ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER 758

OCB GRIEVANCE NUMBER: 02-03-910805-0207-01-05

GRIEVANT NAME: FITCH, MICHAEL

UNION: OCSEA

DEPARTMENT PUBLIC WORKS

ARBITRATOR: SMITH, ANNA

MANAGEMENT ADVOCATE: KIRSCHNER, PAUL

2ND CHAIR: TURRELL, SHIRLEY

UNION ADVOCATE: STEELE, ROBERT

ARBITRATION DATE: MARCH 17, 1992

DECISION DATE: APRIL 25, 1992

DECISION: DENIED

CONTRACT SECTION AND/OR ISSUES: GRIEVANT WAS REMOVED FOR UNAUTHORIZED POSSESSION OF STATE PROPERTY-IN POSSESSION OF 2 BOXES OF HIGHWAY MARKING TAPE.

HOLDING: GRIEVANT APPROPORIATED SOME OF THE STATE'S PROPERTY FOR HIMSELF AND LATER SOUGHT TO JUSTIFY IT BY CLAIMING TO HAVE GOTTEN PERMISSION FROM A SUPERVISOR. GRIEVANT VIOLATED THE TRUST ESSENTIAL TO THE PERFORMANCE OF HIS DUTY AND DELIVERY OF HIS EMPLOYER'S SERVICE.

COST: $783.61

In the Matter of Arbitration Between STATE OF OHIO, DEPARTMENT OF ADMINISTRATIVE SERVICES, DIVISION OF PUBLIC WORKS and OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, A.F.S.C.M.E., AFL/CIO	OPINION and AWARD Anna D. Smith, Arbitrator Case 02-03-910805-0207-01-05 Michael Fitch, Grievant Removal

#758

Appearances

For the State of Ohio:

Paul Kirschner; Ohio Office of Collective Bargaining; Advocate
Shirley Turrell; Ohio Department of Administrative Services; Director's Designee
Ernest Chesser; former Building Construction Superintendent, Ohio Department of Transportation; Witness
Thomas J. Foody; Assistant to Deputy Director of Operations, Ohio Department of Transportation; Witness
Charles J. Nishwitz; Investigator, Ohio Department of Transportation; Witness
Robert N. White; former Building Superintendent, ODAS Division of Public Works; Witness

For OSCEA Local 11, AFSCME:

Robert W. Steele; Staff Representative, OCSEA Local 11, AFSCME; Advocate
Maxine S. Hicks; Staff Representative, OCSEA Local 11, AFSCME; Second Chair
Michael D. Fitch; Grievant
Tommy Cannon; Witness
Larry G. Leigh; Witness

Hearing

Pursuant to the procedures of the parties a hearing was held at 9:15 a.m. on March 17, 1992, at the offices of the Ohio Civil Service Employees Association, Columbus, Ohio, before Anna D. Smith, Arbitrator. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded. The record was closed at the conclusion of oral argument at 1:45 p.m., March 17, 1992. This opinion and award is based solely on the record as described herein.

Issue

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

> Was the Grievant removed from his position for just cause? If not, what shall the remedy be?

They further stipulated that the case is properly before the Arbitrator.

Joint Exhibits and Stipulations

Joint Exhibits

1. 1989-91 Collective Bargaining Agreement
2. Discipline Trail:
   - Notice of charge and placement on administrative leave, 5/9/91
   - Proposal to suspend/remove, 5/10/91
   - Pre-Disciplinary notice, 5/20/91
   - Pre-Disciplinary date change, 5/23/91
   - Pre-Disciplinary report, 6/11/91
   - Notice of removal, 7/19/91
3. Grievance Trail:
   - Grievance, 7/31/91
   - Notice of grievance review meeting, 8/28/91
   - Step 3 response, 2/25/92
4. Investigative Reports:
   - Report of ODOT Investigator, Charles Nishwitz, 5/9/91

Notes in preparation for Nishwitz report, 5/6/91
Inter-office communication of Ernest Chesser to Charles Nishwitz, 6/5/91

Stipulations of Fact

The Grievant, Michael Fitch, was in possession of two (2) boxes of highway marking tape that were the property of the Ohio Department of Transportation.

Case History

The Grievant in this case was discharged for unauthorized possession of State property in violation of his employer's Rule #14, Failure of Good Behavior. At the time of his removal, he was a 3-1/2 year custodial worker employed by the Ohio Division of Public Works and assigned to the second shift crew, cleaning the second floor of the Ohio Department of Transportation's central office in Columbus, Ohio. He was informed on his employer's work rules, but had accumulated a record of seven disciplinary actions, largely for absenteeism and tardiness. The most recent and severest of these was a one-day suspension served on April 17, 1991.[1]

The property that the Grievant is accused of having without authorization is marking tape with an approximate value of $96.00 belonging to the Ohio Department of Transportation (ODOT). The tape was discovered in the trunk of the Grievant's car when he was apprehended by the Columbus Police Department on outstanding arrest

[1]1-day suspension, 11/21/89, neglect of duty; written reprimand, 12/8/89, tardiness; verbal reprimand, 10/29/90, neglect of duty; written reprimand, 10/30/90, tampering with State documents; written reprimand, 1/8/91, neglect of duty; verbal reprimand, 3/28/91, tardiness; 1-day suspension, 4/17/91, neglect of duty, failure to report absence and personal conduct.

warrants on May 3, 1991. Because the two unopened boxes had mailing labels on them addressed to ODOT, the Police Department notified the Ohio State Highway Patrol, who in turn notified Investigator Nishwitz of ODOT. Nishwitz launched an investigation that ultimately led to identification of the property by Thomas Foody of the Department. Mr. Foody testified that the tape had been acquired in 1986 to mark traffic lanes and parking stalls. The tape did not work well for this purpose, so it was stored in an unsecured area of the sub-basement for future alternative use. After being notified that the tape had been recovered, Foody verified that it was, in fact, missing from the storage area. He further testified that ODOT would not have discarded the tape, that Public Works had no authority to do so themselves, and that it was possible but unlikely to have been thrown away by accident. Ernest Chesser, Superintendent in charge of the building, testified that 2-1/2 boxes had been stored (two full and sealed with shipping tape, one open), and corroborated that they were missing although he had not authorized their disposal. Both these witnesses and Robert White, Public Works Building Superintendent, agreed that a general clean-up of the building that occurred in February or March of 1991 was confined to the offices and did not involve the storage area.

The Grievant denies stealing the tape. He and two co-workers testified that trash-picking with supervisor permission is a common practice at the building. They also stated that the night after a general clean-up at the facility, the Grievant found two boxes of

tape in a trash cart. One or both were already open. They further stated that the Grievant got permission from their immediate supervisor (who did not testify) before he took the tape. The supervisor's alleged approval was not previously reported by these witnesses, they said, because the Grievant asked one to withhold the information for his lawyer and neither wanted to implicate their boss. The Grievant's written statement does include a reference to the supervisor's approval:

> ...As we were emptying the trash cart we noticed two (2) cardbord [sic] boxes that were already open in the trash cart. Tommy & I seen [sic] that it was tape....So I put the boxes in the trunk of my car.
>
> About this time it was about 11:45 p.m. I was on my way back up to my floor (2nd) to turn off the lights. I was waiting elevator I heard some thing out in the garage. So I went out to see what it was, and I saw Richard ... (the nigth [sic] supervicer [sic]). I told him about the tape, and he said since it was trash don't worry about it and on my way back to the elevator I saw Richard staggering around by his truck. I asked him was he all rigth [sic]? And he said he was. Thats [sic] when I noticed he wasn't. He had almost [illegible] on his [illegible]. I knew he was drunk so I helped him back to his truck. I told him to sleep it off and to be cool because [illegible] was still in the building. Thats [sic] when I saw four or five empty beer cans in the front seat. And that was the last time I saw him until 12:30 a.m. (Union Ex. 4)

After discovery of the tape in the Grievant's car, he was placed on paid administrative leave pending disciplinary decision. The Employer also pressed criminal charges against him, the outcome of which was a bond forfeiture. As to the disciplinary action, the Grievant was charged on May 20, 1991, with "Failure of good behavior; Theft of state property; Violation of Ohio Revised Code 2921.41 - Theft in Office" (Joint Ex. 2). The pre-disciplinary meeting was duly conducted on June 4, 1991. The Hearing Officer's

finding of just cause for discipline was issued June 11, 1991, with a recommendation that the theft-in-office charge be dropped. The removal order was issued July 19, 1991, citing "Failure of good behavior; Being in unauthorized possession of property belonging to the State of Ohio, Department of Transportation. Violation of Work Rule 14" (Joint Ex. 2).

This action was grieved on July 31, 1991, at Step 3. The grievance alleged violation of Article 24 (Discipline). Section 2.01 (Discrimination) was added later. A Step 3 meeting was held on September 9, 1991. The Employer's response denying the grievance was issued February 26, 1992. Being still unresolved, the grievance came to arbitration, where it resides for final and binding decision.

Arguments of the Parties

Arguments on Procedure

The Union contends that procedural defects are fatal to the Employer's case. It first asserts that it did not receive the Step 3 response until March 12, 1992, a mere five days before arbitration. Article 25.02 of the Contract is not permissive, the Union says, but requires a written response within 35 days of the Step 3 conference:

> Article 25 Grievance Procedure
> **§25.02 - Grievance Steps**
> **Step 3 - Agency Head or Designee**
> A. Disciplinary grievances (suspension and removal)
> The Step 3 grievance response shall be prepared by the Agency Head or designee and reviewed by the Office of Collective Bargaining. The response will be issued by the Agency Head or designee within thirty-five (35) days of the meeting. The response shall be forwarded to the grievant and a copy to one representative designated by

> the Local Chapter Officer. Additionally, a copy of the answer will be forwarded to the Union's Central Office. This response shall be accompanied by a legible copy of the grievance form. (Joint Ex. 1)

The failure of the Employer to meet its obligation indicates a lack of good faith to resolve the grievance early in the process.

The Union also contends that the Step 3 response is filled with inaccuracies. For example, there was no discussion of past discipline at the hearing, nor did Management cite the Grievant's disciplinary record in support of the removal. Additionally, Management erroneously states that the Grievant worked on the same floor where the property was stored.

Another procedural defect, claims the Union, is the Employer's reliance on the Code and its use of rules pre-dating even the first Agreement between the parties. Despite what the State says, the Union maintains citation of the Code is in violation of the Agreement since Article 43.01 states that the Contract supercedes State laws.

The Employer disagrees that absence of a timely Step 3 response to the grievance constitutes a fatal flaw, pointing out that there is no contractual bar to management's ability to discipline under this circumstance. It further notes that the Grievant was afforded due process rights in the pre-disciplinary conference and the Union was not prevented from proceeding to arbitration. Management additionally claims that the Step 3 designee understood that an extension was in effect.

As to the Union's position that the work rules may not be applied since they reference 124.34 O.R.C., the State acknowledges

that the work rules predate the contract, but asserts they do not conflict with it. The charge against the Grievant references a rule which merely gives examples of inappropriate behavior under a concept originating in state law. The Employer goes on to state that the Union has not brought evidence that the Contract was intended to disregard concepts of poor performance recognized under state law. In fact, says the State, the Union's former executive director issued a statement in 1986 by which it was agreed concepts of 124.34 would constitute just cause. Since then the work rules of the Division of Public Works have stood unchallenged. The Employer's position is that the Union has long since waived its rights to challenge the rules.

Arguments on the Merits

The Employer first points out that the Grievant admits possession of property taken from the ODOT facility. It contends that his defense of merely participating in a common practice of trash-picking is without merit. State evidence shows that it was unlikely the tape had been discarded, and there is discrepancy in the testimony about the number and condition of the boxes. Even if the tape had been found in the trash, it was the employee's obligation to get permission to take it from someone in authority, and the Grievant knew this. The Grievant makes a mockery of authorization. In his statement he wrote that he ran into his supervisor by accident after he put the tape in his car, and that when he did, the supervisor was so drunk he had to help him to his vehicle. Now the Grievant testifies he sought the supervisor out,

taking the tape with him. The State goes on to contend that the co-worker's explanation for omitting the critical information about the supervisor's permission from his statement is not credible. The State suggests the Grievant has reconstructed his story with the aid of his friends to suit his own purpose.

The Employer admits that the evidence against the Grievant is circumstantial, but contends that possession of stolen property creates the presumption that the possessor took part in its removal. This presumption is essentially irrefutable if the employee does not tell the employer he has it, says the State. In support of this argument, the Employer references a decision by Arbitrator Klamon (Allen Industries v. U.A.W., 26 LA 363) regarding the use of circumstantial evidence, a decision by Arbitrator Seidenberg (Morgan Millwork v. District 50, U.M.W.A.) affirming discharge for possession of employer property and a decision by Arbitrator Smith (ODOT v. OCSEA, Parties' Case No. 31-02-(01-11-91)-0003-01-06) sustaining removal for theft of employer property of any value.

In conclusion, the Employer requests that the removal be sustained and the grievance denied in its entirety. Should the Grievant be returned to work, the Employer asks the Arbitrator to accommodate the fact that his job has been abolished.

The Union's position on the merits is that the State has failed to prove that the Grievant is guilty of violating Rule 14 or having unauthorized possession of State property. Rule 14 is not specific regarding possession of State property nor does it address

property found in the trash. The Grievant was not aware his job was at risk when he took the discarded tape. He followed the procedure in practice at the facility by asking permission of his supervisor, facts supported by two witnesses. The State cannot say how the property came to leave the unsecured area and get into the trash. It also failed to investigate whether the supervisor permitted the Grievant to take the tape and did not report the results of its investigation into the telephone incident.

In sum, the Union's position is that the State lacks just cause for removing the Grievant. It asks that the grievance be upheld, the Grievant reinstated and afforded all back pay, seniority and benefits, including layoff and recall rights as specified in Article 18.

Opinion of the Arbitrator

The Union raises several procedural points as threshhold issues which can be summarized as follows: do contractual violations exist sufficient to invalidate the discharge without considering the Grievant's guilt or innocence? Although I do find procedural deficiencies, in my opinion they do not compel setting aside the removal. The most serious of these is the Employer's untimely Step 3 response. I must agree with the Union that this indicates a lack of good faith effort to resolve the grievance at an early stage and that the practice should be discouraged. However, this deficiency is not fatal for several reasons. First, there is no evidence even suggesting that the Union sought the response during the months it was overdue. What this implies is

that the Union, itself, was not eager for an early resolution. Whatever the damage to the grievance process, I suggest that the Union participated by its failure to protest the delay until the case came to arbitration. Then, too, regardless of the parties' intentions, the potential loss to this Grievant is only the pay and benefits he might have received had he been returned to work sooner by settlement than by arbitration award. Should the Grievant be reinstated in arbitration, this loss can be remedied by awarding him back pay at least from the date of the Union's protest to the date of the award.

A second reason I do not hold that the violation of §25.02 invalidates the discharge, is that the Contract itself contemplates tardy or nonforthcoming responses and provides a remedy:

> Article 25 Grievance Procedure
> **§25.02 - Grievance Steps**
> **Step 3 - Agency Head or Designee**
>
> ...
>
> If the grievance is not resolved at Step 3, the Union may appeal the grievance to arbitration by providing written notice and a legible copy of the grievance form to the Director of the Office of Collective Bargaining within thirty (30) days of the answer, or the due date of the answer <u>if no answer is given</u> whichever is earlier. [Emphasis added]
>
> **§25.05 - Time Limits**
>
> ...
>
> In the absence of such extensions at any step <u>where a grievance response of the Employer has not been received</u> by the grievant and the Union representative within the specified time limits, the grievant may file the grievance to the next successive step in the grievance procedure. [Emphasis added]
>
> (Joint Ex. 1)

Thus, the Employer's lapse did not prevent the Grievant from appealing his case, for the Union availed itself of the contractual remedy and moved to arbitrate.

Yet a third reason the discharge is not invalidated by the tardy Step 3 response is the absence of any evidence or even a claim that the untimely receipt of the response prevented the Grievant from receiving a full and fair hearing. In fact, he had such a hearing from me, wherein his Union mounted a vigorous defense unblemished by the tardiness of the Step 3 response. In conclusion, the availability of adequate remedies makes this violation no bar to deciding the case on its merits.

The same result is obtained on the point of Step 3 response inaccuracies. None of those referenced by the Union are resistant to correction in arbitration. Indeed, one rarely finds that the parties are in accord on the facts of a dispute. If they were, the important factfinding function of arbitration would not exist. What matters is not whether there are factual errors, but whether those errors that do exist are relevant and correctable.

Another problem claimed by the Union is the reference in the Work Rules to the Revised Code as a basis for discipline. I have held repeatedly and consistently that citation of the Code on discipline documents such as pre-disciplinary hearing notices and removal orders does not invalidate the disciplinary action. I see no reason to rule otherwise here where the reference is in the Work Rules, since the Employer does not attempt to use the Code to usurp

the authority of the Contract, but merely to define unacceptable behavior.

Having crossed the procedural hurdles raised by the Union, I turn now to the merits. It is an uncontroverted fact that the Grievant was in possession of ODOT property. Where he found the tape and its value is irrelevant to this case. What does matter is whether he had premission to take it. I am convinced he did not, and further, that he knew it was necessary to obtain consent to take State property with impunity.

Beginning with the Grievant's knowledge of the consequences of his action, the Union says the rules are inadequate notice because Rule 14 (Employee Discipline - Rights and Responsibilities) and especially Example 4 (Failure of good behavior) do not refer specifically to unauthorized possession of State property or to property found in the trash. While it is true that these rules are not as detailed as some promulgated by other State agencies whose employees are represented by this Union, the Grievant had adequate notice. First, the Grievant's offense is one of the general class referred to in Example 4: "Any misconduct which violates reasonable standards of conduct...." (Union Ex. 1). Second, it is clear to me that the Grievant knew appropriation even of apparently discarded State property without authorization was improper and therefore of this class because he and his co-workers testified that getting a supervisor's approval was essential. All instances of trash-picking related by these witnesses included a supervisor's

knowledge and approval, and the Grievant took considerable care trying to establish that he had it in this instance.

I do not, however, find his claim of authorization credible. His statement differs too much from his testimony to be explained by nervousness. The co-worker's explanation that he left out his observation of the supervisor's permission to help his friend is simply too far-fetched, since the omission could only be detrimental to the Grievant. More credible is the story of the witness who said he did not write a statement because he did not want to implicate his supervisor. Yet now he does implicate him to help his friend. The extent of these changes and the different accounts of the boxes simply makes the version of events offered by the Grievant unreliable. But even if I did believe that the Grievant asked his supervisor, who then gave his consent, I would still hold that authorization was not obtained. This is because the consent of someone so intoxicated he had to be helped to his car is no consent at all.

The Union also alleges a deficient investigation. Inasmuch as the pre-disciplinary report makes no mention of a Grievant defense of permission granted, the Employer would lack knowledge of any role the supervisor might have played in the incident or even of his presence at the time. Although the Employer did not turn over every stone, its investigation was fundamentally fair. It had the strong circumstantial evidence of ODOT property in the Grievant's possession, it looked to see if the tape was missing from storage, it inquired into access, and it heard from witnesses on both sides.

It remains to determine whether the level of discipline is reasonable under the circumstances. This employee was entrusted with the property of his employer's client. It was central to his job. Yet he approporiated some of that property for himself and later sought to justify it by claiming to have gotten permission from a supervisor whom he knew to be incompetent at the time to grant that permission. Clearly this employee violated the trust essential to the performance of his duty and delivery of his employer's service. Removal is justified.

Award

The grievance is denied in its entirety.

Anna D. Smith, Ph.D.
Arbitrator

April 25, 1992
Shaker Heights, Ohio