

#1875

In the Matter of Arbitration *
Between * Before: Harry Graham
FOP-OLC * Case Number:
and * 15-00-20050707-0071-05-02
The State of Ohio, Department *
of Public Safety *

APPEARANCES: For FOP-OLC:

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For the State of Ohio:

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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. The record in this dispute was closed at the conclusion of oral argument in Columbus, OH. on April 27, 2006.

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

Did the Employer have just cause to suspend the Grievant?
If not, what shall the remedy be?

BACKGROUND: There is no dispute over the events that prompted the Employer to suspend Timothy Gales, the Grievant. Mr. Gales was initially employed by the State of Ohio in 1985. He came to work for the Ohio Investigative Unit in the Department of Public Safety in 1995.

There is in the State what is known as the SYNAR program. That program involves checking retail establishments to ensure that they do not sell tobacco to underage purchasers. On March 18, 2005 the Grievant and two colleagues were engaged in such checks in the Columbus, OH. area. With them as well was an underage Confidential Informant (CI). When conducting a check the CI enters an establishment accompanied by an enforcement agent. On March 18, 2005 that agent was Mr. Gales. While the Agent and the CI are in the establishment the other two Agents wait in a car outside. The Confidential Informant attempts to make a purchase. If successful a citation is issued to the vendor. In order to ensure that an underage patron does not make a purchase the store clerk is supposed to check identification. The CI may decline to produce it on a pretext: eg. "I left it in the car" or "I forgot it."

On March 18, 2005 when in various establishments Mr. Gales' badge was visible. So too was his radio. Upon learning of this and conducting an investigation Mr. Gales was

suspended for five days. (It is recognized that under the Agreement of the parties a suspension is a fine. The conventional term will be used in this decision). A grievance protesting that suspension was filed. It was properly processed in the procedure of the parties without resolution and they agree it is properly before the Arbitrator for determination on its merits.

POSITION OF THE EMPLOYER: No doubt exists but that Mr. Gales entered various establishments and his badge and radio were visible. Accounts attesting as much were provided to the Investigative Unit. (Eg. Br. Ex. 1, pp 33-35). An Agent entering an establishment with is badge and radio visible compromises the undercover nature of the investigation. It could potentially place the underage purchaser at risk.

The Department of Public Safety has work rules that deal specifically with the sort of activities engaged in by Agent Gales. Work rules 501.02(A)(1), Performance of Duty and 501.02(W)(2) Compliance to Orders. Work rule 501.02(A)(1) provides:

An employee shall carry out all duties completely and without delay, evasion or neglect. An employee shall submit all required reports pertaining to all duties without delay and in accordance with procedures established by the Director.

Rule 501.02(W)(2) indicates:

A employee shall conform with, and abide by, all rules, regulations orders and directives established by the

Director, Superintendent, Deputy Director of the ODPS Investigative Unit, for the operation and administration of the Department of Public Safety, Ohio State Highway Patrol, or ODPS Investigative Unit.

By permitting his badge and radio to be visible while engaged in an undercover operation with an underage CI the Grievant violated those work rules the State contends.

The behavior demonstrated by Mr. Gales on March 18, 2005 was nonsensical according to the State. He was engaged in an undercover operation. Why he would have his radio and badge visible is inexplicable. No other Agent has ever acted in the manner Mr. Gales did on March 18, 2005. Agents know better than to show their badge and radio during an undercover purchase of tobacco.

This incident received wide publicity. On July 16, 2005 the Columbus Dispatch ran an article about it. The Dispatch pointed out that failure to carry out undercover operations properly could jeopardize over \$67 million in Federal funding in Ohio. That funding represents about two-thirds of the budget of the Ohio Department of Alcohol and Drug Addiction Services. Were it to be withdrawn the Department would be in crisis. Further, the State received negative publicity as a result of the article in the Dispatch.

By his actions the Grievant put the undercover operative at risk. Mr. Gales had a prior one day suspension. Given this history the Employer contends the grievance should be denied.

POSITION OF THE UNION: Mr. Gales was provided a statement of the charges against him on June 17, 2005. Those charges assert that he violated Work Rules 501.02(A)(1) and 501.02(W)(2). As the Union urges those work rules be read, they do not address the activity engaged in by Mr. Gales on March 18, 2005. The State cannot reach from the general phraseology of those work rules to the conduct engaged in by Mr. Gales on March 18, 2005 according to the Union.

On occasion Mr. Gales has been accompanied by supervision while engaged in undercover activities of the sort conducted on March 18, 2005. Specifically, he has been accompanied by Suann Cook the Agent-in-Charge and the investigating officer in this matter. According to the Grievant Agent Cook witnessed him on more than one occasion enter an establishment carrying his radio. He was never instructed to do otherwise.

The investigation in the matter relies on statements from clerks at the retail establishments where Mr. Gales was alleged to have acted improperly. At no time was he questioned about the events of March 18, 2005. He did not have an opportunity to present his side of the story. Given that, the investigation was flawed, fatally so in the opinion of the Union. For this reason alone the grievance should be upheld it contends.

To the time of this incident the Employer did not provide

training on the proper manner in which to conduct an undercover operation involving the potential sale of tobacco to an underage purchaser. Subsequently, it has instituted training. On March 18, 2005 it was not a violation of any rule or standard operating procedure for Mr. Gales to be in a retail establishment with his radio in hand and his badge visible. Absent training and work rules dealing specifically with how an undercover operation of this nature was to be conducted the discipline administered to Mr. Gales cannot stand according to the Union. It urges the grievance be sustained in full and the suspension (and any monies withheld from Mr. Gales) be overturned.

DISCUSSION: It is axiomatic that in order for an employee to be disciplined there must be a relevant rule. Of course, the employer does not have to have a rule prohibiting such serious workplace offenses such as theft. That notwithstanding, the general rule is that when discipline is administered, reference must be made to violation of a rule, handbook or policy.

In this situation Mr. Gales was charged with violating Work Rules 501.02(A)(1), Performance of Duty and 501.02(W)(2), Compliance to Orders. The first rule directs an employee to carry out duties completely and without delay, evasion or neglect. The only possible relevant factor in that

rule is neglect. The second rule directs that an employee is to conform with and abide by all promulgated rules. In the context of this dispute that refers to the first rule. Inquiry turns to the question of neglect.

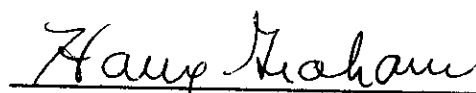
At arbitration Mr. Gales testified that he had been accompanied on undercover operations by Agent-in-Charge Cook from time to time. She had seen him enter an establishment with his radio. Nothing was said to indicate such behavior was inappropriate. Never was he directed to cease. If the Employer was aware of the activity and tolerated it, it cannot now belatedly condemn it as part of a disciplinary proceeding.

Examination of the various statements provided by store clerks shows that two, Deborah Howard and Diane Abdelmegld saw Mr. Gale's badge. Both worked at a Kroger's. Both indicated they had seen it prior to the Confidential Informant attempting to purchase cigarettes. At arbitration Mr. Gales indicated he carried his badge on his belt as did other agents. He also indicated as much in his interview on May 3, 2005. (Er. Ex. 1, p. 15). He also testified that most agents carry their badges on their belt. That testimony was not refuted. It cannot be determined in this situation that Mr. Gales deliberately showed his badge to store personnel prior to the sale of tobacco.

At arbitration testimony was received from Scott Pohlman, Deputy Director of the Ohio Investigative Unit. He indicated there was no rule concerning the proper use of a radio and badge during a compliance check. To March 18, 2005 Agents had not been trained in the proper manner to conduct such checks. Subsequent to this incident training has been initiated. Under these circumstances it cannot be determined that "neglect" within the meaning of Work Rule 501.02(A)(1) has occurred.

AWARD: The grievance is sustained. All reference to this incident is to be removed from Timothy Gales' personnel records. All withheld funds are to be restored to him.

Signed and dated this 12th day of May, 2006 at Solon, OH.



Harry Graham
Arbitrator