

I. STATEMENT OF THE ISSUE

The parties stipulated to a statement of the issue which read as follows:

"Was the disciplinary one-step, five month reduction in pay of Grievant for just cause, and if not, what is the remedy?"

II. RELEVANT CONTRACTUAL PROVISIONS

"ARTICLE XVI (A)

Disciplinary action, including discharge, shall only be for just cause.

State Police Manual

ARTICLE IV, Section 3

Section 3. They shall observe and obey all laws and will be held strictly accountable for personal misconduct, and for any act or omission prejudicial to order and discipline."

III. FACTS OF CASE

The instant case involves a grievance filed by Oregon State Police Trooper Maurice L. Austin. Trooper Austin charges Employer with reducing his pay one step for a period of five months without just cause.

Grievant Austin, is a member of the Oregon State Police and is stationed in Klamath Falls, Oregon. Grievant is 29 years old and had been a member of the Oregon State Police for approximately three years at the time of the hearing.

On March 28, 1986, grievant was returning to Klamath Falls from Salem, Oregon, where he and other officers had attended a State Police basketball tournament. He was driving a car belonging to his girlfriend, Teresa Marie Ellis, who was in the car with him. The testimony is undisputed that at some point, grievant passed Trooper John Mogle. Trooper Mogle was driving his own car and Trooper Robert W. Sundstrom was a passenger. Trooper Mogle subsequently passed grievant. All of the officers were off duty at the time of the incident which lead to the discipline.

At approximately milepost 224 on Highway 97, grievant again passed the vehicle driven by Trooper Mogle. There was no testimony as to the speed of either vehicle at this point.

Trooper Lawrence A. Behrenz, also of the Oregon State Police, was patrolling Highway 97 that evening. He testified that at approximately milepost 268, he clocked grievant on his radar travelling southbound at approximately 88 miles per hour. He further testified that he immediately made a U-turn and pursued grievant. At some point shortly after clocking grievant on radar, Trooper Behrenz reported the incident over his radio. He was not aware of the identity of grievant at this point. Trooper Behrenz testified that grievant then accelerated and he paced grievant's car at speeds of approximately 100 miles per hour. Trooper Behrenz finally activated the overhead lights and grievant immediately stopped. This was at approximately milepost 273, or five miles after Trooper Behrenz first observed grievant.

Trooper Behrenz also testified that he observed grievant weaving from the right hand lane to the center left turn lane. Grievant denied weaving.

After stopping grievant, Trooper Behrenz discovered grievant's identity as an Oregon State Trooper. Trooper Behrenz was upset with grievant and informed grievant that other troopers were on there way to the location of the stop. Grievant testified that he was embarrassed and asked Trooper Behrenz if he could leave before the other troopers arrived. Trooper Behrenz allowed grievant to do so. At about this time, the car with Troopers Mogle and Sundstrom drove past. The elapsed time from when Trooper Behrenz first notified the radio dispatcher of the speeding violation to the time grievant was allowed to leave was less than five minutes.

Trooper Behrenz also testified that at the time of the stop, grievant told him he was "racing" with Trooper Mogle. Grievant later testified at the hearing that he was not really racing but was "screwing around" with Mogle. Grievant also admitted that it was a "dumb thing to do" and that his speed was "way out of line." Trooper Mogle denied that they were racing.

Trooper Behrenz testified that from the time he first observed grievant to the time grievant stopped, there was no doubt that grievant exceeded 100 miles per hour during that period. Grievant testified that he did not know how fast he was going but that it was possible that he exceeded 100 miles per hour.

Trooper Behrenz testified that, as a general rule, he does not cite law enforcement officers. However, it depends upon the circumstances. In this case, he testified that he believed grievant's conduct was a serious offense due to the excessive speed and the fact this specific area of Highway 97 is a particularly dangerous stretch of highway.

Trooper Behrenz also testified that he never saw Trooper Mogle that evening and was not aware if Trooper Mogle was speeding. No other law enforcement official observed Trooper Mogle driving that evening.

Lieutenant Edward E. Hanson of the Oregon State Patrol in Klamath Falls learned of the incident that night and requested that all officers involved submit reports, which was done. On April 4, 1986, Trooper Behrenz cited grievant for Careless Driving. There was some testimony that a Reckless Driving citation was considered but Trooper Behrenz testified that he did not believe that a Reckless Driving citation was appropriate.

Grievant pleaded guilty to a reduced charge of Violation of the Basic Rule in return for dismissal of the Careless Driving citation. He was assessed an \$80.00 fine, which he paid.

Several years ago, an Oregon State Police Lieutenant was arrested for Driving Under the Influence of Intoxicants. Since December 12, 1985, it has been the departments policy that Oregon State Police would be treated according to the law applicable to all citizens. All Oregon State Police Officers were advised that any department punishment would be in addition to

any punishment imposed by the courts. Hence, this grievant was cited and his case processed through the courts.

On April 6, 1986, Lieutenant Hanson wrote a report regarding the incident with grievant and further stated that he believed this was a violation of Article IV, Section 3 of the Department Manual. On April 9, 1986, Major Robert R. Moine of District V headquarters in Bend, recommended disciplinary action as a result of the incident.

On May 2, 1986, grievant was advised that disciplinary action was warranted and was given the option of appearing before the Superintendent. Grievant declined to do so and elected to be informed of the Superintendent's decision by mail.

By letter dated May 20, 1986, grievant was notified of the disciplinary action taken by the department and was notified that this amounted to a one step reduction in pay for a period of five months. Grievant filed his grievance on June 1, 1986.

Due to the parties' inability to resolve the grievance, the matter progressed to arbitration. The arbitration hearing was held before this Arbitrator on April 17, 1987. Grievant appeared in person and through counsel, and was granted ample opportunity to present evidence and argument.

No questions regarding the timeliness or arbitrability of the grievance were raised, post-hearing briefs were received in a timely manner. The grievance is now properly before the Arbitrator for a decision.

IV. POSITION OF THE PARTIES

A. The Association

The Association makes several arguments in support of its contention that the discipline imposed on grievant was without just cause and was too severe.

First, the Association states that the Employer never correctly ascertained the facts of what occurred on March 28, 1986. The Association claims that, due to the time frames as testified to at the hearing, it is physically impossible for grievant to have been travelling as fast as Trooper Behrenz testified he was going. Since the Employer failed to adequately develop the facts, just cause to impose discipline cannot exist.

Second, in a related contention, the Association claims that the Employer failed to perform an adequate and complete investigation. This is based on the facts developed in its first contention and on the basis that none of the individuals recommending or imposing the discipline ever personally interviewed grievant. The Association concedes, however, that there is not an affirmative obligation in every disciplinary case for the Employer to interview the grievant. The Association contends that the Employer's disciplinary decision may have been different had it personally interviewed grievant.

Third, the Association contends that the discipline here was unduly harsh in light of the circumstances. The Association also questions whether an employee can be disciplined at all for off-duty conduct. The Association contends that the fine

grievant paid, coupled with the embarrassment he suffered over the incident was sufficient punishment.

Fourth, the Association contends that by disciplining grievant, the Employer violated Article I, Section 12, of the Oregon constitution by putting grievant twice in jeopardy for the same offense.

Finally, the Association contends that the discipline meted out of demotion was inappropriate. The Association relies on the general rule that a demotion is a disfavored disciplinary penalty. The Association further contends that, absent a showing that grievant cannot perform the job requirements of the position from which he was demoted, the Employer may not demote grievant.

B. The Employer

The Employer contends that, under the undisputed facts, there was a clear violation of Oregon traffic laws. The Employer states that it is undisputed that grievant was driving a car at speeds near or in excess of 100 miles per hour. The Employer contends that this is in violation of Article IV, Section 3 of the State Police Manual.

The Employer further contends that the consequences of such a violation were known to all employees of the Oregon State Police. The Employer contends that all members of the Oregon State Police were aware that violations of the law would have disciplinary consequences in addition to any sanction imposed by the courts.

The Employer states that the discipline imposed was equivalent to a five day suspension. Due to the seriousness of the offense and the fact that grievant's conduct could have led to even more serious consequences involving other officers and the general public, the discipline was warranted.

The Employer also takes the position that this was a flagrant violation of the laws which grievant was hired to enforce, thus further warranting the discipline imposed.

V. DISCUSSION

In the present case, the Association has made a very imaginative argument relating to the physical facts of this case. The Association says, first, that the physical facts do not support Trooper Behrenz's testimony that grievant was driving at 88 miles per hour when first clocked on radar or that grievant accelerated to speeds in excess of 100 miles per hour. Trooper Behrenz testified that he was watching his speedometer and that he believed his calculation of grievant's speed was accurate. Grievant testified that he was not watching his speedometer but that it was "possible" that he exceeded 100 miles per hour, although he did not think he had done so.

An equally likely explanation of the facts is that Trooper Behrenz clocked grievant at 88 miles per hour on his radar. As Trooper Behrenz proceeded to make a U-turn, grievant very well could have slowed down. When grievant saw Trooper Behrenz approaching, he would have accelerated. This would

account for Trooper Behrenz's ability to catch grievant so quickly and arrive at the final stopping point within the time-frame mentioned. Furthermore, grievant testified that he did in fact accelerate when he saw Trooper Behrenz closing on him.

The Association also focuses on the fact that Trooper Mogle's car passed grievant while grievant was stopped by Trooper Behrenz. This is an apparent attempt to support grievant's contention that he was racing with Trooper Mogle and that the discipline of grievant was somehow arbitrary since Trooper Mogle was not also disciplined. This contention also fails in the absence of any testimony of grievant's speed from when he passed Trooper Mogle at milepost 224 to when he was picked up on radar at milepost 268. It is entirely possible that grievant drove those 44 miles at speeds not significantly in excess of the speed driven by Trooper Mogle and then sped up shortly before being picked up on radar by Trooper Behrenz.

It does not require a stretching of physical laws to adequately explain the testimony in this case. The Arbitrator finds that grievant was driving at speeds of approximately 100 miles per hour as testified to by Trooper Behrenz. Grievant has not denied this and has admitted that it was possible.

The next question is whether there was just cause for the discipline imposed here.

"If an employer is going to discipline an employee under the just cause standard, the employer must make a thorough investigation, which includes obtaining the employee's own version of the facts before the discipline is

rendered." In Re St. Clair County, 80 LA 516
(Roumell, 1983) (Emphasis in original).

In the instant case, Lieutenant Hanson requested and obtained written reports from all individuals involved, including grievant. There were no significant factual inconsistencies among all of the reports obtained from the troopers involved. There was testimony that grievant discussed the incident with a number of superior officers. Finally, by the letter dated May 2, 1986 (Ex. S-8), grievant was presented with the opportunity to appear before the Superintendent prior to the imposition of discipline, which opportunity grievant denied.

The Arbitrator finds that the Employer adequately investigated this matter. Grievant was given ample opportunity to explain his conduct, including any facts in mitigation. Since grievant chose not to further explain his conduct or offer facts in mitigation, he can not claim that he should have been questioned further.

Regarding grievant's claim of double jeopardy, under the following circumstances, a second prosecution will be prohibited:

1. Both charges arise out of the same act or transaction.
2. The prosecutor knew or reasonably should have known of the facts relevant to the second charge at the time of the original prosecution.

3. The charges could have been tried in the same court. State v. Sleeper, 36 Or. App. 227, 584 P.2d 333 (1978). (Emphasis added).

The judicial forum is a place to determine whether an individual has violated a specific statute. An arbitration proceeding is not a court but a separate and distinct process involving an allegation that the terms of a collective bargaining agreement have been violated. In the instant case, the just cause section of the labor agreement is the contractual issue in dispute. Clearly, the double jeopardy test has not been met here. Furthermore, it is well-established that an employee can be disciplined for violations of the law, regardless of the outcome of any criminal or other prosecution. cf. Elkouri and Elkouri, How Arbitration Works, 4th Ed., p 678.

In the present case, Oregon State Patrol members were advised that internal discipline could occur for violations of the laws by members of the Oregon State Patrol. They were further advised that such discipline could occur in addition to any sanction imposed by the court system. By the Association's argument, a member of the Oregon State Patrol could never be disciplined for a violation of the law, no matter how egregious. This is clearly not the case, particularly where, as here, the violation is of the laws grievant is charged with enforcing. The Arbitrator finds that the Employer had just cause for disciplining grievant.

The final question is whether the discipline imposed was unduly severe:

"The reasonableness of the penalty must be determined, of course, in the light of all the circumstances... Even when all the circumstances are considered, the exact size of the penalty is still a matter of judgment. The contract does not specify exact penalties for specific violations of order under various circumstances. The initial and primary responsibility for the determination of the penalty is vested in the company. Within a reasonable range of penalties the company may exercise discretion as to the particular one to be selected. The Umpire has no power to upset the company's determination if it is within the range of reasonable penalties from which the company was entitled to choose. If the penalty for a particular violation may reasonably range from one week to one month's lay-off, for example, two different persons might very well choose two different penalties; one a week, the other perhaps two weeks. But the Umpire does not have the power to substitute his judgment for that of the company in all cases and compel the acceptance of the precise measure of discipline which the Umpire would have imposed had he had the initial responsibility for discipline. Such a power on the Umpire's part would lead to a serious difficulty. For then each case of discipline would be appealed to the Umpire in the hope that his judgment might be different from that of the company; and in each case the company would then be tempted to impose the maximum possible penalty in order to make allowances for a probable reduction by the Umpire... (The Umpire's power is only to modify penalties which are beyond the range of reasonableness, and are unduly severe. If the penalty is within that range, it may not be modified." St. Clair, supra, at 519, citing Ford Motor Company (Shulman 1943). (Emphasis in St. Clair).

In the present case, the Arbitrator finds that some discipline was warranted. Grievant drove his vehicle far in excess of a reasonable speed. By his own admission, his conduct

was "out of line." The manner in which he drove could have caused injury to himself, his fellow officers or the general public. Grievant also testified that when he went to take care of his Careless Driving citation, the person at the courthouse was already familiar with the charge since, as grievant stated, Klamath Falls is a small town. If it is generally known among the public that police officers can violate the law with impunity, this could adversely affect the public perception of law enforcement officials. This could, in turn, make it more difficult for all law enforcement officials to perform their duties.

It should also be noted that grievant was not demoted. Grievant was reduced one step in the pay scale. He was still required to perform all of his previous duties and he maintained his existing rank. Therefore, the law cited by the Association relating to demotions is not applicable in the present case.

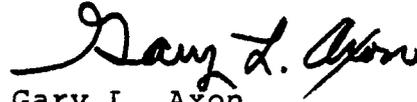
The Arbitrator cannot say that, under the circumstances of this case, the discipline imposed was beyond the range of reasonableness or unduly severe. Therefore, the grievance must be denied.

AWARD

Having reviewed all of the evidence and testimony submitted, the Arbitrator finds as follows:

1. The Employer was justified in imposing discipline under the circumstances of this case.
2. The discipline imposed was not beyond the range of reasonableness or unduly severe.
3. Pursuant to Article XVII(B), the Arbitrator's expenses and fees are payable by the Association as the non-prevailing party.

Respectfully submitted,



Gary L. Axon
Arbitrator

Dated: July 2, 1987