

IN THE MATTER OF THE ARBITRATION BETWEEN

GRIEVANCE NO.: 15-03-20101117-0156-07-15

Ohio State Trooper Association

GRIEVANT: David L. Robison

AND

The State of Ohio
Ohio State Highway Patrol

OPINION AND AWARD

ARBITRATOR: Meeta Bass Lyons

AWARD DATE: June 14, 2011

APPEARANCES FOR THE PARTIES

Employer:

Staff Lieutenant Charles J. Linek, Ohio State Highway Patrol
Employer Advocate

Lieutenant Kevin D. Miller, Second Chair
Jackie Milson, Office of Collective Bargaining

UNION:

Elaine Silveira, Ohio State Trooper Association
Union Advocate

David Riley, OSTA Representative
Grievant: David L. Robison

PROCEDURAL HISTORY

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

Grievance No. 15-03-20101117-0156-07-15 was submitted by the Union to Employer in writing on November 17, 2010 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 2009-2012 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 May 26, 2011 at the Office of 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, Discipline Package, and other individualized exhibits. The parties stipulated to the following statement of issue: Did the Grievant receive a three (3) day fine for just cause? If not, what shall the remedy be?

Union objected to the testimony of two witnesses due to untimely disclosure, and one witness due to nondisclosure. Article 20.08(7) mandates that the parties deliver the names of all witnesses five days prior to hearing. Employer stated that the two witnesses were disclosed a day late due to an oversight. The fifth day was on a Sunday, a non-business day, and the

disclosure was made the next business day. Employer was not aware of the nondisclosure of the third witness until the argument was made. Union argued that in accordance with the collective bargaining agreement days are counted in calendar days. Employer offered a continuance of the case in order to avoid any type of prejudice; Union did not agree to a continuance and sought enforcement of the contractual provisions of the collective bargaining agreement.

The objection related to the testimony of the two witnesses who were disclosed was overruled. There is substantial compliance to the rule, and no prejudice to the Union. The objection related to the testimony of the one witness who was not disclosed was sustained. The discovery rule is a bargained for provision and absent consent by all parties, the Arbitrator has no authority to grant a continuance. To allow testimony in spite of the nondisclosure, nullifies the bargained for provision of the collective bargaining agreement. The grievance proceeded to hearing.

PERTINENT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 18.02 Bargaining Unit Member Rights

When a supervisor is either the complainant or a witness to the alleged events leading to an administrative investigation being opened, the supervisor shall not be the investigating officer.

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.

Work Rule 4501: 2-6-03(A)(1) Responsibility of Command

A member who is in command of any post, district, section, unit, detail or assignment, or part thereof, either on a temporary or permanent basis, shall be held responsible for the efficiency, discipline, performance and welfare of the persons under his/her command, for facilities assigned under the command, and for the performance and condition of all equipment and the effective discharge of the duties and responsibilities of the division within the scope of this command.

The Union did not prosecute a violation of Article 18.02 of the collective bargaining agreement.

BACKGROUND

On July 4, 2010 Grievant was the afternoon shift supervisor at the Dayton Post. Trooper Payne was under his command on this date. As a shift supervisor, Grievant is responsible to assist the other troopers in any ways that he is able including but not limited to supplying them with the proper equipment for the shift, provide guidance, review paperwork, review videotapes and so forth. Trooper Payne, a newly commissioned officer, was involved in his first pursuit on this date.

At approximately 10:00p.m. on the evening in question, Trooper Payne was checking the perimeter of the Dayton Correctional Institute. Trooper Payne randomly ran the registration of a vehicle. The L.E.A.D.S. check indicated that the registered owner was under suspension; the driver of the vehicle matched the description of the owner on L.E.A.D.S. Trooper Payne notified dispatch of the plate information. Trooper Payne attempted to initiate a traffic stop, and activated his overhead lights. The driver travelled to the next traffic light, and turned right on the side street. The driver then went through the stop sign at the next intersection. Trooper Payne activated his sirens, and notified dispatch that the driver was not stopping. The driver increased his speed to 70mph, but later slowed down through several intersections while travelling at a speed of 10mph.

The dispatcher at the post informed Grievant that Trooper Payne was involved in a pursuit. Grievant entered into the dispatch room and engaged in conversation with Trooper Payne. Grievant asked for the original violation, and Trooper Payne responded Suspended License on the Registered Owner. Grievant next inquired on the speed of the driver. Trooper Payne stated 10mph, and he (driver) is stopping at about every stop sign. Trooper Payne comments on his direction of travel but then states he (driver) is stopping. Grievant then checks on his status. Do you have signal six? Check Up? And Trooper Payne responds that he has signal six, cleared and standby.

Although Grievant acknowledged that it was reported that he stated that this is not a pursuit because he had done another pursuit the previous day. Grievant stated to the dispatchers that the incident did not constitute a pursuit. It was less than three minutes and the speed was less than ten miles per hour.

The driver came to a stop at which time Trooper Payne with his weapon drawn ordered him out of the vehicle, and placed him under arrest without any resistance. Trooper Payne contacted Grievant about the potential violations, the charges to be filed, and revised code sections. Grievant made a second call to Trooper Payne to provide the relevant code sections. Another trooper and three Dayton police officers responded to the scene; Grievant did not respond to the scene. The driver was charged with reckless operation of a motor vehicle, driving under suspension and failure to comply with a lawful order of a police officer, which is a misdemeanor.

The next day Trooper Payne submitted his court statement to Grievant for review. Grievant reviewed the statement and asked him to remove the sentence referencing him drawing his service weapon because a case investigation should have been initiated. Grievant was not aware until then that Trooper Payne drew his service weapon. Trooper Payne removed the sentence from the statement. After reviewing the videotape and discussions with his Lieutenant, Grievant was of the opinion that he should have responded to the scene.

Grievant was charged with violation of work rule 4501: 2-6-03(A)(1) Responsibility of Command for failure to supervise when he did not respond to the scene of a motor vehicle pursuit. Additionally, he failed to investigate the incident and initiate a case investigation in a timely manner. Union filed its grievance on November 17, 2010 alleging a violation of Article 18.02, 19.01, 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 Grievant failed to properly supervise a trooper under his command. The trooper, who was just commissioned in December of 2009 and completed his on the job training in March 2010, was involved in the first pursuit of his career. The pursuit ended with the trooper drawing his service weapon. Grievant failed to respond to the scene, failed to review the videotape and failed to complete an administrative case. Said behavior constitutes a violation of work rules 4501:2-6-03(A)(1).

Employer contends Grievant instructed the trooper to charge the driver with a misdemeanor as opposed to a felony in order to avoid the completion of an administrative case. Grievant further told the trooper to remove the sentence referencing his drawn weapon from his court statement in order to avoid initiating the internal response to resistance case. Said behavior constitutes a violation of work rules 4501:2-6-03(A)(1).

Employer maintains that the discipline imposed was not arbitrary, capricious, or discriminatory. The discipline was commensurate with the offense. Grievant failed to respond to the scene. Grievant instructed a trooper under his supervision to remove a statement from his official report in order to avoid his responsibilities in the completion of the administrative case. Grievant instructed a trooper to file lesser charges in order to perform his duties. These were intentional acts, not mere mistakes, which resulted in severe discipline. Employer had just cause to issue a three-day fine.

Employer requests the Arbitrator uphold the discipline, and deny Grievance No. 15-03-20101117-0156-07-15 in its entirety.

UNION

Union contends that Grievant is specifically charged with failure to supervise when he did not respond to the scene of a motor vehicle pursuit. There is a difference of an opinion as to whether this incident constituted a pursuit.

Based upon the evidence that Grievant was presented at the time; to wit, Trooper Payne stating over the radio that driver is stopping at every stop sign travelling ten (10) miles per hour, Grievant did not feel that the incident was a pursuit.

The second charge is the failure to investigate the incident and initiate a case investigation in a timely manner. Union argues that a person cannot fail to investigate something when one feels that no investigation is necessary. Based upon the information presented to him, Grievant did not believe that an investigation was required. His lieutenant thought otherwise, and directed him to complete a case investigation. Once instructed, Grievant completed the investigation within the policy requirements. Howbeit, can there be an untimely investigation, when the investigation was completed within the time frame. There is no just cause to discipline.

Union contends that Grievant is an eighteen year veteran trooper, three of those years as a sergeant. This represents his first administrative investigation for responsibility of command. He had no prior discipline on his record. The response to resistance case is an internal Ohio State Patrol case, and does not have any impact on the court case. A three day fine is far too excessive based upon a difference of opinion.

Union requests the Arbitrator grant Grievance No. 15-03-20101117-156-07-15, that his three (3) days of wages be returned to him, his department record be cleared and to otherwise be made whole.

DISCUSSION

Grievant is charged with a violation of Work Rule 4501: 2-6-03(A)(1) Responsibility of Command, specifically for failure to supervise when he did not respond to the scene of a motor vehicle pursuit. Grievant has maintained throughout the process that in his opinion that a pursuit did not exist due to the duration of the incident, three minutes, the audio and visual signals were activated, the broadcast by Trooper Payne that the driver was travelling ten miles per hour and stopping at every stop sign, and then the sudden stop. Grievant maintained that based upon the information presented to him that a pursuit did not exist as defined by policy. Grievant testified after reviewing the tape and following discussions with his lieutenant he now knows that he should have responded to the scene. The policy was not introduced at the hearing, and there was insufficient evidence presented at the hearing to determine the policy definition, and relevant provisions based upon these facts to determine a violation of the policy.

In summary, the Employer did not satisfy its burden of proving that the Grievant failed to supervise trooper when he did not respond to the scene of a motor vehicle pursuit. There is no just cause to discipline Grievant.

The second charge is the failure to investigate the incident and initiate a case investigation in a timely manner. Although the policy was not introduced at the hearing, Grievant testified that that policy provides for seventy two (72) hours for entering a case investigation.

Grievant first began to evade his responsibilities on July 4th after the driver was arrested, and Trooper Payne contacted him by telephone to discuss what charges should be filed. It is at this instance Grievant told Trooper Payne to file a misdemeanor because he did not want to open a case. On July 5th, Trooper Payne entered into the office of Grievant to submit his court statement for review. Upon reviewing the statement,

Grievant became aware that Trooper Payne drew his service weapon upon the driver. He questioned the Trooper if the event really occurred, and the trooper responded affirmatively. Grievant then asked the trooper to remove the sentence because if the Lieutenant reads the sentence he would have to open a case. To be honest with him (Trooper Payne), Grievant did not want to open a case. Trooper Payne removed the sentence. It is disputed whether Trooper Payne asked, at this point or a couple of days later, how the removal of sentence would affect his credibility in court. But a discussion occurred between the two of them, and Grievant responded that "even like OVI situations, you don't always remember to put everything in there, and this would be something similar. Just because it was not there, does not mean it did not happen." As of July 6, 2010, Grievant did not review the videotape of the traffic stop. His Lieutenant requested on this date that he make him a copy of the tape, and leave it on his desk. Grievant reviewed the tape while copying the same on this date. On July 7, 2010, the Lieutenant directed him to open the case. Grievant testified that he opened and completed the case the next day, July 8, 2010, one day late.

When questioned on why Grievant told Trooper Payne to remove the statement, Grievant responded that a misdemeanor had already been filed. With the weapon involved, it should have been a felony. It would have already been a day late. It was simply easier to handle the matter with the removal of the statement. When questioned on why a misdemeanor rather than a felony was filed, Grievant stated that he was involved in road side checks several months ago, and when a driver failed to stop, and pursuit ensued, speed and stop sign violations, the driver was charged with failure to comply. During the administrative investigation, Grievant acknowledged that a case was not required for misdemeanor failure to comply. The evidence supports that Grievant failed to investigate the incident and initiate a case investigation in a timely manner.

In summary, Employer did satisfy its burden of proving that the Grievant failed to investigate the incident and initiate a case investigation in a timely manner. There is just cause to discipline Grievant for responsibility of command as to this allegation.

Just cause requires that the penalty imposed reasonably be related to the misconduct or infraction. The Collective Bargaining Agreement provides that Employer will follow the principles of progressive discipline, and the discipline shall be commensurate with the offense. Disciplinary action ranges from verbal reprimand(s); written reprimand (s); suspension(s) or a fine not to exceed five (5) days pay, and so forth. However, more severe discipline may be imposed at any point if the infraction or violation merits the more severe action. Grievant has been working as a trooper for eighteen years, three of which as a sergeant. There was no evidence of performance reviews. Management argues that due to the intentional acts to avoid the opening of the case, a more severe penalty is warranted, and imposes a penalty three steps removed from a verbal reprimand. There was no prior discipline on record. A review of the conduct of Grievant indicates that Grievant instructed a trooper under his command to file a misdemeanor rather than a felony to avoid the resulting paperwork and investigation. Next, Grievant instructed a trooper to omit a material fact from his court statement in order to avoid the resulting paperwork and investigation. Grievant pulls the trooper into his deception to avoid the resulting paperwork and investigation. As a supervisor, Grievant compounds his mistake by implicitly instructing the new trooper on how to evade his own responsibilities. The penalty is not beyond the discretion of Employer.

Giving appropriate weight to all relevant factors, the Arbitrator finds that the Grievant violated Work Rule 4501:2-6-02(B)(1) Responsibility of Charge for failure to investigate and initiate a case investigation in a timely

manner. The Arbitrator therefore denies the Grievance no. 15-03-20101117-0156-07-15.

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. 15-03-20101117-0156-07-15, is denied.

Dated: June 14, 2011

/S/ Meeta Bass Lyons _____
Meeta Bass Lyons, Arbitrator
Steubenville, Ohio