

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF PUBLIC SAFETY
DIVISION OF HIGHWAY PATROL

AND

THE OHIO STATE TROOPERS ASSOCIATION

Grievant: Jason Fantone

Case No. 15-03-20130923-0079-04-01

APPEARANCES:

For the Union:

Advocate: Herschel M. Sigall, Attorney
Elaine M. Silveira, Attorney

Witnesses:

Jason Fantone

For the Employer:

Advocate: Lt. Cassandra Brewster

Witnesses:

Valorie Saluga, Sgt.
Chad Bass, Sgt.

OPINION AND AWARD

Arbitrator: Dwight A. Washington, Esq.

Date: March 19, 2014

INTRODUCTION

The matter before the Arbitrator is a Grievance brought pursuant to the Collective Bargaining Agreement (“CBA”) in effect July 1, 2012 through June 30, 2015 between the State of Ohio Department of Public Safety, Division of the State Highway Patrol (hereinafter “OSP” or “Employer”) and the Ohio State Troopers Association, Inc. (“Union”).

The issue before the Arbitrator is whether just cause exists to support the removal of the Grievant, Jason Fantone (“Fantone”) for violating the following Ohio State Highway Rules and Regulations: Rule 4501:2-6-02(I)(1)(2) Conduct Unbecoming an Officer.

The removal of the Grievant occurred on September 17, 2013 and was appealed in accordance with Article 20.08 of the CBA. This matter was submitted to arbitration. The hearing was held on January 21, 2014, where both parties submitted evidence, and post-hearing briefs were submitted to the Arbitrator on February 24, 2014. This matter is properly before the Arbitrator for resolution.

BACKGROUND

Fantone has worked as an Ohio State Trooper for over ten years and was assigned to the Warren Post on July 8, 2013. The Grievant had no active discipline of record, and his most recent evaluations indicate that his on-duty performance indicators assess his performance as overall satisfactory.

On July 8, 2013, the Grievant consumed alcohol at Buffalo Wild Wings (“BWW”) in Austintown, Ohio. The Grievant apparently fell asleep at the bar. Upon being woken by a BWW employee, Fantone consumed some food, threw up at the bar, and left without paying his bill. The Grievant made his way to his car in the parking lot. The Grievant fell asleep again, with the

engine running. He was not roused despite several attempts made by BWW employees, who knocked on his car windows. The vehicle was running.

The Austintown Police Department (“APD”) was contacted, and when the officers arrived, the Grievant was still in the driver’s seat of his car, asleep with the motor running. After additional attempts to rouse the Grievant were unsuccessful, Sgt. Valorie Saluga (“Saluga”) opened the car door and was finally able to rouse him. Sgt. Saluga smelled alcohol and observed the “slurring of his words” during their initial conversation. Fantone refused to undergo a field sobriety test, whereupon he was placed in handcuffs and arrested for operating a vehicle while under the influence (OVI).

While being transported and processed at the APD, the Grievant displayed behavior that was considered confrontational throughout the process. According to the arrest report, Fantone was loud and sarcastic during the entire booking process. (M Ex. 1, p. 20). Fantone also refused to submit to a breath test when offered by Sgt. Saluga.

Fantone’s arrest was reported in the local media and various social media outlets. Contained within the media reports was Fantone’s 2011 prior arrest for an alcohol incident which also occurred off duty at a professional football game. On July 17, 2013, Fantone pleaded guilty to an amended charge of having physical control of a vehicle while under the influence of alcohol or drugs. Fantone’s guilty plea was reported in the local media and social media again.

The Employer removed Fantone on September 17, 2013 for violating Rule 4501:2-6-02(I)(1)(2) in discrediting the Division by his conduct and plea of guilty to the first degree misdemeanor.

The Union contends that Fantone’s behavior did not warrant removal and seeks restoration of seniority, benefits and pay.

ISSUE

Was the removal of the Grievant for just cause? If not, what shall the remedy be?

**RELEVANT PORTIONS OF THE
AND THE OSP RULES AND REGULATIONS
Ohio Administrative Code 4501:2-06-02(I)(1)(2) Conduct Unbecoming An Officer:**

A member may be charged with conduct unbecoming an officer in the following situations:

1. For conduct, on or off duty, that may bring discredit to the division and/or any of its members or employees. A member shall not engage in any conduct which could reasonably be expected to adversely affect the public’s respect, confidence, or trust for Ohio state highway patrol troopers and/or the division.
2. For committing any crime, offense or violation of the laws of the United States, the state of Ohio, or any municipality.

Ohio State Highway Patrol Sworn Officer Discipline Grid

Performance Track Violations	First Offense
Conduct Unbecoming – Criminal Convictions (M-1 or higher)	Removal

POSITION OF THE PARTIES

Position of the Employer

While at BWW on July 8, 2013, the Grievant consumed one and a half tall beers which made him fall asleep at the bar. Upon being woken by the bar manager, the Grievant was offered food and water and was informed that he could not sleep at the bar. (Employer Post-Hearing Statement, p. 1). The Grievant appeared to be intoxicated. Steve Baringer (“Baringer”), assistant general manager, indicated that he told Fantone that he had enough and BWW was not going to serve him any more (alcohol), and he could tell that Fantone had been drinking. (Management (M) Ex. 1, p. 3). Baringer indicated that Fantone had drank one tall beer (23 ounces) and about half of another one. Fantone was at BWW between thirty and forty-five minutes according to Baringer. (M Ex. 1, p. 4).

After the food arrived, the waitress noticed that Grievant vomited and he was no longer at the bar. His bill was not paid, which caused the employees to initially search inside BWW to try and locate the Grievant. Unable to locate him, the waitress began to look in the parking lot. The Grievant was found in his car asleep with the engine running.

Several employees of BWW attempted to wake Fantone for approximately five (5) minutes by knocking on his windows. The Grievant remained asleep. The APD was called and two officers were dispatched to BWW.

Sgt. Saluga and Officer Dan Burich (“Burich”) arrived and saw the Grievant in the driver’s seat “. . . but had rolled to his stomach on the center console and had his head and arms on the edge of the back seat.” (M Ex. 1, p. 20). After pounding on the window unsuccessfully, Sgt. Saluga opened the car door, shouted at the Grievant several times to no avail, and, finally, had to shake the Grievant several times to wake him. According to Sgt. Saluga, she shut the car off; smelled alcohol; saw Fantone’s eyes were glassy and bloodshot; noticed his speech was slurred; and observed generally, that he appeared confused. (M Ex. 1, p. 20).

Sgt. Saluga inquired how much alcohol Fantone had consumed and he replied “I’m a state trooper, leave me alone.” Sgt. Saluga requested that Fantone perform a field sobriety test, which he refused. The Grievant placed his hands behind him and allegedly said, “Just arrest me.” (M Ex. 1, p. 26).

Fantone was transported to APD where his behavior was described as “. . . loud, sarcastic and verbally confrontational” throughout the booking process. (M Ex. 2, pp. 6-7). Fantone refused to submit to a breath test and also made derogatory comments about Sgt. Saluga and the APD according to Sgt. Saluga. (M Ex. 1, p. 20).

The BWW arrest incident was broadcast “. . . in several television and print media markets to include the metropolitan areas of Youngstown and Cleveland.” (M Post-Hearing Statement, p. 4). The conduct associated with Fantone’s BWW arrest was not his first incident of off-duty behavior that received public attention involving the use of alcohol. The media articles not only focused upon Fantone’s July 8, 2013 arrest, but also a prior arrest in 2011 at the Cleveland Browns football stadium. In 2011, Fantone was arrested for belligerent conduct toward security officers and damage that he caused to a holding cell at the stadium. Several of the publications commented in detail about the 2011 arrest and Fantone’s resulting termination for the stadium behavior. However, an arbitrator reinstated him, [REDACTED]. (M Ex. 1, pp. 24-33; 39-40).

As a sworn officer, the Grievant’s off-duty conduct is held to a higher standard than the general public. Due to well-settled arbitral law and public policy, every sworn officer’s conduct, both on and off duty, demands that their behavior does nothing to discredit and/or bring disrespect upon their department.

The Grievant has demonstrated an inability to serve and protect the public, or to enforce the laws of the state that he does not follow. The expectations that police officers only enforce the laws while on duty but when off duty are allowed to “. . . break the same laws they have been sworn to uphold” would lower the standard the public expects and demands. (M Post-Hearing Statement, p. 11)

The Employer contends that the illness Fantone allegedly experienced while doing repair work at his home earlier that day makes no sense. No evidence exists that Fantone sought treatment or told Sgt. Saluga or Officer Burich that he was sick on July 8, 2013. (M Ex. 1, p. 11-

13). No evidence exists that any other family member became ill as a result of inhaling toxic fumes. [REDACTED]

[REDACTED].

The evidence indicates that Fantone's off-duty behavior violated the standard of conduct and violated the public trust, and his guilty plea on July 17, 2013 requires that his termination be upheld.

Position of the Union

Fantone's performance evaluations indicate that he was considered an outstanding trooper with the ability to become a supervisor. (Union (UN) Post-Hearing Statement, pp. 3-5, UN Exs. 1 and 2). Fantone's "overall satisfactory" rating for 2012 meant that in five of the eight measurable categories, he was graded as exceeded or meets expectations. Fantone's on-duty performance was well regarded by the Post Commander, his supervisors, and the public.

On July 8, 2013, the Grievant had no discipline on the record, and any reference by the Employer to past incidents is impermissible based upon the parties' ability to negotiate the effect of past misconduct upon present allegations of wrongdoing. In other words, Fantone had a clean record and prior allegations of misconduct have no bearing on this matter.

Fantone was interviewed on July 29, 2013 and August 22, 2013 by Sgt. C. M. Bass ("Bass") as part of the Administrative Investigation ("AI").

Fantone on July 8, 2013 was in off-duty status and the early part of his day consisted of the following:

1. Perform escort related services for an oversized load;
2. Renewal of his driver's license at BMV;
3. Lunch with his children at McDonald's.

Around 2:00 p.m., Fantone purchased a new toilet for installation in his upstairs bathroom. Being a novice regarding this type of home repair, issues developed. Fantone damaged the wall when removing the old toilet; dropped a bolt down the commode drain once the old toilet was removed; and was unable to accurately set the new commode on the ring for proper installation. (UN Post-Hearing Statement, pp. 5-6).

In an effort to retrieve the bolt, Fantone used his arm unsuccessfully to “fish” in the drain. As a result, Fantone was exposed to odors and sewer gasses due to the toilet being removed, allowing fumes to escape through the exposed drain. Hydrogen sulfide, methane and other chemical agents are present in sewer gas, according to the Union. Fantone did not put a rag in the drain opening to prevent the sewer fumes from entering the bathroom.

Fantone’s wife arrived home around 5:00 p.m. to observe the condition of the unfinished toilet project and was not pleased. She proceeded to contact her brother to come and complete the installation, to Fantone’s dismay. Fantone was upset that his brother-in-law was summoned to correct his “mess,” so at approximately 5:15 p.m., he abruptly left the house and drove approximately 2.5 miles to BWW. BWW is a sports bar and restaurant.

According to Fantone, he was feeling sick when he left his house but didn’t understand the reason for his illness. Upon arrival at BWW, the Grievant consumed one and a half tall beers.¹ As a result of the beers and feeling sick, Fantone fell asleep at the bar. Fantone was awakened by BWW’s Assistant Manager who provided him with water and food. After consuming some of the food, the Grievant threw up and left the bar.² BWW employees

¹ Fantone during his administrative investigation denies having anything else to drink prior to going to BWW. (Joint Exhibit 6, pp. 1-2).

² Fantone failed to pay the bill which surely would prompt the waitress to try to locate the person who was attempting to leave without paying.

attempted to locate Fantone inside the restaurant, to no avail. Finally, he was located in the parking lot in his car asleep, with the engine running.

BWW employees were unable to wake him by knocking on his windows for approximately five minutes. Fantone, due to his sickness and the heat, had the engine on so that the air conditioning could provide him with some relief.

Fantone makes no excuse regarding the awkward position in which he was found, in his car by BWW employees.³ Fantone's falling asleep at the bar and in his car was due to his impairment from inhaling sewer gasses. The Grievant simply did not know the extent of his condition upon leaving his house. "The beer did not make him drunk nor did it, alone, make him sick. But it did add another factor to his methane gas ingestion, and put him down." (UN Post-Hearing Statement, p. 11).

Fantone indicated that he was sick when Sgt. Saluga was able to rouse him and reiterated his sickness throughout his first investigatory interview provided by the Employer on July 29, 2013. (M Ex. 3, pp. 1-4).

The exchanges which occurred when Sgt. Saluga arrived must be balanced by Fantone's illness, which was exacerbated by consuming beer.

The Union points out that credibility concerns are present in that discrepancies exist with the recollection of Sgt. Saluga and Fantone regarding what occurred in BWW's parking lot and at the Austintown Police Department. Apparently animosity existed between Sgt. Saluga and Fantone which colored the incident to Fantone's detriment.

³ ". . . his front seat reclined, and his body twisted away from the driver's door." (UN Post-Hearing Statement, p. 10).

1. Sgt. Saluga indicates that she turned off Fantone's vehicle (M Ex. 1, p. 10; M Ex. 2, p. 3). Fantone claims that he shut off the car after being directed by Sgt. Saluga to do so. (JX 6, p. 6).
2. Sgt. Saluga states that Fantone did not tell her he was "sick" while in the parking lot (M Ex. 1, p. 11). Fantone states that he told Sgt. Saluga that "Yes, I was drinking in there. I'm sick. I'm not drunk but I can't drive." (JX 6, p. 6).
3. Sgt. Saluga claims Fantone stated "I'm a Trooper, just leave me alone" when she asked him how much he had to drink. (M Ex. 2, p. 4). Fantone and Sgt. Saluga had previously worked crash sites and served as back up for each other as police officers. Since they knew each other, Sgt. Saluga's statement simply makes no sense according to the Union.

The Union contends that Fantone is "painfully honest" and as reflective in his evaluations covering the periods from December 15, 2011 to June 15, 2012 (UN Ex. 1) and June 15, 2012 to November 19, 2012 (UN Ex. 2) was rated as exceeds expectations in the area of veracity.

With respect to the plea, Fantone was initially arrested and charged with operating a vehicle under the influence under Ohio Revised Code (ORC) §4511.10(A)(1)(4). Fantone was represented by counsel and was offered a lesser plea of having "physical control" of a vehicle while under the influence, pursuant to ORC §4511.09. Fantone agreed to the lesser charge, a first degree misdemeanor. As a result of the arrest and plea, Fantone was removed in accordance with the Employer's disciplinary grid.

However, the disciplinary grid ("grid") is not summarily dispositive of this matter because of Fantone's plea. The grid allows the Employer to initiate removal, but the principles of progressive discipline and "just cause" still apply. Although Fantone made a series of

regrettable mistakes on July 8, 2013, the evidence indicates that he had a “clean department record and outstanding performance evaluations, who became sick and ended up in jail charged with an alcohol offense.” (UN Post-Hearing Statement, p. 24). Termination was simply too harsh of a penalty.

Lastly, the Union points out that another trooper recently entered a no contest plea following an off-duty OVI conviction. Trooper Tiffany Wilson (“Wilson”) was arrested for speeding at 102 miles per hour, and her Blood Alcohol Concentration (“BAC”) was 18%. This incident was broadcast in the local media, including both television and the newspaper throughout the Columbus, Ohio market.

The Employer terminated Trooper Wilson and this matter was appealed to arbitration. Arbitrator William Lewis (“Lewis”) overturned the discharge as being too “harsh.” Arbitrator Lewis found no evidence that Wilson had a prior or subsequent drinking issue; that she had over eleven (11) years of service with a clean department record and good evaluations; and that she had commendations from citizens and, noteworthy, “. . . her Post Commander (arresting officer) testified that she had been a great trooper and if she came back she would be a better person.” (UN Post-Hearing Statement, p. 22).

Trooper Wilson’s off-duty threat to citizens far exceeded Fantone’s behavior. Fantone was neither a threat to the public, nor drunk on July 8, 2013.

Fantone should be restored to his rank as trooper, with no loss of seniority, benefits or pay.

DISCUSSION AND CONCLUSIONS

Based upon the sworn testimony at the hearing, the exhibits and the post-hearing statements of the parties, the grievance is denied. My reasons are as follows.

The Grievant was charged with violating the rule regulating conduct unbecoming an officer. The removal was based upon the off-duty conduct which occurred on July 8, 2013:

OAC 4501:2-06-02(I)(1)(2) provides:

- (1) For conduct, on or off duty, that may bring **discredit to the division** and/or any of its members or employees. A member shall not engage in any conduct which could reasonably be expected to adversely affect the public's **respect, confidence** or **trust** for Ohio State Highway Patrol Troopers and/or the division.
- (2) For committing **any crime**, offense or violation of the laws of the United States, the State of Ohio, or any municipality. (Emphasis added).

Coupled with the above, all of OSP's officers are also subject to the disciplinary grid. The grid contains the penalties for violations of the list of standardized offenses (M Ex. 4 pp. 1-5). The application of the grid to a specific violation is not automatic and must conform to the CBA principle of "just cause." Therefore, in accordance with the parties' CBA (i.e., Article 19.01) the evidence was analyzed as to whether the charge against the Grievant (i.e., conduct unbecoming an officer) was supported by the facts to meet the "just cause" standard to warrant his removal.

Sworn Officers Held To A Higher Standard

It is undisputable that sworn officers are held to a higher standard of conduct than the general public. It is also undisputed that public policy not only expects but demands that police officers be held to a higher standard of conduct than the general public. *See, Jones v. Franklin County Sheriff*, 52 Ohio St. 3d 40, 44 (1990). Also, the public nature of the off-duty conduct and evidence of any intentional violation of the law by a police officer ". . . goes directly to the

capacity of an individual to serve as a law enforcement officer.” *See, In re City of Rogers City and Police Officers Labor Council*, 110 LA 92, 95 (Arb. Daniel 1997).

Moreover, this higher standard of care exists for both on duty and off duty behavior. *See, Jones* at 44. In this case, the burden rests with the Employer to demonstrate that Fantone failed to model the behavior proscribed above, and engaged in conduct that discredited and adversely affected the public’s respect, confidence or trust in the Division.

Sick Versus Intoxicated

The question which occupied a considerable amount of the arbitral hearing and the post-hearing statements was whether the off-duty conduct on July 8th was due to Fantone’s being sick or intoxicated. As pointed out above and by both parties, it cannot be definitively ascertained whether or not Fantone would have tested “too low” or “too high” had he submitted to the sobriety tests.

It is undisputed that Grievant’s refusal to do “field sobriety”/”breath analyzer” tests would have determined if he was under the influence of alcohol and would have eliminated the opposite certainty, which both parties opine regarding Fantone’s condition on July 8th. His refusal to perform either of the procedures makes the observations of the BWW employees and the Austintown arresting officers as the best evidence to determine the Grievant’s physical condition at the time of his arrest. BWW’s assistant manager indicated that the Grievant was “not falling down” or “obnoxious” but he knew that Fantone had been drinking and refused to serve Fantone any more alcohol. (M Ex. 1, p. 3). Sgt. Saluga and Officer Burich, both trained to recognize the signs of intoxication, noticed that Fantone exhibited the manifestations of one who was under the influence. (M Ex. 1, pp. 10-11; 13).

Regarding the Grievant's position that he was sick, additional evidence to bolster his position could have come through the Grievant's wife's or brother-in-law's sworn statements providing testimony of the noxious fumes they observed upon entering the bathroom on July 8. The record is silent regarding any corroborating evidence regarding the sewer fumes.

Also, the Grievant did not request or seek any medical assistance even though he allegedly stated to Sgt. Saluga upon being roused that he felt "sick." (M Ex. 1, pp. 6-7; Fantone's AI interview on July 29, 2013, p. 6). The real question for resolution is whether 1-1/2 tall beers (approximately thirty-five ounces) consumed within either ten or forty-five minutes or the "sewer gasses" caused the sickness?⁴

The record is also silent as to the actual medical impact of the alleged specific sewer gasses which emanated within the home on July 8, 2013. Except from the Grievant's investigatory statements and testimony, no reliable evidence is in the record which supports the Grievant's "sickness" was due to sewer gasses. On the other hand, BWW's employees, Sgt. Saluga, and Officer Burich each observed behavior of the Grievant associated with being under the influence. The determination of whether Fantone was "sick" or "intoxicated" must be based upon the evidence in the record. Based upon the record, the evidence as a whole fails to indicate that Fantone was sick due to "sewer gasses" on July 8th. Moreover, Fantone's failure to submit to either of the sobriety tests before trained officers is at odds with Grievant's position that he was not under the influence.

Off-Duty Behavior

Fantone's conduct at BWW and the police station is not the behavior expected of a sworn police officer, opines the Employer. In Fantone's defense, the Union points out that he lacked

⁴ On July 29, 2013 during the AI interview, Fantone indicated that he was at the bar and after ten minutes of his arrival he felt that he would not be able to stand up. (M Ex. 1, p. 7) Baringer indicated that Fantone was at the bar between thirty-fourty five minutes prior to falling asleep.

good judgment based in part on the animosity which existed between Sgt. Saluga and Fantone. Once again, the record is silent on the basis of this alleged conflict which existed prior to July 8, 2013. In fact, Sgt. Saluga and Fantone both testified that they had known each other prior to July 8th, and had worked together at crash sites and back up work. As part of the AI investigation, Union representative Bob Cooper asked the following question:

Bob Cooper: "Have you ever had any problems with Valerie in the past?"

Jason Fantone: "No." (AI July 29, 2013 statement, p. 12, ll. 384-88).

The conduct of Fantone at the time of his arrest and his subsequent plea certainly cast a negative light upon the Division and its troopers. The media re-emphasized that the BWW incident was the second off-duty alcohol related arrest since 2011. The public's trust in Fantone was surely undermined. Also, Fantone engaged in well-publicized exchanges with Sgt. Saluga in the parking lot and at the Austintown Police Department. This further undermined his authority as a trooper. I find that the publicized coverage of the arrest and plea had an adverse impact upon the Division's credibility and the public trust in its troopers.

I also find that the minor credibility differences between Fantone's and Sgt. Saluga's interviews for the AI and Saluga's incident report (M Ex. 1, p. 20) do not impact the material facts in the record in determining whether the Grievant's off-duty behavior supports a violation of conduct unbecoming an officer. In other words, the discrepancies between Sgt. Saluga's and Fantone's testimony and exhibits are cured by other reliable evidence.

Fantone's conduct of consuming approximately 36 ounces of beer within a relatively short period of time⁵, falling asleep on the bar, and not paying for his bill, was behavior that neither the public, nor I, find acceptable.

Fantone's additional conduct, including his proclamation that "I am a state trooper – leave me alone," his behavior at the police station which included veiled reminders that the APD employees had better be careful in the future, and his overall bombastic behavior toward fellow police officers -- demonstrated off-duty behavior that not only "tarnishes" the reputation of the Division but also impacts the public's confidence in it. Moreover, Fantone's conduct in the parking lot and police station became part of the reported publicity that was broadcast by the local and social media.

Moreover, no inferences were drawn by this Arbitrator about Fantone's refusal to perform either the field sobriety test or the breath test. The facts are absent to conclusively determine if Fantone was legally intoxicated as defined by BAC. However, sufficient, reliable and credible evidence is in the record from BWW's general manager (M Ex. 1, p. 3), BWW's assistant manager (M Ex. 1, p. 4); (Officer Burich) (M Ex. 1, p. 13) and the testimony of Sgt. Saluga to conclude that Fantone appeared under the influence of alcohol on July 8, 2013. Additionally, no evidence exists to infer that BWW employees and the APD employees were motivated by any bias toward Fantone.

Therefore, sufficient credible evidence exists to find that Fantone violated Rule 4501:2-6-02(I)(1)(2) on July 8, 2013 and through his plea on July 17, 2013. I further find that just cause exists to impose discipline, and that removal was commensurate with the overall record and the

⁵ Whether Fantone drank that amount within ten minutes or forty five minutes is immaterial, but it does reflect a state of mind, particularly when Fantone testified that alcohol is not a good friend of his, and he does not keep liquor in his home due to past alcohol incidents.

grid. As pointed out by the Union, he was highly regarded by his supervisors while performing his job duties. However, Fantone has failed to produce sufficient evidence to warrant any lesser penalty. After carefully weighing the conduct of the Grievant against his record and the other mitigating factors cited above, this Arbitrator finds that to return Fantone to his position under any circumstance would not be prudent.

Simply, the Grievant's department record and performance evaluations were not sufficient to mitigate the off-duty conduct and subsequent plea which brought discredit to the Grievant and to the Division.

The grievance is denied.

Respectfully submitted, this 19th day of March, 2014.

Dwight A. Washington, Esq.
Hearing Officer