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In the Matter of Arbitration *
* Case Number:
Between *
* 15-00-050815-0106-05-02
FOP-OLC *
* Before: Harry Graham
and *
*
The State of Ohio, Department *
of Public Safety *
*

APPEARANCES: For FOP-OLC:

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For Department of Public Safety:

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INTRODUCTION: Pursuant to the procedures of the parties a hearing was held in this matter on June 27, 2006 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. At the request of the Arbitrator post-hearing briefs were filed. They were exchanged on August 3, 2006 and the record was closed.

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

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

BACKGROUND: There is no factual dispute in this matter. The Grievant, Timothy Gales, began his employment with the State of Ohio in 1985. In 1988 he came to work at the Ohio Investigative Unit, part of the Department of Public Safety. Mr. Gales has a hobby. Like many hobbyists he is passionate about his hobby. Mr. Gales hobby is attending auctions, especially car auctions.

From time-to-time the Columbus Police Department auctions cars that have come to be in its possession and have not been claimed. The Ohio Bureau of Motor Vehicles learned that Mr. Gales had sold cars in the State. Specifically, it learned that he had sold more than five (5) cars in a 12-month period without securing a dealer's license. That is a violation of the Ohio Revised Code, Section 4517.02(A)(6). The BMV learned that Mr. Gales had sold 15 cars in a 12 month period. Mr. Gales did not deny doing so. He maintained that while he had sold 15 cars, that total was inappropriate as he had sold some to used car dealerships. The Bureau of Motor Vehicles agreed and the State asserted that Mr. Gales had improperly sold 10 vehicles. Mr. Gales did not disagree. Mr. Gales was discharged effective August 12, 2005. It was the opinion of the Employer that he had violated Work Rule 501.02((H)(2), Conduct Unbecoming and Officer. Mr. specifically he was discharged for violating a crime, offense or violation of the

laws of the State of Ohio.

A grievance protesting that discharge was filed. It was processed through 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: The State points out that Mr. Gales acknowledged selling more than five motor vehicles in a 12 month period. The Statute, ORC 4517.02(A)(6) prohibits just such activity. In fact, Mr. Gales sold 15 vehicles. When investigators from the BMV met with Mr. Gales he claimed the sale of 15 vehicles was an overstatement as some had been sold to used car dealers and should not be counted. The BMV agreed and the total sales credited to Mr. Gales was reduced to ten. In fact, Mr. Gales was charged criminally and pled guilty to disorderly conduct.

Notwithstanding his admission to the BMV investigators, Mssrs. Ballinger and Lightfoot, at arbitration his story changed. He claimed not to have sold more than five vehicles in a twelve month period. This belated assertion should be given no weight the State asserts. Further, if in fact the Grievant did not sell more than five vehicles he had no reason or incentive to plead guilty to disorderly conduct. That he did so must be taken as evidence of wrongdoing the State contends.

This is a clearcut situation. ORC 4517.02(A)(6) prohibits selling more than five cars in a twelve month period without a dealer's license. ORC 4738.03(B) prohibits the sale of more than five "salvage" vehicles in a twelve month period. A salvage vehicle is one that has been so damaged, destroyed or changed so as to lose its character as a motor vehicle or changed so that it is not the vehicle described in the title. There is another class of vehicles recognized by the law. These are termed "rebuilt salvage" vehicles. Such a vehicle has been restored and inspected by the Highway Patrol. Rebuilt Salvage vehicles have a new title, denominating them as Rebuilt Salvage.

At arbitration the Union argued that Mr. Gales did not violate ORC 4715.02(A)(6) as some of the vehicles he sold were salvage or rebuilt salvage. That is not the case according to the State. No matter how the vehicles are categorized Mr. Gales sold more than the permitted number. Furthermore, Todd Ballinger of BMV testified that "rebuilt salvage" vehicles are included under Section 4517(A)(6) of the Code. When a vehicle is classified as "rebuilt salvage" it is considered a motor vehicle for purposes of Section 4517.02(A)(6) of the Code. Even excluding those vehicles classified as "salvage" shows Mr. Gales sold more than five vehicles in a twelve month period.

Mr. Gales was discharged for conduct pertaining to the sale of more than five vehicles in a twelve month period. The Employer does not have to prove a specific violation of ORC 4517.02. It merely has to prove he committed a crime or offense in violation of the laws of the United States, Ohio or a municipality. The policy does not refer to conviction. It refers to committing an offense. The Grievant sold more than the allowable number of cars. His discharge should stand the State contends.

This is not the first incidence of such behavior. A similar situation occurred in 2002. Mr. Gales knew how many cars he could sell in a twelve month period without violating the law. Mr. Lightfoot of BMV discussed the matter with him and gave him materials to apply for a license. Mr. Gales never did so. As a law enforcement officer he cannot violate the law. He knew the law was designed to protect the consumer. As an Enforcement Agent he enforces the alcohol laws of the State. Both the auto sale laws and the alcohol laws are designed to protect the consumer. Mr. Gales violated the statute dealing with protecting the car-buying public. He cannot be trusted to properly enforce the laws dealing with alcohol according to the State.

In Case No. 15-00-20010831-0107-04-01 the Grievant, a Highway Patrol Trooper, provided law enforcement information

to a suspect in a criminal investigation. He was discharged and the Arbitrator, Sandra Furman, sustained the discharge. Arbitrator Furman stressed the Grievant had forfeited the trust of the Highway Patrol and had disregarded his role as a law enforcement officer. That is the case in this situation as well. The Grievance should be denied in its entirety the State asserts.

POSITION OF THE UNION: The Union contends that the Grievant did not violate ORC 4517.02(A)(6). Initially, Mr. Gales was charged with selling fifteen cars, well above the limit prescribed by the statute. Upon discussion of the matter with the Grievant the fifteen were reduced to ten. That was due to the fact that some vehicles were sold as "salvage" vehicles. Such vehicles do not fall within the reach of ORC 4517.02(A)(6). At arbitration Todd Ballinger of BMV agreed that a further two vehicles carried a salvage title and should not have been counted. That reduced the number of vehicles sold by Mr. Gales to eight.

Both Mr. Ballinger and Terry Williams of the Ohio Investigative Unit agreed that sales to family members should not be counted. Mr. Ballinger also testified that sales to friends should not be counted as well. Such sales are considered as transfers, not actually sales. That was disputed by Patrick Lightfoot of BMV. It was his view that

sales to family should be considered as transfers but a sale to a friend should be considered as a sale. In the Union's view if two officials of BMV do not agree on how to count a sale to a friend, either as a sale or a transfer, how can the Grievant be expected to do so?

Mr. Lightfoot of BMV said that sales to family were not regarded as sales as there was no consideration. Thought had been given to prosecuting Mr. Gales for his alleged violation of 4517.02(A)(6). The Prosecuting Attorney, Amy Livingston, was concerned about that as Mr. Gales did not make any money from his sales. The Prosecutor declined to prosecute under 4517.02(A)(6). Ms. Livingston of the Prosecutor's office sought confirmation that Mr. Gales had received consideration for each sale. All were made to friends or family. There are precise descriptions of the manner in which each was sold or transferred. Thus:

Vehicle #2. This was transferred to Jane Bass, a close friend of Mr. Gales family. Ms. Bass contacted the grievant because she was having difficulty getting to and from work and knew he had experience at the Columbus Police Department vehicle auction. Mr. Gales received some funds from Ms. Bass for the purchase. They were insufficient and he used some of his own money. Ms. Bass never used the vehicle.

Vehicle #3. This was transferred to Jeremiah Colson, another

friend of the family. Mr. Gales purchased a salvage vehicle with \$300.00 provided by Mr. Colson. As was the situation with Ms. Bass, he used some of his own monies in this transaction. No additional funds were supplied by Mr. Colson so the Grievant lost money on this transaction.

Vehicle #5. This was purchased by Mr. Gales for Astarr Hayes, his son's girlfriend. He expected to be reimbursed. He was not.

Vehicle #7. One Jamika Kindle is a secretary at the Ohio Investigative Unit and a co-worker of Mr. Gale. She asked him to purchase a car for her daughter and provided \$300.00. In addition, Mr. Gales spent \$50.00 to have the car towed, \$35.00 for a battery and \$40.00 for a key. He was not reimbursed. He lost money on this transaction.

Vehicle #9. This was purchased by Mr. Gales for Edward Stewart, a friend. Mr. Gales used his own money for this purchase and was reimbursed by Mr. Stewart. There was no consideration in this transaction.

Vehicle #10. This was purchased by Mr. Gales for Thaddeus Leonard, a neighbor. He used Mr. Leonard's money to pay for the car. He did not profit by this transaction. There was no consideration.

Vehicle 11. Ms. Nise Bass is Ms. Jane Bass' niece. Mr. Gales' son told her the Grievant could get her a car. Ms. Nise paid

for the car but never used it. Mr. Gales did not profit by this transaction.

Vehicle 13. Mr. Gales purchased this car for Tamarra Slaton, a family friend. He used his own money and was not reimbursed. He lost money on this transaction.

The State must show three tests have been satisfied for a violation of ORC 4517.02(A)(6) to have occurred. Initially, there must be consideration. Mr. Gales made no profit on any of these transactions. Purchasing vehicles at auction is his hobby. He helped family and friends. He did not gain by these transactions.

Secondly, the Employer must show that these transactions represented sales. They did not. All these transactions were done on behalf of a close friend, a friend of the family or a co-worker, using funds provided by that person. These transactions are really transfers, not sales according to the Union. Mr. Lightfoot of BMV made the distinction. He indicated a transaction between family members is a transfer, not a sale.

The third qualification for a casual sale is that the vehicle be fit for customer use. Two were not. The vehicle purchased for Ms. Kindle blew its engine. The one purchased for Ms. Nise Bass was blowing smoke when it was purchased. None of the other six constitute a 4517.02(A)(6) violation as

each was a transfer to a friend or family friend and no consideration was involved.

ORC 4738.02 governs salvage vehicles. Mr. Gales purchased vehicle #8 for Jabar Brooks. It was salvage and repaired to rebuilt salvage. Mr. Brooks gave Mr. Gales some money towards the purchase. He did not reimburse the full price to the Grievant. No consideration was received. Further, Mr. Brooks is a family friend.

Vehicle #12 was purchased by Mr. Gales for his supervisor, Phillip Langston. Mr. Langston asked the Grievant to locate a Cadillac or Oldsmobile for him. Mr. Gales put up the purchase price and was reimbursed by Mr. Gales. No consideration was exchanged. Mr. Langston is Mr. Gales' supervisor and also a friend. The Employer cannot prove the tests set forth in ORC 4517(A)(6) have been satisfied. Thus, the grievance should be sustained the Union argues.

ORC 4505.11 is concerned with the sale of Rebuilt Salvage Vehicles. In order to be sold as Rebuilt Salvage it must pass an inspection. Section 4505.11 does not limit the sale of Rebuilt Salvage vehicles to no more than five per year. Some of the vehicles itemized by the State (Er. Ex. 1) were identified as Rebuilt Salvage. As there is no restriction on the sale of such vehicles they cannot be held against Mr. Gales.

Nor did Mr. Gales violate Section 4738.01 or 4738.02 of the Code. Section 4738.02 is concerned with salvage titles. Each vehicle purchased by Mr. Gale had a salvage title. Most were not sold as salvage and consequently do not meet the definition of a casual sale found in Section 4738.01. The Employer did not attempt to prove Mr. Gales sold more than five salvaged vehicles in violation of ORC 4738.02. The charge against Mr. Gales involves 4517.02(A)(6). The Employer is confined to that charge and, as set forth above, cannot prove it.

Part of the charges against the Grievant involve the assertion he violated Work Rule 501.02(H)(2). This was linked to the allegation Mr. Gales violated ORC 4517.02(A)(6). As he has not, the allegation he violated the work rule must fall the Union insists.

The State contends that notwithstanding the arguments made by the Union, Mr. Gales previously violated ORC 4517.02(A)(6). According to the State, that occurred in 2002. That is incorrect. In fact, Mr. Gales paid a fine for violating ORC 4517.02(A)(5), dealing in vehicles without a license. On occasion Mr. Gales had gone to different auction houses to purchase cars. Some had clear titles. To remain in compliance with the Code he stopped purchasing such cars. He purchased vehicles at the auction conducted by the Columbus

Police Department because all such cars have salvage titles.

Mr. Gales pleaded guilty to disorderly conduct. That was administrative convenience. He paid a fine of \$200.00. The disorderly conduct charge was not included in the specifications against the Grievant. Thus, it cannot be used against him in the proceeding.

At Article 19.05 the Agreement calls for progressive discipline. At his discharge Mr. Gales had a live one-day suspension. To go from a one-day suspension to a discharge does not comport with the principles of progressive discipline. This is not the sort of serious misconduct that permits the Employer to depart from the principle of progressive discipline.

In this situation the Employer did not prove Mr. Gales acted as charged. His hobby is purchasing cars at auction. He has carefully conducted himself so as not to run afoul of Section 4517.02(A)(6) of the ORC. He did not do so in this situation. The grievance should be sustained and Mr. Gales restored to employment with a make-whole remedy the Union contends.

DISCUSSION: The reason Mr. Gales was discharged was that the Employer believed he had violated ORC 4517.(A)(6). The belief that Section of the Code had been violated gave rise to the discharge notice of August 4, 2005. That notice concluded

that the Grievant had violated Departmental Work Rules, specifically 501.02(H)(2), Conduct Unbecoming an Officer. Mr. Gales had been criminally charged in connection with this incident. An allegation that he had violated ORC 4517(A)(6), a first degree misdemeanor, had been lodged against him. In fact, that charge had been converted to one count of disorderly conduct. Mr. Gales paid a fine of \$200.00. At arbitration testimony was received from Jeffrey A. Berndt, Counsel for Mr. Gales in this matter. He detailed how the initial Prosecuting Attorney was reluctant to move forward with the case. There came to be another Prosecutor involved, Amy Livingston. According to Attorney Berndt, Ms. Livingston was also concerned about the number of sales involved, whether or not the sales attributed to Mr. Gales were bona-fide and whether or not the State was proceeding under the correct statute. It was the opinion of Mr. Gales' attorney that no violation of law occurred in this situation. Mr. Berndt's testimony was not contradicted in any way. A deal was struck. Mr. Gales pled to disorderly conduct, paid his fine and went on his way. Mr. Gales was not charged by the Employer with conduct unbecoming as a result of his plea. The conduct unbecoming charge was levied against him as a result of the allegation he had violated ORC 4517.06(A)(6). That charge was not supported in the criminal proceeding

brought against the Grievant.

At arbitration testimony was received from Patrick Lightfoot, Assistant Chief of Investigations for the Bureau of Motor Vehicles. He has a total of 14 years of experience, 4 of which were in investigations. He indicated that a title transfer is not necessarily considered to be a sale. A transfer to a family member does not constitute a sale. Another aspect of a "sale" is that there must be consideration involved in the transaction.

Testimony was also received from Todd Ballinger, an Investigator for BMV. He expanded upon Mr. Lightfoot's conception of sales that did not count towards the limit of five. Mr. Ballinger believed that sales to close associates did not count towards the limit. There is some uncertainty among officials of BMV regarding the persons to whom sales may be made without producing a violation of Section 4517.02(A)(6).

Attention is directed to the concept of consideration. It is concerned with the inducement to enter into a contract. Colloquially, it embodies the notion of profit. If Mr. Gales were selling cars for a profit arguendo there existed the potential for violation of ORC 4517.02(A)(6). Mr. Gales did not profit from the sale of the vehicles he purchased at auction. He did not profit from the sale of the car to Jane

Bass. (Vehicle #2). Nor did he profit from the sale of Vehicle #3 to Jeremiah Colson. In no case does the record demonstrate that Mr. Gales profited from the transactions. The element of consideration identified as essential for a sale to have occurred by Mr. Lightfoot is absent. Absent such showing a violation of ORC 4517.02(A)(6) did not occur in this situation.

Interesting is the fact that the Grievant secured a vehicle for his supervisor, Phillip Langston. It was done at Mr. Langston's behest. Now the Employer seeks to include that vehicle among those as part of the specifications against Mr. Gales. That is improper. Further, no consideration was exchanged and this transaction cannot count in any way against the Grievant.


It is not the case as asserted by the Employer that this incident represents the second violation by Mr. Gales of 4517.02(A)(6). As set out above, there is no violation of the statute and the Prosecutor was unwilling to proceed with such a charge against Mr. Gales. In 2002 he was fined for violation of ORC 4517.02.(A)(5). Obviously that involves a different offense than the one at issue in this proceeding.

Mr. Gales' hobby of attending car auctions poses a potential risk. He may come to violate ORC 4517.(A)(6). He did not do so in this situation as he did not profit from the

sale or transfer of vehicles he purchased. His plea to disorderly conduct was merely to extricate himself from the tentacles of the criminal justice system and cannot weigh heavily in this proceeding. Under the circumstances of the sales involved in this situation his discipline must be stricken from his record.

AWARD: The grievance is sustained. The Grievant, Timothy Gales, is immediately to be restored to employment to the same position he held before his discharge. He is to receive all straight time wages he would have received but for this incident. Upon request by the Employer the Grievant is to supply records of all receipts from wage earnings and Unemployment Compensation, if any. The Employer may use these amounts to reduce its obligation to the Grievant. All expenditures for health incurred by the Grievant that would otherwise have been paid by Employer-provided health insurance are to be reimbursed to Mr. Gales. Appropriate seniority credit is to be restored to the Grievant. Appropriate pension contributions are to be made on his behalf as this incident did not occur. All record of this incident is to be removed from his personnel record.

Signed and dated this 23rd day of August, 2006 at Solon, OH.



Harry Graham
Arbitrator