

Decision and Award in the matter of Arbitration between:

The State of Ohio, Department of Public Safety

And

Ohio State Troopers Association, Inc., Unit 1

Grievance # 15-03-20110323-0053-04-01

Grievant: Trooper Dorien Brown

E. William Lewis, Arbitrator

Date of Hearing:	June 7, 2011
Date Briefs received:	July 15, 2011
Date Decision issued:	August 4, 2011

Representing the Union:

Hershel M. Sigall, Chief General Counsel
Ohio State Troopers Association
6161 Busch Blvd., suite 130
Columbus, Ohio 43229

Representing the Employer:

Lt. Kevin D. Miller
Ohio State Highway Patrol
740 East 17th Avenue
Columbus, Ohio 43211

By mutual agreement the Hearing was convened on June 7, 2011, at 9:00am. The Hearing was held at the Ohio State Troopers Association, Columbus, Ohio.

In attendance for the Employer:

Lt. Kevin D. Miller	Advocate, OSHP
Ms. Marissa Hartly	2 nd Chair, OCB-Labor Counsel
Sgt. Joseph Gebhart	Dayton Post-57 (witness)
Sgt. David L. Robison	Dayton Post-57 (witness)

In attendance for the Union:

Mr. Hershel M. Sigall	Advocate, OSTA
Ms. Elaine Silveira	Assistant General Counsel
Mr. Dorien Brown	Grievant (witness)
Mr. Larry Phillips	President OSTA
Mr. Jeremy Mendenhall	Release Person
Mr. Dave Riley	Staff Representative OSTA

The parties were asked to submit exhibits into the record. The following were submitted as Joint Exhibits:

Joint Exhibit #1	CBA- OSTA Unit 1 & 15, and the State of Ohio 2009-2012
Joint Exhibit #2	Grievance Trail
Joint Exhibit #3	Discipline Package, composed of: Statement of Charges, Pre-discipline Notice, Meeting Officer's Finding, Termination Letter, Department Record, Work Rules 4501: 2-6-02

The following was submitted as a Union Exhibit:

Union Exhibit #1	ORC - 2921.331 Failure to comply With order of signal of police officer
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The following were submitted as Employer Exhibits:

Employer Exhibit #1	Administrative Investigation-2011-0024, Trooper Dorien Brown
Employer Exhibit #2	OSHP Policy # 200.06 Patrol Car/ Motor Vehicle Operation By Sworn Officers
Employer Exhibit #3	Tpr. Brown Probationary Evaluations Mid & Final
Employer Exhibit #4	AI-2010-0197, Tooper Dorien Brown

BACKGROUND:

The State Highway Patrol, a Division of the Ohio Department of Public Safety, hereinafter, known as the Employer/OSP, is responsible for highway safety within the State. The Ohio State Troopers Association, hereinafter, known as the Union/OSTA, represents bargaining unit employees in Unit 1 and 15. Unit 1 is primarily composed of Troopers(Tpr.) and Unit 15 is composed of Sergeants(Sgt.) This particular case involves a Trooper assigned to Unit 1.

Trooper Brown, at an intersection near Dayton, observes an automobile repeatedly bumping the back of a pickup. He entered the intersection to checkup the incident when the ramming vehicle leaves the scene.

Trooper Brown pursues the vehicle leaving the scene, having been told by the pickup driver that he was being rammed for no apparent reason. The suspect is pursued by Tpr. Brown, siren on, into a residential neighborhood. The suspect stops at a residence and exits the car with Tpr. Brown ordering him to stop, and show his hands. The suspect continues towards the residence and Tpr. Brown secures him by tackling. Under the influence, the suspect claimed he didn't stop his vehicle because he didn't see the Patrol Car's overhead pursuit lights.

Shift Sgt. Robison arrives, and after an explanation of what happened by Tpr. Brown, he assists in the arrest and investigation. The perpetrator, with many violations, is transported to county jail by Tpr. Brown, following Sgt. Robison.

At the county jail "sally port" Sgt. Robison asks Tpr. Brown why he didn't have his pursuit lights on. Trooper Brown responded by saying that they were not on because of his concern for traffic safety. The following day(12/17/10), during the routine Response to Resistance review, Tpr. Brown stated that he forgot that the pursuit lights were off, during the chase.

An AI was conducted by Sgt. Gebhart, and it was found that Tpr. Brown violated OSHP Policy 4501: 2-6-02, overhead pursuit lights off during a pursuit, and being untruthful.

Trooper Brown was charged with violation of Rule 4501: 2-6-02(E) False Statement, truthfulness and Rule 4501: 2-6-02(Y)(2) Compliance to Orders. To wit: it was found that you were engaged in a vehicle pursuit and failed to activate the overhead lights on your patrol car. Additionally, you were dishonest when questioned by a supervisor about the incident.

A Pre-disciplinary Hearing was held on March 9, 2011 and the Meeting Officer found just cause for discipline. On March 10, 2011, Tpr. Brown was notified that he was being terminated effective immediately, for his rule violations.

Trooper Brown grieved the discharge on 3/18/11, claiming that the OSHP violated Articles 18.02, 19.01 & 19.05 of the CBA. The grievant requested to be reinstated to his former position and to be made whole for his losses. A Step 2 Hearing was held on April 4, 2011 and the grievance was denied. The Union appealed the grievance to Arbitration (Step 3) on April 6, 2011.

By mutual agreement, the Arbitration Hearing was scheduled for June 7, 2011. There were no procedural issues brought forward and the parties stipulated that the grievance was properly before the arbitrator.

ISSUE:

In conformance with Article 29, Section 20.08 of the Collective Bargaining Agreement, the parties submit the following statement of issue for resolution by the arbitrator.

“Was the Grievant terminated from his employment with the Ohio State Highway Patrol for just cause? If not, what shall the remedy be?”

RELEVANT CONTRACT LANGUAGE:

ARTICLE 19 - DISCIPLINARY PROCEDURE

19.01 Standard

No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause.

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 (with appropriate notation in employee's file);
2. One or more written Reprimand;
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 merit's the more severe action.

The Employer, at its discretion, is also free to impose less severe discipline in situations which so warrant.

The deduction of fines from an employee's wages shall not require the employee's authorization for the withholding of fines from the employee's wages.

EMPLOYER POSITION:

The Employer points out that the facts in this case are straight forward. Trooper Brown witnessed a hit-skip crash and pursued the hit-skip vehicle. The suspect alleged that Tpr. Brown did not have his overhead lights on during the pursuit.

Trooper Brown's shift Sgt. Robison, questioned him at the jail about his overhead lights. Sergeant Robison claimed that Tpr. Brown told him that he purposely left the lights off because of traffic safety concerns.

According to the Employer, Sgt. Robison that same evening at Post, told Tpr. Brown that no matter what road conditions are, overhead lights are to be on during pursuits. The conversations between Sgt. Robison and Tpr. Brown regarding the hit-skip pursuit, were passed to the Post Commander.

The following day during the Response to Resistance Review, per the OSP, Tpr. Brown contradicted his previous statement regarding his reason for not activating his overhead lights. During the RTR review Tpr. Brown alleged he told Sgt. Robison that he thought he had the lights on.

An AI was commenced regarding the Trooper's alleged false statement the night of the pursuit. During the AI interview Tpr. Brown admitted to lying to his Sgt. the night of the pursuit, and he was terminated because of his untruthfulness, states the Employer.

There are no mitigating circumstances in this case, claims the OSP. Trooper Brown had only one year in grade, and he has been disciplined from two separate AI's. The Highway Patrol gave this Trooper a second chance during his probation by levying a three day suspension for conduct that could have caused his removal, claims the Employer. Trooper Brown's questionable behavior again surfaced in this case. His failure to change, coupled with the seriousness of the offense and his short tenure led to his termination.

Trooper Brown committed a serious rule violation relative to his veracity, which is unacceptable in the OHSP, or any law enforcement agency, argues the Employer. The OSHP has a long history of terminating troopers for False Statement/Truthfulness. When entering the Academy, troopers are told that they will be fired for dishonesty, per the Employer Advocate. Therefore the Employer requests the arbitrator to deny the grievance in its entirety.

UNION POSITION:

The grievant is a "rookie" trooper, just out of probation, five or six days/the Union. While approaching a busy intersection he observed one car hitting a pickup repeatedly. Trooper Brown entered the intersection, leaving his

Lights and siren off, to check-up the situation. He drives to the window side of the pickup. He activates his camera. The driver of the vehicle being hit is on a cell phone to Dayton Police. The pickup driver tell Tpr. Brown that he is being hit by the following vehicle.

The offending vehicle takes off with Tpr. Brown in pursuit, with the siren on, according to the Union. Trooper Brown is excited, this being his first pursuit/OSTA. With the Trooper following, siren on, no overhead lights, the fleeing vehicle enters a Dayton residential area.

The perpetrator exits the car, and Tpr. Brown tackles and cuffs him. He is drunk! The perpetrator and a resident of the house where he parked yelled that Tpr. Brown didn't have his lights on/OSTA. Trooper Brown responded saying his lights were on.

While at the scene, Shift Sgt. Robison asked the suspect if he heard the siren, and he answered yes. The suspect was taken to jail. At the jail, Sgt. Robison asks Tpr. Brown about patrol car lights. Trooper Brown said they were not on.

The night of the pursuit, Tpr. Brown reviews the pursuit tape, which shows the lights off, per the Union. According to the Union, the controls to the patrol car lights work as follows: if activate the camera-overhead lights not on automatically, if turn on lights camera comes on automatically.

Trooper Brown was truthful based on his review of the camera recording at the Response to Resistance(RTR) review. He was honest on every written document he signed, and during the AI, per OSTA. This was his first pursuit. Trooper Brown's lack of experience is the reason why he should be returned to his job, argues the Union.

DISCUSSION AND OPINION:

The evidence and testimony is not in dispute regarding the events and statements made surrounding Tpr. Brown's pursuit on 12/16/10. The alleged infractions did occur. The only test for just cause that remains

before the arbitrator is whether the seriousness of the offense is commensurate with the discipline. The Union alleges that the Tpr. Brown's lack of experience should be sufficient to mitigate the termination.

Trooper Brown was involved in his first hit-skip crash pursuit on 12/16/10. He entered an intersection where he observed one vehicle apparently ramming the rear of another. When entering the intersection, he activated his camera without activating his overhead lights or siren(ME-1B). He approached the vehicle being rammed to get more information. The offending vehicle "took off", and was pursued by Tpr. Brown, siren on.

At the residence where the fleeing vehicle stopped, the suspect exited the car and failed to respond to orders from Tpr. Brown(ME-1B). Trooper Brown tackled and cuffed the suspect. Comments were made by the suspect and resident that the patrol car's overhead lights were not on, to which: Tpr. Brown said they were on. Evidence and testimony showed that the lights were off, but the siren was on(ME-1B).

After the suspect was charged with OVI, among other things, Tpr. Brown following shift Sgt. Robison, delivered the suspect to the county jail. Prior to entering the jail, at the "sally port",Tpr. Brown responded to Sgt. Robison's lights question, saying he left the overhead lights off because of traffic safety concerns(ME-1B).

The next day after reviewing the camera recording, a RTR review was held between Tpr. Brown and Sgt. Robison. Trooper Brown, in his RTR statement said he thought his overhead lights were on, but they were not(ME-1).

An AI was conducted regarding the events related to the pursuit. Trooper Brown was found in violation of two OSHP Rules & Regulations: Compliance to Orders(failure to activate overhead lights during a pursuit), False Statement/Truthfulness(contradictory statements regarding failure to activate lights).

There is no doubt that the overhead pursuit lights were not activated by Tpr. Brown. Nor does he claim to any OSHP personnel that they were activated during the pursuit. Trooper Brown does say to the suspect at the scene, that they were on.

However, his statement in the RTR review was, that he thought the lights were on(ME-1). Conducting a pursuit without overhead lights activated, in itself, violates OSHP Policy # OSP 200.06(D)(1)(a,c). This act, on its own, would subject the trooper to additional discipline(ME-2).

Furthermore, evidence and testimony clearly identify Tpr. Brown saying the lights were on, in one situation(scene); turned them off for traffic safety in another situation(sally port); and forgot to turn them on during the RTR and AI(ME-1,1B). The scene statement was not a false statement of belief, in the arbitrator's opinion. Based on Tpr. Brown's testimony depicting the activation process for overhead lights, camera and siren, an excited new trooper, probably thought he turned them on. However, nearly two hours later at the jail "sally port", his statement of turning off the lights for traffic safety, was in the arbitrator's opinion, false(ME-1,1B). At that time, Tpr. Brown knew the lights were off because the suspect and resident had told him they were off(ME-1B). During the RTR and AI interviews, Tpr. Brown corrects his reason for non-activation, by saying he thought they were on(ME-1).

Law enforcement officers, above all must be creditable. Misstatement of facts could have catastrophic consequences. There was no evidence of disparate treatment. On the contrary, substantive evidence of similar discipline for false statement was identified in the OSHP Brief. Furthermore, this organization, in particular, has a history of terminating employees for false statements.

This was a new trooper with two previous disciplinary actions in his first year of employment. Although this discipline is harsh, law enforcement officers are held to a higher standard. Had there been no active prior discipline, the arbitrator could have viewed this false statement, which had no widespread consequences in itself, differently.

The arbitrator, considering the grievant's Department record and seniority, cannot find the instant discipline excessive, arbitrary, capricious, or discriminatory¹.

¹ Elkouri & Elkouri, 6th ed. Pg- 959-61

AWARD: The grievance is denied.

This concludes the Arbitration decision.

Respectfully submitted, this 4th day of August 2011.

A handwritten signature in cursive script that reads "E. William Lewis".

E. William Lewis
Arbitrator