

#1477

IN THE MATTER OF ARBITRATION BETWEEN

OHIO STATE TROOPERS ASSOCIATION Unit 15
Employee Organization

And

STATE OF OHIO, DEPARTMENT OF PUBLIC SAFETY
Employer

GRIEVANT Eleazar Rivera
Case No. 15-00-001115-0154-07-15

ARBITRATOR'S DECISION AND AWARD

Appearances:

For the Employee Organization:
Herschel M. Sigall
Elaine Silveira
Robert Stitt

For the State of Ohio:
Sgt. Charles Linek

Sandra Mendel Furman, Arbitrator
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INTRODUCTION

This matter was heard before the undersigned on February 6, 2001 in Columbus, Ohio at the Office of Collective Bargaining. Grievant Eleazar Rivera, Lt. Colbert and Trooper George Biskup were present as union witnesses. Also present were Staff Representative Bob Cooper, Union President Robert Stitt and Attorney Elaine Silveira. General Counsel Sigall represented Grievant at the hearing. Sigall, Stitt, and Silveira presented closing arguments.

The State's witness was Lt. James Sivak, Ashtabula Post Commander. Also present were Captain Rob Young from central office of the Patrol and Neni Valentine from the Office of Collective Bargaining. Sgt. Linek represented the Patrol, and presented closing argument.

The collective bargaining agreement, the grievance trail, and disciplinary record were introduced and accepted as Joint Exhibits 1-3. Each side provided additional exhibits in support of their respective position; these are referred to in the discussion below.

There were no procedural arguments presented. Each side was given the opportunity to call witnesses, cross-examine witnesses, and present relevant materials in support of their position. All witnesses were sworn. Post hearing arguments were postmarked on February 27, 2001. The hearing was closed upon receipt of the closing arguments.

ISSUE:

Was the Grievant terminated for just cause? If not, what shall the remedy be?

APPLICABLE CONTRACT SECTIONS:

Article 19

STATEMENT OF FACTS:

Grievant was terminated from employment on November 7, 2000. He had been placed on administrative leave on November 1, 2000 due to his arrest on October 29, 2000. At the time of his termination, he was employed as a Sergeant assigned to the

Ashtabula post. He was still in his sergeant probationary period at the time of termination. His tenure at the date of discharge was days short of a decade.

The events preceding his arrest are not in dispute. On October 29, 2000, Grievant attended a Cleveland Browns football game. After the game he spent time in Cleveland flats (an entertainment district) with his brother. Although he promised his wife that he would return by dinnertime, he failed to do so. He and his wife spoke prior to his return to the residence. It was apparent from the tenor of the phone conversation that she was displeased with his later than expected arrival. He had four to five beers during the course of the afternoon.

At the marital residence in Uniontown, some hour and one half drive from Cleveland, Grievant and his wife began to argue about his late arrival home and his whereabouts after the game. From the record, it is clear that his wife struck the first blow: she claimed that she struck Grievant across the face with her hand. Grievant made varying claims -that Mrs. Rivera struck him at least twice with her fist on the side of his head and that she slapped him. Employer Ex. 1. Grievant restrained his wife's wrists, struck her *at least* two times in the face with his closed fist, and broke her glasses. There is some uncertainty in the record as to the number of blows Mrs. Rivera struck, and whether or not she also kicked Rivera. The altercation was witnessed by Grievant's three young children. Mrs. Rivera called 911. The Stark County Sheriff's Department arrived at the home approximately twenty minutes later.¹

Grievant was generally uncooperative with the officers. He initially refused to offer any statement; initially refused a pat down; and initially refused to go outside or enter the cruiser. It is noted that he never became physical in his resistance. Based upon the deputies' assessment of the situation, Grievant was arrested and transported to jail in Canton. The deputies' report noted the appearance of disorientation, stated Grievant was "acting strange" and he was described as visibly intoxicated. The Arbitrator found his demeanor with the deputies at his residence as observed from the videotape to be extremely subdued in voice and tone. When asked by the officers what had happened, he provided none of the details of the argument, and repeated several times

¹ The 911 call refers to six blows received by Mrs. Rivera, and the deputies' reports also refer to six-seven punches.

that he was embarrassed, or that “it was embarrassing”. In the squad car, he admitted to drinking one beer. He was not given a field sobriety test nor was he subjected to a Breathalyzer or urine test after booking.

Mrs. Rivera had sustained visible injuries as a result of the argument with Grievant. Even two days later, Lt. Sivak was able to observe her facial lacerations and facial bruising. There is no record that she received medical treatment. Grievant’s purported injuries at his wife’s hand were neither medically treated nor visible to either the arresting officers or Lt. Sivak.²

Grievant made bail that same night. He did not immediately return home, but spent the night in a North Canton area Comfort Inn. He has been in the marital residence at all dates after his wife asked that the “no contact” order be lifted. The domestic violence charge was eventually plea-bargained; Grievant was convicted of disorderly conduct, a misdemeanor 4 offense. He is not under a firearms disability.

Lt. Sivak was the administrative officer assigned to investigate the situation. Sivak learned of the arrest from a phone call from the Ashtabula post. He spoke to the two arresting officers from the Stark County Sheriff’s department prior to hearing from Grievant. He interviewed Grievant and his wife prior to issuing his report. The administrative investigation packet was admitted as Employer Exhibit 1.

Grievant was removed due to his arrest for domestic violence. He was charged with violation of Rule 4501:2-6-02 (I) (1) Conduct Unbecoming an Officer (conduct that may bring discredit to the Division and/or any of its members or employees.) Lt. Sivak offered his opinion that an arrest for the offense of domestic violence brings discredit and embarrassment to the Patrol. There was newspaper publicity concerning the arrest in the Canton Repository- articles dated November 2, 2000 and November 21, 2000. Employer Ex. 2.

Grievant testified at the hearing that he began counseling as a consequence of the criminal charges. He is enrolled in a court ordered anger management program, and attends weekly sessions at Voyager. Union Ex. 5. He and his wife are participating in

² Grievant also made statements that he did not want to press charges against his wife or receive medical treatment for his injuries in case their children had to go to protective services.

counseling on a biweekly basis sessions. Grievant stated at the hearing that he is a psychological abuser, and had poor communication skills in his marriage.

The abuse incident on October 29, 2000 was not the first physical contact with his wife, but was described by both Grievant and Mrs. Rivera as the most severe.³ Grievant stated that October 29, 2000 was the first time he punched his wife, but admitted to three prior instances of physical contact with her. Grievant testified that he was truly sorry and had embarrassed his wife and friends. He claimed that he would be able to effectively perform his job if restored to duty.

The record defines Grievant as a Trooper with multiple awards reflecting the recognition of his peers and management; superior performance evaluations; a good military service record; commendations from citizens; and a blemish free conduct record from the Patrol.⁴ Union Ex 2. He has received physical fitness awards. The record is likewise replete with the types of training that Grievant has taken. Many of these courses dealt with issues relating to communication; self-defense; use of force; and conflict management. Grievant attempted to distinguish the conflict management and communication courses as pertaining only to work related issues. He has been assigned to a SRT, a position requiring discipline, quick reactions, good judgment, and teamwork.

Lt. Christopher Colbert testified as a union witness. He conducted the administrative investigation on Trooper Bumpus. Bumpus had been arrested for off duty conduct allegedly similar to Grievant's conduct. Bumpus has been on military leave at all dates since July 1999. Although he had a firearms disability for a period of time in 1999 as a result of the criminal charge, that restriction was lifted in December 1999. The record reflects that he received a three- day suspension that has been held in abeyance by agreement of the parties.

Trooper Biskup was similarly charged with domestic violence. He was arrested while on duty for allegations of domestic violence. Unlike Grievant, Biskup never admitted the allegations involved surrounding the events leading up to his arrest. He denied the allegations at the hearing while under oath. In the administrative investigation

³ The record reflects a domestic violence charge from Grievant's first wife, in 1992. He did not seek counseling after that incident, nor did he admit to the conduct alleged in her charge.

⁴ Grievant admitted to a one-day suspension in 1996, which has been expunged. It was not related to the current offense.

packet, he admitted certain physical acts of aggression against his wife that had occurred in the past. Biskup's wife did not make the report to the Lorain Police Department, in contrast to Mrs. Rivera's 911 call. The criminal charges against him were dismissed. Biskup received a ten- day suspension for the events of August 2000. The arrest received publicity in the Lorain Morning Journal. At the time of the discipline, Biskup was an eight-year employee with an active one-day suspension in his file. Union Ex 4.

UNION POSITION

The Union argues the arrest of Grievant has not hurt the reputation of the Patrol. It stresses that Grievant has accepted responsibility for his conduct and is actively working on his marriage. The Union points out that Grievant has an exemplary employment history. The Union also claims disparate treatment citing the Biskup and Bumpus matters. The Union points out that Trooper Biskup was arrested for domestic violence; had a one-day suspension in his file; and his arrest was publicized. It notes in its arguments that Trooper Bumpus was charged with aggravated menacing; had a civil CPO for a period of time; had active reprimands in his file; and received a one-day suspension.⁵ The Union claims that the disparate treatment renders Grievant's removal discriminatory. The Union points out that the discipline is not progressive. For each and all of these reasons, the Union argues that the just cause standard has not been met, and urges that Grievant be reinstated and made whole.

EMPLOYER POSITION

The Employer argues it met the standard of just cause; that Rivera's training should have been a buffer against his use of force on October 29, 2000; and that Rivera's actions brought discredit to the Patrol at the Stark County Sheriff's department through the arresting officers' contact and those unknown and unnamed others involved in the incarceration and through the newspaper publicity. The Employer also distinguishes the two other instances of disparate treatment cited by the Union, and provided a citation to OCSEA v. ODMH, Case No. 23-06-89113-0121-01-03 (Rivera, 1989).

DECISION AND AWARD

⁵ Bumpus' conduct record provided by the Patrol at the Arbitrator's request at the hearing shows a three day suspension not served/abeyance agreement.

Grievant is a highly trained Trooper. Most of his training was with the Patrol. He also had a military career. Even a cursory review of his training illustrates that Grievant knew or should have known that he had a wide number of options available to him the evening of October 29, 2000, once it became apparent that his wife was upset. The option he chose- to strike his wife repeatedly - carried serious consequences.⁶ There was no moment in the evening that Rivera needed to “take the upper hand” or “needed to stop the aggression.” He had superior training, technique, and size as clear advantages over his wife.

At the hearing Rivera claimed for the first time that his conduct was without justification or excuse. He characterized himself as a psychological abuser, but did not admit at the hearing that he has used physical abuse as well on any date other than October 29, 2000. Absent from any of Rivera’s statements either at the hearing or in the record was an acknowledgment that drinking was a trigger to physical abuse against his wife. He did not admit to driving in an impaired state from Cleveland to Uniontown, but both deputies described him as being intoxicated. The abuse incident occurred within minutes of his arrival home, and there was no evidence that he drank anything upon his arrival to the marital residence. The Arbitrator noted a quiescent, docile appearing Grievant as recorded on videotape in the back of the cruiser; he did not make the same appearance at the hearing.

The parties agree that certain off duty conduct- here, the arrest of a law enforcement officer- can become a matter of discipline. It is clearly a challenge to the effectiveness of a law enforcement officer to become personally involved in the criminal process, regardless of outcome. The Union’s closing statement diminishes the publicity attendant to the arrest. However, the Arbitrator cannot ignore that there is obviously an adverse effect on the Patrol’s image when one of its Troopers makes the newspaper in this fashion. Grievant himself acknowledged at the hearing that the newspaper article brought discredit to the Division. Grievant’s status as a Sergeant cannot be ignored, as he was in a leadership capacity to other troopers when this incident occurred. What is debatable is whether discharge is required as a result of the arrest and attendant publicity.

⁶ Rivera had recognition even the night of the incident of the seriousness of his deed. He stated to the arresting officers several times “I am gone “, and initially orally resigned his position.

The Arbitrator finds that the Union has presented sufficient evidence to support mitigation of the discipline. It would be arbitrary to sustain Grievant's discharge when it is clear that an arrest standing alone (or even if it is publicized) is not treated by the Employer as a "capital offense." He is actively engaged in efforts to get his personal life on an even keel. The Grievant has long tenure and an exceptional service record. He received accolades and recognition from his peers, management, and the citizenry. His discipline was not progressive. Finally, Grievant has admitted the wrongness of his actions. For each and all of the above, the discharge was not for just cause.

Although the Union argued that these cited examples support Grievant's reinstatement *and* back pay, the Arbitrator does not find the Bumpus/Biskup cases sufficiently compelling to support a make whole remedy. This Arbitrator did not have the benefit of hearing all the facts and circumstances surrounding Bumpus and Biskup, and Bumpus' discipline was resolved through settlement. But it is clear that the Patrol does reinstate troopers who have been arrested, received adverse publicity, and/or have been convicted, under the same section of its rules: conduct unbecoming an officer.

The Arbitrator is fully cognizant of the potential for damage to the Patrol's reputation occasioned by a Trooper's arrest. However, there was no evidence of a continuing notoriety related to this particular matter. The contrast between the exemplary on the job conduct and the personal behaviors exhibited by Grievant on October 29, 2000 will not result in his forfeiture of employment at this date. The Arbitrator in no form or fashion intends or implies by the order below a condonation of domestic violence. The Grievant is on notice that a future similar violation will likely result in termination.

AWARD

The Grievant is reinstated to his position without back pay, but with uninterrupted seniority.

Sandra Mendel Furman, Arbitrator

Issued in Columbus, Ohio on March 16, 2001