

## IN THE MATTER OF ARBITRATION BETWEEN

Ohio State Troopers Association,  
Union

And

Case no. DPS 2018- 03241-15  
Sergeant Michael G. Roth  
Three day suspension

State of Ohio, Department of Public Safety,  
Employer

### Umpire's Decision and Award

#### **Introduction**

This matter was heard in Gahanna, Ohio on May 14, 2019 at OSTA offices. Larry Phillips represented the Union. Other Union representatives were present throughout.

Lieutenant (Lt.) Darrell Harris represented the Ohio State Highway Patrol. (OSP) The Employer also had a representative from Office of Collective Bargaining (OCB) present, among others from the OSP.

Each side called witnesses in support of its position.

All witnesses were sworn.

There were several joint exhibits presented: Jt. 1- the collective bargaining agreement; Jt. 2- the grievance trail; Jt. 3- the discipline package. The issue was stipulated. Additional exhibits were introduced by the OSP and Union and all were admitted during the hearing.

#### **Issue**

Was the Grievant issued a three (3) day suspension for just cause? If not, what shall the remedy be?

#### **Applicable CBA Provisions**

Article 20

#### **Background**

Grievant is assigned as a Sergeant (Sgt) at the Mansfield Post.

He was charged with violation of 4501:2-6-02 (B)(5) Performance of Duty. Specifically he was cited for making an error in judgment for issuing a minor misdemeanor (MM) citation for a traffic violation he witnessed while off duty.

Grievant had at the time of the hearing an active disciplinary history consisting of a one day suspension: 8/13/18; written reprimand: 4/27/18; written reprimand: 1/12/18; written reprimand: 5/19/17.

He is a 29 year employee of the OSP [28 years' service at time of the incident] and had been a Sgt. for 19 years prior to the instant discipline.

The three-day suspension was issued in October 2018. Jt. Ex.3.

It was timely grieved.

### **Summary of FACTS**

There is no dispute in facts -just how the facts should be interpreted.

Grievant was disciplined for events arising after he observed reckless driving by Michael Fields while off duty, traveling in his personal vehicle with his wife on 6/5/18 at around 5:19pm. Roth took down the license plate [a vanity plate] and had a description of the driver from his observations.

He made no attempt then or thereafter to contact any law enforcement personnel about what he had witnessed and experienced that evening. He claimed that he did not have the means to make a cell phone call nor did his wife.

He created a CAD incident report on 6/8/18 and had a LEADS run to identify the operator as Fields. An incident report was created.<sup>1</sup>

Roth made several attempts to talk to Fields and/or his wife prior to issuing the citation to get information/statements including a visit to Fields' home. At one point he spoke to Fields' step daughter while at the residence. He and Fields had a telephone conversation on 6/10/18 about the events. Roth never shared with Fields that he was the person in the red truck on 6/5/18.

Grievant consulted with Assistant Law Director Mansfield City Michael Kemerer and described what occurred: the reckless operation as well as the

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<sup>1</sup> Grievant's report is dated 6/5/18 but contains events occurring 6/5; 6/8; 6/10 and 6/11. This anomaly was not explained. See p. 23 of AI; M-1. At p. 24 of the AI, the HP7 reflects the dates appropriately.

fact he was off duty when it was observed. This conversation occurred on 6/11/18.

Kemerer listened and advised that he would prosecute such a citation if issued; and that there was no legal barrier from doing so. He gave Grievant a case citation supporting the principle. [Grievant did not read the case.]<sup>2</sup>

Grievant testified that on a prior occasion he had received permission to issue a citation based upon a DOT worker's report of a traffic incident. The complainant was relating an earlier incident and Grievant was not a witness to the events. The report and citation from that incident were introduced into the record. Union Ex. 2.<sup>3</sup>

Without discussing it with his Post Commander Lt. Ivy, Grievant issued the citation for passing in a marked hazardous zone, a MM on 6/11/18 and advised Fields to pick it up at the Post.<sup>4</sup>

The citation is part of M-1 at p. 39 for "passing in marked hazardous zones." The offense if proven would have resulted in a \$153 fine. It issued six days after the fact and three days after Grievant had worked his shifts after 6/5/18.

Fields originally agreed to pick it up but then called in to the Post to ask questions about the matter. He asked about receiving a citation when he hadn't been stopped or pulled over by anyone. Concerned about what Fields stated, Dispatcher Martin advised Lt. Ivy of the call.<sup>5</sup>

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<sup>2</sup> The case of City of Maumee v. Weisner (1999) 87 Ohio St 3d 295 concerned the "reliable informant" as being sufficient predicate for a traffic stop. The facts therein are distinguishable in many crucial aspects from the facts herein. The principle that a law enforcement officer such as Roth would likely fall in the reliable informant category is presumed but not known to be the basis for Kemerer's reliance on this case.

<sup>3</sup> Union Ex.1 was the above described incident where a citation involving Grievant where he was not involved but relied upon a report from the involved citizen in 2015. There was no evidence as to whether or not the incident was reviewed with management. This was not the situation herein where Grievant was the involved party and was off duty.

<sup>4</sup> Grievant had received a written reprimand in 4/18 for responding to a potentially critical incident and not advising Lt. Ivy.

<sup>5</sup> In Fields' interview, he describes the 6/5/18 incident in a very different manner than Grievant. He alludes to alcohol perhaps being involved. Nothing in his commentary on the specifics of the disputed driving incident is credited as it is rank hearsay. It may/may not explain why local enforcement was never called that night. **It is not a reason the discipline is sustained.**

Lt. Ivy decided to pull the citation due to her opinion that it was not validly issued. She spoke to Fields and so advised him.

Lt. Ivy called Grievant at home on his off day to tell him an AI would be commenced.

The discipline ensued.

### **Employer Position**

Grievant did not approach the Prosecutor in asking his question about the viability of a citation from a position framed as “best practices”. Issuing a citation while observing alleged traffic misdemeanor behavior(s) as a private citizen is not consistent with “best practices.”

Grievant deliberately by-passed his Post Commander; the Prosecutor is not the supervisor in the chain of command.

As a private citizen Grievant “overreached.” He did not call in local law enforcement to deal with a so-called “grievous offense.”

The discipline is commensurate; is progressive and no abuse of discretion exists such as to mitigate the discipline.

The discipline is for just cause and the grievance must be denied.

### **Union Position**

Grievant violated no known policies or procedures.

His actions were sanctioned by the local Prosecutor.

There is no rule requiring a Sgt to review citations before issuance with the supervisor.

There is no rule against issuing a citation for actions witnessed while off duty.

Grievant checked the propriety of his actions with the person who would be responsible for prosecution before the citation was issued. This was appropriate and prudent. Grievant had always been encouraged to confer with the prosecutors about cases and follow the advice given. It has never been required to get approval before consulting a prosecutor.

Grievant should not have been contacted while on his day off. Grievant is not able to easily and cooperatively communicate with his Lt. due to the atmosphere at the Post created by her.

These circumstances were not unlike an earlier citation that was upheld despite the fact it was reported by a citizen and later the citation issued. Grievant was involved in that earlier matter.

Ivy has herself not followed procedure when she failed to document on the form why a citation was not issued in the space provided.

The discipline is arbitrary and capricious. As such, it is not for just cause. The grievance should be sustained.

### **Opinion**

The Employer bears the burden of proof.

The Umpire does not believe that Grievant acted within the norms and expectations of the OSP when reviewing the record in this matter.

The Umpire had concerns about the following:

- There was no satisfactory explanation about why the matter was not called in that evening to a local LEA or the Post. If the driving was as “grievous” as described, then safety for others should have been his response.
- The alleged fact that allegedly neither Grievant nor his wife allegedly had cell phones available that evening is somewhat curious as well. If Roth rightfully declines to phone while driving, a pull off to use his phone or ask if his wife had hers would be expected. Two people on a car driving on country roads without a cell phone is not patently unbelievable but certainly not usual in 2018. [Grievant’s wife was not interviewed: nor is the Umpire suggesting she should have been. Grievant never asked his wife if she did have her phone with her.]
- The claim that the activity had ceased ending the need for local law enforcement involvement is not convincing. If the driving was that “grievous” it may very well have continued past the turn off in Butler. Grievant had no basis for knowing or not whether what he had observed

continued or not. In the AI, Roth explained that the erratic behavior has “ceased and desisted”.<sup>6</sup> But he could not know what happened once the driver turned in another direction.

- Grievant had very recently been disciplined for not notifying Lt. Ivy of a call/run. He offered no sound or plausible reason not to inform her of the events he was involved in; or his plan to contact the Prosecutor; or the fact he had asked for a LEADS run on the incident occurring off duty. He had several opportunities to bring her into the loop; nothing about this situation was the “norm” for officer discretion and routine.
- Grievant had received a very recent discipline of a one day suspension for disobeying a superior officer’s direction. That officer was Burkhardt; not Ivy; mitigating to a degree his claim that Lt. Ivy was a problem for him.
- It struck the Umpire as not an “ordinary course of business” for an off duty officer to days after witnessing a traffic violation to issue a citation. The unusual nature of the action was compounded when Grievant went to Fields house and didn’t tell Fields in the phone conversation he was in the red truck. The investigation was conducted without Grievant ever indicating it was him in the other vehicle.
- Although it is accepted that the OSP Troopers and the local prosecutors must and do work together, it is clear that the Prosecutor cannot determine appropriate compliance with internal norms and protocols of the OSP. Kemerer’s opinion that Grievant had a solid basis for issuance of the citation was predicated on what Grievant told him. Kemerer answered only the question asked. In his interview he conceded it was not “best practice” to issue citations in the manner at issue.

The Union stressed repeatedly that there was no specific policy cited by the Patrol indicating a violation by Grievant. But that argument is not compelling in this case under these facts. Grievant violated norms and expectations. He did not call in something he witnessed off duty. He chose to investigate it without

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<sup>6</sup> The AI states “seized [sic] and desisted.” M-1 p.9.

review/discussion with his superior. He could not articulate in a convincing manner (since discretion is so often exercised by OSP Troopers to issue/not issue citations) why this matter required so much of his time and energy, as he witnessed traffic violations not infrequently in his ordinary off duty driving. None before this instance required him to go to anyone else to discuss the propriety of issuance.

If it is “accepted” and not “unusual” to issue a citation based upon a non-observed violation, the Union likely would have had more examples than one other isolated example from Grievant. The other example from Grievant did not involve Grievant himself as the “reporter.”

The Umpire understood Fields’ concerns about getting a ticket days after the event, when no one stopped him; identified himself as a law enforcement personnel; or explained the nature of the alleged offense. Citizens would not expect this to occur. The lack of a policy specifically detailing when/how an off duty citation may issue is no bar to the OSP disciplining a Trooper with such senior experience and very recent discipline for violations of “Performance of Duty”.

The Umpire concludes that under all the circumstances herein, the discipline is appropriate.

### **AWARD**

**The grievance is denied.**

IT IS SO HEREBY ORDERED.

Issued May 19, 2019 in Columbus, Oh

*S/ Sandra Mendel Furman*

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Sandra Mendel Furman, J.D. Umpire