

#792

VOLUNTARY LABOR ARBITRATION TRIBUNAL

015-13-02
REVIEWED BY

MAY 13 2002

In the Matter of Arbitration *

Between *

OHIO CIVIL SERVICE *

EMPLOYEES ASSOCIATION *

LOCAL 11, AFSCME, AFL/CIO *

and *

OHIO DEPARTMENT OF PUBLIC *

SAFETY, DIVISION OF THE *

HIGHWAY PATROL *

GRIEVANCE COORDINATOR

OPINION AND AWARD

Anna DuVal Smith, Arbitrator

Case No. 15-00-20010917-0123-01-07

Boris Hart, Grievant

Removal

APPEARANCES

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

Steve Lieber, Staff Representative
Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO

For the Ohio Department of Public Safety, Division of the Highway Patrol:

Renee L. Byers, Esq.
Ohio Department of Public Safety, Division of the Highway Patrol

Nemi Valentine, Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:00 a.m. on February 27, 2002, at the Lausche State Office Building in Cleveland, 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 Public Safety, Division of the Highway Patrol (the "Patrol") were Wen Qian, Yue Qiu, and Jianshun Shao. Also present was E. Keith Calloway, Human Resources Administrative Assistant, Ohio State Highway Patrol. Testifying for the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO (the "Union") were Adell Wright, Driver's License Examiner 2; Richard Namie, Driver's License Examiner 1; Robert Robinson, OCSEA Staff Representative; and the Grievant, Boris Hart. Joint Exhibits 1-7 were entered into evidence. The oral hearing was concluded at 2:20 p.m. on February 22. Written closing statements were timely filed and exchanged by the Arbitrator on March 18, 2002, whereupon the record was closed. This opinion and award are based solely on the record as described herein.

II. STATEMENT OF THE CASE

At the time of his removal the Grievant was a Driver's License Examiner 1 (DX1) for the Ohio State Highway Patrol. He had been working for the Patrol for approximately three and one-half years and had no discipline on his record. His co-worker, DX1 Richard Namie described him as a "straight arrow" and his immediate superior, lead worker DX2 Adell Wright, found him to be a good employee. On July 14, 2001, an applicant for a driver's license who had failed the maneuverability portion of the test accused him of offering to pass her in exchange for a sexual favor. The applicant, Wen Qian, is Chinese. At the time of the incident she spoke English poorly because she had been in the United States for only three months and consequently had had

little opportunity to speak it although she had learned to read and write English while living in her homeland. Because of the language barrier and the fact that she was upset at the time, the incident was originally reported by two friends of hers, Yue Qiu and Jianshun Shao, whose command of spoken English and knowledge of American culture were superior to hers by virtue of them having lived in the United States four and twelve years respectively. Mr. Shao also acted as interpreter for her during the investigation of the incident.¹

On the day of the incident, Ms. Qian twice went to the Driver Testing Station on East 55th Street in Cleveland. In the morning she took and passed the written examination, but her vehicle did not pass the inspection performed by the Grievant. She was told to return in the afternoon after she corrected the problem. She did as suggested, returning some time after noon with her friend, Ms. Qiu. They were joined by Mr. Shao some time after 1 p.m. The Grievant happened to pull Ms. Qian's application again. This time her vehicle passed, so she and the Grievant proceeded to the road and maneuverability portions of the examination. At this point the two versions begin to diverge markedly. The Grievant claims they left the parking lot at the north end and proceeded east, then south, going around the building to the maneuverability courses at the rear of the station. Ms. Qian and her friends, both of whom were watching from the parking lot, said she exited south on to Grand Avenue, turned right on to East 55th Street, right on to Diamond Avenue and then right again, pulling into the lane at the rear of the building and from there into the maneuverability area. The friends walked past the south end of the building and to the rear where they could watch the maneuverability test. By the time they got there, Ms. Qian had already knocked over a traffic cone and was stopped. They saw the Grievant get out and replace the cone. They started to approach Ms. Qian's car, but according to all three, were waved off by the Grievant. The two friends testified they could see the Grievant and Ms. Qian talking in the car, but could not hear. Then the car moved and stopped another time outside the gate. Ms.

¹By the time the case came for hearing, Ms. Qian's spoken English was sufficiently strong to permit her to testify without the aid of an interpreter.

Qiu tried to approach again, but was, according to the three friends, again waved away. The two friends testified it appeared to them Ms. Qian and the Grievant were talking, but they could not hear what was being said. Ms. Qiu almost lost patience. She returned to the front of the building, followed by Mr. Shao. From here they saw the car return to the parking lot, entering at the north end off of Diamond Avenue, then parking in the northwest corner where it sat for one or two more minutes before the Grievant got out and returned to the station. When the friends got to the car they found Ms. Qian upset and beginning to cry. They asked what had happened. Ms. Qian replied that the Grievant had asked her to “do something” for him and he would pass her on the exam. Ms. Qiu probed and Ms. Qian described further, which led Ms. Qiu to believe that the Grievant had made Ms. Qian to understand that he wanted a sexual favor from her. Mr. Shao testified they were all speaking in Chinese and he understood Ms. Qiu to say, “He wanted me to do that to let me pass.” He inquired, “He asked to kiss you?” Ms. Qian cried. Ms. Qiu became angry and wanted her to report the impropriety, but Ms. Qian just wanted to go home. She testified she thought the Grievant was a police officer because of his uniform and what she thought was a gun hanging on his belt.² This made her fearful of what he could do to her. Her friends insisted she report the incident and tried to pull her out of the car. This was observed by a passing police sergeant, who asked what the trouble was. Mr. Shao told the sergeant what he understood and the two of them went into the station to find a supervisor.

By this time it was about 2 p.m. and DX2 Wright, who was in charge that day, was returning from her late lunch. She invited the party of three into her office where Mr. Shao told her what he thought had happened and they waited for a State trooper. This took some time because it was a very busy day and DX2 Wright had other work to do. She testified that she could hear loud voices in her office while she was outside it, but that they stopped when she went in. The three friends testified they were arguing in Chinese and may or may not have been loud.

²The Driver’s License Examiner uniform includes patches on a blue shirt, a radio and an embossing stamp carried in a black holster.

Ms. Qian was telling them what happened, saying she did not want trouble and wanted to go home. Her friends were angry about what happened and thought she should stay and see it through. Eventually Mr. Shao understood that the Grievant had not asked for a kiss. He reported to DX2 Wright that what had really happened was that the Grievant had pointed to his groin area to make Ms. Qian understand his request and had taken her hand to touch him.

In arbitration, Ms. Qian testified that after she knocked the cone down, she asked for another chance because she understood from some friends that she might be given more than one. When the Grievant refused, she asked again. By and by he said, "If I give you another chance, what will you do for me?" She did not understand, so asked him "What do you mean?" He said, "You can do it for me here." She still did not understand. He pointed to his crotch and she saw his erection through his clothing. Then she understood. She was nervous and said nothing. Meanwhile, her friend started to approach the car for the second time and was waved off again. The Grievant asked if Mr. Shao was her boyfriend and she said no. He was still asking her if she would "do something" for him and he showed her the empty test paper. She shook her head no. Then she drove back to the parking lot and parked as directed. He asked again and told her she would have to come back the following Saturday. Finally he held out his hand. She thought he wanted to shake her hand, so she offered it. He took her hand and stroked his thigh with it. Then he got out of the car and her friends came up to her.

The Grievant testified that none of the allegations are true. Ms. Qian was quiet until she knocked the cone down and he began to mark the test paper, then she asked to take the test again. He did see her friends at the rear of the building, but he did not wave them off. He asked if either had a license. If so, he would have returned to the station through the rear door and let her go on her way with one of them as the accompanying driver. She asked again for a second chance. He explained there was a seven-day waiting period and showed her where to call for an appointment. By then her friends had disappeared, so he had her drive back to the parking lot and park where there was no congestion since she was shaky. She asked again. He gave her the paperwork and

exited. He could not have been with her in the car in the lot for even a minute. A test normally takes about ten minutes and no one complained he was taking too long that day.

Two investigations ensued, both administrative and criminal, during which Ms. Qian took and passed a polygraph test. The Grievant declined the offer of a polygraph on the advice of both his Union representative and attorney. The prosecutor declined to put the case to the Grand Jury, but the Patrol initiated disciplinary action against the Grievant. A pre-disciplinary notice was issued on September 4, 2001, stating that the Director "intends to terminate you" for the violation of two work rules, Rule 501.01(C)(10)(d) - Failure of Good Behavior and 501.01(C)(10)(c) - Dishonesty. A Personal Action removing the Grievant bears the Director's signature dated September 6, 2001. The pre-disciplinary meeting was conducted on September 7, at which the Grievant's Union representative, Robert Robinson objected that the Patrol was already determined to remove the Grievant. The hearing officer's findings were issued that afternoon and the termination notice followed the next morning, said removal to be effective at the close of business that day, September 8. A grievance protesting this action was filed September 13 and subsequently processed according to the terms of the Collective Bargaining Agreement until it came to arbitration where it presently resides, free of procedural defect, for final and binding decision.

III. ISSUE

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

IV. PERTINENT PROVISIONS OF THE CONTRACT

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....

24.04 - Pre-Discipline

...An employee has the right to a meeting prior to the imposition of a suspension, a fine, leave, reduction, working suspension or termination....

24.05 - Imposition of Discipline

The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting....

V. ARGUMENTS OF THE PARTIES

Argument of the Patrol

The Patrol argues the preponderance of the evidence is that the Grievant used his position of authority to solicit an unwanted sexual favor from an innocent victim. As such, it constitutes failure of good behavior and termination is justified.

Proof of guilt, it says, is found in the victim's story which has remained consistent from the beginning. The fact that she did not want to report what occurred does not mean it did not happen. It is not unusual for a victim of unwanted sexual advances to be reluctant to discuss the incident, for discussing it means reliving it. Rather, friends who are more distant from the incident are the ones who see it must be reported and encourage the victim to do so. That is what happened here.

Supporting the victim's story is her polygraph and the testimony of her friends who witnessed the circuitous route, the unnecessary stops, the waving off of their approach, and the talking in the car after the victim had already failed the exam. If this was the busiest day of the year as Union witnesses testified, why did the Grievant not just hand her the paperwork, get out and return to the station for the next test? The victim admitted she was disappointed she had not passed and that she asked several times to be given another chance. Why would she not be disappointed since she had practiced so much and had had to come to come to the station a second time? She never told Mr. Shao that the Grievant had asked for a kiss. He just assumed that is what happened and then corrected what he had reported when he learned the truth.

By contrast, the Grievant is not credible, says the Patrol. He changed the lengths of time various things took, denied taking the longer route the others reported, denied making hand gestures keeping the witnesses at a distance and failed in his attempt to establish that he could

not possibly change a score once recorded. Moreover, the prosecutor's failure to pursue criminal charges is irrelevant since the burden of proof in criminal cases is much higher than in administrative ones.

Finally, the Patrol contends this termination was not pre-determined. It says it is obvious the Personnel Action is misdated because the actual removal was not processed until September 8, the day after the pre-disciplinary meeting. Moreover, the Union overlooks the fact that all other documents show the Grievant received all his contractual protections. In the Patrol's view, the Union is arguing form over substance.

The Patrol concludes that the Grievant has failed to uphold the core values of his employer and so his termination should be upheld and his grievance denied in its entirety.

Argument of the Union

The Union argues that the Patrol failed to make its case. Everything the two witnesses had to say was without their direct knowledge. The three spent some time alone arguing in Chinese and then Mr. Shao changed his story about what allegedly happened. The Union suggests the story was changed to make it more believable. Mr. Shao is not credible for other reasons. He said the sergeant stopped of his own accord whereas the supervisor has it that the sergeant told her he was flagged down. Then, in the sergeant's interview he said he was not called to the station and that he was not a street officer.

The Patrol also relied on a polygraph of the accuser to support her truthfulness. Polygraphs are notoriously unreliable and should be ruled inadmissible. The Union has some problems with this one in particular. The report mentions there were two polygraphs. Where is the other one? And where is the transcript that would show what questions were asked? The Union submits that the Patrol used this polygraph for another purpose which was to badger the Grievant despite Article 24.07 of the Agreement. However, it did not polygraph the two witnesses. Why not? What was it afraid of?

The Union contends the investigation was flawed in other ways as well. The only person besides the Grievant with direct knowledge was interviewed with an interpreter after the investigator apparently did not like the answers he was getting. But no impartial professional interpreter was used. Instead, it used Mr. Shao. The Union concludes that the Patrol must have been looking for an excuse to remove the Grievant, not for the truth. Then it did not call its investigator to defend his work.

The Union submits that the Grievant has been consistent throughout the entire case and he was a good employee. Why would he jeopardize himself over something so stupid on a busy day in broad daylight? His co-worker would have seen anything untoward and he did not. Moreover, he knows the Grievant to be a straight arrow.

Finally the Union argues the outcome was predetermined. The Personnel Action was signed by the Director on September 6, the day before the pre-disciplinary meeting. The Patrol certainly could not have deliberated long after the 3:30 p.m. pre-disciplinary meeting on September 7 because it had the removal order ready for the Grievant when he reported for work the next day.

The Union summarizes that the removal was not for just cause. It asks that the grievance be sustained, the Grievant returned to work and granted all back pay and benefits.

VI. OPINION OF THE ARBITRATOR

This case requires me to decide (1) whether there is substantial evidence sufficient to clearly and convincingly establish that the Grievant solicited a sexual favor from the applicant and (2) whether the Patrol made errors in its processing of the case sufficient to reduce the discipline or overturn it entirely. I consider these in reverse order, looking first at the relationship of the pre-disciplinary meeting to the Personnel Action and imposition of discipline.

The Patrol asserts that the date on the Personnel Action is a misstatement. The Arbitrator has no way of evaluating this claim as no witness with direct knowledge appeared to testify about when it was actually signed. But even if it was not signed until after the pre-disciplinary

meeting, the Patrol cannot seriously expect the Arbitrator to believe it gave careful, unbiased consideration of all the facts after the meeting ended around 4:30 p.m., then wrote up the pre-disciplinary meeting officer's findings, placed these before the Director and cut the removal notice all before 8 a.m. the next day. The Patrol may ordinarily use "intend" to warn an employee he is in serious jeopardy but the outcome is not certain yet. Here I am more convinced than not that the conclusion was already determined and that the Patrol was just going through the steps, thus depriving the Grievant of the fair hearing the Collective Bargaining Agreement guarantees him. However, this error does not constitute a fatal flaw in this case, for it did not deprive him of having a full and fair hearing before an unbiased decision-maker. That hearing came belatedly, on February 27, 2002, before me (record closed March 18), but it did eventually arrive. I shall return to this after considering the question of guilt.

Turning now to that question, I am persuaded that what occurred on July 14 was essentially as described by the victim herself in her testimony at arbitration. There was no interpreter—partial or impartial—to mistranslate. I heard it directly from her and am convinced she was truthful. She admitted her trials in obtaining a drivers license and that she was disappointed that day, but that, by itself, is no reason to conclude she concocted the story. If she were going to make up such a story, it seems more likely she would have threatened to accuse the Grievant as leverage to get him to change his grading than to get revenge after the fact. But there is no suggestion she threatened him in any way, only pleaded with him for the second chance she thought was usual.

Although I find the victim's testimony credible, I do not rely on it alone. Her friends corroborate the parts of the story they did have direct knowledge of: the movements of the car, the relatively long stops, the Grievant's gestures, etc. Mr. Shao's report is easily explained as a misunderstanding based on limited knowledge, later corrected after he had heard the full story and understood the same meaning the victim did. Nonverbal behavior observed by the lead worker and the loud talking she heard but could not understand also fit the pattern of a sexual

victim reluctant to come forward (especially in a foreign culture when dealing with authority) and the outrage of friends. Against this are the Grievant's differing estimates of the times it took for things to occur, claim of a vastly different route, curious behavior for the busiest day of the year, and an inability to explain why the witnesses against him would all construct a lie so elaborate as to agree on seemingly inconsequential details such as route, stops and gestures. As for his co-worker not having seen anything unusual, had he entered the maneuverability area during the relevant period, what, if anything he may have seen would have depended on how distracted he was by his own applicant's test, how long he was there and when he entered and left the area. However, since he testified he starts a road test every 12-15 minutes and the witnesses thought the victim's took 20-30 minutes from beginning to end, he would not necessarily have been in the maneuverability area itself more than once, and then the overlap may not have been long enough for him to observe anything unusual. In fact, Ms. Qiu estimated the Grievant and victim were in the back area for only ten minutes and that another car entered as they were leaving. In short, Mr. Namie did not shed much light on the case.

Finally there is the matter of the investigation. Aside from Union contentions already discussed, the Union wants the Arbitrator to believe that the Patrol was on a mission to get the Grievant. However, it does not suggest what motive the Patrol could have for deliberately skewing the investigation against a good employee. Moreover, if the Union had a problem with the investigation, it could have called the investigator itself. The Patrol's failure to call its investigator does not undermine the Patrol's case here, as the Patrol proved its case in arbitration through the testimony of witnesses, which testimony was only supported by the investigatory interviews and written witness statement. As for the polygraph, the Patrol may have given it weight, but I do not.

In sum, I find the Grievant guilty as charged by the clear and convincing evidence discussed above. Moreover, the Grievant's actions constitute an abuse of his position. He has shown he cannot be trusted with his authority. Removal is justified. However, as found above,

the Patrol violated Article 24.05 in that the decision to terminate the Grievant was made before, rather than after, the pre-disciplinary hearing. For this reason, the Grievant's removal will be effective on March 18, 2002, the date on which written closings were received and the record of the hearing closed. He is awarded back pay and benefits for the period from his premature termination up to and including March 18, 2002.

VII. AWARD

The grievance is granted in part, denied in part. There was just cause for termination but the Employer violated Article 24.05. The Grievant's termination date shall be adjusted to March 18, 2002, and he shall be given back pay and benefits for the period of September 9, 2001, through March 18, 2002, less normal deductions including any earnings he may have had in the interim on account of his premature dismissal. The Employer may require reasonable evidence of interim earnings. The Arbitrator retains jurisdiction for a period of ninety (90) days on the sole matter of remedy.



Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
May 9, 2002