

IN THE MATTER OF ARBITRATION
BETWEEN

OHIO STATE TROOPERS ASSOCIATION
Employee Organization

And

STATE OF OHIO, DEPARTMENT OF PUBLIC SAFETY
Employer

Dwayne Shephard, GRIEVANT

Case No. DPS-2016-05059-01

UMPIRE'S DECISION AND AWARD

Appearances:

For the Employee Organization:

Larry Phillips,
OSTA

For the Patrol:

Lt. Marty Fellure
Ohio State Highway Patrol

UMPIRE

Sandra Mendel Furman, J.D.

INTRODUCTION

This matter was heard before the undersigned on July 20, 2017 in Columbus, Ohio at the OSTA offices in Gahanna, Oh. Grievant appeared as the Union witness. Trooper Carlos Castellanos also testified at the hearing as a Union witness. Also present were Elaine Silveira and OSTA President Jeremy Mendenhall. Larry Phillips represented Grievant at the hearing.

The State's witnesses were Lt. Terry Bush and Sgt. J.S. Davis. Also present were Lt. Darrell Harris from central office of the Ohio State Highway Patrol (Patrol) and Abigail Ledman from the Office of Collective Bargaining. Lt. Marty Fellure represented the Patrol.

The collective bargaining agreement, 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.

Each side was given the opportunity to call the allowed number of witnesses and to 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.

ISSUE:

Was the Grievant issued a five-day suspension for just cause? If not, what shall the remedy be?

APPLICABLE CONTRACT SECTIONS:

Article 19.0; 19.05

STATEMENT OF FACTS:

Grievant is currently employed as a Trooper at the Lisbon, Ohio post. Most of his service has been at the Canton, Ohio post, his assignment at the date of the incident. At the time of the discipline he had over fourteen (14) years of service.

His deportment record is clear.

Grievant was charged with violation of Rules 4501:2-6-02(B)(5); Performance of duty; 4501:2-6-02(I)(4) Conduct unbecoming an officer and 4501:2-6-02(Y)(2) Compliance to orders.

Grievant received a dispatch that there was a stolen vehicle from an off-duty Canton police officer. He attempted to initiate a felony traffic stop at the first location he saw the vehicle. This was a parking lot in a busy shopping center during normal operating hours (around 2pm) parallel to the I-77 interstate. His attempts to get the vehicle to stop by flashers and following did not work. Another trooper joined in the pursuit. The driver of the stolen vehicle did not heed the two Patrol cruisers' lights and went through multiple stop signs and red lights to enter the freeway.

Grievant's patrol car hit the rear bumper of the fleeing driver's car twice before the suspect entered the freeway but this failed to cause a change in the situation. The striking of the car is called "intentional contact." There is evidence in the record indicating that Grievant misunderstood the situation in the parking lot and the first intentional contact was a mistake caused by his misunderstanding.

Once the stolen vehicle entered the freeway ramp additional Patrol cars assisted/intervened. Without dissecting the entire scene, there was a fair amount of confusion, tension and violent actions occurring in the attempt to get the pursued vehicle to stop. Actions the Patrol claimed as inappropriate committed by Grievant: no successful PIT maneuver used; failure to assume command; multiple intentional contacts; profanity and threats made towards the suspect and Grievant broke out both of the passenger side windows with his baton (ASP). Grievant stated he had not been trained on the PIT maneuver- the preferred method of stopping a car chase. He indicated there was no sergeant on duty at the time of the chase. Shephard further indicated that he believed it was critically important to stop the fleeing felon.

Other issues with the chase were attributed to other troopers: Castellanos was engaged in the pursuit in an unmarked vehicle. Hummel had intentional contact and filed an inaccurate first report. Sponaule used a TASER without the

requisite warning shouts, causing others (Castellanos and the driver's unnamed passenger) to believe there had been a gun shot. Sponaugle was dragged by the suspect's vehicle causing injury to himself.

This attempted TASER by Sponaugle, the ramming, the failed PIT move did not stop the suspect. He spun out and continued down I-77 southbound. Grievant rammed his vehicle into the driver's side hard enough to cause the chase to stop. His pursuit was profanity laced and colorful with descriptions of his "intentions" towards the suspect. No bystanders or other motorists were hurt. No other non-involved persons had property damage.

It was clear from the record that there was no line of command; confusion reigned and procedures were ignored. It was most clearly a "heat of the moment" chase that very fortunately left no one seriously hurt. The property damage was considerable.

Grievant and the four other troopers involved in the chase were sent to training at the Academy in appropriate pursuit techniques (Response to resistance or RTR hereinafter). Training officer Sgt. Davis made written comments and those notes were consistent with his testimony at hearing. He assigned error to Grievant in his initiation of the felony stop in the shopping parking lot, ramming the vehicle there, failure to execute a PIT maneuver at the entrance ramp and ramming the vehicle the final time with "[what] could potentially be viewed as deadly force due to the speed and location of the intentional contact."

Davis also applauded the troopers in attendance with a frank and honest discussion, a desire to learn and recognition that mistakes in judgment were made. M. Ex. 5.

One other Trooper-Timothy Hummel-involved in the melee of cars was disciplined. He received a one (1) day suspension.

Castellanos received a verbal reprimand for his role.

EMPLOYER POSITION

There is just cause for the discipline. Grievant was involved in a "demolition derby". RTR procedures were ignored or poorly executed. There was

no command taken by Grievant of the situation. As first officer out, he had that role. There was poor judgment used in initiating the chase in the location due to high motorist traffic. Breaking out the passenger windows was not according to procedure. The maneuvers used were dangerous and not suited to the seriousness of the alleged perpetrator's actions when balanced against the risk of harm to persons and property. There are procedures and processes to be followed when initiating/participating in a felony traffic stop and these were not used. The high risk of danger to others was present due to the failure to follow procedures. His foul language and threats do not meet Patrol expectations and standards. The discipline is commensurate.

The grievance should be denied.

UNION POSITION

Grievant acted with appropriate thoughtfulness and care in a high stress situation. The fleeing suspect was the cause of the incident not Grievant. It is unfair to Monday morning quarterback his actions. Decisions were made in the heat of the moment to remove the suspect who persisted even on three wheels and after being rammed and TASERed to flee down the interstate.

The Patrol offered remedial training and that was sufficient to address his actions. No one was seriously hurt during the pursuit. The profanity was de minimis. The discipline is too harsh and/or no discipline is warranted due to disparate treatment. Imposing a five-day suspension under all these circumstances is arbitrary and capricious.

DECISION AND AWARD

For reasons discussed below the level of discipline imposed is arbitrary and capricious due to disparate treatment. However, discipline is merited for the errors in judgment and actions involved in the felony stop.¹ The Patrol specifically cited in the disciplinary notice his threats, profanity and the intentional contact. Interestingly, the administrative investigation (AI) concerned itself with his failure to communicate a plan to stop the vehicle in the shopping plaza parking lot;

¹ Grievant was charged as follows: "...you were involved in a motor vehicle pursuit where intentional contact was used. You also used profanity and threats towards the suspect during the incident."

intentionally ramming the suspect's vehicle several times disregarding the safety of the occupants or bystanders; placing himself and others in a crossfire situation and breaking out the passenger windows endangering the passenger in the stolen vehicle. There is no mention of the language/cursing/threats.

The umpire finds that Grievant showed poor judgment in initiating the chase and not assuming command in a manner that might have prevented the destruction of property and risks to non-involved motorists depicted on the video. Although it was not definitively established, as first on the scene and no sergeant involved he was de facto in charge.² The repeated ramming (even discounting the one ram in the shopping parking lot as a mistake) and the smash out of the passenger windows all were part of increased adrenalin and pursuit rather than a response consistent with protocol and training. There were at least two crossfire situations which fortunately did not result in gunshots. Grievant did have his weapon drawn and pointed at various moments. This was a bad situation that luckily did not turn out even worse.

Obviously this case requires "Monday morning quarterbacking". All cases do unless there is first hand observation of the allegations. But the umpire was particularly struck by the chaos and violence of the chase observable on the one camera shown at hearing. This section of I-77 was heavily trafficked. Watching the passenger non-involved vehicles attempting to avert involvement and get out of the way was highly tension filled. It was not clear to the umpire why the chase was not aborted in view of the obvious risks involved. The ramming was severe and could have resulted in much more severe injuries to the suspect. There were multiple opportunities for this to have been handled differently. This comment alludes to the conduct of Castellanos, Shonk, Sponaugle and Hummel as well. This situation went off the rails. Property damage to Patrol vehicles approximated \$17,800.

The Patrol's hearing officer focused in part on the profanity and threats used by Grievant in the chase process. He cited this language as evidence of

² This is not a controlling factor in sustaining the discipline in part. The Patrol in its AIs asked all troopers about taking command. Thus the questioning of the others on this issue makes it murky as to what in fact the expectations were of Grievant on this point.

conduct unbecoming. The umpire found the “threats” and language to be the least troubling of the allegations against Grievant. It was established at hearing that this language is not unusual and the threats were clearly in context expressions of frustration and excitement and the adrenalin “talking.” It is also hard to find a valid threat exists when no present intent to act on the threats was evident from all the facts and circumstances. It isn’t at all clear if the suspect *heard* any of the threats as he wasn’t interviewed as part of the AI. Adding the profanity and threats into the entire mix, the record supports a finding that this charge has merit. Standing alone the threats and cursing would not support time off.

The umpire carefully read through the RTR procedures. RTR procedures were not in the main followed by Grievant [nor by any of the other troopers] on June 20, 2016. The clear goal of having such procedures is to maximize safety for all involved yet allow for discretion within prescribed limits. This situation went south rather soon: no clear command or person in charge; the decision to begin pursuit in a shopping center parking lot during mid-afternoon business hours, the repeated ramming of the vehicle so early on; the failure to successfully use the PIT maneuver; the lack of cover; the bust out of the passenger windows for no reason consistent with training; creating at least several cross fire situations; the decision to persist in the chase at a freeway entrance; the hard ramming of the door pillar driver’s side all were inconsistent with good judgment and protocol. These listed errors lie at Grievant’s feet.

This was after all a stolen car. There was no threat to persons or the troopers in this scenario at the outset. The dangers were created by the pursuit and failure of training and techniques. The result was at last apprehension with much property damage. The injuries incurred by the troopers were minor fortunately. The suspect had a bruised lung. Remarkably injuries to innocent bystanders did not occur.

The Union argues that Trooper Sponaugle committed an offense by failing to yell “TASER, TASER, TASER” three times before its use. Sponaugle received no discipline. This is part of the Union’s disparate treatment defense. There is

also evidence in the record that his entire approach to the vehicle was not according to training and expectations.

Trooper Castellanos was engaged in pursuit in an unmarked car, which is not consistent with the RTR. Castellanos received a verbal reprimand for his role in the pursuit. This was another element in the disparate treatment defense.

There was no testimony as to the rationale behind the one day suspension meted out to Trooper Hummel. All that is in the record is the AI pre-interview sheet, which indicated he was being investigated for intentional contact and failure to block the exit path of the fleeing vehicle. There is also some language indicating Patrol dissatisfaction with his failure to include all of the pertinent information in his first written report.

In the grievance step three answer, the Hearing Officer stated: "The AI revealed the grievant was involved in a motor vehicle pursuit of a reported stolen vehicle where intentional contact was used. He also used profanity and made threats toward the suspect during the pursuit." The umpire agrees the record supports those conclusions.

Significantly the Patrol failed to indicate why three of the other participants in the "demolition derby" received no discipline. Clearly the inference was that sending all five troopers to training was remedial. But it treated two of the five participants in a "time-off" manner, despite conducting AIs on all five participants in the chase.

It is noted that the Union arguments of disparate treatment may not have been made at the pre-arbitration steps of the grievance procedure. The written record does not indicate that this defense was raised earlier. No cry of "foul" was made at the arbitration hearing by the Patrol that this argument was barred due to lack of notice. Once argued and proven by undisputed evidence, the umpire lacked some explanation as to the different levels of discipline meted out. The umpire wished for more insight as to the Patrol's analysis as to why a five day suspension was merited.

Regardless the umpire finds that the concept of disparate treatment is inherent in the just cause language and is properly before her.

The umpire finds that the all three charges were proven by a preponderance of evidence. There was sufficient basis for the charge relating to conduct unbecoming as he told the suspect "I'm going to beat your ass...fuck you."³ Even granting that it would have taken self-control of extreme fortitude to not have cursed and reacted to this miscreant, the Patrol sets high standards which are well known and enforced. This was a long tenured trooper with a clean department record. Although there were others who also mishandled the events of June 20, 2016 the series of bad judgments made by Trooper Shepard outlined in full above that date merit discipline. The five-day discipline is harsher as to him. This is not sustainable because of the disparate treatment.

AWARD

The grievance is granted in part. The five-day suspension is reduced to a three-day suspension, due to the Patrol's failure to provide any stated rationale for the disparate treatment. If remedial training sufficed for three participants and a one day suspension for Hummel, some additional rationale and explanation was needed to justify the Grievant's much higher level of discipline. It was not progressive and it was not commensurate under the complex circumstances of this case.

s/ Sandra Mendel Furman

Sandra Mendel Furman, Umpire
Issued in Columbus, Ohio on July 26, 2017

³ The next incident of cursing cited is Grievant stating: "I'm going to fucking kill you next time...fuck." It is not clear that the suspect heard this. The language does not, despite the in extremis circumstances, meet the Patrol's expectations. The third incident it is a reasonable assumption the suspect heard. Grievant tells him: "Put it in fuckin park. Put it in fuckin park." But again, this is an assumption, not proof. So there is additional basis for modification of the penalty; it is unreasonable to assign much harm to in car cursing and threats which are not heard by the purported listener.