered to do so by a member of the Worthington Police Force who then administered a portable breathalyzer test to the Grievant. The results indicated that the Grievant might be impaired so the Officer passed the Grievant on to another patrolman for further testing. This consisted of three separate physical trials including finger to nose, walk and turn, and the horizontal gaze nystagmus test which measures the fluttering of the suspect's eyes. After testing the Grievant, the patrolman conducting the test concluded that the Grievant had performed poorly and was, therefore, impaired.

Specifically, he noted on the Divided Attention Skills Worksheet that he completed as he tested the Grievant that the Grievant twice missed his nose with his right finger and twice with his left finger, failed to keep his foot raised the full 30 seconds on the one-legged stand, turned incorrectly or lost his balance on the performance stage of the walk and turn, lacked smooth pursuit, and had distinct nystagmus of maximum deviation in both eyes on the horizontal gaze nystagmus test. As a result of determining that the Grievant was impaired, he placed the Grievant under arrest. It was at that time that he learned that the Grievant was a member of the Ohio State Highway Patrol. The Officer then went to the Patrol Lieutenant who was assisting the Worthington Police that night and notified him that the individual he had just arrested identified himself as a member of the Patrol. At approximately the same time, another officer who was inventorying the Grievant's motor vehicle discovered an open 40 ounce container of Busch beer behind the driver's seat.

The Grievant was transported to the Worthington Police Department where he was given a breathalyzer test at 3:13 a.m. It indicated that at that time the Grievant had .089 blood alcohol content, or .011 percent below the statutory presumption of being under the influence. Because the Grievant did not test in excess of .10 BAC and because the results of the walk and turn and balance tests he had undergone gave no indication that he was in excess of that limit, the arresting officer asked his supervisor whether the Grievant should be charged with reckless operation instead of operating a motor vehicle while under the influence of alcohol. Shortly thereafter the officer was informed by the Patrol Lieutenant that he should charge the Grievant with OMVI and allow the court to decide whether or not to reduce the charge. Following that conversation, the arresting officer filled out the paperwork necessary to complete the arrest and processing of the Grievant including the alcohol influence report form and the

implied consent form 2255. He was somewhat unfamiliar with the latter, though, and had trouble completing it until he was assisted by the Grievant who was extremely polite and cooperative throughout the entire evening.

The alcohol influence report form, the front of which is broken down into four subjects, is designed to permit an arresting officer to record his or her observations by checking the appropriate boxes under each heading. Under the section, "Observer's Opinion," the arresting officer indicated that the Grievant was suffering from obvious effects of alcohol and was unfit to drive. He marked those boxes, however, because he'd determined that he had probable cause to arrest the Grievant for DUI. The reverse side of the form is an interview guide consisting of a number of specific questions the arresting officer is to ask the suspect, followed by spaces in which to record the suspect's answers. After the question, "Have you been drinking?", the arresting officer wrote, "Yes," and After the question, "What?" he wrote, "Bud Light." He also indicated that the Grievant told him that he had had six or seven beers between 10:00 p.m. and 1:30 a.m. Finally, after the question, "Are you under the influence of an alcohol beverage now?" he recorded the Grievant as having responded, "Yes."

Along with being cited for operating a motor vehicle under the influence of alcohol, the Grievant was also cited for having an open container in his vehicle. When the case subsequently came to trial, the charge of operating a motor vehicle while under the influence was dismissed by the Prosecutor after which the Grievant pleaded no contest to the charge of having an open container of beer in his car, for which he was fined $35.00. Before the case came to trial, the Patrol's Superintendent notified the Grievant on September 23, 1993 that he would be suspended for a period of thirty (30) working days for violating

Rules 4501:2-6-02(I)(1) and (2) of the Rules and Regulations of the State Highway Patrol, which regulations provide:

> (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.

The Union, on the Grievant's behalf, protested Management's decision arguing on the Grievant Report Form that:

> Penalty is unwarranted. (On October 8, 1993, I was advised that a 30 day suspension would be imposed on me from October 12th to November 20, 1993, stemming from an incident that occurred on September 11, 1993.)

The parties were unable to settle the matter at any of the prior steps of the grievance procedure with the result that it ultimately proceeded to arbitration at which time they relied upon the following provisions of their Labor Agreement in support of their positions, which sections provide in pertinent part:

> Article 18 - Internal Investigation
> ***
>
> 18.09 Off Duty Status
>
> Disciplinary action will not be taken against any employee for acts committed while off duty for just cause.
>
> ***

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.

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19.03 Length of Suspensions

No suspension without pay of more than ninety (90) calendar days may be given to an employee.

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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.

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It was upon these facts that this matter rose to arbitration and award.

II. POSITION OF THE EMPLOYER

Management maintains that there is no factual dispute in this matter. The Worthington Police Officer who arrested the Grievant believed that he had probably cause to do so based on the Grievant's failure to pass the portable breath analyzer exam and to successfully complete the field sobriety test. When he was subsequently transported to the Worthington Police Headquarters he blew

(.089). Granted, the results of the Grievant's breathalyzer test were below the .10 percent presumption of operating a motor vehicle under the influence of alcohol. Nonetheless, the .089 breathalyzer result, coupled with the Grievant's inability to pass the field sobriety test, provided sufficient basis to charge him with driving while under the influence of alcohol. Further, there is no question, given the open container of beer found behind his seat, that the Grievant was guilty of that offense. There is also no question that he had been drinking for some time before he started driving and that he had been drinking heavily as he himself admitted that he had between six and seven beers over a relatively short period of time.

While the Union may contend that the discipline meted out to the Grievant was unwarranted because he was not convicted of the driving while under the influence of alcohol charge, the Union's argument misses the point. The Grievant was charged with conduct unbecoming an officer because he was arrested for driving while under the influence of alcohol and having an open container of beer in his car. He was not disciplined for being convicted of driving under the influence of alcohol. If he had been, then Management would have taken much more severe action against the Grievant as it has consistently discharged other employees for committing that offense. The Union's argument also misses the point that the Patrol has a right to hold its employees to a higher standard than would be applied to an ordinary citizen. It has that right because members of the Patrol are charged with enforcing the traffic laws of the State and especially with removing drunk drivers from the roads. It cannot countenance one of its own violating those laws.

To do so not only jeopardizes the Patrol's reputation, but its mission as well. If this officer or any officer can drink and drive, then how can he or any other member of the Patrol legitimately challenge anyone else who engages in

the same behavior? The obvious answer is that they cannot. The fact that the Grievant was off duty at the time he was arrested doesn't excuse his behavior or preclude Management for disciplining him for what he did as Article 18.09 of the Contract expressly provides that Management may discipline an employee for his off-duty conduct if it has just cause to do so. The Grievant's behavior or misbehavior, as the case may be, clearly gave Management just cause to discipline him.

After carefully considering the matter, the Employer imposed a 30 working day suspension. It was not a decision which was taken lightly. Rather, the Grievant's actions must be seen for exactly what they were, a repudiation of all of his training as well as the Patrol's mission. It is because his actions were so serious that the penalty is serious. It is a penalty which Management has imposed in similar circumstances. Since it has, the Grievant cannot claim that he is the victim of disparate treatment. By the same token, the decision to discipline the Grievant, as well as the decision to penalize him by suspending him for 30 working days, was neither arbitrary, capricious nor discriminatory as Management has always imposed the harshest penalties for such behavior.

As there was just cause to discipline the Grievant, as the penalty which Management imposed was not on its face a violation of the Contract and since the penalty was not arbitrary, capricious or discriminatory, it follows that the penalty must stand. The Arbitrator should not, cannot, and must not substitute his judgment for Management's.

III. POSITION OF THE UNION

Management's assertions to the contrary, the Union argues that it is the Arbitrator's responsibility to review the discipline imposed on the Grievant and, if appropriate, as it is in the case, substitute his or her decision for the

Employer's if the Employer's action was unwarranted. In this case, it is absolutely clear that there was no justification whatsoever for the 30 working day suspension the Employer meted out to the Grievant. What the Patrol has done is to blow a simple situation totally out of proportion, behaving as if the Grievant was guilty of driving while under the influence of alcohol.

For all of Management's bombast, for as much as it would dearly like to have the Arbitrator believe that the Grievant was convicted of driving while under the influence of alcohol, there was no such conviction. The reason there wasn't was there was nothing to justify charging the Grievant with the offense let alone convicting him of it. Even the arresting officer admitted that he did not believe that the Grievant should have been charged with operating a motor vehicle under the influence of alcohol. Instead, he testified that the only reason he issued the citation for that offense was that he had been told to do so by the Patrol's representative who was at the Worthington Police Station that night. Fortunately, when the matter ultimately came to trial cooler heads had a chance to prevail and the prosecutor, having taken a look at this case, realized that there was no basis to charge the Grievant with driving under the influence of alcohol and so dropped the charge. Yet, the Patrol would proceed as if the Grievant had been found guilty of that offense.

Perhaps if the Patrol played by its own rules it would be in a better position to argue that the discipline it meted out to the Grievant was justified or at least that some discipline was justified. However, Management is attempting to impose a double standard on the Grievant. Thus, while it argues that it has just cause to discipline him for drinking off duty, Management's own witnesses reluctantly admitted that the Patrol serves alcohol at some of its functions knowing full well that those who consume it will have to get in their cars and get back on the road to drive home. Yet, the Patrol would turn a blind

eye to those officers while at the same time it attempts to crucify the Grievant for doing exactly what they did. More than that, the Patrol's action runs counter to its own policy.

If it wanted to prohibit all off duty drinking or limit it to a certain level, then it has an obligation to so state in the Contract or some rule. It has never taken that step, though. Therefore, the only standard which can be applied is the .10 percent blood alcohol level recognized by the State of Ohio. The Grievant, as the Patrol reluctantly acknowledges, however, didn't come anywhere near that level. As a result, it had no basis to discipline him and certainly not to impose such a draconian punishment.

The purpose of discipline should be to inform an individual that his or her behavior has fallen below the standard the employer deems acceptable. More than that, discipline must be commensurate to the offense the employee is charged with committing. It cannot be punitive. There is, however, no other way to characterize the suspension the Grievant received than as punitive. He was only fined $35.00 for having an open container in his car. The 30 working day suspension the Patrol meted out is a hundred times that amount and is excessive per se. Since it was excessive and since there was no just cause to issue it, the grievance must be sustained and the Grievant made whole.

IV. DISCUSSION

Although the Union initially indicated that it intended to challenge the results of the breathalyzer test, it quickly abandoned that line of defense in favor of two other interrelated arguments. The first was that the Grievant was not driving while under the influence of alcohol and, therefore, Management had no right to discipline him. In the alternative, it argued that even if the Grievant's conduct warranted discipline, it certainly did not justify the penalty

Management imposed. Central to the Union's position in both cases is its claim that the prosecutor's decision to drop the DUI charge against the Grievant vindicated his claim that he was not driving while under the influence of alcohol. Taking the argument to its logical conclusion, the Union reasons that once the DUI charge was dropped, Management lost any justification it may have had to discipline the Grievant. In response, the Employer argues that the Union's position is nonsense since the decision to discipline the Grievant had nothing whatsoever to do with whether or not he was convicted of OMVI, but rather was predicated upon his having been caught driving while under the influence of alcohol.

Neither the Grievant nor the Union challenged the Employer's right to impose discipline for off-duty conduct, nor could they in view of the explicit language of Article 18, Section 18.09 of the Contract which unequivocally gives Management that right. What they are arguing, instead, is that regardless of the language in the Agreement, the Employer did not have just cause to suspend the Grievant. More than that, they are arguing that the Employer has essentially engaged in a shell game of sorts in which it is shuffling the charges against the Grievant from one position to another whenever an argument becomes untenable. As proof, the Union points out that Management at first claimed that the Grievant was disciplined for driving under the influence of alcohol because he was arrested for that charge, but when the Union pointed out that the charge was thrown out of the court, Management reversed itself and instead argued that it had a right and obligation to act simply because he was charged with that offense.

The difficulty with that argument is that the arresting officer testified that the only reason he charged the Grievant with driving while under the influence of alcohol in the first place was because he was told to do so by

the Patrol Lieutenant who was present when the Grievant was arrested. The officer further indicated that because the breathalyzer revealed that the Grievant's blood alcohol content was .089 percent, he did not believe that the Grievant could be charged with operating a motor vehicle under the influence of alcohol. Rather, he felt the Grievant should have been charged with reckless operation. Whether the officer should or should not have charged the Grievant with reckless operation or with driving while under the influence of alcohol, the important point is that the decision about which path to follow was not his, but rather was made by the Employer's representative. What makes the point important is that having made the decision, the Employer is now using it as a foundation for its decision to discipline the Grievant by suspending him for 30 working days. Left unanswered is whether or not the Employer would have taken the same step had the arresting officer charged the Grievant with reckless operation instead of OMVI.

If there is no question that the Patrol has a right to discipline its employees for off-duty conduct, there is also no question about the principles which are to be applied in determining whether or not the employee's off-duty conduct constitutes just cause so as to justify the Employer's decision to discipline or discharge him. Thus, as Arbitrator David Pincus noted In the Matter of 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, Case No. 15-03-921006-083-04-01:

> 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.

In the Matter of Arbitrator Between the Fraternal Order of Police, Ohio Labor Council, Inc., Unit 1 and the State of Ohio which arose out of the discharge of Trooper Brian Roese, Arbitrator Calvin William Sharpe summed up how those principles apply when he stated:

> These standards show that the pivotal factor in off-duty misconduct cases is the nexus between the employee conduct and the employer's legitimate interests in an effective business operation.

For Arbitrator Sharpe and for Arbitrator Emmet Ferguson who Arbitrator Sharpe cited with approval:

> . . . the connection between the facts which occur and the extent to which the business is affected must be reasonable and discernible. They must be such as could logically be expected to cause some result in the employer's affairs. Each case must be measured on its own merits.

Applying those principles, Arbitrator Sharpe upheld the discharge of Trooper Roese who was involved in a motor vehicle accident and subsequently charged with and convicted of driving under the influence of alcohol when it was found that he had a blood alcohol content of .18 percent at the time of the accident.

Applying the same principles, Arbitrator David Pincus upheld 15 days of a 20-day suspension meted out to a dispatcher where the suspension was imposed for a second alcohol-related offense within a relatively short period of time. While agreeing with the Employer that there was a connection between the dispatcher's misconduct and the nature of his job which warranted disciplining him for off-duty alcohol-related misconduct, Arbitrator Pincus reduced the penalty because the Grievant had received only a 10-day suspension for the first

offense which grew out of an incident where he was originally charged with DUI, the charge later being reduced to reckless operation.

In view of the statistics Management introduced into the record, it is obvious that ridding the roads of alcohol impaired drivers is both a necessity and one of the Patrol's prime responsibilities. It is also obvious that the Patrol cannot carry out its mission of apprehending drunk drivers if those who are charged with enforcing the law, break it. There can be no double standard. To the extent that there is, to the extent that members of the Patrol engage in the very behavior they are sworn to prevent, those individuals bring the Patrol into disrepute and undermine its mission. This is not the same as saying that those employed by the Patrol must totally abstain from using alcohol throughout their tenure with the Department. Management doesn't make that claim and as the Union points out, it is in no position to do so as the Patrol served alcoholic beverages at least at one of its official functions.

There is a difference between that, though, and imbibing in sufficient quantities to reach the point where the individual ceases to be able to exercise judgment and operate a motor vehicle without impairment. The State of Ohio has declared that .10 percent blood alcohol content constitutes the threshold where an individual is presumed to be operating a motor vehicle under the influence of alcohol. An individual may have a lower blood alcohol content and may still be guilty of operating a motor vehicle under the influence of alcohol, but there must be other evidence besides the test results to substantiate the charge.

In this case, there was such evidence. Specifically, the arresting officer indicated that the Grievant's failure to perform the field sobriety test correctly convinced him that the Grievant was impaired at the time he was stopped at the sobriety check point in Worthington, Ohio. Considering the Grievant's subsequent admission that he consumed between six and seven beers over a three

and one-half hour period, the arresting officer's conclusion comes as no surprise. Perhaps, if left to his own devices, the arresting officer would have only charged the Grievant with reckless operation of a motor vehicle instead of charging him with DUI as he did. Whatever his decision would have been, there is no doubt in the Arbitrator's mind that he would have charged the Grievant with one or the other offense as a result of his findings. For whatever reason, the prosecutor refused to proceed on the DUI charge and didn't pursue the lesser offense of reckless operation.

Regardless of that decision, the Employer still had a right to discipline the Grievant if it believed it had just cause to do so. After reviewing all of the evidence, the undersigned must agree with the Employer that it did have just cause to discipline the Grievant. He, himself, admitted to the arresting officer that he was impaired at the time that he was stopped. Whether he did so as he now says because of the results of the breathalyzer or whether he did so because he believed he was impaired as a result of having imbibed six or seven beers within a relatively short period of time doesn't matter. It especially doesn't because, if, as the Grievant contends, he concluded he was impaired because of the results of the blood alcohol test, then his belief justifies the Patrol's decision to push for the charge of DUI being laid against him. There is also no question that the Grievant's conduct, if tolerated, would have affected not only his ability to perform his job, but the Patrol's ability to carry out its mission. On that basis, the Arbitrator believes that the Employer had just cause to discipline the Grievant as a result of the events of September, 1993.

However, the undersigned believes that the penalty which the Patrol imposed was inappropriate. There are two reasons for that conclusion. The first

is that in large measure, the Patrol's decision to discipline the Grievant by suspending him for 30 working days was predicated on his having been charged with driving while under the influence of alcohol. However, as pointed out earlier in this decision, the Patrol was instrumental in having the Grievant charged with that offense. It is questionable whether or not he would have been had the Patrol not interfered. It is also questionable what penalty Management would have meted out to the Grievant had he only been charged with reckless operation, a charge on which the prosecutor would have stood a much better chance of securing a conviction. The second reason which leads the undersigned to believe that the 30 working day suspension was too severe is that in the case before Arbitrator David Pincus, Management imposed only a 10-day suspension on an employee who was initially charged with driving while under the influence of alcohol, but who subsequently pleaded no contest to an amended charge of reckless operation. While that employee was only a dispatcher and not a patrol officer as the Grievant is, the distinction makes little difference in view of Management's position that law enforcement dispatchers could be and must be held to the same standard as sworn officers. Having made that argument at that time, Management cannot disavow it now.

Nor can it impose two different penalties for the same offense where there is no discernible reason for doing so. That, however, is what has effectively taken place in this case. While it would be tempting to create some hard and fast system which the parties could look to for the purposes of establishing what the appropriate penalty should be in such cases, it would be a mistake to do so. Each case must be judged on the facts and circumstances peculiar to that particular situation. It is unclear why Management felt that a 10-day suspension was appropriate in the case of the dispatcher who appeared before Arbitrator Pincus. If Management wanted to send a message that such

behavior would not be tolerated because of its negative impact on the employee's ability to perform his or her duties as well as the Patrol's ability to perform its mission, the undersigned believes that the penalty that Management imposed in that matter was too lenient. By the same token, given that decision, the undersigned cannot justify imposing a penalty three times as great on the Grievant for committing the same or a lesser offense.

However, the Grievant, as well as every other member of the Patrol, must understand that the conduct he engaged in cannot be tolerated if the Patrol is to remain an effective force for dealing with drunken drivers. Therefore, while the evidence leads to a conclusion that Management did not have just cause to suspend the Grievant for 30 working days, the Grievant cannot hope to escape without any punishment or only a slap on the wrist. It is especially so given his duties as a Trooper, which includes the responsibility for arresting others engaged in the same misconduct he engaged in in September, 1993.

V. DECISION

For the foregoing reasons, the grievance is sustained in part and denied in part. The Grievant's suspension is converted from a thirty (30) working day suspension to a twenty (20) working day suspension and the Employer is directed to make the Grievant whole for the ten (10) days' difference.

LAWRENCE R. LOEB, Arbitrator

May 13, 1994
Date