

IN THE MATTER OF ARBITRATION

BETWEEN

OFFICE OF COLLECTIVE BARGAINING
OHIO STATE HIGHWAY PATROL

AND

FRATERNAL ORDER OF POLICE
UNIT #15

ARBITRATION AWARD

CASE NUMBER: 15-03-902424-0041-07-15
HEARING DATE: June 25, 1992
ARBITRATOR: John E. Drotning

I. HEARING

The undersigned Arbitrator conducted a Hearing on June 25, 1992 at the Office of Collective Bargaining, 106 North High Street, Columbus, Ohio. Appearing for the Union were: Gwen Callender, Esq., Ed Baker, David Simpson, Jim Roberts, Alicia Sullivan, Sgt. Ken Bell, Debbie Abbott, and Stan Vint. Appearing for the Employer were: Anne Arena, Brian Eastman, Paul Kirschner, Lt. Tim Blubaugh, Kathy Peay, Deborah Frohnauer, Cynthia Kennedy, and Lt. Col. Hartsell.

The parties were given full opportunity to examine and cross examine witnesses and to submit written documents and evidence supporting their respective positions. Post hearing briefs were filed on or about August 3, 1992 and the case was closed. The discussion and Award are based solely on the record described above.

II. ISSUE

Was Stan Vint disciplined for just cause? If not, what is the remedy?

III. STIPULATIONS

The parties jointly submitted exhibits marked Joint Exhibits #1, #2, #3, #4, #5, and #6(A-O).

IV. TESTIMONY, EVIDENCE, AND ARGUMENT

A. MANAGEMENT

1. TESTIMONY AND EVIDENCE

Colonel Robbie Hartsell testified he knew Stan Vint who was in charge of benefits in the Office of Personnel. Those benefits included insurance, worker's compensation, occupational injury, disability, as well as leave claims, etc.

Hartsell testified that the Benefits Office was in a separate room and there were four work stations in that office.

Hartsell said that most of the time there were three people in that room; namely, Sgt. Stan Vint, Cynthia Kennedy, a secretary with a work station in the office, and Deborah Abbott, a temporary employee.

Kennedy, said Hartsell, had been employed for at least three years. He went on to say that he became aware of problems after a week's vacation in February 1992. He said that Capt. John Damaree told him that Cynthia Kennedy accused Sgt. Vint of sexual harassment.

Col. Hartsell said that he, Capt. Damaree, and Lt. Blubaugh discussed the harassment allegations. He went on to say that Capt. Damaree suggested a formal investigation. Hartsell said the Inspection and Standard Section under Captain Webb reported the harassment problem to him.

Hartsell said the grievant was disciplined for sexually explicit language and also physically touching Kennedy. Thus, the incident was a serious issue and he cited Joint Exhibit #2 and #4A.

Hartsell suspended and demoted Vint in order to minimize sexual harassment problems. Hartsell noted the reprimands in Joint Exhibit #6(N) and #6(O) were for the use of profane language and lewd jokes. He said that Sgt. Vint, the supervisor, should know that he should not be an active jokester with his employees.

Hartsell said that Sgt. Vint's discipline was not based on comments by Kennedy and Abbott.

Hartsell went on to say that there are rules against sexual harassment and he cited Management Exhibit #1, a policy on sexual harassment, which was issued to the employees in 1988. He also testified that Management Exhibit #2 which was written by Col. Rice and it said that all employees must read and sign such an harassment policy statement.

Hartsell said that Management Exhibit #3 is an executive order from Governor Voinovich and it talks about sexual harassment policies. He went on to say that employees are trained about sexual harassment policies on a yearly basis. Hartsell testified about Joint Exhibit #3 and Management Exhibits #4 and #5 which all deal with sexual harassment. He was asked whether any other supervisors have been disciplined for sexual harassment and he said that a post commander, some sergeants, and a least one trooper had been disciplined for several harassment incidents.

Hartsell said that each incident must be looked at carefully and an incident did occur and a post commander was demoted to sergeant.

Ms. Cynthia Kennedy, a word processing specialist #2 working in the benefits section, said that Sgt. Vint was her boss between 9/90 and 4/92.

Kennedy said that Vint initiated sexual innuendo. She testified that she and Vint were in his car and they talked about their jobs and about married men. Kennedy said that Vint took his right hand in her left hand and put both in his crotch area and she pulled away. She also said that Vint used to play with the back of her hair while she typed and he did that on two occasions.

Kennedy was asked whether she told Vint to stop and she said No that she did not say anything to Vint but she just blushed or left the room.

Kennedy was asked whether Vint made obscene gestures and she said that yes he did so when Deborah Abbott came to work and she commented about Vint putting his hand in Abbott's crotch area. She went on to say that Vint, at a staff party, moved his hips in and out for screwing.

Kennedy went on to say that Vint as he sat next to her took his ID and put it on his fly. Kennedy then testified that when Deborah Abbott sat next to Vint, he said to her, "Put your legs together, I'm Willie Nelson".

Kennedy said that Vint had been involved in interviewing female employees and Vint then said, "We haven't found one good female employee because none of them have big tits".

Kennedy went on to say that Vint said that Kennedy's husband would like to know what she did on off time.

Kennedy said that she talked to Kathy Peay and Deborah Frohnauer about the incidents involving Vint.

Kennedy said that she talked to Lt. Blubaugh and told him she was uncomfortable in the office because of the above incidents. She went on to say that she never talked to anyone other than Lt. Blubaugh about those incidents.

Kennedy reiterated that she was not comfortable talking to other persons and she did not talk to Col. Hartsell. Kennedy said she did not ask Lt. Blubaugh to talk to Vint.

Ms. Peay, said Kennedy, told her to see Col. Rice but that meeting did not occur.

Kennedy said she once asked Vint how long he would be away and he said he'd be back in timely fashion and "he'd blow me".

Kennedy acknowledged that she received a written reprimand for using profanity in her office when her typewriter fouled up.

She said she never initiated sex with Sgt. Vint. She acknowledged she should have told Vint that she did not appreciate what he was doing. Kennedy said she sought counseling over this issue.

2. ARGUMENT

Sgt. Vint, notes Management, was charged with sexual harassment, discrimination, and conduct unbecoming an officer. He is accused of sexually harassing Cynthia Kennedy by using profane language and making sexual, inappropriate remarks to her. Ohio, notes Management, defines sexual harassment as unwanted attention from someone in the work place. Such

harassment can involve verbal abuse, leering, subtle forms of pressure, physical aggression, lewd pictures, jokes, etc.

In this case, Management argues that Vint sexually harassed Cynthia Kennedy; he was aware of sexual harassment issues and had been trained about such behavior.

Management asserts motivation is irrelevant. Whether Vint was only being playful or whether he was consciously abusing his power as a supervisor or whether he was trying to coerce sexual favors, he simply had abominable bad taste. Whether Kennedy participated willingly or unwillingly under coercion is also irrelevant.

Vint supervised the office; he was in charge and set the standards. As a result, argues Management, he is guilty of sexual harassment. The Ohio Highway Patrol recognizes sexual harassment as an extremely serious offense and thus, it demoted Vint from sergeant to trooper and suspended him for five days.

Management notes that the facts in the case are not in serious dispute and most of Kennedy's testimony is corroborated by the grievant. In short, the incidents that took place did, in fact, occur as follows. Vint became in charge of the Benefits Office in September of 1990 and Kennedy was already employed. Sexual harassment began in December. Kennedy stated that Vint would lean against the back of her chair and "play with her hair". The Employer notes that Vint's ongoing game involved him taking his last cup of coffee and then telling Kennedy to unplug the coffee pot and when she was down on her knees, he would say, "While you are down there," The intimation was that she

should perform oral sex and while Vint said that he was just joking and did not mean anything by it, it is still a serious problem, argues Management.

Management also points out that Vint while driving Kennedy to a meeting in Columbus, took her left hand and pulled it towards his lap area and said he would show her what is hard. She said that she thought he was going to place her hand on his crotch. Vint denied that incident.

Management goes on to say that Kennedy applied for and was denied a position as benefits coordinator but the information is that it was not that Sgt. Vint was not initially counseled by Lt. Blubaugh until October of 1991. Lt. Blubaugh, notes Management, had been alerted to office problems not by Cynthia Kennedy but by another employee who did not work in the Benefits Office; namely, Deborah Frohnauer.

Management notes that Kennedy communicated her concerns with some fellow employees; namely Frohnauer and Peay and she was upset over some of the incidents.

The claim, notes Management, that Kennedy retaliated against Sgt. Vint by charging him with sexual harassment does not stand. She was denied the position in May of 1991 and Vint was first counseled for his behavior in October of 1991, five months later.

Management goes on to say that the records show that Cynthia

Kennedy felt the environment in which she worked was intimidating and offensive. She used to leave the office embarrassed and red-faced and tried to discuss the latest offense with Deborah Frohnauer or Kathy Peay. She actually asked for her father's advise on how to handle the problem and she sought professional counseling.

Management goes on to say that most women, when faced with sexual harassment by a supervisor, essentially do not do much about it. Rather, they try to diminish it in their own minds but it sometimes causes physical and mental anguish.

Management notes that Vint acknowledges that he should not have permitted such conduct to go on.

Management states that the Union argues that Kennedy's complaints cannot be admitted as the basis for sexual harassment against Sgt. Vint because she allowed the behavior to take place over a long period of time, but that is not true, argues Management. In short, Management asserts that Vint conducted himself in a manner that created an intimidating, offensive work environment for one of his employees, namely, Cynthia Kennedy. He knew that he violated the law of the State of Ohio and in this particular case, Sgt. Vint was a supervisor in the State Highway Patrol and to return the grievant's stripes to him would make it possible for him to continually supervise women in an improper fashion.

For all these reasons, Management asks that the grievance be denied in its entirety.

B. UNION

1. TESTIMONY AND EVIDENCE

The Union called no witnesses but cross examined Col. Hartsell and Cynthia Kennedy.

Col. Hartsell on cross testified that one post commander was demoted. He testified that employees have three hours of training plus a Superintendent's letter which dealt with sexual harassment policies and those policies make it clear that Sgt. Vint could not violate such a policy.

Hartsell said he did not know whether Cynthia Kennedy contacted the Equal Employment Office. He went on to say that he thought Kennedy was a long time employee and he talked to her in January of 1992.

Hartsell said that Kennedy did not say Vint offended her. He went on to say that Capt. Damaree supervised Sgt. Vint.

Col. Hartsell said that he supposed he had been in the Benefits Office room at least about once a day.

The Union cross examined Cynthia Kennedy. Joint Exhibit #6(N), said Kennedy, was an inter-office communication involving a written reprimand given her and signed by Capt. Damaree.

Kennedy said that Abbott was a temporary employee.

Kennedy also testified that she applied for a benefits opening but she failed the examination. She said that in the Fall of 1991, she applied for a job audit by the Dept. of Administrative Services and she failed and she did not appeal. She testified she received a performance review (see Union Exhibit #1).

Kennedy said that her feelings are easily hurt.

The Union pointed out that Joint Exhibit #6(N), the inter-office memo from Sgt. Vint to Major Hartsell dealing with Cynthia Kennedy, cites her job description, her specific duties, and it pointed out that she was advised to be more aggressive in her assigned duties and that she should seek supervisory support and direction if she needs help. That communication also stated that she should try to take a pro-active approach to carrying out her tasks, etc., etc.

Kennedy said that she talked to Lt. Blubaugh in February 1992 for the first time over her concern about the offenses and she told Blubaugh about two incidents and she wrote them down.

Kennedy went on to say that Blubaugh talked to her twice that day and she told Blubaugh that she really liked jokes and that she kept those jokes in her office.

Kennedy said that Union Exhibit #2 was in her folder (material dealing with sexual humor).

Union Exhibit #3, said Kennedy, was just a joke and she typed that up.

Kennedy said that she did not tell Blubaugh that she would change her behavior. She indicated a Sgt. Stoughton interviewed her on February 21, 1992 and that was Union Exhibit #4.

Kennedy was asked whether Vint physically assaulted her and she said No. She went on to say that on that on March 12, 1992, she added some more incidents which were told to Sgt. Stoughton.

2. ARGUMENT

The Union notes that Sgt. Vint wanted a relaxed, enjoyable work place in the Benefits Office so off-colored jokes were "the name of the game". Ms. Kennedy, notes the Union, eventually did not get the job she wanted as benefits coordinator because she had a low score. Moreover, Kennedy also had applied for and was denied a new job under the Department of Administrative Services.

Kennedy, argues the Union, never told Sgt. Vint that his "behavior" was inappropriate or that she was offended by the environment of the Benefits Office.

The Union notes that Kennedy never told Lt. Blubaugh about "the coffee pot incident" and as time went on, the Union notes that Kennedy added incident after incident in her second and third interviews. Thus, every time Kennedy was interviewed, asserts the Union, she came up with additional allegations against Vint.

Kennedy, notes the Union, also never told Vint his actions were offensive, yet two days later in an interview with Sgt. Stoughton, Kennedy said Vint "played with her" and she said "Stop".

In Ms. Kennedy's third interview, she said that Vint "touched her" but in the second interview, no such claim was made.

The Union asserts that Kennedy said she took "notes" of Vint's actions on the advice of Lt. Blubaugh but this is a false claim, asserts the Union. Did Kennedy write up "a screwing incident" on 2/5 or 2/6, 1992 or was it written up on 1/22/92?

If so, how could an incident occurring on 2/6/92 take place in January? Kennedy's testimony, asserts the Union, is unclear.

There was, notes the Union, a lot of joking and banter in the Benefits Office, but only Sgt. Vint was disciplined.

The Union also pointed out the statements made by Alicia Sullivan [Joint Exhibit #6(J)] and Debbie Abbott and neither of these persons said that Cindy Kennedy was treated improperly by Sgt. Vint. Moreover, Kennedy passed out xeroxed copies of jokes and drawings (presumably noted in Union Exhibit #2).

The Union also stated that Kennedy's attitude changed after she did not win a position as employee benefits coordinator.

Kennedy, said the Union, participated in off-color comments or jokes (see Joint Exhibit #6(I) and Union Exhibit #2). Apparently, asserts the Union, there was a laid back, joking atmosphere in the Benefits Office and there was no "abusive working environment". Thus, Kennedy participated in sexual joking and suddenly she became offended and then accused Vint of sexual harassment. Such harassment, said the Union, requires the Employer to bear a heavy burden whether it is proof beyond a reasonable doubt or clear and convincing (see Arbitral Awards on pages 17 and 18).

Kennedy as of February 1992 failed to win a position as employee benefits coordinator and she also had the Department of Administrative Services deny her audit. In addition, Sgt. Vint had counseled Kennedy about her work performance [see Joint Exhibit #6(M)]. As a consequence of these events, Kennedy alleged that Vint harassed her. Management, notes the Union, limits its liability in harassment cases by issuing quick and

severe discipline. Thus, the real task is for the arbitrator to review the issues and come to a fair and equitable answer.

Sgt. Vint had six years as a sergeant; he had been with the State Highway Patrol and had an unblemished record. The severe punishment given Vint is not only psychologically damaging but it is also a monetary punishment and it is not commensurate with the principles of progressive discipline under the Contract.

For all these reasons, the Union asks that Vint be returned to his rank of sergeant with full pay and benefits and that his record be expunged.

V. DISCUSSION AND AWARD

The question is whether Stan Vint's discipline should stand? Management issued a five day suspension and demoted Vint from sergeant to trooper based on its investigation of sexual harassment charges raised by employee Kennedy.

There is no proof that the alleged incidents did not occur. Vint did not testify and in fact during the investigation process, he may have acknowledged some of the alleged interaction between himself and Kennedy. So the question is whether the testimony, evidence, and arguments concerning the alleged interactions justify a sexual harassment charge and the discipline?

There are two significant aspects to consider. First is Ms. Kennedy's claim that Vint sexually abused her. Kennedy's sexual harassment allegations apparently followed her failure to pass a test and not receiving a benefits coordinator job she had applied for as well as being denied an DAS audit for her present job.

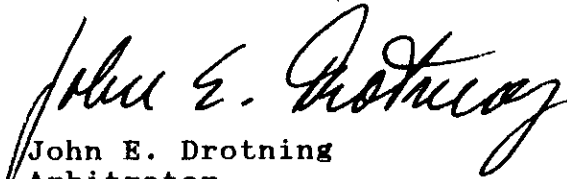
The Union's claim, however, that Kennedy only brought up the allegations because she was denied jobs is not persuasive. It may take an employee some time to make a sexual harassment complaint. Neither the timing of the allegation nor the actual impetus is critical; rather it is the charge itself which must be considered.

The second aspect of the problem involves Vint's interactions with Kennedy while he was head of the Benefits office. The testimony suggests that bantering, joking, and sharing of off-colored material in the office was mutual to a degree. Vint apparently wanted the Benefits office to be a relaxed and enjoyable work place and he viewed the off-colored jokes and drawings (see Union Exhibit #2) as part of a relaxed environment.

However, is it reasonable to find that even if Kennedy did not object to or even may have encouraged Vint's conduct to some extent, that the incidents failed to meet the definition of "unwanted attention" and therefore, sexual harassment did not occur? Does a "relaxed" atmosphere excuse Vint's conduct? The answer to both questions is No.

Vint was the responsible supervisor. Sergeant Vint had been trained about sexual harassment problems. Even if Vint and Kennedy played out sexual issues, it is still obvious that Vint, as head of the Benefits office, must maintain a sense of decorum toward his employees. It was his mistake and/or misjudgement to consider his interactions with Kennedy acceptable behavior because they were not immediately denounced. The issue is not Ms. Kennedy's behavior; it is that Mr. Vint acted improperly in his interactions with Kennedy. That Kennedy's allegations may have coincided with her not obtaining a job shift and that she may have contributed to the "relaxed" atmosphere are not circumstances which mitigate against a finding of sexual harassment or create a situation where the punishment does not fit the crime.

All of the above supports Management's claim that Mr. Vint sexually harassed Ms. Kennedy. Therefore, Management's decision to discipline Mr. Vint must be sustained.


John E. Drotning
Arbitrator

September 9, 1992