 #1923

OPINION AND AWARD

In the Matter of Arbitration

Between

Fraternal Order of Police, Ohio Labor Council, Inc.

And

The State of Ohio, Department of MRDD

Grievance Number 24-07-20060714-0023-05-01
(Dennis Salisbury)

Date of Hearing
February 12, 2007

Date of Award
March 8, 2007

APPEARANCES:

FOR THE STATE:

Laura J. Frazier, Advocate
Matt Banal, LRS, OCB
Donna D. Haynes, LRO 3
Robin Bledsoe, H.R. Dir., GDC

FOR THE FOP/OLC:

Paul Cox, Chief Counsel
Dennis Salisbury, Grievant
Joel Barden, Staff Representative
Renee Engelbach, Paralegal

An arbitration hearing was conducted on February 12, 2007, at the Gallipolis Developmental Center, Gallipolis, Ohio

The parties stipulated the issue in this case to be, ***"Was the Grievant, Dennis Salisbury, removed from his position as a Police Officer 2 for just cause? If not, what shall the remedy be?"***

In a grievance dated July 14, 2006, the Grievant and FOP allege violation of Articles 19.01 and 19.05 of the Collective Bargaining Agreement.

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."

The parties agreed that the matter was properly before the Arbitrator for determination and submitted numerous documents as joint exhibits including the

Collective Bargaining Agreement, the Grievance Trail, the Discipline Trail, and various In-service/Policies and Procedures.

Prior to the hearing the parties had agreed to several procedural matters including the fact the hearing would be held in Gallipolis, Ohio.

These agreements were reduced to writing and provided to the Arbitrator.

BACKGROUND:

Grievant Dennis Salisbury was removed from his position as a Police Officer 2 on July 12, 2006, after serving in that position for approximately two (2) years.

The Order of Removal states the basis for the removal:

> *"This is to notify you that you are REMOVED from the position of Police Officer. The reason for this action is that you have been guilty of CREATING A DISTURBANCE in the following particulars, to wit: From the period of April 2005 through the period of April 2006, your interaction with female co-workers has caused a disruption in the work environment. On various occasions you have made the focus of your conversations offensive i.e. sexual in nature. You have also demonstrated actions that go beyond inappropriate, i.e. placing your fingers in the hole of a person's pants, inviting an employee to meet you at the Habitation Center after work, going by an employee's home in addition to giving unwelcome advice to that employee in regards to her husband, and urinating in an open bathroom stall in the presence of a female custodial worker. All of these behaviors demonstrate a pattern of inappropriate activity. As a Police Officer 2 you are held to a higher standard because you are in a position of perceived authority your actions cannot be tolerated. Therefore you are removed."*

MANAGEMENT POSITION:

Management contends that the actions of grievant Dennis Salisbury between April 2005 and February 2006 "failed to maintain a satisfactory and harmonious relationship with fellow employees and seriously disturbed the normal operation of the facility." [1]

---

[1] Employer's Opening Statement.

Management based much of its case on the testimony of Margaret Mossbarger who is an Administrative Assistant 2 in the Gallipolis Development Center Police Department.

Ms. Mossbarger is the number two person in the Police Department.

According to Ms. Mossbarger, Mollie McFann caused an investigation to be initiated when she reported an incident on January 25, 2006, in which the grievant was alleged to have told her the staff in one her units had, "opened Pandora's Box." Ms. McFann apparently said she could not take it anymore.

The grievant was re-assigned and an investigation was begun.

Another employee reported that the grievant had touched the underwear of another female employee.

Another employee, Dezra Lies, allegedly reported that she had a conversation with the grievant who told her that because they had been talking there would likely be rumor that they had been sleeping together.

This employee stated that the grievant had driven by her house in Jackson and told her that her garage door was open.

This employee allegedly called the police and reported the fact the grievant had driven by her house. According to Ms. Mossbarger, employee Lies was afraid to come to work. After Ms. Mossbarger and Ms. Lies talked, the employee did report to work.

Ms. Mossbarger then interviewed employee Crystal Waugh and asked her about the reported incident of touching her underwear. She apparently replied that he did not touch her underwear but did touch a hole in her jeans.

Ms. Waugh stated that she was not offended by this incident.

Ms. Mossbarger interviewed Brenda Spencer who reported that the grievant had invited her to follow him to see the Habitation Center (a facility on another part of the grounds of GDC). She said she declined.

In an interview with Rebecca Stevens, this employee allegedly reported that the grievant had made an inappropriate statement about getting, "into her stuff."

Emma Johnson is a custodian who reports to Ms. Mossbarger. The two of them discussed a situation wherein the grievant had referred to her as "girl." Ms. Mossbarger informed the grievant that he should address the employee as either Emma or Ms. Johnson.

During a follow-up conversation regarding the "girl" incident, Ms. Johnson reported another incident wherein she was cleaning a bathroom when the grievant came in. She apparently stated that the grievant urinated while she was still in the bathroom.

At the hearing, the Employer called Emma Johnson and asked permission to view the premises of the bathroom. The hearing was recessed and reconvened at the 6040 Cottage location.

Ms. Johnson testified that the grievant's references to her as "girl" hurt her feelings.

In viewing the restroom area Ms. Johnson indicated that she was offended by the grievant's action in the bathroom.

She noted that she did not realize he was still in the restroom until she saw him in the mirror.

Superintendent Donald Walker testified to the reasons for removing the grievant from employment. He indicated that the single incident in the restroom would justify termination in his opinion.

Management argues that the grievant was not removed for sexual harassment but rather because he created a disturbance over a long period of time leading to a disruption of the workplace. It was further argued that if the grievant were to return to GDC it would create a very difficult work environment.

FOP POSITION:

The FOP notes that the grievant was originally charged with some thirteen (13) different incidents as noted in Joint Exhibit C.

Following the pre-disciplinary hearing the hearing officer recommended throwing out two of the three original charges.

The remaining charge is the disruption of the workplace.

The FOP continued to review each interviewee and the incidents they allegedly reported to Mossbarger.

Molly McFann apparently reported three separate incidents:

(a) Pandora's Box.

(b) Computer porn statement

(c) Conversation at a basketball game about sex and an inmate.

The FOP objected to the reliance of the Employer on the Disciplinary Grid (Exhibit E). [2]

In the opinion of the FOP this is a silly case. The Employer has failed to prove the incidents occurred and failed to prove the existence of sexual harassment.

To bolster the FOP's position, it cites two Supreme Court cases which state the tests necessary to determine if sexual harassment has occurred. [3]

The FOP contends that none of the incidents cited by Management, even if they were proven to have happened, meet the tests that constitute sexual harassment.

DISCUSSION AND FINDINGS:

In order to sustain its action of removal of the grievant, the Employer must first prove that one or more of the incidents occurred. If the Employer is able to meet this test, then the Arbitrator must determine if removal is warranted and consistent with the principles of just cause.

An examination of this question necessitates that we first discuss the quantum of proof required in such a case.

Many Arbitrators apply the standard of "clear and convincing evidence" in most termination and removal cases. Arbitrator William P. Daniel clearly articulated this view when he wrote:

> *"Employer's level of proof in discharge is "clear and convincing evidence", rather than preponderance of evidence or criminal-law standard of beyond reasonable doubt, where collective-bargaining contract, in providing for*

---

[2] The Arbitrator noted the objection and agreed to rule on it in the written award.

[3] Meritor Savings Bank v Vinson (477 U.S. 57) and Harris v Fork Lift Systems (510 U.S. 17)

just cause, did not provide intent to adopt criminal standard of proof, and level of proof should be greater than in ordinary contract dispute for person who is terminated and who has suffered capital punishment in employment terms." [4]

Clear and convincing evidence is defined as, "Evidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence." [5]

Having recognized that the standard of proof is greater in a removal case than the "preponderance" standard utilized in lesser cases, let us turn to the type of evidence necessary to meet this standard.

In this case much of the evidence presented to me was hearsay. Ms. Mossbarger testified about what people had told her in the interviews and the Employer submitted statements and reports purportedly collected from witnesses.

While hearsay evidence is often received in arbitration proceedings to bolster certain points and to fill in the gaps between other pieces of evidence, it has significant limitations.

Arbitrator Ann S. Kenis discusses these limitations when she writes:

"The general rule in arbitration is that hearsay may be admitted in some circumstances even though the rule of evidence in a court of law would exclude it. This is because it is recognized that arbitration proceedings are informal, and advocates are not always familiar with the legal technicalities expected of lawyers in a courtroom. Arbitrators are presumed to have the expertise and experience to sift through and evaluate the evidence and assign it the proper probative value. In addition, policy reasons favor the admission of hearsay. The process is supposed to be an "escape valve" for tensions in the workplace and it is believed that there is value in permitting both parties to "get things off their chest" even though the evidence presented might otherwise be deemed inadmissible in a formal courtroom setting.

Nevertheless, one must always bear in mind the inherent weaknesses in hearsay evidence, particularly in the context of a discipline case where the employer has the burden of proving just cause.

A written statement cannot be relied upon to establish the entire truth of the matter, and in a hearing cannot be given the same weight as oral testimony in the course of which the Arbitrator may observe the

---

[4] 111 LA 457 (1998)
[5] Blacks' Law Dictionary, Seventh Edition

witness and which is subject to cross examination during which any uncertainties are subject to further inquiry. " [6]

With the exception of Emma Johnson, all testimony offered to the Arbitrator was hearsay in nature. The testimony of Ms. Mossbarger went far beyond the content of the written statements and involved memories and conclusions not included in the written statements and reports.

The fact that the hearing was held on site in Gallipolis, Ohio should have afforded the Employer greater convenience is calling eye witnesses so the Arbitrator could assess their testimony and the FOP would have the opportunity to cross-examine.

The standard of clear and convincing evidence demands no less.

The ABC Rail Products case cited above records a similar situation faced by Arbitrator Kenis.

"Here, the core of the Employer's case hinges on the hearsay account of the outside janitorial employee who, for whatever reason, did not appear at the hearing to face the Grievant and test his account against cross-examination. The Employer offered no explanation at the arbitration for the absence of this witness and no attempt was made to subpoena him. Without this individual's testimony, we do not know, for example, whether there was motive to falsely accuse the Grievant or whether, as Union witnesses claimed at hearing, he has demonstrated himself to be an unreliable and untrustworthy individual. His un-sworn statement cannot be relied upon under these circumstances since, as it developed, the matters contained in his statement were too important to deprive the Union of its right to cross-examination." [7]

Based upon the record in this case, I cannot accept the written statements or reports as probative evidence to support termination or proof that the alleged incidents occurred. The absence of Molly McFann, Dezra Lies, and Crystal Waugh precludes the Arbitrator from making determinations regarding their credibility.

This Arbitrator received no requests for subpoenas for any of those persons.

---

[6] 110 LA 574, (at page 580) (ABC Rail Products)
[7] 110 LA 574 (at page 581)

It appears that tape recordings were made of several of the interviews. Even the submission of those tapes would have bolstered the Employer's interpretation of these incidents if the witnesses had not been able to appear.

The authoritative text on Arbitration *HOW ARBITRATION WORKS, states:*

> "In discharge and discipline cases witness testimony concerning the facts that led to the disciplinary action comprises the most important evidence... An employers decision to rely solely on hearsay evidence in a case where it had the burden of proof has been deemed insufficient to sustain its case." [8]

Without the presence of all or some of the persons who allegedly have suffered harm, I am in a position of hearing the un-refuted testimony of the grievant.

As an Arbitrator I was not particularly persuaded by the grievant's testimony. He has obviously had much practice in offering testimony and much of what he said struck this listener as self serving and rehearsed. But, without hearing another first hand version of the event or incident, I must accept the grievant's version as plausible.

We are left with the incident(s) involving Ms. Emma Johnson. I found her testimony to be honest and credible. The Superintendent believes that the single incident of urinating in the restroom while Ms. Johnson was present provides justification and support for removal from employment.

Let us turn to an examination of what happened.

I am very troubled by the incident in which the grievant referred to Ms. Johnson as "girl" and, according to Ms. Johnson's testimony, did not correct that behavior after he was counseled to do so. The FOP argues that this is not part of the charge in that it is not sexual in nature.

I disagree. The charge, albeit a strange one, is "creating a disruption in the workplace." Acts that are demeaning or unprofessional are certainly disruptive to the respect and order necessary in any workplace.

---

[8] HOW ARBITRATION WORKS, 6th Edition, Elkouri & Elkouri, editor-in chief, Alan Miles Ruben, The ABA and BNA, 2003.

The bathroom incident is also troublesome. The grievant entered the restroom and saw Ms. Johnson working. A prudent person would have turned immediately and left the area until the cleaning was done.

The area could also have had the door blocked by a sign indicating cleaning in progress or wet floor or some other commonly used indicator.

The grievant did not leave but proceeded to relieve himself. His testimony is that he thought Ms. Johnson had left the room.

This Arbitrator accepts this statement as plausible solely based upon Ms. Johnson's testimony when she said, "I thought he had left."

The physical layout of the restroom with the small, fully enclosed stalls makes the statements of both persons believable.

Even if I were to find the restroom incident to be intentional, I fail see that it rises to a level that supports termination. The record shows the grievant did not expose himself, did not engage in questionable conversation, or other acts that would lead to removal.

I find that the Employer did prove the use of the term "girl" and that the grievant did fail to exercise good judgment by remaining in the restroom while a female employee was cleaning it. Thus, just cause does exist to support some level of discipline.

The FOP objected to the reliance of the Superintendent on Exhibit E, titled ***Performance Track***, which is commonly known as a disciplinary grid. The objection is based upon the fact the FOP and Employer have never negotiated the document.

I agreed to review that objection as a part of this award.

The question of whether the document is a required subject of bargaining is one best decided by the Ohio State Employment Relations Board (SERB) under the provisions of ORC 4117.

Its application and use are relevant questions for me to decide. The FOP is correct that such a document can never "trump" the clear language of the Collective Bargaining Agreement regarding progressive discipline.

This CBA, like most, has clear language on progressive discipline and it is for Arbitrators to decide if the actions of the Employer are consistent with that language.

At the very least the Employer clearly has the right to create tools that will aid in providing consistent penalties for similar infractions.

In an Elkhart County (Indiana) case this Arbitrator was confronted by an internal Discipline Review Board that had the same goal. I concluded in that case:

> "This Arbitrator commends the county on the establishment of an internal process such as the "Discipline Board" in order to provide an internal review mechanism which enables more supervisors to examine, and possibly point out, other approaches to discipline. I also reject the Union's argument that they should have been informed when this Board was created. It is strictly an internal management structure to assist in making good decisions." [9]

The fact that the Employer has shared this Policy with employees in an effort to explain expected consequences for rule violations is laudable and, in my opinion, appropriate.

While it is informative to an Arbitrator to know the thinking of the Employer and the efforts made to achieve internal consistency and fairness, it does not relieve the Arbitrator of the task to deciding the questions of just cause and progressive discipline that each case presents. This determination by the Arbitrator must be limited to the clear language of the Collective Bargaining Agreement.

The Agreement in this case provides in 19.05:

"The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense."

This language does not imply that each employee must first receive a verbal warning for the first offense of any violation, but it does put a burden on the Employer to demonstrate why greater levels of discipline are necessary in a specific case.

The most glaring flaw in the Employer's case in this situation is the absence of an opportunity for the grievant to correct what are believed to be egregious behaviors. Except for the counseling regarding the use of the term "girl," the record contains no reference to any efforts to correct the grievant's behaviors.

In the award that follows the discipline is greatly reduced. This lower level of discipline allows the Employer the opportunity to clearly state to the grievant exactly what behaviors are expected of him and to hold him accountable to conform his behavior to those expectations.

SUMMARY:

In summary I find the Employer has failed to prove to the satisfaction of this Arbitrator that just cause exists to support the removal of Dennis Salisbury.

I do find just cause exists to support a lesser penalty for his use of the term "girl" when referring to a female co-worker and not correcting his behavior after being counseled to do so, and for failure to exit a restroom that he had entered after he realized that the same female worker was present and working in that restroom.

AWARD

The grievance is granted in part and denied in part.

The removal of Dennis Salisbury shall be reduced/rescinded and he will be returned to a position of Police Officer 2. The reduced discipline shall be for a two (2) day fine and shall be dated as of the date of this award. All records of the grievant's removal shall be removed from his personnel file and be replaced the record of the two day fine which shall remain as active discipline for the period allowed by the Collective Bargaining Agreement.

With the exception of the loss of salary for the two (2) days, the grievant shall be made whole.

---

[9] 118 LA 1764

Issued at London, Ohio this 8th day of March, 2007.

N. Eugene Brundige

N. Eugene Brundige, Arbitrator