

IN THE MATTER OF THE ARBITRATION BETWEEN

GRIEVANCE NO.: **15-03-20101210-0164-04-01**

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: June 8, 2011

APPEARANCES FOR THE PARTIES

Employer:

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

Lieutenant Charles J. Linek, Second Chair

Attorney Jackie Milsom, Office of Collective Bargaining

UNION:

Attorney Herschel Sigall, Ohio State Trooper Association
Union Advocate

Attorney Elaine Silveira, Second Chair

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. 15-03-20101210-0164-04-01 was submitted by the Union to Employer in writing on December 10, 2010. Any informality in the submission of the grievance was waived by Employer in writing on December 21, 2010. Following unsuccessful attempts at resolving the grievance, it was referred to arbitration in accordance with Article 20, Section 20.12 of the 2009-2012 Collective Bargaining Agreement.

Pursuant to the collective bargaining agreement between 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 May 26, 2011 at the Office of the Collective Bargaining, 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 May 26, 2011.

The parties stipulated that the grievance and arbitration were properly before the Arbitrator, and submitted joint documents consisting of Contract, Grievance Trail#10-164, and Discipline Package.

The parties stipulated that the issues to be resolved in the instant arbitration to be: Was the Grievant issued a 10-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.

Article 7

Neither party will discriminate for or against any member of the bargaining unit on the basis of age, sex, marital status, race, color, creed, national origin, religion, handicap, political affiliation, sexual preference, veteran status, or for the purpose of evading the spirit of this Agreement; except for those positions which are necessarily exempted by bona fide occupational qualifications due to the uniqueness of the job, and in compliance with the existing laws of the United States, the State of Ohio, or Executive Orders of the State of Ohio.

Ohio State Highway Patrol Policy Number: OSP-203.46

(A) Policy Statement (1) Proactive and consistent traffic enforcement helps to ensure that citizens may freely travel Ohio roadways safe from the actions of careless and reckless drivers...

(B) Definitions – Traffic stop- To stop or detain any person or operator of a motor vehicle suspected of violating the Ohio Revised Code.

(C) 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 US Constitution...

Work Rule 4501:2-6-02(Y) (2)

Compliance to Orders

(2) 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.

Work Rule 4501:2-6-02(B) (5)

Performance of Duty

(5) 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. Unsatisfactory performance may be demonstrated by a lack of job-related knowledge, an unwillingness or inability to perform assigned tasks, failure to take required action, or failure to take appropriate action at any time.

Union did not prosecute a claim for violation of Article 7.

BACKGROUND

A citizen-complaint was filed against Grievant in a matter unrelated to the grievance at issue. As a result of said complaint, a review was conducted of her videotape on September 23, 2010. During the course of said review, a traffic stop due to slow speed was observed. Following said observation, Employer conducted an administrative investigation concerning the traffic stop.

Grievant initiated the traffic stop at 2059 hours on September 23, 2010 on U.S. Route 224 in Huron County. Grievant stopped a vehicle that was travelling westbound ahead of the patrol car of Grievant. Grievant advised the driver that he was travelling 40mph and just wanted to see if everything was okay. The driver responded that they just left church, and Grievant replied, "so you drive slow when you get out of church?" Grievant asked for his driver's license. Grievant observed that driver and his passenger were not wearing seatbelts, and said "doesn't look like you folks are wearing your seat belts tonight, how come?" The driver responded that they just left church. Grievant stated that "you're supposed to put them on in the parking lot", and told them to fasten their seatbelts." Grievant returned to her vehicle to check the driver's license. When Grievant returned to the vehicle, she told the driver it is not against the law to drive slowly unless you're holding traffic up, and you really weren't, because it was just me. Grievant commented on how well the seat belts looked on them and that they needed to get into the habit of wearing them because it is pretty expensive to get a ticket. The duration of the traffic stop was three minutes and three seconds. There were a total of six vehicles that passed by the area during the traffic stop.

During her investigatory interview Grievant stated that she paced the vehicle at 40mph for approximately one half mile to one mile; the vehicle was traveling 15 miles below the speed limit. She stopped the vehicle to conduct a "wellness check". She explained that she was taught in her Advanced Detection and Apprehension and Prosecution (ADAP) training that

when you observe a vehicle that has indications of a possible OVI driver, you stop the vehicle to see if the occupants inside it are sober and licensed. She stated that she was trained that slow speed and weaving within the lanes but not crossing outside the lane markings were appropriate reasons to do "wellness checks". She stated that slow speed in and of itself is reason enough to initiate a traffic stop when looking for an impaired driver. When questioned about what Grievant meant when she asked the subjects if they were okay, she responded that she was looking for possible signs of impairment or if they were sleepy. After she stopped them, she observed that the driver was alert and well oriented. Grievant did not observe any signs of impairment. Grievant did not issue a citation.

Grievant characterized the stop as a "wellness check" based on her official training at the ADAP academy. Grievant attended said training on three occasions prior to the traffic stop in question. The ADAP academy training is a forty hour block of instruction that includes classroom training on alcohol and how it affects the body, different phases of impairment detection, vehicles in motion, observation and field sobriety testing, and a practicum. The ADAP academy training provides a student with a manual entitled DWI Detection and Standardized Field Sobriety. The officer is trained to observe various cues or indicators of impairment while a vehicle is in motion. The cues or indicators of impairment suggest probabilities of impairment based upon a national study recognized by the Division. Problems maintaining proper lane position carry a probability of fifty to seventy percent that a driver is impaired, speed and braking which includes slow speed (10mph + under limit) carry a probability of forty five to seventy percent that a driver is impaired, vigilance problems carry a probability of fifty five to sixty five percent that a driver is impaired, and judgment problems carry a probability of thirty five to ninety percent that a driver is impaired. In addition the probability of detecting an impaired driver by random traffic enforcement stops at night is three percent. Any two cues combined equal a probability of fifty percent or greater that the driver is

impaired. It is during this detection phase that the officer makes the determination whether or not to initiate a traffic stop. There were two cues present at the time of the traffic stop in question.

On December 22, 2010 Grievant was charged with violation of work rule 4501:2-6-02(Y)(2) Compliance to Orders and work rule 4501:2-6-02(B)(5) Performance of Duty for allegedly stopping a vehicle with no probable cause. At the time of the incident, the Grievant was assigned to the Division's Norwalk Post and had been a trooper for approximately six years with an extensive department record. She has received ten reprimands, three one-day suspensions, two three-day suspensions, and a five-day suspension. The Union filed its grievance on December 10, 2010 alleging a violation of Article 19.01 Standard and Article 7 Non-Discrimination. 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 work rule 4501:2-6-02(Y)(2) Compliance to Orders and work rule 4501:2-6-02(B)(5) Performance of Duty for stopping a vehicle with no probable cause or reasonable articulable suspicion contrary Ohio State Highway Patrol Policy Number: OSP-203.46. Grievant stated during the administrative investigation that she observed the vehicle travelling 15 miles per hour below the posted speed for approximately one half (1/2) to one (1) mile, and stopped the vehicle to conduct a "wellness check" in accordance with her (ADAP) training. Employer further contends that trainees are not taught to conduct "wellness checks" but only stops with probable cause or reasonable articulable suspicion based upon the totality of the circumstances. Grievant has been properly noticed and trained on policy and fails to correctly apply training. The actions of the Grievant violate Division Policy and Procedures, and discipline is warranted.

Employer argues that despite the allegations of Grievant that the Employer is "out to get her (Grievant)" Employer has attempted to address deficiencies through trainings, special reviews, and supervisory ride-alongs. Grievant fails to comply with Division policy and procedures. Therefore progression in discipline is a necessary step in correcting behavior, and the ten day suspension is appropriate based upon her department record.

Employer contends that Grievant has an extensive department record. She has received ten reprimands, three one-day suspensions, two three-day suspensions, and a five-day suspension. The Division trained the Grievant in policies and procedures as a result of discipline, and reviews as deficiencies were observed. The failure of Grievant to perform in accordance to the policies and procedures of the Division resulted in progressive discipline. The ten-day suspension is appropriate and commensurate with the infraction.

Employer requests the Arbitrator to deny Grievance 15-03-20101210-164-04-01.

UNION

Union contends that the stop of the vehicle was "text book". Grievant was courteous and polite. She explained to the driver the reason for the stop. The detention was only three minutes and three seconds. There was a friendly exchange of communication regarding an earlier traffic accident. There was no complaint made by the driver. Her actions were in compliance to policy and training, and do not warrant discipline. Therefore no just cause exists to discipline Grievant.

Union contends that the prior discipline record of Grievant is not relevant because there was no just cause to discipline her in this instance. There was probable cause for the stop. Grievant was travelling behind the suspected vehicle. She constituted the traffic as defined by statutes, and her ability to travel was impeded by the suspected vehicle travelling not ten, but fifteen miles, below the posted speed limit. Having determined that no impairment existed through her observations of the driver, the driver was not charged

with a traffic violation. Her actions were in compliance with policy and training, and do not warrant discipline. Union further argues that the prior discipline record only shows Employer calculated measures to terminate Grievant through progressive discipline.

Union contends that a traffic stop may be made on the basis of reasonable articulable suspicion. The ADAP training manual teaches trainees that there exists a probability of forty-five percent to seventy percent that a driver is impaired if he is driving at a speed that is more than 10 mph below the speed limit. Additionally this stop occurred at night, another cue for detection of impaired drivers. Any two indicators present a probability of fifty percent or greater of impaired driving. For the traffic stop in question, the training manual suggests a fifty percent or greater probability that the driver was impaired. Grievant initiated the traffic stop in accordance with her training. Having determined that no impairment existed through her observations of the driver, the driver was not charged with a traffic violation. There is no just cause to discipline.

Union requests the Arbitrator to grant Grievance No. 15-03-20101210-164-04-01, and that Grievant be made whole.

DISCUSSION

Article 19.01 of the 2009-2012 Collective Bargaining Agreement states that no bargaining unit member shall be reduced in pay or position, suspended or removed except with just cause. The just cause standard of review requires consideration of whether Grievant did in fact violate or disobey a rule or order of Employer. If a violation is proven, other considerations relate to fairness and whether the severity of disciplinary action is reasonably related to the seriousness of the proven offense and the employee's prior record.

Ohio State Highway Patrol Policy Number: OSP-203.46 provides in pertinent part that: "(C) All traffic stops, warnings, arrests, searches and seizures of property by officers will be based on a standard of reasonable

suspicion or probable cause..." To initiate a traffic stop, a trooper must have either probable cause or reasonable suspicion of a violation of the Ohio Revised Code. The observation of a traffic violation by an officer constitutes probable cause. Ohio Revised Code Section 4511.22 states that:

No person shall stop or operate a vehicle, trackless trolley, or street car at such an unreasonably slow speed as to impede or block the normal and reasonable movement of traffic, except when stopping or reduced speed is necessary for safe operation or to comply with law.

A violation of the statute requires slow speed and the slow speed must impede or block the normal and reasonable flow of traffic. It is not disputed that driver was travelling at a slow speed, fifteen mile per hour below the speed limit. Grievant initially informed the driver that she stopped him for slow speed but upon returning to vehicle following the LEADS check, she told the driver it is not against the law to drive slowly unless you're holding traffic up, and you really weren't, because it was just me. Grievant maintained throughout the investigatory interview that she believed that the driver did not violate the law. The administrative investigator testified at the hearing. Having previously testified that he watched the video tape of the traffic stop, the following questions were posed on cross examination:

Question: If she would have elected to say said that you are impeding me therefore you are in violation of law. There is probable cause. You would have found there to be probable cause for the traffic stop, correct?

Response: Yes.

Question: So, your position is that probable cause existed, but her problem was that she did not speak to it or she did not cease upon it, and instead chose to use reasonable articulable suspicion which she perceive to be driving 15mph below posted speed for mile?

Response: Yes, she said she was doing a wellness check.

The following questions were posed on redirect:

Question: Is it not true that she could have passed the vehicle during that section of the road way?

Response: Yes.

Question: The vehicle would not have been impeding her?

Response: Yes.

The administrative investigation indicated that there were a total of six vehicles that passed by the area during her traffic stop. The video tape introduced is only of the traffic stop, and not the duration of the observation; the traffic stop lasted three minutes and three seconds. The first vehicle passed by 31 seconds after she stopped the vehicle. Four vehicles were travelling eastbound and two vehicles were traveling westbound.

Employer submits the case of *State of Ohio vs Tamara M. Hagerty*, 2002-Ohio-3379 (Portage County, Ohio) to support its position that probable cause did not exist for the stop. In *Hagerty*, the Eleventh District Court of Appeals affirmed the decision of the trial court granting the motion to suppress. The driver in was driving 18 miles per hour below the posted speed limit, on a four lane highway at night. There were no vehicles on the highway besides the officer and the driver, and wet pavement. The officer remained behind the driver to track her speed, not that the officer was impeded. The Court stated that "although one may be stopped for going substantially under the speed limit, generally such a defendant has been found to have been seriously impeding traffic or going unreasonably slow to create a safety risk before a stop is justified."

Grievant did not state to the passenger that she was not impeded. Grievant said that she was the traffic. The Court in *Hagerty* recognized that the definition of traffic includes a single vehicle as well as many vehicles. Grievant acknowledged during her interview that she could have passed, There was probable cause to initiate a brief investigatory stop, but no violation of the slow speed statute.

Notwithstanding, the justification for a traffic stop need not rise to the level of probable cause if there exists articulable reasonable suspicion. Ohio State Highway Patrol Policy Number: OSP-203.46 permits traffic stops based

on a standard of reasonable suspicion. When probable cause does not exist the trooper must have a reasonable suspicion of criminal activity, including a minor traffic stop, based upon the totality of the circumstances.

Reasonable suspicion is based upon specific and articulable facts and the reasonable inferences that can rationally be drawn therefrom. Union argues that articulable reasonable suspicion existed to initiate the traffic stop. Route 224 is a two lane road with a passing zone. The driver was travelling fifteen miles below the posted speed limit for approximately one mile. It was night. The videotape showed a total of six vehicles that passed by the area during her traffic stop; four vehicles were travelling eastbound and two vehicles were travelling westbound. The duration of the stop was three minutes and three seconds. The focus of the Grievant's observation was the suspicion of impaired driving due to her ADAP training. In accordance with the training, the cues or indicators of impairment were equal to or greater than fifty percent. Further two trainers and the seventeen year certified ADAP veteran trooper who testified were unable to affirmatively state that one cue would be insufficient to initiate a traffic stop. All of them wanted to talk about the legal standard of reasonable suspicion based upon the totality of the circumstances which is the constitutional requirement. It may have been more prudent to wait and see if Grievant would have observed another discreet cue although she already had two present with a fifty percent or greater probability that she may have an impaired driver. The nature of the impairment may not have been alcohol or drugs but simply that the driver was sleepy which may result in a safety hazard. The constitutionality of the traffic stop is ultimately determined by the judge. This Arbitrator is persuaded that reasonable suspicion existed to initiate the brief investigatory stop.

The problem here is that Grievant did not articulate the legal standard of probable cause or articulable reasonable suspicion during her interview. She said "wellness checks." Although pretextual stops using a minor traffic violation to attempt to discover evidence of a more serious offense are

generally permissible, the terminology of "wellness check" is a mischaracterization of the legal standard. When asked what she meant by term "wellness check", Grievant was able to articulate the cues or indicators in detection. Grievant possessed sufficient knowledge of the traffic code for slow speed and seatbelts, and had an understanding of the detection and decision phases of her ADAP training. Grievant did not cite the driver for slow speed. The passenger was left with the impression that Grievant was very nice. The evidence does not support a violation of the work rules.

In summary, the evidence persuades the Arbitrator that Grievant did not violate work rule 4501:2-6-02(Y)(2) Compliance to Orders and work rule 4501:2-6-02(B)(5) Performance of Duty for allegedly stopping a vehicle with no probable cause. The Arbitrator concludes discipline of the Grievant was without just cause. Discipline is not warranted. The Arbitrator must therefore sustain Grievance no. 15-03-20101210-164-04-01.

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. 15-03-20101210-164-04-01, is sustained. Grievant shall be made whole including being given back pay and benefits.

Dated: June 8, 2011

_____/s/ Meeta Bass Lyons

Meeta Bass Lyons, Arbitrator
Steubenville, Ohio