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VOLUNTARY LABOR ARBITRATION TRIBUNAL

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In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 27-20-010307-5042-01-03-T
and	*	
	*	
OHIO DEPARTMENT OF	*	John S. Wendling, Grievant
REHABILITATION AND	*	Removal
CORRECTIONS	*	

* *

APPEARANCES

For the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO:

James McElvain, Staff Representative
Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO

For the Ohio Department of Rehabilitation & Corrections:

Patrick A. Mayer, Labor Relations Officer
Ohio Department of Rehabilitation & Corrections

Patrick Mogan
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:15 a.m. on June 13, 2001, at the Mansfield Correctional Institution in Mansfield, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is 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 or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Department of Rehabilitation & Corrections (the "State") were Juan Esparza, Lt. José Ivan Roqué, and Warden Margaret A. Bagley. Also present was Ronald J. Pawlus. Testifying for the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO (the "Union") were Correction Officers Tim Lawson and Rick Scruggs; Lt. John Wendling; and the Grievant, John S. Wendling. Also in attendance was Mick Bradshaw, Chief Steward . A number of documents were entered into evidence: Joint Exhibits 1-7, State Exhibits 1-3 and Union Exhibits 1-4. The oral hearing was concluded at 3:30 p.m. on June 13 following oral summations, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

This case concerns the removal of a correction sergeant/counselor for an in-uniform, off-duty incident of road rage in which the Grievant allegedly used his State-issued oleoresin capsicum ("OC") spray (commonly known as "mace" or "pepper spray") against a member of the motoring public. At the time of his removal on March 6, 2001, the Grievant was a 14-year employee of the Ohio Department of Rehabilitation and Corrections. His performance

appraisals, lack of active discipline and membership in the prestigious SRT team demonstrate he was an excellent employee.

The incident leading to the Grievant's termination occurred on September 19, 2000. According to the victim, he was driving south on S.R. 13 on his way home from work shortly after 3:00 p.m. when a black pick-up truck pulled out of Mansfield Correctional Institution's ("ManCI") parking lot and proceeded south behind the victim's vehicle. As traffic was heavy, the victim was driving slowly and had to slow down further to get onto U.S. 30. The truck nearly rear-ended him. The victim thought the driver was upset, both about his difficulty in getting on to S.R. 13 and the sudden stop at U.S. 30, so he drove about 40 mph hoping the truck would go away. Instead, it followed behind until they approached Rt. 309. When the truck passed the victim, its driver made an obscene gesture, called the victim a "motherfucker" and signaled him to pull off the road. Seeing the truck driver's uniform the victim was unsure of his authority, so he pulled off to see what the driver wanted, stopping about 200 feet away from the truck. The two men met between their vehicles. After some words were passed, the truck driver sprayed the victim in the face with mace sufficiently so that the victim fell to the ground and could not see for some time. The assailant then left the scene.

During this time, Lt. José Roqué, who works at Richland Correctional Institution near ManCI, was also driving home. As he got off U.S. 30 onto Rt. 309, he saw the two vehicles about 150 feet apart, and a "white shirt" (an officer holding rank above Correction Officer) and what he took to be a teenager standing between them. As he passed, he saw the younger male put his hands to his face and drop to the ground. Then the "white shirt" turned and walked towards the truck. Thinking it was a family matter, Lt. Roqué did not stop. Eventually the victim received assistance from some men working nearby. The police were called and a report

filed. The police report states the appearance of the victim's face and eyes was consistent with the effects of pepper spray.

The next morning Lt. Roqué overheard fellow officers talking about the incident which had been reported in the local newspaper. When he remarked that he had seen the incident, the officers started throwing out names of ManCI officers and looking up their identification photographs. When the Grievant's picture came up, Lt. Roqué identified him as the "white shirt" of the previous day's incident. Later he picked him out of a photo line-up at the Mansfield Police Department, and still later, when he saw the Grievant at ManCI, he recognized him again, and then identified him from his photograph again for the ManCI investigator. In arbitration, as in the telephone interview he gave the investigator, he said the "white shirt" he saw on September 19 was wearing a uniform with grey pants, a black tie, and no hat, and he was positive the truck was black. He also testified he may have seen the Grievant before September 19, but if he did, he did not remember him. He further testified he had never met the victim until the day of the arbitration hearing.

The victim was interviewed by Dave Blake, Assistant Investigator at ManCI, on September 25 in the presence of an officer from the Mansfield Police Department. The victim said his assailant was bare-headed, blonde, a little on the heavy side and wearing dark blue pants, tie and coat and a white shirt like some of the officers at ManCI. When questioned, he said the pants were not grey like he had seen officers wearing in the entry building. He was also "pretty sure" the truck was black and thought it might be an S-10 Chevrolet. He later picked the Grievant out of a photo line-up and confirmed this identification when he saw the Grievant at the institution. In arbitration, he confirmed his original description of the truck and his assailant's

apparel, and correctly identified the color of the dark grey uniforms worn by officers at the hearing.

The record shows that the Grievant was working at ManCI on September 19 and that he clocked out at 3:00 p.m. At his investigatory interview on January 25, 2001, he denied he had a confrontation with the victim and stated that he drives a 1993 blue Pontiac Transport. In arbitration, he admitted that he leases a black pick-up truck for his wife, but testified that he never drives it because his gouty arthritis prevents him from driving a standard shift vehicle. On cross-examination, however, the Grievant admitted he has driven the truck although he never brings it to work since it is his wife's vehicle. Correction Officers Scruggs and Lawson testified the blue van is the only vehicle they ever saw the Grievant drive. The Grievant also testified that although he does own a blue uniform jacket, he was not wearing it that day and he does not have blue uniform pants. He was wearing a uniform, but he had on a hat and no tie. It was a nice day, he said. In addition to testifying about the Grievant's blue van, Lawson testified to his apparel, saying he was not wearing blue pants and jacket or a tie, but was wearing a hat. As for his whereabouts at the time of the incident, the Grievant testified he met his father, Lt. John Wendling of the Mansfield Police Department, at approximately 3:15 p.m. at a restaurant in Mansfield, but the transcript of his investigatory interview does not mention this meeting, nor does the pre-disciplinary hearing report, nor does the Step 3 answer to the grievance. The Grievant testified he did not offer this alibi because, first, he was not asked about his whereabouts and, second, the criminal complaint which he received in January has the incident occurring "on or about January 25," so he did not think about where he was on September 19. Lt. Wendling testified that he did, indeed, have an appointment to meet his son for lunch, and that the Grievant showed up about 3:15 p.m., driving his van. He was sure it was the van

because he was watching for his son, hoping he would not park in the truck loading zone. As corroboration, he offered his calendar (admitted over the objection of the State) which contains the notation "Scott 3:00 Square" for September 19. He explained the lack of other entries about his son by the fact that he and his son had not been close, but were becoming closer, and the occasion of their meeting that particular day was his son's birthday, which had occurred the previous week.

Assistant Inspector Steve Stormes, who took over the investigation in January, filed his report, recommending discipline, on January 25, 2001. By request of the Union, the pre-disciplinary conference was rescheduled from February 12 to February 20. Following the hearing officer's just-cause finding, the Warden recommended removal because, she testified, assaulting a member of the public while in uniform using State-issued equipment is intolerable. The Warden testified she expects off-duty, in-uniform employees to behave professionally as if they were at work. She further stated that after the incident was reported in the newspaper several community leaders called seeking explanations and wanting to know what was being done. In her opinion, the Grievant's conduct brought discredit to the institution and its employees. Accordingly, the Grievant was removed on March 6, 2001, for violation of Rule 29 (purposeful or inappropriate display of weapons, batons, mace, explosives, or facsimile thereof), 37 (actions that could harm or potentially harm the employee, fellow employee(s) or a member of the general public) and 40 (any act that would bring discredit to the employer). Per the Department's Standards of Employee Conduct, a first violation of any one of these rules carries the consequences of reprimand up to and including removal.

This removal was grieved on March 7, 2001, citing lack of just cause and claiming the discipline was not progressive, was excessive and disparate, was imposed more than 45 days

after the pre-disciplinary conference and without taking extenuating or mitigating circumstances into account. At Step 3, the Union raised additional issues relating to the disciplinary procedure, but the grievance was denied. Being unresolved, the case finally came for arbitration as aforesaid, free of procedural defect, for final and binding decision.

III. STIPULATED ISSUE

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

IV. ARGUMENTS OF THE PARTIES

Argument of the State

The State argues that it has met its burden to show by a preponderance of the evidence that the Grievant is guilty as charged. Two witnesses who do not know each other and have no connection to each other, to the Grievant or to the institution credibly testified as to what happened. The victim was understandably fearful of testifying, but the documents show something did happen to him and he gave a fairly accurate description of his assailant, then picked him out of line-ups at the Mansfield Police Department and at ManCI, and identified him when he saw him in person. Lt. Roqué, who has no reason to lie, witnessed what he believed at the time was a family dispute. He, like the victim, saw a black pick-up and his estimate of the distance between the two vehicles was approximately the same as the victim's. He, too, gave a good physical description of the Grievant, being inconsistent only in terms of wearing apparel. He also later picked the Grievant out of a photo line-up and positively identified him when he saw him in person.

Against this is the Grievant's alibi and claim he was driving a blue van, not a black pick-up that day. The State finds it suspicious that the Grievant owns a black pick-up but cannot drive it for medical reasons when he has been an SRT member for 12½ years, subject to the physical demands of that assignment which requires an annual physical examination. As to Lawson's claim that he saw the Grievant driving the van home that day, the State points out Lawson also testified he saw the Grievant driving that van on September 26, then admitted he could not have seen it because he was on vacation that day. The State also points out the Grievant claims not to have known until January that he was under investigation for violation of a work rule. How, then, could Scruggs and Lawson, who surely did not know this before the Grievant did, be so free of doubt about what vehicle the Grievant was driving on September 19?

Turning to the Grievant's alibi, the State finds it suspicious that the Grievant never, until arbitration, said he was with his father at the time the incident occurred. The State takes issue with the Grievant's explanation that he was never given a chance to tell his whereabouts. He had an opportunity at his investigative interview in January, at his pre-disciplinary conference in February, and at his Step 3 meeting, but neither he nor the Union brought it up, and the State was not given an opportunity to inspect the father's calendar until it was offered as evidence in arbitration, where it was revealed to have only that one entry about him in the entire year. While it is possible the Grievant had lunch with his father on September 19 for the first and only time that year, the State submits this is far-fetched. Moreover, the father has motive to lie, both to save his son's job and because the criminal charges must be embarrassing to him, a command officer in the Mansfield Police Department. The State contends the Arbitrator has two options, either to find there was an incredible string of coincidences or to find that the State's story rings true.

The State next argues that the Grievant's actions warrant removal on a first offense despite the Grievant's good record because of the magnitude of the offense. The State has protocols for use of force. None were met. Indeed, argues the State, what the Grievant did amounted to abuse because it was use of force where no force was justified. Had the victim been an inmate, the Arbitrator would have no authority to modify the discipline. The State argues the same standard should apply when the victim is a member of the public rather than an inmate. The Grievant's actions were even more egregious because after he maced the victim (putting him in serious harm's way), he abandoned him to the risk of traffic on the highway, again unnecessarily placing him in harm's way. Moreover, the assault itself put the Department and the institution in a negative light with the public. For these reasons, the magnitude of the act warrants removal and the grievance must be denied.

Argument of the Union

In arguing that the State did not have just cause to terminate the Grievant, the Union submits that the Grievant was not the person who committed the assault. First, the Union points out that there are inconsistencies in the stories told by the victim and the witnesses. For one, in his investigatory interview of September 25, the victim said he "can't read lips," but in his testimony before the Arbitrator he said he could. For another, the victim was unwavering in saying that his assailant was wearing a blue coat, tie and pants while Lt. Roqué said the lieutenants' and sergeants' uniforms are the same, which the Arbitrator could see was grey, and that the perpetrator was not wearing a blue coat. Then, too, the victim said he pulled off the road behind the truck, while Lt. Roqué said the sedan was in front of the truck. The Union also questions how Lt. Roqué, traveling in heavy traffic, could look back and see the Grievant's face, especially if the vehicles were placed as the victim says they were. The Union submits that he

did not see the Grievant because the Grievant was not there. It goes on to point out that the victim was defensive on cross-examination and refused to answer some questions.

The Union also asks the Arbitrator to look at the time frame. The Grievant's father, a 33-year member of the Mansfield police force, brought in his notes (the existence of which the Union was unaware until the day of the arbitration) clearly showing they met on September 19 in downtown Mansfield at the same time the incident was occurring. He also testified it is impossible for anyone to get from Rts. 309 and 30 in five or six minutes, and that his son was driving a blue van. With respect to the vehicle the assailant was driving, Officers Lawson and Scruggs testified they never saw the Grievant drive anything but a blue van, but the police report of the 19th has a witness saying a grey truck was involved. The victim was uncertain of the color of the truck at first, but later changed his mind and was certain it was black. Lt. Roqué, on the other hand, was not sure about the sedan, but could clearly remember that the truck was a black Ford Ranger. How could he remember one so clearly and not the other?

As for the Grievant, he testified he knew nothing about the incident when he was called in for his investigatory interview. He thought there was a criminal complaint against him from some person on the street and did not know it had any nexus to his job. That's what he answered to in the interview. His sworn testimony to the Arbitrator was that he did not, in any way, assault this person.

The Union submits that the State's argument of abuse is irrelevant because the Grievant was not charged with abuse, nor is there any such rule in this department except against an inmate.

The Union does not question that something terrible happened to the victim, perhaps by a member of the Department, perhaps not. But it emphatically states that it was not the Grievant.

He was not there. It therefore asks that he be reinstated, his grievance granted and that he be made whole.

V. OPINION OF THE ARBITRATOR

It is never easy to sustain the discharge of a long-term, good-service employee, but when it is an officer with as impressive a record as the Grievant's, it is particularly difficult. I have pondered my decision in this case for a long time, going back to the record repeatedly to study and restudy the quality of the evidence before me. In the final analysis, though, I come to the same conclusions the State did, and so must deny the grievance.

In reaching this decision I first considered the State's case which rests upon the accounts of two individuals who are connected solely by having been at the same place at the same time. Neither knew the other or the Grievant, although Lt. Roqué perhaps met the Grievant some time ago. Neither had any connection to the institution either, except in that they work at places nearby. Yet they both, independently of each other, separately identified the Grievant by photograph and in person as the assailant. Neither has a motive for falsely accusing the Grievant and their stories fit together reasonably well. Yes, there are some inconsistencies, but none, either individually or collectively, are significant enough to undermine belief in their stories' essential features. Some are readily explained as reporting errors or misunderstandings. The discrepancy on whether the victim claims to have read his assailant's lips was, I believe, caused by the victim's accent. In the context of the interview, "I can read lips" makes more sense because the interviewer, by dropping the matter at that point, appears to have been satisfied that he understood how the victim knew what his pursuer was yelling at him. "I can't read lips" would have left this knowledge unexplained. Because of the victim's accent and the context, I believe the statement was mistranscribed. The victim's nervousness and evasiveness on

answering personal questions on cross-examination can be attributed to the fairly common witness fear of potential repercussions for testifying, especially since the victim was testifying against someone who had already assaulted him once. As for the truck being reported to be grey, silver and then black, I note first that the witness named on the police report did not testify. Second, the police report gives the truck as "gray" and then "silver." Third, the same police report also got the uniform as a "*white* MANCI uniform" (emphasis added), which is clearly wrong. The police report is, therefore, not very helpful. On the other hand, both witnesses who did testify were consistent with each other and with their own earlier statements. The victim "believe[s] it was black" or possibly a "real dark gray almost black." He was "pretty sure black," then "certain." Lt. Roqué was positive it was black. The fact that Roqué's recollection of the sedan is not as good is of no account. Not all features of a scene need to be recalled with the same degree of clarity to make a story credible. Regarding the relative positions of the vehicles when they came to rest, I understood the victim to say that his pursuer passed him, waving him over. I do not have him on record saying that the truck stopped in front of him. He did say, though, that the pursuer was already walking towards the him by the time he got out of his car. From this I take it that the victim temporally stopped after the pursuer did. Both State's witnesses also testified the vehicles were some distance apart (150-200 feet). I therefore conclude that the victim's car traveled some distance before his car came to rest 150-200 feet away from the truck. This would likely place it *in front of* the truck (as Lt. Roqué testified), not behind it, and would account for Lt. Roqué first seeing the back of the assailant (as Roqué approached the men from the rear), then the assailant's face (as Roqué passed, looking back to see the assailant turning to his left towards the ramp and then walking back to return to his truck).

This leaves the matter of wearing apparel. Here there is a clear difference in what the two State witnesses reported seeing. The one is sure it was a dark blue uniform, the other reported it as "the uniform with grey pants." Given that the two saw similar colors (both being dark neutrals), and reported other things consistently with each other (such as the type and color of the car, the distance between the vehicles, and the assailant's physical features), I am confident that one of them is mistaken about the color, not that one is lying. And since this is not only the sole discrepancy, but a minor one as well, it is insufficient to undermine the strength of their independent identification of the Grievant.

I now turn to the Grievant's story that he could not have been the assailant because he was in another place at the time and was driving a different vehicle. To begin with, I find it incredible that the Grievant had this alibi all the time but never, until arbitration, brought it to his employer's attention. He must have known by the time of his investigative interview a lot more than he says he does because he was clearly questioned informally by Officer Bannon of the Mansfield Police Department prior to his formal investigative interview in January. Indeed, in the January interview, he says that Capt. Scott asked to weigh his mace canister in September and that Assistant Investigator Blake did weigh it. But even if he had only a vague idea in January or was confused by the summons as to the date of the incident being investigated, surely by his pre-disciplinary hearing he knew the charges, the time, and the date because the pre-disciplinary notice is clear on these points. Moreover, he knew enough to put John Wendling (whom I take to be his father, the lieutenant) on his witness list to testify about Monday and Tuesday golf leagues, but still he did not give his whereabouts on September 19 as a defense. He had another opportunity at the Step 3 meeting, but did not bring it up there either, even though seeing his father was such a rare event (by Lt. Wendling's testimony) that it would seem it would

stand out in a person's memory. Yet the Grievant did not think of it until he got to arbitration where he remembered the appointment, the weather, and what he was wearing nine months before.

I also have some problems with the Grievant's testimony about what he was driving and with Lt. Wendling's calendar. For the former, the Grievant changed his testimony about why he "never" drives the truck. In direct testimony he asserted that it is because of a physical incapacity. Apparently his condition comes and goes, going enough not to interfere with his SRT qualification but coming enough that he can "never" drive the truck. Then, on cross, he admitted he does drive the truck, but "never" to work because it is his wife's vehicle. His father's calendar is problematic, not just because the September 19 entry is the only one concerning his son, but because the original has part of that entry written over white-out. One is left wondering what was changed and when.

In sum, the State has convincingly established the Grievant is guilty as charged. His alibi came too late to be believable and the Union's witnesses, though understandably desirous of supporting the Grievant's cause, were unable to offer evidence in his favor that would stand scrutiny. Although the offense was committed off duty, discipline was justified by the use of a State-issued weapon and the fact that it was committed while in uniform. I reject the State's argument on abuse. The Grievant did abuse his employer's trust that he would use his weapon only for the purpose for which it was intended, but his actions do not constitute "abuse" within the meaning of Article 24.01 because it was not committed against "a patient or another in the care or custody of the State of Ohio." Nevertheless, using what amounts to a work tool in such a manner while in uniform against a peaceful member of the public for one's own personal emotional agenda constitutes a significant betrayal of trust and strikes at the heart of the safety

force employment relationship. The State has to trust its weapons-carrying employees to use these tools as intended. The public, as well, has to trust its safety forces will not turn their weapons on the innocent. When this trust is lost, termination, even of a long-service, otherwise excellent officer, may be the only remedy. In the instant case, where the victim was not only maced but left, temporarily blinded, by the side of a busy highway, and there is nothing in the record indicative of or predictive of reform, termination is justified.

VI. AWARD

The Grievant was removed for just cause. The grievance is accordingly denied in its entirety.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
July 27, 2001

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