

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO
DEPARTMENT OF TRANSPORTATION

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11, AFSCME, AFL-CIO

ARBITRATION AWARD

CASE NUMBER: 31-07-890323-0020-91-06
ARBITRATOR: John E. Drotning

I. HEARING

The undersigned Arbitrator conducted a Hearing on November 14, 1989 at 65 E. State St., Columbus, Ohio. Appearing for the Union were: Patrick Mayer, Matt Mahoney, Ida Tomason, and the grievant, Kristen Hosier. Appearing for the Employer were: Michael Duco, Dennis Van Sickle, Larry Rowan, Raymond Black, Ron Raines, and Ruth Buck.

The parties were given full opportunity to examine and cross examine witnesses and to submit written documents and evidence supporting their respective positions. No post hearing briefs were filed and the case was closed on 11/14/89. The discussion and award are based solely on the record described above.

II. ISSUE

The parties jointly asked:

Did the Department of Transportation remove the grievant, Kristen Hosier, from her position of Highway Worker 1 for just cause in accordance with Article 24 of the Agreement?

If not, what should the remedy be?

III. STIPULATIONS

The parties jointly submitted the following stipulated facts:

1. Ms. Kristen Hosier was employed with the Department of Transportation as a Highway Worker 1 from December 29, 1986 to March 23, 1989.
2. Ms. Hosier's work schedule is 9:30 a.m. to 6:00 p.m. with a one-half hour lunch. Further, she works alone from 4:00 p.m. to 6:00 p.m..
3. Grievant knew of and read Directive A-301, the disciplinary guidelines.
4. Directive A-301 is posted on the bulletin board in the garage which Grievant worked.
5. Grievant pumped six (6) gallons of ODOT gasoline into her personal vehicle on February 7, 1989.
6. The Highway Patrol found five to eight dollars in the Grievant's purse on February 7, 1989.
7. The Grievant has no prior disciplinary record.
8. ODOT employees have been both suspended and removed for theft.
9. In District 7, no disciplinary action in over ten years has involved theft.
10. This matter is properly before the arbitrator and is free of any procedural defects.
11. The Grievant was prosecuted for theft, the county prosecutor recommended pre-trial probation and the Court dismissed the charges upon payment of court costs without pre-trial probation.
12. Ms. Hosier worked same hours and duties from 2/7/89 to 3/23/89.
13. There are 4 to 5 gas stations close to her house and one is four miles away.

In addition, there are Joint Exhibits identified as Joint Exhibits #1 through #5.

IV. TESTIMONY, EVIDENCE, AND ARGUMENT

A. EMPLOYER

1. TESTIMONY AND EVIDENCE

Ms. Ruth Buck testified that she worked for ODOT in District 7 as an administrative assistant. She said she had responsibility for non-engineering functions; that is, personnel, safety, etc.. Buck testified that she observed Kristen Hosier on 2/7/89 and she testified about the incident as noted on Employer Exhibit #1. This memo dated 2/10/89 reads as follows:

On February 7, 1989 at 5:50 p.m. I was going west on St. Rt. 41 in Springfield. As I always do, I looked at the O.D.O.T. garage to see if anything was going on. I observed a black truck pull east, stop and back up closer to the gas pump. Then someone with blue jeans and a blue satin sports jacket got out, went around the truck and started putting gas into it.

I proceeded west to the St. Rt. 68 south bound entrance where I waited in the left turn lane for a red light, then green, when the light changed red again I made a u-turn and went back to O.D.O.T.

As I entered the garage area the person was just hanging the gas hose and replacing the gas cap. They were heading toward the garage door as I stopped my car. It was Christian Hosier. I said, "You just put gas in you(r) personal truck." She said, "Yes, Ma'am, but I was on empty and I didn't think I could make it home. I was going to ask David Paul tomorrow if it would be O.K. I'll pay for it, I don't steal. I only got 6 gallons."

I told her it was State property and she couldn't do that. We have 503 employees, what if they all took 6 gallons of gas?

We went into the garage where I attempted to phone David Paul, acting Superintendent, but got a recording so I phoned Ray Black. (I later found out the phone number for David Paul was wrong on our posted list.) Ray suggested Ron Raines was at home so I phoned him.

Upon the arrival of Ron Raines and David Paul, Ron said a Highway Patrol report was what should be done, so that

was our next call made.

During the Patrol investigation, Christen produced \$5.00 from her purse, with which she could have purchased gas.

We were at the O.D.O.T. garage until about 8:15 p.m. These are the happenings as I saw and recall them.

Buck also testified that the State has no policy of allowing employees to borrow gas and then pay for the used gas later.

Mr. Ron Raines, General Superintendent, testified that he oversees nine county superintendents and that he has been working in Clark County for about twenty years. He testified that he is aware that employees are not to use gas from the O.D.O.T. garage for personal vehicles. He testified that he cannot borrow gas from other employees.

Ms. Hosier, said Raines, was a Highway Worker 1 and she was the custodian in charge from 9:30 to 6:30 as well as from 4:00 to 6:30 when she worked by herself.

Raines said that on 2/7/89, he got a call from Ruth Buck and was told that Grievant Hosier had put gas in her truck and she indicated that it was stupid, but she didn't have any money and had no gas.

Raines said there are available gas stations in the area.

Mr. Raymond Black testified that he was a Highway Supervisor and that he supervised road crews. Black said that Kristen Hosier lived about seven and one-half miles away from the garage and that if she had called him, he would have given her money for gas.

Black testified that Hosier's truck holds about 12 gallons and she used 6.

Black testified that he had been employed at Clark County for about eight years and all the employees know that they are not to take gas from the garage for their private vehicles. He went on to say there is no practice of using state gas and then reimbursing the state.

On redirect, Black said that Hosier was upset over the incident and he went on to say that the area where she pumped the gas was visible from route 41.

The Employer cross examined Union witnesses. Ms. Ida Tomason testified she was not an attorney.

Ms. Kristen Hosier, on cross, testified that she did acknowledge that she said she had four or five dollars in her purse after the State Highwaymen asked her to check her purse and she found a five dollar bill in the bottom of her large purse (see Joint Exhibit #5). Hosier testified that at the time she filled the truck with six gallons of gas, she was worried about making it to a gas station because her tank was empty. She testified she was not told about using gas from the garage.

2. ARGUMENT

The Employer asserts that the events are not in dispute. The Grievant acknowledged taking six gallons of ODOT gasoline and, therefore, the penalty of discharge is appropriate. The Employer notes that Arbitrator Graham stated that in the final analysis, the task facing an Employer is

twofold; namely, that it must convince the neutral that the events occurred as it asserts and that the penalty is appropriate.

The Employer also argues that in proving theft the Employer has a set of elements which Arbitrator Pincus identified; namely, that personal goods of another must be involved, the goods must be taken without consent of the other, there must be some asportation (that is removing things from one place to another), and that both the taking and the asportation must be with an intent to steal or the intent to deprive the owner of his property permanently. The Employer asserts that all the requisite elements exist. Hosier took the gas without consent and there was no practice of repaying the State and obviously, she moved the gas from the tank to her car and, therefore, there was intent to steal.

The Employer notes that the Union will argue that Hosier told Ms. Buck that she intended to borrow the gas and pay back the state, but this occurred only after she had been confronted with the act. The State goes on to argue that the grievant pumped the gas when she was alone and that she did have about five dollars in her purse and that there were gas stations close to her which she could have used to fill her tank. Moreover, she lives only a short distance from the garage and she could have called her husband. In addition, the Employer asserts that rather than take six gallons, she could have taken a gallon or two in order to get home.

For all these reasons, the State argues that there is just cause for the discharge and that the Arbitrator should not substitute his judgement for that of Management and it cites Stockham Pipe Fittings Co., 1 LA 160, McCoy 1945.

B. UNION

1. TESTIMONY AND EVIDENCE

Mr. Matt Mahoney testified that he is past chapter president and currently steward of the ODOT office in Clark County and is a Highway Worker 2.

Mahoney testified that Hosier is honest and she was not attempting to steal gas or deprive the state of money. Mahoney testified that he has known Hosier for at least three years and she is not the kind of person to steal.

In addition, Mahoney noted that Kristen Hosier stuck it out in an all-male environment and she did a good job. Moreover, he testified that she has a good personality and is a good performer and he noted that he took his own time off to come to testify about her qualities at this hearing.

Ms. Ida Tomason testified she worked for the Ohio Bureau of Employment Service in Springfield, Ohio, and said she has known Kristen and her family for over fourteen years.

Tomason testified that Kris is a caring, quiet, home type and logical, but not necessarily, an outgoing person. Moreover, she testified that Kristen Hosier's family is very close knit and

that Kristen's mother was "totally shocked" at hearing about the charge against her daughter.

Tomason said that it is incredible to conclude that Kristen Hosier would steal six gallons of gas.

Moreover, the court case was dismissed, noted Tomason.

Tomason testified she was here on her own personal time.

Ms. Kristen Hosier testified that on 2/7/89 at 6:00 p.m., she pulled her truck close up to the building to warm it up and she noticed that the motor was not running very well and that the gas tank was on empty. She said she would have filled it in the morning, but she was bit late and drove directly to the garage and did not look at the gas gauges.

Hosier testified she put six gallons in the truck. She left it running and started to walk back in the building to get a notebook to note that she had put six gallons of gas in the truck and to identify how much money she owed the state. She went on to say she got her blue denim notebook and at that time, Ruth Buck pulled up and she went over the passenger side of Ruth Buck's car and opened the door and said to her:

You wouldn't believe my problems. I had to put gas in my truck and I didn't have any money.

Hosier said that Buck responded to her claim by saying:

You stole from the State.

Hoosier went on to say that she refuted that allegation by Buck a number of times and eventually said to Buck that she (Hosier) was not a thief.

Hosier continued that she and Buck went inside and the latter tried to call Dave Paul and she repeated her claims that she did not steal and then Buck called Black and said to Black over the phone, "I caught one of your naughty gals stealing gas." Hosier said that she again told Buck she was not a thief.

Hosier said that she repeated the situation to Ron Raines and to Dave Paul and she said that she was going to let Dave Paul or Becky Bayless know about the gas and, in any event, she said that Bayless would obviously be able to identify the quantity of gas she put in her vehicle. Hosier went on to say that the gas use is written up with the name of the vehicle and the name of the individual using the gas as well as the amount and if it were not logged, it would become obvious that something was amiss.

Hosier went on to say that Ruth Buck continued to indicate to Paul that Hosier stole gas and Paul said he would have to call the Highway Patrol.

Hosier said she went into the conference room and cried and told the employers that she put six gallons in her truck and went on to say she did not know why she didn't just put one gallon in. In any event, Hosier said that Paul and another employee told her to stick to her story.

Hosier went on to indicate that after the Highway Patrol came in, she told him her story and he indicated to her that the Employer wanted to press charges and he took both a side view and front view pictures of her and then he asked her to look at her purse. Hosier said that she went through her purse and there was

a one dollar bill and a five dollar bill in the bottom of the purse.

Following the investigation, Hosier said that Ron Raines helped her carry some things to her car and also Raines carried her notebook and folder. She went on to say that the Highway Patrolman told her on 2/8 that she was charged with petty theft.

Hosier said that Raymond Black told her the next day that he knew she was not a thief and that if only she had called him. She went on to say that all the people in the garage support her except Ruth Buck.

Hosier also noted that she went back to work for Butler Shoes and she identified the positive letter written to her by her subsequent employer.

The Union cross examined Management witnesses. Ms. Ruth Buck, on cross, testified that she did not know Kristen Hosier before she came to work at ODOT and had never talked to the grievant to any great extent.

Buck said she did not observe Hosier holding a pen and a notebook in her hand.

Mr. Ron Raines, on cross, said that he did not know anything about a work rule with respect to employees' use of ODOT gasoline.

He went on to say that Hosier worked after the allegations on 2/7, although he did not know how long, but both sides stipulated that she worked from 2/7/89 to 3/23/89 in the same capacity.

Mr. Raymond Black on cross testified that he knew Hosier and he knows her to be an honest employee. Black said that he did not tell the grievant she should call him if she needed money.

Black testified that Hosier was a good worker and he continued by saying that the gas pump that Hosier used is out in front of the ODOT garage and is in full view of employees and others who might be passing the area.

Black noted that gas cannot be pumped from inside the garage although there might have been some small gas cans in the garage holding petrol for lawn mowers.

Black said that Hosier could have used those cans to fill up her truck if she wanted to be deceptive.

2. ARGUMENT

The Union asserts that the grievant was questioned by Buck, Ray Black, Ron Raines, and eventually the Ohio State Patrol without benefit of legal counsel. Moreover, it notes that she was arrested and photographed by the State Patrol.

The Union argues that the key issue is intent. It acknowledges that Hosier pumped six gallons of gas from the ODOT tank into her truck. However, it goes on to say that this case as well as the others must deal with intent. That is, was there intent to steal. There is no question that the grievant erred with respect to judgement, but there was no intent to steal.

In this particular situation, the Union notes that Hosier wanted to write a note indicating the amount of gas she took and the amount that she would have to reimburse the State for that

gas consumption. The Union points out that Hosier was unaware that she could not use the gas or rather that if it were used for personal vehicle, there was no way she could pay back the state.

The Union points out that Hosier has a perfect record and in this particular case, she was prosecuted, and perhaps even persecuted. Moreover, the State pushed the case and lost and there was no intent for her to steal as ruled by the courts.

Hosier, notes the Union, prepared to leave work and noted that her gas gauge was empty. She thought she had no money in her purse and while gas station(s) may have been close, she simply decided she had better use some state gas and she intended to pay for such use. Moreover, it must be noted that the money found in her purse was not in her wallet but at the bottom of her purse covered with items women put into such a garment bag. Moreover, the grievant utilized the gasoline in full view of arc lights in front of the building and in view of heavy traffic on St. Rt. 41. Obviously, Ruth Buck driving on St. Rt. 41 saw her filling up her tank with six gallons.

The grievant could have defrauded the State by juggling figures but she did none of these things. Rather, she had in her hand a notebook which she was going to use to identify the amount of gas and the cost.

What is clear is that there was no intent on the part of Kristen Hosier to steal gas from the state and, therefore, the grievance should be supported and she should be awarded back pay and benefits and promoted to Highway Worker 2.

V. DISCUSSION AND AWARD

The issue is whether Kristen Hosier was justly terminated from her position as Highway Worker 1 with the Ohio Department of Transportation?

Article 24 - Discipline states in 24.01, in part, that:

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.

Has the Employer proven that it had just cause to terminate Hosier? The facts are clear as stipulated by the parties. Hosier pumped six gallons of ODOT gasoline into her vehicle on 2/7/89. The Highway Patrol identified five dollars found in the bottom of the grievant's purse on that date. The fundamental question as raised by both parties is whether Hosier intended to steal gas from the State of Ohio?

The testimony and evidence concerning the incident does not allow a conclusion that Hosier intended to steal. The gas pump was visible from State Route 41. Hosier was, according to Buck's write-up, moving towards the garage door when Buck drove up and confronted Hosier. Hosier's actions were not that of one who wanted to steal. She did not try to get away from the garage as quickly as possible. There were no hasty, furtive actions by Hosier as she put gasoline in her vehicle. Hosier testified she was going back to the office to leave a note explaining that she had taken the gas.

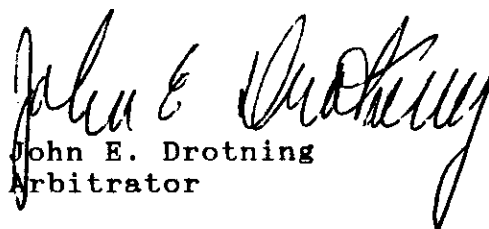
Hosier's demeanor at the hearing as well as testimony and evidence from character witnesses support a finding that Hosier is an honest person and a good employee. Moreover, if she had not accounted for the gasoline, she was aware that the deficit would have been noticed by either Bayless or other employees when they came to work on the following morning.

The grievant testified that when she started her vehicle, it sounded as though she was running out of gas and therefore, she looked at the gas gauge and saw it was on empty. Given that, Hosier then had to decide whether to drive at least about one-half mile with the possibility that the car might not make a gas station. Furthermore, Hosier apparently thought she did not have enough money for gas. It appears that she had a dollar in her purse but was not aware of the five dollar bill found in the bottom of her purse and that is not surprising given the contents of her purse. Thus, rather than take a chance, Hosier used ODOT gas.

It is clear that Hosier made an error in judgement in "borrowing" gas from the ODOT garage and assuming that she could make payment the next day when, in fact, there is no past practice or mechanism for making such payments. There are alternatives as noted by the Employer; namely, that she could have tried to get the car to the nearest gas station or that she could have called either her husband or another employee for money to buy gas if she thought she had none.

Article 24 also notes in section 2 that "Disciplinary action shall be commensurate with the offense." and "Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article." The parties stipulated that Hosier continued to work the same hours and duties from the date of the incident on 2/7/89 to 3/23/89. This, in itself, tends to raise questions regarding Management's view of Hosier's actions as sufficient to warrant termination.

The Employer has not proven that Hosier intended to steal six gallons of gasoline from the ODOT garage and, therefore, the termination is not upheld and the grievant shall be reinstated with full benefits and net back pay. The grievant made a mistake in judgment and, therefore, she shall be issued a written reprimand.


John E. Drotning
Arbitrator

Cuyahoga County, Ohio
November 28, 1989