

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 695

OCB GRIEVANCE NUMBER: 15-03-910326-0052-04-01

GRIEVANT NAME: MILLS, DAVID

UNION: FOP 1

DEPARTMENT: HIGHWAY PATROL

ARBITRATOR: BITTEL, PATRICIA

MANAGEMENT ADVOCATE: ANDERSON, DARRYL

2ND CHAIR: DUCO, MICHAEL P.

UNION ADVOCATE: BUKOVAN, DEBORAH

ARBITRATION DATE: OCTOBER 28, 1991

DECISION DATE: NOVEMBER 29, 1991

DECISION: DENIED

CONTRACT SECTIONS

AND/OR ISSUES: 25 DAY SUSPENSION FOR CONDUCT UNBECOMING AN OFFICER

HOLDING: GRIEVANT WAS A PASSENGER IN CAR WHICH WAS STOPPED IN INDIANA FOR SPEEDING; DRIVER ULTIMATELY ARRESTED FOR DUI. GRIEVANT ADMITTED SAYING "IN OHIO POLICE OFFICER'S TAKE CARE OF EACH OTHER." MILLS WAS RUDE, BELLIGERENT AND ARGUMENTATIVE TO THE ARRESTING OFFICER AND TO THE CHIEF IN TRYING TO INTERVENE ON HIS FRIEND'S BEHALF. HE ALSO ADMITTED IN TESTIMONY THAT HE WAS INTOXICATED AS WELL. GIVEN THESE FACTS AND THE EXTRAORDINARILY HIGH STANDARD SET BY THE EMPLOYER FOR ITS EMPLOYEES, THE ARBITRATOR DOES NOT FIND THE PENALTY TOO HARSH AS TO BREACH JUST CAUSE.

COST: \$910.88

November 27, 1991

In the Matter of Arbitration
between

Ohio State Highway Patrol

and

The Fraternal Order of Police

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) #695
) 15-03-910326-
) 0052-04-01
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APPEARANCES

For the Employer:

Captain Darryl L. Anderson
Michael P. Duco
Officer Edward L. Barcus
Chief Stephen C. Michael

Advocate
Second Chair
Witness
Witness

For the FOP:

Deborah Bukovan
Dave Mills
Ed Baker

Attorney
Grievant
Staff Representative
FOP/OLC

Arbitrator

Patricia Thomas Bittel

BACKGROUND

This case was heard on October 28, 1991 at the Office of Collective Bargaining in Columbus, Ohio before neutral Arbitrator Patricia Thomas Bittel, mutually selected by the parties in accordance with Article 20 of the collective bargaining Agreement. Many of the facts of this case are not disputed.

On January 3, 1991 Grievant was a passenger in a car which was stopped in Culver, Indiana for speeding. The driver was ultimately arrested for DUI. Grievant identified himself to the arresting officer as an Ohio State Highway Patrol Trooper, and asked questions and made comments during the arrest. The nature and tone of his behavior is contested between the parties. He later came to the jail where the driver was incarcerated. The arresting officer was summoned to the jail and another exchange occurred. Several days later Grievant visited the Culver Police Chief and inquired about the status of the charges against the driver. Again, the nature and tone of his conduct with the Chief is contested.

On March 1, 1991 Grievant was charged with conduct unbecoming an officer. His conduct was described as follows:

"As a passenger in a motor vehicle stopped for a traffic violation, you did identify yourself as an Ohio State Highway Patrol trooper and then attempt to influence another police officer's action

concerning the arrest of the driver of said vehicle. Additionally, your interaction with the arresting officer was described 'rude, belligerent, interruptive, and unrespectful'."

For this offense, Grievant was suspended for 25 working days. His suspension was grieved as lacking just cause and failing to follow the progressive disciplinary procedure required by the Agreement. The grievance was fully processed, culminating in the instant arbitration proceeding. There was no issue concerning the arbitrability of the case or the Arbitrator's jurisdiction over the matter.

The applicable rule defines 'conduct unbecoming an officer' as a charge which may be leveled 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."
(quoted in pertinent part)

EVIDENCE PRESENTED

By the Employer

With the FOP's consent, Grievant was called by the Employer as a witness and related that on the night in question he had been drinking beer with a friend, David Butler. He said he was returning home with Butler driving when he noticed Butler was over the speed limit and advised

him to slow down. As Grievant described it, a Culver police officer stopped them and stormed up to the car, asking in a provoking, arrogant tone of voice "Do you know how fast you were going?"

Grievant said he thought his friend was in good enough condition to drive and became upset when he saw the Culver officer was making him perform coordination tests.

At this point, he said, he identified himself and asked what was going on. The Culver officer, Ed Barcus, responded "That badge doesn't mean anything here," claimed Grievant, stating Butler was asked to do the thirty-second single foot test and did it perfectly. He said the only thing Butler did wrong was two bad misses on the heel-to-toe test. In Grievant's view Butler was close to the limit but he did not feel he was over the limit.

Grievant admitted asking questions about the Culver police radar, its calibrations and whether the officers were certified to operate it. He also admitted saying "In Ohio, police officers take care of one another," and confessed that he talks loudly when he becomes angry. He recalled saying something about his own record of DUI arrests and that Butler was not "that bad".

A second officer, Richard A. Systma, was also present at the scene. Grievant said the two officers asked him several times if he was going to drive, and claimed he felt they were trying to set him up. They asked him three times if he wanted a ride home in their car, but Grievant said he

did not trust them and declined the offers, preferring to walk home.

He explained that after walking two miles home, he received a phone call from Butler regarding bail. Grievant and his wife then went to the jail and were told that Butler could not be released for eight hours. Grievant stated he became upset and his wife began asking questions. He said they were asked if they wanted to talk to the arresting officer and his wife said yes.

When Barcus arrived at the jail, Grievant said he burst in the door, exclaiming, "What's the problem?" Grievant admitted he began getting angry. He said Barcus told him his friend tested .13. Grievant claimed he was surprised, and did not believe Butler was to that level. Grievant stated he asked for a second test but was told that that could not be done in Indiana. He claimed the entire conversation lasted approximately five minutes.

He said he subsequently approached an attorney who suggested he speak with the Culver Police Chief. He said he made an appointment but when he came through the door, Police Chief Stephen Michael was hostile and had Officer Systma with him.

He said when he entered Michael's office, he asked what was going on with the charges. He stated he could have asked "What can we do about them?" He explained the attorney asked him to find out what was going on. According to Grievant, Michael remarked "I guess you've come to try to

get the tickets dropped". Grievant said he concluded there was no sense in trying to talk.

Grievant's disciplinary record shows his only previous discipline in seven years of service was a verbal warning for failure to appear for a court case.

Barcus testified that when he stopped Butler for speeding, he noticed the smell of alcohol on his breath. He said he has a portable breath test which he administered to Butler with a result of .121. He explained the limit in Indiana is 1. He said he then conducted field sobriety tests.

According to Barcus, Grievant came up rapidly during these tests and said "I'm an Ohio State Trooper. What the hell's going on here?" and showed his badge. Barcus described his tone of voice as loud and angry. He stated Grievant continued making comments during all the sobriety testing, such as "He didn't do that bad". He said when Butler agreed to go to the station and take the alcohol test, Grievant walked over to his patrol car. Barcus said Grievant became belligerent, stating "In Ohio we take care of our own". He claimed he specifically told Grievant that Butler would have to stay a minimum of 8 hours at the jail if he flunked the breathalyzer test. He said he offered Grievant a ride home several times because it was bitterly cold outside.

He contended Butler apologized for Grievant's behavior on several occasions during the ride to the jail. He said

the dispatcher later called him and said Grievant and his wife were at the station. According to Butler, she described them as very irate, demanding that Butler be released to them.

He claimed he returned to the jail at which point Grievant began asking questions. He described Grievant as red-faced from anger and gesturing. He said Grievant's questions were about the "antiquated" equipment used by the Culver police and Grievant told him the number of DUI arrests per year he had made. Barcus estimated the conversation at the jail lasted from half an hour to three quarters of an hour long.

In the opinion of Barcus, Grievant was intoxicated both at the scene of the arrest and at the jail. He further noted that if Grievant had been a civilian acting in the same manner, he would have been arrested for public intoxication, interfering with a police officer and disorderly conduct. Ultimately Butler pled guilty to DUI and the speeding ticket was dropped.

Barcus said he typed up a report of the incident the night it occurred. The report contained the following:

"[Butler] . . . stated more than once that I was just doing my job and that I was treating him very nice. [sic] and that he was sorry for the way that his friend had acted. During the whole traffic stop, his passenger, who identified himself as an Ohio State Trooper . . . was very interrupting, belligerent and unrespectful to this officer. The trooper was very angry because of the fact that in Ohio, he said, that police officers take care of

each other. The trooper was very interruptive, and rude during the whole process."

As to the scene in the jail, Barcus wrote:

"Again the trooper was very argumentive [sic] and lacking respect.[sic] Stating that I should have enough respect for the brotherhood to release his friend. This officer had a very lengthy and boisterous talk with the subject that he was not in Ohio, and that his Ohio law did not pertain to an Indiana case. *** The subject then left the lobby of the jail in an uproar."

On January 10, two days after Grievant's visit to Chief Michael, Barcus was asked to make another written statement. This statement described the same events Barcus testified to at the arbitration hearing, though in greater detail than his initial report.

On cross-examination Barcus admitted that he had only one year, eight months' experience as a police officer, eleven months of which was part-time, and that he had not attended the police academy yet.

The Employer also submitted the statement of Officer Systma which read as follows in pertinent part:

"A second male subject got out of the passenger car of the blazer and came to the driver's side window of my commission. I rolled my window down and the subject stated 'I'm a state trooper from Ohio. Will that make any difference?' I stated no. He then stated that he made 160 D.U.I. arrests a year and his friend was not drunk. During this conversation, I detected a strong odor of alcohol on his breath. *** Officer Barcus asked the passenger three to four times if he wanted a ride home with the subject refusing, stating he would walk. This subject was extremely belligerent during this entire process and kept interrupting Officer Barcus."

In his statement, Systma also noted Grievant stated "This wouldn't happen in Ohio because police officers there take care of each other." Systma did not appear to testify at the hearing.

Michael testified he had served as Culver's Police Chief for six years. He stated on January 4, Barcus advised him of the incident involving Grievant. He claimed Systma confirmed Grievant's disrespect and disruption at the scene, and the two jailers confirmed Grievant's belligerence at the jail. Michael said he called Grievant's supervisor, Lieutenant Cline, and complained. He said Cline asked him to put the complaint in writing. Michael said he subsequently submitted a letter to Cline. The letter was dated January 21 and reiterated the complaints of belligerence and disrespect noted by Officer Barcus. It further stated:

"On January 8, 1991 [Grievant] came to my office to try to influence me to drop the charges against Mr. Butler or to reduce them. At this point I informed [Grievant] that the charges will neither be reduced or dropped. I also told him that I had discussed his behavior with you and that I would file a formal letter of complaint. [Grievant] did apologize at this time for his actions the night of the incident."

Michael testified Grievant came to his office on January 8, said he wanted to talk and asked if there was something "we could do about this case". Michael said after he told Grievant he had already contacted his lieutenant, Grievant dropped his head and said "I'll probably be fired

over this." Michael claimed he advised Grievant that if he had been one of his own officers, he would have been arrested. He said the visit only lasted ten to fifteen minutes.

By The FOP

Grievant testified briefly a second time when called by the FOP. He explained that his wife is a biology teacher at the Culver Military Academy, while he works out of the Circleville, Ohio post. He identified his wife's statement which stated in part follows:

"It was obvious Officer Barcus was not pleased to be asked to be returned to the jail by the volatile manner in which he entered the lobby -- pushing the doors open with considerable force -- and by the aggressive manner in which he addressed us. Something to the effect "what's the problem".

He also identified a letter his wife wrote to Lt. Cline, stating in part:

"The statements given by jail personnel and Officer Barcus appear to be biased, inaccurate, one-sided and clearly a collaborated effort."

Butler testified that Barcus' statement was erroneous, and strongly denied any apology to Barcus for Grievant's behavior. He said he calculated his damages at \$3,272 plus vacation time, sick leave time, personal leave time and off-duty details for which he would have qualified.

ARGUMENT OF THE PARTIES

By the Employer

The Employer characterizes Grievant's behavior as disruptive, belligerent and disrespectful. It further asserts he attempted to use his position as a trooper to garner special treatment for his friend. It claims a nexus between Grievant's position as a Highway Patrol Trooper and his off-duty behavior in identifying himself as such. It asserts he used his training and experience as a trooper to criticize and interfere in the arrest of his companion and to approach the Culver Police Chief.

It clarified its position by indicating Grievant's behavior in identifying himself to Barcus was not, standing alone, an offense, nor was his agreeing to ride in a car driven by a intoxicated individual. However, it claimed the discipline given to the Grievant was for rude, belligerent, interruptive, disrespectful behavior, coupled with an attempt to influence prosecution following an arrest.

It asserts the FOP is asking the Arbitrator to substitute her judgment for that of the Employer and claims this is improper. It states that with less seniority Grievant could have been removed for his offense. It further asserts that granting the grievance would amount to clemency if the suspension is reduced.

By The FOP

The FOP points out Grievant had an excellent disciplinary record. It asserts Michael is relying on what other people have told him and does not know the truth. It claims his entire investigation failed to analyze the credibility of his own people and was therefore unreliable. It contends there is no reason to think Barcus was telling the truth. In its view, Michael was simply backing up an inexperienced officer, and the episode has been greatly blown out of proportion.

In the FOP's view, Grievant is being disciplined for the actions of his wife. It asserts the "proof" offered by the Employer is only an assumption that Grievant was trying to influence the outcome, because there were no facts to prove this allegation. It further claims discipline for conduct unbecoming an officer is inappropriate because no discredit was brought to the Ohio State Highway Patrol.

DISCUSSION

Article 19.01 of the collective bargaining Agreement states:

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

19.03 - Length of Suspensions

No suspension without pay of more than ninety (90) calendar days may be given to an employee.

19.05 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

1. Verbal Reprimand (with appropriate notation in employee's file);
2. Written Reprimand;
3. Suspension;
4. Demotion or Removal."

Did Grievant Engage in Conduct Unbecoming An Officer At The Scene of Butler's Arrest?

By Grievant's admission as confirmed by Barcus, Grievant was angry and upset at the scene of the arrest. He was clearly intoxicated at the time, and had admitted being more intoxicated than Butler.

There are some questions about Barcus' credibility. He was quite inexperienced and had little training. There are discrepancies regarding Butler's performance on the coordination tests and there is a conflict in testimony as to whether Butler apologized to Barcus for Grievant's behavior. For these reasons, Barcus' testimony is weakened on points not substantiated by other testimony or evidence.

Grievant's belligerence is consistent with his admitted anger, and it is clear from his own testimony that he was attempting to get Barcus to shirk his responsibility to enforce the law. His admitted statement "In Ohio, police officers take care of one another" supports this conclusion.

If there was provocation in the way Barcus approached the car, it was not sufficient to warrant a response. It

was only after Barcus began the sobriety tests that Grievant reacted. Given these facts, provocation cannot be a defense to Grievant's actions. His conduct was plainly rude and disrespectful, and prejudiced good order and discipline at the scene of the arrest. It therefore falls within the offense referred to as "conduct unbecoming an officer."

Did Grievant Engage In Conduct Unbecoming An Officer At The Jail?

No corroboration of Barcus' testimony was presented from the jailer or other jail personnel who were present at the time. It is clear from the evidence, however, that there was a heated exchange between Grievant, his wife and Barcus at the jail.

Some irritation is understandable as a result of the misunderstanding regarding Butler's remaining in the jail for a full eight hours. Certainly, it is frustrating to drive a distance in order to post bond for someone who is not going to be allowed to leave. On the other hand, it is unusual and irritating to be called off a patrol to resume a discussion with someone who has been argumentative and disrespectful.

Grievant was again rude, belligerent, and argumentative. Coupled with his actions at the scene of the arrest, his behavior was so far out of line that Chief Michael complained to Grievant's lieutenant.

The FOP has argued that Grievant is being penalized for the conduct of his wife at the jail. It should be noted that the statement from Grievant's wife was not admitted for its truth, but only as part of the investigation. The Arbitrator gives the wife's conduct no consideration whatsoever in evaluating the just cause of Grievant's discipline and indeed excluded testimony about her conduct at the hearing as utterly irrelevant.

Given the totality of the evidence, the Arbitrator is persuaded Grievant's behavior at the jail aggravated his prior offense of conduct unbecoming an officer.

Did Grievant Engage In Conduct Unbecoming An Officer When He Approached Chief Michael?

The evidence showed that when Grievant entered Michael's office, he made a statement to the effect of "What are we going to do about these charges?" The plain meaning of such a statement is that something should be done about the charges aside from the natural and normal processing that would otherwise occur.

The clear implication here is intervention. It is highly unusual to personally approach a Police Chief about a charge, and highly improper to approach one with an eye toward intervening in the processing of an alleged breach of the law.

This action brought discredit to the Ohio State Highway Patrol in the eyes of a fellow agency. Discredit had

already been brought to bear through belligerence and rudeness of such a magnitude that a verbal complaint had already been lodged between the two agencies. The further discredit of approaching the Police Chief with an agenda which can only be interpreted as intervention was conduct unbecoming an officer.

Should The Discipline In This Case Be Mitigated?

The Arbitrator should reduce a penalty when it fails to meet the just cause standard of being commensurate with the offense. However, the Arbitrator should only substitute her judgment for that of the Employer where such just cause is lacking; if the penalty selected was reasonable in view of the facts, their context and the parties' relationship, it should be upheld.

A suspension of 25 working days is quite severe and warrants careful review. The Ohio State Highway Patrol was embarrassed to receive a complaint from another law enforcement agency that one of its officers was rude and attempted to manipulate the legal system. This weighs in favor of a heavy penalty. To Grievant's credit, his record, while not perfect, is quite good.

Though the chosen penalty is severe, it does not fall outside the limits of reasonableness. For such an offense -- disrespect of the same type law the Grievant is bound to uphold -- a substantial suspension is not a denial of

progressive discipline, but a strong initial step in a program designed for effective deterrence.

The parties' collective bargaining Agreement is also a strong influence on this result. It sets a limit of 90 calendar days on disciplinary suspensions. With a negotiated maximum of 90 days, the parties clearly understood and agreed that the spectrum of disciplinary suspensions could range quite high. This understanding is most likely attributable to the extraordinarily high expectations of Management in the conduct and behavior of its employees because they are officers of the law.

Grievant's suspension must be viewed in this context. It fell a safe distance from the maximum disciplinary suspension and therefore cannot be seen as unduly harsh. Given this backdrop, the Arbitrator does not find the penalty so harsh as to breach the just cause standard.

AWARD

The grievance is denied. The 25 working day suspension given to Grievant was for just cause.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Patricia Thomas Bittel".

Patricia Thomas Bittel