

#1584

In the Matter of Arbitration

Between

FOP-OLC

and

The State of Ohio, Department
of Public Safety

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Case Numbers:

* 15-00-20001106-149-05-02

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Before: Harry Graham

APPEARANCES: For Fraternal Order of Police-Ohio Labor Council

Paul Cox
FOP-OLC
222 East Town St.
Columbus, OH. 43215

For The State of Ohio

Renee L. Byers
Department of Public Safety
PO Box 182081
Columbus, OH. 43218-2081

INTRODUCTION: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post-hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on May 27, 2002 and the record in this matter was closed.

ISSUE: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Were the Grievants discharged for just cause? If not, what shall the remedy be?

BACKGROUND: There is substantial agreement over the events giving rise to this proceeding. The Grievants, Jacob Mullet and Darrin Plummer, both were Agents in the Department of Public Safety Investigative Unit. When they were discharged both had about two years of service and both had compiled good work records.

On September 2, 2000 the Grievants were assigned to work out of the Toledo Investigative Office. At about 4:00 p.m. Agents Mullet and Plummer and another Agent, Tim Gales, were in the computer room entering their daily reports. Agents Mullet and Plummer commenced a conversation about raising money for a legal defense fund for two supervisors who had been fired. Agent Gales agreed that was a good idea. Gales then claimed to have heard Mr. Plummer say that if "he had \$10,000 cash he would have Maureen O'Connor killed." Ms. O'Connor is the Lieutenant Governor of Ohio. He then claimed to have heard Mr. Mullet say that \$10,000 was unnecessary. According to Mr. Gales, Mr. Mullet said "all we have to do is find a crack head and give him \$20.00 and he would gladly do it."

After some consideration Agent Gales reported this conversation to Agent-in-Charge Earl Mack. In due course Mr. Plummer and Mr. Mullet were discharged. Grievances protesting that discharge were filed. They were processed through the

procedure of the parties without resolution and the parties agree they are properly before the Arbitrator for determination on their merits.

POSITION OF THE EMPLOYER: Law enforcement officers are held to a higher standard of conduct than other employees. City of Warrensville Heights v. Jennings et al, 58 Ohio St. 3d (1991). Mr. Plummer and Mr. Mullet made the statements attributed to them. Those statements cannot be considered "shop talk." Reference to killing a public official, hiring a hit man and spending \$10,000 in the attempt goes far beyond shop talk. Such comments must be taken seriously by an employer.

There is an error in transcribing the tape made of the interview of Officer Mullet. The word on the transcript is "we're." It should be "they're." Such a minor error does not affect the fundamental reason behind the discharge of Officer Mullet, that he engaged in the conversation attributed to him and that his comments were highly improper.

The Employer asserts that the testimony of Agent Tim Gales must be credited. It was consistent from the time he went to supervision to the arbitration hearing. He had no reason to fabricate his testimony. In fact, he, did not contact supervision directly. Rather, he considered the import of what he had overheard. He came to realize the

significant nature of the conversation between Agents Mullet and Plummer.

Agent Gales was forthright about his disciplinary history at arbitration. That he has a record of discipline does not serve to render his testimony inaccurate. He came forward and reported what he overheard the Grievants saying. His account should be credited according to the Employer.

At arbitration Agent Mullet produced a tape, purportedly made during his administrative interview on September 28, 2000. To arbitration the Employer was unaware of the existence of that tape. At Section 18.02(5) the Agreement provides that "If a tape recording or transcript of the interview or questioning is made, the party making such recording shall advise the other party of such recording or transcription prior to the start of the interview or questioning." Mr. Mullet did not do that. Should it be the case that he is restored to employment the State urges it be without back pay due to the clandestine nature of his taping of the interview.

Messrs. Mullet and Plummer by their conduct clearly manifested the sort of "conduct unbecoming an officer" warranting discipline. They threatened the life of the Lieutenant Governor of the State. They were not joking. Thus, the grievances should be denied the Employer contends.

POSITION OF THE UNION: The Union asserts the discharge of the Grievants as unjustified. Both had a clean record when they were terminated. Their accuser, Tim Gales, cannot be taken seriously according to the Union. At arbitration he acknowledged he had told co-workers of his dislike for Mullet and Plummer. The Employer was aware of it as well. At arbitration Scott Pohlman, Assistant Deputy Director of the Department, indicated he knew of personal problems between Agent Gales and the Grievants. He was aware that Agent Gales had threatened to "get" Agents Mullet and Plummer.

Agent Gales does not bring an unblemished record to this proceeding. He has been disciplined on several occasions. In 1993 he was suspended for 28 days. In 1998 he received a corrective interview for excessive use of sick leave. He also received a one day suspension for being disrespectful. Some months prior to this incident the Grievants had complained about his treatment of them. It was common knowledge that Agent Gales disliked Mullet and Plummer. At arbitration another agent, Angela Braun, testified as much. James Farmer, another agent testified in the same fashion.

Agent Gales does not get along particularly well with his colleagues. In fact one of them, Agent Klosterman, initiated a petition against Agent Gales. It accused him of harassment and creating a hostile work environment. That petition was

signed by many of Agent Gale's co-workers.

Mr. Gale has a high opinion of himself. As he has many years of service he styles himself a "senior agent." No such classification exists in the table of organization. He has been directed not to call himself a "senior agent."

As the Union views these events, this is not the first time Agent Gales has informed on fellow agents. It occurred that Agent Gales overheard a conversation with Agent Klosterman and another agent involving an e-mail joke. Gales reported the conversation to supervision and Agent Klosterman was disciplined. It developed that a meeting was held to discuss the situation. It was conducted by Supervisor Lewis. Supervisor Lewis felt the situation had been addressed adequately. Not so Mr. Gales. He went to another supervisor, Earl Mack, about the incident. As the Union views it, Agent Gales went out to "get" Agent Klosterman as well as the Grievants. He has a history of vindictive behavior towards co-workers he dislikes.

In the opinion of the Union no reasonable person could conclude the conversation between Mullet and Plummer was serious. They were speaking of establishing a defense fund for two supervisors who had been discharged. They concluded such an effort was impractical. They indicated they needed about \$10,000, an amount impossible to secure. Thus, the

dischargees would have to hire a crack head in lieu of an attorney. Both Mullet and Plummer deny stating that a hit man should be hired to kill the Lieutenant Governor. The Union contends that the State has rushed to judgement in this affair. On the one hand Agent Gales asserts he overheard the Grievants discussing how to assassinate the Lieutenant Governor. On the other hand, Messrs. Mullet and Plummer deny making the statements attributed to them by Agent Gales. Under such circumstances their discharge cannot stand the Union claims. As the Union views this situation Agent Gales was seeking to harm Agents Mullet and Plummer. That he disliked them is amply shown by the testimony of Agents Braun, Lewis and Farmer.

The Union points to the administrative interview of Agent Mullet. There are differences between the tape and the transcript made of the tape. The differences are sufficient to alter the thrust of their conversation.

At the time the Employer did not view the conversation between the Grievants to constitute a bona-fide threat against the Lieutenant Governor. They were allowed to return from Toledo, where they were working, to their homes in Columbus. The Lieutenant Governor resides in Columbus as well.

According to the Union there is a hidden agenda involved

in the discharge of the Grievants. There was put in place an altered enforcement plan in the Department. It was termed Policy 2000. The Grievants did not embrace this policy. As the Union views it, when Mr. Gales came forward upper level management seized upon his story to rid themselves of the Grievants. In essence, there were several people trying to rid the Department of the Grievants. When Mr. Gales implicated them in a plot to kill the Lieutenant Governor all could be satisfied in the Union view. As it reads the record there is no credible evidence the Grievants were plotting to have the Lieutenant Governor assassinated. As that is the fact the Union urges the grievances be sustained and both Grievants restored to employment with a make-whole remedy.

DISCUSSION: There is one person who accused the Grievant's of acting improperly: Tim Gales. In order for his account of events to be accepted scrutiny must be given to his background. His record is marked by discipline. At arbitration A. Ronald Lewis, a management official with more than 30 years of service with the State, indicated he had reservations about Mr. Gales truthfulness. Another Agent, James Farmer, testified he had overheard Mr. Gales say he would "get" the Grievants. While Messrs. Mullet and Plummer have short careers with the State their records were good when they were discharged. Mr. Gales does not bring a

sterling record to this proceeding. His testimony is viewed skeptically by the Arbitrator.

At arbitration there was a sharp divergence in the testimony between Agent Gales and the Grievants. The former testified that Agents Plummer and Mullet indicated they sought to have Lieutenant Governor Maureen O'Connor killed. Both Plummer and Mullet denied making such statements though Agent Mullet acknowledged that such an inference could have been drawn from his comments. It goes without saying that an employer is held to a high standard of proof when seeking to demonstrate it had just cause for discharge. There is a great deal of discussion about the appropriate standard to apply to an employer in discipline and discharge disputes. Should it be "proof beyond all reasonable doubt" or some lesser standard such as "preponderance of the evidence?" In this situation the Employer cannot meet any evidentiary standard. It cannot show that the Grievants were engaged in a plot to have the Lieutenant Governor killed or that they advocated such a course of action. Agent Gales came forward with his account. The crux of that account was denied by Agents Plummer and Mullet. The burden rests with the Employer to show that the Grievants did the deed attributed to them. It cannot do so. Hence, its action cannot be sustained.

At his administrative interview Agent Mullet made a tape

recording of the proceedings. He did not inform the Employer that he was doing so. To the arbitration proceeding he did not inform the Employer of the existence of that tape. The Agreement is clear on the matter of tape recording of interviews. It provides at Section 18.02(5) "If a tape recording or transcript of the interview or questioning is made, the party making such recording shall advise the other party of such recording or transcription prior to the start of the interview or questioning." Clearly that provision of the Agreement applies to all involved, management, union representatives and bargaining unit members alike. Agent Mullet's taping of his interview and his failure to reveal it is a breach of the terms of the Agreement. It is not de-minimus. Part of the Union defense in this dispute are discrepancies between Agent Mullet's tape recording and the written transcript. This dispute is decided on other grounds, namely the failure of the Employer to prove its case. That does not serve to exculpate Agent Mullet from his improper behavior. The clear terms of the Agreement were breached by his taping of the interview and his failure to inform the Employer that he was doing so.

AWARD: The grievance of Darrin Plummer is sustained in full. He is to be restored to employment with all straight time back pay. All seniority and pension credits he would have

earned but for this incident are to be credited to him. All health related expenditures for him and his family (if applicable) that would have been covered by State provided health insurance are to be reimbursed to him. All record of this incident is to be stricken from his personnel record. The same terms are to be applied to Jacob Mullet with this exception: Due to the surreptitious nature of his tape recording of the administrative interview and his failure to acknowledge its existence to arbitration he is to be restored to employment less a thirty (30) calendar day suspension. That suspension is to be recorded in his personnel file.

Signed and dated this 17th day of June, 2002 at Solon, OH.

Harry Graham
Harry Graham
Arbitrator