ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 654

OCB GRIEVANCE NUMBER: 23-18-901025-0562-01-04

GRIEVANT NAME: TOLBERT, EMMETT W.

UNION: OCSEA/AFSCME

DEPARTMENT: MENTAL HEALTH

ARBITRATOR: COHEN, HYMAN

MANAGEMENT ADVOCATE: DUCO, MICHAEL P.

2ND CHAIR: RAUCH, JOHN

UNION ADVOCATE: EASTMAN, BRIAN

ARBITRATION DATE: MAY 31, 1991 (BRIEF FILED JULY 12, 1991)

DECISION DATE: AUGUST 23, 1991

DECISION: DENIED

CONTRACT SECTIONS AND/OR ISSUES: REMOVAL FOR OFF DUTY MISCONDUCT (COMPLICITY IN A THEFT OF STATE FUNDS)

HOLDING: GRIEVANT "KNOWLINGLY AIDED, HELPED, ASSISTED, ENCOURAGED, DIRECTED, ADVISED, ASSOCIATED AND PROVIDED EMOTIONAL SUPPORT TO EVANS FOR THE PURPOSE OF COMMITTING THE OFFENSE OF THEFT AGAINST THE STATE. THE EVIDENCE WARRANTS THE REASONABLE INFERENCE THAT THE GRIEVANT PLAYED AN INSTRUMENTAL ROLE IN THE CHECK CASHING SCHEME AND DO SO IN ORDER TO OBTAIN MONEY."

COST: $928.37

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration

-between-

STATE OF OHIO, OHIO DEPARTMENT OF MENTAL HEALTH, WESTERN RESERVE PSYCHIATRIC HOSPITAL

-and-

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

ARBITRATOR'S OPINION

GRIEVANT: Emmett W. Tolbert

#654

FOR THE EMPLOYER:

MICHAEL P. DUCO
Labor Relations Specialist
Ohio Department of
Administrative Services
Office of Collective Bargaining
65 East State Street
Columbus, Ohio 43215

FOR THE UNION:

BRIAN J. EASTMAN, Esq.
Associate General Counsel
Ohio Civil Service Employees
Association, Local 11, AFSCME
1680 Watermark Drive
Columbus, Ohio 43215

DATES OF THE HEARING:

May 31, 1991

PLACE OF THE HEARING:

Fallsview Developmental Center
Cuyahoga Falls, Ohio

ARBITRATOR:

HYMAN COHEN, Esq.
Impartial Arbitrator
Office and P. O. Address:
Post Office Box 22360
Beachwood, Ohio 44122
Telephone: 216-442-9295

* * * *

The hearing was held on May 31,1991 at Fallsview Developmental Center, Cuyahoga Falls, Ohio, before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at 9:05 a.m. and was concluded at 7:00 p.m. Post-hearing briefs were submitted on July 12, 1991.

* * * * *

On October 24, 1990 **ENNETT W. TOLBERT** filed a grievance with the **OHIO DEPARTMENT OF MENTAL HEALTH, WESTERN RESERVE PSYCHIATRIC REHABILITATION CENTER**, Northfield, Ohio, the "**State**" protesting his removal from the position of Therapeutic Program Worker at Western Reserve Psychiatric Hospital. The reason for the State's action was that the Grievant was guilty of "dishonesty (ORC 124.34) and neglect of duty-unapproved leave".

The denial of the grievance was appealed pursuant to the grievance procedure contained in the Agreement between the State and **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME**, the "Union". Since the grievance could not be resolved, it was carried to arbitration.

FACTUAL DISCUSSION

The Grievant has been employed at the Western Reserve Psychiatric Center since January 31, 1977. He was removed from his position as Therapeutic Program Worker effective October 12, 1990 after he was convicted of grand theft and forgery in the Summit County Court of Common Pleas on August 27, 1991. His conviction was based upon his participation in a check cashing scheme which was designed to cheat the Bureau of Workers Compensation.

While the extent of the Grievant's role in the check cashing scheme is in dispute between the parties, it would be useful to set forth a general outline of the events which led to his conviction. The check cashing scheme involved three (3) persons, namely, Shelly Evans who had been employed by the Massillon State Hospital, Virgil Johnson who was employed by the Bureau of Workers' Compensation and the Grievant. The scheme involved the theft of State issued Workers' Compensation warrants which had been returned to the Bureau because the recipient had died or had moved. The checks were then cashed and then deposited in two (2) bank accounts opened by Evans who used the identification of Mary Beth Humphries to open the accounts. Miss Humphries was a patient at Massillon State Hospital. Johnson was identified at the hearing as the "inside person" at the Bureau of Workers' Compensation. It was alleged that he stole checks that had been returned to the Bureau of Workers' Compensation and then diverted them to Evans and the Grievant.

As I have indicated, Evans opened a business account at Bank One under the name of one of her mentally ill patients, Mary Beth Humphries. She began depositing the checks that she received from the Grievant and soon afterwards opened another business account with the Navarre Deposit Bank Company under Humphries name and identification. After Evans was informed that the checks that cleared, she would withdraw the cash from the accounts by retaining forty

percent (40%) and giving the remaining sixty percent (60%) to the Grievant.

It should be noted that the Grievant was President of the Union at the Western Reserve Psychiatric Center. He was also President of the Ohio Mental Health and Mental Retardation (MH/MR) Assembly. The Mental Health and Mental Retardation Assembly holds monthly meetings of the Mental Health and Mental Retardation Division of the Union. The Grievant and Evans first met at a NH/MR Assembly meeting.

On April 20, 1990 the Grievant and Evans were indicted by a Summit County Grand Jury and charged with grand theft and forgery. Evans was further charged with theft in office. Evans pleaded guilty to the charge of theft in office and the first two (2) counts were dismissed.

On August 27, 1990 the Grievant was convicted by a jury of grand theft and forgery. He was "sentenced to two (2) years of punishment for the Crime of Grand Theft, O.R.C. Sections 2913.02 (A) (1) and 2913.02 (A) (3), a felony of the third (3rd) degree, and for a definite period of one and one half (11/2) years for punishment of the crime of Forgery, O.R.C. Section 2913.31 (A) (3), a felony of the fourth (4th) degree. These sentences ran concurrently". [Stipulation by the parties]

Furthermore, "the Court ordered [the Grievant] to pay restitution in the amount of $8,000 and that any money returned to him from PERS (Public Employees Retirement System) be forfeited and applied to restitution and court costs".

On November 20, 1990 the Court of Common Pleas of Summit County granted the Grievant's motion to suspend his prison sentence, after he was incarcerated for forty five (45) days while placing him on probation for a period of two (2) years upon the following terms and conditions:

"1. That he report to the Adult Probation Department as directed and abide by the rules and regulations of said Department and/or the Adult Parole Authority.

2. That he refrain from offensive conduct of every nature and obey all laws.

3. That he make Sixty Percent (60%) of the restitution owed in this case as directed by the Adult Probation Department.

4. That he obtain and maintain employment.

5. That he notify the Adult Probation Department of any change of residency or employment.

6. That he support his minor children.

7. That he abstain from the abuse of any alcoholic beverages.

8. That he abstain from the use of any illegal rugs and/or substances.

9. That he submit to random urinalysis and testing as directed by the Adult Probation Department.

10. That he attend any counseling sessions as directed by the Adult Probation Department.

11. That he cooperate with the proper authorities in the defrauding of the State of Ohio regarding Workers' Compensation checks.

12. That he pay the costs of this prosecution as directed by the Adult Probation Department; said monies to be paid to the Summit County Clerk of Courts, Court House, Akron, Ohio 44308."

The Court ordered the Grievant to release monies received from the Public Employee Retirement System to his attorney for payment of the restitution owed in this case.

DISCUSSION

The issue that was stipulated by the parties to be resolved by this arbitration is as follows: Was the grievant Emmett Tolbert

removed from his position as Therapeutic Program Worker at Western Reserve Psychiatric Center for just cause in accordance with Article 24 of the Collective Bargaining Agreement? If not, what should the remedy be?"

In light of the stipulated issue by the parties, the State's reference to "(ORC 124.34) in its "Order of Removal" of the Grievant is outside the scope of the instant dispute. The issue that is stipulated by the parties is solely concerned with whether the Grievant was removed "for just cause in accordance with Article 24" of the Agreement. Thus, the standard for determining the Grievant's removal is contained in Article 24 of the Agreement. Given the stipulation of the parties, the test that is required to be satisfied by the State for discharging the Grievant is "just cause".

I.

OFF-DUTY MISCONDUCT

Before considering the widely accepted arbitral criteria for the off-duty misconduct of the Grievant, the threshold query concerning the specific nature of his misconduct must first be addressed.

Based upon the testimony of the Grievant, he first heard about the check cashing scheme from Johnson, whom he has known since 1986. According to the Grievant he gave checks which he received

from Johnson, to Evans on one (1) occasion. This occasion, he said, was the first occasion that Evans participated in the scheme. At the time, the Grievant said that Evans requested him to tell Johnson that she wanted forty percent (40%) of the proceeds. The Grievant went on to state that Johnson told both Evans and himself that he did not have problems with a sixty (60) to forty percent (40%) arrangement--he wanted to make sure that he got sixty percent (60%). After the one (1) occasion that the Grievant gave checks to Evans, he said that thereafter she received "checks from somebody else".

The Grievant went on to state that Evans told him that she had a bank account in which the checks would be deposited. He denied knowing about Mary Beth Humphries who was a patient at the Massillon State Hospital, where Evans worked.

The Grievant admitted that he forged signatures on three (3) checks which were eventually cashed by Evans. He did so in Evans' home while they were drinking alcoholic beverages and "snorting" cocaine. During that occasion he received thirty (30) to forty dollars ($40) from Evans. He testified that he "did it because he needed the money". Except for this occasion, he "never kept the money for (himself)". The following day, according to the Grievant, he did not want to get involved. He called Evans and told her that he did not think that the checks that he signed was a good idea.

Evans' version of the events is consistent with a common sense appraisal of the facts. As a Steward of the Union, she went to an MH/MR Assembly meeting in 1988 where she first met the Grievant. After establishing a friendship with the Grievant, and riding with him "and others" to and from Columbus, Ohio, their friendship evolved into an intimate relationship. Contrary to the Grievant's version, I do not believe that the only time they were intimate was during the evening when he forged signatures on three (3) checks. It is enough to state that Evans' version which I believe is credible, is that they began their intimate relationship when she opened up the first bank account in March, 1989.

In any event, Evans first heard about the checks from the Grievant in November, 1988 when he asked her whether she wanted to make some money or whether she knew someone who wanted to make money. Soon thereafter he brought checks to her home which she kept temporarily and then returned to him.

According to Evans, it was in December, 1988 when the Grievant again raised the subject of making money from the check cashing scheme. On this occasion, the Grievant was to ride back with her from a Union meeting in Columbus. At the end of the meeting and while Evans waited for the Grievant, "he talked to Johnson". After doing so, she and the Grievant left and went to a restaurant where the Grievant

"pulled out some checks" and showed them to her. When she asked the Grievant whether he obtained the checks from Johnson, Evans said that he laughed and said that Johnson "is a crook".

In subsequent meetings the Grievant talked to Evans about the checks indicating to her what was needed to obtain cash from the scheme. He referred to the opening of a business account at a bank, a false identification and a social security number. If she agreed to do it, the Grievant told her that there would be a sixty percent (60%)-forty percent (40%) split. She would keep forty percent (40%) and he would keep sixty percent (60%). According to Evans, the Grievant "implied that others were involved".

In March, 1989, Evans opened her first account at Bank One in Belden Village, Canton, Ohio, under the name of Mary Beth Humphries, a patient at Massillon State Hospital where she was employed as a Therapeutic Program Worker. Evans selected "9-5 and 9-7" as the numbers for her "Jubilee" bank ID card. The numbers indicate the month and days of the birthdays of the Grievant and herself, which Evans said "were easy to remember".

The Grievant obtained Evans' mailing address by telephoning her while he was engaged in contract negotiations with the State. A few days later she began receiving checks in the mail, worth $10,000 "which were more than what he told (her) was coming". The Grievant

called her and said to her that she would "know what to do with them". After depositing the checks, she subsequently withdrew cash from the account. Evans also opened another business account at Navarre.

In March 1989, a camera at the ATM snapped a photo of Evans and the Grievant. Evans related the events leading to the photo of the Grievant and herself. She went to the Grievant's home to pick him up for the purpose of going to the "Jubilee" ATM. As Evans related, she went to the ATM while the Grievant remained in the automobile. When Evans was concerned because the money supposedly in Columbus was not in the account, the Grievant got out of the automobile and approached the ATM which took a photo of both of them. Eventually, this photo led to their identity, arrest and eventual conviction.

The contrast between the stories told by the Grievant and Evans is dramatic. I find it hard to believe that the Grievant was merely a "go-between" for Evans and Johnson. I find Evans' testimony detailed, sincere and, it has the ring of truth and credibility. The Grievant played a major role in enticing Evans to participate in the scheme. He instigated and orchestrated her participation in the scheme, provided emotional support, gave advice on the means by which she would play a role in the scheme to obtain money and

provided overall encouragement on her involvement until the police authorities caught up with them.

The Grievant would have the Arbitrator believe that his role in the check cashing scheme was that of a broker who gratuitously serviced the criminal activities of both Evans and Johnson. According to the Grievant, the only exception to his "good will" gestures on behalf of Evans and Johnson was the thirty (30) to forty (40) dollars he received from Evans. The Grievant's testimony lacks support in the record.

I have inferred that the Grievant's motivation in acting as an intermediary between Evans and Johnson is no different than the motivation of Evans and Johnson. They were in it for the money. In the Grievant's case, he was doing a gram of coke a day during the events in question. He was paying child support for three (3) children. There was a house payment of $450 a month, and payments that were required for both a bank loan and an automobile. The Grievant and his wife earned approximately twenty dollars ($20) an hour, from their jobs. Despite his ability to meet these expenses, the Grievant said that his involvement in the scheme was because Evans needed money. To claim that the Grievant was no more than a "go-between" who rendered his services in a charitable manner for Evans and Johnson, is not supported by the evidentiary record.

Moreover, the Grievant's statement that he merely obtained thirty (30) to forty dollars ($40) for his role in the scheme seriously impairs his credibility about the events of March 17. I am persuaded that the Grievant was not under the influence of drugs or alcohol when he forged the signatures on three (3) or four (4) checks in Evans' home. I am inclined to believe the testimony of Evans, who indicated that the Grievant did not drink anything before he signed the checks.

Dr. Melvin E. Farris indicated that the Grievant has been his patient for "about seven (7) or eight (8) years". He said that he examined the Grievant for drug and alcohol abuse on February 5, 1988 and "found positive levels of valium, marijuana, cocaine and another drug in the same family". He referred to the effects of these drugs in combination and stated that "perception" of the person under the influence prevails over reality. Dr. Farris said that the Grievant's request to be hospitalized, did not occur.

Dr. Farris admitted that he was not an expert in the "field of drug use". Furthermore he has always been a family physician. He indicated that the Grievant's wife has been his assistant "for about thirteen (13) years".

I have not given much, if any weight to Dr. Farris' testimony. His testimony is based upon an examination of the Grievant on February 5, 1988. The implementation of the check cashing scheme

did not take place merely on one (1) day. I cannot conclude that from November, 1988 when the Grievant first mentioned to Evans the check cashing scheme until May 5, 1989 during which period of time, the Court found that both the Grievant and Evans committed the crime of grand theft that the Grievant was under the influence of drugs. I have decided that Dr. Farris' testimony is not entitled to much, if any, weight.

The Grievant's assistance encouragement, aid, advice and emotional support of Evans before and during the events in question lead me to conclude that forging the signature on the checks was an intentional act and consistent with his overall plan, which was to commit an act of theft against the State of Ohio.

II

OFF DUTY MISCONDUCT

Having established that the Grievant was not merely a "go-between" providing gratuitous services to both Evans and Johnson in carrying out their criminal activities, does not end the inquiry.

In large part, the Grievant's removal was due to his off-duty criminal conduct. The widely accepted criteria which are considered by arbitrators in such cases are set forth as follows:

1. Whether the behavior harms the employer's reputation or product (in this case, services).

2. Whether the behavior renders the employee unable to perform his duties or appear at work;

3. Whether the behavior leads to refusal, reluctance or inability of other employees to work with him. See, e.g. *W.E. Caldwell Co*, 28 LA 434, 436-437 (Kesselman, 1957).

Related to the first criterion of behavior which harms the States' reputation or services, is another test, and that is whether an employer has the right to terminate an employee, where the employee's off duty misconduct injuriously affects the business of the State. Accordingly, in *Inland Container Corp*, 28 LA 312 (Ferguson, 1957) the Arbitrator referred to this criterion as follows:

> "While it is true that the employer does not [by virtue of the employment relationship] become the guardian of the employee's every personal action and does not exercise parental control, it is equally true that in those areas having to do with the employer's business, the employer has the right to terminate the relationship if the employee's wrongful actions injuriously affect the business.

> The connection between the facts which occur and the extent to which the business is affected must be reasonable and discernible. They must be such as could logically be expected to cause some result in the employer's affairs. Each case must be measured on its own merits."

Based upon a careful review of the evidentiary record, I have concluded that the Grievant committed the serious offense of theft or dishonesty against the State.

In November 1988, the Grievant first mentioned to Evans whether she, or if she knew someone who wanted to make money. He brought checks to Evans' home which she returned to him, a short time thereafter. In December 1988, the Grievant raised the subject again with Evans, this time indicating that Johnson was "a crook", while showing the Grievant some checks. In subsequent meetings, and with persistence, the Grievant advised Evans on the steps to follow to implement the check cashing scheme. Furthermore, he told her that if she agreed to participate, there would be a sixty percent (60%) to forty percent (40%) split. He implied that others were involved.

In March, 1989, the Grievant opened a Jubilee account, by using an ID card with two (2) of the four (4) numbers consisting of the

Grievant's birth date. Thereafter he telephoned her and obtained her mailing address so that she would receive checks. Shortly afterwards, approximately $10,000 worth of checks arrived. The Grievant then called Evans to tell her that she would know what to do with the checks.

Moreover, on March 17, at Evans' home, the Grievant forged the signatures on three (3) checks that were eventually cashed. In light of the Grievant's active role in the scheme and the reasonable inference that he was sharing in sixty percent (60%) of the proceeds derived from Evans' withdrawals from the two (2) business accounts, I cannot conclude that because he was under the influence of alcohol and drugs he committed the act of forgery. I have also inferred that the Grievant knew that Evans' appropriated the name of a patient at the Massillon State Hospital to open the business accounts.

The Jury in the Court of Common Pleas, Summit County, found that the Grievant and Evans

> "* *from on or about the 3rd day of March, 1989, through on or about the 5th day of May, 1989, in the County of Summit/Stark and State of Ohio, aforesaid, did commit the crime of GRAND THEFT, in that they did with purpose to deprive the owner, Ohio Bureau of Worker's Compensation

and/or Navarre Deposit Bank Company and/or Bank One, of property or services, to-wit: $13,321.06, knowingly obtain or exert control over said property or services without the consent of Ohio Bureau of Worker's Compensation and/or Navarre Deposit Bank Company and/or Bank One or a person authorized to give consent or by deception, the value of said property or services being $5,000.00 or more, in violation of Section 2913.02(A)(1)/2913.02 (A) (3) of the Ohio Revised Code, A FELONY OF THE THIRD DEGREE, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio".

Moreover, the jury found that the Grievant and Evans:

"* * on or about the 17th day of March, 1989, in the County of Summit/Ohio. and State of Ohio, did commit the crime of FORGERY, in that they did, with purpose of defraud or knowing that they were facilitating a fraud, did utter, or possess with purpose to utter, a writing, which they, the said A) SHELLEY L. EVANS and B) EMMITT W. TOLBERT knew to have been forged, in violation of Section 2913.31 (A) (3) of the Ohio Revised Code, A FELONY OF THE FOURTH DEGREE, contrary to the form of the statute in

such case made and provided and against the peace and dignity of the State of Ohio."

Consistent with the Jury findings, and based upon the evidentiary record, I have inferred that the Grievant committed the act of theft in knowingly obtaining or exerting control over a portion of 13,321.06 belonging to the Ohio Bureau of Workers' Compensation and retaining such monies for his own benefit. I have also concluded that on March 17, 1989 the Grievant, with the purpose to defraud or knowing that he was facilitating a fraud forged signatures in order to wrongfully obtain monies from the Ohio Bureau of Workers' Compensation.

The State supports its removal of the Grievant by referring to the criminal law concept of "complicity". The transcript of the criminal trial of the Grievant indicates that the Judge had instructed the jury that "complicity" refers to "a person who knowingly aids, helps, assists, encourages, directs or associates himself with another for either the purpose of committing or in the commission of a crime is regarded as if he were the principal offender and is just as guilty as if he personally performed every act, consisting of the offense". The Judge's instruction on the criminal charge of complicity is contained in Section 2923.03 (F) of the Ohio Revised Code.

There is no need to strictly apply the legal concept of "complicity" to the facts of this case. At the same time, substantive legal principles should not be ignored in arbitration, where such principles can be applied within the concept of "just cause", which is the agreed upon test in the parties' Agreement for discipline and discharge. Legal principles have been tested by experience and common sense. In this connection I have inferred that the Grievant knowingly aided, helped, assisted, encouraged, directed, advised, associated and provided emotional support to Evans for the purpose of committing the offense of theft against the State. He was not merely a "go-between" for Evans and Johnson.

It should be underscored that the Grievant was employed by the State. The Bureau of Workers' Compensation is an agency of the State. The same employer that manages, operates and finances the Western Reserve Psychiatric Hospital is the same employer that manages, operates and finances the Bureau of Workers' Compensation. I do not see any substantive difference between the major role played by the Grievant in aiding and abetting Evans and Johnson in the check cashing scheme to deprive the Ohio Bureau of Workers Compensation of money, and a person breaking into the offices of the Bureau and removing checks that have been returned because of the death of a recipient or the recipient has moved, and has not notified the Bureau of the change of address. The evidence warrants the reasonable

inference that the Grievant played an instrumental role in the check cashing scheme and did so in order to obtain money. The employer that issued the checks from the Ohio Bureau of Workers Compensation that were returned to the Bureau and then diverted by Johnson to Evans, is the same Employer that pays wages to the Grievant.

In an unpublished decision (April 12, 1984) Arbitrator Harvey Nathan "expressed the principle adopted by most arbitrators in the kind of off duty misconduct case which is presented by the instant facts:

> "[T]he generally accepted standard among arbitrators is that proof of off-duty misconduct, even when serious and/or criminal, does not justify automatic discharge. An employer must show that the conduct has a demonstrable effect on the employer's business. In this regard, saying it does not make it so. An employer must do more than simply make the pronouncement that it has or will be injured by retaining an employee who has engaged in off-duty misconduct. It is always possible that an employer could theoretically lose a customer, lose face with the public or suffer some general loss of business reputation by employing 'convicts'. An employer must demonstrate some meaningful nexus between the off-

> duty conduct and the employee's employment. [Emphasis in original] 39th Annual Meeting of the NAA, Discipline and Discharge for Off-Duty Misconduct: What are the arbitral standards? by Marvin F. Hill, Jr., and Mark L. Kahn (BNA, 1987) at page 136.

I have concluded that the State has adequately shown that the actions of the Grievant had a demonstrable effect on the State. The gravity of the offenses of theft and dishonesty against an employer, require no explanation. As society considers such conduct serious enough to warrant imprisonment, the employer is on solid grounds to justify discharge when such conduct is intentionally committed against it.

II.

DISPARATE TREATMENT

The Union presented evidence to show disparate treatment between the Grievant and other employees at the State's facility. The evidentiary record indicated that Sandy Sherman, Thelma Walters, Kathy Colwell and Ted Jones were incarcerated for having committed various criminal offenses but received little or no discipline. None of these employees were removed from their positions.

The critical issue in considering the Union's claim of disparate treatment is whether the employees were similarly situated. Two (2) of the situations presented by the Union can be quickly disposed of, inasmuch as the offenses involved were sexual imposition and parole violation. These criminal acts were not relevant to the work of the employees who were found guilty of such acts of criminal misconduct; nor were the criminal offenses committed against the State.

Betty Williams, Pharmacy Attendant, and President of the Union, said that Kathy Colwell was "charged with Welfare Fraud". According to the State, Colwell was given a leave of absence without pay for three (3) months in 1987. The application for the leave indicated that she was "detained" and that "personal reasons were given" to the Assistant Superintendent of Patient Services. Linda Thernes, who was Director of Human Resources said the reasons that Colwell was given a leave without pay "were known only to the CEO."

I cannot conclude that the Union carried its burden of proving disparate treatment in the manner in which the State treated Colwell and the instant Grievant. That Colwell "was charged with Welfare Fraud" is highly inadequate as credible evidentiary proof to establish disparate treatment. Furthermore, the phrase "welfare fraud" is ambiguous. There was no evidence presented by the Union on the amount involved in the charge of "welfare fraud" and whether a

federal agency, state or city charged Colwell with welfare fraud. On balance I cannot give much, if any, weight to the Union's evidence on Colwell.

Turning to Sandy Sherman, she testified that she committed the crime of grand theft. She was convicted of "Title XX Aid for Dependent Children". While "working, she collected babysitter fees". In its brief the Union contends that the criminal offense of grand theft was committed against the State.

Based upon the evidence, I cannot conclude that Sherman committed a crime closely analogous to the crimes committed by the Grievant against the State by the Grievant. Furthermore, based upon the Union's evidence, I cannot conclude that the Sherman situation is analogous to the instant case. There was no evidence presented of the amount involved in the crime of grand theft committed by Sherman. I cannot conclude that the State was arbitrary or discriminatory in discharging the Grievant.

CONCLUSION

It should be emphasized that the discharge of the Grievant has not depended upon his conviction of grand theft and forgery by the Court of Common Pleas of Summit County. It is of some weight but it is not controlling. What is controlling is the evidence presented at the

arbitration hearing. The forum for arbitration is completely independent of the courts and different roles, procedures and substantive principles apply under a Labor Agreement entered into by the parties.

In arriving at the decision in this case, I have taken into account that the Grievant "has no prior discipline active in his personal file". However, several factors outweigh the Grievant's satisfactory record of employment. The evidentiary record warrants the conclusion that the Grievant played a major role along with Johnson and Evans in the check cashing scheme to steal money from the State. Moreover, he admits to receiving thirty (30) to forty dollars ($40) from Evans which was based upon the proceeds resulting from the scheme. The reasonable inference to be drawn from the evidence is that the Grievant received substantially more than thirty (30) to forty dollars ($40) of the $13,321.06 which were knowingly obtained without the consent of the Ohio Bureau of Workers' Compensation or, the State of Ohio.

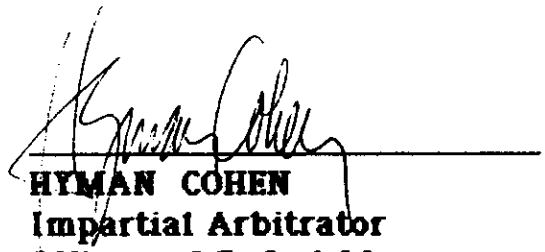
The State proved by clear and convincing evidence that the Grievant was discharged for just cause consistent with Article 24, Section 24.01 of the Labor Agreement for committing the offense of dishonesty against the State of Ohio.

AWARD

In light of the aforementioned considerations the State proved by clear and convincing evidence that the Grievant was discharged for just cause consistent with Article 24, Section 24.01 of the Labor Agreement for committing the offense of dishonesty against the State of Ohio.

The grievance is denied.

Dated: August 23, 1991
Cuyahoga County
Cleveland, Ohio



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