

Decision and Award in the Matter of Arbitration between:

**Ohio Department of Public Safety,
Division of the State Highway Patrol**

And

Ohio State Troopers Association

Grievance #: DPS - 2017- 03712 -10

Grievant: Trooper Nicholas Sutterluety

Arbitrator: Jack Buettner

Date of Hearing: October 12, 2017

Date Briefs Received: November 20, 2017

Date Decision Issued: December 21, 2017

Representing the Employer:

Lieutenant Marty Fellure, Advocate for the Employer
Ohio State Highway Patrol
1970 W. Broad St.
Columbus, OH 43223

Representing the Union:

Ms. Elaine Silveira, Advocate for the Grievant
Ohio State Troopers Association
190 West Johnstown Road
Gahanna, OH 43233

By Mutual agreement the Hearing was convened on December 8, 2015, at 9:00 AM. The Hearing was held at the offices of Ohio State Troopers Association in Columbus, Ohio. Jack Buettner was selected by the parties to arbitrate this matter as a member of the panel of permanent umpires pursuant to Article 20, Section 20.8, of the Collective Bargaining Agreement which is effective from 2012-2015.

The parties each stipulated to the statement of the issue, a series of background facts, and the admission of joint exhibits. The parties have also agreed to the arbitration of this matter. No issues of either procedural or jurisdictional arbitrability have been raised, and the matter is now properly before the arbitrator for a determination of the merits.

In attendance for the Employer:

Lt. Marty Fellure	State Advocate
Sgt. David Bailey	Witness
Lt. Mark Glennon	Witness
Capt. Chad Neal	Witness
Staff Lt. Cassandra Brewster	Office of Personnel
Ms. Abigail Ledman	Office of Collective Bargaining

In attendance for the Union:

Ms. Elaine Silveira	Advocate/Attorney
Mr. Larry Phillips	Staff Representative
Trp. Nicolas Sutterluety	Grievant
Mrs. Kayla Sutterluety	Grievant's Wife
Mr. Jeremy Mendenhall	OSTA President
Lt. Akers	Witness

The parties were asked to submit exhibits into the record.

The following were submitted as Joint Exhibits:

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| Joint Exhibit #1 | 2015-2018 OSTA CBA |
| Joint Exhibit #2 | Electronic Grievance Trail– DPS-2017-03712-01 <ul style="list-style-type: none">A. GrievanceB. Step 2 of GrievanceC. Grievance Submitted for Arbitration |
| Joint Exhibit #3 | Discipline Trail <ul style="list-style-type: none">A. Statement of Charges: AI #2017-0289B. Letter Recommending TerminationC. Termination LetterD. Conduct Unbecoming an OfficerE. Department Record |

The following were submitted as Management Exhibits:

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|-----------------------|--|
| Management Exhibit #1 | Administrative Investigation #2017-0289 <ul style="list-style-type: none">A. OH-1 Crash Report #79-0436-79B. OH-3 Statement from Mr. K. CloseC. OH-3 Statement from Tpr. NM. SutterluetyD. New Philadelphia Municipal Court Record Search for Citation #M120033E. Misdemeanor Citation for ORC 29211111.32A2 served to Trp. N.M. SutterluetyF. Article 16 of Ohio State Troops' Association ContractG. New Philadelphia Municipal Court Docket Entry for Citation #M120033 |
| Management Exhibit #2 | Ohio State Highway Patrol Sworn Officer Discipline Grid |

The following were submitted as Union Exhibits:

Union Exhibit #1	Administrative Investigation #2017-0289, Page 8 Of 8
Union Exhibit #2	Recorded Interview Regarding Tpr. Nicolas Sutterluety, A! #17-0289: Lt. Mark Glennon
Union Exhibit #3	Traffic Crash Report
Union Exhibit #4	Recorded Interview Regarding Trp. Nicolas Sutterluety, A! #17-0289: Tpr. Caleb Cox
Union Exhibit #5	Recorded Interview Regarding Trp. Nicolas Sutterluety, A! #17-0289: Sgt. Clinton Armstrong
Union Exhibit #6	Recorded Interview Regarding Trp. Nicolas Sutterluety, A! #17-0289: Tpr. Nicolas Sutterluety and Larry Phillips, OSTA
Union Exhibit #7	Recorded Interview Regarding Trp. Nicolas Sutterluety, A! #17-0289: S/Lt. Chad Neal
Union Exhibit #8	Recorded Interview Regarding Trp. Nicolas Sutterluety, A! #17-0289: Tpr. Nicolas Sutterluety and Larry Phillips, OSTA
Union Exhibit #9	New Philadelphia Municipal Court, Judgement Entry
Union Exhibit #10	Performance Document-Probationary Review

Background:

The Grievant, Trp. Nicolas Sutterluety, was commissioned as a trooper on September 18, 2015. He was terminated from employment on September 28, 2017, based on violation of Rule 4501:2-6-02 (I)(1): Conduct Unbecoming an Officer.

The circumstances that gave rise to the discipline occurred on April 29, 2017. The Grievant was having a party at his residence. The Grievant admitted he had consumed enough alcohol to be inebriated. Another guest, Kyle Close, was in attendance. Mr. Close attempted to drive himself home but was involved in a single vehicle crash before arriving at his residence. Mr. Close called the Grievant and explained the situation. The Grievant's wife drove Trp. Sutterluety to the crash scene where Mr. Close was picked up. He was taken back to the Grievant's home.

The New Philadelphia Post received a call about the crash and Trp. Caleb Cox was sent to investigate. He determined the owner of the crashed vehicle, walked to the owner's nearby home, and spoke with Mr. Close's mother. She contacted her son, requesting that he return to the scene. Mr. Close was returned to the scene where he was questioned. He was not arrested for OVI.

During the investigation of the crash, it was determined that the Grievant played a role in removing Mr. Close from the scene of the accident. It was implied that the removal was to avoid an OVI charge. An investigation was held and obstruction of justice charges were filed on May 11, 2017 against the Grievant for removing an impaired driver from a crash scene. The charges were later dismissed. Management deemed the Grievant's actions Unbecoming an Officer and moved to terminate him.

Issue:

On September 28, 2017, Trp. Nicolas Sutterluety was terminated from employment for violating Rule 4501:2-6-02 (I)(1), Conduct Unbecoming an Officer. The parties submit the following statement of issue for resolution by the arbitrator:

Was Trp. Sutterluety terminated from his employment with the Ohio State Highway Patrol for just cause? If not, what shall the remedy be?

Employer Position:

The Employer's position is that Trp. Sutterluety was rightfully terminated having violated Rules 4501:2-6-02 (I)(1), Conduct Unbecoming an Officer. This rule states:

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.*

Management contends that the decision made by the Grievant to remove Mr. Close, who was intoxicated by the Grievant's own admission, from the scene of an accident was done in an effort to avoid an OVI charge for Mr. Close. With drunk driving being a critical issue across the state, it is unbecoming for an officer to purposefully try to circumvent the potential ramifications of a drunk driver.

The Union called the Grievant's wife as a witness to suggest it was she who removed Mr. Close from the scene since she was actually driving the car that picked him up. She did not, however, leave her vehicle at any time. The Grievant was the one who exited the vehicle and assisted Mr. Close to the car. Mr. Close was returned to the crash scene when an investigation was initiated. The Investigating trooper, Trp. Cox, could tell he was inebriated and felt that his answers had been "coached" in order to avoid an OVI charge. Management contents Trp. Sutterluety told him what to say in order to avoid serious charges.

Management questioned the intent of the Grievant. When first receiving the call from Mr. Close, no attempt was made to call 911. No attempt was made to call any law enforcement agency. After picking him up, no attempt was made to drive him to his nearby home. Instead, Mr. Close was taken to the Grievant's home. The inference would be that the Grievant was removing his friend from the crash scene so that responding officers would not be able to arrest him for an OVI. Management cites several instances whereby the Grievant admitted to that fact. (Management Exhibit #1, CD attachment labeled 2017-0289 Sutterluety Interviews, Sutterluety Interview, time 11:34; Management Exhibit #1, page 6, 6th & 7th paragraph; Union Exhibit #6, labeled Recorded Interviews Regarding Trooper Nicolas Sutterluety, AI #2017-0289, Trooper Nicolas Sutterluety & Larry Phillips, OSTA, page 14, lines 590-593.)

At issue with the Union was the fact that the Grievant was not read his Garrity or Miranda rights when asked to give a written statement to Staff Lieutenant Chad Neal concerning his role in the crash investigation. Management stated that Staff Lt. Neal did

not need to read him his rights. Staff Lt. Neal was obtaining a witness statement about actions that took place the night of the crash; he was not conducting a criminal or administrative investigation into the Grievant's actions.

Management upholds its right for termination in this instance. They cited several cases in which officers were held to a higher standard than others, on or off duty. The Employer's Sworn Discipline Grid (Management Exhibit #2) states that removal can be recommended for "conduct unbecoming", first offense, and with a clear department record. As Management states, "...we cannot have troopers working for us who are doing exactly the opposite of what we, as an organization, stand for."

Union Position:

The Union's position is that Trp. Sutterluety was wrongfully terminated. The Grievant admitted he and Mr. Close had been drinking that night, but the Grievant had no idea Mr. Close was attempting to drive himself home. When a crash ensued and Close called the Grievant for help, Trp. Sutterluety had his wife drive him to the scene. The Grievant did get out of the car, look at the scene, speak to Mr. Close, and then Mr. Close walked back to the car on his own accord. They returned to the Grievant's home. Close received a call from his mother asking him to return to the crash scene because a trooper was investigating the accident. Kayla Sutterluety, the Grievant's wife, returned him to the scene. Mr. Close was questioned but never charged with an OVI. The investigating trooper never reached out to the Grievant for a statement while investigating the crash.

On May 1, 2017, an investigation on Trp. Sutterluety was initiated. Several days later the Grievant was contacted by then S/Lt. Chad Neal to make a statement and answer questions about what happened at the crash. He complied. He was not read either his Garrity or Miranda rights. Based on the statement on May 11, 2017, obstruction of justice charges were filed against the Grievant for removing an impaired driver from a crash scene. The Union contends that this criminal investigation was about the Grievant's actions, not the crash. Therefore, his rights should have been read to him before he issued any statement. The Grievant did initially enter a guilty plea but prior to the sentence being rendered, he contacted an attorney and rescinded the guilty plea.

Also at issue were the interview summaries that formed the basis for the investigation. The Union contends the summaries did not match what was actually contained in the transcripts, thus providing a "tainted" view of what actually transpired. The Employer charged Trp. Sutterluety with "admitting he removed his friend from the scene of the crash to assist him in avoiding an OVI arrest." (Joint Exhibit 3A). That statement was not

found in the interview transcripts (Union Exhibits #6 and #8) or in the statement to S/Lt. Neal (Management Exhibit #1).

The union contends that Trp. Sutterluety did not remove an impaired driver from the scene of a crash. Kayla Sutterluety did since she was the actual driver of the car. There was no crime committed in leaving the scene since ORC 4549.03 imposes a 24-hour limit to report a non-injury crash to law enforcement.

The obstruction of justice case against Trp. Sutterluety was dismissed without prejudice at the direction of the Tuscarawas County Prosecutor on August 14, 2017. The Employer, however, still moved forward with the termination.

DISCUSSION AND DECISION:

In reviewing the termination of Trp. Nick Sutterluety, I have analyzed the testimony and all evidence put forth by both sides. The job of an Arbitrator, in a disciplinary case, is to evaluate the evidence and determine if “just cause” exists to support the action taken by Management. An Arbitrator generally must determine whether an employer has clearly proven that an employee has committed an act warranting discipline and that the penalty of discharge is appropriate under the circumstance. [*Hy-Vee Food Stores, Inc. and Int’l Brotherhood of Teamsters, Warehousemen, and Helpers of America*, 102 LA 55 (Bergist 1994)]. If an employer does meet this burden, then the Arbitrator must decide whether the level of discipline is reasonable. While it is not an Arbitrator’s intention to second-guess management’s actions, we do have an obligation to make certain that the actions are reasonably fair. [*Ohio Univ. and Am. Fed’n of State, County and Municipal Employees, Ohio Council 8, Local 1699*, 92 LA 1167 (1989)].

This case presented many conflicting positions, some of which were based on assumptions that cannot be proven. The most significant of these is that the Grievant purposefully removed Mr. Close from the scene of an accident **to prevent him from receiving an OVI citation**. Management, through Management Exhibit #1 and Union Exhibit #6, tried to prove this through the Grievant’s own statements. Careful review of each exhibit did not sustain this. In Management Exhibit #1, page 6, 6th & 7th paragraph, the statements were transcribed by another officer and not the verbatim words of the Grievant. In Union Exhibit #6, labeled Recorded Interviews Regarding Trooper Nicolas Sutterluety, AI #2017-0289, Trooper Nicolas Sutterluety & Larry Phillips, OSTA, page 14, lines 590-593, Trp. Sutterluety answered, “Yes sir,” to a string of leading statements by the interviewer which concluded with the fact that the Mr. Close was charged with

failure to control. While it might be inferred that the Grievant removed Mr. Close from the scene of the accident to prevent an OVI, he never admitted to that.

Management also contends that the Grievant coached Mr. Close as to what to say in order to avoid an OVI. This might be inferred but cannot be proven. The Grievant stated (Union Exhibit #8) that he told Mr. Close to be honest and told him what he could be charged with when he left the scene. The Grievant did not admit to coaching Mr. Close. The Grievant admitted to stating his opinion of the consequences of the action.

The Union put forth the issue that the Grievant was not personally driving the vehicle so did not *technically* remove Mr. Close from the scene. The Grievant's wife, who was actually driving the vehicle, was not charged with obstruction of justice yet the Grievant was. Additionally, since it was a one-vehicle accident with no personal injury, Mr. Close had 24 hours to report it.

Charges of obstruction of justice were filed against Trp. Sutterluety and he did initially plead guilty. After talking to an attorney, he changed his plea. The case was dismissed without prejudice at the direction of the Tuscarawas County Prosecutor on August 14, 2017.

What remains of this case is that Trp. Sutterluety, for whatever reason, was complicit in removing Mr. Close, from the scene of an accident. He may not have driven the car, but he went to the scene of the accident. The Grievant admitted that he knew Mr. Close had been drinking. (Union Exhibit #6, Recorded Interview regarding Trooper Nicolas Sutterluety, Lines 206-208.) Trp. Sutterluety made a poor decision in taking any part in removing Mr. Close from the scene. On or off duty, officers are held to a higher standard of behavior. It would be reasonably expected that any officer of the law, upon reaching an accident scene, would contact the proper authorities. In spite of a lack of perceived property damage and in spite of the 24-hour limit to report a single vehicle crash, the Grievant knew Mr. Close had been drinking and knew the legal ramifications of removing him from the scene. To take part in that action in any way could "bring discredit to the division and/or any of its members or employees." Thus, his actions could be construed as Conduct Unbecoming an Officer. There was no real nexus in that the Grievant's actions did not become public thereby "adversely affecting the public's respect, confidence, or trust was for Ohio state highway patrol troopers and/or the division."

Management has not presented a preponderance of evidence or a clear and convincing position to support the idea that the Grievant removed Mr. Close from the scene of the accident with the **specific intent to avoid an OVI**. Mr. Close, since he returned to the scene of the accident, could still have been charged with an OVI. (Union Exhibit #5) The Grievant made a poor judgment, however, in participating in the action that removed Mr.

Close from the accident scene. That judgment could have been exacerbated by his drinking. This Arbitrator finds that his conduct in removing Mr. Close from the scene, for whatever reason, does not demonstrate the behavior expected of a law enforcement officer and would be behavior Unbecoming an Officer.

The question then becomes whether the conduct infraction is of sufficient gravity to warrant termination. The penalty imposed should be tailored to the specific misconduct at hand. [Int'l Union, UAW and Local 8000 and the State of Michigan, 90-2 Lab. (CCH) P8419 (Frost 1989)]. Termination is the penalty reserved for the most grievous of offenses. The Ohio State Highway Patrol Sworn Officer Disciplinary Grid (Management Exhibit #2) cites Conduct Unbecoming as a cause for removal. The grid states "elements of criminal violation or criminal convictions, M-1 or higher" which do not apply to the Grievant. The charges of Obstructing Justice, which would have been an M-1, were dismissed.

This Arbitrator believes that the primary purpose of workplace discipline is not to punish, but rather to correct errant behavior and to utilize progressive discipline as a tool to bring about positive change in employee performance/conduct. The goal is to bring about positive change so that a willing employee will have an opportunity to improve. The Employer/State has invested considerable time and taxpayer money in Trp. Sutterluety which would be lost if he was to be terminated.

AWARD:

For the reasons stated above, the grievance is sustained in part and denied in part. The Grievant did display behavior Unbecoming an Officer but the Grievant's termination should be vacated and modified to a time served suspension without back pay or benefits. The Grievant's seniority should be bridged back to date of his termination, and he should be restored to his position and post.

This closes the arbitration.

Respectfully submitted this day of 21st day of December, 2017,

John F. Buettner, Arbitrator

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one (1) copy each of the Arbitration report was delivered via email on the 21st day of December, 2017, to

Ms. Elaine Silveira, Esq., Advocate for the Grievant

and

Lt. Marty Fellure, Advocate for the Employer

Jack Buettner

Jack Buettner