

Arbitration Between:
Ohio Department of Public Safety, Division of the State Highway Patrol
and
Ohio State Troopers Association
Grievance of Trooper Tyler L. Boetcher, DPS-2022-00633-01

State Highway Patrol Representatives

Aaron Williams, Ohio State Highway Patrol

Kaitlin Fuller, Ohio State Highway Patrol

Cullen Jackson, Office of Collective Bargaining

OSTA Representatives

Larry Phillips, OSTA Staff Representative

ARBITRATOR OPINION AND AWARD

The Ohio Department of Public Safety, Division of the State Highway Patrol (OSHP), issued a three-day suspension to Trooper Tyler L. Boetcher (Grievant) for violating OSHP Rules and Regulations 4501:2-6-02(G)(2), Off-duty Employment. OSHP based the discipline on Boetcher failing to apply for, and obtain, approval of his secondary employment at his uncle's raceway, where he had been working, on and off, since he was a young man. For the reasons below, I uphold the discipline and deny the grievance.

Grievant has worked as a Trooper for the OSHP for over seven years. Throughout that time, he worked intermittently at his uncle's racetrack, on most Saturdays and Sundays during the racing season, from April until September. He worked as a racetrack official, monitoring the races and, on occasion, making decisions about rule violations. His uncle did not pay him for this work, but instead would provide him with pit passes, valued at approximately \$25 per pass, as well as unlimited food at the concession stand. That said, it appears that there were also occasions where Grievant's uncle would admit Grievant to the racetrack for free and give him pit passes and free food even when Grievant was not working while at the racetrack. Most of the time, however, Grievant worked while at the racetrack.

Grievant testified, and the investigation in this case showed, that various members of the OSHP, including officers in management, were aware that Grievant worked at the racetrack. Moreover, the evidence also showed that none of Grievant's fellow officers or anyone in

management who was aware of this activity ever contacted Grievant to ensure that he had filed an application seeking approval of this secondary employment. At the same time, the evidence also showed that no one had ever told Grievant that he did not need such approval.

Things came to a head when Grievant had an altercation with a driver at the track while working there that led to the filing of an incident report in Ross County naming Grievant . When the OSHP investigated the incident, the OSHP realized that Grievant had not submitted an application to obtain approval to engage in secondary employment.

Once the OSHP raised the issue, Grievant immediately filed an application. And the OSHP approved that application. But the OSHP also determined that Grievant's failure to seek approval earlier violated OSHP Rules and Regulations, and thus the OSHP determined that it should discipline Grievant. Specifically, the OSHP imposed a three-day suspension on Grievant, which it contends is progressive because Grievant already had a written reprimand and a one-day suspension on his department record. The OSHP contends that it is essential to OSHP operations that it be able to review a trooper's secondary employment because: [1] secondary employment may create a conflict of interest with OSHP employment; and [2] patrol readiness requires that OSHP employees are not engaged in other work for extended periods of time that might interfere with the immediate recall of the employee.

For his part, Grievant contends he was not aware that he should have sought approval for his secondary employment. Alternatively, he noted that many OSHP employees were aware of his work at the racetrack, and that one of these OSHP colleagues should have informed him of the need to file an application for secondary employment. Grievant conceded, however, that he reviewed the policy that was in place during the relevant time period and that he was responsible for understanding the content of the policies that his employer requires him to review. In particular, as relevant here, OSHP Rules and Regulations state that "A member shall not engage in off-duty employment unless such employment has been approved, in writing, according to directives established by the superintendent." A directive implements this rule, defining secondary employment as "any form of non-DPS employment, occupation or business, whether paid or unpaid, to include . . . working for any private or governmental entity. . . ."

Given Grievant's admission that he reviewed the policy, there is little doubt Grievant was aware that he needed OSHP approval to engage in paid or unpaid secondary employment. The question, though, is whether Grievant's work at the racetrack amounted to "secondary employment". This is a close question. On the one hand, Grievant has worked at the racetrack since he was a young person and, throughout the investigation and hearing, described his activities at the racetrack as "work". Moreover, he works at the racetrack frequently and has requested time off from his work with OSHP to work at the racetrack (AI at 10)¹. On the other

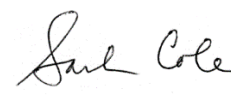
¹ Although the AI states that Grievant has taken time off from work to work at the racetrack, his application for secondary employment states that he does not take time off work to "specifically assist at his racetrack." Although this a factual conflict, the Arbitrator credits the uncontested statement offered during the investigation.

hand, Grievant also testified that he did not receive monetary compensation for his work and that he received the same benefits whether he worked on the track or sat in the stands and did not work. In addition, when he filed his application for secondary employment, he described his activities at the track as both “work” and “help”.

What makes the case difficult is that the rule could be more clearly written with respect to a trooper’s involvement in a family-owned business like the one at issue in this case. In light of this ambiguity, the Arbitrator must interpret the rule, and implementing regulation, to determine whether Grievant should have been disciplined. Here, the regulation is very broadly written, covering all but truly voluntary activities, like working for a charity. And the burden imposed on employees to apply for approval of one’s secondary employment is small, requiring only a short application describing one’s outside activities. Finally, the OSHP offered compelling reasons supporting its interest in ensuring that it is aware of any employee’s secondary employment.

The breadth of the regulation’s coverage, together with the minimal burden an employee incurs when applying, indicate that Grievant should have filled out the application. Moreover, Grievant should have realized that his frequent participation with racetrack activities during the racing season makes it the kind of activity that OSHP needs to review. Grievant’s contention that secondary employment isn’t work because he did not receive compensation fails. The rule indicates that an outside activity can be “work” even though the compensation was non-monetary. That Grievant was aware of the policy also makes his failure to file an application problematic. If he had any doubt as to whether his racetrack work was secondary employment—and given the rule’s language, he at the very least should have had such doubts—Grievant should have erred on the side of caution and simply submitted the short application, a simple form, for approval. Even though he has now obtained the necessary approval, OSHP can still discipline Grievant for the lengthy period during which he worked at the raceway without first seeking the mandated approval. While requiring that an employee seek approval for outside work, even when that work is unpaid, may seem harsh, the OSHP provided a rational explanation for a rule that it believes is necessary to ensure the proper operations of the OSHP. That other OSHP employees were aware of Grievant’s work is irrelevant because it was Grievant’s responsibility to comply with the policy, and in any event, there is no evidence that anyone told Grievant he did not need approval. Finally, because Grievant already had a written reprimand and a one-day suspension on his department record, the OSHP’s decision to impose a three-day suspension on Grievant is appropriate and should be upheld.

Date: November 14, 2022



Arbitrator Sarah R. Cole