

OPINION AND AWARD

#1885

In the matter of Arbitration

Between

Fraternal Order of Police, Ohio Labor Council, Inc.

And

The State of Ohio, Department of Public Safety

Regarding

Grievance Number 15-00-2005081 6-0107-05-02
(Tony Storey)

APPEARANCES:

FOR THE STATE:

Kristen Rankin, OCB Advocate
Ray Mussio, Second Chair
Diane Corey, Agent
Scott Pohlman, Asst. Deputy Director
Rebecca Sterling, Agent
Sgt. Cassandra Kocab, Highway Patrol

FOR THE FOP/OLC:

Paul Cox, Chief Counsel
Tony Storey, Grievant
Joel Barden, Staff Representative
Renee Engelbach, Paralegal

An arbitration hearing was conducted on June 19, 2006, in the offices of the Fraternal Order of Police, Columbus, Ohio.

The parties stipulated the issue in this case to be: ***“Was the Grievant Tony Storey given a three (3) day fine by the Employer for just cause? If not, what shall the remedy be?”***

BACKGROUND INFORMATION:

Grievant Tony Storey has been an enforcement officer with the Ohio Investigative Unit of the Ohio Department of Public Safety since 2000. He is charged with violation of *Department of Public Safety Policy 501.02 (A)(4)-Performance of Duty*. The Investigative Unit of the Ohio Department of Public Safety is the entity of state government that provides investigative and law enforcement services dealing with the illegal use and distribution of drugs and alcohol.

The Grievant had in his possession fifty-three (53) ID cards for approximately six (6) months before turning the ID's over to the evidence officer. The ID's were either fake or had expired.

In late April or early May 2005 Agent Storey approached Assistant Agent in Charge Diane Corey and told her about the ID's he had in his possession. Assistant Agent in Charge Corey testified that

the Grievant told her he had gotten the ID's from the former *Sober Truth Instructor*.¹

Assistant Agent in Charge Corey testified that she instructed the Grievant to get documentation from the former instructor, Agent Sterling, regarding the ID's. She then contacted the evidence officer.

Later Agent Sterling informed Assistant Agent in Charge Corey that she had given Agent Storey only a few ID cards.

The Grievant had the ID's in his possession in an unsecured filing cabinet until he contacted Assistant Agent in Charge Corey.

The Highway Patrol conducted an investigation in this matter.

The Director issued discipline on August 2, 2005, in the form of a three (3) day fine for violation of the Performance of Duty Policy (501.01(A)(4).

A grievance was filed August 3, 2005, contending the three (3) day fine was not for just cause.

RELEVANT CONTRACT PROVISIONS AND RULES:

ARTICLE 19 – DISCIPLINARY PROCEDURE

19.01 Standard

¹ Sober Truth Instructors teach in schools and instruct bar owners regarding the liquor laws of the state.

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.

WORK RULES:

501.02(A)(4)

Employees who fail to perform assigned duties because of an error in judgment or otherwise fail to perform satisfactorily a duty of which such employee is capable, may be charged with inefficiency.

MANAGEMENT'S POSITION:

Management believes Agent Storey acted with poor judgment and that the three (3) day fine is progressive. It notes that he previously received a one (1) day penalty.

The Employer argues that Agent Storey had in his possession fifty-three (53) ID cards for approximately six (6) months before turning them over to the evidence officer.

Agent Storey talked to his supervisor in April or May and told her about the ID cards but did not indicate the large number of cards in his possession.

The Employer notes that while Agent Storey had reason to have a few ID cards in his possession, which he obtained from the previous *Sober Truth Instructor*, Agent Sterling, he did not get all of cards from her.

The Employer notes that while Agent Storey was being interviewed by Highway Patrol Investigator, Cassandra Kocab, he changed his story. First Agent Storey told the investigator that Agent Sterling provided him with the ID cards and then, when confronted with the Statement of Agent Sterling, he stated that some of the ID's might have been seized in other cases.

The Employer argues that the Grievant, in his role as an enforcement officer, must be held to a higher standard regarding the seizure and possession of property.

Management believes, "It is not an acceptable practice to have 53 ID cards laying around the office. ID's left in an unsecured filing

cabinet have the potential for being taken and used in an inappropriate manner.”²

The Employer addresses the severity of the three (3) day fine by noting the existence of a one (1) day fine already on the Grievant's department record, and asks the Arbitrator to deny the grievance.

POSITION OF THE FRATERNAL ORDER OF POLICE:

The FOP argues that there was no policy in place governing the handling of fake ID's. It notes that none of the 53 ID's was real. (Some were fake and some were expired) and that the Grievant had a legitimate use for fake ID's in his role as a *Sober Truth Instructor*.

The FOP explained that this case arose because of attention drawn by another case involving Agents Chad Fannin and Gavin Stanton. One aspect of that case involved the use of an ID (believed to be fake) by a police informant in Troy, Ohio. The fake ID (not one of the 53 involved in this case) was provided by Agents Fannin and Stanton and was subsequently used by the police informant when stopped for a traffic violation. In the Fannin – Stanton case the ID was actually a valid ID which belonged to a private citizen.

In the course of the investigation of this matter, the Employer became aware that as many as 110 ID's were confiscated in an earlier action at the Asylum Club. These ID's were not secured in the Dayton Office and apparently provided the ID used in the Fannin – Stanton Case.

The FOP contends that the negative public attention brought by this case has led to the current action against Agent Storey.

² Employers Opening Statement, Page 2

Because there was no policy in place and no evidence that Agent Storey was ever given a direct order or any training or instruction on how to handle confiscated ID's, the FOP argues that he did nothing wrong and did not violate rule 501.02(A)(4)

DISCUSSION:

The Employer was able to prove that fifty-three (53) ID's were in the possession of Agent Storey for approximately six (6) months and they were not secured in a locked facility or turned in to the evidence officer until June 22, 2005. The question is whether the possession of those ID's and these actions constitute a violation of rule 501.02(A)(4).

Both Deputy Director Pohlman and Agent Corey admitted there was no policy in place regarding the handling of property at the time of the incident giving rise to this grievance.

Highway Patrol Investigator Cassandra Kocab also concluded that there was no policy in place. In her report she notes: *"I reviewed Ohio Investigative Unit Policy 200.09, Handling and Disposition of Evidence, in its entirety and did not locate any provisions that apply to recovered or found property. I also contacted Acting Deputy Director*

Pohlman who verified that their agency does not have a policy that deals with property not associated with a criminal offense or administrative violation.”³

Deputy Director Pohlman admitted that he had no knowledge if Agent Storey was ever given instruction or a direct order regarding how to handle the 53 ID's.

Deputy Director Pohlman testified that Agent Storey used poor judgment by not securing the ID's in a locked facility. The Employer Representative also argues that the Grievant used poor judgment by not turning the 53 ID's over to the evidence officer.

A review of recent cases in which “poor judgment” was a determining factor reveals a myriad of very serious lapses in judgment. One case involved the use of drugs on company property (NTN-Bower Corp. 122 LA 90) and another involved intimidation of a citizen (City of Melbourne, Fla 121 LA 1345). A third case involved an officer who violated five sections of the Code of Conduct (City of Bartlow, Fla 121 LA 799). A fourth involved a matter of endangering public safety (City of Birmingham, Al 121 LA 398.)

³ Management Exhibit 1, Page 3

In all of these cases, the poor judgment displayed is something that is clearly understood by other members of the workforce whether or not those employees agree with the outcome of the particular case.

In this case the evidence is convincing that employees were not aware of, or trained on the expectations of Management in the absence of a policy regarding the proper way to handle and secure property such as the ID's.

Agent Sterling admitted that she confiscated a fake ID in an OSU incident in 1997 and she kept the card for training purposes.

Agent Corey, who was Agent Storey's supervisor at the time of this incident, admitted that she had approximately fifty (50) ID cards in a binder that she used for training. Neither indicated that they kept the ID's in a locked facility.

It is clear that, at the very least, there was a great deal of confusion about the expectations of Management regarding the logging and securing of ID cards or other contraband not connected to a specific charge.

Arbitrator E. William Lewis in his decision in the related cases referred to by FOP, noted: *"What responsibility does the Employer*

*have in the confiscated evidence/property (ID) issue? Evidence and testimony showed that some confiscated evidence and property (ID) was not held in a secure place at the Dayton OIU Office. In addition no written rule or policy regarding agent use of confiscated ID's was introduced into evidence."*⁴

From the testimony of various witnesses it appears that Management has now remedied this matter by adopting policies on the subject. If this is the case, then that should resolve future problems.

It is not reasonable for Management to punish employees where policy does not exist and further, there is no evidence that employees have been given clear direction regarding the expectations of Management.

This Arbitrator, in a previous case,⁵ was faced with a similar issue regarding the logging in of drug paraphernalia. I concluded in that case that no violation could be proven because of the lack of knowledge on behalf of the employees regarding management expectations in relation to the handling of such items.

⁴ Grievance Numbers 15-00-05728-82-05-02 (Fannin) and 15-00-05729-83-05-02 (Stanton).
Issued 04/08/06.

⁵ Grievance Number 15-00-031118-0173-05-02 (Darin Plummer) issued 10/17/05

In this case Management has tried to get at the same type of issue by claiming "poor judgment." That simply will not suffice.

The Employer attempted to prove that Agent Storey was not honest or forthcoming regarding his statement surrounding the source of the ID's. It notes that he first stated he got the ID's from Agent Sterling and later recanted his story under questioning by Highway Patrol Investigator Kocab to indicate that he was not sure where all the ID's had come from.

I do not find these statements to be irreconcilable. It is apparent from the testimony that many people were anxious surrounding the events of the Fannin – Stanton charges. Agent Storey sought guidance from his supervisor regarding ID's that he no longer wanted to have in his possession. He did receive ID's from Agent Sterling although not the total number he had in his possession.

I found the testimony of Agent Storey to be plausible and credible regarding this matter.

If an employer has a clearly delineated policy and has trained employees as to the application of that policy, then certainly there is an expectation that all employees will comply.

In the absence of written policy, there must be evidence that employees have received clear direction regarding the expectations of management.

In this case the evidence clearly shows there were no policy and no clear direction given. In the absence of both, Management has failed to convince this Arbitrator that Agent Storey displayed poor judgment. Consequently there is no proven violation of rule 501.02(A)(4)

DECISION AND AWARD:

The grievance is granted. Grievant shall be repaid for the three (3) day fine. Any record of the three (3) day fine shall be purged. If any other loss occurred, the Grievant shall be made whole.

Issued at London, Ohio this 19th day of July, 2006.



N. Eugene Brundige, Arbitrator