

#1563

OPINION AND AWARD

In the matter of Arbitration

Between

The Ohio State Troopers Association, Inc.

And

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

Regarding

Grievance Number OCB# 15-00-020125-0014-04-01
(Trooper Scott E. Beaver)

APPEARANCES:

FOR THE STATE:

SGT. CHARLES J. LINEK
~~Staff Lt Kevin Teeford~~, Advocate
Robert J. Young, Human Resources
Pat Mogan, OCB Representative

FOR THE UNION:

Herschel M. Sigall, General Counsel
Elaine N. Silveira, Attorney
Robert K Stitt, President
Wayne McGlone, Staff Representative
Scott E. Beaver, Grievant

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An arbitration hearing was conducted February 22, 2002 at the Ohio Veterans Home Sandusky, Ohio.

The issue in this case is: ***"Was the grievant removed for Just Cause? If not, what shall the remedy be?"***

The Troopers Association contends that sections 19.01 and 19.05 of the Collective Bargaining Agreement were violated:

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 Reprimand (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 merit, 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.

The statement of the grievance is: "On January 17, 2002 I received notice that the Patrol intended to terminate my employment. On January 21, 2002, I was issued a termination of employment notice as of the end of that business day. The termination of my employment is in violation of Article 19.01 and 19.05 of the work contract. The termination is unjust and is not progressive."

The remedy requested was: "to be reinstated as a Trooper with the Patrol and to receive back pay for all lost time and benefits. To be made whole."

Both parties were given full opportunity to examine witnesses, pose arguments and present their respective cases. Closing briefs were received within the time period agreed to by the parties.

All testimony and materials, including the viewing of Great Bear Lodge Water Park hot tub, and the review of taped interviews of the witnesses, were reviewed and considered by the arbitrator in reaching this decision.

Grievant's personal attorney was permitted to attend the hearing as an observer, by mutual agreement of the parties.

In that this case deals with a matter of discipline, management assumed the burden of proof and presented its case first.

The parties agreed that the case was properly before the Arbitrator for determination.

MANAGEMENT'S POSITION:

This case deals with the off duty conduct of Trooper Scott Beaver on January 1, 2002. He, along with his family and the neighbor's children, traveled to the Great Bear Lodge in Sandusky, Ohio. The Great Bear Lodge is an indoor water park that caters to family entertainment.

Upon arrival the Beavers were unable to get access to their room. Instead the Lodge issued wristbands that would allow entrance to the water park. Mr. Beaver's wife, children, and the neighbor's children went into the rest rooms and changed into their swimsuits. Mr. Beaver went to the bar to watch the Ohio State game.

According to Mr. Beaver's statement, he drank five to six beers and approximately three shots of tequila.

After leaving the bar Mr. Beaver went to the hot tubs where it was pre-arranged that he would meet his family. His family was not present. After looking further for his family, Mr. Beaver shed his clothing and entered the family hot tub wearing only his underwear.

Management's first witness, Tanya Shoukani, testified that Mr. Beaver touched her on the buttocks when she walked by him in the hot tub. She further testified that she was informed by another woman (Michelle) that Mr. Beaver touched her ten year old daughter when she entered the pool. She testified that she checked with her daughter who confirmed that contact.

In total, management produced five witnesses who either testified that they saw the grievant touch someone or was touched by him.

Management charged the grievant with a violation of Rule 4501: 2-06-02 (I)(1), *Conduct unbecoming an officer*.

The local police were called and arrested the grievant.

As a part of management's investigation, the grievant denied that he touched anyone. He also testified that he was not intoxicated. He maintained this position throughout his interview with the Patrol and his statement to the local police.

The Patrol believes a significant nexus exists between the off duty behavior of the grievant and his employment as a Trooper, and asks the arbitrator to uphold the termination.

UNION POSITION:

The Ohio State Trooper's Association mounted an aggressive defense of the grievant. They assert that the grievant did not touch anyone, or if he did, the touch was accidental. The Union discounts the testimony as being inaccurate and note that "cross contamination and refinement" had occurred after the events of January 1.

The union explained that the grievant made a decision to utilize his underwear as swim trunks because they had no front fly and resembled swimming trunks. The union presented a pair of similar underwear to illustrate this point.

The grievant, through his testimony, explained his involvement in family and community affairs. Trooper Beaver is a deacon in his church, involved in Special Olympics, and a youth coach.

He has been an outstanding Trooper. He received the coveted Chiaramonte Humanitarian Award.

The Union noted that if he is found guilty of the pending criminal charges, he will be unable to serve as a Trooper. Thus, it would be an injustice if his termination were supported through arbitration. The union urges that this arbitrator let the criminal trial run its course and all parties live by those results.

Finally, the union argues that the state has failed to prove the charges against him by a preponderance of the evidence.

DISCUSSION:

This is an unfortunate case. The record clearly shows Trooper Beaver worked hard to establish himself as the type of person others look up to. His performance evaluations reflect a Trooper who excelled in his work and his community.

I am sure, given the opportunity to relive January 1, 2002 the grievant would have made different choices.

The job of an arbitrator, in a disciplinary case, is limited to evaluating the evidence and the relevant contract provisions to determine if "just cause" exists to support the actions taken by management.

Several things are clear to this arbitrator.

1. The grievant had a significant amount to drink. The union refers to his state as "chemically adjusted." Management sees him as intoxicated or under the influence. While the legal determination of his alcohol content is not a matter before this arbitrator, it is clear that Mr. Beaver drank enough to significantly influence his behavior. One witness referred to him as looking "glazed." The Police reported he smelled of alcohol. According to her statement, Trooper Beaver's wife, Rhonda, told Police *"...she was very upset with Scott and notices he was intoxicated."*
2. Trooper Beaver's actions were not those of a model Law Enforcement Professional. While the Union argues there was nothing out of the ordinary in Trooper Beaver stripping to his underwear, this arbitrator disagrees. There is no evidence that anyone else in the water park was in his or her underwear. Clearly the fact that numerous people recognized this indiscretion is evidence that this was a man who was not in control.

3. Trooper Beaver adamantly denies any physical contact with anyone. Even the Union suggests that contact could have been accidental and presents a theory that relates to Trooper Beaver's swimming motion in the water with his hands. The grievant simply says he did not touch anyone even though five persons testify otherwise. I do not find his testimony to be credible on this point. Even giving credence to the Union's argument that the power of suggestion and publicity may have influenced the stories, the sheer weight of evidence indicates that contact took place. The consistent denials of the grievant either indicates, he has chosen to be dishonest or, he was influenced enough by the alcohol that he does not remember making contact. I find the testimony of the lifeguards to be totally credible. They had no axe to grind, no agenda to pursue. They merely stated what they saw.

Based upon the testimony heard and the evidence considered I find that there was inappropriate contact with more

than one individual. The conduct involved was clearly "conduct unbecoming an officer."

The remaining question is whether the infraction is of sufficient gravity to merit termination, especially in light of the Troopers previously positive work record.

This arbitrator is persuaded that the Patrol was justified in its action to terminate the grievant. Clearly the publicity surrounding this incident negatively reflected upon the Ohio State Highway Patrol.

Two statements from the hearing are further evidence of the need for the Patrol to take significant action.

Tonya Shkoukani testified that she was upset, in part, because she had always told her daughter to "trust police officers." She went on to say: "Now I have to tell her that this person, who she should trust, did this to her."

The Patrol, like all police organizations, must be concerned about the skepticism members of the public show toward their organizations.

Brenda Phillips testified that: "my first thought was that he would probably get off."

Arbitrators have long recognized that law enforcement officers are held to a higher standard than other employees. This concept is embodied in the Code of Ethics that governs Troopers.

That Code states: *They shall so conduct their private and public life that the public will regard them as examples of stability, fidelity and morality."*

~~The bad decisions and unfortunate actions~~ of Scott Beaver on January 1, 2002 clearly violated this Code of Ethics.

The Ohio State Highway Patrol believed this infraction was of significant seriousness to demand his removal from the employment of the Patrol.

This arbitrator finds no violation of the Collective Bargaining Agreement or arbitrary or capricious action on behalf of the employer.

Arbitrator James Duff, in a Hamilton County Sheriff's Department case, reflects on the responsibility of the arbitrator in such cases:

"The undersigned has no justification for interfering with the Sheriff's department's legitimate exercise of discretion reserved to it in making the decision to remove the Grievant from its employ."¹

Therefore, just cause does exist to support the termination.

DECISION AND AWARD :

The grievance is denied

It is so ordered at London, Ohio this 18th. day of April, 2002.

N. Eugene Brundige
N. Eugene Brundige, Arbitrator

¹ In re HAMILTON COUNTY [Ohio] SHERIFFS DEPARTMENT and TRUCK DRIVERS, CHAUFFEURS & HELPERS, LOCAL 100, James Duff, January 9, 1992, 99 LA 6.