

VOLUNTARY ARBITRATION PROCEEDINGS  
GRIEVANCE NO. 15-03-930927-088-04-01

STATE OF OHIO	:	
DEPARTMENT OF HIGHWAY SAFETY	:	
DIVISION OF STATE HIGHWAY PATROL	:	
	:	
The Employer	:	
	:	
-and-	:	<u>OPINION AND AWARD</u>
	:	
FRATERNAL ORDER OF POLICE,	:	
OHIO LABOR COUNCIL	:	
	:	
The Union	:	

APPEARANCES

For the Employer:

Lieutenant Richard G. Corbin, Advocate  
 Cynthia Sovell, Associate  
 Captain John M. Demaree, Management Representative  
 Lieutenant J.D. Hall, Witness  
 Captain L.P. Hardesty, Observer

For the Union:

Gwen Callender, General Counsel  
 R.L. Lucas, Grievant  
 Ed Baker, Staff Representative  
 Renee Engelback, Paralegal  
 John Allard, Unit 15 Representative

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 Attorney-Arbitrator  
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## I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties, the parties having failed resolve of this matter prior to the arbitral proceedings. The hearing in this cause was scheduled and conducted on August 23, 1994, at the conference facility of the employer in Columbus, Ohio, whereat the parties presented their evidence in both witness and document form. The parties stipulated and agreed that this matter was properly before the arbitrator; that the witnesses should be sworn but not sequestered and that post hearing briefs would not be filed. It was upon the evidence and argument that this matter was heard and submitted and that this opinion and award was thereafter rendered.

## II. STATEMENT OF FACTS

At the time of the event of this particular matter the grievant was a sergeant assigned to Elyria post number 47 of the State Highway Patrol. At the time of the event the grievant was employed approximately fourteen years with the employer and had risen to the rank of sergeant. His discipline record prior to the instant event revealed the following:

1. February 22, 1991, verbal reprimand.
2. January 3, 1992, verbal reprimand.
3. April 4, 1992, verbal reprimand.
4. February 2, 1993, verbal reprimand.
5. September 7, 1993, two day suspension.

With that record, the grievant on August 27, 1993, was given a five

working day suspension and a demotion from sergeant to trooper. The reason for that activity on the part of the employer was revealed in an August 27, 1993, letter from the superintendent of the State Highway Patrol to the grievant. That letter revealed the following:

"August 27, 1993

Sergeant Richard L. Lucas  
52438 Peck Wadsworth  
Wellington, OH 44090

Dear Sergeant Lucas:

Notice is hereby given that the Director of Public Safety, Charles D. Shipley, intends to demote you to the rank of Trooper and suspend you from your employment with the Ohio State Highway Patrol for a period of five (5) working days for violation of Rule 4501:2-6-02 (E) of the Rules and Regulations of the Ohio State Highway Patrol to wit: it is charged that during 1992 and 1993, you were untruthful in recording functional activity in your daily activity to increase your overall totals.

This discipline is based on investigative reports by Captain L. P. Hardesty and Lieutenant J. D. Hall.

Captain R. N. Rucker, Meeting Officer, will conduct a pre-disciplinary meeting on the matter on September 15, 1993, 10:30 a.m., in Room 318, at the Ohio State Highway Patrol General Headquarters, 660 East Main Street, Columbus, Ohio.

At this pre-disciplinary meeting, you may substantiate why you believe the proposed discipline is not justified. Should you elect to exercise your right to such a pre-discipline meeting, you may be accompanied by counsel or other representative. You or your representative and the Employer's representative have the right to cross-examine any witnesses at the meeting or have voluntary witnesses present at the meeting to offer testimony provided, however, the Meeting Officer maintains the right to limit the witnesses' testimony to matters relevant to the proposed suspension or termination and to limit redundant testimony. If you elect to present

witnesses testimony other than in writing, you must furnish the name and address of each witness you intend to call, and a brief synopsis of their testimony to the Meeting Officer at least 72 hours in advance of the meeting. The Ohio State Highway Patrol reserves the right to submit evidence in support of the proposed discipline which you may cross-examine or otherwise rebut.

Those presenting evidence on behalf of the Ohio State Highway Patrol will be:

Captain L. P. Hardesty and Lieutenant J. D. Hall.

Following the pre-discipline meeting, the Meeting Officer will consider all evidence and testimony. He will then submit a written recommendation to the Director within five days. You shall be provided with a copy of the Meeting Officer's recommendation.

This letter will be the only formal notice of the pre-discipline meeting. Any change of the pre-discipline meeting date shall only be made by the Meeting Officer.

You have the right to waive your pre-discipline meeting and accept the Director's decision. If you elect to waive the pre-discipline meeting, sign the original copy of this notice and forward to the Meeting Officer within 72 hours. Your signature must be witnessed by another person, who must also sign this form."

The investigation revealed that the grievant falsely added an arrest record of some sixty-seven events in 1992 and seventy-one events in the first six months of 1993, to his actual totals. In other words, the grievant computerized his arrest record at the facility in an amount greater than was actually written for the courts to adjudicate. No member of the public was affected. No court record was affected. No claim other than falsely reporting arrest numbers formed the basis of this grievance activity.

To all of that discipline, a timely protest was filed. During the

grievance trail a step three response was made and it is noted that the grievant admitted to all of the charges. The union position, however, is stated in the minutes as follows:

"UNION CONTENTION

The grievant admits that he erred in claiming arrests he did not make. He points out his motivation was not personal gain, but instead, an effort to lead by example. He hoped his 'padded' record of seat belt arrests would motivate his subordinates to increase their productivity. He now admits his actions were inappropriate.

However, it is the position of the union that the level of discipline was not commensurate with the offense. The grievant is a long term employee with a good department record. Demotion was excessive and should not stand. As a remedy the union asks that the grievant be reinstated to the rank of sergeant and made whole."

It might be noted that at the time of the instant event the contractual clauses relative to the matter at hand revealed at sections 19.01 and 19.05 the following:

"19.01 Standard

No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause.

-and-

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."

Also in use were rules and regulations of the department. A regulation known as 4501:2-6-02 at paragraph (E) revealed the following:

"(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."

The evidence in this particular matter further revealed that there had been other activities of discipline under the same or like contractual clauses and under the same regulation by the employer. One such event involved a Sergeant J.L. Scholl and another such event involved Lieutenant R.D. Nickison. In those events those individuals did not tell the truth about their weight. Keeping weight adds an additional fifty dollars per month in salary. Those individuals merely were fined one month of salary increment as their discipline under the same regulation violation as the grievant. In that regard therefore the union suggested that there was not evenhanded treatment for violation under the same regulation and contractual clause because the grievant received a much greater discipline than did either Nickison or Scholl.

Further, the union pointed up an arbitration award concerning a Sergeant Stemple. In that event, management also demoted and the arbitrator in that case vitiated the portion of the award concerning demotion. It might be pointed out that in all three of those events,

namely Scholl, Nickison and Stemple, there was no prior discipline record whatsoever of any of the individuals involved. However, it might be further pointed out that in all three activities the events were ongoing and not a one time event, similar to the activity of the grievant in this matter, in that the instant situation was an ongoing event also.

It might be further noted in this particular case that subsequent to discipline the grievant was the subject of a great deal of newspaper and media attention and further was the defendant in a criminal action against him by public authority in which the grievant finally received a fine and was found guilty of a first degree misdemeanor. It might be noted, however, and I must reiterate that the media activity indicating and revealing that a State Trooper Sergeant faked his arrest record by "padding" was subsequent to the discipline and therefore had no affect upon it. The court activity was also subsequent to the discipline. It might be noted the county prosecutor prosecuted this action on information received through an anonymous letter after the discipline was ordered.

The employer argued that the grievant had a prior discipline record; that the event of "padding" his arrest record was ongoing; that it was incumbent upon a safety officer to keep his activities and behavior above suspicion both on and off duty and that the grievant therefore in not so doing was seriously violative of the rules and regulations regarding ethics. In that regard therefore the employer argued that it had authority pursuant to the terms of the contract to discipline the grievant in the matter that it did.

It was upon those facts, statements, denials, allegations and averments that this matter rose to arbitration for opinion and award.

### III. OPINION AND DISCUSSION

Several things are very important in this particular matter. It is apparent from the terms of the contract that the employer is committed to the system of progressive discipline. It is also indicated in the contract of collective bargaining that there must be just cause to discipline. The contract further indicated that there may be a verbal warning, written warning, demotion, suspension or termination as an answer for discipline. The employees of this particular division in the State of Ohio are also subject to a Code of Ethics and certain rules and regulations. All of these items must be taken into account when determining an answer to the grievance that was propounded to this arbitrator in this particular hearing.

A rule in order to be appropriate and proper must be reasonable, must be published and must be evenhandedly administered. The bargaining unit by way of grievance has not questioned the publication of the rules nor the reasonableness of the rules. The bargaining unit in this particular matter has questioned the evenhandedness of application of the rule or regulation under consideration.

In that regard the union has indicated and stated by and through its evidence that Lieutenant Nickison and Sergeant Scholl who were found guilty of the same rule violation only received a discipline in the form of an order to payback fifty dollars for telling an untruth about their weight. As further buttressing evidence for the union, the union



presented an arbitral award in which the arbitrator found that a demotion was too great a discipline for the events of that particular situation in which the grievant therein was found constantly late and ordered a dispatcher to type personal material. It might be noted however that in all of the events that the union brought into the evidence, namely the grievance of Sergeant Stemple, the grievance of Sergeant Scholl and the grievance of Lieutenant Nickison, it might be noted that there was no prior disciplinary record of any of those particular individuals. In the matter at hand, the grievant in this particular case had been involved in progressive discipline of four verbal reprimands and a suspension for a period of two days. Thus, it is certainly apparent that the theory of evenhanded treatment based upon the comparison of the evidence of the grievant in this case on one hand and Stemple, Nickison and Scholl on the other revealed that the grievant had a substantial prior disciplinary record and the others had none.

Also important in the case at hand is that the employer in this particular instance is a paramilitary organization. The type of individual involved in this particular activity demands that that individual keep his or her activities above suspicion. Thus the argument of the employer is true in that the individual who is employed as a peace officer has a higher duty of conduct.

In this particular case the grievant admitted his serious wrongdoing. That wrongdoing occurred over a period of time and was an attempt on his part to show that his work activity was above and beyond that which was expected of him. Instead, the grievant lied about his

performance record. His activity did not affect any public record such as a court record nor a driving record of the public. The grievant's activity affected statistics and the like having to do with law enforcement in the State of Ohio. Such is not enviable conduct on the part of the grievant.


However, the grievant is a longtime employee at the facility. Further, discipline must be progressive in nature. The purpose of discipline is not punish but to promote conduct acceptable to the employer of a standard higher than that which the grievant exhibited at the time he received the discipline. The demotion is an extremely heavy burden when used as discipline because it is everlasting. Not only is the grievant disciplined immediately for the activity he was involved in but the discipline is ongoing in that it affects his wage for a continuing and lasting period of time. Further, it affects his retirement payments. In this particular case not only did the grievant receive a five day suspension, a continuing loss of wage through the demotion, a loss of some retirement payments but he also received a misdemeanor charge and public embarrassment by way of the bevy of newspaper articles that followed. In other words, the grievant received discipline that was tantamount to a discharge in that he has been the recipient of embarrassment from every quarter.

There are several mitigating events in this particular case. The grievant was not involved in any activity which affected the public. The grievant was not involved in any activity which affected the court system or records. The grievant was involved in a violation of internal rules and regulations. The grievant has an employment record of only

four or five disciplines in some thirteen or fourteen years of employment. None of those activities were serious although one did draw a two day suspension. The activity in this particular case is not of such a nature so as to bring embarrassment to the department. For those reasons it is apparent that the employer was severe in its use of discipline. Further, the use of demotion as a disciplinary tool is a seldom used activity. The witness for the employer indicated that in thirteen years of personnel duties there were no more than five or ten such acts of demotion involved. From all of that it appeared that the grievant should not have been given a suspension of five days in addition to a continuing demotion. As a result it is apparent that there should be some relief for this particular grievant. Arbitrators do not create their own industrial justice. Arbitrators modify, change, supplement or vitiate discipline only when the evidence revealed that the employer acted in a manner so as to create a situation of discipline that is not supported by the evidence. This appears to be one of those cases.

IV. AWARD

The five days suspension of the grievant shall stand. The grievant shall be reinstated to the rank of sergeant on the thirtieth day subsequent to the date indicated below. The reinstatement to rank of sergeant shall be without back pay.



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MARVIN J. FELDMAN, Arbitrator

Made and entered  
this 30th day  
of August, 1994.