

In the Matter of Arbitration between

Ohio State Troopers Association,  
Union

And

Case no.15-03-20121119-0099-04-01  
Marty J. Ferguson, Grievant

State of Ohio, Department of Public Safety,  
Employer

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Umpire's Decision and Award

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Introduction

This matter was heard in Columbus, Ohio on October 30, 2013. Lieutenant Heidi Marshall represented the Employer. Jessie Keyes from the Office of Collective Bargaining was the second chair. Lt. Charles Linek and Lt. Ron Raines both testified on behalf of the Employer. General Counsel Herschel Sigall represented the Union. Grievant was the sole Union witness.

All witnesses were sworn. No procedural matters were raised.

There were several joint exhibits presented: Jt. 1- the collective bargaining agreement; Jt. 2- the grievance trail; Jt. 3- the discipline package. Additional exhibits were introduced by the parties and admitted during the hearing. (Management Ex 1 and 2 and Union Ex. 1 and 2.)

Issue

Did the Grievant receive a one-day suspension for just cause? If not, what shall the remedy be?

Facts

The facts giving rise to the instant discipline are somewhat disputed, but the basic outlines are not.

Grievant was the only Trooper on duty during second shift on August 23, 2012. At the time in question he was assigned to the Marion Post second shift. Marion County and Marion City have experienced reductions in the numbers of law enforcement personnel due to budgetary constraints. The post normally has two-three (2-3) Troopers assigned and an officer in charge. (OIC)

While Grievant was working an injury accident he received a dispatch to go to the City of Marion for another injury crash. He immediately went to the scene that involved a hit and run motorist and a 14-year-old male bicyclist. He

determined that others had affected the crash site as materials were moved. He began canvassing witnesses. He was directed to the home of Patricia Williams.

Grievant made contact with her and asked her to get into the Patrol car. She hesitated getting into the vehicle stating that she wanted to clean blood off.

Grievant told her in a loud voice “ Well, C’mon, let’s go.” Her version varies but the words she quoted in her interview with Sgt. Them were ““whatever, just go...just go...whatever.” Union Ex. 1. Line 166-167. See also line 226-227.

Williams took offense at Grievant’s words and demeanor. This was immediately apparent to Grievant. She responded, “Wow, seriously? “ and slammed his cruiser door.

Her version of the exact exchange varied from telling to telling. In its essential features she characterized her impression of Grievant that he was being inconvenienced by her desire to clean off the blood and he was abrupt. Other versions change the language he allegedly used and include various hand and non-verbal gestures. Ferguson stated he may or may not have thrown up his hands at one point. He also stated that he did not observe any blood on Williams during the investigation.

Grievant interviewed Williams then returned to Marion General Hospital to interview the victim. After he left the hospital he proceeded directly back to the Williams residence to apologize for his conduct. He stated that I apologize if I acted like an ass.”<sup>1</sup> She responded, “Yea, you were.” (Williams also says she said: “yea, you were.”)

Williams did not accept his apology. She called in a complaint about Grievant and was interviewed by Sgt. Them.<sup>2</sup>

Williams made a four-page complaint to Sgt. Them the evening of the event. Management Ex. 1. Williams went into much detail not related to the questions asked.

The Patrol conducted an investigation. Management Ex 1.<sup>3</sup>

Grievant was charged with violation of Patrol Rule 4501:2-6-02 (l)(1)(4): Conduct Unbecoming an Officer:

...

**A member may be charged with conduct unbecoming an officer in the following situations:**

**1. For conduct, on or off duty, that may bring discredit to the Division and/or any of its members or employees. A member shall not engage**

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<sup>1</sup> Williams’s version is remarkably similar: She stated he said, “I apologize for being an ass.” She registered no complaint at all with his choice of words. The claimed profanity is the Patrol’s characterization.

<sup>2</sup> Union Ex. 1 is the transcript of Sgt. Them’s interview with Williams. Williams displayed ambivalence as to whether or not she wanted to proceed with a formal complaint. (Lines 80-81)

<sup>3</sup> Much of the interview with Ferguson focused on his handling of the accident scene: whether sufficient witnesses were interviewed and/or were properly interviewed; whether or not field sketches done; photographs taken; evidence secured; blood pool noted or not. There were many questions not related to the matter for which he was disciplined. The Employer issued no findings according to the record presented as to his handling of the crash- the entire hearing centered on his interactions with Williams.

**in any conduct which could reasonably be expected to adversely affect the public's respect, confidence, or trust for Ohio state patrol troopers and/or the division.**

...

**4. A member shall perform his/her duties in a courteous manner.**

The specific allegation is that Grievant was "unprofessional while conducting a traffic crash investigation. "

#### **Employer Position**

The Employer followed its disciplinary grid and issued a one-day suspension. The grid allows for a written reprimand to a five-day suspension for the stated offense. The Patrol consistently issues a one-day suspension for a citizen's complaint of discourteous treatment on a first time offense.

Grievant did not have a clear department record. His record contained two verbal reprimands both issued earlier in 2012. Although these verbal reprimands did not relate to the matters in issue here (tardiness and preventable patrol car crash) and are on a different disciplinary track, the reprimands indicate a department record that is not pristine.

Grievant also had two prior informal complaints regarding similar behavior the same year-2012. He was on notice from his 2011 and 2012 performance evaluations that he needed to work on his demeanor.

His apology was done with vulgar language.

His conduct was egregious enough to merit a one-day suspension instead of a lesser discipline. Progressive discipline is not mandated in this circumstance. The grievance should be denied.

#### **Union Position**

Grievant was not afforded progressive discipline. He should have received a verbal warning or at most a written reprimand for his conduct. The disciplinary grid also allowed for a lesser discipline even though it is not part of the collective bargaining agreement.

A suspension is a serious mark on a Trooper's department record. It affects transfers, teaching, training and promotional opportunities. His conduct has been ameliorated by this occurrence and the Patrol has noted the improvement in the most recent performance evaluation.

Grievant apologized for his conduct promptly. He is self aware that his demeanor appears harsh to others and is actively working on it.

The discipline is too harsh and should be modified to a verbal or written reprimand at most.

#### **Opinion**

This case turns on whether or not the Patrol was required to issue progressive discipline for Grievant's conduct. The basic outlines are agreed upon: Grievant failed to act with sufficient levels of courtesy to a witness to an accident. This failure of behavior consistent with Departmental standards was readily acknowledged by Grievant. It was acknowledged the very evening of the incident as witnessed by his apology.

The Union's arguments about the possible lack of veracity of the witness due to her prior criminal history were not given weight. If a Trooper were to insult a felon that action could not be excused merely due the status or former status of the complaining party. However even discounting any attempts by the Union to cast aspersions on Williams the arbitrator noted the variations of the witness in the various retellings of the incident. Williams was not present at the hearing and the paper trail and DVDs were reviewed.

The arbitrator also found no justification or excuse for Grievant's abruptness due to his working alone and/or having two crashes to work that night back to back. An essential part of a Trooper's job is to investigate and work a crash. He cannot have a justified "attitude" about that- it is not acceptable if his attitude is discernable in tone, conduct or words. This is something which Grievant must be attentive to in his words and deeds and non verbal actions.

Grievant has a self acknowledged issue with appearing stiff to others not employed by the Patrol. This demeanor has been the subject of notation on his personnel evaluations.<sup>4</sup> He has worked and continues to work on this.

He also received oral counseling on two earlier occasions for perceived rudeness. These prior notices did not rise to the level of discipline.

Union counsel suggested these prior incidents were of a much more serious nature than the incident giving rise to this grievance. The arbitrator heard no testimony on the specifics of those incidents but read Attachments J and K in Management Ex. 1. It seems at a reading that Grievant's conduct as described on those recent earlier occasions was inconsistent with Patrol standards. Grievant did not deny this conclusion. Regardless the Employer neglected to give those prior incidents disciplinary heft. The decision not to discipline Grievant for his conduct on those two earlier occasions is not the subject of this case. But it does illustrate the fact that Grievant had no written notice that further like incidents would result in discipline.

Grievant is a thirteen-year employee. His department record admittedly would not support an automatic advancement to a one-day suspension. The Patrol's rationale in part rests upon the proposition that it always gives a one-day

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<sup>4</sup> The 2011 evaluation stated: "He is aware that his tone at times can be misinterpreted and misconstrued to be negative." He was rated as meets expectations in Interpersonal Skills. Union Ex. 2.

The 2012 evaluation stated: "Trooper Ferguson's demeanor can be perceived as harsh and discourteous. At times his communication over the radio comes across as short and his tone of voice sounds of anger and disgust. He needs to avoid using a lecturing tone with the public. ...Trooper Ferguson acknowledges his shortcomings in this area and is working to improve them...." His rating for Interpersonal Skills for 2012 was "partially meets." In the future goals section it states: He will interact effectively when communicating with his co-workers and the public. Start date 3/27/12 End date :3/27/13. His progress was to be monitored by his supervisors through randomly monitoring his videos and riding with him monthly. Union Ex. 2. The record is silent as to whether or not these acts occurred in the period between the March 2012 evaluation and the August incident giving rise to the grievance. The latest evaluation-post discipline- indicated improvement and that monitoring did occur. Union Ex. 2. It states "Trooper Ferguson is now approaching his job and the people he contacts in a more positive productive attitude. He is able to perform his job duties at an acceptable level." The arbitrator notes that the after the fact evaluation is not weighted in her determinations on the merits of the discipline.

suspension for complaints from the public. Accepting this as true-as it was not contested by the Union- the arbitrator finds that only meets a part of the necessary just cause analysis.

Although the Patrol's witness did not elaborate it is assumed that merely the fact of a citizen complaint would not trigger an automatic discipline. It is assumed that the complaint would need to be investigated and substantiated- as this one was. But a lock step adherence to an automatic discipline in all cases under all circumstances for a citizen complaint fails to recognize the contractual mandate in Article 19.05.

Article 19.05 states in relevant part:

**The Employer will follow the principles of progressive discipline.**

**Disciplinary action shall be commensurate with the offense.**

**Disciplinary action shall include:**

- 1. One or more Verbal Reprimand (with appropriate notation in employee's file)**
- 2. One or more Written Reprimand;**
- 3. One or more day(s) suspension(s) or a fine not to exceed five (5) days pay, for any form of discipline, to be implemented only after approval from the Office of Collective Bargaining...**

**However, more severe discipline (or a combination of disciplinary actions) may be imposed at any point if the infraction or violation merits the more severe action.**

**The Employer, at its discretion, is also free to impose less severe discipline in situations which so warrant.**

This case did not merit the jump from no prior verbal reprimands to a one-day suspension. There were no prior disciplines of record for this infraction: conduct unbecoming. Although Grievant is on notice through two counsellings and his evaluation that he needed to improve his demeanor this falls short of the notice required to inform him that he will be disciplined for future occurrences.

The Employer felt the situation was aggravated by Grievant's apology. The arbitrator views it differently. Grievant knew he overstepped with Williams and made a prompt apology. Williams chose not to accept it which does not diminish the act. The apology was self-started: there is no evidence that Grievant knew that Williams had made a complaint when he returned to her home.

As to the alleged vulgar language used in the apology, the arbitrator finds the use of the word ass to be inelegant- as it could mean a donkey or something less benign. As noted above the complainant Williams expressed no offense at his choice of words and she certainly didn't hold back on her opinion of him in any other regard. His choice of words in the apology did not aggravate the offense in the arbitrator's opinion. The arbitrator found Grievant's actions taken with respect to the prompt apology to be a mitigating factor which was not considered by the Employer.

Notice of consequences of a further action of abruptness or rudeness is equally served by a written reprimand and comports with the contractual requirement of progressive discipline.

AWARD

The grievance is granted in part. The discipline is modified to a written reprimand. Grievant shall be made whole in back pay. IT IS SO HEREBY ORDERED.

Issued this 11th day of November 2013 in Columbus, Ohio.

*sf*

*Sandra Mendel Furman*

Sandra Mendel Furman, Arbitrator