OFFICE OF THE ARBITRATOR

November 4, 2010

In the Matter of the Arbitration Between:

OHIO STATE TROOPERS ASSOCIATION,	)	
	)	
And	)	OCB 15-03-20100820-129-04-01
	)	
THE STATE OF OHIO, DEPT. OF PUBLIC SAFETY, DIVISION OF HIGHWAY PATROL	)	Tracy A. Sims Discharge

APPEARANCES

For the Union:

Herschel M. Sigall, Esq.	Counsel
Elaine N. Silveira, Esq.	Asst. General Counsel
Paul David Riley	Union Representative
Tracy A. Sims	Grievant

For the Employer:

Kevin D. Miller	Lieutenant, Management Representative
Anne R. Ralston	Sergeant, 2nd Chair
Charles Linek III	Staff Lieutenant
Jessie R. Keyes	2nd Chair
James D. Lott	Sergeant
Lee A. Darden	Lieutenant, Post Commander

Arbitrator:

Virginia Wallace-Curry

INTRODUCTION

The instant arbitration arose as a result of a grievance filed on August 13, 2010, by the State Troopers Association (the "Union") on behalf of Tracy A. Sims (the "Grievant"), alleging that The Ohio Department of Public Safety, Division of Highway Patrol (the "Employer" or the "Division") did not have just cause to terminate his employment in accordance with the last chance agreement he had signed. When the parties were unable to resolve the matter, it was submitted to arbitration.

STATEMENT OF FACTS

At the time of his discharge, the Grievant was a trooper employed by the Ohio Highway Patrol for 17 years. He was assigned to the Chillicothe Patrol Post. On April 5, 2010, the Grievant was on patrol and checked a UPS truck on US 23 traveling in the opposite direction in excess of the posted speed limit. He stopped the vehicle which was driven by Ms. Yvonne Hall. Ms. Hall was in the back of the truck retrieving her license when the Grievant arrived at the passenger door of the truck.

The audio portion of the Grievant's patrol car video recorded the exchange between the Grievant and Ms. Hall. During the exchange, the Grievant told Hall she was speeding, and she agreed that she was running late. Not all of the recording is clear (indicated with ??), but a transcript of the event revealed, in part, the following:

G: "I'll tell you what Yvonne we're doin a tac squad this week and I can't give you a warning but I can cut you a deal."

H: Ok.

G: When I came up you were in the back of the truck, so I'm gonna say you didn't have your seatbelt on. Ok? Seatbelt is considered a non-moving violation it won't go against your license.

H: Ok.

G: I'm going to give you a warning for the speed.

H: ?? do they know it?

G: No no, it doesn't get reported or anything.

H: (laughter) cause I really had my seatbelt on.

G: The speed does, the speed does, you know?

G: ?? ?? just say you had it under your arm.

H: I only have the lap belt. (laughter)

G: You only have the lap belt? Say I didn't see it, all right? (laughter)

H: Without without the lap belt. (laughter)

G: Let me do this and I'll hurry up and get you on your way.

Later, the Chillicothe Post received a call from Hall. She related that she had been stopped by the Grievant for speeding. She claimed that he issued her a citation for not wearing her seatbelt, even though, according the Hall, the Grievant knew she had her seatbelt on, and despite her request that she be given the speeding citation as opposed to the seatbelt citation. She also stated that he was unprofessional because he put his arm against her leg and made comments about her tan. Ms. Hall filed a written statement and an Administrative Investigation was opened.

According to the Employer, the investigation revealed that the Grievant did not witness the seatbelt violation, yet issued a citation for the infraction. The Grievant was charged with a violation of the Ohio Highway patrol's Rules and Regulations, specifically Compliance to Orders. The Grievant was under a Last Chance Agreement, which he signed in December 29, 2009. Because of the new violation regarding Compliance to Orders, the Grievant was terminated.

ISSUE

Did Employer have just cause to terminate the Grievant under the Last Chance Agreement for violating Rule 4501:2-6-02 (Y) (2) Compliance to Orders, when he allegedly issued a seatbelt citation without actually viewing the violation?

POSITIONS OF THE PARTIES

Employer's Position

The Employer asserts that it had just cause to terminate the Grievant. The undisputable evidence points to only one logical conclusion: the Grievant did not view the seatbelt violation for which he cited the complainant, Ms. Hall. The audio portion of the video demonstrates that the Grievant attempted "cut her a deal" and issued a seatbelt violation instead of the speeding violation for which he stopped her. The Grievant's own words "I'm gonna say…" demonstrate that he was uncertain and was making an assumption regarding something he did not actually witness.

In his first interview, he was asked, "Did you observe the violator/complainant of the vehicle not wearing a seatbelt while the vehicle was in motion?" The Grievant's response was, "Yes, I believe I did." He was asked, "Is there a possibility that you did not witness her not wearing her seatbelt?" to which he replied, "Anything's possible." Every sworn officer at the hearing, including the Grievant, testified that if you are not 100% sure of a violation, you do not issue the citation.

The Grievant claims that he issued the citation because he did not see a shoulder belt on her. The Grievant asserted that all the similar UPS vehicles he has stopped have all had shoulder and lap belts and he did not witness Hall having a shoulder belt on as she passed him. That is true; Hall did not have a shoulder belt on

because the vehicle was not equipped with one. The Grievant admitted that he never looked at the seatbelt, even after Hall told him there was no shoulder belt.

The Union argues that the vehicle was in violation of law because it was factory equipped with a three point belt (shoulder and lap) and that it was against Ohio law to modify factory installed equipment. The Union argues that the citation she was issued covered this violation as well. This argument must be rejected. A truck of this weight, over 10,000 lb. GVWR, is only required to have a lap belt. In addition, the Grievant stated that he did not know if the truck required a lap or shoulder belts and acknowledged that he was not thinking about vehicle weights and safety belt requirements at the time he made the traffic stop.

At best, the Grievant only observed that Hall did not have on a shoulder belt. He never saw that she did not have on a lap belt. The Divisions Operations policy states "all traffic stops, warnings, arrests, searches and seizures of property by officers will be based on a standard of reasonable suspicion or probable cause in accordance with the U.S. Constitution." The Grievant did not see Hall not wearing her seatbelt; therefore, he issued a citation without probable cause. This is a gross violation of the principles taught at the Highway Patrol Academy. Officers cannot successfully testify in court proceedings if they issue a citation to someone who may have been complying with the law.

The Grievant also violated the Division's Enforcement Guidelines-Mandatory Use Laws policy. The policy states in part "motorists shall be treated fairly and be given every benefit of the doubt when there is evidence that they are attempting to comply with the law." Ms. Hall told the Grievant that she did not have a shoulder belt and that

she was wearing her lap belt. Even if the Arbitrator lends credence to the Union's position regarding the altered restraint system, the Grievant was still in violation of Division Policy. The policy dictates that if the restraint has been altered and the driver is attempting to comply with the remaining components, a warning shall be issued. The Grievant should not have issued a citation in the instant case, because Hall was attempting to comply by wearing the lap belt.

Other troopers have been charged with a violation of the Division's Compliance to Orders rule for improper issuance of seatbelt citations, although they were not discharged. The level of discipline imposed in this case was predicated on a mutually agreed to Last Chance Agreement signed by the Grievant on December 29, 2009.

Troopers feel they are doing the violators a favor by issuing a no-point seatbelt violation in lieu of the moving violation. This justification is admirable if in fact they actually view a seatbelt violation. However, if probable cause is not obtained for the seatbelt violation, they are issuing a citation for an infraction they did not observe. This raises significant credibility issues that would be embarrassing for the Trooper and the Division in subsequent court proceedings. Additionally, this behavior could expose the Division to litigation due to troopers not treating everyone equally. This behavior is unacceptable in a professional law enforcement organization. Law enforcement personnel are continually subject to higher levels of scrutiny by the public.

For all the above reasons, the Employer requests that the grievance be denied.

Union's Position

The Union asserts that the Grievant reasonably believed he had probable cause to issue a citation for a seatbelt violation to Ms. Hall. Ms. Hall passed the Grievant's

vehicle while speeding. He had a clear view of her operation of the truck because she had the door open. The Grievant noted that she did not have her three point shoulder harness fastened. All of the UPS trucks the Grievant has ever stopped had the three point seat restraint.

The Grievant determined to issue Ms. Hall a seatbelt citation rather than a speeding citation in deference to her commercial driver status. Notice of the seatbelt violation would not reach her employer while a speeding violation would. Although Ms. Hall stated that the truck does not have a shoulder restraint, the transcript of the videotape reveals that Ms. Hall never asked for the speeding citation instead of the seatbelt citation. The Grievant did not look to see if she had only a lap belt, as it did not matter. Drivers say many things, not all of them true.

The Grievant charged Ms. Hall under ORC 4511.263, which states that a driver must have a factory installed restraint system and that the driver must be using all elements of that system. Union investigators confirmed with Ford Motor Company that this truck came with a three point seat restraint system. When, and under what circumstance, UPS determined to remove the shoulder restraint and replace it with an aftermarket simple lap belt is unknown. What is known is that such an action violates Ohio law.

In addition, the investigation conducted by the Employer was flawed. Lt. Darden testified that his investigation confirmed the written allegations of Ms. Hall as true, when, based on the transcript, she never asked for a speeding citation because of a zero tolerance policy by UPS for seatbelt violations, as her written statement indicates.

The essence of the Employer's case is that the Grievant is guilty of violating Professional Operations policy because he issued a ticket without probable cause. This "triggered" the Last Chance Agreement and the discipline of termination. However, Lt. Linek confirmed that if the restraint system had been removed or altered it would constitute a violation of the seatbelt law of Ohio. He also testified that there was no reason not to believe the Grievant when he told Lt. Darden that he looked and that he did not see a shoulder strap and concluded that the driver was not in compliance with Ohio law.

Under redirect examination, Lt. Linek testified that the Grievant should have issued a warning. But the standard for a warning is the same as a citation; the trooper must have probable cause. Therefore, the Grievant is no longer accused on fabricating a violation. He is accused of electing to cite rather than warn although both are premised upon probable cause that would support either action.

For all these reasons, the Union asserts that the Employer failed to prove that the Grievant did not observe a seatbelt violation and did not have probable cause to issue a seatbelt citation to Ms. Hall. Because the Employer failed to carry its burden of proof, the LCA trigger was not activated by the facts of this case and the termination of this 17 year Trooper must be set aside. He must be restored to his position with no loss of pay or benefits.

DISCUSSION

In the opinion of the Arbitrator, the grievance must be denied. The Employer proved by a preponderance of the evidence that the Grievant did not have probable cause to issue Ms. Hall a citation for not wearing a seatbelt. Issuing a citation without

probable cause is a violation of Rule 4501: 2-6-02 (Y) (2), Compliance to Orders, of the Rules and Regulations of the Department of Public Safety. The Compliance to Orders violation triggers the Last Chance Agreement signed by the Grievant on December 29, 2009, and subjects him to termination.

The evidence reveals that the Grievant witnessed a UPS truck speeding as it passed the Grievant going in the opposite direction. The Grievant may even have suspected that the driver, Ms. Hall, was not wearing a seatbelt, because the Grievant did not see the shoulder harness. However, when the Grievant approached the truck, Ms. Hall was not in the driver's seat but was in the back of the truck retrieving her license. He did not witness that she did not have the seatbelt fastened.

When he offered to cite her for a seatbelt violation only, Hall told him that she was wearing one. When the Grievant suggested that she say it was under her arm and the Grievant did not see it, Hall told him the truck did not have a shoulder harness. At that point, the Grievant should have checked to see if the truck was equipped with only a lap belt. That would have given credence to Hall's statement and revealed why the Grievant did not see the shoulder harness, if indeed he that was the basis for his seatbelt citation. However, instead of checking, the Grievant stated, "Say I didn't see it all right?...Let me do this and I'll hurry up and get you on your way." He proceeded to write Hall the seatbelt citation.

While this case appears to be one where "no good deed goes unpunished," the Grievant's attempt at a "good deed" (to issue a seatbelt citation in lieu of a speeding citation) has no basis in fact. When he discovered that his suspicion regarding her not

wearing the seatbelt was unfounded, because there was no shoulder harness, he should have said, “I’m sorry, but I’ll have to issue the speeding citation after all.”

The Union’s attempt to show that having only a lap belt was a violation of law must be rejected for two reasons. The Grievant admitted at the hearing that he was not thinking about any tampering with the original seatbelt and the lack of shoulder harness when he issued the citation. In addition, the Division’s Enforcement Guidelines-Mandatory Use Laws Policy states that motorists shall be given every benefit of the doubt when there is evidence that they are tempting to comply with the law. Even if UPS violated the law by replacing the factory equipped seatbelt, which is questionable, Ms. Hall was attempting to comply with law by wearing a lap belt.

The Grievant’s issuing of a seatbelt citation in this instance was the event that triggered the Last Chance Agreement. There is no real dispute that troopers must have probable cause before issuing a citation. Issuing a citation without probable cause is a violation of Compliance to Orders. While such a violation normally may not be cause to discharge a trooper, the Grievant was working under a Last Chance Agreement which states:

> 2. If the Employee violates rule 4501:2-6-02 (Y) (2), Compliance to Orders during the term of the agreement, the employee will be removed from employment with the Ohio State Highway Patrol.
>
> * * *
>
> 4. Grievance rights related to a removal under this agreement will be limited to a challenge of whether his behavior constitutes a violation of a triggering work rule(s). The level of discipline may not be challe3nged or made an issue at arbitration.

Consequently, once a violation of the rule is established, the LCA mandates that the Grievant be removed from employment. The Arbitrator has no power to mitigate the discipline to which the Grievant, the Union and the Employer agreed.

AWARD

For all the reasons discussed above, the grievance is denied.

Virginia Wallace-Curry

Virginia Wallace-Curry, Arbitrator

November 4, 2010
Cuyahoga County, OH