ARBITRATION DECISION NO.:
461

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Highway Safety,
State Highway Patrol,
Bureau of Motor Vehicles

DATE OF ARBITRATION:
February 28, 1992 and
April 1, 1992

DATE OF DECISION:
July 23, 1992

GRIEVANT:'
John W. Jackson, Jr.

OCB GRIEVANCE NO.:
15-02-(91-08-26)-0064-01-09

ARBITRATOR:
David M. Pincus

FOR THE UNION:
Michael Temple, Advocate

FOR THE EMPLOYER:
Edward A Flynn, Advocate
Paul Kirschner,
Second Chair

KEY WORDS:
Removal
Sexual Harassment
Notice

ARTICLES:
Article 2 - Non-Discrimination
§2.01-Non-Discrimination
Article 24 - Discipline
§24.01-Standard
§24.02-Progressive Discipline
Article 25 - Grievance

Procedure
§25.01-Process
§25.03-Arbitration
Procedures

FACTS:

Two female employees complained that the grievant sexually harassed them. Complainant 1 stated that the grievant patted her behind; she also stated that the grievant pulled her down onto his leg and began to gyrate and that the grievant pulled her pants down past her hips as she attempted to leave. Complainant 2 testified that the grievant told her that if she continued to associate with Complainant 1 that she would need "a strap-on device". The comment was regarded as attacking Complainant 1's sexual preference. At a meeting with the departmental chief, the grievant admitted making the comment to Complainant 2 but completely denied Complainant 1's allegations. After the Employer initiated its investigation even more complainants came forward with new allegations that the grievant had sexually harassed them also. Consequently, the grievant was placed on administrative leave without pay and, upon concluding its investigation, the Employer removed the grievant for sexual harassment and failure of good behavior.

The parties stipulated to the following facts: 1) supervisors were disciplined as a direct result of the investigation which led to the grievant's removal, and 2) if Witness 1 had testified she would have corroborated the grievant's testimony with respect to his meeting with his supervisor. The grievant was a Data Processor I with the Ohio Bureau of Motor Vehicles. He had occupied this position for 6 years.

EMPLOYER'S POSITION:

The grievant was removed for just cause. His actions clearly violated the sexual harassment policy set forth in the employee handbook which provided for removal as an appropriate sanction. The grievant's alleged behavior was sufficiently documented by witness testimony and statements. This evidence revealed that the grievant sexually harassed the complainants and many others via insults, suggestive comments, physical aggressiveness and sexually-inspired jokes. The grievant received sexual harassment training and was aware of the consequences for this type of behavior; nevertheless, the grievant created an intimidating and hostile working environment for female co-workers.

Witnesses testified that they repeatedly asked the grievant to refrain from such behavior, but the grievant persisted. The fact that none of the grievant's co-workers testified in the grievant's behalf was indicative of the grievant's poor character. The grievant's supervisors were disciplined as a corrective measure for their lack of awareness of the problem, even though they neither knew of nor condoned the grievant's behavior. The Union's attempt to portray the grievant's behavior as typical office "horseplay" was inaccurate.

UNION'S POSITION:

The grievant was removed without just cause and on the basis of unsupported hearsay. Acts of sexual harassment allegedly occurred over a considerable period of time; however, the Employer failed to provide the grievant with any notice that his behavior was deviant. Likewise, the Employer provided the grievant and supervisory staff with only sketchy training on sexual harassment. Further, the Employer failed to properly document the alleged training; references to sexual harassment in meeting agenda and random meeting notes did not constitute proper documentation to prove that the grievant had been put on notice that his behavior was improper.

The Union also challenged the completeness of the investigation. The Employer presented insufficient details and inconsistent witness testimony and statements. Considering the Employer's lax training and enforcement policies in this area, removal was too harsh a penalty. The Employer itself created an improper work environment in which sexual harassment flourished, and the Employer neither prohibited nor attempted to eliminate sexual harassment in the workplace. In fact, the Employer participated in and encouraged sexual harassment (e.g., sponsoring "calendar girl" contests). Considering the minor discipline the supervisors received, the grievant's removal was overly severe.

ARBITRATOR'S OPINION:

The grievant's behavior was obviously sexual harassment. In light of the grievant's excessive discipline record, the Employer had just cause to remove the grievant for sexual harassment and failure of good behavior. The Arbitrator found neither evidence that the Employer encouraged sexual harassment in the workplace nor defects in the Employer's investigation or training. Most bargaining unit witnesses who attended sexual harassment training with the grievant felt that the training was adequate. Moreover, the grievant was the only witness who claimed that he never received sexual harassment training.

Likewise, the grievant received sufficient notice. The employee handbook and training both put the grievant on notice that his behavior could result in removal. Further, the grievant was not prejudiced by the complainants, failure to come forward immediately; the grievant's behavior was so lewd that the complainants were understandably embarrassed, intimidated and fearful of retaliation. Neither was the grievant prejudiced by his supervisors, failure to act. The grievant was careful to harass his victims in isolated places at isolated times; therefore, his supervisors had no reason to know of his vulgar behavior. But even if the grievant did not receive sufficient notice, removal was proper because of the foul nature of the grievant's conduct.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

THE STATE OF OHIO AND
OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION
VOLUNTARY LABOR
ARBITRATION PROCEEDING

IN THE MATTER OF THE
ARBITRATION BETWEEN

THE STATE OF OHIO,
THE OHIO DEPARTMENT
OF HIGHWAY SAFETY,
STATE HIGHWAY PATROL,
BUREAU OF MOTOR VEHICLES

-and-

OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION,
LOCAL 11, AFSCME, AFL-CIO

GRIEVANT:
JOHN W. JACKSON, JR.

CASE NUMBER:
15-02(910826)64-01-09

ARBITRATOR'S OPINION AND AWARD

Arbitrator:
David M. Pincus
Date:

July 23, 1992

APPEARANCES

For the Employer
Marla Walsh,
Public Inquires Assistant
Arawana Tye,
Purchasing Agent
Shawn Grundey,
Data Processor I
Jeffrey Coleman, Chief
Cheryl Button,
Assistant Chief
Vicky L. Smith,
Office Manager
Ray Yingling,
Personnel Chief
Rachel Livingood,
Office of Collective Bargaining
Paul Kirschner,
Second Chair
Edward A. Flynn,
Advocate

For the Union
John W. Jackson, Jr.,
Grievant
Jeffrey G. Giffin,
Chief Steward
Michael Temple,
Advocate

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.01 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, the Ohio Department of Highway Safety, State Highway Patrol, Bureau of Motor Vehicles, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for the period July 1, 1989 through December 31, 1991. (Joint Exhibit 1).

The arbitration hearing was held on February 28, 1992 and April 1, 1992 at the Office of Collective Bargaining and OCSEA, Local 11, AFSCME, AFL-CIO. The Parties had selected David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to Submit post hearing briefs. Both Parties indicated that they would submit briefs. The briefs were properly postmarked and received on or before April 14, 1992.

STIPULATED ISSUE

Was the removal of John W. Jackson, Jr., the Grievant, for just Cause? If not, what shall the remedy be?

PERTINENT CONTRACT PROVISIONS

ARTICLE 2 - NON-DISCRIMINATION

Section 2.01 - Non-Discrimination

Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio or Executive Order 83-64 of the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, handicap or sexual orientation. Nor shall either party discriminate on the basis of family relationship. The Employer shall prohibit sexual harassment and take action to eliminate sexual harassment in accordance with Executive Order 87-30, Section 4112 of the Ohio Revised Code, and Section 703 of Title VII of the Civil Rights Act of 1964 (as amended).

The Employer shall not solicit bargaining unit employees to make political contributions or to support any political candidate, party or issue.

(Joint Exhibit 1, Pg. 2-3)

Section 24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have the authority to modify the termination of an employee committing such abuse.

Section 24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

A. One or more verbal reprimand(s) (with appropriate notation in employee's file);
B. One or more written reprimand(s);
C. One or more suspension(s);
D. Termination

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

(Joint Exhibit 1, Pgs. 37-38)

STIPULATED FACTS

The Parties agree that the issue is properly before the Arbitrator.
Supervisors were disciplined as a direct result of the investigation resulting in Mr. Jackson's removal.

Mary Callopy, if she had testified, would have corroborated the testimony of John Jackson regarding the meeting with Walter Arrowsmith.

Jim Pate would have testified that he had directed the supervisors to go back and train their employees. However, he had no direct knowledge of what Vicky Smith's supervisors sexual harassment training

consisted of.

CASE HISTORY

John W. Jackson, Jr., the Grievant, has worked as a Data Processor I with the Bureau of Motor Vehicles, the Employer, for six (6) years. His specific work location was the Temporary Tag Section in the Dealer Licensing Division.

The triggering events which gave rise to the administered discipline were discussed with Employer representatives on July 25,1991. Two (2) female employees, Marla Walsh and Kim Sizemore, met with Judy Hartley, a Supervisor, and Cheryl Button, Assistant Division Chief, regarding alleged sexual harassment inflicted by the Grievant. The following circumstances were discussed by Walsh and Sizemore.

Toward the end of July, 1991, Walsh returned from sick leave. The Grievant allegedly sat down in her chair and patted her on the behind, even though this activity was unsolicited. It was also alleged he pulled Walsh down onto his leg and began to gyrate. A brief confrontation ensued, and as Walsh stood up the Grievant pulled her pants down past her hips.

A few days later, the Grievant allegedly sexually harassed Kim Sizemore, a co-worker working in the Grievant's department as a temporary employee. The Grievant purportedly upset Sizemore by uttering a sexually explicit statement. He allegedly held a rubberband in his hand and told Sizemore if she continued to socialize with Walsh she would need "a strap on device." A statement viewed by Walsh and Sizemore as attacking Walsh's sexual preference.

On August 2, 1991, Jeffrey Coleman, the Chief of the Dealer Licensing Division, met with the Grievant. He allegedly admitted to the charges made against him by Sizemore, but denied the charges made by Walsh.

An investigation was subsequently conducted by Cheryl Button, the Assistant Chief, Ray Yingling, the Personnel Chief and Edward A. Flynn, the Labor Relations Officer. Although the initial stages of the investigation included interviewing Walsh and Sizemore, the investigation broadened as other related sexual harassment allegations surfaced.

On August 15, 1991, the Grievant was placed on administrative leave with pay. Shortly thereafter, on August 19, 1991, a Pre-Discipline meeting was scheduled to determine the veracity of charges dealing with sexual harassment and failure of good behavior (Joint Exhibit 3). Kathy Ludowese, the Meeting Officer, concluded just cause existed for discipline (Employer Exhibit 2B).

On August 20, 1991, the Grievant was advised his services were being terminated at the close of business on Tuesday, August 20, 1991. He was terminated for sexual harassment and failure of good behavior (Joint Exhibit 30).

On August 26, 1991, the Grievant contested the removal. His grievance contained the following relevant particulars:

"…

Mr. Jackson was terminated for 2 alledged (sic) incidents of sexual harrassment (sic) without just cause. All evidence provided by management has no merit and is hearsay. Termination is to (sic) severe considering management's lax enforcement of this policy. Supervisor used knowledge of this event to harass grievant, (i.e.) denied requested leave, telling him he was talking too loud. Grievant was not provided supporting evidence and names of witnesses against him when he was given his notification letter.

…"

(Joint Exhibit UA)

A Step 3 grievance meeting was conducted on September 9, 1991. The hearing officer denied the grievance. He concluded the various procedural claims were without merit. Regarding the events, it was determined the Grievant had sexually harassed a number of employees and the extent of the Grievant's actions were enormous.

The Parties were unable to settle the disputed matter. Neither Party raised procedural nor substantive arbitrability concerns. As such, the grievance is properly before this Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

In the opinion of the Employer, the Grievant was removed for just Cause. His actions clearly violated the Sexual Harassment policy articulated in the Work Rules and Procedures (Joint Exhibit 2A, Pgs. 5-8). As such, the Sanctions and Disciplines Section (Joint Exhibit 2A, Pg. 8) provides for the removal option which was properly applied in this instance.

The sexual harassment activities were well documented via testimony and a series of statements taken from a variety of office employees (Joint Exhibits 8A-8Y). These statements not only supported the events which triggered the investigation (i.e. the Walsh and Sizemore incidents), but surfaced other sexually harassing incidents which began sometime during 1987. Various examples were provided which indicated the Grievant's conduct constituted sexual harassment. He verbally abused fellow employees by insulting them and uttering suggestive comments and demands. The Grievant, moreover, engaged in physical aggressiveness such as touching, pinching and patting and regularly uttered sexually inspired jokes. This conduct resulted in creating an intimidating and hostile working environment (Joint Exhibit 2A, Pg. 5).

These various questionable activities were repeated frequently in spite of voiced objections. Witnesses asserted they frequently told the Grievant to stop, but he refused and took great pleasure in their uneasiness. In fact, Shawn Grundey, a Data Processor I, and Walsh testified the Grievant's abusive behavior continued after the investigation was initiated even though his position was clearly in jeopardy.

The Employer urged the Arbitrator to evaluate the previously described behavior by analyzing the behavior from the victims' perspective. It was posited a reasonable woman would view the Grievant's behavior as harassing. His persistence, after being informed these actions were unwanted, was thought to be especially perplexing.

Even though the Grievant felt he had a close personal relationship with his fellow employees, not one employee stepped forward in his defense. The Grievant's denials, therefore, were unsupported and the allegations were never disproved by the Union.

The Union's attempt to paint the Grievant's behavior as mere horseplay and representative of the "normal" office environment was also misplaced. The photos (Union Exhibit 4) introduced at the hearing did not represent the office's typical professional decorum. They merely depicted posed scenes taken during special functions. The scenes, themselves, did not approximate the Grievant's harassing behavior in terms of vulgarity, frequency and persistence. Photographs submitted as evidence were thought to be biased because of the timeframes depicted. Very few of the photos were taken after employees were placed on formal notice regarding the consequences of sexual harassing behavior; most were taken prior to 1986. As such, the sexual harassment training proved to be effective for all those except the Grievant. Even if the employees had somewhat approved of the Grievant's prior actions, once they said stop their prior consent could not be equated to mean perpetual consent.

The Employer asserted its representatives were never aware nor condoned the Grievant's behavior. Some admission that supervisors should have been more aware was acknowledged by the Employer. Each supervisor in the Grievant's chain of command was disciplined; not for condoning the behavior, but for their lack of awareness.

The totality of the Grievant's behavior never surfaced during its early stages partially because employees were fearful. They were fearful of retribution, social ostracism and embarrassment. This fear was partially confirmed during testimony provided by Walsh and Grundey. Walsh was harassed by the Grievant at work when he called her and acknowledged her forthcoming testimony. Walsh also received anonymous calls at home after the Grievant was placed on administrative leave and identified as a potential witness. Grundey reviewed a phone call she received from Charlene Collins, the former Union Chapter President. Collins told Grundey the Grievant knew that she was going to testify and that he had a copy of her statement.

The Grievant received sexual harassment training and was properly notified of the consequences associated with any deviant behavior. Notice took place via a number of alternative sources. Supervisors received training and subsequently trained their employees in staff meetings and other institutional settings. The Grievant, moreover, received the Employer's Work Rules and Procedures (Joint Exhibit 2A) which contain the Employer's sexual harassment policy. As Such, he was properly placed on notice.

Unequal treatment claims were also discounted by the Employer. Each of the examples proposed by the Union was rebutted based on situational differences. Oyler's allegations surfaced a pervasive amount of horseplay within the BMV warehouse; all of the employees were engaging in similar misconduct. A settlement was negotiated resulting in Oyler's five (5) day suspension. Oyler was involved in another sexual harassment allegation which resulted in a pending thirty (30) day suspension. A temporary employee failed to come forward, however, which resulted in no just cause finding by the pre-disciplinary meeting officer. The Employer also distinguished the cases based on the differing work environments. Oyler worked in the warehouse solely occupied by a male work force. The present matter, however, took place in an office environment where employees work in close proximity and the majority of employees are women.

The Employer did not engage in double jeopardy. Section 24.02 does not include counseling as a form of discipline even though the Work Rules (Joint Exhibit 2A) specify this potential option. As such, Pate's conversation with the Grievant was outside the domain of the present grievance even if one considered it as a counseling session. Meetings were never established prior to the pre-terminations meeting that could be characterized as disciplinary. Any preliminary meeting, moreover, did not represent the entirety of the Employer's investigation. The totality of the Grievant's conduct did not become known until the investigation was completed.

The Position of the Union

It is the position of the Union that the Employer did not have just cause to remove the Grievant. This conclusion was based on a number of posited arguments dealing with inadequate training; notice; condoning of sexual harassment by the Employer; lack of progressive discipline and unequal treatment.

Lack of proper notice was raised as a glaring due process violation. If one is to believe the Employer's contention that sexual harassment took place over a considerable period of time, the Employer should have placed the Grievant on notice about its intention to enforce the work rule. The Grievant, however, was never told his horseplay somehow violated the work rule; nor was he ever told by his co-workers that his actions were unwanted.

The Employer and co-workers had ample opportunity to provide the Grievant with proper and timely notice. His prior performance reviews (Union Exhibits 3A-C) raised certain questions regarding the Grievant's relationship with his co-workers. His prior discipline record, moreover, surfaced several incidents dealing with neglect of duty and failure of good behavior (Joint Exhibits C, 5D, 5G, 6A and 6E). As such, if sexual harassment had, indeed, taken place, the Employer should have confronted the Grievant during the early stages of his problem. In a like fashion. fellow employees filed a number of complaints concerning the Grievant's horseplay activities. Similar filings dealing with sexual harassment claims could have been readily filed if the alleged incidents did, in fact, take place.

Several training related issues also led to notice defects. A number of varying accounts were given by Employer witnesses regarding the days of their sexual harassment training. These accounts varied in terms of training duration and training content. It, therefore, appeared as if the supervisory staff was improperly trained in this critical personnel area. This Circumstance made it extremely difficult to properly train bargaining unit personnel.

The Employer failed to properly document the training received by the bargaining unit. References to sexual harassment on meeting agenda (Employer Exhibit 5) and meeting notes (Employer Exhibit 6) do not sufficiently support the degree of training required to overcome the notice defect raised by the Union. An effective training program would have educated employees and supervisors in the extensive nature of this problem and the various forms it might take in the workplace. Proper training format would have encouraged discussion among victims, perpetrators and their supervisors. Such an approach would have encouraged

subsequent reporting of any future violations and would have trained victims regarding proper response alternatives. Without these critical training elements, training protocols were deficient leading to notice defects.

The investigation which surfaced the various matters in dispute was also thought to be defective; which caused related proof concerns. The Employer failed to provide sufficient details concerning the various alleged infractions. Testimony and witness statements (Joint Exhibits A-Y) introduced at the hearing were so weak in terms of specifics that the accuracy of the allegations became quite difficult to verify. The fact gathering process, itself, proved to be suspect because of the manner the investigation was conducted. On more than one occasion, multiple statements were taken from individual witnesses. It appeared as though the Employer forced the creation of corroborating statements to establish its case, rather than allowing the evidence and testimony to speak for themselves.

The Employer violated Section 2.01 because it did not prohibit sexual harassment and failed to take action to eliminate sexual harassment. In fact. the Employer encouraged sexual harassment activity by willingly participating in sexually harassing episodes. A photo abut (Union Exhibit 4) was introduced which provided explicit examples of sexual harassment incidents which were condoned by the Employer. Many of the participants, moreover, were managerial personnel which had the explicit responsibility of eliminating this type of activity rather than providing sanctions by their direct participation. Other photos captured the involvement of employees who raised allegations surrounding matters presently in dispute. The veracity of their testimony was, therefore, disputed as well as their credibility because of their obvious dual standard. The Employer further poisoned the office environment by condoning a "Calendar Girl" contest for women and an "Ugly Leg" contest for male employees. Even if these contests were motivated for clarity purposes, they established an improper tone which encouraged the perception that similar actions would be condoned or viewed as proper office decorum.

Within this poisoned environment, even if the various allegations are proven to be true, the administered penalty was excessive and not commensurate with the offense. Progressive discipline should have been implemented based on the-nature of the allegations and the fact the Employer condoned and engaged in similar behavior. The Employer acknowledged its supervisors received discipline for failing to recognize the sexual harassing symptoms in the workplace. As such. the Grievant's removal seemed excessive in light of the minor discipline administered to the supervisors who fashioned an environment condoning the behavior in question.

The Union also asserted the removal was improper because the Grievant was disciplined twice for the same set of allegations; a clear example of double jeopardy. The Union charged that the Grievant attended a meeting with Arrowsmith and Pate where the sexual harassment allegations were aired in the presence of a Union Steward. Arrowsmith purportedly told the Grievant he expected him to return to his department and conduct himself in a professional manner. The Grievant asserted he asked Arrowsmith "if this was counseling" and Arrowsmith responded "he would be receiving a letter." Once the Employer selected the counseling option it could no longer remove the Grievant for identical acts of misconduct.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, and a complete review of the record, this Arbitrator is of the opinion the Employer had just cause to remove the Grievant for sexual harassment and failure of good behavior. None of the due process claims were properly supported. The Grievant's prior work record and excessive harassing behavior caused the administered penalty to be proper in this particular instance.

The Grievant was provided with proper notice concerning the work rule in dispute and the consequences attached to any violation. He received the Work Rules and Procedures (Joint Exhibit 2A) as evidenced by a signed receipt (Joint Exhibit 2B) dated November 20, 1988. This Arbitrator is also clearly convinced the training efforts engaged in by the Employer were sufficient in terms of providing proper notice concerning the sexual harassment policy. Virtually every bargaining unit witness discussed this training which took place via a number of sources: staff meetings, posted literature, division meetings and employee handbook

references. Each witness, moreover, was able to properly articulate the elements of sexual harassment, and based their knowledge on the training program put forth by the Employer. They all felt the training was adequate and purposeful.

Of all the witnesses providing testimony, the Grievant was the only individual out of the particular institutional setting who maintained he never received training. No other supporting witness from the Temporary Tag Section was offered by the Union. Jeffrey G. Griffith, a Chief Steward, had no idea of the specific training format used in the Dealer Licensing Division, which caused the Arbitrator to discount his testimony.

The Union attempted to place some of the notice problems on the victims; an interesting ploy in light of the sexual harassment charges. Witnesses were, however, able to provide plausible and realistic explanations for their nondisclosure surrounding the Grievant's prior activities. The Grievant's behavior was so lewd they were embarrassed, hesitant and intimidated. Some were also afraid the Grievant would retaliate if their actions caused his ouster and removal. Sizemore and Walsh finally became sufficiently upset and alarmed which caused the initial disclosure.

Management's lack of awareness was also raised as a weakness which led to improper and untimely notice. Again, testimony provided plausible justification for the supervisors' inaction. Several employees noted the Grievant only engaged in his bizarre behavior when the supervisors were out of sight. Also, a review of the witness statements (Joint Exhibits (8A-8Y) reveals a pattern of engaging in harassing behavior in out-of-the-way office locations. Even if the supervisors could have been more insightful, all of the attention in the world could not overcome the deceit engaged in by the Grievant.

Even though this Arbitrator has concluded proper and timely notice took place in this instance, the type and nature of the conduct engaged in is socially disapproved. As such, discipline without specific advance notice may be imposed without any due process sanction.[1]

In my judgment, the Employer, before administering discipline, made an effort to discover whether the Grievant disobeyed the work rule. The Employer, moreover, conducted the investigation fairly and objectively. Multiple interviewing sessions with witnesses do not establish per se due process violations. If anything, they represent a willingness to gather all relevant facts necessary to establish the truth of the matter asserted. The Union attempted to raise an inference unsupported by the record. The witnesses were never asked whether the Employer coerced them into testifying against the Grievant; and whether their recollections were twisted in an attempt to negatively impact the Grievant's defense.

Section 2.01 was not violated by the Employer. The photo album (Union Exhibit 4) submitted by the Union evidenced nothing more than posed positions taken during special light-hearted occasions. Also, the vintage of the photos reduced the veracity of the Union's arguments. Most of the photos were taken prior to the formal implementation of the sexual harassment policy. It would have been far more purposeful if the photos had represented incidents taken after the initiation of the policy. Nothing in the record indicated the Employer encouraged sexual harassment behavior. Supervisors might have been inept and lacked insight, but one cannot equate inactions of this type with condoning the Grievant's behavior.

In my judgment, the Employer obtained Substantial evidence of proof that the Grievant was guilty as charged. The State of Ohio's Policy Prohibiting Sexual Harassment contains the following particulars:

"…
Sexual Harassment is any unwanted attention of a sexual nature from someone in the workplace that creates discomfort and/or interferes with the job. It can take the form of verbal abuse, such as insults, suggestive comments and demands; leering and subtle forms of pressure for sexual activity; physical aggressiveness such as touching, pinching and patting, lewd pictures, sexual jokes, attempted rape or rape. Conduct constitutes sexual harassment when:

1) submission to such conduct is made either explicitly or implicitly as a term or conditions of an individual's employment;
2) submission to or rejection of such conduct by an individual is used as the basis for employment

decisions and/or retaliation;

3) such conduct has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment."

(Joint Exhibit 2A, Pg. 5)

The Grievant's actions in July, 1991 involving Walsh were sufficiently blatant to result in removal. With respect to the Walsh incident, the Grievant engaged in unwanted sexual attention involving physical aggressiveness. He patted her behind, gyrated while pulling Walsh down onto his lap, and subsequently pulled her pants beyond her hips. These events were testified to by Walsh and Kim Sizemore in a statement provided by her as a direct observer to the incident (Joint Exhibit 8J). Shawn Grundy provided second hand testimony in support of Walsh's version based upon a conversation which took place shortly after the incident (Joint Exhibit 8L).

Obviously, this conduct constituted sexual harassment. The conduct in question had the effect of interfering with Walsh's work performance and created an intimidating and oppressive working environment. Also, the Grievant did not help his case by merely denying the event. He never offered any evidence placing him in another location at the time of the incident. He, moreover, never provided any reason for Walsh's allegations.

The Grievant's credibility was greatly reduced as a consequence of the Sizemore incident. At the hearing, he admitted to participating in the incident but he stated he did not initiate the incident. As a consequence, he never directly denied the lewd gesture and comment regarding the potential lesbian relationship between Walsh and Sizemore. He admitted apologizing to Sizemore along with the other male participants. A surprising and unexplainable outcome for a person who denied any sexually harassing behavior.

Several witness statements corroborated Sizemore's version of the events. The Grievant was the initiator of the incident and not a mere participant. Michael Carter's statement (Joint Exhibit 8V) indicated the Grievant called Sizemore over after the Grievant, Herb Holliman and Carter joked about Walsh being gay and following Sizemore around. Although he did not hear the discussion, he thought the Grievant had gone too far because Sizemore was visibly upset. Holliman provided a similar summary in his statement (Joint Exhibit 8W).

The other incidents which surfaced during the course of the investigation merely served as exacerbating events supporting the propriety of the selected penalty. The witness statements and testimony merely underscored the Grievant's excessively deviant predilections; behavior which involved verbal abuse in the form of suggestive comments and physical aggressiveness. The Grievant was the one who poisoned the work environment by engaging in behavior in the Tag Section which created an oppressive working environment. The pattern of behavior included some of the following activities: pulling employees down to his leg and rotating (Joint Exhibit 8O); unstrapping and checking bras (Joint Exhibits 8E and S); licking employees' faces (Joint Exhibit 8M); and lifting up sweaters and pulling down dresses (Joint Exhibits 8Q and E). None of these activities can be characterized as borderline sexual harassing conduct. They become more onerous because they involved more than one female employee, at different time periods, and virtually all of them told the Grievant to stop. He failed to do so and seemed to relish their uneasiness.

The assessed penalty also seems justified in terms of the Grievant's prior work record. For an employee with limited seniority, his discipline record was extremely excessive. During his tenure he realized four (4) verbal reprimands; one (1) written reprimand; six (6) counseling sessions; and two (2) one-day suspensions. Clearly, this record does not support any proposed penalty modification.

The Union's double jeopardy argument is a bit misplaced. The Union alleged the Arrowsmith/Pate interview resulted in a counseling session. As such, the removal caused the classic situation where two penalties are imposed for the same offense. Here, double jeopardy did not arise because a counseling session is not viewed by the Parties as a disciplinary outcome. Such a policy was never considered by the Parties as covered by the disciplinary outcomes specified in Section 24.02. The removal, therefore, was the sole imposed disciplinary action. In fact, the work rule in question specifies that the discipline contained in

any collective bargaining agreement shall apply.

The Union's unequal treatment claim was also poorly supported by the record. Oyler's suspensions were properly distinguished from the present situation. The five (5) day suspension resulted because the Parties realized horseplay was pervasive in the BMV warehouse. All warehouse employees, moreover, were placed on notice regarding the horseplay. The thirty (30) day suspension was eventually dropped when the Employer realized it lacked just and proper cause to support the suspensions. A temporary employee failed to come forward which virtually eliminated any suspension possibility.

AWARD

The grievance is denied.

Dr. David M. Pincus, Arbitrator
July 23, 1992

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[1] Dougr Corp., ARB P 8465 (Haemmel, 1978).