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In the Matter of Arbitration	
Between	Case Number:
Fraternal Order of Police-Ohio Labor Council	15-03-(951208)-112-04-01
	Before: Harry Graham
and	
The State of Ohio, State Highway Patrol	

Appearances: For Fraternal Order of Police-Ohio Labor Council

Paul Cox
Fraternal Order of Police-Ohio Labor Council
222 East Town St.
Columbus, OH. 43215

For State Highway Patrol

Richard G. Corbin
Ohio Highway Patrol
660 East Main St.
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Introduction: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At the hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument on March 13, 1996.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

> Did the Employer have just cause to discharge the Grievant? If not, what shall the remedy be?

Background: There is no dispute over the events that prompt

this proceeding. The Grievant, Frederick Patterson III, has been a Trooper with the Ohio State Highway Patrol. At the time of these events he had in excess of eight years of service and was assigned to the Mt. Gilead post.

During the course of his employment with the Patrol Trooper Patterson accumulated numerous instances of discipline. It is not necessary to cite the record which is well known to all concerned.

In the Summer of 1994 the Grievant received a seven (7) day suspension for failure to properly process documentation regarding an auto crash. That suspension was grieved to arbitration and Arbitrator Marvin Feldman found seven days to be excessive on the facts before him. He reduced the seven day suspension to five days and awarded back pay as appropriate.

In August, 1995 the Grievant was terminated from employment. The Union and the Employer entered into negotiations over that event and Trooper Patterson's termination was modified. A last chance agreement was reached. Under its terms Trooper Patterson's discharge was held in abeyance. He agreed not to violate certain Rules of the Patrol for two years. The parties further agreed that:

> If the employee is charged and found in violation of same or similar rules and regulations within the two year period, the employee will be terminated. The employer and the union agree the severity of the discipline will not constitute a grievable matter.

On November 1, 1995 the Grievant was late for work. He had been scheduled to report to duty on that date for the 8:00 a.m. to 4:00p.m. shift. When he did not appear the Post Commander directed the Dispatcher to telephone him. The call was placed at approximately 8:03 a.m. Trooper Patterson answered the phone. Patterson was initially surprised to learn that he was to be on duty at 8:00 a.m. but came to recall it in the course of the conversation with the Dispatcher. He arrived at work at 8:50 a.m.

In due course the Employer came to regard Patterson's tardiness to constitute inefficiency. He was terminated. A grievance protesting that action was filed. It was processed through the machinery of the parties without resolution and the parties agree it is properly before the Arbitrator for determination on its merits.

Position of the Employer: As the Employer views this dispute, it is unnecessary to conduct the normal inquiry concerning just cause to substantiate discharge. Rather, the question revolves about the enforceability of the Last Chance Agreement of August 18, 1995. In that Agreement the Grievant, the Union and the Employer agreed that if Trooper Patterson violated the same or similar rules as had been the case in that instance his employment would be terminated. When, on November 1, 1995 Patterson was late he triggered the terms of the Last Chance Agreement. Discharge follows automatically in

the State's opinion.

The Grievant had ample notice of his work schedule. It was initially posted in August, 1995. Even earlier, on December 20, 1994 the post commander, Lieutenant John Shore, had spoken with him and pointed out to Patterson that his bid preference had been altered to accommodate military training obligations.

As a matter of coincidence Patterson and a co-worker, Trooper Michael Nisky had had a conversation on October 29, 1995 about the work schedule for the forthcoming week. Nisky, who testified pursuant to supoena, pointed out that Patterson had only one day off in the next workweek. Patterson acknowledged as much and indicated his schedule reflected the accommodation made by the Employer to his military training obligation.

During the months prior to November 1, 1995 Trooper Patterson was aware of his schedule. Several days earlier he had come to discuss it with a colleague. He cannot claim ignorance of his duty tours. He was late for work. Under the terms of the last chance agreement discharge must follow. The State urges that the last chance agreement be enforced and Trooper Patterson separated from employment.

Position of the Union: The Union does not dispute the events that prompted the State to discharge the grievant. It urges that the last chance agreement be read in context. The last

chance agreement came to be negotiated to resolve discipline that had been administered to Trooper Patterson for a failure to honor a supoena and failure to properly complete a traffic citation. It was not concerned with, nor did it deal with, tardiness. Patterson was late for work on November 1, 1995. This represented a minor infraction. The movement of the State to discharge him for such an offense is disproportionate. In no sense does the penalty fit the crime. It is excessive. Never in his history of employment with the Patrol has tardiness been a problem with Patterson. His late report for duty on November 1, 1995 was an aberration. In the opinion of the Union the last chance agreement should not be enforced in this situation. It urges the Grievant be restored to employment with full back pay.

Discussion: In Case No. 15-03-941021-0094-04-01, Arbitrator Marvin Feldman was confronted with a situation involving review of discipline imposed on the Grievant. He found the discipline in that instance excessive and modified it. On page 7 Arbitrator Feldman observed "I am recommending a five day suspension on the basis that the grievant best be advised that further and continued activity may well lead to discharge on the basis of theory of progressive discipline." Coincidently Arbitrator Feldman's decision is dated almost exactly one year prior to the time when Trooper Patterson is again in arbitration over discipline. Feldman's opinion put,

or should have put, the Grievant on notice that his position with the Highway Patrol was in peril.

Notwithstanding the Feldman decision the Grievant again prompted the Patrol to discipline in the Summer of 1995. He was discharged. That discharge was held in abeyance under the terms of a last chance agreement. Use of the word "abeyance" implies that the discharge was not set aside. Rather, it was stayed. If the Grievant met certain conditions over a two year period the discharge would be withdrawn. During the period it remained alive, a sword of Damocles over Trooper Patterson.

The events that prompted the discharge and last chance agreement with Trooper Patterson in the summer of 1995 involved violation of Highway Patrol Rules and Regulations, Section 4501:2-6-02 (B)5, inefficiency. The inefficiency involved in the last chance agreement pertained to court related inefficiency. Examination of the investigation report concerning Trooper Patterson's late report for duty on November 1, 1995 shows that he was cited for violation of the same regulation, 4501:2-6-02 (B)5, inefficiency. Reference is had to the Discipline Abeyance Agreement. In the third paragraph it reads:

> If the employee is charged and found in violation of same, or similar rules and regulations within the two year period, the employee will be terminated. The employer and the union agree the severity of the discipline will not constitute a grievable matter.

The inefficiency committed by Trooper Patterson on November 1, 1995 was not great. In the ordinary scheme of things it would not prompt severe discipline. The late report to work of November 1, 1995 must, however, be viewed in context. The proper context is Trooper Patterson's disciplinary history, the prior arbitration award of Arbitrator Feldman, and the last chance agreement of August, 1995. When Trooper Patterson was late he triggered the terms of the Discipline Abeyance Agreement. There is no question that the Grievant violated the same rule as that referenced in the last chance agreement. The violation occurred during the life of the agreement. Its terms indicate without susceptibility of doubt that under that circumstance "the employee will be terminated." It continues to express the Agreement of the parties that "The employer and the union agree the severity of the discipline will not constitute a grievable matter." It is not the function of an arbitrator to substitute his or her judgement for the bargain of the parties. They reached the discipline abeyance agreement. Its terms must be enforced.

Award: The grievance is denied.

Signed and dated this 21st day of March, 1996 at Solon, OH.

Harry Graham
Arbitrator