

**IN THE MATTER OF ARBITRATION  
BETWEEN**

Ohio State Troopers Association (OSTA),  
Union

And

Case no. DPS 2019-03905-01  
Nicholas L. Thornton, Grievant  
One day suspension

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

**Umpire's Decision and Award**

**Introduction**

This matter was heard in Gahanna, Ohio on 2/18/20 at OSTA offices. Larry Phillips represented OSTA along with multiple other OSTA representatives. Grievant was present and testified.

Lt. Jacob Pyles represented the Ohio State Highway Patrol (OSP) along with other OSP representatives and the OCB representative as well.

OSP 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 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 4501:2-0-6-02(B)(5) Performance of Duty; 4501:2-6-05 (D)(1) Motor Vehicle and Aircraft Operations; and 4501:2-6-02(V)(1) Response to Resistance and Firearms. The events giving rise to the discipline involved two troopers as well as a Sgt.

He is a relatively short-term employee of the OSP.

Grievant is assigned to the Chillicothe post.

The instant discipline was timely grieved.

Grievant had no active discipline in his file.

## **Summary of FACTS**

There is no dispute in facts.

Grievant and two others [Trooper Tyler Boetcher and Sgt. Donald Kelley] were involved in a high-speed pursuit of a stolen vehicle on 5/6/19. The pursuit was captured by each of the OSP participants in-car cameras. All three videos were reviewed at the arbitration. Kelley originally was the lead in pursuit, then Grievant became the primary trooper in the pursuit.

The videos displayed all of the salient concerns stated by the OSP in its discipline. The high speeds were undisputed; travel through an occupied construction zone at high speed was easily observed<sup>1</sup>; the vehicles' contact resulting in the arrest of the driver and passenger; as well as the arrest of the driver and passenger were easily observed in terms of conduct by Grievant and Boetcher.

According to the Post Commander's review of events [Union Ex. 2.] Grievant received permission to execute a PIT maneuver; the "ask" was made by Boetcher. Boetcher could be heard on the radio telling Thornton his speed was

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<sup>1</sup> The travel for the construction zone was noticeably challenging. There was much construction dust obscuring vision, and despite Boetcher's call ahead of the passage through the area there were three visible workers in the zone that were passed by the stolen vehicle and pursuing troopers. The speeds of the troopers through the construction zone are charted at Union Ex. 2. Grievant's speeds were noted as varying between 67-70mph.

Twenty-eight comments were made by Post Commander reflecting safety issues with the chase on Grievant's part. Thirty errors/comments were noted in Karwatske's review of Boetcher's driving during the chase.

too high. The stolen vehicle made an unsafe lane change; Grievant made intentional contact at that moment and the stolen vehicle went off road into a ditch and the arrest followed.

The matter was fully investigated.

Two of the other principals {Boetcher and Kelley} in the high-speed pursuit received a written reprimand for their involvement in the events. Union Ex.3. Grievant received a one-day suspension.

Boetcher and Grievant received a 2.5 hour training in mid- December 2019 regarding issues related to the above incident regarding the driving and felony arrest.<sup>2</sup> In that training session, Grievant maintained that he did not initiate contact.

Witness testimony from Sgt. Davis indicated that PIT maneuvers should not be initiated at more than 40mph absent deadly force. Union Ex.4. He further stated that a property crime should not have caused this high-speed pursuit. Davis further explained that once authority is given to initiate contact, the trooper making the maneuver is the decision maker.

Davis also analyzed what was inconsistent with training and procedure in the approach to the stolen vehicle, the removal of the suspect from the vehicle, the cuffing; the getting the driver up from the ground; the cursing; the placement against the hood of the trooper's cruiser. Grievant used additional force than necessary and failed to deescalate the situation. Davis made similar critical comments as to what Boetcher did as well.

### **Employer Position**

Grievant violated clear and established policy.

The discipline is supported by the record. Grievant was more culpable due to his position as lead and the contact made. The OSP believed Grievant was attempting a PIT maneuver and it went badly. It was clearly imprudent to attempt that at the speeds then present and oncoming traffic visibility a challenge.

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

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<sup>2</sup> The long delay between the May 2019 and December dates was explained as personnel shortages and backlogs of tasks at the Academy.

### **Union Position**

The discipline is arbitrary and capricious. It is disparate treatment. Grievant's conduct was not different in type/extent/level of culpability than the other two participants. As such, it is not for just cause. Just cause requires the discipline be disaffirmed or modified. Grievant should be made whole.

### **Opinion**

OSP bears the burden of proof. It met its burden. There is no dispute that Grievant drove his vehicle at an unsafe speed through an occupied construction zone. There is no dispute that he made intentional contact with the suspect vehicle at more than 60 mph. There is no dispute that he failed to follow proper procedure when executing the felony stop of the stolen car's driver and passenger.

As is usual in this "mini arb" process, the decision maker is not a witness to testify why s/he levied the particular discipline. OSP argued that Grievant's conduct was more egregious, as he failed to slow his speed before attempting a "PIT" maneuver. He also was the first to secure the driver suspect, and his approach to the suspect did not conform to the prescribed approaches to a suspect vehicle.

The approach was clearly not in conformance with approved techniques; the car was approached with no cover being taken; there was cursing and foul language used; the driver was cuffed with Grievant's knee placed in an improper hold; the driver was pulled up from the ground by his cuffed arms in violation of technique and the suspect was placed on the car's hood in a non-approved manner.

The Umpire concluded that Grievant acted [as did Boetcher] in a very high adrenaline, risky and unsafe manner which resulted in actions that did not conform to the expectations/strictures of training, protocols and approved techniques. The videos were vivid and clear enough that the Umpire had no problem distinguishing the acts complained of by the OSP.

Although both Troopers involved [the Sgt. had pulled off before the contact with the stolen vehicle and occupants was made] displayed the same behaviors

vis a vis the contact with the car's occupants, and both utilized techniques not within the protocols, the OSP found greater fault with Grievant. He made contact with the stolen vehicle at speeds in excess of 60 mph, which is acknowledged to be unsafe.

OSTA argued that the contact was in fact initiated by the stolen vehicle, and the contact therefore was unavoidable. Grievant did not testify, so his statements are as reflected in the AI-Management Ex.1. The video shows that the stolen vehicle was in the left lane of a two lane road on a hill crest and began a move into Grievant's lane of travel. The high speeds of both vehicles caused the stolen vehicle to go off road into a ditch with severe damage.

It was not clear at all to the Umpire why a high-speed chase for a stolen vehicle was taken to such lengths- through residential areas; a construction zone; on hill crests. The speeds documented throughout the pursuit and the lack of visibility through the occupied construction zone were inconsistent with training and safe practices and unwarranted per the OSP for a property crime. Certainly the actions captured on the video as the two Troopers approached the vehicles were unambiguously in contrast to training expectations in those circumstances.

The level of discipline issued to Sgt Kelley and Trooper Boettcher was noted by the Umpire as being minimal considering the events as a whole. As stated by Kawartske: was the need for apprehension outweighed by the necessity for a pursuit through a municipality, construction zone and a two-lane highway with curves and hills? Apparently the judgment of the OSP was training and a minimal level of discipline should correct the behaviors.

The case then comes down to did Grievant do something additional/more serious meriting a harsher level of punishment? Prior discipline is a non-factor, so it is the conduct alone as well as his statements in the AI that must be measured.

Thornton was in the lead. Thornton was the one making decisions as between himself and Boetcher. He knew/should have known that contact at the high speeds of both vehicles would cause a collision. The contact shown on the video was not a sudden swerve by the driver into him. The principals were on a

hill that was cresting, making oncoming traffic an unknown. The permission to do a PIT was coupled with the training information of 40 mph as being the threshold and the comment from Boetcher that the speeds were excessive for a PIT maneuver.

There is only the written record and videos to “prove” what happened. From this evidence, Grievant did nothing to avert the contact. The Union argument that the right lane berm was unsafe was somewhat curious as the very excessive speeds through the dust filled unpaved construction zone seemed safe enough to Grievant. No evasive actions were taken by Grievant to avoid contact. The video was clear from that regard.

Grievant’s brake lights were observed but certainly not anything more than a touch of the brakes was evident in the contact moment.

Grievant stated in the AI that he would not have done anything differently were he given the chance. He gave a like response when asked if he could have done anything better-and he was asked this twice. This is in marked contrast to the other two participants in the May 2019 high speed pursuit. They exhibited awareness of their actions and acknowledged the problems in the chase. It is this lack of recognition that Grievant’s actions were not consistent with prudence; good judgment; safety and known OSP policies and procedures that is the tipping point in evidence that Thornton and the two others involved were not similarly situated- coupled with the lack of any demonstrable intent to avoid the contact.

Although in the AI Grievant did state in the future he would do things different [sic], he did not volunteer this response. It came only after repeated prompting by the investigator.

There was no “accident reconstruction” performed in this matter. It is not suggested that would have made any difference. But combining Grievant’s own lack of self-examination even when prompted during the AI plus his contact made at speeds in excess of 60mph for a stolen vehicle pursuit the Umpire determined the imposition of a one day suspension is for just cause.

**AWARD**

**The grievance is denied.**

IT IS SO HEREBY ORDERED.

*S/ Sandra Mendel Furman*

Sandra Mendel Furman, J.D.

Umpire

Issued 2/20/20 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*