



In Re the Arbitration between:

DOJ Case No. 257001-GL0165-03

Oregon State Police,
Employer,

and

**GRIEVANCE ARBITRATION
OPINION AND AWARD**

Oregon State Police Officers Association,
Union.

Grievant – Andrew Axelson.

Pursuant to **Article 12** of the collective bargaining agreement effective July 1, 2001 through June 30, 2003, the parties have brought the above captioned matter to arbitration.

James A. Lundberg was selected as the neutral arbitrator from an Oregon Employment Relations Board list of Arbitrators.

The parties stipulated that all steps of the grievance procedure were properly complied with and the grievance is properly before the Arbitrator for a final and binding determination.

The grievance was filed March 13, 2003.

A hearing was conducted on October 8, 2003.

Briefs were mailed on October 24, 2003 and the record was closed upon receipt of briefs on October 27, 2003.

APPEARANCES:

FOR THE EMPLOYER
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FOR THE UNION
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ISSUE:

Whether the employer had just cause within the meaning of Article 11.1 of the collective bargaining agreement to discipline the grievant by imposing a one step pay reduction for 3 months? If not, what should be the remedy?

FACTUAL BACKGROUND:

The grievant Trooper Andrew Axelson has been employed by the Oregon State Police for eight years. While Trooper Axelson is considered to be a very good Trooper, he has been involved in five automobile crashes in the eight years that he has been a Trooper. The employer determined that all five of the crashes were preventable and followed a sequence of progressive steps designed to improve grievant's driving skills and performance.

- In June of 1996 grievant was involved in a preventable U-turn accident that resulted in damage of \$58,862.17. He received counseling and training to correct his performance.
- In December of 1996 he was involved in a preventable rear end collision resulting in damage of \$6,337.18. The Trooper received a Letter of Reprimand.
- In November of 1997 the Trooper was involved in a second preventable rear end collision resulting in damage of \$2,952.77. He received a second Letter of Reprimand.
- In January of 1999 grievant was involved in a lane change accident that resulted in damage of \$6,439.43. Grievant was given an economic

sanction of one step for three months and received one on one training from an EVOC instructor.

- On December 23, 2002 grievant was involved in the lane change accident that is the subject of this grievance. The accident resulted in damage of \$22,500.00. Trooper Axelson was given an economic sanction of one step for 3 months.

On December 23, 2002 at approximately 9:50 AM Trooper Axelson had determined that he could assist the Oregon City Police Department in pursuit of a stolen Jaguar by positioning himself on northbound I-205 near exit #12 for the purpose of laying out "spike strips." Trooper Axelson put on his emergency lights and drove down the on ramp to northbound I-205. Two cars that preceded the Trooper down the entry ramp pulled over to the side. The grievant looked for on coming vehicles and did not see any on coming vehicles as he moved into the right hand lane of I-205 by crossing the painted gore point that establishes the normal traffic merge pattern. As the grievant moved across the gore point, a Freightliner truck (bobtailed truck with no trailer) that grievant had not seen applied its brake and turned to avoid the patrol car. The rear of the Trooper's car collided with the rear tire of the truck.

Fortunately, the collision did not result in serious bodily injury.

Sergeant Allori arrived at the scene shortly after the crash. In his crash report the Sergeant noted that Trooper Axelson said that the sun was in his eyes. Sergeant Allori confirmed that the sun was in his eyes when he looked in the direction of on coming traffic and it was difficult to see in that direction. The truck driver said he was traveling at 55 miles per hour and the grievant said his speed was about 45 miles per hour.

Sergeant Allori conducted a telephone interview with a Ms. Kinnear who witnessed the crash. Ms. Kinnear said she was traveling about 55 miles per hour and saw the bobtailed truck slam on its brakes creating a lot of smoke and it struck Trooper Axelson's patrol vehicle in the left rear corner. Sergeant Allori also noted "Ms. Kinnear said she clearly saw Trooper Axelson's patrol vehicle and that she was able to slow down. Ms. Kinnear said she didn't know how the truck driver was not able to slow down for the troopers vehicle."

The truck driver was accompanied by his girl friend's mother and a dog.

Skid marks from the accident were not measured for the purpose of determining the speed of the on coming truck.

SUMMARY OF EMPLOYER'S POSITION:

The grievant has been involved in five preventable accidents in eight years as a Trooper. The cost of the crashes has exceeded \$85,000.00 in property damage and bodily injury. The accidents have all involved circumstances where grievant failed to properly judge speed or distance, made a poor decision or simply failed to look before making an offensive move. The goal of the State Police is to facilitate public safety. However, grievant's driving habits have endangered his personal safety and the public. It is essential that the State Police take all reasonable steps to assure both the safety of the public and Trooper Axelson's safety.

In addition to the initial training provided Trooper Axelson, the employer has coached the grievant, counseled the grievant, provided refresher training, required individual coaching and imposed progressive levels of discipline on the grievant in an effort to protect his safety, the safety of the public and public and private property.

Unfortunately, on December 23, 2002 Trooper Axelson was involved in a collision which with the exercise of due care, was preventable. It was grievant's responsibility to be sure that the right lane of northbound I-205 was clear before he merged into the lane. He either was unable to see the truck because he did not check his blind spot or due to the sun being in his eyes. In either event, he could not be sure that it was safe to merge onto the highway at the point he selected.

It is true that traffic is supposed to slow down and pull over to the side for emergency vehicles. However, it has been established that drivers react differently to emergency flashers and do not always properly yield. Troopers are taught that they may not presume that all drivers will immediately yield or properly yield to their emergency lights.

The grievant was well informed of the rule that the employer has used to evaluate crashes involving Troopers. He was involved in four crashes prior to the crash on December 23, 2002 and the same standard was used in each case to determine whether the crash was preventable.

When the employer evaluated the December 23, 2002 crash, it took into consideration the facts of the particular crash, the period of time between the crash and prior incidents and Trooper Axelson's record as a law enforcement officer. The Trooper was given a second reduction in pay. He was not discharged, which would have been the next step in the disciplinary progression.

The employer had just cause to impose a one step pay reduction for 3 months upon the grievant. The employer established that the grievant was involved in a preventable crash. The grievant's driving history was considered by the employer in

determining the level of discipline to impose. The fact that grievant had not had a crash for three years eleven months and ten days was also given weight in determining the level of discipline to impose.

SUMMARY OF UNION'S POSITION:

The union challenges the definition of "preventable" that is being used by the employer. The employer has never clearly defined preventable in terms such as fault. In this case the union contends that the truck driver, who failed to yield to an emergency vehicle, was at fault. It was the failure of the truck driver to yield that caused the crash. If the truck driver's failure to yield caused the accident, how can the employer sanction the grievant for a preventable crash that his conduct did not cause. The employer has never established the level of causation on the part of a Trooper necessary for a determination that a crash was preventable.

The union challenges the validity of the investigation conducted by the employer. Despite the fact that the truck driver admitted that he hit the Trooper's vehicle and Ms. Kinnear saw the truck hit the Trooper's vehicle, the employer determined that grievant hit the truck.

The employer failed to determine, by using the skid marks of the truck, how fast the truck was going. If the skid marks had been measured, it would have been easy to determine the truck's rate of speed. Furthermore, a measurement of the skid marks would also have revealed the point where the truck hit its brakes before making contact with the Trooper's vehicle. The employer determined that the crash was preventable without establishing one of the most important facts, the speed at which the truck was traveling.

The employer simply did not have sufficient evidence to determine whether the crash was preventable.

The union contends that the truck was traveling at a high rate of speed, coming out of the shadow of the overpass behind the entry ramp and the truck driver was intending to leave I-205 at the next exit. If the truck was traveling at a high rate of speed and coming out of the shadows of the overpass, the Trooper could not have seen the truck and could not have prevented the accident.

The penalty imposed upon the grievant was too severe. The crash occurred three years, eleven months and ten days after the last accident. If four years had passed, another twenty days, all of the past discipline would have been wiped out and grievant would have received oral counseling.

The employer has failed to prove that the accident was preventable and the discipline should be reversed. If the arbitrator finds that the accident was preventable, the level of discipline should be reduced to a written reprimand or less.

OPINION:

The grievant testified that he moved from the entry ramp onto northbound I-205, after looking to see whether he could safely merge into the right hand lane. He also testified that the sun made it difficult for him to see. He did not see the bobtail truck until it was right on top of him. A factual determination that grievant did or did not exercise due care as he moved his vehicle across the gore point to the right hand lane of I-205 is dependent upon whether grievant could have seen the bobtailed truck when he turned to look for on coming traffic. A factual determination that grievant could have seen the

bobtailed truck or could not have seen the bobtailed truck is dependent upon the speed at which the bobtailed truck was traveling.

The speed at which the truck was traveling is the critical fact in this analysis. A Freightliner truck is a large vehicle. Assuming the Freightliner truck was traveling at 55 miles per hour as it approached the Trooper's vehicle, the employer's determination that the Trooper could have prevented the crash must be upheld. That a Freightliner truck traveling only 55 miles per hour was concealed from the Trooper's view by either shadows or bright sun light is an explanation that lacks credibility.

The employer accepted the truck driver's representation that he was traveling at 55 miles per hour. However, the truck driver's representation should have been carefully scrutinized. The truck driver testified that he was traveling at about 58 miles per hour. The crash report indicated he was going 55 miles per hour. The fact that the driver was riding with both a passenger and a dog in violation of his company's policy raises some question as to his credibility. The arbitrator is asked to believe that the truck driver was scrupulously observing the speed limit on I-205, while he admittedly failed to observe a ban on passengers and canine companions in his cab.

The truck driver also testified that he saw the Trooper's vehicle with emergency lights on ahead of him and took his foot off the gas to give him some room. He explained that he "wasn't sure what was going to happen" as he approached the Trooper. Clearly, the truck driver was overtaking the Trooper and did not apply his brake until the very last moment. Again, the speed at which the trucker was overtaking the Trooper's vehicle is a critical fact in the analysis. The trucker testified that he took his foot off the accelerator to give the Trooper some room. Then he testified that he was traveling at 58 miles per hour.

He did not clearly fix the point at which he was traveling 58 miles per hour. He did not testify whether he reduced his speed from 58 miles per hour or whether he reduced his speed to 58 miles per hour by taking his foot off the accelerator.

Ms. Kinnear told the investigating officer "she clearly saw Trooper Axelson's patrol vehicle and that she was able to slow down. Ms. Kinnear said she didn't know how the truck driver was not able to slow down for the trooper's vehicle." The information obtained from Ms. Kinnear, a citizen who witnessed the crash, suggests that the speed that the truck was traveling may have been excessive. Her statement should have caused the investigation to focus on the speed of the truck. If the speed of the truck could be determined by some means other than by asking the truck driver, the investigation should have included an attempt to independently determine the speed of the truck.

When the truck slammed on its brakes, it created a lot of smoke. It also created skid marks. It would have taken some additional time for the investigator to measure the skid marks of the truck but the skid marks could have been used to calculate the speed at which the truck was traveling. The failure of investigators to obtain the necessary data to determine by independent means what speed the truck was traveling leaves the fact finder without a means of corroborating or discrediting the testimony of the truck driver which lacks credibility and is self serving.

It is the employer's burden to establish that the grievant failed to operate his vehicle with due care under the circumstances. If the truck was traveling at a speed that made it impossible for grievant to have observed him, when grievant turned to check on coming traffic, then the Trooper exercised due care and he should not have been disciplined. If the truck was traveling at a reasonable speed and the Trooper failed to

observe the on coming vehicle, the accident was preventable. The employer had the ability to independently determine the speed at which the bobtail truck was traveling but did not gather the necessary data during the investigation. In the absence of reliable evidence as to the speed that the truck was traveling, the employer is unable to show by a preponderance of the credible evidence that the grievant operated his vehicle without due care on December 23, 2002. Thus, there is insufficient evidence to determine whether the crash was preventable.

The economic sanction that was imposed upon the grievant based upon his involvement in a preventable crash should be reversed. The employer did not have just cause to discipline the grievant.

The decision is based on a lack of credible evidence of the truck driver's speed. A reversal of the discipline in this case does not prevent the employer from counseling and otherwise training or retraining the grievant in the operation of a patrol vehicle.

AWARD:

The employer did not have sufficient credible evidence to establish the rate of speed that the bobtail truck was traveling at prior to the crash on December 23, 2002.

The evidence was insufficient to establish just cause for discipline.

Thus, the economic sanction imposed upon the grievant shall be reversed and he shall be awarded back pay in the amount of the lost wages he incurred.

This award shall not be interpreted to in any way prevent the employer from counseling the grievant or requiring grievant to obtain additional training or retraining in vehicle operation.

Dated: _____

James A. Lundberg, Arbitrator