

IN THE MATTER OF ARBITRATION

BETWEEN

FRATERNAL ORDER OF POLICE  
OHIO LABOR COUNCIL, INC.  
UNIT 2

AND

STATE OF OHIO/OHIO DEPARTMENT OF PUBLIC SAFETY

Before: Robert G. Stein

Grievance: 3 Day Suspension

Grievant: Byron Guinther

Principal Advocate for the EMPLOYER:

Kathleen S. Gulla, LRM  
Ohio Department of Public Safety  
Division of Human Resources  
1970 West Broad Street  
Columbus OH 43218-2081

Principal Advocate for the UNION:

Paul Cox, General Counsel  
FOP/OLC, Inc.  
222 East Town Street  
Columbus OH 43215

## INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement ("Agreement") (Joint Ex. 1) between The State of Ohio ("State" or "Employer") and The Fraternal Order of Police, Ohio Labor Council, Inc., Unit 2 ("Union"). That Agreement is effective for calendar years 2006 through 2009 and includes the conduct which is the subject of the grievance.

Robert G. Stein was mutually selected by the parties to arbitrate this matter as a member of a permanent panel of arbitrators, as recognized in Article 20, Section 20.08 of the Agreement. A hearing was held on July 20, 2009 at the Office of Collective Bargaining for the State, located at 100 East Broad Street in Columbus, Ohio. The parties mutually agreed to that hearing date and location, and they were each provided with a full opportunity to present oral testimony, documentary evidence, and arguments supporting their respective positions.

The hearing was not recorded via a fully-written transcript, and the parties elected to make closing arguments at the hearing. The parties have stipulated to the submission of four (4) joint exhibits and also to the fact that the matter is properly before the arbitrator for a determination on the merits.

## **ISSUE**

Was the Grievant's three (3) day suspension for just cause? If not, what shall the remedy be?

## **RELEVANT CONTRACT PROVISIONS**

Article 6—Management Rights  
Article 19—Disciplinary Procedure  
Article 20—Grievance Procedure

## **BACKGROUND**

Byron Guinther ("Guinther" or "Grievant") is an employee of the Ohio Department of Public Safety ("ODPS"). His primary function as a liquor control agent is to conduct field investigations regarding liquor permit holders within the Athens, Ohio region or district.

On May 4, 2008, Guinther was traveling home while off duty shortly after 3:00 a.m. He was driving an unmarked state vehicle and was dressed in casual attire when he observed a small white car coming up behind him at a purported high rate of speed. After pulling off the roadway and allowing the vehicle to pass him, Guinther proceeded to follow the vehicle, which Guinther reported was at times traveling left of center and also crossing outside of the white line near the road's outer edge. (Employer Ex. 6) Based on that other motorist's conduct as a

suspected impaired driver, Guinther used his radio to contact the closest Ohio State Highway Patrol location and requested that a trooper be dispatched. Guinther was advised by the dispatcher that a trooper was en route, and the Grievant maintained communication with the dispatch center to advise it of the subject driver's changing location as he proceeded, at times at an allegedly high rate of speed, with the Grievant still following him. Guinther also requested that the Ohio State Highway Patrol post alert the local police department in the Glouster community of the subject driver's approach. When the subject driver came to a stop at a stop sign in another village, Guinther activated his vehicle's red/blue flashing lights located in his vehicle's interior, and the subject driver responded to the flashing lights by pulling his vehicle over to the side of the road. (Employer's opening statement) Guinther got out of his vehicle and instructed the subject driver to turn off his vehicle's motor and to produce his driver's license. The local police officer and Ohio State Highway Patrol trooper then arrived and continued with the traffic stop. Subsequent tests indicated the citable presence of both alcohol and marijuana in the subject driver's body. (Union Ex. 1)

After an Unusual Incident Report (Employer Ex. 6) was completed and Guinther was advised via a letter dated October 1, 2008 of the Employer's intent to impose a three-day suspension against him "for violation of ODPS Work Rule 501.02(A)(4), Performance of Duty, for

initiating a traffic stop with an alleged OVI driver in violation of OIU policy and procedure.” (Joint Ex. 3)

In response, grievance number 15-00-081007-148-04-02 was filed by the Union on the Grievant’s behalf on October 8, 2008. (Joint Ex. 2) After a Step 3 grievance meeting was conducted on October 29, 2009, the Employer denied the subject grievance and determined that the State had not violated the Agreement by meting out the challenged disciplinary suspension.

Because the matter remained unresolved, the Union elected to submit the matter to arbitration, pursuant to Section 20.08 of the Agreement, for final and binding resolution.

## **SUMMARY OF THE EMPLOYER’S POSITION**

The State’s basic contention is that it did have a “just cause” basis to impose the now-disputed three-day suspension against Guinther because “Guinther exceeded his authority and violated ODPS policy by activating his lights and pulling the car over.” (Joint Ex. 2) Specifically, the Employer contends that Guinther violated the following provisions included in Section 501.02(A) (4) of the ODPS work rules (Joint Ex. 4):

An employee shall be subject to all sections of the Ohio Revised Code and the Ohio Administrative Code, including especially, but not limited to, ORC Section 124.34. Employees shall be subject to written Ohio Department of Public Safety work rules.

### **A. PERFORMANCE OF DUTY**

...

4. Employees who fail to perform assigned duties because of an error in judgment or otherwise fail to perform satisfactorily a duty of which such employee is capable, may be charged with inefficiency.

The Employer also contends that the Grievant's conduct constituted a violation of policy number INV 100.29 (Employer Ex. 4), which provides specific guidelines regarding the use and operation of ODSP-issued red/blue lights. That policy includes the following language in Section B:

**The red/blue lights, siren and PA system are NOT to be used to make vehicle stops on public highways.** Agents will contact local law enforcement, the county Sheriff's office, or the Ohio State Highway Patrol to stop vehicles on public highways. While awaiting assistance from the law enforcement officer, the agent will follow the suspect vehicle at a safe speed and distance, obeying all traffic laws.

1. The only exception is when BOTH of the following occur:
    - The suspect vehicle poses a serious risk of physical harm to persons in the immediate vicinity.
- AND
- Local law enforcement requests the agent initiate the vehicle stop. (Emphasis added)

The State claims that the Grievant was not performing his assigned job functions or duties when he followed the suspected impaired driver and that the Grievant lacked the requisite training to execute proper

arrest techniques and handle potential altercations with drivers who are signaled to stop by law enforcement officers using their vehicles' flashing red/blue lights. Based on the Grievant's purported errors in judgment, the Employer requests that the Union's grievance be denied.

## **SUMMARY OF THE UNION'S POSITION**

The Union contends that Guinther acted reasonably under the circumstances as he attempted to protect the public from an impaired driver. The Union insists that the Grievant did not violate any Department rules or policies because he did not attempt to make an actual traffic stop. The Union claims that the Grievant activated his red/blue lights only after the suspect he had followed had come to a complete stop.

The Union also disputes the specific discipline imposed in view of the Grievant's clean disciplinary record and the progressive discipline policy detailed in Article 19, Section 19.05. That section includes the following language:

### **19.05 Progressive Discipline**

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. At the Employer's discretion, disciplinary action shall include:

1. Verbal Reprimand (with appropriate notation in employee's file);
2. Written Reprimand;

3. One or more fines in an 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 Union avers that the three-day suspension was not appropriately commensurate with the nature of the Grievant's conduct and is too severe in light of his prior clean disciplinary record. The Union asks that its grievance be sustained, that the disputed suspension be invalidated, and that the Grievant be made whole for monetary damages sustained.

## **DISCUSSION**

The identified issue for resolution in the instant matter is the validity of the Grievant's suspension. Generally in an employee disciplinary matter, an arbitrator must determine whether an employer has sufficiently



proved by a preponderance of the evidence that an employee has committed one or more acts warranting discipline and that the challenged penalty is appropriate under the specific circumstances. *Hy-Vee Food Stores, Inc. and Local 747, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am.*, 102 LA 555 (Bergist 1994).

In making a determination regarding the validity and reasonableness of the challenged Company-imposed discipline, the arbitrator must consider, among other circumstances, the nature of the Grievant's offense(s), the Grievant's previous work record, and whether the Employer has acted consistently with respect to similar previous offenses. *Presource Distrib. Serv., Inc. and Teamsters Local 284*, FMCS No 96001624 (1997). It is proper for an arbitrator to look at the Employer's policies and rules and also the conduct in dispute to determine whether or not the challenged discipline was actually warranted and justified. *E. Assoc. Coal Corp. and United Mine Workers of Am., Dist. 17*, 139 Lab. Arb. Awards (CCH) P 10,604 (1998).

"Just cause" is not a legal concept, but it embodies the principles of industrial justice. The purpose of "just cause" is to protect employees from unexpected, unforeseen, or unwarranted disciplinary actions, while at the same time protecting management's rights to adopt and to enforce generally-accepted employment standards. *Phillips Chem. Co. and Pace, Local No. 4-227, AFL-CIO*, 00-2 Lab. Arb. Awards (CCH)

P 3553 (Taylor 2000).

"Just cause" imposes on management the burden of establishing: (a) that the standard of conduct being imposed is reasonable and is a generally-accepted employment standard which has been properly communicated to the employee; (b) that the evidence proves that the employee engaged in the misconduct which did constitute a violation of that standard; and (c) that the discipline assessed is appropriate for the offense after considering any mitigating or extenuating circumstances.

*Phillips Chem. Co.* Commonly-accepted "just cause" principles routinely used by arbitrators in disciplinary matters "are intended to ensure a higher level of fairness and due process for employees engaged in wrongdoing." They are also intended to increase the probability of workplace justice."

*Paper, Allied-Indus., Chem., and Energy Workers*

*Int'l Union, AFL-CIO, Oren Parker Local 8-171, Vancouver, Wash. and Petra Pak, Inc.*, 05-1 Lab. Arb. Awards (CCH) P 3078 (Nelson 2004).

One of the most firmly-established principles in labor relations is that management has the right to direct its work force, normally through the use of a collective bargaining agreement, which specifies the parties' respective rights and responsibilities. In this specific case, that right is clearly reserved to the Employer in the Article 6 "Management Rights" provisions, which include the following language:

The Labor Council agrees that all of the functions, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of the work force which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provisions of the Agreement are, and shall remain, exclusively those of the Employer.

Additionally, the Employer retains the rights to: 1) hire and transfer employees, suspend, discharge and discipline employees; . . . 5) make any and all rules and regulations; . . . 10) determine work standards and the quality and quantity of work to be produced;

In the exercise of its retained management rights, the Employer is governed by the rule of reasonableness, and the exercise of its management rights must be done in the absence of arbitrary, capricious, or unreasonable conduct. *Cal. Edison and Int'l Bhd. of Elec. Workers, Local 47*, 84 LA 1066 (2002). Arbitrators do not lightly interfere with management's decisions in disciplinary matters, but that does not mean to suggest that they will sustain an action found to be unjust or unreasonable.

Clearly, the Employer here has retained the right to create and enforce policies regarding the conduct of its employees while they are being paid to safely carry out their job assignments or functions.

[The Agreement's language] does more than grant the Employer rule-making authority. It also authorized the Employer to impose the discipline. Otherwise, it would be impossible to require employees to observe the rules. The authority agreed upon is more than what is needed to merely issue work rules; the authority includes the enforcement of the rules.

*Weyerhaeuser Co. and PACE, Local 7-0345*, 00-2 Lab. Arb. Awards (CCH) P 3539 (Kessler 2000). "Indeed, the right to establish reasonable rules and regulations for the governance of worker conduct is part and parcel of management's right to run the shop."

*Armstrong World Indus., Inc. and United Steelworkers, Local 461*, 06-1 Lab. Arb. Awards (CCH) P 3612 (Oberdank 2006).

"While it is not an arbitrator's intention to second-guess management's determination, he does have an obligation to make certain that a management action or determination is reasonably fair."

*Ohio Univ. and Am. Fed'n of State, County, and Mun. Employees, Ohio Council 8, Local 1699*, 92 LA 1167 (1989). In the absence of contract language expressly prohibiting the exercise of such power, an arbitrator, by virtue of his authority and duty to fairly and finally resolve disputes, has the inherent power to determine the sufficiency of a case and the reasonableness of a disciplinary action or penalty imposed. *CLEO, Inc. (Memphis Tenn.) and Paper, Allied-Indus., Chem., and Energy Workers Int'l Union, Local 5-1766*, 117 LA 1479 (Curry 2002).

Based on a thorough review of all of the hearing testimony, the evidence submitted into the record here and all of the arguments and claims included in the parties' respective briefs, the arbitrator finds that the Employer did have "just cause" to discipline the Grievant in response to his conduct and that the Union has failed to maintain its claim that the challenged discharge was invalid or unreasonable.

Arbitral authority generally holds that management has the burden of proving that it disciplined a grievant with "just cause" and that the Union has the burden of proving that the penalty imposed by management was excessive, abusive of managerial authority, or in violation of the parties' contract.

*Int'l Bhd. of Elec. Workers, Local 108 and TECO Energy, Inc.*, 03-2 Lab. Arb. Awards (CCH) P 3546 (Rothrock 2002).

In response to the Union's claim that Guinther did not actually participate in an official "traffic stop" of the impaired driver, the evidence clearly demonstrates that his use of the vehicle's red/blue warning lights resulted in a delay or detention of that driver, who recognized the lights as a warning signal requiring him to make himself available to law enforcement officers. If he had been more sober and less incapacitated by the combined effects of the alcohol and marijuana he had consumed, the impaired driver might have realized that Guinther was not in an appropriately marked motor vehicle required to be used by all Ohio traffic enforcement officers, as required by Ohio Rev. Code § 4549.13. Fortunately, the detained driver was not aggressive or hostile when he was approached by Guinther in the casual attire of jeans, T-shirt, and a baseball style cap, not in conformity with the requisite uniform worn by law enforcement officers. As noted in Employer Exhibits 9 through 13, innocent and law-abiding drivers have been victimized by a significant number of individuals who have attempted to impersonate police officers and who have used similar flashing lights to stop those persons who ultimately become victims of various crimes committed by the impersonators. Although the Grievant's attire, longer hair, and beard were suitable for his "undercover" work as a liquor control agent, any

stopped driver would likely have been alarmed and/or angry upon seeing him approach them on foot at 3:00 a.m. after having been signaled to stop their vehicle.

Although arguably acting in response to the well-intentioned desire to preclude the occurrence of any accidents or injuries caused by the impaired driver, the Grievant, as a liquor control agent, had no authority to stop any individual for violating traffic laws. *State v. Droste* (1998), 83 Ohio St.3d 36, 697 N.E.2d 620, cert. denied, 526 U.S. 1145 (1999). In that decision, Justice Resnick provided further elaboration of that determination in the decision she authored.

In R.C. 5502.61(C), the General Assembly listed the specific criminal violations that it authorized liquor control investigators to enforce: any violation under R.C. Title 43, and specific violations under R.C. Titles 29 and 45, if the investigators witnessed the commission of the offense during an investigation or the enforcement of an offense described in R.C. Title 43. Traffic offenses (other than R.C. 4507.30), including the offense of OMVI (R.C. 4511.19) are not listed and therefore **the General Assembly did not envision liquor control investigators routinely enforcing the traffic laws.** Additionally, the investigators were not in the process of investigating or enforcing an R.C. Title 43 offense when they saw appellee driving erratically, and thus they **did not have authority to stop him.** (Emphasis added)

The *Droste* decision also included the finding that “the liquor control investigators violated the statute granting them authority to stop” a driver in the absence of an actual emergency or a request from a local law enforcement officer to specifically render assistance.

What is especially troubling about the Grievant's conduct is that he was never afforded the discretion to independently determine his own course of action in dealing with the impaired driver during the May 4, 2008 incident. That attitude or position is in direct conflict with the explicit obligation of all Department officers to responsibly adhere to the policies, procedures, rules and regulations prescribed by the Employer. "Progressive law enforcement agencies are increasingly aware of the public's concern with the threat to safety and well-being which can come from hasty and ill-conceived action by overly zealous police." *The City of Oceanside*, 96-2 Lab. Arb. Awards (CCH) P 6333 (Thompson 1996). Guinther's non-compliant conduct merited the imposition of discipline.

"In reviewing the appropriateness of a disciplinary penalty, the arbitrator's role is not to substitute his independent judgment for that of an employer or to second-guess an employer's decision as to the penalty. Rather, the arbitrator's function is to determine whether the penalty imposed was within the employer's reasonable range of discretion and was not discriminatory, unfair, or excessive." *Vancouver Police Officers Guild and City of Vancouver*, 05-2 Lab. Arb. Awards (CCH) P 3187 (Landau 2005).

The "just cause" principle also applies to the level of discipline imposed, as well as to the reason for the challenged discipline. That means that there must be some proportionality between the offense and the punishment imposed, that the Employer must use progressive discipline, except in extreme cases, and that the Employer must weigh all mitigating factors, such as the employee's seniority, the magnitude of the offense(s), and the employee's past work record. *Lorillard Tobacco Co.*,

*Greensboro, N.C. and Bakery, Confectionery and Tobacco Workers Int'l Union, Local 317T*, 00-1 Lab. Arb. Awards (CCH) P 3433 (Nolan 2000). It is the Employer's burden in a disciplinary matter to prove both the employee's guilt of wrongdoing and to also show "good cause" for the discipline which was actually imposed. *San Diego Transit Corp. and Int'l Bhd. of Elec. Workers, Local 465*, 03-2 Lab. Arb. Awards (CCH) P 3542 (Prayzich 2003).

This arbitrator agrees with the majority of his colleagues, who have recognized that the primary purpose of workplace discipline is not to punish, but rather to correct errant behavior and to utilize progressive discipline as a tool to bring about positive change in employee performance so that a veteran employee will have an opportunity to benefit from continued employment. *Interstate Brands and Gen. Teamsters Local 406*, 97 LA 675 (Ellman 1991). "The concept of progressive discipline requires an employer to demonstrate an honest and serious effort to 'salvage' rather than to 'savage' an employee." *Victory Mkt., Inc.*, 84 LA 354 (1985). The arbitrator here is certainly not intending to convey a message that the Grievant's conduct was either excusable or acceptable. However, the penalty imposed should be tailored so that its "sting" is limited to the specific misconduct at hand. *Int'l Union, UAW and Its Local 8000 and The State of Mich.*, 90-2 Lab. Arb. Awards (CCH) P 8419 (Frost 1989). In this matter, the parties intentionally chose to include



progressive discipline in their Agreement in Article 13 and to specifically utilize it as a tool to bring about positive change or rehabilitation in employee performance so that an experienced and willing employee will have an opportunity to reform and then to benefit from continued employment.

The arbitrator's review of the evidence submitted into the record here notes the absence of any active discipline in the Grievant's record. Also, no evidence was submitted that the Grievant's performance with the Employer had been less than acceptable prior to the incident under review here. Certainly, these must be viewed as mitigating factors. Another significant mitigating factor was the Grievant's inability to monitor the actual location and anticipated time of approach by either the local law enforcement officer or the Ohio State Highway Patrol trooper. Once Guinther had contacted the dispatchers to summon the other officers, he was unable to maintain any radio communication with either of the individual officers to be advised regarding when and where they would actually arrive to deal with the driver, who was subsequently determined to have driven under the influence of both alcohol and marijuana. At the time Guinther activated his red/blue lights and exited his own vehicle, he was unaware of how soon the other officers would be able to actually deal with the impaired driver.

"In disciplinary cases generally, most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe under the circumstances." *Escalade Sports, Inc. and Int'l Union of Elec., Salaried, Mach. and Furniture Workers, AFL-CIO, Local 848*, 01-1 Lab. Arb. Awards (CCH) P 3676 (Allen 2000). In the instant matter, the Grievant's conduct certainly justified the imposition of discipline. However, the three-day suspension is deemed by this arbitrator to be too severe. The Employer failed to utilize any of the less severe forms of discipline recognized in Section 19.05 of the Agreement, i.e., verbal reprimand, written reprimand, or fine in spite of its contractual commitment. Although the arbitrator is not intending to condone the Grievant's conduct as acceptable, the mitigating factors identified above merit the utilization of a less-severe form of discipline, based the good faith commitment of the parties in Section 19.05 of the Agreement, and in consideration of the specific circumstances of this case detailed herein.

Accordingly, the Grievant's three (3) day suspension should be vacated and converted to a written warning, hopefully providing a valid progressive and documented deterrent to the occurrence of similar future violation of ODPS policy by the Grievant.

## AWARD

The grievance is granted in part and denied in part. The three (3) day suspension shall be converted to a written warning and the Grievant shall be made whole for all lost wages and benefits.

Respectfully submitted to the parties this 4<sup>th</sup> day of September 2009.

A handwritten signature in dark ink, appearing to read "Robert G. Stein", is written over a horizontal line.

Robert G. Stein, Arbitrator