

VOLUNTARY ARBITRATION PROCEEDINGS
THE DISCHARGE OF GERALD NAPIER

STATE OF OHIO	:	
	:	
The Employer	:	
	:	
-and-	:	<u>OPINION AND AWARD</u>
	:	
FRATERNAL ORDER OF POLICE	:	
OHIO LABOR COUNCIL, INC.	:	
UNIT 1	:	
	:	
The Union	:	

APPEARANCES

For the Employer:

Robert J. Young, Advocate
Wendy F. Clark, Office of Collective Bargaining
Aimee Miller, Witness
Lieutenant Russ Johnson, Witness
Lieutenant Rick Munk, Observer

For the Union:

Stephen S. Lazarus, Attorney
Gerald Napier, Grievant
Roger Williams, Witness
Matt Schmittauer, Witness
Jeff Breitingner, Witness
Al Pleasant, State Trooper
Lisa Roberts, Dispatcher

MARVIN J. FELDMAN
Attorney-Arbitrator
1104 The Superior Building
815 Superior Avenue, N.E.
Cleveland, Ohio 44114
216/781-6100

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 on September 17, 1996, at the conference facility of the employer in Columbus, Ohio, 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 and 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

Aimee Miller, a female and residing in Middletown, Ohio, who at the time of the instant incident was twenty years old filed a complaint with the State Highway Patrol of the State of Ohio. She stated that at the time of the instant incident on April 26, 1995, at approximately 6:30 p.m., she was driving home from work. She testified that she was on Tylersville Road and entered Interstate 75 at the twenty-three mile marker driving northbound. She testified that when she entered the Interstate she could see in her rear view mirror and behind her a white Grand AM Pontiac automobile and behind that Grand AM, two State Highway Patrol cars, all of those vehicles in single file and moving.

She further testified that the Grand AM was stopped by one of the State Highway Patrol cars and that the other came in behind her as she was traveling north on Interstate 75. She had seen the Grand AM stopped

by the State Highway vehicle whose lights were flashing and she testified that she believed that she was the motorist being stopped although she knew that she had not been speeding. The second trooper pulled from behind her to even with her on the left, according to Ms. Miller. Ms. Miller further testified that she looked over and by her own statement made some gesture to the trooper indicating and stating by mouthing words of "I thought it was me". She then testified that the trooper sped on and went in front of her and then to her right and behind her and then stopped her, with lights on, on the side of the highway for a total period of approximately five minutes. At that point the highway, Interstate 75, northbound, was three lanes wide.

Ms. Miller further stated that at that time of stopping, the trooper walked to her car and told her she was "cute"; that he was not stopping her for any legal reason; that he wanted to meet her at the next exit and would she please get off the Interstate to meet with him; that she told him she had a baby and husband at home and couldn't. The trooper said he understood and he parted company and left the side of her auto and walked back to his vehicle. The citizen then pulled out her vehicle onto the highway and went home. The grievant, the state trooper, Gerald Napier, denied any stop. The complainant in fact was not married.

At the time when the grievant arrived home she stated that she told her boyfriend of the episode. The boyfriend, a suburban policeman, then contacted the Hamilton post at which the grievant was stationed and caused a report to be made. That report was on file with the Ohio State Highway Patrol at the Hamilton station. The matter was investigated by

the employer. Ms. Miller gave her statement to the investigating officer. She further testified at hearing subject to direct examination and cross-examination. She further stated that she testified even after receiving a letter from the grievant's attorney which revealed the following:

"June 11, 1996

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Aimee M. Miller
3303 Lefferson Road
Middletown, OH 45044

Re: Gerald Napier

Dear Ms. Miller:

I have been retained by Gerald Miller to investigate the circumstances surrounding his termination from the Ohio State Highway Patrol. It is my understanding that on or about April 29, 1996, you filed a Complaint with the Ohio State Highway Patrol against Mr. Napier. As a result of your allegations, Mr. Napier has been terminated from the Ohio State Highway Patrol.

Mr. Napier does not understand why you have made such false and defamatory statements about him. In an effort to avoid bringing legal action against you, we would like the opportunity to discuss these allegations with you and your attorney. If I do not hear from your attorney by June 20, 1996, I will assume that you have no desire to settle this situation outside of court. (Emphasis ours: should be Gerald Napier)

Sincerely,

/s/Daniel R. Wireman"

Thus from that evidence it revealed that the complainant caused a report to be made at the Ohio State Highway Patrol; thereafter was investigated by a lieutenant of the State Highway Patrol concerning the

report; thereafter received a letter which the complainant considered intimidating and thereafter testified at open hearing subject to examination and cross-examination. It might be noted that during the examination of the grievant by the interrogating officer during her statement taking, Ms. Miller, identified the grievant as the trooper who stopped her. It might be noted that as a matter of fact, a trooper was picked out from a photo line-up. That trooper in fact was the grievant.

Evidence further revealed that there had never been any contact prior between the complainant and the grievant and that neither party knew the other from any other circumstance in their life. The official records of the Highway Patrol radio dispatch revealed that the grievant Gerald Napier was on duty at the time in question. The radio record further revealed that the grievant was known as unit 733 on the shift in question. The record further revealed that the complainant's license plate was XJX977. The radio log revealed that the grievant called in a registration check for XJX997. The time of that call was 18:47 or 6:47 p.m. or at a time consistent to the time the complainant suggested and testified that she had been stopped by the grievant on I-75, northbound.

Further evidence revealed that the trooper who stopped the Grand AM automobile stated at hearing that the personnel in the Grand AM numbered two males. The trooper of that first state vehicle that stopped the Grand AM stated that he thought he needed back-up and by CB radio called the grievant to help him, the grievant just having left the arresting officer of the Grand AM on the highway. The record further revealed that the call by the arresting officer of the Grand AM was at 18:41 or 6:41 p.m. and that the grievant did not appear until some thirteen

minutes later at 18:54 or 6:54 p.m. back with the arresting officer of the Grand AM. In other words, the highway mileage was some four miles which took, allegedly and according to the grievant, some thirteen minutes to travel although the speed limit was 65 mph on Interstate 75. Between the time of 6:41 p.m. when the arresting officer of the Grand AM called to the time that the grievant arrived at 18:54 or 6:54 p.m., the radio log revealed that the grievant during that thirteen minutes had called concerning XJX997. Thus, the time of alleged stop of Ms. Miller apparently coincided with the time that the radio log reflected that the grievant called for radio information concerning the complainant, Aimee Miller, although the grievant either mistakingly or purposefully used the wrong plate number.

Further official records at the facility revealed that the grievant had a prior department record. On December 23, 1994, the grievant received a three day suspension for failing to follow proper procedure. On September 3, 1993, the grievant received a written reprimand for untruthfulness and lying. On August 10, 1993, the grievant was found to have an unauthorized female passenger in his vehicle and received a suspension of one day. Thus the total records revealed that the department record of the grievant indicated a three day suspension, a one day suspension and a written reprimand.

The record further revealed that the grievant had been the subject of a complete investigation in this matter. The grievant was charged with making a false statement and lack of truthfulness under 4501:2-6-02, paragraph (E) and paragraph (I) for conduct unbecoming an officer. On May 13, 1996, the grievant's seniority at the Department of Public

Safety Division of State Highway Patrol was terminated. That letter revealed the following:

"May 13, 1996

Trooper Gerald Napier
1860 Wynnewood Lane
Cincinnati, OH 45237

Dear Tpr. Napier:

Please be advised that for disciplinary reasons, you are being removed from your position as a Highway Patrol Trooper, Department of Public Safety, Division of the State Highway Patrol, effective at the close of business on May 13, 1996.

This removal is the result of your violation of section 4501:2-6-02 (E) & (I), of the Rules and Regulations of the Ohio State Highway Patrol. It is charged that on April 26, 1996, you stopped a female motorist without probable cause for purposes not related to performance of official duties. In addition, you lied during an official investigation of the matter claiming you had not had any contact with the female motorist.

Very truly yours,

/s/CHARLES D. SHIPLEY
Director"

Evidence revealed that the grievant was at the time and place that the complainant suggested, namely on I-75 at approximately 6:47 p.m. on April 26, 1996. The grievant denied any involvement whatsoever with the complainant. The grievant does admit that the complainant motioned to him after the other trooper stopped the Grand AM Pontiac while both the complainant's vehicle and the state vehicle were still moving. The grievant does admit electrically placing his window in a down position on the passenger side to talk to the complainant through her open window on the driver's side. The grievant denied any stop, any contact other

than talking to the lady complainant while traveling some 60 mph or more beside her on Interstate 75.

The grievant stated affirmatively and vehemently that he left his friend who arrested the Grand AM driver and while proceeding further north heard a call from him and returned immediately to the arrest scene of the Grand AM as requested. The record confirms by and through the radio log that as a matter of fact, the grievant reappeared at the scene of the arresting officer of the Grand AM thirteen minutes after departing company with that same trooper. The record further revealed that as a matter of fact, the grievant only traveled some four miles round trip suggesting that it took thirteen minutes to accomplish such round trip.

Thus we have on one hand an affirmation by the complainant that she was stopped on I-75 North for no legal reason by the grievant and on the other hand we have a denial by the grievant that he in fact stopped the complainant for any purpose whatsoever. The grievant, however was present at the time and place complained of. Neither party ever saw each other prior to the incident. It was on the basis of all of these facts that this matter rose to arbitration for opinion and award.

III. OPINION AND DISCUSSION

It is interesting to note that the evidence revealed that a citizen complained about a State Highway Patrol officer when the citizen was not even ticketed as a result of an alleged stop by that officer. The situation was that a young lady of approximately twenty years of age who was rather sheik in her appearance at hearing complained she was stopped

by a State Highway Patrol officer. The complainant stated that she was told that she was "cute"; that he, the patrol officer, wanted to meet her and that she should get off at the next exit so that they could have a conversation in that regard. The grievant denied any such contact with the complainant. The radio log does show that as a matter of fact, the grievant did call in a license plate for driver identification which license plate was XJX997. The complainant's license plate was XJX977.

The next contact on the radio log was the grievant arriving at the scene of another officer who was involved in an earlier arrest and who felt he needed backup. That scene was only four miles away, round trip, and it should not have taken thirteen minutes to traverse four miles in a 65 mph area.

Buttressing the complainant's testimony was a report made by the complainant's boyfriend which revealed that the complainant told him immediately upon arriving home that such stop had been made by a state trooper. A further buttressing event in this situation is the fact that the complainant could identify the grievant from a photo line-up. The employer suggested that such identification could not have been made but for the grievant stopping the complainant's car and presenting himself at the window of the complainant's car after the stop. A further buttressing element is that the grievant had been involved in prior episodes of untruthfulness and was disciplined for them during the course of his activity at this employer.

It is of interest to note that the grievant during the course of the entire investigation never revealed until arbitral hearing time that

he in fact caused his front passenger window to roll down so that he could talk to the complainant through his open window and her open window on the driver's side, while traveling at high speed. The grievant stated that such conversation took place at highway speed and that he, the trooper, could hardly hear because of the wind. That portion of the testimony was never made part of the prior procedures throughout the grievance hearings prior to arbitration.

The evidence further revealed that the complainant had never been involved with any prior misconduct or driving problems and would have no reason to present any animus toward the grievant. Evidence further revealed that the witnesses at hearing who were occupants of the Grand AM testified as to the arresting officer of the Grand AM drivers that they never saw the complainant nor her car in the vicinity complained of. I don't think that there is any question but that the complainant's car was present because even though the number called to the dispatcher by the grievant was wrong, it was almost those numbers of the complainant's car which would make you believe that the grievant recognized the car of the complainant even though at hearing he testified in the negative. The letters of the plate were the same, XJX.

There was some conflicting evidence as to the mile marker of the various stops. I find that those mile markers are not dispositive of the issue at hand in this matter.

I think the facts are clear in this particular case that there was some contact between the complainant and the grievant and that the contact stemmed from the grievant's improper activity. He had

sufficient time, some thirteen minutes to make that contact and he had the type of personality that was necessary for such involvement there being prior records of such activity in his background. The radio log has a direct impact in this matter since the grievant recognized the complainant's car because he called in the license number, even though it was wrong it was substantially correct. While there is no direct witness to buttress the complainant's activity there is good and sufficient evidence in the file to make this finder of fact believe that as a matter of fact, the grievant was involved in conduct unbecoming an officer and was involved in being untruthful---both events contrary to the rule of ethics and performance of duty and conduct necessary for a member of the safety highway patrol to follow. From all of that I find that the grievant is guilty of the activity complained of and that the entire record in this particular case is one that merits a denial of grievance.

It is apparent that the employer has committed itself to progressive discipline. The discipline in this particular case revealed that the grievant over a period of a few years has garnered a written warning, a one day suspension and a three day suspension. This event however is so grossly substandard that further progressive discipline would make a mockery of such rehabilitation activity. The grievant, in my opinion, not only committed the complained of act, he was not candid in his evidence concerning it.

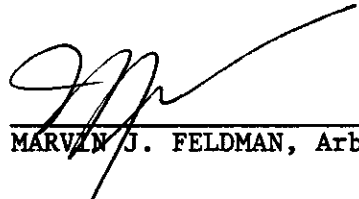
I might note that there is good and sufficient evidence in the file to make findings of guilt in this particular case. An arbitrator may follow any standard of proof, he so desires unless the contract

otherwise dictates. There is good and sufficient evidence in this file and I find that that is a proper standard for this particular case. It might be noted that the parties agreed that the arbitrator should make a finding of just cause and such is the case. The facts revealed that there is just cause for discharge and this grievant should not be placed back to work.

IV. AWARD

Grievance denied for reasons stated. Stopping citizens for personal reasons cannot be tolerated.

Made and entered
this 30th day
of September, 1996.



MARVIN J. FELDMAN, Arbitrator