

## IN THE MATTER OF ARBITRATION BETWEEN

**Ohio State Troopers Association (OSTA)**  
Union

And

Case no. DPS 2023-0046-01  
Trooper Tyler Boetcher Grievant  
Five day Fine

**State of Ohio, Department of Public Safety (DPS)**  
Employer

### Umpire's Decision and Award

#### Introduction

This matter was heard in Gahanna, Ohio on 3/28/24 at OSTA headquarters.

Larry Phillips represented Grievant and OSTA. Grievant was present and testified. Trooper Hall also presented sworn testimony in behalf of Grievant.. Other Union representatives were present as observers.

Lt. Kaitlin D. Fuller represented the State Highway Patrol. (OSP) Other Management representatives from the OSP and the Office of Collective Bargaining were also present as observers/second chair.

The OSP called as its first witness Sgt. Jennifer Burkhart who prepared the administrative investigation (AI).<sup>1</sup> Lt. Jonathan Davis testified as well as he had first-hand knowledge of some of the events.

There were several joint exhibits (Jt. Ex.) presented: Jt. 1- the Statement of Issue; Jt. 2- the collective bargaining agreement; Jt. Ex. 3-the grievance trail; Jt. 4- the discipline package. The issue was stipulated. An additional OSP exhibit was introduced-the administrative investigation [AI] packet, and it was admitted during the hearing.

The decision issued within stipulated time limits.

**Issue:** Was the Grievant issued a five (5) day fine for just cause? If not, what shall the remedy be?

#### **Applicable CBA Provisions**

Article 20

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<sup>1</sup> The AI was conducted four months after the incident.

## **Background**

Grievant was charged with the following: Compliance to Orders: OAC 4501:2-6-02(Y)(2). The allegation was that on 8/6/22, Grievant was intoxicated while at the Academy in off duty status.

The five day fine was issued the pay period ending 1/14/23.

It was timely grieved.

## **SUMMARY of FACTS**

Grievant is a Trooper assigned to the Chillicothe Post. During the 2022 Ohio State Fair [Fair] season, Grievant was assigned to the Mobile Field Force [MFF] unit at the Fairgrounds. The dates/times he was assigned to the Fair were Fridays-Saturday-Sunday during the two weekends of the Fair in late July-early August 2022. His shift was 4pm-midnight. It was not an overtime detail.

Troopers residing more than 50 airline miles from the OSP headquarters may stay overnight at the dormitory rooms at the Academy. There are written rules applicable to being present at the Academy and one rule relates to “being under the influence of an alcoholic beverage” on premises. These rules were part of the record and there is no question Grievant had awareness of the content.

Trooper Hall shared the room with Grievant; they were from posts within the same OSP District. Hall testified the two were friendly and worked in the same District.

After his shift on 8/5/22 Grievant and three of his fellow MFF members [Troopers Beck; Hall; Prose] changed out of uniform and went to two bars north of the Fair. The Troopers walked as the distance was within twenty minutes each way.

An indeterminate number of beers [but no more than 2] beers were consumed at the first bar location by Grievant. The brand name/ABV was not in evidence. The evidence varied somewhat between the amount of alcohol and the type of beverage consumed at Fourth Street by the other three Troopers. The Fourth Street Tavern was closing soon after the group’s visit started.

The group next walked to Oldfields, another neighborhood bar a short distance away. There an additional indeterminate number of beers/alcoholic drinks were consumed by the group. Grievant’s estimated consumption there was two beers. Again, the brand name of the beer[s] and the ABV was not in evidence.

Grievant paid for Hall’s drinks as he had no credit card. The non-itemized receipt was in evidence. Al p.123

On the way back to the Academy where each individual was staying in the dormitories, the Troopers either walked single file on the sidewalk or moved into the street due to foliage and debris near/on the sidewalk near the viaduct.<sup>2</sup>

According to a report/interview in the AI Sgt. Mackie while working the gatepost observed one of the four Troopers nearly get hit by a car -twice-as he was walking/stumbling in the middle of the street. There are additional statements made by him in the AI about Grievant's being assisted in walking by his companions. The stumbling, almost struck Trooper was identified as being Grievant per Mackie. Mackie learned Boetcher's name from another on duty Trooper at the gate. Mackie made no attempt to confront or assess or speak to Boetcher or any of the other three persons individually walking with him. His only comment directed to the group was that he didn't think it was funny. This was based on the group's reaction to his statement that one of them almost got hit by a car.

Lt. Davis' testimony was that he was alerted to the four troopers arrival by radio call from Mackie.

Grievant testified to drinking approximately four beers. The beers were consumed in a one and one half hour time period [approximated]. There is no documented evidence as to the quantity in fact consumed.

Grievant denied being almost hit by a car. He and Hall testified that the car was driving in the wrong direction in the area due to limited access; the car was given directions by the group, and the car's driver turned around and honked his horn as a thank you for the assistance. This testimony was corroborated by Hall.

The group returned to the Academy building around 3am. They were in a talking mode and shushed each other due to the hour. The group ordered food and/or beverages [Gatorade] and ate at the same table in the cafeteria. They ate quietly per Davis.

Grievant had the closest interaction with Lt. Davis who was on duty at that time as one of two commanding officers along with Lt. Swinerton. Davis observed Grievant had a "glazed look" on his face and "glassy eyes" and was unsteady in his gait as he went to the salad bar. Grievant was the only one of the four who spoke to Davis. Davis generally addressed the group of four. Davis stated that he advised Grievant that he would be checked for fitness for duty the

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<sup>2</sup> The four involved Troopers varied a bit in recollecting who walked in the street, who walked on the sidewalk on the way back from Oldfields. No one of the three Troopers with Grievant confirmed that Grievant almost got hit by a car-once or twice-as alleged. There was testimony that that a dark colored/red/maroon car passed them honked to thank them for giving him directions about the closed road and how to get out of the area. Mackey reported that two cars were involved in near misses with Grievant. He was the only person stating two cars passed the group.

next day. Grievant responded "yes sir."<sup>3</sup> Per Davis, Grievant was the only individual of the four displaying visible intoxication.

Davis stated that he directed the four Troopers to finish their food and return to their rooms.

The investigation followed.

There are no procedural issues raised.

The fine was imposed in January 2023.

**OSP Position:**

The discipline is within the grid; is commensurate; is progressive; is nondiscriminatory and no abuse of discretion exists such as to mitigate the discipline. The discipline is for just cause and the grievance must be denied.

**OSTA Position:**

The discipline is without just cause. The discipline is arbitrary and capricious; Grievant was singled out for discipline; there was no reliable proof of intoxication such as a field sobriety test or a BAC being drawn. The grievance should be granted in its entirety.

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<sup>3</sup> Testimony as to who Davis directed his remarks to and what exactly was said varies in the AI. There is evidence that he indicated all four Troopers would be checked for fitness for duty. As it happened, no one was checked.

## Opinion

The Employer bears the burden of proof. The burden in a discipline case such as this is preponderance of the evidence.

The burden of proof was met here by a minimal standard of preponderance of the evidence. However this statement does not end the inquiry as just cause does not exist. OSP did not sufficiently convince the arbitrator that Grievant alone among his three drinking companions was intoxicated. It was OSP's burden to do so, as clearly and definitively a "similarly situated" group of employees were present and engaged in post shift drinking as a cohort. All four were under the same expectations and rules concerning Academy grounds and rooms. Only one was singled out for scrutiny and later discipline.

Boetcher's discipline is not sustainable because of any intrinsic merit to his judgment and demeanor in this incident. He like his companions likely had "one too many".

Just cause required that out of a group of four Troopers, it was incumbent on the OSP to not single out Boetcher for special attention. All four employees were most likely to have had an indeterminate level of intoxication. The evidence indicates likely four alcoholic beverages *at a minimum* were consumed by each member of the group in a two hour period that early morning. There was no testimony that the drinks were absorbed by food ingested at the two bars or that more than twenty minutes lapsed between the last drinks and the return to the Academy. All four were eating in the cafeteria; all four dropped their volume when shushed; all four consumed their cafeteria purchases in silence under Lt. Davis' watch.

All four Trooper interviewees admitted to the consumption of alcohol. None were innocent of drinking and returning to the facility without intervening periods of food or rest. It was unclear which would have met the unstated, undefined definition of intoxicated as stated in the house rules for the dorms. But for reasons that were not within the just cause requirements, only Grievant caught the attention of the OSP.

There were facts that weighed in Grievant's rebalancing of the scales so that a preponderance of evidence was not met by the OSP-once it established

that social drinking had admittedly occurred before the Troopers returned to the dormitory.

Davis said he expected each of the four Troopers to acknowledge him per custom and practice. No one did other than Grievant.

There is no objective, standardized “proof” on intoxication. Proof of such is easily established on cases of inebriation/intoxication-especially by the OSP who patrols the highways for citizen safety from intoxicated/drunk drivers.

No accepted standard for evaluating level of intoxication was offered/attempted that early morning by the OSP despite all its resources. Very experienced persons in measuring intoxication were present and on duty. Glassy eyes/glazed [?] face and abnormal focus on simple tasks *may* have been indicia of intoxication. There was no independent corroboration of Davis’ observations by any other persons present: not the other Lt. on duty nor any of the civilian personnel at work in the cafeteria. But corroboration could/have should have been obtained. This may have bolstered the OSP position to tip the scales in favor of the solitary opinion/observation of Davis.

Three others similarly situated to Grievant were likewise drinking several/multiple intoxicants that night. Merely stating that the others were not “visibly intoxicated” is insufficient to prove Grievant was the *only* intoxicated person. The record is devoid of any attempt to assess the others involved. This is disparate treatment.

Each person in the group no doubt had the same/more drinks/higher proof drinks than Grievant yet were unobserved/unremarked upon for no logical reason. Perhaps he was the least impaired; perhaps the most; perhaps he was just hot and tired after his shift and more tired after drinking a few beers. Under these facts and circumstances laser focus on Grievant was discriminatory. The “under the influence rule” applied to all four Troopers. This is the most significant factor for voiding the discipline.

Grievant was permitted to drive a OSP marked car back to Chillicothe and report to duty at his Chillicothe post the next workday-within 12-13 hours of purportedly being under the influence/intoxicated. The lack of concern for Grievant and everyone else’s safety under these circumstances if he had been drinking to intoxication levels hours earlier is another factor affecting the discipline. If a stated goal was to ensure that Grievant was not to report to duty

intoxicated the next day at 4pm, nothing whatsoever was done to secure that result. He was in fact sent home in the cruiser to his normal job.

Grievant's stated wake up time and morning activities after the night of drinking do not lend weight to the claim he was intoxicated. There was no evidence to the contrary to his statements that he woke up at 8:30am; ate breakfast; worked out for almost two hours; walked the Fair then reported to duty. These activities are inconsistent with intoxication a scant 5-5 1/2 hours earlier. His actions were corroborated by Hall.

The Umpire notes that the Grievant has appeared before her before-most recently in 2023. For what it is worth, his conduct this time was problematic as it certainly was in the prior matter. It is only the facts of clearly disparate treatment herein that require sustaining the grievance. The OSP did not counter the disparate treatment with sufficient rationale to overcome the defense.

### **AWARD**

**The grievance is granted. Grievant should be made whole consistent with the award.**

**IT IS SO HEREBY ORDERED.**

*S/ Sandra Mendel Furman*

Sandra Mendel Furman, Esq., NAA

Issued April 1, 2024 in Bexley, Oh

### **Certificate of Service**

The Award was issued by electronic email to the parties' representatives on this same date.

*s/ Sandra Mendel Furman*