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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
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Case-Specific Data
Grievance No. 15-00-2001-0614-69-04-01
Hearing Held—July 10, 2001
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Subject: Discharge/Failed to Notify OSHP of Court Order

Award
Grievance Sustained In-Part and Denied In-Part

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 "the Highway Patrol"), and the Ohio State Troopers Association ("the Union").[1] Relevant procedural considerations in this dispute date back to an earlier dispute between the Employer and the Grievant and are, therefore, set forth below.

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."[2] That same day the Grievant was notified that at 10: a.m. on August 31, 2000, the Employer would assess the charges against him in a pre-disciplinary hearing. After that hearing the Pre-disciplinary Hearing Officer (S/Lieutenant J. C. Shore) found just case to discipline the Grievant.[3] On August 31, 2000, Lieutenant Governor Maureen O' Connor notified the Grievant that he was terminated.[4]

On September 7, 2000, the Union filed Grievance No. 15-00-000911-0125-04-01 ("the Grievance") claiming the Grievant's removal was for other than just cause.[5] The parties failed to resolve this dispute and mutually agreed to submit the matter to the Undersigned who heard the case on January 22, 2001, reinstated the Grievant on April 23, 2001, but did not order the Employer immediately to place the Grievant back on full-time duty.

The instant dispute erupted on May 9, 2001, when the Employer charged the Grievant with violating Rules 4501:2-6-02(O)(1) (Court Action) (Rule "O") and 4501:2-6-02(Y)(2) (Compliance Order) (Rule "Y").[6] On May 9, 2001, the Employer notified the Grievant of its intent to terminate him for having "failed to notify the Ohio State Patrol that you were under a Civil Protection Order that ***prohibited you from buying receiving, or possessing*** a

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[1] Hereinafter referred to collectively as the Parties.

[2] Joint Exhibit No. 2 at 1.

[3] Joint Exhibit No. 2 at 4.

[4] Joint Exhibit No. at 5.

[5] Joint Exhibit No. 3 at 1.

[6] Joint Exhibit No. 3 at 1

firearm and therefore *unable to perform* the essential functions of a trooper."[7]

That same day the Employer notified the Grievant that a pre-disciplinary hearing would be held on May 14, 2001 at 9:00 a.m.[8] The pre-disciplinary hearing was held as scheduled and on May 15, 2001, the Pre-disciplinary Hearing Officer found just cause for discipline.[9] Accordingly, on May 15, 2001, the Employer terminated the Grievant for the aforementioned violations.[10] The Union responded with Grievance No. 15-00-2001-0614-69-04-01 alleging that the removal lacked just cause.[11] Again the Parties submitted the instant dispute to the Undersigned and presented their arguments and evidence before the Undersigned, in an arbitral hearing on July 10, 2001.

During that hearing, the Parties had a full and fair opportunity to present any and all admissible evidence and arguments supporting their positions in this dispute. Accordingly, the Parties made opening statements and introduced admissible documentary and testimonial evidence, all of which was open respectively to relevant objections and cross-examination. Finally, the parties had a full opportunity either to offer closing arguments or to submit post-hearing briefs; they opted for the latter. The Undersigned received the final brief on or about July 30, 2001, when the arbitral record was closed.

II. FACTS

A. The Proper Perspective

The next step is briefly to recite the facts and circumstances that found the instant dispute and enhance its perspective. In 1998 the Grievant began experiencing marital problems, which resulted in a separation from his wife who retained custody of their two children.[12] During that period of estrangement, the Grievant also had an

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[7] Joint Exhibit No. 3 at 2 (emphasis added).

[8] *Id.*

[9] *Id* at 4.

[10] *Id.* at 5.

[11] Joint Exhibit No. 2 at 1.

[12] Joint Exhibit No. 4 at 26.

unsuccessful relationship with another woman. The Grievant became depressed shortly after that second breakup and was diagnosed with Mixed Bipolar Mood Disorder II, which can adversely affect one's sleep, mood, and concentration.[13] At some point during this cavalcade of horrors, allegations arose that the Grievant had compiled either a "hit list" or a "shit list," containing the names of his wife, mother-in-law, and fellow employees.[14] This and other allegations caused the Employer to launch an administrative investigation on or about August 30, 2000.[15]

That investigation failed to demonstrate the existence of a "hit list." Indeed, after reviewing the investigative report, the prosecutor concluded that there was "*[n]o evidence* to support that a "hit list" existed."[16] The Employer fired the Grievant on or about August 31, 2000, for having violated Rule No. 4501:2-6-02(I)(1), "Conduct Unbecoming an Officer."[17] Theretofore, the Grievant had amassed approximately thirteen years of service as a trooper with the Ohio State Highway Patrol, maintained satisfactory job performance, and held a blemish-free disciplinary record.[18] The Union grieved the August 31 termination, and the parties elected to submit that dispute to the Undersigned.

The Employer completed its two-day administrative investigation on August 31, 2000, without having established the existence of a "hit list." At that time Captain Lisa K. Taylor informed the Grievant's wife (Ms. Rita K. Scarberry) of the allegation or rumor that the Grievant had compiled a "hit list." Yet, after learning of the Employer's failure to establish such a list, Captain Taylor saw no need to correct those accusations.

On or about August 31, 2000, Captain Taylor's accusations became the basis for Ms. Scarberry's successful petition to the 24th District Court of Lawrence County Kentucky (the court) for an emergency protection order (EPO)

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[13] April 23 Opinion, at 9.

[14] April 23 Opinion, at 9-14.

[15] Union Exhibit No. 2, at 3.

[16] Id. at 5.

[17] April 23 Opinion, at 3.

[18] Id. at 4.

against the Grievant.[19] In support of her petition, Ms. Scarberry stated: "I talked to Captain Lisa Taylor and she informed me that I, my mother & my children were on a hit list & that I could be in danger. Bryan Pack apparently has a hit list of people that he wishes to kill & we are on that list."[20] On September 1, 2000, based on these accusations, the court issued its first EPO ("September 1 EPO") against the Grievant, indicating, among other things, that he was "believed to be armed/dangerous."[21] The court ordered that EPO to remain in force until September 6, 2000.[22]

Between September 1, 2000 and November 1, 2000, the court held five hearings in this matter, and consistently extended the September 1 EPO. On or about September 11, 2000, the court continued the September 1 EPO until September 21, 2000.[23] The September 11 EPO also described the Grievant as "believed to be armed and dangerous."[24] On September 21, 2000, the court again extended the EPO until October 4, 2000 with the same "armed/dangerous" notation.[25] On October 4, 2000, the court extended the EPO until October 18, 2000 with the same notation.[26] On October 18, 2000, the court extended the EPO until November 1, 2000. Finally, on November 1, 2000, the court held an evidentiary hearing to determine whether to lift the EPO against the Grievant.[27] This was the first evidentiary hearing that the Grievant attended in this matter. During that November 1 hearing the court

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[19] Joint Exhibit No. 4, at 24.

[20] Id. at 20.

[21] Id. at 19.

[22] *Id.*

[23] Id. at 18.

[24] Id. at 18.

[25] Id. at 17.

[26] Id. at 16.

[27] The Grievant only received notice of the November 1, 2000 hearing, which was the only evidentiary hearing he attended before the court.

heard no evidence regarding the grounds for extending the EPO.[28] Nor was there discussion or even mention of the Grievant's fitness or right either to possess or to own firearms.

Nevertheless, the court not only extended the EPO of November 1, 2000 until November 1, 2003,[29] but also included a weapon's restriction ordering the Grievant to surrender his "Kentucky license to carry concealed firearms or other deadly weapons to the court."[30] Despite the explicit weapons restriction included therein, the November 1 EPO did not indicate that the Grievant was "believed to be armed/dangerous." Indeed, but for the aforementioned weapons restriction the November 1 EPO contained essentially the same substantive restrictions as the immediately preceding, October 18, EPO. Without a firearm, the Grievant could not perform his duties as a trooper.[31]

On January 22, 2001, the Undersigned presided over an arbitral hearing to resolve the dispute about the Grievant's dismissal on August 31, 2000. At that time the Union and the Grievant (but not the Employer) were aware of the court's November 1 EPO. During the hearing, however, the Union introduced a copy of the September 1 EPO, (which had expired, on September 6, 2000) but not the November 1 EPO, which was in force, contained the weapons' restriction, and was to remain enforce until November 1, 2003. The Union successfully challenged the Grievant's August 31 removal and on April 23, 2001, the Undersigned provisionally reinstated the Grievant.[32]

Upon his April 23 reinstatement the Grievant did not apprise the Employer of either the November 1 EPO or the weapons' restriction therein. Nevertheless, the Employer learned of both the November 1 EPO and the weapons restriction on or about May 7, 2001, and immediately launched an administrative investigation into the

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[28] Union Exhibit No. 1, a video tape of the entire evidentiary hearing, on November 1, 2001.

[29] Joint Exhibit No. 4, at 13.

[30] *Id.*

[31] Joint Stipulation No. 2

[32] April 23 Opinion, at 22.

matter.[33] Following that investigation, the Employer charged the Grievant with violating Rules 4501:2-6-02 and 4501:2-6-02[34] and, consequently, terminated him, on May 15, 2001.[35]

III. Relevant Contractual Provisions and Work Rules

Article 4 - MANAGEMENT RIGHTS

Except to the extent modified by this Agreement, the Employer reserves exclusively all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to the following:

1. **Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;**
2. **Direct, supervise, evaluate, or hire employees;**
3. **Maintain and improve the efficiency and effectiveness of governmental operations;**
4. **Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;**
5. **Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees;**
6. **Determine the adequacy of the work force;**
7. **Determine the overall mission of the employer as a unit of government;**
8. **Effectively manage the work force;**
9. **Take actions to carry out the mission of the public employer as a governmental unit;**

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11. **Determine and manage its facilities, equipment, operations, programs and services;**
12. **Determine and promulgate the standards of quality and work performance to be maintained;**

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14. **Determine the management organization, including selection, retention, and promotion to positions not within the scope of this Agreement.**

18.10 Off-Duty Status

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

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[33] **Joint Exhibit No., at 1.**

[34] **Joint Exhibit No. 3, at 1.**

[35] ***Id.* at 5.**

Article 19 - Disciplinary Procedure

19.01 Standard

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

10.03 Length of Suspension

No suspension without pay of more than ninety (90) calendar days may be given to an employee.

19.05 Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

1. One or more Verbal Reprimand (with appropriate notation in employee's file);
2. One or more Written Reprimand;
3. One or more day(s) Suspension(s) or a fine not to exceed five (5) days pay, for any form of discipline, to be implemented only after approval from the Office of Collective Bargaining.
4. Demotion or Removal.

However, more severe discipline (or a combination of disciplinary actions) may be imposed at any point if the infraction or violation merits the more severe action.

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

The deduction of fines from an employee's wages shall not require the employee's authorization for the withholding of fines from the employee's wages.

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ARTICLE 21 - WORK RULES

21.01 Copies of Work Rules

The employer agrees that existing work rules, and directives shall be reduced to writing and be made available to affected employees at each work location. To the extent possible, new work rules and directives shall be provided to the Union two (2) weeks in advance of their implementation. In the event that the Union wishes to present the views of the bargaining unit regarding a new work rule or directive, a time will be set aside at the regularly scheduled Labor/Management Committee meeting. The issuance of work rules and directives is not grievable. The application of such rules and directives is subject to the grievance procedure.

21.02 Scheduling

The Employer maintains the right to establish reasonable work rules to control the number of persons to be scheduled off work at any one time.

21.03 Application

All work rules and directives must be applied and interpreted uniformly as to all members. Work rules or directives cannot violate this contract. In the event that a conflict exists or arises between a work rule and

the provisions of this agreement, the provision of this Agreement shall prevail.

Work Rule 4501:2-6-02(O)(1)
Court action

(1) Members shall report in writing, as soon as possible, to his/her supervisors, any court action instituted against them.

(2) No member, while on duty, shall appear as a witness in a court action, except when subpoenaed to appear based on an action arising from his/her employment with the division.

Work Rule 4501:2-6-02(Y)(2)
Compliance to orders

(1) A member shall immediately and completely carry out the lawful orders of a supervisor, or designated officer in charge, which pertain to the discharge of the member's duties.

(2) A member shall conform with, and abide by, all rules, regulations, orders and directives established by the Superintendent for the operation and administration of the division.

IV. Stipulated Issue

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

V. Joint Stipulations

1. There is a hearing scheduled tomorrow in Lawrence District Court on a motion filed by Bryan Pack to set aside the Emergency Protective Order.
2. A job requirement of a state trooper is that they must be able to carry a firearm.
3. The grievant has been unable to purchase, receive or possess a firearm since November 1, 2000, in accordance with a court order.

VI. Summaries of the Parties' Arguments

A. Summary of the Employer's Arguments

1. The Grievant's removal was for just cause.
2. The Grievant's duty to inform the Employer of the November 1 EPO and the included weapons restriction arose upon his restatement, on April 23, 2001.
3. The Grievant failed to inform the Employer of a valid court order, thereby violating Rules "O" and Rule "Y."
4. The Grievant was aware of these Rules.
5. The Grievant was in possession of the November 1 EPO since November 1, 2000.
6. The existence or nonexistence of fault on the Grievant's part is irrelevant because employees are strictly liable for violations of work rules.
7. The Grievant's motive for remaining silent about the November 1 EPO can be reasonably inferred from the impact of the weapons restriction on his capacity to perform his job.
8. The relevant circumstances and consequences of the November 1 EPO is a basis from which one may draw a reasonable inference about the Grievant's mental attitude that caused him not to inform the Employer about the November 1 EPO.

9. The Grievant was removed for just cause and was not arbitrary, capricious, or unreasonable.

B. Summary of the Union's Arguments

1. The Grievant reasonably believed that the November 1 EPO was an unmodified extension of the September 1 EPO because, during the November 1 evidentiary hearing, the court neither discussed nor heard evidence regarding a weapons' restriction.
2. The Grievant never intended to conceal the weapon's restriction from the Employer.
3. Upon his reinstatement, on April 23, 2001, the Grievant was no longer obliged to notify the Employer of the November 1 EPO, because, during the January 22 arbitral hearing, the Grievant had submitted into evidence September 1 EPO, which he reasonably thought contained the most current provisions. As far as the Grievant was concerned, the Employer was in possession of the most current order, on April 23, 2001.
4. The Grievant first learned of the weapon's restriction in the November 1 EPO, on May 6 or 7, 2001, when he was so apprised. Theretofore, the Grievant had no reason to expect a weapon's restriction to appear in the November 1 EPO.

VII. Discussion and Analysis

A. Preliminary Considerations

During the arbitral hearing and in their post-hearing briefs, the Parties addressed at least two issues that, in the final analysis, were not terribly relevant to the issue in their submission agreement. First, however truncated or dismissive the court's November 1 evidentiary hearing, it is not a factor in the resolution of this dispute. Second, and similarly unavailing is any improvidence that might have tainted the court's decision either to extend its November 1 EPO or to include the weapons' restriction therein.

Instead, the merit of the charges against the Grievant ultimately rests on whether the Grievant intentionally or negligently remained silent about the weapons restriction upon his reinstatement on April 23, 2001. These determinations respectively rest in turn on whether the Grievant had actual or constructive knowledge of the weapons restriction when he was reinstated. His actual knowledge of the weapons restriction is a basis for imputing actual intent to misrepresent or deceive the Highway Patrol in violation of Rules "O" and Rule "Y." If, on the other hand, preponderant evidence in the arbitral record shows that the Grievant had only constructive knowledge of the weapons restriction, then there is no basis from which to impute intent because his violation of the foregoing Rules would be based on ordinary negligence. Obviously, intentional concealment of the weapons restriction warrants more severe disciplinary measures than the negligent concealment thereof. Ever mindful of these considerations

the Arbitrator now turns to an analysis of the case.

B. Grievant's Duty to Reveal the November 1 EPO Upon His Reinstatement

The threshold issue is whether the Grievant had a duty, under Rules "O" or "Y," to inform the Employer of the weapons' restriction. Rule 4501:2-6-02(O)(1) sets the stage, stating: "Members shall report in writing, as soon as possible, to his/her supervisors, *any court action* instituted against them." The Employer insists that, on its face, this Rule absolutely required the Grievant to apprise the Employer of the weapons' restriction, on April 23, 2001. Conversely, the Union contends that the Grievant satisfied Rules "O" and "Y" by informing the Employer of the September 1 EPO during the arbitral hearing on January 22, 2001 and, therefore, was not obliged to mention the weapons' restriction upon his reinstatement on April 23, 2001.

The Arbitrator cannot accept the Union's position. At bottom, the Union essentially contends that the Grievant's erroneous assumption about the content of the November 1 EPO somehow satisfies or nullifies the requirements of Rule "O." That cannot be. The Employer is entitled to have its work rules obeyed, and employees are required to exercise due care in obeying those rules. The Rules in question were properly promulgated and are clearly articulated. As a result, employees misperceive at their on own peril the nature and scopes of their duties under these Rules. Otherwise, recognition of malignant exceptions, such as negligent misconception of duties, would eventually eviscerate the Rules. The Arbitrator therefore holds that the scope of the Grievant's duties, under Rules "O" and "Y" are unaffected by the Grievant's misperceptions of those duties, so long as the Employer had no part in causing or furthering such misperceptions. Ultimately, then, the Arbitrator holds that the Grievant had a duty to report the weapons' restriction on April 23, 2001.

C. The Appropriate System of Liability

The Employer initially argues for the application of a system of strict liability to its work rules.[36] Specifically, the Employer argues that "the work rules impose a strict liability obligation onto all employees . . . to notify the

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[36] Employer's Post-Hearing Brief at 5.

Employer of court action initiated against them. . . . [Therefore,] the Grievant's mental attitude, or intent is irrelevant."[37] In support of this position the Employer contends:

> Employees either violate or comply with work rules. . . . Do they intend to miss court, crash patrol vehicles, fail to turn in paperwork, shoot themselves? No.[38] Would it change anything in this case if the Grievant had testified that he intended to tell the Employer about the court action but just forgot"?[39]

The statement that "intent does not matter"[40] suggests the Employer refers to pure strict liability rather than to some permutation thereof.[41]

The Union disagrees by implicitly contending that the Grievant neither intentionally nor negligently concealed either the November 1 EPO or the included weapons' restriction.[42] In other words, without specifically addressing the applicability of strict liability to work rules, the Union essentially argues that Rules "0" and "Y" operate within a fault-based system.

D. Arbitral Assessment of Disciplinary Strict-Liability

In grievance arbitration, faultless violations of work rules under a system of pure strict liability would expose violators to possible discipline, however compelling the mitigating or extenuating circumstances surrounding the violations. Ceteris paribus, a wholly blameless violation, without more, would warrant some measure of

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[37] Id. at 4-5.

[38] *Id.* at 5. The difficulty with the Employer's position and example, is that they stop short of the line that tends to distinguish fault (intent or negligence) from no fault. Thus, it would indeed matter if an employee was fault-free in the accident, e.g., an act of God. In this scenario, the accident still occurred, but the employee would hardly be held accountable therefor.

[39] *Id.*

[40] *Id.*

[41] Strict liability can don many hybrid guises, involving varying degrees of fault. The reference to "pure" strict liability implicitly recognizes that no bright line distinguishes among these guises. Indeed, strict liability can sometimes appear virtually indistinguishable from the fault-based system of ordinary negligence.

[42] Union's Post-Hearing Brief, at 7-8.

discipline.[43] Adoption of the Employer's position would render irrelevant the Grievant's knowledge of the weapons' restriction as well as whether his silence thereabout was either intentional or negligent. Obviously, such pure strict liability is strong disciplinary "medicine," the prescription of which in grievance arbitration is carefully monitored and administered depending on the nature and severity of the "illness."

Absent explicit agreement of the parties there is a paucity of arbitral support for pure strict liability in industrial jurisprudence.[44] Perusal of arbitral opinions reveals that most arbitrators who have addressed the role and propriety of strict liability in grievance arbitration have tempered that system of liability with just cause. Strict liability in grievance arbitration is the distinct exception rather than the custom. In effect the exceptional status of strict liability raises a rebuttable presumption in favor of fault-based work rules and against their no-fault counterparts. Rebuttal of this presumption requires proof of an intent to replace traditional fault-based disciplinary systems with pure no-fault systems.[45] And, as discussed below, even if strict liability is upheld, it is tempered with just cause.[46] Furthermore, it is essential that employees subjected to a strict-liability disciplinary system have clear notice thereof.

"No-fault" attendance plans are perhaps the most common examples of strict liability in labor-management relations and generally have been accepted as "reasonable" exercises of managerial authority under management

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[43] Observe, however, that even under a system of strict liability, the mere violation of a work rule does not necessarily dictate the proper severity of discipline.

[44] This is not to say that application of pure strict liability is unknown in industrial jurisprudence. To the contrary, other matters equal, even blameless employees who sufficiently threaten their employers operations may be disciplined, up to and including discharge. A quick example makes the point. Suppose some hapless employee is stricken with a malady requiring protracted hospitalization. Suppose further that the employee is wholly blameless in having contracted the malady. Few would seriously contend that at some point the employer may fire the employee, however innocent or blameless he may be. The justification here is that any rational definition of just cause would permit an employer to protect the integrity of its operational efficiency from even the most innocent employee.

[45] Such intent may be evinced either through direct evidence without an inference, or through circumstantial evidence of sufficient strength to support a reasonable inference of the requisite intent.

[46] Restated, strict liability is balanced against just cause.

rights clauses.[47]

Hughes Aircraft Co. v. Electronic & Space Technicians, Local 1553 typifies this view.[48] There, the employer unilaterally developed and implemented a "no-fault" attendance plan that held employees strictly liable for all "chargeable absences," regardless of mitigating factors.[49] Violations triggered automatic penalties. The arbitrator reasoned as follows:

> The company derives its right to develop and promulgate attendance plans from its right to discipline and discharge *for 'cause.'* The latter right is explicit in . . . [the contract]. The grounds for discipline and discharge are based *in 'causes'* and not necessarily the *preconditions* established by the Company for its actions in regard to violations of . . . its attendance plans.[50]

Similarly, in *Iron Workers Local 473 v. Spx Corporation*[51] the parties' contract contained a "no-fault" "excessive absences provision" permitting employees to be terminated, regardless of whether most absences were justified. The grievant was fired for exceeding the quota of absences over a 3-year period. The dispute focused on whether two justified absences should have been counted against the grievant. In sustaining the grievance the arbitrator reasoned:

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[47] Furthermore, as is the case with most issues in grievance arbitration, there exists a continuum of arbitral views regarding the applicability of strict liability in disciplinary matters. Arbitrators at one end of the continuum arguably view strict liability as inherently antipodal to just cause, with the latter trumping the former. Restated, subscribers to this school of thought seem to embrace a strong rebuttable presumption that the parties intended to couch their work rules in a fault-based (or just-cause) system of liability. Rebuttal of that presumption requires an clear manifestation of intent by the parties to reject just cause in favor of strict liability. Absent such an intent, arguments in support of no-fault disciplinary systems may very well fall on deaf arbitral ears.

[48] 105 Lab. Arb. (BNA) 1187 (Concepcion, Arb. January 12, 1996)

[49] The purpose of the Absence Control Policy, as with others, is to control the overall attendance of employees and protect the Company's interest in a steady and reliable work force. While arbitrators generally have found "no-fault" absenteeism plans to be reasonable, many believe that the principle conflicts with a "just cause" standard of discipline. Their reasoning is that the crucial issues of whether the employee's absence is misconduct, and whether the penalty is reasonable, are removed from the arbitrator's reach. All that is left is a hollow mechanical function.

[50] *Id.* (emphasis added).

[51] 1999 WL 555840 (Eglit, Arb. February 22, 1999).

> There has to be some assessment of whether the absences that constituted the grounds for that termination were *justifiable* or not. Otherwise, if in fact no such *assessment* were to be made and no possible account to be taken of *extenuating circumstances* (a massive traffic jam; a tornado; a flood; a sudden illness that rendered the employee immobile; etc.), the *excessive absences language effectively would create a strict liability system,* allowing discharge *without fault,* and thereby the proper cause language . . . would lose all meaning and significance. The arbitrator is unprepared to equate proper cause as contemplated in . . . [the contract] with undifferentiated "excessive" absences. Absent any showing here by the employer that [the Grievant] . . . excessive absences could not be justified by explanations that would relieve her of *blameworthiness,* the arbitrator is unable to credit the employer's excessive absences argument.[52]

In addition, arbitrators Block and Mittenthal published an influential article, addressing the propriety of "no-fault" attendance plans.[53] These authors initially note that consistent with the collective bargaining agreement

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[52] *Id.* (emphasis added). *See also* Perfection Bakeries, Inc. and Teamsters, Local 135, 1997 WL 912655 (November 22, 1997, KLEIN, Arb) (implicitly rejecting an employer's argument for strict liability where the grievant, a route sales driver, received a three-day suspension for improperly servicing his delivery route. The employer had notified all employees that "failure to service route[s] properly was a disciplinary infraction. En route to denying the grievance, the arbitrator carefully examined the Union's mitigating circumstances, thereby implicitly endorsing the inaptness of strict liability. Proper application of strict liability would have rendered superfluous any examination of mitigating circumstances); In Re Rustco Products Co. and Teamsters, Local 435, 79 Lab. Arb. (BNA) 717 (Hogler, Arb. August 24, 1982) (rejecting the employer's argument for the application of vicarious liability where the Grievant's wife (a non-employee) routinely accompanied him to work. During one visit, she subjected another non-employee to verbal abuse for having drank with the grievant. The Employer argued that the Grievant caused, and was thus vicariously liable for, the assault, insofar as he brought his wife to work with him.
The arbitrator flatly rejected the strict liability argument. In his view, "the concept of 'cause' as a basis for industrial discipline *inherently demands some degree of fault attributable to the accused employee.*" An "employee can only be deemed responsible for conduct over which he has a meaningful degree of control and over which, either negligently or willfully, he does not exercise control, to the detriment of the employer. Absent such a standard, discipline would be punitive rather than corrective"); In Re Arvin Industries, Inc. and IBEW Local 1331, 109 Lab. Arb. (BNA) 539 (Keenan, Arb. July 28, 1997) (Subjecting an employer's explicit, zero-tolerance physical altercation policy to a fault-based analysis and sustaining. Specifically, the arbitrator balanced the altercation policy against the contractual just cause provision and "arbitral procedures." In the arbitrator's view, a company's unilateral policy is a "norm" and not a "rigid" "inflexible rule which controls in every factual situation." "Violation of the policy is not prima facie cause for discipline or discharge." Otherwise the zero-tolerance policy would effectively read the just cause clause and "grievance/arbitration machinery," which the parties jointly adopted, out of the contract. According to the arbitrator, the just-cause test rather than the zero-tolerance policy controls. And the arbitrator determines just cause "based upon the Agreement, the particular facts of the case" and other factors like a grievant's "work record, service to the Company and the consistency and non-discriminatory manner in which the Company has disciplined employees; Interior Steel Equipment Co. v. IAM, District 54, 1993 WL 800858 (Minni, Arb. February 15, 1993)(same approach); Crystal Lake Elementary School Dist. No. 47 v. Service Employees International Union Local No. 1, 1995 WL 1103964 (Cook Arb. July 20, 1995) (Same approach).

[53] "Arbitration and the Absent Employee," Proceedings of the 37th Meeting of the National Academy of Arbitrators, topic: "No-Fault Absentee Plans," pp. 94-104. *See also,* Hill & Sinicropi, Management Rights, BNA, 1986, pp. 68-70; Bornstein & Gosline, Labor & Employment Arbitration, Ch. 21, Tener & Gosline, "Absenteeism

management may adopt reasonable rules and regulations about attendance. Indeed, the authors conclude that "fault" is indelibly imprinted on even the most explicit and acceptable no-fault plans.[54] That is, "no-fault" policies may not conflict with the just cause standard. The authors additionally observe that most arbitrally approved plans have, the following traits among others: (1) fully apply progressive discipline to violations; and (2) allow employees to rehabilitate themselves. Finally, Block and Mittenthal resolve that to be fully acceptable under a just cause clause a "no-fault" plan must be something of a hybrid, permitting a "just cause" review when appropriate. The foregoing decisions and article correctly indicate that before *any* work rule becomes a basis for discipline, it must safely negotiate the "straits" of just cause, even where the work rule is explicitly premised on pure *strict liability.*

Application of the foregoing decisions and article is decisive in the instant case. First, rules "0" and "Y" are silent as to strict liability. Second, the Arbitrator can locate no mention of strict liability in either the Collective-Bargaining Agreement or other provisions or regulations in the arbitral record. Such silence regarding strict liability reasonably indicates that the parties intended to couch their work rules in a fault-based system. Finally, there is no indication that troopers were notified that either Rule "0" or Rule "Y" was to be implemented under a system of strict liability. Accordingly, the Arbitrator cannot accept the proposition that Rules"0" and "Y" are to be enforced under strict liability.[55]

E. Inferred Motive

Alternatively, the Highway Patrol argues that even if its work rules are fault-based, "The Grievant's motive for failing to notify the Employer can be surmised based upon the impact of the order.... The impact is clear; while

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& Tardiness," Matthew Bender, 1990, topic: "No-Fault Plans and the Just Cause Standard," Sec, 21.02[3].

[54] *Id.* at 104. Tener & Gosline stress that the policy provisions must be clear (Sec. 21.02 [4]) and that the provisions of the policy must be "reasonable." (Secs. 21.02 [4][a]-[b]). They stress that the policy must distinguish between types of absences and that it should contain some provision allowing for a distinction between individual length of service. Furthermore, general just cause principles relating to disparate treatment and lax enforcement necessarily apply to the administration of no-fault policies.

[55] Finally, insofar as the Employer suggests that all work rules operate under a system of strict liability, the Arbitrator can find no precedent for that proposition.

the court order is in effect, the Grievant cannot perform the duties of a state trooper."[56] The Employer also stresses that the Grievant was in possession of the November 1 EPO from November 1, 2000 until his reinstatement on April 23, 2001.

At bottom, this argument indirectly attempts to establish culpable knowledge and, hence, intent. In other words, the following implicit propositions underlay the argument that the Grievant's silence was motivated by a desire to avoid the adverse impact of the weapons' restriction on his job capabilities: (1) the Grievant therefore actually knew about the weapons restriction; and (2) the Grievant intentionally remained silent about the weapons' restriction. The difficulty is that the argument contains nothing to establish either actual knowledge of the weapons' restriction or an intent to remain silent.

Furthermore, even the facial purpose of the argument—use of the likely impact of the weapons' restriction to draw an adverse inference about the Grievant's motive for silence—is unavailing. To link likely job-impact with motive, one must establish two other facts: (1) that the Grievant actually knew that the weapons' restriction would preclude him from working the roads, and (2) that the Grievant *actually* knew that the November 1 EPO contained a weapons restriction. The first requirement is satisfied because commonsense is an acceptable basis for charging the Grievant with knowledge that the weapons' restriction would adversely impact his capacity to perform his job as a trooper. In other words, commonsense, with which the Grievant is charged, establishes that a trooper cannot patrol the highways without a weapon.[57] However, the second criterion, actual knowledge, is not established.

F. Knowledge and Intent

1. Actual Knowledge of and Intent to Conceal the November 1 EPO

Rule 4501:2-6-02 (0) (1) provides: "Members shall report in writing, as soon as possible, to his/her

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[56] *Id.*

[57] Since the Order was to remain in force for several years, it was unlikely that the Grievant could have found a temporary position, in the Highway Patrol, that did not require him to possess or own a weapon.

supervisors, any court action instituted against them."[58] The Grievant was fired specifically for "failing to notify the Ohio State Highway Patrol that he was under a Civil Protection Order that *prohibited him from buying, receiving, or possessing a firearm and therefore is unable to perform the essential functions of a trooper.*"[59] The foregoing language shows that the Grievant was fired for failing to inform the Highway Patrol of the *weapons restriction* in the November 1 EPO and not for failing to report the November 1 EPO itself. Indeed, during the arbitral hearing on July 10, 2001, the Employer stressed the existence of the weapons' restriction and the Grievant's failure to reveal it, rather than the existence and concealment of the November 1 EPO itself. Obviously, it was the Grievant's failure to report the weapons restriction that triggered his removal. This distinction is important because, as discussed below, the record shows that the Grievant clearly had actual knowledge of the November 1 EPO—he admitted having it in his possession—but the record does not establish that he had actual knowledge of the weapons restriction therein. Given the Grievant's actual knowledge of the November 1 EPO, one might reasonably perceive his silence about *that document* as intentional. Under the circumstances of this dispute, however, that conclusion is irrelevant.

2. Actual Knowledge of and Intent to Conceal the Weapons Restriction

The record lacks preponderant evidence to establish that the Grievant possessed actual knowledge of the weapons' restriction on April 23, 2001. To establish actual knowledge the Employer must adduce either direct evidence thereof—in which case no inference is needed—or circumstantial evidence sufficient to support a reasonable inference of the Grievant's actual knowledge of the weapons' restriction on April 23, 2001. The Employer offers no specific arguments as to actual knowledge, but the Union insists that the Grievant first gained actual

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[58] Joint Exhibit No. 3, at 6.

[59] Id. at 4. *See also, id.* at 2, pre-disciplinary notice, stating in relevant part: Notice is hereby given that the Director of Public Safety, Maureen O'Connor, intends to terminate your employment with the Ohio State Highway Patrol for violation of Rule 4501:2-6-02(0)(1) and Rule 4501:2-6-02(Y)(2) of the Ohio State Highway Patrol Rules and Regulations, *to wit: It is charged you failed to notify the Ohio State Highway Patrol that you were under a Civil Protection Order that prohibited you from buying, receiving, or possessing a firearm and therefore unable to perform the essential functions of a trooper.* (emphasis added).

knowledge of the weapon's restriction on May 7 or 8, 2001, when a union representative so apprised him.[60]

The Union proffers several factors that allegedly reduced the diligence or care that the Grievant exercised when he read the November 1 EPO, thereby precluding him from obtaining actual knowledge of the weapons restriction when he read that document. For example, the Union alleges that the Grievant was unconcerned about weapons restrictions because he thought he could be barred from possessing firearms only if he either pled guilty to or was convicted of domestic violence.[61] Next, the Union claims that, while reading the November 1 EPO, the Grievant noticed the unmarked caption therein regarding possession of firearms.[62] According to the Union, the Grievant concluded that this unmarked section indicated an absence of weapons restrictions and therefore failed to carefully read the entire EPO. The Grievant was also allegedly preoccupied with the establishment of his medical appointments and with his right to visit his children. Finally, the Union claims that Grievant allegedly failed to peruse the November 1 EPO because he believed it would be lifted before his reinstatement.

Actual knowledge is inherently difficult to establish because it usually requires either verbal admissions (direct evidence) or clearly inculpating conduct, from which actual knowledge may be reasonably inferred. The Union's reasons purportedly explaining why the Grievant lacked actual knowledge of the weapons' restriction must be balanced against a pivotal statement he made while testifying before the Undersigned at the arbitral hearing on June 10, 2001. The Grievant was asked whether he saw the weapons restriction when he read the November 1 EPO, and he answered: "I might have looked it over but I really didn't read into it." The Arbitrator interprets "didn't read into it" to mean that the Grievant simply glanced over the weapons restriction but read other sections of the November 1 EPO more carefully. An admission to having read a document would ordinarily suffice to establish an inference of actual knowledge.

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[60] Joint Exhibit No. 4, at 2.

[61] *Id.*

[62] Joint Exhibit No. 4, at 6.

Given the evidence in the instant case, however, one cannot gainsay that it is more probable than not that the Grievant *actually* read the weapons restriction carefully enough to understand it and, thus, to obtain actual knowledge of it.[63] Clearly, several factors tended to contraindicate the existence of a weapons' restriction. First, during the November 1 evidentiary hearing the court failed even to mention (let alone discuss or request evidence relevant to) a weapons' restriction. Second, the only other EPO, of which the Grievant had possession was the September 1 EPO,[64] in which he was deemed him "armed/dangerous."[65] Inexplicably, that EPO contained no weapons' restriction, while the November 1 EPO included a restriction but did not deem the Grievant to be either "armed" or "dangerous." Also, during the arbitral hearing in this dispute the Grievant credibly testified that he was distracted not only by the need to establish some type of schedule with his caretaker, but also by concerns about visitation rights with his children. In light of these circumstances, one is hard-pressed to conclude that preponderant evidence in the arbitral record establishes that the Grievant had the presence of mind to have scrutinized the November 1 EPO and gain actual knowledge of the weapons restriction before his reinstatement on April 23, 2001. Finally, that the Grievant held the November 1 EPO from November 1, 2000 presumably to April 23, 2001 does not establish actual knowledge. In short, length of possession without more does not demonstrate *actual* knowledge. Accordingly, the Arbitrator finds that the Grievant lacked actual knowledge of the November 1 EPO on April 23, 2001.

3. Constructive Knowledge of the Weapons Restriction

As to the Grievant's constructive knowledge, the Employer generally contends that: "Grievant's mental attitude regarding his failure to report the court order can be inferred by the relevant circumstances and obvious

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[63] This conclusion is limited to the Grievant and is not intended to address whether the Union itself read and understood the weapons restriction. Even if that were true, the Arbitrator would not charge the Grievant with the Union's knowledge in this case. In any event, there is no evidence other than the Union's possession of the November 1 EPO to indicate that the Union read and understood the weapons restriction.

[64] Joint Exhibit No. 4, at 19.

[65] Joint Exhibit No. 4, at 17-18, 19, 24, 25.

consequences of the order."[66] The Union predictably claims that the arbitral record fails to establish that either the Union or the Grievant knew or had reason to know of the restriction essentially because the court sprung it on the Grievant, without benefit of previous discussion or mention.

Constructive knowledge differs from actual knowledge in several respects. First, constructive knowledge is less difficult to establish. Second, constructive knowledge serves at least one broader policy-related purpose not necessarily addressed by actual knowledge: Constructive knowledge effectively plugs loopholes created by self-serving disavowals of knowledge that one otherwise would have (and should have) acquired through the exercise of due diligence or reasonable care. As a result, constructive knowledge can and often does rise to the level of a legal fiction to thwart self-service and nonfeasance.

Preponderant evidence, in the arbitral record, demonstrates that on April 23, 2001, the Grievant had constructive knowledge of the weapons' restriction. That is, he should have known of the weapons restriction when he was reinstated, on April 23, 2001. First, that the Grievant did not carefully read the November 1 EPO neither excuses nor addresses whether he should have read it, or whether he should be charged with knowledge of its contents, even if he did not read the November 1 EPO. Second, although the Grievant lacked actual knowledge of the weapon's restriction, he admits that he possessed and glanced over the November 1 EPO, including the weapons restriction.[67] This pivotal fact together with the Grievant's possession of the November 1 EPO constitutes a sound basis from which to infer constructive knowledge. Third, as a general proposition, one carelessly reads such a document at one's own imperilment. Fourth, there is even greater reason to expect a law enforcement officer to scrutinize an official court order that he possess, especially where, as here, the officer is the subject of the document. In other words, irrespective of whether the Grievant carefully examined the November 1 EPO, the nature of his position, the urgency of the situation surrounding the issuance of the November 1 EPO, and his possession of (and

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[66] Employer's Post-Hearing Brief, at 5.

[67] Joint Exhibit No. 4, at 5-6.

opportunity to read) that EPO justify charging him with constructive knowledge of its contents. Fifth, failure to charge the Grievant with constructive knowledge here would offend the well established arbitral principle of charging employees with constructive knowledge of the contents of their sometimes voluminous collective bargaining agreements. It, therefore, would be manifestly inconsistent and inequitable to allow the Grievant to deny constructive knowledge of the contents of a two or 3-page judicial document. Finally, circumstances surrounding the issuance of any court order might reasonably be viewed as creating a greater sense of urgency, relative to circumstances surrounding the general provisions of a collective bargaining agreement. The Undersigned therefore holds that the Grievant possessed constructive knowledge of the weapons' restriction.

4. Intent to Conceal the Weapons Restriction

The arbitral record does not demonstrate that the Grievant intended to withhold the existence of the weapons' restriction from the Highway Patrol because he lacked actual knowledge of that restriction on April 23, 2001. Charging the Grievant with constructive knowledge is not the same as holding that he intentionally misrepresented the truth by deliberately and consciously withholding information from the Employer. Although constructive knowledge is clearly a basis for inferring negligence, it is less acceptable as a basis for inferring actual intent.[68] In the instant case, the evidence establishes that the Grievant should have known about the weapons restriction and was duty-bound to inform the Employer thereof. His failure to do so arose from his failure to exercise due care in reading a judicial document in his possession. As a result, the Arbitrator holds that the Grievant did not

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[68] Although the courts are not unanimous on this point, most agree. *See, e.g.*, Silvera v. Orange County School Bd., 244 F.3d 1253 (11th Cir. Mar 20, 2001) (holding Discrimination is about actual knowledge, and real intent, not constructive knowledge and assumed intent); Pressley v. Haeger, 977 F.2d 295, 297 (7th Cir.1992) (stating, in employment discrimination case, "[r]acial discrimination is an intentional wrong. An empty head means no discrimination. There is no 'constructive intent,' and constructive knowledge does not show actual intent"); 12. Gasho v. U.S., 39 F.3d 1420 (9th Cir. 1994) (Holding, it is unreasonable to infer specific intent merely on the notion that . . . [the accused] should have known that the logbooks were part of the aircraft"); Phillips v. United States, 356 F.2d 297, 303 (9th Cir.1965) ("Holding actual knowledge, not constructive knowledge, of invidious act allows an inference of specific Search intent"); Shipe v. Mason, 500 F. Supp. 243 (E.D.Tenn.1978) (holding, intent to defraud means willful act with specific intent to deceive); Jones v. Fenton Ford, Inc., 427 F. Supp. 1328 (D. Conn.1977) (Holding, "intent to defraud may be inferred from recklessness").

intentionally withhold information about the weapons' restriction from the Employer on April 23, 2001.

VIII. Penalty Decision

Because the Grievant violated Rules "O" and "Y," some measure of discipline is warranted. To ascertain the proper quantum of discipline, one must assess both aggravative and mitigative factors. Furthermore, the Arbitrator lacks authority to modify the termination unless the assessment of these factors reveal that the decision to terminate the Grievant was arbitrary, capricious, or unreasonable.

A. Mitigative Factors

Several mitigative factors exist here. First, when he was fired the Grievant had approximately 13 years of service with the Highway Patrol. Second, and more important, as a thirteen-year veteran the Grievant had no active discipline on his record. Third, the record does not establish that upon being reinstated he deliberately or intentionally refused to apprise the Highway Patrol of the weapons' restriction. Instead, all that can be reasonably inferred or deduced from evidence in this record is that the Grievant negligently failed to read the November 1 EPO with due care and negligently failed to apprise the Employer of the weapons' restriction. As a general proposition the quantum of discipline reserved for negligent conduct is less than that reserved for its intentional counterpart. Fourth, the principle of progressive discipline is applicable here. Finally, although not a *per se* mitigative factor, the record lacks a penalty table to guide the Arbitrator in determining the Parties' conception of progressive discipline.

B. Aggregative Factors

The major aggravative factor is that, upon his April 23 reinstatement, the Grievant violated his clear duty under Rule "O" to timely apprise the Highway Patrol of the weapons' restriction. This duty would seem to be especially clear and acute, given the nature of the Grievant's job and the impact of that restriction on his ability to perform his duties.

This balance of aggravative and mitigative factors indicates that termination of the Grievant is unreasonable.

Instead, the principle of progressive discipline should prevail in the interest of rehabilitating the Grievant and encouraging him to exercise greater care in the future where work rules and legitimate duties hold sway. Restated, the demonstrated negligent conduct hardly warrants the termination of a thirteen-year veteran trooper with a blemish-free disciplinary record. Accordingly, the Grievant's removal shall be reduced to a thirty-day suspension without pay. The Grievant's seniority shall remain undisturbed, as if the termination never occurred. This order of reinstatement is premised on the explicit condition that the Grievant is otherwise fit to resume full duties as an Ohio State Trooper upon receipt of this opinion and award.

IX. The Award

For all the foregoing reasons, the Grievance is hereby **SUSTAINED IN PART AND DENIED IN PART.**

Notary Certificate

State of Indiana)

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County of Marion

Before me the undersigned, Notary Public for Marion County, State of Indiana, personally appeared Robert Brookins, and acknowledged the execution of this instrument this 17th day of September, 2001

Signature of Notary Public: Sandra Swedlund

Printed Name of Notary Public: Sandra Swedlund

My commission expires: 3/31/2007

County of Residency: Hendricks

Robert Brookins

Robert Brookins