

In the Matter of the
Arbitration between

**FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC., UNIT 2**

and

**THE STATE OF OHIO (DEPARTMENT
OF NATURAL RESOURCES)**

Grievance #DNR-2018-04048-02

Grievant: Matthew Kruse

Arbitrator: Tobie Braverman

OPINION AND AWARD

APPEARANCES:

For the Employer:

Andrew Shuman, Labor Relations Advocate
Eric Eilerman, Labor Relations Advocate
Mark R. Smith, Major, Office of Law
Enforcement

For the Union:

Kim Rutowski, Attorney
Bret Vetter, Attorney
Matthew Kruse, Grievant
Jennifer Brown, Union Representative

The State of Ohio Department of Natural Resources (hereinafter referred to as "Employer") and Fraternal Order of Police Ohio Labor Council, Inc., Unit 2 (hereinafter referred to as "Union") have submitted the grievance of Matthew Kruse (hereinafter referred to as "Grievant") to the Arbitrator for decision. Hearing was held at Cincinnati, Ohio on June 8, 2020. The parties argued their positions orally at the conclusion of the hearing, and the hearing was declared closed on that date. The parties stipulated that the grievance is properly before the Arbitrator for decision, and further stipulated that the issue for decision, is as follows:

Was the Grievant, Matthew Kruse, disciplined for just cause, and if not, what shall the remedy be?

FACTS

The Grievant has been employed by the Employer since 2006, and has been employed in the position of Natural Resources Officer Investigator ("NRO") since 2015. The events which led to the three day suspension which is the subject of this arbitration, began in December, 2017. Those events involve a number of officers arising out of the investigations of three separate but related incidents which took place at East Fork State Park, and which have come to be dubbed "Campergate".¹

Campergate began on December 29, 2017 when Investigators attempted to make contact with Ralph Cummings whose camper had been parked at Campsite 43 in East Fork State Park for thirteen days without payment of fees. After running the plates on both the camper and a BMW parked nearby, it was learned that the camper's plates had expired in 2005 and the BMW had fictitious plates registered to a Chevrolet. Cummings was ultimately arrested after leaving the campground in the BMW. He was charged with theft relating to the campsite fees, obstructing

¹ Only those portions of the Campergate events which are relevant to this matter are summarized herein.

official business when he gave a fictitious name to the officers, failure to produce a driver's license and operating a vehicle with fictitious plates. A search of the car revealed drug paraphernalia, and as a result, a search warrant to search the camper was obtained and executed later that evening. The camper itself was not removed due to issues with the ability to tow it at that time. Cummings remained in the Clermont County jail until some time in March, 2018.

On January 16, 2018, the Employer received a complaint that the camper had been broken into. After a NRO determined that there had in fact been a break in on that date, on the following day, the Grievant along with NRO Sgt. Daniel Ferguson went to the camper to attempt to determine what was taken. They were joined by a third NRO, who had been involved in execution of the search warrant, to aid in identifying missing items. The Grievant took photographs and prepared an inventory of missing items. After completion of the review of the camper, the Grievant Ferguson went to the Clermont County Jail to advise Cummings regarding the break in and theft.

During the course of these events, the Grievant noticed a credit card lying in the snow near the camper. He took the credit card and prepared a search warrant request to obtain information concerning its owner and value. The card, however, was not logged in as evidence. The Grievant testified that he gave the card to Ferguson. Ultimately information was returned indicating that the card belonged to Cummings and was of no value. At hearing in this matter, the Union produced a photograph of the card which demonstrated that Ferguson had placed the card in the lost and found at East Fork.

On January 22, 2018, the Employer received a complaint that the camper had been stolen. During a meeting with other Investigators unrelated to these events, the Grievant was assigned as the "owner" of the investigation of the theft. The Grievant went to the Clermont County Jail to advise Cummings that the camper was gone and to attempt to garner any information which Cummings might be able to provide. Although the Grievant began the investigation, he went on paternity leave shortly thereafter on February 8, 2018, and remained on leave until April 22, 2018. During that time the camper was ultimately found and returned to Cummings, but the details of

those events are not relevant here.

Subsequent to the Grievant's return from leave, the case file on the theft case remained open in the Employer's Records Management System ("RMS"). The Grievant was instructed to update and close the case file in July, 2018. By email dated August 9, 2018 the Grievant requested an extension to complete the report due to the press of other work. Apparently the extension was not granted, but the case file remained open as of August 15, 2018. The Grievant testified that while the final report was not complete in RMS, he did maintain an up to date and complete paper file. He further testified that the RMS system was new at this time, and experienced a number of difficulties. At some point in time, it was down entirely, and NRO's were instructed to track their activities in paper files.

In early July, 2018, the Employer began an investigation of the entire Campergate saga. As a result of that investigation, the Grievant was charged with the following rule violations: Rule 86, Failure to properly handle evidence/recovered property; Rule 82 - Failure to file, submit or log a report; and Rule 87 - Failure to take proper enforcement actions. The specific allegations relating to these violations were that the Grievant entered the camper without proper permission on January 17, failed to properly enter the credit card which he found on that date into evidence, failed to complete a narrative in RMS relating to the information received regarding the credit card and failed to properly secure the camper on January 17, 2018 resulting in its later theft.

The instant grievance was timely filed and proceeded through the grievance procedure without resolution to arbitration.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 19 -DISCIPLINARY PROCEDURE

19.01 Standard

No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause. ...

19.05 Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. At the Employer's discretion, disciplinary action shall include:

1. One or more written reprimand(s);
2. One or more fines in an amount of one (1) to five (5) days pay for any form of discipline ...
3. Suspension;
4. Leave reduction of one or more day(s);
5. Working suspension ...

However, more severe discipline may be imposed at any point if the infraction or violation merits the more severe action.

The Employer, at its discretion, is also free to impose less severe discipline in situations which so warrant. ...

POSITIONS OF THE PARTIES

Employer Position: The Employer contends that it has demonstrated that it had just cause to discipline the Grievant with a three day working suspension for the three itemized rule violations. The evidence demonstrated that the Grievant found a credit card at the scene of the breaking and entering, and prepared a subpoena to determine its ownership and value. However, rather than treating it as evidence and properly logging and securing it, he allowed it to be placed in the lost a found, a fact first learned by the Employer at hearing in this matter. Despite this late revelation, the question of why an item which was clearly potential evidence in the breaking and entering investigation was not treated as such is unexplained. It was not logged as evidence, stored as evidence, or properly noted in RMS. The second charge relates to the failure to log both this piece of evidence as well as the Grievant's obligation to update RMS and complete the final reports on the theft investigation. Even after being requested to do so in July, the Grievant had still not done so as of August 15, 2018. The Grievant acknowledged that the case was completed when property was returned to Cummings in May. There was insufficient reason for the failure to update and close the case three months after that time. The Grievant, who is an experienced investigator, acknowledged at hearing that he did not have

consent to enter the camper on January 17. That consent was not obtained until after the entrance had been improperly made. There was no emergency compelling this action and it was completely unwarranted. Finally, the Grievant failed to take appropriate action to secure the camper after the breaking and entering. The camper could and should have been towed to a secure storage facility, but instead was left at the site with the end result being that it was stolen. The three day suspension here was clearly warranted and for just cause.

Union Position: The Union argues that the Employer has not demonstrated just cause for the discipline in this case. The Union notes initially regarding the charge of failure to properly handle evidence, that it was Sgt. Ferguson, and not the Grievant, who took possession of the credit card found at the campsite. While the Grievant found the card, he turned it over to Ferguson who made the decision to place it in the lost and found consistently with policy regarding items found and valued at less than fifty dollars. The Employer was aware that the card had been placed in the lost and found based upon Ferguson's statements during the course of the investigation that he believed that was what had been done with the card. The charge of failure to submit or log a report is similarly without just cause. By the time that the Grievant returned from leave, the camper had been located, and it appeared clear that it had been removed with Cummings' knowledge by people with whom he was associated. By May, it and all other property seized was returned to Cummings. When the final report was requested, the Grievant was inundated with serious cases which demanded attention. He did ultimately upload the final report as requested, although the date of that event is unclear. Significantly, the Union notes, there was no written rule with regard to the use of RMS until December, 2018, well after the events and the discipline here. Regarding Rule 87, the charge relating to securing or removing the camper, the Grievant was aware that there were ongoing discussions with Captain Cox and other NRO's regarding securing the camper after the breaking and entering. While he was aware of ongoing discussions about this, he was not directly privy to them. Ultimately, he was not responsible for the decision to tow the camper. Finally, regarding consent to enter the

camper on January 17, the Grievant was aware that Cummings was in jail and the camper was not actively being used as a residence. Cummings, as the victim of the crime, had given implied consent for the entry which was for the purpose of inventorying missing items, and not seizing evidence. The Employer has not established just cause for the discipline, and the grievance should be sustained in its entirety.

DISCUSSION AND ANALYSIS

This being a case of disciplinary action, it is clear that the burden of proof to demonstrate just cause for the discipline by a preponderance of the evidence is on the Employer. In order to meet that burden of proof it must be demonstrated initially that the Grievant committed the offenses with which he is charged and that the commission of those offenses warranted the degree of discipline imposed under all of the circumstances prevailing at the time. In this case, the Grievant is charged with three separate rule violations with four underlying allegations of misconduct, all of which are related to the breaking and entering and theft of the camper at East Fork State Park.

While the Grievant was assigned as the officer in charge, or “owner”, of the incident of the theft of the camper, all of the three charges and four specifications against him in this case arise out of the breaking and entering of the camper on January 17, 2018. The first charge specified in the October 5, 2018 disciplinary notice is that the Grievant, with two other officers, entered the camper to inventory its missing contents without permission. The Grievant admitted that permission from Cummings, the apparent resident and owner of the camper, was not obtained prior to the entry. The Grievant in his testimony attempted to justify the entry on the basis that the officers were aware that Cummings was in jail, and therefore the trailer was vacant or abandoned. The Union also noted that the purpose of the entry was to take an inventory on behalf of the victim of a crime, and not to search for or seize any property pursuant to a warrant

or subpoena in order to bring charges.

The problem with these arguments, is that there has been no law or regulation provided to the Arbitrator which would support the proposition that law enforcement officers have the right to enter a private dwelling to investigate a crime, either on behalf of the victim or to seek information on the perpetrator, without a warrant, subpoena or other official authorization for the entry in the absence of an emergency. The entry to inspect and inventory missing items was no less an unauthorized entry because its purpose was to aid the victim. The knowledge that Cummings, as the known resident, was in jail, does not alter the fact that the camper was being used as a private dwelling. The circumstances would have been no different if Cummings was away on an extended business trip. Although the camper was vacant, it was not abandoned based on the facts known to the officers at the time.

The NRO's were aware that its resident had been detained, and knew his whereabouts. The fact that Cummings seemed to implicitly approve of the entry after the event does not alter the crucial point that, at the time of the entry, he had not given his consent. There were no exigent circumstances which prevented the Grievant and other officers involved from obtaining Cummings' consent prior to the entry, and it would have been a simple matter to do so. The entry without permission was not justified in the circumstances presented in this case, and discipline for this offense was therefore for just cause.

The next charge against the Grievant is that he failed to enter the credit card found at the campsite into evidence even though he obtained a subpoena to determine the owner of the card. The Grievant testified that he failed to take this action because he gave the card to Ferguson who appropriately placed it in the lost and found since it was valued at less than fifty dollars. This contention, however, ignores the fact that at the time the Grievant found the card he was unaware of either its owner or its value. He clearly believed that it might be of evidentiary value at the time or he would not have sought a subpoena to locate its owner. It was entirely possible that the card was owned by the perpetrator of the breaking and entering of the camper. The

argument that since it belonged to Cummings and had no value it was lost property rather than potential evidence, requires twenty-twenty hindsight. Based on what was known at the time, there seems to be little doubt that the card should have been treated as evidence. Since the Grievant both found the card and prepared the documents to obtain a subpoena, he should have taken the responsibility to also appropriately log and store the card as evidence.

The Grievant's responsibility for failing to adequately secure the camper on January 17 is less clear. As noted above, the Grievant was not the owner of the breaking and entering case. He was aware at the time that there had already been discussions regarding towing the camper, and it had been determined that it was unsafe to do so due to the inability to retract the pop up and weather conditions. The Grievant was further aware that higher ranking officers were involved in those discussions. It is therefore not entirely clear that the Grievant had the authority to make a determination regarding towing the camper.

Further, it must be noted that the charges on this point presume that the failure to tow the camper resulted in its theft several days later. The charges state that "You failed to take action to secure the camper on or about January 17, 2018; the camper was reported as stolen from East Fork State Park on or about January 21, 2018." It is not entirely clear, however, that the removal of the camper was actually a theft since it appears to have been executed by individuals with whom Cummings was associated. This gave rise to the consideration of filing charges of filing a false report against Cummings. This raises a significant question as to whether or not the failure to tow or otherwise better secure the camper was in fact the proximate cause of its removal from the campsite. The Employer has not demonstrated by a preponderance of the evidence that the failure to better secure or tow the camper was the proximate cause of its ultimate removal from the campsite.

The final charge against the Grievant is that he failed to properly complete a narrative in RMS regarding the information which he received pursuant to the subpoena concerning the credit card found at the campsite. The Grievant testified that the information regarding the

credit card was maintained in his paper file on the investigation. He additionally emailed that information to Capt. Cox. The Employer pointed out that even if this was the case, the failure to upload information into RMS results in an inability of others to discern what work has been done on an a case and to coordinate work. Since, as was the case here, multiple officers may work on different aspects of a single investigation or related investigations, there is no doubt that maintaining information in a central accessible location is of vital importance.

The problem with the discipline of the Grievant for failing to upload a narrative about the credit card information, however, is that there were no clear rules or requirements regarding the preparation of narratives or the use of RMS at the time of these events. It is axiomatic that employees must be aware of what is required before being disciplined for their actions. Employees cannot be expected to conform their conduct to expectations which are not clearly spelled out in rules or policy. The failure to provide clear guidelines often results in confusion and a lack of understanding as to precisely what is expected. Without knowledge of clear expectations, employees simply cannot be held responsible for a failure to meet them.

In January, 2018, RMS was a new system which had recently been put into use. Significantly, there was no evidence that at that time there existed any written policy regarding either the preparation of written narratives or expectations for the use of RMS. Those policies were not implemented until December 1, 2018, almost a full year after these events. While there was an email in December, 2017 reflecting that despite its difficulties, the RMS system would be used going forward and NRO's needed to adjust to its use, it was not until the December 1, 2018 policy was promulgated that there were any clearly defined rules for the preparation of narratives and the requirements for their uploading into RMS. In the absence of clear requirements for completing narratives and uploading information into RMS, the Grievant did not have sufficient notice of what was expected in this regard, and the discipline for his failing to do so is without just cause.

It must finally be noted that at hearing the Employer argued that the Grievant was also

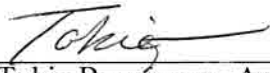
guilty of failing to complete the final report on the camper theft and close out the case in a timely manner. While it appears that the Grievant did unduly delay the close out of the case, this allegation was not part of the specifications in the charges levied against the Grievant. The October 5, 2018 charges do not make any reference to this alleged offense. The only reporting lapse relates specifically to the credit card. There is no additional mention of any other missing or delayed reports. Article 19.04 clearly requires that the Grievant be given written notice which includes a statement of the charges and a summary of the evidence prior to disciplinary action. Since there was not statement that the failure to timely complete the final report of the theft investigation was included in charges against the Grievant in the October 8, 2018 charges, this allegation cannot now serve as an additional basis for the disciplinary action.

Having determined that the Employer has met its burden of proof to establish just cause for two of the four specified offenses levied against the Grievant, the question which remains is that of the appropriate disciplinary action. The offenses which the Grievant committed, that is, entering the camper without permission and failing to treat the credit card appropriately as evidence, are not trivial in nature. These actions do warrant some disciplinary action. Rules 86 and 87, which are applicable to these offenses are listed in the Employer's disciplinary grid as generally warranting either a written reprimand or suspension for the first offense. Rule 82 warrants a written reprimand for the first offense. Since, however, two of the four charges have not been demonstrated to be for just cause, it seems appropriate to reduce the disciplinary suspension by half. The three day suspension will therefore be reduced to a one and one half day suspension.

AWARD

The grievance is sustained in part. The discipline will be reduced to a one and one half day suspension. The Arbitrator will retain jurisdiction for thirty days from the date of this Award to resolve any disputes as to remedy.

Dated: July 23, 2020



Tobie Braverman, Arbitrator