

#1806

IN THE MATTER OF ARBITRATION
BETWEEN
STATE OF OHIO - DEPARTMENT OF AGRICULTURE
AND
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME LOCAL 11, AFL-CIO

Grievant: Randy Harden

Case No. 04-02-04 0019-01-14

Date of Hearing: January 14, 2005

Place of Hearing: Columbus, Ohio

APPEARANCES:

For the Union:

Advocate: Barbara Follmann

Witnesses:

Randy Harden, Grievant

For the Employer:

Advocate: John H. Hix
2nd Chair: Neni M. Valentine

Witnesses:

Heidi Moody

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: February 23, 2005

INTRODUCTION

The matter before the Arbitrator is a grievance pursuant to the Collective Bargaining Agreement ("CBA"), in effect March 1, 2003 through February 28, 2006, between the State of Ohio and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether "just cause" exists to support the thirty (30) day suspension of the Grievant, Randy Harden ("Harden"), for insubordination, sexual harassment and/or threatening-intimidating-coercing of a co-worker. The discipline was issued because the Grievant allegedly engaged in certain inappropriate conduct toward a female co-worker in November/December 2003.

The discipline of the Grievant was issued on January 28, 2004, and appealed in accord with Article 25 of the CBA. This matter was heard on January 14, 2005, and both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing oral argument briefs were offered by both parties, with the record being closed as of January 14, 2005. This matter is properly before the Arbitrator for resolution.

BACKGROUND

Harden was employed as a Facilities Maintenance Specialist 3, and had been employed by Ohio Department of Agriculture ("ODA") for three and one-half (3 ½) years at the time of the alleged incident(s). Harden's duties included the repair and maintenance of ODA's property and/or equipment.

To that extent, the grievant was required to work in various areas of the facility to perform his job. Examples of the various jobs performed by the grievant included: painting; carpentry; temperature controls; snowplowing; mechanical repairs; and electrical.

Giving rise to the discipline was a series of events which occurred on November 25th, 26th and December 4, 2003 involving a female co-worker, Heidi Moody ("Moody") who is an

Office Assistant #3 at ODA in the Animal Industry area. Moody was located in the main reception area requiring visitors and employees to frequently pass her workstation.

Moody answered telephones and directed the public to the proper department regarding issues associated the animal industry. Moody believes she met Harden the first day she began working at ODA and recalls a conversation regarding her father and an ODA employee that her father was dating.

Moody was employed approximately three weeks when Harden asked her to go to the movies - which she declined. This occurred on November 24, 2003. Moody considered this inquiry as inappropriate and it made her feel uncomfortable. However, she did not believe that this was sexual harassment. ' No witnesses were present when this conversation occurred.

On November 25, 2003, Moody was at her desk when Harden allegedly stated, "I would love to eat you up". Moody felt uncomfortable and considered Harden's conduct as inappropriate and sexual harassment. Harden indicates that he was requested to adjust the room temperature controls and stated to Moody "Do you wish to have me heat this area up?" No witnesses were present when this comment occurred.

The alleged third incident occurred on November 26, 2003 when Harden approached Moody from behind her desk and rubbed her shoulders and stated, "You have very soft hair". Harden admitted to touching Moody on her shoulder to get her attention as she was on the telephone. No witnesses were present but Moody informed co-worker Robin Burton ("Burton") and prepared a written statement on November 26, 2003 describing each of the incidents listed above. (Joint exhibit ".JX", 5E)

As a result of the above, Harden on November 28^h was given a direct order by James Hoekstra ("Hoekstra"), Agriculture Enforcement Administrator, and David Grubb ("Grubb"), Administrative Assistant, not to have any future contact with Moody in her work area.

As a result of Moody's belief that the November 24, 2003 was not harassment and ODA's conclusion as such, this incident will not be addressed by the Arbitrator.

The final allegation occurred on December 4, 2003 when Harden on two occasions made sounds and eye contact with Moody that she interpreted as sexual harassment. Namely, Harden walked past her work area and he sighed loudly and turned his head towards Moody. Co-worker Burton confirmed that she heard a loud sigh from Harden as he walked past Moody's area. According to Harden, he was working on pumps in the basement and had to climb a set of stairs. Due to a medical condition and a long time smoker, he may have been breathing hard or winded, but denies he made any derogatory noises directed at Moody.

ODA conducted an investigation (JX 5(D) (E)) and determined that on November 25, 26 and December 4, 2003 Harden violated ODA Disciplinary Grid 9 (A) and 14 "... by committing acts of sexual harassment and intimidation against Ms. Heidi Moody. Further that on December 4, 2003 you disobeyed a direct order from your supervisor, Mr. James Hoekstra, in violation of ODA Disciplinary Grid 5 (A)." (JX, 5A) As a result, Harden received a thirty (30) day suspension.

Harden had no active discipline and filed a grievance contesting the appropriateness of ODA's conduct.

ISSUE

Was the Grievant's, Randy Harden, discipline of thirty (30) days for just cause? If not, what shall the remedy be?

RELEVANT PROVISION OF THE CBA, ODA DISCIPLINARY POLICY

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to. modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established

pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(L).

OHIO DEPARTMENT OF AGRICULTURE DISCIPLINARY POLICY

ODA-Operating Standards Disciplinary Policy (all employees)

		<u>Offenses</u>				
		1 st	2 nd	3 rd	4 th	5 th
Rule 5 - Insubordination:						
a.	Refusal to carry out work assignment or direct order from supervisor.	WR/1-3	1/3-R	5-10/R	R	
b.	Failure to follow work rules, administrative regulations and/or written policies or procedures, unless infraction is covered under another specific section of the grid.	OR/3	WR/5	3/5	5/R	
Rule 9 - Intentional acts of discrimination on the basis of race, color, sex, age, religion, national origin, or handicaps.						
a.	Sexual harassment			WR/R	5-10/R	R
Rule 14-Threatening, Intimidating, or coercing another employee for personal gain or satisfaction.						
				5-10/R	R	

POSITION OF THE PARTIES

POSITION OF THE UNION

Harden with no prior discipline or past allegations of intimidation, sexual harassment or insubordination received discipline without just cause.

Harden on November 25, 2003 was sent to Moody's area to check the heating - ventilation- air conditioning (HVAC) system by Dr. David Glauer ("Glauer") to ensure that the temperature was okay. Harden testified that he asked Moody if she wanted her heat turned up, i.e., The HVAC system, but denied the comment "I would love to eat you up".

Harden who recently returned to work from medical leave, testified that sometimes his speech was impaired and hard to understand. As a consequence some words are slurred and the phonemic sound of words were sometimes confused by third parties. Harden's medical condition may have contributed to Moody's misinterpretation of the word heat versus eat.

On November 26, 2003 Harden denies rubbing Moody's shoulders or making comments about her hair, but admits to coming up behind her and tapping her on the shoulders since she was on the telephone. Harden was trying to find out if another maintenance employee was working in that area. At no time did Moody tell Harden this behavior was inappropriate or unacceptable.

Finally, on December 4, 2003 Harden was directed to perform work on pumps in the basement where Moody worked. Harden had to climb stairs and due to his recent surgery and smoking habits he currently has breathing difficulties. As a result, he may have made a noise consistent with his medical condition but denies directing any noise or stares towards Moody.

The Union contends that the discipline issued was stacking and lacked just cause. Harden received five (5) days for the November 25th incident; fifteen (15) days for the November 26th incident; and ten (10) days for the December 4th incident. The Grievant did not have an opportunity to correct this behavior and why did ODA treat each incident as a separate act when all the allegations took place over a short time frame?

The Union submits that allegation 4 (December 4th) discipline lacks any reasoning when Harden received a work order and was directed to go to Moody's work area to repair pumps in the basement. How could he be in violation of Disciplinary Rules 5(A), 9(A) and 14 on December 4, 2003?

The employer failed to meet its burden under the CBA and Harden should be made whole.

POSITION OF THE EMPLOYER

On November 26, 2003 ODA was informed by Moody of the incidents on November 24th 25th and 26th. A written statement was obtained from Moody and Burton provided a statement regarding the December 4th allegations.

On November 28, 2003 Harden was informed of the allegations of sexual harassment by Moody and was given a direct order from Hoekstra and Grubb to stay away from Moody's work area. Harden was provided an opportunity to respond to each of the allegations and he denied any conduct that might be construed as harassment and/or intimidating.

Moody's recollection and detail notes made of the four (4) instances of misconduct provided the credible evidence upon which the discipline was issued. ODA did not find that Harden's conduct on November 24th (the date request incident) was violative of any rule and such no discipline was issued.

On November 25th, 2003 Moody's statement was found believable resulting in five (5) days suspension. ODA did not find credible Harden's medical condition as a potential justification for not differentiating between "eat" versus "heat".

The November 26th incident was the most problematic because Harden's conduct continued to escalate resulting in words and touching. This type of conduct alone was egregious and could have resulted in his removal. Moreover, the Grievant admitted to tapping her on the shoulders, and no justification existed for Harden to touch Moody on November 26th. Moody becoming increasingly concerned about her safety initially turned to co-worker Burton and then went to her supervisor on November 26th.

On December 4th, 2003 Harden continued his intimidating conduct towards Moody by making loud noises of disgust on two occasions while in her work area. Moody and Burton provided written statements to this behavior. (JX 5(D)). However, ODA admitted that Harden had legitimate reasons to be in Moody's work area on December 4th, 2003 and as such, Harden's conduct was not insubordinate.

ODA proved that sufficient proof existed to find Harden violated ODA Disciplinary Rules 9 (A) and 14. Harden engaged in unsolicited acts of verbal and physical conduct of a sexual nature that was unwelcome. Moody being a new hire was intimidated by his behavior, which must be affirmatively addressed by ODA to ensure the workplace is free from this conduct.

BURDEN OF PROOF

It is well accepted in discharge and discipline related grievances that the employer bears the evidentiary burden of proof. See, Elkouri & Elkouri -"How Arbitration Works" (6th ed., 2003)

The Arbitrator's task is to weigh the evidence and not be restricted by evidentiary labels (i.e. such as "beyond reasonable doubt," "preponderance of evidence," and "clear and convincing, ") commonly used in non-arbitable proceedings. See, Elwell- Parker Electric Co., 82 LA 331, 332 (Dworkin, 1984).

The evidence in this matter will be weighed and analyzed in light of ODA's burden to prove that the Grievant was guilty of wrongdoing. Due to the seriousness of the matter and Article 24 requirement of "just cause", the evidence must be sufficient to convince this Arbitrator of the Grievant's guilt. See, J.R. Simple Co and Teamsters, Local 670, 130 LA 865 (Tilbury, 1984).

DISCUSSION AND CONCLUSIONS

After careful consideration of the evidence in this matter, I find that the Grievance is granted in part, and denied in part. My reasons are as follows:

Harden and Moody's version of the events are in direct conflict requiring the Arbitrator to weigh the evidence in an effort to find honesty and trustworthiness. It is undisputed that Harden and Moody did not have a relationship or friendship outside of the job. No credible evidence

was offered to establish that Moody was motivated by some prejudice or bias to harm Harden in anyway. Harden suggested, unconvincingly that Burton who did not like him, made Moody fabricate the allegations against him. Simply, no evidence exists to find that Moody had ill will or any motive to create these alleged events against Harden.

With that being said, Moody's version of what occurred on November 26th - 26th and December 4th, 2003, were more believable than the Grievant's categorical denials. As example, the November 25th allegation that Harden asked Moody if she wanted her heat turned up is quite different from Moody's version.

It seems reasonable that if Harden had legitimately inquired about the heat and received no response from Moody, additional follow-up questions would have occurred from Harden. Namely, Moody worked in the area of the Animal Industry that was frequently visited by the public, and Harden had a business reason to obtain a reply from Moody if in fact his words to Moody were regarding the heat. Query, why would Harden need Moody's consent to turn the heat up anyways? I find that the facts support the inference that Harden used inappropriate words of a sexual nature towards Moody on November 25, 2003.

On November 26th, 2003, Harden admitted during the investigation that he tapped Moody on her shoulders. Harden also testified that he touched her shoulders to ask if another maintenance man was already in the basement. Moody on the other hand testified that Harden approached her chair from the rear and rubbed her shoulders and stated, "You have very soft hair". Moody was upset, pulled her chair forward and informed Burton of what happened. Moody's credibility and recollection of the events are reinforced in that she kept accurate notes and her version of the events remained consistent at each step of the proceedings. (JX 5(D))

I find that Moody was believable as a witness and her version of the events on November 25th and 26th, 2003 are credible and reliable. The Grievant's overall version of the events on November 25th and 26th were not credible nor believable in the opinion of this Arbitrator. I further find that ODA met its burden of "just cause" under Rule 24 of the CBA in

violation of ODA Disciplinary Grid 9 (A) and 14. No evidence was offered to support a conclusion that Harden's behavior was welcome or not intimidating to Moody.

With respect to the December 4th, 2003 incident ODA conceded at the hearing, Harden had consent to be at Moody's work area that day and the discipline issued in violation of ODA's Disciplinary Grid 5 (A), i.e., insubordination, was inappropriate. In addition to being insubordinate Harden was also charged with violation of Rules 9 (A) and 14 where he made loud sounds and gave Moody angry looks while in her work area to inspect some pumps. Moody indicated that she interpreted this conduct as sexual harassment and made her feel uncomfortable. No words were exchanged between Harden and Moody. Co-worker Burton indicated that she heard a loud sound from Harden on the morning of December 4th, 2003.

ODA required Harden to work in Moody's area on December 4th, 2003 and the evidence of two loud "sighs" or eye contact fails to support an additional finding of a violation of Rules 9 (A) and 14.

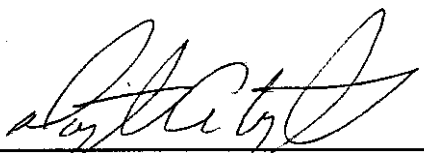
Harden received ten (10) days suspension for the December 4th, 2003 conduct. ODA did not meet its burden of "just cause" for the December 4th, 2003 incident and the discipline shall be reduced from thirty (30) days to twenty (20) days.

ODA's utilization of its sexual harassment policy and Disciplinary Grid was not arbitrary or inconsistent regarding the November 25th and 25th, 2003 incidents and the discipline issued shall stand regarding those days. However, the discipline issued for the December 4th, 2003 incident was not issued for just cause thereby requiring a reduction of the discipline to twenty (20) days is required.

AWARD

The grievance is granted, in part, in that the suspension shall be reduced to twenty (20) days. The remainder of the grievance is denied.

Respectfully submitted this 23^d day of February 2005.


Dwight A. Washington