

IN THE MATTER OF ARBITRATION
BETWEEN

OHIO STATE TROOPERS ASSOCIATION
Employee Organization

And

STATE OF OHIO, DEPARTMENT OF PUBLIC SAFETY
Employer

Jeremy Bryner, GRIEVANT

Case No. DPS-2016-02064-01

UMPIRE'S DECISION AND AWARD

Appearances:

For the Employee Organization:

Elaine Silveira, Esq.
General Counsel

For the Patrol:

Lt. Marty Fellure
Ohio State Highway Patrol

UMPIRE

Sandra Mendel Furman, J.D.

INTRODUCTION

This matter was heard before the undersigned on July 20, 2017 in Columbus, Ohio at the OSTA offices in Gahanna, Ohio. Grievant appeared as the Union witness. Also present were Larry Phillips and OSTA President Jeremy Mendenhall. General Counsel/Executive Director Elaine Silveira represented Grievant at the hearing.

The State's witnesses were Lt. Terry Bush and Newton Falls Police Officer Novak. Also present were Lt. Darrell Harris from central office of the Patrol and Abigail Ledman from the Office of Collective Bargaining. Lt. Marty Fellure represented the Patrol.

The collective bargaining agreement, grievance trail, and disciplinary notices and pre-disciplinary papers were introduced and accepted as Joint Exhibits 1-3. The Union introduced exhibits. The Patrol introduced exhibits. The parties' exhibits will be discussed below as relevant.

There were no procedural arguments presented.

Each side was given the opportunity to call the allowed number of witnesses and to cross-examine witnesses and present relevant materials in support of their position. All witnesses were sworn. Post hearing arguments were made at the close of the hearing.

ISSUE:

Was the Grievant issued a three-day suspension for just cause? If not, what shall the remedy be?

APPLICABLE CONTRACT SECTIONS:

Article 19.0; 19.05

STATEMENT OF FACTS:

Grievant is employed as a Trooper at the Warren Ohio post. At the time of the discipline he had over fourteen (14) years of service. He also had extensive military service both active and reserve.

Grievant and his wife had an evening out in late January 2016 that involved a comedy show where four beers were consumed by Grievant. This was followed by an ill-fated stop at the AMVETS hall in Newton Falls. There was an

indeterminate number of additional drinks served [likely two more beers] and consumed by Grievant at the hall. The Bryners had friction with the bartender which resulted in unabashed rudeness and name calling on their part. The bartender repeatedly asked them to leave. They did not. She ultimately called 911.

Unpleasantness and profanities next resulted in an altercation between Grievant's wife and other patrons at the hall. At some indeterminate point during the brouhaha Grievant told all then present he was a cop. He stated his motivation for relaying this information was to get things to calm down.

After the bartender called 911, Newton Falls Police Officer Novak showed up. When Novak asked for Grievant to produce his identification Grievant showed his state Trooper ID. This was not shown as an exhibit at hearing. Novak indicated that this was not what he asked to see; he wanted to see Grievant's state issued identification [i.e. his driver's license]. Grievant then produced the driver's license, making Novak reach towards Grievant to retrieve it instead of handing it to him.

Bryner characterized Officer Novak as unprofessional and stated he had cursed at Grievant to "get the f outside" when he came to the hall.

No one was arrested or cited at the hall. Other local law enforcement showed up (Trumbull County Sheriff's department and Braceville Police Department) while Novak was interviewing some of the AMVETS members. The Sheriff's deputies recognized Grievant and vice versa. But the fact of recognition seemed to have no significance in the events.

No citations or charges against anyone later ensued from the incident at the AMVETS hall. This was police discretion according to Novak. He had reviewed the various events occurring at the hall with his chain of command.

Grievant did not let things go from that night. Grievant went to the Newton Falls Police Department and looked through the file/reports of the run made by Officer Novak. He saw that he was labelled a "suspect".¹

¹ In his self-requested statement to the Newton Falls Police Department Grievant stated: "During this encounter I was not polite to Officer Novak. *I felt he was rude and [had] no interest in our side*

Grievant thereafter self-reported the events to his post. He thus initiated the events that culminated in the investigation, charges, discipline and grievance.

After the administrative investigation (AI), Grievant was charged with violation of work rule 4501:2-6-02 (I) (1) conduct unbecoming an officer. Grievant received a three (3) day suspension. The specific allegations were: "...Trooper Bryner was involved in an off-duty altercation at a local establishment which turned physical."

His notice of department was clear except for a verbal reprimand in an unrelated matter.

EMPLOYER POSITION

There is just cause for the discipline. Grievant was involved in a verbal altercation which became physical. He should not have identified himself as a cop when he had no law enforcement role that he was fulfilling. He was uncooperative and defiant when asked to leave. He used abusive language. He was admittedly rude to the attending law enforcement officer on the scene. Such conduct brings discredit upon the Patrol. The discipline is commensurate.

The grievance should be denied.

UNION POSITION

The AI was insufficient. The investigating officer did not testify. Persons who should have been interviewed were not.

Grievant was merely defending his wife. He denied name calling the bartender. He did nothing out of the ordinary. His trooper identification serves as appropriate identification. He was trying to calm the situation and defuse the bar fight. He hoped his self-identification as a "cop" would cause the others to restrain themselves. He was compliant at all times. To the extent he was not polite to Novak, he acknowledged his attitude could have been improved. That is

of what happened. I regret our interaction unfolded as it did." M. Ex. 1, p. 40. [emphasis added] This is not an apology; it is an attempt to justify his behavior as triggered by another. Grievant continues in like vein: "The entire event is unfortunate *but the foul behavior of the bartender and her sister were the catalyst for a verbal altercation turning physical.*" [emphasis added] M. Ex. 1. P. 41. The record is devoid of any evidence that the bartender said or did anything that could be considered foul. Grievant attempted to blame others for the evening's messy end. This is not to his credit.

sufficient given the extant circumstances. The discipline is too harsh and no discipline is warranted.

DECISION AND AWARD

For reasons discussed below the offense is not proportionate to the discipline issued.

The umpire finds that Grievant showed poor judgment in many respects that night. He was drinking beer that was pre-fueled by having had four beers before he even got to the AMVETS hall. Grievant used base profanity which from all evidence was utterly unprovoked towards the female bartender. His denials that he used the foul language were not credited. He announced to all present at the hall that he was a “cop” and flashed his trooper identification repeatedly. Grievant did not have any role as a law enforcement person at that time and venue. He also failed to make it clear in his choice of words that he was not local law enforcement but rather was a “Trooper”. He refused multiple requests to leave the hall.² He was admittedly uncooperative with Newton Falls police officer James Novak.

It is important to analyze whether or not Grievant engaged in conduct that may bring discredit to the division or its employees. He did. He was flashing his trooper identification but in no discernable way was he assisting *as a law enforcement personnel in role* in reducing the melee involving his wife. He was not “on the job”. He was not immediately compliant when asked for his state issued identification from the Newton Falls Police Officer. By all accounts he was repeatedly asked to leave before the police arrived and did not.

The umpire finds that Grievant despite the fact he was off duty engaged in conduct that may bring discredit to the Patrol. What he did was not egregious but nor was it acceptable. The sad twist of circumstances here is that Grievant brought about the Patrol’s knowledge of these events by self-reporting.

² Although the AMVETS is a members-only club, Grievant was not current in his membership status. In no way does this fact add to the determination. He was not being asked to leave due to non-member status; he and his wife were asked to leave due to the name calling and fighting and general bad attitude each displayed. He did affirmatively tell Novak he was a member and did not have to leave. Apparently he was misheard by the bartender when he gave his name and was admitted through a misunderstanding.

What struck the umpire was poor self-reflection by Bryner of his mistakes in judgment that night. He chose to be rude and disrespectful to the bartender; he failed to leave the premises when repeatedly requested; he chose to be non-compliant when asked for identification.

Grievant did not have real insight on what he could have/should have done differently to have avoided the ugliness that night. His sincerity about acknowledging he could have exercised better judgment was diminished in its credibility by his obvious scorn for Novak and a demeanor that indicated he was still believing he was wronged somehow that night. There are also discrepancies between his written statement to the Newton Falls Police Department written on January 26, 2016 and his testimony at arbitration. For example, at the hearing he claimed Novak told him to “get the f out of the bar”-twice. This alleged profanity by Novak is missing in Grievant’s written statement written almost contemporaneously.

It stretches credulity to believe that the request for identification made by a fellow law enforcement officer would not have been understood as a request for a driver’s license. It does not take much imagination to believe that if a motorist pulled out his or her law enforcement badge on a stop or in a scenario where identification was sought, that Grievant would be off put and still be in need of the correct identification. It is a reasonable inference that the Grievant was trying to avoid a citation/charge/arrest by his conduct vis a vis Novak. Some things do not need to be stated.

Despite the lack of full compliance and possible ulterior motives held by Grievant, the umpire ultimately agrees with one of the Union positions: It violates in this case with these facts progressive principles to discipline an individual who has not had at a minimum a warning in his file before receiving a suspension with loss of pay. Progressive discipline is not a maxim that prohibits the Patrol from ever imposing a three-day suspension as a first measure; rather in this case it was an abuse of discretion.

A long-term employee should have known that his off-duty conduct can impact his department record. The OAC is explicit in this regard. Even so

stating, the events of January 24, 2016 do not support a three-day suspension for a first-time violation of the work rule at issue in this case.³

Grievant is on fair notice that he cannot engage in actions akin to those related to the events of January 24, 2016. Had he simply been acting to protect his wife instead of what he did there would be no case at all. Instead the following ensued: not leaving when asked, engaging in verbal profanity of the crudest sort and being defiant and uncooperative with the Newton Falls Police officer. He did not do the Patrol credit in also being recognized by fellow law enforcement personnel from the Sheriff's Department under the circumstances that night.

There is irony in his self-reporting. To the extent that he did self-report that too is somewhat of a mitigating factor in the level of discipline that is appropriate.

He was charged with being engaged in a verbal confrontation which resulted in a physical altercation.⁴ Reading the charges literally, he was not charged with what he said and did with Officer Novak. This is another reason for modifying the discipline.

Due to the lack of prior written discipline there is no just cause for a three-day suspension. As a final comment there was no testimony presented as to why the Patrol felt a three-day suspension was merited for this conduct. It is set forth on the grid as an appropriate discipline, but the rationale for why this level of discipline was selected was not in evidence.

AWARD

The grievance is granted to the extent that no time off is sustained. Grievant shall have a written reprimand as discipline of record for this incident consistent with contractual requirements and shall be otherwise made whole.

s/ Sandra Mendel Furman

Sandra Mendel Furman, Umpire

Issued in Columbus, Ohio on July 26, 2017

³ Grievant's department record shows a verbal reprimand at this same time period for a preventable accident.

⁴ Although the record seems clear that a pregnant woman fell/was forced to the ground in the melee and it seemed clear that Grievant was involved, there is no intent alleged/impugned to him for this. Officer Novak stated at the hearing Grievant was not involved in the fight. His only potential charges related to trespassing and disorderly conduct according to Novak.