

IN THE MATTER OF ARBITRATION
BETWEEN
OHIO STATE TROOPERS ASSOCIATION
AND
OHIO STATE HIGHWAY PATROL

Before: Robert G. Stein

Case Number 15-03-20120217-0018-04-01

Grievant: Daniel J. Stephens

Advocate for the EMPLOYER:

**Lieutenant Kevin D. Miller
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Advocate for the UNION:

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INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement (“Agreement”) (Joint Ex. 1) between the Ohio State Troopers Association, Inc. (“Union”) and The Ohio Department of Public Safety, Division of the State Highway Patrol (“Employer” or “OSHP”). That Agreement is effective for calendar years 2009 through 2012 and includes the conduct which is the subject of this grievance.

Robert G. Stein was mutually selected by the parties to arbitrate this matter, having been chosen from the existing permanent panel of umpires identified in Article 20, Section 20.08 of the Agreement. A hearing was conducted on April 5, 2012, regarding the instant grievance, which has been recognized as case number 15-03-20120217-0018-04-01. The parties mutually agreed to that hearing date, and they were each provided with a full opportunity to present both oral testimony and documentary evidence supporting their respective positions. The hearing, which was not recorded via a fully-written transcript, was subsequently closed upon the parties’ individual submissions of post-hearing briefs on May 14, 2012

No issues of either procedural or jurisdictional arbitral authority have been raised, and the parties have stipulated that the matter is properly before the arbitrator for a determination on the merits. The parties have also stipulated to the statement of the issue to be resolved and to the submission of three (3) joint exhibits.

ISSUE

In conformity with Article 20, Section 20.08 of the Agreement, the following was stipulated by the parties as the statement of the issue to be resolved:

Was the Grievant terminated from his employment with the Ohio State Highway Patrol for just cause? If not, what shall the remedy be?

RELEVANT CONTRACTUAL PROVISIONS

Article 19—Disciplinary Procedure
Article 20—Grievance Procedure

BACKGROUND

Daniel J. Stephens (“Stephens” or “Grievant”) has been employed by the Ohio State Highway Patrol (“OSHO”) since September 11, 2002. His most recent assignment was with the Batavia Patrol Post in the OSHP’s Wilmington District and the record demonstrates he has the requisite certification to be recognized as a Technical Crash Investigator.

On July 7, 2011, a two-vehicle T-bone automobile crash (3 13-1147-13) occurred at the intersection of Roan Road and State Route 28 in Clermont County’s Miami Township. Kathie Davidson was driving a Blazer westbound on State Route 28, intending to turn left or south onto Roan Road from a center turn lane by crossing two (2) lanes of traffic when her vehicle was struck on the passenger side by a tan Corolla driven by Suzette Glabb. Ms. Glabb had been driving eastbound on State Route 28 and did not see the black Blazer approaching. (Employer attachment A) Miami Township Police Department Officer Sherri Howard (“Howard”) discovered the vehicular accident while

she was on patrol duty and was summoned to pull over by Ms. Glabb, who indicated to Howard that the Blazer operator involved in the accident had driven to a nearby Circle K location. Stephens was dispatched to the latter location from a previous accident location, and he spoke briefly with Howard at the accident scene approximately fourteen (14) minutes after the dispatch time. The accident involved those two vehicles, moderate property damage and only minor injury, with no one being transported for treatment. After interviewing both drivers, and in recording information for the accident report, Stephens noted that "Unit # 1 [the Corolla] was moved from final rest." (Employer Ex. 4)

4) During a subsequent administrative investigation conducted by the Employer, Stephens was asked why he had indicated in his report that the vehicles had been moved from their final rest, or their actual stopping point after the momentum or force resulting from the accident. In response, Stephens answered: "I believe Officer Howard told me that they were moved, that she had moved them for safety and then came over to get me." (Employer opening statement, p. 2) "{Stephens] stated that Officer Howard instructed him that she had the vehicle moved for safety reasons and that he put that on the appropriate line on his crash report." (Union brief p. 12)

During Danny's [Stephens'] AI interview, he was asked after looking at the photos of the crash scene by Sergeant Hamilton: "In any regard, the comment that put both vehicles moved from rest, do you think that's an accurate comment?" Trooper Stephens responded: "I think I put it down there based on what I was told. I'll admit I probably didn't check it as thoroughly as I should have, but I documented what I was told."

(Union brief p. 13) This accident report, as well as all others completed by Stephens and all other OSHP troopers, was required to be individually reviewed, approved and signed by a supervisor based on Employer-established protocol. No issues arose during that initial review process regarding that specific report or any of Stephens other accident

reports until the August 2011 termination and subsequent grievance arbitration for Trooper Amy Pennington from the same Batavia post where Stephens was assigned.

Prior to that arbitration, the Grievant notified his Post Commander, Lt. Price, that he was going to be called to testify [in the Amy Pennington arbitration hearing] on behalf of the Union . . . [W]hen his Post Commander was notified, he had questions about the duty status for the hearing, so he contacted his District Commander for guidance. His District Commander, Captain Hermes, contacted S/Lt. Linek for answers to their questions. Knowing that Grievant was not involved in the case, S/Lt. Linek notified Sgt. Corry Pennington [an Employer advocate], who began to review the Grievant's crash reports to determine if the Grievant's testimony was to make a disparate treatment defense . . . Sgt. Pennington identified a crash report where the Grievant indicated the vehicles were moved from final rest. This directly contradicted the photographs which clearly showed one of the vehicles was at final rest. As a result, the Employer was faced with the very same fact pattern for which the other trooper [Amy Pennington] was terminated. As a result, the instant investigation was begun.

(Employer opening statement, pp. 1-2)

“When interviewed in the course of the AI [administrative investigation] in the Stephens' case, [Sgt. Corry Pennington] said he pulled all of Trooper Stephens' 153 crash reports previously completed in 2011 to assure himself that Trooper Stephens was not going to testify that he too had used language like Amy [Pennington] used and that no discipline flowed to him . . . “ (Union brief p. 8) Stephenson concluded “that the pictures taken and contained [in] three of Trooper Stephens's crash reports did not support a conclusion of Stephens that the vehicles were not at final rest.” (Union brief p. 10)

The investigation was then handed off to a Sergeant [Matt] Hamilton . . . Hamilton examined all 153 accident reports, initially supported the three challenged reports but then reduced to one in which he challenged [Stephens'] conclusion as to the second vehicle not being at final rest. That report was, of course, the one used by the Employer as justification for terminating Trooper Stephens.

(Union brief p. 10)

A letter dated January 26, 2012, sent to OSHP Superintendent, Colonel John Born, by Wilmington District Commander, Captain Paul Hermes, advised him that the administrative investigation reflected that “Trooper Stephens neglected to properly document evidence during a crash investigation. Additionally, he falsified a crash report by indicating both vehicle(s) were moved from final rest.” (Joint Ex. 3) That letter also identified the following two Rules and Regulations of the OSHP as having been violated by Stephens:

- Rule 4501:2-6-02(B)(1)—Performance of Duty
- Rule 4501:2-6-02(E)(1)—False statement, truthfulness

Those specific charges were further detailed in a January 26, 2012 letter to Stephens from Captain Hermes indicating that Stephens “neglected to properly document evidence during a crash investigation” and also “falsified a crash report by indicating both vehicle(s) were moved from final rest.” (Joint Ex. 3) A pre-disciplinary hearing was conducted on January 31, 2012, and the Grievant was terminated on February 7, 2012. A grievance was subsequently filed by the Union on the Grievant’s behalf on February 9, 2012. (Joint Ex. 2) The grievance asserted that the Employer had violated Sections 19.01 and 19.05 of the Agreement by purportedly imposing the Grievant’s termination “for no just cause” and failing to utilize progressive discipline. Because the grievance remained unresolved after passing through the preliminary stages of the grievance procedure, as detailed in Article 20, the matter was submitted to the arbitrator for final and binding resolution.

SUMMARY OF THE EMPLOYER'S POSITION

The Employer insists that the Grievant was properly terminated for making a false statement on the crash report by indicating that both vehicles were moved from final rest and for neglecting to properly document evidence during a crash investigation. The Employer argues:

If [Stephens] was uncertain of how the crash occurred, he would have examined the evidence at the scene and would have taken statements to help him sort out what had transpired, not immediately directed the vehicle to be moved . . . Yet, he acknowledged during cross-examination that he didn't even ask [Corolla driver Ms. Glabb] if the vehicle was at final rest . . . [Stephens] is a highly-trained trooper and his training and experience told him the vehicle was at final rest. He simply wanted the vehicle moved so he could indicate on the report that the vehicles were moved from final rest, which would provide an explanation to supervision for not completing a field sketch. By making this claim, he could skip the field sketch which saved him considerable work.

(Employer brief p. 9) The Employer also emphasizes that the Grievant not only attended a forty (40) hour basic crash investigation course while at the OSHP Academy, but he also completed technical crash investigation, or TCI training, which consisted of an additional two (2) weeks of training. Based on that expertise, the Employer asserts that the Grievant failed to demonstrate his training skills and did not accurately record the relevant physical evidence surrounding the accident. He did not note the post-impact fluid trail left on the pavement by the Corolla after the vehicular impact while it moved to its final rest, and also did not document the accident debris scattered on the roadway in his post-accident report. The Employer argues: "There is no possible way a nine-year veteran trooper who has investigated hundreds of traffic crashes can look at the physical evidence at the crash scene in question and come to the conclusion he didn't know what happened, where the impact was, or that the vehicle was not at final rest. If this were

true, he is not competent to perform the most essential function of a state trooper, basic crash investigation.” (Employer brief p. 12) The Employer avers that the Grievant’s failure to comply with the established crash report requirements or protocol was a result of Stephens “taking a shortcut on this crash investigation . . . He avoided a significant amount of work by not completing a field sketch.” (Employer brief p. 14)

In most situations, absent a lengthy disciplinary record, an employee’s failure to complete a job duty completely and thoroughly would result in some sort of discipline short of termination. What makes the current situation different is the falsification and untruthfulness exhibited by the Grievant. Troopers are taught from day one at the academy they will be terminated for making untruthful statements of claims. That is what resulted in the Grievant’s termination. It was not the fact that he failed to document pertinent evidence at a crash scene. If he would not have made a false claim on the crash investigation, we would not be arguing a terminations case. It is the Employer’s position that he immediately determined what transpired but told the driver [of the Corolla] to move the vehicle so he would not be required to complete a sketch. If he documented on the crash report that vehicles were moved from final rest, he knew he wouldn’t be challenged by a supervisor for not doing a sketch. He also realized and understood that sergeants don’t routinely review crash photos, as Sergeant Hamilton testified. Therefore, if he indicated the vehicles were moved, his inefficiency would go undetected. The simple truth is the Grievant got caught taking a shortcut and has now chosen to further his lie by fabricating excuses to cover-up his unacceptable behavior.

(Employer brief pp.14-15)

The Employer emphasizes that this case involving Stephens dealt with the very same circumstances leading to the OSHP’s prior termination of Trooper Amy Trooper. The Employer claims: “The Employer did not retaliate against the Grievant as the Union proffered. They simply imposed the exact same discipline as was issued in the previous case . . . The only possible intent for the Grievant’s statement on the crash report [that the vehicle was not at final rest] was to justify his failure to completely and thoroughly document a crash scene with a sketch. Unfortunately, his documentation was not an inadvertent mistake or oversight. It was a false statement meant to deceive supervision.”

(Employer brief pp. 15, 17) The Employer further claims that the Grievant was put on notice of the consequences of his behavior based upon his documented receipt and review of the OSHP's Sworn Officer Discipline Grid (Employer Ex. 5), which was effective on April 29, 2011 and put all troopers on notice that a first offense violation of false reporting, falsification of documents or dishonesty is grounds for removal, even with a clear department record.

Based on the above assertions, the Employer contends that the termination discipline it imposed against the Grievant was not arbitrary, capricious or discriminatory and requests that the Union's grievance be denied in its entirety.

SUMMARY OF THE UNION'S POSITION

The Union's basic premise is that the Employer has failed to meet its burden of proof in demonstrating that Stephen's termination had a valid "just cause" basis. The Union argues:

Of Ohio's 1,400 Troopers, only Danny Stephens had his 2001 crash reports [or] accident investigations pulled and examined. Of the 153 accidents investigated by Danny Stephens, the Employer identified only one wherein it alleged that findings in the crash report were erroneous . . . The Employer did not open an investigation of Stephens' sergeant who approved the report. The Employer did not challenge Stephens' election not to cite either party which was made as a result of the investigation. To the best of our knowledge, the Employer did not refer the investigation for review by a Crash Reconstructionist. What it did was convert a difference of opinion which at best would have yielded a determination of "error" into "error = falsification" and therefore termination.

(Union brief pp. 10-11)

In support of its assertion that the Employer has not proved the Stephens was untruthful and did not give intentionally false statements, the Union makes the following claims:

Danny stated that Officer Howard instructed him that she had the vehicle moved for safety reasons and then he put that on the appropriate line on his crash report. The vehicles were moved from final rest as a result of what he was told by Howard. When Officer Howard was interviewed by Sergeant Hamilton she was asked if she told Danny anything about the vehicle being moved and she said that she does not specifically remember telling him that, but said that it did not mean that she did not say it. She does not know Danny on a personal level and that the only thing that they would have to discuss/talk about would have been the crash. During Danny's AI interview he was asked (after looking at the photos of the crash scene) by Sergeant Hamilton "In any regard, the comment that put both vehicles moved from rest, do you think that's an accurate comment?" Trooper Stephens responded, "I think I put it down there based upon what I was told. I'll admit I probably didn't check it as thoroughly as I should have, but I documented what I was told."

(Union brief pp. 12-13) The Union avers that Stephens' "[r]ecording his honest conclusions does not amount to falsifying a report. For there to be falsification there has to be intent to deceive . . . "[T]he State cannot carry its burden to proving the Grievant's intent to deceive." (Union brief pp. 15-16)

The Union requests that its grievance be granted and the Stephens be returned to his position as an OSHP trooper with full back pay and all benefits foregone due to his termination.

DISCUSSION

Generally, in an employee termination matter, an arbitrator must determine whether an employer has sufficiently proved that a discharged employee has committed one or more acts warranting discipline and that the penalty of discharge 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 that determination, the arbitrator may consider, among other circumstances, the nature of the Grievant's charged offense(s), the Grievant's previous work record, and

whether the Employer has acted consistently with respect to similar previous offenses.

Presource Distrib. Servs., Inc. and Teamsters Local 284, FMCS No. 96-10624 (1997).

An arbitrator will not substitute his own judgment for that of an employer unless the challenged penalty imposed is deemed to be excessive, given any mitigating circumstances. *Verizon Wireless and DWQ, Local 2236*, 117 LA 589 (Dichler 2002).

When a collective bargaining agreement, such as the Agreement in effect between the parties here to facilitate their cooperative relationship, reserves to the Employer the right to discipline for “just cause,” but fails to define what actually does constitute “just cause,” it is proper for an arbitrator to look at the Employer’s policies, rules, and regulations to determine whether or not the challenged discipline imposed was actually warranted or justified. *E. Assoc. Coal Corp. and United Mine Workers of Am., Dist. 17*, 139 Lab. Arb. Awards (CCH) P 10,604 (1998). An arbitrator must make two determinations in deciding whether an employer has disciplined or discharged an employee for “just cause:” (1) whether a cause of discipline exists; and (2) whether the amount of discipline was proper under the circumstances. *City of Cincinnati v. Queen City Lodge No. 69, Frat. Order of Police*, LEXIS 1522 (1st App. Dist., 2005), citing *Bd. of Trustees of Miami Township v. Frat. Order of Police, Ohio Labor Council, Inc.* (1998), 81 Ohio St. 3d 269, 272, 690 N.E.2d 1262. The Employer bears the burden of proving that the Grievant did commit an offense or did engage in conduct warranting disciplinary action and that the discipline imposed was commensurate with the seriousness of the established offense(s). *City of Oklahoma City, Okla. and Am. Fed’n of State, County, and Mun. Employees, Local 2406*, 02-1 Lab. Arb. Awards (CCH) P 3104 (Eisenmenger 2001).

It is axiomatic that in discipline cases where “just cause” is required, the burden of proof falls on the employer. Where the [employer] alleges that the grievant engaged in an act of . . . dishonesty, a “stigmatizing” behavior, it must meet its burden by more than a mere preponderance of the evidence.

Clark County, Nev. And Serv. Employees Int’l Union, Local 1107, 10-2 Lab. Arb. Awards (CCH) P 5030 (Fields 2010). “In cases where the misconduct alleged would constitute . . . an act of moral turpitude, including cases of dishonesty, many arbitrators have required a heightened burden of proof to establish the misconduct by clear and convincing evidence.” *BP Exploration (Alaska), Inc. and USW Local 2959*, 09-1 Lab. Arb. Awards (CCH) P 4544 (Landau 2009).

Because of the seriousness of the charge [of dishonesty], the burden of proof is generally more than simply a preponderance of the evidence; the result to the grievant of a negative finding can be so serious that **the arbitrator must be persuaded by clear and convincing evidence that the grievant acted intentionally.** That is a very difficult burden, and it should be, because generally the only way it can be rebutted is by the testimony of the grievant which is being brought into question by the very charge on which his discipline is being based. (Emphasis added)

City of Minneapolis and Minneapolis Prof’l Employees Ass’n, 97-1 Lab. Arb. Awards (CCH) P 3124 (Bard 1996). “Allegations of theft and dishonesty are significantly more serious than performance-related allegations, because they implicate the employee’s moral character.” *Caesar’s Palace and Culinary Workers Union, Local 226*, 11-1 Lab. Arb. Awards (CCH) P 5261 (Kaufman 2011). Because the alleged misconduct of dishonesty carries with it the severe negative stigma of general social disapproval and generally precludes a law enforcement officer from gaining employment in that capacity with an alternative employer based on the adverse impact on the Grievant’s reputation, it is reasonable and proper that his purportedly dishonest conduct should be clearly and convincingly established by the evidence. “Law enforcement officers hold positions

involving public trust, and they are expected to be above reproach and honest at all times.” *John Kelly and City of Oakland*, 2-10 Lab. Arb. Awards (CCH) P 5076 (Landau 2010).

After reviewing the individual witnesses’ hearing testimony, the exhibits submitted by the parties, and the arguments included in their post-hearing briefs, the arbitrator finds that the Employer here has failed to meet that requisite standard or burden of proof and especially has failed to demonstrate that Stephens did, in fact, violate Section 4501:2-6-02(E)(1) of the OSHP’s Rules and Regulations. (Joint Ex. 3) That section is included in the “Performance of Duty and Conduct” section of the Rules. It is individually labeled “False statement, truthfulness” and states:

- (1) A member shall not make any false statement, verbal or written, or false claims concerning his/her conduct or the conduct of others.

The Employer here has failed to sustain its burden of proving that the Grievant was dishonest under the standard established in the Rules and Regulations. The evidence is not clear and convincing in this matter that the Grievant intentionally lied in the accident report to intentionally mislead his supervisor or anyone else. There is an absence of evidence in the record to demonstrate that Stephens was purposely untruthful and deliberately made an untruthful representation “concerning his conduct or the conduct of others.” In response to questions regarding his accident report noting that the Corolla was moved from its position of final rest after the accident, the Grievant indicated that he originally relied on the oral report of Officer Howard, indicating that the Corolla had been moved from its original post-accident rest position in order to move the vehicle more fully off the heavily traveled roadway, when he completed the accident report. The fact that Stephens remained at the accident site for approximately one and one-half (1½)

hours completing his investigation and report suggests that he committed adequate time to satisfactorily accomplishing those tasks. His work record demonstrates his success in his “exemplary efforts in the area of crash investigation,” as noted in the letter of commendation issued to the Grievant by the OSHP Commander in the Office of Field Operations on January 24, 2012. (Union Ex. 2) In that letter, it was noted that the Grievant was “among the top ten troopers for numbers of crashes investigated in the state in 2011. This accomplished demonstrates [the Grievant’s] leadership and outstanding efforts . . . Your exemplary efforts in the area of crash investigation in 2011 have made you stand out among your peers.” (Union Ex. 2) This commendation clearly acknowledges the level of the Grievant’s past work performance and his reputation for high performance.

The Employer failed to adequately prove all of its case in this matter and to establish that the Grievant intentionally engaged in dishonesty and knowingly made false statements on the identified accident report. The evidence does not demonstrate that he intentionally acted to deliberately make false representations on the accident report. What occurred was simply the Grievant’s individual exercise of judgment as to what happened or, more accurately, his reliance on Officer Howard’s comment(s) based on his own conclusion that he could not determine from the evidence at the crash scene which driver was at fault and the exact impact location. The evidence, while possibly demonstrating that the Grievant may have done more in this situation, does not prove that he intentionally lied about the Corolla’s location.

The record does, however, establish that the Grievant failed to comply with the “field sketch” requirement identified in Section K of the OSHP’s Crash Investigation

Policy (Employer Ex. 2) His failure to comply with that policy requirement subjects him to discipline pursuant to the OSHP Sworn Officer Discipline Grid, which became effective on April 29, 2011. (Employer Ex. 5) That document specifically provides: “The Division will follow the principles of progressive discipline; 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.” As a result of the Grievant’s violation for “[f]ailure to adhere on A/V policy (intentional),” he shall be subject to a three-day unpaid suspension based on his previously clear department record.

In order to function properly and carry out its mission, a police force must be well-disciplined and guided by rules and regulations that regulate its members. The police force must be a highly-regimented organization that cannot tolerate or allow individual members to circumvent its rules and regulations. The standards for compliance to operating procedures are much higher for police organizations than would be found in the general business community.

H.P.P.U., Local No. 109 and City of Houston, Tex., 95-2 Lab. Arb. Awards (CCH) P 5244 (Overstreet 1994). The Employer has a right to set high standards of professionalism for OSHP troopers and to consistently require individual compliance. Although the Employer failed to prove by the requisite standard that Stephens engaged in dishonesty or untruthfulness, his neglect of duty in this instance was demonstrated.

AWARD

The grievance is granted in part and denied in part.

The Grievant's termination shall be vacated and reduced to a three-day suspension, as identified for a first offense in the Discipline Grid. He shall be made whole for the other days subsequent to his termination, minus any unemployment compensation and reportable income received since his discharge. He shall be reinstated to his former position as expediently as circumstances permit with a restoration of lost employment benefits and seniority.

All references to any charges of dishonesty shall be removed or deleted from all personnel files maintained by the OSHP.

Respectfully submitted to the parties this 27th day of June 2012,

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

Robert G. Stein, Arbitrator