

**IN THE MATTER OF ARBITRATION
BETWEEN**

Ohio State Troopers Association (OSTA)

Union

And

Case no. DPS 2024-00757-01

Trooper Michael K. Ervin

Grievant

One 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 5/28/24 at OSTA headquarters.

Larry Phillips represented Grievant and OSTA. Trooper Ervin was present and testified. Lt. Michael Warner testified for the Grievant. Other OSTA representatives were present but did not testify.

Lt. Aaron Williams represented the State Highway Patrol. (OSP) Other Management representatives from the OSP and the Office of Collective Bargaining were also present as observers/second chair. OSP witness Captain Jeff Davis testified on behalf of the OSP standards of review for use of force and Sgt. Bayless, who conducted the AI. Management Ex.1.

All witnesses were sworn in prior to testifying.

There were several joint exhibits (Jt. Ex.) presented: Jt.1- the statement of issue; Jt. Ex.2-collective bargaining agreement; Jt. 3- the grievance trail; Jt.4- the discipline package.

The issue was stipulated.

The decision issued within stipulated time limits.

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

Applicable CBA Provisions

Article 20; Article 19 Section 19.05

Background

Grievant was charged with violation of the following: 4501:2-6-02 (V)(2) Response to Resistance and Firearms.:

A member shall exercise care in ...using firearms so as to avoid endangering any persons. A member shall only draw and display his/her firearm in time of demonstrated need...

Two OSP policies are applicable to the facts. These were presented as Union Exhibits.

OSP-203.20-002 Motor Vehicle and Foot pursuits is relevant. It provides in relevant part:

Firearms...

- a. Deadly Force-Division officers are not permitted to use firearms against fleeing vehicles in order to terminate a pursuit or otherwise present a fleeing vehicle from evading apprehension. Division officers may not fire upon a vehicle unless officers reasonably believe that they or others are **directly threatened** with serious injury or death, i.e. the officer, other officers...is **immediately threatened** by the actions of the vehicle or occupants and the failure to stop the vehicle or occupants by using firearms would amount to a **substantial and immediate** risk of serious injury or death to the officer, other officers...if the vehicle was allowed to continue on its given path and there is **no other reasonable alternative** to mitigating the threat posed by the vehicle or its occupants.

Emphasis in original.

OSP-203.20 Response to Resistance

...

3. Use of Deadly Force

...officers must have an objectively reasonable belief that deadly force is necessary...(2) to defend another person from imminent serious physical injury or death....

...

v. Deadly Force Restrictions-...

- Firearms will only be used against moving vehicles as stated in policy OSP-203.20-002...

The notice of the one day fine issued 3/12/24 effective for the pay period ending 4/6/24.

It was timely grieved.

Summary of Facts

Grievant is a Trooper at the Chillicothe post. He is a long term employee with no prior discipline.

He and Lt. Morgan and others from other law enforcement agencies at various points were involved in a high speed chase involving pursuit of a Dodge Ram 1500 truck. The Ram fled the scene of a store where it had been observed doing "donuts" in the carryout parking lot.

The incident occurred on 11/16/23.

Grievant's involvement with the high speed chase began as the Ram went off Rt 32 and turned on Smokey Hollow Road in Pike County. Ervin was the first vehicle in pursuit; Lt. Morgan from the Jackson post followed. The highway portion of the chase was very high speed; stop sticks were deployed but failed and the Ram and law enforcement in pursuit drove into oncoming traffic before turning off to Smokey Hollow.

The Ram went off road and onto a utility right of way path that was cleared but hilly even steep at points. Debris from the dried out farmland was flying into the pursuer's windshields. Repeat intentional contacts by Morgan's cruiser executing P.I.T. maneuvers occurred. A portion of the truck's debris was large enough to rest on the cruiser windshield. It appeared to be a black plastic piece of the truck.

The P.I.T. maneuvers did not cause the Ram driver to cease driving. This was perceived by Morgan and Grievant as directly threatening to them individually and together.

The repeated contacts from the Ram caused extensive body damage to Morgan's cruiser.

Grievant's cruiser was rammed by the Ram in the front. He exited his vehicle, stood behind his door and took two shots at the Ram's driver, as Ervin perceived the vehicle moving towards him and revving its engine as it did so.

Per Grievant he did not have time to retreat or seek cover. The shots were intentional. The shots did not hit the Ram's driver and the chase continued.

Grievant remained in pursuit. Further details regarding the post shots fired and eventual arrest of the suspect are in the record but are not pertinent to the discipline.

The incident was captured on the OPS employees' BWCs and dash cams.

The AI followed due to the intentional contacts [repeated] from Lt. Morgan and the discharge of Grievant's service weapon. The referral to an AI came from the Response to Resistance [RTR] committee report dated 3/20/24.

Captain Davis stated that there was no direct threat; that he disagreed that there was no other alternative to use of deadly force. That was his opinion after viewing all the available live footage. Davis was not involved in the AI. Nor was he involved in the decision to discipline Grievant; he was part of the RTR review. Davis indicated that the OSP standard for use of deadly force is higher than that articulated in the cases cited such as Graham v Connor [citation omitted] and its progeny. Davis noted that the immediacy of the threat is from the officer's point of view.

Pike County declined to press charges against Ervin.

The one day fine discipline was imposed in March 2024.

OSP Position:

The discipline is within the grid; is commensurate; is nondiscriminatory and no abuse of discretion exists such as to mitigate the discipline. The Ram driver was retreating/not threatening to Grievant as he was pulling away from both him and Lt. Morgan when the shots were fired.

The OSP has a very high standard when it comes to discharging firearms in the line of duty. It is even higher than is articulated in case law. The circumstances extant at the time of the gunshots were not those that permitted firearms to be discharged. The fact there was no criminal prosecution is irrelevant due to the burden of proof differences between the OSP discipline standards and the criminal standards. The discipline is for just cause and the grievance must be denied.

OSTA Position:

The discipline is without just cause. The discipline is arbitrary and capricious and is unwarranted. Grievant was within policy under the facts and circumstances. Lt. Warner and the Pike County Prosecutor found no basis to proceed against Grievant. Grievant is a long term employee with no prior discipline. The threat perceived by Grievant was real and his actions were justified under extant circumstances.

Opinion

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

The case turns on what happened in the seconds before Grievant took his two shots. The OSP maintains that the video evidence shows that the Ram was turning away from Grievant and Morgan and was about to once more flee pursuit.

There is the factor of 20-20 hindsight. In that vein, Morgan indicated that he in hindsight would not have engaged in the pursuit.

The RTR committee finding was that the need to apprehend the suspect - who was only observed doing donuts in a parking lot before the high speed chase began-was outweighed by the danger of the high speed pursuit. Again, hindsight permits this reasoning after the fact.

Lt. Warner stated that based upon analysis of the trajectory of the bullets, the vehicle was pulling away at the time. He stated that the shots would have exited the back window if the vehicle was coming towards Grievant. Warner's statements were in relationship to whether or not a criminal prosecution of Grievant was merited. He repeated as per Davis that the OSP has a higher standard than extant case law to justify use of deadly force. The umpire weighed Lt. Warner's opinion as part of the evidence on whether the shot was appropriate under all extant circumstances.

The umpire weighed what was evident to Grievant in the moment-in the very fraught context of the high speed vehicle chase and confrontation on the sometimes steep rural hillside that visibly was a rough ride for Morgan and Grievant. The ramming and relative size of the cruisers compared to the Dodge Ram truck likewise contributed to the tension and apprehensions of Morgan and Grievant.

In review of the record, the umpire noted Grievant's repetition of the phrase "I'm going to take him out". That comment-repeated- was never explained at the arbitration hearing. It is certainly subject to multiple interpretations. The umpire weighed this as part of the totality of circumstances.

All the real-time experiences of Grievant included: the high speed chase; the ramming of Lt. Morgan's cruiser; so much ramming that Morgan's vehicle had become disabled; the ramming of his own cruiser and the fact Ervin was challenged by the off the road rough terrain.

The arbitrator finds that upon several reviews of the pivotal moments before/after the shots, the Ram was at the time Grievant exited his vehicle and took aim and fired two shots-moving away from Grievant. That careful after the fact review from four cameras [and audio] allowed the umpire to observe a slowed down perception of threat-not the opportunity had by Grievant.

It is most understandable that in context Grievant indeed felt threatened. Grievant testified that he felt an immediate threat. Everything happened in a fluid moment with no time to analyze the best course, the preferred by the manual course of conduct. But the umpire like the OSP reviewing officials' standard of review is looking backward. The question raised is: was the use of deadly force reasonable at that moment in time? More specifically, "Did Grievant have an objectively reasonable belief that deadly force was necessary to defend himself/Morgan from imminent physical injury or death?" [emphasis added]

That articulated standard when carefully reviewing the several camera angles in evidence [BWC/Dash cam from the two involved officers] was not met. The Ram was angled away from Grievant and Morgan when the shots were fired. The revving Ram

engine was to gain purchase on the dirt surface to escape the scene. Multiple reviews of the film confirmed the fact the Ram driver was fleeing not attacking at that crucial moment.

Grievant's understanding and belief is not the determinate of whether the shots were permissible-but what is "objective." The standard required by the OSP is a very high one. The umpire is under this forum required to weigh the evidence by that high bar. Grievant was out of policy when he fired his weapon on 11/16/23. The discipline issued was not arbitrary, capricious nor unreasonable under the extant circumstances.

AWARD

The grievance is denied.

IT IS SO HEREBY ORDERED.

S/ Sandra Mendel Furman

Sandra Mendel Furman, JD., NAA

Issued June 2, 2024, in Bexley, Oh

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