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IN THE MATTER OF ARBITRATION BETWEEN
THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,
AFSCME LOCAL 11, AFL-CIO

AND

STATE OF OHIO, OHIO DEPARTMENT OF COMMERCE
Grievance No. 07-00-20140612-0005-01-07

OPINION AND AWARD

Arbitrator Meeta A. Bass

Award date: November 30, 2015

Employer Advocate:
John Dean
Ohio Department of Commerce

Jessie Keyes
Office of Collective Bargaining

Union Advocate:
Dan Ely
Staff Representative
Ohio Civil Service
Employees Association

Barbara Follman
Staff Representative
Ohio Civil Service
Employees Association

Larry Rector
Grievant

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NOV 30 2015
OCSEA - OFFICE OF
GENERAL COUNSEL

PROCEDURAL HISTORY

The Ohio Department of Commerce is hereinafter referred to as "Employer" or "Division". The Ohio Civil Service Employees Association, AFSCME, Local 11 is hereinafter referred to as "Union". Larry Rector is the Grievant.

Union submitted Grievance No. 07-00-20140612-0005-01-07 to Employer in writing on June 12, 2014 pursuant to the parties' collective bargaining agreement. Following unsuccessful attempts at resolving the grievance it was referred to arbitration in accordance with Article 25, Section 25.03 of the 2012-2015 Collective Bargaining Agreement.

Pursuant to the Collective Bargaining Agreement, hereinafter referred to as the "CBA" between Union and Employer, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on September 23, 2015 in Columbus, Ohio. During the course of the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. By agreement of the parties witnesses were sequestered. The parties were given the opportunity to submit post-hearing briefs on or before October 13, 2015, and submitted them in a timely manner. The record closed on October 13, 2015.

No issues of either procedural or jurisdictional arbitrability have been raised, and the grievance and arbitration were properly advanced before the Arbitrator. The parties stipulated to the issue as follows:

"Did the Ohio Department of Commerce violate the collective bargaining agreement by not allowing the Grievant to rescind his resignation? If so, what shall the remedy be?"

Pertinent Provisions of the 2012-2015 Collective Bargaining Agreement
ARTICLE 2 - NON-DISCRIMINATION

2.02 - Agreement Rights. No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement, nor shall reassignments be made for these purposes. ARTICLE 3 - UNION RIGHTS

3.01 - Access. It is agreed that the Agencies covered by this Agreement shall grant reasonable access to stewards, professional Union representatives and chapter officers, defined to include President and Vice President, for the purpose of administering this Agreement. The Employer may provide a representative to accompany a non-employee Union representative where security or treatment considerations do not allow non-employee access.

Joint Documents

1. The Contract between the State of Ohio and the Ohio Civil Services Employees Association, OCSEA, AFSCME Local 11 AFL-CIO, 2012-2015,
2. Grievance Trail, Grievance # 07-00-20140612-0005-01-07 including referenced 3-page attachment, 5 page attachment provided by Grievant at Step 3 Meeting, and Step 3 Response,
3. Larry Rector Resignation Letter, dated May 30, 2014,
4. Email from Anne Petit to Larry Rector, dated May 30, 2014 at 4:52 PM,
5. Letter to Larry Rector from Sandra Kellam, dated June 2, 2014,
6. Letter to Sandra Kellum from Larry Rector dated June 3, 2014,
7. Letter to Larry Rector from Sanda Kellam, dated June 12, 2014,
8. Larry Rector -Employee History on Computer ("EHOC").
9. Nicholas Chucales -EHOC
10. RE & PL Table of Organization, May 1, 2014

Employer Position

Employer contends that the issue raised in the grievance constitutes a straight forward example of an employee's resignation; Grievant made a voluntary decision to resign his position. Grievant tendered a written resignation letter on Friday, May 30, 2014 and the Superintendent of the Division accepted the resignation in writing on May 30, 2014. There is no violation of the CBA.

Employer contends that although Grievant was arguably emotional and upset at the time of the May 30th office meeting with his supervisors, Grievant voluntarily submitted his resignation several hours later. Grievant, upon returning to work on Monday, June 2, 2014 did inform the Superintendent of his desire to continue employment with the Department. The Superintendent informed Grievant that his resignation was accepted, and he had to discuss the matter with the Human Resources Director. Grievant, Superintendent and the Human resources Director met in the late afternoon, and Grievant did not raise the matter with the Human Resources Director but instead discussed his plans of travel and spending time with his family. Employer argues that the decision of Grievant to resign was voluntary.

Employer contends that the allegations of a hostile work environment by Grievant are an attempt to skirt personal responsibility for his actions. Grievant or other bargaining unit members who testified did not report these claims to the Office of Human Resources or an external enforcement agency in a timely manner. The lack of reporting prevented the Employer from investigating the allegations. After the grievance was filed, Grievant reported the allegations. The Department of Administrative Services, Equal Opportunity Division investigated his claims, and issued a finding of no probable cause. Employer asserts that it did not make the workplace situation so intolerable that a reasonable person would have felt compelled to resign.

Employer contends that Grievant provided no basis in the CBA to support the rescission of his resignation, and therefore, grievance should be denied. Employer requests that the Grievance be denied in its entirety.

UNION POSITION

Union contends that Grievant was constructively discharged when he resigned on May 30, 2014. Grievant's resignation was not voluntary but was motivated by his desire to escape an intolerable work environment. A supervisor in the Division targeted Grievant and two other investigators by harassment, inappropriate sexual talk and insulations, bullying and an increased workload over the years to make their work conditions unbearable for them in order to force their resignation or termination. Grievant and his two coworkers left their positions with Employer under adverse conditions caused by said supervisor.

Union contends that Grievant previously had submitted his resignation in the past due to the stress of the hostile work environment, and at that time Employer gave Grievant the option to take disability leave. Grievant was treated for both mental and physical affliction due to the stress of the hostile work environment. The psychologist report indicated that Grievant should not return to same work environment, but he did. The resignation of May 30th represented the culmination of years of mistreatment.

Union contends that no formal complaints were filed due to the fear of retaliation, and a belief that upper management including the Superintendent was privy to the harassment. Notwithstanding, the chapter president informed the agency EEO administrator of the behaviors, and because the incidents alleged were past any timelines for filing a complaint no action could be taken. The reporting of said issues however put the Employer on notice to monitor future behaviors of said supervisor. The employer was aware of the intolerable conditions and allowed said supervisor to engage in the same behavior without correction.

Union requests that the grievance be granted, Grievant be returned to his position. Grievant be granted back pay, and benefits restored, including any medical expenses incurred, seniority credits, PERS contributions and credits, dues paid to the Union, and otherwise made whole.

BACKGROUND

The following is a statement of those facts found by the Arbitrator to be true and necessary to the Award. To the extent that this recitation differs from any party's that is the result of determinations as to credibility, determinations as to credibility, determinations of relevance, burden of proof considerations, and weighing of evidence, both oral and written.

Grievant began employment with the Department of Commerce on October 14, 2008 as a rehire from layoff status. Grievant was an Investigator within the Division of Real Estate and Professional Licensing charged with the investigation of licensure law against broker and sales people. In this position Grievant was responsible for the verification of information in a complaint, background investigation, collection of exhibits, writing reports, and testifying at hearings as well as customer service telephone answering. Grievant went on disability leave on June 22, 2013. He initially tendered his resignation but the Superintendent gave Grievant the option to take disability leave. On October 15, 2013 his counselor provider indicated that Grievant "would be able to work in a quieter, calmer, lower stress position in current job", and on December 27, 2013 his medical doctor stated that Grievant "may return to work on 1/6/2014 to full duty." Grievant returned to work in his position as Investigator within the Division.

On Friday, May 30, 2014, a situation developed between Grievant and his coworker concerning his answering incoming phone calls; Grievant was on phone duty that particular day. Grievant had received a call with an inquiry that he was unable to answer. He sought advice from another investigator. While in the investigator's cubicle, Grievant continued to receive incoming

phone calls which were going to voice mail via speaker phone. A coworker shouted to Grievant that his phone was ringing, and he responded to her "I know (coworker) I am busy." Grievant observed said coworker entering into the supervisor's office, and he then approached her to apologize. Another exchange occurred between the two ending with Grievant calling the coworker a jerk. The supervisor then intervened which resulted in another exchange of words between Grievant and supervisor. There was insufficient evidence introduced to determine if the supervisor suggested that Grievant take the rest of the day off to calm down or whether he simply told Grievant to go home. Grievant and the supervisor ended up in the office of the Division Counsel where another exchange occurred. The Division Counsel then contacted the Superintendent while she was out for lunch. When the Superintendent returned, Grievant, the Division Counsel and said supervisor met in her office. During this meeting, Grievant was highly agitated and used profanity and other inappropriate language. The Superintendent attempts to "talk him off the edge" were unsuccessful. Grievant told the Superintendent that other people may kiss her ass but he was not going to and, the Holy Spirit told him to tell her what was going on in the Division. Grievant questioned the ethics of the management staff. He spoke about how said supervisor mistreated him in the workplace. The Superintendent advised Grievant that his actions at this point will result in discipline. Grievant then suggested his resignation; the Superintendent responded that the decision to resign was his to make but she was proceeding with discipline.

On May 30, 2014 Grievant tendered his resignation effective June 13, 2014. Grievant left his resignation on the desk of the Superintendent at approximately 4:30p.m almost two and half hours after the meeting concluded; the Superintendent was not present. On the same date at 4:52p.m. the Superintendent emailed Grievant and copied others that she received the letter of resignation, and that she delivered the same to Human Resources.

Grievant returned to work on Monday, June 2, 2014. Grievant immediately approached the Superintendent, apologized for his behavior at the May 30th meeting, and stated that he would like to continue his employment. The Superintendent responded that his resignation was accepted, and provided to Human Resources. Grievant had to discuss the withdrawal of his resignation with Human Resources. Grievant later discussed the circumstances surrounding his resignation with the chapter president.

The Human Resources Director met with Grievant and the Superintendent in the late afternoon of June 2, 2014 concerning his resignation. Grievant did not request to rescind his resignation during this meeting and the Human Resources Director did not have prior knowledge of any attempt to rescind. Grievant shared with the Director his intentions on travelling and spending more time with his family. During the course of the meeting, the Director handed Grievant the acceptance letter dated June 2, 2014. On June 3, 2014 Grievant mailed a letter indicating his formal intent to rescind his resignation. The Human Resource Director notified Grievant on June 12, 2014 that the decision of Employer to accept his resignation would stand.

At the time of separation, Grievant had approximately 24 years of service with the State of Ohio with no active discipline. Union filed its grievance on June 12, 2014, alleging a violation of the Article 2, 22 and 24, of the Collective Bargaining Agreement Union withdrew the allegation of Article 2 at the arbitration hearing. The grievance was not resolved within the procedure established by the collective bargaining agreement, and was properly advanced to arbitration.

DISCUSSION

Union did not prosecute the alleged violation of Article 3 but instead focused its attention and arguments on its position that Grievant's resignation was a constructive discharge. The basis for the instant grievance and Grievant's claim of hostile work environment and harassment is a series of alleged incidents with a Division supervisor, a remark that said supervisor wanted the Grievant along with two other coworkers gone from the Agency, and harassment of female coworkers by said supervisor. To prove this charge, the Union must demonstrate by a preponderance of the evidence that the resignation of Grievant was not voluntary and that his working conditions had become so intolerable that a reasonable person, not the Grievant alone, would have had no alternative but to resign. This test is objective, not subjective.

An incident of significance to Grievant occurred at a departmental retirement meeting of the former Superintendent on January 4, 2011; the entire division was present for the meeting. At that meeting there were discussions about the new governor and mayor, Grievant had announced his relationship with these political officials in this forum, and the alleged harasser who was a fellow investigator at that time stood and responded to the group that Grievant would be either working for the governor or mayor. After disclosure, Grievant testified the alleged harasser continuously badgered him by making the remark, he is either going to work for the governor or the mayor, in the hallways, in front of the customer service desk, on the elevator and other places in the division for almost a year and a half.

Also in 2011, the alleged harasser who was then only an investigator asked Grievant if his girlfriend had given him a blow job, showed him a nude photo of an Asian woman on his cell phone and asked if his "girlfriend's p***y looked like that", and referred to women with derogatory

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Employer originally hired said supervisor as an Investigator on July 6, 2010. Said supervisor was promoted from his investigator position to the investigator supervisor on October 7, 2012. On May 3, 2015 the supervisor transferred to another agency.

comments such as c***s. Grievant responded by telling him to get out of his face and he was interfering with his work. His immediate supervisor who heard the conversation asked Grievant if he wanted to report the incident. Grievant explained that he was so intimidated by his behavior he did not know what to do. He responded only to say, "you are the supervisor." The immediate supervisor who according to Grievant was a friend, a neighbor, and a carpool passenger of said alleged harasser who was then only an investigator did not report the incident to the Administration. While this conduct may have been actionable in 2011, Grievant took no further action to report said conduct to the Administration. His failure to report and continued his employment fails to support that the workplace was so intolerable as to remain in its employ. There was no other evidence that this type of behavior was on-going or continued as related to Grievant.

Approximately two weeks later Grievant heard the alleged harasser who was then only an investigator at this time ask his coworker if she was still f***ing both of her boyfriends. Grievant who found the conversation to be despicable and degrading to women reported the incident to his immediate supervisor. If true, said comments would have been actionable at that time.

On another occasion there was an enforcement meeting within the Division, Grievant and said supervisor who was an investigator at this time were in attendance. A discussion involving the computer system occurred. Grievant shared that it was his belief that the computer problems were common; his brother was one of the original design architects for BWC. The alleged harasser who was then only an investigator at this time made the remark that "if your brother was that good, why is he not working for the State?" Grievant responded that he was retired. Again, Grievant felt that this question was another form of harassment.

When evaluating alleged derogatory or harassing remarks, an Arbitrator will consider the remark, the nature of the remark, the context in which the remark was made, who was making the remark and their position, and

the environment of the workplace, and its effect. Here, this Arbitrator declines to find that this remark is harassment.

In the summer of 2011, his immediate supervisor's father died, and an office card was passed around for signatures. Grievant announced that he personally knew his supervisor's father. The alleged harasser who was then only an investigator openly commented that Grievant knows everybody. Grievant testified that he felt this statement, like the other statements made about his friends, are terrible comments for someone to make about a person and he found them to be a source of harassment. Grievant felt that said supervisor was intimidated that Grievant had friends.

Grievant testified there was no change in his behavior after said investigator was promoted to supervisor, and the harassment toward him continued. As part of his duties, Grievant had customer service telephone answering duties. Grievant believed that said supervisor and others while in said supervisor's office would laugh at his responses, especially when Grievant refused to give legal advice and would refer the caller to another department. Grievant did not report said conduct.

There was a game played in the office where pictures were placed on the wall, and the coworkers had to identify the worker associated with the picture. Grievant submitted a picture of his home. Said supervisor made a comment that Grievant did not know anything about the construction of a home. Grievant took exception to this comment because he and his brother built his home, and the knowledge he has about construction is applied in the workplace. In the context of the statement, the comment is not derogatory. Without other evidence denigrating his work place performance and ability, the comment is irrelevant.

Grievant did not directly report to said supervisor. There was no evidence that said supervisor interfered with any term or condition of Grievant's employment or his opinions factored in evaluating the Grievant's job performance, eligibility for promotion or any other component of employment. A

review of Union Exhibit 5 Question 12 does not attribute the interactions of said supervisor and Grievant as a contributing factor to his disability. To the contrary, the stress is attributed to multitasking, high level of concentration and memory for detail in his job duties.

Said supervisor did make a disclosure to another investigator that is disconcerting. According to this investigator, said supervisor had a list of three investigators which included Grievant that he wanted to get rid of. One investigator took an early retirement due to issues related to the increase workload, another investigator resigned in 2013 amid allegations of what appeared to have been allegations of actionable sexual harassment if timely reported, and now Grievant has resigned as well. She acknowledged that the chapter president told her to file a formal complaint with the EEO officer, but she did not for fear of retaliation. She sought legal counsel but ultimately resigned from her position because she "would rather give up fourteen (14) years with the State rather than continue to work" for said management. She testified that she overheard the alleged harasser who at the time was an investigator make fun of Grievant for residing with his mother, remarks about his friendships and his girlfriend.

Another investigator described his treatment of Grievant as immature; he characterized it as the football star versus the chemistry major. The football star has great skill in his own right but still feels elevated by stepping on someone else, and such was the interaction between Grievant and said supervisor. Said supervisor did not act in this manner all the time and most of the incidences occurred while the supervisor was still an investigator.

This supervisor's interpersonal relationships with his subordinates is lacking. However, the situations cited by Grievant as related to him do not provide evidence of a workplace that was permeated with discriminatory intimidation, ridicule, and insult that was sufficiently severe or pervasive to create a hostile or abusive working environment. The arbitrator is not persuaded that the remarks made by said supervisor about the Grievant's

family or friends were sufficient to compel a reasonable person to resign. While it may have been unpleasant for Grievant to work in such an environment, the treatment of said supervisor (and for most instances the actions of a fellow investigator) against him does not reach the level of severity required for a cognizable claim of constructive discharge.

Grievant described said supervisor "as negative and unprofessional." Grievant never complained to upper management about the conduct of said supervisor, and he did not complain to the Administration about his perceptions or advised the Administration that he thought the conduct of said supervisor made him uncomfortable. Grievant did report the incidents to his chapter president on several occasions. The chapter president advised Grievant and his coworker to file a complaint. Neither filed. But in response to a pattern of sick leave abuse notice, allegations of harassment by said supervisor surfaced and triggered an inquiry in which Grievant and other investigator shared their concerns. No action was taken because the incidents occurred in 2010 and 2011, personnel had left the Department, the lack of documentation, etc. In failing to timely report Grievant denied Employer the opportunity to take corrective action to remedy the alleged harassment. Moreover, the lack of filing timely grievances under the CBA as well as claims to the Office of Human Resources or an external enforcement agency undermines the allegations of a hostile work environment.

In the incident leading directly to the submission of his resignation, the alleged harasser did not in fact harass Grievant, but instead attempted to diffuse the incident with Grievant and his coworker. Grievant's suggestion that said supervisor manipulated this incident is unfounded. Finally Grievant waited over two hours after the incident to submit his resignation indicates that he had time to consider the ramifications of a voluntary resignation, and chose to terminate his employment.

In summary, upon the review of the record in this case, it is the Arbitrator's opinion that Grievant has not carried the burden of proof required to make a showing that he was the subject of constructive discharge. The arbitrator acknowledges Grievant's testimony that he experienced a great deal of stress as a result of his interactions with said supervisor and that he subjectively felt pressured to resign. The Arbitrator finds that Grievant was sensitive to said comments, and said supervisor made light of his feelings causing unnecessary frustrations for Grievant in the workplace. However, the arbitrator is not persuaded that Grievant's working conditions were so intolerable or unbearable that a reasonable person would have been compelled to resign. Further, the decision of the Superintendent to impose discipline for the comments made to her and other management staff during the office meeting of May 30, 2014 does not suffice as an adverse employment action to justify his resignation. Accordingly, the arbitrator concludes that Grievant's resignation on May 30, 2014 was voluntary, and was not a constructive discharge.

AWARD

Based upon my review and analysis of the evidence and the testimony, Grievant has failed to meet his burden of proof that it was reasonable for him to have resign in the manner that he did, and the circumstances giving rise to his resignation constituted a constructive discharge. There is insufficient evidence to show that Employer deliberately made his working conditions so intolerable that he would be compelled to resign. Grievance No. 07-00-20140612-0005-01-07 is therefore denied.

November 30, 2015

/s/ Meeta A. Bass
Arbitrator Meeta A. Bass
Dublin, Ohio