

IN THE MATTER OF THE ARBITRATION BETWEEN

GRIEVANCE NO.: 15-03-20081120-0170-04-01

Ohio State Trooper Association

GRIEVANT: Christopher Ausse

AND

The State of Ohio
Ohio State Highway Patrol

OPINION AND AWARD

ARBITRATOR: Meeta Bass Lyons

AWARD DATE: January 11, 2010

APPEARANCES FOR THE PARTIES

Management:
Aimee Szczerbacki, Employer Advocate
Lt. Kevin D. Miller, Ohio State Highway Patrol

UNION:
Elaine Silveira, Ohio State Trooper Association, Union Advocate
Wayne McGlone, Chief Steward
Grievant: Patrick A. Townsend

PROCEDURAL HISTORY

Ohio State Highway Patrol is hereinafter referred to as "Employer". Ohio State Trooper Association, OSTA, is hereinafter referred to as "Union". Christopher Ausse is hereinafter referred to as "Grievant".

Grievance No. 15-03-20081120-0170-04-01 was submitted by the Union to Employer in writing on November 20, 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 Employer, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on January 5, 2010 at the Office of Collective Bargaining, Columbus, Ohio. 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 January 5, 2010.

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: Was the Grievant disciplined 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(s) (with appropriate notation in employee's file);
2. One or more Written Reprimand(s);
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.

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

The grievance in the present case involves three separate administrative investigations which resulted in a ten (10) day suspension for alleged violations of work rules 4501:2-6-02(B)(1) and (5) Performance of Duty. The first administrative investigation was initiated as a result of a complaint from the mother of a seventeen-year-old child with a learning disability. On April 22, 2008 Grievant was dispatched to the scene of two-car injury accident. Upon his arrival, Grievant questioned why the mother was completing the witness statement on behalf of her son. The mother responded that the son had a learning disability, and the other trooper who arrived first on the scene gave her permission. It is disputed by the mother that she defined the learning disability of her son to the Grievant as slow or retarded. She informed Sergeant Cross when Grievant asked her why she was writing the statement she replied that her son was mentally handicapped. Grievant then asked the question "Should he be driving?" The mother phrased the question as "And he is driving a car?" The mother felt that the remark was unprofessional and made in a condescending manner. There were no audio or video recordings. The other trooper did not hear the conversations between Grievant and the mother. The mother also stated that Grievant was also rude to the firemen on the scene. The assistant fire chief did not recall any of his staff mentioning any negative experiences with any troopers at the crash scene. The investigative officer testified that he was unable to determine if Grievant was rude and unprofessional.

The second administrative investigation arose from the manner in which Grievant handled a two-car non-injury accident. On May 7, 2008 Grievant was dispatched to the scene of a traffic crash. Upon his arrival Grievant gathered preliminary information about the drivers. Grievant learned that the at-fault driver was driving under suspension. Neither driver wanted to wait for a crash report to be completed. The parties exchanged insurance information, and verified coverage on the scene. The other driver was released with instructions to contact Grievant within forty-eight hours if

a crash report was needed. The at-fault driver later began exhibiting signs of impairment. Upon search of her vehicle, a prescription pill bottle was found with over 20 pills missing. In grabbing for the container, Grievant pricked his finger and drew blood. He contacted a squad to transport the at-fault driver, and then drove himself to the hospital for treatment of his injury. Grievant did not issue any traffic citations at the scene. At the hospital Sergeant Midkiff was directed to prepare the crash report and take other appropriate enforcement action.

The third administrative investigation arose from the failure of Grievant to attend a suppression hearing at municipal court. Grievant was subpoenaed to appear at Oberlin Municipal Court on June 19, 2008 at 11:15 pm. Defendant received the subpoena, and failed to appear. Grievant offered no excuse. He forgot about the court date and signed up for a special detail. On the date of the hearing the administrative assistant contacted the post about the whereabouts of Grievant at 11:30 am. Sergeant Cross told the caller that he would locate Grievant and return her call. Grievant was surprised to learn of the hearing. He had the subpoenas to only Rocky River and Lorraine in his vehicle. Grievant and Sergeant agreed that the Sergeant would tell the assistant he would be en route; it would take him approximately 30 to 45 minutes to arrive at the courthouse. The administrative assistant recontacted the post at 11:44 am, and stated to hold off sending Grievant because the police officer did not appear as well. The Sergeant advised Grievant accordingly. The administrative assistant called back at 12:19 pm and informed the Sergeant that the prosecutor dismissed the case and would be sending a letter. The letter detailed the frustrations of the prosecutor, and his request that he would have prompt attendance by the post in the future.

Grievant was charged with violation of work rule 4501:2-6-02(B)(1) and 4501:2-6-02(B)(5) Performance of Duty. The Union filed its grievance on November 20, 2008 alleging a violation of Article 19.01 Standard and 19.05. The grievance was not resolved within the procedure established by

the collective bargaining agreement, and was properly advanced to arbitration.

POSITIONS OF THE PARTIES

EMPLOYER

Employer contends that Grievant carried out his duties at the crash scene in a rude and unprofessional manner. Grievant responded rudely to the mother of a learning disabled driver when he asked whether her son should be driving, and said behavior constitutes a violation of work rule 4501:2-6-02(B)(1) and (5).

Employer contends that Grievant failed to complete a traffic crash report as required by Policy Number OSP 200.01 Traffic Crash Investigating and Reporting and take appropriate enforcement techniques. Under this policy, a Trooper is required to complete a traffic crash report when the crash involves minor property damage and the facts are uncontested or evident. Instead of following the policy, Grievant allowed the drivers to decide that they did not want a crash report. Grievant failed to issue a citation to the driver when he learned that the at-fault driver was under suspension. Grievant failed to issue a citation when it was discovered that the at-fault driver was impaired and had taken an overdose of prescription medication. Grievant was inefficient in carrying out his duties at the crash scene, and said behavior constitutes a violation of work rules 4501:2-6-02(B)(1) and (5).

Employer contends that Grievant failed to appear at the Oberlin Municipal Court to testify in a case for which he had been subpoenaed resulting in a dismissal of an OMVI case. Said behavior constitutes a violation of work rules 4501:2-6-02(B)(1) and (5).

Employer contends that the ten (10) day suspension was a progression of discipline following a five-day suspension.

Employer requests the Arbitrator to deny Grievance No. 15-03-20081120-0170-04-01.

UNION

Union contends that there was no just cause for discipline for the first administrative investigation, the citizen's complaint of rudeness. "Should he be driving?" is a standard question that Grievant asks in responding to crash scenes. The question was not meant to demean the character of the learning disabled driver but rather to gain information of the cause of the accident. The incident was not recorded. There was no corroboration that Grievant was rude by the firemen who were at the scene. The citizen's statements and perception of the tone of the officer was colored by her interest in the matter. There was insufficient evidence to substantiate an allegation of rudeness.

Union contends that there was no just cause for discipline for the second administrative investigation, the two-car non-injury accident. Upon arrival to the crash scene, Grievant did not notice any impairment of the drivers. The drivers had exchange information and verified insurance coverage through their mutual carrier at the crash scene. The drivers did not want to wait at the scene for the completion of the crash report. Grievant advised the drivers if they later discovered that they needed the report to contact him. After the first driver left the scene, Grievant began to notice impairments of the at-fault driver, and determined that she was impaired at that time. Grievant was never directed to complete a crash report. The Sergeant was assigned to complete the crash report while Grievant was at the hospital. Grievant was denied the opportunity to complete the report or issue citations, and should not be disciplined.

Union admits that Grievant failed to appear for a court hearing in a case for which he had been subpoenaed. Grievant simply forgot about the court case. However, when he was notified of the hearing, Grievant responded that he would be there in thirty minutes and was making an effort to appear but was told by his Sergeant that he was no longer needed. If a violation is found, the ten (10) day suspension is not commensurate with the offense when the Grievant could have made himself available.

Union contends that personality conflicts at the post attributed to the issuance of unwarranted discipline.

Union requests the Arbitrator to grant Grievance No. 15-03-20081120-0170-04-01, be paid back all lost wages, the charges be removed from his department record, and otherwise be made whole.

DISCUSSION

Grievant is charged with a violation of work rule 4501:2-6-02(B)(1) and (5), which provides in pertinent part that "a member shall perform his duties in a professional, courteous manner", and "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". It is alleged that Grievant responded rudely to the mother of a learning disabled driver when he asked whether her son should be driving.

"Just cause" is a term of art in collective bargaining agreements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he was disciplined. The Employer has the burden of proving that the conduct of an employee violated certain work rules, directives or policy. There was insufficient evidence to substantiate an allegation that Grievant performed his duties in an unprofessional, discourteous manner. The investigative officer in the first administrative investigation was unable to determine if Grievant was rude and unprofessional. The investigative officer was in the best position to assess the credibility of Grievant and the mother. Only the grievant testified at the arbitration hearing. There was no video or audio recording to assess the credibility of the mother. The mere question, "Should he be driving" in and of itself is not offensive? As Grievant explained a driver license is issued and renewed after a certain number of years. Circumstances may change in the interim that affects one's ability to drive.

In summary, the Employer did not satisfy its burden of proving that the Grievant acted in an unprofessional and discourteous manner. There is no just cause to discipline Grievant for the first administrative investigation.

Ohio State Highway Patrol Policy Number: OSP-200.01(B) (1) "Report-Only Scenarios provides that "a traffic crash report usually involves the completion of the OH-1. The directive is to "complete a traffic crash "report" when the crash involves very minor property damage (under \$400) and facts surrounding the crash are not contested or are evident to officer and involved parties..." The policy further provides "An OH-1 *will be completed* when a Division officer has personal knowledge of property damage and/or injury caused by a motor vehicle crash on any road or highway outside of municipal corporations." (Emphasis Added) Grievant read and reviewed OSP 200.01- Traffic Crash Investigation and Reporting on February 20, 2006, October 14, 2006, December 28, 2007 and July 29, 2008.

Grievant testified that damages were negligible, consisting of a scrape to the paint of the bumpers. Upon his arrival to the scene, the drivers gave conflicting statement on the manner in which the accident occurred. The one driver reported she was "travelling on Grafton and Fuller when my car was hit from behind by Sherry". The other driver reported that the woman in front of me slammed on her breaks (instead of slowing down). I then tapped the back of her car." It was evident that that the at-fault driver hit the other driver from behind. Photocopies of the pictures of the vehicles introduced at the arbitration hearing were of poor quality. The damages appear to be less than \$400.00. In accordance with policy OSP-200.01 (B)(1) the crash report should have been completed.

The policy does not provide a time frame on when the report must be completed. Union argues that Grievant could have completed the crash report after his release from the hospital but the Sergeant directed another trooper to complete the crash report. But, Grievant testified that he had no intent on completing the report unless requested by one of the drivers within forty eight (48) hours. This is an evasion of his duty, and violates work rule

4501:2-6-02(B)(1). However the Lieutenant admitted that although it his expectation that crash reports should be done on the scene, other troopers on this post do not timely complete crash reports, and like Grievant, may hold in abeyance the completion of the crash report until requested by one of the drivers without discipline. There should not be arbitrary application of the rule at this post, therefore, there is no just cause to discipline.

Grievant did not issue a citation. Union argues that the contract does not require him to issue a citation. Management concedes that it is discretionary to issue the citation. Consequently Grievant cannot be disciplined unless there is a demonstration of an abuse of discretion. There was no evidence that Grievant was going to allow the at-fault driver to drive the vehicle home under suspension. The driver was not impaired at the time of the arrival of Grievant to the crash scene, but her condition continued to decline. The traffic crash witness statement of Miller does not indicate any observation by her of impairments of the at-fault driver. Sergeant Midkiff first requested the medical records from the hospital. Then the Sergeant contacted the prosecutor on whether charges should be filed for operating a motor vehicle while under the influence. The prosecutor advised him after that "if the drug was prescribed to her and she was taking the recommended dosage not to take any enforcement action in regards to operating a motor vehicle while under the influence". The Sergeant recontacted the at-fault driver who stated that the medication she had taken was not prescribed to her and was given to her by a friend. Sergeant Midkiff subsequently filed the charges. All of this information was unknown to Grievant at the crash site. As the events transpired, Grievant and the at-fault driver were at the hospital for treatment. The matter was assigned to another trooper. Once assigned to the other trooper Grievant was no longer in the position to issue a citation. There was insufficient evidence as to an abuse of discretion.

In summary, there is no just cause to discipline Grievant for the second administrative investigation.

Grievant admits that he received the subpoena and failed to appear at the Court hearing as alleged in third administrative investigation. The prosecutor dismissed the case without prejudice to the State's right to refile the case because both Grievant and the police officer failed to appear at the suppression hearing. Said conduct does constitute a neglect of duty, and is a violation of work rule 4501:2-6-02(B)(1) and Work Rule 4501:2-6-02(B)(5).

There must be a reasonable relationship between an employee's misconduct and the punishment imposed. Just cause requires that the determination of whether the Grievant's conduct warranted a ten (10) day suspension. 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. Further, the parties to a collective bargaining agreement have agreed upon specific limitations on the employer's power to determine appropriate discipline, just cause requires that the employer abide by those limitations. 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 failed to appear under a subpoena. A bench warrant could have been issued but was not. The prosecutor elected to instead place a courtesy call to ascertain the whereabouts of Grievant. Grievant was willing to travel to court but was instructed to wait by the prosecutor because the other police officer had failed to appear for the second time. The prosecutor on his own initiative requested the case be dismissed without prejudice, which means the case can be refiled by the prosecutor. The prosecutor

vented his frustration in his faxed letter to the post to seek prompt attendance in the future. The lack of appearance of Grievant contributed to the dismissal of the case. The lack of appearance reflects poorly on the reputation of the post as evidenced the letter from the prosecutor.

Grievant missed the hearing date because he misplaced the subpoena, which he keeps in his vehicle. He had the subpoena for Rocky River and Lorraine, but did not have the subpoena for Oberlin in his possession. If the goal under the Contract is to truly modify the unacceptable behavior or improve the performance, there is a need to instruct Grievant on time management, scheduling and other organizational skills. However, his department record contains a five day suspension for conduct unbecoming an officer/discredit to division, three day fine for conduct unbecoming an officer/discredit to division, one day fine for discourtesy, written reprimand for conduct unbecoming an officer/discredit to division. These past disciplines relate to the manner in which Grievant interacts with the public and his coworkers.

Grievant has been working as a trooper since June 1, 1999 approximately ten and half years. Since the filing of this grievance, Grievant has transferred to another post. While his performance evaluation at Post 47 indicates a rating level of meets or partially meets with an overall rating of unsatisfactory. His performance evaluation at Post 52 indicates a rating of meets with some exceeds with an overall rating of satisfactory.

Giving appropriate weight to all relevant factors, the Arbitrator finds that the Grievant violated Work Rule 4501:2-6-02(B)(1) and (5) on August 2, 2008. The ten-day suspension of the Grievant was excessive as punishment as to be unreasonable, and contrary to Article 19.01 and 19.05 of the 2006-2009 Collective Bargaining Agreement. The Arbitrator therefore sustains the Grievance no. 15-03-20081120-0170-04-01, in part.

AWARD

Having heard and read and carefully reviewed the evidence and argumentative materials in this case and in light of the above Discussion, Grievance No. 15-03-20081120-0170-04-01 is sustained as to the first administrative investigation complaint from the mother of a seventeen-year-old child with a learning disability, and second administrative investigation, two-car non-injury accident. There was no just cause to discipline. The grievance is sustained in part for the third administrative investigation, failure to appear under subpoena. There was just cause to discipline Grievant for failure to appear at the suppression hearing. The ten-day suspension is hereby modified to a three-day suspension. Grievant is to be made whole including being given back pay and benefits for the period of the suspension. Grievance should be afforded training on time management, scheduling and other organizational skills.

Dated: January 11, 2010

/s/ Meeta Bass Lyons

Meeta Bass Lyons, Arbitrator
Steubenville, Ohio