

IN THE MATTER OF ARBITRATION  
BETWEEN

OHIO STATE TROOPERS ASSOCIATION Unit 1  
Employee Organization

And

STATE OF OHIO, DEPARTMENT OF PUBLIC SAFETY  
Employer

GRIEVANT Jacquelyn Layson

Case No. 15-03-20110407 -0060-04-01

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UMPIRE'S DECISION AND AWARD

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Appearances:

For the Employee Organization:

Herschel Sigall, 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. Herschel Sigall represented Grievant at the hearing with Elaine Silveira as second chair.

The State's witness was Sgt. R.G. Sellers who conducted the administrative investigation. (AI) (Management Ex. 1) Lt. Kevin D. Miller from central office of the Patrol was the management representative. Also present were Aimee Szczerbacki and Rob Patchen from the Office of Collective Bargaining. Sgt. Corey Pennington presented the Patrol's case.

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 Section 19.05 of the Unit 1 labor agreement? If so, what shall the remedy be?

## **APPLICABLE CONTRACT SECTION:**

Article 19.05

## **STATEMENT OF FACTS:**

Grievant is employed as a Trooper at the Toledo Post. She has been employed by the Patrol for more than six (6) years at the date of the incident.

There is minimal factual dispute. On January 19, 2011 Grievant had arranged to take four hours of comp time leave at 3am. (½ way into her shift).

Immediately leading up to the time of the incident Grievant was responding to a call about an accident scene involving a jackknifed truck blocking traffic. It was an extremely icy and cold night. There was alternately rain and snow and many cars had skidded off the roads that shift.

On I-475 South she noticed a car with its left tail light out in a ditch. Grievant saw that the car was running. She walked around the vehicle and saw no signs of damage and that the driver was on her cell phone. Grievant did not call in the plates or ask the driver for identification.<sup>1</sup> She spoke to the driver (later identified as Tidwell) who was out of her vehicle. Tidwell was having a phone conversation and Grievant observed nothing unusual in that conversation. Grievant asked her if she was injured and Tidwell answered she was ok. Grievant asked her if she had heat in the car and Tidwell responded yes. She asked if the driver had called a tow; the driver responded yes. Grievant offered to make a call for a tow truck that might have a quicker response time. The driver agreed. Grievant then requested a dispatch to a wrecker for a tow. From start to finish the parties' interaction lasted ten minutes all of it outside.

There was neither video nor audio recording of the stop. Grievant indicated that she was within 3-4 feet of the driver during their interchanges. She stated nothing occurred or was observed by her to give rise to reasonable suspicion that Tidwell was impaired.

Having assured herself the situation was under control Trooper Layson left the scene and proceeded onwards to handle another call. She ended her shift at 3:44 am. She was working past her previously approved leave time of 3am.

After Grievant left the scene two Sylvania Township police officers spoke to Tidwell. They assisted her vehicle out of the ditch. One of the officers detected enough of an odor of alcohol to "pique" his interest. He asked his fellow officer to also do a quick check of her eyes to back up his quick eye examination .but he too did no further examination. The Sylvania Officers noted that Tidwell was excited and they lingered until she regained her composure then departed. Neither suspected impairment.

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<sup>1</sup> This was not a basis for discipline.

None of the three officers-Grievant or the two Sylvania officers-inventoried Tidwell's car for contents.

Shortly thereafter Tidwell had an injury accident. She struck a truck in the rear. (ACDA offense) Deputy Sheriff Woodruff at the scene described Tidwell as hysterical and he smelled alcohol on her.

Patrol Sgt. Vitte was called to the scene of the ACDA. He did not notice any alcohol containers nor any smell of alcohol in the vehicle.

Sgt. Sellers was the investigating officer for purposes of the AI. He stated that OVI enforcement is the number one priority in Lucas County. He indicated that troopers are trained to always look for signs of impairment. It is also protocol to always ask the driver for identification and to insure the driver is the owner of the vehicle. Sellers indicated that the time of day was a further indicator that evaluative steps should have been taken. The wee hours are prime time for alcohol offenses.

Sellers described the appropriate steps to follow for a stop. Approach the vehicle, tell the driver the reason for the stop, interview the driver observe the driver's reactions (see if they are slurred in response, fumbling in their physical motions), observe if there is a smell of alcohol, if yes ask where the smell may be from and then begin the steps of the field sobriety test if the progression of steps creates a probable cause situation. There should be reasonable suspicion to progress from one step to the next. The Patrol balances the risk of inconveniencing drivers with the serious risk of injury to persons/property if detection is missed.

Sellers opined that Grievant spent too little time on scene and failed to properly evaluate the driver. She failed to use all available steps to determine if Tidwell was impaired. He indicated that extreme cold weather makes it harder to evaluate the odor of alcohol and that therefore Trooper Layson should have asked the driver to come into her car for further evaluation.

The crash was further investigated by Trooper Zientek at the hospital.<sup>2</sup> Zientek observed bloodshot and glassy eyes and observed the odor of alcohol. He performed the HGN and detected six clues of impairment. Tidwell was charged and he obtained a blood sample which indicated she was clearly over limit. He determined that Tidwell was impaired due to her .178 test results.

Based upon his review of all of the reports gathered in the AI it was Sellers' conclusion that due to the time between Grievant's interaction and the stop Tidwell was impaired at the time Grievant encountered her. Had she spent more time with Tidwell Grievant would have concluded that she was in fact impaired.

Sellers further indicated that the amount of training Grievant had received should have been sufficient to have her perform the protocols on Tidwell. He agreed that she was proficient in the steps to be followed. He noted that she routinely makes OVI arrests.

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 March 24, 2011. The specific allegations were:

... On January 19, 2011, Trooper Layson failed to detect an impaired driver who later became involved in a traffic crash and was subsequently arrested for OVI.

Grievant's record of department is clear of prior offenses.

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<sup>2</sup> All of Zientek's findings are from the AI, Management Ex. 1. Statements earlier about the Sylvania police officers and Woodruff are also drawn from Management Ex. 1 and Sellers' testimony.

## **EMPLOYER POSITION**

Grievant violated a known work rule and failed to perform tasks she had been trained to perform under the circumstances. Grievant was a trained and otherwise efficient employee who knew what needed to be done yet chose not to do the steps. Grievant did not identify the vehicle or the driver. Grievant negligently took the word of the motorist that she was not impaired. Tidwell's impaired state was obvious according to the EMS squad and hospital staff.

Inventory taken at the scene of the crash showed no alcohol in the car. Therefore it is highly unlikely that Tidwell had the opportunity to drink alcohol from her vehicle between the time she was pulled out of the ditch and the time she crashed her car. There were no intervening highway exits.

The Patrol consistently issues a one day fine for failure to administer the OVI protocols. The umpire should note that the only argument made by the Union at step 2 of the grievance procedure was that the discipline was too harsh.

The Patrol places the highest importance on ensuring the safety of motorists. Failure to test a motorist under these circumstances resulted in an injury accident. Failure of another police department to conduct the sobriety tests in no way diminishes Grievant's duties and obligations. Liability issues and the seriousness of her omission support a "jump" in the disciplinary process.

The grievance should be denied.

## **UNION POSITION**

Grievant acted appropriately considering all circumstances then present. There must be reasonable suspicion in order to begin the progression of steps before a PBT is administered. There was no reasonable suspicion on Grievant's part to initiate any of the clues. There was a reason Tidwell's car was in the ditch-the extreme weather conditions. No alcohol was smelled. Tidwell displayed competency in answering questions and placing telephone calls. No other signs of intoxication were present.

Two other police officers did not find sufficient evidence of alcohol to initiate a field sobriety test. This lends support to the fact Grievant's actions were proper and appropriate.

Grievant is not a guarantor that all persons driving drunk will be arrested. Union materials indicate that there are a statistically measurable amount of OVIs that do not get detected.

Grievant was not a shirker. She was not in a hurry to get home and avoid her responsibilities. She was an effective and efficient officer.

The grievance should be granted in its entirety.

## **DECISION AND AWARD**

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

Grievant appeared by all accounts to be a diligent and effective Trooper. On her way into work she arrested a driver and charged the driver with OVI. She is responsible for enforcement on her way to and from work as she drives a Patrol vehicle home.

With a four hour shift approved Grievant was on her way to a dispatched call about a rollover when she stopped to assist a motorist in a ditch. It was a harsh weather night and the very icy conditions made a car in a ditch a not unusual sight.

The Patrol did not and indeed could 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 Tidwell her actions and those of the Trooper could have been observed. Unfortunately it appears from the record that Grievant's video was non-functional due to a blown fuse. Management Ex. 1.

Union Ex. 3 posits that the chance of an OVI being arrested can be as low as 1: 2000. It also states "For every DWI (OVI) violator arrested, 3 others are contacted face to face by police, but are not arrested." Further findings of the study are not recounted here. Suffice it to say that the stop and arrest of drivers for the purpose of OVI enforcement appears per this document to be a less than perfect situation producing high levels of arrests and/or successful convictions. The Union points out that this manual is incorporated into the Patrol's own training materials.

The umpire read and considered the contents of Union Ex. 3 as well as Union Exs. 4, 5 and 6. But these studies and manuals do not provide an “out” or “excuse” for a failure to do rigorous enforcement or for following expected protocols.

The greater weight of the evidence does point to the conclusion that it was not a probable cause situation then and there at the time of Grievant’s encounter with Tidwell. Grievant observed Tidwell and engaged in conversation with her. Tidwell’s response and demeanor suggested nothing out of sorts. Tidwell was able to talk on the phone to secure a tow truck, maintain a conversation with a family member and verbally indicated she was ok. No odor of alcohol was observed.

Union Ex. 2 is from the Patrol’s Policy and Procedure Manual.

Reasonable Suspicion is defined as follows:

Field Sobriety tests should be administered when there is reasonable suspicion to believe a person is operating a vehicle while under the influence of alcohol or drugs of abuse...

Union Ex. 7 defines the standards for field sobriety testing (SFST) as follows:

An officer should follow the NHTSA procedures to ensure the integrity of the SFST.

Probable Cause is explained as follows:

An officer’s observations are crucial in establishing probable cause upon which the traffic stop/arrest is based. Officers have been trained to be constantly alert for erratic driving behaviors that indicate a driver’s possible impairment, including:

- straddling the center or lane marker
- turning with a wide radius
- weaving, swerving, drifting
- driving 10mph below the speed limit
- almost striking an object or vehicle
- stopping without cause in a traffic lane
- following too closely
- tires on center of lane marker
- braking erratically
- signaling inconsistent with driving actions



Initial Contact is described: Interview the driver, recognize and note specific characteristics, attitudes and actions commonly associated with alcohol/drug impairment during a face to face contact.

Union Ex. 7.

None of these factors would be present for a non moving vehicle such as Tidwell's.

Reasonable Suspicion is defined as follows:

Field Sobriety tests should be administered when there is reasonable suspicion to believe a person is operating a vehicle while under the influence of alcohol or drugs of abuse,<sup>3</sup>

Probable Cause for Operating a Vehicle is defined as follows:

If the vehicle was not observed in motion, it will be the officer's responsibility to determine if probable cause exists to charge the driver with operating under the influence...

Union Ex. 7.

In reading those definitions it is not at all clear that Grievant did anything wrong. There appears to be no "bright line" formulaic set of factors (nor could there be in all likelihood) that demanded Grievant respond in a certain way to what she saw and observed that early morning. Of course the odor of alcohol would have triggered a different scenario. She smelled none despite her ten minutes of interaction and observed no other clues.

The Union introduced written transcripts of Sgt. Sellers' interviews with Officers Tanner and Maynard who also interacted with Tidwell the morning of the incident. Union Ex. 1, 2. These interviews indicate that although Tidwell was upset when they saw her-in contrast to Grievant's description- Tanner specifically stated he smelled nothing from her breath. He noticed a slight odor of alcohol from her vehicle. Nothing they saw or observed caused them to do more than eye swipes. No field sobriety test was conducted nor a car search. Another

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<sup>3</sup> Union Ex. 5 states it is the officer's responsibility to "...determine whether there is sufficient evidence to establish "reasonable suspicion" necessary to proceed to the next step in the detection process. It is always your duty to carry out whatever tasks are appropriate, to make sure all relevant evidence is brought to light."

Police Department's failure to conduct the sobriety tests would not excuse Grievant's failure to act if there had been sufficient reasonable cause to proceed with further progression of tests.

There was not reasonable cause to take more steps in the progression outlined above based upon Grievant's interaction. The fact that one of two other police officers smelled alcohol at a later moment does not mean that Grievant smelled it and ignored it. This is true even though it was ultimately clear Tidwell must have been impaired when Grievant first encountered her. This is "one that got away" in the sense of the statistics described in the Union materials. Everything she saw and observed did not lead to reasonable suspicion. Thus she was not inefficient.

There was no just cause for the imposition of the one day fine.

**AWARD**

The grievance is granted

IT IS SO HEREBY ORDERED

s/ Sandra Mendel Furman

Sandra Mendel Furman, Umpire

Issued in Columbus, Ohio on May 7, 2012