

In the matter of Arbitration between:
State of Ohio, Department of Public Safety
Employer

And

Case # 15-03-20110602-0065-04-01
Sergeant Justin J. Hurlbert

Ohio State Troopers Association
Union

In attendance for the OSHP: S/Lt. Charles J. Linek, Advocate; Ms. Aimee Szczerbacki, OBC/2nd Chair; Sgt. J. Adam Burkhardt(witness); Ms. Lara Marlow, DPS, Attorney; Lt. Heidi A. Marshall; S/Lt. Chad M. McGinty(witness); Sgt. Corey W. Pennington.

In attendance for OSTA: Ms. Elaine Silveira, Advocate, Asst. General Counsel; Sgt. Justin Hurlbert, Grievant(witness); Mr. Larry Phillips, OSTA President; Mr. Dave Riley, Staff Representative(witness).

INTRODUCTION:

This matter was heard at the Office Of Collective Bargaining in Columbus, Ohio, on January 9, 2013, at 9:00am. All witnesses were sworn. The Employer raised a procedural issue, and it was determined that the parties would first make their procedural arguments, followed by the Hearing on merits. The arbitrator, in his determination, would first address the procedural matter, and if sustained the grievance would be denied procedurally, with no merit award addressed.

In addressing the merits of the issue, the following Joint Exhibits were submitted: Jt. 1-Units 1 & 15 Collective Bargaining Agreement(CBA)(2009-2012); Jt. 2- Grievance Trail #0065; Jt. 3-Discipline Package, composed of—Statement of Charges, Pre-discipline Notice, Suspension Letter, Department Record, Highway Patrol & Rules & Regulations: 4501: 2-6-02(B)(5) Performance of Duty,

4501: 2-6-02(I)(1) Conduct Unbecoming an Officer, 4501: 2-6-02(V)(2) Use of Force and Firearms. The following were introduced as Employer Exhibits: ME 1-Administrative Investigation(AI) 2011-0068-Sgt. Hurlbert; ME 2-OSHP Policy COURT DEMEANOR. The following was introduced as a Union Exhibit: UE 1-Court Diagram.

ISSUE:

The parties submitted a jointly signed issue statement, which reads as follows;

Did the Grievant receive a three (3) day suspension for just cause? If not, what shall the remedy be?

PROCEDURAL QUESTION:

The Employer charges the Union with violating the time limits outlined in the Grievance Procedure, ARTICLE 20-Section 20.07, Step 3, and the remedy prescribed in Section 20.11. Step 3 of Section 20.07 provides for a fifteen (15) day time limit for the Union to refer a Step 2 answer to Step 3, Arbitration. Section 20.11, paragraph two requires the Union to meet the time limits contained herein, or the grievance will be resolved in favor of the Employer. A Step 2 grievance response was issued by the DPS on June 6, 2011, by letter to the Grievant(Jt. 2). The Union appealed the grievance to Arbitration on December 19, 2012(Jt. 2). Per Advocate testimony, the Employer claimed a time limit violation by the Union. The Employer notified the Union of its claim on January 3, 2013.

Testimony by both Advocates showed that the actual Grievance Response Notice to the Union Headquarters is executed by e-mail. This procedure has been in existence for approximately one year and one-half, per the Advocates. In this instance, the Headquarters claims to not having received an e-mail response. When it was received on 12/19/12, it was immediately moved to arbitration, per the Union.

This was a technical error argues the Union, and the procedural claim should be denied.

The Employer did not argue that they had actually e-mailed the the Union their Step 2 response. Nor did they express an effort to locate and produce a copy of their Step 2 e-mail response. Furthermore, a waiver of timelines was agreed to between the parties on 5/27/11(Jt. 2). It was signed by these two Advocates. The Union Advocate claims that the waiver was the last item in their grievance file.

I find that the above reasons and evidence, and lack thereof, to be reasonable excuses, and justification for proceeding to the merits of the case(1). The Employer procedural claim is denied.

FACTS:

Sergeant Justin Hurlbert, employed by the Ohio State Highway Patrol(OSHP) since 1997, was suspended for three (3) days on May 6, 2011. He has been a Sgt. For six years and is assigned to the Mt. Gilead Post. The OSHP charged him with violating three Rules and Regulations: Performance of Duty/Inefficiency, Conduct Unbecoming an Officer, and Use of Force and Firearms.

On January 18, 2011, Sgt. Hurlbert was testifying in a Suppression Hearing at the Morrow County Court. He appeared as a Prosecutor's witness. Sgt. Hurlbert participated in the arrest of a suspect on June 18, 2010. The suspect was charged with OVI and the inventoried vehicle produced a loaded hand gun.

During Sgt. Hurlbert's testimony, it was alleged that his behavior, demeanor and actions were inappropriate. And while performing a hand gun demonstration he violated OSHP policy. An Administrative Investigation(AI) was initiated on January 25, 2011, and he was found guilty of violating the above identified OSHP Rules

And Regulations(ME-1+videos).

Sergeant Hurlbert filed a grievance on 4/25/11, challenging the pending three (3) day suspension. He claimed the discipline is without just cause and not progressive, therefore, the Employer violated Article 19, Sections 19.01 & 19.05 of the CBA. The discipline was requested to be reduced to a one (1) day suspension, and to make the grievant whole for the lost two (2) days. A Step 2 Hearing was held on May 12, 2011, and the waiver extended response of denial, was issued on June 6, 2011. A notice to Arbitrate was filed by the Union on December 19, 2012.

DISCUSSION AND OPINION:

At the Arbitration Hearing, the Union stipulated to the Unbecoming an Officer charges and was only challenging the Use of Force and Firearms Rule 4501:2-6-02(V)(2). Therefore, as per the grievance, a reduction of two (2) days of suspension was requested.

Sergeant Hurlbert, during his testimony at the January 18, 2011 Suppression Hearing, appears on the Court video to be upset(ME-1). Other persons at the Hearing, per submitted evidence and testimony, also observed his disturbing behavior(ME-1).

Introduced video evidence and testimony shows Sgt. Hurlbert, during his Court witness testimony, performing a demonstration of a loaded hand gun, being unloaded. Testimony of his colleague, Sgt. Burkhardt, evidenced the grievant performing the loaded firearm demonstration for the Court, very quickly(ME-1). The Court Security Officer stated in his interview, that he was shocked by the demonstration. The Security Officer stated that Sgt. Hurlbert should have asked the Court for approval to perform the demonstration(ME-1). Even the Prosecutor, who approved the Grievant's offer to demonstrate the weapon unloading exercise, stated in his interview that, "it scared me"(ME-1).

Rule 4501:2-6-02(V)(2) reads as follows: “A member shall exercise care in handling, carrying, transporting, storing and using firearms so as to avoid endangering any persons. A member shall only draw and display his/her firearm in time of demonstrated need, for official inspection, or during training, qualification, or cleaning.

The arbitrator is not convinced through the submitted evidence and testimony, that the Grievant exercised proper care in handling his firearm. Although the Grievant may not have believed he endangered other persons, their witness convinces me that others in the Courtroom may have felt endangered. In the arbitrator’s opinion, the Prosecutor felt endangered(scared), per his interview.

A demonstration of handling a loaded weapon needs to be executed in a slow meticulous manner, so as to accomplish the demo. Also, while executing the demonstration, the observers need to feel safe. This was not in evidence, in the arbitrator’s opinion(ME-1+video).

Even though the defendant’s Court request to suppress the loaded firearm charge was denied, the end does not justify the means. The State, in the arbitrator’s opinion, has met its burden of proving just cause for discipline.

AWARD:

The grievance is denied.

This concludes the Arbitration decision.

Respectfully submitted this 28th day of January 2013.

E. William Lewis, Arbitrator