

VOLUNTARY LABOR ARBITRATION

-----x
In the Matter of the Arbitration

-between-

**THE STATE OF OHIO, DEPARTMENT
OF TRANSPORTATION**

ARBITRATOR'S OPINION

-and-

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11, AFSCME**

-----x
FOR THE STATE:

**RODNEY SAMPSON, Advocate
State of Ohio, Department of
Administrative Services
Office of Collective Bargaining
65 E. State Street, 16th Floor
Columbus, Ohio 43215**

FOR THE UNION:

**MICHAEL TEMPLE
Staff Representative
Ohio Civil Service Employees
Association
995 Goodale Boulevard
Columbus, Ohio 43212**

DATE OF THE HEARING:

July 8, 1988

PLACE OF THE HEARING:

**State of Ohio, Office of
Collective Bargaining
Columbus, Ohio**

ARBITRATOR:

**HYMAN COHEN, Esq.,
Impartial Arbitrator
Office and P. O. Address:
P. O. Box 22360
Beachwood, Ohio 44122
Telephone: 216-442-9295**

* * * * *

The hearing was held on July 8, 1988 at the Ohio Department of Administrative Services, Office of Collective Bargaining, Columbus, Ohio before **HYMAN COHEN**, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at 9:00 a.m. and was concluded at 3:35 p.m.

* * * * *

On January 13, 1987, **JAMES R. MERANDA** filed a grievance with the **OHIO DEPARTMENT OF TRANSPORTATION**, the "State", in which he protested receiving a fifteen (15) day disciplinary suspension. The State denied the grievance at the various steps of the grievance procedure contained in the Agreement between the State and **OHIO CIVIL SERVICE EMPLOYEES' ASSOCIATION, Local 11, AFSCME, AFL-CIO**, the "Union". Since the Union failed to achieve a satisfactory resolution of the grievance, the dispute was carried to arbitration.

FACTUAL DISCUSSION

The Grievant is employed as a Highway Worker IV, by the State. He works out of the Brown County Garage, in Georgetown, Ohio.

The events giving rise to the instant grievance occurred on October 29, 1986. On that date the Grievant was the crew leader of a work crew consisting of five (5) employees assigned to do berming on Route 52. Stephen Huff is the Grievant's supervisor.

The crew took their lunch break at approximately 11:30 a.m. At

approximately 12:05 p.m., Carlos C. Blake, Jr. and Michael L. Napier returned to the job site. When the Grievant saw Blake and Napier he said, in effect, that Huff had been at the job site and he [Huff] was upset because they were late in returning from lunch. The Grievant was giving Blake "hell", and then looked at Napier and said, "That goes for you too, Babe". "Grabbing [his] crotch", Napier replied "I've got your babe here". Napier then sat down beside Michael King and Billy Graves who along with James Frost ate their lunch, while sitting on a wall alongside the road. King then told Napier that the Grievant had been joking. In other words, Huff had not been at the job site.

Shortly after Napier sat down, and while talking to the Grievant, Frost got up from his sitting position on the wall, walked in front of Napier, and according to Napier, "waved a knife under [his] throat". According to Blake, Frost got up, walked over to Napier and said "see this knife" to which Napier replied: "It has tar on the blade". Frost according to Blake said, "I'll cut your G-d damned throat". According to Blake, Frost made about six (6) passes with his knife about 2 1/2 feet from Napier's face. After Frost placed his knife back into his pocket, Napier said, "What did I tell you about that knife before".

Frost said that when Napier "grabbed his pecker", he thought

that "he [Napier] hinted at me". Frost testified further that "I thought he meant me when he [Napier] moved his foot". After waiving his knife in front of Napier, Frost then jumped up onto the wall, with clenched fists and began shadow boxing, while yelling, "I've whipped Democrats before--if you don't believe me ask the man who owns this place"; (there was a house located close to the wall). Frost indicated that he was a Republican. While Frost was throwing punches into the air, King said "let's go to work" and the lunch break concluded.

Frost said that he remembered saying to Napier that "I would settle with you later--or after 4:00 p.m.". He added that "he (Napier) misunderstood me and I misunderstood him". He acknowledged that he "was teasing (Napier) a bit". Frost testified that approximately twenty (20) minutes after the episode, "we apologized and shook hands".

When the work crew returned to the garage at the end of their shift on October 29, Napier asked Huff "if (the Grievant) said anything about what happened?" When Huff replied "No", Napier told Huff that he was "working around a guy who pulls a knife" on him; he also indicated to Huff, that "he (Frost) has done it twice and he (Napier) was getting sick and tired of it".

Huff said that at about 4:00 p.m. on October 29, Napier told him about the incident involving Frost. The following day, October 30, the Grievant called in sick. During the telephone discussion, Huff asked the Grievant "if anything happened on his crew" during the previous day. According to Huff, the Grievant acknowledged that something had happened, and Huff told him that when he came in the following day they would talk about it. During the morning of October 30, Huff called Blake, King and Graves to his office where they described what had happened on October 29. The following morning, Huff testified that the Grievant told him his version of the events of October 29, after which Frost was called to the office to provide his account of the episode in question.

After hearing from the various members of the work crew concerning the incident involving Frost on October 29, Huff contacted James Brushart, Administrative Assistant of the State's District Office (District 9). Notes which Huff had taken during his discussions with the work crew were submitted to Brushart. Paul W. Griffith, an Investigator with the State's Department of Transportation was then assigned to interview the work crew members with respect to the events of October 29, 1986. After the interviews were conducted by Griffith, the following disciplinary penalties were issued: Frost was discharged, after which he was suspended for eighty-six (86) days

and reinstated; Napier was given a written reprimand for returning late from lunch and for making an "obscene gesture;" Blake received a verbal warning because he was late for lunch; and the Grievant was suspended for fifteen (15) days. The reasons for the Grievant's suspension will be considered under the category of "discussion".

DISCUSSION

The parties stipulated that the following issue is to be resolved by the Arbitrator: "Was the Grievant, James Meranda, Highway Worker IV, suspended for fifteen (15) days for just cause? If not, what should the remedy be?"

In his letter, dated January 8, 1987, Warren J. Smith, Director of the Department of Transportation, informed the Grievant that he had violated the following provisions of Directive A-301:

"1. a. --Neglect of duty"; "2. b.--Failure to report unsafe working conditions, and"; "35--Other actions that could harm or potentially harm the employee or fellow employees or impair the ability of the employees to effectively carry out their duties".

As a result, the Grievant was suspended for fifteen (15) days,

effective, January 12, 1987.

I.

a. CREW LEADER

Like the other members of the work crew on October 29, 1986, the Grievant was a bargaining unit member. However, in the State's view, the disciplinary suspension of fifteen (15) days imposed against him stems from the fact that he was a crew leader. As a crew leader, the State contends that the Grievant is deserving of more serious punishment than the other crew members, except for Frost, who brandished the knife and directed it towards Napier.

Huff described the duties of the crew leader. He indicated that the crew leader "takes the work assignment and employees working with him on the operations". He "sets up the equipment, materials and jobs that he wants the crew members" to perform and "sees that the job is set up safely". Huff added that the crew leader has the "responsibility for the safety of the crew". He went on to state that if a member of the crew believes that the work that he is assigned to perform or the equipment to be used, is unsafe, the crew member has an "obligation" to communicate his belief to the Grievant. Although the Grievant can make decisions in his absence, Huff said that he cannot impose discipline against employees.

The Grievant indicated that he had no training on the responsibilities of a crew leader. He went on to state that he has never been "cautioned or warned" about the responsibilities of the crew leader. He stated that as a crew leader he is "told to do the job right--the best you can for safety so you do not have stuff on the road". The Grievant added that he also "tells the crew what they should do, materials to get and he see to it that they do the job right". He indicated that doing "the job right" includes "safety". He said that his responsibilities as a crew leader "have remained consistent over the years". As I have already indicated, the Grievant occupies the classification of "Highway Worker 4". "In the State's job description of "Highway Worker 4", the duty to "assure the safety of crews" is among the various duties which occupy 50% of his time.

b. GRIEVANT'S REMARKS

In light of the Grievant's responsibilities as a crew leader, the State asserts that he "contributed significantly to the chain of events that followed resulting in [the] unsafe and potentially dangerous situation". By its assertion the State is referring to the Grievant's comment upon seeing Napier and Blake return late from lunch. He indicated to them that they were late and that Huff had been to the

site and was "pissed off" because they were not back from lunch. Huff, in fact, had not been at the site. Napier said that the Grievant referred to him as "Babe". I am inclined to believe, that as the Grievant indicated, his reason for making the comment was that he "was having fun" and that it "takes the boredom from the day". In fact, Napier said that when the Grievant made the comment, King winked at him (Napier) so I did not take (the Grievant) seriously".

It may very well be that the actions of Frost and Napier stemmed from the comments of the Grievant. However, the Grievant did not knowingly contribute to the events that culminated in Frost wielding his knife in front of Napier's face. In other words, I cannot believe that the Grievant could have reasonably foreseen that his comment and reference to "Babe" would have led to the events that followed. It is highly unlikely that the Grievant would foresee that Napier would "grab his crotch" and state "I got your babe here". Nor could the Grievant foresee that Frost would believe that Napier was "hinting" at him when he "grabbed his crotch". Furthermore, I cannot conclude that the Grievant could anticipate that Frost would then wave his knife in front of Napier's face. Had the Grievant known or had reason to believe that his comments to Napier and Blake would have caused Napier and then Frost to react in the way they did, he would be held responsible for the chain of events that followed

resulting in (the) unsafe and potentially dangerous situation to Napier. The Grievant's "contribution" to these events, was innocent rather than culpable.

There is no evidence to indicate that the Grievant could have anticipated Napier's obscene gesture as a reaction to his comments. Furthermore there is Frost's bizarre behavior which could hardly be foreseen. The Grievant's comments were directed at Napier and Blake. Nevertheless, the Grievant inexplicably believed that the Grievant's obscene gesture was directed at him. In light of the evidence in the record I cannot conclude that the Grievant was responsible for the actions of Napier and Frost on October 29, 1986, or contributed to the actions of Napier and Frost. To attribute such blameworthiness to the Grievant would mean that he is to be held responsible for the bizarre and unreasonable conduct of Frost even though such conduct by Frost could not be anticipated. Such a conclusion is unwarranted.

c. SILENCE OF THE GRIEVANT

1. Failure to Speak Up

It is undisputed that as a crew leader, and a Highway Worker 4, the Grievant is responsible for the safety of the crew. Among the primary duties set forth in the job description of Highway 4 is that

the Grievant "assures the safety of the crews". As the Grievant acknowledged, he is required "to oversee * * that they (the crew) do the job right". Doing "the job right" he added includes the factor of safety.

When Frost waved his knife in front of Napier's face, the Grievant did nothing. The Union indicates that since he has no authority to discipline employees and is a bargaining unit member, it was not his responsibility to take any action to intervene.

The Grievant acknowledged that among his responsibilities as a crew leader is to "do the job right". Had Napier and Blake, for example, returned from lunch thirty (30) minutes after the conclusion of the lunch break, rather than five (5) minutes, the Grievant would not be able to "do the job right". At most, as a crew leader, he would indicate to them that their presence was required "to do the job right". With regard to the episode in question, Napier and Blake returned late from lunch. Had Frost waved a loaded pistol in a threatening manner in front of Napier, Napier's safety would have been in as much serious jeopardy as waving a knife at Napier in a threatening manner. The episode delayed the employees in returning to work and certainly cast a pall over the job which had to be performed. Indeed, Napier was agitated enough over the episode that

he talked to Huff about it, when he discovered that the Grievant failed to report the episode to Huff when the crew returned to the garage at the end of the shift.

Realizing that the Grievant cannot discipline his fellow bargaining unit members severely limits the extent of his authority as a crew leader, concerning the episode involving Frost. To assure the safety of the crew, the Grievant should have voiced his concern immediately upon observing Frost's bizarre actions so as to defuse what was potentially, a dangerous and unsafe situation. To merely observe the actions of Frost without indicating so much as a comment to Frost to stop waving his knife and to return to work is not consistent with the Grievant's job duties of assuring the safety of the crew and "doing the job right". Furthermore, the Grievant admitted that he might have said that he has "no dog in this fight", when the episode occurred.

The Grievant who acknowledged that he was five (5) feet away from Frost, when he waved his knife at Napier, said that he "did not think that Frost was serious". He indicated that some of the crew members use knives to cut apples and tomatoes or trim their finger nails. The Grievant went on to state that it is common for the crew members to have knives at work. He did not consider that when Frost

waived his knife, it was a "serious matter", although Napier "appeared a little upset about it".

The record indicates that the actions of Frost was not an argument over fishing or hunting which the Grievant indicates takes place among the crew. It was a dimension above such arguments. Obviously, a knife can be a lethal weapon and in light of the way Frost waived his knife toward Napier, I have concluded that it was a serious matter. It may very well be that as the Grievant indicates, Frost "has been in arguments before", and the "arguments blow over with no problems". He added that the work gets done after such arguments. However, what occurred on October 29 was not merely an argument where the employees exchange words. The act of waving of a knife by Frost close to, and directed at Napier elevates the episode into a matter which is both frightening and potentially dangerous. The Grievant's silence during the incident in question is not consistent with his duty to assure the safety of crews.

c. Failure to Report Unsafe Working Condition

Department Directive A-304, Section D.A.2 provides as follows:

* * *

Subject: Employee Safety

Requirements

* * *

D. Procedures

A. Employee Safety Requirements

* * *

2. Employees will report all unsafe working conditions or hazardous equipment to their supervisors IMMEDIATELY. Employees will be assured there will be no reprimand for reporting unsafe working conditions or hazardous equipment * * *."

The Grievant acknowledged that Directive A-304 "is on the bulletin board but [he has] never read it". Although the Grievant has never read Directive A-304 he is held to know its contents and thus has constructive knowledge of the procedures contained in the Directive.

The evidence warrants the conclusion that the Grievant failed to report the "unsafe working condition" created by Frost when he waived his knife in a threatening manner towards Napier. The Grievant acknowledged that he did not report the episode which constituted an unsafe working condition because he "did not think it was important". He went to say that he "did not believe that "things should be kept stirred up". Furthermore, the Grievant said that he "did

not think that there was too much to it".

Based upon the evidentiary record, the Grievant was unreasonable in believing that Frost's waiving of his knife in a threatening manner towards Napier was "not important", and that there was not "much to it".

The word "condition" in the context of "unsafe working conditions" as set forth in Directive No. A-304, D.A. 2 means "attendant circumstances". Webster's Ninth New Collegiate Dictionary, (Merriam-Webster, Inc., 1986). The failure to report Frost's behavior to Huff "IMMEDIATELY" with reasonable dispatch violates Directive A-304, Section D. A. 2.

II

DIRECTIVE A.-301

The State found that the Grievant violated Directive A-301, 1.a, 2.b. and 35. On the basis of the evidentiary record, I cannot conclude that the Grievant committed the offense of "neglect of duty" which could be characterized as "major" under Directive A-301, 1.a, which provides as follows: "Neglect of Duty

- a. Major (endangers life, property or public safety)."

Having established that the Grievant "failed to assure the safety of crews", I have also concluded that the Grievant's authority at the time the episode took place was limited to voicing his concern that by his actions Frost was jeopardizing Napier's safety and to stop waiving his knife. Furthermore, he should have immediately directed his crew to return to work. Moreover, the Grievant did not report the unsafe working condition created by Frost, to Huff immediately after it occurred or at the end of the shift.

The Grievant's failure to take the appropriate actions as a crew leader concerning the episode in question does not lead me to conclude that he endangered "life, property or public safety" which constitutes a "major" neglect of duty, under Directive A-304. The word "endanger" is defined as "to bring into danger or peril" or "to create a dangerous situation". Given his limited authority at the time of the episode, I cannot conclude that he created a dangerous situation or brought Napier into danger or peril.

In fact, at this juncture it might be wise to consider the mitigating circumstances in this case. It is undisputed that as a crew leader and bargaining unit member the Grievant does not have the authority to discipline fellow bargaining unit members. Napier

was the only crew member who informed Huff about the incident. Assuming that he did so as a report of an unsafe working condition, no other crew member informed Huff about the episode until he [Huff] initiated his investigation.

Directive A-304, Section D. A. 2. requires "employees to report all unsafe working conditions or hazardous equipment to their supervisors IMMEDIATELY * *." The Directive does not merely apply to crew leaders; it applies to all "employees". Although the Grievant is required to "assure the safety of crews" among his job duties, none of the other crew members were disciplined for failing to report the unsafe working condition created by Frost.

Turning to another mitigating factor, the Grievant did not receive any training concerning the responsibilities of a crew leader with regard to the episode that occurred on October 29. It was not the customary "unsafe working conditions" at a work site so much as it is the type of offense by an employee which universally constitutes serious misconduct warranting serious disciplinary action, including discharge. Brandishing a knife and making threatening gestures to a fellow bargaining unit member would require prompt intervention by a supervisor to see to it that such conduct stops immediately. To require a fellow bargaining unit

member, such as the Grievant, who is a crew leader to take the type of action required of a supervisor, because his job description provides that he is to "assure the safety of crews" is inappropriate. Accordingly, I have concluded that since the Grievant's authority is limited, the extent of his action at the time of the episode would likewise be limited. As I have indicated, the Grievant should have told the Grievant to stop waving his knife not because it is a serious offense in the work place but because it was unsafe for Napier; and that they were to return to work immediately. In retrospect, we are all so much wiser. However, there is nothing in the record to indicate that Napier or any of the employees complained that the Grievant failed to take any action at the work site. Indeed, given his bargaining unit status, there is no evidence to indicate that the employees expected the Grievant to intervene during the episode in question. Napier's complaint to Huff was not that the Grievant failed to intervene or to take any action at the work site. Indeed, as Napier testified, when he returned to the garage at the end of the shift, Napier asked Huff, if the Grievant reported the episode to him. Implicit in Napier's testimony is that the Grievant's report to Huff would put a stop to "working around a guy who pulls a knife" at him. In any event, given the limited action that the Grievant would be authorized to take when the episode on October 29 occurred leads me to conclude that the Grievant did not "endanger" the life of

any crew member, including Napier; nor did he endanger "property or public safety". Furthermore, I cannot conclude that the Grievant's failure to report the unsafe working condition to Huff constitutes "neglect of duty" to the extent that it is "major" as set forth in Directive A-301, i.a. Clearly, the failure to report the incident to Huff did not "endanger life, property or public safety".

Moreover, the evidence does not support the State's assertion that the Grievant committed the offense contained in Directive A-301, a.b. which provides as follows:

"2. Insubordination

* * * *

b. Willful disobedience of a direct order by a supervisor * *."

In the view of the State, the Grievant was insubordinate within the meaning of Directive A-301, 2.b. because of his failure to report unsafe working conditions" as set forth in Smith's letter, dated January 8, 1987, in which he advised the Grievant of his fifteen (15) day suspension. Th Grievant "failed to follow written policies of the Director, Districts or offices" as stated in Directive A-301, 2.c.; however, by failing to report unsafe working conditions, the Grievant

did not commit an act of "willful disobedience of a direct order by a supervisor", as provided in 2.b. of Directive A-301.

Turning to Directive A-301, 35, it is my conclusion that the Grievant's failure to intervene in the episode to the limited extent that I have indicated and his failure to report unsafe conditions to Huff comes within the intent and meaning of:

"Other actions that could harm or potentially harm the employee, a fellow employee(s) * *."

By failing to indicate to Frost that he was jeopardizing the safety of Napier and that he was to stop waving his knife at Napier and get back to work, the Grievant created the reasonable impression that such conduct could be repeated with impunity, thus causing potential harm to Frost or any other crew member. The potential harm to fellow employees was further manifested by the Grievant, when he failed to report the episode to Huff.

ARTICLE 24, SECITON 24.04

Article 24, Section 24.04, in relevant part, provides:

"Article 24--Discipline

* * *

§24.04--Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her."

The Union contends that the investigatory interview of the Grievant, which was conducted by Griffith on November 7, 1986 was in violation of the investigatory interview provisions of Section 24.04. Since the Grievant did not request the presence of a union steward during the interview, the State did not violate Section 24.04.

The Grievant has a right to a pre-discipline meeting "prior to the imposition of a suspension or termination" under the terms of Section 24.04. Prior to the meeting, Keith C. Swearingen, District 9 Operations Engineer "recommended" disciplinary suspension of 5 days * * ." The increase in the disciplinary suspension by the State is not in violation of Section 24.04. The Section provides, in relevant part, that prior to the meeting, the Grievant is to be "informed in writing of the reasons for the contemplated discipline and the possible form of discipline". Emphasis added. The word "possible" means "something

that may or may not be true or actual" as defined in Webster's Ninth New Collegiate Dictionary (Merriam-Webster, 1986). Accordingly, the State did not violate the pertinent terms of Section 24.04 when it increased the disciplinary suspension to fifteen (15) days.

"JUST CAUSE"

Article 24, Section 24.01 in relevant part, provides that "Disciplinary action shall not be imposed upon an employee except for just cause". In determining whether the State disciplined the Grievant for just cause, the mitigating circumstances must be considered.

I have already concluded that the Grievant is not responsible for the events which culminated in Frost waving his knife. Moreover, the Grievant has not received any training in intervening in situations which constitute industrial offenses. In fact the episode in question was an extremely grave offense which happened to involve an act by Frost towards Napier which was a threat to the safety of Napier. Furthermore, inasmuch as the Grievant was a bargaining unit member, albeit also a crew leader, I have inferred that the other crew members did not have a reasonable expectation that the Grievant would in fact, intervene during the episode. Napier's complaint on

October 29 was that the Grievant failed to report the episode to Huff;
~~it was not that he failed to take action during the episode.~~

Thus, the Grievant had limited authority to act when Frost waived the knife at Napier. There is nothing in the record to indicate that the Grievant believed he had the authority to intervene, in light of his duties as a Highway Worker IV; nor did he have any past experience in his ten (10) years as a crew leader in addressing such situations. It must be underscored that he was not a supervisor and as a bargaining unit member, he did not have authority to discipline employees.

There is also the Grievant's employment record which must be considered. He has been employed by the State for twenty-one (21) years, ten (10) of which he has been a crew leader. There is nothing in his personnel file which indicates that he has received any discipline by the State.

In light of the entire evidentiary record, the State failed to prove just cause for the disciplinary suspension of fifteen (15) days which was imposed against the Grievant. In light of the circumstances presented in this case, with great weight attributed to the Grievant's failure to report the unsafe working conditions to Huff,

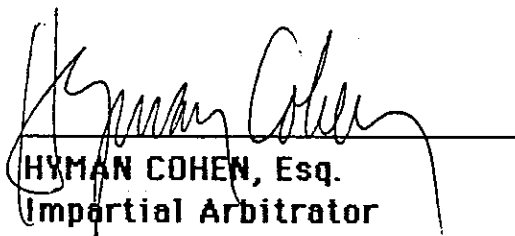
the Grievant should have been suspended for five (5) days for violating Directive A-301, 35, which does not set forth any progressive discipline. Suspension, rather than a written reprimand is warranted. The Grievant is entitled to be reimbursed for ten (10) days pay.

AWARD

In light of the aforementioned considerations, the State failed to prove just cause for the fifteen (15) day disciplinary suspension of the Grievant.

The Grievant should have been suspended for five (5) days. He is entitled to be reimbursed for ten (10) days pay.

Dated: January 5, 1988
Cuyahoga County
Cleveland, Ohio


HYMAN COHEN, Esq.
Impartial Arbitrator
P. O. Box 22360
Beachwood, Ohio 44122
216-442-9295