

#1281

In the Matter of Arbitration Between:

OHIO DEPARTMENT OF PUBLIC SAFETY,
DIVISION OF THE STATE HIGHWAY PATROL

and

OHIO STATE TROOPERS ASSOCIATION

Re: Gr. 15-03-970910-0101-04-01 (S. discharge)

Hearing held March 27, 1998

Briefs received on or before April 11, 1998

Decision issued May 8, 1998

APPEARANCES

Employer

Lt. Robert Young, Esq., Advocate
Lt. Susan Rance
Heather L. Reese, OCB, Second Chair

Union

Herschel M. Sigall, Esq., Chief Legal Counsel, OTA
Thomas Stamos, Grievant

Arbitrator

Douglas E. Ray

I. BACKGROUND

Grievant served as a State Highway Patrol Trooper for approximately three and one half years and was assigned to the Walbridge Post. He was in a bargaining unit represented by the Ohio Troopers Association which is party to a collective bargaining agreement with the State of Ohio.

This case concerns Grievant's August 26, 1997, removal. He was charged with violation of Rule 4501:2-6-02 (I) (1)(2), Conduct Unbecoming an Officer, and removed after an administrative investigation into charges that he had committed acts of domestic violence on his then live-in girlfriend. The two had been living together for several months with her two young children in a house owned by Grievant's father. The girlfriend filed criminal charges for domestic abuse on August 18, 1998 and alleged that Grievant had twisted her arm and had stomped on her foot causing her injury. She also claimed that Grievant had kicked her in the stomach while both were standing. The criminal charges proceeded to trial without a jury before Judge Singer along with criminal charges that Grievant had violated a Temporary Protective Order directing him to stay away from the girlfriend. The charges regarding the TPO were dismissed at the request of the City before trial and the charges of domestic violence went to trial and resulted in an acquittal. Grievant was not reinstated by the Employer after his acquittal and the matter was processed to arbitration. On March 27, 1998, an arbitration hearing was

held before the undersigned arbitrator. At hearing, the parties stipulated that the matter was properly before the arbitrator. The Employer presented testimony from the former girlfriend, her aunt who was an alleged eyewitness to part of the alleged incident, Grievant's commanding officer who had done the administrative investigation, a Toledo police officer and the doctor from the hospital where the former girlfriend had gone for treatment after the alleged incident. The Association presented testimony from Grievant who denied that he had done the acts of which he was accused. The transcript from the criminal trial was submitted into evidence as was a tape recording which Grievant had made of certain conversations between himself and the girlfriend and which had been admitted into evidence at the trial. After the hearing, both parties filed written closing statements.

II. ISSUE

The parties stipulated the issue to be:
Was the Grievant terminated for just cause? If not, what shall the remedy be?

III. CONTRACT PROVISIONS

Section 19.01, Standard, provides that "No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause."

IV. POSITIONS OF THE PARTIES

Both parties made extensive arguments at hearing and in post-hearing briefs. Their positions are only briefly summarized below.

A. The Employer

The Employer argues that Grievant was properly terminated and asks that the grievance be denied. The Employer argues that its administrative investigation turned up evidence indicating that it was proper to discharge Grievant. It asserts that Grievant injured the alleged victim on August 18. In supporting her credibility on charges that Grievant bent her arm, stomped on her foot and kicked her in the stomach, the Employer points out that she had to go to the hospital emergency room and only revealed that Grievant had hurt her after the hospital staff would not believe that she had been hurt in a fall. In other words, argues the Employer, she did not go to the Hospital to fake charges against Grievant but, rather, tried to keep him out of it because of her fear of what he might do. The Employer also points to testimony that Grievant had bitten the girlfriend, choked her and given her a black eye on other occasions. It asserts that the tape recordings, made without the victim's knowledge do not paint an accurate picture of the facts because Grievant knew when the machine was on and knew to sound calm at those times while the victim did not know. It asserts that grievant's explanations for his surreptitious tape recording are not

logical and that Grievant could well have provoked the woman before turning on the tape.

The Employer urges the arbitrator to deny the grievance on the ground that Grievant's misconduct has been proven by the testimony of the victim and the corroboration by her aunt who lives just a few houses down the street and was in the house to see the kick to the stomach. It argues that this conduct makes Grievant unfit to be an officer of the law.

With regard to the acquittal, the Employer argues that the standard of proof in a criminal trial, beyond a reasonable doubt, is not appropriate for a criminal trial. It also argues that it presented additional witnesses, testimony and exhibits at arbitration which were not presented at the criminal trial. Finally, the Employer points to other arbitration decisions, including this arbitrator's decision in a case involving the Highway Patrol and a predecessor labor organization, in which discharge was upheld despite an acquittal.

The Employer argues that Grievant as a sworn law enforcement officer is held to a higher standard of conduct and that he cannot enforce laws while on duty and break the law while off duty. It asks that the grievance be denied.

B. The Union

The Union asks that the grievance be sustained. It argues that Grievant is innocent of the charges brought against him. It points to his exemplary record with the

Patrol. With regard to the alleged incident, the Union argues that the girlfriend was constantly jealous and accused Grievant of seeing other women, often losing her temper and attempting to injure him. It points to Grievant's testimony that he had asked the girlfriend to leave his house because of her emotional outbursts, profanity and attacks on him but that he was giving her time to find a place in light of her financial situation on AFDC and her two children. He testified that, on the morning in question, she had been continually screaming at him and that, if she injured her foot, it was when she kicked him in the back while he sat on the stairs to put his shoes on. The Union points out that Grievant's demeanor at hearing changed from allegedly afraid and tearful to something else and argued that she was able to persuade the police and the investigator by showing her sympathetic face at will.

The Union believes that the administrative investigation was biased and alleges that the Post Commander had bad feelings toward Grievant. It points to testimony from the alleged victim that the Post Commander told her, at the outset of the investigation, that Grievant would be fired. It points out that he did not interview any of the potential witnesses for Grievant, including a masonry contractor who was working right outside the window of the house on the morning in question. The Union also alleges that the Post Commander tried to get Grievant to resign before he even began the investigation. It points out that,

on the day of Grievant's pre-disciplinary hearing, the Post Commander learned of a warrant for Grievant's arrest on what ultimately proved to be a meritless charge of violating the TPO. Instead of telling Grievant so he could turn himself in, the Post Commander asked the Toledo Police to come out to the post at 5 pm when Grievant was to return to receive the disposition of the hearing. The police SWAT squad then came out to the post (out of their jurisdiction) and cuffed Grievant and took him away. This indignity, in the view of the Union, shows the Post Commander's predisposition against Grievant.

The Union asserts that the former girlfriend and her aunt fabricated the charges against Grievant and asks that Grievant be reinstated and made whole.

V. DECISION AND ANALYSIS

In reaching a decision in this matter, the arbitrator has reviewed the collective bargaining agreement, the testimony and exhibits presented at hearing and the arguments of the parties. This is a serious case. The arbitrator understands that the Highway Patrol does not desire to have officers on patrol who might have a propensity to beat women.

The case could present many difficult issues involving the appropriate standard of proof, the application of standards for determining when off duty conduct can support discharge or discipline, the application of the contract's progressive discipline sections and limits thereto, the

propriety of the way in which the administrative investigation was handled and other matters. In this case, however, the arbitrator need not reach these issues because the arbitrator finds that it has not been proven that Grievant committed the acts of which he has been accused. For this reason, the arbitrator believes that he has no choice but to sustain the grievance. The reasons for this ruling follow.

1. Whether the arbitrator applies the preponderance of evidence test espoused by the Employer, the clear and convincing test used by many arbitrators for serious charges or the reasonable doubt test used by the criminal system and by some arbitrators, the result would be the same. The arbitrator simply cannot tell which side's witnesses are telling the truth. When that happens, the party with the burden of proof must lose. In this case, that is the Employer. There is much in this case not to like about the testimony given by witnesses for both sides. Some of the evidence at hearing paints neither Grievant nor his former girlfriend in a good light and Grievant's surreptitious taping of conversations is troubling. Nonetheless, the Employer must prove that Grievant engaged in the conduct of which he is accused.

2. Because arbitrators apply different standards of proof and sometimes hear evidence not presented at a criminal trial, the acquittal does not automatically resolve the matter. See, e.g, City of Sterling Heights, 89 LA 723

(Keefe 1987) (arbitrator finds police officer properly discharged for crime despite jury verdict of not guilty.) Some arbitrators have noted, however, that an employer's burden of persuasion might be higher after an acquittal. See City of Muskegon Heights Police Dept., 88 LA 675 (Girolamo 1987) In this case, the arbitrator finds the evidence too inconclusive to satisfy any burden of persuasion.

3. The testimony of the former girlfriend was sometimes contradictory and not as persuasive as it could have been. For example, a crucial fact is whether she kicked Grievant on the morning in question. She was not wearing shoes and a kick could have been the cause of her foot injury. She was admittedly swearing, yelling and, sometimes throwing things to the floor. When questioned numerous times at the arbitration hearing about whether she had kicked Grievant on the morning in question, she responded numerous times, " I do not recall kicking him," rather than denying it outright. While this could be the testimony of an honest person trying to be accurate about an upset and upsetting time, it could also be a carefully designed response to avoid a charge of lying under oath. Further, the tape recording introduced at the criminal trial of the three way telephone conversation between Grievant, the aunt and the girlfriend (on a remote extension), the accuracy of which was not contested, did seem to contain an admission that she had kicked Grievant. (As the Employer argues, another alleged admission to

beating Grievant seems to have been uttered in a sarcastic tone and is not taken as an admission.)

The alleged victim testified at the arbitration hearing that she was in bare feet when Grievant allegedly stomped her foot. At the criminal trial, she testified that she was wearing socks that morning. In addition, the injury looked much worse in the photograph taken by the Post Commander on August 21 than it did in the photograph taken at the emergency room August 18 more than 12 hours after the incident. The August 18 photo shows apparent bruising only to one toe while the August 21 photo shows a wider pattern of bruising below the toe on top of the foot. There was no medical evidence positively linking the injury to a traumatic blow from Grievant. A traumatic blow from a person wearing deck shoes might well have hit more than the fourth toe and bruising could have come from kicking a person in the back while in bare feet.

At the criminal trial, the former girlfriend testified that she was trying to call her aunt on the phone the morning of the incident and that Grievant bent her arm behind her back, "stomped my right foot, then he threw me to the floor...." At the arbitration hearing, she said nothing about being thrown to the floor. Further, from her testimony at hearing and the trial and from her aunt's testimony, she sounded much more upset about the possibility that Grievant had been seeing a former girlfriend than she was over any alleged abuse. The testimony of the

girlfriend, her aunt and Grievant all indicate that the girlfriend was extremely upset at Grievant. She seems to have found the telephone number of a former girlfriend on Grievant's pager and had herself spoken to the former girlfriend. She was screaming and swearing at Grievant for hours over this matter both the day before the incident and before and after the time the stomping incident was alleged to have occurred. The arbitrator cannot, on this record, know whether the stomping incident occurred or whether she made it up.

4. The testimony about the alleged kick to the stomach is similarly fuzzy. When the woman's aunt testified to how Grievant had allegedly kicked the woman, the description of the kick and the attempted simulation of it did not seem to be the kind of kicking motion that a military trained individual (as Grievant was) would use. The aunt testified at the arbitration hearing that she saw red marks on the woman's stomach from the kick but the doctor in the emergency room did not observe any marks or bruises on the stomach nor did the aunt testify to marks at the criminal trial. Nor did she explain under what circumstances she would have come to examine Grievant's stomach. Although the alleged victim testified to a burning feeling in her stomach that led her aunt to take her to the emergency room, she testified at the arbitration hearing that she was on ulcer medication. Thus, a burning feeling in the stomach does not prove a kick. The girlfriend said that the kick had left

marks on her dress but there was no indication that the dress was ever shown to the police, to Patrol investigators or to prosecutors. It was not introduced into evidence at the trial or hearing. Again, there are inconsistencies and credibility is not strong. The arbitrator simply cannot tell if the kick occurred.

5. The Employer argues that its administrative investigation provides sufficient cause to uphold the discharge despite the acquittal. It points to the fact that the Post Commander spoke to the woman's 6 year old son who allegedly confirmed the stomping incident. There are at least two problems with this argument. First, that report is hearsay. Whatever the child told the investigator, the child was not available at hearing and did not testify at the criminal trial. There was no cross examination and no opportunity for the arbitrator to confirm his opportunity to observe, whether he had been coached, etc. In the public sector, the opportunity to test the credibility of accusers is particularly important. Second, a close review of the investigative report suggests that the child's report might impair rather than support the credibility of his mother. The Post Commander's report states that the child described the arm twisting and said "(Grievant) then threw her to the floor and stepped on her foot." At the criminal trial, the woman described the incident as being stomped first and then being thrown to the floor. The chronology is different and the child might have been coached on what to say and just

gotten the story wrong. Perhaps, instead, the Post Commander recorded his comment inaccurately. There is no way to tell on the present record. It is also worth noting that at the arbitration hearing, the alleged victim did not mention being thrown to the floor at all. Again, the evidence is too murky to prove the case as well as being suspect on due process grounds.

6. The Employer argues that Grievant has brought discredit to the Patrol. Although newspaper stories did cover the charges against him, there was also a newspaper story on his acquittal and his desire to return to his job. When one is acquitted, newspaper stories based on unproven accusations should not provide just cause for discharge.

7. Grievant has now been through a criminal trial and an arbitration hearing. At neither was the evidence sufficient to establish that he committed the acts of which he was accused. The arbitrator agrees with the Employer that the charges and other things alleged at hearing are serious and troubling. They have not been proven however.

VI. DECISION AND AWARD

The grievance is sustained. The Employer is directed to reinstate Grievant and make him whole. The arbitrator will retain jurisdiction for 60 calendar days after issuance of this award in the event that the parties are unable to agree on the exact terms of the make whole award.

Toledo, Ohio, County of Lucas
May 8, 1998



Douglas E. Ray
Arbitrator