

IN THE MATTER OF ARBITRATION
BETWEEN

OHIO STATE TROOPERS ASSOCIATION Unit 1 and 15
Employee Organization

And

STATE OF OHIO, DEPARTMENT OF PUBLIC SAFETY
Employer

GRIEVANT Trooper Kyle Pohlabel

Case No. 15-03-20100311-021-04-01

UMPIRE'S DECISION AND AWARD

Appearances:

For the Employee Organization:

Elaine Silveira, Esq.

For the Patrol:

Lt. Kevin Miller

UMPIRE

Sandra Mendel Furman, J.D.
1119 South Cassingham Road
Columbus, Oh 43209

INTRODUCTION

This matter was heard before the undersigned on April 7, 2011 in Columbus, Ohio at the OSTA headquarters. Grievant was the union witness. Also present were OSTA President Larry Phillips, Unit 15 Release person Jeremy Mendenhall and Staff Representative Dave Riley. Elaine Silveira represented Grievant at the hearing.

The State's witness was Captain Gaskill the individual who conducted the administrative investigation. (AI). Also present were Sgt. Anne Ralston from central office of the Patrol and Marissa Harley from the Office of Collective Bargaining. Lt. Kevin Miller represented the Patrol.

The contract, grievance trail, and disciplinary notices and pre disciplinary papers were introduced and accepted as Joint Exhibits 1-3. The Union introduced exhibits. The Patrol introduced exhibits. The parties' exhibits will be discussed below as relevant.

There were no procedural arguments presented.

A request for separation of witnesses was granted. Each side was given the opportunity to call witnesses and cross-examine witnesses, and present relevant materials in support of their position. All witnesses were sworn. Post hearing arguments were made at the close of the hearing. The decision is submitted within the time period agreed to by the parties.

ISSUE:

Was the Grievant suspended one day for just cause? If not, what shall the remedy be?

APPLICABLE CONTRACT SECTION:

Article 19.01

STATEMENT OF FACTS:

Grievant is employed as a Trooper at the District 5 Dayton post 57. He has been employed there for seven years. At the time of the incident he had nearly five years tenure.

During the course of a traffic stop Grievant had verbal and physical resistance from the driver Brandi Lyle. The driver was unwilling to provide

Grievant with her driver's license and registration. Her resistance was extreme. She was using her cell phone during the interaction with Grievant. She had called her sister to the scene.

Following protocol Grievant took her cell phone. The citizen resisted. In the struggle to gain control over the cell phone. It left the possession of Lyle and Grievant and landed in front of the car. The battery purportedly fell behind the Trooper. The phone was never recovered.

An investigation ensued. Following normal Patrol procedures there was a response to resistance (RTR) investigation held.¹ Grievant was cleared of any charges as a result of the RTR investigation.²

As a part of that investigation the RTR committee determined that it should be looked into as to whether or not Grievant violated Patrol Rule: 4501:2-6-02 (W). Gaskill indicated that as a result of an RTR there may be an AI ordered if there are any unanswered questions relating to the incident. She indicated that generally the RTR ends the matter if there is no finding.

Gaskill indicated that the matter of the alleged failure to protect the phone could have been handled as a training matter or by a review of the particular policy.

The Patrol contended that the videotape of the arrest supports the conclusion that Grievant deliberately threw the cellphone to the front of the car. In this deliberate action Grievant violated his responsibility to ensure the security of property.

The phone was never recovered. Lyle's written statement to the Patrol is at p 18-19 of Management Ex. 1, the AI. She states: "he snatched the phone then threw it." She repeated her assertion that "he threw it...on the street." Gaskill conducted no interview with Lyle as she was represented by counsel by the time the AI started.

¹ The case went to RTR two times.

² There was a spin out from the arrest. On the day of the incident the suspect's sister called her sister Shawanda Johnson to the scene. Her brother came also to the scene. A complaint was filed with the Southern Christian Leadership Conference two days later. The suspect and her sister retained counsel. Lyle was involved in an unrelated criminal matter set for trial in December 2009.

Grievant specifically denied throwing the cell phone claiming that it inadvertently left his hands during the struggle for control. He denied any intent to throw the telephone. He denied any intention of violating the cited rule. He stated that the battery came apart from the phone in his struggle with Lyle.

Gaskill stated Grievant had other choices that date. Grievant could have placed her phone on the hood or roof of the car; placed it in his pocket, or put the phone in the back seat of her car.

Both counsel "acted out" the phone's trajectory.

After the investigation, Grievant was charged with violation of work rule 4501:2-6-02 (W) Evidence and Recovered Property.

The rule states:

A member shall carefully protect and preserve for proper disposition any article of property ...seized from a prisoner....

A member shall exercise diligence in safeguarding ...or other incident, in order that such property shall be returned to its rightful owner without damage, loss or unnecessary delay. A member taking control of any shall secure that property and report its recovery according to directives established by the Superintendent.

Grievant received a one (1) day suspension on March 7, 2010. The specific allegations were: "On May 20, 2009 you failed to properly preserve and protect the property of an arrestee during a traffic stop when you threw the arrestee's cell phone."

EMPLOYER POSITION

Grievant violated a work rule. He failed to preserve and protect property. Whether or not the phone is produced or whether or not the phone was damaged is irrelevant. Grievant "chucked" the phone. It did not slip from his hands and land in front of the car. It is highly unlikely that the phone would land in front of the car if it was taken from Lyle in the manner viewed on the videotape. Grievant did not have the phone slip from his hands; he threw it.

The grievance should be denied.

UNION POSITION

The Union states that Grievant inadvertently lost control of the phone in the struggle to get it from Lyle. The Patrol's reenactment of the "chucking" is dead wrong. There was no intentional throwing of the phone. Grievant was neither negligent nor intentional in his actions. Grievant was the only eye witness to the incident. He must be credited. The Patrol was searching for blame in the incident as the matter went to the TR committee twice-an unusual occurrence.

The grievance should be granted in its entirety.

DECISION AND AWARD

The Patrol was concerned about an informal complaint received from Shawanda Johnson, the sister of the traffic stop driver Lyle³. The participants in the arrest retained counsel, would not cooperate in the investigation and enlisted the support of a national civil rights organization. Lyle never made any complaint. Johnson –the complainant-never said there was any damage to the phone. She was not present when the phone was taken from Lyle.

All but one of the questions asked by Gaskill of Grievant in the AI relates to his conduct during the stop and after Lyle went to the hospital. The umpire finds that indicative of the Patrol's greater concern-did he conduct himself appropriately during the stop and its aftermath? But the instant discipline is about the phone.

Gaskill indicated that the course of action selected by the Patrol could also have been training or review of policies instead of discipline. The hearing officer also noted that the discipline is not progressive.

The videotape was less than definitive as to what in fact happened. The umpire reviewed it at hearing and twice after the hearing on a large TV screen prior to writing the decision.

It is not a clear picture as to the method by which the telephone left the struggling parties' hands. The aural evidence is likewise unavailing on the matter of the phone. Although the AI makes the statement that the phone was thrown it is not a binding fact but rather is a conclusion made by the writer. There is no

³ The record contains no details at all about the nature of Johnson's complaint despite Gaskill's interview of multiple witnesses. Documents in the AAAI state merely "alleged force."

admission to that fact and only one eyewitness testifying as to the events. The maxim "a picture is worth a thousand words" is less apt in this case.

Could Grievant have deliberately tossed the phone once he obtained it in his struggle with Grievant? Yes. Could the phone have been pulled with such force during a struggle so as to fly in front of the car? Yes. There is insufficient corroborating evidence to meet the preponderance standard that Grievant did act so as to violate the rule with intent and deliberation. Thus since there is not sufficient evidence that it is more likely than not that he chucked/tossed/threw the phone in front of the cruiser there is a failure of proof.

What really happened with the phone must be more than mere assumption about a deliberate toss rather than an unintentional result of a struggle with a noncompliant citizen in order to sustain a just cause analysis.

AWARD

The grievance is granted.

IT IS SO HEREBY ORDERED

s/ 

Sandra Mendel Furman, Umpire

Issued in Columbus, Ohio on April 18, 2011