ARBITRATION AWARD SUMMARY

OCB Award Number: 308

OCB Grievance Number: 31-12-880926-0041-01-06 Gary Snyder

Union: OCSEA/AFSCME

Department: ODOT

Arbitrator: Frank Keenan

Management Advocate: Don Wilson

Union Advocate: Linda Fiely

Arbitration Date: 6-8-89

Decision Date: 8-2-89

Decision: Modified

Hearing Date
6/8/89

ARBITRATION
BETWEEN

STATE OF OHIO,
OHIO DEPARTMENT OF TRANSPORTATION
(PAINESVILLE GARAGE)

and

OCBGR #31-12-(88-09-26)-0041-01-06

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11, A.F.S.C.M.E.,
AFL-CIO

APPEARANCES:

For the Agency:
Don Wilson, Advocate
Office of Collective Bargaining
Ohio Department of Administrative Services
Columbus, Ohio

For the Union:
Linda K. Fiely, Associate General Counsel
O.S.C.E.A., Local 11, A.F.S.C.M.E., AFL-CIO
Columbus, Ohio

OPINION AND AWARD OF THE ARBITRATOR

FRANK A. KEENAN
ARBITRATOR

Statement of the Case:

The Grievant in the case, Gary Snyder, was employed as a Mechanic 2 by the Agency at its Painesvillle garage where some thirty (30) employees are employed. He was hired May 30, 1978. Effective September 16, 1988, the Grievant was terminated from this position of employment. His removal letter reads in pertinent part:

> "This letter is to inform you that you are hereby removed from employment . . .
>
> . . . After reviewing the recommendation of the impartial administrator and others, it has been determined that just cause exists for this action.
>
> The charge you have been found in violation of is Directive A-301, Item 8--Theft of State Property."

This latter directive is posted on the garage's bulletin board, and provides at the cited item that theft of State property warrants suspension or removal for a first offense and removal for a second offense.

Another Directive, namely no. A-107, was promulgated March 1, 1986, superseding a prior Directive dated January 18, 1965, Directive 5-C. Directive A-107 provides in pertinent part as follows:

> "Subject: Stolen or Missing State Property. The purpose of this Directive is to clarify the policy and procedure of the Department with regard to stolen or missing property.
>
> A. STATE PROPERTY
>
> 1. Materials which appear to be discarded, or scrap materials, or damaged materials, or materials which have been detached from the state property that may have been a part of or used with such a property, are still state property.

2. No state property or materials of any kind can be taken by any employee, and no employee can allow anyone else who is not a state employee to take any state property or materials regardless of its condition or location.

3. State property remains state property until it is properly disposed of in accordance with Department procedures.

B. REPORTING PROCEDURE

1. It is the duty and the responsibility of every employee of this Department to report to his immediate Superior the theft or loss of any State property assigned to him or under his control. This report shall be promptly reported through the regular reporting channels to the Division or District Deputy Director. . . .

This Directive was briefly posted on the Garage's bulletin board at the time of the promulgation and thereafter taken down. Additionally, a meeting was conducted at the time of its promulgation among the employees at the Painesville garage to discuss the provisions of the Directive. Attendance was taken, but the attendance record could not be located and it was not therefore produced at the hearing. In this regard the Grievant, and fellow employee Ontko, who testified at the hearing on the Grievant's behalf did not recall seeing this Directive posted, nor did they recall any employee meeting at which it was discussed.

The events which gave rise to the Grievant's discharge occurred on March 11, 1988. On that date the Grievant took a piece of sheet metal some four by nine feet and cut it into three pieces right there in the garage. The Grievant took two pieces and put them in his car trunk. Another piece was given to fellow employee Pastrano. Prior to cutting up this sheet metal the Grievant contacted fellow employee Huck Cameron. As the Grievant explained at the arbitration hearing, he contacted Cameron because he, Cameron, worked with sheet metal every day and he wanted to make sure he,

Cameron, didn't have a use for. Cameron evidently assured him that he didn't have a use for it. The Grievant conceded that Cameron "had no authority to give me permission to take anything."

The Grievant asserted that he regarded the sheet metal as junk because it was rusty. In this regard the sheet metal had been lying around the garage for some three years. Because it was snagging employees and their clothes as they walked by it, it was moved to under a window, where it evidently often got wet. Nonetheless, management witnesses who viewed the sheet metal pieces in the Grievant's trunk characterized them as only slightly rusty.

It was the Grievant's testimony that when Pastrano came along he asked for a piece of the sheet metal. Assuring him that Cameron had characterized it as junk, the Grievant gave Pastrano a piece.

It came to management's attention that Snyder had taken some of the sheet metal. The Ohio State Highway Patrol was called in. In the presence of his Union representative, management and the Patrol's Trooper confronted the Grievant. The Grievant cooperated and conceded he'd taken the metal and given some to Pastrano. He opened his trunk and showed it. Thereafter criminal proceedings were instituted against both the Grievant and Pastrano for theft. The Grievant was convicted; Pastrano was acquitted. What transpired at the criminal trials was not delved into at the hearing. Pastrano was in no way disciplined.

At the hearing the parties entered into the following stipulations.

> Mr. Snyder had no previous record of discipline prior to his removal for theft of state property.

On March 11, 1988, Mr. Snyder was confronted by ODOT supervisors regarding sheet metal that was later found in the trunk of his car.

Acting under ODOT Directive A-301, Mr. Bernard Hurst, Director of ODOT, informed Mr. Snyder that he was removed from his employment with ODOT for violation of Directive A-301, Item 8, Theft of State Property.

Todd Hersman was hired April 26, 1986, and was assigned to Ohio Department of Transportation, District 12.

On June 13, 1986, Mr. Thomas Brinkman, an Auto Mechanic III, and Mr. Richard Peck, an Auto Mechanic II, employed at the Lima Garage of ODOT District 1, took a 1981 Dodge truck engine from an open lean-to that was considered salvage. They contended they believed the engine was to be sold as scrap iron to the salvage company and they took it for their own personal use.

Investigation by the ODOT of possible theft brought forth the employees who admitted that they had taken a salvaged engine. On June 20, 1986, Mr. Brinkman and Mr. Peck returned the engine to ODOT property. The prosecutor was contacted regarding filing of theft charges.

On October 17, Brinkman and Peck entered a plea of guilty to a charge of disorderly conduct. Following the advice of their lawyer, they contended that the plea should not be construed as an admission of guilt to any theft offense.

An A-302 hearing was not held, but a waiver of right to an A-302 hearing was signed on November 19, 1986. Director Warren Smith imposed a 30 day suspension to each employee.

This matter is properly before the Arbitrator for disposition.

Other matters of note include the fact that Hersman was caught in 1986 in the process of stealing gas. ODOT viewed it as an attempted theft and not a theft. He was given a ten (10) day suspension. Hersman was not referred to law enforcement authorities and no charges against him were made.

It appears that from time to time employees at the Painesville garage take from it materials they regard as junk, whether the property of the State or found along the roadways and brought back to the garage. The record fails to show, however, that management was aware of and condoned such practices.

Finally it is noted that the record reflects that there was a theft and pilferage problem at the Painesville garage.

The Union's Position:

The Union takes the position that "the Employer has not met the burden of establishing removal as the appropriate penalty given the circumstances in this case by the requisite degree of proof."

It is the Union's position that

". . . Section 24.02 of the contract establishes that the Employer will follow the principals [sic] of progressive discipline.

Section 24.05 of the contract provides that `[d]isciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.'

The Union contends Grievant has been treated more harshly than other ODOT employees for similar offenses. ODOT's disciplinary directive A-301 provides:

> [i]t is of . . . importance that disciplinary be administered fairly and consistently throughout this department.

Thirty (30) day suspension dated January 8, 1987, were given to ODOT employees Thomas Brinkman and Richard Peck for multiple charges including theft of State property. An investigation conducted by ODOT disclosed that the two (2) employees had taken a 1981 Dodge engine. The investigation determined that both employees admitted loading the engine on a State vehicle without permission and transporting it to Peck's residence. The employees intended to use the heads from the engine which both knew to have value. The employees voluntarily returned the property. Theft charges were brought against them and both pled guilty to a lesser offense. Thereafter, the thirty (30) day suspensions were imposed. The Union argues that the case at bar is similar to those cases. Grievant herein like Peck and Brinkman thought the metal was salvage or junk. In all cases, the employees confessed, and then, cooperated to return the property. In addition, to the Grievant's advantage, he had a long good work history. Further, Grievant thought the metal was without value to his employer. Brinkman and Peck knew parts in the engine had value.

Another example of disparate treatment is presented by the circumstances of Todd Hersman. Mr. Hersman received a ten (10) day suspension dated November 3, 1986 for theft of ODOT property. Mr. Hersman was in the process of obtaining five (5) gallons of gas to place in his personal vehicle when he was caught in the act by his supervisor, Charles Schupska. The Employer presented testimony from Mr. Rush (who is not involved in the disciplinary decision making

process) that this case was different from the case at bar for several reasons. One reason presented was that the act had not been completed by the Employee. The Union submits that it is clear that the gas was not actually placed in the tank of the employee's personal car only because the employee was caught by his Employer. The Employee had taken control over the Employer's property which was clearly of value. He intended to take the gas for his personal use. Mr. Rush also argued that the case was different because the Employer had failed to press charges against the Employee. The Union argues that the Employer's failure to press charges cannot be construed to be a factual distinction because that is a decision that is wholly up to the Employer and is subject to selective abuse. The Arbitrator must consider the circumstances surrounding the actual incidents in order to determine if the facts are similar. Unlike the Grievant, Mr. Hersman also was a short term employee of less than one (1) year at the time he was disciplined for theft as compared to the Grievant's ten (10) year work history.

Mr. Pastrano was also treated differently in that he was not disciplined for taking ODOT scrap metal without the permission of a supervisor.

Further the Employer improperly failed to give deference to mitigating circumstances present in the case when it removed the Grievant. The Employer's disciplinary policy provides that a suspension may be appropriate in the first instance of theft. Since the disciplinary policy gives notice that a lesser penalty may be appropriate, this creates a reasonable expectation in Employees that

mitigating circumstances will be considered by the Employer. In fact, a management representative considered the mitigating circumstances in this case and recommended a suspension."[1]

The Union also asserts that

". . . [t]here are several mitigating circumstances to consider in this case. The Grievant had already provided the Employer with ten (10) years of good service previous to this incident without discipline. It should also be considered that when he took the metal, Grievant thought it had no value to his employer. He attempted to ascertain the value and usefulness from a co-worker. In fact, the property was of little value according to testimony from Mr. Ontko. The Union's testimony regarding the metal was uncontroverted. The property was not taken in stealth. It was taken in full view of numerous shop employees during the regular hours of work at the time when supervisors could have walked in and discovered him at any time. His cooperation with his employer should also be considered.

The Employer asserts that the Employer had a clear policy that even if ODOT property was scrap or junk, employees were clearly aware that they were prohibited from taking the property for personal use. The Union submits that the facts clearly indicate otherwise. Grievant and Tom Ontko both testified that they were not familiar with the Employer's Policy #107. Mr. Ontko testified that he had not seen the

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[1] The reference is to pre-discipline hearing, Hearing Officer Richard Barnick's recommendation to the Deputy Director dated August 9, 1988.

Policy prior to the date of the Arbitration hearing. Both testified that it had not been posted or disseminated at the garage. Neither of management's two (2) witnesses testified that they had personally disseminated or posted that particular policy (emphasis supplied). The evidence indicates actual practices in the yard were different than the written policy regarding employees taking scrap from the yard. Mr. Ontko testified at the time of the incident which is the subject of this case, that it was a regular and recurring practice for employees to take home scrap or property considered to be of no value or use to the Employer. Further, Mr. Pastrano's actions in this case provide support that this was the practice. Mr. Ontko testified he would not have sought permission to remove the scrap metal if he had a use for the metal. Just like the Grievant checked with a non-supervisory co-worker, Mr. Pastrano checked with the Grievant about taking the metal home. His actions and Mr. Ontko's testimony provide support for the position that employees took this type of property home without obtaining clearance from supervisors. Further, Mr. Ontko's testimony that he thought nothing suspicious or bad of the Grievant's intent and actions to take the property indicates that Policy #107 was not followed. The Grievant's actions are not those of a person who thought he was committing a theft. He made no efforts to conceal his activities. All his actions were blatant. He informed Huck Cameron and Mr. Ontko of his intentions.

The Grievant's long work history and harm that a removal of this nature would cause him must be balanced against the nature of the wrong he committed against the Employer in taking a piece of scrap

metal of slight value. Peoples Gas Light & Coke Co. 44 LA 234 (Drake, 1965); Sparta Stones Inc., 33 LA 40 (Howlett, 1959).

It is the Union's contention that "to impose discipline excessively amounts to a punitive rather than a corrective act."

So it is that "the Union asks the Arbitrator to sustain the grievance in part by reinstating the Grievant and to modify the removal to a penalty appropriate to the circumstances and ordering such benefits and back pay the Arbitrator deems fair and appropriate."

The Agency's Position:

The Agency contends that it "acted correctly" in removing the Grievant under ODOT Directive A-301 and A-107 for theft of State property. It is the Agency's contention that "the Grievant was found guilty of theft in a court of law by a jury of his peers. Therefore, under Directive A-301, the amount of proof required to sustain the discharge is not the issue . . . The highest level of Management at ODOT considered the penalty appropriate considering that it was using one of its options under the policy and that it needed to send a message regarding the rash of stealing taking place in ODOT District 12. Clearly, Directive A-301 . . . allows removal or suspension for the first offense."

Concerning the Union's contentions of disparate treatment, the Agency contends that

> ". . . successful claims of this kind require that the Employer be aware of certain irregularities, condones those irregularities, and treats like instances in a dissimilar fashion. These pertinent facts were not established by the Union in this case.

In fact, the State is puzzled by the examples of alleged disparate treatment offered by the Union in its testimony and exhibits.

John Pastrano was never convicted of theft in a court of law; Mr. Snyder was.

Thomas Brinkman and Richard Peck (ODOT District 1) were never convicted of theft in a court of law; Mr. Snyder was.

Todd Hersman was never convicted of theft in a court of law; Mr. Snyder was. The fact was that he intended to steal, and was disciplined.

In the above examples cited by the Union, the circumstances were different enough that the Director decided that a penalty of removal was not justified.

Frank Belanger, ODOT Supervisor in District 12, testified to the consistence of Management's application of the discipline guidelines in Directive A-301 when in direct testimony he reviewed five recent theft cases in that ODOT area. The Management acted to remove in each case and each case involved a legal conviction. One was removed (Mr. Snyder), three resigned prior to removal, and one is pending.

The State believes the Union's disparate treatment argument does not establish that the Director of ODOT treated like instances in a dissimilar fashion. The fact that persons got different penalties for theft does not mean disparate treatment. The disciplinary grid under Directive A-301 permits varying discipline. In all cases offered by the Union, everyone except Pastrano was removed or given a major suspension. . . . One must also consider that the resulting investigations identified other employees who the employer acted to

remove following their theft convictions. Mr. Snyder's removal was not done in a vacuum."

In addition it is the Agency's contention that "in regard to the employee's perception that they had the right to decide what was scrap and what wasn't, this would leave it up to their discretion of what was the standard for personal use. Clearly, no evidence was shown by the Union that Management of ODOT condoned this personal-judgment use of scrap. The Agency asks rhetorically: "How can we rely on employees to determine what was usable by the Ohio Department of Transportation?"

It is the Agency's position that

"the Grievant . . . was convicted and his case stands on its own in relationship to the Management policies applied and therefore Management has established just cause. The Arbitrator must decide whether the discipline was commensurate with the act under policy Directives A-301 and A-307.

The State would ask the Arbitrator not to substitute his judgment on managing the work force for that of the ODOT Director, who is the hiring authority for the Department, and unlike any Arbitrator, would know the complete workings of the ODOT facilities. Stockham Pipe Fittings Co., 1 LA 160 (McCoy, 1945).

The Agency argues that "since Management's actions in removal of Mr. Snyder cannot be construed in any way as a denial of his rights under any article of the Agreement, we respectfully ask the Arbitrator to deny this grievance in its entirety."

Issue:

The parties being unable to agree on the precise issue, the issue is framed by the undersigned as follows:

Was the Grievant discharged for just cause and if not, what is the appropriate remedy?

Discussion and Opinion:

As a logical starting point, it is noted at the outset that theft of employer property ranks as one of the most serious breaches of the reasonable expectations of the employer-employee relationship such that discharge for a first offense, absent "extraordinary mitigating circumstances" is generally upheld. And in this regard, a moderately long period of employment and a record unblemished by prior discipline, while mitigating circumstances, are simply not the kind of "extraordinary" mitigating circumstances required in a theft case. Because of the seriousness of the offense of theft I am unimpressed with the Union's contention that the managerial option of suspension or removal somehow misled or failed to put the Grievant on notice, that theft could well result in discharge. Rather this option simply preserves the reality of extraordinary mitigating circumstances undermining the propriety of discharge. I am also unimpressed with the Union's "of little value" contentions. It is also noted that it is generally held that theft is one of those offenses for which "progressive" discipline need not be applied.

It is additionally noted that it is now well established that lenient employer policies can be made more stringent and "tightened up" following clear notice to employees that such will be the case. Here it is clear as

the Brinkman, Peck and Hersman cases demonstrate, that despite the seriousness of theft and attempts at same, the Agency had a rather lenient theft policy. However, these situations arose before the "clarification" of the theft policy in Directive A-107. In the clearest of terms this directive let employees know that nothing was to be regarded as scrap or junk which could be taken without supervisory permission. Through this directive the Agency was entitled to tighten up its theft policies. The question arises, however, was this directive communicated to the employees at the Painesville garage, and in particular to the Grievant. In my judgment the answer to that question must be in the affirmative. Thus the record reflects that the direction was posted for some short period of time. Employees are reasonably expected to read the bulletin board and hence are deemed to know of its contents. Additionally, this is a small workforce, and the inescapable inference is that following the posting of the directive and the employee meeting stressing its contents, employees at the garage discussed the matter and in this manner the Grievant came to know of it.

Thus, if the Grievant is to escape the otherwise appropriate consequences of his admitted act of theft mainly, discharge, it must be in his disparate treatment contentions vis a vis Pastrano. For the reasons which follow, this contention is found to be meritorious.

As other arbitrators construing this Contract have observed, its "just cause" for discharge/discipline standard calls for a de novo presentation of the case against the Grievant before the Arbitrator. This, it simply is inadequate to defer to the criminal justice system. Under the just cause standard it does not suffice to say that one employee guilty of virtually

the same conduct as another is subject to discipline because the criminal justice system found him guilty whereas it found the other innocent. If the Agency elects to defer to the criminal justice system with all its varieties of prosecutorial discretion and juries, then it does so at its peril. Here then is room for a slight distinction in Pastrano's and the Grievant's situation and that is that Pastrano did not initiate the theft, but merely took part in it. Pastrano, like the Grievant, is deemed to be aware of Directive A-107, and its proscriptions against taking any State property without supervisory permission. Moreover, Pastrano had to be well aware that no supervisory permission existed. But these circumstances are the critical elements that make out "theft" with respect to both employees.

Under the disparate treatment concept embedded in the applicable just cause standard, the slightly mitigating circumstance of Pastrano not having initiated the theft is insufficient to support the totally disparate treatment of no discipline whatsoever versus discharge. Thus as Arbitrator J. Charles Short observed in Alan Wood Steel Co., 21 LA 843, 849 in discussing the arbitral principles involved with the just cause standard's prohibition against disparate treatment, said prohibition ". . . requires like treatment under like circumstances. In the cases of offenses the circumstances include the nature of the offense, the degree of fault and the mitigating and aggravating factors. There is no discrimination, or no departure from the consistent or uniform treatment of employees, merely because of variations in discipline reasonably appropriate to the variations in circumstances." (Emphasis supplied) In my view one standard which emerges from these concepts is that where, as here, the nature of the offense (theft) is the same, but other circumstances vary, variations

in the discipline imposed must nevertheless be reasonably appropriate to the variations in the other circumstances. Stated otherwise, an essentially proportionate relationship must be maintained. Discharge of the Grievant in the face of no discipline for Pastrano is clearly not a reasonably appropriate variation in light of the only slightly different circumstances. The Grievant's discharge must therefore be set aside. Because of the seriousness of the offense, notwithstanding Pastrano's good fortune in escaping any punishment whatsoever, the Grievant is to be reinstated without loss of seniority, but without back pay.

Award:

For the reasons more fully set forth above the grievance is sustained in part and denied in part. The Agency is directed to forthwith implement the remedy more fully set forth above.

Dated: August 2, 1989

Frank A. Keenan
Arbitrator