

ARBITRATION DECISION NO:

637

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Department of Transportation

DATE OF ARBITRATION:

April 28, 1997

DATE OF DECISION:

June 2, 1997

GRIEVANT:

Dennis Elliott

OCB GRIEVANCE NO:

31-04-(96-09-14)-0050-01-06

ARBITRATOR:

Anna DuVal Smith

FOR THE UNION:

Lynn Kemp
Peggy Tanksley

FOR THE EMPLOYER:

Edward A. Flynn
John A. McNally

KEY WORDS:

Just Cause
Removal

ARTICLES:

Article 24 - Discipline
 §24.01 - Standard
 §24.02 - Progressive Discipline
 §24.06 – Prior Disciplinary Action

FACTS:

The grievant was employed as a Highway Maintenance Worker 2 at the Ohio Department of Transportation. At the time of his removal, he was assigned to the Ashtabula County Garage. On June 19, 1996, the grievant and a co-worker allegedly dropped their pants and exposed their buttocks to other members of the crew and a 14-year-old boy who was watching the crew work. A female co-worker complained that the act offended her. Management conducted an investigation, and concluded there was just cause to discipline the grievant. The grievant was subsequently removed for making obscene and

insulting gestures towards another employee and the general public.

The grievant denied that he "mooned" anyone. He stated, however, that he was heavy and his pants often drooped. The grievant also testified that the female co-worker who reported the incident had previously made sexual advances toward him, and that he resisted those advances. The grievant stated that the female co-worker was not credible because she was exaggerating the story out of spite.

Two witnesses, the female co-worker and the 14-year-old boy, testified for the Employer that they saw the grievant expose himself. The other members of the crew testified that they never saw the grievant expose himself. They did, however, testify that some members of the crew had made sexual jokes during the day of the incident.

EMPLOYER'S POSITION:

The Employer argued that there was just cause to remove the grievant. First, the 14-year-old boy was the most reliable witness, since he had nothing to gain or lose from the outcome of the case. The boy's testimony corroborated the testimony of the female co-worker. The Employer further argued that the full exposure of the grievant's buttocks could not have been accidental.

Second, the Employer also argued that the female co-worker did not report the incident out of spite. The Employer pointed out that if the female co-worker wanted to retaliate against the grievant she could have done so sooner with a better story.

Third, the Employer argued that the investigation conducted by Management was not flawed. Management's investigator has always been thorough and fair.

Last, the Employer points out that the grievant is only an 18-month employee who has prior discipline. Further, the grievant has not shown any remorse for the incident. He has not apologized, nor has he even admitted that he committed the act.

UNION'S POSITION:

The Union argued that there was not just cause to remove the grievant. First, the Union challenged the credibility of the Employer's two witnesses. The female co-worker had a reason to try to hurt the grievant and she did not have the sort of personality that would be offended by a "mooning". Also, the 14-year-old witness did not know any of the employees at the work site, and he never identified the grievant as the person who committed the act. The Union also argued that the credibility of the statements was brought into question because none of the other employees present saw the grievant expose himself.

The Union also argued that the investigation was not fair and impartial. Management did not interview all of the people present at the incident, and the investigator did not interview the grievant to get his statement. The Union also argued that the investigator led witnesses and added words to their statements

ARBITRATOR'S OPINION:

The Arbitrator found that this case turned on the credibility of the witnesses to the incident. First, the Arbitrator determined that the Employer's version of the facts was credible as to the basic elements. The statements of the female co-worker and the 14-year-old corroborated each other. Also, if the female co-worker made her statement out of spite, it did not make sense that she would implicate the other worker who allegedly exposed himself. The Arbitrator also stated that the female co-worker could have been offended by the "mooning" despite her personality. The Arbitrator pointed out that it was difficult to see how the

grievant could have exposed his buttocks by accident, merely by pulling up his pants. Also, the statements of the boy and female co-worker were not damaged merely because no one else saw the mooning. It is possible that they were not paying attention to the grievant at the time of the incident.

Second, the Arbitrator was not convinced that the investigation was flawed. The investigator interviewed a sufficient number of witnesses and there was no evidence that the investigator led witnesses or altered statements.

The Arbitrator found, however, that removal was too extreme as a penalty. The Arbitrator felt that the grievant did not intend to harass or insult his co-workers. There was testimony that his co-workers had been making off color jokes and the grievant's actions merely took this joking too far. The Arbitrator stated that the grievant's actions demonstrated disrespect and exposed the state to liability, but were not severe enough to warrant dismissal.

AWARD:

The grievance was denied in part and sustained in part. The removal was reduced to a ten-day suspension. The grievant was restored to his former position with full back pay less any appropriate deductions. The grievant's record was adjusted to reflect a 10-day suspension and a final warning.

TEXT OF THE OPINION:

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VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration
Between

**OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION
LOCAL 11, AFSCME, AFL-CIO**

and

**OHIO DEPARTMENT OF
TRANSPORTATION**

OPINION AND AWARD

Anna DuVal Smith, Arbitrator

Case No. 31-04-(96-09-14)-0050-01-06

**Dennis Elliott, Grievant
Discharge**

Appearances

For the Ohio Department of Transportation:

Edward A. Flynn
 Labor Relations Administrator
 Ohio Department of Transportation

John A. McNally
 Labor Relations Specialist
 Ohio Office of Collective Bargaining

**For the Ohio Civil Service
 Employees Association:**

Lynn Kemp, Staff Representative
 Peggy Tanksley, Staff Representative
 Ohio Civil Service Employees Association

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I. HEARING

A hearing on this matter was held at 8:30 a.m. on April 28, 1997, at the Ashtabula Garage, District 4, Ohio Department of Transportation, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties from their permanent panel, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter was properly before the Arbitrator and presented one issue on the merits, which is set forth below. They 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. Testifying for the Employer were Donald Perry (by subpoena), Christine Ford (Highway Maintenance Worker 3), Donald Campbell (Superintendent, Ashtabula County), Bette Mendenhall (Administrative Investigator), and Greg Zemla (Labor Relations Officer, District 4). Testifying for the Union were Frank Hocevar (former Highway Worker 2), Nancy Scott (Union Steward), Jim Costello (Union Treasurer and Steward), Patrick Barrett (Highway Maintenance Worker 2), Robert Geraghty (Highway Maintenance Worker 2), Loreen Korver (Highway Maintenance Worker 2), and Dennis Elliott (*the Grievant*). Also present were observers Jack Kolehmainen (Steward) and Robert Bossar (Deputy Director of Business, ODOT District 4). A number of documents were admitted into evidence (Joint Ex. 1-20, Employer Ex. 1, and Union Ex. 1-9). The hearing concluded at 3:00 p.m. on April 28, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

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II. BACKGROUND

The Grievant, Dennis Elliott, was employed by the Ohio Department of Transportation as a Highway Maintenance Worker 2 on March 13, 1995. At the time of his removal on September 13, 1996, he was assigned to the Ashtabula County Garage. He met performance expectations according to the two probationary evaluations prepared in June and October 1995, but the latter indicates he needed to improve his relationship with his crew leader (Union Ex. 1). Three Highway Maintenance Worker 4's and two private employers supplied written statements to the effect that he was a capable and willing worker (Union Ex. 3-7). In addition, he received a number of commendations during his career with the U.S. Army (Union Ex. 8). Against this background, Elliott was disciplined twice in the year prior to his removal, receiving a verbal

reprimand on August 16, 1995, for "using obscene, abusing or insulting language toward another employee" and a one-day suspension in March 1996, for "fighting/striking with a fellow employee or non-employee on State time or State property." "Threatening a Superior, fellow employee, or non-employee" (Joint Ex. 3d and 3e).

The incident that led to his removal occurred during the morning of June 19, 1996, when the Rome and Harpersfield crews were removing a tree at Route 84 and Sexton Road. Christine Ford testified two male co-workers, Robert Geraghty and the Grievant, dropped their pants and deliberately exposed their buttocks. The incident was witnessed by the rest of the crew and by a 14-year-old youth who was watching them work.

Donnie Perry, the youth, corroborated Ford's contention insofar as the Grievant was concerned. He testified he saw the Grievant pull his pants down, exposing all his buttocks,

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bend over and "moon" for about three seconds with a laughing manner. He said it did not look like Elliott was tucking in his shirt and he did not think the exposure was accidental, but he did not really know.

Doug Dreslinski did not testify but his statement has it that Geraghty had been making jokes about "butt cracks" and that he exposed "part of the back of his rear end" (Joint Ex. 17). Dreslinski did not see what Elliott is accused of doing.

The others who were present gave a different account. Frank Hocevar, Loreen Kotver and Robert Geraghty all testified that Joshua Hartz, a summer helper, put a log or branch between his legs and told Geraghty, who had chased him out from under the tree several times, to "suck on this." They said Ford laughed and remarked, "Don't you wish you had a woody like that?" Hartz was not called to testify, but his statement is in agreement with this version (Joint Ex. 15). All of these witnesses asserted they never saw the Grievant pull down his clothing or "moon" anyone.

As for the Grievant, he denies he would ever drop his pants and expose himself. His crack may have been apparent when he bent over because he was heavy then and his pants drooped. Co-workers constantly teased him and others about this. Other employees (Barrett and Korver) testified many butt cracks were seen on the job, and some (Geraghty, Costello and Barrett) testified they doubted Ford would be offended by this as she condoned and engaged in off-color joking and remarks, and was sexually aggressive towards male co-workers. The Grievant testified Ford made advances towards him when he was assigned to the Rome Outpost. He rebuffed her and confided in Korver, who corroborated this in her own testimony. Ford's advances and his poor relationship with his supervisor at

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the Rome Outpost were the reasons he got himself transferred in September of 1995, since which time he had not worked with Ford until the day of the incident.

In any event, Ford complained about the incident, which she testified offended her, to Donald Campbell, Superintendent of the Ashtabula County garage. Campbell called District 4 headquarters for guidance and was given the number of the EEO Officer, which he passed back to Ford. He then obtained statements from Ford and Dreslinski, and wrote his report. The EEO Officer notified Bette Mendenhall, ODOT Administrative Investigator. Mendenhall conducted interviews on June 27 with Ford, Dreslinski, Elliott and Geraghty, all in the presence of Nancy Scott, Union Steward. Korver was interviewed by telephone. The youth was interviewed on July 17 in the presence of his grandfather. Mendenhall testified that Hocevar refused to be interviewed and that Hartz had left the employ of the Department. In arbitration, Scott challenged the accuracy of the statements collected by Mendenhall, saying Mendenhall led her interview subjects, added or

changed words, and badgered Elliott. Geraghty said he felt led and Elliott believed Mendenhall had her mind already made up when she interviewed him. Scott explained that she did not complain about the discrepancies at the time because she did not read the statements then, only keeping them from being harassed and witnessing their signatures.

Mendenhall concluded the charges were founded and submitted her report, after which a pre-disciplinary meeting was conducted. At this meeting, the Union requested time to obtain their own written statements from the crew. Jim Costello, Union Steward, collected statements from Korver, Hocevar, Dreslinski and Hartz, in which all state they did not see either Geraghty or Elliott pull their pants down and moon anyone that morning,

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though Dreslinski restates that he saw Geraghty's "butt crack" (Joint Ex. 12, 13,15, 18). In addition, Costello and Staff Representative Peggy Tanksley took a statement from the youth in which he says it was possible that the Grievant's pants were loose enough to show part of his buttocks and that he might have lifted his shirt to pull them up (Joint Ex. 7). These statements were attached to the pre-disciplinary meeting report (Joint Ex. 3b).

Greg Zemla, District 4 Labor Relations Officer, testified that he discussed the case with Jim Miller, who recommended termination to the Deputy Director. A number of factors were considered when making the decision: the Grievant's short-term employment, the public circumstances of the incident and the Grievant's light treatment of such conduct and failure to admit his guilt.

The Grievant was removed on September 13, 1996, for violation of Directive WR-101, Item 3. "Posting or displaying obscene or insulting material and/or using obscene, abusing, or insulting language or gestures toward another employee, a supervisor, or the general public" (Joint Ex. 3C). This action was grieved that same day, alleging violation of Articles 24.01 through 24.06 and all other pertinent sections of the Agreement. Being unresolved at lower steps of the grievance procedure, the case was appealed to arbitration where it presently resides for final and binding decision, free of procedural defect.

III. SUPULATED ISSUE

Was the Grievant terminated for just cause? If not, what shall the remedy be?

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IV. PERTINENT CONTRACT PROVISIONS

ARTICLE 24 - DISCIPLINE

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action....

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 oral reprimand(s) (with appropriate notation in employee's file);
- B. one or more written reprimand(s);
- C. a fine in an amount not to exceed two (2) days pay for discipline related to attendance only, to be

- implemented only after approval from OCB;
- D. one or more day(s) suspension(s);
- E. termination.

V. ARGUMENTS OF THE PARTIES

Argument of the Employer

The State's position is that it has demonstrated just cause for removal. Reviewing the credibility of the testimony, it submits that the most credible witness was Donnie Perry, the 14-year-old who had nothing to gain or lose by testifying in this case. His testimony establishes that the Grievant was bent over with his full derriere exposed. This could not have been an accident. It was aggravated by the Grievant laughing about how truckers on I-90 love such displays and then denying it happened. The Union's best defense would have been for the Grievant to admit his guilt, express remorse and claim termination as too severe. Instead, the Union adheres to the claim of innocence and attacks the credibility of State witnesses.

The State challenges the Union's theory and testimony of its witnesses, saying if Ford were motivated by retaliation for being sexually rejected by the Grievant, she would have done so sooner and with a better story. As for the theory that Mendenhall's investigation

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was flawed, never before has Scott had a problem with her procedure, nor has it ever come up in all the cases she has done for the State that Mendenhall has been other than a thorough investigator. Compared to the training and experience of Mendenhall, Costello's background is weak and he did not interview all the witnesses either. Hartz, who allegedly committed the act that Ford supposedly made light of, did not testify, and Barrett's testimony only amounts to hearsay. Dreslinski, who rolled on the story, did not testify, and Geraghty, who did, was accused of the same thing as the Grievant. The credibility of the Grievant is undermined by his testimony that he had not worked with Ford for eleven months, which conflicts with Korver's that he had done so a lot. One of the two is lying, claims the State, suggesting that the Grievant's testimony is self-serving. By contrast, Campbell had no reason to get Elliott. Indeed, he gave him good evaluations during his probationary period, but even towards the end there were indications of the problems to come after his probation. Elliott was an 18-month employee with prior discipline who denies what he did and made jokes about it. The State asks that the Arbitrator deny the grievance.

Argument of the Union

Taking the position that just cause has not been proven, the Union challenges the testimony of the State's two witnesses. Ford, it says, had a reason to get the Grievant and does not have the sort of personality that would be offended by seeing someone's butt crack. Perry is 14 years old and did not know any of the employees at the work site. The Union questions whether he would be able to remember their names a month later and finds it curious that the State did not ask him to identify the Grievant at the hearing.

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The Union points out that it presented statements and testimony from witnesses who never saw the Grievant drop his pants and expose his derriere to anyone. It did, however, present evidence that "butt cracks" are a common occurrence at ODOT and often joked about.

The Union argues the investigation was not fair and impartial. Campbell seemed to be in a hurry to have

the Grievant discharged. He took only two statements, neither of which was that of the accused. Mendenhall picked and chose whom to interview as well, took one statement by phone and another a month after the incident. She asked only eight questions of the youth in 30-45 minutes, which suggests that she was having trouble getting him to remember. Testimony also has it that she led witnesses and added words to the statements she did not use during the questioning. The Union concludes the investigation was completely biased.

The Union urges the Arbitrator to disregard the verbal reprimand on the Grievant's record because he was not the only party using "abusive or insulting language," and it was used during a grievance meeting.

In conclusion, the Union is of the view that removal was too harsh a penalty in this case. It was strictly for punishment and not progressive in nature. The Grievant was a valuable asset to the Employer. He should be reinstated with back pay, benefits, seniority and loss of overtime wages, and made whole.

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VI. OPINION OF THE ARBITRATOR

This case turns entirely on credibility. The picture painted by the State through its witnesses and summation is that of two grown men mooning co-workers (one of whom was an offended female) and a minor citizen while they worked beside a public highway, all the while joking and laughing about it with their buddies who later protected the Grievant by denying the incident ever occurred. The picture painted by the Union is that of a scorned woman out for revenge, a biased investigator, and an employer overly eager to rid itself of a valuable employee. I have carefully read the statements and testimony of all witnesses several times over and find the State's version is sound in its essential elements, though this does not invalidate all of the Union's version.

To begin with, the testimony and statements of Perry and Ford match in key aspects: the Grievant bent over and exposed his full derriere or "quite a bit of it." It was seen for a few seconds by Ford from the Grievant's rear and by Perry from the side. I cannot see a man bending over with his hands at knee height to pull up his trousers unless his trousers are already below his hips. It occurred in an atmosphere of laughing and joking. This is not an accidental "butt crack," but horseplay gone too far.

The Union challenges Ford's testimony on the grounds of her character and motivation. While it may be true that Ford has an aggressive sexual attitude towards men and was once rejected by Elliott, a grudge against him does not explain why she would also accuse Geraghty.¹ In addition, though she may herself use coarse language, be entertained

¹ I expressly make no finding on the guilt or innocence of Geraghty as that question is not before me. **10**

by off-color jokes, and be accustomed to accidental "butt cracks," what she witnessed may have crossed the line of what she thought of as acceptable on-the-job public behavior. Possibly she felt herself to be the target of the gesture, since the Grievant's buttocks were aimed towards her, though one can see that if her reputation is as alleged, the Grievant might not have expected her to be offended.

As for Perry, his statements and testimony are also consistent. The only thing he waives on is whether it was on purpose. In the end, he thought it was, but admitted he did not really know. I do not weigh the State's failure to have Perry identify the Grievant at the hearing. The Grievant testified he was a lot heavier

at the time of the incident, which occurred ten months before the hearing, so it would not have surprised me had Perry not been able to pick him out of the group. In any event, the Union might just as easily have asked the question. As far as Mendenhall's interview is concerned, the boy's grandfather was present and signed the statement, Perry testified he read it himself before signing, and 30-45 minutes does not seem excessive to me for the length of the statement. The Union's interview, also conducted in the presence of an adult family member, elicited nothing materially different other than the aforesaid uncertainty about the deliberateness of the act.

With regard to the rest of the investigation, had the State acted only on the statements collected by Campbell, I agree it would have been insufficient. However, it did not act until after Mendenhall's investigation, which included interviews with the two accused and four of the six witnesses. Failure to interview the remaining two crew members did not, in this case, prejudice the Grievant. As far as the way Mendenhall conducted and recorded the interviews is concerned, the time to raise such concerns is before signing the

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statement, as Dreslinski did. In any case, neither Ford nor Elliott, who were the only two admitting to seeing a mooning, complained that their written statements were materially different from what they saw.

I am also not troubled by other witnesses' statements and testimony that they did not see the Grievant moon anyone. First, if it lasted only a few seconds, not everyone would necessarily be looking. Dreslinski's statement certainly has it this way. Second, from their vantage point, they may have seen it as only a "butt crack." Third, if the crew was encouraging the Grievant by hooting and laughing, they may feel partially responsible for his removal and feel a strong need to stick by him now that he is in trouble over it.

In sum, I am convinced the Grievant purposefully revealed his buttocks, but I am not convinced it was done to harass or insult his co-workers, superiors, or a member of the public. I also do not find it aggravated by the alleged boast about truckers on I-90 because the evidence on that is too weak, no one but Ford having heard or noticed any remarks between her and the Grievant. I conclude the gesture was horseplay gone too far, expressing disrespect and exposing the State to legal risks, probably in a context of inadequate supervision for which management must bear some responsibility. As such, and on top of a one-day suspension, discipline is called for but removal is too harsh. A more corrective penalty is a major suspension with final warning. The Grievant needs to understand he now sits on the cusp of removal and must conform his behavior to the legitimate needs of his employer.

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VII. AWARD

The grievance is sustained in part, denied in part. The Grievant was disciplined, but not removed, for just cause. The removal is reduced to a 10-day suspension. The Grievant is to be restored to his former position forthwith with full back pay, benefits and seniority retroactive to ten working days following the effective date of his removal, less normal deductions and any earnings from employment he may have had in the interim. The Grievant will supply such evidence of earnings as the Employer may require. His record is to be adjusted to reflect a 10-day suspension and final warning. The Arbitrator retains jurisdiction for thirty (30) days to resolve any disputes that may arise in the implementation of this award.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
June 2, 1997

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