#1954

In the Matter of the Arbitration
- between -
The State of Ohio
Ohio Lottery Commission
- and -
Ohio Civil Service Employees Association,
Chapter 1801

Arbitrator:	John J. Murphy Cincinnati, Ohio
Hearing Date:	April 27, 2007; June 15, 2007
Hearing Location:	Cleveland, Ohio
For the Union:	Deborah Bailey OCSEA Representative P.O. Box 1651 Elyria, Ohio 44035
Also Present:	Mary Lamb Grievant
	Lieutenant Thomas Stacho Cleveland Police Department
	James LaRocca Chapter President
	Maureen McCrystal Executive Secretary
	Michael Liszniansky Sales Representative
For the Employer:	Michael Banal Office of Collective Bargaining 100 East Broad Street, 18th Floor Columbus, Ohio 43215
	Michael Duco, 2nd Chair Office of Collective Bargaining
	Bruce Trakas, 3rd Chair Ohio Lottery Commission
Also Present:	Karen Skinner Regional Manager, Region 1
	Kenneth E. Adams Assistant Deputy Director of Sales
	Michael R. Abouserhal Executive Director

THE THREE GRIEVANCES

The parties agreed to combine three grievances filed by the Union on behalf of the Grievant. All of these grievances were agreed to be arbitrated at the same hearing under the grievance number set forth in the caption of this Opinion.

The factual connection among the three grievances will become apparent from the discussion below, however, the following is the core of the Union's complaint in the three grievances. First, the Union complained that "When employee stated that she did not feel safe in her sales district, following her statements, the Lottery initiated discipline proceedings against her." This complaint centered on a transaction involving the Grievant that occurred on August 10, 2006.

The second and third grievances centered on events that occurred on August 23, 2006. One Union claim alleged that "On August 23, 2006 employee was denied emergency personal leave." The third and final grievance stated, "Employee was removed from payroll, without just cause."

FACTUAL BACKGROUND

The Grievant's employment with the Ohio Lottery Commission (Employer) began in 2001 as a sales representative. Sales representatives serve retailers who sell lottery tickets. They

are assigned to districts with about 80 retailers, visiting each every two weeks with tickets and promotional material.

The problem in this case concerns the Grievant's work in Region 1--the area of Cleveland and its environs. The Grievant transferred to Region 1 in 2005, and her first assignment was in District 104. Without contradiction the regional manager testified that the Grievant sought to return to Cleveland and voluntarily transferred. The manager also told the Grievant that she would be assigned to District 104, and that district was in the inner city. The Grievant noted that that was fine with her.

The grievances in this case center on events that occurred on August 7, 10, and 23, 2006. They are briefly set forth below.

A.) August 7, 2006

The skein of events in this arbitration began on August 7, 2006 when the Grievant was transferred from District 104--an inner city district--to another adjacent district in the inner city--District 106. Her supervisor was K. Skinner. After serving District 106 for one day, she telephoned K. Adams, the Assistant Deputy Director of Sales in the absence of her direct supervisor. The unrebutted record shows that she told the Deputy Director that she did not feel safe in District 106, wanted a new route, and asked why she was transferred to 106.

The Deputy Director told her to speak with her supervisor and the Union.

B.) August 10, 2006

On August 10, 2006, the Grievant asked her supervisor for the resolution of the problem that she had raised with the Deputy Director. The supervisor did not know and arranged a conversation between the Grievant and the Deputy Director on speaker phone in the supervisor's office. The unrebutted record shows that the Grievant told the Deputy Director that a woman should not be performing this work in District 106, to which the Director responded that two women had performed this work in the past and named the women. The director then told the Grievant to service her retailers, to which the Grievant responded that she would perform paperwork in the office. When the Director told the Grievant to "go back to the field," the Grievant stated that she was getting panic attacks and that she would stay in the office.

Later on August 10, the Grievant sent an E-mail message to the Chief of Staff of the Employer with copies to the Executive Director and others. The E-mail stated in part concerning her second conversation with the Deputy Director, K. Adams:

> Ken was extremely arrogant and rude about the situation. He said that I would be neglecting my route if I did not go out and service the agents . . . He was so insensitive to my cause, condescending and rude that I am shaking as I type this.

August 10 concluded with the Grievant's supervisor giving her a pre-disciplinary notice and placing her on administrative leave with pay. The pre-disciplinary hearing was scheduled for August 24, 2006.

The administrative leave with pay ended on August 15 when the Union and the Employer reached an oral temporary agreement to have a third person accompany the Grievant on her route whenever there was someone available. There were no time limits set for this procedure, and it was for the purpose of increasing the Grievant's familiarity with the District.

C.) August 23, 2006

This is the critical date in this case and it is on this date that the Grievant and her supervisor met in the supervisor's office. At this point it would be well simply to state those points on which the testimony of the Grievant and the supervisor unite. First, the Grievant called the supervisor early in the morning and told her that she was upset because she was servicing her route alone. The Grievant wanted to know why she was being harassed. The supervisor told her to return to the office and that the supervisor would have someone else ride with her on the route. The second point of unity in their testimony is that the Grievant was very upset during their meeting. As the supervisor noted, the Grievant was gagging near her desk. At some point the Grievant requested emergency

personal leave which was denied by the supervisor because of a low leave balance. The supervisor told her she could take leave without pay.

The next and most critical element of unity in their testimony is that in some point in time the Grievant took off the lanyard that holds her ID card and key card and threw them on the supervisor's desk. At that point, both the supervisor and the Grievant testified that the Grievant said "I'm out of here."

The last point of unity in their testimony is that the Employer called 911 and told the Grievant of this call as she departed the premises. At that point the Grievant stated that she did not wish emergency assistance and that she was going home.

Apart from the points of unity in the testimony of the Grievant and supervisor on their meeting on August 23, the last point of importance on August 23 is a letter hand delivered to the Grievant from the Executive Director of the Employer. It purported to accept the Grievant's resignation and canceled the pre-disciplinary meeting scheduled for the next day--August 24. It stated:

> This correspondence serves as formal notice that your verbal resignation to Regional Manager Skinner earlier this day is hereby accepted. Receipt and acceptance of Lottery property, which you voluntarily returned to Manager Skinner, are also hereby acknowledged.

> Additional exit paperwork and your final pay check will be forwarded to you under separate covers.
>
> It is noted that a number of disciplinary matters for alleged questionable and egregious behavior in the workplace remain outstanding at this time, and that the pre-disciplinary meeting scheduled for 8:00 A.M. on Thursday, August 24, 2006 is cancelled.

STIPULATED ISSUE

Did the Grievant voluntarily resign her position with the Ohio Lottery Commission or was the Grievant improperly removed?

POSITIONS OF THE PARTIES

A.) Union Position

The Union urged that the Grievant had an ongoing concern for safety in her work on District 106. She should not have been asked to work this District alone. The Grievant did not resign on August 23, 2006 but experienced a panic attack with the result that she left her keys on the desk of the supervisor. It was an ungraceful exit from the building, but it was in the height of anxiety. The Grievant knew how to calm herself down and needed to leave the building in order to achieve this result.

Lastly, the evidence by the Employer is not clear and convincing of a resignation given the circumstances of the Grievant's medical emergency. Indeed, a similar arbitration case decided by Arbitrator Smith in 1996 is instructive. Arbitrator Smith found that the evidence in that case--similar

to the evidence in this case--did not convince her that the employee resigned.

B.) Employer Position

The Employer questioned the sudden appearance of safety concerns by the Grievant because she had been servicing an adjacent district in the inner city, and the adjacent district was indeed more dangerous than District 106.

The Employer argued that the actions of the Grievant on August 23 clearly indicate a decision by her to resign and leave her employment with the Employer. This was not impelled by a medical emergency since there was no evidence of such. Indeed, the Grievant refused medical assistance called to the premises by the Employer.

Apart from the absence of any medical emergency, the Grievant was faced with a pre-disciplinary hearing on August 24, and evidence in the record indicates that she had good reason to be concerned about her job tenure.

OPINION:

A.) What Happened on August 23, 2006?

What happened during the meeting of the Grievant and her immediate supervisor is found in this record by two sources. One is the point at which the testimony by the Grievant and the supervisor unite, as recited above. In addition, the supervisor

testified about the following- -none of which was denied or rebutted in any way by the Grievant.

In addition to throwing the lanyard that held her identification card as a State employee and her key card to the premises on the Supervisor's desk, she threw the keys to her van on the desk. After stating that she was "out of here," the Grievant then picked up her van keys and said she needed to get her personal keys out of the van.

The second important element of the unrebutted testimony by the supervisor concerns a discussion between the supervisor and the Grievant early in the day of August 23. The Grievant arrived at the supervisor's office at 8:00 a.m. and told the supervisor she wished to speak privately with her. The supervisor testified that the Grievant stated "If you go into the pre-disciplinary hearing on August 24 and lie that I am not doing my job, I hope you burn in hell." The supervisor further testified that she said she would not do this.

Later in the same day, the supervisor had a conversation with the Deputy Director, K. Adams, and reported the Grievant's "burn in hell" comments. Again later in the same the supervisor told the Grievant of her conversation with Adams and testified of the Grievant's reaction. The Grievant cried and said, "That's the nail in my coffin. Ken will turn that information into a threat and I will lose my job." The supervisor further

testified that she responded: "I don't consider that a threat. I would never lie when you are doing your job."

B.) The Results of the Panic Attack?

One of the major arguments of the Union is that the Grievant's actions and comment "I'm out of here" were the result of a panic attack and a culmination of suffering safety concerns arising out of the performance of her work. There are several difficulties with this claim. First, the parties stipulated the authenticity of a letter and one doctor's note from Dr. A. Mary Willborn, the Grievant's physician. They also stipulated a letter by Dr. Willborn's medical partner. These three documents refer to a heightened anxiety state experienced by the Grievant. However, none of these documents reflect an appraisal by the physicians of the Grievant before the August 23 meeting between the Grievant and her supervisor. These documents reflect meetings between the Grievant and her doctor after the events in the supervisor's office, and a second meeting occurring on September 21, 2006.

There are two other elements in the record that gainsay an explanation of the Grievant's actions and comments as resulting from panic. The Grievant was facing a pre-disciplinary hearing on August 24. At her meeting with the immediate supervisor on August 23, she learned that the Employer had been told of her challenge to the supervisor to "burn in hell" if the supervisor lied at the pre-disciplinary hearing. Her reaction upon

learning of the transmission of this information to the Employer's hierarchy shows that the Grievant was deeply concerned about the results of the pre-disciplinary hearing.

Finally, the record raises a serious question of why safety concerns for servicing District 106 should be raised by the Grievant. The Grievant had serviced an adjacent inner city district since 2005 and the record contains no complaints about safety. The Union offered the testimony by an officer in the Cleveland Police Department who supplied records of crime statistics. The officer compared the crime rate in District 104 serviced by the Grievant since 2005 with the crime rate in District 106--the district from which the Grievant had unremitting safety concerns since her first assignment on August 7, 2006. The officer observed that the crime rate in District 104 was higher that that of 106.

C.) Is This a Resignation?

This is the key question in this case: Does the comment and the action by the Grievant on August 23, 2006 manifest an intention by the Grievant to resign--voluntarily leave her employment with the Ohio Lottery Commission? The findings above on what happened on August 23, 2006 clearly indicate such an intention to resign, and this is further reinforced by comparison with the facts in the case decided by Arbitrator Smith relied upon by the Union.

In the case before Arbitrator Smith, a warden at a correctional institution relied upon a statement by a lieutenant who said the grievant had emptied her locker and voluntarily surrendered her official identification and badge on her way out of the institution. The warden testified about the lieutenant's comments before Arbitrator Smith, but the lieutenant's testimony was not presented. By comparison in this case, there is no dispute about the fact that the Grievant tossed her lanyard with her identification and keys as well as the keys to her State-supplied van on the supervisor's desk. This action was accompanied by the comment "I'm out of here." There was direct testimony about this comment and this action, and there is absolutely no dispute with respect to that testimony.

In deciding there was insufficient evidence to support a voluntary resignation, Arbitrator Smith also relied on evidence which is not present in this case. There was uncontroverted testimony that the lieutenant offered to have a resignation note prepared for the Grievant to sign and that the Grievant refused to sign such a note. Had there been such evidence in this case, it would certainly countervail against a finding of voluntary resignation. No such evidence exists in this record.

E.) Retaliatory Discipline for Safety Concerns

To some extent, this claim against the Employer is mooted by the finding that the Grievant voluntarily resigned on August 23. However, the record does show that the grievance

raising this claim was merged into the grievance captioned in this Opinion. The record also shows that the Step 3 response by the Employer included a response to this claim.

As noted above, the record raises a question as to why safety concerns in District 106 were raised on August 7th in 2006. The question arises from the fact that the Grievant had serviced an adjoining district since 2005--a more crime-ridden district--without safety concerns.

The supervisor explained the safety policy applicable to all of the sales representatives in Region 1, including the Grievant. If a representative feels unsafe or concerned about people in the surrounding area, the representative should not stop but return at a later time. If the representative decides that a stop would be unsafe, the representative can use his or her discretion and proceed without stopping. Representatives have the flexibility to come back on another day rather than return on the same day to an area initially considered unsafe.

Lastly, there are facts in the record that question any retaliatory motivation involved in the pre-disciplinary notice given to the Grievant on August 10. The Grievant was reassigned to District 106 as part of a policy adopted by the Ohio Lottery Commission throughout all its operations. The Commission engaged an outside entity to enhance its sales, and, as a result, adopted a policy of periodic redistricting of its sales

representatives. The Grievant was not selected for an individual transfer to District 106.

F.) The Matter of the Personal Emergency Leave

This claim also appears to be mooted by the finding of a voluntary resignation by the Grievant on August 23, 2006. On the other hand--as was true with the complaint about retaliatory discipline, the matter of emergency personal leave was processed through the grievance procedure.

The record shows, however, that the Grievant received on June 5, 2006 a memorandum from the Employer's Labor Relations Officer notifying her of "Low Sick Leave Policy Activation." Essentially, when an employee's sick leave bank descends to a certain level, restrictions on the use of leave become activated. One such restriction requires requests for personal leaves to "be made no less than 24 hours in advance." Consequently, the denial of the request for the emergency personal leave by the supervisor appears to comport with this policy.

The denial also appears to comport with Article 27.04 of the Contract. Ordinarily, personal leaves require 48 hours notice. Emergency leaves cannot be "unreasonably denied." In this case the findings above show that her panic or anxiety, if real, arose, in part, from her decision to challenge her supervisor "to burn in hell." She then learned that this challenge had been reported by the supervisor.

AWARD:

The grievance is denied.

Date: October 11, 2007

John J. Murphy
Arbitrator

IN RE. GRIEVANCE # 22-01-20060825-0007-01-14
MARY J. LAMB

Hearing is deemed closed on September 10, 2007, for purpose of arbitrator's rendering a decision under Article 25.03 of the contract.

However, hearing is deemed closed on June 15, 2007, for the purposes of receiving testimonial or documentary evidence of argumentation.

Grievant:

Mary J. Lamb

Mary Jo Lamb

For Office of Collective Bargaining:

Matthew M. Banal

Matthew M Banal

For OCSEA:

Deborah Bailey

Deborah Bailey 6/15/07

For Ohio Lottery Commission:

Bruce W. Trakas

Bruce W. Trakas, Lab. Relations Officer
June 15, 2007