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**Bench decision and Award**

Arbitrator Sandra Mendel Furman

Department of Public Safety

Management Advocates: Capt. Rob Young and Keith Calloway

Hearing Date June 18, 2001

Grievance No. 15-00-000913-0128-01-07

Union- OCSEA Local 11, AFSCME, AFL-CIO

Union Advocate: William Anthony

**ISSUE:** Was Grievant suspended for just cause? If not, what is the appropriate remedy?**AWARD:** The grievance is sustained in part and denied in part; the discipline is modified to a five-day suspension.

**Discussion:** Grievant is an eleven year employee of the Division of Public Safety. At the date of the incident which is the subject matter of the instant agreement, he was employed as a Drivers license examiner at the Circleville and London posts. He gave a drivers license exam to Erin Taylor on June 15, 2000. At the time, she was 16 years old. During the course of the examination, Grievant made certain remarks to Taylor that were unrelated to the examination. It is undisputed that he commented on her appearance by remarking that she was one of or the prettiest girl in Grove City. It is undisputed that he told her she looked fine, when she was looking into the mirror of the car prior to starting the skills test portion of the driving examination. It is disputed as to whether or not he made a remark to her to the effect of betting she ran around in a bikini. Due to the alleged remarks made, Grievant received a ten-day suspension.

His prior discipline record reflects a verbal reprimand in April, 1999 for rudeness toward a young female examinee and asking inappropriate questions that were offensive to her. A verbal reprimand is non grievable. (Management Ex. 4) Grievant received a one day suspension dated October, 29 1999, for making comments of a sexual nature to a female customer (Joint Ex. 4). The suspension grievance was grieved and proceeded to mediation. All parties agree that as of the date of the instant hearing, the one-day suspension was "active." In each of the prior instances, the stated rule violation was 501.01 (C) (10) (d) - Failure of Good Behavior.

Erin Taylor testified as to the events of June 15, 2000. She stated that Grievant made a remark "I bet when it gets hot you go prancing around in your little bikini" after she made an out loud observation about how hot a pedestrian must be, as she was dressed in black. She soon thereafter drove through a four way stop and failed her driving portion of the examination. She was upset that she had failed. She took the test again at the Circleville post with Grievant approximately a week later, and made the same

mistake. She again ran a stop sign, and failed the test. There is no dispute that Grievant said nothing to Grievant prior to or during the second examination. Taylor stated that she knew flunking the test was her own fault.

On June 28, 2000 her mother made a telephone complaint to the Patrol about Grievant's alleged conduct during the first examination. (Taylor had not yet passed the driving portion of the state mandated examination). The Patrol began its investigation shortly thereafter. (Joint Exhibit 4).

Haller testified on behalf of the employer. He gave background on the training of examiners, and set forth the requirements for a graduated drivers license. He explained a routine examination procedure. Haller identified management Exhibit 2, which detailed the numbers of customer complaints received concerning Drivers License Examiners of a three-year period. (Management ex. 2) Haller explained the set up of the Circleville and London posts.

The Union called Susie Graham as a witness. Graham, a long-term employee of the Department who had recently retired, characterized Grievant as a kidder and a very likable person who likes to "devil people." She was the drivers license examiner who gave Taylor a test in London on July 8, 2000. Taylor passed that test. Graham noted that she has commented on people's appearance in the past- by telling women that they were very pretty and that a suited young man that he looked very nice. None of these comments were made the subject of a complaint. She had never been written up for saying nice things to people.

Grievant stated that he was a happy go lucky guy, that he made remarks to females to set them at ease, that he didn't make remarks about physical appearance to males because they would be misinterpreted. He stated that he loves working with people, that he is a kidder, that there was never any sexual content behind his comments about appearance. Grievant denied making any remarks about a bikini during the Taylor driving test. Grievant stated that he had, as of the date of the incident, received no training concerning sexual harassment. He denied ever signing off on any documents or policies concerning sexual harassment. The Union proffered evidence (Ex. 5) that Grievant took a course in customer communication in late August, 2000. In the administrative investigation, it relates that Grievant stated that he tries to watch what he says because there have been previous complaints about his comments. (Joint Ex. 4)

Grievant suggested that the Taylor complaint was motivated by the fact that she failed the test twice. She and her mother were visibly upset at each occasion. The Union proffered two exhibits 3 and 4- related to Grievant's character in conduct in prior examination situations.

The employer has the burden of proof in a discipline case. Here, it proved that at least two inappropriate remarks were made to a customer on June 15, 2000. The undisputed remarks may not have caused offense to every hearer, and they may not have been reported but for the fact the hearer failed the test two times in front of grievant. (The

Arbitrator was not enlightened as to why Taylor took her second examination with Grievant after the events of June 15, 2000) Regardless of the motivation of Taylor and regardless of who may have been the impetus behind the complaint to the Patrol, Grievant had been cautioned and indeed disciplined prior to June 15, 2000 concerning his manner of speaking to customers.

As to the third and clearly most inappropriate remark, Grievant denies it was made and Taylor states it was. Considering the type of remarks grievant admittedly had made in the past, and the fact that the Arbitrator is not convinced that on June 15, 2000 grievant understood that his style of communication was inappropriate, the Arbitrator concludes that a remark about a bikini was made. However, the Arbitrator finds that modification to a lesser discipline is appropriate due to the Grievant's long tenure and for the reason that the discipline was not progressive. The Grievant is strongly cautioned by this holding that his ways and methods of setting female customers at ease are not consistent with his role and responsibilities.

Issued at Columbus, Ohio this 18<sup>th</sup> day of June, 2001



Sandra Mendel Furman, Arbitrator