

#723 REVIEWED BY
6/7/18/00
JUL 18 2000

IN THE MATTER OF ARBITRATION

BETWEEN

GRIEVANCE COORDINATOR

THE OHIO DEPARTMENT OF MENTAL RETARDATION

AND DEVELOPMENTAL DISABILITIES

AND

THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION

LOCAL 11 /AFSCME-AFL-CIO

Before: Robert G. Stein

PANEL APPOINTMENT

24
CASE # ~~7~~ 06-990809-631-01-04
Classon Martini, Grievant

Advocate(s) for the UNION:

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Michael Scheffer, 2nd Chair, OCSEA
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Advocate(s) for the EMPLOYER:

Ruth A. Rehak, MLHR
Labor Relations Coordinator
Carolyn Borden-Collins, 2nd Chair, MRDD
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OHIO DEPARTMENT OF MENTAL RETARDATION
AND DEVELOPMENTAL DISABILITIES
Columbus OH 43215

INTRODUCTION

A hearing on the above referenced matter was held on March 14th and April 11, 2000 in Columbus, Ohio. The parties stipulated to the fact that the issue was properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties submitted briefs in lieu of closing arguments. The receipt of the Union's brief was delayed due to an inadvertent error in mailing. The Union sent another copy of the brief and the hearing was closed on May 20, 2000. The Arbitrator's decision is to be issued within forty-five (45) calendar days or no later than July 5, 2000.

ISSUE

The parties agreed upon the following definition of the issue: (See Joint Issue):

Was the Grievant removed from employment for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE
(Listed for reference, see Agreement for language)

ARTICLE 24 DISCIPLINE

BACKGROUND

The issue in dispute in this matter involves the termination of Classon Martini, a Therapeutic Program Worker (TPW) at the Columbus Developmental Center (CDC). CDC is a facility of the Ohio Department of Mental Retardation and Developmental Disabilities (hereinafter referred to as "Employer" or "Department"). Mr. Martini, a twenty-one year employee with no active discipline on this record, was terminated from his employment on August 6, 1999 for violation of an Employer rule. The rule that Mr. Martini was accused of violating was "Creating a Disturbance/Failure of Good Behavior." This rule is considered a Category A offense and according to the Department's policies, the level of discipline (including discharge) is based upon the seriousness of the offense.

On April 12, 1999, the Grievant was accused of grabbing a co-worker, TPW, Janice Martin, around her neck and attempting to kiss her on the lips. Ms. Martin pushed the Grievant away and stated, "*Don't do that.*" "*Don't do that and I mean it.*" Ms. Martin, visibly upset by the incident (JX 21), reported it to her Residential Care Supervisor, David Grant. Mr. Grant notified Human Resources Administrator, Brenda Gerhardstein, of the incident. That same day, Ms. Gerhardstein met with the Grievant and a Union Representative in her office. During the meeting Ms. Gerhardstein notified the Grievant of the complaint made by Ms. Martin. The Grievant denied that he grabbed

Ms. Martin but did not deny touching her. The Grievant stated that he touched Ms. Martin in a manner similar to what he has done in the past. The Grievant denied that he attempted to kiss Ms. Martin. The Grievant had known Ms. Martin for some eighteen years and worked with her frequently. He stated that he was surprised at her reaction in this situation. Ms. Gerhardstein told the Grievant that this had been the third time in three years that she had him in her office regarding this type of complaint (EX 6). She told Mr. Martini not to have any contact with Ms. Martin on or off duty until this issue was resolved.

On May 3, 1999, the Employer held a pre-disciplinary conference that was chaired by Donna Adams, Labor Relations Officer. As a result of allegations made on May 3rd regarding an existing relationship between the Grievant and Ms. Martin, the Employer decided to call Ms. Martin and the Grievant to a meeting on May 5, 1999. In addition to Ms. Martin and the Grievant, Ms. Gerhardstein, Ms. Donna Adams, Mr. David Grant, Cathy Ross, and Union Representative, Theresa James, attended the May 5th meeting (sometimes referred to as a "face off"). During the meeting Ms. Martin revealed other encounters with the Grievant that had occurred prior to April 12, 1999. Ms. Martin also provided the names of other female employees whom she claimed had been treated in a similar fashion by the Grievant. The Grievant denied these allegations. During the May 5th meeting Ms. Martin stated that she had a good working relationship with the Grievant (EX 6) and would embrace him as a good friend if she had not seen him in a while. She also stated that after a couple of hugs that involved more intimate physical contact with which she was comfortable, she decided she would avoid hugging him (EX 6).

The Employer conducted a further investigation into these allegations and the Union agreed to extend the timeliness of the disciplinary process to accommodate the investigation. Ms. Gerhardstein led the investigation and conducted eight additional interviews during the weeks following the May 5th "face off" meeting. According to the Employer, the interviews yielded several additional allegations of inappropriate conduct by the Grievant against female coworkers. When questioned about these additional allegations, Mr. Martini denied being involved in them.

The specifics of the statements gathered during Ms. Gerhardstein's investigation are included in the record (See Joint Exhibits and Employer Exhibits). Statements from Edna Rivers, Willogean Bell and Linda Smith painted a picture of the Grievant grabbing and pulling female workers close to him. Ms. Bell stated that about a year ago the Grievant "*grabbed me and kissed me in my mouth.*" (JX 22). Cathy White Moore recounted an incident that occurred years ago in which the Grievant grabbed her wrist and asked her where her husband was (JX 28). She stated she set him straight and has never had a problem with him again. Ms. Moore characterized the Grievant as a "*touchy-feely*" guy. Ms. Cynthia Mahoney stated that she has never observed the Grievant being inappropriate with her or with other women. Ms. Linda Riley stated that years ago Mr. Martini stated he was going to "*get one of them,*" referring to her and Ms. Martin. She said she thought the Grievant was joking, and she never took it personally.

The Employer determined that the incident involving Ms. Martin that occurred on April 12, 1999 was not an isolated incident, but was indicative of a pattern of sexual harassing behavior. The Employer determined that the Grievant was well aware of the Department's rules on sexual harassment. He had been given copies of the rules (JX 20)

and had been counseled about his conduct in 1993 and 1996 by Ms. Gerhardstein. Based upon its investigation of the April 12th incident (involving Ms. Martin) and past incidents involving Martin and other female employees, the Employer terminated the employment of the Grievant on August 6, 1999.

The Grievant subsequently filed a grievance claiming he was fired without just cause.

EMPLOYER'S POSITION

The Employer charges the Grievant with committing acts of sexual harassment over an extended period of time with several female employees. The last act committed by the Grievant involved Janice Martin whom he inappropriately had attempted to kiss against her will, argues the Employer.

The Employer contends that the Grievant has demonstrated a pattern of sexual harassing behavior of which he received two separate warnings by the Human Resources Administrator, Brenda Gerhardstein. The Employer insists that the evidence and testimony of Ms. Martin, Ms. Rivers, Ms. Smith, and Ms. Bell provide convincing evidence that the Grievant has had a problem with treating female staff members appropriately. The Employer rejects the Union's allegation that the Grievant is a victim of a conspiracy. It contends that the testimony of its witnesses was very credible and should be given great weight considering the difficulty of testifying in an arbitration hearing and the unpopularity of testifying against a long-term fellow employee. The Employer argues that the testimony of the Grievant is tainted by his desire to regain employment and that his "*mechanical and stoic*" testimony was highly suspect. In

addition, the testimony of the Union's witnesses must be discounted because they are his friends, contends the Employer.

The Employer acknowledges the fact that the Grievant is a long term employee. However, the Employer argues that his longevity does not overcome what he has done to female employees over the past several years. The Employer rejects the Union's argument that the Grievant had not attended training sessions regarding sexual harassment. Common sense dictates that grabbing a fellow employee and sticking your tongue down into her mouth is not appropriate behavior, argues the Employer (JX 22). The Employer also rejects that Mr. Martini was treated in a disparate manner. It contends that the testimony of Union witness, Bobby Hooper, testified about an incident that is dissimilar to the instant matter. It is involved an incident that involved welcomed sexual attention and not unwelcome or unwanted attention.

Based upon the above, the Employer requests that the grievance be denied.

UNION'S POSITION

The Union and the Grievant have a very different view of the facts from that of the Employer. The Union argues that the Mr. Martini is a victim of a conspiracy based upon "*...a mixture of lies, unsupported allegations, faked fear and total deceit.*" The Union argues that the Grievant is a dependable and respected employee who is not a threat to anyone.

The Union is sharply critical of the investigative methods employed by the Department through the offices of Ms. Gerhardstein. The Union claims that several people involved in the process of investigation and several who provided testimony had

motives to be untruthful and deceitful. For example, it argues that Ms. Martin and Mr. Grant, her supervisor, had a personal relationship during that time. Any testimony from Mr. Grant should be considered suspect based upon his relationship with Ms. Martin and based upon the additional fact that the Grievant has had an ongoing romantic relationship with Mr. Grant's wife, contends the Union. The Union argues that Mr. Grant had a powerful motive to "get back" at the Grievant. Mr. Grant's bias against the Grievant most likely influenced Ms. Martin's view of the Grievant given Mr. Grant's and Ms. Martin's personal as well as professional relationship, argues the Union.

The Union rejects the content and credibility of the Employer's witnesses. It argues that in some cases the Employer unduly influenced the statements they made by writing them for the witnesses instead of having the witnesses fill out their own statements. In addition, it contends that the statements of Employer witnesses Martin, Rivers, Smith, Bell, and Grant were driven by bias, lacked credibility, were contradictory, and appeared to be born out of collusion. Witness Grant had the motive of revenge, argues the Union. Witness Rivers openly disliked the Grievant and attempted to get him fired in the past. The Union points out that Ms. Bell's statement appeared to suspiciously contain words common to those used in the incident with Ms. Martin, which was likely a result of managerial pressure and the influence of her co-worker Edna Rivers. In her testimony, Ms. Bell testified that she had no hostility toward the Grievant and had no problem working with him, contends the Union.

The Union argued that hearing officer, Catherine Ross, was biased in this matter due to the fact that she had a romantic relationship with Employer witness Linda Smith. This relationship also taints the statement and testimony of Ms. Smith, contends the

Union. Ms. Smith portrayed herself on the witness stand as being as a shy person. The Union contends that its witnesses demonstrated that Ms. Smith is a loud and aggressive person. The Union argues that she was not afraid of the Grievant and is known to be a person who is physically flirtatious in her dealings with co-workers. In addition, Union witness Hooper testified that Ms. Smith told him that she was being forced by management to testify against the Grievant under the threat of being disciplined.

The Union also asked the Arbitrator to consider the fact that the atmosphere at CDC was one in which the behaviors of flirtation, hugging, and kissing were common, and romantic relationships that involved employees and supervisors occurred frequently. The Union argues that Mr. Martini is a long-term employee with a good record of employment. His testimony is credible, and his reputation as a trusted coworker was established in the evidence and testimony presented. On April 12, 1999, he did not grab Ms. Martin as she described. Ms. Martin wears heavy makeup, yet none of it ended up on the Grievant in this incident. This is proof of the fact that the Grievant simply touched her in a friendly manner and never grabbed her around the neck, pulled her toward him, and attempted to forcefully kiss her, argues the Union.

Based upon the above, the Union requests the grievance be granted.

DISCUSSION

The Grievant was terminated for "Creating a Disturbance/Failure of Good Behavior." The central issue in this case is sexual harassment. The Employer first carries the burden of proof to demonstrate whether the Grievant sexually harassed Ms.

Martin and other employees and whether its actions in terminating the Grievant met the test of just cause.

I am convinced from the evidence and testimony that on April 12, 1999, the Grievant inappropriately grabbed and attempted to kiss Ms. Martin. Ms. Martin's testimony was credible and did not appear to be contrived. It is clear that the Grievant's advances on April 12, 1999, were sexual in nature, unwanted, and unwelcome. The forcefulness of her words, spoken twice, "*Don't do that,*" "*Don't do that and I mean it*" and her actions in pushing the Grievant away demonstrate that she did not welcome the Grievant's advances. The evidence indicates that the Grievant stopped pursuing Ms. Martin after she rejected his advances. Stopping his behavior after being warned was correct on this part. If this were a one time isolated incident characterized by inappropriate playfulness that the Grievant realized was improper and for which he was appropriately apologetic, this situation may be viewed differently. However, the evidence and facts clearly demonstrate this was not the case.

Sexual harassment is difficult to define in terms of specific behaviors. What is harassment to one person may be welcomed attention to another. I am convinced from the testimony and evidence presented by the Union that CDC is a place where some people are comfortable with hugging one another, where romantic relationships develop, and where people joke around to an extent that may include sexual banter or playfulness.

The Employer presented evidence and testimony that demonstrate that the Grievant has had a long-term problem of inappropriate interaction with female employees. In addition to the incident of April 12, 1999, Ms. Martin described other incidents where the Grievant went beyond the bounds of being friendly and physically

appropriate. On one occasion he hugged her and pressed himself against her breasts. On another occasion he hugged her and pressed himself against her pelvis area. She stated this made her uncomfortable and that on subsequent occasions when he attempted to hug her she would tell him, "*Stop Martini,*" or would elbow him and tell him, "*stop Martini stop.*" (See Martin testimony). While working with the Grievant at Parkside several years earlier, he picked her up and threw her on a bed. Ms. Martini testified that she was upset by this conduct. She also stated that, Kelly Sadler, sister of Ms. Martin and a former Department employee, was the recipient of an unwanted kiss from Mr. Martini while she was working in a bathroom.

Ms. Martin stated that she thought the Grievant would eventually stop this behavior and that she was strong enough to handle him. Several years ago the Grievant was accused of attacking (by pushing her to the floor) a female worker, Parthinia Lindsey, in a bathroom at Parkside 2. The Grievant denied that he attacked Ms. Lindsey and she received a suspension for using profanity against him. However, Ms. Martin testified that a few years after the alleged incident, Ms. Martini admitted to her that he did it. I found Ms. Martin's testimony to be credible. Her experiences with Mr. Martini strongly suggest a pattern of conduct that is distinguished from harmless and or playful conduct that can occur in a workplace. Instead, it suggests behavior that is more obsessive in character.

The statement and testimony of Willogean Bell, who appeared to bear no particular grudge against the Grievant, further supported the contention that the Grievant has a serious problem regarding his appropriate treatment of women. In a similar fashion to that described by Ms. Martin, Ms. Bell stated that in 1998, the Grievant "...came up to

me grabbed me and kissed me in my mouth." From her testimony, it is clear that the Grievant's actions were unwanted and unwelcome. It is noted that Ms. Bell wrote this statement herself and confirmed this fact during her testimony.

Witness Edna Rivers made statements that corroborated what Ms. Martin stated as well as the conduct in general of Mr. Martini with other female employees. Her descriptions of his behavior describe the experiences of Ms. Martin and Ms. Bell. In addition, she also stated that Mr. Martini admitted to her that he physically threw Parthinia Lindsay to the floor of a bathroom in Parkside 2 (See Rivers testimony). The statements and testimony of Ms. Linda Smith and Ms. Cathy White Moore reveal more incidents of unwanted and unwelcome physical grabbing that are similar to those experienced by other female workers.

The Union claims that a conspiracy exists against the Grievant; however, it could not provide any substantive evidence of this assertion. Indeed, there is some similarity in the use of the word grabbing that appears in the accounts of the Employer's witnesses. However, there is no way to discern whether this represents collusion or is indicative of the Grievant's true pattern of behavior. The Union's witnesses, while credible, did not discount or undermine the experiences of the Employer's witnesses. The Union's witnesses established the fact that the Grievant was a dependable worker who was considered a "good guy." This sentiment was expressed by some of the Employer's witnesses. However, whether the Grievant was a dependable worker or was well liked does not preclude him from harassing female coworkers. An employee who works many years and is dependable is still subject to discipline or discharge if he or she commits a major rule violation.

Social relationships in a place of employment are sometimes complicated by personal interests. What is appropriate and what is offensive is a highly individualized matter. The standard that the courts and this Arbitrator adhere to is the "reasonable woman" standard (Ellison v. Brady, 924 F. 2nd 872, 54 FEP Cases 1346 (9th Cir. 1991)). Arbitrator Thomas Levak explained the reasonable woman standard in his 1992 Award:

"[W]hat that means is that a man who makes comments or makes approaches to a female must determine how a woman would reasonably take his comments or approaches, not how this male's co-workers feel she should take them" (100 LA 866)

Article 2 of the Collective Bargaining Agreement is consistent with the intent of Title VII of the 1964 Civil Rights Act. In Article 2 the parties mutually agree that *"The Employer shall prohibit sexual harassment and take action to eliminate sexual harassment..."* The facts in this case support the Employer's actions to terminate the employment of the Grievant. Mr. Martini was well aware of the rules against such behavior and on two occasions (1993 and 1996) was counseled about his conduct with female employees by Brenda Gerhardstein (See Gerhardstein testimony and EX 6).

I find that in applying a reasonable woman standard to his conduct, it is clear that the Greivant practiced a deliberate and repetitive pattern of sexual harassment. In spite of that fact that many women have rebuffed his advances and warned him, he continued his inappropriate behavioral pattern. After everything that has occurred, Mr. Martini remains remarkably unaware of the gravity of his actions and shows no remorse for his behavior. I believe that any reasonable woman would consider Mr. Martini's behavior to be sexually harassing and in fact any reasonable man should come to the same conclusion. Mr. Martini's actions were clearly demeaning and offensive.

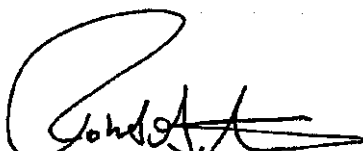
It is reasonable to also conclude from the evidence and testimony that the work environment was detrimentally impacted by the Grievant's conduct. On April 12, 1999, Ms. Martin stopped her work and reported the Grievant's conduct to her supervisor. Ms. Smith, Ms. Rivers, and Ms. Bell have reported encounters with the Grievant's that caused a disruption. Mr. Martini's actions created a level of sexual hostility that female employees had to endure. In the testimony there was additional concern expressed regarding the modeling of Mr. Martini's behavior by male clients toward female clients and female staff members.

The society in which we live has come to realize (but not fully actualize) the importance of treating female employees in the same manner and with the same respect as male employees. There is little question that men and women may react differently to various stimuli and that each person has his/her own level of tolerance for questionable human behavior. However, the Agreement and the laws against discrimination cited call for the Department to maintain a work environment that is free of sexual harassment. The courts and the EEOC have provided substantial meaning and guidance in this area. The Department has a contractual and a legal obligation to protect employees from sexual harassment. Those who are informed and choose to ignore that reality risk a great deal!

AWARD

The grievance is denied.

Respectfully submitted to the parties this 5th day of July, 2000.



Robert G. Stein, Arbitrator