

ARBITRATION DECISION

December 7, 2003

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In the Matter of:

Ohio Department of Public Safety,)	
Division of State Highway Patrol)	Case No. 15-00-030724-0106-04-01
)	Benjamin Huff, Grievant
and)	Case No. 15-00-030724-0105-07-15
)	Donald Ryan, Grievant
Ohio State Troopers Association)	

APPEARANCES

For the State:

Captain Robert J. Young, Advocate
Amy Tait, Second Chair, Office of Collective Bargaining
Renee Byers, Ohio Highway Patrol
Beth Lewis, Labor Counsel, Office of Collective Bargaining
Lieutenant Kelly P. Hale, Witness
Sergeant Rodney Tyler, Witness
Michelle Wilson, Witness
Randall Wilson, Witness
Richard W. Hinig, Witness
Lieutenant Colonel Michael W. Finamore, Witness

For the Union:

Herschel M. Sigall, Advocate
Elaine N. Silveira, Second Chair
Dennis Gorski, President
Bob Cooper, Staff Representative
Wayne McGlone, Staff Representative
Sergeant Donald Ryan, Grievant
Trooper Benjamin Huff, Grievant
Lieutenant Eric Escola, Witness
Trooper Andrew Slezak, Witness
Sergeant Rick Campbell, Tuscarawas County Sheriff's Department, Witness

Arbitrator:

Nels E. Nelson

BACKGROUND

The events giving rise to the instant case began on December 13, 2002. On that date Randall Wilson went to a Christmas party in New Philadelphia in connection with his employment. He left the party sometime after 1:00 a.m. on December 14, 2002. While headed south on State Route 416, he lost control of his pick-up truck, struck a number of mailboxes, and ran into a tree in the front yard of a home.

Randall Wilson walked a short distance to a Stone Container Corporation plant. At the plant he called his wife, Michelle Wilson, who picked him up and took him home. John Hill, an employee at the plant, told investigators that Randall Wilson could “barely speak or stand and smelled like alcohol.” Michelle Wilson testified, however, that her husband was cogent and that she did not smell alcohol.

A newspaper delivery person reported the accident to the Tuscarawas Sheriff’s Department and it notified the Ohio Highway Patrol post in New Philadelphia. Trooper Benjamin Huff, one of the grievants, was advised of the accident at 5:38 a.m. He arrived at the scene of the accident shortly after Trooper Victor Wolfe. They searched the area but found no trace of the driver. Huff and Wolfe reported a strong smell of alcohol in the cab of the truck.

In the meantime, Deborah Betts, the dispatcher at the patrol post, called the Wilson residence. She asked Michelle Wilson to have her husband return to the scene of the accident. When she told Betts that he would not do so, Betts said that a trooper would come to their house to talk to him. Michelle Wilson responded by calling Richard Hinig, an attorney in New Philadelphia. He told her that she did not have to let a trooper into her home and that her husband did not have to talk to a trooper.

While Huff stayed at the accident scene to continue the investigation, Wolfe proceeded to the Wilson residence. When he arrived, he told Michelle Wilson that he needed to talk to her husband but she refused to allow him into their house. She told him that she had called a lawyer and that he had informed her that she did not have to permit him to talk to her husband. When Wolfe asked Michelle Wilson whether her husband had been drinking, she acknowledged that he had.

Wolfe then contacted Betts. He told her that Huff could go forward with his DUI charge against Randall Wilson because Michelle Wilson had admitted that her husband had been drinking. Huff asked Betts to find out if Wolfe had personally observed Randall Wilson. In response to this inquiry, Wolfe told Betts to contact the sheriff's department because he believed that a deputy sheriff would have the authority to enter the Wilson residence. Betts contacted the sheriff's department and told Wolfe that a deputy was on his way to the Wilson residence.

Trooper Andrew Slezak, a twelve-year veteran who was in his cruiser on his way to the post to start his 7:00 a.m. shift, heard the radio communications between Betts and Huff.¹ He called Betts on his cell telephone to ask her to tell Wolfe that he could give Randall Wilson a ticket but he could not remove him from his house. Slezak also suggested that she give Sergeant Donald Ryan, who was the supervisor of the day shift, a "heads up."

Betts contacted Ryan who was in his cruiser on his way to the post. She told him about the accident and that Randall Wilson refused to talk to Wolfe. Ryan responded that there was nothing that could be done. When Wolfe inquired about entering the house to check on Randall Wilson's welfare, Ryan told him that he could not enter the house

¹ Huff had only two years of experience and Wolfe had less than two years of service.

Huff: 819, thank you.

Slezak: Wonder if he charges mileage for this.

Ryan: Hope he remembers what the speed limit is this morning.
G'head.

Slezak: Exactly my point.

Huff: In between the three of us, we oughta run into him.
(Employer Exhibit 22, page 1)

As the troopers were returning to the patrol post, Huff, who was heading northbound on State Route 416, encountered a vehicle proceeding southbound at 62 miles per hour where the posted speed limit was 55 miles per hour. When he confirmed on the CB radio that Wolfe had clocked the vehicle at 62 miles per hour, he stopped the vehicle and found that Hinig was the driver. Huff told Hinig that because he had previously stopped him for speeding and had warned him that if he found him speeding again he would cite him, he issued a ticket for going 61 miles per hour where the limit was 55 miles per hour.

During the stop Hinig told Huff that he was on his way to the Wilson residence. He indicated to Huff that he was going there because some troopers were trying to gain entrance. Huff responded that he would check to see if his story was true. He then gave Hinig the citation for speeding and returned to the post.

On Monday, December 16, 2002, Huff called the Wilson residence. He told Michelle Wilson's daughter that her mother had to come to the post to pick up some papers. The next day Michelle Wilson and Hinig went to the post where Michelle Wilson received a summons from the dispatcher that had been issued by Huff for obstructing official business in violation of Section 2921.31(a) of the Ohio Revised Code.

On December 18, 2002, Hinig requested the tapes of radio traffic on December 14, 2002. The tapes were not provided in a timely manner and as a result the charges against Randall and Michelle Wilson and Hinig were dismissed.

Hinig, however, did eventually receive copies of the tapes of the radio communications. After listening to them he wrote a letter to Colonel Paul D. McClellan, the superintendent of the highway patrol, complaining that Huff, Ryan, and Wolfe had conspired to stop him for speeding when they knew that he was on his way to a client's house where they were trying to gain entry without his client's consent. Hinig charged that their actions violated his constitutional rights and requested compensation for their actions.

The patrol responded by launching administrative and criminal investigations. Sergeant Rodney Tyler was assigned to conduct the administrative investigation. He started his investigation by reviewing the radio tapes and other material related to the case. On March 3, 2003, Tyler interviewed Hinig. The next day he met with several highway patrol officials and a decision was made to place the administrative investigation on hold.

The same day Lieutenant Kelly Hale was assigned to conduct a criminal investigation. He interviewed the individuals involved in the events and examined many records. On April 23, 2003, he presented his report to Amanda Bornhorst, the Prosecuting Attorney for Tuscarawas County. A week later Bornhorst informed Hale that she found that neither Huff, Ryan, nor Wolfe violated any criminal statutes in their activities on December 14, 2002.

The administrative investigation was resumed on May 5, 2003. On June 2, 2003, Tyler presented his report to Major F.G. Goldstein. Tyler stated that the charges that

Huff, Ryan, and Wolfe conspired to stop Hinig for speeding; that Huff did not need to check the relevance of Hinig's story about going to the Wilson residence; and that Huff failed to record Hinig's entire stop to be founded.

On July 17, 2003, Huff and Ryan were advised of the charges against them and the proposed disciplinary action. The patrol charged:

Trooper Huff conspired to stop an attorney that was traveling to a client's residence and failed to properly record the contact. It is also charged that Trooper Huff filed DUI and obstructing official business charges without proper cause.

Huff was advised that the patrol intended to terminate him.

Ryan also faced termination. The patrol stated:

Sergeant Ryan failed to provide proper supervision to subordinates at a private residence. It is also charged that Sergeant Ryan engaged in unprofessional radio traffic with his subordinates.

Both were advised on July 22, 2003, that they were discharged as of that date.

On July 24, 2003, Huff and Ryan filed grievances. Both claimed that there was not just cause for termination and that the patrol failed to use progressive discipline.

They requested to be reinstated to their respective ranks and to be made whole.

When the grievances were not resolved, they were appealed to arbitration. The arbitration hearing was held on September 23 and 29, 2003. Post-hearing briefs were received on October 25, 2003.

RELEVANT CONTRACT PROVISIONS

Article 19, Sections 19.01 and 19.05

ISSUE

The parties agreed that the issue in each of the grievances is:

Was the grievant terminated for just cause? If not, what shall the remedy be?

PATROL POSITION

The patrol argues that the instant case is extremely important. It points out that its mission is “to save lives, investigate crime and enforce the law with compassion and unbiased professionalism.” The patrol notes that troopers are given a great deal of power to accomplish this mission but that they are subject to numerous checks and balances including the U.S. and Ohio constitutions. It charges that the grievants “became so caught up in issuing a misdemeanor citation that morning that they ignored basic constitutional protections held by Michelle and Randy Wilson...[and] exposed themselves to any number of charges and claims by conspiring to stop Richard Hinig.” (Patrol Brief, page 2)

The patrol contends that Huff did not properly cite Randall Wilson for driving under the influence. It states that even assuming that the crash occurred at 5:38 a.m., Randall Wilson was away from the scene for more than an hour so there was no way to know if he was impaired while he was behind the wheel. The patrol indicates that this becomes even more problematic given that the crash took place at least a couple of hours earlier.

The patrol charges that Huff failed to update the crash report. It observes that a month after the accident Hill confirmed that it had occurred at the time claimed by Michelle Wilson. The patrol indicates that its policies required Huff to supplement the crash report and the obstruction charge against Michelle Wilson.

The patrol maintains that there is no evidence to support Huff’s charge that Randall Wilson was not wearing his seat belt. It acknowledges that there are times when

a trooper can look at a vehicle and tell whether the driver was wearing a seat belt. The patrol notes that neither the crash report, the administrative investigation, the criminal investigation, nor the DUI paperwork mentions a defect with the seat belt or that it was cut out or locked in place. It states that Huff did not make this claim until the arbitration hearing.

The patrol argues that Huff had a limited opportunity to observe Randall Wilson's condition. It points out that his testimony and his paperwork indicate that he had no chance to talk to him. The patrol notes that Huff acknowledges that he only heard Randall Wilson say "yes" in response to a question from Campbell. It stresses that he claims that in a matter of seconds he was able to observe numerous signs of intoxication.

The patrol charges that the HP-70B, the Impaired Driver Report, does not provide an accurate account of the events of December 14, 2002. It observes that the report fails to mention the time of the accident and that it indicates that Huff knocked on the door at the Wilson's residence even though he later claimed that Campbell did. The patrol adds that although Huff testified that he heard only "brief portions" of the telephone conversation between Betts and Michelle Wilson, half of his statement is based on it.

The patrol contends that the HP-70B is very important. It states that the form allows the arresting officer to communicate directly with the judge. The patrol emphasizes that the officer is telling the judge how he or she came to file the charges in the case.

The patrol asserts that Huff planned to remove Randall Wilson from his residence. It points out that when Betts advised him that Randall Wilson would not return to the crash site, he told her that he would "come get him now." The patrol claims that Betts and Wolfe "furthered this by talk of dragging Randall Wilson from his house."

(Patrol Brief, page 6) It notes that Betts requested help from the sheriff's department with "dragging some drunk guy out of his house that refuses to report crashes." (Ibid.)

The patrol charges that Huff made premature determinations about Randall Wilson's background and socio-economic status. It asserts that this is reflected in "his comment about Michelle Wilson being both the wife and daughter of Randy." (Patrol Brief, page 6) The patrol observes that when Huff was challenged regarding the comment, he would only say that he did not recall what he meant.

The patrol argues that there was absolutely no reason for Huff to charge Michelle Wilson with obstructing official business. It indicates that the reason he gave for filing the charge was that Wolfe told him to do it. The patrol observes that despite this claim Huff never got a written statement from Wolfe. It further notes that while he relied on the conversation between Betts and Michelle Wilson, he did not get a statement from Betts.

The patrol contends that although the complaint states that the obstruction occurred at 5:38 a.m. at milepost #9 on SR 416, Michelle Wilson was never there. It points out that at 5:38 a.m. Michelle Wilson had been home with her husband for more than two hours. The patrol indicates that Huff may have believed that if he used 5:38 a.m. as the time of the crash, it would bolster his DUI charge against Randall Wilson.

The patrol insists that Michelle Wilson was not involved in obstructing official business. It observes that in the administrative investigation Huff said that she engaged in the conduct by "1) advising her husband swerved to miss a deer, 2) not letting anyone talk to him, 3) taking him from the crash scene, and 4) not bringing him back to the crash scene." (Patrol Brief, page 7) The patrol claims that it is "truly implausible" that any of these actions could be considered obstructing.

The patrol maintains that Michelle Wilson acted pursuant to her rights. It points out that under Section 4549.03 of the Ohio Revised Code, her husband had 24 hours to report the crash so that she could not be charged with obstructing until that time period expired. The patrol states that it is “interesting” that while Huff felt that she was obstructing, he failed to file a companion charge of hit-skip against Randall Wilson.

The patrol contends that Huff never consulted with a prosecutor before filing the charge against Michelle Wilson. It reports that in the criminal investigation he told Hale that he did not “run the charge by” a prosecutor but that during the administrative investigation he stated that he discussed the charge with prosecutor Hank Meyer after it was issued. The patrol notes that Meyer was at the first day of the arbitration hearing but was never called to testify. It claims that this suggests that he did not recall the events the same way as Huff.

The patrol charges that the subsequent process used by Huff to file the charge against Michelle Wilson clouds the situation even more. It points out that he called her at 11:00 p.m. two nights after the accident and told her daughter that her mother had to pick up “paperwork” at the patrol post. The patrol claims that Huff’s effort to avoid contact with Michelle Wilson “paints the impression that he was uncomfortable or ashamed of filing this charge.” (Patrol Brief, pages 8-9)

The patrol argues that when Randall Wilson refused to talk to Wolfe, Huff should have told him to leave the Wilson residence. It claims that he knew that Michelle Wilson had contacted an attorney who had advised her that she did not have to talk to the troopers. The patrol notes that Wolfe told Betts that “we’ll probably have to drag him out.” (Patrol Brief, page 9) It states that there was no clear reason to continue to try to

contact Randall Wilson so that Huff, as the senior trooper, should have told Wolfe to clear the scene.

The patrol maintains that when Ryan advised Huff and Wolfe that they could not remove Randall Wilson from his home, they did not readily accept his advice. It claims that they were determined to get their hands on Randall Wilson so that they could arrest him for driving under the influence. The patrol states that as a result of their insistence Ryan did not want to slow down to look at his map to see where the Wilson residence was located but instead relied on Slezak's directions on the radio.

The patrol charges that when Ryan arrived on the scene, he failed to take command of the situation. It observes that Ryan knew very little about the events that had occurred and that without knowing the facts it was "impossible for him to offer any valid direction to these young troopers." (Patrol Brief, page 11) The patrol maintains that a briefing off the Wilson property was needed but instead he began a briefing in the driveway of the Wilson's home. It rejects Ryan's claim that there was not enough time to plan a course of action.

The patrol characterizes the role played by Campbell as "troubling." It asserts that there was no reason to call him because he had no more authority to enter the Wilson residence than the troopers. The patrol indicates that he knocked on the residence door even though he knew that Michelle Wilson was following her attorney's advice in denying the troopers permission to enter. It observes that Campbell testified that Randall Wilson had to provide his driver's license information to the trooper but could not cite any section of the ORC to back up his position.

The patrol contends that there is some dispute about who knocked on the door of the Wilson residence before Randall Wilson opened the door. It points out that in

documents written shortly after December 14, 2002, both Huff and Campbell claim to have done it. The patrol notes, however, that the statements of the other officers say that Campbell knocked on the door.

The patrol argues that what is even more confusing is where the officers were when the door opened. It reports that while it is clear that Campbell was at the door, it is important to know where the others were standing because of the “gesture” which they claim was a nonverbal invitation to enter. The patrol notes, however, that the statements of Campbell and Huff do not mention a gesture but claim that Randall Wilson responded verbally when he was asked if they could enter. It further observes that the statements and testimony of Campbell and Huff regarding what, if anything, Randall Wilson said are contradictory.

The patrol maintains that Randall Wilson’s testimony differs from the officers in several respects. It acknowledges that he admits to “cracking the door open” but claims that the “real opening of the door was done by two officers on the outside of his house applying pressure to the door.” (Patrol Brief, page 12) The patrol adds that Randall Wilson testified that he did not hear the officers ask permission to come in and that he did not invite them to enter. It asserts that in his statement “it appears the officers basically forced their way into his home.” (Ibid.)

The patrol questions the claim that Randall Wilson was highly intoxicated. It states that it is clear that the officers were in contact with Randall Wilson for only a few seconds. The patrol reports that Ryan testified that it was ten to fifteen seconds; Randall Wilson stated it was less than ten seconds; and Michelle Wilson claimed it was only as long as it took her to go from the kitchen to the living room.

The patrol argues that there is another problem with the claim that the grievant was drunk. It acknowledges that Campbell testified that Randall Wilson was leaning back and forth and Huff and Ryan indicated that his eyes were bloodshot and glossy and that he looked like a deer in headlights. The patrol stresses, however, that if this were the case, he would not have had the capacity to consent to the officers entering his home.

The patrol rejects the union's contention that there was a "sense of urgency" in wrapping up the crash report. It claims that "the union is hitting from both sides of the plate" by claiming that everything had to be done right then and there because it later argued that Huff routinely worked before and after his scheduled shift. The patrol adds that Ryan did not approve the crash report until three days later.

The patrol charges that the troopers engaged in a conspiracy to stop Hinig. It observes that they knew when and where he was going and that he could be identified because at 7:00 a.m. on Saturday there was very little traffic and Hinig was driving a very distinctive car. The patrol claims that it is highly unlikely that an aggressive trooper like Huff would not have been able to identify him.

The patrol questions whether Hinig was speeding. It points out that the tape of his stop reveals that Huff did not operate his camera in accord with its policy and failed to perform a calibration check on his radar. The patrol wonders whether "it was coincidental that Huff picks this time, date, and place to issue the only speeding ticket he wrote in all of 2002 for six or seven miles over the speed limit." (State Patrol, page 15)

The patrol acknowledges that it will never know what the troopers discussed on the CB radio but it indicates that no conversation should have taken place. It reports that the troopers admit to talking on the emergency channel about Randall Wilson urinating in

his shorts and calling off traffic violations. The patrol insists that its policy relating to the use of the CB radio is important and should be followed.

The patrol contends that it is difficult to defend the way Hinig was treated. It points out that he called the post to let the patrol know he was on his way to the Wilson residence where he was hoping to calm the situation. The patrol notes that Betts knew that the officers were in the house but she failed to tell Hinig even though it would have been common courtesy to do so.

The patrol maintains that there was no excuse or operational reason for Huff's treatment of Hinig. It reports that after Hinig was stopped, he took the time to explain where he was going and why. The patrol complains that instead of telling Hinig that the officers had left the Wilson residence and that there was no longer an emergency situation, he denied any knowledge of the events.

The patrol asserts that Huff would have gone to any length to avoid a conversation or direct action with Hinig. It points out that when he gave the citation to Hinig, he used the earlier warning he gave him as the reason for the ticket. The patrol adds that Huff avoided any truthful discussion regarding the events at the Wilson residence and had a dispatcher serve the obstruction charge on Michelle Wilson. It charges that his actions violated its core values of honesty and professionalism.

The patrol asserts that it does not look to terminate employees. It states that it continually looks for ways to increase its personnel ceiling so it can put more troopers on the road. The patrol indicates that it goes to great lengths to hire the best people possible.

The patrol maintains that it does not shy away from taking disciplinary action when it discovers violations of its rules and regulations. It recognizes that troopers are

generally on the road where they are out of direct contact with their supervisors. The patrol emphasizes that it is important that it hold them accountable for their actions.

The patrol rejects the union's contention that the actions of Huff and Ryan on December 14, 2002, were not rule violations. It disputes the union's claim that if the Arbitrator were to determine that the grievants' termination was appropriate, it would impact the decision-making process of all troopers. The patrol also challenges the assertion that "a finding in its favor would strike a blow to basic rights of public employees under O.R.C. 4117." (Patrol Brief, page 18)

The patrol acknowledges that termination is a severe penalty. It states, however, that it does hold strongly to its beliefs and standards and takes appropriate disciplinary action when necessary. The patrol asks the Arbitrator to deny both grievances.

UNION POSITION

The union argues that the patrol failed to demonstrate that there was just cause to terminate the grievants. It claims that in over 25 years of labor representation it has never "reviewed charges so without merit as those levied against [the grievants]." (Union Brief, page 2). The union asserts that if the evidence in this case is deemed sufficient to support the patrol's action, the terms of the contract calling for just cause and progressive discipline would be a nullity.

The union contends that the burden of proof is on the patrol. It indicates that the patrol must prove by a preponderance of the evidence that its factual allegations are true and constitute just cause for its actions. The union states that in meeting the second requirement it must demonstrate just cause for the degree of discipline administered.

The union indicates that the patrol must prove the charges against the grievants. It points out that Ryan is accused of failing to properly supervise subordinates at the Wilson residence and engaging in unprofessional radio traffic. The union notes that Huff is accused of conspiring to stop Hinig, failing to properly record the stop, and filing DUI and obstruction charges without probable cause.

Sergeant Donald Ryan- The union maintains that Ryan is one of the patrol's "very best." It reports that his post commander's most recent evaluation stated:

Donnie (is) an outstanding supervisor and person who demonstrates all Core Values. He is a valuable player in the post management team. Donnie is a strong supervisor who is counted on by his Post Commander to complete tasks and achieve divisional goals. He is an example for the other supervisors to follow. Is a motivator and takes charge of his shift. A valued asset to the post and the Division. (Union Brief, page 6)

The union contends that it is important to recognize that Randall Wilson was charged with a violation of Section 4511.19(1)(A) of the O.R.C. It points out that a conviction under this provision does not require a test to establish driving under the influence. The union notes that it simply bars a person from operating a vehicle under the influence of alcohol or drugs of abuse.

The union claims that the troopers had every right to go to the Wilson residence. It acknowledges that since they did not observe Randall Wilson's offense, they did not have the right to remove him from his residence or arrest him. The union indicates, however, that if the troopers were able to establish the elements of Section 4511.19(1)(A) of the O.R.C., they had the right and ability to serve him with a notice of the offense.

The union argues that Wolfe wanted to see Randall Wilson for the same reason his wife did not want him to see her husband. It claims that she knew that his condition was no better than it was at the Stone Container plant where an employee reported that he was highly intoxicated. The union indicates that Wolfe wanted to observe Randall

Wilson's condition because he had smelled alcohol in the cab of his truck at the accident scene. It observes that such evidence would support a DUI charge.

The union asserts that Wolfe felt that the elements for a DUI charge had been met. It states that when he asked Michelle Wilson whether her husband had been drinking, she acknowledged that he had been. The union reports that Wolfe told Betts that it would be all right for Huff to go forward with the DUI charge.

The union reports that after Huff asked Wolfe whether he had personally observed Randall Wilson, Wolfe asked Betts to have a deputy sheriff sent to the Wilson residence. It observes that Wolfe erroneously believed that a deputy had more authority to enter the residence than he or Huff. The union reports that Betts contacted the sheriff's office and Campbell was sent to the residence.

The union indicates that Ryan's first involvement with the events of December 14, 2002, was at 6:42 a.m. It points out that at that time he radioed to advise that he was on his way to the post. The union reports that when he was told about the situation at the Wilson residence, he told Wolfe that he could not enter the residence. It notes that after Wolfe inquired about the deputy sheriff entering the home, Ryan stated:

Okay, let me repeat for a third time. He cannot be removed from the house without a piece of paper. Especially, if there's somebody in there that's not begging and screaming that he's injured severely bad. (Employer Exhibit 24, page 19)

The union describes Ryan's performance as "terrific by any standard" and labels him as "the quintessential sergeant." It observes that he was just coming on duty and had limited facts. The union suggests that although he could have proceeded to the post, he elected to go to the Wilsons' residence.

The union states that shortly after Ryan arrived at the Wilson residence, he saw Campbell knock on the door. It indicates that he heard Campbell say something to

Randall Wilson about the troopers needing his license and Randall Wilson admitted him into the house. The union claims that Ryan prodded Huff to “get up there” and observe Randall Wilson’s physical condition and demeanor. It emphasizes that once they were inside, it was “overwhelmingly evident that Randall Wilson was highly intoxicated.”

(Union Brief, page 26)

The union asserts that there can be no question that Ryan was doing his job in an outstanding fashion. It states:

With no preparation, he had (1) informed Trooper Wolfe of what he could and could not do vis-à-vis the Wilsons. He was right on the money as to the law. (2) He intelligently elected to proceed to the site where Wolfe was having his difficulty to give on the scene instruction and to see to it that his rookie in all his desire to make a case against an obvious drunk drive, played by the rules. (3) He took full advantage of the opening provided by Randall Wilson answering the door and inviting/permitting the entrance of Deputy Sergeant Campbell, to move Trooper Huff into a position where he might be able to satisfy the remaining elements of a (A)(1) DUI and thereby foil the attempt by Michelle Wilson to have her husband escape the consequences of his drinking and driving in violation of law. (Union Brief, pages 26-27)

The union argues that it was of no consequence to Ryan when he learned that Hinig was on his way to the Wilson residence. It claims that Randall Wilson provided the remaining element of a Section 4501.19(1)(A) charge when he opened the door and displayed himself as obviously drunk. The union acknowledges, however, that Ryan might have been pleased when Hinig arrived and found no law enforcement personnel and learned that Randall Wilson had been charged with driving under the influence.

The union maintains that there is inherent friction between cops and defense lawyers. It states that cops are given the job of protecting the public while defense lawyers help violators escape the consequences of their actions. The union stresses that in the case of DUIs, troopers recognize that “drunk drivers kill, maim, and injure innocent people.” (Union Brief, page 28)

The union reports that at approximately 6:55 a.m. Betts radioed Ryan that Hinig was on his way to the Wilson residence. It points out that Ryan simply acknowledged the call but Slezak commented about setting up a tac squad to intercept Hinig. The union, however, insists that “there is nothing wrong with Tac Squads” and that “these guys weren’t serious.” (Union Brief, page 33)

The union observes that by 7:05 a.m. Ryan radioed the post to indicate that he and all the officers were leaving the Wilson residence. It suggests that he had to ask Betts the name of the attorney coming to the scene and Slezak responded, “it’s your buddy Hinig.” The union acknowledges that Ryan then said, “Hope he remembers what the speed limit is this morning” and that Huff stated, “between the three of us, we ought to run into him.” It claims, however, “there is absolutely nothing inappropriate about either Sergeant Ryan’s statements or for that matter about Trooper Huff’s statements.” (Union Brief, page 34)

The union argues that Ryan’s conduct does not merit discipline of any degree. It reports that he shared the events of December 14, 2002, with his post commander who found nothing wrong. The union observes that two months later Hinig wrote a letter of complaint to patrol general headquarters and the criminal investigation was launched the day after Tyler met with Hinig.

The union charges that while Ryan was not charged with being part of a conspiracy, it is “the silent, unexpressed allegation” that drove the patrol’s decision to terminate him. It rejects any suggestion that Ryan’s comment about Hinig remembering the speed limit was a code to punish Hinig for coming to a client’s home. The union asserts that the troopers did not know Hinig’s vehicle; that Huff did not know whom he stopped; and that the vehicle Huff stopped was exceeding the speed limit.

The union concludes that Ryan's termination violates the contract's requirement that discipline be for just cause and progressive. It asks the Arbitrator to reinstate Ryan without loss of pay or benefits.

Trooper Benjamin Huff - The union argues that Huff is the trooper that the public wishes all troopers to become. It points out that he spent two years as a Cadet Dispatcher before he entered the academy in 1999. The union suggests that he is particularly concerned about DUIs because he lost a loved one to a drunk driver.

The union claims that Huff is a leader among the troopers at New Philadelphia. It indicates that he leads the post in arrests, assists, and warnings and won an award from MADD. The union notes that his post commander has authored many statements attesting to his quality as a trooper. It adds that Huff lived the patrol's core values.

The union contends that Huff treats every traffic stop as a tool to identify and arrest drunk drivers. It notes that in one instance on the tape with Hinig's stop shows a DUI arrest after Huff pulled over a vehicle that went left of center twice. The union asserts that a traffic stop is a way for a trooper to "get his nose into the area of the driver's seat and smell for alcohol." (Union Brief, page 40)

The union maintains that Huff's service is so focused that it does not know time boundaries. It indicates that it was not unusual for Huff to work before his shift started and after it ended. The union claims that Hinig's suspicion about Huff stopping him after his shift had ended should be laid to rest by the twenty instances between June 30, 2002, and December 31, 2002, when Huff worked outside his usual work day.

The union argues that it is important to note that Huff was not charged with any improper conduct in the investigation of Randall Wilson's crash. It points out that he responded to the call about the crash in the "spirit of urgency," a core value of the patrol.

The union notes that at the scene he performed all the usual chores while Wolfe went to the Wilson residence to see if the alcohol he had smelled at the scene might lead to a DUI.

The union contends that Huff knew that the fact that Michelle Wilson admitted her husband had been drinking was not sufficient evidence for a DUI charge under Section 4511.19(1)(A). It states that he asked Betts to forward that information to Wolfe. The union indicates that Huff knew that a deputy sheriff had been called to the Wilson residence.

The union maintains that while the patrol peppered Huff with questions regarding his actions at the Wilson residence, his conduct was proper in all respects. It reports that the patrol did not challenge Huff's entering the Wilson residence after Campbell gained access. The union observes that he was not criticized regarding filling out the citations and returning them to Michelle Wilson.

The union states that the dismissal of the charges against the Wilsons is not evidence that Huff engaged in misconduct. It reports that the cases were dismissed when the court determined that the prosecutor failed to comply with discovery requests within a reasonable time. The union claims that the reasons for the failure to do so was related to copying and duplicating and did not involve any misconduct by Huff. It stresses that the dismissal of the cases was not based on the merits.

The union insists that Huff had probable cause to file the DUI and obstructing charges. It indicates that the charges were reviewed by his sergeant and lieutenant and neither challenged the propriety of the charges. The union adds that a New Philadelphia city prosecutor reviewed the obstructing charge and found probable cause.

The union complains that the patrol sent a layman to the arbitration hearing to testify that Huff did not have probable cause to file the charges. It claims that the division and the department have many attorneys on their payroll and have access to innumerable assistant attorneys general. The union protests that despite this fact the patrol relied on the testimony of Finamore, who has no legal background and who has not worked on the road in more than twenty-five years.

The union asserts that the obstructing charge against Michelle Wilson is an “easy case.” It states that Michelle Wilson knew that her husband was drunk and hid him and that fact from the troopers. The union emphasizes that Michelle Wilson lied to Betts when she told her that her husband’s accident occurred when he swerved to avoid a deer. It notes that the law declares:

No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official’s official capacity, shall do any act that hampers or impedes a public official’s lawful duties. (Union Brief, page 47)

The union states that the landmark case regarding oral statements is The State of Ohio v. Lazzaro, (1996), 76 Ohio St. 3d 261. It indicates that the majority stated:

... we hold that the making of an un-sworn false oral statement to a public official with the purpose to mislead, hamper or impede the investigation of a crime is punishable conduct within the meaning of R.C. 2921.13(A)(3) and 2921.31(A).

The union argues that all of the elements of a Section 4511.19(1)(A) charge were present in Randall Wilson’s case. It states:

Wilson (person) was established as driving (Michelle Wilson’s statements) his truck (vehicle) on SR 416 (within Ohio) while under the influence of alcohol (presence of alcohol at the scene; Michelle Wilson’s admission to Trooper Wolfe; obvious condition of Randall Wilson when observed by Trooper Huff at the Wilson residence.) (Union Brief, pages 48-49)

The union acknowledges that it is unlikely that Randall Wilson would have been convicted. It speculates that the case would have been pleaded out. The union stresses, however, that it was not Huff's job to win cases.

The union argues that Huff did not engage in a conspiracy to stop Hinig. It claims that there are questions regarding even the procedural aspects of this charge. The union asks whether Huff was supposed to have conspired with Slezak, Wolfe, Brindley, or Betts. It observes that all of them engaged in some "banter" regarding Hinig but complains that Slezak, Brindley, and Betts were not suspended.

The union contends that there cannot be a conspiracy to commit a lawful act or to enforce the laws of Ohio. It reports that the GRAB DUI website encourages citizens to report drunk drivers. The union observes that Highway Watch enlists truck drivers to alert officials to safety and security problems.

The union suggests that Huff properly stopped Hinig. It indicates that not a single witness, except Hinig, testified that he was not speeding. The union dismisses the testimony of Tyler and Finamore that once Huff discovered that Hinig was driving the car he stopped, he should have let him go even if he had been going 80 miles per hour. It claims that Huff could have said the following:

You know, Hinig's a monumental pain in the ass and if he thinks he can break the law because he is some kind of big time lawyer, he's in for a rude awakening. If I see that white Cadillac of his breaking the law, he's toast.
(Union Brief, page 51)

The union insists that Huff did not know whom he was stopping. It states that he did not know what kind of car Hinig was driving and observes that it was dark and sleet and rain were falling. The union indicates that Huff did not know Hinig's license plate number.

The union maintains that Huff had no grudge against Hinig. It points out that only a few months earlier he stopped him for speeding on the interstate but, as a professional courtesy, gave him a warning rather than a ticket. The union notes that Hinig acknowledged this fact on the tape of his December 14, 2002, stop and said that he was grateful for the courtesy. It stresses that on the date in question Huff wrote a ticket because he had told Hinig that if he caught him speeding in the future, he would give him a ticket.

The union denies that the troopers at New Philadelphia hated Hinig. It states that there was no testimony to suggest that he was viewed as anything more than a minor irritant. The union claims, however, that Hinig bent the rules in defending the Wilsons as “he splashed in the legal and media waters weaving a patchwork quilt of accusation sufficient to have an image driven, overly sensitive OHP, choose to terminate two of its best in an attempt to mollify him.” (Union Brief, pages 52-53)

The union argues that contrary to Hinig’s suggestions, the troopers had every right to go to the Wilson residence. It points out that they suspected Randall Wilson of drunk driving, involvement in at least a property damage accident, leaving the scene, and conspiring to avoid criminal liability.

The union contends that it is important to note that neither Huff nor Ryan was charged with violating the civil rights of either of the Wilsons. It asserts that there is no issue that Randall Wilson invited Campbell into his house either by word or action. The union notes that Michelle Wilson testified that when she found the troopers in her home, she said she was canceling her husband’s invitation to come in. It further claims that Huff and Ryan were not part of the process whereby entrance was achieved.

The union denies that Hinig's constitutional rights were violated. It reports that he claimed his "right to travel freely" was impeded but was unable to identify what part of the constitution was violated. The union emphasizes that Hinig had no constitutional right to speed to a client's house.

The union complains that Hinig brought pressure to bear on the patrol. It points out that his letter to Colonel Paul McClellan indicated that he was a former member of city council and the General Assembly. The union notes that Hinig's father was a long-time member of the Ohio Senate and was appointed by the governor to the Personnel Board of Review.

The union charges that the patrol was sufficiently cowed to ask Hinig what he wanted by way of a resolution. It reports that he replied that he wanted Ryan demoted and wanted all the troopers transferred so he would not have to deal with them. The union asserts that the patrol felt that this involved too much administrative hassle so it fired Huff and Ryan.

The union maintains that the patrol's action "shocked everyone." It observes that the Tuscarawas County Prosecutor testified that she wanted Huff and Ryan back to work to help with law enforcement. The union notes that she stated that she knew them to be of excellent character.

The union questions the significance of the fifteen to thirty seconds of Hinig's stop that was not recorded. It states that when Huff put the tape in the camera, it did not record immediately because there is a period of catch-up. The union adds that "the machines are machines and do not always function properly." (Union Brief, page 57)

The union objects to the patrol's complaints about the grievants' use of the CB radio. It observes that the patrol did not charge them with improper use of the CB to

support their discharge yet it raised the issue at the arbitration hearing. The union claims that in any event its witnesses testified that troopers use CBs to talk to each other unofficially. It stresses that if there is a policy banning it, it flies in the face of recognized practice.

The union contends that the policy of paramount importance is OSP 200.05. It points out that it states:

It is the intent of the Division that all sworn officers actively intervene in all incidents of speeding regardless of the number of miles per hour in excess of the posted speed limit on public roadways. (Union Brief, page 58)

The union notes that the policy also indicates:

Each officer must make the decision whether compliance can be accomplished through issuance of a citation, warning, vehicle inspection report or traffic safety reminder. The decision to take enforcement action rests with the individual officer. (Ibid.)

It suggests that taken together these provisions mean that a trooper should stop a motorist who is speeding to any degree but is not required to cite every driver who is stopped.

The union asserts that Huff was acting in accord with this.

The union asks the Arbitrator to sustain the grievance and to restore Huff to his position with no loss of pay or benefits.

ANALYSIS

The instant case involves two separate grievances. While the grievances arise from the same event, the charges against Huff and Ryan are different and many of the important factors relate only to one of the grievants.

Benjamin Huff - The charges against Huff are set forth in the statement of charges dated July 17, 2003. They are:

Trooper Huff conspired to stop an attorney that was traveling to a client's residence and failed to properly record the contact. It is also charged that Trooper Huff filed DUI and obstructing official business charges without proper cause.

For these offenses, he was accused of violating Rule 4501:2-06-02(I)(1), Conduct Unbecoming an Officer, and Rule 4501:2-6-02(B)(1)(5), Performance of Duty.

The Arbitrator believes that the testimony and evidence establish that Huff did engage in a conspiracy to stop Hinig. The transcript of the radio communication on the morning in question reveals the following:

Betts: 819.

Ryan: Go ahead.

Betts: Attorney Hinig is enroute to that 25. He'll be on scene in about 15 minutes.

Ryan: Okay.

Slezak: 819. We'll be watching for him.

Slezak: 77.

Brindley: Go right ahead.

Slezak: You wanna work a little tac squad here uh, Mile post 8, 416?

Brindley: I was gonna ask you which way he's comin'down.

Slezak: Well, he'd have to come through town. (Inaudible) 416.

Betts: (Laughing as a telephone call comes in.) Highway Patrol,
Dispatcher Betts.

* * *

Sergeant Ryan: Who was the attorney? Can you advise?

Huff: 819.

Ryan: Go ahead.

Huff/Slezak: It's your buddy Hinig, go ahead.

Ryan: Okay 79. Break.

Slezak: Yes.

Ryan: We're all Signal 45. Uh, Mr. Hinig's gonna come down here to just talk to his client, I guess. 406 can advise his activity. G'head.

Huff: 3-7's, one belt, 19, 1-A.

Slezak: Outstanding.

Huff: 819, thank you.

Slezak: Wonder if he charges mileage for this.

Ryan: Hope he remembers what the speed limit is this morning. G'head.

Slezak: Exactly my point.

Huff: In between the three of us, we oughta run into him.
(Employer Exhibit 24, page 22 and Employer Exhibit 22, page 1)

A few minutes after this exchange, Huff encountered Hinig on SR 416 near the village of Tuscarawas. He testified that he clocked him at 62 miles per hours and locked him in on his radar at 61 miles per hour. Huff turned and pursued Hinig and gave him a ticket for going 61 miles per hour in a 55 mile per hour zone.

The Arbitrator must reject the union's argument that there was nothing suspect about the stop. First, its claim that Hinig was stopped because he was exceeding the posted speed limit cannot be accepted. Finamore testified that no trooper would write a ticket for driving 62 miles per hour where the speed limit is 55 miles per hour. While the union had the opportunity to rebut this statement, it did not do so.

Second, the union's contention that Huff did not know who he was stopping must also be rejected. The stop took place at approximately 7:00 a.m. on a Saturday morning

in a rural area so one would expect there to be little traffic. In fact, the tape of the stop revealed that it was 3 1/2 minutes after Huff stopped Hinig before another southbound car passed them. In addition, Hinig was driving a distinctive car with vanity license plates bearing his initials.

Huff's failure to tell Hinig that he had been at the Wilson residence and that the troopers had left raises a question. When Hinig told him that he was on his way to the Wilson residence, honesty and common courtesy required Huff to tell him that he knew about the events at the residence and that the troopers had left the scene. Telling Hinig that he would check out his story suggests that he did not want Hinig to suspect that he had any knowledge of where he was going or any motive to stop him.

The patrol also charged that Huff failed to properly record the stop. While the evidence is clear that the initial part of the stop was not recorded, the union offers an explanation. It claims that when Huff recieved the call about Randall Wilson's accident, he was reviewing the tape of a previous traffic stop and did not properly reset the camera so the first part of Hinig's stop was not recorded because the camera was searching for a blank section of tape.

The Arbitrator does not feel that this is a pivotal issue. Although it was Huff's responsibility to see that the camera was ready to record, his effort to get to the scene of an accident where there might have been serious injuries make his carelessness easier to excuse. Furthermore, Hinig's testimony about Huff's conduct at the stop raises no questions about his conduct immediately after the stop was made.

The second charge against Huff is that he did not have proper cause for citing Randall Wilson for DUI or Michelle Wilson for obstructing official business. In support

of this charge, it offered the testimony of Finamore. He testified that there was not probable cause for the DUI and that Huff was “far out of line” in citing Michelle Wilson.

The Arbitrator must discount the union’s claim that Finamore’s testimony should be ignored because he is not an attorney. The record indicates that he has been employed by the highway patrol for over 25 years and, more importantly, he taught the laws of arrest at the academy. The Arbitrator would also note that while the union argued strenuously in its brief that there was proper cause for both the DUI and the obstructing citations, it presented no sworn testimony at the hearing in support of its claim.

The Arbitrator doubts that either of the charges would have held up in court. Too much time passed between the accident and when the troopers and Campbell observed Randall Wilson in what appeared to be thoroughly intoxicated state. A statement by Michelle Wilson to Betts that her husband might have been drinking would not seem sufficient to support the DUI charge.

The charge of obstructing official business against Michelle Wilson is even more problematic. It appears to be based in substantial part on the fact that she told Betts that her husband lost control of his truck when he swerved to avoid a deer and because she did not allow the troopers to talk to him. The problem is that the union could not establish that Randall Wilson did not encounter a deer and that Michelle Wilson was under no obligation to allow the troopers into her home to talk to her husband.

The Arbitrator is much less concerned with the patrol’s charge that Huff’s DUI and obstructing citations were improper than the conspiracy charge. First, he understands the frustration that Huff felt because he had strong reasons to believe that Randall Wilson was intoxicated at the time of his accident and that Michelle Wilson was interfering with

his ability to charge him with DUI. Second, as Finamore acknowledged, the patrol does not normally terminate troopers who issue citations without proper cause.

At the hearing the patrol made numerous other allegations against Huff. Those additional charges include that Huff improperly cited Randall Wilson for not wearing a seat belt, failed to direct Wolfe to leave the Wilson residence when Michelle Wilson refused to allow him to enter, neglected to update the crash report when he learned that the accident occurred at approximately 1:30 a.m., planned to remove Randall Wilson from his residence without an arrest warrant, and made a premature judgment about the socio-economic status of the Wilsons. The Arbitrator, however, does not believe that it is necessary to examine these allegations.

The remaining issue is the proper remedy. The evidence establishes that Huff engaged in a conspiracy to stop Hinig and then did stop him and issue him a citation. This action, taken by a trooper against a defense attorney who is on his way to assist a client, is very alarming and cannot be tolerated. The Arbitrator must deny the grievance and uphold Huff's termination.

Donald Ryan - The charges against Ryan are set forth in the statement of charges dated July 17, 2003. They are:

Sergeant Ryan failed to provide proper supervision to subordinates at a private residence. It is also charged that Sergeant Ryan engaged in unprofessional radio traffic with his subordinates.

For these offenses, he was accused of violating Rule 4501:2-6-03(A)(1), Responsibility for Command, and Rule 4501:2-06-02(I)(1), Conduct Unbecoming an Officer.

With respect to the charge that Ryan failed to provide proper supervision at the Wilson residence, the patrol had two specific complaints. First, it claimed that Ryan should have ordered Wolfe to leave the Wilson residence. Second, it asserted that he

should have had a briefing off the Wilson property because it “would have afforded [him] more time to gather pertinent information with participation from all officers.” (Patrol Brief, page 11)

While one could conclude that Ryan should have ordered Wolfe to leave the Wilson property, the fact that he did not would not represent a significant failure to provide proper supervision. The record indicates that when he learned from Betts and Slezak that Wolfe was trying to enter the Wilson residence, he told him in no uncertain terms that he could not do so without a warrant. Given these instructions and the fact that he was enroute to the scene and would arrive in a few minutes, his decision not to order Wolfe to leave does not appear to justify any disciplinary action.

The charge that Ryan failed in his responsibilities by not requiring a briefing off the Wilson property must also be rejected. The facts involved in the incident were simple and uncomplicated. Once Ryan arrived at the scene, a briefing could have been accomplished in a matter of minutes.

The charge that Ryan engaged in unprofessional radio traffic is much more serious. The record indicates that he heard some or all of the conversation between Betts, Brindley, Huff, Slezak, and Wolfe about stopping Hinig on his way to the Wilson residence. Ryan was obligated as a sergeant to put an end to such conversation just as he had to Wolfe’s insistence on getting into the Wilson residence.

The Arbitrator believes that it is important to note that Ryan was not part of any conspiracy to stop Hinig. The record indicates that he took the comments of the troopers as nothing more than “banter.” Furthermore, there is no reason to believe that his comment on the radio that he hoped that Hinig remembered the speed limit was a signal to the troopers to lie in wait for him. The patrol’s decision not to charge Ryan with

participating in the conspiracy indicates that it reached the same conclusion after its extensive administrative and criminal investigations.

At the arbitration hearing and in its brief, the patrol argued that Ryan violated its policy regarding the use of the CB radio. The policy restricts the use of the CB to emergency situations. The troopers' discussion of Randall Wilson urinating in his shorts and calling off traffic violations do not constitute emergencies.

Despite these facts, Ryan's use of the CB radio cannot serve as the basis for any disciplinary action. He testified in a very credible manner that the CB radio is used for non-emergency communications on an everyday basis without any objection by the patrol. If the patrol wishes to begin to enforce its policy, it must advise troopers of its intent before starting the enforcement.

The remaining issue is the proper penalty. It is clear that termination would be too severe a penalty even if both of the patrol's charges against Ryan were fully justified. Neither involve dischargeable offenses without the imposition of progressive discipline and the grievant has no prior discipline in his record. Furthermore, he was a trooper for over 19 years and a sergeant for 9 1/2 of those years.

While discharge is not appropriate, Ryan's failure to end the radio conversation about stopping Hinig and his brief contribution to the exchange, constitute a serious misjudgment. He should have ended the conversation after the comments by Slezak about working a "tac squad" and warned the troopers not to interfere with Hinig.

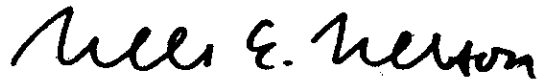
The Arbitrator feels that a five-day suspension would be an appropriate penalty. It is more than the three-day suspension received by Wolfe, the one-day suspension received by Slezak, or the written warning received by Betts but it reflects Ryan's greater

responsibility as a sergeant. In addition, a five-day suspension and the associated loss of pay are sufficient to impress upon him the importance of his role as a supervisor.

AWARD

Case No. 15-00-030724-0106-04-01 - The grievance of Benjamin Huff is denied.

Case No. 15-00-030724-0105-07-15 - Donald Ryan is to be reinstated with no loss of seniority and made whole for any loss in wages and benefits less a five-day disciplinary suspension. The Arbitrator will retain jurisdiction for 60 days from the date of his award to resolve any disputes over its implementation.



Nels E. Nelson
Arbitrator

December 7, 2003
Russell Township
Geauga County, Ohio