

IN THE MATTER OF THE ARBITRATION BETWEEN

GRIEVANCE NO.: 15-03-071219-0185-04-01

Ohio State Trooper Association

GRIEVANT: Jamie L. Norris

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 Hartley, Office of Collective Bargaining

UNION:
Elaine Silveira, Ohio State Trooper Association, Union Advocate
Wayne McGlone, Chief Steward
Grievant: Jamie L. Norris

PROCEDURAL HISTORY

Ohio State Highway Patrol is hereinafter referred to as "Management". Ohio State Trooper Association, OSTA, is hereinafter referred to as "Union". Jamie L. Norris is hereinafter referred to as "Grievant".

Grievance No. 15-03-071219-0185-04-01 was submitted by the Union to Management in writing on December 18, 2007 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 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 ten-day suspension for just cause? If not, what shall the remedy be?

PERTINENT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Article 19.01 Standard

No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause.

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)

(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.

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.

On August 15, 2007 Grievant, a trooper, was working the afternoon shift at the Xenia Patrol Post. Grievant described the incident as an active night; she had a number of stops that night. The other troopers on duty were Trooper Soderquist and Sergeant Lumpcik. Trooper Soderquist was on SR-4 in the Fairborn area, Sergeant Lumpcik was in Beavercreek and the Grievant was working in the city of Xenia. The dispatcher at the post received a call of a suspected drunk driver. Grievant was dispatched to the call, as she was the closet unit to the suspected drunk driver. Grievant was in the city of Xenia when dispatched to the call and the suspected drunk driver was southbound on US 42 just north of Cedarville with an active caller behind it. Grievant was approximately 10 miles from the approaching suspected drunk driver. Grievant

proceeded north on US 68 instead of north on US 42. Grievant drove away from the direction of the suspected drunk driver instead of continuing straight toward the driver to make the stop. Grievant testified that she was driving at excessive rates of speed, 80 miles per hour, on US 68 in order to intercept the driver. After going north on US 68, Grievant then traveled east on Brush Row road to US 42 south. (The GPS spot map verified her locations during this incident.) She testified that they (the post) kept checking in with her about her location. By this time, the suspected drunk driver was proceeding into the City of Xenia. Grievant then advised the post to contact the Xenia Police Department to request assistance with the suspected drunk driver.

As the Grievant entered the City of Xenia, the suspected drunk driver turned west on US-35 business from US-42. She never contacted the post to inquire of the location of the suspected drunk driver. Trooper Norris began checking the individual streets trying to locate the Xenia police and the driver; she ended up at the post where she turned around. Again the GPS verified her location. Later she heard that Trooper Soderquist had stopped and assisted the Xenia Police Department. Grievant testified that she traveled to the scene and "stopped to make sure that everybody was Okay, and asked if anyone needed any thing." Then, she cleared and returned to the post. The suspected driver was arrested for OVI and tested a .205 more than double the legal limit.

At the time of the incident Grievant had 10 years of service. Her only department is a verbal reprimand for tardiness. Her evaluations for the review period from 2005-2006 indicate that she meets expectations for interpersonal skills, and commitment to goals. The comments indicate that Grievant "has trouble dealing with confrontational situations in both arenas. The comments further indicate that "her participation in safety belt, commercial and OVI enforcement is minimal. Her evaluations for the review period from 2006-2007 indicate that the Grievant is "reluctant to become involved in traffic stops which may become confrontational, and thus limited her effectiveness as a State Trooper. She needs to expand her efforts in these areas..." Her evaluations for the review period from 2007-2008 indicate that Grievant meets expectations in Interpersonal skill. The comments state that "she has made significant improvements in her interpersonal skills...She does not hesitate to become involve in traffic stops. She

exceeds expectations in commitment to goals, and is a post leader in overall activity, aggressive violations and safety belt enforcement.” Grievant testified that these concerns were not discussed with her prior to the discipline, and she received no training to address them.

The Union filed its grievance on December 18, 2007 alleging a violation of Article 19.01 Standard and 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 Grievant did not neglect, delay or evade her duties. The route taken by Grievant represented only a two (2) mile difference, and Grievant did appear on the scene to assist. Therefore there was no violation of the work rule 4501:2-6-02(B)(1).

The union contends that if a violation is found, Grievant, an eleven-year employee, only had a verbal reprimand on her record for tardiness. A ten (10) day suspension, which represents a complete disregard of progressive discipline, is unwarranted.

The union contends that imposition of the ten (10) day suspension of the Grievant was capricious and arbitrary.

The Union requests the Arbitrator grant Grievance No. 15-03-071219-0185-04-01, be paid back all lost wages and benefits and the suspension be removed from her department record.

MANAGEMENT

Management contends that Grievant was derelict in her duties as an Ohio State Trooper in evading her duties by not responding by the most direct route to a serious call. Said behavior constitutes a violation of the work rule 4501:2-6-02(B)(1), 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.

Management requests the Arbitrator deny Grievance No. 15-03-071219-0185-04-01.

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.

Grievant is charged with a violation of work rule 4501:2-6-02(B)(1), failure to carry out all duties completely and without delay, evasion or neglect arising out of response to a suspected drunk driver on August 15, 2007. She did not take the direct route to stop the suspected drunk driver. Grievant gave several explanations for traveling on US 68 rather than US 42. The Sergeant testified that she had first stated that she was not familiar with the area on the date of the incident. Grievant has been working at this post for ten years; the Line Assignment indicates that US 68 and SR 42 is part of the line assignment for the post. She later stated in the administrative investigation, that she was anticipating that the driver would take the bypass. Grievant acknowledged that if the driver did in fact take the bypass, Grievant would have been even farther away. At the hearing Grievant testified that the route she took was a familiar route; it is the route she drives her children to the doctor. When questioned again, Grievant explained that she was at the intersection. "US 68 was right there, and US 42 was a mile away." She took the route that she felt would get her to the suspected driver. Grievant failed to provide a satisfactory explanation of her decision to travel US 68 to Brush Row then to US 42 once Management established that she did not take the direct route. Her decision to travel US 68 placed her behind the suspected drunk driver, and left the initial stop to the Xenia police.

The testimony of the Grievant was somewhat troubling as well, and suggests avoidance of the confrontation. Grievant testified that she recalled thinking about the suspected drunk driver traveling at 55 miles per hour, the accidents that had happened in the area, and the rate of speed that she was traveling to intercept of the driver. During the course of her testimony Grievant stated that she was of small stature and a female. She felt that she pushed herself harder than what she should.

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.

As noted above, just cause requires that an employer administer discipline even handedly. In support of its position, Management introduced the department record of Unit 1302. On two consecutive dates, the trooper failed to respond to two calls of suspected drunk drivers. The trooper was approximately three miles from the area in the first incident. The GPS determined that he went into another direction, and he stated that he needed gasoline. The trooper did not respond to the incident until his fellow trooper requested that he respond to the scene for assistance. The next day the trooper was advised of a caller behind a suspected drunk driver. The trooper was driving a few vehicles behind the suspected drunk driver when he observed a disabled vehicle. The trooper disregarded the suspected drunk driver who was weaving all over the interstate, and assisted the disabled vehicle. The interoffice communications dated July 18, 2005 indicated that after "considering the steps that have been taken to improve the trooper's performance in this area, I recommend appropriate discipline." The steps included counseling in the area of OVI detection and apprehension, specialized training in the area of apprehension and detection of impaired drivers (A.D.A.P. #129) and F.A.S.T. course. The discipline imposed for the two consecutive incidents was a ten (10) day suspension. The labor relation officer testified that the disciplines were merged because "they had not used any progressive discipline to correct his actions" The trooper had a verbal reprimand for accidental discharge of taser on his record.

In the instant case avoidance of confrontation is noted in the two evaluations immediately prior to the incident, but there were no steps taken to improve her

performance in this area although the concerns were raised in the evaluation. Both troopers had a verbal reprimand on their department record. But, Management in the Unit 1302 case issued a ten-day suspension because "they had not used any progressive discipline to correct his actions." In the instant case, there is no progressive discipline for incident in questioned. It is the position of Management that the Employer has the right to impose more severe discipline when the misbehavior merits more severe action. In the Unit 1302 case there are two back-to-back incidents, and Management determines that progressive discipline is necessary. In the instant case there is one incident of similar conduct. 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 lesser transgression.

In another instance, Management introduced the department record of Unit 1455. The trooper was dispatched to a request for service call, dead deer removal, and he refused to respond to the call stating, "I am not going and I'll take an A.I." Ten days may in situations of outright defiance and subordination be appropriate. But, the circumstances in the instant case are different.

This offense, failure to respond, covers a wide range of conduct as evidenced by the department records introduced. A trooper maybe called to respond to the deer removal, the traffic crash, the felony, or the OVI. Just cause requires that there be a reasonable relationship between an employee's misconduct and the punishment imposed for that misconduct. The discipline in these cases may vary depending on the circumstances. 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. Because the 2006-2009 Collective Bargaining Agreement provides that the "Employer will follow the principles of progressive discipline," The Arbitrator must also consider whether Management imposed the least severe action to correct the undesirable situation, if the situation can be corrected. The degree of penalty should be commensurate with the seriousness of the offense. The goal is to modify the unacceptable behavior or improve performance. The goal is not to punish the employee but to more strongly alert the employee of the need to correct the problem.

Grievant worked at the Post for ten years, and she had a verbal reprimand on her record for tardiness. Her performance evaluations indicate that she had issues with confrontation and OVI enforcement. Although Management recognized these issues, she did not receive counseling and training like Unit 1302.

The infraction is that Grievant evaded her duties by not responding by the most direct route to a serious call. Unlike the failure to respond to the deer removal or failure to respond to a traffic crash, failure to respond to a suspected drunk driver is a public safety issue. A felony may also be in progress depending on the prior offense level of the suspected driver. The presumption is that while under the influence, one's ability to drive is impaired thus resulting in an increased risk of accident. It is the responsibility of the State Highway Patrol to regulate traffic to achieve safe, lawful, and efficient use of the highway transportation system. Failure to respond to an OVI is serious.

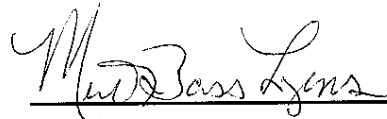
Giving appropriate weight to all relevant factors, the Arbitrator find the ten-day suspension of the Grievant was excessive as punishment as to be unreasonable, and contrary to Article 19.05 of the 2006-2009 Collective Bargaining Agreement.

In summary, the evidence persuades the Arbitrator that the Grievant violated Work Rule 4501:2-6-02(B)(1)(5) on August 15, 2007. Management did not follow progressive discipline. The Arbitrator sustains Grievance No. 15-03-071219-0185-04-01 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. 15-03-071219-0185-04-01 in part. The ten-day suspension is hereby modified to a five-day suspension. Grievant is awarded five-day back pay and commensurate benefits.

Dated: February 27, 2009

A handwritten signature in cursive script, reading "Meeta Bass Lyons", is written over a horizontal line.

Meeta Bass Lyons, Arbitrator
Steubenville, Ohio