#1147

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 15-03-950911-0081-04-01
Anderson suspension

Hearing held October 9, 1996, in Findlay, Ohio

Decision issued November 4, 1996

APPEARANCES

Employer
Sgt. Robert Young, Advocate
John McNally, OCB, Second Chair
Union
Paul Cox, Esq., Chief Counsel
Melvin C. Walcott, Staff Representative
Beth Klopfstein, Paralegal
Tpr. Christopher Anderson, Grievant

Arbitrator
Douglas E. Ray

I. BACKGROUND

Grievant has been an Ohio State Highway Patrol Trooper for approximately four years. He is 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.

This matter arises out of a five day suspension given Grievant effective September 21, 1995. A grievance protesting the suspension was filed and the matter processed to arbitration.

Grievant was scheduled to appear as a witness for the second day of a criminal trial set for June 15, 1995. The first day of the trial had taken place on June 6 and the prosecution had begun its case in prosecuting a defendant for driving under the influence, establishing that the defendant had a high blood alcohol level. Grievant, as the arresting officer, was to be the prosecution's sole witness on June 15 and the date had been set taking into account Grievant's vacation schedule as well as the schedules of the judge, lawyers and jurors. Although Grievant was scheduled for vacation on June 15, he indicated that he could be present to testify.

The trial was scheduled to begin at 8:30 a.m. At 8:26 a.m., Grievant called the prosecutor and told him that he did not feel well and would not be coming. Grievant testified that he awoke with stomach cramps and a headache

and that he would not have gone to work that day had he been scheduled to work. (Grievant was on vacation at the time.) The prosecutor told Grievant that he did not know whether the case could be continued and that the court might dismiss the case. The prosecutor testified at hearing that Grievant told him on the phone that he did not feel well and had "worked last night" which he then repeated to the trial judge. Grievant denied that he had said he had "worked last night."

Upon hearing from the prosecutor, the judge called the Patrol post and spoke to Sgt. Born. Sgt. Born checked the records and advised the judge that Grievant had been on vacation and had not worked the night before. The judge ultimately dismissed the case against defendant. Contempt proceedings against Grievant were discussed but the matter was resolved by Grievant's paying defendant's expert witness fees.

On the morning of June 15, at approximately 8:15 a.m., Sgt. Born had called Grievant to get the phone number of another Trooper. Grievant did not mention his court date at that time. Sgt. Born called him again that morning after the case had been dismissed and suggested that Grievant see a doctor because the judge was "boiling mad." Grievant did not do so.

An investigation was conducted and, on July 11, 1995, Grievant was charged with violation of Rule 4501:2-6-02(B)(5)-Inefficiency and Rule: 4501:2-6-02(E)-False

Statements. He was specifically charged with failing to appear for a scheduled court case and providing false information to the Court. A pre-disciplinary hearing was conducted August 29, 1995, and the instant suspension issued September 20, 1995.

The matter was processed to arbitration by the parties and a hearing held October 9, 1996, in Findlay, 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 given a five day suspension for just cause? If not, what shall the remedy be?

III. COLLECTIVE BARGAINING AGREEMENT

Among the provisions of the Agreement 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 suspension was for just cause and asks that the grievance be denied. The Employer argues that Grievant had only 2 and 1/2 years service at the time of the incident and had other discipline in his record. The Employer argues that Grievant failed to appear, failed to notify his post of his court obligation, did not tell his supervisor of the court obligation despite speaking with him only 15 minutes before trial was to start and called only moments before the trial was to start. This, in the Employer's view, constituted inefficiency under the rules.

With regard to false statements, the Employer argues that the prosecuting attorney has been consistent in reporting that Grievant said that he had worked the night before and had no reason to misrepresent. The Employer stresses that there can be no lying to law enforcement officers and argues that it regularly imposes discipline for untruthfulness. As evidence of this, the Employer introduced an arbitration award imposing a 60 day suspension on a trooper who reported false locations, noting that it

had sought discharge in such case. The Employer stresses that this is serious and asks that the grievance be denied.

B. The Union

The Union argues that the suspension was not for just cause. The Union argues that imposing a 5 day suspension on Grievant because he was sick and unable to go to court is not just. The Union stresses that the Employer never tried to prove that Grievant was not ill and asserts that Grievant should not be punished for the prosecutor's failure to get a continuance. It points out that Grievant was never charged with failing to notify the Employer of his court date and that such evidence cannot be considered.

With regard to charges of untruthfulness, the Union asserts first that it is immaterial whether Grievant did or did not say he worked the night before. This is a case where two people recall an incident differently. The Union asserts that the real reason the sanction was so severe was that the judge dismissed the case and argues that this was beyond Grievant's control. Rather, in the Union's view, this case is about failing to appear in court and that Grievant's illness provided a legitimate reason. The Union asks that the grievance be granted and Grievant made whole.

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

separate charges of untruthfulness and false statements as well as possible analysis of the appropriateness of the penalty.

A. Inefficiency

After reviewing the arguments, the arbitrator upholds the Union's objection with regard to arguments that Grievant did not advise the Post of his new court date. There was no indication that the Post had yet implemented specific rules to deal with rescheduled or extended court dates. More importantly, this was not part of the charges against him.

With regard to the failure to appear, however, the arbitrator notes that Grievant provided few details about the severity of his condition on the morning in question, testifying only to stomach cramps and a headache. He said that he decided he would be "uncomfortable" in court. He did not mention trying any over the counter remedies or taking any other measures to enable himself to get to court. Court dates are very important and failing to appear places a huge burden on the courts, judges, witnesses, jurors and attorneys. Many attorneys suffer nausea, stomach cramps and/ or gastointestinal distress before a trial. If all were to cancel, we would have far fewer trials.

The second day of trial was scheduled for a particular date so that Grievant could be there. To not show up and to give only 4 minutes notice looks like inefficiency under all the circumstances of this case, especially in that Grievant testified only that he would be "uncomfortable" in court. He

did not testify that he was physically unable to attend. Despite his supervisor's suggestion and despite being told that the judge was upset, he did not see a doctor on the day in question and thus has no medical evidence to offer other than his brief descriptions of his condition. Given the importance of testimony by the arresting officer, the arbitrator finds that inefficiency has been established. With Grievant's testimony, for example, an alleged drunk driver might have been kept off the streets.

B. False Statements

After reviewing the testimony, the arbitrator believes that it is more likely than not that Grievant mentioned working the night before when he called the prosecuting attorney the morning of the trial. The arbitrator can find no reason why the prosecuting attorney would have wanted to misrepresent this fact and no reason why he would have told the trial judge that Grievant had worked the night before if he had not been told so by Grievant. It could have been something Grievant mentioned as a way of making his case more sympathetic to the prosecutor.

Even though a false statement is found, a number of factors make it less serious than many such cases. First, it doesn't sound all that material. When a trial has been reset and the prosecuting witness has agreed to the new date, a judge will expect a person to appear whether or not he or she has worked the night before. Grievant was charged, on July 11, 1995, in part on the basis that he

"provided false information to the Court in an apparent attempt to explain his absence." Grievant provided the information to the prosecutor, not directly to the Court. Although he should have anticipated that the information would be relayed to the Court, he did not provide it himself. (The arbitrator agrees with the Employer, however, that providing false information to a prosecutor is serious as well.)

In addition, this does not appear to be a case where Grievant has falsified information to evade his duty to testify in favor of some personal activity. He was provably at home at 8:15 a.m. and at approximately 10:00 a.m. to receive calls from Sgt. Born and he was home that afternoon as well for Sgt. Born's visit. There was no proof that his primary reason for missing, that he did not feel well, was false.

Although the consequences of dismissing the criminal case are serious, there is another factor in that dismissal as well. Apparently the judge, by telephone, gave Sgt. Born 30 minutes to get the information or get Grievant to court. Sgt. Born, acting for the Post Commander, did not call Grievant at all but merely checked the work records and called the judge back. Had Sgt. Born called Grievant, he might have come up with a way to get to court to help the prosecution avoid dismissal.

C. Remedy

The arbitrator agrees with the Union that, under the circumstances of this case, the remedy is too severe. Because Grievant did not seem to fully appreciate the importance of his presence at trial (or the importance of early notice in case of serious illness) , the arbitrator believes that a written reprimand is appropriate on the inefficiency. Although Grievant admitted that there had been other occasions when he called in sick before a trial, there had been no prior warnings about this pattern. Under the contract's progressive discipline provisions, a written reprimand should be sufficient here.

The charge of making false statements to a Court is a serious one. Under some circumstances, it could be a dischargeable offense and the Employer has likely taken into account mitigating factors in setting its penalty at five days suspension rather than a more serious penalty. In this case, however, there is no proof that Grievant fabricated the primary reason he gave the prosecutor, that he did not feel well. He was not found at a sporting event or away from his home even though he was on vacation on the day in question. There did not seem to be a premeditated fabrication with regard to working the night before inasmuch as it would not provide a compelling excuse standing by itself. The public, judges and prosecutors, however, expect absolute truthfulness from members of the State Highway Patrol and, as this case demonstrates, even relatively minor

falsehoods can have consequences. Therefore, a serious penalty is still appropriate. The arbitrator suspects that being made to pay the criminal defendant's expert witness fee for the day in question has already sent Grievant a strong message about the behavior in question and believes that, under the circumstances, one step less discipline is an appropriate remedy. Under the contract, this is a two day fine.

VI. AWARD

The grievance is granted in part. A written reprimand dated September 20, 1995 for inefficiency in failing to appear in court and a fine of two (2) days pay dated September 20, 1995, for making a false statement shall be substituted for the five working day suspension. Grievant shall be made whole for any difference between the five day suspension and the two day fine.

Respectfully submitted,

November 4, 1996

Douglas E. Ray
Arbitrator