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VOLUNTARY ARBITRATION PROCEEDINGS
GRIEVANCE OF EDWARD J. KRCAL

THE STATE OF OHIO OHIO STATE HIGHWAY PATROL The Employer -and- FRATERNAL ORDER OF POLICE OHIO LABOR COUNCIL, INC. UNIT 1 The Union	: : : : : : : : : : : :	OPINION AND AWARD

APPEARANCES

For the Employer:

S/Lieutenant Richard Corbin, Advocate
Colleen Wise, Office of Collective Bargaining
S/Lieutenant H.J. Callahan, Ohio State Highway Patrol
Patrolman J. Simone, Cleveland Police Department
Sergeant Robert Young, Ohio State Highway Patrol

For the Union:

Paul L. Cox, Chief Counsel
Renee Engelback, Paralegal
Gloria L. Sydnor, General Counsel
Edward J. Krcal, Grievant
Edward Baker, F.O.P. Staff Representative

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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 in Columbus, Ohio, at the conference facility of the employer on April 25, 1995, 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

On the date of the incident involved in this particular matter, the grievant was employed by the State of Ohio, Ohio Department of Public Safety Division, State Highway Patrol as a communication technician 2 at the Berea Post. On January 8, 1995, he was stopped on I-71, an interstate road running through the City of Cleveland, Ohio, at the intersection of West 25th and Fulton Avenue. When stopped he showed his identification to the arresting officer. The identification shown was a State Highway Patrol identification card.

The arrest was video taped by a camera attached to the dashboard of the police car. A conversation ensued between the arresting officer and the grievant at the time of arrest. The grievant was asked and answered as follows in one exchange:

"A: You're a patrol officer?

B: um, hum"

In a second exchange the following ensued:

"A: Trooper, what would happened to you if you went to jail for 'DWI'?

B: I'd lose my job."

Instead of being arrested, the grievant was sent home with his father who was called by the officer who stopped the grievant on the interstate. A driver was brought by the father also and the grievant's car was removed from the highway. The matter was passed on through the State Highway Patrol by the arresting officer and the grievant was questioned by an officer of the State Highway Patrol. A statement was taken by a State Highway Patrol officer who questioned the grievant. The grievant was asked where he was employed and the following exchange took place between the officer who questioned the grievant and the grievant stated:

"Q. WHAT WAS YOUR REPLY?

A. I TOLD HIM I WORKED FOR THE HIGHWAY PATROL.

Q. DID HE PURSUE THAT LINE OF QUESTIONING?

A. NO. HE JUST ASKED ME FOR IDENTIFICATION.

Q. WHAT DID YOU PROVIDE HIM?

A. I SHOWED HIM MY PATROL ID AND HE RETURNED IT RIGHT AWAY.

Q. DID HE ASK WHERE YOU WORKED OR WHAT YOU DID FOR THE PATROL?

A. NO. HE ASKED WHERE I WORKED AND I SAID THE HIGHWAY PATROL AND THAT WAS IT. HE DIDN'T ASK ME WHAT I DID OR HOW LONG I WORKED FOR THE PATROL OR ANYTHING LIKE THAT."

The employer caused an investigation to be made. The arresting officer was querried. The Cleveland Police Department arresting officer indicated and revealed that he later found the grievant was not a tropper but a communications worker and the grievant was prosecuted for misrepresentation because he represented himself as a sworn officer of a law enforcement agency of the State of Ohio. The matter was a misdemeanor and the grievant was found guilty thereunder by the court. The Cleveland Police Department also further revealed that the grievant had a breathalizer taken of him in the field at the time of being stopped and was found to have a .181 result, a finding which revealed that the grievant in fact was intoxicated while he was driving.

At the time that the incident took place, there was in place at the facility certain work rules. The grievant had signed off as receiving those rules in October of 1992. At any rate the two rules of violation cited in this particular matter revealed the following:

"c. DISHONESTY: Employment-related dishonesty, intentionally falsifying/altering employment applications or any other job-related documents/records/statement.

d. FAILURE OF GOOD BEHAVIOR: Any misconduct which violates recognized standards of conduct, including but not limited to unauthorized release of information, speeding in a state vehicle, misuse of position for personal gain, taking bribes, threats or acts of physical violence, verbal abuse or criminal convictions."

After the investigation and after due deliberation the grievant received a letter from the Director of the Highway Patrol which revealed the following:

> "Mr. Edward J. Krcal
> 14689 North Gallatin Boulevard
> Brook Park, OH 44142
>
> Dear Mr. Krcal:
>
> Please be advised that for disciplinary reasons, you are being removed from your position as a Highway Patrol Communications Technician 2, Department of Public Safety, Division of the State Highway Patrol, effective at the close of business on February 13, 1995.
>
> This removal is the result of your violation of the Department of Public Safety work rules and the State Highway Patrol work rules, specifically policy 9-507.19 Rule (d)(6)(c) and (d) Failure of Good Behavior and Dishonesty, to wit: it is charged that while in an off-duty status, you brought discredit to yourself and the Division when you were stopped by the Cleveland Police Department for speeding and driving while under the influence of alcohol. Upon being stopped, you provided the officer with false information regarding your occupation. In addition, evidence showed that you were both under the influence of alcohol and exceeding the speed limit.
>
> Very truly yours,
>
> /s/CHARLES D. SHIPLEY
> Director"

A protest was filed in a timely fashion by the union on behalf of the grievant and that protest revealed the following:

> "STATEMENT OF GRIEVANCE (GIVE TIMES, DATES, WHO, WHAT, WHEN, WHERE, WHY, HOW) BE SPECIFIC.

NO BARGINING UNIT MEMBER SHALL BE REDUCED IN PAY OR POSITION, SUSPENDED, OR REMOVED EXCEPT FOR JUST CAUSE.

THE EMPLOYER WILL FOLLOW THE PRINCIPLES OF PROGRESSIVE DISCIPLINE. DISCIPLINARY ACTION SHALL BE COMMENSURATE WITH THE OFFENSE. DISCIPLIARY ACTION SHALL INCLUDE: (1) VERBAL REPRIMAND (2) WRITTEN REPRIMAND (3) A FINE NOT TO EXCEED TWO DAYS PAY (4) SUSPENSION (5) 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. FINES ARE ONLY TO BE ADMINISTERED IN ACCORDANCE WITH THE PROCEDURES ADOPTED BY THE OFFICE OF COLLECTIVE BARGAINING. THE DEDUCTION OF FINES FROM AN EMPLOYEE'S WAGES SHALL NOT REQUIRE THE EMPLOYEE'S AUTHORIZATION FOR THE WITHHOLDING OF FINES FROM THE EMPLOYEE'S WAGES."

At step 2 the grievance was denied by the employer and in that regard the employer stated the following:

"The grievant by accepting employment as a highway patrol employee has accepted the responsibility to protect the reputation of the organization. Management must carefully guard the reputation of the organization to insure public trust. Public trust begins with the personal credibility of individual employees, grievant through his off duty misbehavior has destroyed his personal credibility. The serious nature of this offense makes the level of discipline appropriate. The discipline is commensurate with the offense. There has been no violation of the labor agreement.

The grievance is denied."

It might be noted that the management rights' clause in the contract at article 4 revealed that management had the exclusive right and authority to suspend, discipline, demote, or discharge for just

cause, or layoff, transfer, assign, schedule, promote or retain employees. Thus, the dismissal of the grievant and the denial at step 2 were predicated upon the work rules that were allegedly violated by the grievant as well as upon the management rights' clause of the contract specifically retaining for management its inherent common law rights of suspending, discharging, etc.

The grievant did not deny the incident. The grievant did not deny the exchange between he and the arresting officer. The grievant testified that he had been employed by the Ohio State Highway Patrol for ten and a half years; that his discipline record was clear; that he sought to retain his employment; that he was newly divorced with two children and that he does not have a record of alcoholism but that he has attended a program set up by the court known as a selective intervention program. The grievant presented evidence at hearing and it was not denied by the employer, that he, the grievant, actually attended sessions of rehabilitation for alcoholism on 2/26/95, 2/28/95, 3/2/95, 3/7/95, 3/9/95, 3/12/95, 3/14/95, 3/16/95, 3/19/95, 3/21/95, 3/23/95, 3/27/95, 3/28/95, 3/30/95, 4/4/95, 4/6/95, 4/11/95 and 4/18/95. The grievant in addition to attendance at those free sessions also attended paid counselling sessions at the Kaiser Permanente Department of Medical Health, Brookpark Medical Offices. The records that were presented revealed that the grievant attended those meetings on 2/14/95, 3/8/95, 3/20/95 and 3/16/95. The grievant indicated and stated that the reason that he did not further attend the counselling sessions at the medical facility was that they were subject to his health care and that by virtue of his termination that health care had been denied. It might be

noted that the grievant was removed on February 13, 1995 and that the evidence did not reveal that he had received any subsequent employment. This matter was hastened to arbitration because of the termination.

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

III. OPINION AND DISCUSSION

Placed into the record of this case were four arbitration opinions. The common denominator in each of them, and I read them, is that the State Highway Patrol employees were all involved in alcoholic conduct and in each of those instances there was an aggravating circumstance. It is further noted that in none of the situations were the discharges of the employer sustained by the arbitrator. I refer the parties to the Vermillion case, the Peterson case, the Simon case and the Young matter.

The situation in this particular case revealed that the grievant was employed as a communications person for the State Highway Patrol. Upon his arrest on January 8, 1995, the grievant was released in the custody of his father although he tested .181 on the field breathalizer apparatus. The grievant by his own admission represented to the arresting officer that he was a sworn officer of the Ohio State Highway Patrol. None of this evidence is controverted. The record of the grievant is clear in ten and a half years of service.

The circumstance of driving while under the influence of alcohol is activity and conduct which is subject to the work rules. In this event that occurrence was aggravated by the grievant's representation that he

was a sworn officer of the State Highway Patrol. The employer, which is a paramilitary organization, considered that driving while intoxicated was substandard behavior for a member of the State Highway Patrol and that the aggravating circumstance of representing himself as a sworn officer is further serious substandard conduct, also punishable under the work rules.

There is good and sufficient authority that the activity of DUI plus an aggravating circumstance, at least at the first time around is not considered a termination event by any of the arbitrators who have reviewed these types of matters previously. I point to Arbitrators Loeb, Bittel, Pinkus and Leach, all of whom were the hearing officers in the four cited cases hereinabove indicated. Some of the reasoning is that the event may be subject to progressive discipline, that the event was the first of its kind for the employee and that there are circumstances which may be treated as medical reasons for the activity. A reading of each of those cases may be important to the reader but suffice it to say that those caused the jurisprudence between these parties relevant to this type of factual pattern.

In this situation we have an individual who has worked without incident for ten and a half years. He has a sensitive position and now he has a intoxication charge and a misrepresentation charge in his background. He revealed that he had undergone a divorce and that he had two children and that activity of alcohol intake may be the result of a serious reactive depression that the grievant had. At any rate the grievant visited a medical counsellor for a period of four visits and when his money ran out attended an employee assistance program perhaps

known as Alcoholics Anonymous or some other agency which is not revealed in the evidence in this particular case. At any rate, from all of this it appeared that the grievant is of good moral fiber. He has worked at one facility for ten and a half years; he has garnered a decent record for the employer; he has worked in a sensitive position for that employer; he has been a failure at marriage which may have caused the reactive depression (but so have many others); he has shown some rehabilitation activity by attending the many sessions of the free counselling that he went to and the four sessions of the hospital counselling that were paid for by medical coverage and has sought the return of his employment.

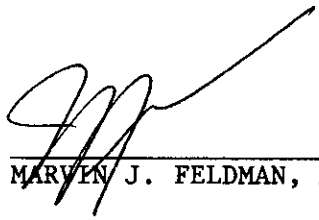
It is apparent therefore, that one activity of substandard activity of this sort should not cause the grievant to be terminated. That is evident from the four prior awards that were indicated hereinabove. Because of the rehabilitation and because of the prior jurisprudence and because of the grievant's previous record and because of an understandable reactive depression it is all apparent that the grievant should receive another chance at his employment and for those reasons is being returned to his employment on a forthwith basis but with several understandings.

It is necessary that the grievant receive a two day a week order to attend an alcoholic anonymous facility for a period of six months so as not to interfere with his work schedule---all of which must be reported to his employer on a monthly basis so that the activity of the grievant in that regard may be monitored. Failure to complete the six months of indicated treatment without a waiver by the employer shall be the

grievant's ticket to discharge.

IV. AWARD

The grievant shall be returned to work forthwith with his record revealing a fifteen work day suspension. The balance of time after the fifteen days to the date of return shall be considered a leave without pay. The grievant shall not suffer a loss of seniority. The grievant shall attend the two day a week alcoholic anonymous session appropriately monitored by the employer and the attendance shall be for a period of six months unless waived by the employer. The grievant must fulfill all of the conditions of this return to work situation or be discharged. None of the meetings may interfere with the work schedule of the grievant.



MARVIN J. FELDMAN, Arbitrator

Made and entered
this 3rd day
of May, 1995.