

#1419

STATE OF OHIO
CASE NO. OCB 15-00-980917-0131-04-01

In The Matter of Arbitration Between:

THE STATE OF OHIO)
DEPARTMENT OF PUBLIC SAFETY,)
DIVISION OF HIGHWAY PATROL)
)
-AND-)
)
OHIO STATE TROOPERS ASSOCIATION, INC.)

APPEARANCES

For The Employer

Captain Richard Corbin	Captain/Advocate
Renee Macy	OCB/Second Chair
Sgt. Charles J. Linek III	Observer
Lt. Timothy O. Del Vecchio	Witness
Lt. Gabriel Ferencz	Witness

For The Union

Herschel M. Sigall	Advocate
Elaine Silveria	Legal Assistant, OSTA
Pres. Bob Stitt	President, OSTA
Rep. Ron Moening	Staff Representative
Lt. William Voelker	Witness
Sgt. Frank Nedveskey	Witness
Det. Paul Sigsworth	Witness, Erie County Sheriff's Office
Tr. Craig Franklin	Witness
Tr. Matt Witmer	Witness
Tr. Jennifer Lavine	Witness
Tr. Allen Marcum	Witness
Tr. Charles J. Morsher	Grievant
Tr. Matthew M. Manly	Grievant
Tr. Richard J. Dietz	Grievant

BEFORE ALAN MILES RUBEN, ARBITRATOR

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PREFACE

The undersigned was appointed from the Permanent Panel of Arbitrators to hear and decide the within grievances over the refusal of the Division to permit three Troopers, who were involved in a high speed chase of a stolen vehicle which resulted in a death of the suspect operator, to have Union representation or to advise them of the "use immunity" of their statements when they were subsequently interviewed during the course of what was denominated by the Division as a "Criminal Investigation."

The Union contended that the Division's refusal violated Section 18.02, Clauses 3 and 4 of the Collective Bargaining Agreement:

"3. Prior to an interview or questioning which might reasonably lead to disciplinary action, the employee shall be advised of his/her rights to Union representation and, if the employee so requests, the Union representative shall be provided before the interview and investigation proceeds. This right of representation shall apply except for unusual situations in which the interview or questioning must take place immediately. No interview or questioning will occur until the employee has a reasonable opportunity to secure such representation. The first available Union representative will serve as the employee's representative. This right does not extend to performance evaluation interviews or meetings the purpose of which is solely to inform the employee of intended disciplinary action. The role of the Union representative at such interview or questioning will be to serve as the employee's representative.

"4. An employee who is to be interviewed, questioned, or tested concerning the

employee's performance or fitness for office shall be informed that the interview, questioning or test is part of an official investigation and that the employee is subject to disciplinary action, including dismissal, for failing to answer the questions. The employee will be advised that the answers may not be used against him/her in criminal proceedings. If, during the investigation, it is believed the member has knowledge of, or has participated in, any act which violates the criminal laws of the United States, the State of Ohio or any of its political subdivisions, the employee shall be advised of all constitutional and other legal rights applicable."

At the direction of the parties the grievances were consolidated and heard on November 22, 1999 at Sandusky, Ohio.

Thereat, the Department initially reserved its right to object to the arbitrability of the grievances, but has subsequently elected not to exercise that right.

The parties were afforded full and equal opportunity to present testimonial and documentary evidence.

At the request of the Union the Arbitrator issued subpoenas to compel the attendance of witnesses.

All witnesses were separated, placed under oath and subject to cross-examination, but their testimony was not recorded and transcribed.

The advocates for the parties made opening statements and, at the conclusion of the evidentiary portion of the hearing, elected to file post-hearing briefs.

With the receipt of the last of the two briefs on December 21, 1999, the Arbitrator declared the hearing closed.

SUMMARY OF THE EVIDENCE

On September 9, 1998, at approximately 7:15 a.m., Officer Richard J. Dietz, a twenty-three year veteran of the Road Patrol assigned to the Milan Post on the 7:00 a.m. to 3:00 p.m. shift, ran a routine license plate check for stolen vehicles on a 1990 Honda vehicle with New York license plates which had been parked at the curb of the Middle Ridge Service Plaza on the Ohio Turnpike. The automobile was reported as having been stolen. Officer Dietz noted that a towel had been wrapped around the steering column, a common way of concealing a "peeled" column which allows the vehicle to be started without the ignition key by "hot wiring."

Looking into the back of the car he saw what appeared to be a sleeping bag or blanket. Officer Dietz reached through the partially opened rear window, opened the door, and removed the covering. He discovered a white male, later identified as John W. Anderson, Jr.,¹ asleep. Officer Dietz ordered the suspect to get out of the car, and informed him that it had been reported as stolen. As Trooper Dietz grabbed the suspect's arm, the suspect wrenched free, slammed the door closed, locked it and jumped into the front seat. Officer Dietz immediately returned to his vehicle and positioned it behind the stolen car. The suspect backed the Honda into Officer Dietz's vehicle, and then jumped the curb, drove over the pavement and exited the Plaza, proceeding west on the

1. Mr. Anderson was wanted by the State of New York for walking away from its State Prison Furlough Program, and for assaulting a New York Police Officer during a recent traffic stop.

Turnpike at a high rate of speed. Officer Dietz pursued and radioed for assistance. In response Trooper Allen C. Marcum of the Milan Post, a six and one-half year member of the Patrol assigned to the midnight to 8:00 a.m. shift, was dispatched. Officer Marcum followed Officer Dietz in pursuit of the suspect.

Meanwhile, some eighteen miles ahead at the 127 Mile Post, Sergeant Frank C. Nedveskey, the Assistant Milan Post Commander in charge of the 7:00 a.m. to 3:00 p.m. shift, and a twenty-three year member of the Patrol, assisted by Trooper Charles J. Morsher, a fifteen year senior Officer also assigned to the 7:00 a.m. to 3:00 p.m. shift at the Milan Post, deployed so-called "stop sticks" - metal spikes - to puncture the tires of the suspect's vehicle.

The suspect managed to avoid the barrier, but Officer Dietz did not, and three of his tires were blown-out.

While Officer Marcum continued the chase, Trooper Dietz parked his automobile at the side of the highway and joined Trooper Morsher in pursuit of the suspect.

Lieutenant Gabriel Ferencz, a twenty-five year veteran of the Force and Post Commander of the Sandusky Patrol Post was notified of the situation, and took command of the operation. Assisted by Trooper Craig T. Franklin, a nine and one-half year employee with the Sandusky Post assigned to the 7:00 a.m. to 3:00 p.m. shift, Lieutenant Ferencz placed a second set of "stop sticks" at Mile Marker 111 adjacent to Exit 6A.

Also participating in the operation at this point was Trooper Matthew M. Manly who had been with the Force for twenty-three years and assigned to the Milan Post as a K-9 Officer working with the Drug Traffic Interdiction Team on the 7:00 a.m. to 3:00 p.m. shift.

The suspect attempted to avoid the second set of stop sticks, but this time was unsuccessful. One of the tires on the Honda blew-out, and the suspect drove-off the highway at Exit 6A. There, he managed to pass through the Toll Booth, and headed south on Route 4. Trooper Morsher's vehicle, however, was able to force the suspect's car against the concrete guard rail where it came to a stop. Trooper Manly then pulled his car immediately behind the Honda while Lieutenant Ferencz positioned his vehicle in front of the suspect's car so that it was unable to maneuver. Trooper Morsher broke open the driver's side window of the Honda, and Officer Dietz managed to open the door of the vehicle. The suspect was found slumped over the seat. Blood was visible on his head. Officer Dietz reached in and pulled the suspect out, and Officer Manly immediately handcuffed him. The suspect was seen to have a bullet wound to his head, but none of the Officers present reported having fired a weapon or hearing a gun shot. Another Officer called for an ambulance.

Arriving on the scene at this time were the District 10 Commander, and his Staff Lieutenants, other Officers from the Division, several Sheriff Deputies from the Erie County

Sheriff's Office, Firefighters, Photographers, Criminologists, Reconstructionists and a Coroner's Investigator.

When an EMS ambulance arrived, Trooper Jennifer L. Lavine who had been with the Milan Post for the past six years and was then assigned to the midnight to 8:00 a.m. shift, was asked to move Trooper Morsher's patrol car so that the EMS vehicle could obtain access to the suspect. In doing so she caused the vehicle to become scratched.

The suspect was pronounced dead on arrival at Providence Hospital in Sandusky, Ohio. His death was later ruled a suicide by the Lucas County Coroner's Office. Mr. Anderson had been a diagnosed manic-depressive, and had made earlier attempts at suicide.

Criminal Investigator Matthew Witmer arrived by helicopter from Garfield Heights, and took charge of what was operationally called a "crime scene."

Accompanying him to provide assistance was Lieutenant Timothy O. Del Vecchio, a twenty-nine year veteran of the Force assigned to District 10 Investigation's Section for the past five years. Lieutenant Del Vecchio was regularly assigned to Criminal Investigations, but also, on rare occasions, had conducted Administrative Investigations.

Sergeant Nedveskey and Lieutenant Ferencz were instructed to inspect the service weapons of the Troopers present to determine whether any had been fired and caused the fatal wound. (Two of the Grievants had fired their weapons in a

training exercise the night before, and had not yet cleaned them).

A .38 caliber revolver, also reported to have been stolen, was found inside the suspect's car along with two shell casings, and led to the conclusion that the suspect had shot himself. The spent bullet which apparently caused the wound was also recovered, and subsequent ballistic tests confirmed the suicide hypothesis.

Meanwhile, Lieutenants Witmer and Del Vecchio asked Troopers Dietz, Manly and Morsher to provide statements. The three asked to have a Union representative or an attorney present during any interview.

Officer Dietz believed that his statement could possibly subject him to discipline because of the following circumstances:

1. He had not turned-on the camera on his vehicle when he attempted to remove the suspect from the Honda. (He had been the subject of an Administrative Investigation for a previous lapse).

2. He had not waited for back-up before approaching the suspect, and possibly the suspect would not have managed to escape from the Plaza if he had had such assistance.

3. He was unable to avoid the "stop sticks" and punctured three tires on his vehicle.

Officer Morsher's request for Union representation was based on his concern about the way he conducted the chase, and the failure to immediately render first aid to the suspect.

On the other hand, Officer Morsher did not believe that he had committed any criminal act, and he acknowledged that he routinely files reports concerning stolen vehicles and the actions he took to recover them without Union representation.

Trooper Manly was concerned that the evening before the incident in question he had fired 120 rounds with his weapon by firing and had yet to clean it. He was also concerned about the fact that his car was damaged in forcing the suspect's vehicle against the barrier at Highway 4, as well as the fact that he had handcuffed the mortally wounded suspect. Nonetheless, Trooper Manly acknowledged, as had Trooper Morsher, that all use of force and Police authority was customarily documented through the filing of appropriate case reports in the absence of Union representation.

Lieutenant Del Vecchio replied that he had "no problem with acceding to their requests. Lieutenant Del Vecchio had been briefed by Lieutenant Ferencz as to what had transpired, and it was his opinion that there was no immediate need for speed in conducting the interviews.

However, Lieutenant Del Vecchio was overruled in an Inter-Office Communication, to Captain P.G. Ash (Attention Lt. T.O. Del Vecchio) from Major M.R. Everhart - Human Resource Management Commander, "Subject: Demand for Witness Statement - Performance of Duties." The Memorandum directed Lieutenant Del Vecchio as follows:

"You are hereby authorized to issue a written order to require a statement from

employees who witnessed a high speed chase which resulted in the death of a suspect. Troopers who are refusing to provide a statement without the presence of private counsel shall be immediately ordered to provide a statement detailing the performance of their duties in this matter. As witnesses to the event and as employees of the Division of State Highway Patrol they do not have the right to refuse to provide a statement concerning the performance of duties. In addition, they do not have a right to union representation under the circumstances since this interview will not reasonably lead to disciplinary action.

"However, inform each employee that their refusal to provide a statement will result in disciplinary action up to and including removal."

In compliance with these instructions Lieutenant Del Vecchio issued the following order to Troopers Dietz, Manly and Morsher:

Subject: Demand for Witness Statement - Performance of Duties:

"You are hereby ordered to provide a statement reference a high speed chase which resulted in the death of a suspect. The statement relates to the performance of your duties and based on the information known will not reasonably lead to disciplinary action.

"You are also informed that refusal to provide a statement will result in disciplinary action up to and including removal."

Thereafter, Trooper Dietz prepared a written statement of the episode.

Lieutenant Del Vecchio proceeded to interview separately Lieutenant Ferencz and each of the three Troopers during the afternoon of September 9th. He informed them that he was

conducting a criminal investigation stemming from the chase and ultimate death of the suspect, and that Lieutenant Ferencz and these Troopers were witnesses to the events.

As Lieutenant Del Vecchio was to acknowledge at the arbitral hearing, in interviews conducted pursuant to Criminal Investigations Troopers are never given the rights provided under Article 18 of the Contract. However, as he was also to acknowledge, there is no bar to the use of information gained in a Criminal Investigation interview in a subsequent Administrative Investigation directed against the interviewee Officer.

Two attorneys and a Union Steward were present at the Milan Post, and Officer Dietz spoke briefly to them before being called-in for his interview. Officer Del Vecchio reminded each of the three Troopers they could not have a Union Steward or an attorney present during the interviews.

The transcripts of the Troopers' sessions read in relevant part:

Trooper Dietz

"Testing ... testing. Okay. The following is a tape recorded interview between Lt. Tim Del Vecchio and ah ... Tpr. Rick Dietz. The interview is taking place at the Milan Highway Patrol Post. Ah ... it's Wednesday, September 9th, 1998 and the time is about 3:53 p.m. Present in the room are Tpr. Dietz and Lt. Del Vecchio.

"Del Vecchio: Okay, Rick, just for the record, how long have you worked for the Highway Patrol?

"Dietz: Approximately twenty one and a half years.

"Del Vecchio: Okay and what can you tell me about the events that took place this morning?"

Lieutenant Del Vecchio did not inquire into the areas about which Trooper Dietz had expressed concern:

Trooper Morsher

"The following is a tape recorded interview between Lt. Del Vecchio and Tpr Morsher. The interview is taking place at the Milan Highway Patrol Post on September 9th, 1998 and the time is 4:26 p.m. Present in the room are Tpr. Morsher and Lt. Del Vecchio.

"Del Vecchio: Ah ... just for the record, ah ... you're being interviewed as a witness to the events that took place this morning and ah ... the purpose of your being here is to tell us what happened. So what can you remember about the events that took place this morning around Gate 6A?

"Morsher: Okay. Well, first I had a couple of questions. Ah ... am I the subject of the criminal investigation?

"Del Vecchio: No. You're a witness.

"Morsher: Okay. I'm strictly a witness?

"Del Vecchio: Strictly a witness.

"Morsher: Okay. Ah ... will there be any de ... departmental charges or policy charges ... anything against me resulting from this?

"Del Vecchio: I can't answer that because this is purely a criminal investigation and again, you're a witness. I ... there's nothing that I've heard so far that would indicate that you would be the subject of any discipline...

"Morsher: So I would not be subject to any disciplinary...

"Del Vecchio: Well ... I don't know what you're gonna tell me. (Laughing) ... but you've been ...

"Morsher: Okay.

"Del Vecchio: ... ordered to you know discuss this and ...

"Morsher: I understand I have been ordered and that my attorney's are told that they can't be here.

"Del Vecchio: Right.

"Morsher: I understand that.

"Del Vecchio: Right.

"Morsher: And my union representative is not here also ...

"Del Vecchio: Right. Right.

"Morsher: ... for the record.

"Del Vecchio: Right.

"Morsher: Ah ... he was denied access.

"Del Vecchio: Right.

....

"Del Vecchio: Okay and just so there can't be any question about this later, he didn't shoot out and none of our guys shot in ...

"Morsher: No.

....

"Morsher: ... one thing I would like to add, ah ... Lt. Ferencz at the scene immediately upon seeing that the subject ah ... did have a gunshot ... all of the officers at the scene in witness of all the other officers ... each officer checked their weapon ah at ... to see that they were fully loaded, that none had been discharged."

Lieutenant Del Vecchio did not inquire into the areas about which Trooper Morsher had expressed concern.

Trooper Manly

"Okay. The following is an interview with Tpr. Manly and ah ... Lt. Del Vecchio. It's taking place at the Milan Highway Patrol Post. Ah ... the date is September 9th, 1998. The time is 4:15 p.m. Present in the room are Tpr. Manly and ah ... Lt. Del Vecchio.

"Del Vecchio: Just for the record ... Tpr. Manly, I want to make this clear that you're here as a witness and not a suspect and the purpose of this interview is to um ... determine what happened this morning at Gate 6A and I believe you were one of the Troopers involved in that incident. Is that correct?

"Manly: Yes sir.

"Del Vecchio: Okay. Ah ... why don't you just tell me ah ... what happened?"

Lieutenant Del Vecchio did not inquire into the areas about which Trooper Manly had expressed concern.

Troopers Marcum, Franklin and Lavine were not asked to provide a statement to Lieutenant Del Vecchio or Officer Witmer, but were rather sent home, apparently to avoid incurring overtime costs.

Trooper Lavine, however, was subsequently reprimanded for having scratched the patrol car while moving it to enable the Emergency Medical Service vehicle to have access to the suspect.

On later dates interviews were conducted with other witnesses, including a truck driver and the Toll Booth Attendant.

According to Lieutenant Ferencz there was never any suggestion that any of the Troopers involved in the pursuit could be suspects in the criminal investigation. On the contrary, he asserted that it was "routine" to obtain witness statements in high speed chases involving "use of force." "Stop sticks" were considered such a use of force. And, Sergeant Nedveskey affirmed that the policy of the Division required a Criminal Investigation, to be conducted whenever physical force has been used in connection with the apprehension of a suspect.

The Ohio Highway Patrol conducts an average of 12,000 criminal cases per year. Each and every one of these cases is completed by sworn Highway Patrol Officers, many of whom are Troopers. In the majority of those cases the Troopers document the performance of their duties as it relates to the apprehension of criminal suspects or reports of criminal activity.

As it turned out none of the three Troopers - Dietz, Manly or Morsher - were ever disciplined or subject to an Administrative Investigation or to criminal proceedings with respect to their participation in the events of September 9th.

On September 15, 1998 Troopers Dietz, Morsher and Manly each filed independent but identical grievances complaining:

"During an investigation, the member was ordered to answer questions and denied union representation."

The requested remedy was: "Cease and desist the practice to union members."

Step 2 grievance meetings were held on September 18th & September 22, 1998. The grievances were denied in a consolidated answer provided by Staff Lieutenant Thomas R. Derr:

"FACTS

"The grievants were involved in a pursuit on the Ohio Turnpike. The vehicle eventually was stopped and the driver committed suicide before the officers could reach him. The scene was secured in order that a criminal investigation may be conducted.

"Lieutenant Timothy Del Vecchio was in charge of the criminal investigation. As a part of his investigation he wanted to obtain witness statements from the officers involved. The officers demanded legal counsel prior to giving a statement. An attorney, Troy Wisehart, was contacted by the officers. He advised Lieutenant Del Vecchio it was unlikely he would be available that day.

"Mr. Wisehart and Kevin Zeihr did go to the Milan Post that day. They were there when the officers were ordered to provide witness statements to the investigators. Grievances were filed contending violation of the Unit 1 labor agreement.

"UNION POSITION

"The grievants each contend violation of Section 18.02 of the labor agreement. They believe they were entitled to either a labor representative or an attorney while being interviewed by Lieutenant Del Vecchio. As a remedy they request the Employer cease and desist the practice.

"MANAGEMENT POSITION AND FINDING

"The Employer was clear from the outset that they were conducting a criminal investigation. There was a dead body in a vehicle on the Ohio Turnpike. The circumstances surrounding that death had to be investigated. An investigation to determine a cause of death is criminal, not administrative.

"What was the status of the officers involved? Were they suspects in a criminal investigation? No. If they had been criminal suspects they would have been advised of their Miranda rights and they would have had a right to have an attorney present during questioning. Were they subjects of an administrative investigation? No. If they were they would have been advised of their rights via the reading of an HP 24A. The officers were witnesses to a criminal investigation. If they were ordinary citizens would they be required to give a written statement? No. However, they are not ordinary citizens. They are law enforcement officers who were to be questioned as witnesses in a criminal investigation. They were on duty working for the State Highway Patrol at the time of the events. The Employer has a right to have these officers give a witness statement as to what they did and saw while working for the Employer.

"Attached you will find a IOC dated September 9, from Major Everhart to Captain Ash. In the IOC it clearly states the Employer was ordering the officers to give a witness statement. Also attached you will find the actual written order given to the officers. Again it states the Employer is asking for a witness statement. The order also states: "The statement relates to the performance of your duties and based on the information known will not reasonably lead to disciplinary action." Each officer received this order and provided a statement to the Employer.

"The officers contend they should have been afforded union representation when they were ordered to answer questions. That is just

not the case. The officers were told in the order that the statement related to their duties and would not reasonably lead to disciplinary action. Attached you will find a decision rendered by the State Employment Relations Board. This decision lays out the standard which governs when employees are entitled to have union representation. On page 6 and 7 it states:

"The record in this case does not reflect that Ms. McNamara (employee) experienced anything more than some general apprehension, unspecified anxiety, and a feeling of insecurity because the employees she had been supervising were being questioned, and that she lacked confidence as to whether she did the right thing in her supervisory capacity. Such general and unspecified concerns cannot substantiate reasonable belief by objective standards that discipline might result from the investigatory interview. If that was the case, then any investigatory interview would automatically satisfy the "reasonable belief" element in the Weingarten rights and the standard would be subjective. An employee could always argue that any time the employer questions an employee about work performance there is a "threat" of discipline. A latent threat, without more, does not invoke the right to the assistance of a union representative."

"That is exactly what these officers had, general insecurity about talking to the Employer. Despite reassurances they were just witnesses and all that was being asked was a witness statement they still had doubts. These doubts did not entitle them to union representation. The union would have you believe anytime the Employer questions an employee about work performance there is a threat of discipline. Again, that is just not the case nor is it the standard set by the State Employment Relations Board.

"Had the officers refused the written order to provide a witness statement then they would have had a reasonable belief disciplinary action may result. An interview discussing their refusal to comply with a lawful order would entitle them to a

union representative. That is not what occurred here.

"Their [sic] has been no violation of the labor agreement. The actions of the Employer were in accordance with the labor agreement and the standard set by the State Employment Relations Board.

"The grievance is denied."

With the evidence in this posture, the Arbitrator proceeds to consider his Decision.

ISSUE PRESENTED

Did the Employer violate Section 18.02, Clauses 3 and 4, of the Contract by denying the Grievant Troopers their Weingarten union representation rights and failing to advise them of their Garrity immunity privilege during the course of their interviews by Lieutenant Timothy O. Del Vecchio of the Office Of Investigative Services in connection with the September 9, 1998 high speed chase and ultimate death of a suspect operating a stolen vehicle on the Ohio Turnpike? If so, what should the remedy be?

DECISION

The Union contends that the September 9, 1998 interviews conducted by Lieutenant Del Vecchio of the Grievants, Troopers Dietz, Manly and Morsher, were flawed by his refusal, despite the Troopers' requests, to permit Union Representatives to be present, in violation of the Weingarten doctrine, as adopted by the State Employment Relations Board in its Davenport decision, and by his failure to notify them of their Garrity immunity rights.

The right of Union representation at an investigatory interview which the employee reasonably believes might result in disciplinary action was held by the United States Supreme Court to constitute an unfair labor practice by restraining the employee's right to engage in concerted activities for mutual aid or protection within the meaning of the National Labor Relations Act National Labor Relations Board vs. J. Weingarten, Inc., 420 U.S. 251 (1975).

This decision stemmed from an undercover investigation into whether a chain store's "lobby food" service employee was taking money from a cash register. The surveillance initially turned-up no evidence to support the suspicion, but the store manager informed the investigator that the employee had apparently purchased and eaten a \$2.98 box of chicken, but had placed only \$1.00 in the cash register. When the employee was summoned to be interviewed by the investigator and the store manager, she asked to have her Union Shop Steward present. Her request was denied. The employee then explained that she had purchased the small portion of chicken for which the price was \$1.00, but since the appropriate sized box was out of stock, she had placed the meal in a larger container. A check of the facility's box inventory tended to confirm the employee's narrative. However, the employee then volunteered that the only thing she had ever gotten from the store without paying for it was her "free lunch." Although free lunches were provided at "lunch counter" stores operated by the chain where the employee had previously worked, employees at the

chain's "lobby food" operations had no such permission to take lunch without charge.

Based upon the employee's admission, the employee was required to pay the store approximately \$160.00, and the Union thereupon filed an unfair labor practice charge.

The National Labor Relations Board held that Section 7 of the National Labor Relations Act gives an employee a statutory right to refuse to submit to an interview which she reasonably fears may result in discipline without union representation. The employee's belief that the investigation will result in disciplinary action is to be measured by "objective standards, under all the circumstances of the case."

The Supreme Court approved the Board's construction of the Act in the context where:

"[a] single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or to ignorant to raise extenuating factors."

Ohio's State Employment Relations Board adopted the Weingarten standard in In re Davenport, SERB 95-023 at 3-156 (12-29-95):

"Therefore, we specifically find that, upon an employee's request, representation by the employer organization is required at investigatory interviews which the employee reasonably believes could lead to discipline.

...."

The Davenport ruling was then applied in an unfair labor practice complaint against the City of Cleveland (SERB Decision No. 97-011 (6-30-97)) (Cleveland I). There, the Board concluded that a violation of the right to representation is established when four elements are proven:

- "(1) That the interview was investigatory;
- "(2) That the employee requested the presence of a union representative and the request was denied;
- "(3) That the employee reasonably believed that the interview might result in discipline; and
- "(4) That after the employer's denial of representation, the employer compelled the employee to continue with the interview."

In State Employment Relations Board vs. City of Cleveland, Opinion 97-017 (Cleveland II), the Board concluded that the City had violated Ohio Revised Code Sections 4117.11(A)(1) and (A)(8) by limiting the participation by representatives of the Cleveland Association of Rescue Employees, Communications Workers of American, Local 4550 ("CARE") during an administrative investigation into whether one of its Police Officers warranted discipline because of an allegation of domestic abuse against his wife, a Cleveland EMS employee.

The EMS employee and two of her co-workers were subpoenaed to appear at pre-disciplinary hearing for the Police Officer, and all three requested CARE representation. The City refused Union representation on the grounds that the

Union had to reduce to writing and justify its request to represent employees called as witnesses, and not as subjects, in disciplinary hearings. No such written statement had been submitted.

Initially, a Union Representative was allowed to attend the hearing, but not allowed to speak or to advise the subpoenaed EMS employees. However, before the second day of the spouse-employee's testimony at the hearing it was ultimately agreed that Union counsel could participate in those areas where her answers to the questions put to her might implicate her either administratively or criminally.

Subsequently, the EMS spouse-employee was disciplined with a one day suspension as a result of her statements during the first day of her testimony concerning certain on-duty telephone conversations about which she was interrogated.

The State Employment Relations Board held that the City's restriction on the participation of the investigatory hearing violated O.R.C. Sections 4117.11(A)(1) and (A)(8).

In this arbitral proceeding the Union argues that the Weingarten - Davenport right to Union representation is incorporated in Section 18.02, Clause 3 of the subsisting Collective Bargaining Agreement which governs "Bargaining Unit Members Rights" and that this provision was applicable to the instant interviews undertaken as part of the "Criminal Investigation" into the episode of September 9th.

Clause 3 provides:

"3. Prior to an interview ... which might reasonably lead to disciplinary action, the employee shall be advised of his ... rights to Union representation and, with employees request, the Union representative shall be provided before the interview ... proceeds.

...."

The Arbitrator agrees that Section 18.02, Clause 3 of the Contract was intended to incorporate the Weingarten - Davenport right to Union representation. Under Cleveland II, an interview is "investigatory if its purpose is to elicit information pertaining to the conduct of the employee being interviewed [even if the employee is not the subject of the investigation if the questioning focuses] ... specifically on their conduct and their acts while on the job." (97-017 at p.5). As in Weingarten, the SERB standard requires that the purpose of the interview be to assess the propriety of the employee's conduct in terms of its conformity with, or violation of, any applicable employer work rules and employment policies.

Clause 3 of Section 18.02, however, is a part of Article 18 which is entitled "Administrative Investigation," the purpose of which is "to inquire into complaints of misconduct by bargaining unit employees." (Section 18.01).

Thus, Clause 1 of Section 18.02 recites:

"When an employee is to be interviewed ... concerning a complaint or allegation of misconduct, the employee will be informed of, prior to the interview, the nature of the investigation and whether this employee is the subject of the investigation or a witness in the investigation."

The Arbitrator finds that the three interviews presently subject to complaint were not undertaken pursuant to an "Administrative Investigation" and were not "investigatory" within the meaning of the Weingarten doctrine and the relevant SERB decisions following it. The Grievants were interviewed in connection with a Criminal Investigation of a high speed car chase involving the "use of force" and ultimately the gun shot wound death of the fleeing suspect.

The Grievants were informed that they were not the subjects of an Administrative Investigation as set forth in Article 18 of the Contract, and that no complaint or allegation of misconduct had been made against them as would trigger such a proceeding. While the Grievants may all have been concerned about their possible exposure to subsequent discipline because of the way they performed various aspects of their duties, Lieutenant Del Vecchio's interview of each of the Officers was a straight-forward request for information as to what had happened from the time of the detection of the stolen vehicle at the Service Plaza through the subsequent pursuit of the vehicle's operator and until the discovery of what turned-out to be the suspect's death by his own hands. None of the questions that Lieutenant Del Vecchio asked concerned the propriety or impropriety of their actions or their failures to act.

Thousands of Criminal Investigations had been undertaken under Collective Bargaining Agreements for eighteen years by the Union without any request being made that Union Stewards

or counsel be present during Trooper interviews conducted in connection with the Investigations.

Of course, the Division is not privileged to conduct what is in reality a proceeding looking towards the possible disciplinary action of the Trooper being interviewed merely by labelling the process a "Criminal Investigation" rather than a "Administrative Investigation." But, in the present case the evidence does not disclose any such breach of good faith on the part of the Division. Should, in any such purported Criminal Investigation, a Trooper be interviewed and questions put to him which appear designed to elicit information which might be inculpatory and subject the Trooper to potential disciplinary action, the Trooper would at that point clearly be entitled to place on the record his contention that the examiner had crossed over the line and converted the Criminal Investigation into a precursor of an Administrative Investigation and properly renew his demand for Union representation.

However, nothing in the transcript of the examinations conducted by Lieutenant Del Vecchio in the subject interview would in any way suggest that, advertently or inadvertently, he had crossed over the line.

The Arbitrator turns next to consider whether the Grievants were entitled to be informed of their Garrrity immunity rights as paraphrased in Clause 4 of Section 18.02 of the Contract.

Clause 4 reads in relevant part:

"4. An employee who is to be interviewed, ... concerning the employee's performance or fitness for office shall be informed that the interview ... is part of an official investigation that the employee is subject to disciplinary action, including dismissal for failing to answer the questions. The employee will be advised that the answers may not be used against him ... in criminal proceedings."

Garritty vs. State of New Jersey, 385 U.S. 493 (1967), arose in the context of an investigation by the State's Attorney General into the alleged fixing of traffic tickets by Police Officers. Certain Police Officers who were the targets of the investigation were questioned pursuant to a New Jersey statute which provided, inter alia, that any municipal employee who refused to testify as to matters relating to his employment in any criminal proceeding where he was a defendant upon the ground that his answer might tend to incriminate him would be removed from his employment.

Each of the Officers was warned that anything he said might be used against him in a State criminal proceeding and that, if he exercised his privilege to refuse to answer on the grounds that the disclosure would tend to incriminate him, he would be subject to removal from office.

Rather than forfeit their employment the Officers answered the questions put to them. Subsequently, they were indicted and tried for conspiracy to obstruct the administration of traffic laws, and their inculpatory interview statements were admitted in evidence. Each Officer

was convicted and the convictions were sustained over their protests that their statements had been coerced.

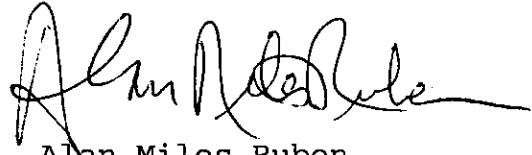
Since the choice given the Officers was either to forfeit their jobs or to incriminate themselves, the Supreme Court concluded that their "statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary in violation of the Fourteenth Amendment. 385 U.S. at 497-498.

Accordingly, the court held that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are Policemen or other members of our body politic." 385 U.S. at 500.

Garrity simply prohibits use in a subsequent criminal proceedings of statements obtained under threat of removal from office. Garrity is thus an exclusionary rule, and is not applicable to the present case because, although the statements of the Grievants were coerced under threat of potential loss of employment, none of the Grievants was ever subject to criminal prosecution. The Criminal Investigation to which the interviews were appurtenant was not directed to the potential culpability of the three Troopers, but rather to ascertaining the events which led to the death of Mr. Anderson.

For the foregoing reasons, the grievances will be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Alan Miles Ruben". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

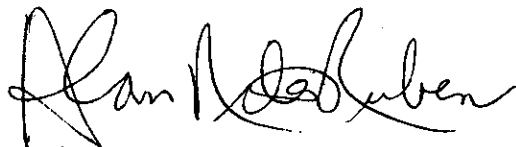
Alan Miles Ruben
Arbitrator

AMR:ljg

AWARD

The grievances filed by Troopers Robert Dietz, Matthew M. Manly and Charles J. Morsher on September 15, 1998 over the refusal of Lieutenant Timothy O. Del Vecchio to accord them the right to Union representation, as they requested, during his interviewing of each of them pursuant to a Criminal Investigation of a high speed chase and ultimate death of the suspect operating a stolen vehicle, and his failure to announce to them their Garrity immunity right, as those rights are incorporated in Article 18, Section 18.02, Clauses 3 and 4 of the Collective Bargaining Agreement, are denied.

AWARD signed, dated and issued this 20th day of January, 2000 at Cleveland, Ohio.

A handwritten signature in black ink, appearing to read "Alan Miles Ruben". The signature is fluid and cursive, with the first name "Alan" being particularly prominent.

Alan Miles Ruben
Arbitrator

AMR:ljg