

IN THE MATTER OF ARBITRATION BETWEEN

Ohio State Troopers Association (OSTA)

Union

And

Case no. DPS 2022-5539-15

Sgt. David Stuart Grievant

Five day suspension

State of Ohio, Department of Public Safety (DPS)

Employer

Umpire's Decision and Award

Introduction

This matter was heard in Gahanna, Ohio on 2/9/23 at OSTA headquarters. Larry Phillips represented Grievant and OSTA. Grievant was present and testified. Other Union representatives were present as observers.

Michael Wood represented the State Highway Patrol. (OSP) Other Management representatives from the OSP and Office of Collective Bargaining were present as observers.

The OSP called as witnesses Sgt. Stacy Stidham who prepared the administrative investigation (AI) and Lt. Schuldt as supervisor at the Portsmouth Post.

The Union called Grievant as its witness. The Union also called Trooper Dewaine Norman the Trooper assisting Wallace in the 1/9/22 incident.

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 five day 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. In summary the OSP expected Grievant to go to scene on both of two separate calls received at Portsmouth Post regarding stops made by two different Troopers during January and February 2022. He did not report to the stop scene as a response to either of the calls. He did not conclude that his presence was necessary as neither was described as a RTR incident/ fleeing while in pursuit incident by the responding Troopers. Neither Trooper sought his assistance or involvement.

The five day suspension was timely grieved.

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. However, due to mitigation of the prior disciplines, one through settlement and a through arbitration, the OSP maintains that a three day suspension is appropriate.

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 facts are not in dispute. It is whether or not discipline is warranted based on the facts that is the crux of the dispute. Grievant was on post at the time of the two events but engaged in administrative duties of an indeterminate nature.

Trooper Wallace was on patrol in Pike County. He is assigned to the Portsmouth Post. Grievant was his supervisor at the time of the events. On 1/8/22 Wallace was following a vehicle in Pike County on Shyville Road for a short time without his flashers and without his siren on when the vehicle left the road and crashed. Wallace never indicated on the radio that he was in the midst of following a motorist. He indicated that he was trying to catch up/get one stopped. Those are not the words used when in pursuit per Grievant. Wallace never explicitly said: "I am in pursuit."¹ The video indicated Wallace's cruiser's siren and flashers were engaged seconds before the subject vehicle was found by the roadside, having crashed,

Wallace indicated on the radio that the vehicle crashed. Wallace was assisted on scene by Trooper Norman, also from the Portsmouth Post. The underage for drinking purposes driver [18] was arrested without incident on

¹ Grievant introduced Wallace's most recent job evaluation prepared by Schuldts which stated "" needs to continue to work on good decision making while involved in a pursuit or RTR." There was no context supplied for the comment. Union Ex. 1.

scene. It was from Stuart's perspective a minor crash with OVI and gun charges. The location of the incident was approximately 30 minutes from the Post.

Grievant was discussing the situation in real time with Wallace on the radio. He knew that no Taser was used, there was no damage to OSP equipment, there were no reported injuries. Wallace never indicated that he deemed it to be a pursuit. Although a gun was found this is a routine occurrence in the area patrolled by the Post-per Stuart. This was not controverted. Stuart asked Wallace if he needed his assistance on scene and was advised no. As indicated, Trooper Norman was on scene as well.

When asked during the AI if he would do it differently in the future, he said no, if the information were the same in the future. Stuart stated in the AI that these kinds of stops are routine, and that Wallace had back up, that it isn't feasible for him as Sgt. to go out to every stop. He characterized Wallace as an experienced seasoned Trooper.

At no point did Grievant perceive a need to respond on scene. He felt he had accurately assessed the situation over the radio discussions and the fact that the Trooper was experienced and had an assist present on scene; that Wallace declined assistance. He pointed out that he reviewed the in car video with Wallace and that the video did not reveal a pursuit. He felt this was a run of the mill incident in Pike County and was not a pursuit.²

The first time the incident was characterized as a pursuit was back at the Post upon Wallace's return. Wallace did not describe the incident as a pursuit at the time the events were occurring. Once Wallace returned to the Post, Wallace

² A vehicular pursuit is defined in OSP -203.20-002 as "an active attempt by an officer in an authorized emergency vehicle to apprehend a fleeing suspect(s) who is attempting to avoid apprehension."

An incident will be classified, defined and reported as a pursuit if sufficient elements are present to support a charge of fleeing and eluding a law enforcement officer, whether or not an apprehension is made....

characterized it as a pursuit in the report. This caused Grievant some consternation, and there were words exchanged between the two. He discussed with Wallace why it-the interaction- was not a pursuit, but Wallace filed his report as he saw fit. Grievant knew the fact Wallace now was claiming it was a pursuit would flag the matter for further attention. He told Wallace the charge did not fit the facts.³

A second incident occurred on 2/8/22. This involved Trooper Malone from the Ironton Post. That post was and is under a different command but Grievant was the Sgt. on duty that date/shift. Malone also did not state he was in pursuit but was trying to catch up with one on SR93. Grievant stated radio reception is undependable on that area. A similar set of facts to the Shyville Road arrest occurred herein. Grievant and Malone spoke by radio. Malone advised that there was a suspect fleeing into the woods and that the vehicle's owner was remaining in the parked vehicle. The Ironton incident would have been a 50 minute response time for Grievant. Malone was advised by Grievant not to proceed into the woods for pursuit of the driver. When Stuart asked Malone if he needed him on scene, Malone responded in the negative. Grievant was on post at the time of the events but was engaged in administrative duties of an indeterminate nature- as was his status in the Wallace scenario.

He stated the incident did not involve a pursuit nor a RTR. He stated that his email written that evening was in error as there was no RTR and no pursuit. After Malone indicated that he did not need an on-site assist from him, Grievant had no further contact with him. He did not know that Malone was charging the driver with a pursuit. The Lawrence County Sheriff's office was sending in

³ At the arbitration, OSTA pointed out that Wallace did not conform to the provisions in 203.20-002B.1. i.-v.

It was likewise pointed out that the charges of fleeing/eluding were dropped at the criminal hearing. Union Ex. 2. These two points did not affect the responsibilities of Grievant.

backup. He stated that Malone was uninterested in talking to him on scene via the radio.

Grievant emailed his report to Lt. Schuldt on 2/9/22. The words “very short pursuit” were used in the email. He stated he should not have used the words “short pursuit” because in real time Malone had not described the situation as a pursuit. At no point did Grievant agree that the situation was appropriately described as a pursuit. Lt. Lunsford agreed the matter should not be designated as a pursuit in his email dated 2/11/22. Management Ex.1 p16.

For either/both incidents, Grievant did not indicate that he would have changed any of his actions; that the distance to respond to the calls was a nonfactor; that neither Trooper sought his assistance and that pursuits were not involved.

Trooper Norman who was at the scene with Wallace testified at the arbitration. He concurred that nothing indicated there was/had been an active pursuit by Wallace; that Wallace could not see the vehicle until it had crashed.

Lt. Schuldt stated that Grievant asked appropriate questions of Wallace, but the questions should have been more detailed, or he should have appeared on scene. It was his opinion that Trooper Wallace had been afforded too much discretion by Grievant. One action Grievant could have taken had he been on scene was to review the MCT.

Regarding the incident in Lawrence County with Trooper Malone, Schuldt indicated 11-12 minutes had passed before Grievant asked if help was needed. This time gap was never explained. He agreed that Malone is a good Trooper.⁴

⁴ The Umpire felt that Lt. Schuldt was reluctant to characterize Grievant's actions in an unfavorable light. However, his testimony stands that grievant should have responded in person to each of the two crime scenes at issue in this matter. He bore grievant no bad animus; none was alleged.

Although OSTA alleged bad animus from a now non present supervisor Allwine, the record did not support the animus as being relevant. The statement quoted by Grievant was “If you don’t do what I want you to do, I will manage you out.” No date, time or place of the comment was in the record.

Although Captain Allwine had brought the matter to AI and had brought the two other past charges resulting in discipline against Grievant, there was enough other evidence of matters supporting the need for an AI that whatever bias may have existed, the AI itself showed no such bias. Nor was it explained why Wallace was “out to get” Grievant by changing his characterization of the events on scene to a pursuit when writing the events up later in his report.

Supervisor responsibilities are delineated in paragraph 4 of the OSP pursuit policies.

The primary responsibility of the supervisor is to direct and control the pursuit through effective communication until its end. It is not necessary for the supervisor to be physically present on station or directly involved in the pursuit.

...

If feasible, a supervisor shall respond to the scene where the pursuit ends, whether or not there is an apprehension of the suspect(s), if the pursuit ends in a crash, the pursuit ends and the suspect(s) is apprehended or flees on foot,

By a plain reading of the policy, Grievant was expected to be on scene for both events-even despite the fact neither Trooper sought his presence. The rule is clear. It was feasible for him to be there- even taking into account the greater distance involved for the Ironton area run. He was doing unspecified administrative duties. There is no leeway for the experience level of the Troopers below the supervisory level; asking the employee if s/he needs help is not answer to the failure to follow policy. Although the back and forth about whether or not it was a pursuit or not was somewhat confusing, at the end of the day

reports were filed making it clear that in each instance a Trooper went after a suspect flashers and siren on. Absent more, the Umpire finds the pursuit happened. The rule applied and was not followed.

AWARD

The grievance is granted in part and denied in part. The appropriate discipline is a three day suspension. His prior disciplines have been modified and the progression is to a three day for the like offenses. Grievant should be made whole consistent with the award.

IT IS SO HEREBY ORDERED.

S/ Sandra Mendel Furman

Sandra Mendel Furman, Esq., NAA

Issued February 13, 2023, 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