

**IN THE MATTER OF ARBITRATION
BETWEEN**

Ohio State Troopers Association (OSTA),
Union

And

Case no. DPS 2018- 04282-01
Grievant Drew M Thomas
One day (Working) Suspension

State of Ohio, Department of Public Safety (OSP),
Employer

Umpire's Decision and Award

Introduction

This matter was heard in Columbus, Ohio on 11/8/19 at OCB offices. Larry Phillips represented OSTA. Other OSTA staff present were Elaine Silveira, and Robert Cooper. Grievant was present and testified, as did Trooper Anderson.

Lt. Jacob Pyles represented the OSP. OSP also had LRO Michael Woods from DPS and Thomas Dunn from the Office of Collective Bargaining (OCB) present. OSP witnesses were Sgt. Jacob Fletcher and Trooper Phillip Sommers.

There were several joint exhibits presented: Jt. 1- the collective bargaining agreement; Jt. 2- the grievance trail; Jt. 3- the discipline package. The issue was stipulated. Additional exhibits were introduced by each side and all were admitted during the hearing.

All witnesses were sworn.

There was no transcript.

The decision issued within agreed upon timelines.

Issue

Was the Grievant issued a one day suspension for just cause? If not, what shall the remedy be?

Applicable CBA Provisions

Articles 19 and 20

Background

Grievant is assigned as a Trooper at the Lisbon Post at the date of hearing. He was a relatively new employee at the time of the discipline.¹ His date of hire was 9/28/17.

Thomas was charged with violation of 4501:2-6-02 (J)(2): Sexual harassment and discrimination. The specific claim was that Trooper Thomas made disparaging remarks related to sexual preference /orientation to one of his Academy classmates, Ibrahim Ibrahim during the post -graduation training week at the Academy. Grievant and the three other principals [Sommers; Ibrahim and Anderson] were boarding at the Academy that week of 3/12-3-16/18.

Grievant had no disciplinary history.

The one day working suspension issued 12/16/18. Jt. Ex.3.

It was timely grieved.

Facts and Analysis

The record was extensive in this matter. All documents were reviewed as presented and all testimony was weighed and considered. Salient facts are summarized herein.

Grievant among many others [approximately 100] was part of the 162nd training class at the Patrol Academy. As part of the training classes, troopers are expected to room in small groups. Troopers exchange roommates through the assignments made at the Academy by the supervisors/trainers. The purpose is to allow maximum opportunities for exposure to as many different individuals as possible. The exact timing of the roommate changes and the methodology used is not in evidence but is not critical to the decision.

Grievant and Anderson were for unstated reasons repeatedly assigned to room with Trooper Ibrahim. These three individuals were assigned together far outside the normal rotations. Anderson in particular roomed most of the time with Ibrahim. Both Grievant and Anderson testified that the three men for some of the period of the training portion had a basically amicable relationship. There was

¹ His department record indicated a longer tenure: five years. This discrepancy was not cleared up.

kidding and joking. One of the common threads was the use of the word “gay” by all three to refer to the other two roommates. No one took offense; no one documented complaints about this. All three by actions understood it to be joking. One of the names usually used by Ibrahim to speak to Anderson and Grievant was “Gay Boys.” Again no offense was registered or reported by anyone.

Trooper Anderson from Canton post was a witness for Grievant. Anderson stated that Ibrahim did report matters that he was upset about while at the Academy. Ibrahim was called a “terrorist” at some point and both he and Grievant discussed that with him and wanted Ibrahim to report that situation. Anderson further testified that Ibrahim blamed others for his mistakes and faults.

Ibrahim was not a successful cadet. He had documented and alleged issues with failure to comprehend course expectations and known instances of cheating. He stated on numerous occasions to his classmates that he could not be disciplined or affected due to his protected status [religion and national origin]. He indicated to fellow cadets and troopers that he would not hesitate to use his protected status to report anyone.

Ibrahim was of Iraqi origin and of the Baha’i faith. According to the record there was some tension between him and other cadets who were veterans as Ibrahim expressed opinions on the Iraqi war and Saddam Hussein that were uncomfortable for the vets in the cadet class. The combination of the tensions created by the “political” disagreements and his conduct vis a vis cheating and being able to report to anyone at some indeterminate point created a barrier between Grievant, the others and Ibrahim.

The above three individuals [Ibrahim, Grievant and Anderson] were assigned again to room together during the final week of the training period. During the post graduate week at the Academy Grievant was alleged to have remarked about “hickeys” on Ibrahim’s neck to Ibrahim in the hallway of the dorm area. The follow up remarks had to do with whether or not the marks were placed there by a male or a male Trooper who may be Ibrahim’s boyfriend. Ibrahim’s then reaction is not in the record.

Some of the exchange between Grievant and Ibrahim about the neck marks was overheard by Sommers. Anderson was not present when the alleged offensive remarks were made. Sommers told Ibrahim to take up any complaints he had with the person who made the remarks or exhibited behaviors he [Ibrahim] didn't like directly with the speaker.

The remarks made were not reported then or anytime thereafter by Sommers. Sommers indicated that he felt Ibrahim knew and had been told by him then that there was a chain of command to file complaints. Sommers testified that he told Ibrahim that he knew what to do if he wanted to talk to anyone about the remarks.²

Ibrahim resigned from the OSP in May 2018. He was in process for a probationary removal and resigned before the paperwork issued from the OSP. After his removal, he filed a complaint with the OCRC. It is the filing of the OCRC complaint by Ibrahim that triggered the AI. The remarks about the hickeys were not reported by Ibrahim then or at any time until an Ohio Civil Rights Commission (OCRC)/AI investigation was conducted.

The AI although it named and involved numerous individuals, only resulted in a disciplinary recommendation for Grievant.

Sommers was interviewed as part of the AI; Anderson was not.

Grievant was not named in the OCRC filing by Ibrahim.

The OCRC complaint determined no probable cause existed on Ibrahim's complaint on 1/31/19.

Opinion

Ibrahim would have been the clear choice as the best witness as to what happened between him and Grievant. It was obvious however why OSP may have chosen not to bring him as a witness. Ibrahim had apparent multiple deficiencies in performance and credibility. These caused him to be rejected as a successful Trooper. Regardless even as a less than model trooper he would be entitled as all others to a discrimination free and harassment free workplace.

² EEO training was provided to Grievant in April 2017.

Grievant did not admit or deny the critical verbal exchange. He repeatedly stated that he did not remember what was said. At the arbitration, he admitted that he “probably” kidded Ibrahim about being gay. He described the joking around as a coping mechanism for the pressures of the Academy. He admitted that during the AI he said nothing about Ibrahim calling him gay.

Sommers corroborated in part the written report of what Ibrahim claimed Grievant said both during the AI and at hearing. He did not at the time of the AI have a specific recollection of the remarks made by Grievant to Ibrahim regarding Ibrahim’s “boyfriend.” He did not as Rule 4501:2-6-02(B)(6) requires, make his own report about the hallway exchange between Grievant and Ibrahim.

It is more likely than not that Grievant made remarks to Ibrahim about hickeys on his neck and followed up with comments about the source of the neck marks. It is more likely than not that these remarks were witnessed in part by Sommers. Sommers has no known or alleged reason to make up the incident.

The next relevant inquiry is did Grievant sexually harass Ibrahim by those remarks? ³ The Umpire concludes the answer is no. The reasons are several. The culture between Ibrahim, Anderson and Grievant was one at most points in their work interactions friendly, bantering and teasing. Ibrahim participated fully in this at all dates and times of record. He called Anderson and Thomas “gay boys”. This testimony stands uncontroverted. The banter was never a matter of official notice or complaint during Ibrahim’s entire tenure of employment. The three principals roomed together many weeks. This remark was made on 3/10/18 and wasn’t reported until post-employment.

According to the uncontroverted testimony, Ibrahim knew clearly that he had an open door and listening pipeline to upper management at the Academy. If he was offended by this remark about his neck and putative source of the neck marks, he absolutely had the ability to complain then and there and put a stop to

³ The OOSP defines *harassment* as : Conduct that has the purpose or effect of unreasonably interfering with a person’s work performance or creating an intimidating, hostile, or offensive working environment, and which is on the basis of a person’s membership in a protected class or other protected characteristic. *Sexual harassment* is defined as [having] ‘the purpose or effect of interfering with a person’s performance or creating an intimidating, hostile, or offensive work

it. He chose to wait until months later; complained not to the OSP, but made it a part of the investigatory narrative of his OCRC complaint. *Even then* Ibrahim didn't name Grievant as a perpetrator. He thought it was someone named "Thomas Deim" who insulted him. [Management Ex 1 p9.] This is somewhat remarkable as the record is clear that Grievant and he roomed together frequently over the term of the Academy and the post-graduation week as well.⁴

It is also noted that the OCRC complaint as filed focused on national origin and religion as the discrimination indices cited by Ibrahim. The statement of facts supporting the alleged national origin and religion discrimination complaint contains no allegations whatsoever about sexual harassment. Management Ex.1 p22.

It is not "safe" or appropriate humor in work related/employment contexts to make remarks such as "gay boy" or to comment in any manner on the same sex gender of another's lover or sexual partner-real or hypothetical. Of course life and common sense make it clear that such jokes, bantering and crudeness do continue despite training and aspirations of trainers and managers. It is where the line gets drawn and who is the hearer that makes a controversy-or sets the stage for the matter in dispute.

These remarks had a context: an undisputed record of similar joking between Grievant and Ibrahim. Ibrahim had at all dates and times the opportunity to say "stop"; "I am uncomfortable"; "I am offended"; "I will report you" and/or display by act or facial expression his anger/hurt/disappointment/embarrassment about the banter. He did none of that. He did nothing of the sort the day of the "hickey" exchange. The record instead shows he "gave as good as he got"- calling his roommates "gay boys". The fact Ibrahim after employment chose to make this one incident a matter to bolster his OCRC claim does not mean it constituted sexual harassment by Grievant.

environment. The arbitrator conclusively holds this level of conduct was not exsitant based on the record presented.

⁴ At p. 277 of Management Ex. 1 Ibrahim's notes about who allegedly did offensive acts towards him are presented. Ibrahim stated that Sommers stated "I am not involved in this" and walked away. Sommers denied this was stated or occurred during the arbitration.

Humor and manners change with the times. The back and forth routinely employed by the three cadets-Anderson-Grievant-Ibrahim-was not the stuff to support a valid sex harassment claim in that particular context considering all the known facts and circumstances.

There was no evidence at the time the remarks were made that the remarks were offensive; pervasive or made with hostile or discriminatory intent. There was no evidence that the remarks created an intimidating, hostile or offensive work environment-the gravamen of the cited rule violation.

In fact no evidence exists in the record to indicate any sort of discrimination existed against Ibrahim. The OCRC found no probable cause; the OSP's own investigation urged that result.

It can be said that the friendliness that had previously existed between Grievant and Ibrahim had diluted by the time of the post graduate Academy rooming experience. This is undisputed. Despite this, no one asked to have a room change when the threesome Ibrahim, Grievant and Anderson assignment was made for the week of 3/12/18 or significantly any time after the remark was made on that date. Had the atmosphere changed to toxic or threatening by the time of the post-graduation rooming assignment surely one or more of the three roommates would have signaled the need for a room change. More notably, Ibrahim was silent after the remarks until he left the Academy. His recourse and opportunity to tell anyone that he was offended was there all the time. Instead he went to an outside agency long after the remarks were made.

The sexual innuendo remarks made are not remarks that anyone should in the current climate of heightened awareness and sensitivity make in jest or otherwise and assume a receptive, like minded ear for the jest intended. But a counseling once the remarks were made known would have more than sufficed to put Grievant on notice that such remarks can be offensive and potentially-depending entirely on context- evidence of sexual harassment. The counseling or additional training that would have been an appropriate response was not considered.

The discipline was not for just cause. The claimed of conduct in no manner reached the standard for sexual harassment. At most, it was a joke gone bad. It wasn't even deemed to be offensive until long after it was made. Its "offensiveness" was claimed only in the context of post-employment charges relating to national origin and religion purviews. Grievant was unfairly and unreasonably singled out by the OSP for this interaction with Ibrahim. Ibrahim's conduct was equally "off the mark" with his undisputed "gay boy" remarks. These were never reported by Anderson/Grievant, further supporting the conclusion that context is all when it comes to analyzing this allegation.⁵

AWARD

The grievance is Granted. Grievant is to be made whole.

IT IS SO HEREBY ORDERED.

s/ Sandra Mendel Furman

Sandra Mendel Furman, J.D.

Issued 11/10/19 in Columbus, OH

Certificate of Service

A copy of the foregoing was sent by email to the parties' representatives this date.

s/_ Sandra Mendel Furman

⁵ The Union also argued the discipline was not progressive. It was not; but as no just cause existed this additional argument is not the reason for the ruling. OSTA also introduced department records of others named in the AI, showing their relative disciplinary statuses unrelated to the current matter. To the extent Thomas was the only one of the Academy crowd disciplined, that fact is a factor in but not the lodestar of the favorable ruling.