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 In the Matter of Arbitration *
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 Between * Case Number:
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 Fraternal Order of Police-Ohio * 25-12-(09-26-96)-42-05
 Labor Council * 02
 *
 and * Before: Harry Graham
 *
 The State of Ohio, Department *
 of Natural Resources *
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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 Department of Natural Resources

Jon Weiser
 Labor Relations Administrator
 Department of Natural Resources
 1930 Belcher Dr.
 Columbus, OH. 43224

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this case was closed at the conclusion of oral argument on June 26, 1997

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

Was the discharge of Gerald Drake for just cause? If not, what shall the remedy be?

Background: At the hearing the parties stipulated to the events giving rise to this proceeding. The Grievant, Gerald Drake, is a veteran of 19.5 years of State service. For the past 10 years he has worked as a Park Officer. At the time of the events leading to this proceeding he worked at the Maumee Bay State Park near Toledo, OH. In December, 1995 the State became aware that the Grievant had used state or Lodge phones at the Park to make long distance calls of a personal nature. He neither sought permission, paid for, nor reported those calls. When confronted, the Grievant offered to pay for the call. He did not acknowledge that he had made long distance calls prior to December, 1995. After December, 1995 he continued to make such calls.

In early July, 1996 the Grievant gave a bottle of wine to a Park employee. She was under the legal age to consume it. He transported it in a cruiser, while in uniform. This act was not reflected on his daily log.

Learning of these events, the State discharged Mr. Drake. A grievance protesting that discharge was properly filed. It was processed through the grievance procedures of the parties and they agree it may be decided on its merits by the Arbitrator.

Position of the Employer: The State emphasizes that the Grievant is a law enforcement officer. He must be held to a

high standard of conduct. He did not meet it.

Turning to the long distance calls, the State points out that he gave a woman his pager number. He encouraged her to call him, even when he was on duty. He responded to her calls. Examination of the telephone records, showing many one minute phone calls, suggests to the State that he initiated many calls to her. When initially confronted with the State's knowledge of the phone calls he did not deny them. Nor did he admit to making other calls. He also continued to make calls after being found out. The State terms such behavior "audacious." Mr. Drake had been directed to cease making personal long distance telephone calls. By continuing to do so, he was insubordinate. In addition, examination of his daily logs shows instances of what the State regards as falsification. As a generic example, he records himself at site A when in fact he was at site B, the location of a phone he improperly used. Finally, the Grievant did not come forward and acknowledge phone calls made months prior to the time he was found out. He covered up.

When Mr. Drake gave a bottle of wine to a Park employee it should have been obvious to him that she was underage. From conversation with her he knew she was to be a college freshman in the forthcoming Fall. College freshmen are not usually 21 years old, the legal drinking age in Ohio. He

never inquired about her age. He was in uniform and drove to her work site in his State-provided vehicle when he gave her the wine. She was on duty. While he had not officially gone on duty had enforcement needs demanded it, he would have responded and acknowledged as much.

The State points out this is not the first instance of discipline on Mr. Drake's record. From March, 1988 to October, 1993 his record is replete with discipline. That discipline ranges in severity from a verbal reprimand to a 20 day suspension. The State argues "enough is enough." The offenses are serious. They warrant serious discipline. Set against the record compiled by the Grievant, discharge is the appropriate penalty in the State's view. It urges the grievance be denied in its entirety.

Position of the Union: As noted earlier, the Union agrees with the account of events set forth by the State. It views them in a different light. According to the Union it is commonplace for employees at Maumee State Park to make long distance calls on park phones. When they are given a bill, they pay it. That did not occur in this instance. Mr. Drake was never given his phone bill; hence he could not pay it.

Further, he was calling a person whom he had befriended. He was trying to help her through a difficult time in her life. His motives were pure.

The Union is incredulous that the State views these events as serious enough to prompt discharge. Mr. Drake was confronted with his long distance phone calls in Winter, 1996. He was not interviewed about them until June, 1996. The amount of money owed by him was small, about \$29.00. He has consistently offered to pay it.

That the Grievant gave a bottle of wine to an underage employee cannot be considered a dischargeable offense according to the Union. He and his co-worker became friends. He did not inquire about her age. She had a birthday. He gave her a present of a bottle of wine. This cannot constitute grounds for discharge in the Union's opinion.

The Union points to Article 19.05 of the Agreement, committing the Employer to progressive discipline. It provides as well that "Disciplinary action shall be commensurate with the offense." The discharge of Mr. Drake is not "commensurate with the offense." To the contrary, it is disproportionate. It must be considered as such when viewed in connection with Section 17.05. In pertinent part, Section 17.05 provides that "Records of suspensions and demotions will not be utilized by the Employer beyond a twenty-four (24) month period if no further disciplinary action occurs within the twenty-four (24) month period." Examination of Employer Exhibit 3, Mr. Drake's discipline record, shows he

had a one day suspension in October, 1993. It was followed by the discharge in September, 1996. Obviously this is almost three years between the suspension and the discharge. The State cannot use Mr. Drake's prior discipline history against him the Union insists. As that is the case, it claims the grievance must be sustained and the Grievant restored to employment with full back pay.

Discussion: Many aspects of Mr. Drake's conduct are troubling. When confronted with the long distance phone calls, he did not acknowledge making others, at that time unknown to the State. He continued his activity. He acted wrongly. There is about his behavior an element of subterfuge, of cover-up. He did not make a clean breast of affairs when he had an opportunity to do so.

Similarly, even with the purest of heart, to give alcohol to a minor is prohibited. The Grievant acted wrongly again.


Those conclusions must be set against the language of the Agreement. Cited earlier, Section 17.05 prohibits the State from using discipline more than 24 months old to support further discipline. It did so in this case as evidenced by Employer Exhibit 3. Use of Mr. Drake's prior record is improper. When the State came to impose discipline on him for the long distance telephone calls and the gift of wine to a minor he had a clean record. Under the clear terms of the

Agreement the State cannot use Mr. Drake's prior discipline history to support the action under review in this proceeding.

That conclusion must be viewed together with the language in Article 19.05, calling for discipline to be "commensurate" with the offense. There are two offenses here, the unauthorized, concealed and continuing use of State and Lodge phones for personal long distance calls and the gift of wine to a minor. As noted above, they are serious offenses. By the duration between disciplinary entries on the Grievant's record, they cannot be used to justify discharge.

Award: The grievance is sustained in part and denied in part. The discharge of Gerald Drake is to be converted to a one-month suspension. He is to be paid all straight time monies he would have earned but for this event. He is to be credited with seniority he would have earned but for this event, reduced by the length of the suspension. The record of this event in his personnel file is to be altered to reflect this award.

Signed and dated this 20th day of July, 1997 at Solon, OH.


Harry Graham
Arbitrator