

In the Matter of Arbitration)	
between)	
)	
The State of Ohio)	Cases No. 89-017 &
)	89-018
and)	
)	
The Fraternal Order of Police)	
Ohio Labor Council, Inc.)	

October 31, 1989

APPEARANCES:

For the Union:

Paul L. Cox	Chief Counsel
Ed Baker	Staff Representative
Ellen Davis	Attorney
Jack Holycross	Staff Representative
-03-890206-0013 Trooper T. E. Stockman	Grievant
5-03-890201-0017 Trooper James W. Smelser	Grievant

For the State:

Lt. Darryl L. Anderson	Labor Relations Unit
John Tornes	Second Chair
Capt. J. M. Demaree	Management
Lt. R. F. Welsh	Bucyrus District

ARBITRATOR:

Patricia Thomas Bittel

BACKGROUND

This matter was heard on October 2, 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 disciplinary suspensions of two troopers. Trooper Timothy Stockman received a five-day suspension for violating rules regarding proper use of force, failure to exercise care in the use of a shotgun and failure to provide adequate guidance to a new trooper in training. Trooper James W. Smelser was given a three-day disciplinary suspension for violation of the rule regarding use of force.

Both troopers allegedly violated the rules while pursuing a fleeing felon. A protracted, high-speed chase ended in a shooting during which Grievants and other law enforcement officers discharged firearms. The felon was apprehended. While a resident of the neighborhood was shot during the incident, neither Grievant has been charged with this injury.

Both suspensions were grieved. Stockman's grievance protested "Suspension without pay for five (5) working days, beginning 2-8-89 and ending 2-12-89, without just cause and discrimination," and requested the "Suspension be reversed and expunged from my record." Smelser's grievance protested

his "Suspension without pay for three (3) days without just cause in violation of Articles 7 and 19.01" and requested the "Suspension be reversed and my record be expunged."

Both grievances were fully processed, culminating in this arbitration case. The stipulated issue is "Were the grievants properly disciplined as the result of actions on October 23, 1988? If not, what shall the remedy be?" There is no contest to the arbitrability of the case.

PROCEEDINGS

The Employer provided three witnesses: Captain C. E. Ireland, who investigated the events in question; Lt. Robert F. Welsh, an expert on proper use of deadly force; and Captain J. M. Demaree, an executive officer in personnel. It also provided a diagram of the residential area where the incident occurred, photographs taken after the incident, statements taken from both Grievants and a map.

The Union stringently objected to the Employer's presentation of its case. It pointed out none of the Employer's witnesses were present at the time the alleged violations occurred, and Captain Ireland's testimony was limited to second-hand information he had gathered in the course of his investigation. It argued the Employer was trying to meet its burden of proof via hearsay and double hearsay, denying the Union its right of cross examination.

It claimed this was a blatant violation of its fundamental right to due process.

The Employer argued it conducted a thorough investigation of the case, and had every right to present the results of this investigation. It asserted the Federal Rules of Evidence are inapplicable in labor arbitration proceedings.

The Umpire permitted Ireland to testify regarding his investigation. It was noted, however, that his testimony frequently strayed from the steps taken in the course of investigating the case to statements of the ultimate facts. Ireland did identify the sources of information in his investigation: witnesses, officers who interviewed witnesses, a chemist, Sgt. Steve Stechel from the Putnam County Sheriff's department, visits to the scene, a taped radio log and statements from the Grievants. None of these sources except the Grievants' statements was provided at the hearing.

While it is frequently said the Federal Rules of Evidence do not apply in a labor arbitration case, this is not entirely true. The Rules are not generally used to exclude evidence; rather they are used to help evaluate the relative importance of the evidence admitted. Evidence will usually be accepted in arbitration unless it is wholly irrelevant, inflammatory or prejudicial.

Where evidence is admitted despite its violation of the Federal Rules, its weight or importance may be reduced or

even totally eliminated. Deciding the relative value of evidence in view of its failure to meet the standards set by the Rules of Evidence, is a critical function of the Arbitrator. For this reason, it is important for parties to object to evidence based on the Federal Rules, but not to expect exclusion as a result.

This Umpire views the written statements of Grievants and their testimony at hearing as the most reliable evidence of what happened during the shooting incident. By contrast, information from Ireland's investigation when his sources are untested or his information second-hand is less reliable.

APPLICABLE PROVISIONS OF AGREEMENT, RULES & REGULATIONS AND POLICIES

Smelser's grievance alleges violation of Articles 7, 19.01 and 19.02. Stockman's grievance asserts violation of Articles 7 and 10.02.

Article 7 of the Agreement prohibits discrimination on the basis of age, sex, marital status, race, color, creed, national origin, religion, handicap, political affiliation, sexual preference or for the purpose of evading the spirit of the Agreement. No evidence was submitted by either party regarding a discrimination claim.

Article 19.01 states: "No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause."

Article 19.02 provides for an administrative leave with pay for the purpose of investigating an event or condition of significant consequence to the Highway Patrol, the employee or the public. Though Smelser's grievance cites a violation of this provision, no evidence was submitted by the parties on the subject of administrative leaves.

The Employer cited the following provisions of the Regulations of the Ohio State Highway Patrol:

"4501:2-6-01 DEFINITIONS

* * *

- (F) The term 'deadly force' means any force which carries a substantial risk that it will proximately result in the death of any person.

* * *

4501:2-6-02 PERFORMANCE OF DUTY AND CONDUCT

* * *

(B) Performance of duty

* * *

- (4) Members who fail to perform assigned duties because of an error in judgement or otherwise fail to perform satisfactorily a duty of which such member is capable, may be charged with inefficiency. * * *

(V) Use of force

- (1) A member shall be justified in using deadly force under the following circumstances:
 - (a) To defend himself/herself from serious injury or death.
 - (b) To defend another person from serious injury or death.
- (2) A member shall only use that force necessary to effect an arrest, detention, or mission.
- (3) A member, while on duty, shall exercise care in handling, carrying, transporting, and using firearms so as to avoid endangering other persons.

* * *

(Y) Compliance to orders

* * *

- (2) A member shall conform with, and abide by, all rules, regulations, orders and directives established by the superintendent for the operation and administration of the State Highway Patrol."

The Employer also cited the Administrative Operations and Policy on the use of force and firearms/qualification:

"A. USE OF FORCE

Officers will use only that force necessary to effect an arrest, detention, or mission. The amount or type of force needed will be determined as an incident progresses. An officer must react to the aggressor in a manner that will limit injury to himself/herself, the suspect, and the public.

An officer shall be justified in using deadly force under the following circumstances:

1. To defend himself/herself from serious injury or death.
2. To defend another person from serious injury or death.

An officer must have reasonable belief that deadly force is necessary to protect life. Reasonable belief is that which is so conclusive and complete that there is no doubt of the suspect's intent to cause serious physical injury to any person; serious physical injury is when the injuries being inflicted or about to be inflicted could cause the death of any person.

Deadly force will not be used against a fleeing felon unless the situation falls within the above guidelines. Under no circumstances will an officer discharge warning shots. * * *

CONTENTIONS OF THE EMPLOYER

Captain C. E. Ireland testified he investigated the case and recommended the discipline of Grievants.

He said he was called to Columbia Grove on October 23. When he arrived, the suspect had been apprehended about .6 miles from the location on High Street where firearms had been discharged. He said he inspected the scene and found disturbed ground in certain places as well as three casings on High Street near a tree where the pursuit vehicle initially spun out, plus a fourth near the corner of High and Pendleton.

Inspection of the pursuit vehicle showed the right front tire had been hit and there was disturbed ground below the estimated location of the radiator, said Ireland; the right rear tire and the panel above its wheel well were also hit.

From Stockman's statement, Ireland determined his first shot hit the right front passenger window. He estimated Stockman's second shot to have impacted the trunk. Ireland first based this conclusion upon the angle and pattern of the shot. He later said he considered the position of the pursuit vehicle and Stockman's statement, then admitted on cross examination that Stockman's statement did not identify the position of the car.

Ireland determined Stockman shot four rounds, though Stockman only described three in his statement. Ireland said

Stockman's third round impacted the left side of the back window of the pursuit vehicle, and his fourth, the right side of the back window as well as a resident in a home on the corner of Pendleton and High.

Ireland took Grievant Stockman's five-page statement describing events occurring on October 23. In his statement, Stockman said he was on routine patrol as a coach with newly graduated Trooper Dennis Voss, and described his background information on the suspect: a discussion with a Bluffton Police Officer who said the suspect shot at him; examination of the damage to the Bluffton Officer's vehicle; reports the suspect had pushed a juvenile passenger out of his car then run over his ankle, that he had stolen a blue Dodge Aires and taken a hostage and that the suspect had aimed his gun at a fellow trooper.

Stockman's statement described a chase during which the suspect was forced off the road, but regained control and continued fleeing. It described a road block in the town of Columbia Grove causing the suspect to go off the street again, this time against a tree and Captain Roney pulled up to block him in. The suspect kept attempting to escape by rocking his car back and forth, according to Stockman's statement.

"I heard two officers yell, 'Put the gun down'. The suspect got away from Ronney and I heard gun shots. As the suspect began to drive away, several officers tried to get away from the car. As the suspect's vehicle's rear was toward me, I shot two rounds from the shot gun in the rear of the car causing the rear

window to shatter. I saw the suspect hunch forward as the glass was breaking. It appeared the window just exploded. I think I fired one more round at the suspect's car. The suspect then drove northbound on the street in front of the school. Voss was standing on the porch on the northeast corner and fired one shot at the car. That's the only round I saw Voss shoot.

* * *

- Q. When you fired the first shot, exactly where were you in relationship with the car?
- A. (Trooper Stockman positioned vehicles on a map to help explain).
I was approximately 30 feet from the suspect vehicle as it was off the side of the road. As the car got away from there, he drove southbound and was approximately 10 feet from me when I shot. The second shot was as quickly as I could chamber another round. He moved approximately 5 more feet.
- Q. Was the car traveling toward the house where the subject was shot inside his home?
- A. Traveling generally toward that house.
- Q. Were all your rounds fired as the car traveled in that general direction?
- A. From what I recall, they were.
- Q. At that time did you see anyone near the vehicle?
- A. Not when I shot.

* * *

- Q. Do you recall what Trooper Voss did when he got out of the patrol car at the scene?
- A. I don't know what position he took but I did see him fire one round while on the porch toward the school.

* * *

- Q. What direction, if any, did you give Trooper Voss?
- A. I told him this guy appeared to be on a suicide mission. He had already shot at a police officer and the way he was driving he was crazy. I told him I felt he was either going to get killed or injured or there would be a gun fight whenever it ended. I told him to just watch himself.
- Q. Why did you shoot?
- A. I felt there were other police officers' lives in danger. I felt the suspect was trying to run them over. The suspect had shot at a Bluffton Police Officer. I observed him run several vehicles off the road head-on.
- Q. When you fired, were there any officers in front of the car?

A. I didn't see any.

Q. When you fired, what was your intention?

A. To shoot the suspect." (Statement of Stockman)

As part of his investigation, Ireland interviewed Voss and determined hr had fired two shots from the middle of High Street, aiming towards the pursuit vehicle and its driver. According to Ireland, Voss said he then fired two more rounds through the back window and struck the center of the car. As the pursuit vehicle turned down Pendleton and took off, Voss said he fired one more shot from a porch on the near side of the intersection, stated Ireland. Voss' stated intent was to shoot the driver, he said.

Ireland also took the statement of Grievant Smelser, who lives in Columbia Grove. His statement also described reports the suspect had shot at a Bluffton Officer and taken a hostage, as well as a later report the suspect had stolen a Dodge and beat a female but not taken a hostage.

Smelser's statement described the suspect's driving during the chase as highly dangerous, noting he swerved to hit a pedestrian who jumped out of the way, and caused another driver to pull over to avoid a collision. It stated the suspect picked up what appeared to be a rifle and pointed it toward Smelser, then lost control of his vehicle and put down the gun. A short time later the suspect spun out, then drove on the left side of the road and swerved sharply to avoid collision with a van, said Smelser in his statement. It described Deputy Roney striking the suspect

vehicle with his car, knocking him off the road, with the suspect regaining control and continuing.

It said the suspect car was against a tree when Smelser got to Columbia Grove. At that time Deputy Roney's car was in front of it, nose-to-nose, according to the statement.

"I walked up to the right front of the suspect car with the intent of disabling the suspect vehicle. I fired one round into the right front tire with my shotgun and as the car started to back up, I could see the driver maneuvering the gear shift selector up and down like he is rocking the car. Then I shot at the left front tire but I don't know if I hit it or not. The car was backing up and at that time I took a shot at the radiator and I don't know if I hit it or not. The car started to go around the tree and at that time, I shot at the right rear tire and the gun was empty and the suspect drove off. People were still shooting and I walked toward the car, reloaded but did not fire again because of the number of people and the car was too far away."

* * *

- A. I walked up and shot the right front tire.
Q. Why?
A. He already shot at the police officer, beat up a person and ran people off the road. I felt he had to be stopped. Nobody took charge so I felt I had to.
Q. How close were you from the car when you fired?
A. Two to three feet.
* * *
Q. While the suspect was in his car against the tree, did you see him with a weapon?
A. No.
Q. Why did you shoot a second round at the left front tire?
A. I could see the driver trying to shift gears, trying to get away.
Q. Why did you shoot at the radiator?
A. Because he was trying to get away.
Q. And the right rear tire?
A. He was getting away. * * *"
(Statement of Smelser)

Ireland determined Smelser first said he fired into the right front, left front tire and radiator of the pursuit vehicle, then changed right front to right rear tire. Ireland said his investigation showed the right front tire had been hit and there was disturbed ground below the estimated location of the radiator, indicating Smelser missed the radiator. The right rear tire and the panel above its wheel well were hit, said Ireland. These shots were fired in a progression as both the pursuit vehicle and Smelser moved down High Street toward the intersection with Pendleton, Ireland concluded.

According to Ireland, Trooper T. B. Brookhart drew his weapon but did not fire and Sergeant J. M. Schleiter was behind the door of his car with his shotgun drawn. Neither trooper fired, said Ireland, stating their weapons were checked.

The Employer provided photographs of both the area and pursuit vehicle. Sometime during the event, a Mr. William Brown residing at 219 High Street was alerted, said Ireland. Brown came to his window to look out and was struck in the chest, he said, explaining the shot pierced his lung and entered his liver where it has remained since hospitalization. Several of the photographs depict the impact of buckshot on the residence of the injured civilian.

From a Sgt. Stechschulte, Ireland learned that #4 buckshot had impacted the residence. The Highway Patrol were the only ones to have shotguns out, said Ireland. Ballistics

tests cannot be run on weapons that shoot buckshot, he stated.

The pattern of buckshot expands over distance, explained Ireland, interpreting the photographs to depict two shots impacting the residence, one high and one low. While at one point he said he could not determine where they were fired from, he later voiced a conclusion Stockman's shots were the ones to impact the resident, and claimed his conclusions about Stockman's location when firing were consistent with the pattern of buckshot on the residence.

Ireland said he learned from talking with other officers that other weapons were discharged: Officer Pingle of the Putnam County Sheriff's office discharged six shots; Hancock County Deputy Dlunk fired two; Sgt. Blumfield of the Bluffton Police Department fired four; Officer Foust of the Bluffton Police Department fired eight and Deputy Zimmerly of the Allen County Sheriff's Department fired once. One of Foust's shots, .38, hit the suspect in the shoulder, said Ireland.

When the suspect drove off down Pendleton, his vehicle had three flat tires, said Ireland. He said the Putnam County Sheriff began chasing the pursuit vehicle and struck it with his car, causing it to spin and come to rest partially off the roadway. At this point, the suspect was apprehended, concluded Ireland. A mussel-loading rifle and a .22 caliber rifle were recovered from his vehicle after it was stopped, he said.

The Columbia Grove Police Department advised the Putnam County Sheriff's Department that none of its officers fired their weapons, said Ireland. He admitted he did not talk to any of these officers at the time and obtained this representation from Putnam. Ireland further admitted he failed to inquire of any officer about the command to "put the gun down". He stated he relied on information from others because he did not want his administrative investigation to disrupt the criminal investigation of the case being conducted by Putnam County. He admitted he did not go along on the interviews conducted in the criminal investigation, but simply reviewed the information after it had been collected. He also admitted he does not know whether every officer who fired a shot was interviewed.

In Ireland's estimation, it was significant that neither Grievant reported seeing a weapon in the suspect's hand while in Columbia Grove. He said Stockman violated the applicable rules by using his weapon when it was not necessary to defend himself or any one else. Stockman fired when the driver was fleeing; the Rules do not allow force against a fleeing felon, he said. Ireland said Stockman also violated the rule on handling firearms by endangering other persons because all four of his shots were fired as the vehicle left the scene. The first shot cross-fired when there were officers on the other side of the street, said Ireland. His fourth shot also violated this rule, said

Welsh described a force continuum, explaining that as a situation escalates, the force warranted to deal with it escalates accordingly. Use of force must always be equal to the situation being addressed, he said. He said as much time is spent on safety and use of force as is spent in actual range time at the Training Academy. Welsh said the rules and standards have remained unchanged in his 23 years with the division.

Troopers are given additional training two times each year, explained Welsh. He said they also do yearly in-service at the Academy on subjects including officer safety. Training videotapes are also put out to reemphasize the points covered, he said.

A shotgun by its nature is a deadly weapon, particularly when used with people in the immediate vicinity, said Welsh. He stated there are only two situations in which a trooper should shoot a gun: in self defense or in defense of another. He added that shooting is permitted during proper firearms practice and in dispatching a wounded animal. During their training at the Academy, all cadets get the rules, he said.

Welsh explained after graduation, new troopers are placed into a coach/pupil training program. New coaches get three days' training; one day if they have coached before, he said. Welsh maintained one of the coach's functions is to reinforce the training given at the Academy.

He said he was familiar with the Grievants' case and had reviewed the investigation. His review included the Grievant's statements, Ireland's synopsis, maps, transcript of the radio log and photographs. He was not sure whether lab reports or the results of the criminal investigation were included in his review. He said he discussed the case with Ireland.

Welsh stated there were no contradictions between the evidence in the file and Ireland's synopsis. Welsh's opinion was that Smelser violated the rules regarding use of force because no life was in danger at the time he fired. The same is true for Stockman, he said. Stockman further violated the rules regarding proper handling of firearms by endangering others when he discharged his firearm in a residential area with pedestrians, said Welsh. Stockman also violated the rules for coaches in that he never gave Voss directions to hold cover, stay with him or stay behind a car, stated Welsh. At the time of the shooting, Voss did not know where Stockman was, and the situation was highly stressful for a trooper only one month out of the Academy, said Welsh.

Welsh explained the test for 'reasonable belief' as threefold: the suspect must have the ability and opportunity to injure another, and there must be actual jeopardy. The existence of each of these factors is determined at the very instant of the use, he said.

Welsh admitted seeing the suspect's weapon, or hearing of it from a prior report would be an important factor in

determining whether Grievants had 'reasonable belief' deadly force was necessary. These factors would affect the trooper's alertness, according to Welsh. He also admitted an automobile could be used as a deadly weapon, and officers have been killed by them. Because the suspect had both weapons and a motor vehicle, the troopers were justified in having their weapons drawn at the scene, said Welsh. But he emphasized no weapon was seen in the suspect's hands, and no one was jeopardized by his driving at the time of the shooting. Rather than shooting, the officers should have exercised other options, such as boxing in the pursuit vehicle with other cars.

Capt. John Demaree, an executive officer in personnel, testified he was responsible for processing the discipline. He said he considered Grievants' past records and the totality of circumstances when he reviewed the case. The review process included Legal Counsel, Operations, the Director of Highway Safety and the Superintendent. This group is responsible for processing all disciplinary action, he explained.

Both Grievants' discipline was tempered because neither had previously been disciplined for a related offense, said Demaree. Smelser's actions were less serious than Stockman's because he shot towards the ground while Stockman used a higher level of deadly force, he said. Stockman's lack of direction to a cadet was also considered, he said. The

serious nature of the offense did not warrant a mere verbal reprimand, in Demaree's assessment.

CONTENTIONS OF THE UNION

The real question in this case involves the reasonableness of Grievants' belief in the need for force stated the Union, arguing the Employer failed to even address this. No one even asked Grievants about their beliefs during the investigation, it claimed. The Employer has failed to meet its burden of proof by leaving out this crucial element, maintained the Union.

Further, the Employer failed to produce witnesses who saw the incident, argues the Union. Ireland did not even interview the witnesses during his investigation, it claimed. Roney at least was present at the time, but was not brought in to testify, it asserted, advocating a negative implication from his absence.

Both Grievants testified at the hearing. The testimony of each Grievant basically tracked the facts described in his statement, but included some detail not previously mentioned.

Stockman testified that during the chase he received a call from Findlay District Headquarters advising not to ram the pursuit vehicle. He said he saw the suspect deliberately

run about six cars off the road head-on into ditches while taking curves at 40 to 90 mph.

As the chase reached the town of Pandora, the suspect drove down the left side of the road and went through a red light at approximately 90 mph, almost hitting a van, said Stockman at hearing. He said he recognized the voice of Sgt. Warren over the radio: "We're going to have to end this pretty soon." No other instructions were given, he said. At about this point, Trooper Reaver asked over the radio if he could shoot out the tires and one of the supervisors told him not to, reported Stockman.

He said he did not box the suspect in with his car because he knew the suspect had a gun and had shot at one person. When the pursuit vehicle broke away from Roney's car and looped out, he saw two deputies jump out of the way to keep from getting hit, stated Stockman.

Stockman said he fired towards the suspect because he was basically concerned about his own safety. Stockman testified he could not see into the suspect's vehicle. He was shooting to hit the suspect, he said, stating he was also concerned for the other officers ahead. He said he did not know what the suspect was going to do and was concerned he would run over other people.

He was not sure how many times he shot, and did not deny it was four times. Stockman said he knew he was in a residential area and it was possible to hit a residential home.

Stockman said his instructions to Voss were simply to be careful. He said he is sure they talked about it during the chase, but does not remember what was said.

After the shooting, he met Voss at the corner of Pendleton where Voss fired. He said he yelled to Voss "Ho!" meaning stop because the pursuit vehicle was almost disabled and other officers were coming up the street. He admitted he gave no verbal commands to Voss from the time they left the car until they met on the porch at the corner of Pendleton and High streets.

Stockman testified he feels what he did was consistent with policy. He states he had discussed use of force with Voss during the coaching period, and that it is not part of coaching to give specific instructions during a shooting -- he did not have time to do so.

The shooting occurred at 8:09 a.m. on a Sunday morning, after a chase lasting about 30 minutes. None of the deputies received discipline for the incident, said Stockman.

Stockman said one or two weeks after the incident, Deputy Zimmerly said he had advised Ireland of having jump or get run over by the suspect's vehicle.

Stockman claimed he had 'reasonable belief' within the meaning of the policy. "The pursuit vehicle looped in our general direction when it took off from the tree," he said. At the time, he felt the suspect's intentions were to resume the chase, he said. The "suspect's intent" are the turning words of the employer's policy, claims the Union.

It was not use of deadly force for Smelser to shoot into the ground, asserted the Union. The disabling of a car simply does not fall within this category, it claimed.

Even if the discharge of his weapon into the suspect's car is found to be the use of deadly force, it was warranted by the situation, argued the Union. Smelser testified he arrived at the scene aware of the suspect's reported violence, and had personally observed his violent and reckless use of his vehicle.

Smelser testified he began walking towards the pursuit vehicle when he heard, "Drop the gun and get out of the car." He said he walked directly towards the pursuit vehicle, stating he was not afraid of being shot because the suspect could not swing a rifle around inside his car. Smelser said his intent was to disable the vehicle. He said he was not being random and was frustrated by the fact that there was no leadership in the situation. At the time he fired his weapon he was aiming down and there was no danger if he missed, he said, adding he knew the residents and figured they were looking out their windows.

Smelser stated when the pursuit vehicle began zigzagging and bouncing forward and backward, he thought the suspect was attacking the officers and not simply trying to escape. Had he wanted to flee, said Smelser, the suspect could have simply driven backwards between the houses to the next street over.

Smelser testified he shot the right front tire from a three foot distance and hit it. He said he then shot the radiator from a six foot distance, and finally shot the right rear tire from a distance of one foot. He stated he was trying to protect everyone and did not hear any radio report advising not to shoot out tires. He fired to keep the suspect from running over any one, he said. He testified one of the training tapes he viewed specifically said the rules permitted disabling shots.

Clearly at the time of the shooting, the suspect was prepared to aggressively operate his vehicle, argued the Union. It maintained there can be no doubt as to the suspect's intent given his conduct and the length of the chase. The radio instructions indicated the situation was dangerous and needed to end, pointed out the Union. There were seven to eight people shooting weapons at the same time and the suspect in the case was a fleeing felon who wound up getting 40 years for his offenses, it said. The Grievants' belief in the need to use firearms was entirely reasonable, claims the FOP, and the rest is superfluous.

There is no evidence on the record as to what Stockman was supposed to do with Voss; no one said he should have handled it differently, argued the Union. There is no evidence of wrongdoing in his service as a coach/officer, it claims.

The Union claims the only reason for the discipline is that a civilian was injured. It asserts but for that fact,

there would have been no discipline. The situation had escalated, states the Union, and the suspect was using his vehicle as a deadly weapon.

A total of 31 to 33 shots were fired at the time of the incident, contends the Union, claiming it is absurd to suggest that everyone who fired a shot was wrong. Each of the shooting officers had the same reasonable belief and each acted properly argues the Union. As a remedy, it seeks restoration of pay and expungement of the discipline.

DISCUSSION

Grievance of Smelser

Smelser fired his shotgun into the right front tire of the pursuit vehicle from a distance of three feet, into the radiator from a distance of six feet and into the right rear tire from a distance of one foot. All shots were fired from very close range with the sole intent to disable the car.

The submitted photographs only give a clear view of the impact of one of Smelser's shots -- the right rear. Photograph 2-K shows a downward impact at close range. The downward direction of the impact is depicted by the peeled metal of the vehicle body metal at the point of impact.

The Employer has argued the discharge of any firearm is use of deadly force. This position, however, is not substantiated by the definition offered in the Regulations.

Rather, a substantial risk of proximately causing death of any person is the applicable criteria.

In my view, Smelser did not use deadly force within the meaning of this definition when he attempted to disable the suspect's vehicle. His shots were fired towards the ground at close range. The possibility of ricochet is speculative at best, particularly given the proximity of Smelser to his target.

While Welsh carved out a few exceptions where discharging firearms need not be in defense of self or another, he did not mention disabling a vehicle as such an exception. His examples were practice shooting and dispatching injured animals. The dispatching of an animal is not substantially different from Smelser's actions; in both instances the discharge is at close range, and no danger is involved when properly done.

It is simply not logical to maintain the same standard of restraint applies whether shots are fired at close range down into an inanimate object, or are fired directly at another human being.

It is significant that Smelser testified he was specifically trained by videotape in the use of firearms to disable a vehicle in appropriate circumstances. This testimony was not rebutted or countered in any way. Because Smelser did not use deadly force within the meaning of the regulations, questions regarding his 'reasonable belief' are irrelevant.

His actions must nevertheless comply with the requirement that any force used must be necessary to effect an arrest, detention or mission. This rule applies to any and all force, whether or not deadly.

In attempting to disable the suspect's vehicle, Smelser used only the force necessary to accomplish that purpose. The suspect was making every attempt to escape and definitive action was desperately needed to stop him. Smelser's actions were safe, reasonable and warranted under the circumstances. I find his suspension for improper use of force to be lacking in just cause.

Grievance of Stockman

There is no question but that Stockman used deadly force. He was not aiming his gun toward the ground; rather he was shooting down a street with the barrel of his gun raised. By his own statement, he was aiming at the suspect and intended to shoot him. He said he was aware he was in a residential neighborhood. Since Stockman was using deadly force within the meaning of the regulations, he must comply with the provisions regarding use of deadly force.

These regulations require deadly force be used only to protect either the trooper himself or another person from serious injury or death. The decision as to whether deadly force is necessary in such circumstances is made on the basis of the officer's "reasonable belief that deadly force is necessary to protect life." The belief must be

"conclusive" and "complete" with "no doubt of the suspect's intent to cause serious physical injury." The determination as to whether the requisite 'belief' exists comes not from the mind of the particular trooper involved, because it is virtually impossible to reconstruct a mental impression after the fact. Rather, the existence of 'reasonable belief' must be determined from the facts and circumstances existing when the deadly force is used.

Welsh testified this determination must be made at the instant the deadly force is used. This testimony is well-taken. While background is relevant to a trooper's anticipation of a suspect's violent attempt, it is not sufficient to meet the 'reasonable belief' standard. The situation at the moment of use must be such that the danger is imminent, and the need for protection immediate, not speculative or expected at some future time.

Stockman should in no way be faulted for relying on the truth of the radio reports he received. Indeed, the dispatching function exists to give officers as much information as possible in helping them deal with difficult situations. The role that information plays, however, is relatively narrow at the moment a firearm is discharged.

Upon hearing the words "Put the gun down," Stockman had every reason to believe the suspect had a gun in his hand and was ready to use it against persons on the scene. It was daylight, though Stockman stated he could not see into the suspect's car. When the suspect's car looped out from the

tree, officers had to jump out of the way to avoid getting run over. Shots were fired and Stockman had no way of knowing whether the suspect fired them. He had every reason to believe the suspect was attacking the officers with his car if not also with his gun. At that point in time, Stockman's belief in the necessity of deadly force was reasonable.

But the situation changed. The suspect's car started down an empty street; Stockman stated he saw no one in its path. The suspect was in a clear line of sight, yet no gun was seen in his possession. The driver was now facing the other direction with his back to Stockman. His behavior evidenced an intent to simply escape, and there was no identifiable danger to any person at that point. Even so, Stockman kept firing.

The heat of the moment is no doubt an important consideration in this case. A number of officers were firing, some several rounds. The heat of the moment made it understandably difficult to hold fire. Yet, a state trooper is a professional specially trained in handling just such a situation.

Whether other officers ceased firing before or after Stockman, and whether or not they were disciplined by their employers is neither well-established on the record nor particularly relevant to the issue here presented. Stockman should have stopped firing once the suspect was clearly in

flight, and his failure to do so constituted a violation of the rules and regulations regarding use of deadly force.

In so doing, he simultaneously violated the rule requiring use of care in handling and using firearms so as to avoid endangering other persons. When Stockman fired his shotgun down the street, he risked injury or death to the residents who lived there. While this risk might have been warranted in a situation of imminent threat to an identifiable person, it was not an appropriate risk to take where no such threat existed.

As to the coaching allegation, the Union quite correctly points out there is little concrete guidance on the subject. Troopers and arbitrators alike are called on to use common sense when considering effectiveness in handling coaching responsibilities.

It seems evident that the trooper who is serving as coach is in a very different situation from the one who is not. His role is expanded. He must not only deal with the situation at hand, but also with how another person is reacting to that situation. There is a fine line between concentrating so much on training that the situation is left unattended, and concentrating so much on the situation that the trainee is abandoned.

The basic concept inherent in coaching is to give a new trooper guidance in a variety of situations. The whole idea is to stay with the trainee so that confusion or problems can be sorted out early on in his or her career. This added

responsibility certainly makes the coach's job harder, for to deal with an urgent situation and to think about someone else at the same time splits attention when it is most needed.

The problem in this case is that Stockman did not really know where Voss was while the shooting was going on. This behavior is incompatible with the basic concept of being a coach. He further complicated the scenario by violating the rules himself. At the very least, the coaching function contemplates staying in contact with the trainee, particularly in difficult circumstances. This could be as small a thing as a sideways glance, a gesture or a step closer.

Stockman stated he did not have time. No doubt this was true after the shooting began. But it is the moment of exiting the patrol vehicle into a dangerous situation that the Employer is concerned about. Given the multiple reports of violence, coupled with the speed and danger of the chase and the fact the suspect was known to be armed, Stockman should not have allowed Voss to exit the vehicle without giving him an idea of how to proceed.

The Employer properly expected Stockman, as a coach, to provide Voss guidance. Stockman's general warning to be careful was inadequate in a volatile and dangerous situation.

AWARD

The grievance of Stockman is denied; the grievance of Smelser is granted. Smelser's records will be expunged of all references to his conduct on October 23, 1988 as a violation of applicable rules and regulations. In addition, he shall be fully compensated for time lost due to his suspension.

Respectfully Submitted,


Patricia Thomas Bittel

Dated: October 31, 1989