

Decision and Award in the Matter of Arbitration between:

Division of the State Highway Patrol

And

**Ohio Department of Public Safety,
Ohio State Troopers Association**

Grievance #: DPS - 2018- 03007-15

Grievant: Sergeant Randall Petersen

Arbitrator: Jack Buettner

Date of Hearing: February 12, 2019

Date Briefs Received: March 25, 2019

Date Decision Issued: April 15, 2019

Representing the Employer:

S/Lt. Jacob D. Pyles
Ohio State Highway Patrol
1970 W. Broad St.
Columbus, OH 43223

Representing the Union:

Ms. Elaine Silveira, Esq.
Ohio State Troopers Association
190 West Johnstown Road
Gahanna, OH 43230

By Mutual agreement the Hearing was convened on February 12, 2019, at 9:00 AM. The Hearing was held at the Office of the Ohio State Highway Patrol 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 2015-2018.

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. Jacob Pyles	OSTA
Sergeant David Zatvarnický	OSHP
Lieutenant Lawrence Roberts	OSHP
Major Joshua Swindell	OSHP
Ms. Elizabeth Dziatkowicz	ODPS HR Administrator
Commander Eric Wolfe	OIU Enforcement
Captain Charles Linek	OSHP

In attendance for the Union:

Ms. Elaine Silveira	Advocate/Attorney
Mr. Larry Phillips	Advocate
Mr. Jeremy Mendenhall	Advocate
Sergeant Randall Peterson	Grievant
Agent Steve Stocker	Ohio Investigative Unit
Major David Church	
Mr. Bob Cooper	OSTA Staff Representative

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 Collective Bargaining Agreement between the State of Ohio and the Ohio State Troopers Association, Inc. Unit 1 and 15 |
| Joint Exhibit #2 | Grievance Trail
a. Grievance--DPS-2018-03007-15
b. Step 2 Response
c. Arbitration Resolution Event |
| Joint Exhibit #3 | Discipline Trail
a. Statement of Charges
b. Pre-discipline Notice
c. Discipline Letter
d. Highway Patrol Rules & Regulations: 4501:2-6-02 (G) - Off-duty Employment
e. Department Record |

The following were submitted as Management Exhibits:

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| Management Exhibit #1 | Inter-Office Communication: Administrative Investigation #2018-0306, Sergeant Randall W. Petersen, Unit 1774, Warren District 4, Chardon Post 28 |
| Management Exhibit #2 | Transcript: June 11, 2018, Administrative Investigation 2018-0306 |
| Management Exhibit #3 | Transcript: July 18, 2018, Administrative Investigation 2018-0306 |
| Management Exhibit #4 | Transcript: July 18, 2018, Administrative Investigation 2018-0306, Continuation |
| Management Exhibit #5 | Ohio Department of Public Safety, Investigative Unit, Case Details, # 19-000532, 1/13/19 |

Management Exhibit #6	Application for Secondary Employment: Hampton
Management Exhibit #7	Application for Secondary Employment: Witmer
Management Exhibit #8	Application for Secondary Employment: Thomas

The following were submitted as Union Exhibits:

Union Exhibit #1	Application for Secondary Employment, Multiple Submissions
Union Exhibit #2	State of State, Department of Commerce, Division of Liquor Control, License: Plank Road Tavern, LLC
Union Exhibit #3	Individual Rights to LLC
Union Exhibit #4	Food Service Operation License
Union Exhibit #5	Geauga County OVI, Arrests 2017-2018 YTD
Union Exhibit #6	Performance Document – Annual Review
Union Exhibit #7	Home Page: ohio.gov/liqr/
Union Exhibit #8	Department of Commerce, Division of Liquor Control: How to Apply for a Liquor License
Union Exhibit #9	Department of Commerce, Division of Liquor Control: Application Process
Union Exhibit #10	Department of Commerce, Division of Liquor Control: How to Transfer a Liquor License

Background:

The Grievant, Sgt. Randall Petersen, was an Ohio Trooper for almost seventeen years. During his tenure, he was promoted to Sergeant and served as a member of the Employer's Special Response Team (SRT). The Grievant submitted an Application for Secondary Employment (Management Exhibit #1 B) on July 27, 2017, requesting to be the co-owner of the Plank Road Tavern. The application was denied on September 9, 2017. A Limited Liability Company (LLC) was created in November of 2017 (Management Exhibit #1 D) of which Sgt. Petersen is listed as President. That LLC purchased the Plank Road Tavern. The Grievant was subsequently terminated from employment on September 11, 2018, for violation of the Department of Public Safety's Rules and Regulations, 4501:2-6-02(G)(1) and 4501:2-6-02(G)(2), Off-duty Employment.

Issue:

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

Employer Position:

The Employer's position is that Sgt. Petersen was rightfully terminated having violated Rules 4501:2-6-02(G)(1) and 4501:2-6-02(G)(2), Off-duty Employment. Rule 4501:2-6-02(G)(1) states:

A member shall not engage in off-duty employment which hinders or interferes with the performance of his/her duties. A member shall not engage in any off-duty employment that represents a conflict of interest with the performance of his/her duties.

The Grievant applied for Secondary Employment to co-own the Plank Road Tavern in Montville, Ohio. This tavern is a bar and restaurant and holds a liquor license. The Employer contends that it is a conflict of interest for the Grievant to co-own an operation that depends on the sale of alcohol while it is the OSHP's goal to remove impaired drivers from the roads. Additionally, since the Grievant is a supervisor in the OSHP, he could have influence over Traceback Investigations which determine where an impaired driver received the alcohol.

The Employer also cites an incident that occurred on May 12, 2018, as demonstration of a conflict of interest. Trooper Scott Boyle of the OSHP's Chardon Post made a traffic stop. He was beginning Field Sobriety Tests when the Grievant pulled alongside of him. The Grievant identified himself as Sergeant Petersen and identified the driver as one of

his employees. The Grievant asked if everything was okay and then drove away. Trooper Boyle was upset by the incident and reported it to the Chardon Post Commander. An administrative investigation ensued.

This investigation found that the Grievant had gone forward to purchase the Plank Road Tavern despite the fact that his Application for Secondary Employment had been denied. The Grievant knowingly went ahead with the purchase because he believed the form did not apply to him.

Rule 4501:2-6-02(G)(2) states:

A member shall not engage in off-duty employment unless such employment has been approved, in writing, according to directives established by the superintendent.

Thus, the Employer terminated the Grievant for violation of Rules 4501:2-6-02(G)(1) and 4501:2-6-02(G)(2).

Union Position:

The Union's position is that Sgt. Petersen was wrongfully terminated. The Grievant invested in a tavern. An LLC was created in the Grievant's name and in his business partner's name, William Welker. A law firm was hired to complete the paperwork. An error was made, however, in that the initial liquor license was applied for in the partners' names instead of the LLC. The error was corrected and the liquor license is now in the name of Plank Road Tavern, LLC. (Union Exhibit #2) The Union contends that the Grievant is not an employee of the tavern but an owner. There is no conflict of interest with his OSHP position since he does not work in the tavern.

Testimony from Ohio Investigative Unit (OIU) Commander Eric Wolfe stated that liquor licenses are not issued by the Department of Safety but the Department of Commerce. The Division of Liquor Control, under the Ohio Department of Commerce, regulates liquor permits (Union Exhibits #7,8,9,10). OIU Commander Wolfe and OIU Agent Steve Stocker both stated that the Grievant's connection to the tavern would not hinder them from doing their job. Again, the Union contends there is no conflict of interest.

As to the alleged interference by Sgt. Peterson at a traffic stop, the Union believes that the Grievant was not stopped for a sufficient amount of time to consider it interference, and he did not try to influence Trp. Boyle's investigation. Further, this incident has no bearing on the case since the Grievant was charged with violation of Off-Duty Employment, not Conduct Unbecoming or Performance of Duty.

The Union also contends that the approval of an Application for Secondary Employment was sometimes capricious. They cited several instances whereby the standard for “conflict of interest” was not consistent (Union Exhibit #1).

The Grievant did follow through with the purchase of the Tavern after the Application for Secondary Employment was filed, but several circumstances affected that decision. The Grievant verbally agreed to the purchase prior to the denial on September 9, 2017. He stated that he spoke to Major Joshua Swindell on the phone and that Major Swindell said he had his approval. The Grievant had no reason to believe the Application would not be approved at that point, and, because it was a business deal, he had to move forward with the purchase. Additionally, the Grievant spoke with his attorney who said the Application for Secondary Employment was not valid for this instance. The Grievant was not employed by the Plank Road Tavern but a co-owner. The LLC was an investment and that the Grievant was not getting any income from the business.

DISCUSSION AND DECISION:

In reviewing the termination of Sgt, Randall Petersen, 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 the Employer. “Just cause speaks not only to the determination of whether an employee is guilty of wrongdoing but must also, “...safeguard the interests of the discharged employee by making reasonably sure that the causes for discharge were just and equitable and as such would appeal to reasonable and fair-minded persons as warranting discharge.” [Riley Stoker Corp., 7 LA 764 (Platt, 1947)] An Arbitrator generally must determine whether an employer has clearly proven that an employee has committed an act warranting discipline. If an employer does meet this burden, then the Arbitrator must decide whether the level of discipline is reasonable under the circumstance [*Hy-Vee Food Stores, Inc. and Int’l Brotherhood of Teamsters, Warehousemen, and Helpers of America*, 102 LA 55 (Bergist 1994)]. 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)].

The first issue in this case is that of conflict of interest, Rule 4501:2-6-02(G)(1). Management cited several areas whereby the Grievant’s secondary employment could be considered a conflict of interest. The first instance was in what was deemed as interference in a traffic stop with an employee of the Plank Road Tavern. An administrative investigation was held. The driver, who was stopped, was not deemed impaired. The Grievant, who did stop at the incident, was there for fifteen (15) seconds

(Management Exhibit #1). He stopped and identified himself, identified the driver as his employee, and then the Grievant moved on. It might be assumed that this was a conflict of interest in the Grievant co-owned the tavern in which the driver was employed. The Grievant stated he stopped because he thought perhaps the driver had hit a deer or had some mishap. When it was clear the driver was OK, the Grievant moved on and let Trooper Boyle complete the Field Sobriety Tests. The Grievant contends he stopped as a safety concern. Both sides can make assumptions as to the underlying reason for the stop. A "reasonable and fair-minded person" would think that a fifteen second stop whereby the Grievant did not verbally try to influence the Trooper was not a conflict of interest.

Another conflict of interest cited by Management was that the Ohio Investigative Unit (OIU), which falls under the auspices of OSHP, commonly performs investigations and enforces regulations at bars throughout the state. One such task is the Traceback Investigation which OIU performs usually after fatal crashes to determine where an impaired driver receive alcohol. Since Sgt. Petersen is the co-owner of a bar, he could have influence over said investigations. The key word here is "could". OIU Commander Wolf and OIU Agent Stocker testified that knowing the Grievant was an employee of OSHP would not deter them from doing their job. It is more aptly assumed that these officers would perform their duty regardless of who owned a given establishment. To think otherwise denigrates the integrity of the agency.

A clear conflict of interest in owning a tavern and performing as an OSHP officer was not shown. In reviewing Ohio Department of Public Safety Investigative Unit Case # 19-000532 (Management Exhibit #5), the Plank Road Tavern was investigated regarding a "Queen of Hearts" drawing. The investigation took place on January 9, 2019. The Grievant was co-owner of the tavern at that time. He did not identify himself as an OSHP officer and his job status had no bearing on the investigation.

Both sides submitted exhibits showing other secondary applications, some denied and some approved. A main factor that must be considered in conflict of interest situations is the appearance of any nexus between the employee's current employment and the requested secondary employment. Here are several examples that were cited:

Lawrence Hampton (Management Exhibit #6)

He was a Stationary Load Limit Inspector who requested secondary employment as a commercial truck driver. There was a nexus. He was denied on 5/25/17 because the delivery trucks are regulated by OSHP.

Paige Thomas (Management Exhibit #8)

She was a Public Safety Intelligence Analyst who requested secondary employment doing threat assessment for private clients at a consulting company. There was a

nexus. She was denied on 8/28/18 because her private work could overlap with clients of the State, and privileged information and research obtained from her state employment could possibly be used in private work.

Mathew Witmer (Union Exhibit #1, 58)

He was a driver License Examiner and applied for secondary employment as a private investigator/security. There was no nexus between the two jobs. He was approved on 7/11/17.

Dennis Wilcox (Union Exhibit #1, 53)

He was a trooper who applied for secondary employment to do excavating work. There was no nexus between the two jobs. He was approved on 9/7/18.

Two of the examples show a clear nexus between the employment requested and the current job and were denied. The other two examples showed no nexus and were approved. In the Grievant's case, there is no discernible connection between his work with OSHP and his co-ownership in a tavern in which he does not work.

Another conflict of interest cited by Management is that the Grievant is employed by a business that profits from the sale of liquor, and OSHP has the responsibility for enforcing laws concerning alcohol consumption. The Union rightly contends that the Grievant is not selling liquor. He does not work as an employee at the tavern. He is a co-owner in a business that happens to sell liquor.

The last issue in the discharge is the violation of Rule 4501:2-6-02(G)(2) which states:

A member shall not engage in off-duty employment unless such employment has been approved, in writing, according to directives established by the superintendent.

The Application for Secondary Employment was clearly denied on September 8, 2017 (Management Exhibit #1 B) yet the Grievant went ahead and filed the paperwork to become co-owner of the Plank Road Tavern. This is a clear violation of the above rule. Had emotions not gotten in the way, any "reasonable and fair-minded person" would have had some discussion about the issue before moving forward with the purchase. Even if the Grievant didn't believe the Application for Secondary Employment pertained to his situation (per his attorney's advice), he could have initiated a discussion with Management, withdrawn the application, or made a reasonable attempt to resolve the situation. As Management made reference to in their closing statement, the principle of "Obey now—grieve later" could instead have been used.

In reviewing Management Exhibit #1, Administrative Investigation, during the questioning of the Trooper Boyle, there are continuous references soliciting the opinion of the individuals as to their personal view of conflict of interest. An example is on page 4 of Management Exhibit #1. The investigator asked Trooper Boyle if he would be surprised to hear Petersen's Application for Secondary Employment was denied, as it pertains to the ownership of the tavern. The approval or disapproval of secondary employment is an administrative function and would not necessarily be known to officers in the field. According to the Administrative Investigation (Management Exhibit #1), "Boyle did not get the impression Petersen was trying to influence the outcome of the traffic stop with the driver, but he did make it known that he knew her." Additionally, "Boyle indicated he and others on the midnight shift have not avoided the area of the Plank Road Tavern despite learning of Petersen's involvement in it." Management seems to be investigating the traffic stop incident not on its own merits but on how it could be used to make a case against the Grievant for co-owning the tavern.

Having found the Grievant in violation of Rule 4501:2-6-02(G)(2), this Arbitrator must now determine if the degree of discipline administered by the Employer was reasonably related to a) the seriousness of the employee's proven offense and (b) the record of the employee's service [Grief Bros. cooperage Corp., 42 LA 555, 557-59 (Daugherty, 1964)]. In considering the seriousness of the offense, one must consider the "Workplace Nexus" standard for off-duty misconduct. The general rule asserts that discipline may be imposed if the employee's conduct: (1) harms the employer's business, (2) adversely affects the employee's ability to perform his or her job, or (3) leads other employees to refuse to work with the offender [W. E. Caldwell C., 28 LA 434, 436-37 (Kesselman, 1957)]. An employer can impose discipline based on the relevance and notoriety that the misconduct generates. In this instant case, none of the standards apply. Additionally, except in the most extreme cases, a fundamental employee protection is that of progressive discipline. There was none. The severest penalties are reserved for cases when an employee's past record indicates that the unsatisfactory behavior will continue. Such is not the case. Hence, termination, the ultimate discipline, seems unwarranted.

Sgt. Peterson has a clean work record with no violations after almost seventeen years of service. His annual reviews (Union Exhibit #6) show that he meets or exceeds expectations in all competencies. Additionally, the Grievant agreed to transfer his ownership of the business into the name of a third party. This incident appears to be an isolated one. This Arbitrator is modifying the penalty since it appears unlikely that the Grievant will repeat the misconduct [City of Napa, 102 LA 590 (Knowlton, 1994)]. The State of Ohio has many years of training invested in an employee who has had no prior disciplinary actions on record and who has served OSHP in multiple capacities.

AWARD:

For the reasons stated above, the grievance is sustained in part and denied in part. The Grievant did not violate Rule 4501:2-6-02(G)(1). His co-ownership in the Plank Road Tavern is not in conflict with his employment. The Grievant did violate Rule 4501:2-6-02(G)(2) by moving forward to purchase the Plank Road Tavern after his Application for Secondary Employment was denied. The Grievant's termination should be vacated and he will be returned to duty no later than Monday, May 6, 2019, without back pay or benefits. The Grievant's seniority should be bridged back to the date of his termination, and he should be restored to his position and post.

This closes the arbitration.

Respectfully submitted this day of 15th day of April, 2019,

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 15th day of April, 2019, to

Staff Lieutenant Jacob D. Pyles, OSHP

And

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

Jack Buettner

Jack Buettner