IN THE MATTER OF ARBITRATION BETWEEN:

BROWN COUNTY SHERIFF	)	
	)	
and	)	**FMCS # 00-01056**
	)	
FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL, INC.	)	
	)	

APPEARANCES

For the Employer:

Robert W. Cross
8593 Ohio River Road
Wheelersburg, OH 45694

For the Association:

Paul L. Cox
222 East Town Street
Columbus, OH 43215

ARBITRATOR:

Patricia Thomas Bittel

Issue: Resignation/Termination

BACKGROUND

This case was heard on March 14, 2000 at the Brown County Department of Human Services in Georgetown, Ohio before Patricia Thomas Bittel, the neutral arbitrator mutually selected by the parties in accordance with Article 23(E)(4) of the collective bargaining agreement.

Grievant is a Deputy Sheriff in the Brown County Sheriff's Department. He is alleged to have begun campaigning for election to Sheriff over Labor Day weekend 1999. On September 7 he met with Sheriff Windel Crawford. Crawford claims he advised Grievant he could be fired for campaigning for political office and gave Grievant copies of the applicable state statutes.[1]

The Sheriff asserts Grievant resigned during this meeting, recalling they shook hands then Grievant cleaned out his locker. An undated memorandum signed by the Sheriff states as follows:

> On September 7, 1999 at 3:00 p.m. Dwayne Wenninger verbally advised me that he was resigning his position as a Deputy for the Brown County Sheriff's Department.

This memorandum appears to simply be a memo to file; neither Grievant nor the Union were sent a copy.

Sheriff Crawford subsequently met with Grievant and Union Representative Jerry Crawford. During this meeting Deputy Crawford said he explained that Grievant was not going to resign. However, in a letter dated September 13, 1999 to Grievant, Sheriff Crawford stated as follows:

---

[1] ORC 123.1-46-02 states: "(C) The following activities are prohibited to employees in the classified service; (1) Candidacy for public office in a partisan election; * * * (D) An employee in the classified service who engages in any of the activities listed in paragraphs (C)(1) to (C)(13) of this rule is subject to removal from him or her position in the classified service." ORC 124.57 prohibits officers or employees in the classified service from soliciting or receiving campaign contribution.

> This letter is a request, since you have resigned your position with the Brown County Sheriff's Department, to turn in your department owned uniform's, identification and equipment. It would be greatly appreciated if you would do this as soon as possible.
>
> Thank you for your cooperation in this matter.

That same day the instant grievance was filed stating as follows:

> Grievant was terminated without just cause and without due process. There was no written statement of charges, no disclosure of available evidence, and there was no predisciplinary hearing. Furthermore even if disciplinary action were warranted it was not taken within 10 working days.

The remedy requested was Grievant's reinstatement with back pay and benefits.

The grievance was fully processed, culminating in the instant arbitration proceeding. The Employer maintains that because Grievant has resigned, his case is not substantively arbitrable. The parties jointly submitted the following issue on the merits: Whether *Grievant was terminated? If so, whether the termination was for just cause? If not, what shall the remedy be?*

DISCUSSION

Arbitrability

The parties sharply disagree on whether Grievant actually resigned. The Employer's objection to arbitrability is premised on a finding that Grievant did in fact resign. In its view, this defeats the arbitrability of the case.

This argument is circular because the Arbitrator must make a determination as to whether Grievant actually resigned before determination of arbitrability could be made, yet cannot make this determination without proceeding with arbitration on the merits.

For this reason, the question of arbitrability is subsumed in the question on the merits. Clearly, if Grievant voluntarily resigned there was no termination without just cause and the grievance would be dismissed. Because the protest to arbitrability cannot be addressed without proceeding on the merits, it cannot function as a bar to arbitrability.

Analysis of Evidence

Sheriff Windel Crawford testified that he saw Grievant at the tobacco festival and received reports that Grievant was in uniform with signs on a float over Labor Day weekend. He said he called Grievant to his office and advised him he could not do this and could be fired for it. He claimed Grievant replied "No, I quit." He said he asked Grievant when and Grievant replied that he guessed now is as good as any, then left and cleaned out his locker.

Crawford asserted the undated memo was an acknowledgment of the resignation and that the September 13 letter was a request for Grievant to turn in his uniform and I.D., noting Grievant did not return these items when he resigned on September 7. Crawford asserted he did not fire Grievant and that when he left his office on the seventh, Grievant shook his hand and said he would run a clean campaign. He said if Grievant had not resigned, he would have taken action to terminate his employment. Sheriff Crawford stated he had no written confirmation of Grievant's resignation on the seventh, since Grievant said he would drop it off later but did not do so. He recalled other employees have orally resigned and followed up with a letter of resignation later, claiming this is not unusual.

Sheriff Crawford recalled that subsequent to the meeting on the seventh, he met with Grievant and Deputy Jerry Crawford during which Grievant asked when he wanted him to leave. Sheriff Crawford said he replied "You resigned so you might as well leave now." He related that Deputy Crawford stated he understood

Grievant was not going to resign, to which Sheriff Crawford replied "Since you are not going to resign I'll have to get back to you."

Sheriff Crawford recalled having fired another employee, Bette Coburns, on about January 26 after Coburns filed a Declaration of Candidacy for the Sheriff's position. This employee received a pre-disciplinary hearing as well as notice of termination.

Jerry Crawford testified that Grievant contacted him, stating that he had just had a meeting with the Sheriff and was issued an ultimatum but did not want to give his job up. Deputy Crawford said Grievant asked if he would become involved. He related that about two days later they met with the Sheriff and explained that Grievant did not want to give his job up and that if the Sheriff wanted to get rid of Grievant he would have to fire him. He recalled the Sheriff stated Grievant had already resigned, to which Deputy Crawford reminded the Sheriff that there was nothing in writing. The Sheriff then stated "Since you are not going to resign I will have to get back with you." Deputy Crawford stated that he was under the impression that the Sheriff would contact Grievant about coming in to work that afternoon.

Grievant stated that on the seventh the Sheriff gave him a choice between being fired and resigning. He said he took some things out of his locker and then set up a meeting a few days later when he told the Sheriff "I made my decision – I want to work." He said the Sheriff responded that since Grievant was not resigning, he would contact the Department's labor relations consultant, then let Grievant know whether he would be working that afternoon. He said the Sheriff called later that afternoon and said he had not heard from the consultant so Grievant should just stay home.

Grievant said he subsequently received a letter from the Sheriff asking him to turn in his equipment. He claimed that when he left on the seventh he did not "totally 100% understand that he was accepting my resignation; a letter was

supposed to follow." Grievant acknowledged that he did clean out his locker, stating he did not keep much there. He asserted he was never paid for his accumulated vacation.

The Employer cites *Continental Whitecap*[2] for the principle that an employee may resign by oral statement as well as by written statement or course of action. Cases show that timely withdrawal of resignation may be deemed effective at arbitration where there is no reliance by or inconvenience to the Employer.[3] Written resignations have generally been recognized as effective.[4]

On September 7 Grievant tendered his resignation. He shook hands with the Sheriff and cleaned out his locker. This constitutes both an oral statement of resignation as well as a course of action. The memo to file by the Sheriff acknowledges Grievant's resignation but does not actually accept that resignation. Grievant testified without rebuttal that he first saw the memo to file on September 15 after he had been asked to turn in his identification and uniform. Since it is unrebutted that the acknowledgment was not sent to Grievant, he was not placed on notice of any acceptance of his offered resignation.

On or about September 9 Grievant retracted his resignation. At this point in time he had not confirmed his resignation in writing as expected. He had not turned in his badge or uniform. His conduct was not consistent with an outstanding tender of resignation, much less one that had been accepted.

The Sheriff acknowledged the retraction when it was made, and articulated his understanding that Grievant was not going to resign. After it was pointed out the resignation had not been reduced to writing, he no longer maintained that it was too late for Grievant to retract his resignation or that the resignation had

---

[2] 90 LA 1119 (Staudlahar, 1988)
[3] Elkouri & Elkouri, *How Arbitration Works* (BNA Books, 1997) 897-898.
[4] *Id*

already been accepted. Instead, he indicated he would respond to the retraction after conferring with the labor relations consultant.

There was no demonstrable reliance by the Employer on Grievant's initial offer of resignation. There is no evidence of inconvenience to the Employer due to the retraction. There was no apparent detriment to the Employer in recognizing Grievant's retraction of resignation on or about September 9. Indeed, the Sheriff acknowledged Grievant's retraction and stated his intent to confer with his labor relations consultant and get back in touch with Grievant about his status. The words "Since you are not going to resign" presume, acknowledge and confirm the retraction.

The Sheriff's response is incompatible with a position that Grievant's resignation had already been accepted. The evidence shows Grievant's initial offer of resignation was never reduced to writing as mutually expected by the parties. It was not actually accepted before being retracted, and the Sheriff affirmed the retraction. These facts do not establish an effective resignation, but only an offer and subsequent retraction of that offer. After the meeting on September 9 there was no longer an offer of resignation to accept; it had been retracted. It follows that at that point, the employment relationship had not been severed.

The Sheriff contended there was no termination in this case. The evidence indicates the matter was handled as a resignation and not a termination. However, the September 13 letter advised Grievant to turn in his badge and uniform. Grievant could no longer work as a deputy without uniform or badge. Hence, the letter severed the employment relationship and constituted a termination. Article 22(A) prohibits removal of a bargaining unit member without just cause. The collective bargaining agreement makes no provision for removals without application of the just cause standard.

The only evidence that Grievant was a candidate for sheriff in September 1999 is Sheriff Crawford's testimony that he was seen at the tobacco festival.

There is no description of what he was seen doing there. The Sheriff also cited reports that Grievant was seen in his uniform riding a float in a Labor Day parade. While the evidence certainly implies that Grievant was campaigning, there is no direct evidence to that effect. Mere implication is not sufficient to prove facts at arbitration.

There is no cognizable evidence on the record that Grievant was a candidate in September 1999. Just cause for his termination at that time has not been established. Evidence of Grievant's alleged statutory violations prior to December 22 cannot be found in the record. Hence, the conclusion must be reached that the September 13 termination was without just cause.

REMEDY

Grievant was terminated as of September 13, 1999 and just cause for the termination has not been established. The question of remedy is complicated by the legal ramifications of reinstatement in view of Grievant's actual candidacy for Sheriff after the termination.

Article 27 articulates the parties' intent that the Agreement comply with applicable law. The Arbitrator interprets this provision as articulating the parties' intent that remedies at arbitration also comply with applicable law. The law definitively establishes that Grievant is prohibited from candidacy for public office while in the employ of the Brown County Sheriff's Department.

There is no convincing evidence that Grievant solicited contributions to his campaign in violation of O.R.C. Section 124.57. However, O.R.C. 123.1-46-02 flatly prohibits employees in classified service from candidacy in a partisan election and states the employee is subject to removal from his or her position in the event such candidacy is sought.

Grievant's candidacy is not unequivocally established until his Declaration of Candidacy was filed and stamped received December 22, 1999. The Sheriff testified that employee Coburns was not terminated until after filing his Declaration for Candidacy. Without question Grievant became subject to removal under ORC Section 123:1-46-02(D) at the time he filed his Declaration of Candidacy.

Retroactive reinstatement on or after December 22 is therefore prohibited as a matter of law. Grievant shall be deemed reinstated from the date of his removal from payroll through December 21, 1999 with back pay and retroactive benefits. Effective December 22, 1999 he shall be deemed terminated for just cause. Because just cause exists as a matter of statutory law, the contractual requirement of statutory compliance controls over the due process procedures in the contract. Hence, no further remedy is available on due process grounds. The Arbitrator will retain jurisdiction for 60 calendar days to resolve any dispute regarding this implementation of this award.

Respectively Submitted,

Patricia T. Bittel

Patricia T. Bittel

Arbitrator

Dated: April 17, 2000