In the Matter of Arbitration Between:

OHIO DEPARTMENT OF PUBLIC SAFETY
DIVISION OF STATE HIGHWAY PATROL

and

FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL

Re: Grievance 15-03-950310-0026-07-15
Stitt suspension

Hearing held October 2, 1995, in Columbus, Ohio

Decision issued October 23, 1995

APPEARANCES

Employer
Capt. Michael R. Everhart, Advocate
Staff Lt. Richard Corbin, Second Chair
Rodney Sampson, OCB

Union
Paul Cox, Esq., Chief Counsel
Ed Baker, Staff Representative
Sgt. Robert K. Stitt, Grievant

Arbitrator
Douglas E. Ray

I. BACKGROUND

Grievant is employed by the Ohio State Highway Patrol as a sergeant at the Wooster Post. He has been with the Highway Patrol for approximately 17 years. The instant matter arose out of a March 10, 1995 grievance protesting the imposition of a one day suspension for matters relating to Grievant's failure to show up for his scheduled 11 p.m. shift on January 6, 1995 and his responses to a subsequent investigation. The suspension was based on alleged violations of Rule 4501:2-6-02(B)(5), Inefficiency, and 4501:2-6-02(E), False Statement.

On January 6, 1995, Grievant was at Dillon State Park in the Zanesville area on a hunting trip. The Park was approximately 100 miles from his duty station. He was scheduled to work that night, beginning at 11 p.m. January 6 was a day of bad weather and it seems uncontested that there was freezing rain from at least 3 p.m. through 6 p.m. At 5:49 p.m., Grievant called his post commander to advise him that he might be late due to the bad weather. The post commander advised him to be careful and told him he could use personal leave if he was a little bit late. Grievant then packed his car and left for the Wooster post. He drove on route 146 to Interstate 70 and drove on I70 to the US 40 exit at which point he turned around because of road conditions and returned to the park. From the park, he called the post at approximately 10:13 p.m. to advise that

he was stranded due to the weather and to request personal leave for the shift.

Lt. Maxey, the post commander, spoke to Grievant about why he had missed his shift and ultimately began an investigation, calling the Zanesville area for road condition information and taking a recorded statement from Grievant on January 10. On February 9, Grievant was advised that reasonable and substantial cause had been found to believe that Grievant had violated Patrol rules and regulations in that he had failed to report for duty at 11:00 p.m. and that he had falsely reported the road and weather conditions to his Post Commander. After a pre-disciplinary meeting, Grievant was suspended for one day on the grounds that he had failed to report for duty at 11:00 p.m. and falsely reported road and weather conditions.

The matter was processed to arbitration by the parties and a hearing held October 2, 1995 in Columbus, Ohio, before the undersigned arbitrator. At hearing, the parties stipulated that the matter was properly before the arbitrator.

II. ISSUE

The parties stipulated the issue to be:

Was the Grievant, Robert K. Stitt, issued a one day suspension for just cause? If not, what shall the remedy be?

III. COLLECTIVE BARGAINING AGREEMENT

Among the provisions of the Agreement referred to by the parties and consulted by the arbitrator are:

Section 19.01, "Standard," which provides:

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

Section 19.05, "Progressive Discipline"

IV. POSITIONS OF THE PARTIES

The parties made a number of detailed arguments during the course of the hearing. Their positions are only briefly summarized below.

A. The Employer

The Employer argues that the suspension was for just cause and asks that the grievance be denied. The Employer argues that Grievant, as a supervisor, must be held to a higher standard and that the basic obligation to show up for work cannot be ignored. It asserts that Grievant was aware of his responsibilities yet failed to make a good faith effort to fulfill his obligations to the Division and the people of Ohio and argues that road conditions were not nearly as serious as represented by Grievant to his supervisor and that he therefore committed a major breach of trust. Management argues that the absence was not justified.

The Employer asserts that Section 19.05 gives the Employer discretion to impose a suspension if the infraction merits it. In this case, the Employer asserts that the infraction did merit a suspension and that Grievant's self

serving explanation should not be accepted. The Employer asserts that weather conditions had improved by the time Grievant made his decision to turn around and that most accidents had been cleared by that time as well. The Employer argues that it has already taken into account Grievant's long term employment in limiting the suspension to one day and that, therefore, the arbitrator should respect its judgment and not overturn the discipline imposed.

B. The Union

The Union argues that the suspension was not for just cause. It argues that the Employer has proven nothing more than that Grievant missed work. The Union points out that Grievant did call in twice and attempted to come to work under hazardous conditions. The Union introduced records from the Zanesville post demonstrating that January 6 was by far the worst day of the winter with 28 accidents reported by the post, 21 of which occurred on I-70, the highway Grievant attempted to use before turning back. In demonstrating the dangerous conditions, the Union points to 3 accident reports concerning accidents that occurred or were being cleared during the time Grievant would have been attempting to pass. The accident reports all stated that conditions were icy and one driver went off the road despite a reported speed of 45 mph.

The Union argues that, witnessing dangerous conditions and seeing that there had been crashes, Grievant was not

unreasonable to conclude that he could not make it to work and that he made no false statements. The Union notes that the contract calls for progressive discipline and argues that even were discipline appropriate, which it is not, that the Employer furnished no reasons to justify a suspension as opposed to lesser discipline. The Union asks that the grievance be sustained, that the suspension be rescinded and that Grievant be made whole.

IV. DECISION AND ANALYSIS

In reaching a decision in this matter, the arbitrator has considered the testimony and exhibits presented at hearing, the collective bargaining agreement and the arguments of the parties. The decision is based on the following factors.

1. With regard to the inefficiency charge, the Union established by detailed charts, graphs and records that I-70 was dangerous between mileposts 152 and 176 where Grievant had traveled and that January 6 by far involved the most Zanesville area crashes of any day of the winter. Nonetheless, there is evidence that can support an inefficiency charge. Grievant chose to be on a hunting trip 90 to 100 miles away from his duty station on a day he was scheduled to work. Although the weather was bad, he chose not to leave until approximately 6:20 pm. Although he did call to advise the post, the post commander still expected him to come to work even though he might be late. Despite this expectation, Grievant did not call at the time he

decided to turn around because of road conditions. Nor did he call before turning around to inquire about weather forecasts or road conditions further down the road to see if things would improve further down the road or if he should wait out the situation and still try to get to work later. Instead, he turned around and drove back to the cabin over the very same roads which he had determined were too dangerous to continue on. As a consequence, he did not call the post to let them know he would not be there until approximately 10:13 pm. The arbitrator understands that it is much easier with hindsight and a warm October afternoon for people who were not there to second guess and that second guesses are often not realistic. Nonetheless, Grievant did not make it to work as a consequence of his choices and that is something management was entitled to complain about.

2. As to the serious charge of making a false statement, however, the arbitrator does not find this charge supported. After reviewing the entire record of the case, that accusation appears to have been based in substantial part on an initial misreading or misunderstanding of a statement made by Grievant to Lt. Maxey in his January 10 interview. Late in the transcript, Lt. Maxey asks a long question that includes the words "about from 6:30 to after 10:00 pm. you were driving and you made it as far as route 40 because of the ice covered interstate and numerous 31's. Is that correct?" Grievant answers, "that's correct." From

this answer, disciplining authorities seem to have gotten the idea that Grievant was claiming to have driven from 6:30 to 10 before turning around, having covered only 20 miles from the cabin in all that time. This conclusion is questionable because based on a short answer to a long leading question and is not supported by other parts of the transcript. Earlier, Lt. Maxey asks "Okay, so 17:49 when you called me until after 10:00 pm. you drove out to 40?" Grievant answers "No" and subsequent testimony gets off that point. Further, the first page of the transcript includes testimony that Grievant called the post after 10 pm. from the cabin at Dillon State Park, thus indicating that he had completed the return trip by that time.

This misunderstanding of Grievant's statement appeared to have been an important part of the charge. The 1/19/95 Report of Investigation indicates on page 3 that Grievant at his January 10 interview "indicates that he was travelling I-70 from approximately 6:30 pm to 10 pm and managed to cover only 20 miles due to the poor road conditions." Similarly, the Step 2 Response alleges that Grievant "contends he was driving from 6:30 P.M. to 10 P.M. and only went 20 miles due to crashes and poor road conditions" and that it was Grievant's "contention that he could only cover 20 miles in 3 1/2 hours." This misunderstanding of Grievant's January 10 statement appears to have lasted up til the eve of the arbitration hearing in that the large map introduced into evidence by the Employer contains a typed in

box stating "Grievant stated he was on the interstate from approximately 1830 hours to 2200 hours." It does not appear to the arbitrator that Grievant made such a statement.

Similarly, in his January 10 interview, Grievant was asked the condition of Interstate 70. He responded, "Black ice, looked wet but it was slippery." Shortly thereafter he is asked "I-70 was covered with ice?" He responds, ..where I wa..yeah" In the Report of Investigation, it is reported that he "reports the condition of I-70 as completely ice covered." Again, a response to a leading question forms the basis for the charge of falsification. The accident reports introduced by the Union establish that there was ice on I-70. Further, not all the accidents from ice occurred on bridges which may be icier. At least one in the relevant time period did not appear to involve a bridge. Grievant did see evidence of accidents. The accident reports establish that at least three of the accidents had not been cleared by the time he passed. His statement as to bumper to bumper traffic was not followed up on and it is not infrequent for the flashing lights of an accident scene, especially when an ambulance is called, to cause traffic to slow appreciably. This would be especially possible on a night when cars were reportedly spinning out at 45 mph. Although the Employer points out that some of the accidents occurred in the traffic lanes traveling the other way from Grievant, it appeared that the cars slid to rest on the median after hitting guardrails on their right. Cars in the

median are visible to traffic going both ways. In addition, it appeared quite likely that there were other cars abandoned on 146 and I-70 during the times in question.

Because the charges seemed to have been based on a misreading of Grievant's January 10 interview and because the Union's evidence did establish that dangerous driving conditions were still present while Grievant was on the road, the arbitrator finds that the charges of false statements have not been proven.

3. There was no indication that Grievant's failure to report to work under the facts of the situation would have resulted in a one day's suspension absent the Employer's belief that Grievant had made false statements. Each of the management documents in the discipline chain includes reference to false statements. Most importantly, his Personal Deportment Record now states, with regard to the suspension, "False Information About Why He Was Unable To Report To Work." Because this appears to be the more serious of the two charges and because the arbitrator finds that the Employer has not met its burden with regard to this charge, the arbitrator believes that the discipline should be reduced to a verbal warning for failing to report and the suspension and references to false information removed from Grievant's Record. There was no proof that the Employer would have imposed more serious discipline had it not believed that Grievant had falsified his reasons for absence.

V. AWARD

The grievance is sustained in part. The Employer is directed to remove the suspension and reference to false information from Grievant's record, to convert the discipline to a verbal reprimand and make Grievant whole.

October 23, 1995

Douglas E. Ray
Arbitrator