IN THE MATTER OF ARBITRATION BETWEEN

Ohio State Troopers Association,
Union

And

Case no.2015-00631-1
Vic. L. Wolfe Grievant

State of Ohio, Department of Public Safety,
Employer

Umpire's Decision and Award

Introduction

This matter was heard in Columbus, Ohio on September 30, 2015 at OSTA headquarters. Lieutenant (Lt.) Brewster represented the Employer. General Counsel Sigall represented the Union. All witnesses were sworn. A motion to separate witnesses was granted. There were several joint exhibits presented: Jt. I- the collective bargaining agreement; Jt. 2- the grievance trail; Jt. 3- the discipline package and Jt. 4 the EIP policy. Additional exhibits were introduced by the parties and admitted during the hearing.

Issue

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

Applicable CBA Provisions

Articles 7, 18, 19; MOU dated February 2014; 20

Facts

The facts giving rise to the instant discipline are not disputed. Grievant is assigned as a Trooper in the Cambridge District. His post is Lisbon. His immediate supervisor is Lt. Dragovich.

Grievant has an extensive disciplinary history. It is reflected in Jt. Ex.3 [1]

[1] The Union introduced evidence that Grievant was terminated in 2015. Other exhibits introduced by the Union contain information about the Early Intervention Program (EIP) detailing further mistakes/errors in performance by the Grievant post October 5, 2014. The umpire cannot consider events occurring post the instant ten-day suspension as relevant for determination of the instant dispute. This current discipline will stand or fall based upon its elements not subsequent

In addition to his extensive disciplinary history, his 2013 and 2014 performance evaluations reflect a series of problem areas that rated "does not meet". Management Ex. 3.The 2013 evaluation covered the period from September 2013 to September 2014. According to the unsigned document it was acknowledged by Grievant on September 18, 2014. The 2014 evaluation covered the period from September 6, 2014 to February 5, 2015. Management Ex. 4.

Grievant has been part of a Performance Improvement Program (PIP) in 2013. Management Ex. 5. There was some improvement in performance noted when Grievant was working "one on one" supervision. Other issues re-surfaced and/or remained as problems once the period of direct supervision was completed.

He was placed on a PIP again in 2014 on or about October 6, 2014. Management Ex. 4.

Grievant was considered for Early Intervention Review and was approved. The EIR is described in detail in Jt. Ex. 4. It is an Employer designed program and doesn't have Union input or concurrence. Its stated purpose is to "address problems/and or deficiencies (if found) as early as possible to change unwanted behavior prior to employee entering the disciplinary track, or to work in conjunction with formal discipline."

Once an employee is enrolled in the EIP s/he receives notice that "participation is mandatory, and this program will not mitigate any other disciplinary action resulting from the employee's employment. (I.e. *future* complaints or administrative investigations.)

As part of management's efforts to improve Grievant's performance in deficient areas he was sent to specific individualized trainings. Some of these occurred before the incidents that are the subject of the instant grievance, others were subsequent. Management Ex. 6.

His two most recent disciplines preceding the current matter were a three-day and a five-day suspension. Two of the three days of the three-day suspension were held in abeyance until a second discipline soon followed- a five-day suspension. Due to the timing the two days held in abeyance were imposed as part of the five-day suspension thereby creating a seven-day suspension.[2]

Dragovich came to the post on October 3, 2014 to serve Grievant with the Statement of Charges relating to the five-day suspension.[3]

Grievant was working the 11pm to 7 am shift but was not present at the time of Dragovich's arrival.

---

actions of the parties. However for purposes of chronology and background some events post the ten-day suspension will be discussed.

[2] Neither the three-day nor the five-day suspensions were grieved.

[3] The five-day suspension related to allegations involving a failure to mail drug evidence and create a case report in a timely manner.

When Dragovich entered the post, he saw only Dispatcher Land present. He observed a mailing envelope in the dispatcher area and determined it was evidence taken from an arrest (Armstrong) by Grievant. The evidence was not in the evidence locker but was lying on a worktable. The post is secured but members of the public may have access for limited purposes when admitted by the staff. There was no testimony that anyone other than Land and Dragovich were present in the relevant time period.

Grievant had left the post for a break. Grievant passed the Calcutta post office on the way to his break location. Lisbon also has a post office. Neither of the two post offices was open at the hour of the day involved. Grievant had at all dates relevant worked third shift; the post office itself would never be open during his shift.

Another issue occurring on October 3, 2014 related to errors in filling out paperwork relating to Armstrong. It was the "unsecured" evidence in his arrest described above . Grievant improperly recorded I a third OVI as being the first offense on the citation as a first offense.

The number of OVI offenses directly impacts sentencing. Information concerning prior convictions is immediately available to the arresting trooper in his vehicle and/or through verification with a dispatcher.

The second set of circumstances surrounding the ten-day suspension concern the fact Grievant failed to get a witness signature to the reading of a BMV 2255 form at the time a urine specimen was collected. He indicated that he went back and secured it from the witness (Brooke Kosko) the next day. The sample was collected at a Tim Horton's. No explanation was provided for the delay. Her signature obtained a day later did not record through all four copies of the BMV 2255 form.

The notice of suspension cites to the fact that the Driver Impairment Report had "numerous errors." Errors related to the defendant's wife's name, the amount reflected in the PBT, the court date and defendant's place of residence.

The ten day suspension was served beginning February 25, 2015.

It was timely grieved.

Employer Position

Grievant should have mailed the evidence and not left it in the dispatch area which is accessible to numbers of persons. Land was unaware of its (the evidence mailer) existence. Grievant had an alternative to putting it in the evidence locker. He could have secured it in his vehicle. The manner in which the evidence was left raises concerns about the chain of custody directly impact the evidentiary value of the evidence.

Grievant failed to properly fill out Armstrong's prior conviction record. This was part of a continuing pattern of Grievant making errors in forms and paperwork.

Grievant failed to properly secure a witness signature for BMV form 2255 relating to Boyd. There were inconsistencies as to the BAC reading and as to personal identifiers for Boyd. It was obvious that Grievant had done a cut and paste on a prior report and failed to proofread for errors. This is inefficient and poor performance of duties.

The Employer made extensive efforts to work with Grievant to improve efficiency and job performance. Efforts include PIPs and an EIP. Grievant seemed only to improve when he is under direct and constant scrutiny.

Grievant's actions violated Rule 4501:2-6-02 (B)(5) Performance of Duty and Rule 4501:2-6-02(W).

The discipline is progressive, it is for just cause and the grievance must be denied.

Union Position

The grievance must be granted due to the untimely issuance of the notice of discipline. It issued more than ninety days from the start of the AI.

Grievant was unfairly disciplined in rapid succession in 2014. The Employer was intent on building a case for termination. Grievant should have had more opportunity to conform to expectations and benefit from the EIP.

Grievant received discipline for two incidents occurring on October 3 and 5, 2014. This was before he was even served with the five-day suspension. He had no opportunity to change/modify his performance before he was being disciplined yet again. Due to the rapid and frequent imposition of discipline Grievant had no opportunity to improve his performance. This is unfair and not consistent with just cause principles.

The grievance should be granted and Grievant made whole.

Opinion

This case presented a possible procedural bar to imposition of the discipline. The Union pointed out that MOU language extant at the date of the grievance states in relevant part:

> The administrative investigation and notice of discipline must be completed within ninety days *from inception of the investigation* unless mutually agreed otherwise. The Union shall not unreasonably deny an extension of the deadline. [Emphasis added.]

The MOU was executed by the last signatory on 2-6-14-well before the events giving rise to this grievance.

The MOU states on its face that it "will not be used in any. …arbitration…" it also states "The agreement may be used by any party to enforce its provisions." As the exhibit was admitted without discussion or testimony the

umpire assumed its efficacy. The MOU compressed the time period in the relevant collective bargaining agreement for two steps- the AI and issuance of the notice of discipline- into a 90 day versus a 105-day period.

In this case the administrative investigations (AI) supporting the discipline began on October 7, 2014. Management Ex. 1- A and 1-B. This was further supported by the testimony of Sgt. Bailey. Notice of Discipline issued January 30, 2015. Any other date recorded indicated dates the AI was recorded/filed/submitted/completed, not initiated. The notice of discipline was issued outside of the bargained for period; no extensions were requested.

The parties agreed that a 90 day period should typically and ordinarily suffice for an AI to begin, end and result in charges-or not. Extensions are contemplated but none were sought. The question is: what is the bargained for effect of a failure to meet the ninety day processing time frame? The contract and the record are silent on the answer.

The umpire noted there is no context presented for the above-cited language. No bargaining history for this provision exists in this record. No precedent was cited to support a default /procedural win- although that is not surprising because if the deadline was missed once-it would likely not be missed again.

The umpire further noted that the Union did not raise a procedural argument until the date of the hearing. The MOU is not cited on the face of the grievance. If it had been a slam-dunk win for the Union in its intent, then the MOU provision would/should have been cited at an earlier stage of the grievance procedure. If it were patent the language had the Union's proffered effect the grievance would have likely been settled at earlier steps of the grievance procedure.

The umpire is loath to add to the language of the parties' agreement. Such is prohibited by the language in Article 20. To conclude the failure to issue a notice of discipline within 90 days results in a void discipline would without more in the record requires the umpire to amend and add to the parties' agreement. There is the added uncertainty of what the parties meant by stating the MOU could not be used in any arbitration. It seems even more unlikely that this MOU was intended as a default as the agreement clearly specifies that a discipline must issue within two years of the occurrence per Article 18.09. Grievant's current discipline certainly issued well within this time frame.

Grievant has an unenviable deportment record. It is replete with multiple disciplines of record going back to 2005. For ten of his fifteen years of employment he has been the subject of discipline. The Employer has coached Grievant, put him on PIPs (and more recently the EIP), sent him to individualized trainings and issued corrective actions to get him to conform to expectations and

improve performance.[4] Per Employer testimony unrebutted by Grievant, Grievant met expectations only when he was closely monitored. The Employer has attempted to work with Grievant to improve efficiencies and performance.

Wolfe's most recent disciplines prior to the current matter were not grieved. Thus each stands as stated by the Employer in its charges.

Grievant's testimony failed to reveal any justification or excuse for the errors in the Boyd/Armstrong OVI paperwork and attendant citations.

Some explanation albeit inconsistent in nature was offered for the securing of evidence charge. It was not explained by Grievant at the hearing why the marihuana evidence in the Armstrong matter was not secured in the patrol car or at a bare minimum brought to the attention of Dispatcher Land to monitor while Wolfe was off post for his break.

Grievant provided an explanation in the AI that he was required to review his paperwork before mailing with a supervisor. And his explanation is consistent with the policy set forth in OSP-103.7. See Management Ex. 2. It is noted that the date of the policy is 1-14-15; it is unknown whether the sections applying to this matter were revised after the date of the incident or not. Grievant appeared at first blush to be acting at least partially in compliance with his instructions by not mailing the evidence mailer until his paperwork was reviewed.

Unfortunately his testimony at the hearing stated he placed the HP 28 *in the tube*-as contrasted to in the mailing envelope-as was intending to mail it when he returned from his break. If the aforesaid policy was in effect he was not following policy to have placed the form inside the sealed tube.

Furthermore his claim at the hearing he was intending to mail it after his break makes little sense as he passed at least one mailbox on his break. If that was his intention it may have also been a violation of a required step of reviewing the HP 70 with his supervisor first. But he was not charged with anything other than failing to secure the evidence properly. The umpire is merely noting the inconsistencies in testimony that bear on credibility.

The incident involving the Armstrong evidence mailer might have more weight in favor of sustaining discipline had the five-day suspension been a matter of record first. Notice to Grievant likely would have been clear and unequivocal at that point- as the bare bones record of the five day suspension seemed also to have been in part about evidence handling. He was served with the notice of five-day suspension on October 3, 2014. He therefore lacked a timely opportunity to correct mistakes and issues relating to evidence handling before he fell into

[4] The EIR referral came after the dates of the incidents forming the predicate for the ten-day suspension. However testimony from Dragovich indicated he was being considered for it earlier as a result of the imminent five-day suspension.

another discipline. The umpire finds that discipline is not merited *for this aspect only* of the ten-day suspensions.

The Employer bears the burden of proof and there are too many questions and issues about this particular incident. Even though Grievant's story is inconsistent it is the Employer's burden of proof. If he was supposed to have reviewed the HP-70 first before mailing he couldn't do so that night based on staffing. He lacked access to the evidence locker due to the same staffing issue- no Sergeants on duty. The umpire finds at most a warning should have issued for this event.

Although the error as to filling out the citation correctly noting it was the third offense for Armstrong-the same individual whose evidence was allegedly improperly secured- was ultimately caught, the responsibility was Grievant's to do the catch. Courts, prosecutors and most significantly the public rely on the traffic laws being enforced. It is a matter of legal significance to not record it was a third offense. The umpire finds that this is carelessness within the scope of the Performance of Duty rule. Grievant was an enforcer of the traffic laws with a commendable arrest rate. But the arrests and paperwork must be done by the book to be effective. The umpire concludes discipline is appropriate for this error.

There were multiple errors in Defendant Boyd's HP 70-B report prepared by Grievant for another OVI. These multiple errors including discrepancies in the PBT results show inattentiveness to detail and a failure to properly fill out forms.[5] The car video didn't match the written report. The Prosecutor said there were problems and the matter could not be prosecuted as an OVI. Boyd ultimately plead to an OVI and other charges. The fact the conviction resulted does not minimize the errors made; it is just a fortunate outcome.

It was unexplained as to why the 2255 form witness signature was not attainable in the Boyd matter the night the document was claimed to be witnessed by Kosko. It strains credulity that the witness could not have signed the document in a very quick manner considering the time of day that the witnessing allegedly occurred. It is careless that Kosko's signature obtained a day later was not checked to make sure it appeared on all of the form's carbon copies. The court copy lacked a witness signature. No signed copy was admitted at hearing. Discipline is appropriate for the various paperwork errors described above relating to Armstrong and Boyd.

The Union noted that the disciplines came fast and furious in 2014 barely giving Grievant an opportunity to correct his behaviors before another discipline was imposed. This argument militated against the charges related to evidence

[5] Although there was consternation and frustration about the place Boyd's urine sample was taken Grievant was not specifically cited for his decision to take the urine test there. The location plays no part in the discipline being reviewed by the umpire.

preservation in the Armstrong matter but bears less weight on the Armstrong and Boyd paperwork issues.

The Union argued Dragovich's timing of service of the notice of the five-day suspension became the predicate for another discipline. This was in the umpire's view merely Grievant's bad luck – to have his supervisor present to witness another alleged rule violation involving evidence preservation.

The umpire reviewed Union Ex. 2 relating to the EIP. The EIP is intended to forestall future discipline and aid the employee. It was noted that the report details continued repeated errors by Grievant in the same types of ways noted in the current matter.

The existence of the EIP and PIPs indicate an effort by the Employer to improve performance not to build the case for harsher discipline. The umpire does not find a hostile animus against Grievant based on this record.

A fundamental precept of just cause is that an employee should be on notice of the consequences of behavior before discipline is received and that an employee should be given an opportunity to correct behaviors before another discipline is imposed for like misconduct.

Here the timing of disciplines leading up to the ten-day suspension is compacted and discipline did issue in quick sequence. It is not the conclusion of the umpire that Grievant is being unfairly targeted-at least for the ten-day suspension matter heard by her. Despite the fact that the incidents were close after a five-day suspension, the facts are undisputed and the discipline is progressive.

Grievant should have had sufficient notice at this point in his career about proper filling out of paperwork. He had notice through evaluations, PIPs, coaching and individualized training and multiple disciplinary actions over the years. The arguments about timing and notice may be better heard in another case.

AWARD

The grievance is denied.

IT IS SO HEREBY ORDERED.

Issued this 9th day of October 2015 in Columbus, Ohio.

S/ *Sandra Mendel Furman*

_____

Sandra Mendel Furman, Arbitrator