VOLUNTARY LABOR ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION

- AND –

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME

GRIEVANT: Jessie Hubbard
GRIEVANCE NO.: 27-11-20111201-0010-01-03

Arbitrator's Opinion and Award
Arbitrator: David M. Pincus
Date: March 6, 2013

Appearances

For The Employer

Tim Brunsman	AA2
Don DeWitt	ELM - Manager
Paul Shoemaker	Assistant Chief Inspector
Roy Outcalt	LRO
Dean Overstreet	LRO
Kristin Rankin	Advocate

For The Union

Jessie Hubbard	Grievant
Richard Stiehl	Chapter Vice President
Phil Morris	Chapter President
Malcolm A. Heard	Captain
Gary E. Link	Project Manager
William Floyd	Dentist
Brian Mewhorter	SRT Commander
Bob Jones	Staff Representative
John Gersper	OGC

INTRODUCTION

This is a proceeding under Sections 25.03 and 25.05 entitled Arbitration Procedures and Arbitration/Mediation Panel between Department of Rehabilitation and Correction, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, hereinafter referred to as the Union, for the period of April 15, 2009 to February 29, 2012 (Joint Exhibit 1).

At the arbitration hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the arbitration hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing written closings. The parties agreed to submit briefs.

STIPULATED ISSUE

> Was the Grievant removed from his position at DRC, Lebanon Correctional Institution, for just cause? If not, what shall the remedy be?

JOINT STIPULATIONS

1. Grievance is properly before the arbitrator.
2. There are no procedural objections.
3. Grievant was hired as an interim external on December 1, 1997 and began a full-time permanent appointment on March 29, 1998.
4. Grievant was removed from the position of Correction Officer at Lebanon correctional Institution effective January 17, 2012.
5. At the time of his removal, the Grievant had no active discipline.

CASE HISTORY

At the time of his removal, Jessie Hubbard, the Grievant, had been employed as a Correction Officer at Lebanon Correctional Institution for fifteen (15) years. He worked on first shift and was assigned as a Special Response Team (SRT) Leader and a volunteer football coach.

The disputed incident arose as a consequence of an anonymous letter originally sent to Governor Kasich's office which was eventually forwarded to the Director of Rehabilitation and Correction. The letter (Joint Exhibit 3(G) contained several accusations involving the Grievant's harassing conduct allegedly condoned by management staff.

Also attached to this letter were several Facebook documents taken from the Grievant's account which referenced alleged threats against the Governor. On May 3, 2011, a transmission stated:

Ok we got Bin Laden…let's go get Kasich next…who's with me?

It was also determined a total of seventeen (17) people viewed the transmission and indicated they "liked" the comment. Four (4) of these individuals were employed by Lebanon Correctional Institution.

On or about September 19, 2011, the Grievant was interviewed by the Ohio State Highway Patrol regarding the incident. He refused to make a statement. The matter was presented to the Warren County Prosecutor's office. The prosecutor declined to pursue criminal charges against the Grievant.

On January 9, 2012, the Employer issued a Notice of Disciplinary Action (Joint Exhibit 3(A) which removed the Grievant from employment effective January 17, 2012. Several particulars were cited in support of this disciplinary action:

XXX

> During an investigation into inappropriate Facebook postings, you self admitted to posting the following comment on your Facebook web page "Ok we got Bin Laden…let's go get Kasich next. Who's with me?"
>
> Your actions constitute a violation of Rules 18 – Threatening, intimidating, or coercing another employee or a member of the general public; 37 – Actions that could compromise or impair the ability of an employee to effectively carry out his/her duties as a public employee; and 39 – Any act that would bring discredit to the employer, of the Standards of Employee Conduct.
>
> Pursuant to the AFSCME/OCSEA Contract, Article 25.02, you may choose to grieve this disciplinary action. You must file a grievance through your union representative within 14 calendar days of notification of this action.

XXX

On January 23, 2012, the Union filed a grievance (Joint Exhibit 2(A) contesting the removal. It contained the following statement of facts:

XXX

> On January 17, 2012, Officer Jessie Hubbard was separated from employment at Lebanon Correctional Institution. Said separation was WITHOUT just cause and malicious. Following separation, the employer announced to the media that Officer Hubbard was fired for making threats on the Governor of the Great State of Ohio. The allegations are baseless and found to be without merit by the Ohio State Highway Patrol, yet the employer pursued removal without jurisdiction in the matter.

XXX

The parties were unable to resolve the disputed matter during subsequent stages of the grievance procedure. Neither party raised procedural or substantive arbitrability concerns. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Employer's Position

The Employer opines it had just cause to remove the Grievant. He was properly charged with violating several work rules: Rules 18, 37, and 39. Each of these rules is designated as removal for an initial offense. The Employer noted the Grievant was not removed as a consequence of any policy violation. Facebook was the platform used to convey the threat against the Governor.

The posted statement was, indeed, a threat. The statement was communicated and conveyed an intent to inflict physical harm to a person; The Governor. Here, intent, itself, is not a necessary condition justifying removal. The comments reflect an intent to harm which violate the Standards of Employee Conduct.

Notice was clearly reflected by evidence and testimony introduced at the hearing. The Grievant was placed on notice that making threats was a disciplinary offense. He was also notified he could be disciplined for what he posted on social media sites. DeWitt testified he conducted on-line training involving this very subject. The Grievant's training records (Joint Exhibit 6(A)

indicate the Grievant completed the training in question on April 16, 2011; a few weeks before the disputed posting.

The Employer affirmed the posting did not take place during working hours and did not involve use of State property. Still, the threat had sufficient nexus to justify removal. The Grievant issued a threat against the Governor, his boss, while identifying himself on the posting as a State of Ohio employee.

The Grievant's self-serving testimony, character witnesses, and opinions regarding the Grievant's intent are all irrelevant. The words posted were threatening and nothing else matters.

The Union's attempt to apply the National Labor Relations Board's standards to this particular matter are totally inappropriate. The stipulated issue under review deals with just cause, and not whether the Grievant's conduct was protected concerted activity. Such an issue is under the purview of the State Employment Relations Board (SERB). This particular issue was never agreed to by the Employer nor anticipated as a potential argument. Once the parties stipulated the dispute was properly before the Arbitrator, the Union was precluded from revising issues which should have been raised in an alternate forum.

The threat cannot be veiled by the debate surrounding Senate Bill 5/ Issue 2. The posting did not reference these proposed statutory changes. The posting, moreover, failed to reference unions, collective bargaining issues and terms and conditions of employment. As such, the posted comments were not made to motivate concerted protected activity by others. They were posted as a means to energize others in criminal activity against the Governor.

The Union's Position

The Union asserted the Employer did not have just cause to remove the Grievant. Granted, the posted comment might have been inappropriate, but should not be viewed as a threat against the Governor. In fact, the Warren County Prosecutor's office reviewed the incident but declined to prosecute.

The Grievant was never properly placed on notice. The record indicates the Employer failed to articulate an off-duty social media policy. Warden Brunsman and Captain Malcolm Heard testified that such a policy does not exist. The existing policy is too vague to cover off-duty activity.

The training discussed by Don DeWitt was equally unpersuasive; and did not establish proper notice. DeWitt alleged the Grievant participated in a mandated webinar on April 16, 2011. Yet, DeWitt was unable to produce a sign-in sheet or an electronic record of this training. The Grievant could not recall participating in the course.

The Facebook comment was merely inappropriate and not a threat. The Grievant claims he was attempting to get his membership's attention, and was not a threat to the Governor. As such, his comment should be viewed as protected concerted activity. The Grievant was no threat to the Governor or anyone else. He wrote the Governor a letter of apology and sought forgiveness.

The Employer never rebutted a series of mitigating circumstances; which at a minimum should result in modification of the imposed penalty. The Grievant had an extensive record of good behavior and outstanding service. He was a known jokester which probably caused this self-inflicted discipline.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony adduced at the hearing, a complete review of the record including pertinent contract provisions and the parties' briefs, it is this Arbitrator's finding that the Employer had just cause to discipline the Grievant, but the penalty imposed was too severe. The Facebook posting was not a threat justifying removal but was severely inappropriate justifying an extensive suspension.

The Arbitrator does not view the comment as protected concerted activity. The activity engaged by the Grievant was not concerted. He acted solely on behalf of himself, and did not initiate group action through discussion of complaints with fellow employees. The Facebook statement cannot be considered as a discussion of complaints. Additionally, disputes involving potential legislative enactments are not specific enough to be equated with existing terms and conditions of employment. Linking Bin Laden's assassination with potentially injurious conduct against the Governor cannot be viewed as protected activity. The Arbitrator considers the Union's attempt to associate these two events as superfluous and misplaced.

A statement becomes a threat if certain conditions exist. Words, themselves, do not establish a threatening circumstance. They must be evaluated in terms of context, the way the words are used and the circumstances existing at the time. Here, the Facebook comment is viewed as ripe for discipline, but not removal.

The record failed to establish the comment was anything more than empty words. Nothing in the record supports the view that the Grievant's alleged threat was perceived as potentially dangerous to the physical well-being of the Governor. Union and Employer witnesses did not consider the comment as a serious threat. The Grievant, regardless of his military and correction experience, was not disposed to violence. The Grievant, moreover, had a good performance record with no active prior discipline. These mitigating factors serve as a basis for modification of the imposed penalty. Under these circumstances, removal was improper.

The comment, however, is not shielded from disciplinary consequences. Even though a bona fide threat was not supported by several specific circumstances, the conduct, itself, is viewed as improper. The Grievant disparaged the Governor and the Arbitrator does not view this as a mere joke. It was uttered in a public forum, Facebook, and exhibited a certain job-related nexus. His Facebook profile designated his job location and his public employee status. These conditions support the Employer's position in asserting a violation of Rule 39 of the Standards of Employee Conduct in bringing discredit to the Employer.

The Arbitrator concurs with some of the Union's arguments regarding the Employer's computer-based training program (Joint Exhibit 6(C). The policy of E-mail, Internet, and On-line Services Use, in its present condition, does not place

an employee on notice regarding off-duty misconduct. Here, this defect did not play a role in the present analysis. The alleged threat, itself, was the focus of the dispute.

This ruling, with the associated extended suspension, should place the Grievant on notice that virtually any future misconduct could result in termination.

AWARD

The grievance is upheld in part and denied in part. The removal is modified to a time-served suspension without back pay. The Grievant shall be returned to his former position and duties with no loss of seniority. All lost benefits and related accruals shall be recouped by the Grievant.

March 6, 2013
Chagrin Falls, Ohio

/s/ Dr. David M. Pincus
Arbitrator