

Decision and Award in the Matter of Arbitration between:

**Ohio Department of Public Safety, Division of the State
Highway Patrol
and
Ohio State Troopers Association**

Grievance #: 15-03-20121219-0101-07-15

Grievant: Daren L. Johnson

Arbitrator: Jack Buettner

Date of Hearing: January 31, 2013

Date Briefs Received: March 4, 2013

Date Decision Issued: March 27, 2013

Representing the Union:

Hershel M. Sigall, Chief General Counsel

Ohio State Troopers Association

6161 Busch Blvd.

Suite 130

Columbus, OH 43229

Representing the Employer:

Sgt. Corey Pennington

Ohio State Highway Patrol

740 East 17th Ave.

Columbus, OH 43211

By Mutual agreement the Hearing was convened on January 31, 2013 at 9:00 AM. The Hearing was held at the Ohio State Troopers Association in Columbus, Ohio.

In attendance for the Employer:

Sgt. Corey Pennington	Advocate, OSHP
S/Lt. C. J. Linek	OSHP
Aimee Szczerbacki	2 nd Chair, OCB
Lora Manon	DPS
Shane Black	OCB (observer)
Sgt. Mathew R. Crow	OSHP, AIU (witness)
Trp. D. J. Edelbrock	OSHP, Post 2 (witness)
Trp. J. M. Slusser	OSHP, Post 2 (witness)
Lt. Heidi A. Marshall	OSHP, Labor (witness)

In attendance for the Union:

Mr. Daren L. Johnson	Grievant
Mr. Dave Riley	OSA staff
Mr. Larry Phillips	OSTA President
Ms. Elaine Silveira	Assistant General Counsel
Mr. Herschel Sigau	General Counsel/Advocate
Trp. Gerald K. Manley	OSHP, Lima post (witness)

The parties were asked to submit exhibits into the record.

The following were submitted as Joint Exhibits:

Employer Exhibit #1	Unit 1 Contract 2012 - 2015
Employer Exhibit #2	Grievance Trail #0101
Employer Exhibit #3	Discipline Package composed of: <ul style="list-style-type: none">a. Statement of chargesb. Pre-discipline Noticec. Meeting Officer Replyd. Highway Patrol Rules & Regulations: 4501:2-6-02 (E) (1) False Statement Truthfulness: 4501:2-6-03 (A) (1) Responsibility of Command and 4501:2-6-03 Responsibility for Orderse. Department Record

The following were submitted as Union Exhibits:

Union Exhibit #1	Recorded Interview with Tpr. Daniel Edelbrock regarding Sgt. Darren Johnson
Union Exhibit #2	Recorded Interview with Tpr. Justin Slusser regarding Sgt. Darren Johnson
Union Exhibit #3	OSHP Policy Number OSP-203.3 Powers/Duties, Authority/Code of Ethics/Oath/Rules and Regulations
Union Exhibit #4	Text Message Record 9/20/12 to 9/26/12
Union Exhibit #5	Unit History Report 9/22/12 Sgt. Johnson
Union Exhibit #6	Unit History Report 9/22/12 Tpr. Slusser
Union Exhibit #7	ORC 5503.01 Division of state highway patrol
Union Exhibit #8	ORC 5503.02 State highway patrol-powers and duties
Union Exhibit #9	Search and Seizure Scenarios #16
Union Exhibit #10	Powers and Duties Scenarios #7
Union Exhibit #11	DVD of the Slusser stop on 9/25/12
Union Exhibit #12	Annual Performance review of Sgt Johnson from 2010, 2011, 2012
Union Exhibit #13	29 Letters of Positive Recognition

The following were submitted as Employer Exhibits:

Employer Exhibit #1	DVD of recorded interviews: Edelbrock, Johnson, Slusser, Slusser, Zemelka
Employer Exhibit #2	OSHP Policy Number OSP-902.04 Officer Safety and Deadly Errors
Employer Exhibit #3	Putnam County Towing Services Service Information
Employer Exhibit #4	Towed Immobilized Vehicle Follow-up
Employer Exhibit #5	OSHP Policy Number OSP-200.17 Towing services

Background:

The Grievant, Sgt. Daren Johnson, was commissioned as a State Trooper In June, 1993. He was promoted to the rank of sergeant in 2002 and was assigned to the Lima Post in the Division's Findlay District. Sgt. Johnson was terminated on December 22, 2012, for alleged violations of OSHP rules in three incidents where he was the shift commander.

The first incident occurred on September 1, 2012. Trp. Manley made a traffic stop and the driver fled on foot. A female passenger identified the suspect and led Trp. Edelbrock to her apartment where she allowed him in. The suspect was there and Trp. Edelbrock took him back to the scene of the original traffic stop for Trp. Manley to identify. The issue concerns Trp. Edelbrock's statement in the Response to Resistance investigation.

The second incident occurred on September 22, 2012. Trp. Slusser stopped a vehicle pulling a trailer which was hauling a Honda CR-V. He planned to have the vehicle towed and called Sgt. Johnson. Sgt. Johnson advised Trp. Slusser to follow the vehicle to its destination and he would meet him there. The issue concerns whether or not Trp. Slusser was properly supervised.

The third incident occurred on September 30, 2012, and involved the same trooper, Slusser. Trp. Slusser observed a vehicle "doing donuts" in a cemetery causing property damage. The issue concerns a private property criminal damaging investigation.

Issue:

On December 12, 2012, Sgt. Daren L. Johnson was terminated from employment for the violations of the following rules 4501:2-6;02 (E)(1) False Statement, Truthfulness, 4501:2-6-03 (A)(1) Responsibility of Command, and 4501:2-6-03 (C) Responsibility for Orders. The parties submit the following statement of issue for resolution by the arbitrator:

"Was Sgt. Daren Johnson terminated from his employment with the Ohio State Highway Patrol for just cause? If not, what shall the remedy be?"

Employer Position:

The employer's position is that Sgt. Johnson was rightfully terminated based on the following three incidents.

The first incident occurred on September 1, 2012. Trp. Gerald Manley was in pursuit of a suspect who fled his vehicle. Trp. Edelbrock appeared at the scene to aid in the pursuit. The owner of the vehicle approached Trp. Edelbrock, said she could identify the suspect, and that said suspect was most likely in her apartment. She gave permission for troopers to enter her apartment where the suspect was found. Trp. Edelbrock placed the suspect under arrest for fleeing and eluding, put him in handcuffs, and walked him back to the vehicle.

Later that day Sgt. Johnson phoned Trp. Edelbrock to discuss the suspect's pursuit and arrest. According to Trp. Edelbrock, Sgt. Johnson told him to "be creative" when writing his statement, as Johnson did not think Edelbrock had a right to enter the apartment and arrest the suspect. Sgt. Johnson then sent several text messages to Trp. Edelbrock asking when the report would be done and in one text stated, "Need a statement from you about G-man's guy you tracked down who agreed with you that it would be in his best interest to return to the scene voluntarily and graciously accept a ride from you...not. LOL". In another, Sgt. Johnson texted, "You have a couple of corrections to make on your statement. Do you remember us discussing the suspect agreed to come back to the scene? You wrote you took him into custody."

The employer contends that Sgt. Johnson violated rule 4501:2-6-02 (E)(1), False Statement, Truthfulness—"A member shall not make any false statement, verbal or written, or false claims concerning his/her conduct or the conduct of other."

The second incident occurred on September 22, 2012 and involved Trp. Justin Slusser, a trooper new to the post. Trp. Slusser observed a vehicle towing a trailer that was traveling at an "odd speed." The occupants seemed nervous and did not know specifics about the towed car, other than that they were taking it to a residence in Lima. During the stop, Trp. Slusser spoke with an officer from Illinois where the vehicle was registered. The officer advised Trp. Slusser that the owner of the towed car was a "federally indicted crack-cocaine dealer". Trp. Slusser determined he would have the vehicle towed for further investigation and contacted Sgt. Johnson to obtain approval for the tow.

Sgt. Johnson advised Trp. Slusser he would call him back with a plan. He called within 5-8 minutes and told Trp. Slusser to follow the vehicle to the address in Lima where he would send a wrecker. When asked what he should do if the driver should decide to flee, Sgt. Johnson told him to let him go since Trp. Slusser had the driver and passenger information.

When asked why the vehicle could not be secured and towed from the scene of the incident, Sgt. Johnson responded, "We are not messing around with going up there [Putnam County] to deal with a seized vehicle. If we are going to have to deal with this mess, we are going to deal with it in Lima." Johnson then advised Trp. Slusser he would meet him in Lima.

Trp. Slusser stated that no back up units were requested, Putnam County wrecker services could have been used, the vehicle occupants could have concocted a plan to ambush him, and that he was "scared to death" about the plan to follow the vehicle. He was also alone at the residence in Lima for about 10 minutes.

The employer contends that Sgt. Johnson violated rule 4501:2-6-03 (A)(1), Responsibility of Command—"A member who is in command of any post, district, section, unit, detail or assignment, or part thereof, either on a temporary or permanent basis, shall be held responsible for the efficiency, discipline, performance and welfare of the persons under his/her command..."

The third incident occurred on September 30, 2012 and again involved Trp. Slusser. Trp. Slusser observed a vehicle "doing donuts" in a cemetery causing damage to the cemetery grounds. Trp. Slusser initiated a stop and determined to cite the driver for both a traffic violation (reckless operation) and the offense of criminal damaging. Sgt. Johnson called the trooper during this time. Trp. Slusser explained the situation. Sgt. Johnson told him he could not issue a criminal damaging citation since the offense

occurred on private property which was not in OSP jurisdiction. He instructed Trp. Slusser to contact the Allen County Sheriff's Department to handle the damaging incident and that he could be the witness to the crime. Trp. Slusser claimed that this was contrary to his training but did as was instructed. The Sheriff's Department arrived and told Trp. Slusser to handle the criminal damaging matter.

Back at the Lima post Trp. Slusser began entering the criminal damaging case. Sgt. Johnson told the trooper he "didn't have a criminal damaging case... You don't have jurisdiction or the ability to write that ticket for anything." Sgt. Johnson then told Trp. Slusser that if he did not void the ticket and delete the criminal damaging case from the data base he would be written up for insubordination.

Additionally, the employers stated that Sgt. Johnson was untruthful when questioned about the facts of the investigation and while testifying during the Arbitration Hearing.

Union Position:

The union's position is that Sgt. Johnson was wrongfully terminated. They presented Sgt. Johnson's past history of 19 years of service which included 29 letters of positive recommendation, Trooper of the Year and Trooper of the District awards, a position as an instructor at the Highway Patrol Academy, other leadership roles, and his evaluations from the last 3 years which had all been satisfactory. The union also addressed each of the three incidents referenced by the employers.

The incident involving Trp. Edelbrock occurred on September 1, 2012. Trp. Edelbrock was involved in the pursuit of a suspect who fled the scene after being stopped by Trp. Manley. Trp. Edelbrock was taken by the owner of the vehicle to her apartment where he found the suspect. He placed the suspect in custody and brought him back to the scene so Trp. Manley could positively identify him. Manley arrested the male, took him to the Post and tested him for blood alcohol content.

As supervisor, Sgt. Johnson called both Trp. Manley and Edelbrock for a report. Trp. Edelbrock related the facts as they happened, but his descriptive term was that he "arrested" the suspect and took him to Trp. Manley who identified him. Sgt. Johnson told him he couldn't have "arrested" him, absent a warrant on private property for an offense he did not observe. Sgt. Johnson explained that either the subject voluntarily agreed to accompany Edelbrock or Edelbrock placed him in "investigative custody" and took him to Manley. Since he could not be arrested but was none the less in custody, it had to be

that he was in "investigative custody". Sgt. Johnson thought he had made his point. Trp. Edelbrock essentially agreed so he "could end the conversation."

An issue occurred over Trp. Edelbrock's "Response to Resistance" report. After 5 days had passed and no report had been filed, Sgt. Johnson sent a text to Trp. Edelbrock asking for his statement. The text did state, "Need a statement from ya on G-Man's guy that you tracked down. Who agreed that it would be in his best interest to return to the scene voluntarily and graciously accept a ride from you...not. LOL" The text was not sent to get Trp. Edelbrock to falsify or change his statement. It was meant in jest as evidenced by the "not" and the "LOL". Edelbrock responded with "LOL" so it was assumed that he saw the humor in it and remembered their previous conversation.

Trp. Edelbrock did finally complete the report but submitted it through another sergeant, unbeknownst to Sgt. Johnson. Sgt. Johnson saw the statement in the communication box, thought it was a work in progress, and that it needed to be sent on to District, which is his responsibility. He made minor punctuation and capitalization corrections to the report and sent it back to Trp. Edelbrock. Sgt. Johnson sent another text to Trp. Edelbrock stating, "You have a couple of corrections to make on your statement. Do you remember us discussing the subject agreed to come back with you to the scene? You wrote you took him into custody." Sgt. Johnson's intent was to impress upon Trp. Edelbrock that the suspect was taken into "investigative custody", not merely "custody", which is the correct term for the action.

The union contends that Sgt. Johnson did not in any way suggest that Trp. Edelbrock commit perjury or falsify his record. Sgt. Johnson's intent was explaining the terms "arrest" vs. "investigative custody" to the trooper. The only changes he suggested to the final report were with capitalization and punctuation. Further, the union contends that the investigators did not ask for clarification of Sgt. Johnson's intent and did not interview him concerning the incident.

The second incident occurred on September 22, 2012, and involved Trp. Slusser. Trp. Slusser stopped a vehicle towing a trailer traveling at low speed that had neither plates nor brake lights. According to Trp. Slusser, both occupants seemed nervous but cooperative. Sgt. Johnson directed Trp. Slusser to follow the vehicle to its intended destination in Lima where he would meet Trp. Slusser and order a wrecker.

Trp. Slusser stated he was "scared to death" at being directed to follow the vehicle to Lima. His fear was not mentioned until his administrative investigation interview. Trp. Slusser claimed he investigated the suspect and the vehicles, contacted appropriate law enforcement agencies in Illinois, and determined from them that the owner of the vehicle in tow was "an indicted drug dealer whose whereabouts were unknown". Exhibits show, however, that it was Sgt. Johnson who made the initial inquiry and that

the decision to follow the vehicle to Lima was made long before any contact was made with Illinois law enforcement. Trp. Slusser did not request back up or share any concerns for his personal safety with his supervisor or other law enforcement officers.

Additionally, Sgt. Johnson did meet Trp. Slusser at the residence in Lima. He arrived before Slusser, confirmed the house number and that it was occupied. While waiting for Trp. Slusser to arrive, Sgt. Johnson pulled over an OVI within eyesight of the Lima address. He turned over the processing to another trooper to arrive within a minute of Slusser and the towing company.

The union contends that Sgt. Johnson did not "fail to properly direct a subordinate during a traffic stop, placing the subordinate at risk of harm". Sgt. Johnson took precautions based on the information available at the time, including meeting the trooper at the residence.

Additionally, the union contends that the investigation in this matter was flawed.

Evidence showed that Trp. Slusser did not have any knowledge as to the background of the vehicle's owner prior to following the vehicle as he stated. Also, the patrol car video, which may have been helpful, was not viewed by the investigators and not preserved.

The third incident was not specifically referenced in the Statement of Charges but came to light when Trp. Slusser was asked about any other questionable actions of Sgt. Johnson. On September 25, 2012, Trp. Slusser stopped a vehicle driven by a juvenile that he suspected of "doing donuts" in a cemetery. He determined he was going to charge the driver with criminal damaging. Sgt. Johnson called Trp. Slusser to check up on his whereabouts and was apprised of the situation. Sgt. Johnson told Trp. Slusser he could not charge the driver with "criminal damaging" but could charge him with "reckless operation". He directed Trp. Slusser not to write the "criminal damaging" charge but to call the Sheriff's Department and to turn the charge over to them as directed in 203.03. Trp. Slusser would then become a witness to the offense. The responding deputy told Trp. Slusser that, "You caught it, you clean it." Trp. Slusser then disobeyed a direct order from his sergeant and moved forward with the "criminal damaging" charge. Trp. Slusser stated upon cross examination at the arbitration hearing that it was his belief he could write any charge against anyone anywhere.

The union contends that there was no wrong doing on the part of Sgt. Johnson. His decision concerning the ability of Trp. Slusser to write a "criminal damaging" charge was based on the given circumstances, his interpretation of OSHP jurisdiction and authority, his 20 years of service, and his knowledge as an instructor at the OSHP Academy.

DISCUSSION AND DECISION:

In reviewing the termination of Sgt. Daren Johnson, I have analyzed the evidence put forth by both sides. Each side speaks to three incidents that led to his termination, and I will address each singularly before giving my final decision.

In the first incident involving Trp. Edelbrock, Sgt. Johnson is accused of attempting to convince the trooper to falsify a Response to Resistance report thereby violating policy 4501:2-6-02 False Statement/Truthfulness. After a review of testimony, Administrative Investigation reports, and evidence submitted by both sides I find that Sgt. Johnson did not violate policy 4501:2-6-02. Sgt. Johnson was making the distinction between the terms "investigative custody", "custody", and "arrest". He was trying to impress upon Trp. Edelbrock those distinctions as they relate to the OSHP's inability to "arrest" anyone on private property. He did not ask that Edelbrock falsify a statement; he asked that he use the correct terminology. It appears to be a matter of semantics/interpretation and not of intentional falsification. Further, evidence shows that Sgt. Johnson's written corrections to the report showed only grammatical, capitalization, and punctuation corrections, not any changes to the substantive content. (Employer's Exhibit #29 shows Trp. Edelbrock's original statement. Employer's Attachment C, Exhibit 38, shows corrections Sgt. Johnson suggested to the report.)

The second incident involved Trp. Slusser and the possible towing of a vehicle. Sgt. Johnson is charged with violating Responsibility of Command 4501-2-6-03 (A) (1) and 4501-2-6-03 (C). Sgt. Johnson was contacted by Trp. Slusser who informed him of his intent to have the vehicle towed. Sgt. Johnson advised Trp. Slusser to follow the vehicle to a Lima address as opposed to having it towed from Putnam County and that Johnson would meet him there. Due to his belief that there may be a need for ongoing investigation and search of the vehicles, Sgt. Johnson used Army's Towing Service because of its proximity to the Lima Post and easy availability for further investigation. Sgt. Johnson's decision was made based on efficiency, effectiveness, his knowledge of the situation, and his years of experience in these situations. Trp. Slusser stated that he was "scared to death" following the vehicle. He did not, however, share his fears or concerns with Sgt. Johnson at that time or at any other time during the incident. Trp. Slusser also stated that he had contacted Illinois authorities and that the towed vehicle was registered to an indicted drug dealer. This information from Illinois was not available at the time Trp. Slusser began following the vehicle to Lima, so Trp. Slusser could not have known about the towed vehicle owner's past record (Union Exhibits 4 and 6). Indeed, it was Sgt. Johnson who initiated that inquiry. Trp. Slusser was with the vehicle occupants for over 20 minutes prior to calling Sgt. Johnson. He expressed no concerns for his own safety at the time and did not request backup. Sgt. Johnson did go

on to meet Trp. Slusser in Lima to provide further assistance as well as maintained phone/radio contact throughout (Union Exhibits 4 and 6).

The last incident also concerned Trp. Slusser but in a private property criminal damaging case. It involved a question of OSHP's jurisdiction regarding incidents on private property. The circumstances occurred when Trp. Slusser issued a citation to a juvenile for "criminal damaging" which occurred in a township cemetery. He was directed by Sgt. Johnson not to file that particular charge since it was not, in Sgt. Johnson's perception, within the OSHP's jurisdiction. Sgt. Johnson believed, based on his knowledge and experience, that they lacked jurisdiction. Later at the post, further discussions with other sergeants and a lieutenant (M-1-A) who shared a different viewpoint regarding jurisdiction, the suggestion was made to contact the county prosecutor and to seek their opinion. After discussion with the county prosecutor, it was decided to issue the citation and to let the case move forward. It was not a question of falsification of records or a failure to supervise on the part of Sgt. Johnson. It was a difference of opinion concerning the jurisdiction of the OSHP.

After a thorough review of the case, I do not believe the Employer presented clear, substantial and convincing evidence to terminate Sgt. Daren Johnson. Factors in my decision are: the 19 years of satisfactory service of Sgt. Johnson and his many leadership roles, especially at the State Highway Patrol Academy. In each instance mentioned above, Sgt. Johnson had nothing to gain by the actions he took. There was no personal gain, reward, or recognition in it for him. In the cited cases he acted upon what he believed to be true concerns regarding the jurisdiction of the OSHP. He also believed that it was part of his supervisory duties to make sure other troopers were aware of the limitations regarding the Patrol's jurisdiction.

Additionally, the administrative investigation was not expansive enough. It did not conduct interviews with key witnesses, there were no review of videos, no preservation of videos, and included contradictions to statements that could have been cleared up by a deeper investigation.

As in any termination case, the burden of proof falls upon management. In my opinion there is not a substantial and persuasive body of evidence to warrant the penalty of termination. The employer has not carried its burden of proving it has just cause to terminate Sgt. Johnson.

AWARD:

For the reasons stated above, I find in favor of the grievant. I award that he be restored to his position with restoration of all pay, benefits, and seniority retroactive to December 22, 2012.

This concludes the arbitration.

Respectfully submitted this 27th day of March 2013,

A handwritten signature in cursive script, reading "John F. Buettner". The signature is written in dark ink and is positioned above the printed name.

John F. Buettner

Arbitrator

To: Sgt. Corey Pennington and Mr. Herschel Sigau

Subject: Clarification of Award

Date: April 9, 2013

Dear Sirs:

This correspondence is written in response to my recent Arbitration Award dated March 27, 2013 between the Ohio Department of Public Safety, Division of the State Highway Patrol, and the Ohio State Troopers Association, Grievance # 15-03-20121219-0101-07-15.

I need to clarify the date I used for the restoration of pay and benefits (page 12 of Award). The correct date is December 12, 2012 not December 22, 2012.

I apologize for the confusion in dates.

With regards,

A handwritten signature in black ink, appearing to read "Jack Buettner", written in a cursive style.

Jack Buettner
Arbitrator

Cc: Alicyn Carrel

Hershel M. Sigall, Chief General Counsel
Ohio State Troopers Association
6161 Busch Blvd. Suite 130
Columbus, OH 43229

Sgt. Corey Pennington
Ohio State Highway Patrol
740 East 17th Ave.
Columbus, OH 43211

Dear Mr. Sigall and Sgt. Pennington:

This correspondence is a response to our Conference call of April 26, 2013, and is written to clarify the arbitration decision awarded to Sgt. Daren Johnson. There were four issues which the parties needed clarification on: 1. Article 63-Shift Differential; 2. Article 44.02-Holiday Pay; 3. Article 40.06-Health and Fitness Incentive Pay; and 4. Return to third shift position.

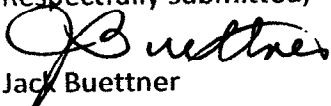
In reference to Article 63-Shift Differential, Sgt. Johnson should receive payment for the shift differential. The arbitration award stated that he would be "made whole" and had he not been separated from service, he would have continued to work his third shift position which yields shift differential for that time.

In reference to Article 44.02-Holiday Pay, it was not my intent for Sgt. Johnson to receive overtime pay equivalent to one and one half times the hours worked for holidays. This is due to the fact that there was no way of determining whether or not he would have actually worked those holidays had he not been separated from service.

In reference to Article 40.06-Health and Fitness Incentive Pay, Sgt. Johnson should not receive the Health and Fitness incentive. There is no way to determine whether he would have met the requirements of Article 40.02 without actual testing.

In reference to the issue of returning Sgt. Johnson to his third shift position, it was my intent to return him to the third shift at the Lima post, the position he held prior to his dismissal.

I hope the above clarification answers the outstanding questions the parties had concerning the award of this arbitration.

Respectfully submitted,

Jack Buettner
Arbitrator

