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OPINION AND AWARD # 1594

In the matter of Arbitration

Between

The Ohio State Troopers Association, Inc.

And

The State of Ohio, Department of Public Safety,
Ohio State Highway Patrol

Regarding

Grievance Number OCB# 15-00-020408-0059-04-01
(Trooper Michelle White)

APPEARANCES:

FOR THE STATE:

S/ Lt. Reginald Lumpkins, Advocate
Robert J. Young, Human Resources
Neni Valentine, OCB Representative
Linda Workman, Witness
Charles Bower, OHP Investigator
Mark Masters, Witness
Charles McDonnell, Witness
Valeria Perkins, Witness

FOR THE UNION:

Herschel M. Sigall, General Counsel
Elaine N. Silveira, Attorney
Dennis Gorski, President
Robert Cooper, Staff Representative
Michelle L. White, Grievant

An arbitration hearing was conducted May 14, 2002 at the Ohio Office of Collective Bargaining Columbus, Ohio.

The issue jointly submitted in this case is stated as follows: ***"In conformance with Article 20, Section 20.08 of the Collective Bargaining Agreement, the parties submit the following statement of issue, for resolution by the arbitrator. Was the grievant terminated for Just Cause? If not, what shall the remedy be?"***

The Troopers Association contends that sections 19.01 and 19.05 of the Collective Bargaining Agreement were violated:

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.

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 merit, 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.

The grievant in this matter is charged with violation of two sections of OHP Rule 4501:2-6-(02) (B) (1) (5) **Performance of Duty/Inefficiency**. Section (1) states:

A member shall carry out all duties completely and without delay, evasion or neglect. A member shall perform his/her duties in a professional, courteous manner.

Section (5) adds:

Members who fail to perform their duties because of an error in judgment or otherwise fail to satisfactorily perform a duty of which such member is capable, may be charged with inefficiency.

The statement of the grievance is: "On April 2, 2002 I was terminated without just cause and in violation of progressive discipline"

The remedy requested was: "to be reinstated as my position of Trooper with full back pay, seniority, benefits and be granted transfer to Zanesville, to be made whole."

Both parties were given full opportunity to examine witnesses, pose arguments and present their respective cases. Closing briefs were received within the time period agreed to by the parties.

All testimony and materials, including the viewing of Video and Audio tapes, were reviewed and considered by the arbitrator in reaching this decision.

In that this case deals with a matter of discipline, management assumed the burden of proof and presented its case first.

The parties agreed that the case was properly before the Arbitrator for determination.

MANAGEMENT'S POSITION:

The Highway Patrol charged Trooper. Michelle L. White with violation of Rule 4501:2-6-(02) (B) (1) (5) **Performance of Duty/Inefficiency**, to wit: it is charged that on January 28, 2002 you

failed to take appropriate action after being informed that an armed robbery had just occurred.

Management contends that Grievant was negligent in her handling of an armed robbery with which she had contact, on the night of January 28, 2002

Trooper White returned to the Cambridge Post of the Highway Patrol near the end of her shift. While in the parking lot, she heard a request from Trooper Masters that the Cambridge Police Department be contacted and requested to send a unit to his location. She attempted to go to the aid of Trooper Masters.

While in route, Trooper White apparently nearly hit a pedestrian. At the same time a clerk at the Working Man's Friend Gas Station flagged Trooper White down. She pulled into the gas station and spent 10-11 seconds there. She did not leave her cruiser. She apparently attempted to radio someone to no avail. She then left the gas station parking lot and continued to attempt to find Trooper Masters.

After Trooper Masters cleared the scene, Trooper White continued to look for him for a while and then returned to the post past the Working Man's Friend.

In managements view Trooper White made a number of errors on January 28. These started when she decided to respond to a call without being dispatched and without finding out where she was going.

The major infraction, and the one with which she is charged, is her behavior the robbery scene.

Management charges that she did not pursue the suspect, secure the crime scene or provide assistance to the clerk Nor did she properly report the crime by sharing the information she had as an eye-witness, with the Cambridge Police Department..

They further charge that she failed to stop and report the information she had to the investigating officers, upon her return past the crime scene.

Management feels this clearly constitutes a violation of the cited rule and believes the proper penalty is termination.

UNION POSITION:

The union believes Trooper White did nothing wrong and that she should be commended for her initiative in being willing to go to the aid of a fellow trooper, rather than being terminated.

The union believes that someone in the chain of command determined that Trooper White was not a good trooper and thus the Administrative Investigation was a further step toward getting rid of a "malingerer".

In proof of their assertions, the union offers a record of the attempts to monitor the absences of Trooper White by Sergeant Perkins, prior to her surgery for gall bladder removal. This documentation, the union suggests, is evidence that management was "out to get" Trooper White.

The union also believes management determined Trooper White was afraid to perform police duties, without proof, and that this premature conclusion also colored the judgment of Patrol decision makers in deciding to terminate Trooper White.

The Union argues that the patrol was not clear in stating what the grievant should have done in the instant situation.

DISCUSSION:

Not often does one see a case where the respective parties substantially agree on the facts of the matter but are diametrically opposite in their interpretation as to the meaning.

The union would have me believe Trooper White is eligible for commendation because of her decision to go to the aid of Trooper Masters. Management would have me believe that Trooper White totally failed in her duty as a sworn police officer and must be removed for the protection of the citizens of Ohio.

This arbitrator lacks sufficient information to decide if it was a wise or unwise decision to go to the aid of Trooper Masters. . Regardless of the wisdom of thi initial decision, this is not the issue with which Trooper White has been charged.

Let us look at what we know happened surrounding the gas station. We know Trooper White nearly hit a pedestrian who was

running across the street. While there is confusion surrounding the location of Trooper White's cruiser, we know the grievant saw Linda Workman waiving and immediately entered the gas station lot and pulled to the location of Ms. Workman.

Ms, Workman said Trooper White did not say anything to her when she stopped. We know that Ms. Workman was understandably upset. Trooper White states that she asked Ms. Workman if she was injured. She believed that Ms. Workman has "said something about the police." She then stated she attempted to notify the Highway

Patrol Post of the robbery but was unable to do so. Trooper White also stated that she was able to see that there was no one in the station.

The tape indicates that Trooper White was physically present for 10-11 seconds. It is not possible to accomplish all of the things Trooper White remembers in that period of time.

If we then consider the testimony of Trooper Masters, which I find to be highly credible, we are told that Trooper White told him that she was "scared and didn't know what to do."

The wording Trooper White chose to refute the statement of Trooper Masters is very interesting. She said: " I never admitted to anyone that I was scared of anything. I don't believe I said that."

We know for a fact she did not attempt to pursue the robber. We know she did try to contact someone on her radio but was apparently unsuccessful in doing so. We know Trooper White did not stay with Ms. Workman, or go into the station to call the police or to secure the crime scene. We know she did not attempt to reach the post on a different frequency or her personal radio device.

We know Trooper White continued her journey to find Trooper Masters and was unsuccessful in doing so. We know she returned

past Working Man's Friend while the Cambridge Police were on the scene and did not stop to report her information to them.

In the view of this Arbitrator, the Highway Patrol has proven that Trooper White was in violation of Rule 4501:2-6-(02) (B) (1) (5) **Performance of Duty/Inefficiency.**

The question then arises about the appropriateness of the penalty.

The termination of employment is a very serious action. The collective bargaining agreement states that *"no bargaining unit member shall beremoved except for just cause.*

Section 19.05 adds: *"The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. However, more severe discipline (or a combination of disciplinary actions) may be imposed at any point if the infraction or violation merit, the more severe action."*

A review of the disciplinary record of Trooper White reveals only one other non-related entry.

The infraction proven is a very serious one. Notwithstanding the discussion of proper jurisdiction of the crime scene, the citizen (Linda Workman) who signaled for help, saw only a uniformed, sworn police officer. She was relieved, believing that she would now be

protected and assisted. Instead she met a Trooper who contacted no one, stayed only 10-11 seconds and sped off on a quest that she either knew, or should have known, was not an emergency situation.

Once Trooper White did reach the post on the radio, trying to find out where she was going, she still failed to mention the robbery she had just left.

Even though the infraction is an extremely serious one, the penalty seems to be a particularly harsh one. While arbitrators must avoid substituting their judgment for that of the decision makers, we are charged with deciding if penalties meet the tests of just cause and to assure they are not arbitrary or capricious.

In addition to the apparent harshness of the penalty, there are several troublesome aspects to this case. It is clear that there existed a tension between Sergeant Perkins and Trooper White. Union exhibit 2 illustrates a suspicion about the appropriateness of Trooper White's absences. The confrontation between the two regarding "inappropriate radio traffic" again seems to be too much about too little.

Union exhibit 1 illustrates that someone in the Chain of Command reached the conclusion that Michelle White was afraid to do her job.

In order to uphold this removal, this arbitrator must be convinced that the grievant is unable to function as a Trooper and that the infraction is severe enough to support this most serious disciplinary action.

The most compelling evidence offered was by the grievant during her examination by the Patrol Advocate. The grievant explained how she was continuing to the aid of Trooper Masters when she received a message from Sergeant Perkins telling her

Trooper Masters had cleared the scene and asking her if she was O.K. with that? She responded that she was and then continued to look for Trooper Masters.

When questioned why she did not stop and return she responded that she had not personally heard Trooper Masters clear the scene. It was abundantly clear to this arbitrator that she either did not understand the most basic police procedure or she had another reason to continue on her self appointed mission. The post had given

her an instruction, she had acknowledged that instruction and then chose to do what she wanted.

Notwithstanding any ill will that might exist between her and Sergeant Perkins, no paramilitary organization can exist when persons fail to understand or accept the basic reporting structure.

The examples continued when asked why she did not stop at Working Man's Friend to consult with police upon her return. She responded that her radio was not working and that the post was only a minute away.

The basic point was missed that she had first hand information that could aid another police organization and such information,

which was getting staler by the minute, could best be conveyed in person. Instead she returned to the post. When confronted by Sergeant Perkins she failed to say "I need to call the Cambridge Police Department first." Instead she gave the Sergeant only part of the story, telling her about nearly hitting the suspect, but failing to tell her about stopping at the station immediately after the robbery.

The final point noted by this arbitrator relates to a question asked about radio communication. When asked if she tried another

radio, or tried to contact Trooper Masters directly, or did she try another frequency, it was apparent that she had tried none of these..

One plausible explanation for these three answers is that Trooper White did not want to be in or around the Working Mans Friend even though a felony had occurred in which she had involvement. This is a serious failure of the duty of any sworn police person.

Even without the qualifying language about commensurate discipline, other arbitrators have held that a proper application of "progressive discipline" does allow a first time removal for a serious performance of duty/ inefficiency infraction..

In a 1996 Cleveland Case wherein a Police Officer had lost her weapon, Arbitrator Allen wrote:

The discipline should be in proportion to the seriousness of the offense. Certain types of misconduct are so serious, by their nature, as to warrant a discharge for the first violation. Negligence can be so serious as to justify a discharge without prior warnings. The negligence of a police officer may justify a termination of employment without the application of "progressive" discipline.¹

In conclusion, while the penalty appears severe, and it appears that Sergeant Perkins was very tough on the grievant, the bottom line

is that the grievant did violate a significant rule of the Patrol and shows no sign of remorse or even understanding her infractions.

As a result, I find that just cause does exist to support the removal of the grievant from service with the Ohio State Highway Patrol.

DECISION AND AWARD :

The grievance is denied.

Issued at London, Ohio this 15th. day of July, 2002.


N. Eugene Brundige, Arbitrator

¹ In re: CITY OF CLEVELAND AND THE OHIO BENEVOLENT PATROLMAN'S ASSOCIATION, 106 LA 264, April 3, 1996 AAA 53-390-00444-95, Arbitrator Richard E. Allen.