

**ARBITRATION SUMMARY AND AWARD LOG**

**OCB AWARD NUMBER: 2005**

*1205*

**OCB GRIEVANT NUMBER:** 31-04-960914-0050-01-06

**GRIEVANT NAME:** Dennis Elliott

**UNION:** OCSEA

**DEPARTMENT:** Department of Transportation

**ARBITRATOR:** Anna D. Smith

**MANAGEMENT ADVOCATE:** Edward Flynn  
**2ND CHAIR:** John McNally

**UNION ADVOCATE:** Lynn Kemp

**ARBITRATION DATE:** April 28, 1997

**DECISION DATE:** June 2, 1997

**DECISION:** Sustained in part/Denied in part

**CONTRACT SECTIONS AND/OR ISSUES:** Article 24; Was Grievant removed for just cause

**HOLDING:** Arbitrator Smith found that the Grievant was disciplined, but not removed for just cause. The removal was adjusted to a 10-day suspension for the Grievant's offense of dropping his pants and exposing his buttocks. His offensive behavior was witnessed by his working crew and a 14-year-old youth watching the crew work. The Grievant was restored to his position with full back pay, benefits and seniority retroactive to ten working days following the effective date of his removal. The Employer will minus the normal deductions and any earnings from employment he may have had since his termination. His personnel record will reflect the 10-day suspension and final warning.

**ARB COST:**

## I. HEARING

A hearing on this matter was held at 8:30 a.m. on April 28, 1997, at the Ashtabula Garage, District 4, Ohio Department of Transportation, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties from their permanent panel, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter was properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded, and to argue their respective positions. Testifying for the Employer were Donald Perry (by subpoena), Christine Ford (Highway Maintenance Worker 3), Donald Campbell (Superintendent, Ashtabula County), Bette Mendenhall (Administrative Investigator), and Greg Zemla (Labor Relations Officer, District 4). Testifying for the Union were Frank Hocevar (former Highway Worker 2), Nancy Scott (Union Steward), Jim Costello (Union Treasurer and Steward), Patrick Barrett (Highway Maintenance Worker 2), Robert Geraghty (Highway Maintenance Worker 2), Loreen Korver (Highway Maintenance Worker 2), and Dennis Elliott (the Grievant). Also present were observers Jack Kolehmainen (Steward) and Robert Bossar (Deputy Director of Business, ODOT District 4). A number of documents were admitted into evidence (Joint Ex. 1-20, Employer Ex. 1, and Union Ex. 1-9). The hearing concluded at 3:00 p.m. on April 28, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

bend over and "moon" for about three seconds with a laughing manner. He said it did not look like Elliott was tucking in his shirt and he did not think the exposure was accidental, but he did not really know.

Doug Dreslinski did not testify but his statement has it that Geraghty had been making jokes about "butt cracks" and that he exposed "part of the back of his rear end" (Joint Ex. 17). Dreslinski did not see what Elliott is accused of doing.

The others who were present gave a different account. Frank Hocevar, Loreen Korver and Robert Geraghty all testified that Joshua Hartz, a summer helper, put a log or branch between his legs and told Geraghty, who had chased him out from under the tree several times, to "suck on this." They said Ford laughed and remarked, "Don't you wish you had a woody like that?" Hartz was not called to testify, but his statement is in agreement with this version (Joint Ex. 15). All of these witnesses asserted they never saw the Grievant pull down his clothing or "moon" anyone.

As for the Grievant, he denies he would ever drop his pants and expose himself. His crack may have been apparent when he bent over because he was heavy then and his pants drooped. Co-workers constantly teased him and others about this. Other employees (Barrett and Korver) testified many butt cracks were seen on the job, and some (Geraghty, Costello and Barrett) testified they doubted Ford would be offended by this as she condoned and engaged in off-color joking and remarks, and was sexually aggressive towards male co-workers. The Grievant testified Ford made advances towards him when he was assigned to the Rome Outpost. He rebuffed her and confided in Korver, who corroborated this in her own testimony. Ford's advances and his poor relationship with his supervisor at

though Dreslinski restates that he saw Geraghty's "butt crack" (Joint Ex. 12, 13, 15, 18). In addition, Costello and Staff Representative Peggy Tanksley took a statement from the youth in which he says it was possible that the Grievant's pants were loose enough to show part of his buttocks and that he might have lifted his shirt to pull them up (Joint Ex. 7). These statements were attached to the pre-disciplinary meeting report (Joint Ex. 3b).

Greg Zemla, District 4 Labor Relations Officer, testified that he discussed the case with Jim Miller, who recommended termination to the Deputy Director. A number of factors were considered when making the decision: the Grievant's short-term employment, the public circumstances of the incident, and the Grievant's light treatment of such conduct and failure to admit his guilt.

The Grievant was removed on September 13, 1996, for violation of Directive WR-101, Item 3, "Posting or displaying obscene or insulting material and/or using obscene, abusing, or insulting language or gestures toward another employee, a supervisor, or the general public" (Joint Ex. 3C). This action was grieved that same day, alleging violation of Articles 24.01 through 24.06 and all other pertinent sections of the Agreement. Being unresolved at lower steps of the grievance procedure, the case was appealed to arbitration where it presently resides for final and binding decision, free of procedural defect.

### III. STIPULATED ISSUE

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

was flawed, never before has Scott had a problem with her procedure, nor has it ever come up in all the cases she has done for the State that Mendenhall has been other than a thorough investigator. Compared to the training and experience of Mendenhall, Costello's background is weak and he did not interview all the witnesses either. Hartz, who allegedly committed the act that Ford supposedly made light of, did not testify, and Barrett's testimony only amounts to hearsay. Dreslinski, who rolled on the story, did not testify, and Geraghty, who did, was accused of the same thing as the Grievant. The credibility of the Grievant is undermined by his testimony that he had not worked with Ford for eleven months, which conflicts with Korver's that he had done so a lot. One of the two is lying, claims the State, suggesting that the Grievant's testimony is self-serving. By contrast, Campbell had no reason to get Elliott. Indeed, he gave him good evaluations during his probationary period, but even towards the end there were indications of the problems to come after his probation. Elliott was an 18-month employee with prior discipline who denies what he did and made jokes about it. The State asks that the Arbitrator deny the grievance.

#### Argument of the Union

Taking the position that just cause has not been proven, the Union challenges the testimony of the State's two witnesses. Ford, it says, had a reason to get the Grievant and does not have the sort of personality that would be offended by seeing someone's butt crack. Perry is 14 years old and did not know any of the employees at the work site. The Union questions whether he would be able to remember their names a month later and finds it curious that the State did not ask him to identify the Grievant at the hearing.

## VI. OPINION OF THE ARBITRATOR

This case turns entirely on credibility. The picture painted by the State through its witnesses and summation is that of two grown men mooning co-workers (one of whom was an offended female) and a minor citizen while they worked beside a public highway, all the while joking and laughing about it with their buddies who later protected the Grievant by denying the incident ever occurred. The picture painted by the Union is that of a scorned woman out for revenge, a biased investigator, and an employer overly eager to rid itself of a valuable employee. I have carefully read the statements and testimony of all witnesses several times over and find the State's version is sound in its essential elements, though this does not invalidate all of the Union's version.

To begin with, the testimony and statements of Perry and Ford match in key aspects: the Grievant bent over and exposed his full derriere or "quite a bit of it." It was seen for a few seconds by Ford from the Grievant's rear and by Perry from the side. I cannot see a man bending over with his hands at knee height to pull up his trousers unless his trousers are already below his hips. It occurred in an atmosphere of laughing and joking. This is not an accidental "butt crack," but horseplay gone too far.

The Union challenges Ford's testimony on the grounds of her character and motivation. While it may be true that Ford has an aggressive sexual attitude towards men and was once rejected by Elliott, a grudge against him does not explain why she would also accuse Geraghty.<sup>1</sup> In addition, though she may herself use coarse language, be entertained

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<sup>1</sup>I expressly make no finding on the guilt or innocence of Geraghty as that question is not before me.

statement, as Dreslinski did. In any case, neither Ford nor Elliott, who were the only two admitting to seeing a mooning, complained that their written statements were materially different from what they saw.

I am also not troubled by other witnesses' statements and testimony that they did not see the Grievant moon anyone. First, if it lasted only a few seconds, not everyone would necessarily be looking. Dreslinski's statement certainly has it this way. Second, from their vantage point, they may have seen it as only a "butt crack." Third, if the crew was encouraging the Grievant by hooting and laughing, they may feel partially responsible for his removal and feel a strong need to stick by him now that he is in trouble over it.

In sum, I am convinced the Grievant purposefully revealed his buttocks, but I am not convinced it was done to harass or insult his co-workers, superiors, or a member of the public. I also do not find it aggravated by the alleged boast about truckers on I-90 because the evidence on that is too weak, no one but Ford having heard or noticed any remarks between her and the Grievant. I conclude the gesture was horseplay gone too far, expressing disrespect and exposing the State to legal risks, probably in a context of inadequate supervision for which management must bear some responsibility. As such, and on top of a one-day suspension, discipline is called for but removal is too harsh. A more corrective penalty is a major suspension with final warning. The Grievant needs to understand he now sits on the cusp of removal and must conform his behavior to the legitimate needs of his employer.