

IN THE MATTER OF THE ARBITRATION BETWEEN

GRIEVANCE NO.: 15-03-20091208-0163-04-01

Ohio State Trooper Association

GRIEVANT: Bertha L. Toton

AND

The State of Ohio
Ohio State Highway Patrol

OPINION AND AWARD

ARBITRATOR: Meeta Bass Lyons

AWARD DATE: October 25, 2010

APPEARANCES FOR THE PARTIES

Employer:

Sergeant Anne R. Ralston, Ohio State Highway Patrol

Employer Advocate

Lieutenant Kevin D. Miller, Second Chair

Attorney Aimee Szczerbacki, Office of Collective Bargaining

UNION:

Attorney Elaine Silveira, Ohio State Trooper Association

Union Advocate

David Wiley, OSTA Representative

Grievant: Bertha L. Toton

PROCEDURAL HISTORY

Ohio State Highway Patrol is hereinafter referred to as "Employer". Ohio State Trooper Association, OSTA, is hereinafter referred to as "Union". Bertha L. Toton is hereinafter referred to as "Grievant".

Grievance No. 15-03-20091208-0163-04-01 was submitted by the Union to Employer in writing on December 11, 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 October 18, 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 October 18, 2010.

The parties stipulated that the grievance and arbitration were properly before the Arbitrator, and submitted joint documents consisting of Contract, Grievance Trail#0163, and Discipline Package.

The parties stipulated that the issues to be resolved in the instant arbitration to be: Was the Grievant issued a 1-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(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(Y) (2)

Compliance to Orders

A member shall conform with, and abide by, all rules, regulations, orders, and directives established by the Superintendent for the operation and administration of the division.

Ohio State Highway Patrol, Policy Number: OSP-103.22 Audio/Video Monitoring and Recording, Storage, Handling, Release, and Destruction

(A)USE OF FIXED, MOBILE, and HANDHELD CAMERAS...(3) Monitor – Ensure the audio/video equipment is not deactivated until the recorded contact is completed.

(B)IN-CAR CAMERAS (1)Operational Use(a) It is expected that officers operating patrol vehicles equipped with functioning recording equipment record traffic stops, pursuits, and other public contacts occurring within the operating range of the camera.

(2) Officer Responsibility – Inspection, Maintenance, and Repair (d)

It is not necessary to take a vehicle out of service because of non-functional camera, but the in-car video system will not be used until repaired.

BACKGROUND

On August 6, 2009, Grievant was dispatched to a reckless operation call. Grievant observed the suspected driver travel left of center, and initiated a traffic stop. Grievant handled the stop as a medical issue rather than as impairment due to alcohol consumption. Upon the arrival and assistance of another trooper, the investigation turned toward alcohol. Grievant eventually arrested the driver for driving under influence. Grievant drove the suspect to the police station. While en route, Grievant turned off her audio/video equipment.

Employer conducted an administrative investigation concerning the inability of Grievant to detect the impaired driver. During the course of the investigation it was determined that Grievant turned off her on-person belt microphone and later turned off her in-car video prior to arriving at the police department contrary to patrol policy. Grievant acknowledged that she turned off the recording devices.

Grievant was charged with violation of work rule 4501:2-6-02(Y)(2) Compliance to Orders for violation of the policy regarding the use of audio/visual system in the patrol car. The Union filed its grievance on December 11, 2009 alleging a violation of Article 19.01 Standard. 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 violated Highway Patrol Policy regarding Audio/Video Monitoring. Grievant has a pattern of deficient behavior, and gave no explanation for the violation of the Audio/Video Monitoring Policy.

Employer contends that Grievant has received remedial and individualized training throughout her five-year service career. Her training record shows that Employer has sent Grievant to non-mandatory, developmental training including firearms proficiency, English grammar, remedial crash, time

management and ADAP. Grievant has been properly noticed and trained on the Audio/Visual Monitoring Policy.

Employer contends that Grievant has an extensive department record. She has received both reprimands and suspensions in the past. Excluding patrol car crashes and tardiness, Grievant has received 2 verbal reprimands, 3 written reprimands, 2-one day and 1- three day suspension. All of these disciplines were current on her department record at the time of the incident. Further, the Employer chose not to progress the discipline, and issued a less severe discipline, a one-day suspension. The one-day suspension is appropriate and commensurate with the infraction.

Employer requests the Arbitrator to deny Grievance No. 15-03-20091208-0163-04-01.

UNION

Union contends that the Audio/Video Monitoring Policy allows a patrol car with a nonfunctioning audio/video equipment to continue in operation. Recordation of every aspect of every stop is not crucial. No crucial evidence or information was missed as a result of Grievant turning off the equipment five minutes before her arrival at the police station. Therefore no just cause exists to discipline Grievant.

Union contends that although Employer provided training to Grievant on other aspects of her duties, the Employer failed to provide training on the proper use of audio/video equipment and the audio/video policy. Prior video review checklists indicate that the performance of this duty has been a nonissue for Grievant. Therefore the proper avenue to correct behavior is training, and not discipline.

Union contends that the progression of discipline is only a consideration if just cause exists. The prior discipline record of Grievant is not relevant because there was no just cause to discipline her in this instance.

Union requests the Arbitrator to grant Grievance No. 15-03-20091208-0163-04-01, and that Grievant be made whole.

DISCUSSION

In order to impose discipline under the just cause standard, Employer must demonstrate that a work rule has been violated. Grievant is charged with a violation of work rule 4501:2-6-02(Y) (2), which provides in pertinent part that "a member shall conform with, and abide by, all rules, regulations, orders, and directives established by the Superintendant for the operation and administration of the division." It is the responsibility of the officer to ensure the audio/video equipment is not deactivated until the recorded contact is completed. Grievant deactivated her audio/visual equipment five minutes before reaching the police station.

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. Sergeant Faunda stated that the Audio/Video Monitoring Policy aids in the collection of evidence and protects the division and officer from liability and allegations made by suspects and/or the public.

As an employee of the Ohio Highway Patrol, a trooper is required to stay up-to-date on agency's policy. In order to maintain proficiency of staff, Employer has established a policy and procedure website. Policies are assigned and reviewed by troopers on line. Employer introduced Exhibit M-6, ODPS- Policy and Procedure Management. Exhibit M indicates that Grievant read the Audio/Video Monitoring Policy on October 19, 2006 and again on July 11, 2007. Employer introduced M-7, Roll Call Training Record, which further indicates Grievant received training on custodial and non-custodial transportation on October 6, 2008, and was quizzed on said subject matter. Grievant received training on the audio/video monitoring on November 17, 2008 and was quizzed on said subject matter. Grievant

had notice and training on the Audio/Video Monitoring Policy. The Audio/Video Monitoring Policy is reasonable.

The application of work rules must be reasonable not only in their content but also in their application. There was no evidence of disparate treatment.

Union submits the Umpire Decision in Grievance No. 15-03-20091123-0156-04-01, to support its position. In said grievance, grievant failed to turn on her belt microphone when she approached a vehicle for a traffic stop. The arbitrator commented that "standing in isolation the failure to activate the body microphone would likely merit no more than counseling or a verbal warning." This case is distinguishable from the aforementioned case because Grievant deactivated her audio/video equipment during a DUI transport. This Arbitrator can accept that certain reactions are performed out of habit and routine. However, habit is not a reasonable explanation in light of the audio/video policy that requires monitoring until the recorded contact is completed. To have activated the equipment indicates that Grievant is well aware of the policy. A review of Exhibit U-1, Inter-office Communications further demonstrates Grievant is aware of the policy.

Union argues that no crucial evidence was lost. This is mere speculation; that nothing came forward does not mean nothing happened. The video depicts a talkative suspect being transported to the police station even after she was mirandized. It cannot be determined what information was lost because the audio/video was deactivated contrary to policy.

In summary, the evidence persuades the Arbitrator that Grievant violated Work Rule 4501:2-6-02(Y) (2) Compliance to Orders, when she deactivated her audio/video equipment. The Arbitrator concludes discipline of the Grievant was for just cause. Grievant has an extensive disciplinary record, and Employer, in consideration of the nature of violation did not progress, but imposed a less severe discipline. A one day suspension was not so excessive a punishment as to be beyond the Employer's managerial

prerogatives. The Arbitrator must therefore deny Grievance no. 15-03-20091208-0163-04-01.

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. 15-03-20091208-0163-04-01, is denied.

Dated: October 25, 2010

/S/ Meeta Bass Lyons _____

Meeta Bass Lyons, Arbitrator
Steubenville, Ohio