

#1361

DECISION AND AWARD OF ARBITRATOR
CASE NO. 15-00-980922-0140-04-01

In The Matter of Arbitration Between:

STATE OF OHIO)
OHIO DEPARTMENT OF PUBLIC SAFETY)
DIVISION OF THE STATE HIGHWAY PATROL)
-AND-)
THE OHIO STATE TROOPERS ASSOCIATION)

APPEARANCES

For The State

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|------------------------|---------------------------------|
| Lt. Susan M. Rance | Employer - Advocate |
| Roger C. Eckert, Esq., | Counsel - Mason City School |
| Rhonda Bell | Office of Collective Bargaining |
| Lt. Robert J. Young | State Highway Patrol |

For The Association

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|------------------------|---------------------------------|
| Hershel Sigall, Esq., | Counsel |
| Richard Skelton, Esq., | Counsel |
| Bob Stitt | President - O.S.T.A. |
| James Brinck | Staff Representative - O.S.T.A. |
| David E. Brown | Grievant |

BEFORE ALAN MILES RUBEN, ARBITRATOR

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SUBMISSION AND PROCEDURE

The undersigned was selected from the permanent panel of arbitrators to hear and decide the within grievance over the discharge of a Trooper for alleged sexual harassment of female school Bus Drivers during the course of his duties as a Motor Vehicle [Safety] Inspector.

At the direction of the parties the arbitral hearing was begun on December 16, 1998 in Cincinnati, Ohio, and concluded on January 27, 1999, in Columbus, Ohio.

Thereat, the jurisdiction of the Arbitrator over the subject matter of the dispute and the parties thereto was acknowledged, and all objections, procedural and substantive, to his exercise of jurisdiction were waived.

The parties were afforded full and equal opportunity to present testimonial and documentary evidence.

At the request of the Department the Arbitrator issued subpoenas to compel the attendance of witnesses.

All witnesses were separated, placed under oath and subject to cross-examination. Their testimony was not, however, recorded and transcribed.

At the conclusion of the second day of hearing, the Arbitrator, accompanied by representatives of the parties, inspected the school bus in which one of the incidents of alleged sexual harassment was said to have taken place.

The advocates for the parties made opening statements and, at the conclusion of the evidentiary portion of the hearing, elected to file post-hearing briefs.

With the receipt of those briefs on March 8, 1999 the hearing was declared closed.

SUMMARY OF THE EVIDENCE

The Grievant, Mr. David E. Brown, was initially employed as a Trooper in 1987 and assigned for the first seven years to the Road Patrol. His patrol service was said to have been blemished only by a single minor reprimand. In 1995, he was trained, qualified and reassigned to function as a Motor Vehicle Inspector in District 8, headquartered in Wilmington, Ohio.

The Division's School Bus Inspection Policy provides:

"A. Scheduling Inspections - All Ohio school buses shall be inspected a minimum of twice annually. Each school bus shall receive at least one annual and at least one spot inspection. Annual inspections should be scheduled to begin at the end of the school year and be completed prior to the beginning of the next school year. Generally, spot inspections should be scheduled no sooner than three months after the latest annual inspection; however, spot inspections may be scheduled sooner if the inspector deems necessary.

....

"B. Bus Inspection and Preparation - School bus inspections shall be performed only by personnel trained to perform such inspections (Personnel who have successfully completed a course of instruction by the Office of Licensing and Commercial Standards Section in motor vehicle inspection approved by the Superintendent (e.g. CEC Sergeants or MVI Teams)).

...."

On September 8, 1998, Captain K.T. Woehrmyer, District Eight Commander, wrote to Colonel Kenneth B. Marshall, Superintendent of the Highway Patrol, charging that Trooper Brown had committed a violation of the Department's regulations prohibiting sexual harassment when he allegedly made "inappropriate physical contact with female Bus Drivers while conducting bus inspections."

Section 4501:6-02(J) of the Division's Policies reads in pertinent part:

"(J) Sexual harassment and discrimination

"(1) No member shall sexually harass any person. "Sexual harassment" is defined as the unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct or contact, or innuendo of a sexual nature. No member shall, by his/her actions, create an intimidating, hostile, or offensive work environment.

...."

On due notice, a pre-disciplinary hearing was held on September 14, 1998 before Lieutenant T.C. Hook at the District Headquarters.

Article 19 of the governing Collective Bargaining Agreement sets forth the applicable disciplinary standards and procedures:

"19.01 Standard

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

....

"19.05 Progressive Discipline

"The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

"1. One or more Verbal Reprimand (with appropriate notation in employee's file);

"2. One or more Written Reprimand;

"3. One or more day(s) Suspension(s) or a fine not to exceed five (5) days pay, for any form of discipline, to be implemented only after approval from the Office of Collective Bargaining.

"4. Demotion or Removal.

"However, more severe discipline (or a combination of disciplinary actions) may be imposed at any point if the infraction or violation merits the more severe action.

"The Employer, at its discretion, is also free to impose less severe discipline in situations which so warrant.

...."

Lieutenant Hook, after reviewing the investigatory documentation and listening to the evidence, concluded that the Division had established "just cause ... for discipline."

On the same day, Mitchell J. Brown, Director of the Department of Public Safety, notified Trooper Brown that he had been discharged.

On September 22, 1998, Mr. Brown timely grieved his removal from service:

"Grievance Facts

"On 9-14-98 I was terminated from my employment without just cause for an alleged violation of Rule 4501:6-02(J) of the Rules and Regulations of The Highway Patrol.

"Requested Remedy

"To be made whole and be reinstated as a Trooper with all back pay and seniority."

The grievance was denied in a Departmental Answer which read in relevant part:

"Grievant is a motor vehicle inspector trooper with the Ohio Highway Patrol. As part of his routine duties he safety inspects school buses. A complaint was received and investigated which revealed grievant had inappropriately touched female bus drivers on the breast and buttocks at five (5) different bus garages in four (4) different counties.

"The evidence of Grievant's misbehavior is clear and convincing. Grievant denies intentionally touching the women and denies inappropriate comments attributed to him.

....

"Grievant's behavior puts him in the category of sexual predator. He boldly and intentionally touched eight (8) different female bus drivers during the course of performing his duties as a trooper. The women all outline the similar methods employed by grievant in order to have inappropriate contact with their breasts and buttocks. He intimidated and frightened all of the women through the use of his position as a trooper.

"Grievant's behavior has rendered him unfit to hold the position of trooper, a position of public trust and responsibility. Grievant's weak and unbelievable denial of the allegations, simply put, demonstrates his willingness to lie in an attempt to cover his misbehavior.

"The Employer had ample just cause to remove grievant from the position of trooper. The decision was not unreasonable, arbitrary or capricious. The decision was absolutely appropriate."

The Union then timely demanded arbitral review.

The events leading up to the Grievant's discharge began with a complaint from a female Bus Driver to the Xenia Highway Patrol Post on August 3, 1998 alleging that Trooper Brown had engaged in improper conduct by grabbing her breast.¹

An internal investigation was commenced and the scope expanded to survey all of the female Bus Drivers employed by the school districts and other agencies whose buses had been inspected by the Grievant during 1998. Ten of the contracted Bus Drivers alleged Trooper Brown had touched them inappropriately. Eight declared that the Grievant had touched or rubbed them on the breast or buttocks during the course of an annual or spot inspection conducted between July of 1996 and July of 1998. The complaining Bus Drivers were employed by five school districts located in four counties within District Eight's jurisdiction. The drivers in each district were unacquainted with the drivers in the other districts. Six of the Drivers gave testimony in these proceedings. Statements taken from eight others were, by stipulation of the parties, entered into evidence.

At the arbitral hearing, Ms. Cindy Hester, who had been employed by the Xenia City Schools for the past four years, testified that on August 3, 1998 she was serving as a volunteer Bus Driver for the annual safety inspection. She drove the City buses to the spot where Trooper Brown and a

1. The incident was referred to the Xenia Police Department for criminal prosecution under a city ordinance making such conduct a misdemeanor.

civilian Vehicle Inspector, James D. Bradley, performed the requisite checks.

During the annual inspection a complete review of all bus operational systems is conducted. One of the two assigned Inspectors checks the undercarriage while the other tests the signal, brake and headlights and looks under the hood. In the spot inspections the undercarriage is not checked. If the bus does not pass inspection as certified by an appropriate decal, it cannot be used to transport children.

Before exiting the bus the Drivers follow a routine which ends with their turning the head lights on and off. When Ms. Hester had completed her part of the light inspection function, Trooper Brown said to her, "OK you're done. Do you want to get off the bus?" He then entered the bus. As she got up out of her seat, the Grievant, who according to Ms. Hester, was standing in the aisleway or adjacent platform, started to get into the driver seat and brushed his left hand against her breast. Ms. Hester did not say anything at that point, but complained to District Supervisor Laura Smith that "He pulled his hand across my breast as he was going to the seat." Ms. Smith assertedly responded, "He's a big flirt - you have to watch him." She recommended that in the future Ms. Hester just pull the bus up to the designated inspection station, and leave the bus without performing the driver's normal safety check operations.

Ms. Hester eventually resumed her duties and drove another bus to be inspected by Trooper Brown. This time she

stood-up as soon as the Grievant came to the door. Mr. Brown climbed the steps and stood parallel with her seat. But, instead of sitting down, he stood facing her as she prepared to descend the steps. Then, she alleged, the Grievant took his right hand and placed it firmly over her right breast. She jerked her shoulder and turned to get free. She yelled to one of the Schools' mechanics, David C. Johnson, who was standing on the front side of the bus at the doorway, "Did you see what he f- did to me?" Mr. Johnson replied, "Yes, Maam I did." Ms. Hester, angry and in tears, related the incident to Laura Smith and exclaimed "I'm not going to do this anymore."

Ms. Hester's husband subsequently drove her to the Xenia Highway Patrol Office where she made the report which triggered the instant investigation.

Two other Xenia School employees testified that they had observed the incident.

Xenia Mechanic Johnson corroborated Ms. Hester's account of the episode. Mr. Johnson averred that he had a perfect view of the scene because he was standing at the side of the hood and could look through the passenger side front window. He observed the Grievant reaching around to "rake her [Ms. Hester's] breast" with his right hand as Ms. Hester was descending the steps. Mr. Johnson advised her, "Don't get on the bus anymore we mechanics will do the lights."

Mr. Johnson further testified that Another Bus Driver, Terri L. Muterspaw, had told him that Trooper Brown had also improperly touched her that day.

On cross-examination Mr. Johnson conceded that over the approximately three years that he had served as a mechanic when Trooper Brown made his inspections, he had never noticed a similar incident. He further acknowledged Trooper Brown was less patient than his predecessor. He would get on the bus right away and "wanted to move it [the process] along."

Ms. Pamela A. Eldridge, who had been a Xenia City School Bus Driver for twenty years, also averred that she saw Trooper Brown place his hand across Ms. Hester's shoulder and grab her right breast as she got up from her seat to leave the bus..

Ms. Eldridge who is 5'1" tall, stated that she was standing at some four or five feet from the side of the bus at the fifth window, some ten feet from the door, when she observed the encounter.

Although she noticed that Mr. Johnson also seemed to be upset, neither she nor Mr. Johnson said anything directly to Trooper Brown. She explained that she felt intimidated because he was a Police Officer. However, Mr. Johnson did advise the Bus Drivers not to ferry the buses to the inspection stations. Thereafter, Mr. Johnson drove the rest of the vehicles to the spot.

Another Xenia Driver, Ms. Terri L. Muterspaw claimed to have been similarly molested by Trooper Brown that day. She averred that Trooper Brown "likes to be close," and had brushed against her during previous inspections. On August 3rd, Ms. Muterspaw continued, Trooper Brown "grabbed my breast with his hand to move me around." She insisted it was "not

any kind of accident." When she learned of Ms. Hester's similar account, she told Ms. Smith, "something needed to be done," and that Trooper Brown had "better not touch me again." Ms. Smith directed her to stay away from Trooper Brown, and Mr. Johnson advised her to cease driving buses to the inspection area. She heeded his advice.

Three Bus Drivers from the Mason City Schools were examined at the hearing as to their contacts with the Grievant.

Ms. Connie S. King-Johns, a Bus Driver for some thirteen years, complained that the first time Trooper Brown conducted a safety inspection for her buses in 1997, he made offensive physical contact several times. On two occasions his elbow pushed against her right breast, and, during a later encounter he moved his hand across her buttocks. After this third episode she was convinced that the encounters were "not accidental," and she tried thereafter to avoid Trooper Brown by exiting the bus only when "there was plenty of room." Nevertheless, he managed to put his arm on her backside.

In the transcript of her pre-hearing interview Ms. King-Johns stated that she had been forewarned by other Bus Drivers about Trooper Brown's behavior. She shrugged-off the comments, and "didn't quite believe it until it happened to me."

Upset, she reported the incidents to Garage Mechanic, Jeff Stair, who told her to "calm down, we have to get the buses inspected." During the day another Bus Driver, Kathy

Abbott, claimed that Trooper Brown had touched her backside. Mr. Stair then informed the Mason School District Director of Transportation, Bill Frauenknecht of these allegations.

Because of her prior experience with Trooper Brown, another Mason Schools Bus Driver, Ms. Tonia Barnette, testified that she had refused to operate the buses during the 1998 annual inspection, but opted instead to perform only cleaning services that day.

Ms. Barnette, who had been with the School District for only the past three years, related that prior to the start of the 1997 annual inspection, one of the other Bus Drivers had warned her that "you're going to meet 'Chester the Molester.'" During that year's inspection she pulled-up a series of seven or eight buses to be checked by Trooper Brown. Each time, he would wait on the bottom step and bring his elbow across her breast as she descended. In her interview statement she explained that after several such incidents she realized that it was not an accident. Thereafter, when she saw him coming towards the bus she would jump out of her seat, step back into the aisle and tell him to come into the bus because there was no room for her to get down. Only after he sat down would she exit the bus. Nevertheless, he still managed to hit her "butt" with the back of his hand.

During a coffee break she looked inside a bus where Trooper Brown was standing on the platform atop the steps and noticed that as Connie King-Johns got out of her seat he did the same thing to her.

At another time as she walked to the restroom the Grievant, who was leaning against a table, saw her coming and proceeded to walk directly in front of her so that she had to come to a halt to avoid running into him. He had his elbow raised so that it brushed across her breast. She complained to Mr. Frauenknecht, and vowed not to drive the buses for the inspections so long as Trooper Brown was involved.

Ms. Melisa A. [Missy] Fath a senior Bus Driver with the Mason City Schools, affirmed that the Mechanics referred to Trooper Brown as "Chester the Molester." She, too, complained about Trooper brown's behavior to Jeff Stair who forwarded her allegations to Mr. Frauenknecht.

During the June, 1997 inspection Trooper Brown would wait in the stairwell and on three or four occasions rub his forearm against her breast as she stepped-off. Finally, she told Trooper Brown in emphatic terms to wait until she left the bus before he went up the steps. As she sat in the bus seat with the window open she overheard Trooper Brown remark that Ms. Barnette "has nice teats" or "hooters." (Ms. Barnette had previously worked at a Hooter's Bar and Restaurant.

The final witness for the Department, Mr. James D. Bradley, a civilian Motor Vehicle Inspector for the past ten years had worked with the Grievant during the last three years.

He averred that on July 16, 1998 he had been told by Hillsboro School District Bus Driver Wanda Larrick that

Trooper Brown "can't keep his hands to himself," and "keeps rubbing up against her." Two other Drivers also complained to him about the Grievant's conduct. However, because no supervisor was then available he did not report the complaints then, and because he did not want to form a "bad relationship" with Trooper Brown, he did not pursue the matter with the Division.

On the other hand Mr. Bradley averred that during the first two and one-half years that he worked with Trooper Brown, he never saw the Grievant engage in inappropriate behavior towards Bus Drivers. Nor, was he aware of complaints from any other the Drivers. Indeed, the Grievant complained to him that it was the women Drivers who kept rubbing their breasts against him.

The only criticism directed to Trooper Brown was that he had "too strict an attitude," apparently because he would not issue a "decal" upon a promise of repair as his predecessor had done.

Aside from this testimonial evidence, statements taken during the course of the internal investigation from Bus Drivers and other personnel who were not called as witnesses were admitted into evidence by stipulation of the parties, and the employees were not called to testify.

Five of these individuals worked at the Mason City Schools.

Ms. Jackie Collins, one of the Mason Drivers, gave a statement to the effect that, in 1996, Trooper Brown would

touch her breasts on numerous occasions by intentionally raising his elbow as he entered the bus while she was exiting. She told her Supervisor, but did not report the incidents to anyone else because she was afraid Trooper Brown would not permit the buses to pass inspection, and that she would be personally harassed by Trooper Brown.

A second Driver, Ms. Debra L. Land related that during the 1998 annual bus inspection she observed that Trooper Brown putting himself into a position where physical conduct with Drivers would be inevitable. After Ms. Jackie Collins had told her that Brown had a habit of lifting his arm to brush against her breasts, Ms. Land avoided placing herself in a situation where he could do so to her.

Mr. Jeff Stair, the Head Mechanic, reported that Trooper Brown positioned himself in such a fashion that the Bus Drivers had to brush against him to get by. Mr. Stairs wrote "I saw him do it about on every bus. He stepped in the stairwell making them brush him to exit almost every bus." He added that "I haven't seen anything like this in twenty years, he's the third Trooper we have worked with, we have never had any trouble before. In his position I know he can make it hard on us, that may have influenced them about making a formal complaint, retaliation by him crossed my mind."

Henry Feltner, Assistant Mechanic at the Mason bus garage, related that in 1997 two of the Bus Drivers had complained that Trooper Brown had made it a practice of intentionally brushing-up against them.

Another Mechanic, Mr. Rodney N. Gaylor, asserted that although he had not personally witnessed any improper conduct by Trooper Brown, he, too had been told by female co-workers that Mr. Brown had been "brushing against their breasts" and forcing them to rub against him as they came out of the bus.

Two of the interviewed Bus Drivers were employed by the Wilmington Schools.

Ms. Susan Boldman asserted in her statement that during the Grievant's second inspection visit to the garage, Trooper Brown:

"... would stand in front of the door handle as I would exit from my seat to the right and then he would turn his body from left to right to enter the seat and in doing so, he would brush his forearm across my breasts. The first time it happened I just thought it was an accident and then it happened at least 5 (five) more times. When his forearm would brush across my breasts it was a slow brush and he wouldn't say anything like excuse me or I'm sorry then towards the end of the inspection he had placed his hand on my lower back, like he was trying to help me out of the bus, but then slid his hand down onto the top portion of my buttocks.

...."

On one occasion when Ms. Boldman had managed to get out of the seat and reach the aisle before the Grievant arrived at the platform or top step, he turned from left to right and extended his elbow more than normal, leaned his body towards her and tried unsuccessfully to touch her. She told co-workers Nancy L. Roberts, Jo Vance and Dennis Zurface what had happened.

Ms. Roberts, in her statement confirmed that Ms. Boldman had made those complaints to her. Mr. Zurface thereafter ferried the buses to the inspection site.

Ms. Boldman stated that she had been "humiliated" by what Trooper Brown did to her, but feared to report his actions to anyone other than fellow Bus Drivers because of the possibility of "retaliation on his part."

Two of the employees at the Clinton County Community Action Headstart, Agency told investigators of similar incidents.

Thus, Ms. Britta Garringer asserted that Trooper Brown would brush against her and rub his arm across her breasts "every single time" she got up out of the driver's seat.

During the 1998 inspection she jumped off the bus and took four steps backwards to see if Trooper Brown would purposefully make physical contact. He deliberately walked over to her and again brushed his arm across her breasts before ascending the bus steps. She did not report his behavior to anyone except co-workers. She was afraid that because of his rather strict attitude that he would "cause trouble."

Ms. Dawn M. Williams asserted that during the course of his inspections Trooper Brown had made comments about "coming and seeing me," and that "he would like to take me out" despite his knowledge that she was married. Although he never touched her in any inappropriate way, she complained that he would stare at her breasts. She did not, however, report

Trooper Brown's conduct to her supervisor because of fear of retaliation.

Two Drivers from the Hillsboro Schools also provided statements about their encounters with Trooper Brown.

Ms. Wanda Larrick commented that during the Grievant's July 16, 1998 inspection he brushed against her three or four times as she would leave her bus. Initially, she thought the contact occurred just because Trooper Brown was hurrying to check as many buses as quickly as possible. Ms. Larrick had driven buses for Trooper Brown's previous inspections, without incident. However, she reported that the same type of physical encounter happened outside the bus:

"I would be standing outside waiting for them [Brown and Bradley] to be done then I would get back into the bus to pull it outside. Outside of the bus, there is plenty of room to move around without having to rub up against anybody. I told my Supervisor about Trooper Brown's action so he could watch for him I also told Trooper Bradley afterwards."

Ms. Elissa Zornes reported that some three to five times during the 1996 and 1997 inspections Trooper Brown would come into the bus before she exited. On those occasions she would move backward into the aisle because she "didn't want the closeness there." He would usually stand on the bottom step, or by the rail, so that in order to leave the bus she would have to run into him. Although there were times when she could not avoid physical contact, she was not touched on her breast or buttocks.

During the July, 1998 inspection, Trooper Brown would "look at me (up and down)." At one point, when she was seated at her desk, Trooper Brown asked to use the telephone book. She moved her chair over so that he would be able to get around her, but as he proceeded to take the book out of the drawer, "he put his left hand on my shoulder and leaned over my right shoulder to get the book. He had plenty of room that he did not have to touch me at all."

In the Association's case, the Grievant, David E. Brown, averred that during the entire length of his service as a Road Trooper, no one had ever accused him of taking liberties or engaging in improper conduct with female drivers.

Over the course of his duties as a Motor Vehicle Inspector he had interacted with approximately 1,000 Bus Drivers and other personnel, of whom at least half were female, employed by fifty-two School Districts, private agencies and churches.

He averred that when he enters a bus and the driver is still seated he stands to the rear and the side of the seat until the driver leaves. Occasionally it has happened that as he climbed the steps to enter a bus, the Driver was coming down them and that in the process there may sometimes be unintended physical contact. Prior to the August 3, 1998 incident in Xenia, no Driver had ever complained to him about "inappropriate touching."

Contradicting his partner, Vehicle Inspector Bradley, the Grievant denied ever stating that females were "rubbing their

breasts against him." When he learned that Mr. Bradley had made this attribution during the course of the internal investigation, Trooper Brown asked his co-worker why he had made-up such a statement. Mr. Bradley responded that he thought it would help the Grievant if it appeared that "the females were coming onto him."

Though there was a reference to Ms. Barnette having worked at Hooters, Trooper Brown denied saying that "she had nice teats."

On the initiative of the Union the parties further stipulated that the following Transportation Managers were contacted and reported having received no complaints from their female staff concerning Trooper Brown:

Tim Hutchens, Miami Trace Schools; Herb Stalsenberg, Washington Courthouse District; Tammy Murry, Fayette Headstart Programs; John Steele, Fayette Progressive Schools; Charlie Rosenberger, Clinton Massie Schools; Daryl Holbrook and Anita Brewer, Highland Headstart Program; Doug Feters, Bright Local Schools; Theresa Newton, Yellowspring School District; Dave Albrink, Bellbrook Sugar-Creek Schools; Jim Bachus, Springboro Schools; Dan Gervin, Fairborn Schools, and Richard Porter, Kings Mills Schools.

The parties additionally stipulated that the following named persons if called to the stand by the Grievant would testify that each had interacted with the grievant during school bus inspections at their district over extended periods

of time, and that at all times surrounding such inspections David Brown had been professional in attitude and action:

Evelyn Nichelson, School Bus Driver, Yellow Springs Schools; Theresa Newton, Bus Supervisor, Yellow Springs Schools; Pam Faulkner, School Bus Driver, Fairborn School District; Sherry Sipe, School Bus Driver, Mowrystown School District; Doug Felters, Bus Supervisor, Mowrystown School District; Twila Nave, School Bus Driver, Mowrystown School District; Stacy McGowan, School Bus Driver, Miami Trace Schools, and Daniel Gervin, Bus Supervisor, Fairborn Schools.

With the record in this position, the Arbitrator proceeds to consider his Decision.

DECISION

The Union seeks arbitral review of the removal from service of Ohio State Highway Patrol Trooper David E. Brown for his alleged violation of the Division's "Sexual Harassment" Policy in the course of the performance of his duties as a Motor Vehicle Inspector of school buses.

That Policy provides in pertinent part that "no member shall sexually harass any person ... [by making] unwelcome sexual advances ... and other verbal or physical conduct or contacts, or innuendo of a sexual nature."

The Policy's prohibition is not limited to the harassment of co-workers, but broadly extends to those with whom a Trooper has contacts in the line of duty.

The Grievant was accused of offensively and unconsentedly touching the breasts and buttocks of female Bus Drivers.

These parts of the female anatomy are universally regarded as off-limits for physical contact except in the course of private consensual and intimate displays of romantic affection and sexual foreplay.

The investigation which led to the discharge of Trooper Brown was launched after a complaint was filed on August 3, 1998 by a Bus Driver, Ms. Cindy Hester, from the Xenia City School District. Similar complaints from another Xenia Bus Driver, Terri L. Muterspaw, quickly surfaced. Both of the Drivers averred that the Grievant had intentionally grabbed hold of their breasts.

The investigation was then broadened to encompass the Bus Driver and garage employees of all the other School Districts whose vehicles had been inspected by the Grievant. In addition to Ms. Hester and Ms. Muterspaw, no less than eleven Drivers from other Districts reported that Trooper Brown had engaged in similar unwanted physical contact during the course of his inspections of their buses.

In his powerfully written brief, the Union's Chief Counsel argues that these accusations are not credible in light of the fact that during the seven years the Grievant had served as a Road Patrol Trooper, making traffic stops of perhaps hundreds of unaccompanied female drivers, not a single such complaint had ever been made about Trooper Brown's conduct. The inference to be drawn from this record is that the accusing witnesses had misconstrued what were accidental physical contacts as deliberate. They were prompted to place

this interpretation upon the Grievant's innocent behavior because they were informed that Trooper Brown was being investigated for sexual harassment and were susceptible to the suggestion implicit in the questioning that he had engaged in the offensive practice, particularly because the Grievant was not popular as a result of his strict enforcement of safety standards and his brusque manner.

The Arbitrator has given much thought to the Union's contention that Trooper Brown's prior seven year unblemished record gives sufficient cause to disbelieve the present accusations. However, the absence of reported complaints against the Grievant, while facially significant, does not prove the case.

In the first place, it is not necessary to assume that if the pattern of misconduct currently attributed to the Grievant had actually taken place, it would have come to light years earlier. A misbehaving individual need not have been a life long perpetrator of offensive conduct. The onset may have been triggered or associated with physiologic or psychological changes of recent origin.

Moreover, there may well have been incidents of similar inappropriate touching of female drivers which, however, were unreported for a variety of reasons. First, the victim may not have been certain that the touching was intentional rather than accidental. Second, the victim may have been too embarrassed to report the matter. Next, a victim may believe it would be futile to complain because it would simply be "her

word against his," and she would be accused of acting out of anger at being ticketed, and attempting "to get even." Alternatively, the victim may simply be unwilling to "get involved" in the proceeding which her complaint would inaugurate, or perhaps be afraid of retaliation from the Trooper or his Police Officer friends.

As to the argument that the Bus Driver witnesses may have been subtly induced to interpret otherwise innocent behavior in a sinister manner because of the suggestive conduct of the investigation, the evidentiary record simply will not support such a conclusion.

Complaints about the Grievant's conduct were made to various Bus Supervisors well before the August 3, 1998 incidents which triggered the investigation. Indeed, the Grievant's colleague, Motor Vehicle Inspector Bradley, averred that Bus Drivers had complained to him about the Grievant's conduct in July of that year. The fact that the Grievant may have been strict in the enforcement of safety standards and may not have ingratiated himself with the Bus Drivers would not seem sufficient motive for them to falsify their accounts, nor would it explain why so many, who had no contact with each other, would have related similar incidents of misconduct.

Could the Bus Drivers have been mistaken and misconceived what were accidental physical contacts as deliberate efforts by Trooper Brown to touch their private parts in a fashion which humiliated and outraged them?

The Union argues that Trooper Brown was under time pressure to complete thorough safety inspections on a number of buses. To minimize the delays, he would attempt to ascend the steps of buses before the Drivers came down. The steps were so narrow, as the Arbitrator through his personal inspection verified, as to make it virtually impossible for the Grievant and a Bus Driver to pass each other without some physical contact occurring.

While that it is true that "common sense" would suggest that an Inspector wait until a Driver had gotten off the bus before attempting to get on, still, that consideration falls short of proving the Grievant's intent to feel the bodies of the female Drivers.

What causes the Arbitrator to reject the Union's exculpatory explanation of the Grievant's actions, however, is the fact that many of these assertedly offensive encounters did not take place on the steps of the bus, but rather, as the victims related, on the platforms at the top of the steps adjacent to the Driver's seat and, indeed, on at least two instances, entirely outside of the bus.

Further, the episode which launched the investigation, was not susceptible of any such innocent interpretation. Ms. Cindy Hester complained that the Grievant while standing in the aisle had not just "brushed" her, but had reached over her shoulder and grabbed hold of her breast as she left the drivers seat. Two witnesses purported to corroborate her version of the encounter. One of them, Ms. Pamela A.

Eldridge, claimed to have seen the incident through a side window some ten feet from the front of the bus. The Arbitrator in reconstructing the situation doubts that Ms. Eldridge could have seen clearly the events which took place, and does not therefore place any reliance upon her testimony. On the other hand, the testimony of David C. Johnson, a Mechanic's Helper for Xenia City Schools who had been standing at the front of the bus and could observe what had happened through the front window, did have a clear view of the encounter and confirmed Ms. Hester's accusations. Mr. Johnson was so convinced that the Grievant had intentionally grabbed Ms. Hester's breast that he subsequently told the Drivers not to ferry the buses to the inspection point, and thereafter personally drove them to the safety check station.

The evidence presented of record by the Division that the Grievant had committed the offense charged, does not necessarily rise to the standard required in criminal cases of proof "beyond a reasonable doubt." But, in this arbitration proceeding the employer was not obliged to meet this criteria. As the Union acknowledged, the applicable standard is "preponderance of the evidence." The Arbitrator is constrained to acknowledge that the Division has proven its case because, as the record makes clear, it is more likely than not that the Grievant did engage in sexual harassment within the meaning and prohibition of the Highway Patrol policies, and that discipline was warranted.

Normally, as the Contract itself provides, progressive discipline is appropriate. However, as the Contract also notes, "more severe discipline ... may be imposed at any point if the infraction or violation merits the more severe action."

The accusations proven against the Grievant involve not a isolated incident, but rather a systematic pattern of offensive physical touching of the breasts and the buttocks of female Bus Drivers. Indeed, in one garage his reputation for such behavior earned him the appellation of "Chester the Molester."

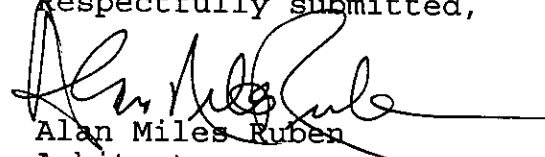
If the Grievant's conduct was the product of psychological problems, the Arbitrator is unaware of any therapy proven to be an effective cure. Thus, although the Arbitrator has considered whether a lesser penalty - a period of suspension, coupled with mandatory counseling, and followed by reassignment - was appropriate, he is not persuaded this sanction would extinguish the risk of reoccurrence and otherwise be consistent with the public interest. Much authority is given to our police forces, and much is required of them in exercising that power. All citizens are entitled to be secure in their legitimate expectations that State Troopers act only for their protection, and do not take advantage of their positions to abuse their power.

The record does not permit the Arbitrator to determine that the removal of Trooper Brown from service was disproportionate to his offense, or otherwise inappropriate in light of the demands of his position and the need to maintain

public confidence that he would perform his duties properly in the future.

For the foregoing reasons the grievance will be denied.

Respectfully submitted,




Alan Miles Ruben
Arbitrator

AMR:ljg

AWARD

The grievance filed on September 22, 1998, by Ohio State Trooper David E. Brown assigned as a Motor Vehicle Inspector for the Division over his removal from service on September 14, 1998, is denied.

AWARD signed dated and issued at Cleveland, Ohio this 9th day of April, 1999.


Alan Miles Ruben
Arbitrator

AMR:ljg