

IN THE MATTER OF THE ARBITRATION BETWEEN

GRIEVANCE NO.: 15-03-20090302-0030-04-001

Ohio State Trooper Association

GRIEVANT: Patrick Townsend

AND

The State of Ohio
Ohio State Highway Patrol

OPINION AND AWARD

ARBITRATOR: Meeta Bass Lyons

AWARD DATE: April 19, 2010

APPEARANCES FOR THE PARTIES

Employer:

Marissa Hartley, Office of Collective Bargaining
Employer Advocate
Sgt. Anne Ralston, Ohio State Highway Patrol

UNION:

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

PROCEDURAL HISTORY

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

Grievance No. 15-03-20090302-0030-04-001 was submitted by the Union to Employer in writing on February 23, 2009 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 April 19, 2010 at the Office of the Ohio State Troopers Association, Columbus, Ohio. During the course of the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witness, and oral argument. The hearing was closed on April 19, 2010.

The parties stipulated that the grievance and arbitration were properly before the Arbitrator, and submitted joint stipulations of fact.

The parties stipulated that the issues to be resolved in the instant arbitration to be: Was the Grievant's 3-day fine 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) (5) Performance of Duty

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 parties submitted the following joint stipulations of fact: "Trooper Patrick Townsend has been employed by the Ohio State Highway Patrol since February 23, 2000. Trooper Townsend's department record contains a written reprimand. Trooper Townsend voluntarily changed his work schedule for Friday, December 26, 2008 from 2:45p.m -10:45p.m to 6:45 a.m – 2:45 p.m. On Friday, December 26, 2008, Trooper Townsend did not report for the start of his shift at 6:45a.m because he forgot he changed his shift. Trooper Townsend did not become aware that he was late for his shift until Sgt. Bocsy called him the morning of December 26, 2008. Trooper Townsend arrived for work on December 26, 2008 at 7:28a.m."

Grievant was charged with violation of work rule 4501:2-6-02(B)(5) Performance of Duty. The Union filed its grievance on February 23, 2009 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 failed to report to work at the start of his shift because he forgot that he voluntarily changed his work schedule. Grievant misread or did not read his schedule. This conduct does not constitute the traditional reasons for tardiness but rather constitutes inefficiency of duty, the failure to check duty assignment at the end of shift, in violation of work rule 4501:2-6-02(B)(5).

Employer contends that at the time that the discipline was imposed Grievant had a one-day suspension on his record which was subsequently reduced to a written reprimand. Employer concedes that a one-day fine is appropriate to maintain progression of discipline.

Employer requests the Arbitrator to deny Grievance No. 15-03-20090302-0030-04-01 on violation of the work rule but modify the discipline imposed to a one-day fine.

UNION

Union contends that Grievant should have been charged with tardiness instead of performance of duty. Grievant was forty-three (43) minutes late for work on December 26, 2008. Tardiness has a separate discipline track, and follows a specific progression. Grievant had no prior tardiness disciplines on his department record, and as a first offense for tardiness, Grievant should have received a verbal reprimand.

Union contends that there was no just cause for discipline for performance of duty. Tardiness means to be late, behind time and not on time. The conduct of Grievant is no different than the conduct of an employee who provides the traditional reasons for tardiness. Grievant was forty-three (43) minutes late for work on December 26, 2008. The application of the performance work rule in this instance is not reasonable, arbitrary and capricious.

Union requests the Arbitrator to grant Grievance No. 15-03-20090302-0030-04-01, in part, that the discipline be upheld under the attendance grid and the discipline be reduced to a verbal reprimand, Grievant paid back all lost wages, and otherwise be made whole. In the event that the offense is found to a work rule (performance) violation, then discipline should be at a maximum a one-day fine.

DISCUSSION

In order to impose discipline under the just cause standard, the employer must demonstrate that a work rule has been violated. Grievant is charged with a violation of work rule 4501:2-6-02(B) (5), which provides in pertinent part that "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 the responsibility of every officer to check the duty assignment at the end of shift or before the officer goes on leave to determine when the next time the officer is to return to duty. Grievant failed to report to work at the start of his shift because he forgot he had voluntarily changed his schedule.

It is well established that an employer has the unilateral right to establish work rules. However, when an employee is disciplined for violation of a work rule, the reasonableness of the rule is drawn into question. Reasonableness of a work rule means whether it is reasonably related to a legitimate management objective, and communicated to the employees. The reasonable work rule promotes the business purpose of maintaining orderly, efficient, and safe operations of the employer. Regular and punctual attendance is a legitimate business concern. Irregular attendance affects staffing and ability to operate the organization efficiently. Irregular attendance affects the assigned work duties of other employees and the morale of coworkers. Irregular attendance warrants the conclusion that an employee is not doing his job for the duration of the tardiness. The employer has a right to expect employees to be present and ready to perform their duties, and to implement work rules to promote regular and punctual attendance.

Traditionally the Employer has distinguished tardiness arising from a misread schedule from tardiness arising from the alarm clock that did not ring, the babysitter who is late that causes a ripple effect for the employee, traffic congestion, and other run of the mill reasons for tardiness. The Employer has treated tardiness arising from a misread schedule as a performance of duty issue, and has treated tardiness arising from regular excuses tardiness on the separate track. The Employer has classified the two offenses differently. The Employer considers the misread schedule more serious of an offense because of the duty to check duty assignment at the end of shift or leave to know when he returns to duty. The classification of the conduct as separate offenses is also reasonable, and within the discretion of management.

Notwithstanding, the application of work rules must be reasonable not only in their content but also in the application. It is not disputed that the rule in question is a long term rule within the organization and there was no evidence of disparate treatment.

The Union argues that the conduct of Grievant does not warrant a one day fine. The Employer has conceded to the modification from a three day fine. First time offense for tardiness on the attendance grid is a verbal reprimand.

If an arbitrator is persuaded that the discipline imposed was within the bounds of reasonableness, she may not impose a lesser penalty. This is true even if the arbitrator would likely have imposed a different penalty in the first instance. On the other hand, if an arbitrator is persuaded the punishment imposed by management was beyond the bounds of reasonableness, she must conclude that the employer exceeded its managerial prerogatives and impose a reduced penalty.

In reviewing the discipline imposed on an employee, an arbitrator must consider and weigh all relevant factors including the employee's seniority, prior work record and the seriousness of the misconduct. Grievant has been employed by the Ohio State Highway Patrol since February 23, 2000. The department record of Grievant contains a written reprimand. There is a legitimate distinction in the classification of the offense. But for the phone call by the representative of the employer, it can be inferred that Grievant would have come to work in accordance with his regular schedule. The one-day fine is within the bounds of reasonableness.

In summary, the Employer has satisfied its burden of proving that the Grievant failed to report work at the start of his shift due to not knowing his work schedule. There is just cause to discipline Grievant for the inefficiency of duty.

Giving appropriate weight to all relevant factors, the Arbitrator finds that the Grievant violated Work Rule 4501:2-6-02(B)(5) on December 26, 2008. The three-day fine of the Grievant was contrary the principles of progressive discipline as agreed to Article 19.01 and 19.05 of the 2006-2009 Collective Bargaining Agreement once the prior discipline was reduced to a written reprimand. The Arbitrator therefore sustains the Grievance no. 15-03-20090302-0030-04-01, 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. 15-03-20090302-0030-04-01, is sustained in part. There was just cause to discipline Grievant due to the work rule and as a performance violation. The three-day fine is hereby modified to a one-day fine. Grievant is to be made whole including being given back pay for the period of the fine.

Dated: April 19, 2010

____/s/ Meeta Bass Lyons_____

Meeta Bass Lyons, Arbitrator
Steubenville, Ohio