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VOLUNTARY ARBITRATION PROCEEDINGS
GRIEVANCE OF TIMOTHY E. KEELS
GRIEVANCE NO. 15-03-960408-0031-04-01

STATE OF OHIO :
 :
 The Employer :
 :
 -and- : INTERIM
 : OPINION AND AWARD
 :
 OHIO STATE TROOPERS ASSOCIATION :
 :
 The Union :

APPEARANCES

For the Employer:

Robert J. Young, Advocate
Rodney D. Sampson, OCB
Robert W. Booker, Lieutenant, Observer
R.S. Slater, Lieutenant, Witness
Bryan Tackett, Witness
Tom Slone, Witness

For the Union:

Herschel M. Sigall, Attorney
James Roberts, Executive Director
Thomas Vargo, Attorney
Timothy E. Keels, Grievant
Jonathan Small, M.D.

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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 matter was scheduled and conducted on June 9, 1997, at the conference facility of the employer in Mason, 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

The grievant was an eight year employee of the Ohio State Troopers. He was employed as a trooper and was assigned highway duty. The undisputed facts revealed the following, taken from the summary of the reported investigation:

"Subject Administrative Investigation - Tpr. T. E. Keels, U274

Summary -

Trooper T. E. Keels was off-duty on April 3, 1996, at approximately 11:55 a.m., at the Micro Center Mall, 11755 Mosteller Road, Cincinnati, Ohio. Trooper Keels systematically removed compact disks from their respective boxes and hid them in his jacket. Trooper Keels opened five boxes in this matter and hid seven compact disks on his person while under observation by loss prevention staff. After approximately one hour, Trooper Keels moved to a checkout line and purchased a book. He exited the store with the compact disks concealed in his jacket. He did not stop until confronted

by Loss Prevention staff.

Loss Prevention staff seized seven compact disks from Trooper Keels which were valued at \$374.79. Sharonville Police were summoned to the store.

Loss Prevention staff completed an affidavit charging Keels with theft, ORC 2903.02 (F4). Trooper Keels was taken into custody by Sharonville Police and subsequently cited to appear in Hamilton County Municipal Court on April 4, 1996.

The evidence, plastic sealed or taped boxes, and the eyewitness account of Trooper Keels' actions confirm he deprived Micro Center of their property and was subsequently charged with a felony count of theft.

Upon being interviewed, April 3, 1996, Tpr. Keels said he suffered from some sort of episode while in the Micro Center store related to stress and he did not remember what had happened related to the computer software until he exited the store and realized what he had done. He said he started back into the store to pay for the items when confronted. Tpr. Keels confirmed that he had been charged with felony theft related to this incident."

At the time of the incident the grievant was employed under a set of rules and regulations of the State Highway Patrol. The rule and regulation pertaining to the matter at hand, as stated by the employer, revealed the following:

"(1) Conduct unbecoming an officer

A member may be charged with conduct unbecoming an officer in the following situations:

(1) For conduct that may bring discredit to the division and/or any of its members or employees."

It might be noted that the discipline that may be meted out

pursuant to a violation of the rules and regulations for state troopers revealed the following:

"(C) Discipline

Discipline for violations of the rules and regulations of the division may be given as follows:

(1) 'Verbal reprimand' - verbal reprimand with appropriate notation in employee's personnel file, which may be given a subordinate by any supervisor with the approval of the commander of the office of human resource management or his/her designee.

(2) 'Written reprimand' - a written reprimand which may be assessed a subordinate by a post commander or other commissioned officer with the approval of the commander of the office of human resource management or his/her designee.

(3) 'Suspension' - at the direction of the superintendent and with the approval of the director of the department of public safety, a member may be suspended.

(4) 'Demotion or removal' - at the direction of the superintendent, and with the approval of the director of the department of public safety, a member may be demoted or removed." (Emphasis ours)

As a result of the activity of the grievant on April 1, 1996, the employer took the following action:

"April 8, 1996

Trooper Timothy Keels
8316 Kingsmere Court
Cincinnati, OH 45231

Dear Trooper Keels:

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 April 8, 1996.

This removal is the result of your violation of section 4501:2-6-02, (I) (1) of the Rules and Regulations of the Ohio State Highway Patrol. It is charged that on April 1, 1996, while off duty, you shoplifted several items from the Micro Center Computer Mall, Cincinnati, Ohio."

To that, an appropriate protest was filed and the statement of the grievance revealed the following:

"On April 8, 1996 I was discharged without just cause and without the employer following the steps of progressive discipline."

It might be noted that at paragraph 19.01 of the contract of collective bargaining the following language was found:

"ARTICLE 19 - DISCIPLINARY PROCEDURE

19.01 Standard

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

It might be noted that the grievant had a minimal department record during the course of his eight years. On March 1, 1994, the grievant was cited for using unnecessary force when he fired three shots at a fleeing vehicle. He was suspended a period of three days beginning March 26, 1994. On October 6, 1995, the grievant was found to have been speeding in his patrol car while in route home from an escort. He received a written reprimand.

The court records further revealed that the grievant was cited for fourth degree felony and entered into a Diversion Program in Hamilton County. The Diversion Program is a method of dealing with those cases involving first time non-violent felons. The complainant from whom the goods were taken consented to such program for the grievant and it is apparent that at the time of the hearing of this arbitration matter or some fourteen months after the event, the grievant had already fulfilled the requirements of the program. It is also apparent that the record of the grievant (the fourth degree felony) is expunged so as not to reflect any fourth degree felony or other criminal event. The records of that Diversion Program completion also revealed that the grievant made restitution for any loss.

The matter was fully investigated by a very capable Lieutenant Slater of the Ohio State Highway Patrol. Lieutenant Slater included in his reported investigation the following question and answer, the question being propounded by Lieutenant Slater and the answer being given by the grievant:

"Slater

Are you suggesting to me that you don't remember what happened?

Keels

I, basically, don't. When, I, I'll tell you this, when I was in that store, uh, uh, I just, I was in a state of, I don't now(sic) if you would say confusion or whatever, but it was, I hadn't slept, which I haven't been sleeping, uh, about two weeks prior to this. Stuff I'm going through with my wife. I was still living there and she saw a mark on my back from an ingrown hair and I was outside and this is the kind of stress that I've been dealing with for a long time with her. There were

kids playing, my sons, I was taking them to tumbling, they were sitting in my care, one's seven, one's five, and she came out and I was going to take my youngest son, who's two, uh, we were sitting in my Dodge Intrepid and she saw this mark on my neck from where I had squeezed this bump that I had and there are kids outside paying, you keep that in mind, and she just started cussing at me. Just going off. Calling me, you mother-fucker, you mother-fucker, this and that, and this and that, and I told her that's from an ingrown hair that I've had - that's from some bitch sucking on your neck. My neighbors were out. My neighbors have heard all of this, just go on and on and on and on and on. I was raised Catholic and I always believed that the families just stay together and to, to just go through whatever it takes. My parents have been married for almost forty years. Uh, that particular incident was about two weeks ago, I left, I just couldn't take it, and I drove, we drove off to go to tumbling. Then, when we got to tumbling, I had called her and tried to explain, I said, Gretchen, that's not from nobody sucking on my neck, that is from an ingrown hair. I said I even had Dana look at it. And she starts, you mother-fucker, which she goes, I mean, just, like, that's just her language that she uses in front of me. The boys even say to me, Daddy, I don't why she, you know, cause I said, why does you mommy cuss all the time and they even said, what does your mommy cuss all the time and they even repeat it, and calls you mother-fucker. Well, when we left tumbling, I came back, she was there with one of her girlfriends and she had thrown all my stuff out on the patio. All of my stuff, uniforms and everything, all of my clothes were out on my patio. She had a friend of hers there and I'm bring my sons back and there's all my stuff laying out on the patio. So I see it, and this had happened before, and I'm not one to fight with anybody. I can't get into any domestic situation because I know that they're delicate and you can get in trouble for them and it's just not me. I haven't been in any domestics, fighting with her or anything. So, I had, this was two weeks ago and I had to say to myself, well, what are you doing to do. ---, just get your stuff. So I got my stuff off the patio. My oldest son helped me. We put it in my car and I left. I just left. And it's just stress that I've been dealing with. So yeah, when I went in the store, when I took, picked my son up and took him to get some pancakes, and, I think it R&G's Restaurant, right around the corner of Finneytown, before I took him

to school, he sat there and he told me that he had to take me to court. I said, okay. And I'm not really one to let anybody see me sweat, because I try to stay in control all the time, and just that day, it just happened at Micro Center, but for some reason, the actions that apparently took place, is what took place and it climaxed and life, my father and I were talking, my uh, you know I immediately called my father when I realized what had happened, what was taking place and he sat to me, he said, we'll get an attorney and everything is going to be fine. He said there's more to it than, than just this. I said, oh, there is. So they took me to Sharonville Police Department and I called my father, and then they released me and then I met with my father and we said there at the dealership he owns, a big car dealership in Cincinnati, and we're talking about it. And I was just so distraught. He told me, he said, I knew when you were working with me Saturday at the house, I knew, I knew and your mother knew. And I said, it's not the money, I said, oh hell, he's got millions. I've got money. I mean, he makes millions. Uh, and it wasn't that. I don't even remember what happened."

It might be noted that three days after the event or on April 4, 1996, the grievant placed himself under the care of a psychiatrist. That psychiatrist testified at length at the hearing in this particular matter. He testified that he was a medical doctor since 1981 and that he is certified as a psychiatrist by the American Board of Psychiatry. He further testified that he knew the grievant as a patient beginning on April 4, 1996, and was referred to him on an emergency basis from a trooper organization. He further testified that ever since April 4, 1996, he saw the grievant on a weekly period. He further stated that he has assessed the grievant with a diagnosis based upon his clinical judgement, personality testing and as a result has ordered certain medication for the grievant which has helped. He further testified that the grievant at the time of the first visit and thereafter saw that the grievant was suffering from lack of sleep, saw that the grievant was

unable to sleep, saw that the grievant had in fact not had any decent sleep, testified to the fact that the grievant was suffering from chronic insomnia, testified to the fact that the grievant was suffering from chronic mood swings and that the grievant was easily confused. Dr. Small further testified that the grievant was unstable, that he was suffering from anxiety, that he was depressed, that he was filled with sadness, that he was quick talking, that he had trouble with his temper, that he was immediately responsive to any change, that he was subject perhaps to buying sprees and very impatient.

Dr. Small further testified that the grievant was depressed over his presently pending divorce and the activity of his wife in secreting the children in another state so as to deprive him of his visitation rights. Dr. Small also opined that he in fact saw the grievant soon enough after the incident of April 1, (three days later) so as to make him, the psychiatrist, believe that the grievant was in the same stooper and under the same hold of all of these abnormal tendancies at the time of the event of April 1, 1996. Dr. Small further testified that he read the investigative report, that he read the answer of the grievant as stated in full above and that the diagnosis of the grievant is certainly in concert with the rambling answer given by the grievant at the time of the investigation. Dr. Small further stated that the grievant was under treatment of lithiam carbonate and that that has had a serious positive impact on him so as to help with the mood swings and place the grievant's activity into more tolerable behavior patterns. The doctor described the drug as being a mood stabilizer so as to prevent depression and allow the grievant to sleep normally. The doctor testified that the grievant was not presently able to work in the

stressful duties of a Ohio State Trooper and that he really wasn't able to work prior to the April 1, 1996, incident, for a period of time at least.

The State of Ohio offered no evidence contrary to that evidence placed into the record by Dr. Small.

The grievant testified. He testified that he was currently unable to work. He testified that he had been under a tremendous amount of strain due to his divorce and the secreting of his children. He testified that he had been under the constant care from Dr. Jonathan Small, the doctor who testified at hearing from April 4, 1996 and thereafter. He testified that he had been with the State Highway Patrol for a period of eight years, three years at one duty station and five years at his current duty station. He stated that he had received during the course of those eight years some thirteen or more letters of commendation. He stated that he was chosen as an Academy Instructor for ninety days, which he also regarded as commendation. The grievant also described the fact that he was a driving instructor and that that too was considered as commendation by him. He also stated that he had served on a recruiting team of Ohio State Troopers. He also stated that he was asked to speak concerning the Ohio State Highway Patrol from time to time and those events were also considered by him as commendation. He stated that he was a coach or big brother for a period of three months. He also stated that he was nominated for trooper of the year on three separate occasions and the last time was eight or nine months prior to his termination. The grievant further stated that he had dreamt of being a member of the Ohio State Highway Patrol from his

childhood and that he would do nothing at this time or any time to place himself in a position or activity portraying that of conduct unbecoming an officer. The grievant further stated that he had attended Central State University, Xavier University and was a veteran of six years in the United States Air Force.

The grievant further stated that the fact of the matter is that he was told he was in the store for over a period of an hour taking game disks for a computer that he didn't even own. The grievant further stated that he bought a book that he couldn't even use on a subject that he knew nothing about. From all of that, the grievant asked for a return of his employment, not at the present time but after his mental disability has been cured and he is able to go back to work as a trooper for the State of Ohio.

The parties stipulated an issue in this particular matter and the sign off by the parties in that regard revealed the following:

"STATE OF ISSUE

In conformance with Article 20, Section 20.08 (8) of the Collective Bargaining Agreement the parties submit the following statement of issue for the resolution by the arbitrator:

Was the grievant terminated for just cause? If not, what shall the remedy be?"

It was upon all of this evidence that this matter rose to arbitration for opinion and award.

III. OPINION AND DISCUSSION

Upon a review of this matter, it is noted that the grievant was terminated for conduct unbecoming an officer. It is also noted that the rules and regulations in which that particular type of infraction was issued also has a discipline section and four types of discipline are allowed for an infraction of any of the rules. Therefore, discharge is not mandatory under either the rules or the contract in fact patterns of this sort. Under the contract, discharge and other discipline is only reserved for just cause. The event involved was a violation of a state statute which triggered the charge of a fourth degree felony. There was never a plea of guilty in this particular matter but rather the grievant was sent to a Diversion Program. That Diversion Program is a method of dealing with those cases involving first time non-violent felons. The defendant was given an opportunity to reconcile himself with society, participating in a closely supervised program, not unlike probation. That program was entered into with the express consent of the complainant. The records revealed that the grievant was no longer in that program, but that he made restitution to the company from which he took merchandise and that those people not only consented with the activity of a Diversion Program but also participated in signing off to such event. The fourth degree felony has been expunged from the record of the grievant and no longer appears as a public record.

The long treating physician of the grievant testified. He testified at great length indicating and stating by way of direct examination subject to cross examination that the grievant was presently unfit for work; that the grievant was under treatment by way of psychiatric counselling sessions and medication. The medical doctor

further stated that the grievant would not be available for a period of time perhaps as long as two months in returning to work. The grievant concurred indicating and stating that he was not fit for duty at or near the time of the incident and that he still is unfit for duty. The grievant insisted however that he retain his status as a trooper, a dream of his boyhood, as revealed in the record of this case.

Other than the event at hand the grievant has had a distinguished record at the State Highway Patrol. He was a recruiter, a speech maker, a big brother, he was nominated for trooper of the year three times, attended Central State University, attended Xavier University, was a six year veteran of the Air Force and quite frankly an honor trooper other than for the instant event. His department record is minimal and without any dispositive activity concerning the current action.

The society in which we live has many turns. We never know when we will find ourselves in a period of decision at a crossroads of our life. It is not always easy to take each fact and weigh it with the norm. The grievant, it appeared, went off the deep end but on the other hand obtained immediate and continuing psychiatric help, bringing him back at least partly to the norm. I think there has to be some protection to an employee as that employee goes through their work duties especially when the activity of work in which they are engaged, is very stressful.

I consider the work of the state trooper to be honorable but to be stressful, demanding and necessitating an acutely involved individual willing to give up his time and effort over and above his scheduled duties to keep peace, law and order in the community in which he is

assigned. There is no doubt in my mind that the grievant's reaction to both his stressful duties and his divorce involving the secretion of his children were simply triggering events for the grievant's activity on April 1, 1996. There is no indication in this record that the grievant planned a theft. There is no indication in this record that the grievant was involved in a concerted activity of crime. There is evidence in the record and it is not contested by the employer that the grievant in fact suffered on April 1, a manifestation of his stress. Luckily, the only result was a fourth degree felony vitiated by the grievant's successful participation in a Diversion Program established by Hamilton County in and around Cincinnati, Ohio. Based upon those facts there is no thought that a cause for discharge has arisen. Simply put, there is no just cause triggering the necessity of the supreme penalty in the industrial community of a discharge.

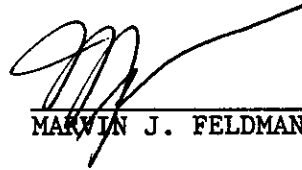
Arbitrators are not generally prone to change a severe discipline of the employer. However, this is one of those cases that merit such result, especially when the testimony of the grievant's treating psychiatrist stands unrebutted in the record.

As a result, I must modify the discharge of the employer. The grievant shall remain on disability leave without pay until September 1, 1997, at which time he shall be examined by Dr. Small who shall forward a written report. That report along with the grievant shall report to a psychiatrist in the Cincinnati, Ohio, area for a diagnosis and prognosis which examination shall be arranged and paid for by the employer. When both of those reports are available, the parties shall immediately contact this arbitrator for a new date of hearing for further argument

and final disposition of this particular case.

IV. AWARD

This arbitrator shall retain jurisdiction in this particular matter in concert with the language of this opinion and award. This matter shall be on for further hearing no later than October 1, 1997. This arbitrator shall retain continuing general jurisdiction herein.



MARVIN J. FELDMAN, Arbitrator

Made and entered
this 23rd day
of June, 1997.