

MARC A. WINTERS
ARBITRATOR

In The Matter of Arbitration

Between

State of Ohio, Department of Public Safety,
Division of Highway Patrol,

Employer

And

Ohio State Troopers Association,

Union

OPINION & AWARD

Arbitrator Case No.:	OCB #: DPS-2022-06375-01
Employer Advocate:	Lt. Kaitlin D. Fuller
Union Advocate:	Larry Phillips
Subject:	Demotion
Grievant:	Joshua Bolduam
Date of Hearing(s):	April 19, 2023
Location of Hearing:	Gahanna, Ohio
Record Closed:	May 22, 2023.
Opinion and Award Issued:	June 16, 2023

APPEARANCES

For the Union:

Larry Phillips, Staff Representative, Advocate

Also Present:

Joshua Bolduan, Grievant

Kari L. Root, OSTA President

David Richendollar, OSTA Vice President

Bruce Elling, Union Representative

Tpr. Scott Gonzales, Witness

Cpt. William Bowers, Witness

Lt. Shaun Robinson, Witness

Tpr. Shane Barton, Witness

For the Employer:

Lt. Kaitlin D. Fuller, 1st Chair, Advocate

Also Present:

Michael D. Wood, 2nd Chair, Advocate

Victor Dandridge, OCB Rep.

Sgt. Jacob Fletcher, Witness

Lt. Bradley Longo, Witness

S/Lt Aaron Williams, Witness

PRELIMINARY STATEMENT

The parties, Ohio Division of Highway Patrol, (“Employer”) and Ohio State Troopers Association, (“Union”), having failed to resolve a dispute involving a demotion, proceeded to final and binding arbitration pursuant to the terms of their collective bargaining agreement, (“Agreement”). Marc A. Winters was mutually selected to serve as impartial arbitrator. The Arbitrator assigned Case Number to the Grievance is DPS-2022-06375-01. The Grievance was filed on September 23, 2022. An oral hearing was held on April 19, 2023. Both parties were given full opportunity to present evidence, to cross-examine the witnesses and to argue their respective positions. A stenographic record of the hearing was not made. The Arbitrator has full authority to resolve any arbitral challenges or procedural issues and to decide the case on its merits. Post-hearing briefs were filed, electronically, by the parties on or before May 22, 2023 and exchanged, electronically, through this Arbitrator on May 22, 2023.

BACKGROUND

The matter at hand addresses the demotion of the Grievant, Joshua Bolduan for violation of the Department of Public Safety’s Rules and Regulations:

4501:2-6-03(D)(3) – Military Courtesy

(3) A member shall not act or speak in an insubordinate manner to any supervisor; and,

4501:2-6-02(D)(4) – Respect for Rank

(4) A supervisor shall not bring physical or verbal abuse upon a subordinate.

Prior to his demotion, Sergeant Joshua Bolduan had served 8 years as a sergeant for the Ohio State Highway Patrol.

The Ohio Highway Patrol charged Sgt. Joshua Bolduan with violating two separate rules and regulations thus demoting him from sergeant back to trooper.

Through Administrative Investigation #2022-11561, it was found that Sergeant Bolduan acted and spoke in an insubordinate manner to supervisors. He also displayed unprofessional and abusive behavior towards subordinates.

The Grievant had active discipline up to a progressive five-day suspension at the time the three allegations of misconduct within the current administrative investigation took place.

The first alleged insubordinate act occurred in March of 2022, when Lieutenant Bradley Longo sent an e-mail to recipients regarding an upcoming awards banquet. The e-mail requested the recipients to respond if they were going to attend and with the number of guests to accompany them. The Grievant, who was one of the award recipients, responded, *“No chance in hell.”* Shortly after sending the e-mail the Grievant responded, *“Didn’t mean the hell meant heck”*.

The second alleged insubordinate act committed by the Grievant involved the blocking of supervision with his cell phone. During a Dominance, Influence, Steadiness, and Conscientious (D.I.S.C.) assessment with Lieutenant Longo, which was moderated by a neutral third party, it was discovered the Grievant intentionally and purposefully blocked supervision from contacting him on his cell phone during the summer holiday reporting periods. The Grievant stated he blocked supervision because of *“their continuous, harassing calling”*.

The third alleged misconduct committed by the Grievant was his abusive response to a subordinate in a group text message thread, which involved the entire post (1 lieutenant, 4 sergeants, and 12 troopers). A subordinate questioned the Grievant, via text message, if he had received the subordinate’s certificate. The Grievant responded, *“Borton you make \$2.87 less than. Me [sic] an hour (for now...soon you will bid before Me)...keep track of your stuff you ‘completed’. Maybe you didn’t complete it... I did...mine shows complete...unfuck yourself”*.

The Grievant's previous evaluations, before being demoted, showed that he was fully capable of performing the duties as an Ohio State Highway Patrol Sergeant as his previous post commanders evaluated him to meet or exceed expectations in every category.

This issue is now properly before this Arbitrator for adjudication.

The following documents were entered into the Record:

- Jt. Ex. 1, 2018-2021 Collective Bargaining Agreement between the State of Ohio and the Ohio State Trooper Association, Inc., Unit 1 and 15.
- Jt. Ex. 2, Grievance Trail – DPS-2022-06375-01.
- Jt. Ex. 3, Discipline Trail.
 - a. Statement of Charges
 - b. Pre-discipline Notice
 - c. Highway Patrol Rules and Regulations:
 - 4501:2-6-03 (D) (3) – Military Courtesy and Respect for Rank
 - 4501:2-6-03 (D) (4) – Military Courtesy and Respect for Rank
 - d. Discipline Letter
 - e. Department Record

Management's Exhibits

- M. Ex. 1, Administrative Investigation #2021-11561.
- M. Ex. 2, May 27, 2022 Letter, Kolleen Scott to Jessica Scalley.
- M. Ex. 3, December 3, 2021 Email, Lt. Longo to S/Lt. Bowers.

Union Exhibits

- U. Ex. 1, Administrative Investigation #2022-11474.
- U. Ex. 2, Group Chat Screen Shots.
- U. Ex. 3, Verizon Phone Records.
- U. Ex. 4, Joshua Bolduan Evaluations 2012-2015.
- U. Ex. 5, Joshua Bolduan Evaluations 2016-2021.

PERTINENT PROVISIONS OF THE AGREEMENT

Negotiated agreement between Ohio State Troopers Association, Inc. Unit 1 & 15 and The State of Ohio 2018 – 2021

ARTICLE 19 – DISCIPLINARY PROCEDURE (Relevant Sections)

19.01 Standard

No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause.

19.03 Length of Suspension

No suspension without pay of more than ninety (90) calendar days may be given to an employee.

19.05 Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

1. One or more Written Reprimand(s).
2. One or more day(s) Suspension(s) or a fine not to exceed five (5) days' pay, for any form of discipline, to be implemented only after approval from the Office of Collective Bargaining.
3. One or more day(s) Working Suspension(s). If a working suspension is grieved, and the grievance is denied or partially granted by the Arbitrator, and all appeals are exhausted, whatever portion of the working suspension is upheld will be converted to a fine; the employee may choose a reduction in leave balances in lieu of a fine levied against him/her.
4. Demotion or Removal.

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.

The Employer, at its discretion, is also free to impose less severe discipline in situations which so warrant.

The deduction of fines from an employee's wages shall not require the employee's authorization for the withholding of fines from the employee's wages.

ISSUE (As Stipulated by the Parties)

Was the Grievant demoted for just cause? If not, what shall the remedy be?

BRIEF SUMMARY OF EMPLOYER'S POSITION

The facts and testimony presented during the arbitration clearly show the Grievant willfully violated 4501:2-6-03(D)(3) and (4) – Military Courtesy and Respect for Rank.

The Grievant's three misconducts are not "stacking charges" as alleged by the Union. It is to the benefit of the Grievant that the allegations were combined into a single administrative investigation rather than three separate investigations where three separate issuances of discipline could be issued.

Testimony and evidence show the Grievant's behavior as a sergeant was insubordinate and abusive. The Grievant has been placed on prior notice as supported in the administrative investigation, prior annual evaluations, testimony, and evidence. The prior notice combined with the Grievant's progressive five-day suspension left only one option; to demote the Grievant to the position of trooper, where he has proven to be successful.

There is no one for the Grievant to blame but himself. No individual is acting on behalf of the Grievant; the Grievant brings about his own behavior. His actions are purposeful, they are not mistakes. The Employer attempted to help the Grievant, as evidenced by the numerous steps the Employer took to try to correct the Grievant's behavior. However, the Employer can only do so much when a supervisor is willingly defiant and/or makes excuses for defiance. Only the Grievant can fix those remedies.

The discipline imposed was not arbitrary, capricious, or discriminatory. The Employer established just cause for demotion, and factors of mitigation are not present for modification of discipline. The Grievant's response in e-mail form was defiant to his supervisor, as testified by Lieutenant Longo and Sergeant Fletcher. The Grievant's own admittance that he should not have blocked supervision but admitted he did so anyway, is clearly insubordination. Lastly, his response to a subordinate is abusive, and the lack of evidence to show similar acceptable speech supports that statement. Past evaluations prove the Grievant has been placed on prior notice for his behavior and the Employer has made attempts to correct his behavior. If the Grievant is reinstated to a position of a sergeant it will prove his behavior is acceptable and only embolden his actions.

The Employer respectfully requests that the Arbitrator uphold the demotion and deny the grievance in its entirety.

BRIEF SUMMARY OF UNION'S POSITION

There was no credible evidence introduced by the employer to indicate Sgt. Bolduan's inability to complete his tasks as a supervisor. S/Lt. Williams attempted to use the training completed by Sgt.

Bolduan May 26, 2022, as evidence that they had attempted to train Sgt. Bolduan but he continued to need discipline. This was clearly a Hail Mary by the employer as two of the three incidents had occurred prior to the training and the third was the off-duty group text messaging.

For the employer to sustain its demotion of Sgt. Bolduan there needs to be clear and convincing evidence of the just cause of its allegations, and it needs to show that Sgt. Bolduan has an inability to perform his duties as a sergeant with the Ohio State Highway Patrol.

The employer has the burden of proof to not only show just cause but to also demonstrate that the discipline imposed is commensurate with the offense. It has failed on both charges. The actions of Sgt. Bolduan do not meet any accepted definition of insubordination. Nor does his off duty joking in a group text message with a friend rise to the level of unprofessionalism and abuse of a subordinate. It is clear that the discipline imposed was done so in an arbitrary, capricious, and discriminatory manner.

The union would ask that you grant the grievance in its entirety, return Sgt. Bolduan to his position as a sergeant within the Highway Patrol, and make him whole for all lost wages and benefits, including overtime, during his unjust demotion.

DISCUSSION AND FINDINGS

A number of issues were raised, by both Advocates, during the Hearing and in their respective post-hearing briefs. It may not be necessary, on arriving at a decision, to discuss each issue raised.

The basic principle in arbitration, when discussing discipline or discharge/termination, is that an Employer must have just cause for imposing such a penalty. The burden of proof falls directly on the Employer. Here, the Employer bears the burden of proving their charges by a preponderance of the evidence.

Preponderance of the evidence, simply put, means the evidence has to be sufficient, to create, in this Arbitrator's mind, that the Employer has established its case.

The Grievant, in this case, has been charged with and demoted for violating Highway Patrol Rules and Regulations;

- 4501:2-6-03 (D) (3) – Military Courtesy and Respect for Rank
- 4501:2-6-03 (D) (4) – Military Courtesy and Respect for Rank

The Employer, in this case, uses demotion as the form of discipline to be applied believing additional suspensions will not modify the Grievant's behavior.

When addressing discipline, Arbitrators normally look for two distinct areas of proof. First, whether guilt has been established. Second, has the proper penalty been handed out?

This Arbitrator first must determine if the Grievant's conduct did in fact rise to the level of misconduct which would satisfy the elements of just cause for which the end result would warrant discipline. Second, whether the appropriate discipline in this case should be a demotion.

The question becomes. Was the evidence presented at the Hearing, in support of the charges, sufficient to prove the allegations made by the Employer against the Grievant?

The most important evidence in a case, such as this, comes in the form of testimony from witnesses. The source of such testimony, whether it is firsthand knowledge or merely hearsay is an important part for proving just cause and whether the appropriate penalty was handed out. This Arbitrator relies heavily on the firsthand knowledge of such witnesses since the consequences to the Grievant are so great.

The Grievant, as stated above, was charged with violating the Highway Patrol Rules and Regulations;

4501:2-6-03(D)(3) – Military Courtesy

(3) A member shall not act or speak in an insubordinate manner to any supervisor; and,

4501:2-6-02(D)(4) – Respect for Rank

(4) A supervisor shall not bring physical or verbal abuse upon a subordinate

The statement of charges read:

Through Administrative Investigation #2022-11561, it was found that Sergeant Bolduan acted and spoke in an insubordinate manner to supervisors. He also displayed unprofessional and abusive behavior towards subordinates.

The Grievant, in this case, was demoted based on three (3) allegations of misconduct.

The first alleged insubordinate act occurred in March of 2022, when Lieutenant Bradley Longo sent an e-mail to recipients regarding an upcoming awards banquet. The e-mail requested the recipients to respond if they were going to attend and with the number of guests to accompany them. The Grievant, who was one of the award recipients, responded, "*No chance in hell.*" Shortly after sending the e-mail the Grievant responded, "*Didn't mean the hell meant heck*".

The second alleged insubordinate act committed by the Grievant involved the blocking of supervision with his cell phone. During a Dominance, Influence, Steadiness, and Conscientious (D.I.S.C.) assessment with Lieutenant Longo, which was moderated by a neutral third party, it was discovered the Grievant intentionally and purposefully blocked supervision from contacting him on his cell phone during the summer holiday reporting periods. The Grievant stated he blocked supervision because of "*their continuous, harassing calling*".

The third alleged act of misconduct committed by the Grievant was his abusive response to a subordinate in a group text message thread, which involved the entire post (1 lieutenant, 4 sergeants, and 12 troopers). A subordinate questioned the Grievant, via text message, if he had received the subordinate's certificate. The Grievant responded, "*Borton you make \$2.87 less than. Me [sic] an hour (for now...soon you will bid before Me)...keep track of your stuff you 'completed'. Maybe you didn't complete it... I did...mine shows complete...unfuck yourself*".

The Grievant's past disciplinary record is as follows:

First, the Grievant received a written reprimand for Performance of Duty and Responsibility of Command for failing to check the welfare of a trooper who fell off an overpass. The discipline for this incident was received in 2017.

Second, the Grievant received a progressive one-day suspension for Performance of Duty and Evidence/Recovered Property. The Grievant mishandled evidence and approved cases where evidence had been mishandled. This discipline was received in 2018.

Third, the Grievant received a progressive three-day suspension for Conduct Unbecoming an Officer for unprofessional comments he made to a dispatcher on a recorded line. The discipline was received in 2019.

Fourth, the Grievant received a progressive five-day suspension for two administrative investigations, which were combined, and a single form of discipline was rendered. The Grievant failed to follow directives to complete supervisory tasks and failed to conduct quality video reviews, as instructed by his supervisor. This discipline was received in 2022.

The three allegations of misconduct will be discussed separately:

When discussing insubordination you generally look for two distinct actions of misconduct. First, a refusal to obey an order and second, abusive behavior by the employee. Whereby either action would impinge upon the Employer's ability to direct the workforce.

First: As to the Grievant's e-mail response as to whether he would attend the awards banquet where the Grievant's response was: first, "*No chance in hell.*" Then shortly after sending the e-mail the Grievant responded, "*Didn't mean the hell meant heck*":

Even after taking into consideration the Grievant's past discipline record this allegation fails as being insubordinate behavior. It was not shown in the record that the Grievant's response was intended to be disrespectful. The Grievant's response was spontaneous without malice or evil intent. The profanity was not directed at Lt. Longo or the Ohio Highway Patrol. The response was directed towards the attendance at a voluntary banquet.

Intentional disrespect, malice or evil intent, all innate characteristics of insubordination.

Testimony by witnesses was that profanity was quite often used in this Post. Nowhere does the record show any discussions or orders given by Lt. Longo, to the Grievant or anyone else for that matter addressing the use of profanity. The Grievant's response in the e-mail may have been unorthodox and may have not been the most professional answer to be given, it does not rise to a level of misconduct covered under insubordination.

Second: As to the Grievant intentionally and purposefully blocked supervision from contacting him on his cell phone during the summer holiday reporting periods for at least a period of two years:

There is absolutely nothing in the parties Collective Bargaining Agreement which would prohibit the Employer from using cell phones to communicate with employees and expecting employees to take calls on their personal cell phones especially from their Supervisors.

Nor is this Arbitrator aware of, from the record, any opposition by the Union as to the use of personal cell phones for work purposes by their members.

The Employer's expectation that employees maintain telephone service and respond to telephone calls from the Division whether the phone call was from a personal or state phone, is not unreasonable.

OSP Policy 203.030 - Ohio State Highway Patrol Regulations, Code of Ethics, and Oath Office clearly state: *"A member shall immediately establish telephone service, by cellular or landline..."* and *"A member shall promptly answer or respond to any telephone call from the division"*

As the Employer argues the Grievant's purposeful and deliberate actions, by not answering his cell phone, can have a consequential effect on the Division. Law enforcement must be able to quickly and efficiently contact its members in order to relay critical information to promote law and order within the community. Such information may include the deployment of units to the Statehouse for a riot, updates on road closures from a fatal crash that occurred on the interstate, or facts with regard to an on-duty suicide.

The Grievant's actions of blocking supervisors from contacting him on his cell phone is deliberate, defiant and does rise to the level of misconduct that would fall under insubordination.

Third: As to the Grievant's abusive response to a subordinate in a group text message thread, which involved the entire post:

No Employer should permit comments from a supervisor to a subordinate in the language used by the Grievant. Especially an Employer like the Ohio State Highway Patrol that operates in a paramilitary structure.

Those days when such language or behavior was considered shop talk is long gone and not acceptable in any industry or employment setting.

Additionally, there was no evidence to suggest or support that the language used by the Grievant directed to his subordinate was the norm at this Barracks for a supervisor responding to a subordinate.

The Employer, here, is correct when they expect subordinates to be respectful towards their commanding officer, and likewise, expects commanding officers to be respectful of their subordinates.

Police Officers are, and appropriately so, always held to a higher standard. This holds even truer for Police Supervision. That goes for on and off duty as well.

The Grievant's language, as a supervisor, in the text thread was disrespectful to his subordinate and unbecoming professional conduct for a supervisor.

Arbitrators generally agree that the use of a demotion, as a step in administering progressive discipline or any discipline for that matter, is usually grounded on the reality or fact that the demotion, although being used as a form of discipline is really an adjustment required because of an employee's inability to perform his job duties.

Demotions are not intended to be punitive but to place an employee in a position commensurate with his or her abilities.

Additionally, it is quite possible for a demotion to have other side effects or ramifications not anticipated, such as loss of seniority which could affect layoffs, benefits, wages, desired shifts or shift assignments to mention just a few.

To be demoted an Employer needs to show that an employee is incapable of, unable to, or be unqualified to perform his or her job function as required.

Here, that was not the case. The record does not support that finding.

Testimony from witnesses including the Grievant's supervisors was that the Grievant's abilities as a supervisor and a Sergeant were demonstrated not only by his annual evaluations, but also by the direct testimony of a fellow supervisor and a subordinate officer and for the most part not contradicted.

The evidence did not prove the Grievant was incapable, unable or unqualified to perform the duties of a Sergeant.

What was proven is that the Grievant's professional conduct as both a supervisor and mentor to other troopers is lacking.

After reviewing the testimony this Arbitrator believes that absence of a strong presence or leadership and the lack of direct communication by Lt. Longo led to the continuation of the Grievant's unprofessional conduct.

Had the Grievant been warned, given a direct order or even had a discussion by and with Lt. Longo about how Longo viewed the Grievant's conduct whereby the Grievant would have had reasonable expectations that violating Lt. Longo's orders or warnings would result in further discipline including a possible demotion, coupled with the Grievant's indifferent and cavalier attitude testifying at the Hearing a more severe penalty would have been warranted.

However, this Arbitrator is not convinced by the Union's argument that the supervisory styles of Lt. Longo and Sergeant Bolduan were different as a justification for the Grievant's conduct.

The evidence presented, the weight associated, and the credibility of the witnesses support these findings and conclusion.

AWARD

Based on the discussion and reasoning above, this grievance is granted in part and denied in part.

Based on the reasoning and discussion above and the entire record before me, this Arbitrator finds that the evidence presented at the Hearing, in support of the charges were sufficient to show just cause exists whereby the end result would justify discipline as being the appropriate penalty. However, that same evidence is insufficient to make a determination that the penalty of a demotion is the appropriate penalty.

The demotion is hereby overturned. While taking into account and consideration all prior discipline issued the appropriate penalty is a five (5) day, 40 hour unpaid suspension.

The Agency/Employer is hereby ordered to make the Grievant whole for any and all loss of earnings he incurred from the time of the demotion until he is returned to the rank of Sergeant minus the amount of the unpaid five (5) day 40 hour suspension.

This Arbitrator will retain jurisdiction over the remedy portion of this Award should any issues between the parties arise.

It is hereby so Ordered, this 16th Day of June 2023.



Marc A. Winters
Arbitrator
Seven Fields, Pennsylvania