

In the Matter of the Arbitration
between
THE STATE OF OHIO
and
STATE COUNCIL OF PROFESSIONAL
EDUCATORS/OEA/NEA

GRIEVANT: Richard R. Lehman

DEPARTMENT: Department of
Rehabilitation and
Correction

FACILITY: Hocking
Correctional
Facility

No. 27-10(05/16/89)
012-06-10

BEFORE: Joyce Goldstein, Arbitrator

APPEARANCES:

For the Employer: Thomas E. Durkee, Labor Relations
Officer; Louis E. Kitchen; Carol
Shiplevy

For the Union: Grant D. Shoub, Esq.; Henry L. Stevens;
Thomas Bunsey

PLACE OF HEARING: Office of Collective Bargaining, 65 E. State
Street, Columbus, Ohio

DATE OF HEARING: October 12, 1989

BRIEFS POSTMARKED: October 30, 1989 (Received, OEA on 11/1/89;
ODRC on 11/6/89)

AWARD: The grievance is sustained. The removal of Richard R.
Lehman was not for just cause. Ten day suspension for
violation of Rule 5. One day suspension for violation
of Rule 23.

DATE OF AWARD: December 6, 1989


Joyce Goldstein

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ARBITRATOR: Joyce
Goldstein

I. INTRODUCTION.

Richard R. Lehman, the Grievant, was employed by the Ohio Department of Rehabilitation and Correction ("Employer") as a vocational education teacher at the Hocking Correctional Facility ("HCF"). As such, he was a member of a bargaining unit whose exclusive representative is the State Council of Professional Educators/OEA/NEA ("Union").

The Grievant was discharged from his employment for alleged theft, insubordination and failure to immediately report a violation of work rules. These violations resulted from the Grievant's alleged participation in the theft of salvage materials from the abandoned Ohio Penitentiary ("OP"), some materials which were then left at the Grievant's residence where they remained for approximately three years at which time the Grievant attempted to dispose of them. The day after the Grievant's attempted disposal of this property, the Grievant

voluntarily confessed to an Ohio State Trooper and took the Trooper to recover some of the goods.

The parties stipulated that the issue to be decided by the Arbitrator is

Was the removal of Richard R. Lehman, grievant, on May 10, 1989, for just cause? If not, what should the remedy be?¹

The parties further stipulated that

The grievance is both procedurally and substantively arbitrable. The time limits in the grievance procedure have either been met or waived. The arbitrator has been properly chosen and has jurisdiction to hear the case.

In addition, the parties stipulated to many of the facts relevant to the disposition of this case. However, the remaining relevant facts as set forth below are also undisputed.

II. STATEMENT OF FACTS

A. The Employer.

HCF, one of the Employer's twenty-one correctional facilities in the State of Ohio, is a medium security institution with an average population of 320 adult males. Its primary mission is to provide a safe and secure institution for the humane housing and rehabilitation of inmates, and protection of the general public. It houses a range of convicts from the very dangerous inmates convicted of murder, rape and arson, to

¹ Article 13.01 of the collective bargaining agreement provides, "Employees shall only be disciplined or discharged for just cause."

individuals convicted of lesser degree felonies such as burglary and illegal distribution of drugs.

B. The Grievant

Richard R. Lehman, a forty-four year old, married, father of two teenage boys, is a lifelong resident of Athens County, Ohio and has spent his adult life working in that county. He has never been accused or convicted of any crimes.

Prior to beginning his employment at HCF, the Grievant had over three years experience working for the State of Ohio at a mental health facility in Junction City, Ohio. While employed there, the Grievant performed the duties of a correction officer, inter alia, writing conduct reports and disciplinary tickets on inmates under his supervision. Theft among inmates was an ongoing problem and the Grievant wrote disciplinary tickets for theft in an effort to control the problem.

When that facility closed in 1976, the Grievant went to work for the Brooks Shoe Company in Nelsonville where he worked for nearly ten years. Starting as a machine repairman, the Grievant worked his way up to maintenance foreman, a position he held until he went to work at HCF. As maintenance foreman, he supervised thirty employees, one of whom he fired because he did not do his job.

In over thirteen years working for the State of Ohio and the Brooks Shoe Company, the Grievant had never been subjected to any disciplinary action.

It was stipulated that the Grievant was hired at HCF on January 21, 1986, as a teacher of Vocational Building Maintenance ("VBM"). He completed his five-month probationary period on June 20, 1986. At the time he started his employment, the Employer had no VBM program, nor was there available building space in which to house such a program. The Grievant built his program from the ground up, including the construction of a new facility in which to teach.

In order to perform his job duties, the Grievant was required to participate in an on-the-job educational course administered by the Ohio State University and to obtain a four year provisional teaching certificate. The director of this program was so impressed by the Grievant's achievements that he selected the Grievant to become his teaching assistant and rated him among the top ten percent of all students ever trained in this program.

The Grievant's supervisors and colleagues were similarly impressed by the Grievant's talents and accomplishments over his three year tenure at HCF, from 1986 until he was discharged in 1989. He consistently received rave evaluations from his supervisors and was voted "Teacher of the Year" at HCF in 1987 and "Teacher of the Year" for the entire Department of Rehabilitation and Corrections in the State of Ohio.

C. The Trip to the Ohio Penitentiary.

Soon after he was hired and while building the new facility to house the VBM program, it was suggested to the Grievant that he could salvage some building materials from the old Ohio Penitentiary in Columbus, then an abandoned penal institution. The Grievant was informed in the Spring of 1986 that Jimmie Arnold, the Plant Maintenance Engineer at HCF, was going to the OP to salvage some materials for his department and that the Grievant could accompany him to obtain materials for the construction of the VBM building.

The Deputy Warden of Operations authorized the Grievant to go to the OP and to take two inmates with him. Thus, on May 20, 1986, the Grievant and two inmates, and Mr. Arnold and another HCF employee left for Columbus. The Grievant and the two inmates were in one large truck, and Mr. Arnold and the other employee were in a separate pick-up truck.

At the time of this trip, Mr. Arnold was a supervisory employee at HCF and the Grievant was a probationary employee. Although both Mr. Arnold's and the Grievant's work involved building construction and maintenance, unlike Mr. Arnold, the Grievant was a teacher of those subjects, not a building or maintenance employee. The Grievant's direct supervisor was in the education chain of command, not building maintenance.

While Mr. Arnold was not the Grievant's direct supervisor, the Grievant knew that Mr. Arnold was a supervisor nevertheless. And, because Mr. Arnold had attempted to function as the

Grievant's supervisor on prior occasions, there was an ongoing controversy between Mr. Arnold and Burt Harter, the Grievant's "real" supervisor. Yet, the Grievant relied on Mr. Arnold for assistance and cooperation in the Grievant's own project to construct the VBM building. Further, Mr. Arnold had the ability (which he had on occasion exercised) to make the Grievant's work life difficult by withholding supplies and equipment necessary for the Grievant's work. Moreover, as a supervisory employee on this trip to the OP, Mr. Arnold had at least apparent authority over the Grievant, a probationary employee.

Upon arriving at the OP in the morning, the Grievant and the two inmates began their search for salvage. Mr. Arnold and his assistant apparently did the same. The two groups worked separately throughout the day, reuniting only briefly to share lunch. By mid-afternoon the trucks were loaded. As the Grievant prepared to board the truck he had driven, which was loaded with salvage material for the new building, he was told by Mr. Arnold that he instead was to ride with Mr. Arnold in the pick-up truck and that the employee who had traveled to Columbus with Mr. Arnold would now drive the Grievant's truck. The Grievant complied. The state truck loaded with the items the Grievant and the inmates had salvaged went directly back to HCF where the items were unloaded and subsequently used in the construction of the new building.

Meanwhile, Mr. Arnold drove the pick-up truck, and on the way back from Columbus, he asked the Grievant if he could leave some of the materials that he and the other employee had loaded

on the pick-up truck at the Grievant's house. The Grievant asked if they could get in trouble for doing this, and Mr. Arnold replied affirmatively. The Grievant acquiesced. Mr. Arnold then drove the truck to the Grievant's house where the following items were unloaded: some fence material, a water fountain, five pieces of ninety-degree two inch conduit, hydraulic lines, a twenty-four hour timer, and five lights. Although the value of these items was never established, it was undisputed that they were salvage items of relatively little value. There was no evidence that they were ever intended for use at HCF. Mr. Arnold told the Grievant he would return the next day to pick up the items.

Mr. Arnold did return the next day and removed the fence and the water fountain. The other materials remained in the Grievant's driveway for three months when the Grievant's wife complained they were an eyesore. Grievant then, at his wife's insistence, moved the materials back behind his house. The items remained in the Grievant's possession for approximately three years until April 1989. During that time, the Grievant never used any of those items, he was not paid to store them, he did not sell any of them, and they were of absolutely no benefit to him or his family. To the contrary, the Grievant believed that the items were Mr. Arnold's junk and Mr. Arnold should have disposed of them.

D. April 1989.

On April 6, 1989, nearly three years after having allowed Mr. Arnold to store the salvage items on his property, the Grievant was called into the Warden's office to be questioned by State Highway Patrol Trooper, J.L. Scholl as part of an on-going criminal investigation of Jimmie Arnold. Without the benefit of either legal counsel or union representation, the Grievant answered Trooper Scholl's questions for nearly four hours. He was not asked about the salvage items from the OP and there is no evidence that his answers to the Trooper's questions were anything less than truthful.

That evening, after being interviewed by the State Trooper, the Grievant, in a moment of panic, decided to throw away the scrap items Mr. Arnold had left on his property. He threw some into a river, others into a pond, and others along a dirt road to the trash dump near HCF. The Grievant accurately testified that it was a "stupid thing to do".

The next day, April 7, 1989, a second interview was held with the Grievant by Trooper Scholl. The Grievant freely admitted his involvement in the diversion of materials from the OP in the Spring of 1986 and his subsequent attempt to dispose of the property the previous night. The Grievant then led Trooper Scholl in recovery of the five pieces of conduit and the twenty-four hour timer. The other material was not recovered from the river or the pond. The Grievant admitted that he knew he did

something wrong when he allowed Jimmie Arnold to leave the property at his house, and when he threw away those items.

In a separate interview with Captain James Chuvaes, Chief of Security for HCF, the Grievant reiterated his involvement in the OP salvage run, the diversion of state property and attempted disposal. Captain Chuvaes concluded his investigation on April 21, 1989 and reported his findings to Carole J. Shiplevy, the Warden of HCF. After a predisciplinary conference was held and a report prepared, the Grievant was removed from his employment.

The Notice of Disciplinary Action (Joint Exhibit 2) states:

You are to be removed for the following infractions: During the spring of 1986, yourself and another employee went to the Columbus Correctional Facility to pick up State property which was intended to be utilized by the Hocking Correctional Facility. The State property was taken to your residence and not to its intended destination. Your actions during the incident and the investigation are contrary to Rule #5 Deliberate destruction, damage and/or theft of State property/property of visitors to departmental facilities or property of another employee including State vehicles; Rule #6C Insubordination, failure to follow Post Orders, Administrative Regulations and/or written policies or procedures; Rule #23 Failure to immediately report a violation of any work rule, law or regulation that could jeopardize the security of the work place or effect job performance, of the Employee Standards of Conduct. Your actions will not be tolerated and you are hereby removed.

The Grievant cooperated with the Athens County Prosecuting Attorney in his on-going investigation into Mr. Arnold's criminal activities and a decision was made by that office not to prosecute the Grievant for his participation in the salvage run, participation which the prosecutor's office described as "minor".

III. EMPLOYER'S POSITION

The Employer asserts four arguments. First, the Employer maintains that the Grievant was disciplined for just cause and the termination of his employment was justified because he had committed theft. Within this general argument, the Employer makes a number of points. The Employer argues that the Grievant had notice that he could be disciplined for theft and that a work rule prohibiting theft is a reasonable rule. Additionally, the Employer maintains that it conducted a full and fair investigation of the alleged theft and that there is ample proof of the Grievant's misconduct. The Employer also asserts that the Grievant received equal treatment inasmuch as Jimmie Arnold was also discharged. The Employer further argues that the penalty of discharge for a theft offense is reasonable, regardless of the value of the stolen property, and especially since employees of correctional facilities should be held to a higher standard of conduct, as role models for the inmates.

As its second argument, the Employer asserts that the length of service, work performance and disciplinary record do not mitigate the penalty imposed. These traditional mitigation factors were offset by the Grievant's actions in April 1989 when he attempted to dispose of the stolen property. Additionally, at the time of the original incident, the Grievant was a probationary employee who could have been summarily discharged without the benefit of the grievance procedure. It was the Grievant's misconduct in concealing the stolen property for three

years and his failure to promptly report the theft which both allowed the Grievant to escape discharge as a probationary employee and which aggravated his original misconduct to the extent of offsetting any other mitigating, exonerating factors.

Third, the Employer argues that the intent to steal was established by the Grievant's actions in the Spring of 1986 and April 6, 1989. Acknowledging that intent is a necessary element of a theft offense, the Employer stresses that the Grievant "knowingly" participated in a theft offense as that term is commonly defined in Websters New World Dictionary, Second College Ed. (1986), the "taking away of another's property without his consent and with the intention of depriving him of it."

The Employer's fourth argument is that the lack of criminal prosecution is irrelevant to the finding of just cause and subsequent termination from employment. The parties and standards of conduct are different in a criminal prosecution than in a discharge from employment.

IV. THE UNION'S POSITION.

The Union contends that six factors warrant modification of the decision to discharge the Grievant. First, the Employer failed to prove by clear and convincing evidence that the Grievant intended to steal property from his employer. Second, the Grievant was exonerated from any criminal liability in the matters which gave rise to his discharge. Third, the Grievant's situation was not equivalent to Jimmie Arnold's, so that they are

not entitled to equal discipline. Fourth, the Grievant derived no personal gain by allowing Mr. Arnold to store the scrap on his property for three years. Fifth, the de minimus value of the property does not warrant a penalty as severe as discharge. Sixth, the Grievant's exemplary work record should mitigate his discipline.

V. DISCUSSION.

In analyzing the respective arguments of the parties, there are some positions which are not in dispute, while others are at the core of the controversy. As stated above, the essential facts are not disputed.

Additionally, there is no dispute that (1) the Grievant had notice that he could be disciplined for theft, (2) a rule prohibiting theft is reasonable, (3) the Employer conducted a full and fair investigation, (4) correction employees should be held to a high standard of conduct, (5) length of service, work performance and lack of a disciplinary record could mitigate the penalty for violating work rules in appropriate cases, and (6) intent is a necessary element of a theft offense.

The critical issues in dispute are (1) whether the lack of a criminal prosecution is relevant to the determination of whether the Grievant is guilty of a theft offense for purposes of removal from employment, (2) whether the value of stolen property is relevant to a determination of whether a theft occurred, (3) whether the Grievant is guilty of a theft offense, or violating

any of the other work rules which he is accused of violating, (4) whether the discharge of Jimmie Arnold justifies discharging the Grievant, (5) whether the Grievant's exemplary work record should mitigate the penalty for violating work rules.

Addressing these disputed issues in order, this Arbitrator agrees with the Employer and many other arbitrators that the fact of (or lack of) a criminal prosecution is irrelevant to the determination of guilt for purposes of imposing discipline in an employment setting. See, Chrysler Corp., 53 L.A. 1279, 1282 (1969) (although grievant was acquitted of criminal charge arising out of same conduct, acquittal does not foreclose the arbitrator from proceeding to decide the issue of just cause for discharge). After all, many of the offenses listed in the work rules which could warrant removal from employment would never even be the subject of a criminal prosecution (e.g., absenteeism, carelessness, insubordination, sleeping on duty).²

This Arbitrator also agrees with the Employer that the value of stolen property is irrelevant to a theft offense. If an employee steals an employer's property, the value of the items stolen is of no consequence. An employer, and especially this employer, has the right (and perhaps in this case, the obligation) to maintain a workforce free of thieves. As noted above, there is no dispute that correction employees should be held to a high standard of conduct considering the nature of

² Additionally, a criminal conviction of a theft offense is not a prerequisite for removal under Rules 5 or 13, the two rules expressly prohibiting theft. The work rules specifically provide for removal upon the commission or conviction of any felony under a separate rule. See, Rule No. 7.

their work and the importance of serving as role models. A thief is a thief, regardless of the value of the property which he/she steals.³

With regard to the remaining disputed issues, this Arbitrator must disagree with the Employer.

The most critical issue in this case is whether the Grievant actually committed a theft. Using the definition of theft urged by the Employer, there is no evidence, let alone clear and convincing evidence, that the Grievant committed a theft. Applying the Employer's definition, a theft offense requires all of the following elements: (1) a "taking", (2) "without consent", (3) "with the intention of", (4) "depriving" the owner of his property. In this case, there is no evidence that the Grievant either "took" or "intended to deprive" the Employer of its property.

It is undisputed that Jimmie Arnold, not in the presence of the Grievant, loaded materials at the OP onto his own truck. Mr. Arnold then directed the Grievant to ride with him back to HCF. Upon these facts, it is clear that the Grievant had no role in the taking of the Employer's property. Moreover, when the

³ However, the Employer's argument that all acts of theft are punishable by removal is less clear. It is true that some employers consistently apply (and arbitrators often uphold) the standard that all thefts, regardless of circumstance, warrant the penalty of discharge. The Employer cites a number of these cases. Yet, the Employer's own work rules tend to undermine this argument. The Employer's work rules set forth a range of penalties for theft, from a five to ten day suspension to removal. This range itself suggests that there is no absolute rule that all thefts will be punished by discharge. Indeed, the range of penalties requires consideration of the circumstances surrounding the violation.

property was left at the Grievant's residence, he did not even want it. Thus, he had no intent of depriving the Employer of its property. At no time did the Grievant intend to, or in fact, convert the property to his own use or benefit. Yes, there was a theft, but the Grievant was no the thief.

Therefore, even accepting the Employer's argument that there are not degrees of theft, as discussed in the cited case of Northwestern Bell Telephone Co., 79 L.A. 79 (1982), that argument does not end the inquiry. Unlike in the instant case, in Northwestern Bell, there was direct evidence of theft. The grievant was observed pumping the employer's gasoline into the grievant's personal vehicle. By contrast, the theft in the instant case was perpetrated by Jimmie Arnold. There was no evidence that the Grievant stole the property from the OP. The property the Grievant loaded onto his truck at the OP was taken back to HCF where it was used in the construction of the VBM building.

However, Rule 5 prohibits not only theft but also damage and destruction of the Employer's property. And while the Grievant could not be disciplined for theft, the Employer is certainly justified in disciplining him for damage and destruction to its property. There is no question that the Grievant allowed the Employer's property to sit outside for three years, during which time its value was further reduced from whatever minimal value it had when it was originally left in his yard. Additionally, he effectively destroyed the items that he threw in the pond and the river, those which were never recovered.

Beyond Rule 5, the Employer also found that the Grievant violated Rules 6(c) and 23. Rule 6 is "Insubordination" and subsection (c) proscribes "failure to follow post orders, administrative regulations and/or written policies or procedures." Rule 23 proscribes "failure to immediately report a violation of any work rule, law or regulation that could jeopardize the security of the work place or effect job performance."

Regarding Rule 6(c), this Arbitrator finds that there was no violation. Subsection (c) is a subcategory of the more general topic of insubordination. This is not a case of insubordination. If anything, the Grievant subordinated his own best interest to an improper request by a supervisor, albeit not his own direct supervisor. An employee cannot be insubordinate for following a request of a supervisor, even if the satisfaction of that request required the violation of work rules or procedures.

Regarding Rule 23, there are two aspects of the rule, (1) failure to immediately report a violation, that (2) could jeopardize the security of the work place or affect job performance. The Grievant obviously failed to immediately report Jimmie Arnold's theft of the salvage materials. However, the Employer never presented any evidence of how either this failure or the underlying theft actually jeopardized security or job performance. Nonetheless, because there was some evidence of Jimmie Arnold's participation in other thefts from HCF itself (as distinct from the abandoned OP), one could argue that had the grievant reported Jimmie Arnold three years prior, Jimmie Arnold

might not have been in a position to subsequently engage in misconduct that did jeopardize the security of the workplace. Thus, given the Grievant's failure to report, and Mr. Arnold's alleged continuing pattern of thefts, it is proper to discipline the Grievant under Rule 23.

Having established that the Grievant did violate Rules 5 and 23 by damaging and destroying Employer property and not immediately reporting Mr. Arnold's theft, the question remains what discipline is appropriate.⁴

First, the fact that Jimmie Arnold was removed does not justify a removal of the Grievant. Indeed, Jimmie Arnold was the thief, not the Grievant. They are not similarly situated and it would be unfair to similarly discipline them.

Second, given the nature of the specific offenses which the Grievant committed, it is entirely appropriate to consider the mitigating factor of his exemplary work record.⁵ Not one witness disputed the fact that the Grievant made an enormous contribution to HCF and that he had always been a good and honest employee.

⁴ Although no specific work rule was cited, the Employer also retains the power to discipline an employee for the possession of the Employer's stolen property.

⁵ The Employer argues that the Grievant's involvement in the misconduct occurred during his probationary period, a time when he could (and arguably would) have been fired without the protections afforded to non-probationary employees. However, the Employer's argument could be turned on its head. The fact that the Grievant was a probationary employee rendered him all the more vulnerable to the coercive effects of Jimmie Arnold's "request" to store the stolen property at the Grievant's house. Because as a probationary employee his job was always in jeopardy and he knew Arnold could directly or indirectly affect his employment status, the Grievant was more likely to succumb to Arnold's improper undue influence.

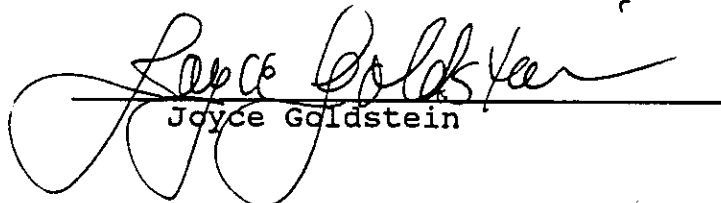
These facts, together with his voluntary admission of his participation in the 1986 events and his expression of remorse, militate against the penalty of removal.

Applying the Employer's chart for proposed discipline for various offenses, a first violation of Rule 5 is punishable by a suspension of five to ten days, or removal; a first violation of Rule 23 is punishable by an oral reprimand or a one day suspension. Under the circumstances, it is appropriate to suspend the Grievant for ten days for possessing, damaging and destroying Employer property, and one day for failing to immediately report a violation of work rules.

Thus, in conclusion, this Arbitrator finds that the Employer did not have just cause to discharge the Grievant.

VI. AWARD.

The grievance is sustained in part. The Grievant is awarded reinstatement to his former position with back pay, benefits and seniority as of May 26, 1989, eleven working days after he was removed on May 10, 1989. The back pay award shall be reduced by any interim wages of unemployment compensation benefits the Grievant may have received.


Joyce Goldstein

Cleveland, Ohio
December 6, 1989