#986

IN THE MATTER OF ARBITRATION

BETWEEN

The State of Ohio	)	CASE NO. 15-03-931018-0133-04-01
	)	
	)	GRIEVANT: THOMAS UHLER
and	)	
	)	
	)	
Fraternal Order of Police, Ohio Labor Council, Inc., Unit 1	)	OPINION AND AWARD
	)	

APPEARANCES:

On Behalf of the State

Lt. Rick G. Corbin	Advocate
Teri Decker	Office of Collective Bargaining - Second Chair
Anne K. Van Scoy	Ohio State Highway Patrol

On Behalf of the Employer

Kay Cremeans	General Counsel
Ed Baker	Staff Representative
Jim Roberts	Representative, Ohio Labor Council
Thomas Uhler	Grievant

LAWRENCE R. LOEB, Arbitrator
55 Public Square, Suite 1640
Cleveland, Ohio 44113
(216) 771-3360

I. STATEMENT OF FACTS

On September 13, 1993 the Patrol notified the Grievant that pursuant to Section 124.388 of the Ohio Revised Code and Article 19.02 of the parties' Agreement he was being placed on administrative leave effective the next day, September 14, 1993. Beyond citing those two provisions, the September 13th notice gave no indication why Management decided to take that step. The Patrol's position finally became clear a month later when, on October 12, 1993, Superintendent Rice sent the Grievant a letter informing him that the Director of Public Safety intended to terminate his employment for:

> . . . violation of Rule 4501:2-6-02 (B) (2), (E), and (I) (3) of the Ohio State Highway Patrol, to with: it is charged that on January 18, 1993, and on July 31, 1993, you did fail to perform your duty satisfactorily, conducted yourself in a manner unbecoming an officer, and made false statements concerning your conduct. On or about Monday, January 18, 1993, and on or about Saturday, July 31, 1993, you failed to submit all required reports concerning an alcohol related offense, had an improper on-duty association with an individual who was in your custody, and made false statements concerning your conduct.

The sections of the Regulations which were cited in the Superintendent's letter provide in pertinent part:

> **4501:2-6-02 PERFORMANCE OF DUTY AND CONDUCT**
>
> (B) Performance of duty
>
> . . .
>
> (2) A member shall submit all required reports without delay and in accordance with directives established by the superintendent.
>
> . . .
>
> (E) False statement, truthfulness

A member shall not make any false statement, verbal or written, or false claims concerning their conduct or the conduct of others.

. . .

(I) Conduct unbecoming an officer

. . .

(3) For any improper on duty association with any individual for purposes other than those necessary for the performance of official duties.

The matters outlined in the letter initially came to the Patrol's attention when a young woman the Grievant had stopped for speeding on July 31, 1993 complained about his conduct. According to the young woman, she had been to a party earlier in the evening at which she drank a significant amount of beer. She left the party, returned home, picked up her own car and was on the way back to the party when she stopped for gas. She went inside the station, paid for the gas and left. Unbeknownst to her, the station operator informed the Grievant, who happened to be present at the time, that she had a strong smell of alcohol on her breathe. The Grievant initially made no attempt to follow up on the operator's information. However, when he saw the young woman coming back from the direction she had initially taken when she left the station, he decided to investigate. He followed her, determined that she was speeding and pulled her over. He, too, noticed the smell of alcohol on her breathe and gave her the field sobriety test, which the young woman reported failing. The Grievant then took her to his cruiser and had her sit in the front seat at which time he checked her license and the license of the vehicle she was operating. According to her, the computer indicated that she was driving with expired plates as well as an expired license and there was an outstanding warrant for her arrest because

she failed to appear in court in Cuyahoga County. The Grievant also administered a portable breathalyzer test to the young woman, which she reported failing. As a result, the Grievant placed her under arrest.

The combination of the outstanding warrant and her impending prosecution for driving under the influence of alcohol as well as the other problems revealed by the check of her license, were too much for the young woman who broke down and began to cry. Her plight touched something in the Grievant who, like her, was going through a divorce at the time. As a result, he began talking to her, the conversation drifting into personal matters. Eventually, he transported her to the Jackson Township Police Department for the purpose of having her undergo a breathalyzer examination. After arriving at the station, the two continued to talk in his cruiser for a short period of time. It was during the course of this conversation that the young woman reported the Grievant told her to refuse to take the breathalyzer examination and to trust him to do the rest. It was her understanding that, if she did so, the Grievant would see to it that she was not prosecuted for driving under the influence of alcohol.

Whatever else was said between the two of them in the course of that conversation, they eventually exited the Grievant's cruiser and went inside the police station to the breathalyzer testing room. Although the station was crowded at the time, the breathalyzer was not in use so the Grievant directed the young lady to sit at the desk where the machine was kept so he could give her the exam. She never took the test, however. The Grievant later testified that he never told the young woman to refuse the test, but instead decided not to give her the breathalyzer exam because she was such a borderline case he felt it would be a waste if he did so. Whatever the reason, the young lady was not tested. Thereafter, she and the Grievant left the station and again sat in his vehicle where they talked about personal things for some time. They subsequently left

the station and drove to a secluded area where they continued their conversation. From there they drove to the drivers' license examination station in North Canton where the young woman used the rest room. According to her, the Grievant kissed her while they were in the station. They remained inside the building only a short time, however, subsequently getting back into the Grievant's cruiser and driving to another site. It was here, according to the woman, that they got out of the car and went to the back of the cruiser where the Grievant had sex with her. When she subsequently reported the incident to the Patrol, she explained that she felt that she had no choice but to go along with the Grievant because she was afraid what would happen if she refused his advances since she was still under arrest and still had the outstanding charges hanging over her head.

Following the incident, the woman reported that she and the Grievant re-entered his cruiser and drove back to her car at which time they separated. According to her, she arrived home a few minutes later at approximately 5:30 a.m. at which time she called her brother who had had his own problems with driving while under the influence of alcohol and told him what happened. The Grievant subsequently called the young woman twice over the next two days and tried to meet with her. She ultimately agreed to do so, but instead of talking to him she handed him a two-page letter, a copy of which she provided to the Patrol, in which she set out her feelings about what had taken place on the night in question. The two had no further contact after that time.

When the Patrol got the young woman's report, they started a general investigation into the Grievant's conduct and discovered that on January 18, 1993 he had voided two tickets for another young woman, one of which was for speeding and the other for driving a motor vehicle while under the influence of alcohol, that young woman having tested .20 on the breathalyzer. The Grievant, who was

working with a new officer he was training at the time, had stopped the young woman and a friend on Portage Road after the young woman's car went by at a high rate of speed. The new officer had started to make out the tickets, but the Grievant completed them. The young woman surrendered her license, was given her copies of the citations and eventually released. The other copies of the two citations were kept by the Grievant and turned in as required. Approximately an hour after releasing the young woman, the Grievant and the officer he was training appeared at her door with her car keys which she had dropped while she was being processed. An hour after dropping off the keys, the Grievant called the young woman who reported that he told her he could take care of the tickets. Although she was leery about the Grievant's intentions, she subsequently agreed to meet him the next day at approximately 4:30 in the morning at the drivers' license examination station in North Canton, Ohio.

Because she was unsure of his intentions, she was accompanied by a friend who sat in another car a short distance away. She arrived at the meeting site before the Grievant who got into her car leaving the officer he was training in the cruiser. He returned the young woman's license and retrieved her copies of the two citations from her. The two also had a conversation for approximately ten to fifteen minutes during which the Grievant told her, among other things, that there were some mistakes on the tickets and that she looked like a nice young woman. The young woman told the Patrol that at some point in the conversation she told the Grievant she would not have sex with him or do anything else of that nature as a result of his voiding the tickets. She reported that the Grievant told her that wasn't his intention. It was her clear understanding at the end of the conversation, though, that the tickets were voided and would not be reissued.

The Grievant took the young woman's copies of the citations, attached them to the originals and presented them to his commanding officer with the notation:

> Citations were made out for the wrong court. Should have been Canton court. New charges have been filed.

The tickets had been made out for the proper jurisdiction, although there were some errors on them including one that indicated that the young woman was to report to the Canton Municipal Court while the other citation directed her to appear in the Massillon Municipal Court on the same day at the same time. Contrary to his statement, though, the Grievant had not reissued the tickets at the time that he voided them and never reissued them.

On October 19, 1993 the Grievant was charged with two counts of violating Ohio Revised Code Section 2921.44, dereliction of duty, which is a minor misdemeanor. One count grew out of the incident of January 18, 1993, while the second concerned the incidents of the night of July 31, 1993. The Grievant went to trial on the charge involving the January 18, 1993 incident at which time he testified that he legitimately believed that the tickets had been made out improperly, that he had told the young woman when he picked up the tickets that he may reissue them, and that he decided not to do so because he was embarrassed because of so many mistakes in the process, especially when he realized that he had been right in the beginning and that the infractions had taken place in the jurisdiction of the Massillon Municipal Court, not the Canton Municipal Court. The trial court did not believe the Grievant and found him guilty on April 8, 1994. The young woman involved in the July 31, 1993 incident never had a chance to testify as the Grievant subsequently plead no contest to the second dereliction of duty charge.

When he testified at the arbitration hearing about that incident, he admitted most of what the young woman testified to concerning the events of July 31, 1993. However, he adamantly denied that he ever touched her, kissed her or had sex with her. Further, he testified that he dropped the young woman off at her car approximately an hour earlier than she said he did and that he did so as a result of receiving a call over the CB radio about an occupied vehicle having broken down in the area of Nickleplate and Route 62. This is the same area the young woman testified the Grievant took her to when he had sex with her.

The Union timely objected to the Employer's decision to terminate the Grievant, demanding that he be reinstated with no loss of pay or benefits. The parties could not resolve the matter at any of the prior steps of the grievance procedure with the result that it proceeded to arbitration at which time they relied upon the following provisions of their Agreement to support their respective positions, those sections providing 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.

19.02 Administrative Leave

Upon verbal notification followed within twenty-four (24) hours by written delineation of the reasons, an employee may be placed upon administrative leave with pay at regular rate. The employees will not lose any pay, fringe benefits or seniority as the result of administrative leave. Administrative leave may be instituted as the result of the Employer's reasonable belief that the employee participated in an event or was in a condition of significant consequence to the Highway Patrol, the employee, or the public. Such administrative leave with pay shall be for the purpose of investigating the event or the condition.

Administrative leave with pay shall not be considered discipline and is not subject to the grievance procedure as long as no loss of pay or benefits is incurred by the employee.

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.

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

II. POSITION OF THE EMPLOYER

Management asserts that it had no choice but to terminate the Grievant who, at a minimum, was convicted of two criminal offenses. The Union, of course, would downplay the significance of those convictions, arguing that they were only second degree misdemeanors. In making that argument, though, it deliberately ignores both the significance of the convictions themselves, as well as the true nature of the offenses which underlay those convictions. While the Union would turn the focus from the facts in this matter, the Arbitrator cannot.

Even the most casual review of the record reveals what the Union would like to hide, that the Grievant used his position as a patrol officer to prey on

young women. In doing so, he shirked his responsibilities both to the Patrol and to the people of the State of Ohio by impeding the prosecution of two individuals whom he arrested for driving under the influence of alcohol. In one of those cases, the woman was speeding before she was apprehended and tested .20 on the breathalyzer. The other woman was likewise stopped for speeding, was driving with expired plates and an expired license and, by her own admission, completely failed the field sobriety test, testing positive on the portable breath unit. The Grievant initially arrested both women, which was his responsibility. Thereafter, however, he behaved in a manner which was not only grossly inappropriate, but brought disrespect to the Patrol.

Thus, in the first case, the Grievant arranged a private meeting with the young woman the night after he had arrested her at which time he voided her tickets and handed her license back to her. Even though he told his commanding officer that he had reissued new tickets, he did not do so, allowing the woman to escape prosecution. Unfortunately, in the second case, the Grievant went much further. After arresting the woman and placing her in his cruiser, he took advantage of the situation, eventually taking her to a secluded spot and had sex with her. The experience had a devastating effect on the young woman who neither sought the Grievant's attentions nor knew how to refuse him because of the fear of what he might do if she did.

The Grievant maintains that in both instances he did nothing wrong and that the two women are making much of their testimony up out of whole cloth. He especially denies that he took advantage of the second woman, but his statements are self-serving and hollow in the face of her testimony. The simple fact of the matter is that the Grievant did everything the two women allege he did. At the time that the Grievant committed those offenses, he knew exactly what he was

doing. He had been an exemplary employee up to that point and knew what the rules were, what procedures to follow and what not to do. For whatever reason, he threw it all away, preying on those two women instead of performing his job. What he did was inexcusable. More than that, it provided the Employer with just cause to terminate him. Given the nature of the Grievant's behavior, it is not a penalty which the Arbitrator should set aside.

III. POSITION OF THE UNION

Unfortunately, the Employer in this case was more interested in convicting the Grievant than it was in determining the truth of the allegations against him. As a result, it prejudged the Grievant and, in its rush to terminate him, trampled on the protections he was entitled to under the Contract. Thus, even though the Agreement demanded that the Patrol inform the Grievant of the reasons he was being placed on administrative leave, Management failed to do so. Instead, it sent what amounted to a form letter which left him in the dark as to why he was being placed on administrative leave. Nor was he informed of the charges against him at the time he was initially interviewed even though, again, the Contract required that Management do so. Those violations, which are more than simply minor procedural irregularities, demonstrate not only Management's bad faith, but also its total lack of concern for the Grievant's innocence. More importantly, the failure to accord the Grievant the procedural rights called for under the Contract requires that the termination be set aside.

Perhaps if the Patrol had not been in such a hurry it would have realized that there was no basis to discipline, let alone discharge, the Grievant who was neither derelict in his duty nor took advantage of either of the women who testified against him. In the case of the woman who was stopped for speeding and tested .20 on the breathalyzer, the Grievant carefully and fully explained why he voided the two tickets and did not reissue new ones. Management at this

time feigned surprise that an officer would ever fail to pursue the prosecution of anyone he or she stopped. Yet, it is a basic premise of law enforcement that the officer making the stop has the discretion to charge an individual. In the two cases at issue, the Grievant exercised that discretion. Since he did nothing more than any other member of the Patrol has a right to do, he cannot be disciplined for doing so.

Management claims that there was a sinister motive behind the Grievant's actions, that he expected a quid pro quo for not charging the women. That, however, is merely the Employer's speculation as there is no evidence that the Grievant asked or demanded anything in return from the two women. There is not even any evidence that the Grievant had sex with either woman, Management's suppositions to the contrary. At worst, the Grievant overstepped the line when he spent part of one July night talking to one of the women about his personal life. He recognizes that he did step over the line and that he should not have done so. That, however, does not justify discharging him. Certainly it does not in view of disciplinary actions the Employer has handed out to other employees who have committed similar or worse offenses.

The concept of just cause requires, among other things, that employees be treated equally and that Management not discriminate against employees who commit the same or similar offenses. That, though, is exactly what the Patrol is doing in this instance by terminating the Grievant who was convicted of a minor misdemeanor when it meted out only a five day suspension and a demotion to another employee who was likewise convicted of a minor misdemeanor. If a minor suspension was only warranted in that instance, then a similar penalty should apply in this one. This is especially so where the Grievant was a fourteen-year veteran with an unblemished record. Since he had no prior disciplinary incidents

on his record, it follows that Management, which is obligated to impose discipline in a corrective, progressive manner cannot terminate the Grievant for his first offense. Further, since the purpose of discipline is to correct improper behavior and since the Grievant has demonstrated that he has learned from his mistake, it follows that the penalty Management is attempting to impose must be set aside.

IV. OPINION

The first issue which has to be faced is the Union's claim that the discharge must be set aside because of procedural defects in its processing. Specifically, it argues that when the Employer failed to specify the reasons it was placing the Grievant on administrative leave it violated the Contract which, in turn, voided the attempted termination. While it is true that Section 19.02 does call for the Employer to specify the reasons an employee is being put on administrative leave, it doesn't follow that the failure to do so vitiates a subsequent disciplinary action. The reason it doesn't is that the Contract explicitly defines administrative leave as a change in the employee's status, not as a disciplinary action. An employee on administrative leave continues to draw his pay and accumulates seniority just as he does under normal circumstances. What he doesn't do is work. Since the change, by definition, doesn't amount to discipline and cannot be grieved, it follows that Management's failure to inform the Grievant of the reasons he was being placed on administrative leave, while technically a violation of the agreement, does not effect his discharge which is a separate procedure. Although, the two actions are obviously interrelated, the connection is not sufficient to override the contractual declaration that administrative leave is not discipline.

Turning to the discharge itself, there is every reason to sustain Management's decision to terminate the Grievant who is guilty of all of the

charges leveled against him. Specifically, with respect to the woman he arrested in January, 1993, the record leaves no doubt that she was guilty of driving while under the influence of alcohol. She not only failed all three parts of the field sobriety test, but tested .20 on the breathalyzer, more than twice the presumptive level for operating a motor vehicle under the influence of alcohol. The Grievant initially issued a ticket to her for that offense, as well as one for speeding, which was what brought her to his attention in the first place. He then voided those tickets, giving as his excuse for doing so that both he and the probationary employee who was riding with him at the time had made a number of mistakes when they filled out the forms, including putting the wrong municipal court on the citation. Obviously, members of the Patrol are as human as the next person. They can and do make mistakes so there are procedures for voiding tickets where circumstances warrant such action being taken. However, the Grievant's explanation of what he did next strains credibility.

He maintains that having called the young woman and requested a meeting with her, he decided that he would not reissue the tickets because having initially thought there was a mistake and determining that there was not he was so embarrassed that he could not bring himself to reissue the citations. Considering the nature of the young woman's offenses, speeding and driving an automobile at more than twice the minimum level for driving while under the influence of alcohol, the Grievant's excuse for his decision to take no action makes little sense at all. The woman admits that she was extremely intoxicated on the night in question and, in fact, distrusted the Grievant enough to tell him in advance that she would not have sex with him for voiding the tickets. Considering the nature of the power imbalance between the two, it is not surprising that she thought that the Grievant wanted something from her for

permitting her to escape the obvious consequences of her actions. If the young woman didn't trust the Grievant's motives, Management never had an opportunity to pass on them as the Grievant deliberately misled his supervisors, informing them when he voided the ticket that he had already reissued a new one. That was an out-and-out lie. It seems obvious that the Grievant had to lie as it is difficult to believe that a supervisor would have ever permitted him to void the initial ticket under the circumstances of that case without issuing a new one. Yet, the Grievant did so allegedly out of embarrassment. It is difficult, though, to understand what the Grievant would have been embarrassed about except that he made a mistake or how the embarrassment of having done so could have impacted the woman's prosecution.

Beyond those obvious questions, there is the issue of how the Grievant went about obtaining the woman's copy of the citations from her. It is undisputed that the two met some time after 4:00 in the morning at a drivers' examination station in North Canton, Ohio. The meeting took place in the woman's car, not in the Grievant's cruiser. According to the Grievant, he decided to meet the woman alone in her car because he intended to blame the probationary trainee who was riding with him for the whole affair and did not want to embarrass the trainee who was sitting in the cruiser. If the Grievant told the trainee that, the trainee never reported it. What both he and the woman did report and what the Grievant confirmed is that the Grievant told the woman she looked like a nice person and that he would take care of the ticket when he met her. The Grievant doesn't deny that he said those things, but strenuously argues that the implication the Patrol is attempting to draw from the words, that he voided the tickets and did not refile them as part of the plan to become involved with the woman is false. Although the relationship never materialized, it is

easy to understand how the Patrol could reach that conclusion given the sequence of events.

There is as little merit to the Union's claim that the Grievant was simply exercising his discretion when he failed to charge the young woman he stopped in July, 1993. According to the Grievant, she was "borderline" with regard to whether or not she was operating a motor vehicle while under the influence of alcohol. Because she was, he decided not to charge her. Standing alone, the Grievant's explanation for his actions seems plausible. In the context of the events of that evening, though, his statements are absurd. His explanations for his actions in this case, in fact, make even less sense than his explanation of why he failed to reissue the two tickets to the other woman.

The woman involved in the second incident admitted that she had been drinking and told the Grievant so after he pulled her over for speeding. She had apparently been drinking heavily enough, in fact, that the clerk at the service station where she stopped for gas noted the smell of alcohol on her breathe and told the Grievant, who was present in another part of the station at the time, of his observations. Further, the woman testified credibly that she failed at least one part of the field sobriety test and that her reactions on the other parts, taken together, were suspicious enough to cause the Grievant to have her take the portable breathalyzer, which she said she also failed. Whether she did or not, there is no question that the Grievant placed her under arrest and transported her to the Jackson Township Police Department for the purpose of having her take the regular breathalyzer exam. He also admits that he took her into the station and took her to the room where the breathalyzer tests are given and then, even though the machine was not in use at the time, decided not to have her take the test because she was so borderline. Having gotten the young woman so far, the Grievant's explanation of why he didn't proceed with the test is incredible. It

is especially so as he himself admitted that the only way he could establish with certainty whether or not she was under the influence of alcohol was to have her take the breathalyzer test. Since the Grievant claims there was a question in his mind whether or not the young woman was operating a motor vehicle while under the influence of alcohol, his failure to have her take the test, which would have confirmed his suspicions, is totally unbelievable.

In contrast, the young woman's version of the events of that evening is both more credible and more logical than the Grievant's. According to her, when the two arrived outside the Jackson Township Police Department, she was distraught and began to cry, just as she had when the Grievant first stopped her. The Grievant calmed her down, telling her to refuse to take the breathalyzer exam and to trust him because he would take care of everything. Thereafter, she calmed down and the two entered the Jackson Township Police station and proceeded to the room where the breathalyzer was maintained. After seating her in the room, she testified that the Grievant left her and returned a short while later with another officer. At that point, the Grievant asked her if she would take the breathalyzer test and she refused as he had prompted her to do. The other officer then said, "Okay," and left, leaving the young woman alone with the Grievant. The two then exited the station and went back to the Grievant's cruiser where they sat and talked for some period of time. Considering the Grievant's training, experience and the Patrol's mission to remove drunk drivers from the roads of this State, the Grievant's explanation for his actions make little sense, while the young woman's has the ring of truth to it. This is especially so as she mentioned that there was another officer present when she refused to take the breathalyzer examination. Since there is no indication that she had ever been stopped for driving while under the influence of alcohol before

or had ever taken a breathalyzer exam, it is difficult to see how she would have known that another officer would have had to have been present unless the events transpired exactly as she testified.

Regardless of what took place in the police station, there is no question that once he left the building the Grievant ceased to act as an on-duty highway patrolman, and instead behaved as if he was out on a date. With the exception of denying how long he was with the young lady and that he had sex with her, two key issues in this matter, the Grievant admits the salient points of the woman's testimony and that he overstepped his bounds and ceased to carry out his duties. Instead, he spent the time talking to the young woman while she sat in his cruiser at various locations in the area. The Grievant claims that the whole episode lasted less than an hour and a half and that he dropped her off back at her car by 4:30 in the morning. Again, though, his explanation for what took place is not as credible as the young woman's.

Specifically, where the Grievant claims that he dropped her off in order to investigate a call he received over the CB that there was an occupied vehicle broken down at Nickleplate and Route 62, the young woman testified that the Grievant took her there and eventually had intercourse with her. Unfortunately, she did not report the incident until much later and, therefore, there is no concrete evidence to establish her claim. However, there are a number of factors which lead the undersigned to conclude that the events unfolded exactly as she testified they did. Chief among those is the Grievant's failure to offer any explanation for why the young woman would manufacture the two-page letter she claims she gave him in which she set forth in agonizing detail her feelings of having been used by the Grievant as the result of his having taken advantage of his position to have intercourse with her. The Grievant admits receiving a letter from the young woman, but denies it was the two-page document offered into

evidence. Instead, he claims what he received and what he showed to a fellow officer was a one-page, unsigned, undated note. Left unanswered is why the young woman would have not only fabricated her claim that the Grievant had intercourse with her, but would have gone so far as to manufacture a second letter, running the risk that the Grievant would have kept the first one and produced it later to impeach her credibility.

Further, to believe the Grievant is to believe that the young woman heard the call come in over the CB radio, remembered the location of the call and incorporate it into her story as the place where the Grievant took her. In the face of conflicting testimony, it is the Arbitrator's responsibility as the finder of fact to determine which, if any, of the witnesses is more credible. In reaching any such conclusion, the Arbitrator must take into account not only what is said, but the witness's demeanor when he or she testifies, as well as the reasons they may have for testifying as they do. In this case, the young woman's demeanor was entirely consistent with her feelings of having been taken advantage of by the Grievant. Further, considering that the Grievant had essentially rendered her a service by not forcing her to take the breathalyzer test which would have resulted in a citation for operating a motor vehicle while under the influence of alcohol and did not issue any other tickets to her, her story, which could have resulted in the Grievant going to jail and, at a minimum, may have caused him his job, seems a strange way to repay his kindness.

There are but two explanations for the young woman's testimony. The first is that she is pathological and has deliberately entered upon a course of conduct designed to destroy the Grievant for reasons that only she can fathom. There is no evidence that she suffers from any such pathology or has a history of such behavior. Certainly, the Grievant never raised the issue and he spent

considerable time talking to her about the most intimate aspects of both of their lives. The only other explanation and the more logical one is that the events unfolded exactly as the young woman testified.

Whether they did or did not, the fact remains that the Grievant's admission that he stopped the young woman for speeding, did not issue a ticket to her, claimed to have issued a warning when he did not and spent considerable on-duty time talking about personal matters to her, gave the Patrol sufficient basis to discipline him. In view of his actions in January, 1993 and the conclusions reached by this Arbitrator, Management had more than just cause to terminate his employment.

The Union, in his defense, maintains that the Patrol violated the Contract when it failed to follow the progressive discipline system laid out in the Contract and that the Grievant is the victim of disparate treatment which require that the discharge be set aside. Neither argument has any merit. The former, that Management was obligated to follow the progressive discipline system in deciding what penalty to mete out to the Grievant, is ludicrous on its face. In making that claim the Union is essentially arguing that the Employer should have done nothing more than give the Grievant a slap on the wrist for what essentially amounted to rape. To take the Union's argument to its logical conclusion would mean that the Grievant would have to engage in such behavior three or four more times before Management would be in a position to terminate his employment. Progressive discipline never intended such results.

While it is a given that discipline is to be imposed in a progressive manner in order to warn an employee that his or her actions are improper and will not be tolerated and to afford that individual an opportunity to correct his or her behavior, it is also a given that some actions are so outrageous, are such a breach of the employment contract, that their very nature permits the Employer to

ignore the progressive discipline structure outlined in the Agreement and instead impose the harshest penalty for the first offense. In this case, the parties memorialized that principle in the Contract, explicitly declaring in Section 19.05 of the Agreement that Management could, in an appropriate case, deviate from the progressive discipline system. This is one of those situations.

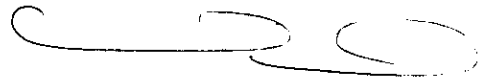
The Union's other defense of the Grievant, that he is the victim of disparate treatment, is no more meritorious than its first one. The claim is predicated on the fact that the Grievant was found guilty of two counts of dereliction of duty, minor misdemeanors, and that other employees found guilty of such offenses, namely, a sergeant, were not terminated, but instead received only a minor suspension. The problem with the Union's argument is twofold. In the first place, the Grievant wasn't discharged for twice being convicted of dereliction of duty. Instead, he was discharged for having violated a number of the Employer's rules, including two counts of conduct unbecoming an officer the specifics of which is that he used his position to prey on vulnerable women.

The second problem with the Union's argument and interrelated to its first is that it is really trying to compare apples and oranges, arguing that the Grievant's offenses are really no worse than those committed by any other employee. The argument is absurd. The Grievant's conduct, or misconduct, goes far beyond anything any other employee engaged in. A hallmark of disparate treatment, however, is that the Employer discriminates against similarly situated employees by punishing one far more harshly than it punished all the others for violating the same or similar rules. It was this principle which led the undersigned to reduce the penalty Management imposed against a trooper who had been charged with driving under the influence of alcohol. In that case, the claim was legitimate since the two officers had essentially committed the same

offense but received substantially different punishments for no discernible reasons. Here, the Grievant's actions and his flagrant disregard of so many of the Employer's rules coupled with the fact that what he did was so antithetical to the Patrol's mission led Management to conclude that the Grievant's conduct was substantially worse than that engaged in by any other employee and that those actions warranted his termination. Having carefully reviewed the matter, the undersigned must agree with that decision.

V. **DECISION**

For the foregoing reasons, the grievance is denied.



LAWRENCE R. LOEB, Arbitrator

July 8, 1994
Date