

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 #: 15-03-20140314-0026-04-01

Grievant: Lonnie Michael Butler

Arbitrator: Jack Buettner

Date of Hearing: June 24, 2014

Date Briefs Received: July 28, 2014

Date Decision Issued: August 27, 2014

Representing the Union:

Hershel M. Sigall, Advocate for the Grievant

Ohio State Troopers Association

6161 Busch Blvd.

Suite 130

Columbus, OH 43229

Representing the Employer:

Lt. Cassandra Brewster, Advocate for the Employer

Ohio State Highway Patrol

1970 W. Broad St.

Columbus, OH 43223

By Mutual agreement the Hearing was convened on June 24, 2014 at 9:00 AM. The Hearing was held at the Office of Collective Bargaining conference rooms in Columbus, Ohio. Jack Buettner was selected by the Parties to arbitrate this matter as a member of the panel of permanent umpires, pursuant to Article 20, Section 20.08 of the Collective Bargaining Agreement which is effective from 2012 – 2015.

The Parties each stipulated to the statement of the issue, a series of background facts, and the admission of joint exhibits. The Parties have also both agreed to the arbitration of this matter. No issues of either procedural or jurisdictional arbitrability have been raised, and the matter is now properly before the arbitrator for determination on the merits.

In attendance for the Employer:

Lt. Cassie Brewster	Advocate, OSHP
Lt. Jacob Pyles	2 nd Chair, OSHP
Mr. Robert Patchen	HRD-OCB Policy Analyst
Mr. Michael Benza	OCB
S/Lt. Heidi Marshall	OSHP
Sgt. Mark Herren	OSHP
Off. Danielle Smith	Union Township Police Department
Off. Brandon Bishop	Union Township Police Department
Off. Jeff Joehnk	Union Township Police Department
Off. Rick Wagner	Union Township Police Department
Ms. Caroline Calhoun	Witness

In attendance for the Union:

Mr. Lonnie Michael Burton	Grievant
Mr. Herschel Sigall	Advocate/Attorney
Ms. Elaine Silveira	Advocate/Attorney
Mr. Larry K. Phillips	Staff Representative
Mr. Jeremy Mendenhall	President
Mr. Robert Hayslip	AIV Sergeant
Lt. Jeremy Landis	OSHP
Ms. Marla Porstner	Witness

The parties were asked to submit exhibits into the record.

The following were submitted as Joint Exhibits:

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| Joint Exhibit #1 | 2012-2015 Bargaining Agreement between the State of Ohio and OSTA, Inc., Unit 1 and 15 |
| Joint Exhibit #2 | Grievance Trail <ul style="list-style-type: none">a. Grievance #0036b. Step 2 Responsec. OSTA Intent to Arbitrate Notice |
| Joint Exhibit #3 | Discipline Trail <ul style="list-style-type: none">a. Statement of Chargesb. Pre-Disciplinary Noticec. Disciplined. Highway Patrol Rules and Regulations: 4501:2-6-02 (l) (1)—Conduct Unbecoming an Officere. Department Record |

The following were submitted as Union Exhibits:

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| Union Exhibit #1 | OPERATIONS Evaluation of Trp. Butler |
| Union Exhibit #2 | Affidavit of Mark J. Tekulve, Attorney |
| Union Exhibit #3 | Entry granting sealing of record, Clermont County Municipal Court |

The following were submitted as Management Exhibits:

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| Management Exhibit #1 | Administrative Investigation <ul style="list-style-type: none">a. Written Administrative Investigation #2014-0122 with 3 CD'sb. Medical records |
| Management Exhibit #2 | CD: Phone Call with Butler |
| Management Exhibit #3 | Judgment Entry Finding Defendant Guilty and Imposing Sentence, Clermont County Municipal Court |

Background:

The Grievant, Trp. Lonnie Michael Butler, was commissioned as a State Trooper In October, 2005. Trp. Butler was terminated from employment on March 11, 2014, for an alleged violation of OSHP rule 4501:2-6-02(I) (1), Conduct Unbecoming an Officer.

On February 9, 2014, Trp. Butler was involved in an auto accident, rear-ending a vehicle that was attempting to make a right-hand turn. Officer Danielle Smith of the Union Township Police department arrived at the scene of the accident. She spoke to Trp. Butler, asking him if he had had anything to drink. He told her he had two beers. She asked him to perform field sobriety tests and he refused. She then placed Trp. Butler under arrest for operating a vehicle under the influence (OVI). She took him to the Union Township Police Department where he refused a Breathalyzer test.

Trp. Butler was issued a citation for Operating a Vehicle Under the Influence (ORC 4511.19A1a) and Assured Clear Distance Ahead (ORC 4511.21A). On May 27, 2014 Butler pled no contest to an amended charge of Reckless Operation—3rd Offense in 12 months, in the Clermont County Municipal Court. Prior to the court date, on March 11, 2014, he was terminated from employment with the Ohio State Highway Patrol for Conduct Unbecoming an Officer.

Issue:

On March 11, 2014, Trp. Lonnie Michael Butler was terminated from employment for violating the following rule: 4501:2-6 02 (I) (1)—Conduct Unbecoming an Officer. The parties submit the following statement of issue for resolution by the arbitrator:

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

The Employer Position:

Employer's position is that Trp. Butler was rightfully terminated having violated Rule 4501:2-6(l) (1), Conduct Unbecoming an Officer. On February 9, 2014, Trp. Butler was involved in an injury crash. He rear-ended an 18-year-old victim causing her vehicle to flip onto the driver's side. Off. Danielle Smith from the Union Town Police Department responded to the crash scene. She observed signs of impairment as well as a strong odor of alcohol. Off. Bishop, who was assisting Off. Smith, also observed indicators of alcohol use. Off. Smith requested that Trp. Butler perform field sobriety tests, which he refused to do. He was then placed under arrest for operating a vehicle under the influence and assured clear distance and taken to the Union Township Police Department. Once there, he again refused a Breathalyzer test. His behavior while at the station, as witnessed by Off. Smith, also indicated an impaired state.

The Union contends that Trp. Butler acted as he did due to a concussion which occurred at the time of the crash. However, at no time during the crash investigation or afterwards at the police station did Trp. Butler mention a head injury. When asked if he was injured at the scene he replied, "No." During a follow-up investigation by Off. Joehnk he never mentioned any head injury.

Management noted several discrepancies occurred during the hearing. Trp. Butler could not remember a stop at Applebee's just prior to the crash. Sgt. Herron, who later drove Trp. Butler home, stated he did not have enough interaction with Trp. Butler to determine if he was impaired, yet he spent 20-25 minutes with him in the parking lot of the police department. Tr. Butler's reasons for not taking a Breathalyzer test were proved unfounded and yet he did not have an independent blood test which would have showed he was not intoxicated. Trp. Butler's truthfulness was also in question as he stated numerous times he only had two beers that night but later admitted to having four.

On May 27, 2014, Trp. Butler pled guilty to an amended charge of Reckless Operation—3rd Offense in 12 months which is a misdemeanor of the third degree. He was sentenced to OVI penalties with two years of court reporting probation, a 365 day license suspension with ignition interlock device being required for the duration of the suspension, 15 days of electronically monitored house arrest, a three-day Residential Driver's Intervention Program, and 40 hours of community service.

Trp. Butler was terminated for conduct unbecoming an officer. The fact that he was off-duty at the time was not relevant according to the Rules and Regulations of the Ohio

State Highway Patrol. Testimony from the crash victim showed that Trp. Butler's conduct brought discredit to the Ohio State Highway Patrol and adversely affected the public's respect, confidence, and trust. His arrest and plea brought discredit to the Division, thereby leading to his termination. Progressive discipline was not an option considering the nature of the offense.

Union Position:

The Union's position is that Trp. Butler was wrongfully terminated. He was involved in an accident and subsequently arrested and charged with OVI and Assured Clear Distance on February 8, 2014. The OVI charge was based on the observations of the arresting officer. Trp. Butler's actions, however, at the scene and at the police station, were due to a concussion he received when his head hit the "P" pillar.

Trp. Butler was terminated from his employment March 11, 2014. The statement of charges says, "It was found that Trooper Butler was involved in a motor vehicle crash and was subsequently arrested for Operating a Vehicle under the Influence of Alcohol or Drugs." This led to the charge of Conduct Unbecoming an Officer. He was fired, however, on the basis of the arrest, not the conviction. He was terminated before the charge was resolved.

Trp. Butler was never convicted of OVI but pled to a lesser charge of Reckless Operation. He entered into plea negotiations because he could not afford the expense of going to a jury trial. He pleaded "no contest" to reckless operation involving the third traffic violation in one year even though he had never been convicted of any previous offense.

The Union contends that the bargained rules for progressive discipline found in Article 19 of the Collective Bargaining Agreement were not followed. Trp. Butler's personnel file shows a one-day suspension issued two years ago. Progressive discipline would warrant a verbal or written warning and, at most, a one to three day suspension.

The Union testified through various witnesses of the character and honesty of Trp. Butler. He was never convicted of OVI, just arrested. The arrest does not demonstrate Conduct Unbecoming an Officer and, therefore, Trp. Butler should not have been terminated.

DISCUSSION AND DECISION:

In reviewing the termination of Trp. Lonnie Michael Butler, I have analyzed the testimony and evidence put forth by both sides. I believe that Management failed to carry its burden of proof that it had just cause to remove the Grievant.

Management contends that the Grievant was charged with operating a vehicle under the influence (OVI). I believe the more accurate statement can be found in Management's Exhibit 1-a, page 18, paragraph 1, of Off. Jeffrey Joehnk's Traffic Crash/Injury/ Incident Report. Trp. Butler was arrested "on suspicion of OVI". Many people are arrested on suspicion of committing a crime, but the determination of the validity of an arrest is left to the courts to determine whether or not the charges can be sustained. Trp. Butler was not convicted of an OVI. A plea agreement was negotiated between the Grievant and the Clermont County Municipal Court whereby the Grievant entered a "no contest" plea to Reckless Operations, a misdemeanor of the 3rd degree, on May 27, .2014.

The Union makes a case that the Employer may use an internal disciplinary grid as guidance to disciplinary actions. While not a negotiated provision of the CBA, it is meant to provide some uniform guidance. Removal, according the Ohio State Highway Patrol Officer's Disciplinary Guide grid, is predicated on Conduct Unbecoming—Criminal Convictions (M-1 or higher). Such is not the case with Trp. Butler; he was not convicted of an OVI. He later pled "no contest" to a misdemeanor of the 3rd degree. Additionally, Trp. Butler was terminated on March 11, 2014, prior to any adjudication of the OVI charge.

Management also contends that this off-duty incident brought discredit to the Ohio State Highway Patrol and to Trp. Butler's division. This arbitrator agrees that law enforcement officials and public safety employees may be held to a higher standard, however off-duty misconduct must be relevant and are governed by the three tests set forth in W.E. Caldwell Co. [28 LA 434 (Kesselman, 1957)]. "Discipline may be imposed if the employee's conduct: (1) harms the employer's business, (2) adversely affects the employee's ability to perform his job, or (3) leads other employees to refuse to work with the offender." While Management may argue that the Ohio State Highway Patrol was discredited by Trp. Butler's actions, the mere showing that an employee has been arrested or involved in some misconduct as a matter of public record is an insufficient reason to cite harm to the Employer. [Inland Container Corp., 28 LA 312, 314 (Ferguson, 1951). This incident involving the Grievant did not, I believe, adversely impact the reputation, mission, or the public trust of the Ohio State Highway Patrol. Also, after application by the Grievant, the court granted to seal the official records. Therefore, I find no nexus between his off duty activity and the charges which led to this termination.

Furthermore, the Grievant was cooperative throughout and conducted himself in a professional manner. At no time did he attempt to use his status as a trooper to gain favorable treatment or accommodation. Trp. Butler fulfilled all aspects of his court directed probation, including 40 hours of community service and attendance at a State of Ohio certified Residential Driving Intervention Program. On June 17, 2014, the court modified his driving suspension from one year to six months, terminating on August 8, 2014. Trp. Butler regained his full driving privileges. This was an isolated incident in an otherwise good work record with no indication of reoccurrence and did not warrant discharge.

For the period of time between March 6 and June 1, 2014, Trp. Butler will be considered on medical leave based upon the information in Management Exhibit 1-b, page 9. This is the report from Dr. James J. Anthony, MD, which states in part that, "Lonnie M. Burton was seen in our Anderson office today [March 6, 2014]. He has been under my care and may return to work on June 2, 2014."

Due to the mitigating circumstances of the arrest and plea agreement which suspended the Grievant's driving privileges, Trp. Butler could not perform the essential job functions of a state trooper. He was terminated from employment on March 11, 2014, and did not regain full driving privileges until August 8, 2014. It is because of this circumstance that I am making any reparations retroactive to August 8, 2014.

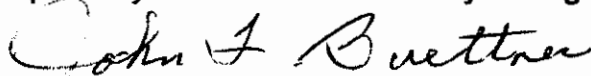
For the period of time between when Trp. Butler was eligible to return to work (June 2, 2014) to the time when his full driving privileges were reinstated (August 8, 2014) he will be considered on suspension since he would have been unable to perform the necessary functions of a state trooper.

AWARD:

For the reasons stated above, I find in favor of the Grievant. He will be considered on medical leave from March 6 to June 1, 2014. From June 2 to August 7, 2014 he will be considered on suspension, without pay or benefits. I further award that he be restored to his position effective immediately with restoration of all pay, benefits, and seniority retroactive to August 8, 2014.

This concludes the arbitration.

Respectfully submitted this 27th day of August, 2014



John F. Buettner, Arbitrator