#556

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

Ohio Department of
Transportation/OCB

Employer.

Grievance No. 31-02-(08-01-90)
26-01-06
Grievant (St. Clair)
Hearing Date: January 17, 1991
Award Date: February 12, 1991
Arbitrator: Rivera

For the Union: Lois Haynes

For the Employer: John Tornes
Roger Coe (OCB)

Present at the hearing in addition to the Grievant David St. Clair and the Advocates named above were the following persons: Lloyd Tack (witness), Ray Brown, Steward (witness), Bill Dunn, ODOT Superintendent (witness), Dennis Daup, ODOT Assistant Supervisor (witness), Rebecca Ferguson, ODOT Labor Relations Officer (witness), Debra Ashton, Highway Maintenance Worker II (witness), and Brenda Vincent, Highway Maintenance Worker II (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 556

OCB GRIEVANCE NUMBER: 31-02-900801-0026-01-06

GRIEVANT NAME: ST. CLAIR, DAVID

UNION: OCSEA/AFSCME

DEPARTMENT: TRANSPORTATION

ARBITRATOR: RIVERA, RHONDA

MANAGEMENT ADVOCATE: TORNES, JOHN

2ND CHAIR: COE, ROGER

UNION ADVOCATE: HAYNES, LOIS

ARBITRATION DATE: JANUARY 17, 1991

DECISION DATE: FEBRUARY 12, 1991

DECISION: DENIED

CONTRACT SECTIONS AND/OR ISSUES: REMOVAL FOR IMMORAL OR INDECENT CONDUCT (SEXUAL HARASSMENT OF 2 FEMALE CO-WORKERS)

HOLDING: DEFENSE OF GRIEVANT WAS UNCLEAR; NO CREDIBLE EVIDENCE OF CONSENT WAS PRODUCED. MOREOVER, PRIOR CONSENT TO SEXUAL EVENTS IS NOT PERPETUAL CONSENT. GRIEVANT'S TESTIMONY NOT CREDIBLE; GRIEVANT INDICATED THAT HE NEITHER NEEDED HELP OR WOULD SEEK IT. CORRECTIVE DISCIPLINE IN THIS CASE WOULD BE FUTILE.

ARB COST: $707.50

that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

Joint Documents

1. Contract
2. The Grievance Trail
3. Directive A-301
4. Directive A-302
5. A-302 Notice of Hearing, dated June 18, 1990
6. A-302 Notice of Reconvening of the Hearing, dated July 3, 1990
7. Ms. Ashton's statement taken by Ms. Ferguson on June 14, 1990
8. Ms. Vincent's statement taken by Ms. Ferguson on June 14, 1990
9. Ms. Ashton's statement taken by Mr. Nishwitz on June 26, 1990
10. Ms. Vincent's statement taken by Mr. Nishwitz on June 26, 1990
11. Mr. St. Clair's statement taken by Mr. Nishwitz on June 26, 1990
12. Mr. St. Clair's Performance Evaluations of 1985 through 1989.

Jointly Stipulated Facts

1. Mr. Daniel St. Clair was hired into a full time position by the Department of Transportation, District 2, on October 5, 1981 as Highway Worker 2. He took a lateral classification change on June 19, 1988 to a Equipment Operator 1. Through Class Modernization he became a Highway Maintenance Worker 2 in 1990. Mr. St. Clair was assigned to the Ottawa County Work Unit during his tenure with the Department.

2. Mrs. Deborah Ashton was hired as a Highway Worker 2 on February 11, 1985, assigned to the Ottawa County Work Unit. She is currently a Highway Maintenance Worker 2 at Ottawa County.

3. Mrs. Brenda Vincent was hired as a Highway Worker 2 on January 23, 1989, assigned to the Ottawa County Work Unit. She is currently a Highway Maintenance Worker 2 at Ottawa County.

4. The supervisors for the Ottawa County Work Unit were/are Mr. Bill Dunn, Highway Maintenance Superintendent 2, Mr. Dennis Daup, Highway Maintenance Superintendent 1, and Mr. Fred Newton, Highway Maintenance Worker Supervisor.

5. Directive A-301 was posted in Mr. St. Clair's work location.

6. On June 13, 1990, at approximately 2:50 p.m. Mrs. Ashton made allegations about Mr. St. Clair to Mr. Daup, in the presence of Mr. Don Kreager, Highway Maintenance Worker 4.

7. On June 14, 1990, Mr. Daup brought the information to Mr. Dunn. Mr. Dunn talked to Mrs. Ashton who informed him he should talk to Mrs. Vincent. Mr. Dunn talked to Mrs. Vincent and Mr. St. Clair. Mr. Dunn contacted Ms. Rebecca Ferguson, Labor Relations Officer.

8. On June 14, 1990, Ms. Ferguson took voluntary statement from both women, Mr. Dunn was present during the interviews.

9. An A-302 Pre-Disciplinary meeting was held on June 21, 1990 at the District 2 office complex. Mr. St. Clair attended the meeting and was represented by Mr. Brown. Also present were Mr. Dunn, Ms. Ferguson, Mr. John Tornes, Labor Relations Officer, and Mr. David Donley, Personnel Officer/Impartial Administrator. At this meeting, Mr. St. Clair made allegations about Mrs. Ashton and Mrs. Vincent. The meeting was placed in abeyance by the parties for further investigation.

10. On June 26, 1990, Mr. Charles Nishwitz, Investigator from the Department's Central Office, took voluntary statements from Mrs. Ashton, Mrs. Vincent, and Mr. St. Clair.

11. An A-302 meeting was re-convened on July 6, 1990 at the District office complex. Mr. St. Clair was represented by Mr. Brown and Ms. Lois Haynes, OCSEA/AFSCME Staff Representative. Also present were Mr. Dunn, Ms. Ferguson, Mr. Tornes, Mr. Nishwitz and Mr. Donley as the Impartial Administrator.

12. Subsequently, Mr. St. Clair was removed on July 27, 1990.

Jointly Stipulated Issue

Did the Department of Transportation discharge the Grievant for just cause in accordance with Article 24? If not, what shall the remedy be?

Relevant Contract Sections

§ 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.

§ 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 authority to modify the termination of an employee committing such abuse.

§ 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.

§ 24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months. Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during

to repeat his actions. When he was unable to continue his touching, the Grievant opened his fly, took out his penis, and played with himself in her company. He ceased his behavior when they arrived at the work site.

Subsequently, a second female ODOT employee reported a second alleged incident. ODOT employee B.V. said that while she was on night radio duty, the Grievant unexpectedly arrived at her post early in the morning. She said he came into the room where she was working and said that he "had something for her." He then unzipped his pants and exposed his penis to her. She said that although she kept her eyes downcast on the book she was attempting to read to avoid the incident, she could see his actions. She testified at the hearing that even though the Grievant eventually left that she had been very frightened and feared for her safety.

When originally confronted with these allegations, the Grievant admitted he had grabbed D.B.'s thigh and rubbed her crotch. He denied exposing himself and claimed he had merely unbuckled his pants to tuck in his shirt. He denied he had exposed himself to B.V. but admitted that he had been at the work site at that early hour which was not within his work hours.

On June 18, 1990, the Grievant was notified of a pre-disciplinary hearing on June 21, 1990. At that hearing, he defended himself by alleging that he had been having prior sexual liaisons with both D.A. and B.V. during work times. The hearing was suspended for the purposes of investigating the allegations.

the past twenty-four (24) months. This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement.

§ 24.08 - Employee Assistance Program

In cases where disciplinary action is contemplated and the affected employee elects to participate in an Employee Assistance Program, the disciplinary action may be delayed until completion of the program. Upon successful completion of the program, the Employer will meet and give serious consideration to modifying the contemplated disciplinary action.

Facts

The Grievant is a Highway Maintenance Worker 2 with the Ohio Department of Transportation. His hire date was 10/5/81. At the time of these incidents, he was assigned to the Ottawa County Work Unit. His evaluations from 1981 through 1989 indicate that the Grievant met the expectations of his supervisors and was a satisfactory worker.

Most of the employees on ODOT crews and in ODOT garages are male, and the atmosphere was described by the management advocate as "male dominated." At the time of the incidents, only two women worked on the Grievant's crew.

ODOT female employee D.A. accused the Grievant of sexual harassment. She alleged that on June 13, 1990, while she and the Grievant were at work, riding in a dump truck which she was driving, the Grievant reached over, grabbed her right thigh in the groin area and then rubbed her crotch several times. She pushed his hand away and thwarted several other of his attempts

The hearing was reconvened on July 7, 1990. Subsequently on July 18, 1990, the Grievant was terminated for violation of Work Rule 2C (insubordination by failing to follow the written policies of ODOT) and Work Rule 14 (immoral or indecent conduct).

A Step 3 meeting was held. The Union's defense at that meeting was three fold:

1) The Grievant was in an EAP.

2) The Grievant was at the time of the incidents under extreme stress due to marital difficulties.

3) The discipline was neither progressive or commensurate given the Grievant's 9 year employment and lack of current discipline in his file.

The Step 3 hearing officer upheld the discipline. He also found no EAP agreement to exist.

At the arbitration hearing, testimony was given by employees D.A. and B.V. consistent with the above described events. Both women denied previous sexual liasons with the Grievant. Two management persons, Grievant's supervisors, testified that Grievant had admitted in their presence grabbing D.A.'s thigh close to her genitals, and one management person testified that the Grievant had admitted rubbing D.A.'s crotch.

Management provided evidence that Grievant had received training on what behavior constituted sexual harassment and the disciplinary consequences of sexual harassment (Employer Exhibits 7 and 8). The Employer presented work documents indicating the proper work station of B.V. on the night in question and that the

Grievant had no work related duties at that site that night (Employer Exhibit 9).

The Grievant testified in his own behalf. With regard to the incident with D.A., he said he did not grab her thigh near her genitals and that he had never admitted that he had. He said he merely placed his hand on the middle of her right thigh. He denied that he had ever rubbed her crotch or admitted that he had. He claimed that he had previously had sexual intercourse with D.A. during his marital troubles and that those incidents only happened because of his "vulnerability." The Grievant said D.A. was lying about him now.

He said he had also had sexual relations with B.V. According to his story, she was constantly following him around in bars and dressing purposively at work so as to attract him. Then, one day when they were returning a truck to an outpost, as they were about to leave, their eyes locked, they kissed, and she immediately fell to her knees, unzipped his pants, took out his penis, performed fellatio on him, zipped him up, and left -- all without words. He said he only participated because of the stress of his marital problems and because of his vulnerability. According to the Grievant, a few days later, the exact same scene was repeated. On the night of the alleged sexual exposure, the Grievant said he just dropped by the outpost after a night on the town "to talk" and that he never exposed himself.

The Grievant described himself as highly vulnerable and taken advantage of by both women during his time of marital crisis.

When asked about counseling, he said he had been admitted psychiatrically to a hospital for suicidal ideation. The Employer, in rebuttal, recalled female employee B.V. who testified that during the time when she was alleged to have been providing the Grievant with unsolicited fellatio, she was undergoing dental surgery for the removal of 4 teeth, that she had stitches which made mouth motions painful, and that her lips and gums were swollen. A dental bill in corroboration was introduced (Employer's Exhibit 12).

Union's Position

The Grievant has been a good employee for 9 years and 42 days.

He was charged with two incidents and fired for these two incidents. At his pre-disciplinary hearing, he admitted to one of these charges and disagreed with the interpretation of the March incident but went on to explain that both females had an ongoing relationship with him. The pre-disciplinary hearing was halted with the understanding that the hearing would be reconvened after further investigation by management. The investigation consisted of conversations with the two females only. The investigation was not thorough or unbiased.

As the third step hearing, the Union pointed out that mitigating circumstances existed in the Grievant's personal life: he was hospitalized at that point and was willing to participate in an EAP program after his release.

The management in ODOT chose not to see the obvious but upheld the firing of the Grievant. The contract specifically states in Article 24.05, "Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment." ODOT's own A-301 says that ODOT is dedicated to the policy of progressive constructive discipline and item 14 specifically shows progression from a written reprimand to a removal. ODOT's actions have been capricious in that the firing was predicated on two females statements with no corroboration or further investigation to find why the Grievant would do this and with no regard to the Grievant's situation.

The Union can show through testimony that both of the females had in fact led the Grievant on. The Union firmly believes that the punishment is too severe. The Arbitrator should change the termination to a suspension.

Management's Position

Management will show that it had just cause to impose discipline upon the Grievant. The Grievant has admitted to some actions and being in the physical location for other allegations. The Grievant's allegations could not be substantiated but were

seemingly self-defeating at the same time, if they actually occurred. Many aspects of the women's allegations against the Grievant are related or indicate a consistent pattern of behavior which lends them more credibility. The discipline that was imposed was commensurate with the seriousness of the offenses, and the offenses are magnified by the fact that they occurred in the traditionally male dominated work place -- a place that can be suspect for harassment, but a place where women have every right to work and a right to work without being sexually harassed and intimidated by co-workers. These actions will not be tolerated. The actions by the Grievant went beyond sexual harassment. They were grossly immoral, profane, and illegal.

Procedural Note

The Union attempted to introduce evidence of how the two women dressed at the work site, how they talked at work, and about their daily mannerisms. Management objected. The testimony was unrelated to the incidents charged and did not describe any interaction between the Grievant and the two women.

The Arbitrator sustained the objection. The dress and mannerisms of the women has no relevant relationship to the charge of unwanted sexual touching or unwanted sexual exposure.

Discussion

The evidence is clear and convincing that the Grievant did precisely what he was alleged to have done. 1) He grabbed D.A. near her genitals and then rubbed her crotch. He exposed himself to her. These behaviors were unwanted and occurred on the work site. 2) He made sexual remarks and exposed himself to B.V. on the work site. The timing of this incident reasonably caused B.V. to regard her working conditions as unsafe. These actions constitute sexual harassment. The evidence indicates that the Grievant was on notice of actions which would constitute sexual harassment as well as the discipline which could result. The contract with the Union at Article 2.01 commits the Employer to the elimination of sexual harassment.

The direct defense of the Grievant is somewhat unclear. On one hand, at the hearing, the Grievant maintained that he only touched D.A. on the thigh. Yet in the closing, the Advocate said that the Grievant apologized for what he did. Nowhere in the various documents nor at the hearing, did the Arbitrator find any evidence of an "apology."

Secondly, the Grievant impliedly claimed consent, i.e., since allegedly he had had previous sexual relationships with the two victims. The Employer found no evidence to support these allegations. No credible evidence of consent to the actual incidents by either woman was produced at the hearing. Moreover,

prior consent to sexual events is not perpetual consent.[1] Both women testified that they neither consented to or solicited the Grievant's behavior.

Thirdly, the Grievant's testimony was not credible. He changed his story to lessen his behavior. His description of his alleged sexual encounters with B.V. were the stuff of fantasy. Moreover, every explanation was self-serving. Everything and everybody else was to blame -- his marital troubles, his vulnerability, the manipulative ability of his female co-workers. The Grievant even claimed that he only tolerated the fellatio events because of his vulnerability.

The Union argues, assuming the Grievant did the harassment, that the discipline is too severe. This argument deserves serious consideration. The Grievant is a 9 year employee with a decent work record and no current discipline.

Clearly, some actions can warrant discipline which begins and ends with termination. Sexual harassment, which involves touching and exposure of the genitals, is serious enough to warrant a major suspension or a termination. Hence, a termination is commensurate. However is it corrective? Under certain circumstances, a major suspension might be corrective.

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[1]In Ohio, even in marriage, perpetual consent is not given. Even if common mythology supports a belief in perpetual consent, the law of Ohio does not. One of the witness-managers also testified that he felt prior consent to sex gave subsequent lifetime consent. Hower, his belief is inconsistent with the law.

However, absolutely no evidence was adduced that indicated that the Grievant either wanted or would be amenable to correction. No evidence was produced to show that the Grievant was seeking appropriate treatment for either sexual addiction or compulsion. Being hospitalized for suicidal threats is neither an EAP nor enrollment in a therapeutic program. The Grievant evidenced no words or manner that indicated that he either needed help nor would seek it. At the hearing, he lied, he blamed others, and he steadfastly refused responsibility for his acts or the situation. The Arbitrator finds no evidence that corrective discipline would indeed "correct."

Award

Grievance denied.

February 13, 1991
Date

Rhonda R. Rivera
Arbitrator