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GRIEVANCE COORDINATOR

ARBITRATION DECISION

September 8, 2001

In the Matter of:

State of Ohio, Department of Public Safety, State Highway Patrol	Case No. 15-00-20010119-0008-01-07
and	Terry James, Grievant
Ohio Civil Service Employees Association, AFSCME Local 11	

APPEARANCES

For the State:
Renee B. Macy, Advocate
Neni Valentine, Labor Relations Specialist, Office of Collective Bargaining
E. Keith Calloway, Management Representative
Constance Barber, Driver's License Examiner
Diane Brown, Driver's License Examiner
Gino Ciotola, Driver's License Examiner
Lt. Susan Rance-Locke, Training Supervisor, Ohio Highway Patrol

For the Union:
William A. Anthony Jr., Advocate
Carol Bowshier, Operations Director
Terry James, Grievant
Louella Jeter, Steward
Pamela Wolfe, Grievant's Daughter
Beverly James, Grievant's Daughter
Bellah Graham, Driver's License Examiner, Retired
Arthur Wilson, Driver's License Examiner

Arbitrator:
Nels E. Nelson

BACKGROUND

The grievant is Terry James. He was hired by the state on June 5, 1989. At the time of his removal, he was a driver's license examiner. He was assigned to the office at the Great Northern Shopping Center.

The events that led to the grievant's discharge began on April 11, 1999. At that time he was charged with asking a young examinee with an infant, "aren't you a little too young to be having babies?" He received a verbal warning for asking inappropriate questions.

On October 29, 1999, the grievant was suspended for one day for a similar offense. The state indicates that he asked an examinee, who was having her driver's license photo taken, whether she was wearing a bra.

The grievant challenged his one-day suspension. At mediation, it was agreed that the grievant would receive eight hours of compensatory time after one year provided he did not commit any similar violations. The settlement agreement states that the grievant "shall attend training to be determined by the employer." The union claimed that the mediator indicated that the grievant would be sent to a sexual harassment program.

The grievant was involved in another incident in June 2000. The record indicates that the grievant told a 16-year old girl that she was the best looking girl in Grove City and commented on her checking herself out in the rear view mirror. When the girl's mother complained, the grievant was suspended for ten days. At an expedited arbitration, the suspension was reduced to five days.

On January 2, 2001, Pauletta Radel, the District 6 supervisor, contacted the Highway Patrol. She reported that Constance Barber and Diane Brown, driver's license

examiners at Great Northern Shopping Center, had complained to her that the grievant had made inappropriate comments, remarks, and gestures to or about them. Captain Goldstein reviewed the notes written by Barber and Brown and determined that an administrative investigation should be conducted.

Lt. D.E. Zwayer was assigned to investigate. On January 4 and 5, 2001, he got statements from Barber and Brown; Arlene Gilkey, the grievant's immediate supervisor; Radel; and five of the grievant's coworkers. On January 9, 2001, he took the grievant's statement. Lt. Zwayer's subsequently prepared a report that describes in detail a number of incidents involving the grievant. On January 10, 2001, he submitted the report to Major R.G. Corbin.

On January 12, 2001, the grievant was informed by Colonel Kenneth Morckel, the superintendent of the Highway Patrol, that the Director of Public Safety intended to terminate him. A pre-disciplinary hearing was held on January 17, 2001. The same day Captain Richard Keys, the hearing officer, found that there was just cause for discipline and the grievant was notified by Lt. Gov. Maureen O'Connor, the Director of Public Safety, that he was being removed for the failure of good behavior in violation of Rule 501.01(10)(d).

The next day the union filed a grievance on behalf of the grievant. It claimed that the state had violated Article 24 of the collective bargaining agreement and that termination was too harsh a penalty. The union asked that the grievant be placed back in his job and be made whole.

When the grievance was denied, it was appealed to arbitration. The hearing was

held on August 1, 2001. The parties opted not to file written closing statements and the record was closed at the conclusion of the hearing.

ISSUE

The issue as agreed to by the parties is:

> Was the grievant terminated for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 24 - Discipline

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.

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 oral reprimand(s) (with appropriate notation in employee's file);
B. one or more written reprimand(s);
C. a fine in an amount not to exceed two (2) days pay for discipline related to attendance only; to be implemented only after approval from OCB;
D. one or more day(s) suspension(s);
E. termination.

* * *

24.05 - Imposition of Discipline

* * *

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

STATE POSITION

The state argues that the grievant has a history of making inappropriate comments. It points out that he received progressive discipline over a period of almost two years. The state indicates that despite its efforts, the grievant continued his improper behavior.

The state observes that the grievant also received assistance. It notes that after his one-day suspension he was sent to "Achieving Extraordinary Customer Relations" training. The state reports that at the training program he had a one-on-one conversation with Lt. Susan Rance-Locke, the instructor, where he made clear that he understood why he was there and what was expected of him in the future.

The state contends that the grievant engaged in improper behavior on a number of occasions beginning in the fall of 2000. It charges:

> [The grievant] called a coworker a "dego" and a "fagboy" in the presence of customers ... [made] obscene facial gestures ... to a coworker on numerous occasions while she was eating a banana in the break room ... repeatedly called the same coworker a "suck-ass" in the presence of customers ... accused a coworker of wanting to "do" a customer, in the presence of the customer ... showed several female coworkers a pecan and implied to them that this resembled a vagina. (State Opening Statement, page 3.)

The state rejects the union's suggestion that the grievant's conduct was the norm at the Great Northern Shopping Center office. It states that there is no evidence to suggest that other employees made offensive, off-color, and inappropriate comments to customers and coworkers. The state observes that there were no complaints about other employees from customers or coworkers.

The state disputes the union's contention that the grievant was a "kidder" and that he never meant to be offensive. It claims that the grievant's subjective intent is irrelevant. The state contends that he continued to make blatantly inappropriate comments even after he was warned about the consequences of such behavior. It notes that Lt. Rance-Locke testified that the grievant told her that he understood that his behavior had to change or he would face further discipline.

The state maintains that it does not matter that Barber and Brown did not tell the grievant that his behavior upset them. It claims that coworkers have no duty under the collective bargaining agreement, the law, or policy to advise an offending employee. The state asserts that it makes no sense for an employee to confront a coworker.

The state argues that the emails sent to office employees by Arlynne Gilkey, the grievant's immediate supervisor, and the photos taken in the office by Bellah Graham, a retired driver's license examiner, are not relevant. It points out that the emails were sent outside of work and have no relation to the workplace. The state indicates that since no one shown in Graham's photos ever complained, no one was offended.

The state acknowledges that after the grievant was terminated, Gilkey advised employees to adjust their behavior. It insists, however, that subsequent remedial action cannot be used to show that it condoned the grievant's behavior.

The state contends that it would be liable if it failed to remove the grievant. It observes that it has been put on notice regarding the grievant's inappropriate behavior. The state indicates that if the grievant were not terminated, it would be subject to a lawsuit for negligent retention.

The state concludes that the grievant's conduct constitutes just cause for removal. It asks the Arbitrator to deny the grievance in its entirety.

UNION POSITION

The union argues that the grievant did not engage in sexual harassment. It states that the Equal Employment Opportunities Commission's 1980 Guidelines on Sexual Harassment defines sexual harassment as follows:

> 'Unwelcome sexual advances, request for sexual favor, and other verbal or physical conduct of a sexual nature' that have the 'purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment' ... this grievant is not and was not in a position of authority over either female co-worker, he could not render any decisions that would have affected the terms and condition of their employment ... His comments did not substantially interfere with the work performance of either female co-worker or any other worker. (Union Opening Statement, page 2.)

The union asserts that the grievant's behavior did not rise to the level of sexual harassment. It complains that the state is trying to draw a parallel between his inappropriate comments to customers and his remarks to Barber and Brown.

The union contends that other employees engaged in similar conduct and were not disciplined. It claims that the grievant's comments were simply "shop talk." The union indicates that the same behavior continued even after the grievant's termination.

The union maintains that Barber and Brown did not tell the grievant that his behavior and comments were unwelcome. It points out that the grievant acknowledged that he is a "jokester and prankster." The union notes that the grievant insists that his coworkers and supervisors encouraged his behavior.

The union argues that Barber and Brown should have confronted the grievant. It observes that Section 501.01(12)(d)(2) of the department's policy states:

> Information provided by the Ohio Civil Rights Commission advises the employee to confront the harasser. Tell the harasser clearly that you are offended by the behavior. Tell the harasser you don't like what was said or done and you want it to stop.

The union contends that once the grievant was advised that Barber and Brown objected to the way he behaved, he changed his behavior. It claims that Gilkey said to the grievant, "as a friend, I'm telling you to watch what you say to [Barber and Brown], this is not going any further than this." (Union Opening Statement, page 3.)

The union rejects the state's claim that the grievant cannot be rehabilitated. It indicates that after the grievant's ten-day suspension was reduced to five days and prior to the mediation of his one-day suspension, the grievant had stopped making comments to female customers. The union notes that as part of the settlement of the one-day suspension the grievant agreed to go to sexual harassment training but instead the state sent him to a customer service training program.

The union concludes that there is not just cause to terminate the grievant. It asks the Arbitrator to reinstate him to his former classification and to make him whole.

ANALYSIS

The grievant was removed for failure of good behavior in violation of rule no. 501.01(10)(d). More specifically, the state charged that "he behaved in a sexually harassing manner by making several inappropriate sexual remarks, gestures, and facial expressions to coworkers." (Joint Exhibits 3A and 3B.)

The charges against the grievant are based on the statements made by Barber, Brown, and Gino Ciolota, a driver's license examiner. The statements refer to events that are alleged to have occurred between late-September and late-December of 2000. Barber's allegations include:

- When a coworker answered the telephone and said that it was her husband, the grievant called out, "just how many boyfriend do you have," which upset her husband.
- The grievant showed her a pecan and asked her what it looked like which indicated to her that he felt that it resembled a vagina.
- The grievant threw a packet of mayonnaise on the lunch table and told her to get her mind out of the gutter that she took to suggest that he was referring to semen.
- The grievant referred to a co-worker as a "blond bombshell" in a situation where the comment could have been overheard by a customer.

Brown claimed:

- When she was going to give an attractive male customer a driving test, the grievant asked her in a suggestive manner whether she was going to "do him."
- The grievant turned off the eye test machines so she repeatedly asked a customer what she could see when nothing was visible.
- On three or four occasions the grievant bumped her elbow while she was writing causing her to make an unwanted mark on a form.

- The grievant pulled her chair back from the counter as she was writing.
- On the day after her anniversary, the grievant asked her whether Gary, her husband, "got lucky last night."
- On three to five occasions the grievant made faces while she was eating a banana suggesting that he was referring to oral sex.
- On three to five occasions the grievant called her a "suck-ass."
- The grievant showed her a pecan and asked her what she saw suggesting to her that he meant a vagina.
- The grievant threw a packet of mayonnaise on the lunch table which she connected with semen.

Ciotola testified:

- On a few occasions the grievant referred to him a "dego" or "faggot."

The grievant does not dispute some of these allegations. He admits that he pulled Brown's chair back from the counter, pushed her elbow while she was writing, turned off the light in the eye test machine while she was giving a test, and called her a "suck-ass." He also acknowledges that he asked Barber how many boyfriends she had and called Ciotola a "dego" and "faggot." The grievant, however, insists that he was simply "joking around."

These actions do not justify his termination. The grievant's comments and actions involving Barber and Brown do not constitute sexual harassment. Ciotola testified that he was not particularly upset by the grievant's statements and acknowledged that he would swear at the grievant in Italian. This suggests that Ciotola was an equal

participant in the exchanges with the grievant. Thus, while much of the grievant's behavior was juvenile and offensive, it was not as serious misconduct as the state suggests.

The more serious charges against the grievant relate to the grievant's reaction to Brown eating bananas and his asking her if her husband got lucky, throwing mayonnaise on the table, showing the pecan to Barber and Brown, and asking Brown if she was going to do a customer. He testified that he did not recall making any comment about Brown's husband getting lucky and insisted that there was nothing sexual involved in the other incidents.

The Arbitrator must reject the grievant's denials. It does not seem that both Barber and Brown would misinterpret his behavior. Their testimony about the grievant's reaction to Brown eating bananas is supported by Ciotola.

Despite the very serious nature of the grievant's misconduct, the Arbitrator cannot uphold his discharge. First, the grievant had no indication that his behavior was unwelcome. Barber and Brown acknowledge that they never told the grievant his behavior upset them or complained about it. Furthermore, the fact that Barber referred to the grievant as her "boyfriend," suggests that she condoned or even encouraged the grievant's inappropriate behavior.

Second, the state failed to take appropriate action after the grievant's one-day suspension. At the mediation relating to the grievant's one-day suspension, a settlement was reached that the grievant would be required to attend training. While the settlement agreement indicates that the training is "to be determined by the employer," the testimony

of the grievant and the statement of the union's advocate indicate that the intent was for the grievant to receive sexual harassment training.

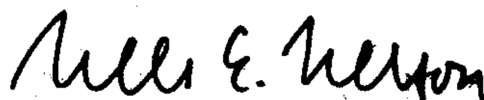
The state failed to provide the training that the grievant needed and that appears to have been called for by the settlement of the grievance. Instead of being sent to the Highway Patrol's sexual harassment training, he was ordered to attend customer service training. Lt. Rance-Locke acknowledged that the program did not cover sexual harassment. To make matters worse, the grievant had taught the course he was ordered to attend and, in fact, Lt. Rance-Locke had taken the course from the grievant.

The remaining issue is the proper remedy. The Arbitrator cannot award the grievant back pay. Prior to the fall of 2000, he was disciplined three times for inappropriate comments to female customers. The grievant should have realized that remarks of a similar nature to coworkers was not acceptable conduct and could not be dismissed as "joking."

The Arbitrator believes that the grievant must be required to attend sexual harassment training. After he completes such a course there cannot be any doubt that he understands the bounds of proper behavior. The grievant then would be unable to escape the full consequences of any sexually harassing statements or conduct whether aimed at a customer or a coworker.

AWARD

The grievant is to be reinstated to his former classification without back pay. He shall be required to complete a sexual harassment training program selected by the state.



Nels E. Nelson
Arbitrator

September 8, 2001
Russell Township
Geauga County, Ohio