

**IN THE MATTER OF ARBITRATION
BETWEEN**

Ohio State Troopers Association (OSTA),
Union

And

Case no. DPS 2018-01711-01
Jason Hurlburt, Grievant
One day suspension

State of Ohio, Department of Public Safety (DPS),
Employer

Umpire's Decision and Award

Introduction

This matter was heard in Gahanna, Ohio on January 15, 2019 at OSTA offices. Larry Phillips represented OSTA. Grievant was present and testified.

Lt. Darrell G. Harris represented the Ohio State Highway Patrol. (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 the Union and all were admitted during the hearing.

The decision issued within agreed upon timelines.

Issue

Was the Grievant issued a one (1) day suspension for just cause? If not, what shall the remedy be?

Applicable CBA Provisions

Articles 20; 19

Background

Grievant was charged with violation of DPS 4501:2-6-02(I)(1)): "Conduct unbecoming an officer."

Grievant has a clear disciplinary history. He is a long term employee of the OSP: twenty-one (21) years.

The instant discipline was timely grieved.

Summary of FACTS

There is some dispute in facts. These are not sufficient to affect the burden of proof needed by the DPS as is discussed below.

Grievant was disciplined for a disparaging comment made in an open courtroom in Franklin County Municipal Court on 3/8/18.

Grievant has to appear as a witness in court on traffic matters as a regular part of his duties. In this particular instance, Grievant had appeared a day earlier (3/7/18) in Judge Pollitt's courtroom on a traffic matter. The Judge had granted a defense motion [a motion to suppress] affecting adversely prosecution. Grievant had testified as to his role in the arrest and left the courtroom. He did not firsthand know that the Judge had dismissed the case, finding no probable cause for the OVI arrest. He learned somehow about the disposition.

In the same courtroom the next day, Grievant stopped by to chat with the Assistant Prosecutor (APA) Monroe who had handled the case. Grievant was not assigned to Pollitt's courtroom on 3/8/18. Grievant was upset about the ruling which he had learned about prior to the chat.

Monroe provided some context about the ruling. Monroe stated that Grievant became even more upset. Per Monroe, Grievant called Pollitt a "dumbass" and saying "it's amazing someone who doesn't know what they are doing, like him [pointing to the empty bench] is allowed to be a judge". Monroe indicated to Grievant that he was exploring the possibility of appealing the case.

Monroe prepared a memorandum after the conversation after he went to his supervisor about the events. According to the AI, Monroe would not have felt the need to record what had happened had not others present- a group of Assistant Public Defenders- asked him about Grievant's statements and demeanor. These conversations between the Assistant Public Defenders and Monroe occurred within fifteen (15) minutes of his conversation with Grievant. Monroe stated his belief that Judge Pollitt became aware of the comments

because of remarks Pollitt made. Monroe indicated Grievant's comments and behaviors reflected poorly on the OSP and on Grievant's credibility as a witness in future proceedings. Monroe's written statement prepared 3/9/18 and AI interview are consistent.

Various other witnesses were interviewed concerning the events in the courtroom. There was variation in the comments remembered. According to the AI, Judge Pollitt's bailiff informed him of Grievant's comments. Her comment did not match what Monroe reported as being said.

Employer Position

Grievant acted in a manner that brought discredit to DPS. Monroe and others confirm that his conduct on 3/8/18 was inappropriate. Monroe's report was unsolicited and was sent to the Granville Post Commander prompting the AI.

The discipline is within the grid; is commensurate; 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 was engaged in a private conversation regarding a case wherein the APA also disagreed with the Judge's ruling. Grievant and the APA were "on the same team." Grievant did not remember calling the Judge a dumbass saying if he had he would have remembered it. There were multiple versions of what was said in the courtroom calling into question what really happened. Smolka didn't hear anything and he was the closest to the parties involved.

The Union suggested that Monroe prepared the memorandum as a cover up for his own comments that the Judge made the wrong decision in the OVI suppression ruling.

Grievant is a long term employee with a clean department record. The discipline is overly harsh and punitive. It is not progressive. As such, it is not for just cause.

Opinion

The Employer bears the burden of proof.

The Umpire focused on the person who was the closest in proximity to the conversation, OSTA witness Trooper Smolka and the two persons directly involved in the conversation: Hurlburt and APA Monroe.

Trooper Smolka was a “junior” Trooper [just one year tenure]. He was trailing Grievant to learn the ropes and court procedures and processes. He claimed to have been standing close [less than 5 feet] to Grievant and Monroe but heard nothing as he claimed he wasn’t listening.

Grievant in effect denied making the remark; saying that he didn’t remember making it and if he had called the Judge a “dumbass” he would have remembered it. He did not admit to being loud or upset. He claimed to be almost whispering as other cases were going on. He claimed that he pointed at the bench and said Pollitt was the only judge down there who would make the decision he made on the motion to suppress.

APA Monroe stated the dumbass remark was made, recording his version of events the day after the incident in a written memorandum. He confirmed the incident in the AI conducted by Sgt Taylor.

Assessing the credibility of the primary participants, the Umpire finds Grievant’s version wanting. There are multiple reasons for this finding. Grievant spoke at the arbitration hearing in a loud voice. He was in a closed room with no other persons talking at the time. It was above conversational level.

The Municipal courtrooms are busy beehives of activity and conversations. Since all agree the Judge was not then presiding, the conversations could be louder than when court is in session without disturbing proceedings. Other persons heard Trooper Hurlburt talking, noted his demeanor, and this confirms the impression he made at hearing.¹ Although the other “reporters” (interviewees) did not match up verbatim to Monroe’s report, the fact that Hurlburt could be heard by anyone other than Monroe confirmed the

¹ Public Defender Mendieta commented on Grievant’s loud voice. She was standing ten feet from him. She stated to Sgt. Taylor that she could tell Grievant was very upset. Bailiff Cain reported Grievant saying something “to the effect of the judge being a fucking idiot.” She stated that Grievant was loud, drawing her attention to the conversation. She told Judge Pollitt about Hurlburt’s remark. Judge Pollitt was not then on the bench; the courtroom was thus quieter than

impression that Monroe could hear him easily and thus report promptly what happened in the conversation.

There is no suggested motive for the APA to fabricate the incident as he reported it. No one asked him to report on Grievant. He was sufficiently dismayed by the remark to on his own make the report verbally to his supervisor. He made a written report at the direction of a manager in the Prosecutor's office. It was likely a thought out process for the APA, as the OSP and the APAs are "on the same side". The Troopers are the prosecution witnesses in many of these cases and a good working relationship is necessary and important.

Grievant was careful in not making a flat out denial. He said he didn't remember saying it. He qualified his answer very carefully. He could not "categorically say that I did not use is the word "dumbass". He admitted his disappointment about the ruling; admitted he was in a conversation in the courtroom; has a loud voice which carries very well in a quiet room and suggested no ill will of Monroe towards him.

The clear weight of evidence is that Grievant did use a disrespectful, disparaging term regarding Judge Pollitt while in his courtroom-with many others then present. Grievant was overheard being inappropriate and loud by others.

The umpire also was convinced it happened as related by Monroe due to the admitted gesture made and comments directed toward the then empty bench by Grievant. Grievant himself noted that he pointed at the bench and said Pollitt was the only judge down there [in Municipal Court] who would make such a ruling. The fact he gestured towards the bench when engaged in the conversation would likely draw others' eyes and ears to him as well.

The next question is whether the Grievant's discipline was commensurate. The umpire finds it was. There is little to quarrel about that a trooper referencing a judge as a dumbass in a courtroom while in full uniform during normal courtroom hours is *per se* conduct unbecoming. It served his personal reputation

usual. The umpire noted the discrepancy between Cain and the APA and finds that Grievant said what Monroe said he did and what Grievant claimed not to remember.

ill; the Judge was informed of the comment; the APA reported it to his supervisor and the OSP's reputation was adversely affected by his actions.

Whether or not Grievant can/cannot be effective in Pollitt's courtroom since this incident is speculative and irrelevant. Trooper Hurlburt is entitled to his disagreements and opinions but the public, intemperate expression of same is not the time or place. In no manner was this a "private" conversation.

The umpire read through Union Ex.1. It indicated that Grievant was an employee who at least in his most recent review meets expectations in all respects and exceeds expectations in making/maintaining records. A positive performance evaluation even in the same time period as the incident does not in this case mitigate an otherwise just cause discipline.

AWARD

The grievance is denied.

IT IS SO HEREBY ORDERED.

S/ Sandra Mendel Furman

Sandra Mendel Furman, J.D. Umpire
Issued January 25, 2019 in Columbus, Oh

Certificate of Service

A copy of the foregoing was sent by email to the parties' representatives this date.

s/ Sandra Mendel Furman