

Thomas J. Nowel
Arbitrator and Mediator
Cleveland, Ohio

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT OF THE PARTIES
**MINI ARBITRATION PURSUANT TO SECTION 20.12
OF THE AGREEMENT**

In The Matter of a Controversy Between:)	Grievance No.
)	15-03-20131023-
The Ohio State Troopers Association)	0091-04-01
)	
and)	ARBITRATION
)	OPINION AND
Ohio Department of Public Safety, Division)	AWARD
Of the Ohio State Highway Patrol)	
)	Date:
Re: Disciplinary Suspension)	February 17,
Rufus V. Irby)	2014

APPEARANCES:

Elaine Silveira, Esq. for the Ohio State Troopers Association; Lieutenant Heidi A. Marshall for the Ohio Department of Public Safety, Division of the Ohio State Highway Patrol; and Aimee Szczerbacki for the Ohio Office of Collective Bargaining.

INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the Ohio State Troopers Association and the State of Ohio. The parties are in disagreement regarding the disciplinary suspension of Trooper Rufus V. Irby who is assigned to the Hamilton Post of the Highway Patrol. The Grievant, Rufus Irby, was suspended on October 15, 2013 for five (5) days without pay. He chose to forfeit accrued vacation leave in lieu of the unpaid suspension. The suspension was appealed through the Grievance Procedure and then arbitration when the Employer denied the grievance.

The Arbitrator was selected by the parties, pursuant to Article 20 of the collective bargaining agreement, to conduct a hearing and render a binding arbitration award. The matter is arbitrated pursuant to Section 20.12, Alternate Dispute Resolution. This provision limits the parties to opening and closing statements, two (2) witnesses each, and no post hearing briefs. The arbitrator is directed to deliver a decision in five (5) calendar days with minimal rationale. The parties agreed that the Award would be issued on February 17, 2014. Hearing was held on February 12, 2014 at the offices of the Ohio State Troopers Association. At hearing, the parties were afforded the opportunity for examination and cross examination of witnesses and for the introduction of exhibits. Witnesses were sworn by the Arbitrator. No procedural issues were raised by the parties.

ISSUE

The joint issue stipulation is as follows. "Did the Grievant receive a five (5) day suspension for just cause? If not, what shall the remedy be?"

WITNESSES

TESTIFYING FOR THE EMPLOYER:

Jacob Pyles, Lieutenant and Investigator
James Brayden, Maintenance Repair Worker

TESTIFYING FOR THE UNION:

Rufus V. Irby, Grievant

DISCUSSION

The Grievant has been a Trooper for thirty-four years and has been assigned to the Hamilton Post. He performs the duties of a Motor Vehicle Inspector which include the inspection of school buses and other vehicles in the region. Trooper Irby suffers from a number of medical conditions including a sleep disorder and diabetes. He has been a diabetic for ten years and, based on his testimony, takes insulin orally and an injection at the end of each day. The Grievant received a three day disciplinary suspension in 2013 for failing to maintain control of his medications which caused him to fall asleep while on duty on a number of occasions and in various work locations. The discipline was appealed by the Union, but it was sustained at arbitration.

On August 12, 2013, the Grievant reported for duty at the Hamilton Post on his regular day shift. After a number of routine duties at the Post, the Grievant was

assigned to follow Maintenance Repair Worker, James Brayden, who was driving a department vehicle to a local car dealership for maintenance. The Grievant was assigned to transport Brayden back to the Post. Maintenance Worker Brayden reported, and testified at hearing, that the Grievant drove in an erratic manner when returning to the Post. He reported that the Grievant was, at first, communicating with another individual on his blue tooth as they left the dealership. He approached a traffic light very slowly and nearly drove through the red light. Brayden states that he warned the Grievant that it was necessary to stop at the approaching light. He then nearly crashed into another vehicle at the next light as Brayden shouted at him to stop to avoid a collision. It appeared to Brayden that the Grievant was sleeping as he operated the cruiser. He stated that the Grievant continued to swerve and drove into the opposite traffic turn lane almost striking an oncoming truck. The Grievant stated to Brayden that he was not feeling well and drove into a McDonald's Restaurant drive through lane. Brayden reported that the Grievant continued to appear to be sleeping as he was attempting to drive and was asleep in the McDonald's drive through lane. Brayden stated that he continued in his attempts to awaken the Grievant. The Grievant ordered an orange soda, and Brayden stated that he had difficulties inserting a straw into the cap. Brayden reports further that the Grievant drove out of the McDonald's and continued to swerve. He then drove off the road, and Brayden stated that he grabbed the steering wheel to prevent the cruiser from completely leaving the road and berm. At this point the Grievant stated that he was not feeling well, and Brayden drove the remaining two miles to the Highway Patrol Post.

Upon arriving at the Post, the Grievant informed Sergeant Russell that he was not feeling well and was unable to drive. Sergeant Russell drove the Grievant home. The following day the Grievant called his physician who referred him to a neurologist. Medical reports indicated that the Grievant probably had suffered from a diabetic attack while returning from the car dealership. Trooper Irby received a medical release to return to work on August 16, 2013 but was initially placed on non-driving, light duty. Medical statements indicate that the Grievant has been able to maintain blood sugar levels (hemoglobin A1c) at safe levels since the incident of August 12, 2013.

The Employer decided to initiate an investigation of the events of August 12 as the Grievant had been disciplined for sleeping related events earlier in the year. A number of employees were interviewed including Maintenance Worker Brayden and the Grievant. Investigator, Lieutenant Jacob Pyles, submitted his administrative investigative report to Major Brigitte Charles. The Employer determined that there was substantial cause that the Grievant was in violation of Rule 4501:2-6-02(B)(1), Performance of Duty, and a pre-disciplinary hearing was conducted on October 15, 2013. Following the hearing, the Grievant received a five day disciplinary suspension. The Grievant elected to deduct vacation leave in lieu of an unpaid suspension. Trooper Irby grieved the disciplinary suspension, and the Union appealed the matter to arbitration following the denial of the grievance by the Employer.

The Employer states that the actions of the Grievant on August 12, 2013 constitute violation of Rule 4501:2-6-02(B)(1), Fitness For Duty (Man. Exb. 2). The

rule states in part, "State of Ohio employees are required to report to work in a fit condition to perform their duties." The Employer states that Troopers are expected to be alert and fit for duty at all times and argues that the Grievant knew that he was becoming ill due to a known medical condition. His decision to drive to the Post placed Maintenance Worker Brayden in an unsafe situation in addition to the public. The Employer states that the Grievant did not seek medical attention until the following day. The Grievant, the Employer argues, was already on notice following the three day suspension earlier in the year and states that this discipline was sustained in arbitration. The Employer argues that the discipline did not violate Article 19 of the collective bargaining agreement, Disciplinary Procedure. There was just cause for the suspension, and a five day suspension was the next form of progressive discipline. The Employer advocates for the denial of the Union's grievance in this matter.

The Union states that the Grievant is a thirty-four year employee of the Highway Patrol. The Union argues that the Employer is fully aware of the Grievant's medical conditions and states that he did not fall asleep while driving back to the Highway Patrol Post but rather suffered a diabetic attack. The Union argues that the discipline of the Grievant was based on his medical condition and is therefore in violation of the just cause provisions of the collective bargaining agreement, Article 19. The Union states further that, if anything, a five day suspension is excessive based on the circumstances and service years of the Grievant. The Employer has acknowledged the medical condition of the Grievant in the past and is aware of his diabetic symptoms. The Union argues further that the three day suspension, which

was sustained in arbitration (Union Exb. 5), was nonetheless violative of the Agreement and the rights of the Grievant. Testimony at hearing in the instant matter regarding the previous disciplinary suspension argues that the Grievant was suspended earlier in the year for a medication issue which was beyond his control. The Union states that, pursuant to the Rule, the Grievant was clearly fit for duty on August 12 when he arrived at work in the morning, and that testimony and the Employer's investigation confirm this fact. The Union argues that the Grievant did not fall asleep as suggested by Maintenance Worker Brayden. He had suffered a **diabetic attack**, and he was able to remember the entire series of events. And at the point that the Grievant felt he could not safely control his vehicle, he asked Brayden to drive to the Post. The Union argues that there is no just cause in this matter, and the lost vacation leave should be returned to the Grievant. He cannot be disciplined for **his medical condition**.

The Grievant has a long and productive career with the Highway Patrol. It is unfortunate that he suffers from a number of medical conditions which have impacted his employment. Trooper Irby reported fit for duty on August 12, 2013. As the Employer suggests, an employee is required to maintain a level of fitness during the entire work shift appropriate to the responsibilities of the position. The Union's argument, that an employee must not receive discipline based strictly on a **medical condition** is meritorious. The Grievant testified that he has been **a diabetic** for ten years. He has been treated by his physician for the condition during this period of time and takes two medications in an attempt to control the condition and

its symptoms. The Grievant testified further that he is very experienced with motorists who have suffered diabetic symptoms while driving motor vehicles. He testified that the course of action is to call for an ambulance and have the motorist's vehicle removed from the highway. As a thirty-four year veteran of the Highway Patrol, the Grievant is well experienced with conditions which impair motorists and which are potentially dangerous and life threatening. The Grievant testified that, when he arrived at the automotive dealership and was waiting in the parking lot for Maintenance Worker Brayden, he "felt kind of funny" and then "felt worse." The Grievant used poor judgment when he made the decision to drive to the Hamilton Post knowing his medical history, recent discipline and the symptoms of low blood sugar. This was not the first time he experienced symptoms of light headedness and dizziness, and he testified at hearing that he knows these are warning signs of a diabetic attack. The fact that the Grievant recognized the need for a sugary drink to regain control of his blood sugar level should have alerted him that it was a risk to operate a vehicle. He placed himself in harms way as well as Brayden and other motorists. But it wasn't until he nearly drove completely off the road, forcing Brayden to grab the steering wheel, that he decided he could no longer operate the cruiser in a safe manner, and, at this point, he had driven nearly eight miles. The Grievant had, by that time, nearly caused two accidents and clearly would have if Brayden had not also been in the vehicle. The Grievant reported for duty in a fit manner, but, when he arrived at the dealership, he knew that he was experiencing symptoms of low blood sugar due to his diabetic condition. At the very least he should have removed himself as operator of the cruiser at McDonald's. His failure to

do so was in violation of Rule 4501:2-6-02(B)(1). The Grievant states, during the investigative interview that he “all of a sudden started feeling real tired and started feeling like I was getting ready to pass out” while driving (Man. Exb. 1). He states further during the interview that “I would snap out of it.” As a thirty-four year veteran of the Highway Patrol, the Grievant also knew what the consequences of “not snapping out of it” could be. He had a responsibility to not take that chance and risk the safety and lives of others. The Grievant testified at hearing that he knows that the **symptoms of a diabetic attack** are light headedness and dizziness. While the Grievant argued at hearing that the previous three day suspension for sleeping on the job was not for just cause and unfair, that matter had been arbitrated, and the discipline had been sustained. It is therefore included as part of his permanent disciplinary record. Therefore, the Employer’s argument, that the imposition of a five day disciplinary suspension in the instant matter meets the standard of progressive discipline, is meritorious. The investigative report included allegations that the Grievant was found sleeping while at the shooting range, and there was a reference to these concerns at hearing. Allegations regarding the shooting range incidents were not included in the official charges brought against the Grievant and are therefore not in any way a factor in the decision in the instant matter.

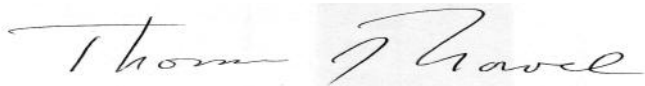
The five day disciplinary suspension is not about the medical condition or medical history of the Grievant but instead is based on his decision to operate a motor vehicle while knowingly suffering from symptoms of a potential **diabetic**

attack. This poor judgment on the part of a seasoned Trooper violated policy. The Employer had just cause to suspend the Grievant for five work days. The grievance of the Union is denied.

AWARD

The grievance of the Union is denied.

Signed and dated this 17th Day of February, 2014.

A handwritten signature in cursive script, reading "Thomas J. Nowel". The signature is written in dark ink on a light-colored background.

Thomas J. Nowel
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that, on this 17th Day of February, 2014, a copy of the foregoing Award was served, by way of electronic mail, upon Elaine N. Silveira, Esq. for the Ohio State Troopers Association; Lieutenant Heidi A. Marshall for the Ohio Department of Public Safety, Division of the Ohio State Highway Patrol; Aimee Szczerbacki for the Office of Collective Bargaining; and Alicyn Carrel for the Office of Collective Bargaining.

A handwritten signature in cursive script that reads "Thomas J. Nowel". The signature is written in dark ink on a light-colored background.

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