#1845

OPINION AND AWARD

In the matter of Arbitration

Between

Fraternal Order of Police, Ohio Labor Council, Inc.

And

The State of Ohio, Department of Natural Resources

Regarding

Grievance Number 15-00-031118-0173-05-02
(Darin Plummer)

APPEARANCES:

FOR THE STATE:

Krista M. Weida, Advocate
Andrew Shuman, LRS, OCB
John Allard, ODPS Er. Rep.
Deputy Sheriff Meister, Witness
Patrol Trooper Finnell, Witness
Terry Williams, Asst. Agent in Charge
Kevin Page Agent in Charge
Karen Cook, Agent in Charge

FOR THE FOP/OLC:

Paul Cox, Chief Counsel
Darin J. Plummer, Grievant
Joel Barden. Staff Rep.
Renee Engelbach, Paralegal
Doug Mullett, Witness
Phil Williams, Witness
Harold Kolski, Witness
Jymes Farmer, Witness
Jack Holland, Witness

An arbitration hearing was conducted on July 20, and continued on August 19, 2005 at the Ohio Office of Collective Bargaining, in Columbus, Ohio.

The parties stipulated the issue in this case to be: ***"Was the Grievant removed for just cause? If not, what shall the remedy be?"***

In a grievance dated November 18, 2003 the Grievant and FOP allege violation of Articles 18.09, 10.03 and 19.05 of the Collective Bargaining Agreement.

ARTICLE 18 – ADMINISTRATIVE INVESTIGATION

18.09 Off Duty Conduct

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

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. Verbal Reprimand (with appropriate notation in employee's file);
2. Written Reprimand;
3. One or more fines in the amount of one (1) to five (5) days pay, for any form of discipline. The first time fine for an employee shall not exceed three (3) days pay;

4. Suspension;
5. Leave reduction of one or more day(s);
6. Working suspension;
7. Demotion;
8. Termination;

However, more severe discipline 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 an employee's wages."

WORK RULES:

501.02

(H) Conduct Unbecoming an Officer

(1) An employee may be charged with conduct unbecoming an officer in the following situations:

(a) For conduct that may bring discredit on the Department of Public Safety, its Divisions, or its members.

(b) For committing any crime, offense, or violation of laws of the United States, the State of Ohio, or any municipality.

(U) Evidence and Recovered Property

(1) An employee shall carefully protect and preserve for proper disposition any article or property recovered or turned over to them after loss by its rightful owner, held as evidence, seized from a prisoner, or otherwise entrusted to their care.

Background:

Darin Plummer, at the time of the incident giving rise to this grievance, was an Enforcement Agent for the Ohio Investigative Unit of the Ohio Department of Public Safety.

Most of the facts in this matter are not in dispute.

Agent Plummer was working in the Columbus area and he and a partner completed their shift around midnight. They stopped by a friend's house to visit. Agent Plummer was dropped off at his office on West Broad Street near interstate 70 on the Hilltop area of Columbus. He got in his state issued car and returned to the friend's house allegedly to pick up his electronic swipe card and his daily planner.

He stopped by a Kroger Store on West Broad to get something to eat and went to the home of the friend.

While there he had a cell phone conversation with another Enforcement Agent for about an hour. He testified he picked up his swipe card and his planner and proceeded down West Broad Street heading east toward his office.

At approximately 4:37 a.m. his car made contact with something that caused noticeable damage to the windshield on the passenger side of the state owned car he was driving.

Agent Plummer proceeded toward his office without stopping.

In the vicinity of the office he stopped to examine the car. He found the mirror on the passenger side of the car to be loose and decided to return to the scene of the incident.

At about this same time he had a telephone conversation with Agent Farmer who was at his home in Newark, Ohio.

Agent Plummer returned to the West Broad location where he found several emergency vehicles.

He identified himself and was informed that a pedestrian was struck at that location and transported to Doctor's West Hospital.

Agent Plummer was cited for the criminal charge of "*Failure to stop After an Accident.*" He was tried in Franklin County Common Pleas Court and was found "*Not Guilty*" by a Jury on April 13, 2005.

In separate action the Department informed Agent Plummer in a letter dated November 5, 2003 that he was being charged for violation of "Work Rule DPS 501.02 (U) *Evidence & Recovered Property* and *Conduce Unbecoming* DPS 501.02 (H) (1) (a) & (b)."

The specifics noted in this *pre-disciplinary letter* state: "Specifically, you were involved in a hit skip injury crash involving a pedestrian in a state vehicle while off duty on July 18, 2003, and during the course of the subsequent investigation, unmarked and undocumented drug paraphernalia was discovered in the trunk of your state vehicle."

Captain Richard J. Keys conducted a pre-disciplinary meeting on November 12, 2003 and reported to the Department Director that same day that he found that *"just cause exists for discipline."*

In a letter dated November 14 2003 Department of Public Safety Director Kenneth L. Morckel informed Agent Plummer that he was being terminated. The text of this letter stated:

"Dear Mr. Plummer:

You are hereby advised you are being terminated from your employment with the Department of Public Safety-Investigative Unit effective close of business November 14, 2003.

You are being terminated for violation of DPS 501.02 (U) Evidence & Recovered Property and DPS 501.02 (H) (1) (a) & (b) Conduct Unbecoming an Officer."

Agent Plummer and the FOP filed a grievance on November 18, 2003 asserting violations of Articles 18.09, 19.01, and 19.05 of the Collective Bargaining Agreement.

The statement of the grievance reads: *"discipline without just cause and without regard to progressive discipline in the form of termination on November 14, 2003."*

The remedy requested was "*to be reinstated and made whole for all time lost."*

Management's Position:

Management argues that the behavior of the Grievant reflected poorly on the employer. The employer argues that the Patrol investigated the scene and "advised that the evidence found was conducive to an accident where the driver was inattentive and drifted off the road surface." [1]

Management also argues that when the grievant asked the law enforcement officers on the scene to "help him out" that he was attempting to inappropriately use his position as a law enforcement officer.

The Employer notes that when the car was impounded and searched that drug paraphernalia was found in the trunk. Because that paraphernalia was believed to contain drug residue, the grievant

[1] Management Opening Statement page 2.

was in violation of Departmental Policy and Procedure for handling such material.

They note it is uncontested that the grievant was using his state vehicle for purposes that were non-work related.

They believe he lost control of his vehicle, hit a pedestrian and ran from the scene.

In their brief the employer lists their arguments as follows:

1. *Even though the Grievant was acquitted at the criminal trial, his actions still warrant removal from his position.*

The employer acknowledges the Grievant was acquitted of the criminal charge but believes he brought discredit on the Department and that this is an offense to merits termination in and of itself.

They support this view by referring to an arbitration decision by Arbitrator Susan Grody Ruben. They quote the Arbitrator when she notes: "The Employer must prove the Grievant committed 'some of all of the misconduct of which he is accused, and that the removal is appropriate for the charges that are proven."

The Employer argues that "Conduct Unbecoming an Officer" applies to a broad range of conduct. They go on to say "Misuse of his state vehicle was inclusive in this charge."

2. *The Grievant's actions the morning of July 18, 2003 were clearly inappropriate and brought discredit to the DPS.*

The Employer argues that "the Grievant's version of the events that happened that early morning does not make sense."

3. *Jack Holland's testimony has no bearing on whether the Grievant's behavior amounted to conduct unbecoming an officer.*

Jack Holland is an accident re-constructionist employed by the FOP to give his views of what happened on the morning of July 18, 2003. The Employer notes that Mr. Holland examined the scene of the accident several months after the incident occurred and that he was in the employ of the Grievant's representative. They argue his testimony has no relevance in the arbitration.

4. *Finding drug paraphernalia containing a controlled substance in the trunk of Grievant's state car is completely unacceptable.*

The Employer notes that in the course of the investigation of this matter drug paraphernalia was found in a cardboard box in the trunk of the car that had not been labeled, logged or correctly disposed of. The employer rejects the position of the Grievant when he states he did not of a clear policy regarding how to handle such material.

In conclusion the Employer argues the actions taken by the grievant constitute just cause to support his termination.

FOP Position:

The FOP argues the Employer has failed to prove just cause and request the Grievant be reinstated with full back pay and made whole. They argue:

1. *The Charge of violation of the law should not be considered by the Arbitrator*.

The FOP argues that the Employer chose to charge the Grievant with a criminal offense "hit-skip crash involving a

pedestrian." This is a criminal offense and the determination by a Jury was that the Grievant was found not guilty of the charge. Thus, the first charge by the employer cannot stand.

2. *The Grievant did not violate the Employer's policy relating to unbecoming conduct.*

The FOP believes the Employer has attempted to bring in unrelated issues. The FOP relates the view of the Grievant regarding what happened. He acknowledges he was involved in an accident but he denies that he had any knowledge that he had hit a pedestrian.

The FOP points out that the Employer believes the Grievant should have stopped but attempts to explain why he did not do so.

The FOP notes that in spite of the large number of Law Enforcement personnel on the scene no one conducted tests of took photos to investigate what really happened. No measurements were taken. No tire treads were analyzed and no pictures were taken until later. The FOP offered the testimony of Jack Holland an expert accident re-constructionist in order to refute the opinions held by other law enforcement officers at the scene regarding what happened.

The FOP explained that when the Grievant asked some of the officers on the scene to "help him out" he was asking that they perform a full investigation and that he was not asking for special consideration.

3. *The Grievant did not violate rule no. DPS 501.02 (U) by maintaining certain drug paraphernalia in the trunk of his vehicle.*

To refute Management's position that the Grievant knew the procedures he was to follow regarding the possession and distribution of drug paraphernalia, the FOP called other Agents who testified that they did not know of any procedure or policy that would cover a situation such as the material found in the trunk of the Grievant's car. One of the witnesses called was an assistant property officer.

The FOP believes the Employer added charges following the acquittal of the Grievant in order to support his termination.

To buttress it's claim that the termination of the Grievant should not stand, the FOP cited a case in which the Arbitrator states: "there is no basis to justify a discharge for misconduct [Arbitrator Kesselman (28 LA 434)] unless;

(1)The behavior harms Company's reputation or product;

(2)Behavior renders employee unable to perform his duties or appear at work in which case the discharge would be based on inefficiency or excessive absenteeism;

(3)Behavior leads to refusal, reluctance or inability of other employees to work with the grievant.

The FOP argues that in the instant case, none of these criteria are met.

DISCUSSION:

This is a very sad case. An unfortunate accident happened. A citizen was struck and injured. She and her fiancé (now her husband) will always remember that terrible event.

Likewise, the life of an employee was also altered because of the events of July 18, 2003.

Having noted the human tragedies involved, the task of a Labor Arbitrator is to examine the situation and determine if *Just Cause* exists to support the disciplinary action taken by the employer.

Separate from the legal action taken against the Grievant, the Employer investigated the incident and issued charges pursuant to the collective bargaining agreement and the relevant sections of the

Ohio Revised Code. The original charge letter, the report of the pre-disciplinary officer and the letter of termination issued by the Department Director are all very specific regarding the administrative charges levied against Mr. Plummer. There are three. I will list them in the order in which they will be discussed:

Work Rule 501.02 (H) (1) (b) "For committing and crime or violation of the laws of the United States, the State of Ohio or any municipality."

This FOP argues that the fact the Grievant was charged with a violation of statute and found not guilty by a jury of his peers should be the end of this matter. The Arbitrator should not examine anything about the charge. The action of the criminal courts should be dispositive.

The State argues that notwithstanding the verdict by the jury, the standard of proof is much less in an arbitration proceeding than in a criminal case. Arbitrators generally deal with a "preponderance of the evidence." Criminal courts deal with "beyond a reasonable doubt."

A review of the cases shows that many arbitrators do examine the proofs and evidence offered and occasionally decide differently than the outcome of the criminal court. Arbitrator Gail R. Smith notes

in a Prince George's County Case, "Strict scrutiny of the allegations is in order, where, as here, the alleged misconduct is of a kind recognized and treated as a crime, and punished by the criminal law. But even under the preponderance of the evidence standard, it is concluded that the Department failed to sustain its burden as to Charge 1." (120 LA 682).

Also, Arbitrator Knaufman reached the same conclusion in a Lockheed case (75 LA 1081). He did note the distinction between a case in which "Grievants were never convicted but neither were they acquitted."

Even though many arbitrators believe they have a responsibility to examine the evidence under the lens of the lesser "preponderance" standard, the very specificity of the rule of the Ohio Department of Public Safety in this matter, requires that the judgment of the jury be accepted. The rule states:

"for committing any crime, offense or violation of the United States, the State of Ohio or any municipality."

It is a well accepted practice in Arbitration to determine just cause on the specific charge(s) levied against employees

[See Arbitrator Joseph M Schneider (118 LA 1556) and Arbitrator Laurie G. Cain (101 LA 470).]

The Ohio Revised Code 2931.03 states: "*The Court of Common Pleas has original jurisdiction of all crimes and offenses except in cases of minor offenses the exclusive jurisdiction of which is vested in courts inferior to the court of common pleas.*"

I agree with the FOP that the Employer could have charged the Grievant with any specific rule violations that they chose to. Once they elected to charge the Grievant with the violation of a crime, the appropriate body to determine his innocence or guilt related to that crime was a Common Pleas jury.

At the very least, in order for this Arbitrator to reach a different conclusion regarding the incident, would have required different evidence than that considered by the Jury. The testimony of the Law Enforcement Officers who were called was basically the same as considered by the Common Pleas Jury. Their speculations regarding what happened were called into question by the testimony of Jack Holland, an expert accident re-constructionist.

The Department of Highway Safety has the expertise and ability to conduct their own investigation in addition to that done by the

Sheriff's Department. They did not do so, but relied on the Criminal Investigation done by the Sheriff.

I find the testimony of the Grievant regarding his comment to the law enforcement officers to "help him out" to be a credible possibility of the statement. Thus, I assign no weight to it.

Consequently I find the employer has failed to support a violation of Department Work Rule 501.02 (H) (1) (b).

I have to believe the employer had reached the same conclusion when they note in their brief on page 2: "even though the Grievant was acquitted at the criminal trial, his actions still warrant removal from his position."

Let us turn to consideration of the next alleged rule violation. (501.02 (U).

In the course of the investigation of the incident the car assigned to the grievant was inspected and drug paraphernalia was discovered. A pipe with residue was among the items found in a cardboard box.

In the employer's brief (page 11) this is equated to an extremely serious offense when they state:"... the investigators were *horrified*

(emphasis added) to find drug paraphernalia containing a controlled substance in a cardboard box in the trunk."

Agent in charge, Cook testified that she had trained the grievant as well as Agents Mullet and Farmer on the proper procedure for handling drug paraphernalia when there is no liquor charge involved While I have no doubt that some training or instruction did occur, this arbitrator finds the testimony of Agents Mullet and Farmer to be credible that, at the very least, confusion exists about what should be done with drug paraphernalia not attached to a suspect.

I have no doubt some training has taken place but it should be done and documented so that everyone is knowledgeable regarding the Department's expectations.

In any case, the presence of the material in the Grievant's trunk certainly does not, in and of itself, justify termination.

It was abundantly clear from the testimony of various witnesses that the designations "FNU" and "LNU"[2] were not clearly understood nor were the circumstances in which they should be used.

On page 13 of the Employer's brief there is a troubling implication when the employer says: "In reality, there is no evidence

to prove that these items were not for the Grievant's personal use." There is also not one shred of evidence to suggest they were *for* the Grievant's personal use. It was acknowledged that in the routine duties of an enforcement agent, contact would be made with drug paraphernalia.

This implication is misplaced and appears to be an attempt to paint a picture of the Grievant in the mind of the Arbitrator not supported by the evidence.

The employer attempts to include a charge of "Misuse of a State Vehicle." (See page four—Employer's brief).

"There was no need to charge the Grievant with an additional charge. Misuse of his state vehicle was inclusive in this charge. To do otherwise, the Employer would have been 'stacking the charges.' "

To support this view the Employer cites an ODOT case [3] by Arbitrator Rivera. This Arbitrator is aware of that case. This case is different in that the Employer has a specific work rule (501.02 [Equipment] B. which states: "An employee shall not use state owned equipment except for the performance of official business."

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[2] "FNU" is a designation of "First Name Unknown" and "LNU" is a designation of "Last Name Unknown" that can be entered into the evidence tracking database.
[3] Ohio Department of Transportation, Ohio Grievance # G-87-2316, Rhonda Rivera, (unpublished)

If the Employer wished to charge the Grievant with a violation of that specific work rule they could have done so. Fairness and due process demands no less. Such a charge allows the Grievant to prepare for and offer a defense to the charge.

We have then one remaining issue for consideration. 501.02 (H) (1) (a) *"For conduct that may bring discredit to the Department of Public Safety, it's Divisions, or its members."*

There is no question that the conduct of the Grievant on the night of July 18, 2003 was less than that which is desired by any Employer.

The Arbitrator can understand the speculations of the Employer regarding what happened that night. To the Employer it appears that something very bad occurred. The Grievant was frightened; he *could have stopped,* to see what happened. He *could have* pulled into the well lit gas station down the street, or the Shopping Center, or the Waffle House.

Instead he proceeded to his office. His first call was to a co-worker rather than a Police Agency or supervisor. The Employer, no doubt speculated that he was trying to develop a strategy regarding what to do next.

He drove several miles before he stopped his car.

The Employer's speculations are understandable and reasonable but an employee cannot be terminated based on speculation. It requires proof.

The Employer charged him with a work rule tied to the commission of a crime. (Hit Skip). He was found not guilty by a Jury of his peers.

Thus, the major charge against him simply cannot stand.

In the Employer's Brief and at the hearing, the State's advocate made a creative attempt to argue a general violation of "conduct unbecoming." The specificity of the rules cited and the documents charging the Grievant simply do not allow the Arbitrator to consider this, somewhat revised, view of the case and charges.

While this Arbitrator finds that such an incident, and the actions of the Grievant have brought a measure of discredit on the Department, I agree with the logic of Arbitrator Kesselman (28 LA 434) and the criteria cited in that case by the FOP in their brief. "A discharge cannot be justified for misconduct unless:

(1) The behavior harms Company's reputation or product;

(2) Behavior renders employee unable to perform his duties or appear at work in which case the discharge would be based on inefficiency or excessive absenteeism;

(3) Behavior leads to refusal, reluctance or inability of other employees to work with the grievant."

There is no evidence that the Grievant is unable to perform his duties and testimony of various witnesses demonstrated that other employees are more than willing to work with him."

As noted, I do not find sufficient evidence to support the termination but do find a violation of Work Rule 501.02 (H) (1) (a).

The Employer cites an 1199 arbitration decision by Arbitrator Susan Grody Ruben. They quote the Arbitrator when she notes: "The Employer must prove the Grievant committed 'some of all of the misconduct of which he is accused, and that the removal is appropriate for the charges that are proven."

I concur with that conclusion. However, I find the proven "misconduct" in this case is not appropriate to support removal.

So what is the appropriate penalty? A suspension of thirty (30) days would appear to be of sufficient impact to impress the gravity of the situation.

DECISION AND AWARD:

The grievance is granted in part and denied in part. The termination is modified to a thirty (30) day suspension. Grievant is to be re-instated and awarded back pay from the period beyond the thirty (30) day suspension, minus interim earnings and any normal deductions.

The Grievant's record shall reflect a thirty (30) day suspension for violation of Department Work Rule 501.02 (H) (1) (a). No violation will be noted for Work Rule 501.02 (U) but the Employer may train (and document such training) regarding their expectations for handling drug paraphernalia not connected to a suspect.

This Arbitrator will retain jurisdiction to decide any disputes that might arise regarding the implementation of this award for a period of sixty (60) days.

Issued at London, Ohio this 17th day of October, 2005.

N. Eugene Brundige

N. Eugene Brundige, Arbitrator