

# 1635

**In the matter of Arbitration between:**

**State of Ohio, Department of Public Safety  
Employer**

**And**

**Case # 15-00-020806-0119-04-01  
Marlin E. Folden, Grievant**

**Ohio State Troopers Association  
Union**

**In attendance:** For the highway Patrol--- Sgt. Charles J. Linek; Lt. Reggie Lumkins-Advocate; Lt. Carl Roark (witness); Ms. Shirley Turrell, OCB

For OSTA--- Trooper Marlin E. Folden (witness); Mr. Dennis Gorski, President; Mr. Wayne McClone, Staff Representative; Mr. Hershel M. Sigal, General Council-Advocate; Ms. Elaine Silveire, Attorney

**INTRODUCTION:**

This matter was heard in Columbus, Ohio at the Office of Collective Bargaining on January 22, 2003. The hearing began at 9:00am and all witnesses were sworn. No procedural issues were raised and the parties agreed that the issue was arbitrable. The following exhibits were presented: Jt. 1-OSTA Unit one Contract; Jt. 2-Grievance trail; Jt. 3-Discipline package, composed of- Statement of Charges, Pre-discipline Notice, Suspension Letter, highway Patrol Rules & Regulations: 4501: 2-6-02(B)(1), Performance of Duty, Department Record; Mgm't. 1-Administrative Investigation # 20021908; Mgm't. 2-Response to Resistance Review Guide & Post Level Training-re: Response to Resistance Review.

**ISSUE:**

A jointly signed statement was submitted and stipulated to as follows:

“Did the Grievant receive a three-day suspension for just cause? If not, what shall the remedy be?”

## **FACTS:**

Trooper Folden has been employed as a trooper by the Highway Patrol since December 10, 1999. He is now assigned to the Jackson Post. At the time of the traffic stop (6/9/02) he was working out of the Ironton Post. On June 9, 2002 at approximately 1:00am Tpr. Folden, while working the 11:00pm to 7:00am shift, pulled over a vehicle for a number of violations, including left of center. All three of the occupants were minors. As a result of on the scene testing the driver was charged with DUI and one passenger with under age consumption. The under age intoxicated passenger became unruly. A scuffle occurred with the under age drinker resulting in him being "cuffed". The grievant transported all the occupants to the Ironton Police Department. A Response to Resistance Review was conducted and the grievant was found to have used proper force. The Post Commander in reviewing the video- tape regarding the R and R detected other alleged violations and instituted an Administrative Investigation. The AI resulted in Tpr. Folden being charged with violating Highway Patrol rules & Regulations; 4501: 2-6-02(B)(1)-Performance of Duty, to wit: It is charged that you made unprofessional comments during an arrest. The grievant was suspended for three days effective August 15, 2002. Trooper Folden filed a grievance on August 3, 2002 challenging the pending discipline. He alleged that the employer violated Article #'s 19.01 & 19.05, DISCIPLINARY PROCEDURE.

## **OPINION:**

Testimony, audio and video tapes, show that Tpr. Folden stopped three minors at approximately 1:00am. Two of the three tested above the legal limit and were so charged. Parents were called to the scene because none of the occupants could legally drive the vehicle. During the somewhat extended wait for a parent to arrive (approx. 35 min.) all went relatively smoothly. After the driver's parent arrived the grievant was relocating the intoxicated passenger to the patrol car when most of the employer charged violations allegedly occurred.

During the transfer of the fifteen- year old passenger, who tested .103, he became belligerent and mouthy. The young passenger used vulgar language as well as physical resistance. Trooper Folden had to use force to subdue and hand cuff the young man. The use of force by the Trooper was found to be appropriate by investigating personnel.

There is no dispute between the parties as to what was said by the grievant. All the comments were recorded on the tape. The question is, do the comments made by the grievant rise to the level of unprofessional conduct, as charged? And if so, was the level of discipline administered for just cause?

With the exception of the grievant's references to Sheriff Ratcliff to the vehicle driver, all the other charged allegations occurred with the intoxicated passenger. In the arbitrator's opinion, there is no doubt that the passenger was uncooperative and that the Trooper's comments were responsive to the circumstances as they were occurring. "You make me mad! & we're going to fight" occurred during the detainee's resistance. "Do you want to go to JDC?" occurred also during resistance and with no parental response that was where he was going. "Shut your mouth", occurred more than once and in reaction to the detainee's drunkenness and vulgar language. Could the grievant have done differently, maybe not the best choice of comments but certainly responsive to the situation.

The Sheriff Ratcliff comments, the other component of the AI charged misconduct, were uttered in casual conversation with the driver. Most of the comments may have been accurate, but certainly unnecessary. However, in the arbitrator's opinion, the comments were not disparaging enough to merit a suspension. The Post Commander could have handled the Ratcliff matter along with some other observations, in the training component of Tpr. Folden.

The grievant did not use vulgarity or unresponsive intimidation in this situation. The substantive action on the stop (Response to Resistance) was in compliance. Therefore, in the arbitrator's opinion, the occurrences during this particular traffic stop and arrest do not merit escalating the disciplinary process with this trooper. Since there was no evidence submitted that the two abeyance days from the 2001 incident were part of this discipline, the arbitrator must assume the abeyance agreement has expired. The grievant, being a young trooper, to escalate the disciplinary process to the brink of removal may cause him to retrench too much in enforcing the law. He could have been more professional in his behavior, but considering his youth and short time in the service a three-day suspension is excessive.

**AWARD:**

In accordance with Article 20.12(F), I am reducing the three- day suspension to a one day suspension. The employer is directed to make the grievant whole regarding the two- day's lost wages and benefits.

This concludes the arbitration decision.

Issued this 29<sup>th</sup> day of January 2003.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "E. William Lewis". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

E. William Lewis  
Arbitrator