

OPINION AND AWARD

In the Matter of Arbitration

Between

Ohio State Troopers Association

And

Ohio State Highway Patrol

Case Designation

DPS-2015-03223-1

Date of Hearing: October 20, 2015

Date of Briefs: November 23, 2015

Date of Award: December 18, 2015

APPEARANCES

For the Union

Herschel Sigall, Esq., General Counsel, Advocate

Elaine Silveira, Esq., Assistant General Counsel, Second Chair

Larry Phillips, OSTA Staff Representative

Jeremy Mendenhall, OSTA President

Brian Barnhart, Extern

For the Employer

Lt. Cassandra Brewster, Advocate

Lt. Marty Fellure, Second Chair

Michael Wood, OSHP Labor Relations Officer

Jim Miller, Office of Collective Bargaining

Witnesses

Trp. Richard Tocash, Grievant

Sgt. Laura Taylor, Internal Investigator, OSHP

Lt. Brian Charles, Special Response Team (SRT), Commander

Sgt. Aaron Reimer, Member Assistance Team (MAT), Member

Staff Lt. Steven Rosta, Field Operations, SRT, Commander

Tpr. Nick Malo, SRT, Member

Sgt. Brandon Cruz, SRT, Supervisor

Jeffrey Balzer, Assistant Chief Deputy U.S. Marshal

Rt. Lt. Col. Thomas Charles, Former Director, Ohio Department of Public Safety

An arbitration hearing was conducted on October 20, 2015 at the Ohio State Troopers Association Offices in Columbus, Ohio.

At the hearing, the Parties submitted the current collective bargaining agreement as Joint Exhibit 1 (J1), the grievance trail as Joint Exhibit 2 (J2), and the Disciplinary Trail as Joint Exhibit 3 (J3). In addition each Party submitted additional exhibits, which were all admitted into evidence.

The Parties agreed that the matter was properly before the Arbitrator for determination. The stipulated issue before the Arbitrator was presented by the Parties as: "Was the Grievant terminated for just cause? If not what shall the remedy be?" Both Parties were given full opportunity to examine and cross examine witnesses, pose arguments, and present their respective cases.

Both Parties timely submitted post hearing briefs. All materials were reviewed and considered by the Arbitrator in reaching this decision.

RELEVANT CONTRACT PROVISION:

Negotiated agreement between Ohio State Troopers Association, Inc. Unit 1 & 15 and The State of Ohio effective July 1, 2012 – June 30, 2015

ARTICLE 19 – DISCIPLINARY PROCEDURE (Relevant Sections)

19.01 Standard

No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause.

19.03 Length of Suspension

No suspension without pay of more than ninety (90) calendar days may be given to an employee.

19.05 Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

1. One or more Verbal Reprimand (with appropriate notation in employee's file);
2. One or more Written Reprimand;
3. One or more day(s) Suspension(s) or a fine not to exceed five (5) days pay, for any form of discipline, to be implemented only after approval from the Office of Collective Bargaining.
4. Demotion or Removal.

However, more severe discipline (or a combination of disciplinary actions) may be imposed at any point if the infraction or violation 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 the employee's wages.

BACKGROUND

This case involves the termination of State Trooper Richard Tocash (i.e., Grievant).

The Grievant has been an Ohio State Trooper for 15 years, with a distinguished career, excellent performance evaluations, and no prior disciplinary record. For the last 10 years the Grievant has served on the State Highway Patrol's Special Response Team (SRT). The SRT is utilized for issuing arrest warrants that result from the Patrol's law enforcement activity, and assisting other law enforcement agencies, such as sheriffs, villages or townships, in dealing with high risk situations. In 2011, the Grievant was selected to participate on the Southern Ohio Fugitive Apprehension Strike Team (SOFAST) as a special Deputy U.S. Marshal. SOFAST is tasked with tracking down and arresting violent fugitive felons.

On July 15-19, 2015 the Grievant visited his brother in Noblesville, Indiana (Hamilton County) for an annual family golf outing. At approximately 10:00PM on the night of Friday, July 17 the Grievant went, with family and friends, to a local bar. The bar is located within a quarter of a mile of where the Grievant was staying and so the Grievant walked to the bar. While there, between approximately 10:30PM and 1:30AM the Grievant consumed approximately five vodka and cranberry drinks. At bar closing time, as the Grievant and his group of family and friends were leaving, the Grievant was asked to take a car, belonging to a friend of the family, to that friend's home. The owner of the car was too impaired to drive. The Grievant determined, based on the amount of alcohol he had consumed, that he was not over the legal limit, not impaired, and able to drive the car.

Within minutes of leaving the Plaza where the bar is located the Grievant was stopped by Hamilton County Deputy Sheriff Crask. The Grievant was administered standard field sobriety tests, which he failed. The Grievant was also administered a portable breath test, which registered .146% Breath Alcohol Content (BAC). The legal limit in Indiana is .08% BAC. The Grievant was placed under arrest and transported to the Hamilton County Sheriff's Office where a second breath test was administered, which registered .144% BAC.

The Grievant was charged with two misdemeanors: Operating a Vehicle While Intoxicated Endangering a Person – Misdemeanor Class A, and Operating a Vehicle With Alcohol Concentration Equivalent to at Least .08 but Less Than .15 – Misdemeanor Class C. On September 1, 2015 the Misdemeanor Class A (OVI Endangering a Person) was dismissed and the Grievant entered a Plea by Agreement on the Misdemeanor Class C (Management Exhibit 2 – M2). The Grievant was sentenced to: 2 days jail credited and 58 days jail suspended, 60-day license suspension in Indiana, 365 days of probation, a substance abuse evaluation, and a Victim Impact Panel (M2).

The Ohio State Highway Patrol, Administrative Investigation Unit undertook an investigation of this matter and issued a report dated July 31, 2015 (Management Exhibit 1 – M1). Subsequently, the Grievant was issued a pre-disciplinary notice on August 21, 2015 and was issued a termination letter effective August 27, 2015 (J3).

On August 27, 2015 a grievance was filed by the Union claiming that the Grievant's termination was without just cause and seeking restoration of the Grievant to his position as a Trooper assigned to the SRT and made whole in seniority and wages (J2).

POSITION OF THE UNION

The Grievant is an exemplary Trooper; he has been through his entire career. This is evidenced not only by his performance evaluation and clean department record, but more importantly by the testimony of his teammates, immediate supervisors, commanders, and those with whom he has served on special assignments.

Six months prior to the incident in Indiana, which gave rise to the Grievant's termination, the Grievant was involved in a serious and dramatic gun battle as part of a team tasked with arresting a violent fugitive felon. Although no law enforcement officers were shot, there was an exchange of fire that put the Grievant and another State Trooper in the direct line of fire. The felon was shot and killed. This incident in January has taken a toll on several team members who were in the building when the shots were exchanged. To this day, the Grievant and other team members continue to contact one another and support each other as they each work through the after effect of the shooting. In addition, just weeks prior to the July incident in Indiana, the Grievant's mother passed away. This personal loss has also taken a toll on the Grievant. These personal and work traumas, although not excuses for the Grievant's conduct, shed light on Grievant's state of mind and help to explain the context for the incident that occurred in Indiana.

The Grievant was charged with *Conduct Unbecoming an Officer –elements of criminal violations or criminal convictions (M1 or higher)*. The rule has not been properly applied in this case. The Employer took its disciplinary action prior to the conclusion of the Indiana court case. Ultimately the Indiana Misdemeanor-A charge was dismissed (equivalent to the Ohio M1) and the Grievant entered into a plea agreement on the Indian Misdemeanor-C charge (equivalent to the Ohio M3). Regardless, the Employer's disciplinary grid is a guideline and must be applied with deference to the contractual disciplinary standard of Just Cause. The Employer's strict application of its unilaterally developed disciplinary grid does not allow for the proper functioning of the principles of just cause which require that consideration be given to mitigating circumstances and the use of progressive discipline.

The Employer asserts that the Grievant's misconduct has brought discredit to the Patrol and could adversely affect the public's respect for the Patrol. To the contrary, nothing about this incident has been made public. Throughout the entire incident, even in an impaired state on the night of the arrest, the Grievant has conducted himself with courtesy and deference to the position he holds. Every Commander, Supervisor, and team mate called as a witness, whether on behalf of the Employer or the Union, has unequivocally expressed support for the Grievant's reinstatement. Clearly, with this amount of support, even from the chain of command, the notion that the Grievant's conduct has brought discredit to the Patrol is an overstatement.

Finally, the incident that has led to the Grievant's termination occurred both out of State and off-duty. Had the Grievant actually reported to work under the influence of alcohol the response from

the Employer would not have involved discipline at any level, let alone termination. In accordance with the negotiated Drug Free Workplace Policy, a first offense of reporting to work under the influence leads to enrollment in a substance abuse program, not discipline. All the more reason to look at the circumstances of the instant case and conclude that the Employer's response has been overly harsh and unwarranted.

The Union seeks to have the termination overturned and the Grievant restored to his position.

POSITION OF THE EMPLOYER

The facts of the case are not in dispute. The Grievant was arrested on July 18, 2015 in Indiana and charged with two OVI Misdemeanors: Operating a Vehicle While Intoxicated Endangering a Person – Misdemeanor Class A, and Operating a Vehicle With Alcohol Concentration Equivalent to at Least .08 but Less Than .15 – Misdemeanor Class C. These basic, undisputed facts establish that the Grievant has violated Ohio Administrative Code 4501:2-6-02(I)(1)(2) Conduct Unbecoming an Officer. This particular OAC Rule addresses conduct, both on or off-duty, that brings discredit to the Patrol, and the commission of a crime, offense or violation of law. The Ohio State Highway Patrol's Sworn Officer Discipline Grid, calls for removal on a first offense for *Conduct Unbecoming an Officer –elements of criminal violations or criminal convictions (M1 or higher)*. In this case, the Grievant was charged with both a Class-A and a Class-C misdemeanor in Indiana, which is the equivalent of a Class-1 and a Class-3 misdemeanor in Ohio. Even though the Class-A misdemeanor was dismissed, it remains that the Grievant was charged with the Class-A misdemeanor and therefore the Grievant had engaged in conduct that contains the "*elements of criminal violations*" at the M1 level. An actual conviction is not required under the rule.

The nature of the Grievant's misconduct, even though off-duty, has a direct nexus to the Employer's mission. It is the primary duty of the State Highway Patrol to enforce traffic laws and maintain highway safety. For an Ohio State Trooper to engage in the very type of law violation that a Trooper is employed to prevent is entirely unacceptable and works to undermine the credibility and respect of the Patrol. It is well-established public policy that law enforcement officers are held to a higher standard of conduct than the general public. Both the Courts and arbitrators have made it clear that this higher standard applies to both on-duty and off-duty conduct.

The Union's suggestion that the Grievant's actions on July 17-18, which lead to his termination, were related to and/or mitigated by his having been involved in an active shooter incident in January is without merit. In response to the January shooting incident, the Grievant was provided with the full scope of support available from the Patrol including well-being checks by his Supervisor and Commander, access to a clinical psychologist who works with the Patrol, as well as access to the Member Assistance Team – trained in providing critical incident stress management support. Prior to the administrative investigation into the July incident in Indiana, the Grievant had not revealed a need for, or sought out, any help from the Employer in coping with the after effect of the January shooting. These facts simply do not support mitigation.

The Employer seeks to have the termination upheld in its entirety.

DISCUSSION

For the most part, the facts of this case are not in dispute. Therefore the Arbitrator's role as fact finder is of limited value. Here, the Arbitrator's job is to determine the reasonableness of the discipline imposed rather than the existence of a reason for the discipline.

The Standard of Review is Just Cause

In this matter, it is clear that the Grievant is guilty of wrong doing and that the Employer has a right to take disciplinary action. The question is, does the Grievant's conduct warrant removal? The Arbitrator's authority derives from the collective bargaining agreement, which establishes in Section 19.01, *No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause.* Additionally, Section 19.05 incorporates the principle of progressive discipline; *The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.* Fundamental to the Just Cause Standard and progressive discipline is the notion of proportionality. For discipline to be just and fair there must be an equitable balance between the offense and the penalty.

I have no objection to the Patrol's administrative rule which sets forth the basis for a charge of, 'Conduct Unbecoming an Officer.' Furthermore, I have no objection with the Patrol applying that rule in the instant case. The rule is reasonable and its application in this circumstance is appropriate. The Employer has translated the administrative rule into a variety of work rules for inclusion in its disciplinary grid. This Grid is a detailed expression of what the Patrol considers appropriate disciplinary penalty levels for specific types of misconduct. Given that it is not a negotiated expression of what constitutes 'Just Cause' the Arbitrator is not bound by the Grid. The Grid's value is that of a guideline, not a mandate. The Arbitrator must evaluate a decision to discharge an employee in view of a broad range of possible penalties and mitigating factors.

The Employer's steadfast adherence to its Disciplinary Grid is presumably based on a belief that the Grid correctly delineates a bright line, which on one side allows for discretion and consideration of mitigating or aggravating factors, the other side of which does not provide for the exercise of discretion. By virtue of the way the Disciplinary Grid (M3) is drafted, there is a bright line when a Trooper's conduct involves a criminal conviction or the '*elements of criminal violations*' at a 1st degree misdemeanor or higher level. For the Patrol, a 1st degree misdemeanor is the Rubicon, and the only disciplinary response can be removal. Presumably, this bright line is based on the view that law enforcement officers are held to a higher standard of conduct than the general public. And yet, even given the truth of this higher standard, public policy does not go so far as to clearly establish precisely what the higher standard is, and what the penalty is for breaching that standard.

Among the classic 'Seven Tests of Just Cause' the principle of proportionality is expressed as follows: *Was the degree of discipline reasonably related to the seriousness of the employee's offense and the employee's past record?* It is in this 'test' that mitigating and aggravating circumstances come to bear.

Seriousness of the Employee's Offense

The Employer's decision to impose the ultimate sanction on the Grievant is based on the belief that the record is clear that the Grievant's misconduct involved the '*elements of criminal violations*' at the M-1 level. This refers to the Indiana Misdemeanor-A charge of Operating a Vehicle While Intoxicated Endangering a Person. The assumption is that the charge itself translates directly and clearly to the Employer's work rule that references '*elements of criminal violations*.' However, the Indiana Court chose to dismiss this charge. The charge was not 'reduced' it was simply and fully dismissed (M2). I understand that the Employer changed the wording of this work rule when a revision of the Disciplinary Grid was issued in August 2014, giving the Employer the option to take disciplinary action that is not contingent on an actual criminal conviction. However, the new wording is ambiguous and there is nothing in this arbitration record to explain how a dismissed criminal charge is the equivalent of '*elements of criminal violation*.' A dismissed charge could actually be viewed as perhaps having lacked the '*elements of criminal violation*.' What remains is that the Grievant was charged with, and entered into a plea agreement on, a Misdemeanor-C charge of: Operating a Vehicle with Alcohol Concentration Equivalent to at Least .08 but Less Than .15. This Misdemeanor is equivalent to a 3rd degree misdemeanor in Ohio.

Regardless, the charge is serious and warrants a stiff disciplinary penalty.

The Employee's Past Record

The Grievant is a 15-year veteran of the Patrol and has no prior disciplinary record. In each of the past three years (2013-2015) the Grievant has received an overall performance rating of '*Exceeds Expectations*.' In his 2015 performance evaluation, the Grievant's supervisor indicated that the Grievant was preparing himself to, "...possibly take a Squad Leader position." Throughout all three years of performance evaluations submitted into evidence, the Grievant is described as an "important team member"; "an informal leader and a voice for his peers"; "respected by more junior members of the team" and "sought after for a senior member point of view"; and "a peer leader... sought after for advice by others on the team." Testimony on the day of the hearing from the Grievant's supervisor and unit commanders left no doubt that the Grievant not only exceeds performance expectations on required competencies and assigned duties, but that the Grievant consistently offers his discretionary effort to his Employer. The Grievant was described as one of the hardest working troopers on the SRT, someone who "takes it upon himself to take care of things when no one else will from emptying trash cans to driving an armored vehicle."

The Grievant's length of service and outstanding work record is an important mitigating factor.

Off-Duty Conduct

In a widely-cited award [W.E. Caldwell, 28 LA 434 (Kesselman, 1957)], the standard for judging whether off-duty conduct can constitute just cause for discipline is whether the employee's off-duty conduct (1) harmed the company's reputation or product; (2) rendered the employee unable to perform his duties or appear at work; or, (3) resulted in the refusal, reluctance or inability of other employees to work with the employee whose off-duty conduct is in question.

On the first point of this analysis the Employer asserts that the Grievant has brought discredit on the Patrol. The Employer argues that discredit ensues by virtue of the mere fact of the Grievant's arrest, regardless of whether there is any media coverage or public awareness of the arrest. This is a claim that actual harm has occurred to the Patrol's reputation, not that there is potential for harm if the conduct were to become known. As an Employer, the Patrol is not immune to the variety of mistakes that employees make in their off-duty conduct, however the Patrol must take care not to exaggerate what the public may think without any evidence to support the claim of harm to its reputation. In this case, the Grievant is not a prominent employee, nor a high ranking official; there has been no public communication regarding the incident; and the facts of the case are down-right tame compared with those of the other cases cited by the Parties for comparison purposes. Unlike the cited cases, this case involves no belligerent behavior, no aggressive or violent behavior, no inappropriate sexual conduct, no lying, no falsification or misrepresentations, and no witnesses observing the incident and developing adverse opinions about the trooper, and by extension the Patrol. In fact, all of the evidence in this case record indicates that the Grievant has conducted himself with great deference to his position and shown a respectful and remorseful attitude throughout. The only evidence in the record that addresses how someone outside of the Patrol views the circumstances of the Grievant's arrest are the comments by the arresting officer, Deputy Crask. In his statement Deputy Crask says that the Grievant, "remained completely cooperative," "didn't ask for any favors and was actually apologetic." When Deputy Crask was asked if the Grievant had done anything to bring discredit to the Patrol, he replied, "Other than getting arrested, no." This statement by Deputy Crask sums up the situation nicely. It supports the Patrol's assertion that the simple fact of the Grievant's arrest brings with it discredit, but it also supports the Union's assertion that the degree of harm to the Patrol is minimal.

On the second point of the analysis there is no evidence that the Grievant's off-duty conduct has resulted in an inability to perform his duties or appear at work. The suspension of his driver's license only impacted his ability to drive in Indiana and that suspension has already run its course. There was no Ohio consequence.

As for the third point in the analysis, the evidence in the record is overwhelmingly in the Grievant's favor. Not only is there no refusal or reluctance on the part of the Grievant's coworkers to work with him where he to be reinstated, his chain of command supports his return to the Patrol, as do law enforcement professionals from other jurisdictions. During the course of the arbitration hearing, eight witnesses were called to testify, four on behalf of the Employer and four on behalf of the Union. With the exception of Sgt. Laura Taylor, who served as the internal administrative investigator on this case, each of the witnesses was asked by the Union's advocate about the prospect of the Grievant's reinstatement. Every witness supported the Grievant's reinstatement and volunteered further comments on the Grievant's ongoing value to the Patrol. In addition, statements of support for the Grievant's reinstatement from U.S. Marshal Peter Tobin and Deputy U.S. Marshal Damon Willaman were accepted into the record without objection (U7). This is substantial evidence on the side of reinstatement, and not just because of the number of witnesses willing to offer a good character reference. This evidence speaks directly to the tenure and work record of the Grievant, which are recognized important factors in the just cause analysis. Furthermore this evidence is significant as a

counterbalance to the discredit that the Grievant's off-duty conduct may, or may not, have brought to the Patrol.

The three-prong analysis of off-duty conduct shows that the basic facts of the Grievant's conduct (i.e., arrest and conviction at the M-3 level) carry a degree of discredit for the Grievant and the Patrol; though mitigated by a lack of evidence showing harm to the Patrol's public reputation or the Grievant's inability to continue as a trooper.

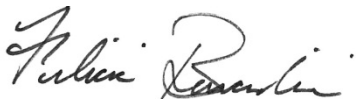
Conclusion

The standard of Just Cause requires that the disciplinary penalty levied be proportionate to the seriousness of the offense and the employee's past record. In this case, the conduct occurred off-duty and although serious, is lessened by a lack of evidence of harm to the Employer's reputation or ability to carry out its mission. Furthermore the conduct has not resulted in any restrictions on the Grievant's ability to perform the duties of his position, nor has it made him unwelcome among his peers or chain of command. As to the Grievant's past record, it has been exemplary for 15 years. As a law enforcement officer the Grievant is held to a higher standard than the general public in both his on-duty and off-duty conduct, however this higher standard does not demand termination without regard for crucial case elements. I find that the Patrol has established just cause for discipline, but that the ultimate sanction of termination is disproportionate.

AWARD

For the reasons herein stated the grievance is denied in part and sustained in part. The Grievant shall be reinstated to his position as a Trooper with the State Highway Patrol in his prior assignment with the Special Response Team. The Termination will be converted to a ninety (90) day suspension and the Grievant restored in seniority, benefits and back pay for time-off that extends beyond the 90-day suspension.

Respectfully submitted at Columbus, Ohio, December 18, 2015.

A handwritten signature in cursive script, reading "Felicia Bernardini".

Felicia Bernardini, Arbitrator