

IN THE MATTER OF ARBITRATION BETWEEN

Ohio State Troopers Association (OSTA)
Union

And

Case no. DPS 2020-731-01
Marty Ferguson Grievant
Three 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 October 9, 2020 at OSTA headquarters. Elaine Silveira represented Grievant. Grievant was present and testified. Other Union representatives were present.

Lt. Jacob Pyles represented the State Highway Patrol. (OSP) Other Management representatives from the OSP and Office of Collective Bargaining were also present.

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 and all were admitted during the hearing.

The decision issued within stipulated time limits.

Issue

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

Applicable CBA Provisions

Articles 19; 20

Background

Grievant was assigned as a Trooper working at the Parole Board in

Columbus Oh. This is a special assignment. Grievant is normally assigned to the Delaware Post.

His date of hire was March 22, 2001.

Ferguson was charged with violation of DPS 4501:2-6-02 (I) (1) and (4):
Conduct unbecoming an officer.

Grievant has a disciplinary history consisting of a written reprimand issued in September 2019.

The three day suspension was issued March 11, 2020.

It was timely grieved.

Summary of FACTS

Grievant was disciplined for events arising occurring during a Parole Board hearing. He was assigned to work security which is an off duty detail. As the State Public Defender Erica Young [PD] assigned to the next case being called was taking her seat at counsel table, Grievant pulled the seat from under her. The PD fell on her backside, made remarks to the Grievant, calling him an “asshole”. She was not injured and was laughing. She then took her seat without further incident. Grievant was laughing as well. He did not apologize then or ever.

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The events were recorded on video. The events were undisputed. The Parole Board members did not see the events, but two interested parties were present as were several witnesses including Trooper Patrick White, staff from the Parole Board, as well as other persons identified in the administrative investigation. [AI]. These persons included offender family members as well as the Parole Program Supervisor and victim advocates. Victim family members would not have seen the incident due to the nature of the recording.

Per White [who did not testify] Ferguson’s only comment at the time was “That’s our [the PD] relationship. It’s how we act around one another.” White

¹ In hindsight, he had recognition of the inappropriateness of the act in that time and place, and the effect it would have on perception of the OSP.

described the “gasping” reaction allegedly made by the victim’s advocates who were present.²

OSP’s witness was Sgt. Laura Taylor who conducted the Administrative Investigation (AI) .

The Union called Grievant as its witness.

Employer Position

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

The incident put the OSP in a bad light. The incident was embarrassing; the fact the victim was not hurt and knew it was a prank in no way diminishes the poor judgment displayed and the effect such a witnessed event in that venue has on the OSP reputation.³

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

Union Position

The discipline is overly harsh and punitive. The PD knew and understood it was a prank. She was not hurt and did not initiate the complaint.

The discipline is arbitrary and capricious as Grievant is a very long tenured employee. He would not have grieved a one day suspension. He recognized in hindsight that his conduct was not becoming. As such discipline is excessive and not progressive, it is not for just cause. The grievance should

² White described conversations allegedly between himself and the Parole Board Chairperson occurring the next day. White himself reported the incident to the OSP the same date it occurred.

³ The Parole Board Chairperson said Grievant Ferguson was not welcome to return for the detail but Trooper White was. See also comments made in the Hearing Officer’s report, Jt.Ex. 2. Tab B. The fact Grievant was no longer permitted to work that detail is part of the written record in this matter. It was an appropriate consideration by the Employer in assessing the level of discipline as the “client” was adversely affected.

be granted so that the discipline should be modified to a one day suspension.

Opinion

The Employer bears the burden of proof. The burden in a discipline case such as this is preponderance of the evidence.

As the events are undisputed, the issue is the appropriateness of the discipline. The Umpire was not convinced by the Union's arguments for modification. In many cases, the Umpire is swayed by a pristine or nearly pristine service record and/or a failure by the Patrol to explain its rationale for choosing a harsher over a lesser discipline. In this matter, no such "mitigation" supports a modification.

The Parole Board is a solemn proceeding. It is a quasi-judicial, administrative event, where a record is made and a prisoner's fate is determined. The public, family members, Parole Board employees, victim relatives and advocates and other interested parties are present.-whether remotely or in person. The crimes being reviewed for Parole Board action are serious felonies- rapes and murders by way of illustration. The venue is not one for practical jokes or levity-in any circumstance. There were multiple other persons present who were directly involved not ancillary and had negative reactions to what was witnessed. This was not a "private" "just between us" incident of horseplay. Had it been, there would be scant likelihood of it becoming a disciplinary event.

The fact that the victim of the joke was not the reporting party nor seeking to avenge her treatment is irrelevant.⁴ Clark was quite clear in her statement that she did not want to report it but was compelled to by various other involved parties.

Grievant is not able to explain his poor judgment in any manner that showed he timely recognized the clear inappropriateness of his conduct in terms of time and place. His "prank" was witnessed by numerous persons, none of whom thought "Ha ha ha ha". Several were dismayed, including his co-worker,

⁴ The "optics" cited by the PD were that of a 'cop being mean to a PD'. She also cited the fact that her client had supporters in the room, further aggravating the optics. The umpire agrees.

Trooper White. White was concerned enough to make a report himself-that same day.

Grievant clearly thought the joke was ok, the day/time of, as no apology to the PD or anyone else present was immediately forthcoming. It was fortunate that PD was not injured, as the aftermath then would have been quite different. But the lack of injury is in no way a mitigating factor.⁵

The Umpire found such lack of judgment as to time and place for “joking” sufficiently lacking to support the discipline. This was not a recent cadet or new Trooper. The level of experience of the Trooper militated against mitigation. The Umpire finds such discipline to be non-discriminatory. It was neither arbitrary nor an abuse of discretion.

AWARD

The grievance is denied.

IT IS SO HEREBY ORDERED.

S/ Sandra Mendel Furman

Sandra Mendel Furman, JD, NAA

Umpire

Issued October 11, 2020 in Columbus, Oh

Certificate of Service

The Award was issued by electronic email to the parties’ representatives on this same date.

s/ Sandra Mendel Furman

⁵ In this era of heightened awareness about gender roles, the optics of a male Trooper pulling a chair out from under a female PD- were also concerning. The PD occupies an integral role on the “other side” to the usual law enforcement role held by Troopers in a courtroom setting. It would in no way be obvious to observers that the principals enjoyed a comfortable, joking rapport. All they could see was a male security officer in OSP uniform making a female PD fall on her backside as a prelude to her acting as a representative for the prisoner. This was undisputedly “conduct unbecoming.”

As an additional aside, the PD was noticeably wearing a wrist brace. This was not favorably weighted by the umpire in considering whether the poor judgment displayed by Grievant on the date, time and place of the horseplay deserved to be mitigated by just cause considerations. The lack of injury was just fortunate circumstance. The totality of circumstances were considered: the fact of her obvious prior injury served as an additional factor to confirm the appropriateness of the discipline imposed.