

IN THE MATTER OF THE ARBITRATION BETWEEN

GRIEVANCE NO.: 15-03-080229-0029-04-01

Ohio State Trooper Association

GRIEVANT: Bobby Rose

AND

The State of Ohio
Ohio State Highway Patrol

OPINION AND AWARD

ARBITRATOR: Meeta Bass Lyons

AWARD DATE: February 27, 2009

APPEARANCES FOR THE PARTIES

Management:
Lt. Charles J. Linek, Management Advocate
Marissa Hartly, Office of Collective Bargaining

UNION:
Elaine Silveira, Ohio State Trooper Association, Union Advocate
Wayne McGlone, Chief Steward
Grievant: Bobby Rose

PROCEDURAL HISTORY

Ohio State Highway Patrol is hereinafter referred to as "Management". Ohio State Trooper Association, OSTA, is hereinafter referred to as "Union". Bobby Rose is hereinafter referred to as "Grievant".

Grievance No. 15-03-080229-0029-04-01 was submitted by the Union to Management in writing on February 26, 2008 pursuant to Article 20 of the parties' collective bargaining agreement. Following unsuccessful attempts at resolving the grievance it was referred to arbitration in accordance with Article 20, Section 20.12 of the 2006-2009 Collective Bargaining Agreement.

Pursuant to the collective bargaining agreement between the Union and Management, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on February 20, 2009 at the Office of Collective Bargaining. During the course of the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. Witnesses were sequestered during the hearing. The hearing record was closed on February 20, 2009.

The parties stipulated that the grievance and arbitration were properly before the Arbitrator.

The parties stipulated that the issues to be resolved in the instant arbitration to be: Did the Grievant receive a three (3) day suspension for just cause? If not, what shall the remedy be?

PERTINENT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Article 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 merits the more severe action.

The Employer, at its discretion, is also free to impose less severe discipline in situations, which so warrant.

Article 21- Work Rules

Section 21.03 Application

All work rules and directives must be applied and interpreted uniformly as to all members. Work rules or directives cannot violate this contract. In the event that a conflict exists or arises between a work rule and the provisions of this Agreement, the provisions of this Agreement shall prevail.

Work Rule 4501:2-6-02(B)(1)(5)

(B) PERFORMANCE OF DUTY

- (1) A member shall carry out all duties completely and without delay, evasion or neglect. A member shall perform his/her duties in a professional, courteous manner.
- (5) Members who fail to perform their duties because of an error in judgment or otherwise fail to satisfactorily perform a duty, of which such member is capable, may be charged with inefficiency.

BACKGROUND

Set forth in this background is a summary of undisputed facts and evidence regarding disputed facts sufficient to understand the parties' positions. Other facts and evidence may be noted in the discussion below to the extent knowledge of either is necessary to understand the Arbitrator's decision.

The facts in this case are largely undisputed and are hereinafter summarized. Where, however, relevant evidence regarding pertinent facts conflicts, the evidence is summarized.

Grievant was commissioned as a trooper on October 27, 2006. On November 2, 2007, Grievant was working the afternoon shift at the Lebanon Patrol Post. Grievant was dispatched to a crash that occurred in Warren County on Martz-Paullin road. A vehicle had traveled off the left side of the road, struck a utility pole with the side mirror. The driver of the vehicle stated that she had fallen asleep. The property owner had damage to the fence, the yard, gouge marks in the driveway and damage to some shrubs. The insurance carrier paid \$ 578.74 in damages to the property owner and \$1,383.01 in damages to the driver.

The driver of the vehicle, an elderly woman, waited approximately forty-five (45) minutes until the Grievant arrived on the scene. Upon his arrival, Grievant spoke with

the driver to obtain necessary information including her license plate and driver's license, and then assessed the damages. The property owner was not at home and the Grievant did not speak with anyone who resided at the residence. Grievant was of the opinion that the damages were minimal to the property owner. Grievant advised the driver that if he conducted a crash investigation report, he would have to issue a citation as well. As the discussions between the Grievant and the driver ensued, Grievant became sympathetic to her plight, and gave her the opportunity to voluntarily make arrangements with the property owner. Grievant instructed the driver to leave contact information for the property owner. Grievant did not make contact with the property owner or leave his information at the residence of the property owner before leaving the scene. Grievant left the scene without conducting a traffic crash investigation.

When the property owner arrived home, her neighbor informed her of the incident. She then contacted the Lebanon Patrol Post and was highly upset. The dispatcher took her information, and then contacted the Grievant about the complaint. The Grievant initially contacted the property owner on his cell phone. The property owner complained that he was rude; the Grievant testified that he was professional and curt because of her demeanor. At the conclusion of the conversation, Grievant informed the property owner that he would contact the driver, and then recontact her.

After the conversation, Grievant drove over to the residence of the driver. While enroute he drove past the residence of the property owner who was standing in her driveway with two other gentlemen. He stopped and spoke with the property owner to explain what happened. Again, the property owner complained that he was rude; the Grievant testified that he was professional and curt. The Grievant drove to the residence of the driver. Upon his arrival, Grievant was informed that the driver was at work and he obtained her employment information. Grievant then drove to the residence of the property owner. He contacted the post to obtain a crash report number to provide to property owner. He again spoke to the property owner. Again, the property owner complained that he was rude; the Grievant testified that he was professional and curt. While at the scene, the Grievant conducted a crash investigation, but failed to complete a field sketch or take photographs of the property owner's damage. Grievant later contacted driver to issue the citation.

The property owner contacted the post because she was upset with the situation and the manner in which she was treated by Grievant. The property owner stated that the Trooper was impolite, and that he “snatched” the document out of her hand when she noticed there was no report number documented. According to the property owner, the Grievant then wrote the report number on the form and then “shoved” it back at her. Grievant denies such conduct. During the course of the investigation, the property owner stated that Grievant acted like an “asshole.” It was her opinion that it was guys like the Grievant that give police officers a bad name. She denied that Grievant was loud, threatening or abusive towards her.

Grievant had a clean department record when the discipline was imposed. His annual evaluation for 2007 –2008 indicates that the Grievant met Management’s criteria for Professional Conduct/Public Relations. The Comments indicate that “Trooper Rose is polite, professional, tactful and courteous. His demeanor and actions reflect positively on the Division. Trooper Rose maintains a professional appearance. He treats others, as he would want to be treated himself.” Prior evaluations reflect similar performance levels and comments.

The Union filed its grievance on February 26, 2008 alleging a violation of Article 19.05 Progressive Discipline. The grievance was not resolved within the procedure established by the collective bargaining agreement, and was properly advanced to arbitration.

POSITIONS OF THE PARTIES

UNION

The Union contends that the Grievant did complete the crash investigation report. The Grievant treated the property owner in a professional but curt manner that was misinterpreted by the property owner as being discourteous. The merits of the case as supported by the evidence demonstrate that a three-day suspension, which represents a jump in progressive discipline, is unwarranted.

The union contends that imposition of the three (3) day suspension of the Grievant constituted disparate treatment.

The Union requests the Arbitrator grant Grievance No. 15-03-080229-0029-04-01.

MANAGEMENT

Management contends that Grievant failed to complete the crash investigation upon his initial response, failed to complete a thorough investigation of the crash site, and failed to treat the property owner in a courteous manner. Said behavior constitutes a violation of the work rule 4501:2-6-02(B)(1)(5), and the discipline was commensurate with the offense.

Management contends that the Employer has the right to impose more severe discipline when the misbehavior merits more severe action. Grievant, a short-term employee needed a strong reminder of appropriate behavior when dealing with the citizens of Ohio and performing his job duties.

Management requests the Arbitrator deny Grievance No. 15-03-080229-0029-04-01.

DISCUSSION

It is well established in labor arbitration that where, as in the present case, an employer's right to suspend an employee is limited by the requirement that any such action be for just cause. The employer has the burden of proving that the suspension of an employee was for just cause. "Just cause" is a term of art in collective bargaining agreements. "Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he or she was disciplined. Another element is that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided, and a requirement that there be a reasonable relationship between an employee's misconduct and the punishment imposed.

In the present case, the Grievant's own testimony leaves no doubt that he engaged in the conduct for which he was suspended, failing to timely conduct a crash investigation report. Moreover, a reading of the Management Work Rule 4501:2-6-02(B)(1)(5) shows the Grievant's conduct constituted a violation of the rule. Further the Grievant only seeks modification of the penalty imposed. Rule 4501:2-6-02(B)(1)(5) requires a member to carry out all duties completely and without delay, evasion or neglect. The evidence presented, including the Grievant's own testimony, makes it clear that Grievant left the crash site without completing a crash investigation report, and that Grievant completed the report only after the property owner complained. The report

was incomplete in that Grievant failed to takes sketches or photographs of the crash scene.

Rule 4501:2-6-02(B)(1)(5) further requires a member to perform his duties in a professional, courteous manner. The investigator testified that the issue of whether or not the Grievant was discourteous could not be determined because the Grievant utilized his personal cell phone and not the post recorded line and turned his in-car camera off when he arrived at the crash scene on the second and third instance. But, the investigator failed to separately interview the property owners, and failed to identify and question the second gentleman at the crash scene. The neighbor did not substantiate complaints by the property owner regarding the Grievant's interaction with him.

In summary, the Arbitrator is persuaded and finds that Management satisfied its burden of proving that the Grievant failed to carry out all duties completely and without delay, evasion or neglect but Management did not satisfy its burden to prove that Grievant was discourteous toward the property owner.

As noted above, just cause requires that an employer administer discipline even handedly. The Union contends the evidence shows that imposition of the three (3) day suspension of the Grievant constituted disparate treatment. The Arbitrator disagrees. The essence of disparate treatment is differently disciplining similarly situated employees. However, administering different punishments to differently situated employees is not disparate treatment. Thus, if all other elements of two employees' acts of misconduct were equal, one would expect the employee who had engaged in a serious violation to be disciplined more rigorously than one who had committed a minor transgression. In support of its position, the Union introduced the department record of Unit 891. On March 8, 2007, the Post received a complaint alleging that the trooper with twelve-year tenure was rude, abrupt, and non-caring and he failed to do a crash report for a deer crash. The trooper had given the driver an option to complete or not complete the report to avoid the citation. The complainant was the driver of the vehicle. The trooper received a verbal reprimand. Although there exists subtle distinctions with the instant case, the resulting damages only affected the complaining witness. The situation presented in the instant case involves damages to another party and the failure to give the property owner notice of the incident.

In another instance, the Union introduced the department record of Unit 1011. The trooper with 14-year tenure failed to investigate injury crash as he was trained. The trooper failed to photograph the crash scene and vehicle, and failed to diagram the crash scene. Further, the trooper failed to ask relevant questions related to the investigation to hit skip injury crash. Here, although the charge is the same for both cases, the facts are quite different.

Finally, to determine whether the Grievant's termination was supported by just cause, the Arbitrator must determine if the Grievant's conduct warranted a three (3) day suspension. As stated above, just cause requires that there be a reasonable relationship between an employee's misconduct and the punishment imposed for that misconduct. But an arbitrator does not have unlimited discretion to substitute her judgment for that of management about the magnitude of a penalty given. Rather, an arbitrator must determine if the penalty imposed by management was within the bounds of reasonableness. If the arbitrator is persuaded that the punishment was so excessive as to be beyond that limit, she not only may but must reduce the punishment. On the other hand, if an arbitrator is persuaded that the punishment imposed was reasonable, even if the arbitrator would have imposed a less severe punishment if he or she had the power to do so, the arbitrator must find the punishment was within the employer's managerial discretion and for just cause. In reviewing the reasonableness of punishment imposed, an arbitrator must look at all relevant circumstances including the seriousness of the offense and the employee's record.

The 2006-2009 Collective Bargaining Agreement provides that the "Employer will follow the principles of progressive discipline. The underlying principle of progressive discipline is to use the least severe action that an employer believes is necessary to correct the undesirable situation. The goal is to modify the unacceptable behavior or improve the performance. The goal is not to punish the employee but to more strongly alert the employee of the need to correct the problem. The degree of penalty should be commensurate with the seriousness of the offense.

Grievant worked at the Post for one year, and his record was free of discipline. His performance evaluations and an annual activity report indicate that the Grievant is a good worker. Although untimely and incomplete, the Grievant completed the crash

investigation report. His failure to complete the report was due to his compassion toward the elderly driver, and not an avoidance of his duties. It was the opinion of the Grievant that to complete a crash investigation report also requires an issuance of a traffic citation, if traffic laws have been violated. The Grievant did not believe that the circumstances warranted a citation. It should be noted that there is a difference of opinion on whether or not a citation must be issued if a crash investigation report is conducted within the department. The infraction is that Grievant failed to timely complete a crash investigation as trained. In an employer-employee relationship this offense is not classified as serious. However the ramifications resulting from the Grievant not completing the report affected a private citizen and her perception of the Association as a whole.

Giving appropriate weight to all relevant factors, the Arbitrator finds the three-day suspension of the Grievant was excessive as punishment as to be unreasonable, and contrary to Article 19.05 of the 2006-2009 Collective Bargaining Agreement.

In summary, the evidence persuades the Arbitrator that the Grievant violated Work Rule 4501:2-6-02(B)(1)(5) on November 2, 2007. The three-day suspension of the Grievant did not constitute disparate treatment. However, the three-day suspension was excessive a punishment as to be beyond Management's managerial prerogatives. The Arbitrator must therefore sustain Grievance no. 7722-17 in part.

AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above Discussion, the Arbitrator grants Grievance No. 15-03-080229-0029-04-01 in part. The three-day suspension is hereby modified to a written reprimand. Grievant is to be made whole including being given back pay and benefits for the period of the suspension.

Dated: February 27, 2009

/s/ *Meeta Bass Lyons*

Meeta Bass Lyons, Arbitrator
Steubenville, Ohio