H 1121

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 15-03-951213-0111-04-01
Roubanes termination

Hearing held February 9, 1996, in Massillon, Ohio

Post-hearing briefs mailed on or before February 29, 1996

Decision issued March 26, 1996

APPEARANCES

Employer
Staff Lt. Richard Corbin, Advocate
Cynthia Sovell, OCB, Second Chair

Union
Paul Cox, Esq., Chief Counsel
Ed Baker, Staff Representative
Melvin C. Walcott, Staff Representative
Ron Moenins, Release Associate
Renee Engelbach, Paralegal
Julie Roubanes, Grievant

Arbitrator
Douglas E. Ray

I. BACKGROUND

Grievant was employed by the Ohio State Highway Patrol as a Trooper and had been so employed for approximately six years when, on December 5, 1995, she was discharged. She was a member of a bargaining unit represented by the Fraternal Order of Police, Ohio Labor Council, Inc. The unit includes, among other classifications, both troopers and dispatchers of the Ohio State Highway Patrol.

Grievant's discharge occurred after a complaint from a member of the public about a State Highway Patrol car sitting in a Taco Bell parking lot late at night and an investigation into allegations that Grievant had falsely reported her location while on duty on November 2, 1995. Grievant was charged with falsely reporting her location on three occasions. At hearing, she admitted that she had called in false locations on at least two of the occasions. Testimony at hearing established that Grievant had been sitting in a Perry Township patrol car talking with an acquaintance whose duty station was in the parking lot of a Perry Township Taco Bell. Grievant responded to check up calls from the dispatcher by walking over to her patrol car and calling in false locations on her radio. At 0037 hours, she reported her position as Interstate 77 and US 30, a location over 4 miles from the Taco Bell and at 0107 hours, she reported her location as being at US 30 and Richville Drive, also over four miles from the parking lot. At 0139, Grievant reported her position as being at SR 172 at

Woodlawn Avenue, approximately 1/10 mile from the Taco Bell restaurant. Grievant admitted the first two calls were false but argues that she may have left the parking lot by the time of the third call.

On November 28, 1995, the Employer gave Grievant notice of an intent to terminate. The notice charged her with falsely reporting her location on several occasions. A pre-disciplinary hearing was scheduled for and held December 5, 1995. Grievant was removed from her position as a Highway Patrol Trooper effective at the close of business December 5, 1995. A grievance was filed December 13, 1995. The matter was processed to arbitration by the parties and a hearing held February 9, 1996, in Massillon, Ohio, before the undersigned arbitrator. At hearing, the parties stipulated that the matter was properly before the arbitrator. The arbitrator took under advisement Union objections to certain evidence presented by the Employer and asked the parties to brief issues concerning after acquired evidence and allegations of post discharge misconduct. Briefs were mailed on or before February 29, 1996, and received by March 4, 1996.

II. ISSUE

The parties stipulated the issue to be:

Was Grievant disciplined 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 19.04 "Pre-suspension or Pre-termination Meeting"

Section 19.05, "Progressive Discipline," which provides in part:

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. A fine not to exceed two (2) 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.....

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 termination was for just cause and asks that the grievance be denied. The Employer argues that the public has to have basic trust in the integrity of individual officers and that Grievant has violated that trust. It asserts that Grievant neglected her duties and lied to cover up her misbehavior. The Employer asserts that Grievant compounded her rules violations by

lying to the post dispatcher about her location. The calls were made on her patrol car radio rather than her walkie talkie as part of a premeditated attempt to deceive in that walkie talkie calls can be distinguished over the air.

The Employer further argues that Grievant's hearing testimony and responses to investigating officers are part of a pattern of evasive answers during official inquiries which the arbitrator should take into account. The Employer further asserts that, shortly before her termination, Grievant contacted Officer R., the officer in whose car she had been sitting, and attempted to influence her testimony at the arbitration hearing. The Employer argues that it would be pointless to direct the reinstatement of someone the Employer would terminate in any event for behavior such as this. The Employer provided numerous authorities in support of its position that after acquired evidence and post discharge misconduct can be considered by an arbitrator.

The Employer argues that the decision to discharge was proper, especially in light of Grievant's dishonesty, her deportment record and her damaged credibility in future court proceedings. In summary, the Employer asks that the grievance be denied.

B. The Union

The Union argues that the discharge was not for just cause. The Union argues that Grievant has admitted she exercised poor judgment on November 2 and asserts that discharge is an

excessive and punitive sanction and not consistent with principles of progressive discipline. The Union further argues that there has been disparate treatment. It points to discipline given to two other Troopers for transmitting false locations. Each received a five day suspension, even though one was apparently on duty out of uniform and attending a karate demonstration.

The Union attacks management's attempts to argue that Grievant had a propensity to be evasive in official investigations. First, it asserts that the charge is not established and that it is not unwise for an employee to answer carefully where questioning could result in termination. Second, the Union asserts that it is improper for the Employer to submit such arguments in that they are irrelevant as after acquired evidence The Union argues that the discharge "must stand or fall upon the reasons given at the time when the decision to discharge was made." Hill and Sinicropi, Evidence in Arbitration, p. 308. In addition it points to Section 19.04 of the collective bargaining agreement which requires the Employer to notify the Grievant of all the charges against her.

Further, the Union argues that post discharge evidence, too, should be excluded and cites numerous authorities. In summary, the Union argues that the Employer's evidence must be limited to the charges identified in the original statement of charges and that such evidence does not support

discharge. The Union asks that Grievant be reinstated with back pay.

V. 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 case requires analysis of the penalty for transmitting false locations, the allegations concerning a pattern of evasive responses to investigations and the alleged attempt to influence a witness.

A. False Location Reports

Grievant has admitted making false location reports on at least two of the three occasions for which she was charged. She has also admitted sitting in the Perry Township patrol car located in the Taco Bell parking lot for an extended period. She was there at least one and one half to two hours. The December 5 notice of removal states that she was removed as a result of her violation of section 4501:2-6-02 (B)(3) and (E) of the Rules and Regulations of the Ohio State Highway Patrol and the letter charges that "on November 2, 1995, while on duty, you falsely reported your location on repeated occasions." (The original letter identified November 1 as the date in question but a corrected copy was offered at hearing.) Of the cited Rules, (B)(3) states that "A member, while on duty, shall not be absent from his/her district post, section, unit, detail or assignment without authorization and shall be available

through usual communication channels." (E), "False statement, truthfulness," states that "A member shall not make any false statement, verbal or written, or false claims concerning their conduct or the conduct of others." Grievant has violated these rules and admits she falsely reported her location on at least two occasions.

The real issue is whether these violations constitute just cause for removal. The Union has presented evidence from 1994 and 1995 that two other troopers had falsely reported their locations but had received five day suspensions rather than being terminated. One had apparently called in by telephone that he would be investigating a crash and, instead, was out of uniform at a karate demonstration. The other was charged with being unavailable through normal communication channels for 13 minutes while a dispatcher attempted to dispatch him to a crash and subsequently transmitting a false location. As the Union argues, these instances demonstrate that the Employer has not always treated false reports as seriously as it did here.

Other aspects of the case indicate that Grievant's situation may have been more serious than the two cases relied on by the Union. Grievant misrepresented her position over a considerable period of time. Too, hers was a knowing and deliberate violation, not a spur of the moment impulse. She did not get immediately into her patrol car at 0037 hours and resume her duties after transmitting a false

location. Rather, she went back to the Perry Township car to resume her conversation and later transmitted at least one more false location report at 0107. The fact that she admittedly repeated the offense makes this a more serious offense. If the time had gotten away from Grievant, the first checkup call should have been her signal to immediately return to her duty station. Instead, after making her first false report, she returned to the other car and resumed her conversation as she did after the second false report. Too, the Employer established that Grievant had received four written reprimands in the past, including one that charged her with failing to maintain radio contact. This, too, can distinguish the case from that of the other two troopers disciplined for falsely reporting location.

Because of the progressive discipline standards contained in Section 19.05 and the treatment of the other troopers, the arbitrator believes that the penalty of discharge is too severe. There was no evidence that troopers have been discharged for the offense of transmitting false locations. Because the offense was intentional, deliberate and repeated, however, the arbitrator believes that reinstatement should be without back pay and that a 60 day suspension should be entered into Grievant's deportment record.

B. After Acquired Evidence

At hearing, the Employer argued that Grievant's responses to the investigation were evasive and filled with

a failure to remember and that this was consistent with a pattern of evasive responses in other investigations. The Employer sought to introduce testimony and exhibits concerning these other investigations in support of its termination case. The Union objected. After reviewing the matter, the arbitrator believes that this evidence should be excluded. As the Union has argued, the great majority of arbitrators have taken the position that a discharge case must rise or fall on the facts the Employer knew at the time it made its termination decision. See, e.g., Safeway, Inc., 105 LA 718 (Goldberg 1995); Columbia Metropolitan Housing Authority, 103 LA 104 (Fullmer 1994); O. Fairweather, Practice and Procedure in Labor Arbitration, pp. 259-60, (3d ed. 1990). This is particularly appropriate under this collective bargaining agreement which, in Section 19.04, requires that written notice of a pre-disciplinary meeting include a statement of the charges and a summary of the evidence being brought against the employee. Here, the pre-disciplinary notices charged Grievant only with the false reports. She was not charged with evasive responses to this or any other investigation as a formal disciplinary matter. Indeed, even the Employer's Step 2 response to the grievance did not raise these other charges. Under these circumstances, the arbitrator believes that the evidence should be excluded and does not express an opinion as to its merits or its weight.

C. Allegations of Witness Tampering

A final evidentiary issue which the arbitrator took under advisement involves the Employer's assertion that Grievant improperly sought to influence a witness at the arbitration hearing. According to Employer witnesses, its investigating officer was contacted on or about December 1 by Officer R., the Perry Township officer in whose patrol car Grievant was sitting on November 2. In a statement taken on December 12, Officer R. asserted that Grievant called her November 28 and then on December 1 or 2. She asserted that, in the second call, Grievant suggested that she not remember anything at the arbitration hearing. Officer R. testified at hearing that Grievant told her she was not to remember anything that happened that night. The Union objected to Officer R.'s testimony and to testimony and exhibits concerning her December 12 interview.

The Union asserts that this testimony and evidence should be excluded for the same reasons that other after acquired evidence should be excluded and notes, in addition, that Grievant denies that the call took place. The Employer asserts that it is appropriate to admit such evidence and argues that it would be pointless to reinstate an employee who had committed an offense warranting discharge. It points to numerous cases suggesting that if favorable post-discharge conduct is admissible, then negative post-discharge conduct should be admissible and to other cases allowing evidence of post-discharge misconduct for the purpose of determining whether an employee has forfeited the

opportunity to be reinstated. The Employer notes that arbitrators have considered post discharge conduct in many situations such as where subsequent occurrences are, in effect, an extension or continuation of the events leading to discharge and where the conduct indicates that grievant "could not reasonably be expected to be of reasonable value as an employee." Cadillac Plastics, 58 LA 812 (Kates 1965) Both parties provided numerous arbitration and court cases to support their positions.

As noted above, most arbitrators exclude after acquired evidence. On the other hand, many arbitrators will consider post discharge misconduct, at least insofar as it goes to the issue of remedy. See Atlantic Southeast Airlines, 101 LA 515 (Nolan, 1993) (fully discussing role of post discharge evidence and discussing decided cases.) In this case, the parties disagree over whether this is post-discharge misconduct or pre-discharge after acquired evidence. It appears that the Employer's investigating officer was made aware of the charge when Officer R. approached him at a football game where he was working traffic control on or about December 1. The alleged telephone call took place at that time which was before Grievant's December 5 pre-discharge hearing and before her December 5 discharge. Lt. M., the investigating officer, then advised Captain E. of the conversation while both were at the December 5 pre-disciplinary hearing. Lt. M. was directed to recontact Officer R. and get a statement, which

he did. The statement was taken December 12, which was one week after the discharge.

After reviewing the authorities cited by the parties and studying the evidence, the arbitrator believes that this evidence, too, should be excluded for purposes of the instant arbitration. It was not the basis for official charges against Grievant and was not even referred to in the Employer's December 22 Step 2 response to the grievance. The arbitrator believes that, in the particular circumstances of this case, these serious allegations would benefit from the notice and fact-finding procedures of the full disciplinary process should the Employer elect to pursue them. The arbitrator could not, in the circumstances of this case, do a reliable job of fact-finding in the absence of full notice to Grievant and the Union of the charges against her.

Among the limiting circumstances are possible inconsistencies in the record that would warrant the kind of investigation that notice would provide. For example, Officer R., the witness against Grievant for these allegations, may have herself misrepresented facts to investigators when initally interviewed. First, Officer R. testified at hearing that Grievant was seated in her (Officer R's) vehicle. This is consistent with Grievant's admissions to investigators and at hearing. When Officer R. was interviewed on November 7, however, she stated that Grievant had pulled up beside her. She was asked, "Was she

(meaning Grievant) in her car the whole time?" Officer R. answered "Pretty sure." (page 5 of 9 page interview transcript.)

Second, based on Grievant's admissions to the investigating officer and at hearing, it is clear that Grievant was in Officer R.'s car for between one and one half and two hours. In her November 7, 1995, statement, however, Officer R. said "I mean is she in trouble for talking to me for a <u>couple of minutes</u>. I mean is that the problem? I mean what's the big problem." (page 9 of November 7 statement, emphasis added) Thus, Officer R.'s November 7 official statement to the Ohio State Highway Patrol seems somewhat inconsistent with the admitted facts, a matter that would have to be explored to assess her credibility.

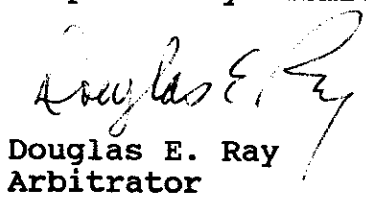
Another matter that invites inquiry is the timing. In an official statement to Lt. M. on November 7, 1995, Grievant admitted she had been seated in Officer R.'s car talking and that she had returned to her car and responded to the check-ups with false locations. Thus, she had already admitted the charges against her by November 7. This makes it necessary to inquire why Grievant might have felt the need to influence arbitration testimony as of December 1. Although she had received her notice of pre-termination hearing, she had not yet been discharged and had not yet filed her grievance.

The arbitrator grants the Union's motion to exclude evidence concerning allegations of attempting to influence a witness on or about December 1, 1995. The arbitrator expresses no opinion as to the merits of such charges.

VI. AWARD

The grievance is granted in part. Grievant shall be reinstated without loss of seniority but without back pay. A sixty day suspension dated December 5, 1995, shall be entered into Grievant's deportment record.

Respectfully submitted,



March 26, 1996

Douglas E. Ray
Arbitrator