#1117

OHIO DEPARTMENT OF PUBLIC SAFETY
DIVISION OF THE STATE HIGHWAY PATROL

and

FRATERNAL ORDER OF POLICE,
OHIO LABOR COUNCIL, INC.

Re: Grievance 15-03-930618-0043-04-01

Hearing held January 25 and February 23, 1996

Decision issued March 12, 1996

APPEARANCES

State
Sgt. Robert J. Young, Advocate
S/Lt. Richard G. Corbin, OSP
Colleen Wise and Lou Kitchen, OCB

Union
Paul L. Cox, Chief Counsel
Ed Baker, Staff Representative
Melvin Walcott, Staff Representative
Ron Moenings and Jim Roberts, Release, Unit #1
Terrence W. Hoagland, Jr., Grievant

Arbitrator
Douglas E. Ray

I. BACKGROUND

Grievant served as a State Highway Patrol Trooper for approximately four years and was assigned to the Milan Post. He was in a bargaining unit represented by the F.O.P./O.L.C., which is party to a collective bargaining agreement with the State of Ohio.

This case concerns Grievant's June, 1993, discharge on grounds that he had secured cash bond from three Ohio Turnpike motorists for his own personal use. He was charged with accepting $120 from a Pakistani motorist on July 11, 1992, accepting $100 from a New Jersey motorist who had recently moved to this country from India on May 14, 1993 and of accepting $60 from a Canadian motorist on May 14, 1993. A charge was made against Grievant by the Canadian motorist on May 15 and 16 and an investigation begun. Grievant was placed on administrative leave. He was subsequently indicted for the charge of theft in office and discharged by letter dated June 15, 1993. A grievance was filed June 18, 1993, and arbitration requested. The criminal trial was held from November 7 through November 10, 1995. At trial, the motorist from New Jersey and the motorist from Canada testified and Grievant was tried on the two charges arising from their allegations. On November 10, 1995, the jury returned with their verdicts of not guilty.

The instant arbitration was then scheduled and hearings held in Columbus, Ohio on January 25 and February 23, 1996. The motorist from Canada was called as a witness as were his

mother in law, who had lodged the initial telephone complaint, and the Patrol officers who had participated in the investigation. Grievant, who had not provided a statement to investigators and had not testified at trial, testified and denied the charges against him. The transcript of the criminal trial was introduced as a joint exhibit and each party submitted numerous exhibits. At hearing, the parties stipulated that the matter was properly before the arbitrator.

II. ISSUE

The parties stipulated that the issue before the arbitrator is:

Was the Grievant terminated for just cause? If not, what shall the remedy be?

III. CONTRACT PROVISIONS

Section 19.01 states "No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause."

IV. POSITIONS OF THE PARTIES

The parties made extensive arguments at hearing. Their positions are only briefly summarized below.

A. The State

The State argues that Grievant was properly terminated and asks that the grievance be denied. The State takes the position that it has presented sufficient evidence of just cause and asserts that the arbitrator is not bound to follow the ruling of the jury in this matter.

The State argues that the arbitrator should credit the testimony of the Canadian motorist, W., asserting that he had no reason to lie and that he has consistently told the same story throughout the investigation, trial and arbitration hearing. The State points to W.'s testimony that he was stopped for speeding on the Ohio turnpike by Grievant, told by Grievant that he would be jailed if he did not pay and that he put $60 cash in a small envelope provided by Grievant. The State also points to the testimony of W.'s mother in law from Toledo, Ohio, who testified that when W. arrived in Toledo on May 14, 1993, he told her he was concerned that he had to give $60 to a patrol officer and had been given no receipt and that she had then called the Highway Patrol to inquire. The State argues that both were credible witnesses.

The State further argues that its investigation revealed that the court copies of the speeding ticket written out for W. were never located despite a search of courts. It also asserts that the subsequent investigation revealed that the court copies of the citation written to the Pakistani driver and to the New Jersey driver were also missing from the official files. It also points to the investigator's testimony that parts of the Pakistani's citation were found in the shredder bag on May 17, 1993.

The State further argues that there is no reason why three people from different parts of the world would lie to

Patrol investigators about being asked for cash and putting it into small envelopes provided by Grievant.

The State argues that taking cash on the road is never proper under Patrol procedure and,in the circumstances of this case, constituted theft. The Employer asserts that such behavior by a law enforcement officer sworn to uphold the law must constitute just cause for discharge.

B. The Union

The Union argues that the State has not established just cause for discharge. It argues that the burden is on the State to prove that Grievant did what he was charged with and it is not the duty of the Union and Grievant to prove a negative. The Union asserts that the acquittal is directly relevant to this proceeding and that the jury considered the exact questions before the arbitrator here. The question before this arbitrator is one of fact and the Union asserts that the arbitrator should respect the jury's role as factfinder and believe Grievant rather than W.

The Union notes that other tickets have turned up missing from court records, that all officers have access to the court boxes into which tickets are placed for transmittal to court. It also points out that there is no accounting to keep track of which tickets are delivered to court and by whom. With regard to the alleged shredder evidence, the Union points out that everyone in the Post has access to the shredder. It also points to other pieces recovered from the shredder that it argues come from a

ticket issued to a Mr. D. by Grievant on May 14, 1993. Mr. D. did have his copy and did pay the court by a mailed in money order. Mr. D. was not asked for cash. The Union points to hundreds of tickets issued by Grievant which it entered into evidence. They show that Grievant regularly issued tickets to persons of foreign birth and foreign nationality without any allegation that they had been asked for cash.

With regard to W., the Union argues that he was well coached. It points to cross examination at hearing and at trial in which he was asked about a telephone call he received from the defense attorney's investigator in October, 1993. It points to the investigator's trial testimony and her investigative report in which she asserts that W. told her he paid $80 rather than the $60 testified to and argues that this substantially undercuts Grievant's testimony.

The Union argues that it is illogical that Grievant would take money and then leave a paper trail in 4 separate documents by recording these stops on tickets filed at the post, on his arrest recap log, on his activity log and on radio dispatch logs. The Union argues that it makes no sense to believe that he would have recorded these matters if he was doing what he is charged with.

The Union argues that the State's case does not hold together and does not justify depriving Grievant of his job.

The Union asks for reinstatement, restoration of seniority and full back pay less interim earnings.

V. DECISION AND ANALYSIS

This case was hard fought on both sides. Both sides made thorough arguments throughout the two days of hearing. The arbitrator has reviewed the arguments of the parties, the collective bargaining agreement, the testimony of witnesses, and the exhibits introduced at hearing in reaching the decision which follows. Among the considerations which motivated the arbitrator were:

1. The first issue is the effect the November, 1995, acquittal is to have on this proceeding. Two of the charges against Grievant were tried and the jury came back with verdicts of not guilty. After reviewing the arguments of both parties, the arbitrator believes that he has a duty to independently review the charges under the controlling collective bargaining agreement. A number of arbitrators have reached the same result in somewhat similar situations on the basis that the parties were different at the criminal trial and that somewhat different standards of proof and evidence may apply. See City of Sterling Heights, 89 LA 723 (Keefe 1987) (arbitrator finds police officer properly discharged for crime despite prior jury verdict of not guilty) and Associated Grocers of Alabama, 83 LA 261 (Odom, Jr. 1984) (jury acquittal of theft charges held not controlling). As Arbitrator Girolamo noted in City of Muskegon Heights Police Dept. 88 LA 675 (Girolamo 1987),

however, although the jury's not guilty verdict is not binding, it may well increase the employer's burden of persuasion.

2. Grievant was discharged based on allegations that he had improperly taken money from three motorists. Two of the three accusers did not testify at hearing.

As to the charges that Grievant took money from Mr. R., the arbitrator does not find sufficient evidence to uphold discharge. Mr. R. was alleged to have gone back to Pakistan and could not be located to testify. The arbitrator refused to accept into evidence the investigator's report of his interview with Mr. R. and his tape recording of the interview. The basis for this ruling was that, on charges this serious, there should be an opportunity to cross examine the charging party. The fact that Mr. R.'s ticket was missing and could not be located in court files is suspicious. (If a ticket is not sent forward to court, the court will have no record and no reason to communicate with the cited motorist.) Suspicious, too, is the apparent fact that pieces of the court copies of Mr. R's ticket were found in the shredder bag on May 17, 1993. As the Union pointed out, however, all personnel had access to the court boxes where officers leave tickets for transmittal to the courts. All have access to the shredder as well and these facts do not prove Grievant asked for money or that Grievant was responsible for the ticket being missing or shredded.

The allegations made by Mr. L., the New Jersey motorist from India, were not corroborated by personal testimony at the arbitration hearing but he did testify at the criminal trial where he was cross examined by Grievant's defense attorney. His ticket, issued in July, 1992, could not be found in court records either , another suspicious fact. Mr. L. was not at the arbitration hearing, however, and Grievant did testify, denying the allegations made by Mr. L. The arbitrator does not find Mr. L.'s allegations to be sufficiently persuasive to carry the State's burden here without the arbitrator having the opportunity to see him and assess his credibility first hand.

3. The general circumstantial evidence about missing tickets is not considered to prove that Grievant committed the acts with which he is charged. There was testimony to the effect that tickets do end up missing occasionally and there did not seem to be sufficient accounting controls to tell how or why they turned up missing.

4. The case will turn, then, on the credibility of Mr. W., the motorist from Canada. The arbitrator has reviewed Mr. W.'s testimony at hearing, his testimony at trial and the statements he made to investigators. The arbitrator has also reviewed the testimony of Ms. K, his mother in law. The arbitrator found them to be credible witnesses. Mr. W. was made to understand early by investigators that there could be serious consequences to him if he falsely accused a law enforcement officer of a crime. Nonetheless, he gave a

statement to investigators in May, 1993, and has been consistent throughout. The arbitrator can come up with no reason why he would want to falsify his testimony.

The arbitrator finds Mr. W.'s testimony to be consistent and credible. He testified that Grievant told him that if he did not pay cash, he could be put in jail for a day or two until bond was posted or the Canadian consulate contacted. Mr. W. said that he asked if he could pay by VISA card and that Grievant told him no. Mr. W. testified that he placed three twenty dollar bills in the envelope given him by Grievant and, when he asked about a receipt, was told that his copy of the ticket went to the courts. He testified that he felt odd about it after he pulled away and told his fiancee's mother when he arrived at her house. The then future mother in law, Ms. K., corroborated his story about what he told her when he arrived and she was the one to contact the Highway Patrol about the matter. This led to the investigation.

The Union, at hearing, and the defense attorney at trial attempted to shake Mr. W.'s credibility by questioning him about a telephone interview conducted in October, 1993, by an investigator hired by Grievant's defense attorney. The investigator testified at the criminal trial that Mr. W. told her he paid $80 in the form of four twenty dollar bills and both cross examiners sought to get Mr. W. to admit this. He did not admit this at either the criminal trial or the

arbitration hearing but, rather, claimed to have little recollection of the telephone interview.

After reviewing the matter and all the testimony, the arbitrator does not find this to destroy Mr. W.'s credibility. First, the arbitrator has some questions about the investigator's testimony. She conducted a telephone interview, not a face to face interview. She seems to have testified from notes rather than direct personal recollection and had no transcript of the conversation to enable fact-finders to determine the form of questioning and answers. Indeed, she testified that her transcript of the interview had been destroyed by taping over it. Much of her testimony corroborated Mr. W.'s story.

Second, the arbitrator does not find it surprising or implicating that Mr. W. did not recall the conversation with the investigator very well. It occurred years before the trial and arbitration hearing. An incident like a highway stop under the circumstances alleged would be far more memorable to most of us than a telephone call, which is a fairly common event. Further, Mr. W. would have had less reason to take the investigator's telephone call seriously. The arbitrator is not at all convinced that he told her $80 was the sum. In any event, he is a Canadian who paid in U.S. dollars and even if he had misspoken on that one occasion many months after the event, it would not necessarily outweigh his other testimony.

5. The arbitrator has reviewed Grievant's testimony and has reviewed, as well, the trial testimony from his many character witnesses. The character witnesses characterized Grievant as a solid and good friend, a good employee and co-worker and honest and trustworthy. Grievant made a good impression at hearing and it is quite easy to believe that he could be the kind of neighbor and friend described by his character witnesses. The arbitrator can find no reason, however, why Mr. W. would have lied about the incident to which he testified and finds Mr. W.'s testimony to be true.

6. The arbitrator has considered the Union's other arguments as well. One exhibit was of a ticket given to a Mr. D. by Grievant on May 14, 1993. It was matched up with fragments found in the shredder May 17. Mr. D. was a ticketed motorist who did pay his fine despite his court copies not being located, meaning that he was not asked for cash and was given a copy of his ticket. The arbitrator was not sure that the ticket fragments quite matched the D. ticket. Even if they did and the event was unexplainable, the arbitrator does not believe that this unexplainable event would change the result. Unfortunately, the shredder bag seemed to have been changed prior to the May 17 check by the investigator and only a few fragments of the R. ticket and the ticket alleged to be the D. ticket were found. (It was speculated that they had been caught in the gears at the time the bag was changed.) Had the shredder bag in place May 14 and May 15 been looked for there might have been

evidence that would have helped one party or the other. As it is, the shredder evidence does not seem persuasive for either side.

The fact that Grievant consented to a search of his car and locker thus eliminating the need for a search warrant and the fact that nothing was found in the search does not add a lot in the circumstances. On May 15, 1993, Sergeant V. could not find Grievant's May 14 tickets from his shift the night before. He asked Grievant for them. Grievant brought them out and gave them to Sergeant V. but omitted the ticket to Mr. W. from the packet, providing only 6 of the 7 tickets issued. The Sergeant asked him for the ticket issued to Mr. W. and Grievant returned to his car and brought out the buff copy. The Sergeant then asked him for the pink copy as well, which Grievant returned to his car again to retrieve. The court boxes were then searched for the W. ticket and it was not found. From this focus on Mr. W.'s ticket, Grievant would surely have been aware that something was up with regard to his stop of Mr. W. Again, it is suspicious that the one ticket missing from the pack of tickets he brought in from his car was that of Mr. W. As the Union argues, it is possible for a ticket to get mislaid or to stick to the side of the arrest book, but it is another suspicious incident and the entire transaction would have put Grievant on notice well before the May 17 search that an investigation might ensue.

As the Union argues, Grievant did call in his traffic stops on the radio where they were entered in the dispatcher's log and did enter the contested tickets in his arrest and activity logs. The Union argues that it would make no sense to do this if he had something to hide. There was testimony, however, that in the arrest recap log Grievant had originally entered "Michelle" rather than "Michael" as Mr. W.'s first name. This could have been a mere clerical error but could also be suspicious. Further, it appears that tickets signed out to officers must be accounted for and the pink copy of each ticket sent to Columbus. It is possible that failing to record a ticket in the appropriate log could raise inquiries.

In response to the Union's other arguments, the arbitrator does not pretend to know why all these things happened. The arbitrator does find, however, that the State has met its burden.

VI. AWARD

The grievance is denied.

March 12, 1996

Columbus, Ohio, County of Franklin

Douglas E. Ray

Douglas E. Ray, Arbitrator