

OPINION AND AWARD

In the Matter of Arbitration

Between

Ohio State Troopers Association

And

Ohio State Highway Patrol

Case Designation

15-03-20140327-0031-07-15

Date of Hearing: May 7, 2014

Date of Briefs: June 9, 2014

Date of Award: July 1, 2014

APPEARANCES

For the Union

Herschel Sigall, Advocate

For the Employer

Lt. Jacob D. Pyles, Advocate

Witnesses

Trooper William F. Lee, Grievant

Retired Captain Roger A. Hannay

Captain Christopher J. Zurcher, District Commander

Linda Sayers, Ohio Turnpike Commission, Secretary

Sgt. Darren Huggins, Assistant Post Commander

An arbitration hearing was conducted on May 7, 2014, at the Ohio State Troopers Association Office in Columbus, Ohio.

At the hearing, the parties submitted the current collective bargaining agreement and a joint exhibit book containing the grievance trail, the disciplinary trail and several stipulations. In addition each party submitted several exhibits – all were entered into the record.

The stipulated issue presented to the Arbitrator at hearing is as follows: “Was the Grievant demoted from Sergeant to Trooper for just cause? If not, what shall the remedy be?”

Both parties timely submitted post hearing briefs. All materials were reviewed and considered by the Arbitrator in reaching this decision.

Both parties were given full opportunity to examine and cross examine witnesses, pose arguments, and present their respective cases.

RELEVANT CONTRACT PROVISION:

Negotiated agreement between Ohio State Troopers Association, Inc. Unit 1 & 15 and The State of Ohio effective July 1, 2012 – June 30, 2015

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.

19.02 Administrative Leave

Upon verbal notification followed within twenty-four (24) hours by written delineation of the reasons, an employee may be placed upon administrative leave with pay at his/her regular rate. The employees will not lose any pay, fringe benefits or seniority as the result of administrative leave. Administrative leave may be instituted as the result of the Employer's reasonable belief that the employee participated in an event or was in a condition of significant consequence to the Highway Patrol, the employee, or the public. Such administrative leave with pay shall be for the purpose of investigating the event or the condition.

Administrative leave with pay shall not be considered discipline and is not subject to the grievance procedure as long as no loss of pay or benefits is incurred by the employee.

19.03 Length of Suspension

No suspension without pay of more than ninety (90) calendar days may be given to an employee.

19.04 Pre-suspension or Pre-termination Meeting

When the Employer initiates disciplinary action which is covered by this Article, written notice of a pre-disciplinary meeting shall be given to the employee who is the subject of the pending discipline. Written notice shall include a statement of the charges, recommended disciplinary action, a summary of the evidence being brought against the employee and the date, time and place of the meeting. An impartial representative of the Employer shall be appointed. Said representative shall be a member of the general headquarters staff or district staff as appointed by the Employer, who is impartial and detached and has not been involved in the incident or investigation giving rise to the discipline. Prior to the meeting, the Union will be provided with a copy of the administrative investigation.

The employee may waive this meeting. The meeting shall be scheduled no earlier than three days following the notice to the employee. Absent any extenuating circumstances, failure to appear at the meeting will result in a waiver of the right to a meeting.

A member who is charged, or his/her representative, may make a written request for continuance of up to forty-eight (48) hours. Such continuance shall not be unreasonably requested nor denied. A continuance may be longer than forty-eight (48) hours if mutually agreed by the parties but in no case longer than sixty (60) days.

If either party makes a tape recording or transcript of the hearing, such recording or transcript shall be made available to the other party upon request.

The employee has the right to have a representative of his/her choice present in accordance with Section 8.02 at the meeting. The Employer shall first present the reasons for the proposed disciplinary action. The employee may, but is not required to, give testimony.

After having considered all evidence and testimony present at the meeting, the meeting officer shall, within five (5) days of the conclusion of the meeting, submit a written recommendation to the Employer and the employee involved.

The parties understand that this meeting is informal and not a substitute for the grievance and arbitration procedure.

The Employer shall render a decision within a reasonable period of time to accept, reject or modify the recommendations.

The employee shall be notified by the Employer for final disposition of statement of charges.

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 merits 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.

19.06 Suspension Options and Implementation Procedures

If a bargaining unit employee receives discipline which includes lost wages, the Employer may offer or the Employee may request the following forms of corrective action:

1. Actually having the employee serve the designated number of days suspended without pay; or pay the designated fine; or
2. By deducting the employee's accrued personal leave, vacation or compensatory leave banks of hours or a combination of any of these banks, under such terms as might be mutually agreed to by the Employer, the employee and the Union.

19.07 Abeyance Agreements

The parties agree that it may sometimes be in the best interest of the parties to participate in the negotiation of discipline abeyance agreements, including Last Chance Agreements. The parties further agree that such agreements should be entered into under the spirit of the collective bargaining agreement. Abeyance agreements entered into pursuant to Appendix C are not subject to this Section.

Abeyance agreements, including Last Chance Agreements, shall be two (2) years in duration and shall be signed by a representative of the Employer, the Union, and the Employee.

Violations of any cited work rule may cause the abeyance agreement to be invoked during the life of the agreement, pursuant to the three conditions stated below. A violation of the work rules within Performance of Duty 4501:2-6-02(B) must be of a same or similar nature to cause the abeyance

agreement to be invoked. A non-sworn employee charged with a violation of work rule 501.01(C)(10)(b), Neglect of Duty, must be of a same or similar nature to cause the abeyance agreement to be invoked.

1. Grievance rights related to a discipline action under the agreement will be limited to a challenge of whether his/her behavior constitutes a violation of a triggering work rule(s). The level of discipline may not be challenged or made an issue at arbitration.
2. The Employee retains all rights to the grievance procedure provided in the labor agreement for violations not include within the abeyance agreement. If the Employee abides by the agreement, and the agreement is not invoked within two years of the signing, the agreement will become void and no active record of it will remain.
3. The parties agree the agreement is non-precedent setting and will not be used in any unrelated hearing, grievance, arbitration, or negotiation. The agreement may be used by either party to enforce its provisions.

BACKGROUND

This case concerns the disciplinary demotion of Grievant William Lee from the rank of Sergeant to that of Trooper, for alleged violation of the Ohio State Highway Patrol's rules and regulations, specifically rules: 4501:2-6-02(F)(2) Rewards, Bribes, Payment for Duty; 4501:2-6-02(Y)(2) Compliance to Orders; and 4501:2-6-05(B)(1) Use of Equipment. The demotion was effective March 24, 2014. William Lee timely filed a grievance on the same day alleging that the disciplinary demotion violated the collective bargaining agreement, Section 19.05 – Progressive Discipline.

The facts of the incident giving rise to the demotion are not in dispute. They are as follows:

- At the time of the incident, Grievant Lee had been a Sergeant for approximately one year.
- Grievant Lee was assigned to the Hiram Post – one of three posts on the Ohio Turnpike.
- Upon assignment to the Hiram Post, Grievant Lee had been issued an E-ZPass non-revenue transponder to facilitate travel through toll gates on the Ohio Turnpike.
- On December 12, 2012 when the transponder was issued to Grievant Lee, he signed a form acknowledging that the transponder was strictly for official Patrol business – not personal use.
- On October 31, 2013, after working his regular shift (6:00AM – 2:00PM) Grievant Lee used his assigned transponder (tag number 105624) in his personal vehicle to drive himself and his friend, Sgt. Jonathan Lujan, to Lujan's military separation hearing in Coraopolis, Pennsylvania.
- Grievant Lee retired from the military in 2004.
- At the time of the incident Grievant Lee was not subject to military orders, nor had he been subpoenaed to attend the separation hearing.
- Grievant Lee had been requested to attend the separation hearing and serve as a witness for Lujan by Senior Defense Counsel, Major Dungan, US Army. Grievant Lee did in fact attend the hearing, in his military uniform (as requested), and served as a witness.
- As a result of using the non-revenue transponder on the Pennsylvania Turnpike, Grievant Lee was billed \$82.50 by the Pennsylvania Turnpike Commission (\$7.50 in tolls and \$75.00 in administrative fines). Grievant Lee paid this bill.

- Grievant Lee was also subsequently billed \$13.00 by the Ohio Turnpike Commission (\$3.00 in tolls and \$10.00 in administrative fees). Grievant Lee paid this bill.
- Upon receipt of the bill from the Pennsylvania Turnpike Commission (PTC), Grievant Lee contacted the PTC to explain his travel on the PA Turnpike and his use of the Ohio Turnpike E-ZPass transponder.
- The PTC agreed to waive the fines as long as Grievant Lee provided the account number associated with the E-ZPass transponder.
- On December 3, 2013 Grievant Lee contacted Ms. Linda Sayers, Ohio Turnpike Commission employee and Secretary to the Patrol, in regard to getting the necessary account number.
- Grievant Lee is a 21-year employee of the Ohio State Highway Patrol.
- Grievant Lee has no prior discipline.

POSITION OF THE EMPLOYER

The Employer maintains that the Grievant's behavior is a clear and serious violation of the Highway Patrol's Rules and Regulations. Beyond the violation of rules however, the Grievant's behavior is a serious breach of trust and reveals that he is not fit to serve in a leadership position responsible for oversight and command of subordinate troopers. The Employer asserts that Grievant Lee knowingly violated the rules pertaining to use of the E-ZPass transponder, he compounded the misconduct when he attempted to use his position with the Patrol to get the fines waived, and during the investigation he made false claims of being on "official business" and "reporting to the government" rather than characterizing the circumstances as personal in nature, which they were – he was "helping a friend." The Employer further maintains that the Grievant's behavior was so serious that the Patrol's multi-million dollar contract with the Ohio Turnpike Commission for policing along the Turnpike could have been jeopardized.

POSITION OF THE UNION

The incident giving rise to this disciplinary matter involves off-duty conduct. There is nothing in the situation that involves the Grievant's actions or duties as a Sergeant of the Highway Patrol. In fact, when it comes to Grievant Lee's performance as a Patrol Sergeant he is highly qualified and respected, as evidenced by his performance record and a completely clean department record over 21 years of service. Furthermore, this is a matter that came to the attention of the Patrol because the Grievant self-reported the situation when he received notice from the PTC that his Ohio-issued transponder did not actually work in Pennsylvania. There is no guilty intent in any of the Grievant's actions. There has been no effort to hide anything or act in a surreptitious manner with regard to any aspect of this incident. To the contrary, the Grievant believed in his heart that he was using the transponder for government use, which would make it permissible use. The Grievant spent 20 years in the military and is a decorated combat veteran of the Iraq war. Although he retired from the military in 2004 as a Lieutenant, when he was requested to attend this military separation hearing for a Sergeant with whom he had served, he believed he was acting honorably and on official government business. In retrospect and upon a review

of the actual signed acknowledgement form, the Grievant is now clear that this particular use did not comport with the stated usage parameters. He admits that he made a mistake. This was a minor error in judgment and one not worthy of the response of the Patrol. A reduction in rank such as this is rare and not consistent with the principles of just cause and progressive discipline.

DISCUSSION

This is a case where the arbitrator's job is to determine the reasonableness of the discipline imposed rather than the existence of a reason for the discipline.

Mitigating Circumstances

Grievant Lee's use of the transponder was intentional – he took it out of the patrol car and put it in his personal car. However, upon a close review of the facts and evidence in the record, I am persuaded that Grievant Lee did not intend to use the transponder in a wrongful manner. Grievant Lee did not “knowingly” violate the transponder usage parameters. The Grievant held an incorrect belief (based on faulty recollection of the details of a document signed a year prior) that the official nature of his off-duty task legitimized the use of the transponder. This is not an unreasonable mistake. There was ‘official-ness’ in his task; he was not simply running a household errand. The Grievant was responding to the call of the military, and he was to be part of a military hearing. Furthermore, there was selflessness in his task; he gained nothing personally. The signed acknowledgement form is clear, neither the official-ness nor the selflessness of his off-duty task make the trip to Coraopolis, PA official Highway Patrol business. But such is the nature of a mistake – you do not know you are making it until it is too late.

The Employer maintains that Grievant Lee could have asked for advice before using the transponder and that his failure to do so shows an absence of due care. For the Arbitrator to reach the same conclusion as the Employer there must be further evidence that the Grievant was in some way negligent and not acting in a reasonable manner. The burden is on the Employer to show that the Grievant was either not operating under a mistaken belief as he claims, or that the mistaken belief was unreasonable. It is insufficient to simply point to the signed acknowledgement form and argue that it alone is proof certain that the Grievant knew that what he was doing was wrong. This is not to say that any single misuse of a transponder could be easily written off with, *“Whoops, I forgot the rules.”* Or *“Oops, I had a faulty recollection of the regulations.”* It is the facts of this particular situation that make the Grievant's assertion of an honest mistake plausible. I agree with others in the Patrol who characterized this incident as an, “honest one-time mistake” (Management Exhibit 5).

Grievant Lee's further decisions and actions in this incident, which the Employer views as aggravating and compounding violations, must be viewed in light of the Grievant's original (and at the time, ongoing) mistaken belief. The Grievant's un rebutted testimony is that he called the PTC upon receipt of his tickets and explained the ‘military nature’ of his travel on the PA Turnpike. They agreed to waive the fines. The next reasonable step for the Grievant, still believing that he is acting within official bounds, is to openly ask for assistance in his effort to get the administrative fees waived. There is

nothing in these actions that suggests that the Grievant believed he was acting contrary to a known policy. The idea that these actions should be construed as the Grievant's pursuit of personal gain and an abuse of his position as a Sergeant in the Ohio State Highway Patrol is an overreach.

Is the Grievant's mistaken belief so serious a cognitive failure or did it lead to so serious an outcome, that his competency as a Sergeant can legitimately be called into question? Certainly not. Anyone can fall subject to an inaccurate memory, especially when there are cognitive cues and circumstances that are somewhat alike and yet ultimately different. As for adverse consequences, there have been none except those experienced by the Grievant himself. The notion that the Grievant's misuse of his assigned transponder on a single occasion could have jeopardized the contract between the OTC and the OSHP is a dramatic overstatement. In fact, unbidden by the Grievant, a high-ranking official with the OTC kindly waived one of the two \$10 administrative fees levied for the unpaid tolls.

Commensurate Penalty

Demotion is a profound consequence for workplace behavior; so profound that only discharge lies beyond it on the progressive discipline continuum. The Patrol has retained for itself the management right to demote employees, and the Parties have negotiated language that allows demotion to be used for disciplinary purposes. However, the use of a disciplinary demotion must be in keeping with other provisions of the collective bargaining agreement including the standards of just cause and progressive discipline. I am in agreement with arbitrators who have come before me and opined on the appropriate use of disciplinary demotion – both those unknown to me and whose landmark cases are recorded in the annals of labor relations, and those I do know and whose cases have involved the Ohio State Highway Patrol – that is to say, demotion should be reserved for those situations where the subject employee shows a genuine lack of ability not temporary poor performance. There is no pattern of carelessness or failure to comply with orders; this is a single incident of a breach of policy – not health and safety related, not security related, and not law enforcement related –equipment related.

I note that there are several types of misconduct on the Patrol's Sworn Officer Discipline Grid (Joint Exhibit 4c) that could have much farther reaching consequences than those associated with the personal use of equipment and for which the Employer has limited its disciplinary response on a first offense to a reprimand or minor suspension such as, sleeping on duty, escape from custody, failure to report a patrol car crash, or failure to stop a suspect/arrestee from conveying a weapon into a detention facility, to identify just a few. The misuse of an E-ZPass transponder, as in the circumstances outlined in this case, is a minor offense in comparison to these. I understand that the Employer views this matter as dishonesty or a form of cheating, which in their mind strikes at the very heart of the Patrol's professionalism and esprit de corps. However, the known facts in this case lead me to believe that the tipping point between an honest mistake and dishonesty has not been reached and therefore disciplinary demotion is not an appropriate response.

Summary

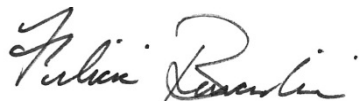
In summary, this Grievant is guilty of inadvertent wrong-doing. If any set of circumstances can be termed an 'honest mistake' it seems that this can; the grievant was not guided by self-interest. This was

a moment of carelessness by an otherwise capable and valued employee of twenty-one years with a clean department record. The Grievant has acknowledged that he wrongly used his assigned transponder; however he did not do it knowingly. The purpose of workplace discipline is to correct, not punish. The Employer's obligation is to give employees the opportunity to correct deficiencies in work habits and skill that are remediable in nature. Such is the case in this matter. The penalty imposed by the Employer in this case is greater than one would expect for the particular set of facts, therefore it should be reduced to a commensurate level.

AWARD

For the reasons herein stated the grievance is sustained in part and denied in part. Without undue delay the discipline shall be converted to a one-day suspension. The grievant shall be restored to the rank of Sergeant, returned to his assignment at the Hiram Patrol Post, restored in his Sergeant seniority and restored in his pay minus the one-day suspension.

Respectfully submitted at Columbus, Ohio, July 1, 2014.

A handwritten signature in cursive script, reading "Felicia Bernardini".

Felicia Bernardini, Arbitrator