

IN THE MATTER OF THE ARBITRATION BETWEEN

GRIEVANCE NO.: 15-03-20091124-158-04-01

Ohio State Trooper Association

GRIEVANT: Jeffrey A. Burroughs

AND

The State of Ohio
Ohio State Highway Patrol

OPINION AND AWARD

ARBITRATOR: Meeta Bass Lyons

AWARD DATE: October 26, 2010

APPEARANCES FOR THE PARTIES

Employer:

Lieutenant Kevin D. Miller, Ohio State Highway Patrol
Employer Advocate

Sergeant Anne R. Ralston, Second Chair

Aimee Szczerbacki, Office of Collective Bargaining

UNION:

Herschel Sigall, Ohio State Trooper Association
Union Advocate

Elaine Silveira, Second Chair

Wayne McGlone, OSTA Representative

Grievant: Jeffrey A. Burroughs

PROCEDURAL HISTORY

Ohio State Highway Patrol is hereinafter referred to as "Employer". Ohio State Trooper Association, OSTA, is hereinafter referred to as "Union". Jeffrey A. Burroughs is hereinafter referred to as "Grievant".

Grievance No. 15-03-20091124-158-04-01 was submitted by the Union to Employer in writing on November 30, 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, and other individualized exhibits.

The parties stipulated that the issues to be resolved in the instant arbitration to be: Was the Grievant issued a three-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(B)(1) Performance of Duty

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

On August 20, 2009, Grievant initiated a traffic stop. As a result of the stop, Grievant placed the driver of vehicle into custody; the driver had a passenger. Grievant called for assistance. At the scene, Grievant and fellow trooper agreed that she would transport the passenger to the sheriff's department to make transportation arrangements. The fellow trooper explained to the passenger that she needed her consent to conduct a search of her person and property for safety purposes before entering her patrol car. The passenger gave consent. Fellow trooper discovered a self-contained container; the trooper manipulated the container in such a manner that a marijuana blunt was exposed. The passenger is questioned by Grievant about the substance, amount and paraphernalia. Fellow trooper asked Grievant whether "you gonna take it, are you to take her for" and his response on the audio is disputed. Although Grievant stated that he said "ought to toss it", his response is understood by Grievant and passenger to mean toss it. This dialogue transpired in a matter of seconds. Grievant questioned the driver whether he too had contraband in his possession, and he negatively responded. Fellow trooper questioned Grievant whether or not he wanted her to do the case. Grievant stated that he would issue the citation, and the citation is subsequently issued to the passenger at the sheriff's department.

Grievant was charged with violation of work rule 4501:2-6-02(B)(1) Performance of Duty for failure to perform his duties in a professional manner. The Union filed its grievance on November 30, 2009 alleging a violation of Article 19.01 and 19.05 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 on the date of the incident Grievant failed to carry out his duties in a professional manner. Specifically, when a marijuana blunt was found in a search of the purse of a passenger in a traffic stop, Employer contends that Grievant told the assisting officer to "toss it". The passenger heard the instructions, and reiterated the directive. It is the position of the Employer that the statement to dispose of evidence is unprofessional and the discipline was proper and appropriate in these circumstances.

Employer contends that it is not the responsibility of Grievant to determine the admissibility of evidence, but for the judicial system. Evidence is evidence, and it is the responsibility of Grievant to preserve and not dispose of the same. Employer asserts that disposing of evidence is a crime. The behavior exhibited by Grievant is grossly unacceptable in its professional organization.

Employer maintains that the discipline is progressive. Grievant had two written reprimands and a one-day suspension on his department record. Adhering to the principle of progressive discipline, Employer issued a three-day suspension.

Employer requests the Arbitrator uphold the standards and expectations of the Division, and deny Grievance No. 15-03-20091124-158-04-01 in its entirety.

UNION

Union contends that Grievant did not direct his fellow trooper to dispose of evidence. Grievant, a thirteen year veteran with extensive training on drug identification and detection, evaluated the situation and subconsciously verbalized his analysis. In his opinion, there was a residual amount of contraband, the search was unconstitutional, the passenger gave consent to search only for weapons, and marijuana was located in a self-contained container. In his analysis, in light of the aforementioned considerations, a

charge would likely be dismissed. When Grievant knew that his statement was misinterpreted by fellow officer and passenger (within seconds), Grievant says, "no, hold on to it!" Grievant subsequently issued the citation. There is no just cause to discipline.

Union contends that if just cause is found, the discipline imposed is excessive. It is contemplated by the Collective Bargaining Agreement that the penalties can be repeated; it is not necessary to advance to the next step in progression. Within the life of the patrol, a three-day suspension does not represent a minor infraction in the discipline progression. The discipline must be commensurate with the offense. In consideration of his tenure, training and work record, the discipline should be reduced.

Union requests the Arbitrator grant Grievance No. 15-03-20091124-158-04-01, and that Grievant be credited with three vacation days and his department record be cleared.

DISCUSSION

There exists a factual dispute whether or not Grievant directed his fellow trooper to dispose of the marijuana blunt. Grievant testified that he said "ought to toss it." His fellow trooper testified that he said "toss it." Both officers had their video and audio equipments activated. Although the video of Grievant depicts the incident as it unfolds, the video of his fellow trooper provides better audio of the dialogue exchange between Grievant, his fellow trooper and the passenger. Exhibit M-2, Interoffice communication dated September 17, 2009 provides a timeline summary of the fellow trooper's video. Page 3 of the exhibit at 07:55:55 provides an incomplete response on the audio. The exhibits indicate that 07:55:55(Audio) Trooper Nemeth says "are you going to go ahead and take her for..."then you hear Trooper Burroughs say softly "toss it." Trooper Nemeth then says "No, I can't do that." The passenger then says "toss it, he said to toss it." Trooper Nemeth then states to the passenger" I can't do that." The timeline summary of this video does not include the following: The passenger then questioned Grievant "Didn't you say toss it?" Grievant responds, "Hold on to it?"

Grievant and the passenger understood his response to be "toss it." The video of Grievant depicts him walking away from the fellow trooper and passenger toward his patrol car. Uncertain on whether Grievant would issue the citation; his fellow trooper asks him on two occasions in the videos whether he wanted her to do the paperwork. Grievant informed her that he would issue the citation. Fellow trooper later reports the incident to her supervisor.

Grievant argues that the evidence was taken into custody, and the citation was issued. Grievant characterizes his statement as an utterance of his subconscious analysis of the time, effort and legal consequence of the discovery of the marijuana blunt, and nothing more. He never meant for his fellow trooper to dispose of the evidence. Unfortunately, some things are not meant to be spoken. It is not meant for a trooper to make this type of determination in the field. The residual amount of contraband is not an issue in the performance of his duties as a trooper. The law provides a charge for said amount, a 7M. The expectation from his employer is to secure the evidence, and then allow the judicial system to administer justice.

The evidence in this case supports a finding that Grievant directed his fellow trooper to dispose of the marijuana. Said conduct is unprofessional and has a direct correlation to his job duties. Said conduct is a violation of Work Rule 4501: 2-6-02(B)(1) Performance of Duty. The discipline is with just cause.

The next question is the appropriateness of the remedy. Employer maintained progression. Grievant is a thirteen year veteran of the Patrol. Grievant had two written reprimands (Negligence and on duty conduct/discredit to division) and a one-day suspension (failed to report to duty-misread schedule) on his department record at the time of the incident. A three-day suspension would be the next step in progression.

Notwithstanding the Collective Bargaining Agreement provides that "a disciplinary action shall be commensurate with the offense." Due to the nature of the trooper position, a high level of professionalism is vital to the

integrity of the Division. The Division must maintain its established trust and confidence with the judicial system. The fellow trooper met with Grievant following the stop; the purpose of the meeting was to discuss in her opinion his 'transgressions". She informed Grievant of her concerns about the media and the perception of their integrity if his directive was made known. Although no media was involved, his statement was heard and understood by the passenger to dispose of evidence. Word of mouth generates opinions on the professionalism of the position. The integrity of the Division depends on the reliability of the employees within the Division.

In summary, the evidence persuades the Arbitrator that Grievant violated Work Rule 4501:2-6-02(B) (1) Performance of Duty in his failure to maintain professionalism during the traffic stop. The Arbitrator concludes discipline of the Grievant was for just cause. Employer maintained progression in discipline, and the discipline imposed was commensurate to the offense. A three day suspension was not so excessive a punishment as to be beyond the Employer's managerial prerogatives. The Arbitrator must therefore deny Grievance no. 15-03-20091124-158-04-01.

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. 15-03-20091124-158-04-01, is denied.

Dated: October 26, 2010

/S/ Meeta Bass Lyons _____

Meeta Bass Lyons, Arbitrator
Steubenville, Ohio