

ARBITRATION DECISION

November 11, 2003

In the Matter of:

Ohio Department of Public Safety,)	
Division of State Highway Patrol)	
)	Case No. 15-00-021224-0204-04-01
and)	Timothy D. Dawson, Grievant
)	
Ohio State Troopers Association)	

APPEARANCES

For the Patrol:

Sergeant Charles Linek, Advocate
Amy Tait, OCB, Second Chair
Renee Byers, OHP
Captain Robert J. Young, OSP Representative
Staff Lieutenant Michael Greene, Witness
Police Officer Gary Lee Kelley, Witness
Staff Lieutenant Howard Hudson, Witness
Lieutenant Douglas Williard, Witness
Lieutenant Charles Bower, Witness
Lieutenant Colonel Michael Finnamore, Witness
Al Pierce, Witness

For the Union:

Herschel M. Sigall, Advocate
Elaine N. Silveira, Second Chair
Dennis Gorski, President
Wayne E. McGlone, Staff Representative
Timothy D. Dawson, Grievant
Paula Greene, Witness
Paula Mack, Witness
Janet Packard, Witness
Denny Hales, Witness
Skip Salome, Witness
Sergeant Kevin Brun, Witness
Jim Flowers, Witness
Fred "Corky" Wydra, Witness

Arbitrator:

BACKGROUND

The grievant, Tim Dawson, has been a trooper since October 8, 1980. He was promoted to sergeant in 1990. The grievant was assigned to Post 96 at the Ohio State Fairgrounds as the facility administrator on May 22, 2000. As the sergeant at the fairgrounds, he supervised several Highway Patrol police officers and one police officer sergeant.

The fairgrounds are the site for more than two hundred events each year. In approximately sixty of the cases the event organizers have selected the Highway Patrol to provide security. This means that the grievant and the police officers at the fairgrounds have the opportunity to work extra duty details for which they are paid by the event organizers.

The biggest event at the fairgrounds is the All-American Quarter Horse Congress, which is sponsored by the Ohio Quarter Horse Association. It lasts more than a week and brings \$126 million to the Ohio economy. For a number of years, the OQHA has used the Highway Patrol to provide security rather than a private security company or the Columbus Police Department.

In October 2002, three or four police officers assigned to the fairgrounds approached Staff Lieutenant Michael Greene with concerns about the grievant. They reported that he parked his horse trailer on the fairgrounds during the Quarter Horse Congress without paying the fee, received free tickets to the Professional Bull Riders Show that is held during the Quarter Horse Congress, and worked extra details while on the patrol payroll.

As a result of the complaints, a criminal investigation was begun on October 17,

2002. Staff Lieutenant Howard Hudson, who was the lead investigator, submitted his report to the Franklin County Prosecutor on October 28, 2002. The prosecutor threatened to charge the grievant with theft in office and bribery (two felonies), which would have prevented him from receiving his pension and prohibited him from carrying a firearm and would have barred him from any employment in law enforcement.

On April 3, 2003, the grievant appeared in Franklin County Municipal Court. He pled guilty to two ethics charges, which are first-degree misdemeanors. The grievant also paid a \$200 fine and \$472.52 in restitution to the patrol for the sixteen hours between November 2001 and November 2002 when he was paid by an exhibitor as well as the Highway Patrol.

On December 9, 2002, the patrol charged the grievant with violating Rule 4501:2-6-02(I)(1), Conduct Unbecoming an Officer, and Rule 4501:2-6-02(F)(1) and (F)(2), Reward, Bribes, Payment for Duty. On December 13, 2002, he was demoted to the rank of trooper and was transferred to the Mt. Gilead Highway Patrol Post.

The grievant filed a grievance on December 20, 2002. He charged that his demotion was a violation of the just cause provision of the collective bargaining agreement. The grievant asked to be reinstated to the rank of sergeant, reassigned to Fairgrounds Post 96, and to be made whole for any losses.

When the grievance was not resolved, it was appealed to arbitration. The hearing was held on August 19, 2003, and August 27, 2003. Post-hearing briefs were due on September 15, 2003, but the parties agreed to extend the time limits. Ultimately, briefs were received on October 2, 2003.

ISSUE

The issue as agreed to by the parties is:

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

RELEVANT CONTRACT PROVISIONS

Article 19, Section 19.01 - Standard and Section 19.05 - Progressive Discipline

PATROL POSITION

The patrol argues that there is just cause for the grievant's demotion. It points out that he admitted his fault by pleading guilty in a criminal court and by paying restitution to the Highway Patrol. The patrol charges that the union tried to "muddy the waters" by focusing on the alleged misdeeds of Greene and others.

The patrol challenges the union's reliance on the testimony of Greene's ex-wife. It claims that her testimony is the result of a bitter divorce that was finalized only one week before the arbitration hearing. The patrol notes that she did not come forward regarding the gratuities Greene received until she was contacted by the union. It observes that her testimony that he received two OQHA jackets from Al Pierce, who is in charge of security at the Quarter Horse Congress, was denied by Pierce.

The patrol acknowledges that both Greene and the grievant have received jackets. It indicates that both of them got jackets in 2002 and both returned them. The patrol stresses, however, that in 2001 both Greene and the grievant received jackets but only Greene returned his jacket.

The patrol questions the testimony of Denny Hales, an OQHA official, that every year he gave jackets to the two lieutenants responsible for security at the fairgrounds. It reports that although he specifically mentioned giving a jacket to Lieutenant Colonel

Michael Finnermore, Finnermore denied ever receiving one. The patrol observes that Hudson, Greene, Lieutenant Charles Bower, and Staff Lieutenant May, all of whom worked at the fairgrounds in the past, indicated that they never received free jackets.

The patrol claims that the union's attempt to show disparate treatment fell sadly short. It states that every time an allegation about an employee receiving a gratuity was investigated, it could not be substantiated. The patrol asserts that the only individuals mentioned at the hearing by the union who were not questioned were employees who had retired prior to its investigation.

The patrol indicates that Lieutenant Douglas Williard investigated the allegations that the grievant had engaged in double-dipping. It points out that he compared the grievant's starting times shown on the HP-29s and HP-53s with the sign-up sheets for the special duty details. The patrol notes that Williard also checked invoices to see that the grievant was paid for the special duty detail hours he signed up to work and the grievant's leave requests. It stresses that there were four special duty details where the grievant was on the patrol's payroll while also working an off-duty detail.

The patrol rejects the grievant's claim that he would typically split this shift to work the overtime details. It reports that for the Arena Motocross on December 2, 2001, the grievant changed his starting time from 7:00 a.m. to 11:00 a.m. and signed up to work the detail from 1:30 p.m. to 6:30 p.m. The patrol asserts that if he were trying to save his leave, he would have kept his morning starting time or even begun work earlier.

The patrol charges that the grievant failed to document his assertion that if he was supposed to work twelve or sixteen hours in conjunction with an off-duty detail, he did so. It observes that he could have reported this in the remarks sections of the HP-17s or the HP-29s. The patrol further notes that the grievant could have documented the times

he left the post in the typed HP-53s.

The patrol maintains that the most interesting discrepancy concerns the Good Guys Car Show that took place from July 11 to July 14, 2001. It indicates that on July 14 the grievant was scheduled to work from 7:00 a.m. to 3:00 p.m. and signed up to work a special detail from 8:00 a.m. to 6:00 p.m. so that he needed to request seven hours of leave. The patrol stresses that the grievant failed to request leave and that he initially admitted that he had "screwed-up."

The patrol questions the grievant's testimony on the second day of the arbitration hearing that he remembered that a fight had broken out at the show and that he was there until after midnight. It points out that the union never entered the record of the criminal investigation regarding the incident into evidence. The patrol notes that Sergeant Kevin Brun, who was involved in the incident, could not account for the grievant's whereabouts after 10:00 p.m., which leaves a three-hour discrepancy. It adds that even if the grievant worked until 12:00 midnight, there would still be one hour when the grievant was paid by the Highway Patrol and the promoter of the car show.

The patrol accuses the grievant of double-dipping in connection with the Don Scott Antique Show on November 25, 2001. It points out that he was scheduled to work the special duty detail and his regular shift from 7:00 a.m. to 3:00 p.m. but requested only four hours of leave. The patrol acknowledges that the grievant claimed that he worked after the detail ended but stresses that there is no evidence on the HP-29 or HP-17 that he did so.

The patrol contends that despite the fact that the grievant frequently adjusted his starting time or split his shift, it is not a common practice. It states that the grievant had the ability to make the changes to save his leave balances because he was the facility

commander. The patrol charges that "this self-serving practice affects morale and set the stage for the abuses that occurred." (Patrol Brief, page 6)

The patrol discounts the union's complaint that the HP-53Bs were missing from the payroll documentation. It indicates that the grievant was the person who was responsible for seeing that these documents were included with the other payroll documents. The patrol observes that the grievant stated on cross-examination that he could have requested the HP-53Bs from Post 96 and included them with the payroll documents. It stresses that in every payroll discrepancy the grievant was the one who audited the payroll and in two cases he also made the requested manual data entries.

The patrol challenges Denny Hales' testimony that Greene received an OQHA jacket and that he saw him wearing it. It points out that on October 19, 2002, Hales told Hudson that Greene got jackets the past two years but on both occasions returned them. The patrol notes that Greene testified that he purchased jackets at the show.

The patrol asserts that Hales conducts business by giving away jackets and other gratuities. It observes that Hales testified that he gave jackets, tickets, and VIP parking to the fire marshal. The patrol notes that while Kelley and Greene complained to Hales about the new traffic pattern at the Quarter Horse Congress, Hales testified that the fire marshal found nothing wrong with it.

The patrol challenges the testimony of Skip Salome, one of the tri-chairmen of the Quarter Horse Congress. It acknowledges that he testified at the arbitration hearing that he and Jim Flowers, the OQHA employee responsible for setting up and tearing down the Congress, were happy that the grievant's trailer was on the grounds because it meant that the grievant would be available 24 hours per day. The patrol emphasizes, however, that this contradicts what Salome told Hudson during the criminal investigation. It adds that

while Salome testified at the arbitration hearing that for 33 years the OQHA had given jackets to workers at the Quarter Horse Congress, he could not recall the name of a single Highway Patrol employee who had received one.

The patrol rejects the union's claim that the grievant's acceptance of gratuities did not impact his effectiveness in the administration of his office. It charges that he "affirmed his allegiance to the Quarter Horse Congress when he testified that the Quarter Horse Congress was his employer and not the State Highway Patrol." (Patrol Brief, page 8) The patrol complains that the grievant sided with the OQHA in the dispute over the new traffic pattern and failed to support Greene in the meeting with the OQHA about it.

The patrol dismisses the union's claim that the grievant did not violate the policy against accepting gratuities because at the time he accepted them he was working for the OQHA rather than the Highway Patrol. It points out that the rules and regulations make it clear that such behavior is not acceptable. The patrol notes that the union failed to produce a single witness to support "the ridiculous assertion that it is appropriate to receive gratuities while working in an off or on-duty status." (Patrol Brief, page 9) It stresses that those working under the grievant knew it was wrong and complained to Greene.

The patrol insists that there is no need for the Arbitrator to mitigate the penalty. It states that it already considered the grievant's clean department record and years of service when it elected not to terminate him. The patrol maintains that it is disturbing that after Kelley reported the problems to Greene, he received a threatening email from the grievant.

The patrol contends that the grievant admitted his guilt in Franklin County Municipal Court. It reports that he did not enter an Alford plea, as the counsel for the

union indicated in his opening statement, but pled guilty. The patrol observes that the grievant was also required to pay restitution for his sixteen hours of double-dipping.

The patrol maintains that the union failed to show that the grievant received disparate treatment. It acknowledges that the union alleged that other employees received gratuities but claims that the allegations were investigated and were not substantiated. The patrol complains that when it asked for the names of the employees, none were provided.

The patrol rejects the union's defense that the payroll documents were not completely filled out. It points out that the grievant was the facility manager at the fairgrounds and that payroll was part of his job duties. The patrol claims that the grievant was responsible for seeing that the paperwork was properly done.

The patrol maintains that the grievant cannot serve as a facility administrator or in any supervisory role. It asserts that he is a terrible role model for troopers and police officers. The patrol indicates that even if the grievant's payroll discrepancies are dismissed as a mistake, there was just cause for the discipline imposed.

UNION POSITION

The union argues that Greene determined to remove the grievant based on his own ego and insecurity. It points out that Greene used to deal directly with the OQHA but since his promotion the OQHA people have come to regard the grievant as their "go to guy." The union contends that this troubled Greene because he was a horse breeder and because the OQHA is preeminent among the equine associations. It further claims that he may have come to believe a report from police sergeant Gary Rice that OQHA officials were dealing only with the grievant and felt that it was an erosion of his

authority and an act of personal disloyalty on the part of the grievant.

The union maintains that Greene felt that his suspicions were confirmed when he learned that the OQHA had changed the traffic pattern for the 2002 Quarter Horse Congress. It notes that the administrative investigation summarizes his statement as follows:

Greene stated that the traffic pattern on the fairgrounds was changed without his knowledge or approval. Greene said he personally believes that there was an agreement between the AQHA people and [the grievant] in regards to the traffic pattern being changed. Greene said that in July of 2002, there was a meeting with the patrol and the AQHA officials and that the traffic pattern was one of the things discussed. Greene went on to say that no one from the Congress had contacted him reference changing the traffic pattern prior to it being changed. Greene stated that usually if there is a problem or something that needs changed, the Quarter Horse officials contact him. (Union Brief, page 6)

The union observes that Greene complained that the grievant failed to support him. It states that Greene testified that he was called into a meeting with OQHA officials where he "basically got his butt ripped." The union indicates that Greene told Hudson that he looked to the grievant for support but got none.

The union contends that Greene's statements do not comport with those of the grievant or Hales. It points out that the grievant stated that although the OQHA indicated that it had decided to use the new traffic pattern no "butt ripping" took place. The union claims that Hales confirmed the grievant's testimony that he had no part in the decision.

The union argues that it was easy for Greene to start an investigation. It states that he knew that the grievant had received OQHA jackets and had parked his trailer in a lot by the patrol's office at the fairgrounds during the Quarter Horse Congress. The union observes that both actions were common knowledge because the grievant never tried to hide them. It stresses that Greene omitted the fact that he too had received

jackets and had parked his trailer on the fairgrounds during past Quarter Horse Congresses.

The union contends that Hudson should never have been allowed to conduct the investigation. It charges that he was tainted from the beginning because he testified that he left the interview with Greene believing that the grievant was "in the pocket of the OQHA." The union notes that Hudson cited the grievant's involvement in the OQHA's decision to change the traffic pattern as evidence for his belief.

The union reports that Hudson was also involved in OQHA Congresses. It points out that he supervised the patrol unit at the Quarter Horse Congress only three years prior to his investigation. The union states that he accepted a free meal card from a vendor and had to defend his own conduct as to whether he had received a jacket. It observes that Hudson's future assignments to Congresses are subject to Greene's support.

The union charges that Hudson's investigation is suspect. It complains that he did not have witnesses write or sign statements and did not record interviews. The union observes that Hudson wrote in his report that Hales told him that Greene was given jackets in 2001 and 2002 and returned them but at the hearing Hales testified that Greene did not return the jacket in 2001 and that he never told Hudson that Greene returned the jacket. It notes that Hudson stated that the grievant solicited tickets for a bull-riding show but Hales indicated at the hearing that he asked the grievant if he needed tickets. The union adds that Hudson's report states that Salome had no knowledge of the grievant's trailer being at the fairgrounds but Salome testified at the hearing that Hudson never asked him about it and that he knew that the grievant's trailer was there.

The union charges that the patrol has a double standard regarding the receipt of gratuities. It claims that it is clear that Greene lied when he testified that prior to 2002 he

was never given a jacket or any other gratuity. The union indicates that despite this fact no administrative or criminal investigation was undertaken.

The union argues that the charge that the grievant received gratuities from the OQHA is without merit. It observes that at the times he received the gratuities he was working for the OQHA. The union noted that the OQHA directed the grievant's work and paid him and that he did not receive contractual benefits such as sick leave and vacation and that his wages were not subject to the Ohio State Highway Patrol Retirement System.

The union contends that the issue of the receipt of gratuities is not present in the instant case. It points out that the statute indicates that gratuities are an issue only where they are "of such character as to... influence [a trooper] with respect to his duties." The union states that it is ludicrous to think a jacket or tickets to an event would lead the grievant to act more reasonably toward the OQHA than the thousands of dollars they were paying him for working special duty details.

The union maintains that the patrol could have troopers and police officers in active duty status during fairground events. It observes that this is the case during the Ohio State Fair so the troopers and police officers are paid overtime and receive all of their fringe benefits. The union indicates that if such were the case, gifts given to troopers and police officers would be gratuities. It suggests that the patrol has not operated in this manner because it would be more expensive and would make it impossible to compete for the work at the Quarter Horse Congress.

The union charges that Greene's actions and testimony present a very repugnant picture of him. It points out that his testimony that he did not know until after the start of the Quarter Horse Congress that the grievant had parked his trailer at the fairgrounds

defies logic because he parked it adjacent to the post facility during the preceding two Quarter Horse Congresses where it was impossible to miss it. The union notes that while Greene claimed that he never accepted a jacket from the OQHA, Hales testified that he personally gave him a jacket and that he never returned it. It adds that Greene claimed that he never had a trailer on the grounds during any of the Congresses but Paula Mack testified that he borrowed her trailer from her and that she and her husband helped him set it up at the Quarter Horse Congress.

The union challenges Greene's testimony that he never received free passes for parking or any events at the Quarter Horse Congress. It observes that Mack testified that Greene gave her and her husband VIP parking passes and invitations to the VIP party and that he told her that he also had passes to the bull-riding show. The union claims that there can be no conclusion except that Greene lied during the investigation and at the arbitration hearing.

The union characterizes the patrol's refusal to accept that Greene lied as "discomforting." It reports that when the patrol received its witness list for the arbitration hearing, it included the name of the woman who embroidered Greene's name on his OQHA jacket. The union notes that the patrol responded by trying to convert the Quarter Horse Congress jacket into some look-alike purchased jacket.

The union argues that the grievant did not think or have reason to believe that he was violating patrol policy. It points out that the grievant never hid his trailer from the OQHA. The union notes that the association could have objected but it was glad to have the grievant on the grounds because he would be available "24/7." It claims that it was not the same for Greene who placed his trailer in a spot where it would not be seen.

The union asserts that charging the grievant with two counts of criminal conduct

was "near criminal in itself." It states that the use of a trailer and 15 tickets to events does not meet the demands of the statute as constituting criminal behavior. The union notes that the statute requires that the charged officer receive, in essence, a bribe. It stresses that the items at issue were given to the grievant by his employer who was paying him \$240.00 per day not only to influence his behavior but also to direct him.

The union explains that the grievant pled guilty because of the immense coercive power of the patrol. It reports that if the grievant was convicted of the charges he originally faced, he would have lost his retirement benefits and been prevented from carrying a weapon which would have prevented him from working in law enforcement. The union adds that a trial would have made life for the grievant's family even more miserable than it was.

The union argues that the least persuasive charge against the grievant is that he intentionally put in for pay for time he had not worked. It points out that the investigators reviewed the grievant's previous twenty months of work using HP-29s, special duty sign-up sheets, and HP-53s. The union notes that despite this effort the patrol found only four days and a total of sixteen hours where the patrol and an exhibitor paid the grievant.

The union complains that the grievant was prevented from explaining the shortfall in documented hours worked. It reports that he was ordered not to go to Post 96 where he could have accessed his computer to review his actions and cases to explain the sixteen hours. The union also protests that the patrol provided only one HP-53B and did not do so until the arbitration hearing.

The union rejects the patrol's claim that the grievant was improperly paid seven hours on July 14, 2002, by both the Good Guy Car Show and the patrol. It claims that

between the first and second days of the arbitration hearing the grievant received a telephone call regarding a criminal case that jogged his memory relating to that date. The union observes that on July 14, 2002, the grievant and Sergeant Brun apprehended a suspect and that the subsequent investigation kept the grievant at work so that he worked the entire seven hours he was paid by the patrol.

The union charges that the patrol did not establish that the grievant stole time on either November 25, 2002, or December 2, 2002. It indicates that on both days HP-53s show that the grievant and units 5004 and 5024 started work at 7:00 a.m. The union observes that the HP-53s show that units 5004 and 5024 completed their shifts at approximately 3:00 p.m. but do not show the grievant clocking out. It charges that the patrol "simply established 3:00 p.m. for both November 25th and December 2nd and declared that [the grievant] was stealing time." (Union Brief, page 19)

The union contends that the HP-53Bs are essential for an audit and that their absence reduced the efficacy of the audit of the grievant's time. It states that they are intended to show the exact time a unit calls in to mark off. The union indicates that since the dispatcher was not located at Post 96, she simply marked off all Post 96 day shift units when her shift ended at 3:00 p.m. It stresses that this meant that any additional time worked by the grievant was not reported.

The union complains that the patrol does not have a good system at Post 96. It points out that there is no dispatcher at the site to record when personnel come to work and when they leave. The union notes that officers frequently split their shifts to accommodate special duty assignments. It states that leave is approved after the fact to cover the time working the special detail.

The union concludes that there was not just cause to demote and transfer the grievant. It asks the Arbitrator to restore the grievant to the rank of sergeant and to return him to his position at the fairgrounds.

ANALYSIS

The grievant is charged with violating Rules 4501:2-6-02(I)(1) - Conduct Unbecoming an Officer, and 4501:2-6-02(F)(1) and (F)(2) - Reward, Bribes, Payment for Duty. The first rule states:

(I) Conduct unbecoming an officer

A member may be charged with conduct unbecoming an officer in the following situations:

- (1) For conduct that may bring discredit to the division and/or its members or employees.

The second rule states:

(F) Rewards, bribes, payment for duty

- (1) A member shall not solicit or accept any reward, bribe, gratuity, gift of any nature, payment or compensation for the performance of any duty for which a regular salary is received.
- (2) A member shall not use or attempt to use his/her official position to secure anything of value that would not ordinarily accrue to the member.

The charges against the grievant involve two separate offenses. First, the grievant is alleged to have solicited and accepted 12 tickets and 3 parking passes for the Professional Bull Riders Show, an OQHA jacket, and parking and utility service for his trailer at the Quarter Horse Congress. The total value of the tickets and the parking passes was \$441 and the value of the parking and utility service was \$286. The value of the jacket was not specified.

There is no doubt that the grievant accepted gratuities from the OQHA. Hales, Salome, and other association officials testified that the grievant received jackets, tickets,

and parking passes. At the arbitration hearing Hales and Salome testified that the grievant parked his trailer at the fairgrounds with their knowledge and consent. Most importantly, the grievant acknowledged receiving these gifts.

Despite the fact that the grievant accepted the gratuities in clear violation of the patrol's rules and regulations, it does not justify the grievant's demotion. Hales and Salome told Hudson, who conducted the criminal investigation, and Bower, who conducted the administrative investigation, that they for many years they gave jackets and other gratuities to the troopers in charge of the detail at the Quarter Horse Congress. In fact, Hales volunteered that the OQHA gave jackets and other gratuities to many people, including the fire marshal and health inspector. In addition, although Greene denied parking his trailer at the QH Congress, his ex-wife and Mack testified that he did so in 2000.

The wide distribution of tickets to the Professional Bull Riders Show is also supported by Hudson's testimony regarding his interview of Highway Patrol police officer Rex Yeagley. Hudson reported that Yeagley stated that "the free tickets were going to general headquarters for years" but that "the secretaries were usually the ones who got the tickets." (Arbitrator's Notes) Hudson noted, however, that "Yeagley couldn't be specific." (Ibid.)

The Arbitrator believes that the patrol did not conduct an adequate investigation of these claims. The extent of the investigation is reported on page 62 of the criminal investigation. Hudson stated:

It should be noted that this investigator was a Lt. in charge of the detail three years ago and was not offered and did not receive anything free. Other past commanders, S/Lt. Greene, S/Lt. May were contacted and also advised that they did not receive any free jackets although they had been offered.

The fact that the previous commanders denied receiving gratuities from the OQHA is not surprising given the charges against the grievant, who admitted receiving gratuities.

David Buchman, a Franklin County Assistant Prosecutor, and Franklin County Municipal Court Judge Anne Taylor faced a simple situation. The grievant admitted that he had accepted gratuities from the OQHA. Thus, he was guilty of the two ethics violations to which he pled guilty and for which he was fined \$200 plus court costs. The fact that other patrol employees might have engaged in the same misconduct was irrelevant.

The Arbitrator has a much different case to consider. It is well established in arbitration that employers cannot treat employees who have committed an offense differently than other employees who have committed the same offense.

As indicated above, Hales, Salome, and other OQHA officials testified that they routinely gave gratuities to the commanders of the detail at the fairgrounds as well as other officials. Since there is no reason to reject their testimony, the patrol's decision to demote the grievant for accepting gratuities while other patrol employees who did the same go unpunished constitutes disparate treatment. Although the Arbitrator is not eager to allow any employee who violates an important work rule to avoid discipline, he cannot ignore the union's charge of disparate treatment.

The second alleged offense is that the grievant was paid by the patrol for time for which he was also paid by exhibitors for working on a special duty detail. The patrol claims the double-dipping took place on November 6, 2001; November 25, 2001; December 2, 2001; and July 14, 2002. It indicates that the activity involved 16 hours and an overpayment of \$474.52.

Although the record establishes that the grievant was paid for at least some hours

by both the patrol and exhibitors, he does not believe that it constitutes just cause for the grievant's demotion. Williard audited the pay and hours worked by the grievant over a twenty-month period. Given the grievant's testimony that he worked special duty details up to 100 times per year, he had numerous opportunities to engage in double-dipping. The fact that Williard was able to find only four occasions totaling 16 hours of overpayment supports the claim that the discrepancies either had an explanation or were simply errors. Had the patrol audited other employees' pay, it may have found similar problems.

Without some evidence that the grievant intended to defraud the patrol, the proper remedy would seem to be to order the grievant to reimburse his employer. Buchman and the Franklin County Municipal Court apparently agreed. The settlement of the criminal charges required the grievant to make restitution to the patrol in the amount of \$472.52.

The Arbitrator must also note that the record indicates that the patrol, the grievant through his attorney, and the Franklin County Assistant Prosecutor agreed to a complete settlement of the charges against the grievant. On April 10, 2003, Buchman faxed a memorandum to the grievant's attorney and to Hudson. It indicated that the grievant would be charged with two ethics violations and would have to pay \$474.52 in restitution. The memorandum added:

You had inquired whether the criminal charges would conclude the matter, or if further discipline is anticipated. From all my discussions, I understand that OSP intends these charges and restitution to resolve the matter. My understanding is that, absent a felony conviction, OSP will consider [the grievant's] conduct already punished administratively.

There is nothing in the record to indicate that anything different than this was communicated to the grievant.


The remaining issue is the proper remedy. While the Arbitrator believes that the

grievant should be restored to the rank of Sergeant, he does not feel that he is entitled to back pay for the time he spent as a trooper. He committed a serious offense when he accepted gratuities from the OQHA that would normally justify a demotion. However, to uphold the grievant's demotion would be contrary to clearly established arbitral principles barring disparate treatment.

The Arbitrator must also deny the union's request that the grievant be returned to the fairgrounds. The nature of the grievant's misconduct makes such a request unreasonable. Furthermore, his ability to deal with exhibitors has likely been compromised by his past actions.

AWARD

The grievant is to be reinstated to the rank of Sergeant effective no later than December 1, 2003.



Nels E. Nelson
Arbitrator

November 11, 2003
Russell Township
Geauga County, Ohio