
IN THE MATTER OF THE ARBITRATION BETWEEN: *

State of Ohio Highway Patrol

-and-

Fraternal Order of Police/Ohio Labor
Council

* Grievance No.:
* 15-03-950805-
* 068-04-01

* Grievant:
* Matthew D. Witmer
*

Arbitrator: Mollie H. Bowers

Appearances:

For the State: Staff Lieutenant Richard D. Corbin

For the FOP: Paul L. Cox, Chief Counsel

This case was brought to arbitration by the Fraternal Order of Police/ Ohio Labor Council (hereinafter, "the FOP") to protest, as without just cause, the two day suspension of Trooper Matthew D. Witmer (hereinafter, "the Grievant") by the State of Ohio Highway Patrol (hereinafter, "the State"). The Hearing was held at 10:00 a.m. on January 17, 1996, in Room 705 Office of Collective Bargaining, 106 North High Street, Columbus, Ohio. Both parties were represented and agreed this case is properly before the Arbitrator. They had a full and fair opportunity to present evidence and testimony in support of their case and to cross-examine that presented by the opposing party. At the conclusion of the Hearing, the parties presented oral closing argument. The record, in its entirety, has been carefully considered by the Arbitrator in determining what the outcome of this case shall be.

ISSUE

Was the Grievant's two day suspension for just cause? If not, what should the remedy be?

APPLICABLE RULE

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

(B) Performance of Duty

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

BACKGROUND

The facts of this case are largely undisputed. The Grievant was first employed as a Trooper in September of 1984, and, by all accounts, is a valued member of the Highway Patrol. His only prior discipline was a verbal reprimand, on March 20, 1995, for a matter unrelated to the factors present here.

Staff Lieutenant Charles Cubbison participated on a committee to clarify and to remove ambiguity from the Employer's policy on Motor Vehicle Pursuits and Roadblocks. (JX-6) He testified the revision was completed in March of 1995, and that Troopers, including the Grievant, were trained on the revisions, in April, at the annual Civil Disturbance Training session. (JX-6) Lt. Cubbison conducted this training himself. He said he reviewed the revised ares of the policy, emphasized the critical importance of safety, gave examples to illustrate application of various parts of the policy, and so forth. According to Lt. Cubbison, he also stressed that flashing lights and a siren do not give a Trooper the right to go through an intersection, but rather are means of asking the motoring public to allow a Trooper to proceed with caution. He advised the Troopers that an investigation would be conducted after all motor vehicle pursuits because they are defined as a use of deadly force which requires such investigation.

The incident which gave rise to the discipline contested in

this proceeding occurred on Monday, May 1, 1995.¹ The Grievant was working as a Traffic Drug Interdiction Trooper out of the Ravenna Post. He had seen a red cadillac parked off the road near exit 14 of the Ohio Turnpike. The occupants, a black male and female, were outside the vehicle either changing drivers or getting something out of the trunk. When the Grievant pulled up to inquire if they needed assistance, the couple indicated they did not. The Grievant then proceeded to a nearby location where Trooper M.A. Gooding had stopped a trailer and was awaiting arrival of a canine unit to search the vehicle. (JX-7)

The Grievant testified that the driver of another truck came running up to his vehicle and said there was a man "beating the hell out of a woman" at the tollgate. The driver described the vehicle as a red cadillac, but did not indicate the extent of injury to the female. The Grievant radioed the Warren Post that he had been informed of a "domestic" and proceeded to the tollgate ramp where he recognized the red cadillac as the one he had seen a few minutes before.² As he approached, the vehicle ran over the cement tollgate divider, failed to stop to pay the toll, and continued down the exit ramp for S.R. 5 westbound. The Grievant followed, activating both his lights and siren. He testified he believed the female was still in the cadillac

¹ It is a fact that K-12 school was in session at this time.

²The video camera in the Grievant's vehicle was on before he responded to the "domestic" at the tollgate and remained on until after the pursuit concluded. A duplicate of the tape appears in the record as State Exhibit 9.

throughout the ensuing pursuit. Sgt. Horsely, the Grievant's Supervisor of record for May 1, was enroute to court when the pursuit commenced and was apprised of the circumstances.

Within 30 seconds after the pursuit began, two things occurred. First, the Grievant was close enough to the fleeing vehicle to radio in not only its description, but also the temporary license plate number. Second, at that juncture, the vehicle made a U-turn though a cross-over between the two sides of S.R. 5 (which is a divided highway), nearly collided with another vehicle, proceeded across the highway, appeared to be stopping on the shoulder facing against traffic, then made another U-turn, narrowly missing another vehicle, and sped off. The Grievant followed all these maneuvers and then followed the fleeing vehicle eastbound on S.R. 5. Sgt. Horsely was being kept apprised of the progress of the pursuit, including the high speeds (65 to 85 m.p.h.) at which the fleeing vehicle was traveling. (See, JX-8-9)

Approximately one minute into the pursuit, the Grievant requested information from Turnpike authorities about whether the female could be in the exit 14 tollgate area. He can be heard on the video tape saying, "I think he [the suspect] pushed her out at the gate". Also, Lt. Cubbison wrote in the Report of Investigation that the Grievant "believed the suspect may have pushed her [the female] out at the gate". The Grievant testified that he did not receive a response from the Turnpike authorities until moments before the crash.

In the early stages of the pursuit eastbound on S.R. 5, the Grievant testified that the suspect "looked back at him a couple of times as if to say 'What do you want me to do?'" The Grievant kept indicating, with hand motions, for the suspect to pull over, but he did not.³ The suspect, proceeded eastbound on S.R. 5, past Center of the World, driving recklessly and several times on the wrong side of the road, nearly colliding with on coming traffic. The Grievant can be heard on the video tape saying, "He's [the suspect] trying to run people head on". The Grievant followed most of the suspect's maneuvers.

Subsequently, the Grievant was advised, by radio, that Sgt. Horsley was going to attempt to deploy stop sticks at a bridge just before an exit into Warren, Ohio. It is a fact this effort was made and that it was unsuccessful. The Grievant can be heard on the video tape saying, as he approached the bridge, "I'll back off". He testified that he did not want to risk puncturing the tires on his police vehicle by running over the sticks. Thereafter, the distance between the Grievant's and the suspect's vehicle increased to about a quarter mile, but the Grievant remained in pursuit and asked that the Warren Police Department be notified that "we missed him [the suspect]" at the bridge.

The suspect exited on West Market Street, heading toward Warren. Shortly thereafter, the suspect ran a red light and nearly struck a van. The Grievant also ran the light, however,

³This information is corroborated by Joint Exhibit 7 and by State Exhibit 9.

he testified that he slowed down and checked both ways to see there were no motorists coming before he proceeded through the intersection. The pursuit continued through a school zone and into an area where road construction was being done. Both the suspect and the Grievant drove, several times, in and out of the cones into the on-coming traffic lane. They also drove on the wrong side of the road and around traffic that had not pulled over thereafter until the suspect collided with another vehicle, severely injuring the female driver. The suspect ran from his vehicle, but was apprehended by the Grievant. The entire pursuit, from its beginning to the crash encompassed just over 5 minutes.

An investigation was conducted by Lt. Cubbison. It is a fact that back-up Trooper Gooding and Sgt. Horsely were both disciplined as a result. The Grievant was questioned during this investigation and given an opportunity to add any other information he wished to provide. (JX-8) These are the essential facts and circumstances that resulted in the Grievant's two day suspension.

POSITIONS OF THE PARTIES

State Position:

The State maintains it had just cause for the Grievant's two-day suspension because of his error in judgment by failing to terminate a high speed pursuit in accordance with the criteria set forth in the Motor Vehicle Pursuits and Roadblocks policy. (JX-6) It believes the abundance of evidence (i.e., the video

tape, the Report of Investigation, and the Grievant's own statement during the investigation), as well as the Grievant's testimony at this Hearing, shows that he either did not understand the policy, did not agree with it, or chose to ignore it in favor of his decision to continue the pursuit regardless of the risks to the traveling public and to himself.

According to the State, management understands that adrenaline and an attitude that "the suspect is not going to get away" can take over under the tense and emotional circumstances of a high speed pursuit. These are critical reasons why, the State contends, a commission was convened to clarify the policy and Troopers were trained on the changes. As supporting evidence, the State points to Lt. Cubbison's un rebutted testimony that the overriding theme of this training was that high speed pursuits should be terminated when the associated danger to the public, to the Trooper, and/or to co-workers outweighs the need to apprehend the fleeing suspect. In the instant case, the State asserts the "suspect was in control of the chase". As proof, the State utilizes the video tape to show that the Grievant did everything the suspect did, instead of recognizing the numerous danger signals and stopping the pursuit at any of the several junctures where such signals were clearly evident.

The seriousness of the Grievant's error in judgment is compounded, the State alleges, for other reasons. Within seconds of the outset of the pursuit, the State emphasizes that the Grievant was able to radio in a description and the license plate

number of the fleeing vehicle. Even though this number and the name the female subsequently gave for her male companion both proved to be false, the State relied upon Lt. Cubbison's un rebutted testimony to assert that Troopers know these are not formidable obstacles to apprehending a fleeing suspect through other accepted and regularly used means.

The State also maintains the FOP's characterization of the obligation of a law enforcement officer to pursue an arrest when an allegation of a "domestic" is made is not only a 'smoke screen', in the instant case, but also fails to overcome the overriding imperatives set forth in the Motor Vehicle Pursuits and Roadblocks policy. According to the State, at best, the Grievant's own contemporaneous remarks, recorded on the video tape, indicate that he had a reasonable doubt about whether the female was still in the fleeing vehicle early on in the pursuit. Even acknowledging the Grievant's commendable concern for her safety, the State contends it had just cause for the Grievant's discipline because he failed to exercise good judgment as prescribed by the aforesaid policy, regardless of his involvement in a "domestic" dispute.

Finally, the State rejects the FOP's claim that the Grievant's discipline emanated from the fact that the pursuit ended in a crash in which a civilian was severely injured. It is the State's position that, if this was the case, then the discipline meted out would have been significantly more severe than that at bar here. Based upon the evidence and the thorough

investigation conducted, the State contends it has provided sufficient evidence to support its claim that the two day suspension was warranted and that the Arbitrator should not substitute her judgement for that of management in deciding what the outcome shall be. This is all the more important in the instant case, the State asserts, because the Grievant reiterated at the Hearing that he still did not think he had done anything wrong. The State therefore maintains the subject discipline is not only reasonable, but also essential for the purpose of correcting the Grievant's behavior. It asks that this position be upheld as the outcome of this proceeding.

FOP Position:

The FOP acknowledges the State's policy on Motor Vehicle Pursuits and Roadblocks, but offers a multi-faceted defense of the Grievant's actions in the instant case. One such defense is that the State has offered an abundance of information gathered entirely by "hindsight" about what the Grievant should have done on May 1, 1995. The FOP maintains that such information is not dispositive because none of the management decision-makers were on the street at the time the pursuit occurred. Second guessing a Trooper is not, the FOP asserts, an appropriate basis for discipline under just cause principles.

It is also the FOP's position that the limits of safety are not objectively ascertainable in every case. While the State has emphasized the Grievant's discretion, the FOP contends there is no guidance afforded Troopers about when a pursuit should be

terminated (e.g., when stop sticks fail, if the fleeing vehicle goes into the left lane, if the pursuit goes through a construction site, etc.). Absent such guidance, the FOP argues the Trooper has discretion to make judgment calls on the scene and the State must be prepared to support those decisions. That is not what happened here, the FOP points out. In its view, management decided its "better your ass than our ass", meaning management sought to deflect its responsibility for the crash by accusing the Grievant of an error in judgment instead of acknowledging the policy could be at fault. According to the FOP, the pursuit was not improper, although the result was unfortunate.

The FOP also stresses that both Sgt. Horsley and Trooper Gooding were both disciplined as a result of the circumstances that gave rise to the instant case. It is the FOP's position that, but for, the failures of both these individuals to exercise authorized judgment regarding the pursuit and to provide appropriate back up, the Grievant would not have been disciplined.

In closing argument, the FOP's attorney made assertions about what was expected of a law enforcement officer when responding to a "domestic" complaint. He contends the public policy in the state of Ohio is that arrest is "preferable" in cases where domestic violence is alleged. This policy, the FOP maintains, provides all the more impetus, when "occupants of a vehicle . . . are willfully attempting to flee or elude a law

enforcement officer by using high speed driving", for a Trooper not only to initiate pursuit, but also to maintain such pursuit until arrest is achieved. That the State has offered a "red herring" by asserting the potential liability of such action is demonstrated, the FOP claims, by the cases of Stone v. Ohio State Highway Patrol, (1993) 63 Ohio Misc. ed 351 and Baum v. Ohio State Highway Patrol, (1995) 72 Ohio St. 3e 469. The FOP argues that both these cases provide legal precedent showing the State is immune from liability for injuries caused by a Trooper operating his vehicle while responding to an emergency call. (See, Baum)

Finally, the FOP contends that the Grievant's discipline was not only inappropriate, but also not progressive and should be stricken. As remedy, the FOP asks that the two-day suspension be rescinded and that the Grievant be made whole in every respect for the lost time.

ANALYSIS

There is no dispute the subject driving the red cadillac engaged in behavior creating conditions for a "pursuit" as defined by the State's policy. (JX-6) The subject was "willfully attempting to fee or elude a law enforcement officer". He used "high speed driving", drove off the highway and into on-coming traffic, made "sudden", unexpected "turning movements", drove at both illegal and legal speeds, and failed to yield to the Grievant's signals to pull over and to stop. However, nothing in the State's policy mandates, when the conditions indicating a

pursuit are present, that a Trooper is obligated either to initiate such pursuit or to maintain same until a suspect is apprehended. This decision is made at the discretion of the "primary pursuing officer" on the scene.

In the instant case, the evidence is clear the State made every effort not only to ensure the Motor Vehicle Pursuits and Roadblocks policy provided appropriate guidance to Troopers, but also to train them on how to make critical judgments on the spot. There is no dispute the Grievant received both the revised policy and such training. Thus, it is reasonable to conclude that he knew or should have known what to do when the "domestic" was reported to him on May 1, 1995.

Based upon the record, there is no indication the Grievant's discipline resulted from his decision to initiate a pursuit after the red cadillac failed to stop at the exit 14 tollgate. The discipline resulted, first, from the Grievant's errors in judgment by continuing the pursuit contrary to the guidance set forth in the policy, B. PRIMARY CONSIDERATIONS. Item 1. addresses the goal of protecting life. The Grievant testified he was concerned about the life of the female throughout the pursuit because he believed she was still in the fleeing vehicle. This testimony is inconsistent with the Grievant's statements recorded contemporaneously during the pursuit and in the investigation. He clearly indicated he thought the male "pushed her out" at the tollgate and asked the Turnpike authorities to verify this suspicion. In his defense, the Grievant testified

that he did not receive an answer from such authorities until moments before the crash. Given his reasonable suspicion about whether the female's life was in danger, this cannot be credited as a sound explanation for continuation of the pursuit.

Item 2. advises that, "Officers of this Division will pursue violators within the limits of safety, while using other methods to identify or arrest the individual". It is evident from the video tape that the "limits of safety" were abridged numerous times during the pursuit, beginning approximately 30 seconds after it commenced with the multiple U-turns and near collisions when the red cadillac went from S.R. 5 westbound to eastbound. It is also apparent from the video tape that the State is correct in asserting that the suspect, rather than the Grievant, was in control of how the pursuit proceeded because the Grievant's driving was a near mirror of the suspects regardless of safety considerations. The Grievant rationalized his behavior by claiming he was protecting the public by following the suspect, with lights and siren activated, to warn motorists about the dangerous driver. This explanation was not persuasive for the following reasons: (1) Lt. Cubbison's testimony was un rebutted that, at high speeds, the siren may not be audible to other drivers until the vehicle is upon them; (2) this testimony was supported by the video tape which showed motorists, on both sides of the road, either did not hear or did not heed such warning; and (3) for a period during the pursuit, the Grievant was, according to his own testimony, approximately one quarter

mile behind the suspect and, thus, it is plausible that motorists did not make the connection between the fleeing vehicle and the Grievant's warning signals.

Also with respect to Item 2., the record shows that other means were used to identify the suspect. Fact are that neither the tag number nor the name the female gave for the suspect were correct, however, the Grievant was not privy to such information during the course of the pursuit. Since he called in the tag number approximately 30 seconds into the pursuit, the Grievant had every reason to believe that other means were being used to "identify . . . the individual". Even if the Grievant had known the information was incorrect, Lt. Cubbison's testimony is again un rebutted that other means are routinely and successfully used to obtain such information without pursuing a suspect directly. Given the Grievant's years of service, it is reasonable to conclude that he knew or should have known this.

Item 3. states that, "A pursuit is only justified when the necessity of the apprehension outweighs the level of danger created by the pursuit". Regardless of how the pursuit ended, it is evident from the video tape that a high level of danger was created for the motoring public throughout most of the pursuit. This conclusions is based not only on the high speeds characterizing much of the pursuit, but also the numerous occasions when the red cadillac drove headlong into on coming traffic followed by the Grievant and through a school zone on a day when classes were in session.

To justify this behavior, the FOP argued the Grievant was impelled by public policy in the state of Ohio which allegedly states that arrest is "preferable" in cases where a suspect is accused of domestic violence. However, Item 4. a. states, among the conditions for "initiating or continuing a pursuit" (emphasis added) the "Seriousness of the offense". Regardless of where the Grievant thought the female was, the fact is the pursuit occurred because of a "domestic", which is a misdemeanor offense. It is nonsensical to accept the FOP's position that the "necessity of apprehension" outweighed the level of danger under such circumstances. This conclusion is buttressed by the facts that the pursuit occurred in business, residential and school zones, and in some areas where there was a high volume of traffic. (See, item 4. c. and d.).

Regardless of these considerations set forth in the policy, the Grievant testified that his experience was that fleeing suspects "keep on running", so he pursued the red cadillac. Since the "necessity of apprehension" did not outweigh the danger, this is clear evidence of an error in the Grievant's judgment. The FOP points to the discipline of both Sgt. Horsley and Trooper Gooding as a result of this pursuit. While it may be true that they did not perform their duties in accordance with the policy on May 1, this does not exonerate the Grievant from accountability for his actions under such policy. In particular, Section M. Pursuit Termination, makes it clear that the "primary pursuing office or a supervisor" (emphasis added) is responsible

for terminating a pursuit. The Grievant was the primary pursuing officer but did not terminate the pursuit even though "unreasonable danger to the officer . . . and . . . the general public [was] created by the pursuit that [outweighed] the necessity for immediate apprehension". Thus, the record again supports the State's position that the Grievant's discipline was warranted for error in judgment.

The FOP attacked the State's claim that, unchecked, the Grievant's behavior could be a potential liability. The Arbitrator carefully read both cases submitted by the FOP and found, in the most part, their content represented a difference with distinction with respect to the instant case. The circumstances here did not involve the negligence of a motorist in driving while intoxicated nor joy riding. Furthermore, it is beyond the scope of this Arbitrator's authority to address negligence questions, properly within the purview of the courts, concerning the "willful or wanton" operation of a State Highway vehicle.

Having concluded the State has presented sufficient evidence to prove just cause for the Grievant's discipline, the remaining question is whether this discipline is appropriate for the offense committed. The Arbitrator agrees that the two-day suspension was both progressive and appropriate given all the facts and circumstances of this case. She further finds this discipline is corrective, rather than punitive, since the Grievant acknowledged at the Hearing that he would have handled

the pursuit in the same way, even knowing what he does now.

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AWARD

The grievance is denied.

Date: February 11, 1995

Mollie H. Bowers
Mollie H. Bowers, Arbitrator