

ARBITRATION AWARD SUMMARY

OCB Award Number: 275

OCB Grievance Number: 31-01-880929-0048-01-06 Cont Swant

Union: AFSCME 31-01-880603-0025-01-07 James

Department: ODOT

Havenstein

Arbitrator: Harry Crewson

Management Advocate: Robin Thomas/Meril Price

Union Advocate: Bob Rowland

Arbitration Date: 5-3-89

Decision Date: 5-3-89

Decision: Denied/Modified

ARBITRATION HEARING

ODOT, District 1, Lima, Ohio

May 3, 1989

OHIO DEPARTMENT OF TRANSPORTATION

(Hereafter referred to as the Department)

and

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION/AFSCME

(Hereafter referred to as the Union)

Grievance No. 31-01 (9/29/88) 48-01-06

Curt Swank, grievant

For the Union

Bob Rowland, Advocate, Staff Representative, OCSEA

Curt Swank, grievant

For the Department

Robin Thomas, Advocate, Office of Collective Bargaining

Meril Price, Office of Collective Bargaining

Henry Horne, ODOT, District #1

Issue:

Was the five (5) days suspension, effective September 26, 1988, for just cause? If not, what should the remedy be?

Position of the Department

On July 25, 1988, the grievant, Curt Swank, while driving a tractor-mower in one lane of a closed section of road, deliberately turned his vehicle toward members of a work crew in the other lane. Two workers moved to avoid being struck and the mower did strike a Department vehicle. The grievant proceeded to drive the damaged mower down the road for a few hundred feet.

Damage to the tractor-mower was costly and the possible harm to other workers could have been serious. In an investigation of the accident by the State Highway Patrol, the grievant plead no contest to the charge of reckless operation; he was fined \$100. and his license was suspended until January 1, 1989.

The grievant had two previous reprimands.

Witnesses were called to testify.

The five (5) days suspension was for just cause and is commensurate with the seriousness of the offense. The grievance should be denied in its entirety.

Position of the Union

The incident involved some horseplay between the grievant and a second person, Doug. Stephens. There had been a previous incident between the two individuals which also involved the spraying of water. Stephens was not disciplined in the incident at issue.

Because the grievant, who was wearing glasses, was sprayed in the face by Stephens, his vision was temporarily impaired and he lost some control of the tractor-mower. The grievant did not try to run down Doug Stephens.

The listing of repair costs to the tractor-mower by the Department was not received by the Union prior to the arbitration hearing. The costs appear to be inflated.

A witness was called to testify.

The five (5) days suspension was not for just cause; rather it was punitive. The suspension should be expunged from the record and the grievant should be reimbursed for the five (5) days he was suspended.

Decision

The position of the Department is sustained.

The grievance is denied in its entirety.

Comments

An examination of the written and oral testimony supports the contention that the suspension was for just cause. Property damages and the potential harm to other workers underscore the seriousness of the behavior of the grievant in this incident. The references to extenuating circumstances and provocations were not persuasive.


Harry B. Crewson
Arbitrator

Grievance No. 31-01 (6/3/88) 25-01-07

James J. Hauenstein, grievant

For the Union

Bob Rowland, Advocate, Staff Representative, OCSEA
James J. Hauenstein, grievant

For the Department

Meril Price, Advocate, Office of Collective Bargaining
Robin Thomas, Office of Collective Bargaining
Henry Horne, ODOT, District #1

Issue:

Was the grievant disciplined for just cause?
If not, what shall the remedy be?

Position of the Department

The grievant, James Hauenstein, reported to work at the District 1 garage at approximately 11:30 p.m. on February 24, 1988. He carried a pizza and a paper sack into the garage and placed them on "the counter" or work bench by the wash bay. A fellow employee and a guard testified that the sack contained cans of Dr. Pepper and one can of Miller beer.

On the morning of February 25, 1988, as he was preparing to leave the garage, the grievant was stopped by the Superintendent and the Assistant Superintendent and asked about the contents of his sack. Upon inspection, the sack contained cans of Dr. Pepper and one can of Miller beer.

The grievant was charged with the possession of alcoholic beverages while on duty; he was not charged with the consumption of alcoholic beverages while on duty.

Witnesses were called to testify.

The grievant was given a three (3) days suspension, effective May 24, 1988.

The advocate contended that the Union allegation of possible entrapment and other extraneous claims should be ignored. The fact is, there was a violation of rule #9 by the grievant. The suspension was for just cause. The grievance should be denied in its entirety.

Position of the Union

The advocate contended that the Department did not prove that the grievant violated rule #9. Grievant testified that he had come to work from another job on the night in question and that he did

bring a pizza and cans of Dr. Pepper as he usually did.

He offered a piece of pizza and a can of soda pop to a fellow worker.

The grievant stated that he did not put a can of beer in the sack and that he did not, knowingly, carry it to work that night. As a Union official, he said that he was very familiar with the rule about alcoholic beverages. He said that he might have been the victim of a set-up or a bad joke.

The advocate maintained that the grievant did not keep an eye on the sack when it was on the bench and, also, that the sack was in the refrigerator for some three hours. In addition, there was some confusion among the witnesses as to the time when each saw the can of beer, the distance from the sack when each saw it, and the position of the sack (on its side and partly opened or standing upright)

Witnesses were called to testify.

The grievance should be upheld. The grievant should be awarded three (3) days of pay plus any overtime pay that might have been lost during the suspension and the disciplinary action should be expunged from his record.

Decision


The suspension of three (3) days shall be reduced to one (1) day. The grievant shall be reimbursed for two (2) days of wages at his rate of pay at the time of the suspension.

Comments

The evidence presented by the advocate for the Department did provide just cause for some disciplinary action. However, a careful examination of the written and oral testimony gave rise to many questions. There were contradictory statements by witnesses regarding the people involved in a certain alleged conversation. There were apparent differences of opinion as to the position of the sack (on its side or standing upright); whether it was partly or completely open; whether the can of beer was seen from approximately 10 feet or from directly above the upright sack; and whether the can of beer was laying beside the cans of Dr. Pepper or attached to the plastic carrier with the other cans.

Also, the grievant had no record of previous disciplinary action. In addition, the written and oral testimony of the grievant had the aura of credibility.

Given the numerous ambiguities attached to this incident as well as the previous record of the grievant and his testimony, the reduction of the suspension from three (3) days to one (1) day seems to be a justifiable compromise between the positions of the Department and the Union.


Harry B. Crewson
Arbitrator