

OPINION AND AWARD

In the Matter of Arbitration

Between

Ohio State Troops Association

And

Ohio State Highway Patrol

Case Designation

DPS-2016-01997-15

Date of Hearing: October 28, 2016

Date of Briefs: November 28, 2016

Date of Award: January 06, 2017

APPEARANCES

For the Union

Herschel Sigall, Advocate

Elaine Silveira, Second Chair

For the Employer

S/Lt. Cassandra Brewster, Advocate

Cullen Jackson, Second Chair, OCB

Captain Chuck Linek, OSHP

Heather Frient, ODPS

Witnesses

Heath Strawser, Grievant

Lt. Darrell Harris, OSHP Administrative Investigator

Lt. Jacob Pyles, West Jefferson Post Commander

Lt. Heber M. Fellure, Former West Jefferson Post Commander

Sgt. Henn, West Jefferson Post Second Shift Supervisor

Larry Phillips, OSTA Staff Representative

An arbitration hearing was conducted on October 28, 2016, at the Ohio State Trooper Association Office in Gahanna, Ohio.

At the hearing, the parties submitted the 2012-2015 collective bargaining agreement, the grievance trail and the discipline trail as joint exhibits 1, 2, and 3 respectively. In addition each party submitted into evidence exhibits that were taken into the record.

The parties also submitted a joint issue statement – Was the Grievant terminated for just cause? If not, what shall the remedy be?

Both parties timely submitted post hearing briefs. All materials were reviewed and considered by the Arbitrator in reaching this decision.

Both parties were given full opportunity to examine and cross examine witnesses, pose arguments, and present their respective cases.

RELEVANT CONTRACT PROVISION

The negotiated agreement between Ohio State Troopers Association, Inc. Unit 1 & 15 and The State of Ohio effective July 1, 2012 – June 30, 2015

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 Verbal Reprimands (with appropriate notation in employee's file);
2. One or more Written Reprimand;
3. 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.
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.

BACKGROUND

The incidents giving rise to Sgt. Strawser's termination occurred on a series of 13 documented dates beginning on October 7, 2015 and ending December 25, 2015. On the specified dates, Sgt.

Strawser placed himself in service at the beginning of his shift, but stayed at his residence for varying amounts of time ranging from 1.14 minutes at the least to 40.37 minutes at the most. The total amount of time that Sgt. Strawser was stationary at his residence on these 13 occasions was 2:21:33. Undisputed evidence of Strawser's stationary location on these occasions was gleaned from the Patrol's Automatic Vehicle Locator (AVL) information. An administrative investigation was undertaken in February 2016 and concluded in April 2016. The investigation led to a pre-disciplinary notice to Sgt. Strawser dated May 5, 2016. Sgt. Strawser waived his right to the pre-disciplinary meeting, and was subsequently terminated on May 16, 2016. The charges against Sgt. Strawser were noted as violations of the OSHP's Rules and Regulations 4501:2-6-02(B)(1) Performance of Duty and 4501:2-6-02(Y)(1) Compliance to Orders.

At the time of his termination, Sgt. Heath Strawser was the third-shift Sergeant at the West Jefferson Post. Sgt. Strawser had over 15 years of service with the State Highway Patrol at the time of his termination and his department record contained a prior, unrelated written reprimand issued 3/30/2016. Sgt. Strawser filed a grievance concerning his termination on May 18, 2016 claiming that his termination violated the just cause and progressive discipline provisions of the collective bargaining agreement.

POSITION OF THE EMPLOYER

The circumstances giving rise to the grievance are as follows. The Grievant placed himself in an on-duty status on numerous occasions for various amounts of time up to a maximum of 40 minutes, yet remained at his residence in Westerville, Ohio. The Grievant is assigned to the West Jefferson Post and is required to be at the Post, or at a minimum within his assigned geographic district (i.e., Madison County) at the start of his shift. The Grievant's residence is in Westerville, Ohio, which is in Franklin County, outside of the West Jefferson Post's area of responsibility. Post Commander Lt. Pyles made his expectations clear that supervisors were to be on Post at the start of their respective shifts, or at the very least, if necessary on occasion, to be within the jurisdiction area in order to 'go direct' at the start of their shift. This work directive was clearly expressed at a supervisors' meeting on October 13, 2015. This meeting was attended by the Grievant. The former Post Commander Lt. Fellure, maintained the same work directive regarding reporting to the Post at the beginning of shift. The work expectations regarding placing oneself in an on-duty status (i.e., Signal 2) and 'going direct' had been the same at the West Jefferson Post for some time, and clearly known to the post supervisors, of which the Grievant was one. Placing oneself in an on-duty status and remaining stationary at one's residence, as the Grievant did on 13 documented occasions, is contrary to the known work directive.

As an Assistant Post Commander and supervisor of troopers, the Grievant is responsible for ensuring that those under his command follow the Patrol's rules and regulations. The Grievant's failure to follow the very same rules he is responsible for enforcing is a significant breach of trust. Termination is commensurate with the proven offense and the Employer asks that the grievance be denied in its entirety.

POSITION OF THE UNION

There is no doubt that over a period of six months, from June through December 2015 there were 13 instances (ten of which are clustered in October) when the Grievant was in service, in his vehicle, in uniform, stationary at his residence. The dispute is over the significance of those 13 occasions.

The rules that govern the start of shift for the Patrol are not uniform for all. Some troopers commute to their assigned post, in their assigned cruiser, start their shift at the post and are not paid for their commute. Other troopers have a 'line assignment' and go directly to that assignment in their state vehicle at the start of their shift, and begin to patrol without commuting to the post. Troopers permitted to 'go direct,' as this is called, are paid for their travel time to their assigned location. Sergeants do not have a line assignment; however it is understood that if a Sergeant 'goes direct' the Sergeant will be within the post's area of responsibility at the start of the shift.

The Grievant was assigned to the West Jefferson Post which has an area of responsibility that is Madison County and a western portion of Franklin County. Of significance in this case is the fact that in October (the month when ten of the 13 instances occurred) the Grievant was assigned to a Franklin County task force to crack down on OVI in all of Franklin County. Therefore, during the month of October the Grievant's area of jurisdiction began in Franklin County, not in the western portion of Franklin County or Madison County. On these ten October occasions, for which the Employer has charged the Grievant with wrongly placing himself in-service while at his residence, he was in fact within his assigned jurisdiction because his residence is located in Westerville, which is within Franklin County.

The underlying assumption in this case, was that on the 13 occasions, the Grievant was running late for work and would go out to his cruiser, fire it up along with the equipment in the vehicle, hit the button that placed him in-service, then go back into his house and finish getting ready for work. This version of events was not proved through the investigation; there is no evidence of this being what actually happened on these 13 occasions.

In December, 2015, due to concerns expressed by the Grievant's coworkers that the Grievant was placing himself in-service within minutes of the start of his shift, and while at some distance from the Post's area of jurisdiction, the Post Commander had the AVL records pulled. When the records were reviewed in December 2015 they revealed these 13 occurrences. In response on January 6, 2016, the Post Commander called the Grievant in to his office and told him that he was no longer allowed to 'go direct.' As of January 6 the Grievant was required to be at the Post at the start of his shift and to clock out at the end of shift from the Post. From that time, the Grievant never again went direct. An administrative investigation of the 13 occurrences was started in February 2016. That investigation ultimately led to the Grievant's termination on May 16, 2016.

The Grievant is a 15.5 year member of the Patrol. He was promoted to Sergeant as a result of his excellent performance as a trooper, and his performance evaluations as a supervisor are excellent. The violation for which the Grievant is charged is not a capital offense; it does not warrant termination. The record shows that counseling corrected the problem. The progressive discipline provision of the contract requires the Employer to use a progressive approach when issuing corrective action. The action taken in

this case was not progressive. The Union requests that the termination be overturned and the Grievant restored to his position.

DISCUSSION

To understand the dispute that underlies this case, it is helpful to have a grasp of a couple of the Patrol's terms and standard practices regarding reporting to work. These terms and practices include: Signal 2, going direct, stationary duty, and line assignment.

Placing oneself in service and available for call upon getting into one's state vehicle and heading off for work is standard practice within the Patrol. Placing oneself in service this way is known as going Signal 2.

Whether or not one is compensated for travel time (i.e., the commute to work) depends on whether the officer is reporting to the Post at the start of shift or going directly to a 'line assignment' in the Post's area of responsibility. Reporting to the Post is an uncompensated commute. Whereas going direct to a line assignment allows for paid travel time within the Post's area of responsibility.

A line assignment is a particular, assigned area of patrol within the Post's overall area of responsibility. Sergeants do not have line assignments. Sergeants are expected to report to the Post in order to be available to officers at shift change. On occasion as needed, Sergeants are permitted to go direct rather than report to the Post. Going direct is a practice that is also available at the end of shift to bypass reporting into the Post.

Stationary patrol, as the term itself suggests, is a period of time during the tour of duty when an officer will place himself/herself in a stationary position such as sitting in a crossover shooting laser or at a stop sign looking for violators. An officer properly puts himself/herself into stationary patrol via radio or the mobile computer terminal (MCT).

Case Evidence

There are a good many undisputed elements in this case.

1. There are 13 documented dates beginning with October 7, 2015 and ending with December 25, 2015 when the Grievant placed himself in service and remained stationary in his home driveway for varying amounts of time – as little as 1:14 minutes to as much as 40:37 minutes.
2. Automatic Vehicle Locator (AVL) Reports from the Patrol's GIS database, and the longitude and latitude of the Grievant's residence were used to establish the basic facts of the Grievant's location and the amounts of time the Grievant was stationary at his residence.
3. These AVL records were cross checked with the Patrol's Unit History Reports to determine when the Grievant placed himself in service.
4. Ten of the 13 incidents occurred in October 2015, one occurred in November 2015 and two occurred in December 2015.
5. Of the 13 incidents seven are for periods of time less than five minutes, one incident lasted seven minutes, and five of the incidents are for periods of time greater than 15 minutes.

6. The Grievant was the third shift supervisor of the West Jefferson Post. His shift began at 10:00PM (22:00hrs.).
7. On the 13 occasions referenced in this case, the Grievant placed himself into service (i.e., signal 2) within a few minutes of the start of his shift – anywhere from 0-7 minutes prior to 22:00hrs.
8. The Grievant's location when he placed himself in service on each of these occasions was at his home which is 36 miles from the West Jefferson Post – approximately a 30minute drive.
9. The performance expectation for the Grievant, both under current Post Commander Lt. Pyles and former Post Commander Lt. Fellure, is that he was to be at the Post at the start of his shift (i.e. 22:00hrs). At the West Jefferson Post, Sergeants (including the Grievant) were permitted to occasionally 'go direct' which is to bypass reporting to the Post at the start of the shift and instead go directly into the Post's area of responsibility to begin duties. To properly 'go direct' one must be within the Post's area of responsibility at the start of the shift – in the Grievant's case, at 22:00hrs.
10. At the West Jefferson Post, the Commander's expectation was that no officer would go direct at both the start and end of a shift. It could only be one or the other on any given day.
11. The Grievant was aware of and understood his Post Commander's expectations regarding reporting to work.
12. During the month of October 2015, the Grievant was assigned to a Franklin County OVI tactical squad. Therefore, during October any location within Franklin County would have been within the Grievant's area of responsibility.
13. The Grievant was not using the MCT in his vehicle for messaging during the time he was stationary in his driveway; nor was he using the MCT for Roll Call records while stationary in his driveway, nor was he using the MCT for Read and Sign activities with the possible exception of the two occasions in December when the records indicate that the grievant did access Read and Sign documents, but not the exact time when those activities occurred.

Evaluating the Evidence

An important fact brought up in testimony at the hearing, and apparently not considered in the disciplinary process is that during the month of October 2015, the Grievant was assigned to a Franklin County OVI tactical squad. This being the case, the Grievant was actually, technically within his area of responsibility for each of the ten cited occurrences in October, rather than 36 miles away from his area of responsibility as represented by the Employer. Being assigned to this special detail could account in some way for the Grievant's conduct on these ten occasions. It could make sense of the fact that the Grievant did not have any occurrences of this questionable conduct in the months prior to October, and had only three such occurrences after October.

The problem however, is that the Grievant's assignment to the Franklin County OVI tactical squad in October does not completely exonerate him of wrongdoing on the occasions in question. The testimony of two lieutenants, the Grievant's current Post Commander and his former Post Commander, made it amply clear that remaining stationary in one's home driveway for any amount of time at the start of the work shift is wrong, not accepted practice, and a violation of the Patrol's rule regarding Performance of Duty. Both Lieutenants testified that this was the case despite the fact that the Grievant

could be considered technically in his area of responsibility as a result of having been detailed to the Franklin County OVI tactical squad. Furthermore, the Grievant himself on cross examination, testified that, "He did not have permission from his post commander or any other commander above him in rank to sit in his driveway after putting himself in service."

There was much made of what the Grievant was doing during the minutes that he remained stationary in his driveway after placing himself in service. The records from the Grievant's MCT show that he was not using the MCT to do messaging, nor was he using the MCT to work on roll call records, nor was he using the MCT to work on read and sign records, with the possible exception of December 24 and 25 when the Grievant did access read and sign documents, albeit the time at which he did so is not part of the record. No records were available from the Department's Outlook email to determine if the Grievant had been working on email, nor were there phone records to determine if the Grievant had been making work phone calls. Just as there is no evidence to conclude that the Grievant was working on behalf of the Employer during the time in question, there is no evidence to conclude that the Grievant was engaged in activity for his own benefit during the time in question. There is simply inadequate evidence to make any sure affirmative conclusion as to what the Grievant was doing during the time in question.

The Grievant's testimony at the hearing was that during the times in question, he would have been comparing the computer generated "Bi-Web" report with a separate tracking template used to document the activities of each unit assigned to the OVI tactical squad to ensure accuracy in crediting the output of each assigned unit. There is no evidence to support this testimony and the arbitration hearing is not the first opportunity that the Grievant had to make this important recollection known to the Employer in order to verify it and seek documents to support the claim. Furthermore, why not simply radio Dispatch or use the MCT to place oneself into a stationary mode, in order to perform needed administrative tasks?

Regardless of whether the Grievant was or was not engaged in administrative duties while stationary in his home driveway on these multiple occasions, **the fact remains that he did not have leave to be where he was.** The Patrol's suspicion of neglect is well understood. There is a distinct appearance of impropriety in signaling that one is in service and then remaining at home. Here is a situation where the Grievant can conveniently claim to have been in his area of jurisdiction while at the same time not acknowledge that he was where he should not have been. The Grievant relies on the notion that as a sergeant he did not have a line assignment to report to; thus during the month that he was detailed to the Franklin County OVI tactical squad he could be anywhere in Franklin County at the start of his shift, including his home driveway. The Grievant is simply wrong to rely on this interpretation of the circumstances.

Taking a generous, yet clear view of the circumstances it is safe to say that the Patrol has correctly identified November 26 as a date when the Grievant was in violation of the work expectations set for him. The same is true of the two dates in December. All three are occasions when the Grievant should have been within the area of responsibility for the West Jefferson Post at the start of his shift, yet he was in his home driveway. As for the dates in October, a couple of the smallest alleged violations

become irrelevant because the Grievant could have radioed Signal 2 a minute or two before his shift start time and then actually have left his driveway by 10:00PM – the start of his shift. (*As I said, this is a generous view.*) As for the other October dates, most especially, October 17 (40:37 minutes), October 21 (28:25 minutes), October 23 (7:53 minutes), October 28 (15:08 minutes), and October 30 (16:05 minutes) the Grievant was in his home driveway without permission or explanation for substantial periods of time at the start of his shift and after having radioed Signal 2. Doing what, we do not know – perhaps administrative duties, perhaps not. If it truly was administrative duties that occupied the Grievant, it is hard to believe that there is not a single trace of his activities. Certainly some administrative duties are ephemeral and not reduced to a record. However, it is more common, especially in the public sector, that administrative work leaves a paper trail. Regardless of what the Grievant was or was not doing, he should not have been doing it in his home driveway once his shift started.

Disciplinary Penalty and Progressive Discipline

Having established that the evidence supports the Patrol's finding of just cause for discipline, the remaining question is whether the discipline levied in this case is commensurate with the proven offense and consistent with the contractual obligation to use progressive discipline.

The total amount of time for which the Grievant has been negligent in his duty is approximately 2 hours and 20 minutes. However, the offense is something more than an unaccounted for 2 hours and 20 minutes. The offense incorporates the break in trust that comes with this misconduct. It is not just a matter of whether or not the Grievant was 'going direct' on these occasions it is the impropriety of idling in one's driveway rather than pulling out and getting about the business of the Employer. The nature of this wrongdoing can be understood to undermine the trust upon which a successful employment relationship is based. This is particularly so when the circumstances involve a position of supervisory authority and when the position has significant autonomy as in this case.

Nevertheless, the seriousness of the misconduct does not call for setting aside the principle of progressive discipline. I cannot conclude as the Patrol has that the evidence clearly shows that the Grievant is unfit to continue working for the Patrol. The consequences of what the Grievant did are not so serious that the Employer's ability to function has been impaired. All employers must trust their employees to be honest about their time and attendance, and to be efficient in the performance of their duties. When misconduct surfaces in these areas it is certainly disappointing, but only the most exceptional fact pattern would call for termination as a first (and final) response. Even with giving serious consideration to the uniqueness of the Patrol's mission, the Grievant's supervisory role, and the independence and autonomy vested in the Grievant's position the circumstances of this case do not call for termination. This is a 15 year veteran of the Patrol with a single written reprimand on his record. When it comes to supporting a termination, the longer the employee's tenure and the cleaner the employment record, the higher the bar. There is nothing in this record that leads me to conclude that the Grievant cannot be rehabilitated. There was no evidence of this type of misconduct in the months prior to the spate of incidents that are the basis for the termination and there was no further conduct of this type for the four months after Lt. Pyles spoke to the Grievant up to the time of his termination.

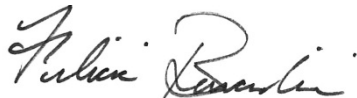
There is also the matter of the October detail to the Franklin County OVI tactical squad which is an important factor not considered by the Patrol in the pre-disciplinary process. Although it does not absolve the misconduct, it does provide a possible explanation for why the conduct surfaced primarily in October.

In this case, the basic misconduct has been established and is not explained away by claims that the Grievant was simply 'going direct' within his area of responsibility. But that said the evidence in the record does not show that termination is commensurate with the proven offense. The Grievant is a 15-year employee of the Patrol with a performance record that earned him promotion just two years ago. As recently as the conclusion of his promotional probationary period the Grievant was meeting all performance expectations. The Patrol certainly has a right and obligation to maintain discipline and efficiency among its workforce, but termination is a harsh consequence not supported by the record in this case. Under the contractual terms of progressive discipline the Grievant is entitled to a lesser penalty that is corrective.

AWARD

For the reasons herein stated the grievance is denied in part and sustained in part. The Grievant is reinstated to the rank of Sergeant. The termination will be converted to a thirty (30) day suspension and the Grievant restored in seniority, benefits and back pay for time-off that extends beyond the 30-day suspension.

Respectfully submitted at Columbus, Ohio, January 06, 2017.

A handwritten signature in cursive script, appearing to read "Felicia Bernardini".

Felicia Bernardini, Arbitrator