

IN THE MATTER OF ARBITRATION BETWEEN

OHIO DEPARTMENT OF PUBLIC SAFETY, )  
DIVISION OF THE STATE HIGHWAY PATROL)

Employer, )

v. )

OHIO STATE TROOPERS ASSOCIATION )

Union, )

Grievance of Daren L. Johnson  
Grievance No.: DPS-2015-01930-15

**Arbitrator Sarah R. Cole**

Appearances:

For the Union:

Larry Phillips, OSTA Representative  
Elaine Silveira, OSTA Representative  
Sgt. Daren L. Johnson, Grievant  
Sgt. Jeremy Mendenhall, OSTA President  
Bruce Elling, OSTA Staff Representative

For the Department of Public Safety:

Lt. Darrell Harris, OSP Representative  
Captain Charles Linek, OSP Representative  
Cullen Jackson, OCB Representative

Opinion

Sergeant Daren L. Johnson, the Grievant, has been employed by the Department of Public Safety, Ohio State Patrol (OSP) for twenty-four years. On June 12, 2015, OSP suspended the Grievant for five days without pay for three rule violations: Rule 4501:2-6-02(B)(1) and (5), Performance of Duty, Rule 4501:2-6-05(C)(1), Wearing the Uniform, and Rule 4501:2-6-02(Y)(2), Compliance with Orders. OSP issued this discipline because the Grievant did not wear

his uniform Stetson, nor did he conduct adequate pat-downs during three traffic stops on March 7, 2015. The Grievant already had a one-day and three-day suspension on his record.

Video evidence presented at the hearing confirms that the Grievant was not wearing his uniform Stetson during the three traffic stops in question on March 7, 2015. Video evidence also confirms that the Grievant's pat down of each driver during the three traffic stops did not involve checking the ankles or the waistband and/or the back of the driver. Nor did the Grievant turn the driver around so that the driver's back was facing the Grievant or have the Driver put his hands behind his back prior to the pat down.

The question here is whether it was proper to discipline the Grievant for failing to wear the uniform Stetson and for his failure to follow what the OSP representatives testified was the proper procedure for pat downs of drivers before those drivers are placed in a trooper's patrol car. Both Nathan Henn, a Sergeant from District 1 who was the administrative investigator in this case, and Lt. David Dillon, testified that the video evidence revealed that the Grievant was not wearing his uniform Stetson during the three stops and did not use the proper pat down technique. Both testified that whether or not the Grievant obtained consent from the driver for the pat down was irrelevant because the pat down procedure is generally the same whether the pat down is consensual or not. The video evidence was ambiguous as to whether the Grievant obtained consent for the pat downs before conducting them.

The question, then, is whether the Grievant's failure to wear his uniform Stetson and to properly pat down three drivers on March 7, 2015, justified a five-day suspension. For the reasons that follow, I conclude that the OSP did not have just cause to issue this discipline.

The OSP presented evidence supporting its contention that the Grievant understands and has been properly trained regarding how to pat down a driver, whether the pat down is

consensual or as part of a Terry frisk. On January 28, 2015, the Grievant attended an individualized training with Lt. Dillon. One of the topics covered during the three-hour session was how properly to pat down a driver before allowing that person to sit in the patrol car. Although the Grievant does not recall the topic being reviewed, Lt. Dillon's testimony, together with his contemporaneous report that he reviewed the pat down procedure with the Grievant, suggests otherwise. If, in fact, Grievant was trained on proper pat down techniques, the question is why he failed to use those techniques on the three traffic stops a mere month and one-half later? The testimony of Lt. Brode, combined with the video evidence of the Grievant's colleagues, Sgts. Cook and Schmenk, provides the answer. It appears that the day-to-day practice of pat downs at the Lima Patrol Post is much more relaxed than the OSP's training requires. Both Sgts. Cook and Schmenk conducted traffic stops during the same period of time as the Grievant, and videotapes of the pat downs they conducted were presented at the hearing. Their pat downs were indistinguishable from those that the Grievant conducted. Lt. Brode, upon review of the Cook and Schmenk videos, testified that their pat downs were inadequate. Yet, when he previously conducted contemporaneous review of those pat downs, Lt. Brode declared that the officers used "good" pat down procedures during those traffic stops even though, as noted above, those pat down procedures are indistinguishable from the pat down procedure the Grievant used. (U Ex. 5)

If Schmenk and Cook did not receive discipline for their pat downs, the Grievant should not be disciplined for using the same pat down procedure. It is axiomatic in labor relations that similarly situated employees must be treated similarly. Thus, although I find that the Grievant was trained to do pat downs more thoroughly than he did, I find that OSP's decision to discipline him based on his failure to use the technique he was taught was unjustified.

Given that finding, the validity of OSP's discipline of the Grievant must turn on whether it was justifiable to discipline the Grievant for failure to wear his OSP-issued uniform Stetson during the three traffic stops on March 7, 2015. The Grievant's uncontroverted testimony is that he forgot his uniform Stetson at the post after he took it off to fix a light on his patrol vehicle. As he pulled over the first driver for speeding, he realized he did not have his uniform Stetson. He nevertheless proceeded with that stop as well as the other two stops at issue in this grievance. Sergeant Henn, who has conducted administrative investigations for two years, and who conducted the investigation in this case, testified that he has never conducted an administrative investigation of a trooper for failure to wear his or her uniform Stetson. Moreover, Sergeant Henn testified, "[w]e've all left Stetsons on post." Because the OSP has not historically issued discipline for failure to wear the uniform Stetson, and because basing the severe discipline in this case solely on the failure to wear the proper headgear seems unduly harsh in light of the severity of the infraction, I find that the discipline imposed in this case is unwarranted.

#### **Award**

The grievance is granted. The five-day suspension shall be removed from the Grievant's record and all back pay, seniority and any other benefits lost due to that suspension be restored.

May 8, 2015



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Arbitrator Sarah R. Cole