ARBITRATION DECISION NO.:
286

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Highway Safety

DATE OF ARBITRATION:
July 11, 1990

DATE OF DECISION:
August 9, 1990

GRIEVANT:
Robert L. Beck

OCB GRIEVANCE NO.:
15-02-(90-01-26)-0004-01-09

ARBITRATOR:
Anna D. Smith

FOR THE UNION:
Lois Haynes, Advocate

FOR THE EMPLOYER:
Marlaina Eblin, Advocate
Bruce Brown, Second Chair

KEY WORDS:
Removal
Sexual Harassment
Article 25.08
EEO Investigation

ARTICLES:
Article 2 - Non-Discrimination
§2.01-Non-Discrimination
Article 24 - Discipline
§24.01-Standard
§24.02-Progressive Discipline
§24.05-Imposition of Discipline
Article 25 - Grievance Procedure
§25.08-Relevant Witnesses and Information

FACTS:

The grievant was a field representative for the Bureau of Motor Vehicles with eight years seniority. His duties included visits to agencies within his assigned area. An employee of one of the agencies filed a complaint against the grievant. He was accused by the employee of touching her on the thigh and pinching her stomach on November 6, 1989. Female employees from a second office complained of the grievant's behavior on December 7, 1989. A subsequent Equal Employment Opportunity (EEO) investigative hearing found probable cause and recommended initiation of discipline. As a result the grievant was therefore removed for sexual harassment.

EMPLOYER'S POSITION:

There was just cause for removal of the grievant. The grievant sexually harassed a female employee. He clasped the thigh of the employee while responding to her request for assistance. Shortly thereafter the grievant pinched the employee on the stomach. The employee did not encourage the touching and was embarrassed and upset by it. The grievant had made suggestive remarks and touched the employee on prior occasions. Female employees of the second office also reported that the grievant acted in such a way as to make them feel uncomfortable and that he was too friendly.

The employer conducted a full and fair investigation of the charges. The proximity in time of the two complaints was not due to any solicitation by the employer. Further, there was no discriminatory intent due to the grievant's political affiliation. The employer's rule against sexual harassment is reasonable. It is mandated by the Agreement and by state and federal law. The grievant also knew and was trained on the subject of sexual harassment. The grievant was not subject to disparate treatment. All employees guilty of sexual harassment have been disciplined. Progressive discipline warranted removal of the grievant for his actions.

UNION'S POSITION:

There was no just cause for removal of the grievant. The incidents did not occur as the employer or witnesses characterized them. The grievant did not clasp the leg nor pinch the original complaining female employee. He believes in working closely with others. The grievant did not intend to sexually harass nor did he sexually harass the employee. Other employees of the same registrar find the grievant respectful, willing and helpful. The complaints from the second office were solicited by the employer. This was done due to the grievant's supervisor's desire to remove the grievant because of his political affiliation.

The employer's investigation was not sufficient to satisfy the Agreement. The EEO hearing consisted solely of a telephone call to the original complaining employee and other statements made the day before the hearing. The employer also violated section 25.08 by not providing the employment record of the grievant's supervisor as requested. Lastly, the discipline imposed was too severe based on the grievant's length of service and performance evaluations. The grievant also received disparate treatment. Other employees have received less severe discipline for similar offenses.

ARBITRATOR'S OPINION:

The reasonableness of the employer's rule against sexual or political harassment was found not to be at issue. Both parties opposed this behavior. Different characterizations of the facts does not change what occurred. The original complaining witness's testimony was specific, detailed and consistent. The grievant did clasp the employee's thigh and pinch her stomach. The evidence of sexual harassment from the second office, while less egregious, does not change the initial incident. While it is probable that the grievant's supervisor did look for other complaints, the testimony of the second office's employee was credible. The testimony of the persons who support the grievant can be distinguished. The fact that the grievant did not harass these individuals does not change what occurred between himself and the other employees.

The grievant was responsible for knowing the employer's rules. The rules were published and given to him. However, the definition used for sexual harassment is so general that the grievant may have been mistaken in thinking that his actions were not harassment. The grievant did not appreciate the effect of his

conduct. He must be held accountable for his failure of good behavior even if he is not guilty of sexual harassment.

The employer's investigation was sufficient to satisfy due process. There was an EEO investigation and a pre-disciplinary investigation. The employer did not violate section 25.08 by not producing the grievant's supervisor's personnel record. The employer may not withhold public information but an employee's entire personnel file is not discoverable under section 25.08.

Just cause requires comparison to similarly situated employees. The cases cited by the union were not comparable, therefore, disparate treatment was not proven. However, progressive discipline was violated by the employer. The grievant was not given a chance to correct his behavior. Therefore, there was just cause for discipline, but not removal.

ARBITRATOR'S AWARD:

The grievance is sustained in part. The removal was reduced to a fifteen day suspension without pay or benefits. The reinstatement was contingent upon the grievant's enrollment in the Employee Assistance Program for counseling on sexual harassment. The grievant must prove compliance satisfactory to the employer. Back pay was to be reduced by interim earnings. Lastly, the grievant was put on notice that another incident will subject him to removal.

TEXT OF THE OPINION:

In the Matter of Arbitration
Between

**THE STATE OF OHIO,
DEPARTMENT OF HIGHWAY SAFETY**

and

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11,
A.F.S.C.M.E., AFL-CIO**

OPINION and AWARD

Anna D. Smith, Arbitrator

Case No.:
15-02-900126-04-01-09

Removal of Robert L. Beck

I. Appearances

For the State of Ohio:
Marlaina Eblin, Labor Relations
Administrator, Ohio Department of
Highway Safety, Advocate.
Bruce Brown, Office of
Collective Bargaining, Second Chair.
Tim Wagner, Office
of Collective Bargaining.
James Pate, Bureau of

Motor Vehicles, Witness.
Thomas P. Coady, Bureau
of Motor Vehicles, Witness.
Sally Atkins, Willard
License Bureau, Witness.
Jackie Trautman, Sandusky
License Bureau, Witness.

For OCSEA/AFSCME Local 11:
Lois Haynes, Staff Representative,
OCSEA, Advocate.
Robert L. Beck, Grievant.
John Latino, Examination
Supervisor, Witness.
Dolores F. Crooks, Willard
License Bureau, Witness.
Margaret Shade, Willard License
Bureau Deputy Registrar, Witness.
Charlene K. Collins, OCSEA Bureau
of Motor Vehicles Chapter President.
Craig W. Klein, Witness.

II. Hearing

Pursuant to the procedures of the Parties a hearing was held at 9:30 a.m. on July 11, 1990 at the offices of the Ohio Civil Service Employees Association, 1680 Watermark Drive, Columbus, Ohio before Anna D. Smith, Arbitrator. The Parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded, and to argue their respective positions. No post-hearing briefs were filed in this dispute and the record was closed at the conclusion of oral argument, 2:15 p.m., July 11, 1990. The opinion and award is based solely on the record as described herein.

III. Issue

The Parties stipulated that the issue before the Arbitrator is:

Did the Employer, the Department of Highway Safety, have just cause to terminate the Grievant, Robert Beck.

They further stipulated that this issue is properly before the arbitrator.

IV. Joint Exhibits

1) State of Ohio/OCSEA Local 11 Contract, 1989-91;
2) Grievance Trail;
3) Discipline Trail;
4) Statements presented by Union at Step 3 meeting;
5) Statements presented by Management at Step 3 meeting.

V. Relevant Contract Clauses

Article 2 Non-Discrimination

§2.01 Non-Discrimination

Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio or Executive Order 83-64 of the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, handicap or sexual orientation. Nor shall either party discriminate on the basis of family relationship. The Employer shall prohibit sexual harassment and take action to eliminate sexual harassment in accordance with Executive Order 87-30, Section 4112 of the Ohio Revised Code, and Section 703 of Title VII of the Civil Rights Act of 1964 (as amended).

The Employer shall not solicit bargaining unit employees to make political contributions or to support any political candidate, party or issue.

Article 24 Discipline

§24.01 Standard

Disciplinary action shall not be imposed upon an employee except for just cause. . . .

§24.02 Progressive Discipline

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

A. One or more verbal reprimand(s) (with appropriate notation in employee's file);
B. One or more written reprimand(s);
C. One or more suspension(s);
D. Termination.

§24.05 Imposition of Discipline

. . .

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

. . .

Article 25 Grievance Procedure

§25.08 Relevant Witnesses and Information

The Union may request specific documents, books, papers or witnesses reasonably available from the employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied.

VI. Background

The Grievant in this case, Robert L. Beck, was a field representative for the Bureau of Motor Vehicles, Ohio Department of Highway Safety for approximately eight years prior to his removal on January 19, 1990. In this capacity he acted as liaison between the Department and independent deputy registrars in the territory to which he was assigned. His responsibilities included visitation of the agencies, auditing their operations and reporting on their efficiency. He did not ordinarily have supervisory responsibilities. At least until October 1987 his job performance was evaluated as positive (Union Exhibit 3), and his supervisor at the time of his dismissal, John Latino, testified that administratively he did a good job. Written statements from a number of deputy registrars further attest to Mr. Beck's competence (Joint Exhibit 4). The discipline record of the Grievant, however, was not clean, for since June, 1988 he accumulated a written reprimand and two one-day suspensions for failure of good behavior and unprofessional conduct. His employment with the Department was terminated on January 19, 1990 for sexual harassment. The basis for this action was an

incident which allegedly occurred on November 6, 1989 involving Sally Atkins (an employee of the Willard Deputy Registrar) and the Grievant. In a statement written on November 14, 1989 and discrimination complaint filed November 21 (Joint Exhibits 2 and 3), Miss Atkins charged Mr. Beck with touching her on her thigh and stomach while she was working at the agency. Statements from female employees of the Sandusky Deputy Registrar, claiming Mr. Beck's behavior made them uncomfortable were written on December 7, 1989 (Joint Exhibit 5). On December 8, 1989, an EEO investigative hearing was held, the outcome of which was a finding of probable cause and recommendation for initiation of the discipline procedure (Joint Exhibit 2). Pre-disciplinary hearing notice was given on December 21 and the hearing conducted on December 27, with the result on January 16, 1990 of removal effective January 19. This action was subsequently grieved and processed through to arbitration where it presently resides.

VII. The Incident

The Union and Employer views of what happened on November 6 and the basis for this discharge differ considerably. The following summarizes each Party's position as presented to the Arbitrator.

Employer's Contentions of Fact

On November 6, 1990, Sally Atkins, a new employee of the deputy registrar in Willard, Ohio, was working in the agency, as was the Grievant. No other employees of the deputy registrar or of the State were present. In the presence of a customer, the Grievant clasped Miss Atkins on her upper thigh as he responded to her request for computer assistance. She said, "Don't," and the Grievant moved away. Several minutes later the Grievant pinched her on her midriff just below her brassiere. She was embarrassed and upset. She testified that she had not encouraged the contact. She further said that on this occasion Beck made no sexually suggestive comments, but in the past he had said and done things that made her uncomfortable. (For instance, he brushed up against her. He also said, "Old men are good.") Returning the November 6 incident, when a co-worker, Dolores Crooks, came back from lunch later in the day, Atkins told her what had happened and asked not to be left alone with Beck again. Crooks advised her to think things over and report the incident if she thought it was misconduct. Atkins did so, and told her supervisor. Several days later Beck's supervisor, John Latino, came into the agency. Atkins told him what had happened. Latino called Columbus, asked for Mr. Jarrett (his own supervisor) and handed Atkins the phone. She was asked to write a statement, which she did, followed by a formal complaint (Joint Exhibits 2 and 3). Her objective was not to get Beck fired. In a statement supplied to a union representative prior to the Step 3 hearing she writes,

“In concern of Robert Beck, I would like to clear up the confusion that has taken place. The intent of my letter was to inform my bosses of the incident which took place. I asked for Mr. Beck to seek help and to be reprimanded. I was mislead [sic] by the action that was taken. The incident did take place and I reported to Mr. Latino. I did not intend for Mr. Beck to lose his job and would like him to be reinstated with only him seeking help as a provision.” Joint Exhibit 4

Sally Atkins was not the only deputy registrar employee to complain about Beck's behavior. Latino reported to Thomas Coady, Deputy Administrator of Deputy Registrar Services, that employees at the Sandusky agency had told him they were being harassed. As with the Willard agency problem, Coady instructed Latino to have the women submit written statements. On December 7, 1989, the Sandusky Deputy Registrar and three of her employees wrote that Beck was "too friendly," asked questions and made them "uncomfortable" and "uneasy" (Joint Exhibit 5). One of these, Jackie Trautman, testified in corroboration of her written statement. She further said that the behavior of which she complained had been going on for some time, but that a formal complaint had not been filed earlier out of fear that it would jeopardize her deputy registrars contract proposal.

For these reasons the Employer claims the Grievant is guilty of sexual harassment.

Union's Contentions of Fact

The incident as presented by the Employer never occurred. Mr. Beck denies that he ever made sexual contact with Miss Atkins, that he intended to sexually harass her or, in fact, pinched her or groped her leg. He believes it to be more professional to speak quietly, pleasantly and close up than to bellow. Two female employees of the Willard Deputy Registrar, Dolores Crook and Margaret Shade, testified that they had never had any problems with Beck's behavior. They found him respectful, willing and helpful. Moreover, the Union goes on, the story of one of the witnesses against the Grievant changed in the retelling, strongly suggestive of tainted allegations.

The true reason Beck was discharged was his supervisor's animosity towards him because of his political party affiliation. Beck testified that when Latino became his supervisor his working conditions changed. He felt Latino did not like him very well and was looking for ways to get him. A written reprimand and suspension were part of this vendetta. In support of this charge, Craig Klein testified that he had heard Latino make derogatory remarks about the Grievant. For example, "If he ever had the opportunity he would like to blow the Republicans out, such as Bob and Pat."

For these reasons the Union claims the charge of sexual harassment is unfounded.

VIII. Other Positions of the Parties

The Employer

The Employer argues that it conducted a full and fair investigation of the charges against the Grievant and found substantial evidence of guilt. Although the behavior of the Grievant in two different agencies came to the Employer's attention at times proximate to each other, the agencies were unaware of each other's charges. The record shows that the Employer did not solicit the charges, and the Union's allegation that they were prompted by political animosity is merely a grasping at straws. What happened, happened. The Grievant sexually harassed young women not in the employ of the State, one at a time when she was defenseless, customers being present. The Employer cannot condone this behavior and, indeed, is mandated by §2.01 of the Collective Bargaining Agreement and by state and federal law to prohibit and take action to eliminate sexual harassment. The rule is thus reasonable. Moreover, the Grievant knew of the rule and had foreknowledge of the consequences of its violation, having signed receipt of the Department's work rules, received training on the subject, and having access to the Collective Bargaining Agreement.

The Employer further argues that it has been even-handed in its treatment of those who violate this rule: those who break it are disciplined. In this case, removal is justified both because of the circumstances involving members of the public and the fact that the Grievant has previously been progressively disciplined for inappropriate behavior unbecoming a State employee in relation to the public.

In response to a plea for clemency, the Employer points out that leniency is the prerogative of the Employer, not the Arbitrator, and cites Arbitrators Bittel (Ohio State Highway Patrol v. Fraternal Order of Police, 89-918 re Miller) and Rivera (Ohio Department of Mental Health v. Ohio Civil Service Employees Association, G-87-0846 re Gilmore).

For these reasons the Employer asserts it had just cause to remove the Grievant and asks that the grievance be denied. However, if the Arbitrator finds the removal was not justified, it seeks a lengthy suspension, no back pay, and mandatory participation in the Employee Assistance Program.

The Union

In addition to the claim reviewed above that the charges against the Grievant are false, the Union makes arguments of defective procedures and unduly harsh discipline.

With respect to procedure, the Union submits that the EEO pre-hearing investigation was weak, consisting only of a phone call to the principal complainant (Miss Atkins) and collection of statements from

another agency that suspiciously were made the day before the hearing.

The second procedural argument is that the Employer obstructed the Union's preparation of its defense of the Grievant in violation of Article 25.08 of the Collective Bargaining Agreement. On June 27 and July 2, Lois Haynes, Staff Representative of O.C.S.E.A., requested certain documents from Marlaina Eblin, advocate for the State. Ms. Eblin wrote back. Amongst else, she declined to supply the personnel record of the Grievant's supervisor, citing lack of contractual mandate and authorization from the supervisor. The Union points out that it has an obligation to investigate the background of witnesses against its members and that Union requests for documents and witnesses are protected by the Contract which states in part, "Such request shall not be unreasonably denied." It finds precedence for modifying discipline when Employer refusal to supply requested information hampers the Union's defense (Arbitrator Pincus in Ohio Department of Transportation v. Ohio Civil Service Employees Association G-87-1494 re Hurst).

The final Union position is with respect to the form of discipline. It asserts and presents testimony and evidence that other employees of the Department have received less severe discipline, specifically minor suspensions, for sexual harassment. It further contends that discharge is too harsh given the length of the Grievant's employment, his positive performance evaluations, statements of deputy registrars attesting to his competence.

The Union concludes that the Employer did not have just cause to terminate the employment of the Grievant. It asks that he be reinstated, awarded full back pay and benefits, and that his record be expunged.

IX. Opinion

There is no issue here as to the reasonableness of the rule prohibiting either sexual harassment, with which the Grievant is charged, or political harassment, with which the Grievant charges his supervisor. The Parties are sufficiently united in their opposition to this conduct that they have jointly taken a position in their Collective Bargaining Agreement. What is at issue is (1) whether the Grievant is guilty and knew the consequences of his behavior, (2) whether the Grievant's or Union's due process rights under the Contract were compromised by the Employer's handling of the discipline and resultant grievance, and (3) whether the penalty imposed is appropriate.

With respect to the first, the evidence against the Grievant is both substantial and credible. Although the chief witness against the Grievant, Miss Atkins, used a variety of terms to refer to the parts of her body that Beck touched, it was clear that the parts referred to were always the same. Mere use of different language does not change the meaning and, therefore, constitute inconsistent and suspect allegations as the Union argues. On the contrary, this witness's testimony was specific, detailed and consistent, both in what happened in her encounter with the Grievant on November 6 and in how she came to file a complaint against him.

The evidence from the Sandusky agency presents some problems but does not undo or offset the occurrences at the Willard agency. Given the less egregious nature of Beck's actions in this agency, Ms. Trautman's apparent inability to deal with it assertively herself, and her concern for her employer's contract with the State, it is within the bounds of reason to believe that she would delay making her objections known to the State. On the other hand, that her charges came to light when they did is suspicious, particularly in view of Mr. Klein's testimony about statements made by Beck's supervisor about Beck. Notwithstanding Latino's denial, a reasonable person could find a probability that having received the Willard complaints, Latino looked for other evidence of guilt, recalled the earlier Sandusky ones, and sought to have them formalized. However Ms. Trautman's statement and testimony were obtained -- and there is no real evidence of impropriety -- I find no reason to believe other than that she, as Miss Atkins, told the truth about Beck's behavior and how it affected her. Latino may have disliked Beck, but Trautman's and Atkins' statements are nonetheless credible.

How, then, does their testimony square with that of Ms. Crooks and Ms. Shade, who appeared in behalf of the Grievant? Atkins and Trautman described conduct they found offensive. Crooks and Shade found him respectful. Neither Crooks nor Shade, however, was present during the incidents reported and so could not testify to his behavior during the period in question. Moreover, it is a truism that people may behave

differently under different circumstances or with different individuals. Crooks and Shade are mature women, Atkins and Trautman are young. While this distinction does not excuse a difference in decorum, it may explain it. In short, the testimony of Crooks and Shade does not discredit that of Atkins and Trautman. As the State put it, what happened, happened.

The next question is whether the Grievant knew or could have reasonably foreseen the consequences of his conduct. Clearly he had received the Department's Work Rules and Procedures which contains, in addition to the federal definition of sexual harassment, the following State of Ohio's definition:

"Sexual harassment is any unwanted attention of a sexual nature from someone in the workplace that creates discomfort and/or interferes with the job. It can take the form of verbal abuse, such as insults, suggestive comments and demands; leering and subtle forms of pressure for sexual activity; physical aggressiveness such as touching, pinching and patting, lewd pictures, sexual jokes, attempted rape or rape. Conduct constitutes sexual harassment when:

1) submission to such conduct is made either explicitly or implicitly as a term or condition of an individuals employment;
2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions and/or retaliation;
3) such conduct has the purpose or effect of interfering with an individuals work performance or creating an intimidating, hostile or offensive working environment. Joint Exhibit 3

Prior discipline can also have the effect of putting an employee on notice that certain conduct is unacceptable and, if repeated, will result in certain consequences. The Grievant had been previously disciplined as follows:

6/8/88 1 day suspension "for using abusive, obscene, insulting language and failure of good behavior in regard to an incident with the public."

1/26/89 Written reprimand for "conduct unbecoming a state employee due to conversations you have had with Deputy Registrars and their employees."

4/6/89 1 day suspension "for failure of good behavior, unprofessional conduct and lack of good judgment."

Both suspension notices warned of possible termination upon recurrence.

The Grievant says that he does not know what it was he did to warrant the written reprimand and claims that the second suspension was for a political reference he made in a conversation with a Deputy Registrar. He offered no comment on the first suspension. He also denies that he received training on sexual harassment and, in fact, defines it as "chase somebody and attack them." Latino stated that in conveying correct behavior to field representatives under his supervision he always stressed "be careful with the girls." The record does not disclose more substantial or specific training on this subject.

One must hold the Grievant responsible for knowing the rules under which he worked, given that the rules were published and given to him. However, the definition of sexual harassment, particularly that pertaining to the Grievant's conduct in this case,[1] is sufficiently general that, absent training and/or counseling, one might not know it when one sees it or, in this case, does it. In light of the Grievant's definition of sexual harassment, the vague caution to "be careful with the girls," the absence of more specific counseling or training on the subject, and the Grievant's apparently sincere view that he did nothing wrong, I must conclude that the Grievant did not appreciate the effect of his conduct in the Sandusky agency. I also find that while he may not have known that grasping Miss Atkins' thigh and pinching her midriff constituted sexual harassment, he knew or ought to have known that it was wrong. Even had the Union successfully explained

away his contact with her thigh, one is left with the unexplained and totally inappropriate pinch. Surely the Grievant must be held accountable for this contact as "failure of good behavior" even if he did not intend or recognize it as sexual harassment.

Turning next to the due process issues, the Union's first position is that the EEO preheating investigation was weak. This argument is misplaced. Due process only requires that the Employer make a fair and objective investigation, not that it turn each and every stone. In this case there was an investigation before the EEO investigatory interview which itself preceded the pre-discipline meeting. The investigator, James Pate, was neither in the line of command above the Grievant nor a witness against him, and he did not proceed with the EEO investigatory interview without first ascertaining whether there was a real complaint. The Employer's obligation was met.

The second procedural issue raised by the Union is whether the Employer violated §25.08 of the Contract by refusing the Union's request for the complete personnel files of witnesses against the Grievant, including his supervisor. There was no violation in the refusal to supply the records of Atkins, Trautman, Showalter and Hixon, for these documents are not available from the Employer, the witnesses not being employees of the State. Additionally, I cannot issue a blanket holding that the complete file of an exempt employee is discoverable, for the file may contain privileged information. On the other hand, it is unreasonable for the Employer to deny the Union's request for such information as is available to the general public. With respect to Latino's records, I therefore conclude that the Employer's refusal to supply the complete file was reasonable although the Union was entitled to some portion of it. The Union's request was insufficiently specific and its showing of the complete file's relevance was inadequate to warrant a finding that the Employer violated §25.08 of the Contract and that the discharge should be overturned for this reason alone.

Having found the Grievant guilty of sexual harassment and his due process rights unabridged, it remains to consider the penalty. The Employer claims that no field representatives have been previously charged with sexual harassment, but that employees who have been judged guilty of this offense have been consistently disciplined. It further states that this particular employee has been previously progressively disciplined for unprofessional conduct vis-a-vis the public. Thus, removal is warranted. It concludes by asserting an exclusive right to show clemency.

The Union takes exception to the argument of even-handed treatment, asking the Arbitrator to consider two cases of discipline for sexual harassment. One of these, the Mancuso case, resulted in a settlement agreement and therefore must be disregarded lest consideration of a bargained agreement chill future grievance negotiations and settlements. The Oyler case is presently being appealed through the grievance structure and thus detailed comments on it by this Arbitrator are inappropriate. Suffice it to say that the just cause requirements for nondiscriminatory treatment means that where circumstances are similar, similar results should obtain. Union Exhibit 2 and the testimony of Charlene Collins reveal that the circumstances of the Oyler and Beck cases are not comparable. Therefore, the degree of discipline given Beck must be judged without reference to either of the cases put forth by the Union.

Finally, while the Employer's argument on leniency is well taken, I cannot overlook the contractual requirement for progressive discipline (§24.02 and §24.05). It is a well-established principle of just-cause progressive discipline that its purpose is to correct rather than solely to punish the offending employee. It is my opinion that this employee has not been given that opportunity and right. What he did is not so serious and obviously wrong that he should have known it made him subject to discharge. However, Mr. Beck must learn what conduct constitutes sexual harassment and that society and his employer find it intolerable. Counseling and corrective discipline hold the best promise for rehabilitating this employee. In view of his previous discipline for unprofessional conduct, a major suspension is in order. The Employer asks that participation in the Employee Assistance Program be a condition of reinstatement. It is so ordered. Mr. Beck is also put on notice that a single recurrence of unprofessional conduct could result in his removal. He is advised that he is afforded this last chance only because his employer failed to more carefully instruct him on the nature of sexual harassment.

X. Award

The grievance is denied in part, sustained in part. The Employer did not have just cause to terminate the

Grievant, Robert Beck, but did to discipline him. Accordingly, the discharge is reduced to a fifteen-day suspension without pay or benefits. The Grievant is to be reinstated to his former position contingent upon his enrollment in the Employee Assistance Program for counseling on sexual harassment. Mr. Beck will provide such evidence of compliance as the Employer may reasonably require. Back pay is to be reduced by such interim earnings as the Grievant may have had and he is to supply the Employer with such evidence of earnings as it may require. Mr. Beck is further put on notice that another instance of unprofessional conduct will subject him to removal.

Anna D. Smith, Ph.D.
Arbitrator

Shaker Heights, Ohio
August 9, 1990

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[1] "physical aggressiveness such as touching, pinching and patting, lewd pictures, sexual jokes. . . .Conduct constitutes sexual harassment when: . . . 3) such conduct has the purpose or effect of interfering with an individuals work performance or creating an intimidating, hostile or offensive working environment." (Joint Exhibit 3)