

IN THE MATTER OF ARBITRATION BETWEEN

Ohio State Troopers Association (OSTA)
Union

And

Case no. DPS 2020-3047-01
Chad Schell 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. Larry Phillips represented Grievant. Grievant was present and testified. Other Union representatives were present.

Lt. Aaron Williams 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.

The OSP called Sgt. Bass who conducted the AI and Captain Kemmer, who described proper canine handling.

The Union called Grievant as its witness. The Union also called an experienced former law enforcement officer Eric Stambro who trains K-9s and their handlers for use in detection and arrest.

All witnesses were sworn and advised of the strictures of the Motion to Separate.

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. These will be discussed below as relevant.

The decision issued within stipulated time limits. [An extension was requested by the Umpire and granted by the parties.]

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 with the Cleveland Police Department [CPD] on an assignment known as Criminal Patrol. This is an arrangement between the CPD and OSP due to the nature and amount of crime in certain Cleveland neighborhoods. He was familiar with the neighborhoods and streets involved in the current incident under review.

His date of hire was 9/12/2012.

Schell was charged with violation of DPS 4501:2-6-02 (Y)(2):

Compliance to Orders.

A member shall conform with, and abide by, all rules, regulations, orders and directives established by the superintendent for the operation and administration of the division.

The specific charge was that Grievant deployed his canine on two suspects without having proper justification to do so.

Grievant has a disciplinary history consisting of a written reprimand issued in January 2019.¹

The three day suspension was issued August 12, 2020.

It was timely grieved.

Summary of FACTS

Grievant is a canine handler. He has received two recent evaluations indicating many areas wherein he exceeded expectations.

¹ Review of the discipline in Jt. Ex. 3 indicated it was unrelated to the matters in contention herein.

He was disciplined for events arising on March 4, 2019 occurring from two attacks made on the same date by his canine Belgian Malinois Jimmy in the course of an arrest and pursuit within the City of Cleveland.

He received a radio call from Trooper Skipper that date that three persons were in a vehicle under pursuit by him for speeding and running stop signs. The occupants were two white males and a white female. The vehicle had crashed and the occupants were fleeing on foot.²

Grievant joined in the pursuit. While in the neighborhood identified by Trooper Skipper, he was stopped by a male citizen named Michael Pobega who advised him of the direction the suspects were fleeing by foot.

According to Grievant, he was also provided hand gesture and verbal information by a female standing at the fence line of nearby property that a gun may be involved. Grievant stated he acknowledged her information by the phrase “alright” and he took off after the suspects which he soon saw seconds after getting the information.

Grievant identified the suspects by their clothing walking on a sidewalk at the next corner almost immediately after he left Pobega [and the unnamed never identified woman at the fence line]. When he pulled behind them, the two suspects separated and ran in different directions. Grievant retrieved Jimmy and took him off leash.

Jimmy, hearing the “here, here voran” command from Grievant then took off and apprehended the female. Grievant stated that that he had no intent for the dog to apprehend the female. Two CPD officers appeared soon after to render

² There are multiple other conflicting matters in the narratives: whether there was/was not a black male involved; which was the person wearing the red/reddish orange jacket; a missing shoe of one of the car’s occupants. None of these are central to the determination of just cause.

her assistance. Grievant did not search the female for a firearm nor advised the CPD officers attending about a possible firearm. They [CPD] did pat her down.

After moving his vehicle to another nearby location Schell was met by two other CPD officers. As the male suspect was fleeing on foot, again canine Jimmy was given the “voran” command followed by warnings and the suspect was ultimately apprehended after fleeing on foot and being chased. Both suspects were taken to the hospital for medical treatment for the bites received and criminal charges followed.

Due to the canine apprehension the incident was reviewed pursuant to OSP policy beginning in late 2018-early 2019.³

OSP Position

The discipline is within the grid; is commensurate; is nondiscriminatory and no abuse of discretion exists such as to mitigate the discipline. The discipline is for just cause and the grievance must be denied.

OSTA Position

Grievant reacted appropriately with all the facts he knew at the time. He acted consistent with his training, policies and procedures. It was exigent circumstances-a pursuit with the belief a firearm was involved- and Grievant performed as trained and expected. Other superior officers on scene could have/should have taken charge of locating the suspected firearm. The discipline is without just cause. The grievance should be granted in its entirety.

³ Grievant had been involved in multiple canine apprehensions over his tenure. No prior incident resulted in discipline. It was noted that training is a possible outcome for an incident where the handler's actions do not meet standards. Grievant was an experienced handler with many years of prior training.

Opinion

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

The issue is whether or not Grievant did deploy his canine on one or two occasions within the same incident on March 4, 2019 without justification. The umpire concluded that the greater weight of evidence is that he did. He is an experienced trained canine handler. Multiple examples of prior deployments were made part of the record by OSTA. This is not a rookie who needed more training. Grievant himself stated that he had the highest number of canine deployments in the State.

The record consisted of Grievant's testimony, that of an experienced independent canine trainer-handler; the AI conducted by and reviewed by Sgt. Bass, and Capt. Kemmer.⁴

The AI was exhaustive and was accompanied by a disk drive/thumb drive of camera shots and audios and real time recordings from CPD body cameras and in car cameras. The umpire watched the videos at the hearing and listened to the recordings [some of which were difficult to decipher] and again at her office. She reviewed the entire record, including all exhibits presented by the OSP and OSTA.

The fact that the record clearly demonstrates that no warning was issued by Grievant **before** the "voran" [apprehend] command was issued makes the case relatively simple. In all the OSP procedures/policies a command to apprehend requires a warning first be issued. OSP Ex.4.⁵ It is uncontroverted that this did not occur vis a vis the female. The "exception" is the existence of exigent circumstances and application of the so called "Graham" test.

⁴ The Union pointed out that one of the persons filling out a report related to the incident-Lt. Payer-received discipline in the form of a demotion for making up false narratives about Troopers at an unknown date and time. This in no way changed the non disputed facts. The investigation was not unduly biased nor tainted by this singular statement by Payer. Payer was not a principal in the investigation.

⁵ OSP Ex. 3 states "Handlers will not use the canine in bite situations for misdemeanants who do not pose an immediate threat to officers and citizens." All Grievant knew at the time was this was a traffic violation situation where the driver/occupants crashed and fled the scene on foot.

The Graham test standards are incorporated into OSP 203.39 and set forth in the Canine Handler's Manual. The standard set forth therein states in relevant part:

The canine handler shall give a verbal warning to the suspect advising that the canine will be deployed if the suspect does not immediately comply with the handler's or other officer's order to stop or surrender, unless exigent circumstances exist such that giving an order would endanger the handler or other officers.

There was no evidence that either the female or male suspect was endangering the handler or any officer. The only basis for "endangering" would have been if there was a known or suspected firearm present.

Reviewing OSP-203.39, Grievant did not "exhaust all reasonable means to effect apprehension without incurring a canine bite." He stated that he did not intend for the canine Jimmy to bite the female passenger; that he didn't know she had been attacked until she screamed. See p 12 AI. This is concerning on all levels.⁶ The canine had of course been given the voran command; this was audible on the videos. Grievant admittedly clearly did not have control of Jimmy vis a vis the female suspect.⁷ This in and of itself is a concern that is a reasonable predicate for an investigation and discipline.

As stated the only possible excuse for not giving such a command is the existence of exigent circumstances. OSTA argued that such circumstances existed; OSP stated to the contrary. The umpire agrees with the OSP.⁸

⁶ It was suggested by Capt. Kemmer that the warning should have been "Police. Stop or I will release my dog". The warning is essential as a safety measure to avoid apprehension and alert any other bystanders/law enforcement personnel present. He also commented that this was a traffic pursuit: existence of drugs was an after the fact discovery. Canines are not used on misdemeanor suspects without other factors being present such as obstructing the administration of justice.

⁷ His conversation with another CPD officer while not probative of whether or not Grievant violated OSP procedures is illustrative of the fact that dog deployments require a protocol for sister agencies as well. CPD policies and procedures are not binding on the OSP.

⁸ Grievant had been advised before he arrived on scene that Trooper Hosey was en route to assist.

The Graham v Connor US Supreme court standard for use of force is utilized for canine deployment. Graham was not a canine case, but its principles apply. The test is summarized at p 5 of OSP Ex. 3.

The mandatory verbal warning prior to canine deployment is only avoidable if “*exigent circumstances exist such that giving a warning would endanger the handler and/or other officers.*” OSTA argues this analysis is in the nature of Monday morning quarterbacking. It is. But nevertheless use of force will likely always be reviewed in the rear view mirror, recognizing Troopers are making in the moment judgment calls affecting themselves and others-often in life or death scenarios.

The umpire recognizes the stresses and the pressures involved of acting in the moment. But these decisions made in the moment must be consistent with training and experience and consistent with well-known and established procedures.⁹ Nothing in these facts in this instance save the alleged possibility of a gun would have allowed Grievant to deploy Jimmy without a warning. But this was clearly no excuse at all for the deployment against the female-at the barest minimum. Grievant claimed in cross examination that he made a deliberate choice not to give a warning. That choice resulted in a just cause discipline.

Weighting the scales against Grievant was his statement that an unknown female witness stood at a fence line and spoke to him and alternately verbally stated and gestured to him that a gun was involved. See AI pp.8-9. The fence line was 83 feet [nearly 28 yards] from his cruiser. She was never located/identified. Video/audio footage does not reveal her presence.¹⁰ Interestingly, in his grievance statement he does not claim that he spoke with

⁹ The OSP made a written statement to all personnel in 2/19 that all Response to Resistance [RTRs] involving canines would be reviewed. This incident occurred in March 2019. Grievant had notice of this policy.

¹⁰ The sole identified confirmed female is Ruth Ocasio, who was standing on her porch when Pobega was approaching Grievant’s patrol car. Nothing by way of a confirmation regarding Grievant’s assertions regarding a gun presence or exchange appears of record. Nothing confirms the verbal exchange with the female witness at the fence line beyond Grievant’s own testimony. There is no confirmation as to the existence of cinderblocks that the woman was purportedly standing upon as she spoke/gestured to Grievant about a gun.

her- he only acknowledged her hand gestures signaling a gun. Jt. Ex.2. His testimony at various stages of the investigatory/pre-disciplinary process was not consistent.

OSTA suggested that the first “ok” related to bystander Pobega’s oral report made while he was standing at the cruiser’s passenger window. Grievant then immediately thereafter said “all right.” -which the Union posits as being in response to the mystery female’s information about the suspect. Neither Schell’s tone nor volume were elevated. It strains credulity too far that Grievant was then acknowledging the pantomimed gun signal from the female and/or her verbal statement there was a gun involved. She is too far away to hear a word spoken at that volume and distance.

It is more easily believed that Grievant was either double acknowledging Pobega with an “OK; all right” or talking to himself in the moment of high adrenaline as a pursuit was in progress.¹¹

Pobega stated he was the only one who spoke with Grievant. Had there been an audible conversation with the third female it is highly unlikely that Pobega would not have heard it but Grievant would. The timeframe and the proximity would have made it extremely unlikely the conversation had it occurred not also have been heard by Pobega.

As further convincing the umpire that there was no such “warning” of a gun, is the undisputed fact that Grievant made not one single other officer of the CPD or OSP dispatch or Trooper aware of the firearm possibility *at the time of the events*.¹² All discussion with law enforcement personnel about the gun took place post apprehension of the two suspects. Grievant stated that the CPD patted down the two suspects. This is all at time of arrest.

¹¹ In later interviews/reports Grievant then stated “witnesses” saw the suspects pass a gun from one to the other. See pp. 5-6 of AI for details. This was unsubstantiated and was not repeated at the arbitration.

¹² Grievant did have a conversation with Lt. Thorne of the Cleveland License and enforcement division after the apprehensions where he claimed to have heard from a female resident that two males exchanged a gun. Thorne’s written email makes no mention of the gun. Pobega stated nothing about a gun.

No search for the gun was made at the time the male suspect was apprehended. Neither was any search made in the area the female was arrested. This gun search-had it happened- was according to Grievant not the job of his dual purpose canine after two apprehensions. But leaving a suspected firearm unaccounted for is not consistent with OSP practices and procedures. As Grievant was not disciplined for this it is stated as background to the whole events, but such a fact does not support mitigation of the discipline.

It was the greater weight of evidence that Grievant created an after the fact justification for two canine apprehensions which were not per procedure thereby bypassing the necessary and required warnings well established by policy and procedure.

Although in his AI Grievant claimed that he made multiple warnings to the fleeing male suspect, these warnings were all made after the dog was in pursuit. Any alleged warnings pre deployment were not recorded on any means. Thus the claim he gave warnings to the male suspect is uncorroborated by any other evidence.

Grievant's repeated training/receipt of policies was documented in OSP Ex.2. The fact Grievant had in the past issued a warning before a canine apprehension was documented in OSTA Ex.1. His multiple experiences with canine apprehensions were documented in OSTA notebook exhibit at Tab 2.

OSP also pointed out that Grievant should not have been conducting a search for the male subject absent assistance/participation from other law enforcement. See OSP 203.39; OSP Ex.3. Grievant denied he was conducting a search. See p11 of the AI. Certainly his own verbal description of the scene surrounding the male suspect's apprehension is a direct challenge to that assertion. This was not the charge for which he was disciplined so further discussion is unwarranted.

There was brief discussion at the hearing about whether or not the discipline issued was progressive, as an extant one day suspension at the time of issuance of the three day suspension was later overturned in arbitration but before this case was heard. The umpire notes that at the time the decision was

made to issue discipline, a three day suspension would have represented a progression. The after the fact result that the one day suspension was overturned is insufficient predicate for overturning the current discipline. The seriousness of the events herein: two suspects bitten after canine deployment without adherence to procedures with all of the training on RTR and canine deployment being known to Grievant was sufficiently serious so that the discipline issued was not arbitrary, capricious or discriminatory.

AWARD

The grievance is denied.

IT IS SO HEREBY ORDERED.

S/ Sandra Mendel Furman

Sandra Mendel Furman, JD, NAA

Umpire

Issued October 16, 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