

IN THE MATTER OF ARBITRATION BETWEEN

Ohio State Troopers Association (OSTA)

Union

And

Case no. DPS 2021-1727-15

Sgt. David Stuart Grievant

One Day working suspension

State of Ohio, Department of Public Safety (DPS)

Employer

Umpire's Decision and Award

Introduction

This matter was heard in Gahanna, Ohio on 9/13/22 at OSTA headquarters. Larry Phillips represented Grievant and OSTA. Grievant was present and testified. Other Union representatives were present as observers/second chair.

LRO Kaitlin Fuller represented the State Highway Patrol. (OSP) Other Management representatives from the OSP and Office of Collective Bargaining were also present as observers/second chair.

The OSP called as witnesses Lt. Ricardo Alonso who prepared the administrative investigation (AI) and Lt. Hutton as supervisor for Trooper Floyd.

The Union called Grievant as its witness. The Union also called Trooper Lewis, the Trooper directly involved in the stop at issue.

All witnesses were sworn and advised of the strictures of the Motion to Separate.

There were several joint exhibits (Jt. Ex.) presented: Jt. 1- the collective bargaining agreement; Jt. 2- the grievance trail; Jt. 3- the discipline package. The issue was stipulated. Additional exhibits were introduced, and all were admitted during the hearing. These will be discussed below as relevant.

The decision issued within stipulated time limits.

Issue

Was the Grievant issued a one (1) day working suspension for just cause? If not, what shall the remedy be?

Applicable CBA Provisions

Articles 19; 20

Background

Grievant was charged with the following:

Responsibility of Command.

A member who is in command of any post, district, section, unit, detail or assignment, or part thereof, either on a temporary or permanent basis shall be held responsible for the efficiency, discipline, performance and welfare of the persons under his/her command...and the effective discharge of the duties and responsibilities of the division within the scope of the command.

The details are discussed below. The OSP expected Grievant to review the in-car video in Trooper Lewis' cruiser on site prior to release of Floyd who had been detained in a traffic stop. The issue was whether or not a RTR situation existed. The RTR requires investigation and reporting.

The one day working suspension was issued 6/3/21.

It was timely grieved.

Summary of FACTS

Grievant was assigned to the Portsmouth post. At the time of the incident, he had 15 years tenure.

He responded to a radio dispatch on 11/11/20. He was on post at the time the dispatch came in. It was a Signal 5, requiring immediate response. Grievant was advised that the Trooper involved-Lewis-had a person pinned against a car.

Trooper Lewis was then assigned to the Criminal Patrol Section-another work location with a different reporting structure.

Grievant was not Lewis' immediate supervisor-except in the situation extant in this case. On route, the radio traffic Grievant stated he heard was "step it up."

Grievant was first on scene.

When he arrived on scene the interaction between Trooper Lewis and Floyd- the citizen involved- was mostly over. Grievant noticed a TASER on the ground and returned it to Lewis. Floyd was successfully cuffed and was assisted in that process by Grievant. Grievant placed Floyd in the rear of Lewis' cruiser.¹

Grievant spoke to both participants and interviewed each separately. He concluded there was no RTR. He returned to post without reviewing either of the in-car videos.

Grievant did not report the matter to Lewis' supervisors.

The incident came to the attention of reviewing supervisors during a monthly routine review. The interviews, AI and discipline ensued.

OSP Position:

The discipline is within the grid; is commensurate; is progressive; is nondiscriminatory and no abuse of discretion exists such as to mitigate the discipline. The discipline is for just cause and the grievance must be denied.

OSTA Position:

The discipline is without just cause. The grievance should be granted in its entirety.

Opinion

The Employer bears the burden of proof. The burden in a discipline case such as this is preponderance of the evidence.

The parties dispute whether or not Grievant had a duty and responsibility to review the in-car video(s) of Trooper Lewis to ascertain whether or not the

¹ The events reflected in the AI were somewhat different than the testimony at hearing, but nothing that affected the determinations herein.

Floyd situation was an RTR. The reasons for determining/investigating a RTR are clear; and it is an established protocol with the OSP. The issue here is whether or not Grievant failed in his duty to review the in-car video to assist in reporting the facts on the ground the date of the incident. He did not claim to be unfamiliar with the protocol.

The call Trooper Lewis made to dispatch indicated there was a resistance in the moment. A “Signal 5” was received. Although Grievant claimed and Lewis agreed that area radio reception was spotty, it was clear that Grievant was responding to another Trooper’s request for assistance. The radio traffic did not bear on the matter in dispute.² No one testified that there was no resisting situation on the radio announced nor was it announced that the situation had deescalated.

When Grievant arrived, the concern was minimized by Trooper Lewis. Lewis’ testimony at hearing was in contrast to what was apparent on the video. Floyd was not cooperating in being cuffed. Had both cameras been reviewed, a fuller picture might have emerged. The Umpire is not opining whether or not it was a RTR situation. That determination was not part of the issue before her.

Lewis also downplayed the actions of Floyd stating in arbitration that he didn’t consider it resisting. The after the fact description of the past events by Lewis contained none of the “drama” viewed on the video. The Umpire felt his explanation was less than what was plainly visible on the camera.

The in-car video indicated Lewis stated, “You have been fighting me the whole time.” Floyd complains of fear of his arm being broken. Lewis makes the remark “You are a black guy. That’s resisting”. Floyd asked if he was going to jail.

² Grievant stated in the investigation that he did not hear the word “resisting” in the radio traffic. He did hear the dispatch as a Signal 5.

Lewis commented on the number of times he asked Floyd to give him his hands [for the cuffs]. Lewis can be seen trying to gain control and pinning Floyd to the cruiser. His TASER falls during the contact between the two. Floyd repeatedly stated the word “resisting” in the video. Per testimony, an arrest is not required for the situation to be an RTR.

OSP expectations and policy is that the Trooper in supervision should review all available documentation/information to ascertain if a RTR report needs to be generated. The purpose per the OSP in full documentation as a stop where there is physical contact is to protect all involved: the Trooper(s); Supervisor(s) and the citizen(s) affected.

The entire incident involving the motorist was recorded by the in-car cameras. The footage from the rear camera was not reviewed nor was it played at the arbitration. While much could be seen from the front camera there was much that could not be clearly seen. While Floyd was far from compliant as he was being cuffed, neither was it clear that he was being placed under arrest. The evidence of record was that Floyd was not placed under arrest nor charged with any offense. He was allowed to leave after this incident.

No one made it clear why Floyd was not arrested. He was not compliant when being cuffed and Floyd had \$7000 in cash and marihuana odor present in the car. This aspect of the matter was never developed and thus was not part of the determination made by the Umpire. It is Grievant’s conduct under examination in this review proceeding-for failure to review the in-car camera-nothing else.

While the Umpire was able to see and hear enough at the hearing to make a layperson’s assessment, the evidence was sufficiently developed on the record that it was likely a RTR event. A report made would have allowed the appropriate reviewers to make that call. Failure to make the report means no timely review

was made. Although no liability evolved, the breach existed of expectations and procedures.

Grievant interviewed the citizen Floyd and Trooper Lewis separately on scene. This was not disputed. What remained for discussion is whether his failure to review the in-car video in addition to his onsite interviews of Lewis and Floyd indicated an improper response to a possible RTR incident. Under careful consideration of all the facts and circumstances, there were enough factors present before and on scene to require a view of the in-car video. There was a lack of follow up and follow through, as the facts extant when Grievant arrived posed enough evidence that this was not a gentle, sociable, discursive encounter with the motorist. The TASER on the ground was one clue.

The Union argued that Lewis received a written reprimand for the failure to report to his supervisors what occurred on scene. Harsher discipline for Grievant was thus inappropriate. Furthermore, Grievant was not Trooper Lewis' direct report supervisor and had diminished responsibility to him as he was not from the Portsmouth post.

It was not convincing to the Umpire as argued by OSTA that Grievant was not in the direct chain of command and his duties were not as clear to intervene had Trooper Lewis been from his post. This defense is unavailing. Grievant was the supervisor on scene and held superior rank to Lewis regardless of the differing unit assignments. Grievant really did not offer a defense to not reviewing the in-car video-other than he interviewed the two involved in the event: Lewis and Floyd- and received satisfactory answers and saw no reason to watch the videos.

Lt. Hutton made this clear: "trust but verify" is a salient motto. He was convincing in his testimony that the in-car video should have been viewed-by Grievant. Hutton stated this was the only time that he was not notified regarding

a RTR by the Sgt. present on scene. The fact Grievant was not assigned to Criminal Patrol was irrelevant in terms of the expectations for Grievant.

The Union also argued disparate treatment, as Trooper Lewis received a counseling. But Trooper Lewis was not in charge of the scene once Grievant arrived.

Grievant has a disciplinary history consisting of an unrelated written reprimand. (WR) It was active. It was issued on 1/27/21. Management Ex. 7. It alleged he failed to terminate a pursuit when the necessity to apprehend the suspect was outweighed by the risk to the public.

The Union contended that the WR was not reflected in materials received by it; not until the record hearing in arbitration on 9/13/22. Lt. Alonso indicated at the time he prepared the AI, there was no prior discipline attached for inclusion. He had no firsthand notice of a prior discipline.

However, the discipline was of record and inadvertence/mistake caused it to be not reflected on certain materials provided to the Union. No prejudice above and beyond the negligent omission was claimed or demonstrated. The fact of the prior written reprimand was of record at the time of the step three hearing- a full year prior to the current arbitration- as evidenced by Jt. Ex. 2. Grievant's contention that he didn't recall getting a written reprimand only a year earlier is not determinative of its efficacy.

Discipline here was too harsh considering the record as a whole. A one day is progressive but this current discipline is not for the same offense. Grievant received sufficient notice by and through a written reprimand that regardless of interviews, when he approached a scene with the dispatch received, determined a "suspect" was "cuffed" and saw a TASER on the ground, it required more than he did. He needed to review the in-car video-then his determination would have been based upon all the extant facts and circumstances. He chose not to in

violation of established policy and procedure. But his failure was not so egregious as to merit a loss of pay. Notice/warning in the form of a written reprimand is appropriate under the facts. It is overly punitive to cause a loss of pay, therefore the discipline is modified.

AWARD

The grievance is granted in part and denied in part. The appropriate discipline is a written reprimand. Grievant should be made whole consistent with the award.

IT IS SO HEREBY ORDERED.

S/ Sandra Mendel Furman

Sandra Mendel Furman, JD, NAA

Issued September 19, 2022, in Bexley, Oh

Certificate of Service

The Award was issued by electronic email to the parties' representatives on this same date.

s/ Sandra Mendel Furman