

#1799

In the Matter of Arbitration between:

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

And

15-00-040526-0051-04-01
Case #15-00-0405226-04-01-
Penny A. Beaty, Grievant

AC

**Ohio State Troopers Association
Union**

In attendance:

For the Highway Patrol: Lt. Charles J. Liner, (advocate), Andrew Shuman, OCB, Sgt. Kevin D. Miller, Observer, Renee Byers, OSB, and Sgt. Robin Schmutz, witness.

For the Union: Herschel Sigal, Esq., (advocate), Elaine Silveire, OSTA Atty, Trooper Penny Beaty, Grievant, Bob Stitt, OSTA Staff Rep. and Ramona Bean, observer.

INTRODUCTION:

This matter was heard in Columbus, Ohio at the Office of Collective Bargaining on December 9, 2004 at 10AM and all witnesses were sworn. No procedural issues were arbitral. The following exhibits were present: Joint Documents: #1- Unit 1 Contract #2- Grievance Trail, #3- Discipline Package composed of (a) Statement of Charges, (b) Pre-Discipline Notice, (c) Meeting Officer Reply, (d) Suspension Letter (e) Department Record, (f) Highway Patrol Rules and Regulations 4501: 2-6-02 (b) (1) (5). Management Exhibits: #1- Enter investigation package, consisting of interviews, hearings, hearing officer's reports, and review of records, letters, conclusions and findings. Management Exhibit #2- In car video tape. Union Exhibits #1- Copy of Ohio State Patrol Policy- 203.05 Search and seizure. #2- In-car video tape.

ISSUE:

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

"Did the Grievant receive a three (3) day suspension for just cause? If not what shall the remedy be?"

FACTS:

The Grievant, Trooper Penny Beaty has been employed by the Highway Patrol for nine (9) years and at the time of the alleged incident was assigned to the Bucyrus District Headquarters. She has since been transferred to the Ashland Post.

On March 5, 2004 Trooper Beaty was on patrol along Route 23, southbound and observed a vehicle traveling at what seemed to be at an excessive speed. The Trooper pulls out behind the vehicle and paced it for approximately a mile and pulled the vehicle over for a traffic stop. The Troopers in-car video was engaged at the time of pulling the vehicle over. Upon approaching the vehicle for the routine check of license and registration, Trooper Beatty says she observed what looked like "blunt" residue (remnants of smoked marijuana, or ashes, as this Arbitrator was given to understand the term "blunt" residue). At this time the Trooper asked the driver to exit the vehicle. She asked if he minded her searching his vehicle and he denies consent to search. The Trooper "pats-down" the driver and places him in the front seat of the patrol car. Trooper Beaty asks again for consent to search and again it was denied. She states that she has "probable cause" to search the vehicle based upon her observation of the "blunt residue".

Trooper calls for assistance in the search and another trooper arrives upon the scene. Brent Hunter assists in the search. The search was conducted, no evidence of illegal narcotics was found. Trooper Beaty issued a warning ticket for speeding and assured and clear distance. The driver and his passenger were allowed to leave. Time elapsed, approximately 31 minutes.

The following day Mr. James M Hogan II, the driver, filed a complaint with the Highway Patrol alleging that Trooper Penny Beaty had, for no valid reason, initiated a traffic stop and conducted an illegal search.

As a result of the complaint by Mr. Hogan, an administrative investigation was conducted. The A.I. findings supported the complaint. A pre-disciplinary hearing was conducted and Trooper Penny Beaty was given a three (3) day suspension for violation of Highway Patrol Rules and Regulation 4501: 2-6-02 (b) (1) (5). Performance of duty/inefficiency. The suspension was effective June 1, 2004. Trooper Beaty subsequently filed a grievance, requesting the employee be made whole (receive back-pay for three (3) days and any pay for lost overtime opportunities), citing articles 19.01 and 19.05 as violations of the Collective Bargaining Agreement.

OPINION:

Testimony, and video tapes, shows that Trooper Beaty initiated a traffic stop on March 5, 2004 at approximately 3:00PM on Route 23 South. During the conduction of the stop Trooper Beaty asks on more than one occasion for consent to search the vehicle and repeatedly it was denied. Trooper Beaty states that she has “probably cause” from her observation of the “blunt residue” on the console of the vehicle and proceeded to search the vehicle with the assistance of another trooper, Brent Hunter. The grievant testified that she never intended to seek consent to search, but merely asks a rhetorical question to gauge the reaction of the suspect as in indicator of what, I don’t know. It is reasonable that any citizen, would at the least, be nervous when approached by such an authoritarian figure in the guise of a uniformed Highway Patrol Officer. The Ohio State Highway patrol Policy (203.05) clearly lays out the procedure for search and seizure.

SECTION F: Motor Vehicle Searches with Probable Cause (in pertinent part).

1. Probable cause searches may extend to all areas of the motor vehicle where the item of search could be located or concealed, unless the probable cause is limited to a specific area of the vehicle. This probable cause search is justified when ALL of the following are true.
 - (a) There is enough probable cause to obtain a search warrant;
 - And
 - (b) The vehicle is moving or is about to be moved.

SECTION G: Consent to Search (in pertinent part).

1. Although consent searches are an excellent method of conducting searches, gaining consent from a suspect is not needed if other methods of searching and seizing evidence are available. (I.e. do not ask for a consent search if probable cause exists to search a motor vehicle).

This arbitrator would reasonably surmise that there are good and valid reasons for these policies and expectations that they would be uniformly applied throughout the system.

Employer’s witness Lt. Charles Jones, an impartial and detached observer with expertise as a certified instructor in the area of search and seizure, had review the tap of March 5, 2004 traffic stop. His professional opinion was that there was no probably cause.

The assisting officer, Trooper Brent Hunter did not see any "blunt residue" and he was the only one, according to the in-car video hat actually searched the driver's compartment during the stop.

There was no evidence collected nor a field test conducted, which could have been readily done as a field test kit is provide in each patrol car.

In reviewing the tape this incident occurred on a clear day and the line of vision for the patrol car in the median strip would have been quite some distance, and the trooper did not utilize the radar to ascertain speed, but waited until the vehicle passed her position before pulling out the pace the vehicle for a mile.

The complainant states that he was traveling at approximately 67 MPH when he went by the patrol car parked in the median. He alleged that he next saw the patrol car approaching from the rear and he assumed that the trooper was on call and immediately moved into the right lane, closely behind a truck. He states he only, moved over to permit the patrol car to pass and that sounds reasonable to this arbitrator.

In considering the totality of the circumstances surrounding this incident, I can not find where the employer violated the labor agreement and the discipline was in accordance with the Progressive Discipline Procedure as outlined in Articles 19.05.

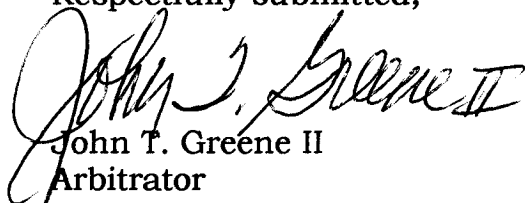
AWARD:

This grievance is denied.

This concludes the arbitration decision.

Issued this 15th day of December 2004.

Respectfully submitted,


John T. Greene II
Arbitrator