

In the Matter of Arbitration)	
between)	
)	
The State of Ohio)	Case No. 89-040
)	(Tpr. Del Ray Feagin)
and)	
)	
The Fraternal Order of Police)	
Ohio Labor Council, Inc.)	

November 13, 1989

APPEARANCES:

For the FOP:

Ellen Davies	Attorney
Paul L. Cox	Chief Counsel
Tpr. D. R. Feagin	Grievant
Renee Engelbach	Paralegal
Ed Baker	FOP/OLC
Jack Holycross	FOP/OLC

For the Highway Patrol:

Anne Arena	Advocate
Sgt. Richard G. Corbin	OSHP
Sgt. Barry Elder	OSHP
John J. Tornes	Office of Collective Bargaining
Sharon Fedor	Witness

ARBITRATOR:

Patricia Thomas Bittel

BACKGROUND

This matter was heard on October 25, 1989 at the Office of Collective Bargaining in Columbus, Ohio before Patricia Thomas Bittel, the permanent umpire mutually selected by the parties in accordance with Article VIII of their Collective Bargaining Agreement.

The case involves a two-day disciplinary suspension for conduct unbecoming an officer based on Grievant's his conduct October 24, 1988 while giving a citation to Ms. Sharon Fedor. The grievance states:

"On 3-30-89 Tpr. Feagin was given a two day suspension without just cause for the period of 3-31-89 through 4-1-89. Tpr. Feagin was charged with violation of Section 4501:2-6-02(1) and (2) of the Ohio State Highway Patrol Rules and Regulation, Conduct Unbecoming an Officer. The charges are the result of a citizen complaint from a contact with the complainant on 10-24-88."

The remedy requested is "That Tpr. Feagin be reimbursed for all lost wages and his personnel record be cleared of said suspension and discipline."

The issue was stipulated as follows: "Was the grievant disciplined for just cause in accordance with Article 19, Section 19.01 and Section 19.05 of the collective bargaining agreement between the parties? If not, what shall the remedy be?"

Article 19, Section 19.01 states: "No bargaining unit member shall be reduced in pay or position, suspended, or

removed except for just cause." Article 19, Section 19.05 establishes a system of progressive discipline starting with verbal reprimand, followed by written reprimand, suspension and finally demotion or removal. The section states:

"However, more severe discipline (or a combination of disciplinary actions) may be imposed at any point if the infraction or violation merits the more severe action."

The Ohio State Highway Patrol Code of Ethics states "Members of the Ohio State Highway Patrol shall be courteous at all times" Regarding conduct unbecoming an officer, the regulations state:

- "A member may be charged with conduct unbecoming an officer in the following situations:
- (1) For all disorders and neglects to the prejudice of good order and discipline.
 - (2) For conduct that brings discredit to the Ohio State Highway Patrol and any of its members."

The parties are in agreement as to some of the facts in the case, but disagree as to others. Ms. Fedor was speeding on the night of October 24, 1988 when Grievant stopped her. It was raining. He asked her to come to his vehicle. She verbally protested the inconvenience of doing this but went to the passenger side of his car. He asked her for her drivers' license. At this point the parties' descriptions of what happened begin to differ.

CONTENTIONS OF THE EMPLOYER

Ms. Fedor testified she was upset about going to Grievant's car, and had never been asked to go to an officer's car before. He did not ask her to roll down her window, she said, nor did he give her any explanation why she needed to leave her car in the rain. In her testimony she described herself as inconvenienced but not hostile.

She claimed Grievant asked her for her driver's license and she gave it to him. She said he was writing when she put her license on the arm rest between the seats. He reacted by shoving his fist in her face, she said, adding his fist was clenched and he held no pen. Later in her testimony, she said the back of his knuckles touched her left cheek. She said she felt threatened with physical violence, and he did not explain the fist. Rather he said "How'd you like it if I did that to you?"

Fedor claimed she saw no relationship between his behavior and hers, and was baffled. He did say "I think we got off on the wrong foot" but never apologized, she stated, explaining she felt his conduct was highly inappropriate and reported it to his supervisor.

She described her motion in putting down the driver's license as an arc, and demonstrated it in a motion that looped up in the air before coming down. He was leaning away from her when she put down her license, she said. She stated she did not touch him in any way and claimed she would have

felt the 'pressure' if her license had touched him. As to his assertion that her license brushed him against the face, she stated "It didn't happen that way," and claimed her license was seven to 12 inches from his face. She said he had his hat on in the car, and her license would have touched his hat if it had gotten 'that close.'

In her view, he was negligent in not being prepared to receive the license. She claimed she did not understand why he thought he needed to defend himself. She described Grievant as angry and hostile, and said he escalated the situation.

In her statement given to the Highway Patrol on October 29, 1989, she described giving Grievant her license as a swinging motion.

"Q. How long after you placed the license on the arm rest did he place his fist in front of your face?

A. Almost Immediately.

Q. Did it appear to you that he did it out of anger or out of natural reflex action when you swung your arm?

A. At the time, I thought it was out of anger, but thinking back now, it was both.

Q. While the officer was in the car, did he have his Stetson hat on?

A. I can't remember.

* * *

Q. After the officer put his fist up to you & made the comment, what was his demeanor?

A. Abusive, threatening & angry.

Q. Did his actions change later?

A. He didn't continue like that after I had ask [sic] him for his name & badge number.

Q. When you were first stopped, and still in your car, were you angered or upset where it would be noticeable to the officer?

A. Yes, I wasn't real happy, he continued to shine his flashlight inside my car while I was putting on my shoes. Knowing that I had to go out into

the bad weather and not knowing if that was standard procedure to have to go back to his car. Also just being stopped."

Sgt. Elder, Grievant's supervisor, stated Grievant had received special training in officer-violator contact. At the post level, supervisors have ridden with him and had one-on-one discussions with him about eliminating confrontation. Several troopers have had such assistance, he said.

It is very important to deal with the public courteously, said Elder. The officer's goal is to defuse a situation, he said. This is precisely what Grievant failed to do; he escalated it instead, stated Elder.

Elder testified he believed Grievant saw the license arc through the air and overreacted. He felt she was threatened by a fist in the face, and contended Grievant orally admitted as much when he stated he had put his hand in her face. Elder confirmed it is an accepted practice for troopers to bring civilians to their car when issuing a citation.

The Employer entered Grievant's disciplinary record into evidence. It showed a written reprimand on 9/4/86 for Conduct Unbecoming an Officer; a Verbal Reprimand on 8/11/87 for Reporting to State Fair detail without uniform equipment as required; Verbal Reprimand on 4/7/88 for Tardiness and a Written Reprimand on 9-21-88 for a Patrol car crash.

In the Employer's view, Grievant acted unprofessionally by overreacting and threatening a civilian, and his

resulting suspension was for just cause. Given his past disciplinary record, the Employer maintains his two-day suspension was appropriate to the offense.

CONTENTIONS OF THE UNION

Grievant testified he clocked Fedor going 69 in a 55 mile per hour zone. He said he asked her to sit in his car, which is his usual practice. She had not rolled down the window of her car far enough to communicate, he said, describing her as upset.

Grievant stated he did not have his hat on in the car because he is too tall and routinely takes it off. When he asked her for her license, he said she jerked it up into his face hitting the corner of his eye. He claimed he was startled, jerked back and his hand went up in the air, touching her face. He said her arm was already down when he swung.

He said he was not sure what she slung up at him at first; it could have been something else, she had a big purse, he said. He testified he said "How'd you like it if I did that to you?" when his hand was in her face, and probably made the comment more than once. He said it was probably in response to her reaction "Why did you do that?"

Later in his testimony, he said his intent was to stop whatever was coming his way, not to hit her. He admitted he

touched her chin with the back of his hand, but noted no red mark or bruise afterwards. Nothing else he did could have been threatening, he said. He claimed she made a verbal attack on him and said he did not think she knew she struck him in the eye with her license. He stated for a second he felt threatened by her, and his reaction to protect himself.

In his statement, Grievant said it was normal procedure for him to take a driver back to his car, especially at night. He described the weather as snowing, raining and very cold. After she got in his car and he asked her for her license, "she flung her arm up with the license in it and the license was up in my face & the corner of the license struck my right eye," he said. "I reacted to her," he said in his statement, "I moved back and my arm came up in a defensive position and my hand brushed across her face. She then appeared startled." He also said "She didn't want to admit that she even touched me."

Grievant contended he did not mention the incident to his supervisor because he did not think it important enough. He said he apologized to Fedor because they got off on the wrong foot, after which she became less hostile. He stated he tried to leave her comfortable. He said he had not been previously reprimanded regarding conduct with citizens, but had received three letters of commendation regarding his conduct with citizens. He admitted he was sent to the Academy for special training, but claimed he was not told why he was being sent there.

He admitted maybe he should not have reacted the way he did, and perhaps she had not expected that kind of behavior from a trooper.

DISCUSSION

Ms. Fedor was hostile upon entering Grievant's car. When she took out her driver's license, she arched it through the air in a gesture as demonstrative as it was belligerent. It was her swinging or arching motion that startled Grievant.

Both he and Fedor said he was looking down when it happened. Whatever he saw, he saw through peripheral vision and did not have the visual acuity to know exactly what she was doing until he looked up.

It is more believable that her license touched his face than not, in my view, because he was more likely to feel the touching than she. He has consistently maintained he was touched, and the touching is a plausible cause for his reaction. Fedor testimony that her license would have hit his hat is not credible as she stated in her written statement that she did not remember whether he wore a hat. As Grievant conceded, it must have been a very light touch. Even so, it served to surprise Grievant and bring about his reaction.

While in his statement he described his reaction as defensive, in his testimony he said her arm was already down when he swung. If her arm was down, then her gesture could no longer have been a threat. And if her gesture were no longer a threat, his motion could no longer be defensive. When he felt the license touch ins eye, he whirled around in a swift but uncontrolled movement that was more aggressive than defensive. While I find he had no specific intention to make physical contact with Fedor, his actions were neither sufficiently restrained nor controlled to avoid it.

Grievant overreacted. He did not assess the situation before flinging his arm across the car. Because his reaction occurred after her gesture, it was more in the nature of an angry response than a defensive bar. This lends credibility to Fedor's testimony that he used a fist rather than an open hand. Grievant himself stated Fedor did not expect "that kind of behavior" from a trooper.

Grievant's behavior was conduct unbecoming an officer because it was an unnecessarily threatening gesture. His gesture was not equal in kind to her tantrum-like behavior. Her intent was simply to protest the situation by being demonstrably contentious. By contrast, his gesture of using a fist escalated the interchange by introducing a recognizably threatening signal.

Rather than assessing the situation and assuming control of it, Grievant overreacted and lost control of his relationship with a violator. His comment "How'd you like it

if I did that to you?" was unprofessional in that it focused on his own emotions and called for an inappropriate response.

While it is understandable that the average person might immediately react defensively to a perceived menacing gesture, the Employer quite properly has higher expectations of a trained trooper in dealing with the public. Grievant's reaction was more volatile than its provocation and therefore amounted to a disorder to the prejudice of good order and discipline. Given Grievant's disciplinary record, a two-day suspension for the violation was appropriate.

AWARD

The grievance is denied. The two-day suspension given to the Grievant in this case was for just cause.

Respectfully Submitted,

Patricia Thomas Bittel

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