VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration	
	ARBITRATOR'S OPINION
-between-	
STATE OF OHIO, DEPARTMENT OF TRANSPORTATION	GRIEVANT: RANDY S. FAUBERT #668
-and-	
	No. 31-13-(91-03-19)
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME, AFL-CIO	15-01-06

FOR THE EMPLOYER:	MICHAEL K. WAGGONER State Labor Relations Officer Ohio Department of Transportation 25 South Front Street Columbus, Ohio 43215
FOR THE UNION:	JOHN GERSPER Staff Representative Ohio Civil Service Employees Association, Local 11 1680 Watermark Drive Columbus, Ohio 43215
DATE OF THE HEARING:	July 25, 1991
PLACE OF THE HEARING:	OCSEA 1680 Watermark Drive Columbus, Ohio 43215
ARBITRATOR:	HYMAN COHEN, Esq. Impartial Arbitrator Office and P. O. Address: Post Office Box 22360 Beachwood, Ohio 44122 Telephone: 216-442-9295

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The hearing was held on July 25, 1991 at OCSEA, Columbus, Ohio, before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties pursuant to the Rules and Regulations of the Federal Mediation and Conciliation Service.

The hearing began at 9:00 a.m. and was concluded at 1:25 p.m.

* * * * *

On or about March 19, 1991 **RANDY G. FAUBERT** filed a grievance with the **STATE OF OHIO, DEPARTMENT OF TRANSPORTATION**, the "**State**" protesting his removal from employment effective at the close of March 14, 1991 for committing the offense of theft (Offense No. 29 which provides for removal for "theft in and out of employment" that is contained in the State's Directive No. A-601). The State denied the grievance after which the grievance was appealed pursuant to the steps of the grievance procedure contained in the Agreement between the State of Ohio and **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME, AFL-CIO**, the "**Union**". Since the parties were unable to resolve the grievance, it was carried to arbitration.

FACTUAL DISCUSSION

The following facts were stipulated by the parties:

> "1. The Grievant has been continuously employed by the Ohio Department of Transportation since 1984 and held the position of Sign Worker 5 at the time of his removal.
>
> 2. The Grievant's immediate supervisor was Sign Supervisor 2 Schumann.

3. Mr. Schumann's immediate supervisor was Sign Shop Superintendent Mormon.

4. Mr. Mormon's immediate supervisor is Traffic Maintenance Shop Administrator Sheppard.

5. Mr. Sheppard also has under his direction Signal Shop Supervisor Duemmel.

6. Supervisors Schumann and Mormon were present in the Sign Shop from 7:30 A.M. until 8:45 A.M. on December 13, 1990.

7. Supervisors Sheppard, Duemmel, Jackson and Tufts were present in the Sign Shop during the entire morning of December 13, 1990.

8. The Grievant was discovered by Supervisors Sheppard and Duemmel while in the act of siphoning gasoline from a State vehicle into a container belonging to him at about 9:45 A.M. on December 13, 1990.

9. The Grievant did return the gasoline to the vehicle upon instruction by the Supervisors making the discovery.

10. A pre-disciplinary meeting was properly conducted on January 28, 1991, with Messrs. Sheppard and

Tornes present for Management and Messrs. Faubert, Wing, Horne and DeMoss present for the Grievant.

11. At the pre-disciplinary meeting the Grievant acknowledged siphoning the gasoline but offered a rationale for doing so.

12. At the time of the incident, the Grievant had on file one written reprimand dated June 22, 1990, for a charge of unauthorized absence.

13. The Grievant was removed from employment on March 14, 1991, and a grievance was properly filed on March 18, 1991.

14. A Level 3 grievance hearing was properly conducted on April 15, 1991, with Messrs. Sheppard and Waggoner and Ms. Grundey present for Management and Messrs. Faubert, Wing and Gersper present for the Grievant.

15. The case is properly before the Arbitrator for determination. * *"

The parties agreed to the following stipulation which constitutes the broad essential issues to be resolved by the Arbitrator:

"Did the Department of Transportation remove Randy Faubert for just cause, in accordance with Article 24?If, not, what shall the remedy be?"

In addition to the stipulated facts, it would be useful to set forth a general summary of the events as related by the Grievant which took place on December 13, 1990.

On December 13, 1990 the Grievant was required to report to work at 7:30 a.m. Upon turning the key of the ignition to the truck which he purchased within thirty (30) days of December 13, the Grievant noticed that the gas gauge was on "E" or Empty. He said that "vandals" had removed gas from his truck the previous night. The Grievant stated that since the truck was newly purchased he did not know how much gas the tank actually contained when the gas gauge was on empty. If he drove the truck to work he did not know "if it would die" while traveling to work. He did not like to be late and as a result he decided to take a chance by going to work. While on his way to work, he drove by a Sohio gas station (now BP). He indicated that he did want to purchase the more expensive gas sold at Sohio but he intended to obtain gas at the Omega gas station which is within one quarter (1/4) of a mile of where the State's Sign Shop is located.

When he arrived at the Omega station at about 7:20 or 7:25 a.m. he informed the attendant that he had a $50 bill in his wallet. When

he asked whether she could provide him with change the attendant told him that it would take approximately ten (10) to fifteen (15) minutes for her to do so. The Grievant did not want to wait and decided to drive the short distance to the sign shop.

He returned to his truck where he proceeded "down the entrance of the State's facility" where he is employed. While doing so, his truck ran out of gas in front of the test laboratory. The Grievant "coasted" the rest of the way in his truck to the Sign Shop parking lot and he parked "a little crooked".

At approximately 9:00 a.m. the Grievant asked several employees in the shop if they had "access to a gas can", to which they replied they did not. As the Grievant related, he intended to request permission from his Supervisor to use a vehicle to go to the gas station during his one-half (1/2) hour lunch break to get a gallon of gas to get his truck started. However, he said that he would not be able to have enough time for lunch.

There is a morning break which is usually taken around 10:00 a.m. As the Grievant explained, he works a good deal with aluminum and fiberglass. He uses the time during his morning break to wash up.

Shortly before 9:45 a.m. the Grievant went out to his truck where he keeps "emergency equipment" such as a jug for water or gas for people who may be stranded on the road. He picked up a hose along with a jug from his truck and returned to the shop. Some of the employees asked him what he was doing and he told them that he wanted to borrow gas to get his truck up to the gas station after which he would return the gas that was removed from the truck. The Grievant then went on to state that someone suggested that he siphon gas from the forklift and replace the amount of gas when he returned from obtaining gas at the Omega station.Since it is a large shop, the Grievant did not know where the forklift was located.

During the morning break, the Grievant said that he went outside and walked up to the "first" State vehicle, a van, a "DT 579", and set up the hose and can to siphon enough gas to enable him to drive to the gas station. The Grievant indicated that he had less than a quart of gas when Bob H. Sheppard, Traffic Maintenance Shop Administrator and Traffic Maintenance Shop Supervisor appeared and asked him what was he doing. The Grievant told Sheppard that he ran out of gas and that he wanted to start his truck up again, get it to the gas station, fill it up and return the gas to the State van. According to the Grievant, Sheppard advised him that "if I were you, I would not take anything off State property". The Grievant then placed approximately a quart of gas back into the State truck and returned to

the Shop. The Grievant proceeded to Supervisor Gary Jackson's office and showed him that nothing was in the jug. He then walked to Supervisor Tufts' office and did the same thing. He then placed the jug and hose back in his truck. After returning to the shop, the Grievant went to the offices of Supervisors Duemmel and Bower and explained the circumstances to each of them, after which he returned to the shop and went to work.

DISCUSSION

The critical issue to be resolved is whether the Grievant committed the act of theft on December 13, 1990. It is well established that the offense of theft requires the taking of personal property belonging to another, from his possession without his consent and with the intent to deprive the owner of the value of the property and to appropriate it for one's own use or benefit. It is undisputed that on December 13 the Grievant siphoned gas from a State vehicle without the consent of a supervisor. The question remaining to be resolved is whether the Grievant intended to borrow the gas, -- in other words, did he intend to remove the gas from the State vehicle with the intention to return an equivalent amount of gas during the lunch break; or did he intend to commit the offense of theft? The State challenges the Claimant's story and indicates that it warrants the inference that he siphoned the gasoline with the intent to commit the

act of theft. I turn to a critical evaluation of the events of December 13, as related by the Grievant.

In a handwritten statement which was written by the Grievant and provided to the State on December 18, 1990, he said that "someone the night before the morning of December 13 "had taken [approximately] 3/4 a tank of gas from [his] truck". At the hearing the Grievant said that vandals had "stolen the gasoline". He went on to state that he participated in a police investigation which led to apprehending the vandals who vandalized a neighbor's automobile and slashed her tires. No documentation was submitted by the Grievant to support his statement concerning the vandals. In light of the Grievant's termination, such documentation of the police investigation would have been helpful. Such documentation would dispel any doubt given to his testimony that "vandals" removed the gas from his vehicle. However it is the events stemming from the Grievant's predicament caused by his failure to have a sufficient amount of gas in his vehicle which is of great weight in this case.

Since he does not like to be late for work, the Grievant decided to take a chance and drive his truck to the Omega gas station which is located approximately one quarter (1/4) of a mile from the State's facility where he performs his work. In doing so, the Grievant went by a Sohio gas station on his way to work. Thus, knowing that at any

moment his vehicle might stop on any one of the streets or the highway, the Grievant failed to procure gas at the Sohio station because its price of gas was higher than the price at Omega! In the Grievant's view, stopping at the Sohio station and buying one (1) or two (2) gallons of gas did not outweigh the risk of stopping at some uncertain location on his way to work since the gas gauge indicated "E". Indeed, because of his lack of familiarity with the amount of gas in the tank of his newly purchased vehicle, when the gauge is on empty, he should have gone to the gas station closest to his apartment. Furthermore, in the balancing of factors that he failed to consider, is that the objective of arriving at work on time would certainly not be achieved if his vehicle stops operating on his way to work because his gas tank is dry. As he realized he had a $50 bill which he knew might cause some delay or difficulty at the Omega station. Thus, he sacrificed the certainty of obtaining enough gasoline for his vehicle at Sohio in order to arrive at work on time for the uncertainty of not arriving at Omega where he would save money in buying gasoline. I find the Grievant's judgment and thinking on these matters nothing less than astonishing, although it must be stated that in retrospect, we are so much wiser.

Moreover, there are Sunoco and Omega gas stations close to his apartment on Georgeville which he would pass by on the route he used to get to work. However, he said that he would have to cross

three (3) or four (4) lanes of heavy traffic during the rush hour traffic in order to procure gas at these stations. Again, it should be underscored that the Grievant passed up these opportunities because of his compulsion to obtain gas at the Omega station close to work. Although there are two (2) alternative routes with easy access to several gas stations located along these routes that could have been taken by the Grievant on his way to work on December 13, he did not use them. He indicated that one (1) of the routes was twice as far as the route he had used on December 13. The inference to be drawn is that the Grievant's exercise of judgment on December 13 is subject to serious question.

The Grievant realized that there could be a problem because he had a $50 bill in his wallet. He told the attendant at Omega about the $50 bill and asked if he could obtain change for it. According to the Grievant, the attendant told him that it would take approximately ten (10) to fifteen (15) minutes before she would have sufficient change.

The Grievant was aware of the difficulties that he might encounter at Omega. Thus, instead of driving through "the pull up" and getting gas, after which the buyer proceeds to the teller window to pay for the gas, the Grievant first asked the attendant whether she was able to give him change of the $50 bill. Again, the Grievant demonstrated extremely poor judgment in failing to stop at any of the

several gas stations along the route in order to arrive at Omega where he anticipated problems because of the $50 bill in his wallet.

Turning to another consideration, the State questions why the Grievant siphoned the gasoline from the State's vehicle at approximately 9:45 a.m. in order to drive to the Omega facility during his lunch break, some two (2) hours later to purchase gas after which he planned to replace the gas which he removed. In his testimony the Grievant disclosed his reason for not waiting until his lunch break to follow his plan of siphoning gas. He simply indicated, that he would not have enough time for his lunch. When the Grievant was asked why did he not wait until 4:00 p.m., the end of his shift to siphon the gas, he replied that "[T]he thought never entered my mind".

At approximately 9:00 a.m., the Grievant asked the employees in the shop if they had access to a "gas can" in order "to borrow enough gas". The Grievant acknowledged that he had a "jug" in his truck. He indicated that the reason that he asked the employees in the shop for a gas can is that he wanted to show the other employees that he intended to borrow gas and that he "would have to bring the gas can back".

It is reasonable to believe that it would have been sufficient for the Grievant to tell his co-workers that he intended to siphon gas from the State's vehicle and would replace an equivalent quantity

during the lunch break. At any rate, it is nevertheless puzzling as to why the Grievant would ask his co-workers if they had access to a "gas can" when he had a "jug" that would be used for that purpose.

It is of great weight that the Grievant decided to siphon gas from the State's vehicle without permission of any supervisor. The Grievant indicated that he asked a co-worker, Michael Catiglione if he knew if Schuman, his immediate supervisor, was in the facility but was told that "he was in schooling" and that he left the building at 8:30 a.m. The Grievant's other supervisor, Mormon was also "at schooling, and also out of the building". The Grievant failed to ask for permission from any other supervisor to resolve his problem concerning the lack of gas in his vehicle. He said that he did not seek out Signal Shop Supervisor Duemmel because he was "never told to report to him". The Grievant failed to contact supervisors Jackson and Tufts. He went on to state that he did not know that they were present in the building. The Grievant added that it is "not standard procedure to go to the other supervisors".

It should be noted that Supervisors Sheppard, Duemmel, Jackson and Tufts were at the State's facility during the morning of December 13. That the Claimant did not seek advice or consent from these supervisors on siphoning gas from the State vehicle on December 13 because he does not report to these supervisors or that

the only time he does so is when Schumann tells him to report to them the day before, or that it is not standard procedure to report to the other supervisors strains the outer limits of credulity. The siphoning of gas from a State's vehicle cannot be said to be standard procedure. Before taking such an unusual step, the simple gesture of seeking consent, advice or some other assistance from a supervisor not in the direct chain of command of the Grievant is certainly called for. To rely upon a table of organization for the State's facility and for the Grievant to indicate that it is not standard procedure to go to other supervisors, is, to put it mildly, extremely unwise and a serious departure from common sense.

Furthermore, the Grievant said that he did not know which supervisors were at the facility on December 13. However, all he had to do was ask but he failed to do so. Despite the Grievant's failure to seek advice, assistance or consent to carry out his decision to siphon gas from any of the supervisors at the State's facility, he sought out the supervisors at the State's facility after Sheppard advised him not to take anything off State property. After Sheppard instructed him not to remove the gas, the Grievant returned to the shop where he proceeded to the offices of Jackson, Duemmel, Tufts and Bowens. When he met with each of these supervisors, he explained the circumstances surrounding the act of siphoning gas from the State's vehicle. Unless he did not know that he was committing a wrongful

act, the Grievant's behavior in meeting with the various supervisors after but not before the act of siphoning gas, to say the least is puzzling.

In his written statement on December 18, the Grievant indicated that he intended to request consent of his immediate supervisors for permission to use a State vehicle to go to the gas station to obtain gas. However, no such request was made by the Grievant of his co-workers whom he works with on a daily basis. The Grievant said that at 7:30 a.m. an employee named "Moss" offered to help him but at that time [7:30 a.m.] "it was not permitted". He also indicated that there was "no time limitation" placed on the offer of assistance. It is enough to state that the Grievant's testimony on this aspect of the dispute between the parties is astonishing and consistent with his poor exercise of judgment throughout the morning of December 13.

The Grievant said that he asked a person, whom he could not identify, for permission to remove gas from his vehicle. This testimony cannot be credited as constituting probative evidence. However, the Grievant siphoned gas from the State's vehicle without consent of any supervisor on the premises rather than request permission to siphon gas from the vehicles of the employees in the shop. It should be pointed out that three (3) co-workers of the Grievant,Sign Worker, Scott Radford, and Painters Michael Castiglione,

Fred Horne not only submitted written statements on behalf of the Grievant but also testified at the hearing. Nevertheless, the Grievant failed to ask any of these employees for assistance!

Horne indicated that during his lunch break, he drove the Grievant to the gas station. He said that he "loaned" the Grievant "about $2" to buy gas. Horne added that the Grievant told him that he had a $50 bill in his wallet and that he "could not get change". The Grievant did not explain why he could not obtain change of the $50 bill during the lunch break.

The various aspects and omissions from the Grievant's testimony about the events of December 13 are damaging to the Grievant's case. However, there are factors which weigh in the Grievant's favor and from which I have drawn the reasonable inference that he did not possess the intent to commit the act of theft against the State.

The record supports the Grievant's testimony that his vehicle ran out of gas while entering the State's facility. As the Grievant indicated his vehicle "coasted" into the parking lot and he parked "crooked". Supervisor Jackson said that on December 13 he first became aware that the Grievant's vehicle ran out of gas "due to the extraordinary way that [the Grievant's] truck was parked on the lot". Jackson stated that he "had to drive around it to get by".

Jackson further testified that as he walked into the shop "the guys said good parking Randy" and he responded "I ran out of gas from the test lab and coasted all the way in". Jackson elaborated by stating that the "fellows were teasing" the Grievant.

In addition to the common knowledge in the shop that the Grievant ran out of gas, I turn to underscore his choice of a location to siphon the gas. At approximately 9:45 he went out to the parking lot and selected the "first" State van and began removing gas from its tank. The parking lot where he performed the siphoning of gas was located behind the sign shop which has six (6) to seven (7) windows. There are fifty-five (55) to sixty (60) employees who work in the garage across the street from the lot. There is a chain-link fence on the sides of the parking lot. In addition, there is a good deal of "foot traffic" close by because other employees take their morning break at the same time. There is a "Johnson truck" at both the garage and the sign shop from which food is sold to employees during the break. Moreover, at about 9:45 it was daylight when the Grievant performed the act of siphoning gas from the State's vehicle. If the Grievant intended to steal gas from the State, the parking lot which he selected is the least likely place to commit such an act. In any event, it is not surprising that Sheppard received an "anonymous phone call" indicating that "if you want to see someone removing gas from a State vehicle to go to the back lot". He thought that the call was made from

the garage. The act of the Grievant of siphoning gas from the State's vehicle is not the conduct of a thief. The common knowledge of the co-workers in the shop as well as the location fo the Grievant to siphon gas into a jug in public view does not warrant the inference that he intended to commit the offense of theft.

There is still one (1) other aspect of the events of December 13 to consider. Jackson indicated that during the morning of December 13 "several guys" said to the Grievant that they would take him "down" to get him "some gas" but [the Grievant] "did not take the employees up on their offers". As I have previously set forth, Jackson heard "Moss" make the offer but the offer was "declined" by the Grievant.

The Grievant's failure to accept Moss' offer of assistance because "it was not permitted" at 7:30 a.m. and that there was "no time limitation" on his offer is simply not believable. Furthermore, I am persuaded by Jackson's testimony that other co-workers other than Moss, offered to provide assistance to the Grievant so that he could obtain gas, even though no such testimony was provided by the Grievant.

Based upon the evidentiary record I have concluded that the Grievant did not believe that he was committing a wrongful act when he siphoned the gas from the State's vehicle on December 13. I have inferred that he intended to replace the gas that he removed with an

equivalent amount of gas that he intended to purchase at the gas station. I have further concluded that the failure to take alternative courses of action, including but not limited to seeking assistance from supervisors or co-workers can be explained by the Grievant's perception or belief that he was not doing anything wrong. Accordingly, I cannot conclude that the Grievant possessed the intent to commit the act of theft against the State.

THE "FITCH" CASE

In 1986, David Fitch, a bargaining unit employee took an axle from the Central Garage, placed it in back of his truck and then took the axle to his home. The Ohio State Highway Patrol found the axle at Fitch's residence, "confiscated" it for evidence and returned it later to the State. The Grievant was prosecuted for committing a criminal offense against the State and "convicted of a type 4 misdemeanor". In light of Fitch's past record, the State reduced his removal from employment to a thirty (30) day suspension. Union President Karen Williamson indicated that the axle had a value of $1.83.

The Union contends that by suspending Fitch for thirty (30) days in 1986 and terminating the Grievant, the State is guilty of disparate treatment. I cannot conclude that the isolated case involving "Fitch" demonstrates that the State is guilty of disparate treatment. The circumstances surrounding the removal of the axle

from State property by Fitch in 1986 cannot be considered the same or similar to the offense committed by the Grievant.

As stated in OCB grievance number 23-06-891113-0121-01-03 (Ohio Department of Mental Health--Grievant: Dennis Jennings), the question of whether there is a sufficient showing of proof of disparate treatment depends upon various factors, including:

> "* *some recognition that absolute homogeneity of discipline in a work force is impossible. What is required to quote Arbitrator Graham is "a range of reasonableness". Moreover, the employer must be known or have had reason to have known of the particular disparities. One instance of disparate treatment on an employer's part (unless shown to have been an intentional act) will not suffice. On the other hand, a clear pattern of arbitrary or discriminatory discipline infers motivated different treatment which is manifestly prohibited. The employer is not excused for unfair disparate treatment merely because no evidence of intention is available. On the other hand, discipline does require some flexibility in administration. Most cases where disparate treatment is alleged will, in all likelihood, cover more than one instance of disparate treatment and

> less than a clear cut pattern of disparate treatment. Once the employer has shown prima facie just cause and once the Union has shown prima facie disparate treatment (similar offense, dissimilar treatment apparently without a proper reason), the waters get murky in terms of burdens of proof and standards. One obvious problem of proof is that the best evidence lies in the hands of the employer who has the greatest access to the background and details of each disciplinary instance * *." at pages 14-15.

It is enough to state that in addition to what has been set forth so far, Fitch had been employed by the State for approximately fifteen (15) years; the Grievant has been continuously employed by the State since 1984. Since the Grievant's tenure with the State was interrupted by military service, he had a total of nine (9) years of employment with the State. In light of these considerations, I cannot conclude that the Fitch case and the instant case are similar. Accordingly, I cannot find that the Union carried its burden of showing disparate treatment against the Grievant.

CONCLUSION

The record warrants the conclusion that the Grievant did not commit the offense of theft against the State and thus did not commit

offense No. 29 which provides for removal for "theft, in and out of employment" contained in State Directive No. A-601. However, this is not to conclude that any lesser penalty than reinstatement without back pay should be awarded.

The Grievant did not exercise merely poor judgment. In a word, it was reckless and almost exceeds the outer limits of irresponsibility. The State acted reasonably given the astonishing aspects of the Grievant's story of the events of December 13. The Grievant is not to be granted any back pay for such an exercise of reckless judgment. On the other hand the State should in no way be penalized for its reasonable but mistaken judgment that the Grievant committed the act of theft. It is clear that the act of siphoning gas from the State vehicle is unauthorized. However, there was no intent by the Grievant to appropriate the gasoline for his permanent use or benefit. He siphoned gas from the State's vehicle with the intention to return an equivalent amount in a few hours.

As a final matter, it should be noted that I have taken into account the mitigating factor of the Grievant's satisfactory record during the tenure with the State. The only discipline that is "on file" is a written reprimand for unauthorized absence in June, 1990.

AWARD

The State failed to prove by clear and convincing evidence that the Grievant was removed for "just cause" as required by Article 24, Section 24.01. The Grievant is to be reinstated to his former position, without back pay, but with seniority since March 14, 1991 when he was removed from employment.

Dated: September 19, 1991
Cuyahoga County
Cleveland, Ohio

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