

IN THE MATTER OF THE ARBITRATION BETWEEN

Ohio State Troopers Association, Inc.	:	
Unit 1 & 15,	:	Grievance No.: DPS-2023-02458-01
	:	
Union,	:	Grievance: 10 day suspension
	:	
and	:	Grievant: Nicholas Nolte
	:	
The State of Ohio, Department of Public	:	Opinion and Award
Safety, Division of State Highway Patrol,	:	
	:	January 30, 2024
Employer,	:	

APPEARANCES

For the Union:

Larry Phillips, Staff Representative
Bruce Elling, Staff Representative
Kari Root, President
David Richendollar, Vice President
Nicholas Nolte, Grievant

For the Employer:

Kaitlin Fuller, Lieutenant
Aaron Williams, Staff Lieutenant
Collin Jackson, Office of Collective Bargaining

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I. INTRODUCTION

This is a labor arbitration conducted under the terms of the parties' collective bargaining agreement. It involves a grievance filed by the Ohio State Troopers Association, Inc. (Union or OSTA) on behalf of the Grievant, Nicholas Nolte, contesting the Ohio Department of Public Safety, Division of State Highway Patrol's (Employer or SHP) decision to suspend him for 10 days for a violation of SHP Rules and Regulations 4501:2-6-02(B)(5) - Performance of Duty. The Employer suspended the Grievant by letter dated August 31, 2023 for exercising poor judgment when he failed to provide pertinent information to a utility foreman during a construction detail. The grievance was timely filed on September 1, 2023. It was processed under Article 20 of the 2021-2024 Contract Between Ohio State Troopers Association, Inc. Unit 1 & 15 and The State of Ohio (Labor Contract).

The Employer denied the grievance at all steps of the grievance procedure and the matter was submitted to alternative dispute resolution pursuant to Section 20.12 of Article 20 of the Agreement, which includes a permanent panel of arbitrators. This Arbitrator was selected from the panel. The arbitration hearing took place on January 25, 2024 at the offices of OSTA, 190 W. Johnstown Road, Columbus, Ohio. During the hearing, the parties had the full opportunity to present witnesses, introduce relevant exhibits, and argue their positions in accordance with Section 20.12. Witnesses were sworn and separated, examined and cross-examined. The parties made closing statements and the matter was submitted.

II. ISSUE

The parties submitted the issue as follows:

Was the Grievant issued a ten (10) day suspension for just cause? If not, what shall the remedy be?

II. RELEVANT PROVISIONS OF THE LABOR CONTRACT AND EMPLOYER RULES

ARTICLE 19 - DISCIPLINARY PROCEDURE

19.01 Standard

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

* * *

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 an 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.

OHIO ADMINISTRATIVE CODE SECTION 4501:2-6-02(B)(5)

Members who fail to perform their duties because of an error in judgment, or otherwise fail to satisfactorily perform a duty of which such member is capable, may be charged with inefficiency. Unsatisfactory performance may be demonstrated by a lack of job-related knowledge, an unwillingness or inability to perform assigned tasks, failure to take required action, or failure to take appropriate action at any time.

IV. FACTS

The facts in this arbitration are not seriously disputed by the parties. The Division of State Highway Patrol (SHP) is a division of the Department of Public Safety (DPS). The SHP is an internationally accredited agency whose mission is to provide professional public safety services in the State of Ohio. The Ohio State Troopers Association represents all permanently appointed full and part-time CAD Specialists, Dispatchers, Electronic Technicians, Troopers, and Sergeants employed in the SHP. (JX 1). The Grievant has been employed as a Trooper since June 6, 2018. (JX 2). His 2022-2023 performance review gave him meets expectations for each category except one, which was an exceeds expectations rating. His supervisor noted that he is aware of risks and motivated to promote safety. (UX 3). Prior to his 10 day suspension, the

Grievant received a written reprimand in 2019 for failing to thoroughly investigate a reported stolen trailer, a one day fine for losing the jewelry of an arrestee, and a three day suspension for losing an assigned narcotic training aid. The written reprimand fell under Section 4501:2-6-02(B)(5). (JX 3.E).

The 10 day suspension at issue here arose from an off-duty construction detail on the morning of Sunday, December 18, 2022. It was a four person detail that did not require a supervisor. However, one person was to act as the contact person between the detail and the construction crew. The Grievant was the least senior of the four who worked the detail. The others were Troopers Mark Murray, Darren Weathington, and Kyle Pohlabel. Murray had 21 years, Weathington 23, and Pohlabel 18. (UX 1). The construction detail was on State Route 4 near Chambersburg Road in Montgomery County and involved pulling a fiber cable across the traffic lanes. Route 4 was to be shut down to allow the work to be completed. (MX 1).

The Grievant testified that he was the first Trooper to arrive on the scene near Chambersburg Road and called the construction foreman to ensure he was in the correct location. When the others arrived, they spoke with the construction crew. The foreman indicated that the Grievant would serve as the contact person since he already had his phone number. In his criminal investigation statement, the foreman stated that he and the Grievant had worked prior jobs together. (MX 1, p. 39). Given it was dark and some snow was falling, the Troopers noted that one of the crew did not have on any reflective gear. He was wearing a white helmet and head lamp. (MX 1, p. 19).

The Troopers then left to get into position to close the roadway. The Grievant's dash camera shows him blocking the southbound ramp to Route 4. At 7:02:13, two of the Troopers advised they were in position. The Grievant then called the foreman at 7:02:30 and advised that the road was shut down. The foreman responded that he would call back when they were finished. At 7:03:10, the Grievant advised the other Troopers to shut it down. At 7:03:20, one of

the Troopers advised a red four-door was the last vehicle southbound, and another noted a Huber Heights ambulance and an SUV as the last going northbound at 7:03:52. At 7:05:34, the foreman called the Grievant to report one of the crew had been struck by a vehicle and was dead. (MX 1; Attachment B).

The incident was investigated by the Huber Heights Police Division as a reckless homicide. Since a criminal investigation ensued, the SHP took no disciplinary action against the Grievant initially. When the grand jury returned a no bill indictment, the SHP began an investigation. On August 21, 2023, Staff Lieutenant Chad Miller of the Administrative Investigation Unit instructed Sergeant Jacob Fletcher to conduct the investigation. Sgt. Fletcher interviewed Troopers Murray, Pohlabel, Weathington, and the Grievant. He obtained a copy of the Huber Heights criminal investigation, and reviewed in-car video and other paperwork. (MX 1, p. 8).

The SHP concluded the Grievant was negligent because he did not communicate to the foreman that vehicles were in the roadway after he informed him the road had been shut down. Given that he had a prior suspension and that the incident resulted in the death of a construction crew member, DPS determined that more severe action was warranted. (MX 1). The Grievant was suspended for 10 days without pay on August 31, 2023 to be served beginning September 11, 2023. (JX 3.D). This grievance followed. (JX 2).

V. POSITION OF THE EMPLOYER

The grievance should be denied and the 10 day suspension upheld. The SHP had just cause to suspend the Grievant. He was the point person for the detail and communicated between the detail and the foreman. Yet he failed to communicate pertinent information, i.e., that there were vehicles in the roadway, for about 90 seconds.

As the point person, the Grievant's role was to communicate with the construction crew. It takes no special skill to be the point person, so the Grievant's seniority compared to the other

Troopers is not relevant. He told the foreman that the road was shut down when he meant to say that they were ready to shut it down. He was then told there were vehicles in the roadway, but did not inform the foreman.

The investigation confirmed that the Grievant failed to report pertinent information, i.e., vehicles in the roadway, for about 90 seconds. He was the only person who could have told the foreman and he did not. That there was no criminal charge against the Grievant is irrelevant. The Employer disciplines employees all the time without criminal charges being filed. Simply put, the 10 day suspension was not arbitrary and capricious and should be upheld.

VI. POSITION OF THE UNION

The grievance should be granted and the suspension reduced to five days, the next step in progressive discipline. The Employer did not have just cause to skip a step and suspend the Grievant for 10 days. Construction details typically involve Troopers from different units working together. Of the four involved, the Grievant had the fewest years of seniority by far and should not have been the point person. When the Grievant communicated with the foreman, it had not been discussed what signal would be given. When he said the road was closed, he meant they were only in position to close the road.

This was a tragic accident, but many mistakes were made. The worker was not wearing a reflective vest. The foreman did not require him to wear a vest. There were no flashing lights at the sight. In addition, the investigation was not complete. The SHP interviewed the Troopers only, not any of the construction crew, the driver, or witnesses. The Grievant shares blame, but he was not the only one. The Employer ignores the mistakes and focuses on the end result of the incident, i.e, the worker's death, to defend the suspension.

VII. OPINION

The Employer bears the burden of proving that just cause exists for the Grievant's discipline. Just cause generally requires persuasive proof that the rules or policies cited for the

discipline were violated and the discipline was proportionate to the offense. That is, the discipline imposed was reasonable under the totality of the circumstances. Usually, the just cause standard favors progressive discipline, which gives the employee an opportunity to correct behavior and provides notice that failure to do so will lead to more severe discipline. However, progressive discipline need not always follow an oral warning, written warning, suspension, and discharge in lock step order. The facts and circumstances of each particular case dictate the appropriate disciplinary level. Progressive discipline concepts, however, do not apply in the face of gross misconduct, such as dishonesty, that warrants summary discharge in the first instance. This is particularly so when law enforcement officers are involved, given their unique place in the working world. Law enforcement officers are guardians of the peace and security of the community, and the efficiency of our entire system, designed to maintain law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust given them. For this reason, police officers must be held to a higher standard of conduct than other public employees. "Law enforcement officials carry upon their shoulders the cloak of authority of the state. For them to command the respect of the public, it is necessary then for these officers even when off duty to comport themselves in a manner that brings credit, not disrespect, upon their department." *Jones v. Franklin Cty. Sheriff*, 52 Ohio St.3d 40, 43 (1990). Law enforcement officers are generally aware of this, although they do not always like it. Finally, no citation is needed for the principle that employers have the initial discretion to impose discipline for proven misconduct. Generally, arbitrators will not second guess management so long as the penalty imposed is reasonable under the facts and circumstances.

The Employer disciplined the Grievant for exercising poor judgment by failing to provide the construction foreman with pertinent information. The pertinent information was there were vehicles still in the roadway. OSTA argues that the Grievant was only partly at fault and there were other mistakes, particularly that the worker who was killed was not wearing a reflective

vest. While this is true, it does not relieve the Grievant of his responsibility in the incident. He was the contact or point person. It takes no special skill to communicate between the detail and the crew, and the Grievant had performed this kind of detail two or three times before. (MX 1, p. 6). That the Grievant was the least senior Trooper and should not have been the point person does not carry the day.

In addition, the Grievant acknowledged that there had been some miscommunication between him and the foreman. At 7:02:13, two of the other units advised they were in position. He told the foreman at 7:02:30 that the road was shut down and the foreman replied that he would call back when the work was completed. (MX1, p. 35). The Grievant then realized there might have been a miscommunication and told the other Troopers to shut the road down. (MX 1, p. 7). There are several problems with his actions, though.

First, the Grievant told the foreman that the road was shut down, but stated he meant only they were in position to shut the road down. However, he admitted he had worked other details and being in position and shutting down the roadway are different. If he meant only that they were in position, he did not call the foreman back to clarify or explain the situation. Second, while the miscommunication was with the foreman, he spoke to the other units and told them to shut the road down. This did not clear up the misunderstanding with the foreman. Rather, it tends to show that he realized his mistake and tried to fix it by shutting the road down. But he did not call the foreman, the person with whom he had the miscommunication. This does not make much sense.

Third, and most important, after being told at 7:03:20 about the southbound red four-door and about the northbound ambulance and SUV as the last vehicles at 7:03:52, the Grievant was aware that there were still vehicles on the road. Yet he made no attempt to contact the foreman to let him know. The Grievant was the only person in the detail who could contact the foreman. And the entire purpose of the detail was to shut the road down to allow the work to

be done and protect the crew from harm. Telling the foreman earlier that the road was shut down led the foreman to understand it was safe to do the job. Knowing he had told the foreman the road was shut down, realizing there might have been a miscommunication between him and the foreman, and knowing that vehicles were still on the road heading toward the crew, the Grievant did nothing.

Furthermore, not having flashing lights or not making certain the construction crew member who was killed wore a reflective vest are red herrings. That is, they distract from the important question. While they might excuse the driver who struck the worker, the important question involves the Grievant's actions. Here, those actions defeated the purpose of the detail. Had he told the foreman they were only in position and had yet to shut down the road, or had he informed the foreman that vehicles were still in the roadway, this incident would have been prevented. The crew not having flashing lights or the crew member not wearing a reflective vest does not excuse the Grievant's failure to communicate to the foreman that the road had not been shut down and vehicles were heading toward the crew.

The Union argues that the Employer skipped a step and the Grievant should have received the next step, a five day suspension, instead of 10 days. The Arbitrator disagrees. The reason for the detail was to ensure safety, both of the fiber cable being pulled across the road and the crew. The purpose of shutting down the roadway was to prevent vehicles from damaging the cable or injuring the construction crew. Not relaying the information that vehicles were in the road after the foreman was led to believe no more vehicles were on the road defeated the very purpose of the detail. This was not a simple or minor infraction and merited more severe action than the next step in progressive discipline. Simply put, the Arbitrator concludes the Employer had just cause to suspend the Grievant for 10 days.

VIII. AWARD

The grievance is denied.

Dated: January 30, 2024



Daniel G. Zeiser
Arbitrator