In the Matter of the
Arbitration Between

Ohio Department of
Transportation

Employer,

and

OCSEA, Local 11
AFSCME, AFL-CIO

Union.

Grievance 31-08(89-05-12)
0034-01-06

Grievant (Mark McCleese)

Hearing Date: January 23, 1990

Award Date: March 5, 1990

For the Employer: Carl Best

For the Union: Mike Temple

Present in addition to the Grievant and the Advocates were the following persons: Mike Duco (OCB) and Bill Hancock, Superintendent ODOT (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the

Arbitrator. All witnesses were sworn.

Joint Exhibits

J-1 Contract

J-2 Directive A-301 (ODOT)

J-3 Directive A-302 (ODOT)

J-4 Grievance Trail

J-5 Prior Discipline

Issue

The issue before the Arbitrator is that of determining whether or not the Employer acted with just cause in imposing a ten (10) day disciplinary suspension on Mark McCleese on May 1, 1989. If not, what shall the appropriate remedy be.

Stipulated Facts

1. Mr. Mark A. McCleese was hired by O.D.O.T., District Eight on April 22, 1985 and assigned to the Clermont County garage as an Assistant Auto Mechanic.

2. On May 24, 1987, Mr. McCleese was promoted to the position of Auto Mechanic I, a position he held at the time of the ten (10) day suspension now in question.

3. On May 29, 1986, Mr. McCleese was issued a verbal reprimand for unexcused tardiness.

4. On November 28, 1986, he was issued a written reprimand

for **carelessness** resulting in damage to State property.

5. On October 28, 1987, Mr. McCleese was suspended for one (1) day for **unauthorized absence.**

6. On July 12, 1988, Mr. McCleese was suspended for three (3) days for **unauthorized absence.**

7. On November 14, 1988, he was suspended for five (5) days for a vehicle **moving violation** that involved a serious accident. On January 18, 1990, Arbitrator Craig Allen reduced the aforementioned five (5) day suspension to two (2) days.

Facts

The suspension letter of April 26, 1989 states that Grievant violated Directive A-301, Item 2(b) **Insubordination, willful disobedience of a direct order by a superior.** In its opening statement, the Employer said that the Grievant was suspended "for gambling during work hours while in an overtime status on February 3, 1989 at 7:18 p.m." which behavior the Employer deemed to be Insubordination.

On the day in question, the Grievant and others were working voluntary overtime from 4 p.m. to midnight to deal with snow and ice. Mr. Hancock, Assistant Superintendent, was the Grievant's direct supervisor that night. Mr. Hancock testified that on overtime, no lunch break is scheduled, but that workers can take a 1/2 hour. He said that on overtime, this half-hour break is not the employee's time as it is on regular shift, but is

"state-time". On February 18, Mr. Hancock remembers the Grievant and Mr. Bundy leaving the garage, apparently for lunch. The time was 5:40 p.m. which, according to Mr. Hancock, would require the Grievant to be back at work at 6:10 p.m. Mr. Hancock took his own break subsequently and returned to the garage at 7:15. At 7:18 returning from the bathroom, he found the Grievant and Mr. Bundy playing cards and "gambling" in the stockroom. He told them to return to work which they did. Mr. Hancock testified that he reached the conclusion that they were gambling because $1 - $1.50 in loose change was scattered on the table. He said that "he (Mr. Hancock) kept his money in his pocket" and that "I don't gamble". Mr. Hancock testified that all workers had been verbally warned about card playing. The Employer introduced Employer's Exhibit E-1 a statement of "Guidelines" allegedly posted at the workplace.

#2 read "NO playing cards during work hours"

"Stockroom is off limits to employees"

The Grievant testified that he took his lunch break from 7:00 p.m. to 7:30 p.m. He admitted that he and Mr. Bundy were playing cards in the stockroom at 7:18 p.m. He denied gambling however; he said the change on the table came from Mr. Bundy who was repaying him for previously loaning Bundy money for lunch. The Grievant testified that the "ban" on card playing was inconsistently enforced, depending on the work to be done and the Superintendent's mood.

Discussion

Neither A-301, A-302, nor Employer's Exhibit #1 directly prohibit "gambling" and only E-#1 prohibits card playing "during work hours". The Arbitrator concludes that insufficient evidence was presented to prove "gambling". Mr. Hancock who clearly disapproves of gambling, formed an opinion without investigation.

Card playing, according to the Guidelines (Employer Exhibit #1), is only prohibited "during work hours". The evidence is insufficient to clearly show that at 7:18 the Grievant was not on his lunch break. The Employer maintains that even if the Grievant were on lunch break, he still was playing cards "during work hours" because on overtime no lunch breaks are required. Hence, the Grievant was on "State" time. No where was a notice of this latter rule, even if appropriate, introduced as evidence into the hearing.

No where in his testimony did Mr. Hancock allege a direct order given to the Grievant which was disobeyed. Quite the contrary, the only direct order he gave was immediately obeyed (i.e., return to work). Insubordination as delineated in 2(b) is a serious charge. It requires a direct order and willful disobedience. No where in the hearing was evidence introduced to support the willful disobedience of a direct order.

Admittedly, the Grievant was playing cards. The evidence about the timing of the Grievant's lunch break was at best

inconclusive. The Grievant said he was unaware that lunch breaks on voluntary overtime were not his time to use as he wished. No evidence was introduced to support the contention that he was "on notice" with regard to the status of luncheon breaks.

The Arbitrator believed the Grievant's testimony that enforcement of the "No" card playing rule had been inconsistent. The sole charge of the April 26, 1989 suspension letter was 2(b) "willful disobedience of a direct order by a superior". The Arbitrator finds no such direct order nor any willful disobedience.

Award

Grievance sustained; Grievant to be made whole.

March 5, 1990
Date

Rhonda R. Rivera
Arbitrator