

VOLUNTARY ARBITRATION PROCEEDINGS
GRIEVANCE OF NATHANIEL C. BENN

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

APPEARANCES

For the Employer:

Richard G. Corbin, Advocate
Cadet A.M. Lepage, Witness
Marsha Murray, Witness
Trooper R.T. Albers, Witness
Mike Zukoski, Witness
Sergeant Mike Marchek, Witness
Amy Beach, OCB

For the Union:

Paul L. Cox, Chief Counsel
Ed Baker, Staff Representative
Nathaniel C. Benn, Grievant

MARVIN J. FELDMAN
Attorney-Arbitrator
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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 in Troy, Ohio, at the conference facility of the employer on December 17, 1996, 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

The grievant was employed as a trooper at the Dayton Post of the State Highway Patrol. His seniority date was November 3, 1989. Since that period of time the grievant has garnered some fourteen chargeable discipline matters. A review of them revealed the following;

1. On May 7, 1992, the grievant received a verbal reprimand for tardiness.

2. On January 15, 1993, the grievant received a written reprimand for tardiness.

3. On June 10, 1993, the grievant fell asleep and crashed his patrol car for which he received a two day suspension.

4. On July 31, 1993, the grievant received a written reprimand for a preventable patrol car crash.

5. On August 26, 1993, the grievant received a verbal reprimand

for being discourteous.

6. On August 26, 1993, the grievant received a written reprimand for two chargeable complaints for being rude and argumentative.

8. On April 14, 1993, the grievant received a verbal reprimand for a preventable patrol car crash.

9. On May 13, 1994, the grievant received a written reprimand for a preventable patrol car crash.

10. On October 20, 1994, the grievant failed to file reports and received a written reprimand.

11. On August 15, 1995, the grievant received a verbal reprimand for a sixth sick leave incident.

12. On September 8, 1995, the grievant received a written reprimand for being tardy.

13. On March 25, 1996, the grievant received a written reprimand for a seventh episode of sick leave in a twelve calendar month period.

14. On February 16, 1996, the grievant received a verbal reprimand for a sick leave incident.

15. On August 8, 1996, the grievant failed to report to duty and received a one day suspension.

On August 20, 1996, the District Commander in which the grievant was employed, wrote to the Superintendent of the Highway Patrol concerning the grievant. His letter revealed the following:

"August 20, 1996

Colonel Warren H. Davies
Superintendent
Ohio State Highway Patrol
660 East Main Street
Columbus, Ohio 43205

Dear Colonel Davies:

Subject: Statement of Charges (Administrative
Investigation #96-0548)

It is herewith stated that reasonable and substantial cause exists to establish that Trooper N. C. Benn has committed an act or acts in violation of the Rules and Regulations of the Ohio State Highway Patrol, specifically of:

Rule 4501:2-6-02 (B) (5)
Performance of Duty and Conduct

It is charged that on Saturday, June 22, 1996, Trooper Benn, while in Patrol uniform, failed to handle traffic control at a busy intersection to which he was dispatched. His failure to act was a contributing factor in a motor vehicle crash in the intersection.

Respectfully,

/s/Captain James H. Walker
District 5 Commander"

Thereafter the grievant was removed from duty as of September 9, 1996, for violation of the rules and regulations that the State Highway Patrol indicated in that letter. The language of that discipline predicate was found in the Performance of Duty and Conduct Code at the indicated section and the language therein revealed the following:

"(5) Members who fail to perform their duties because of an error in judgment or otherwise fail to satisfactorily perform a duty of which such member is capable, may be charged with inefficiency."

On September 9, 1996, a letter was written to the grievant from the Director of the Ohio Department of Public Safety and that letter revealed the following:

"September 09, 1996

Trooper Nathaniel C. Benn
4958 Airway
Dayton, OH 45431

Dear Tpr. Benn:

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 September 09, 1996.

This removal is the result of your violation of section 4501:2-6-02 (B) (5), of the Rules and Regulations of the Ohio State Highway Patrol. It is charged that on June 22, 1996, you failed to handle traffic control at a busy intersection to which you were dispatched. Your failure to act was a contributing factor in a motor vehicle crash in the intersection.

Very truly yours,

/s/CHARLES D. SHIPLEY
Director"

A protest was filed and the protest requested that the grievant be made whole because he was discharged without just cause. It might be noted that two contractual clauses are important to the matter at hand.

19.05 of the contract reveals the following:

"19.05 Progressive Discipline

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.

The Employer, at its discretion, is also free to impose less severe discipline in situations which so warrant."

Also important to the matter at hand is paragraph 19.01, which revealed the following:

"19.01 Standard

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

The facts in this case are not in substantial conflict. The facts revealed that on the date in question the grievant was dispatched to the intersection of State Route 725 and 741 near the City of Dayton. The reason for the dispatch was that the power outage in the area had caused a traffic light failure and the intersection was very busy and backed up as a result of it. The grievant stated that he was six and half miles from the intersection at the time of the call. It took him thirty-nine minutes to arrive at that intersection because of traffic. The grievant was dispatched to that section to handle the traffic.

Evidence revealed that the grievant after arriving at the scene and staying there for a short period of time got into his car and drove off without dispatching that activity to his post. The grievant never handled any traffic at the intersection. Evidence further revealed that within minutes after his departure a two car injury crash occurred and

he was asked if he saw the accident. He responded by radio stating that he was down the street and ten minutes later he radioed again that he arrived on the scene. When the grievant arrived for the second time two other troopers were present, having come in from off duty. Two employees of BP testified that they talked to the grievant when the grievant was in their station during the grievant's initial stop at that intersection. They stated they asked him to help out with the traffic. The grievant did not answer and he left as indicated. As a result of that activity the grievant's willful refusal to perform a basic duty established, according to the employer, just cause for discipline.

The evidence revealed that at the time of the traffic light outage there were probably fifteen or sixteen lanes of traffic, four on each highway going in opposite directions with no one controlling the busy intersection. The grievant indicated that there may have been a safety problem with him going into the intersection. There is also some evidence which revealed that the grievant thought that it was not the State Highway jurisdiction to service that intersection. Based upon that evidence, the grievant's seniority was terminated.

III. OPINION AND DISCUSSION

The union argued in this particular matter that the fact that an adverse result occurred (accident) because the grievant did not service the intersection should not be part and parcel of the reasoning for termination. In other words argued the union on behalf of the grievant, that the fact that an accident occurred at the intersection should not be a predicate for discipline in this particular matter. The predicate for discipline according to the union should be the activity of whether

the grievant participated in traffic control or not. Further, the union questioned whether or not it was safe for one person to attempt to control the mass traffic at that intersection. There was good evidence revealing that at the time the grievant arrived for the second time at the intersection, there were several other people controlling the traffic and not only one person.

The Employer on the other hand indicated and stated that the State Highway Patrol trains their troopers to control traffic; that the incident of traffic at that particular intersection while heavy was not uncontrollable and that the grievant walked away from his duty without permission and without calling backup and without notifying the dispatcher that he left the scene.

The contract demanded just cause for discipline including termination and the contract also demanded progressive discipline with the proviso that certain activity may impose more severe application of discipline if the event that occurs warrants that more severe discipline.

There is no doubt that in this particular matter the grievant walked away from his duty. He was called to the scene of an intersection and he knew what his job was. There is no evidence in the record to reveal that the grievant needed any direction as to his duty in that particular area. It is also the impression of this arbitrator that the grievant's indication of a safety problem to himself was a recent fabrication of the grievant. There is no evidence that the step activity in this particular matter prior to arbitration revealed that

the grievant felt unsafe about taking charge of the activity then and there occurring. Faced with the situation, the grievant took no action, did not call for back up but merely got into his car and drove away and never called into the post indicating that he was leaving.

Back up did arrive before he returned some ten minutes later and the situation was under control but it was under control with the thought that an accident had occurred. The activity in this particular case was an activity of the grievant that was intentional. The grievant saw the situation. The grievant decided to leave and when the discipline was meted out and the termination was served the grievant now sought to escape that termination on the basis of some feeble excuses. Such cannot be the case.

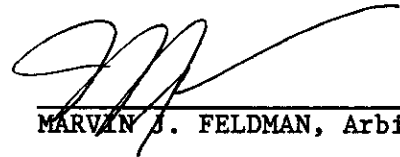
The fact of the matter is that a trooper is involved in a dangerous occupation. Whether the activity is traffic control or catching the bad guys with the use of a weapon, the fact is, the activity is dangerous. Based upon that thought, some discipline must be considered in this particular matter and not just a small suspension either.

As the grievant's department record is reviewed, it is noted that the grievant has not received any heavy suspensions. It is further noted that the contract of collective bargaining presumes a progressive discipline activity. The grievant has some seven years involved on this particular job and it may well be that he can understand that he has a greater duty to his duties as a trooper than he exhibited in June of 1996. On the basis of all of that, it is apparent that the grievant should be returned to work without back pay and that his termination be modified.

Arbitrators are not prone to modify. However, this is one of those cases in which a modification is in order because the grievant is going to receive a rather lengthy and meaningful suspension.

IV. AWARD

The termination is modified into a suspension and the grievant shall be returned to work January 15, 1997, without back pay but without loss of seniority.

A handwritten signature in dark ink, appearing to be 'M. J. Feldman', written over a horizontal line.

MARVIN J. FELDMAN, Arbitrator

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