

IN THE MATTER OF ARBITRATION BETWEEN

OHIO STATE TROOPERS ASSOCIATION Unit 1 and 15  
Employee Organization

And

STATE OF OHIO, DEPARTMENT OF PUBLIC SAFETY  
Employer

GRIEVANT Kyla Walker

Case No.

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UMPIRE'S DECISION AND AWARD

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Appearances:

For the Employee Organization:  
Elaine Silveira

For the Employer:  
Lt. Kevin Miller

Sandra Mendel Furman, J.D. 0010057  
1119 South Cassingham Road  
Columbus, Oh 43209

## **INTRODUCTION**

This matter was heard before the undersigned on March 2, 2010 in Columbus, Ohio at the Office of Collective Bargaining. Grievant and Lydia Wagner appeared as union witnesses. Also present were OSTA President Larry Phillips and Staff Representative Dave Riley. Elaine Silveira represented Grievant and the Union at the hearing.

The State's witnesses were Sgt David Dillon and Dispatcher Brent Sigler. Also present were Sgt. Anne Ralston from central office of the Patrol and Marissa Harley from the Office of Collective Bargaining. Lt. Kevin D. Miller represented the Patrol.

The contract, grievance trail and disciplinary notices and pre disciplinary papers were introduced and accepted as Joint Exhibits 1-3. The Union introduced an article relating to the challenges of overtime and shift work for safety forces as Union Ex. 1.

There were no procedural arguments presented.

A request for separation of witnesses was granted. Each side was given the opportunity to call witnesses and cross-examine witnesses and present relevant materials in support of their position. All witnesses were sworn. Post hearing arguments were made at the close of the hearing.

## **ISSUE:**

Was the Grievant disciplined for just cause? If not what shall the remedy be?

## **APPLICABLE CONTRACT SECTION:**

Article 19.01

## **STATEMENT OF FACTS:**

Grievant is employed as a Dispatcher at the Bucyrus post. At the time of the discipline she had five years service. Her normal hours of work were 11pm to 7am. Bucyrus is a relatively small post. It does not have much radio or telephone activity; this is particularly true on third shift.

The third shift is staffed with three personnel at the Bucyrus Dispatch Center: Sgt. Dillon, Dispatcher Brent Sigler and Grievant. Grievant was responsible for telephone coverage; Sigler was monitoring the CAD.

On October 16, 2008 Grievant was nodding/asleep during her shift. Dispatcher Sigler observed Walker's head on the desk. As a practical joke he took toner from the copier machine, dampened a paper towel and put toner on the tip of her nose. Grievant did not make any indication that she was aware of this action. He also pitched the paper towel into the trash and that did not bestir Grievant. Dillon walked into the room and observed Grievant for 10-15 seconds. Walker did not notice that he was present. He dropped some papers on her desk. Dillon stated that she reacted to the noise of the papers being dropped. According to Sigler it wasn't until he used his feet to roll her chair that Grievant reacted. When she was alert she made a comment about needing to use the restroom.

The matter was referred to administrative investigation. (AI) Grievant admitted that she was nodding off. She stated that she was going through a challenging divorce and was on medicine that made her sleepy. After the investigation

Grievant was charged with violation of work rule DPS 501.01-C-10 (b) Neglect of Duty. Grievant received a five day suspension. Her notice of deportment contained the following:

One day fine AI 20080593 asleep on duty

Written reprimand AI 20080479 sleeping on duty

Three day fine AI 20080917 failed to run W-W check

Verbal reprimand AI 20078660 tardy 11 minutes.

### **EMPLOYER POSITION**

Grievant is in a safety sensitive position. She is the trooper's lifeline. The public depends upon her to be alert and ready to receive calls and transmit information. The OSHP bulletin is not a defense to sleeping on the job. It is a stated awareness of the problem but does not excuse sleeping. Although third shift dozing is not unheard of, it is disciplined whenever the Patrol is aware of its

occurrence. Grievant had been previously disciplined for this same offense. A five day suspension is progressive and is not arbitrary capricious or unreasonable.

### **UNION POSITION**

The Union argues that Grievant was under family related stress and was reacting to medicine that had drowsiness as a side effect. The Union points to the fact that it is not unusual for third shift employees to nod off or fall asleep. It highlighted the testimony of Dillon and Wagner- two supervisors who themselves admitted to sleeping on the job. Grievant should be excused as she did not miss or fail to perform any critical job duties. In the alternative, because her last suspension for three days was unrelated to sleeping, she should receive a three day suspension, not a five day suspension.

### **DECISION AND AWARD**

Grievant had notice of the work rule. She had been counseled and received recent prior discipline for this same offense. The Union pointed out that Grievant specifically denied sleeping on all prior occasions. The arbitrator noted that the prior discipline was of record and not grieved. It is further noted that the abeyance letter says nothing about Grievant maintaining her stance that she was not asleep on the occasion prompting the one day fine. The arbitrator therefore relies upon the record not Grievant's denials.

The Patrol conducted a fair and impartial investigation.

The arbitrator read and considered the article presented by the Union. It is noteworthy that the Patrol distributed the article but no one could misconstrue it as a free pass to nap.

The arbitrator is well aware that third shift is a ripe time for employees to struggle for alertness. It is human and not shocking that Grievant fell into a nodding off status. It is also likely that the medicine taken at that time may have had a side effect of drowsiness.

Even though others have fallen asleep in the job- including both Sgt Dillon and Dispatcher Manager Wagner while acting as Dispatcher- this is not a disparate treatment situation. stated that she was not caught by management

and that she knew that she could be punished if she had been caught. Dillon was "caught" by Grievant but he self reported and received counseling. As dispatcher Sigler put it, he expects punishment if he falls asleep during his shift. He has vigilantly fought against the natural tendency to nod off or sleep. Dillon suggested exercises to Grievant when he counseled her on past occasions.

The arbitrator noted that Grievant did not put her employer on notice that she was taking a medicine that may cause drowsiness. This would have been prudent and a *possible* mitigating factor. It is not in this case.

There is no safe harbor for the Union to argue that it is expected or acceptable for an employee to sleep on shift. It matters not that there were no critical calls missed or delayed responses. This is a safety forces operation. It is beyond argument that alertness and responsiveness are demanded. Third shift work cannot be seen as an excuse to sleep because it is challenging and against the body's natural rhythms. No one is paid to sleep on the job at the Patrol. With full recognition of the challenges of third shift work at a slow and quiet location it is still necessary and required that a dispatcher stay fully awake.

It is the Umpire's conclusion that a five day suspension is not arbitrary capricious or unreasonable. The Patrol was measured in its response to Grievant's repeated failures to stay alert. It gave her a verbal warning, counseling, one day fine<sup>1</sup> and three day suspension before it took the current action. This was the third occurrence within a six month period.

#### **AWARD**

The grievance is denied.



Sandra Mendel Furman, Umpire

Issued in Columbus, Ohio on March 8, 2010

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<sup>1</sup> The one day fine was held in abeyance pursuant to a settlement agreement dated 8-7-08. Jt Ex. 3 pg.6. Due to the current infraction, the abeyance letter's terms were voided. Director Guzman imposed the fine in his notice of discipline dated January 16, 2009.