

October 26, 1990

In the Matter of Arbitration
between

The Ohio State Highway Patrol

and

The Fraternal Order of Police
Ohio Labor Council Inc.

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)
)
) Case No. 15-03-
) (900624)-0050-0401

#505

APPEARANCES

For the Patrol:

Ann Arena
Richard Corbin
Robert F. Welch
Georgia Brokaw

Advocate/Labor Relations
Sergeant, Second Chair
Captain
Observer

For the FOP:

Paul L. Cox
Trooper Paul Riley
Edward Baker
Trooper T. Jones
Renee Engelbach

Attorney
Grievant
Staff Representative
Witness
Paralegal

Arbitrator:

Patricia Thomas Bittel

FACTUAL BACKGROUND

This matter was heard on September 26, 1990 at the Ohio Office of Collective Bargaining in Columbus, Ohio before Patricia Thomas Bittel, the permanent umpire mutually selected by the parties in accordance with Section 20.08 of the collective bargaining Agreement.

Grievant is a trooper of 12 years' experience with the Ohio State Highway Patrol. He was issued a one-day disciplinary suspension for violating rules regarding performance of duty, use of force and compliance to orders. The suspension arose out of a high speed pursuit during which he attempted to disable the suspect's vehicle by shooting at the tires.

The statement of charges described Grievant's failure to perform satisfactorily as follows:

- "- Failed to follow the pursuit policy as outlined in File 9-200.06-01.
- Improperly used deadly force in an effort to stop the vehicle. This was done by firing his revolver twice in a residential area.
- Failed to comply with operations policy in File 9-203.20A, Use of Deadly Force and Firearms, by improperly discharging his firearm at a vehicle's tire."

After imposition of the one-day suspension, a grievance was filed claiming "I was suspended without pay for one (1) working day on June 1st, 1990. I contend that this suspension was without just cause and discrimination." The

remedy requested was reversal and expungement of the suspension.

The parties stipulated to many of the documents involved in the case, including applicable rules and policies, reproduced below in pertinent part.

REGULATIONS

"4501:2-6-01 DEFINITIONS

(F) The term 'deadly force' means any force which carries a substantial risk that it will proximately result in the death of any person."

4501:2-6-02 PERFORMANCE OF DUTY AND CONDUCT

(B) Performance of Duty

(4) Members who fail to perform assigned duties because of an error in judgement or otherwise fail to perform satisfactorily a duty of which such member is capable, may be charged with inefficiency.

(V) Use of Force

(1) A member shall be justified in using deadly force under the following circumstances:

- (a) To defend himself/herself from serious injury or death.
- (b) To defend another person from serious injury or death.

(2) A member shall only use that force necessary to effect an arrest, detention, or mission.

(Y) Compliance to Orders

(2) A member shall conform with, and abide by, all rules, regulations, orders and directives established by the superintendent for the operation and administration of the State Highway Patrol."

OPERATIONS AND POLICY, FILE 00-9-203.20

"A. Use of Force.

Officers will only use that force necessary to effect an arrest, detention, or mission. The amount or type of force needed will be determined as the incident progresses. An officer must react to the aggressor in a manner that will limit injury to himself/herself, the suspect and the public.

An officer shall be justified in using deadly force under the following circumstances:

1. To defend himself/herself from serious injury or death.
2. To defend another person from serious injury or death."

OPERATIONS POLICY, FILE 00-9-200.06-01
MOTOR VEHICLE PURSUITS.

"A. Primary Considerations

1. The primary goal of the division is the protection of life and property. If a motor vehicle pursuit exposes any officer, member of the public or violator to unnecessary risk, then the pursuit is inconsistent with that goal and should be terminated.

3. A pursuit is only justified when the necessity of the apprehension outweighs the level of danger created by the pursuit.

F. Stopping the Fleeing Violator.

2. Methods for stopping a fleeing violator should always be employed from the least dangerous progressively to the most dangerous.

d. Use of Deadly Force.

(4) Firing to disable a vehicle shall be a last resort measure and done only when failure to do so will, with a high degree of probability, result in injury or death to innocent persons. Officers shall consider:

- (a) Location of the pursuit,
- (b) Vehicular and pedestrian traffic,
- (c) Hazards to innocent persons, and
- (d) The probability that the action will disable the vehicle.

When firing to disable, the following should be communicated to all officers involved in the incident: (including officers from other agencies who are involved)

- a) The impending fire is intended to disable the vehicle,
- b) Which officer will fire, and
- c) The area of the vehicle where the fire will be directed.

* * *

5) The intent of this prior notification is to insure that all officers involved in the incident are aware that shots are to be fired only by the designated officer and others shall not fire."

Most of the facts are not in controversy as Grievant's description of the incident was not countered by other evidence. On January 27, 1990 Grievant attempted to stop a suspect for speeding and suspicion of DUI. The suspect was driving a pick-up truck and took off fast, being paced at 80 in a 50 mile an hour zone. Grievant signaled him to stop with his overhead lights. The suspect pulled to the berm, then accelerated, at which point Grievant turned on his siren and put a spotlight on the truck. He saw the suspect finish a can of beer and throw it on the floor. He radioed he was in pursuit traveling towards Springfield, Ohio.

The suspect continued to speed 80-85 miles per hour, then slowed to 55 to 60 miles per hour in a 35 mile an hour zone in Springfield. Sergeant Davies of the Springfield Police Department joined the pursuit. There was no other traffic and the suspect ran a few stop signs and a red light.

As the chase continued through the city, Grievant radioed to Trooper Jones who said he would come into town. Jones then joined the chase which continued through streets and alleys. The suspect finally turned into an alley and Jones entered the alley from the opposite direction. Sergeant Davies of the Springfield Police Department pulled partially into the alley and Grievant stopped behind him.

The suspect stopped his truck immediately after turning into the alley, being blocked by Trooper Jones. From the location of the vehicles, Grievant concluded the suspect was blocked in. He got out of his car to walk toward the suspect vehicle. Suddenly the pickup truck backed up with its tires squealing and gravel flying. It managed to back out of the alley past the other vehicles and into the street.

At this point Grievant was facing the truck. He drew his weapon and instructed the suspect to stop. The suspect hesitated and then floored his accelerator, driving his truck straight towards Grievant. Grievant jumped out of the way and as the truck went by, fired two rounds into the left rear tire of the suspect vehicle.

Grievant states when he drew his weapon he had no intent to discharge it unless he was threatened. It was a split-second decision, he said. He knew where the other officers were when he fired, and knew no pedestrians or traffic were in the area. He stated when he shot at the tire, he was aiming down and fired down.

Grievant admits he made no verbal warning to the other officers prior to firing the rounds. He says he did not have time to yell anything before he fired.

After backing up the truck, the suspect headed towards downtown Springfield, a route which would take him past a number of bars, into a more heavily populated area. Grievant said he felt it was highly probable the suspect

would cause death or injury to others because the pursuit had lasted over ten minutes with reckless driving, and the suspect had proven he was willing to run him over. He said he felt it necessary to do something because the suspect was going to kill someone; it was clear the suspect would have run over anyone who got in his way.

The suspect was apprehended shortly thereafter when he turned down a blind alley and crashed.

Trooper Jones testified to his version of the same facts, stating he heard two shots but did not know who fired them. He said shortly after the incident, he received Grievant's radio message explaining the shots.

The parties stipulated to Grievant's training record as well as to his department record which was clear of any disciplinary action.

CONTENTIONS OF THE EMPLOYER

Captain Robert F. Welch, an instructor in officer safety, firearms and self-defense at the academy, stated officers are allowed to fire to disable only if failing to shoot was likely to result in injury or death to innocent persons. He stated a last resort situation did not exist when the pursuit could simply continue. In his view there has to be an imminent threat of harm to justify firing to disable.

He stated the failure to warn other officers of a disabling shot leaves the other officers unaware of who was shooting, creating a situation of heightened danger. The possibility of ricochet exists when shooting at a tire, said Welsh who described several incidents of injury or death occurring from ricochet bullets.

He explained the restrictions on using firearms to disable a vehicle were based on the need for safety in apprehending a suspect. He said the danger of ricochet was taken into account by the policy.

As part of its case, Management submitted a videotape used in training troopers on proper methods in pursuing a fleeing suspect. The videotape included a number of different scenarios illustrating options in apprehending the suspect. As to use of a firearm, the following was stated:

"Officers shall not discharge a firearm at or from a moving vehicle except as the ultimate measure of self defense or defense of another when the suspect is using deadly force by means other than the vehicle.

Officers shall not under most conditions fire upon a pursued vehicle. If fired upon, officers may return fire when appropriate.

Firing to disable a vehicle shall be a last resort measure and done only when failure to shoot will with a high degree of probability result in injury or death to innocent persons.

Officers shall take into account the location, vehicular and pedestrian traffic and hazard to innocent persons.

Safety is always the foremost factor to be considered.

Remember, pursuit is justified only when the necessity of apprehension outweighs the level of danger created by the pursuit."

These directions were also presented to the trainee by written word on the screen. The judgement of the officer was credited only in the context of "deliberate contact between vehicles or forcing the pursued vehicle into parked cars, ditches or another obstacle". Deference to the officer's judgement was not made in the context of shooting to disable.

Management argues its rules and policies concerning the use of force in firearms are reasonably related to safe and efficient operation. It claims shooting out tires is not the method of choice for apprehending a suspect except under an extremely narrow set of conditions. It asserts Grievant had been trained in rules and policies and was familiar with them.

Management maintains any time a firearm is discharged there is danger of causing injury to a person. In its view Grievant failed to consider the necessity of apprehension as compared to the danger of the pursuit and the seriousness of the offense of the suspect. It claims shooting at a tire is justifiable only as a last resort.

It asserts there was no imminent threat of danger at the point when Grievant fired. Because of the danger of ricochet, the Patrol argues Grievant created a liability situation. It claims that although the Patrol is involved in many pursuit situations, it is rare for an officer to attempt to disable a vehicle by shooting at it.

It argues the degree of discipline imposed was related to the seriousness of the offense and was favorably tempered by Grievant's past deportment.

CONTENTIONS OF THE UNION

There is no evidence the pursuit should have been terminated, states the Union. In its view, any claim the pursuit should have been dropped is absurd; the policy of the Highway Patrol is not to drop suspects, rather troopers are expected to pursue and apprehend them. The Union further claims Grievant did not have time to verbally warn the other officers before firing his shots.

In the Union's analysis the issue is not violation of policy but whether the judgement can effectively be made in hindsight. It claims mistakes are foreseeable and should not result in punishment. It insists Management's discipline in this case is an unreasonable interpretation of what troopers are expected to do under stress.

Troopers make subjective judgements within short time frames at moments of extreme danger, it points out, while Management looks back at a situation in hindsight to criticize the trooper's actions. Troopers do not have the luxury of weighing and considering the subtleties of policy when confronted with a fleeing suspect, argues the Union.

Grievant's judgement while pursuing the suspect should receive serious consideration, claims the Union, asserting his belief of imminent danger to citizens was justifiable. The critical issue in the Union's view is the judgement of the Grievant. His conclusion after the suspect had attempted to run him over was not unreasonable, it asserts, noting the Sergeant in this case made no effort to terminate the pursuit.

Grievant is not contesting policy, states the Union; he followed it. The policy should not permit shooting to disable then discipline those who shoot, it contends.

The Union references two prior arbitration decisions: one, the Ertel case, decided by Samuel S. Perry and the other, the Smelzer case, decided by this Arbitrator.

In the Ertel case, Grievant Ertel received a 20-day suspension for using excessive force to effect an arrest. That case involved the pursuit and capture of a rape suspect. Three officers were attempting to handcuff the suspect who was resisting arrest, when Grievant Ertel jumped on the hood of the suspect's vehicle, then tried to help subdue him by hitting him with his flashlight.

According to Perry, perception about danger is a subjective introspective phenomenon. Though agreeing that jumping on the suspect's hood was foolish or even dangerous, Arbitrator Perry noted such conduct was not outlawed by the Agreement or forbidden in the training manual. He saw little difference between the "ineffective touchings with

the flashlight" and the fist fight between the suspect and another trooper. Because Grievant was not trying to kill or maim the suspect but only to "subdue a ferocious arrest resister", Arbitrator Perry found Grievant did not use any more force than necessary. The suspension was revoked.

Trooper Smelzer was given a three-day disciplinary suspension for violating the rule regarding use of force. Management did not charge Smelzer with violating the pursuit policy in that case. The suspect was known to have been armed and to have shot at a police officer. There were also reports the suspect had run over the ankle of a juvenile passenger, taken a hostage, aimed his gun at a trooper, stolen a car and beat a female during the extended pursuit.

When the suspect's vehicle stopped, Smelzer shot the right front tire from a distance of two to three feet. The suspect then began moving his vehicle and Smelzer shot at the radiator. This Arbitrator concluded Smelzer did not use deadly force within the meaning of the regulations but used only the force necessary to effect his mission. His three-day suspension was expunged.

DISCUSSION

1. Was Grievant in Violation of Stated Rules, Regulations, and/or Policies?

A. DID GRIEVANT FAIL TO FOLLOW THE PURSUIT POLICY?

Grievant's alleged violation of the pursuit policy generally falls into three categories: failure to terminate the pursuit, failure to warn fellow officers of the intent to shoot, and Improperly firing to disable.

(1) Failure To Terminate the Pursuit

The policy instructs the officer to terminate the pursuit if any officer, member of the public or violator is exposed to unnecessary risk.

In all practicality, it would take a very special set of circumstances indeed to warrant the abandonment of a pursuit and consequent unleashing of a violator at the very point in time when he or she is creating danger to others. A certain amount of risk is 'necessary' in the apprehension of any fleeing violator. The training video articulated the standard for terminating pursuits with a slightly different slant: when the level of danger created by the pursuit outweighs the necessity of apprehension.

There is no evidence any of the 'risk' involved in apprehending the suspect in this case was 'unnecessary.' Nor was there any indication the danger created by the pursuit outweighed the danger of letting the suspect go. The suspect was speeding and suspected of DUI before the

pursuit even began. Good reason to abandon such a person to the community was not shown. Grievant did not violate the pursuit policy by continuing the pursuit.

(2) Failure to Warn Fellow Officers

The policy does not absolutely require the officer to advise others in the area prior to shooting to disable. It states the intent "should" be communicated, but does not use mandatory language.

Had Grievant waited until he could shout this information over the roar of the truck's accelerating engine, the opportunity to shoot at close range at the tire would be lost along with the relative safety of aiming down at a target only two feet away. He did not have time to advise others of his intent. The policy contemplates this possibility and specifically leaves room for it. Grievant did not violate this part of the policy.

(3) Firing To Disable

The pursuit policy is clear that firing to disable a vehicle is a last resort measure to be only used when there is a high degree of probability that failure to apprehend the suspect will result in injury or death to innocent persons. This policy is not only available to troopers in writing but was also the basis of instruction in pursuit methods contained in the videotape. It is designed to maximize the safety of a pursuit and incorporates known dangers of ricochet when firing into a largely metal target

such as a vehicle. The policy is entirely reasonable, and its appropriateness is not contested by the Union.

At the point in time when Grievant discharged his firearm into the suspect's wheel he had already jumped out of harm's way. The attempt by the suspect to attack Grievant with his vehicle had passed. There was no imminent danger to Grievant or to other persons in the vicinity.

There was speculation about the likelihood of the suspect continuing downtown into an area where persons were likely to be coming out of bars. This theory assumes the suspect would follow a predictable route. It also assumes the fortuity of persons exiting bars at the moment of the suspects' passing. Grievant testified without rebuttal that there was very little vehicular traffic and no pedestrian traffic at the time. There was no imminent danger to anyone in the vicinity. Based on these facts, it cannot be said failure to disable the suspect vehicle would "with a high degree of probability" result in injury or death to any person. It follows that Grievant's decision to discharge his firearm to disable the suspect's vehicle violated that policy.

B. DID GRIEVANT IMPROPERLY USE DEADLY FORCE?

The regulations define deadly force as "any force which carries a substantial risk that it will proximately result in the death of any person." The mere discharging of a firearm, therefore, does not necessarily fall within this

definition. The risk of harm must be substantial, not speculative, in order for the discharge of a firearm to be considered use of deadly force.

The term "substantial" is commonly understood as meaning considerable or significant. At the time of firing, Grievant knew the other officers were behind him. He knew there were no civilians in the area. He fired down into the tire from a short distance of two feet.

The risk of harm from ricochet, while quite real, is nevertheless relatively remote and fails to rise to the level of being "substantial." While Captain Welsh testified in some detail about the possibility of ricochet, this possibility was nevertheless characterized by the Management advocate as "thin". Welsh's examples were anecdotal; his informational sources were not identified, nor was the date, time or foreseeability of the described incidents of ricochet. A few unsubstantiated episodes within the context of an unknown number of shooting incidents over an unknown number of years plainly fail to establish a "substantial" level of risk.

The fact that something is possible does not make it a "substantial risk" within the meaning of the regulation definition. As in the Smelser decision, the evidence does not show that firing down from close range into an inanimate object creates substantial risk of proximately causing death. It follows that the restrictions in using deadly force do not apply in this case.

C. DID GRIEVANT OTHERWISE FAIL TO COMPLY WITH
OPERATIONS POLICY?

Operations policy provides simply that officers will only use that force necessary to effect an arrest, detention or mission. It further states the amount or type of force needed will be determined as an incident progresses and the officer must react in a manner that will limit injury to all concerned.

Grievant did not violate this policy. The suspect stood an excellent chance of getting away; his vehicle was not disabled, two of the officers' vehicles were pointed in the wrong direction to follow him and several officers had exited their vehicles. Grievant's conclusion that disabling the vehicle was necessary to effect an arrest was reasonable under the circumstances.

In its Level III decision on the grievance, Management remarked "the goal of stopping a fleeing traffic violator did not justify the means employed by the grievant, specifically the discharge of firearms." This statement fails to take into account the fact that the suspect pointedly attempted to run over the Grievant with his truck. The suspect was much more dangerous than a fleeing traffic violator as he had intentionally attempted to inflict serious bodily harm upon an officer of the law.

Grievant reacted in a manner designed to limit injury to all concerned. In shooting down at an inanimate object

from a range of two feet, the only danger created by Grievant was the possibility of a fluke ricochet. By contrast, his actions were specifically devised to arrest a suspect proven to be quite dangerous. Grievant did not violate operations policy by exceeding the force necessary to effect his mission.

From the foregoing it can be seen that the only policy violation by Grievant was his failure to follow the letter of the pursuit policy in that he used his firearm to disable the suspect vehicle when the situation was not one of last resort.

2. Should Grievant's "Reasonable Judgement" at the Time Justify Violation of a Policy?

Management's policies are reasonably related to preserving the safety of officers on duty and the public in general. They are also needed to prevent situations of potential liability. Indeed, the Union does not take issue with the reasonableness of the policies themselves.

Yet the Union would have Management compromise its policies by deferring to the reasonable judgement of an officer at the time. This argument, in effect, would prevent the employer from enforcing its policies, with the practical result that the policies would cease to function as concrete criteria for acceptable performance. It is clear to this Arbitrator that concrete standards are necessary to the safety and effectiveness of the organization.

Troopers are not at liberty to modify, stretch or otherwise rewrite policy based on the exigencies of the particular circumstances they confront. It is indeed familiarity with these circumstances that gives rise to the standards articulated. It follows that failure to follow policy is an error of judgement subject to discipline.

There is, however, a distinction between a conscious and intentional rule violation and a misjudgment made in a stress situation. The distinction goes to the seriousness of the offense and the appropriate penalty.

It would be highly unrealistic to impose disciplinary action for a violation of policy without giving consideration to the reasonableness of the trooper's reaction as a mitigating circumstance. The concept of just cause entails a determination that the level of discipline is related to the seriousness of the offense. The fact of a violation has been established, but if the circumstances are such that the trooper's behavior appears reasonable and in compliance with the spirit of the regulations, his discipline may be mitigated.

Indeed, such are the facts in this case. Grievant had just experienced the suspect's capability to do serious bodily harm to others. The suspect was unexpectedly on the verge of an escape. Grievant's conclusion that it was more dangerous to allow the suspect to flee than to attempt to disable his vehicle from close range was reasonable under the circumstances. It also accorded with the spirit of

regulations and policy, being designed to limit injury to all concerned.

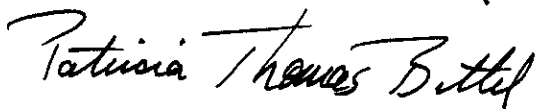
The imposition of a suspension is reserved for violations of a relatively serious nature. Section 19.02 of the Agreement articulates the parties' intent that discipline be progressive, and lists verbal and written reprimands as less serious available penalties.

Management failed to give appropriate consideration to its obligation to administer discipline progressively. It did not give adequate consideration to applicable mitigating circumstances. For this reason its imposition of a disciplinary suspension was without just cause.

AWARD

The one-day suspension given to Grievant was without just cause. He was guilty of only one of the three charges leveled against him. Furthermore, his guilt was mitigated both by the reasonableness of his judgement at the time and his exemplary record. His one-day suspension shall be reduced to a verbal reprimand. He shall receive one day back pay and his record shall be expunged of references to the one-day suspension.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Patricia Thomas Bittel".

Patricia Thomas Bittel

October 26, 1990