

# OPINION AND AWARD

In the matter of Arbitration

Between

Fraternal Order of Police, Ohio Labor Council, Inc.

And

The State of Ohio, Department of Natural Resources

Regarding

Grievance Number 25-18 (05-05-05) 02-05-02  
(Mark Smith)

## APPEARANCES:

### FOR THE STATE:

Brad Nielsen, Advocate  
Michele Ward, LRS, OCB  
Cindi Solomon, ODNR  
James Quinlivan, Witness

### FOR THE FOP/OLC:

Paul Cox, Chief Counsel  
Randy Mark Smith, Grievant  
Joel Barden, Staff Representative  
Renee Engelbach, Paralegal

An arbitration hearing was conducted August 23, 2004 at the Ohio Office of Collective Bargaining, in Columbus, Ohio.

The parties stipulated the issue in this case to be: ***"Was the Grievant, Mr. Mark Smith, disciplined for just cause? If not, what shall the remedy be?"***

After lengthy discussion, the parties jointly submitted to the arbitrator, Articles 18, 19, and 20 and represented them to be the proper contract sections for deciding this grievance. (Due to the length of the three articles, most sections will not be reproduced in this Award, but sections will be cited as appropriate.) The Disciplinary Standard is found in Article 19.01

## **ARTICLE 19 – DISCIPLINARY PROCEDURE**

### **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. Verbal Reprimand (with appropriate notation in employee's file);
2. Written Reprimand;
3. One or more fines in the amount of one (1) to five (5) days pay, for any form of discipline. The first time fine for an employee shall not exceed three (3) days pay;
4. Suspension;
5. Leave reduction of one or more day(s);
6. Working suspension;
7. Demotion;
8. Termination;

However, more severe discipline 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.

The deduction of fines from an employee's wages shall not require the employee's authorization for the withholding of fines from an employee's wages."

**Background:**

Grievant Mark Smith is employed by the Ohio Department of Natural Resources (ODNR) as a Wildlife Investigator. The duty of the Wildlife Officer is to enforce the wildlife laws and protect native Ohio wildlife.

ODNR received a hunting without permission complaint from a citizen of Coshocton County. The suspect in this complaint was an out of state hunter. The Grievant spoke with him by phone. During this interview allegations surfaced against another ODNR employee, Wildlife Area Technician, Erich Long. Based upon information gleaned from the out of state hunter, it appeared Mr. Long might have impersonated a Wildlife Officer and may have misused a state vehicle.

The grievant's behavior regarding Mr. Long is the basis for the resulting disciplinary action.

Because the grievance is disciplinary in nature, management proceeded to present its case first.

The parties agreed the matter was properly before the arbitrator for determination.

The advocates clearly and professionally presented their proofs, arguments and respective views of the matter.

**Management's Position:**

Management contends that Mr. Smith, under the guise of investigating the hunting without permission complaint, interviewed Wildlife Area Technician Erich Long in violation of ODNR Procedure 71.

Procedure 71 titled: "*Complaint Against Division Employee*" outlines the process used to investigate complaints against Division employees.

Management contends that the procedure requires employees to inform their supervisor if they possess knowledge of illegal activity or other complaints against a Division employee. Management argues that in February 2003, Investigator Smith was told by the out of state hunter that Wildlife Area Technician Long had identified himself as a Wildlife Officer and that he used a

state vehicle while hunting with his wife. The fact that Investigator Smith did not inform his supervisor is a violation of departmental policy.

Management also notes that the procedure identifies who will investigate allegations of misconduct. The procedure states that when the District Manager receives notification of a complaint against a Division employee, the District Manager "reviews, assigns an exempt supervisor to investigate and forward immediately to Wildlife Chief."

Managements witness testified that the grievant did inform his supervisor that he would be leaving the region to conduct an interview but did not tell that supervisor the person being interviewed was a fellow employee.

Management provided a video tape of the interview of Mr. Long. Based upon the techniques used in this voluntary witness interview, they contend that Grievant Smith violated the Code of Conduct. They note the grievant told WAT Long that he is "not under arrest" and that this was a "voluntary witness" interview.

The real purpose of the interview was to interrogate Mr. Long regarding impersonating a Wildlife Officer and misuse of a state vehicle. It is management's contention that the tape clearly shows the use of techniques such as intimidation, harassment, and threats of discipline. These tactics, in the view of management, violate Procedure 71 and the Code of Conduct.

James Quinlivan, Law Enforcement Supervisor, testified that the techniques utilized by the grievant were not appropriate.

Mr. Quinlivan testified that the requirement for having an exempt supervisor conduct an investigation for other department employees was done to assure the supervisor would have knowledge of the appropriate collective bargaining agreement. An exempt employee would be required to observe and protect the collective bargaining rights of an accused employee.

#### **FOP Position:**

The FOP argues that management simply cannot prove the case as presented in their opening statement.

They see three specific allegations being presented by management today against Investigator Smith.

The FOP notes the "real charge" is that the grievant failed to inform his supervisor of allegations against another department employee and thus he violated Procedure 71. They argue the record shows the grievant did leave a message for his supervisor telling him that he would be leaving the region.

The second allegation that Mr. Smith did something that is reserved only for exempt supervisors was not charged and the arbitrator should not consider any evidence on this subject.

The FOP contends that the investigative techniques utilized by Grievant Smith are appropriate techniques and have been taught to him as a law enforcement investigator. Mr. Smith was simply applying the techniques that he had been taught by the department in order to get information from a suspect.

The FOP contends that there is some difficulty between Mr. Smith and his supervisor.

The FOP calls the arbitrators attention to the Disciplinary grid of the employer (exhibit F) and notes that the appropriate section (*failure to follow the written policies of the Director division/office.*) lists appropriate discipline anywhere from an oral warning to a suspension. The FOP then directs the arbitrator to the contract language which reserves more severe discipline "if the infraction warrants more severe action."

Through cross examination, the FOP notes that Procedure 71 does not supersede State Statute.

## **DISCUSSION:**

In order to analyze this case I find it helpful to use the three basic assertions as noted by the FOP advocate.

The first "charge" relates to the failure of Mr. Smith to inform his supervisor of allegations against another Department employee. The union argues that

Director Donnally could have read the investigative file. There are many ways in which Mr. Donnally or others *could have* (emphasis added) gathered the information. The form 45 (investigative report) filed by Mike Reed, clearly names Eric(sp) Long as a suspect.

The fact remains that the grievant did not meet his responsibilities under Procedure 71.

The section of Procedure 71 which relates to "Division Employees" States:

**Situation:**

"Has witnessed or has personal knowledge of an illegal activity of an illegal activity of a Division employee."

**Action:**

"promptly notify the Director of the department."

**Situation:**

"complaint received from person outside Division of Wildlife against a Division employee. Special note: "Oral complaints are not to be ignored but handled according to the situation. All such complaints must be discussed immediately with the next in command."

**Action:**

"Advise complainant to put complaint in writing and sign it. Advise complainant to forward complaint to district manager or chief, Division of Wildlife, preferably in the above order. (All complaints are to be forwarded to the chief immediately regardless of who receives them.) Statement should include nature of complaint, time, date, place of infraction, and names of all persons involved, with addresses if known."

I am convinced that Mr. Smith did not fulfill his duties by failing to notify his supervisor that he possessed allegations against Area Wildlife Technician, Erich Long.

The second prong of the FOP analysis of the charges relates to the action of Mark Smith when he interviewed Department employee Erich Long.

The grievant argues that he was interviewing Mr. Long as a "witness." He states that during his interview he became aware of the inconsistencies in the statements made by Mr. Long and, at that point, pursued the possibility that Mr. Long was a suspect.

This arbitrator is not persuaded. A viewing of the tape clearly shows a man on a mission. Likewise, the grievant, at page 126 of the *Law Enforcement Investigation Report*<sup>1</sup> acknowledges he talked to Dennis Solon **prior to the interview of Erich Long** (emphasis added). The pertinent section of the report notes: "I asked Randy Smith if he talked to anyone else at the wildlife area when he was there at any time and if he told anyone "Erich Long was in trouble?" He said he talked to Dennis Solon on March 4<sup>th</sup>. He told Dennis Solon that Erich Long was in trouble. I must conclude that Investigator Smith viewed Erich Long as a suspect and conducted an interview. to which he had not been assigned.

The FOP position that this part of the charge was not properly made, is also rejected. Ms. Shelly Ward, Disciplinary Hearing Officer, in her letter of October 31, 2003, clearly states the charges against Mr. Smith: "Specifically, the Division contends that you allegedly failed to comply with Division Procedure 71 – Complaint Against Division Employee and Policy 17 – Wildlife Officer's Code of Conduct."

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<sup>1</sup> The FOP objected to the introduction of Appendix F except for specific pages. As noted in the hearing, I noted the objection and received all sections of Appendix F with the intention of assigning "proper weight" to each part. I find much of the material that was not specifically identified, to be of little or no value. I do find the material in Form 104 (R497), pages 86-133 to have been properly identified and relevant to this matter.

The fact the Department did not state that they believed the employee violated two sections of Procedure 71 does not prohibit the employee from having adequate notice to defend against managements charges.

The third and final part of the charge argued by the FOP relates to the way Investigator Smith conducted himself during the interview of Erich Long.

FOP would have me believe that the tactics used by Mr. Smith are just routine police work. I hope not. Supervisor Quinlivan, himself, a qualified law enforcement officer, testified that Mr. Smith had gone beyond the norm. I agree. This arbitrator has observed many investigations. In my experience it is not the norm for law enforcement officers to mislead, bully, harass and intimidate witnesses, which is what Mr. Long was told he was.

Mr. Smith would certainly not have wanted his own interviews to be conducted in the manner in which he conducted the Long interview. The fact that there may have been statutory violations does not give the investigator carte blanche privileges to behave in the way recorded on the video tape (exhibit G).

While the charges against Mr. Long were not unimportant, they hardly rise to the level of a terrorist attack and such behavior is not appropriate.

Having established that the Department has proven just cause did exist to issue some discipline against Investigator Smith consideration must be given to the appropriateness of the level of discipline imposed.

The challenge put to the arbitrator by the FOP is why was Progressive Discipline not applied.



While arbitrators, this one included, are reluctant to substitute their own opinions regarding the proper level of discipline for that imposed by management, it is the duty of management to prove to the satisfaction of the arbitrator that they did impose the proper level of discipline if they go beyond the next step in progression.

Arbitrator William F. Reeves, in a May 2004 case notes: "Employer has the duty of proving just cause for discipline *including the level of discipline imposed.*"<sup>2</sup>

Did the employer provide proof or explanation to the arbitrator that the proper level of discipline was imposed?

The Disciplinary Policy of the of the Department of Natural Resources (Joint Exhibit E) on page 2 offers little guidance. It notes that the infraction of *Failure to follow the written policies of the Director, division/office*, can receive discipline anyplace between an "oral" to a "suspension."

Arbitrator Samuel J. Nicholas, Jr., in a 2003 case states the duty of management more succinctly: "These parties are aware that in an action such as we have here, it is incumbent upon Agency to make out a *prima facie* case and show that the penalty given was commensurate with the nature of the offense."<sup>3</sup>

Based upon the behavior of the grievant, the Agency may have been able to support the one day suspension , but it is the duty of management to offer an explanation or justification to the arbitrator that the discipline imposed is the appropriate level.

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<sup>2</sup> In re City of Seaside [Ore.] and AFSCME LOCAL 234 & Council 75, 119 LA 1341, May 4, 2004.

When a collective bargaining agreement includes a progressive discipline clause it should be the starting point when management considers imposing discipline. If the offense warrants a penalty greater than the next step in progressive discipline, it is incumbent upon management to justify why the offense is commensurate with a higher level of discipline. Absent such a showing an arbitrator should rely on the agreed to progressive discipline provision.

Discipline is to be corrective in nature and should not be greater than necessary for the Agency to achieve the goal of resolving the problem for the future.

The record indicates no discipline for this employee. While the actions of the grievant were inappropriate and a violation of Departmental Policy and Procedure, I have no evidence to convince me that Mr. Smith would fail to correct his behavior with a lesser level of discipline.

Because the Agency has successfully proven a violation of Procedure 71 and Policy 17, and absent any justification for a suspension, it is my determination that the proper discipline is a written reprimand.

#### **DECISION AND AWARD:**

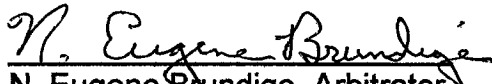
The grievance is granted in part and denied in part. The one day suspension is to be rescinded and the grievant is to be made whole for any financial loss suffered as a result of the suspension.

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<sup>3</sup> In re WARNER ROBINS LOGISTICS CENTER and AFGE, LOCAL 987, 119 LA 402, Grievance No. ARB 02-96, December 19, 2003.

The record shall reflect a written reprimand for the disciplinary violations noted and said reprimand shall remain in the grievant's file for the period of time permitted by the collective bargaining agreement.

Issued at London, Ohio this 16<sup>th</sup> day of September, 2004.

  
N. Eugene Brundige, Arbitrator