

#1952

VOLUNTARY ARBITRATION PROCEEDINGS
GRIEVANCE NO. 25-17-20070319-0005-05-02
GRIEVANT: KENNY STAPLETON

THE STATE OF OHIO

The Employer

and

THE FRATERNAL ORDER OF POLICE,
OHIO LABOR COUNCIL, INC., UNIT 2

The Union

OPINION AND AWARD

MARVIN J. FELDMAN
Attorney/Arbitrator
1104 The Superior Building
815 Superior Avenue, N.E.
Cleveland, Ohio 44114
216/781-6100

Fax: 216/781-6119

Email: marvfeldmn@aol.com

LICENSED TO PRACTICE LAW IN THE STATE OF OHIO AND COMMONWEALTH OF KENTUCKY

APPEARANCES

For the Employer:

Bradley Nielsen, Management Advocate
John Kinkela, OCB, 2nd Chair
Bill McGarity, ODNR, Deputy Chief, Watercraft
Bret Benack, ODNR, Labor Relations Administrator
Abbie Workman, ODNR, Labor Relations Officer 1
Jamie Harless, Witness
Christian Zlocki, Witness
Matthew Kruse, Witness
Michael Quinn, Witness

For the Union:

Paul Cox, Chief Counsel
Joel Barden, Staff Representative
Kenny Stapleton, Grievant
Tom Rymarczyk, Witness
Matthew Kruse, Witness

I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties, the parties having failed resolve of this matter prior to the arbitral proceedings. The hearing in this cause was scheduled and conducted on August 21, 2007, at the Office of Collective Bargaining in Columbus, Ohio, whereat the parties presented their evidence in both witness and document form. The parties stipulated and agreed that this matter was properly before the arbitrator; that the witnesses should be sworn and sequestered and that post hearing briefs would be filed. It was upon the evidence and argument that this matter was heard and submitted and that this Opinion and Award was thereafter rendered.

II. STATEMENT OF FACTS

By way of a letter of March 12, 2007, the grievant was removed from his seniority:

“March 12, 2007

Kenneth Stapleton
13 Germany Hollow Road, #A
Wheelersburg, Ohio 45694

Dear Mr. Stapleton:

As a result of recent predisciplinary conference, you were found guilty of the ***Failure of Good Behavior; Dishonesty & Violation of Uniformed Officer's Code of Conduct*** provisions of the Ohio Department of Natural Resources (ODNR) Disciplinary Policy.

Therefore, you are being ***Removed*** from your position as a Watercraft Officer with the ODNR-Division of Watercraft effective immediately.

You shall receive payment of wages for your entire work day today.

Please contact ODNR-Labor Relations Officer Bradley A. Nielsen at (614) 265-6918 or brad.nielsen@dnr.state.oh.us with any future questions or concerns.

Sincerely,
/s/
Sean D. Logan
Director, ODNR”

To that, a grievance report form was filed in a timely fashion, signed off by the grievant, in which the grievant questioned whether the removal was for just cause. At the time of the removal, the grievant was under discipline, which discipline was entitled “Last Chance Agreement”. The language of that Last Chance Agreement revealed the following:

“Last Chance Agreement

The Ohio Department of Natural Resources (ODNR), Fraternal Order of Police, Ohio Labor Council Inc. (FOP) and Watercraft Officer (WO) Kenneth Stapleton hereby are entering into an Agreement concerning the continued employment of WO Stapleton. The intent of this Agreement is to provide WO Stapleton with one final opportunity to retain his position with the ODNR-Division of Watercraft.

Specifically, in consideration of the ODNR-Division of Watercraft providing a last chance opportunity for employment, the FOP and WO Stapleton agree to the following:

- 1) **WO Stapleton shall serve a ten (10) day out of work suspension;**
- 2) **WO Stapleton and the FOP shall not grieve the issuance of the 10 day suspension;**
- 3) **WO Stapleton shall register, pay for himself and attend the Problem Solving & Decision Making class scheduled for March 10, 2006, at the Columbus State Community College. WO Stapleton shall receive administrative leave to attend the training. The Course and other relevant information is found at the State of Ohio-DAS website or at the following link: www.das.ohio.gov/hrd/training/pdf/BlueprintCatalog&AllCourseSchedules.pdf; &**
- 4) **If WO Stapleton commits a violation of the ODNR Disciplinary Policy during a period of two (2) years commencing with the date of the signatures on this Agreement and just cause is present, the ODNR shall terminate the employment of WO Stapleton and neither the FOP nor WO Stapleton shall grieve the termination. Thus, the only issue appropriate for a grievance/arbitration is whether just cause exists for any discipline that occurs within two (2) years of the commencement of this agreement.**

WO Stapleton and the FOP hereby agree to waive any contractual time restrictions regarding the imposition of discipline.

WO Stapleton, by signing this agreement, acknowledges he received a copy of this Last Chance Agreement and is fully informed of the terms and consequences and hereby voluntarily is signing said Agreement after discussions with the FOP.”

It might be noted that the contract of collective bargaining at Article 19, Section 19.01, has contract language that states that the bargaining unit member shall be disciplined for just cause. The language, in full, stated the following:

“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.

Any employee who, as a result of the action of any court, loses his or her certification and/or ability to carry a firearm, may be charged with serious misconduct and terminated without progressive discipline.

An employee who is subsequently convicted of or pleads to a felony will be subject to disciplinary action, up to termination, irrespective of any previous discipline received for the same or related conduct; and such discipline shall be deemed to satisfy the standards of just cause and shall not be grievable.

An Employer representative shall not use the knowledge of an event giving rise to the imposition of discipline to intimidate, harass, or coerce an employee. (Emphasis ours)”

Also in effect at the time of the removal of the grievant was the published Code of Conduct for Watercraft Officers. Some of that Code is pertinent to the matter at hand. In that Code, a paragraph concerning the conduct and personal habits of the watercraft officer are indicated. That language in pertinent part revealed the following:

“Conduct and Personal Habits

The public evaluates your conduct and personal habits continually. The manner in which a watercraft officer performs his/her duty, regardless if it involves apprehending an offender; educating a boater; selling a boat registration; etc, determines your reputation, the Division’s reputation and the reputation of your fellow employees.”

Also stated in that Code is a paragraph entitled Association with General Public, and it revealed the following:

“Association with General Public

1. A watercraft officer may associate with the general public while performing his/her duties as a watercraft officer. The watercraft officer must keep these associations with the general public professional and timely.
2. Association with the general public while off duty shall be of quality acceptable by good social standards that assure the member of exemplifying stability, fidelity, and morality.”

Also revealed in that Code is the conduct expected of a watercraft officer and that language revealed the following:

“Conduct on Duty and Off Duty

1. The conduct and attitude of a watercraft officer while on duty shall be mature, self-controlled, moral and in keeping with the highest standards for professional behavior.
2. The conduct and attitude of a watercraft officer while off duty shall not reflect unfavorably on the Division, and particularly when he/she is identifiable to the public as a watercraft officer.”

Thus, all of the indicated information above revealed the backdrop of the grievant in this particular matter when the January 22, 2007, episode occurred. It might be noted that the grievant was first employed at the Employer on September 19, 2004 and signed off as

receiving a copy of the Officers Code of Conduct, the document quoted above. The main incident of January 22, 2007, was the subject of an internal investigation. A statement of the grievant was taken during the course of that investigation.

The general facts in this particular matter revealed that several watercraft officers were assigned to a training seminar away from their home station. They stayed overnight at a motel near the training session. One of the watercraft officers was a female. At dinner, on the evening in question, namely January 22, 2007, the evidence revealed that the group of 5 or 6 watercraft officers attended the daily session of training and then went to a steakhouse for dinner, at which time they had several beers each. They thereafter congregated in the Best Western Executive Inn Hotel in Grove City. Included in the people who went to the rooms of two of the officers was the female officer by the name of Harless. During the course of her being in the room, she was disallowed from leaving the room by two particular officers, namely the grievant and another officer who has since resigned, by the name of Rymarczyk.

It was also revealed in the evidence that during the course of that time in the room, Officer Harless was sprayed with shaving cream, causing her an eye irritation. The events further revealed that during the course of the evening in the room, a case of beer was purchased and consumed, i.e. 24 bottles. That amount of beer, including 6 or 7 was

consumed by the grievant, during the course of his being in the room with the complainant Harless. That was in addition to two beers the grievant had at dinner. The episode of throwing Harless onto the bed by the grievant and another (not removing any of her clothing) and disallowing her from leaving the hotel room lasted for a period of about an hour according to the grievant, as he remarked in his statement taken during the investigation and later testified.

A witness in the room, by the name of Kruse, revealed the following in his statement, which was signed off by him. In pertinent part, that statement revealed the following:

“Q. Did you observe Officers Stapleton and Rymarczyk, at any time, place their hands on Officer Harless?”

A. Yes. They threw her on the bed a couple of times and once had her by the hands and feet and swung her on the bed.

Q. Did Officers Stapleton and Rymarczyk prevent Officer Harless from leaving the room?

A. I guess when they held her and threw her on the bed you could say they kept her from leaving.

Q. Had anyone been drinking alcohol that night and if so how much?

A. We shared a case. I had 2 or 3.

Q. Did Officer Harless ever tell them to stop or she wanted to leave?

A. Only when she first said she was going back to her room. She might have when they sprayed her in the eyes, but I couldn't tell.”

There was some evidence that prior harassing activity of the grievant directed toward Officer Harless occurred on January 11, 2007, when he was annoying her while she was on duty and doing some paperwork on a laptop computer. Another incident was when the grievant again annoyed Officer Harless while she was on duty on January 16, 2007, when he was touching her hair and asked her what her pony tail was. The action in the instant case however, i.e. the January 22, 2007, incident, was now considered the main predicate of termination.

It is interesting to note that the grievant herein considered the activity of the people in the room, including the complainant, was just nothing more than horseplay and that the grievant meant no harm to Officer Harless.

Officer Harless testified. She testified substantially the same as her statement, which statement was placed into the record. The activity towards the complainant is best described in the complainant's statement, which revealed the following:

"January 22nd I went out to eat with everyone that was attending Reid training. A former Watercraft officer, Nate Amstutz, was also there. I had one beer with my dinner and after dinner we went back to the hotel. After arriving at the hotel Kenny Stapleton and Troy Thompson went and got beer. I had two more beers and I talked with them and left the room where I went and made phone calls and other stuff. Later on I went back to Tom and Matt's room. It was about 11:30 p.m. I watched TV. (About 15-20

minutes) and then decided that I wanted to go back to my room. I told the guys (Matt, Kenny and Tom) that I was going back to my room. Either Kenny or Tom, I think Kenny stated, "No you're not". I informed him I was and started to walk out of the room. Kenny and Tom stopped me from leaving and then Tom threw me on the bed. I tried to leave several times that way and they kept throwing me back on the bed. A couple of times I told them to stop that my pants were starting to come off. I then tried jumping on the bed over top of them and I still got thrown back onto the bed. One time I got to the door and tried to open it. Kenny put the latch over the door and Tom grabbed my legs and started to pull me away from the door. As he was doing that he was pulling my pants down. I told him to stop.

Then Kenny grabbed my arms and they carried me over towards the bed where they tossed me onto the bed. Matt said, "If she can get to the door then she can leave". They agreed and let me get close to the door. Kenny was holding my shirt so tight that he was almost choking me. I tried to get to the door again but was pulled back by Kenny onto the table that he was sitting on. Finally they (Kenny and Tom) called a side bar and went outside. I locked the door because I was scared that they were going to hold me over the railing outside. When I something told them they laughed and told me to open the door. Matt got up and went to his bag and got shaving cream and hand stuff and sprayed in on Tom, I believe, as they were trying to open the door.

Tom said, "Let me in". He made me believe someone was coming. I opened the door and that is when Tom was holding me while he sprayed shaving cream down my shirt and all over my clothes. Kenny was the one, I believe, that got the shaving cream for him. While Tom was spraying the shaving cream he got it into my eyes. I started screaming and I ran to wash out my eye. I then was able to return to my room to take a shower and rinse out my clothes. I still have a spot on one of my items. After I took the shower I noticed two red spots on my lower back. I went over and told them look what you did. Kenny said to get a wet rag and the swelling would go down. Tom got a wet rag and tried to help. I left the room and went back to my room. I was in the room for about 2-3 minutes before I returned to my room."

In the denial of "horseplay" Officer Harless was asked the following when her

statement was taken. It might be noted that the complainant testified the same as her written statement. The statement stated the following:

“Q. Did you find Officer Stapleton’s actions, during all three events and the actions of Officer Rymarczyk, during the event at the motel on January 22, 2007 funny, offensive or harassing?

A. I never thought it was funny. I was scared at the motel room. I know it sounds silly but when Tom and Kenny were in the hallway I was afraid if I went out they might hold me over the rail. I don’t think they would intentionally hurt me but I was really scared what they might do next.”

Thus from all of this, it is found that the grievant was an employee of approximately 3 years of seniority, having already been involved in serious discipline and at the present time of the instant incident, was under scrutiny of a last chance agreement, in effect at the time of the instant activity. The complainant on the other hand orally testified in her case, similar to the statement she gave at the time of investigation. From all of this also, the grievant considered the activity of the evening of January 22, 2007 as nothing other then horseplay on off-duty time, for which no discipline should have been meted out whatsoever. The grievant did not deny the complained of activity or that it occurred.

It was upon those facts that this matter rose to arbitration for Opinion and Award.

III. OPINION AND DISCUSSION

There is no question that the grievant was only a short time employee at this particular

employer, with only a little over 3 years of seniority. Further, he was involved in the discipline activity at the facility and was at the time of the instant incident, under scrutiny of a Last Chance Agreement. There was some evidence placed into the file showing that the grievant was an exemplary employee, but his discipline record at the facility revealed otherwise.

The clear facts in this particular case reveal that the grievant was in the room with the complainant, as well as with the two other officers of the Department of Natural Resources. The activity of the grievant in this case revealed that the grievant and another officer (who has since resigned) were involved in restraining and jostling the complainant. The activity of the grievant further showed that he was involved in tossing the complainant and swinging the complainant and throwing the complainant upon the bed in the room. While there was no sexual activity involved, it appears that the grievant and another put their hands on the complainant. The evidence further revealed that the grievant and another sprayed the complainant with shaving cream. None of this conduct was joyful to the complainant, but the complainant testified that she never thought that any of the conduct was funny. She testified that she was scared. She further testified that she didn't know what to expect from the grievant and another. The complainant also testified that she would have to work with these people who were causing her harm and that she could never trust them again.

It appears to this writer that the grievant lacked candor, lacked sensitivity towards a

fellow officer and was guilty of reprehensible and harassing conduct towards the complainant at the place and time indicated. The grievant is better served working elsewhere and for all of these reasons I must deny the grievance.

The earlier incidents by the grievant directed toward the complainant, namely those on January 11 and January 16, 2007, were not the activity upon which the termination of the grievant was based, but merely as additional evidence to show that the grievant had serious disrespect for the complainant. I find that there is sufficient activity of the grievant in this particular file, to show that there was just cause for the discipline invoked. I find that the grievant was guilty of conduct unbecoming an officer and that the grievant had knowledge of the rules under which he worked. Those rules are stated in significant quotes herein above and were not new or novel. A rule in order to be proper must be published, must be reasonable and even-handedly applied. I find all the ingredients of the rule to be proper in this particular case and that is a sufficient predicate for the termination of the grievant. Based upon all of these stated facts, I must find that there is sufficient evidence to show that the grievant was involved in conduct unbecoming an officer. Simply put, the grievance is denied and there was just cause for the activity of the employer.

IV. AWARD

Grievance denied.



Marvin J. Feldman, Arbitrator

Made and entered
this 10th day
of Oct 2007.