

OHIO DEPARTMENT OF PUBLIC SAFETY,)
DIVISION OF THE STATE HIGHWAY PATROL)

Grievance of David Francway
Grievance No.: DPS-2018-00036-15

OHIO STATE TROOPERS ASSOCIATION

Arbitrator Sarah R. Cole

Sergeant David Francway, the Grievant, has been employed by the Department of Public Safety, Ohio State Patrol (OSP) for nineteen years. On December 15, 2017, OSP imposed a three-day suspension on the Grievant for violation of Rule 4501:2-6-03 (C), Responsibility for Orders. This discipline arose out of a motor vehicle pursuit that the Grievant supervised, which

took place on April 10, 2017. For the reasons set forth below, I uphold the grievance and reverse the three-day suspension.

On April 10, 2017, at around 2:20 a.m., Trooper Morales attempted to stop a suspect's vehicle for a marked lanes violation. The suspect fled the scene in his vehicle and, over the course of about 15 minutes, ran approximately 29 stop signs and red lights and traversed city streets as well as the freeway, exceeding the speed limit. He also went the wrong way on a city street. Although at times the suspect was speeding, he also was cautious when making turns and did not reach exceedingly high speeds on the city streets. The video recording of the pursuit showed that only four or five citizens' vehicles, and no pedestrians, were in the vicinity of the pursuit. Eventually, the OSP apprehended the suspect when Officer Morales and two other officers "boxed" him in. The boxing of the suspect's vehicle caused damage to two of the OSP's vehicles.

The Grievant was the supervising officer for the pursuit. Pursuits are somewhat common in the Cleveland Metro Post, where Grievant is a supervisor. In 2017, for example, the Cleveland Metro Post participated in 175 pursuits, 75% to 80% of which took place on the night shift. This number of pursuits greatly exceeds any other posts' numbers of pursuits. To prepare for the inevitable, the Grievant provides his team pre-pursuit training and post-pursuit reviews. As part of the training, the Grievant counsels his team not to talk very much on the radio during a pursuit, so that everyone can follow the pursuit – in other words, the trooper in pursuit should be the primary voice heard on the radio transmission. He also reviews every pursuit with his team and attempts to provide training based on dash cam video following each pursuit.

In the early morning hours of April 10, 2017, Trooper Morales began the pursuit of a fleeing suspect. The video recording of the pursuit demonstrated that Officer Morales was

following his supervisor's protocol, as his voice was the primary voice that could be heard during the pursuit. This seemed particularly important in this pursuit, as there were almost constant changes in direction and location. After about 14 minutes, one of the other officers, now also in pursuit of the suspect vehicle, asked the Grievant if the Grievant wanted to have the suspect boxed in. The Grievant did not hear his name in this question and thus did not respond to it. The Grievant did not tell the troopers to make contact, but they ended up boxing in the suspect, which resulted in damage to two vehicles. The question is whether the Grievant exercised appropriate supervisory responsibility over the pursuit, i.e. whether he directed and controlled the pursuit through effective communication until its end (Mgmt Ex. B. RTR policy at 10, 6/22/17).

According to the RTR policy, "[a] pursuit is only justified when the necessity of the apprehension outweighs the level of danger created by the pursuit." Lieutenant Gable, the Grievant's supervisor, testified that this language is ambiguous. After reviewing the video of the pursuit, Lt. Gable provided somewhat conflicting conclusions about whether the pursuit violated the RTR policy. On the one hand, he found that the Grievant's response to resistance was "reasonable to affect the arrest, detention, or mission". (Mgmt Ex. A at 16). On the other hand, he concluded that the Grievant failed to supervise the pursuit because he did not terminate the pursuit when the suspect began running red lights and stop signs. (Id.) Lt. Gable also stated that he had spoken with the Grievant about how to conduct pursuits in the past.


I find that the language of the RTR policy creates an ambiguous standard that appears to require the supervising officer and the troopers conducting the pursuit to balance two potential factors – the need for apprehension and the level of danger created by the pursuit. Both factors deal with risks – the risk of a dangerous suspect remaining at large and the risk to society by

continuing the pursuit. Supervisors are making these decisions on a real time basis with limited information. Discipline in this context should reflect the difficulties and challenges associated with the decision making process in which a supervisor must engage. Given the ambiguity of the policy and the difficulty in application, discipline is not warranted unless there is a significant imbalance between the risk of harm to the public and the need for apprehension. Here, it would appear that there was not substantial risk to the public as it was the middle of the night when few cars (and no pedestrians) were on the road. While it is not immediately clear what harm the fleeing suspect presented, deference to the pursuing trooper and his supervisor's decision to pursue makes sense in light of their experience and expertise in such pursuits. While this might have started as a lane violation, the suspect's decision to flee changed the nature of the offense, indicating the suspect's desire not to be apprehended. If OSP had offered clearer guidance to the Grievant about when and under what circumstances a pursuit should be terminated, I would enforce that guidance – but OSP provided insufficient evidence that such guidance was available to its employees or that the Grievant understood that he should have terminated this pursuit. Finally, I do not find that he failed to communicate adequately during the pursuit. Like Officer Bass, the administrative investigator, I find the Grievant's explanation of how he trains his officers and how he supervises his pursuits to be reasonable. Because I find that the Grievant did not violate Rule 4501:2-6-03 (C), I grant his grievance.

Award

The grievance is granted. The three-day suspension shall be removed from the Grievant's record and all back pay, seniority and any other benefits lost due to that suspension be restored.

October 29, 2018



Arbitrator Sarah R. Cole