

OPINION AND AWARD

**IN THE MATTER OF THE ARBITRATION BETWEEN
The Ohio Department of Public Safety/Ohio State Highway Patrol**

-AND-

Ohio State Troopers Association, Inc.

APPEARANCES

For Ohio State Highway Patrol

Sherry J. Dyer, Witness
Richard E. Grau, Witness
Anthony Haner, Witness
Troy S. Johnson, Witness
Rodney M. Tyler, Sergeant, Administrative Investigation Unit
Robert J. Young, Captain, Advocate

For Ohio State Troopers Association

Wayne E. McGlone, OSTA Staff Representative
Bryan Pack, Grievant
Sharon Pack, Witness
Johnnie Russell, Witness
Millissia Russell, Witness
Herschel M. Sigall, Esq., Advocate
Elaine Silveira, OSTA Attorney
Jimmy Spears, Witness
Robert Stitt, President

Case-Specific Data

Grievance No. 15-00-000911-0125-04-01
Hearing Held—January 22, 2001
Case Decided—April 23, 2001
Subject: Discharge/Conduct Unbecoming an Officer

Arbitrator: Robert Brookins, J.D., Ph.D.

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I. Procedural History

The parties to this dispute are the Ohio State Highway Patrol (Gallipolis Post), a branch of the Ohio Department of Public Safety (the Employer or OSHP) and the Ohio State Troopers Association (the Union).¹¹ On August 28, 2000, the Employer charged Trooper Brian W. Pack (the Grievant) with violating Rule 4501:2-6-02(I)(1), "Conduct Unbecoming an Officer."¹² Also, that same day, the Grievant received notification that a pre-disciplinary hearing would be held, on August 31, 2000 at 10: a.m., during which the Employer would consider the charges against the Grievant. The pre-disciplinary hearing was held as scheduled, and the Pre-disciplinary Hearing Officer (S/Lieutenant J. C. Shore) found just case for discipline.¹³ Also, on August 31, 2000, LT. Governor Maureen O' Connor notified the Grievant that he was removed from his employment.¹⁴ On September 7, 2000, the Union filed Grievance No. 15-00-000911-0125-04-01 (the Grievance), claiming that the Employer removed the Grievant for other than just cause.¹⁵ The Grievance was submitted Step-3 on September 7, 2000, and was denied at that step.¹⁶ On October 10, 2000 the Grievance was submitted for Step-4 consideration where it was again denied. The Parties then mutually selected the Undersigned from their panel of arbitrators to hear and resolve this dispute in final and binding arbitration under their Collective Bargaining Agreement.

Accordingly, on January 22, 2001, the Undersigned presided over an arbitral hearing in this matter, in which all persons relevant to the resolution of the instant dispute were present. The Parties had a full and fair opportunity to present any

¹¹ Hereinafter referred to collectively as the Parties.

¹² Joint Exhibit No. 2 at 1.

¹³ Joint Exhibit No. 2 at 4.

¹⁴ Joint Exhibit No. at 5.

¹⁵ Joint Exhibit No. 3 at 1.

¹⁶ Joint Exhibit No. 2 at 3-6.

admissible evidence and arguments supporting their positions in this dispute. Specifically, the Parties were permitted to make opening statements and to introduce admissible documentary and testimonial evidence, which were available for relevant objections and cross-examination, respectively. Finally, the parties had a full opportunity either to offer closing arguments or to submit post-hearing briefs and opted for the latter. The Undersigned received the last brief on or about February 23, 2001 when the record was officially closed. At the Undersigned's specific request, the Parties graciously extended the due date to 60 days from the date the Undersigned received the last post-hearing brief.

II. Facts

Prior to his termination, the Grievant served as a trooper for the Ohio State patrol for approximately 13 years and until the instant dispute maintained a blemish-free disciplinary record and a satisfactory performance record. The Grievant's employment problems began in 1998 along with his marital problems, which first caused him to miss work, on July 17, 1998.¹⁷ On or about July 16, 1998, the Grievant had consulted Dr. Loyd M. L. Browning, complaining of stress and anxiety at home and on the job.¹⁸ Dr. Browning's diagnosis was "anxiety, depression, insomnia, and auorexia plus persistent heart burn (signs of gastrointestinal . . . [influx—?] precipitated by stress and pressure(?) on job."¹⁹ In addition, Dr. Browning observed that the Grievant had a "melancholy mood, awliaus? (no joy in anything), [but was] physically normal"¹¹⁰ Nor did the Grievant display "evidence of a thought disorder or impairment in

¹⁷ Union Exhibit No. 3 at 1.

¹⁸ Union Exhibit No. 3 at 7.

¹⁹ *Id.* at 7.

¹¹⁰ *Id.* at 8.

¹¹¹ *Id.*

memory.¹¹ To correct the foregoing problems,¹² Dr. Browning prescribed medication for the Grievant, advised him to obtain marriage counseling, and to take a one-month disability leave from work.¹³

On July 22, the Grievant received the proper documentation for a formal leave request, and submitted that documentation on August 3, 1998.¹⁴ Lieutenant W. E. McGlone communicated that information to Captain Meredith¹⁵ and signed the Grievant's release to return to full-time duty.¹⁶ In September 1998, the Grievant began dating Ms. Sherry Gibson Dyer.

On September 1, 1998, Dr. Browning released the Grievant to return to full-time duty as a state trooper in Ohio.¹⁷ However, the Grievant actually worked approximately seven days, during which his emotional and physical condition deteriorated alone with his marital status. The marriage counseling sessions were largely unproductive, and the Grievant's wife frequently denied him the right to visit his children.¹⁸ The Grievant resumed his sessions with Dr. Browning, on or about September 9, 1998. At that time, Dr. Browning described the Grievant as suffering from even greater anxiety, trembling hands, and occasional thoughts of suicide.¹⁹ The Grievant also cried both on and off

¹¹ *Id.*

¹² *Id.* at 8, 27.

¹³ *Id.* at 27.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Union Exhibit No. 3 at 3.

¹⁷ Union Exhibit No. 3 at 16-17.

¹⁸ *Id.* at 11, 28.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 11. According to Dr. Browning the Grievant suffered, "Depression, anxiety, GEND(?)" Normal recovery was delayed because "Separated from wife whom (sic) does not allow him [the Grievant] to see his children." Subjective symptoms, "insomnia. anorexia, anxiety, lack of self worth, labia(?) Mood & loneliness." Objective findings, "weight loss flat effect(?)." Retrogressed because of "Much strife with marital situation. Apparently wife won't cooperate with court ordered sharing of children." (Union Exhibit

duty,¹²⁰ and felt a "lack of self worth . . . loneliness."¹²¹ Although the Grievant received increased dosages of medication, on September 14, 1998, Dr. Browning could not predict when the Grievant's condition would be markedly improve.¹²²

On or about October 12, 1998, Dr. Browning released the Grievant for limited duty until his next date of examination, on October 20, 1998.¹²³ On October 16, 1998, the Grievant signed a "Transitional Work Program Participation Agreement," that was apparently intended to be effective through October 20, 1998.¹²⁴ On or about October 27, 1998, Dr. Browning again released the Grievant for full-time duty.¹²⁵

In August 1999, the Grievant and Ms. Dyer began living together and became engaged to be married on or about October 17, 1999. During his relationship with Ms. Dyer, the Grievant was continually frustrated and irritated regarding his inability to see his children, despite his court-ordered visitation rights. Consequently, he and his wife frequently engaged in verbal disagreements or "fights." Confronted with these unmitigated marital frustrations and irritations as well as work-related stress, the Grievant began consuming more alcohol, crying more frequently, and suffering mood swings. He also physically threatened his wife and, on several occasions, verbalized a hope that a truck would hit her.

Ms. Dyer, who is a registered nurse, advised the Grievant to consult a physician. Heeding that advise, the Grievant began receiving treatment from Dr. Miller during the fall of 1999. Nevertheless, during mid-November and early December 1999, the Grievant's threats to kill his wife acquired specificity, in that he verbally considered the

No. 3 at 11).

¹²⁰ *Id.*

¹²² *Id.* at 11.

¹²³ *Id.* at 25.

¹²⁴ *Id.* at 26.

¹²⁵ *Id.* at 37.

likelihood of crossing the border into Kentucky, killing his wife and his mother-in-law and returning to Gallipolis before the bodies were detected. The Grievant approvingly referred to another trooper who was apprehended after having killed his wife and stuffed her in a dumpster. In December 1999, the Grievant mentioned killing his wife and stuffing her in a duster. And when Ms. Dyer's fourteen-year-old son telephoned her at home, the Grievant intercepted the call and jokingly said he had killed Ms. Dyer and stuffed her body in a dumpster. Also, the Grievant told Ms. Dyer, "If you ever leave me, I'll make your life hell."²⁶

On or about December 1999, Ms. Dyer began to consider breaking off her engagement with the Grievant and actually terminated their relationship on December 27, 1999. The breakup together with his ongoing marital dispute about seeing his children literally devastated the Grievant, sinking him even further into a pit of despair and depression.

The next day, while driving a patrol cruiser, the Grievant intercepted Ms. Dyer and instructed her to enter the cruiser where they conversed for approximately 30 minutes. During that time the Grievant mentioned blowing his brains out and taking others with him. Thereafter, the Grievant occasionally telephoned Ms. Dyer, in either an energetic or a depressed mood. At this point, however, the Grievant was receiving no medical care and swore that he would not be committed to a facility equipped to treat emotionally troubled persons.

Nevertheless, on or about January 2, 2000, when Ms. Dyer spoke to the Grievant on the telephone, his mood was very "labile, quickly changing "from extreme anger to tearfulness."²⁷ Roughly an hour later, sounding quite lethargic, the Grievant

²⁶ Ms. Dyer's testimony and statement, Employer Exhibit No. 1 at 50.
²⁷ Employer Exhibit No. 1 at 52.

again telephoned Ms. Dyer, at Holzer Medical Center Emergency Room (Holzer), where she was employed, and asked for someone to help him. Shortly, thereafter, he telephoned Ms. Dyer to say that he was coming to Holzer for observation. Ms. Dyer immediately, reported his request, apprised her superiors of the circumstances surrounding the Grievant's case, and recused herself from the situation. Dr. Miller was the attending physician at Holzer.¹²⁸

While at Holzer, the Grievant decided to receive treatment from Dr. Sidney C. Lerfald, a psychiatrist at the Charleston Area Medical Center (CAMC), in Charleston, West Virginia. When the Grievant arrived at CAMC, the staff searched him for the ankle holster and pistol Ms. Dyer had said he carried. The staff even removed the Grievant's shoe strings.¹²⁹ The Grievant was diagnosed as suffering from "depression, impaired concentration, and flight of ideas."¹³⁰ Dr. Lerfald specifically determined that the Grievant suffered from Mixed Bipolar Mood disorder II, which can adversely affect sleep, mood and concentration.¹³¹ Consequently, Dr. Lerfald ordered the Grievant to cease working for approximately two months,¹³² thereby effectively placing the Grievant on disability leave.¹³³ The Grievant's sessions with Dr. Lerfald ranged from daily to thrice weekly.

On or about January 4, 2000, the Grievant's sister and Sergeant P. W. McDonald secured both the Grievant's service and personal weapons.¹³⁴ On January 6, 2000, the Grievant was released from CAMC, but remained under Dr. Lerfald's care.

¹²⁸ Employer Exhibit No. 1 at 61.

¹²⁹ Employer Exhibit No. 1 at 55.

¹³⁰ Union Exhibit No. 4 at 2.

¹³¹ Union Exhibit No. 4 at 6.

¹³² Union Exhibit No. 4 at 2, 4.

¹³³ Union Exhibit No. 4 at 16-18.

¹³⁴ Union Exhibit No. 4 at 1.

On January 10, 2000, apparently out of concern about the Grievant's possible actions, the Employer essentially barred the Grievant from the Gallipolis post.¹³⁵ On January 12, 2000, the Grievant's divorce from his wife was finalized.¹³⁶ On January 31, 2000, Ms. Dyer wrote a letter for her employer about the Grievant's behavior during their courtship and shared that letter with the Employer.¹³⁷

On February 15, 2000, Dr. Lerfald released the Grievant to return to full-time duty, commenting that the Grievant was "improving very well."¹³⁸ During the first week of August 2000, the Grievant and Tony Haner, Auxiliary Police Officer, happen to meet at the Gallia County Fair. The Grievant drove up in a private vehicle, smelled of alcohol, and obviously had been driving after consuming alcohol. Also, Mr. Haner observed two cases of beer and a bottle of whiskey in the trunk of the Grievant's vehicle. According to Mr. Haner, the Grievant response to a comment from Mr. Haner's mother was, "I don't give a fuck." Shortly thereafter, the Grievant displayed an ankle holster and pistol.¹³⁹ Mr. Haner said the Grievant claimed to have had a "hit list."¹⁴⁰ The Grievant admitted that on the day in question, he was drinking beers while on the prescription medication, even though alcohol could exacerbate some undesirable side effects of that medication.¹⁴¹

Shortly before August 17, 2000, Ms. Melissa Russell, a Local news reporter and friend of the Grievant, overheard the Grievant interacting with a motorist he had

¹³⁵ Union Exhibit No. 4 at 1.

¹³⁶ Employer Exhibit No. 4.

¹³⁷ Employer Exhibit No. 1 at 48-59.

¹³⁸ Union Exhibit No. 4 at 19-20.

¹³⁹ Employer Exhibit No. 2 at 2.

¹⁴⁰ *Id.*

¹⁴¹ Specifically, "Alcohol can increase the *sedative* effect of Depakote and can also increase the *depressant* effects of alcohol on the brain. Also, carbonated beverages should not be taken with medication due to the possible irritation of the mouth and throat." Employer Exhibit No. 7 at 2.

stopped. Ms. Russell detected something different in the Grievant's verbalizations and subsequently approached Lieutenant Richard Grau to express her concern that the Grievant might not have been taking his medication.

Lieutenant Grau was absolutely positive that Ms. Russell said the Grievant had a "hit list" of persons he intended to harm. Nevertheless, during her testimony before the Undersigned, Ms. Russell stoutly insisted that she never mentioned the Grievant's having either a "hit" or "shit" list.

In contrast, Ms. Russell told Sergeant Tyler that she had mentioned "shit list" to Lieutenant Grau. However, during her testimony, Ms. Russell also denies that accusation, saying that Sergeant Tyler first mentioned that the Grievant might have had a "shit list," but Ms. Russell denied any knowledge about a "shit list."

Several other individuals, including Ms. Dyer, either testified or asserted in written statements that the Grievant mentioned a "hit list." Other individuals claimed the Grievant mentioned a "shit list." While conceding that he maintains a "shit list," the Grievant adamantly denies having a "hit list."

Based on Ms. Russell's alleged comments about the "hit list" and the belief that some troopers were on that list,^{V42} the Employer initiated an administrative investigation of the Grievant, on or about August 17, 2000.^{V43} Sergeant R. M. Tyler was the Chief Investigating Officer. Before he conducted the actual interviews and with his audio tape recorder off, Sergeant Tyler pre-interviewed some of his interviewees and then conducted the actual interview with the recorder turned on. In this way, Sergeant Tyler could determine which questions he would ask the interviewees in the actual interview that he subsequently recorded on audio tape.

^{V42} Employer Exhibit No. 2 at 1.

^{V43} Employer Exhibit No. 2 at 1.

On or about September 1, 2000, a court ordered the Grievant out of his home in Gallipolis, restrained his interaction with his wife, ordered his wife to move back into the Kentucky residence, gave the Grievant visitation rights to his children, and ordered marriage counseling.¹⁴⁴ However, the Grievant's wife consistently refused to allow him to see his children. At the end of its administrative investigation of the Grievant, the Employer decided to him for Conduct Unbecoming an Officer.

III. Relevant Contract Language **Article—Disciplinary Procedure**

19.01 Standard

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

Article 20.08

8. Issues

Prior to the start of an arbitration under this Article, the Employer and the Union shall attempt to reduce to writing, the issue or issues to be placed before the umpire. In cases where such a statement of the question is submitted, the umpire's decision shall address itself solely to the issue or issues presented and shall not impose upon either party any restriction or obligation pertaining to any matter raised in the dispute which is not specifically related to the submitted issue or issues. More than one issue may be submitted at the same time to arbitration, particularly if they are related to each other, by mutual agreement.

Article 18—Administrative Investigations

Section 18.09

Disciplinary action shall be instituted within two (2) years of the occurrence except in the event of a criminal violation subject to the possibility of prosecution, a criminal investigation or prosecution of the employee.

Section 18.10 Off-Duty Status

Disciplinary action will not be taken against any employee for acts committed while off duty except for just cause.

¹⁴⁴ Union Exhibit No. 6.

IV. The Issue

In conformance with Article 20, Section 20.08 (8) of the Collective bargaining Agreement the parties submit the following issue for resolution by the arbitrator: Was the grievant terminated for just cause? If not, what shall the remedy be?

V. Summaries of the Parties' Arguments

A. Summary of the Union's Arguments

1. There was not just cause for termination in this case.
2. The Grievant kept no "hit list."
3. The Grievant made no defined, pointed, or direct threats to any specific individuals.
4. The Employer has not shown that the Grievant's drinking, carrying, and displaying a weapon at the County Fair violated any work-related rules.
5. The termination is based on symptoms of the Grievant's illness.
6. Even absent the Grievant's illness, the record does not establish just cause for the Grievant's removal.
7. Dr. Browning, Dr. Lorfald, and Dr. Miller agree that, with continued treatment, the Grievant can be a good, competent law enforcement officer.
8. The Grievant's on-duty record is unblemished, and the Employer has not charged the Grievant with any on-duty misconduct that justifies dismissal.

B. Summary of the Employer's Arguments

1. Just cause for discipline was established, and the severity of discipline is neither unreasonable, arbitrary, capricious nor discriminatory.
2. The Grievant claimed to have a "hit list" or a "shit list," containing specific persons: his ex-wife and his mother-in-law, Ms. Dyer, Sergeant McDonald, Sergeant Holcomb, Sergeant Harlow, and Trooper Johnson. Whether he had either list is irrelevant because his threats were direct, planned, and aimed at specific persons. Mentioning specific persons on one's "shit list" is not a general threat, but a "direct, personal dangerous" threat.
3. At the county Fair, the Grievant was drinking alcohol while operating a motor vehicle while on his medication. He also displayed the weapon and mentioned a "hit list."
4. The Grievant's medication is ineffective. Some of the incidents for which the Grievant was removed occurred approximately eight months after his treatment began, thereby suggesting that even eight months of treatment did not leave the Grievant sufficiently responsible to control his conduct.
5. The Grievant placed himself under a physician's care when it suited his purpose.
6. The administrative investigation was timely under Section 18.09.
7. The Grievant's on-duty misconduct involved an illegal traffic interception for purely personal reasons and asking a motorist for a date.

8. Approximately fifteen interviewees claimed to have heard the Grievant make threatening remarks.
9. The Grievant's medical condition excuses neither his displays of anger nor his intimidating behavior.
10. Threatening to "hit" someone constitutes aggravated menacing and violates Ohio Revised Code 2903.2 1. Had these threats been uncovered in close proximity to their utterance, we certainly would have initially approached this case from a criminal prosecution angle.

VI. Discussion and Analysis

A. Preliminary considerations

Because this is a disciplinary matter, the Employer has the burden of persuasion and must establish its charges against the Grievant by preponderant evidence in the arbitral record as a whole. Justification for an employer's disciplining employees for off-duty misconduct depends, in the first instances, on the existence of a nexus between the established conduct and the actual or potential impact of the conduct on the employer's legitimate business interest. Defined broadly, "legitimate business interest" includes the Employer's right to run an efficient operation and to produce quality service and/or workmanship. Inextricably intertwined with these two fundamental interests is an employer's right to protect the reputation of an operation. Finally, the nature of an employee's job often factors prominently into determining the existence or nonexistence of a nexus. Generally, the greater the employee's public visibility and the clearer his link to the employer's operation, the more likely that his off-duty misconduct will form a basis for a disciplinary nexus. Of course, the Union has the burden of persuasion regarding any affirmative defenses it raises.

B. Threshold Issues to Just-Cause Analysis

Although the Parties offered numerous arguments in support of their positions in this dispute, whether the Grievant was removed for just cause can be resolved into two sub-issues: whether the Grievant committed the alleged acts which were the bases for

his removal; whether those acts warranted discipline up to and including removal, and whether the Grievant's illness partially or wholly excuses any established misconduct. It is to those consideration that the Arbitrator now turns.

C. Nature of Established Misconduct

Preponderant, credible evidence in the arbitral record establishes that the Grievant engaged in both on-duty and off-duty misconduct from approximately July 1998 to August 2000. His on-duty misconduct includes: (1) requesting a date from a motorist he had stopped presumably for official reasons; (2) stopping Ms. Dyer while on-duty in a patrol cruiser for the sole purpose of discussing their relationship.

While off-duty, the Grievant embraced the following misconduct: (1) increased his consumption of alcohol; (2) frequently threatened to kill his wife and mother-in-law; (3) several times considered how he might cross into Kentucky, murder his wife and mother-in-law, and return to Gallipolis undetected; (4) openly wished a truck would run his wife over; (5) approved of another state trooper's murdering his wife and stuffing her body in a dumpster; (6) jokingly told Ms. Dyer's fourteen-year-old son that he had killed Ms. Dyer and stuffed her body in a dumpster; (7) claimed to have had either a "hit list" or a "shit list" of persons who had somehow angered him; (8) threatened to make Ms. Dyer's life "hell" if she ever left him; (8) threatened to commit suicide and take others with him.

In addition to the foregoing behavior, the Grievant frequently cried, and began to experience exaggerated swings in his moods.

The foregoing behavior is substantiated in the record either by the Grievant's open or tacit admission, his physicians's statements, or credible testimony by the Employer's witnesses. The only remaining issue here is the nature or character of the misconduct and whether it constitutes actionable misconduct.

Not surprisingly, the Parties' views of the foregoing conduct could hardly be more

divergent. For example, in an attempt to discount the character of the conduct, the Union perceives the Grievant as having made "no defined threats to injure specific individuals," only the "muttering of an angry divorcee toward an ex-mate."¹⁴⁵ Similarly, the Union seems unperturbed where the Grievant asks a female motorist for a date after he stops her in the line of duty and in his official capacity. However, the Union concedes that the Grievant spoke inappropriately to Ms. Dyer's young son. Finally, the Union characterizes the Grievant's drinking at the County Fair as normal if not done on the fair grounds. Nor does the Union find a problem with the Grievant's carrying a weapon onto the Fair Grounds.¹⁴⁶

The Employer, on the other hand, argues that the Grievant's threats to kill his wife and mother-in-law are directly and specifically aimed at those individuals and, therefore, constitute "aggravated menacing," in violation of Ohio Revised Code 2903.21. . . . [and, if detected earlier] would have triggered a criminal prosecution"¹⁴⁷ Nor is the Employer deterred by the contradictory evidence regarding the existence of a "hit list." Instead, the Employer argues that the specificity of the Grievant's threats to named individuals renders the character of the list—"hit" or "shit"—irrelevant. Likewise, the Employer finds fault with the Grievant's asking motorist for dates and with stopping Ms. Dyer for personal conversation while he was on duty. Indeed, the Employer finds fault with each of the foregoing enumerated behavioral episodes, taken either individually and collectively.

The Arbitrator agrees with the Employer to a point. The difficulty with much of the Grievant's behavior lies not in the behavior itself but in the combination of the

¹⁴⁵ Union's Post-hearing brief at 5.

¹⁴⁶ *Id.*

¹⁴⁷ Employer's Post-hearing Brief at 12.

behavior and the Grievant's position as a state trooper. The Grievant's behavior would almost certainly raise civilian eyebrows. Whether fair or unfair, most civilians would likely view the Grievant's conduct with added disdain because he is a state trooper. The Ohio Highway Patrol can hardly maintain an image that generates public respect—an absolutely essential component of effective law enforcement—if its troopers were free to embrace the Grievant's behavior in this case. Consequently, the Employer cannot entirely ignore the Grievant's behavior. Indeed, absent the Grievant's documented illness, this would not be a difficult case, given the nature of the Grievant's conduct.

D. Nature and Impact of Established Illness

The challenge in this case is the Grievant's demonstrated illness. The Grievant suffered episodic eruptions of essentially the same symptoms from approximately July 1998 to August 2000. And although the Union does not specifically argue that the Grievant's illness caused his misconduct, the record reveals a nexus between those factors.

Before the onset of these problems, evidence in the record does not suggest that the Grievant was anything but a fine trooper. For approximately 13 years before his problems began, in July 1998, the Grievant competently served the Employer, as evidenced by his flawless disciplinary record and his satisfactory job performance.¹⁴⁸ His physical and emotional problems coincide with the disintegration of his marriage and the concomitant estrangement of his children. Furthermore, the highly stressful and sometimes unforgiving nature of his job deepened his emotional quagmire.

The Arbitrator could not disagree more with the Employer's argument that the

¹⁴⁸

Union Exhibit No. 5A-B

Grievant resumed medical treatment when it suited his agenda or purposes. The record shows that each time the Grievant—with the help of a physician—climbed out of his emotional abyss, another traumatic event plunged him back into it. For example, his marriage counseling went poorly, his wife secluded his children from him, the court banned him from his home, his relationship with Ms. Dyer ended, and he was targeted for an administrative investigation.

The arbitral record is replete with medical evidence that the stresses of the Grievant's marital problems and of his job were randomly extracting a terrible emotional

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- ¹⁴⁹ 7/17/98 The Grievant reported off work due to stress and under physician's care (Union Exhibit No. 3 at 1)
The Grievant described his disability as, "anxiety due to stress of job plus home problems, leading to depression and anxiety." (Union Exhibit No. 3 at 5) Dr. Browning description was, "Patient has had anxiety, depression, insomnia and anorexia(?) plus persistent heart burn (signs of gastrointestinal reflux???) Precipitated by stress at home and on job." (Union Exhibit No. 3 at 7)
Dr. Browning also reported, "Melancholy mood, anxiety(?) anorexia and anhedonia(?) (No joy in anything). Physically normal (Also has problem with insomnia.)."
- 8/23/98 Dr. Browning released the Grievant for full-time duty, understanding nature of the Grievant's duties (Union Exhibit No. 3 at 3) Dr. Browning commented: "Patient has had temporary stress which I feel he has handled well and should be able to function normally."
- 9/1/98 The Grievant returned to duty from disability. (Union Exhibit No. 3 at 9). The Grievant had been on disability leave since 7/17/98. (Union Exhibit No. 3 at 15).
- 9/9/98 The Grievant took disability leave due to same condition. (Union Exhibit No. 3 at 9).
Dr. Browning's diagnosis was, "Depression, anxiety, GEND(?)" Normal recovery was delayed because "Separated from wife whom (sic) does not allow him [the Grievant] to see his children." Subjective symptoms, "insomnia. anorexia, anxiety, lack of self worth, labia(?) Mood & loneliness." Objective findings, "weight loss flat effect.?" (Union Exhibit No. 3 at 11) Retrogressed because of "Much strife with marital situation. Apparently wife won't cooperate with court ordered sharing of children." (Union Exhibit No. 3 at 11).
- 9/29/98 David Clay described the Grievant as suffering from, "Adjustment Reaction, with mixed anxiety and Depression. . . . [with] . . . the following symptomatology: dysphoria, pessimism regarding the future, poor concentration, feelings of hopelessness (at times); chronic fatigue; disrupted sleep, apprehension; excessive worry; and generalized anxiety." (Union Exhibit No. 3 at 32).
- 1/5/00 Dr. Lorfald stated that the symptoms were, "sleep disturbance, impaired

and physical toll from him.⁴⁹ More importantly, the toll was all the greater because of his bipolar mood disorder. The straits that plagued the Grievant throughout the relevant period in this dispute likely would have challenged—if not eroded—the physical and emotional health of most individuals, and the Grievant was obliged to cope with these burdens while struggling with a bipolar disorder that was real rather than imagined and that somehow interfaced and exacerbated the environmental stresses that beset the Grievant.

E. Propriety of Discipline

Under these conditions, discipline is highly unlikely to rehabilitate or deter the Grievant or any other employees unfortunate enough to find themselves in the Grievant's circumstances. Instead, the physicians in this dispute suggest that treatment is the likely answer because the Grievant's ailment was a major factor in his inability to better cope with circumstances on and off duty. Indeed, every physician's statement tends to link the foregoing stresses with the recurrence of physical and emotional retrogression. Under these conditions, the Grievant obviously is not himself. Why treat him as if he is? Perhaps the Employer is correct and the Grievant has become a "bad employee" after thirteen years of exemplary service. However, it hardly seems reasonable or fair to make that judgement while the Grievant is under the character-distorting influence of a bipolar disorder, which is aggravated—if not precipitated—by both marital and job pressures.

This is not to say that the Employer must return the Grievant to full-time duty as a trooper. The nature of the Grievant's condition precludes the Arbitrator from ordering the Employer to reinstate the Grievant to full-time duty. Indeed, the Arbitrator is

concentration, flight of ideas, irritability, depressed mood and motor restlessness." (Union Exhibit No. 4 at 4)

unqualified to make such a judgement here. Nevertheless, the Grievant was not terminated for just cause because preponderant evidence in the record as a whole does not place the blame for all the Grievant's established misconduct squarely at his feet. The disability, against which he struggles, played a substantial, albeit not the entire, part in his inability to cope with trying circumstances while fully controlling his emotions and exercising self restraint consistent with his position. One should recognize that it is equally unreasonable to expect an emotionally compromised employee to negotiate "normal" emotional strain like he did theretofore, or to expect a physically compromised employee to negotiate "normal" physical stresses as he did theretofore. This does not mean that the Grievant was guiltless for all of his misconduct, in this case, only that he was not wholly to blame.

VII. The Award

Consequently, the Arbitrator holds that the Employer shall reinstate the Grievant with no loss of seniority or benefits but only four months backpay. However, the Arbitrator expresses no opinion on when or if the Employer must place the Grievant back on either full-time or part-time duty. If the Grievant is to have any opportunity to return to full-time duty as a state trooper, he must continue to receive any and all medical treatment necessary to enable him to cope with the burdens of his employment and of his life. Clearly medical professionals must determine when, if ever, it is safe for the Grievant to return to full-time duty as a state trooper. Ultimately, then, because the record establishes that discipline, in the presence of the Grievant's bipolar disorder, clearly is not for just cause and is unreasonable, the Arbitrator cannot support the Grievant's termination in this case.

For all the forgoing reasons, the Grievance is **SUSTAINED** as set forth above. The Arbitrator shall retain jurisdiction of this matter for 30 days from the date of this opinion and award.

Appendix

Description of Exhibits (Sorted by Exhibit)

EXHIBITS	PAGE	DATE	CONTENT
Joint Exhibit No. 2	1-3	08/28/00	Letter of charges/Notice of pre-disciplinary hearing
		0	
Joint Exhibit No. 2	4	08/31/00	Decision of pre-disciplinary officer
		0	
Joint Exhibit No. 2	5	08/31/00	Notice of removal
		0	
Joint Exhibit No. 2	6	00/00/00	Penalty table
		0	
Joint Exhibit No. 2	7	00/00/00	Personal department record
		0	
Joint Exhibit No. 3	1	09/07/00	Grievance #15-00-000911-0125-04-01
		0	
Joint Exhibit No. 3	2	09/07/00	Letter submitting grievance
		0	
Joint Exhibit No. 3	3-6	09/07/00	Step-three step grievance decision
		0	
Joint Exhibit No. 3-	7	10/10/00	Appeal to step-four
		0	
Employer Exhibit No.	48-59	01/31/00	Sherry Dyer letter
1		0	
Employer Exhibit No.	60	05/31/00	Psychologist Boone's letter
1		0	

Employer Exhibit No.	61	08/29/0	Dr. Miller's letter excusing G from work
1		0	
Employer Exhibit No.	62	10/11/0	Dr. Lerfald's letter explaining G's condition
1		0	
Employer Exhibit No.	1-47	08/02/0	Administrative investigation summary
2		0	
Employer Exhibit No.	1-41	01/10/0	Report of investigation
2		1	
Employer Exhibit No.	00 00	01/10/0	Tapes of investigatory interview
3		1	
Employer Exhibit No.	00 00	00/00/0	Time of events
4		0	
Employer Exhibit No.	1	01/10/0	Memo re G's treatment at Holtzer & Charleston/weapon/barring from Post
5		0	
Employer Exhibit No.	1	01/13/0	Memo re G's treatment at Holtzer & Charleston/describe G's prob./Lerfald's stmt.
6		0	
Employer Exhibit No.	2	01/17/0	Internet description of G's medication/problem when used with alcohol
7		1	
Union Exhibit No.	1	08/30/9	Dr. Boone's letter describing his history of treatment of the Grievant
		8	
Union Exhibit No.	2	01/24/0	Cpt. Meredith letter to Maj. Everhart re G's return to duty/ees. Doubt G's fitness
		0	
Union Exhibit No.	3	08/03/9	Lt. McGlone Letter to Cpt. Meredith re G's absence for stress/under Dr.s care
		8	
Union Exhibit No.	3	07/30/9	Lt. McGlone's description of the Grievant's duties
		8	

Union Exhibit No. 3	4-8	07/22/9	Grievant's disability file
		8	
Union Exhibit No. 3	9-13	09/18/9	Lt. Grau letter to Cpt. Meredith re G's return from leave on 9/1/98/marriage/stress
		8	
Union Exhibit No. 3	14-15	10/15/9	The Grievant's disability leave denied for insufficient medical evidence.
		8	
Union Exhibit No. 3	16-17	08/14/9	"Medical Appraisal of Job Capacity" Dr. Browning released G for full-time duty.
		8	
Union Exhibit No. 3	18-22	09/18/9	BWC notice of intent to deny the Grievant's disability
		8	
Union Exhibit No. 3	23	10/13/9	The Grievant's response to BWC's letter, submitting additional information
		8	
Union Exhibit No. 3	24-25	10/05/9	"Medical Appraisal of Job Capacity" Dr. Browning released G for lim/duty
		8	10/20/98
Union Exhibit No. 3	26	10/13/9	"Transitional Work Program Participation Agreement" to begin 10/13/98.
		8	
Union Exhibit No. 3	27-28	10/06/9	Dr. Browning's complete statement of the Grievant's condition.
		8	
Union Exhibit No. 3	29-31	9/21/98	"Riverview Medical Statement" about the Grievant.
Union Exhibit No. 3	32	9/29/98	David Clay's statement about the Grievant's condition.
Union Exhibit No. 3	33-34	10/27/9	Benefits Administration Services letter restoring the Grievant's disability leave
		8	
Union Exhibit No. 3	35	10/27/9	Lt. Grau's letter to Cpt. Meredith re the Grievant's return to full duty on
		8	10/27/98.
Union Exhibit No. 3	36-37	10/26/9	Dr. Browning's "Medical Appraisal of Job Capacity" releasing G' for full-time duty
		8	


Union Exhibit No. 4	1-2	01/10/0	Lt. Grau's letter to Cpt. Meredith re the Grievant's relapse.
		0	
Union Exhibit No. 4	3-4	01/05/0	Application for Disability Leave Benefits. Dr. Lerfald's statement
		0	
Union Exhibit No. 4	5-6	01/06/0	Dr. Lerfald's statement re G's Disability
		0	
Union Exhibit No. 4	7	01/06/0	"Medical Appraisal of Job Capacity" Dr, Lerfald—Return to work to be determined
		0	
Union Exhibit No. 4	9-11	01/05/0	Dept. of Admin. Services Work Capacity Form" Lerfald's statement.
		0	
Union Exhibit No. 4	12-15	01/05/0	Physician or Health Care Provider Certification for FMLA Lerfald's Statement.
		0	
Union Exhibit No. 4	16-17	02/03/0	Benefits Administration Services letter granting Grievant's disability leave.
		0	
Union Exhibit No. 4	18	02/04/0	Grievant's FMLA granted.
		0	
Union Exhibit No. 4	19-20	02/15/0	"Medical Appraisal of Job Capacity" Dr, Lerfald—Return G to full duty.
		0	
Union Exhibit No. 5A	1-14	03/10/0	Grievant's performance evaluations
		0	
Union Exhibit No. 5B	1-15	03/16/9	Grievant's performance evaluations
		9	
Union Exhibit No. 6	1-3	09/01/0	Restraining order against the Grievant.
		0	

Description of Exhibits (Sorted by Date)

EXHIBITS	PAG	DATE	CONTENT
	E		
Union Exhibit No. 3	4-8	072298	Grievant's disability file
Union Exhibit No. 3	2-3	073098	Lt. McGlone's description of the Grievant's duties
Union Exhibit No. 3	1	080398	Lt. McGlone Letter to Cpt. Meredith re G's absence for stress under Dr. care
Union Exhibit No. 3	16-1	081498	Medical Appraisal of Job Capacity" Dr. Browning released G for full-time duty.
	7		
Union Exhibit No. 1	1	083098	Dr. Boone's letter describing his history of treatment of the Grievant
Union Exhibit No. 3	18-2	091898	BWC notice of intent to deny the Grievant's disability
	2		
Union Exhibit No. 3	9-13	091898	Lt. Grau letter to Cpt. Meredith re G's return from leave on 9198 marriage stress
Union Exhibit No. 3	29-3	092198	Riverview Medical Statement" about the Grievant.
	1		
Union Exhibit No. 3	32	092998	David Clay's statement about the Grievant's condition.
Union Exhibit No. 3	24-2	100598	Medical Appraisal of Job Capacity" Dr. Browning released G for lim. duty
	5		102098
Union Exhibit No. 3	27-2	100698	Dr. Browning's complete statement of the Grievant's condition.
	8		
Union Exhibit No. 3	26	101398	Transitional Work Program Participation Agreement" to begin 101398.
Union Exhibit No. 3	23	101398	The Grievant's response to BWC's letter, submitting additional information
Union Exhibit No. 3	14-1	101598	The Grievant's disability leave denied for insufficient medical evidence.
	5		
Union Exhibit No. 3	36-3	102698	Dr. Browning's "Medical Appraisal of Job Capacity" releasing G' for full-time
	7		duty

Union Exhibit No. 3	33-3	102798	Benefits Administration Services letter restoring the Grievant's disability leave
	4		
Union Exhibit No. 5B	1-15	031699	Grievant's performance evaluations
Joint Exhibit No. 2	7	000000	Personal deportment record
Joint Exhibit No. 2	6	000000	Penalty table
Employer Exhibit No. 4	00	000000	Time of events
	00		
Union Exhibit No. 4	9-11	010500	Dept. of Admin. Services Work Capacity Form" Lerfald's statement.
Union Exhibit No. 4	12-1	010500	Physician or Health Care Provider Certification for FMLA Lerfald's statement.
	5		
Union Exhibit No. 4	3-4	010500	Application for Disability Leave Benefits. Dr. Lerfald's statement
Union Exhibit No. 4	5-6	010600	Dr. Lerfald's statement re G's disability
Union Exhibit No. 4	7	010600	Medical Appraisal of Job Capacity" Dr, Lerfald—Return to work to be determined
Union Exhibit No. 4	1-2	011000	Lt. Grau's letter to Cpt. Meredith re the Grievant's relapse.
Employer Exhibit No. 5	1	011000	Memo re G's treatment at Holtzer & Charleston/weapon/barred from Post
Employer Exhibit No. 6	1	011300	Memo re G's treatment at Holtzer & Charleston describe G's prob. Lerfald's stmt.
Union Exhibit No. 2	1	012400	Cpt. Meredith letter to Maj. Everhart re G's return to duty. Doubt G's fitness
Employer Exhibit No. 1	48-5	013100	Sherry Dyer letter
	9		
Union Exhibit No. 4	16-1	020300	Benefits Administration Services letter granting Grievant's disability leave.
	7		
Union Exhibit No. 4	18	020400	Grievant's FMLA granted.
Union Exhibit No. 4	19-2	021500	Medical Appraisal of Job Capacity" Dr. Lerfald—Return G to full duty.
	0		
Union Exhibit No. 5A	1-14	031000	Grievant's performance evaluations

Employer Exhibit No. 1	60	053100	Psychologist Boone's letter
Employer Exhibit No. 2	1-47	080200	Administrative investigation summary
Joint Exhibit No. 2	1-3	082800	Letter of charges notice of pre-disciplinary hearing
Employer Exhibit No. 1	61	082900	Dr. Miller's letter excusing G from work
Joint Exhibit No. 2	4	083100	Decision of pre-disciplinary officer
Joint Exhibit No. 2	5	083100	Notice of removal
Union Exhibit No. 6	1-3	090100	Restraining order against the Grievant.
Joint Exhibit No. 3	2	090700	Letter submitting grievance
Joint Exhibit No. 3	3-6	090700	Step-three step grievance decision
Joint Exhibit No. 3	1	090700	Grievance #15-00-000911-0125-04-01
Joint Exhibit No. 3-	7	101000	Appeal to step-four
Employer Exhibit No. 1	62	101100	Dr. Lerfald's letter explaining G's condition
Employer Exhibit No. 2	1-41	011001	Report of investigation
Employer Exhibit No. 3	00	011001	Tapes of investigatory interview
	00		
Employer Exhibit No. 7	2	011701	Internet description of G's medication problem when used with alcohol


Robert Brookins, Labor Arbitrator