

Arbitration Between:

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

And

Ohio State Troopers Association

Grievance of Todd Henry; DPS-2019-02601-15

State Highway Patrol Representatives

Michael D. Wood, LR 3

Lt. Darrell Harris

Robert W. Patchen, OCB

OSTA Representatives

Larry Phillips

Elaine Silveira

Bob Cooper

*Witnesses for the Grievant:* Grievant, Sgt. Todd Henry

*Witnesses for the OHSP:* Sgt. David Bailey, Staff Lt. Anne Ralston

ARBITRATOR OPINION AND AWARD

The Ohio Department of Public Safety, Division of the State Highway Patrol (OHSP), issued a one-day suspension to Sergeant Todd Henry (Grievant) for a violation of Ohio State Highway Patrol Rules and Regulations, Rule 4501:2-6-02(B)(5) – Performance of Duty. On March 14, 2018, Staff Lt. Anne Ralston conducted a Quality Review Audit at the Zanesville Highway Patrol Post, where the Grievant was stationed. As part of the audit, Lt. Ralston reviewed the BAC Datamaster (breathalyzer machine) calibration reports. She discovered that, on one occasion, the same bottle of alcohol solution was used a second time, during a test conducted by the Grievant, after its first use, by Sgt. Kevin Kelley, resulted in a low test. The

Ohio Department of Health Regulations, with which the Grievant was familiar, require that alcohol solution be discarded if the BAC Datamaster records a low test using that solution. In other words, the alcohol solution may not be used a second time (although normally it can be used multiple times), if the BAC Datamaster records a low test result. Correct calibration of the BAC Datamaster is important since the correct readings of the Datamaster are used to assist in the arrests and convictions of impaired drivers. After an administrative investigation, the Grievant was disciplined because he used the alcohol solution a second time after Sgt. Kelley's test of the same machine with the same alcohol solution achieved an unacceptable result.

Here, though, extenuating circumstances require a reversal of the Grievant's discipline. Grievant is familiar with the regulation that prohibits a second use of an alcohol solution after a low test result using that otherwise valid solution. On November 4, 2017, Kelley first ran a test of the BAC Datamaster machine, and recorded a low result in a notebook kept for such records. He left the solution out rather than discarding it, which is atypical (the solution should have been discarded). Then, he had to leave the post and asked Grievant to run a test on the BAC Datamaster machine. Critically, he did not tell the Grievant about the first low test result, so the Grievant reused the alcohol solution that Kelley had left out (either in the bottle or in the simulator). Although the information about the low test result was in the notebook, the Grievant's uncontradicted testimony revealed that a machine tester is not required to look at the notebook for test results, just for information about the date the machine was previously tested. Moreover, Grievant testified that when a problem exists with the BAC Datamaster, the person who discovered the problem is to place an IOC form in the notebook. That did not happen in this case, so the Grievant had no reason to believe that there was a problem with the machine (and, if there is no problem with the machine, the alcohol solution may be reused if it is not expired or

over a year from the manufacturer's date on the bottle). I found his testimony on this account credible. Perhaps the Grievant should have realized that the solution was the potential issue and the reason why the machine needed to be retested. If he had realized this, he would likely have discarded the otherwise usable solution and used a new bottle of solution for calibration. But, in this situation, I find that the fault is with Sgt. Kelley, who left the solution out, and not with the Grievant. To punish him in this situation would be unjustified and I therefore reverse his one-day suspension without pay and grant him backpay with his shift differential as well as seniority and any other benefits he lost due to the suspension.

Date: February 8, 2019

A handwritten signature in black ink, appearing to read 'S. Cole', is written over a horizontal line.

Arbitrator Sarah R. Cole