

IN THE MATTER OF ARBITRATION
BETWEEN

OHIO STATE TROOPERS ASSOCIATION Unit 1
Employee Organization

And

STATE OF OHIO, DEPARTMENT OF PUBLIC SAFETY
Employer

GRIEVANT Trooper Adam Foster

Case No. 15-03-20110414-002-04-01

UMPIRE'S DECISION AND AWARD

Appearances:

For the Employee Organization:

Elaine Silveira, Esq.

For the Patrol:

Sgt. Corey W. Pennington

UMPIRE

Sandra Mendel Furman, J.D.
1119 South Cassingham Road
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INTRODUCTION

This matter was heard before the undersigned on April 19, 2011 in Columbus, Ohio at the OSTA headquarters. Grievant was the union witness. Also present were OSTA President Larry Phillips and Staff Representative Dave Riley. Elaine Silveira represented Grievant at the hearing.

The State's witnesses were Sgt. Terrell Campbell the officer who conducted the administrative investigation. (AI) and Lt. Kevin D. Miller from central office of the Patrol. Also present were, Aimee Szczerbacki and Rob Patchen from the Office of Collective Bargaining. Sgt. Corey Pennington represented the Patrol.

The contract, grievance trail and disciplinary notice and pre disciplinary papers were introduced and accepted as Joint Exhibits 1-3. The parties each introduced additional exhibits. Exhibits will be discussed below as relevant.

There were no procedural arguments presented.

A request for separation of witnesses was granted. Each side was given the opportunity to call witnesses and cross-examine witnesses and present relevant materials in support of their position. All witnesses were sworn. Post hearing arguments were made at the close of the hearing.

The decision is submitted within the time period agreed to by the parties.

ISSUE:

Did the Employer violate Sections 19.01, 19.05 and 18.02 of the Unit 01 labor agreement? If so, what shall the remedy be?

APPLICABLE CONTRACT SECTIONS:

Article 19.01. 19.05 and 18.02

STATEMENT OF FACTS:

Grievant is employed as a Trooper at the Swanton Post, Findlay District. He has been employed by the Patrol for more than four years at the date of the incident. Prior to this time he was stationed for two years in Hamilton Ohio. He made the lengthy commute each weekend in order to stay with his family on the weekends.

There is no factual dispute. Grievant was patrolling the Ohio Turnpike when a call came in from a concerned motorist about reckless driving by driver of a commercial vehicle (18 wheeler truck).

Trooper Foster located the truck driver and pulled him over due to the observed marked lanes violations. The truck was also followed by the concerned motorist who followed the truck in for the stop. The motorist was described as extremely agitated about the way the vehicle had been driven. She had indicated that the truck was “all over the road” and she was fearful for her safety.

The driver of the truck was not required to engage in any sort of field sobriety test when pulled over by the Trooper. The Trooper administered a “swipe” eye test on each eye, nothing more. The Trooper did not see anything significant in the trucker’s failure to come to an immediate stop when he flashed his flasher lights, the fact he almost hit a guardrail when braking or his failure to respond to his flashlight signals to get out of the truck. Trooper Foster further furthermore did not conclude that the trucker flashing his headlights was another sign of possible impairment. No Horizontal Gaze Nystagmus (HGN) test was administered at the initial stop.

Foster noted the existence of a flat tire on one of the front passenger inside tires. Due to the extreme weather conditions that night Grievant determined the safest course of action was to allow the trucker to drive three miles to the nearest toll plaza (Fallen Timbers).

At the service plaza Grievant discerned the odor of alcohol. He indicated there was much less wind as he encountered the driver in a more sheltered area between trucks. Trooper Foster called in another trooper as his car lacked the PBT. Thereupon Trooper Foster administered a full field sobriety test looking for all six “clues.” All were present. He thereafter arrested the truck driver due to his failure to pass the tests and charged him with OVI.

Grievant self-reported the incident. His supervisor Sgt. Campbell reviewed the traffic stop video and conducted training with Grievant afterwards. Neither party saw this interaction as a prelude to discipline.

Thereafter the AI took place and Grievant had Union representation.

After the investigation Grievant was charged with violation of work rule 4501:2-6-02 (B) (1) (5) Performance of Duty, Inefficiency.

The rule states in part:

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 within efficiency. ...

Grievant received a one (1) day fine on April 1, 2011. The specific allegations were:

...on February 3, 2011, you failed to detect an impaired driver and allowed him to drive his vehicle to another location.

Grievant's record of department is clear.

EMPLOYER POSITION

Grievant violated a known work rule and failed to perform tasks he had been trained to perform under the circumstances. .

The Patrol consistently issues a one day fine for failure to administer the OVI protocols.

The Patrol places the highest importance on ensuring the safety of motorists. Failure to test a motorist under these circumstances put the truck driver and all others on the road at risk. Liability issues and the seriousness of his omission support a "jump" in the disciplinary process. The Patrol imposes a one day fine for failure to properly handle an OVI.

The grievance should be denied.

UNION POSITION

Grievant did not intend to violate the rules. "Nobody's perfect". Grievant did effect a proper arrest at the toll plaza. The extreme cold weather made it unlikely under the circumstances extant on the road that the odor of alcohol could be detected. Grievant acted appropriately considering all circumstances then present. Failure to stop quickly; failure to respond quickly to the flashlight signals and the flashing of lights could all be signs of nothing or at most a sleepy driver. The problems observed by the trooper in the marked lanes violation and the

failure to come to a clean stop could also be ascribed to a sleepy driver, the flat tire and bad weather conditions.

The discipline was not progressive.

Grievant was interviewed prior to being informed of his Garrity rights and prior to being able to obtain Union representation.¹

The grievance should be granted in its entirety.

DECISION AND AWARD

The Umpire is deciding this case on the preponderance of evidence standard.

Clearly Grievant had sufficient indicia to merit a field sobriety test. One of the “tipping” factors for the umpire is the urgency and anxiety expressed by the citizen who called in the truck for report. Campbell described her as frantic. Although there was no eyewitness testimony from her at the hearing it is reasonable to assume that the driving observed was something more dramatic than an occasional veering out of a lane. The motorist in fact stated the truck was all over the place. The record indicates that the driver spoke to Grievant and told him how worried she was about the truck’s actions. The excited motorist remained committed enough to see what was going on that she remained present for the stop. Grievant described her as “extremely upset and very emotional-to the point she was crying because of the incident.”

The Trooper himself observed erratic driving. While it was later suggested by the Union through testimony at the hearing that the veering could have been caused by the flat tire this was just one possible excuse. Grievant had no doubts about the protocols; he performed them correctly at the turnpike plaza but not at the scene.

It was a harsh weather night and this condition may have delayed his observation of the odor of alcohol. The actual distance between the driver and the Trooper was not clear from the record. It is undisputed that he did not

¹ No details were provided on this claimed violation. No argument was made at the close of the case concerning the alleged Garrity violation. The Umpire considered the argument to be abandoned.

conduct the HGN test but instead conducted a onetime swipe which is inconclusive.

Union materials indicate that there are a statistically measurable amount of OVIs that do not get detected. Union Ex.1.

The Patrol did not present a video of the stop. In past cases a video was used to illustrate the facts on the ground. Although the video may not have been determinative of the condition of the driver, the amount of the difficulty encountered in making the stop, the resistance if any of the driver in following the Trooper's directions and the general demeanor of the truck driver all could have been observed. However what is purportedly on the video is fully described in the AI.

Considering the factors at play that night the Umpire considers it more likely than not that Grievant was inefficient in failing to conduct a full field sobriety test at the stop. The information he had both before the stop and at the stop would have made it prudent, reasonable and training and rule compliant to administer a field test at that point.² The factors that all coalesced were his stated inability due to the cold to detect the odor; the fact the motorist called in erratic driving and stayed with the truck to ensure it was being addressed, the failure of the trucker to promptly react to the flashing lights of Trooper Foster's car, the failure of the driver to respond to hand signals to promptly get out of the cab, the difficulty the vehicle had coming to a complete stop after being so directed; the fact that in an abrupt stop the truck almost hit the guardrail; the ten minutes or so direct contact with the driver which should have been an opportunity to pick up more clues; and the lateness of the hour all combined to make a field test appropriate.

The Union countered that a slow to stop vehicle can be explained by factors other than OVI; that the flat tire could have caused the erratic driving; that impaired truck drivers due to alcohol are more rare than the much frequently observed sleepy drivers; that Grievant ultimately made an effective and

² There was no discussion by either party as to why Grievant's car did not have a PBT in it and back up needed to be called. This was not a matter for discipline and the umpire is not weighing it in her decision.

appropriate arrest; that a perfect stop is not always achievable and that the cold blustery weather made alcohol detection more difficult. The fact that the trucker also safely navigated the three miles to the Fallen Timbers service plaza should be a mitigating factor as well, lessening the claimed inefficiency in not making the arrest earlier.

The Umpire read and considered the contents of the Union Ex. 1. But the studies and various articles do not provide an “out” or “excuse” for rigorous enforcement or for following expected protocols.

The greater weight of the evidence points to the conclusion that it was a probable cause situation then and there at the time of the stop. As stated by Campbell Grievant did not use all means available to determine impairment.

What is interesting is reading the statement of Facts at p. 21-22 of the AI. Trooper Foster states that “I noticed that the defendant had red, blood shot glassy eyes, but due to the cold and the wind on the side of the road I did not notice the odor of alcohol on his person at that time.” Granted this statement (unsigned) was prepared for the trial. But this additional fact- of the eyes being red and glassy points even more clearly to the error in judgment made by Trooper in allowing the truck to be driven three miles and not administering the HGN at the time of the initial stop.

The issue bearing review is the question of progressive discipline. Grievant had a perfect department record. He self-reported the incident which also stands him in good favor.

Campbell didn't believe more than a training video review was warranted. Campbell's comments that “it could have happened to any of us” and his belief that the training was the end of the situation were given consideration in the overall weighing of factors.

The Department explained its “jumping” to a one day fine due to the emphasis it places on enforcement of OVI laws for highway safety. It strives to prevent injury to persons and property and avoid potential liability situations. There is no dispute that these are important goals that go to the very mission of the Patrol.

However the umpire has authority under the cba to modify discipline when appropriate factors exist. This is such a case. The umpire believes a written reprimand serves the appropriate corrective purpose. The imposition of a one day fine with due respect for and taking into consideration the important policy considerations of the Department- is excessive under all the circumstances extant here. Here are mitigating factors: a quick and honest self- report to Lt. Wiederman; a timely arrest; review of a training video suggested by the Lt. and conducted by Sgt. Campbell; a clear department record all needed to be weighed by the Patrol instead of imposing a lock step response of a one day suspension. The Umpire notes also that there was no notice to the employees presented at the hearing that indicated that it was policy of the Patrol to always impose a one day fine for first offense on inefficiency.

The cba explicitly recognizes principles of progressive discipline. A written reprimand is still effective notice to Grievant of the need to be more efficient in stops when indicia indicate probable cause. OVI enforcement is key to the mission and purpose of the Patrol. Grievant has official written notice to handle possible OVIs in a more efficient manner.

AWARD

The grievance is granted in part and denied in part. The discipline is modified to a written reprimand.

IT IS SO HEREBY ORDERED

s/ Sandra Mendel Furman

Sandra Mendel Furman, Umpire Issued in Columbus, Ohio on May 7, 2012