861

ARBITRATION DECISION

April 10, 1993

In the Matter of:

Ohio Civil Service Employees Association, AFSCME Local 11	)	
and	)	Case No. 15-02-072292-40-01-091 Gene Christian, Grievant
State of Ohio, Department of Highway Safety, Bureau of Motor Vehicles	)	

APPEARANCES

For the Union:

Jane Braddy, Staff Representative
Brenda Goheen, Second Chair
Jeff Giffin, Chief Steward
Jeremy E. Worden, Observer
Gene Christian, Grievant

For the Department:

Lt. Richard G. Corbin, Advocate
Pat Mogan, Office of Collective Bargaining, Second Chair
Ray Yingling, Deputy Administrator, Bureau of Motor Vehicles
Edward A. Flynn, Labor Relations Coordinator
Scott George, Manager, Distribution Center

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant, Gene Christian, was employed by the Bureau of Motor Vehicles in the Department of Highway Safety for approximately 11 years. At the time of his discharge the grievant was working in the salvage section of the distribution center which is a large warehouse with many doors and loading ramps. The grievant's job involved destroying outdated forms such as drivers' license applications, validation stickers, and license plates.

The events leading to the grievant's discharge took place on April 21, 1992. On that day Edward Flynn, the labor relations coordinator for the Bureau of Motor Vehicles, and Ray Yingling, the deputy administrator of the Bureau of Motor Vehicles, drove together to the distribution center to attend a 2 P.M. meeting. Flynn testified that as he was driving up to the distribution center he noticed a door to the salvage area open even though the door was supposed to be kept closed unless it was being used to load or unload materials. He stated that he saw the grievant standing three or four feet inside the door looking out. Flynn indicated that he stopped opposite the open door and pointed out to Yingling the open door and the grievant standing inside. After a brief pause Flynn pulled away and he and Yingling went to their meeting.

When they arrived at the meeting, Flynn asked Scott George, the manager of the distribution center, to have someone check on the door to the salvage area. He sent Frank

Bennett, the grievant's supervisor, to the area. When Bennett returned, he reported that the door was closed and that the grievant stated that the door had not been open.

Subsequently, Flynn and Bennett met with Anthony Morgan, an employee who works with the grievant in the salvage area. Flynn testified that Morgan initially provided a statement indicating that the door had not been open but later provided another statement that he did not know whether the door was open. The grievant continued to insist that the door was not open.

On May 26, 1992 the grievant was informed that the Department of Highway Safety was considering terminating him for the violation of Bureau of Motor Vehicles's rule 6(c) -- failure to follow policies or procedures -- and that a pre-disciplinary hearing would be held on May 29, 1992. At the hearing George testified for the employer. The grievant, who did not attend the hearing, was represented by Jeff Giffin, a union steward. Following the hearing the hearing officer found that just cause existed for discipline.

On July 5, 1992 the grievant was terminated by Charles D. Shipley, the director of the Department of Highway Safety. A grievance was filed on July 22, 1992. It charged that the grievant was terminated without just cause and asked that he be reinstated with back pay and benefits. The grievance was denied at step three of the grievance procedure on November 4, 1992 and was subsequently heard by the Arbitrator on March 3, 1993.

ISSUE

The issue as framed by the Arbitrator is as follows:

Was the grievant discharged for just cause? If not, what is the proper remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 24 - DISCIPLINE

24.01 - Standard

> Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action...

EMPLOYER POSITION

The employer argues that the grievant violated the rule that requires that the door to the salvage area be kept closed. It states that both Flynn and Yingling testified that the door was open and that the grievant was standing inside looking out. The employer maintains that the credibility of Flynn and Yingling is beyond reproach. The employer asserts that the grievant's denial that the door was open is absurd.

The employer contends that the rule that the door to the salvage area must be kept closed except for loading and unloading is necessary and reasonable. It points out that material such as drivers' license applications, validation stickers, and license plates which are sent to the area to be destroyed have a high value on the street. The employer indicates that in 1985 drivers' license applications and validation stickers got out and were sold on the street.

The employer claims that the grievant was aware of the

rule. It points out that on March 4, 1992 he signed an acknowledgment indicating that he received a copy of Work Rules and Procedures of the Department of Highway Safety/ Bureau of Motor Vehicles. The employer notes that rule 4(D) states that "the outside pedestrian door in the Salvage Section is to be used only for loading and unloading of items to be salvaged." It further states that a memorandum summarizing the grievant's corrective counseling by George on January 28, 1992 indicates that on January 21, 1992 the grievant was instructed to keep the outside door to the area closed and not to use it for anything except loading and unloading salvage materials.

The employer contends that the grievant's failure to be honest put the employer in the position of having to terminate him. It observes that Yingling testified that if the grievant had owned up to the door being open, he would not have been terminated. The employer asserts that by denying that the door was open the grievant so damaged his credibility that his continued employment was unacceptable.

The employer argues that the penalty imposed on the grievant is commensurate with the grievant's deportment. It points out that the grievant was suspended for one day on February 15, 1990 when eight boxes of drivers' license applications which the grievant had signed off as being destroyed were found. The employer notes that he was suspended for two days on July 30, 1990 when again drivers' license applications which he had indicated had been

destroyed were found under shelving as though they had been hidden. It states that on November 29, 1990 the grievant was suspended for ten days when it was discovered that he had altered a statement from the Army Reserve to show that he had been called up for eleven days of active duty during Desert Storm rather than one day.

The employer asserts that there was no bias against the grievant. It acknowledges that Yingling was involved in the payment of back pay to the grievant following his reinstatement by an Arbitrator in a prior case but notes that he testified that he did not personally handle it. The employer claims that the grievant's back pay was delayed because he was slow in supplying documents regarding his earnings while he was off work. It further notes that George testified that he approached the grievant's return to work with an open mind and met with the grievant upon his return to work to clarify the rules.

The employer denies that the grievant was subject to disparate treatment. It acknowledges that Morgan received no discipline but points out that Flynn testified that he and Bennett met with Morgan and determined that he could not see the door from his work station. The employer admits that Morgan's initial statement said that the door was not open but notes that he replaced that statement with one indicating that he did not know if the door was open.

The employer asks the Arbitrator to deny the grievance in its entirety.

UNION POSITION

The union argues that there is not just cause for the grievant's termination. It points out that the grievant testified that the door was not open. The union notes that the grievant indicated that if he had wanted fresh air, he would have opened the overhead door in the area secured by a chain link fence. It indicates that the grievant stated that Flynn and Yingling were liars.

The union maintains that the employer violated Article 24 by not conducting a full and fair investigation. It complains that Flynn, who was himself a witness, questioned Morgan. The union points out that Morgan changed his statement and that George, who was supposed to have investigated, was unaware of the second statement. It claims that the employer should have produced Morgan to explain the two statements. The union also charges that the employer failed to interview the grievant after his initial questioning.

The union contends that the grievant received no notice that having the door to the salvage area open could lead to termination. It points out that the grievant testified that he did not feel that he could be fired for having the door open.

The union argues that the grievant was subject to disparate treatment. It notes that both Morgan and the grievant work in the salvage area so that Morgan rather than the grievant could have opened the door. The union

emphasizes that despite this fact the grievant was terminated and Morgan received no discipline.

The union claims that there is "bad blood" between Flynn and Yingling and the grievant. It contends that he was harassed by them since he was returned to work by an Arbitrator. The union asserts that the grievant was forced to wait three to four months for his back pay even though the contract requires it to be paid in two weeks. It disputes Yingling's testimony that he did not know the grievant at the time of the incident. The union notes that the grievant feels that he was terminated for questioning the credibility of Flynn and Yingling.

The union argues that even if some penalty is in order termination is too severe. It stresses that no harm was done because nothing was missing from the salvage area. The union characterizes the discharge as punitive and not commensurate with the offense. It contends that the Arbitrator has the authority under the contract to reduce the penalty.

The union concludes that the grievant should be reinstated and made whole for all pay and benefits.

ANALYSIS

The issue before the Arbitrator is the discharge of the grievant for insubordination and failure to follow policies and procedures. The incident giving rise to his discharge occurred on April 21, 1992 when he is accused by Flynn and Yingling of having the door to the salvage area open in violation of the rules of the distribution center. The

original charge is complicated by the grievant's continued insistence that the door was not open and that Flynn and Yingling, who testified that the door was open, are liars.

An initial consideration is whether there was a rule regarding the door and whether the grievant was aware of the rule. The Arbitrator believes that there is no question about either point. Rule 4(D) of the Work Rules and Procedures of the Department of Highway Safety/Bureau of Motor Vehicles states that "the outside pedestrian door in the Salvage Section is to be used only for loading and unloading of items to be salvaged." On March 4, 1992 the grievant signed an acknowledgment that he received the rules. Furthermore, on January 28, 1992 the grievant acknowledged the receipt of a notice of corrective counseling that states that "we instructed you to keep the outside door and the internal gate to the Salvage Section closed and locked at all times and not to use the outside door for anything except for loading/unloading salvage materials."

There can be no dispute about the reasonableness of the rule. Drivers' license applications, validation stickers, and license plates are stored in the salvage area. These items have a high value on the street. In fact, in 1985 some items were stolen and sold on the street. It would be irresponsible for the employer not to take reasonable measures to insure security.

The next question is whether the grievant violated the rule. Flynn and Yingling testified that they observed the

door open and the grievant standing three or four feet inside looking out. The union did not claim that it was a case of mistaken identity or that there was any reason for the door to be open. The grievant simply claimed that Flynn and Yingling were liars.

The union charged that Flynn and Yingling were biased against the grievant. This allegation was based upon the fact that the grievant previously had been discharged and reinstated with back pay by an Arbitrator. The union maintains that the bias is also reflected in the time it took for the grievant to get his back pay.

The Arbitrator feels that the union fell short of establishing that the grievant's discharge is the result of bias against him. First, while it is true that the grievant was discharged and reinstated, that fact does not establish that it provided the motive for the grievant's termination. Many employees are reinstated by Arbitrators and encounter no difficulties. Second, although there was a delay in the grievant receiving his back pay, it appears to have been the result of a dispute over the amount of back pay rather than harassment. This is indicated by the union's letter to Yingling dated March 30, 1992 which reveals that there was a dispute over the amount of back pay based upon the amounts of money the grievant received after his discharge from a retirement fund and for military service. After the union's letter explaining its position, the grievant was paid. Third, if Flynn and Yingling wanted to discharge the

grievant, surely they would have been able to come up with something other than leaving a door open.

In light of the above discussion the Arbitrator must conclude that the door was open. Flynn and Yingling testified credibily that such was the case. Furthermore, the union was unable to establish that their testimony was concocted to get the grievant fired because of the prior arbitration case.

The union argues that the just cause standard was not met because the employer failed to conduct a full and fair investigation. This allegation is based on the fact that Flynn questioned Morgan even though he was a witness himself; that Morgan submitted two statements about whether or not the door was open; and that the grievant was not questioned after his initial interview.

The Arbitrator must reject this contention. First, although it would have been better for Flynn, who was a key witness in the case, not to be involved in the investigation, it does not mean that a full and fair investigation did not take place. Second, while Morgan may have submitted two statements, neither was presented at the hearing and any testimony about the content of those statements is not necessary for the disposition of the case. Third, there was no need for further interviews of the grievant. He was interviewed by George and/or Bennett shortly after the incident and did not change his position even up to the time of the arbitration hearing.

The union asserts that the grievant was subject to disparate treatment. It points out that the grievant and Morgan worked in the same area and that Morgan could have opened the door rather than the grievant yet the grievant was terminated and Morgan received no discipline. The Arbitrator cannot accept this argument. The grievant's discharge is based upon the testimony that he was seen standing by the open door. Morgan was never observed in a position to see that the door was open and the investigation indicated that he could not have seen the door from his work station. Under these circumstances it would have been inappropriate to discipline him and if the employer did so, it would not have been upheld in arbitration.

The union argued that the discharge penalty is too severe. This charge is based upon the contention that no harm or damage occurred; that Rule 6(C) of the disciplinary grid which covers the failure to follow policies and procedures provides for discharge only upon the fourth offense; and that the grievant had no way to know that he might be discharged for having the door open.

The Arbitrator does not believe that the union established that the penalty imposed by the employer was too severe. First, while it is true that nothing was missing from the salvage area, someone could have entered the area and removed material. As indicated above, material was stolen in 1985 and sold on the street. Second, the grievant's record indicates that he was disciplined numerous

times including several times for insubordination which in the disciplinary grid includes the failure to carry out a work assignment and the willful disobedience of a direct order as well as the failure to follow policies and procedures. The grievant's recent discipline includes a one-day suspension on February 15, 1990 for failing to perform his duties, a written warning on March 12, 1990 for neglect of duty and failing to follow notification procedures, a two-day suspension on July 30, 1990 for neglect of duty and failing to follow notification procedures, a one-day suspension on August 21, 1990 for neglect of duty and failing to follow notification procedures, and a ten-day suspension on November 29, 1990 for dishonesty and neglect of duty. Third, the grievant should have known that having the door to the salvage area open would place his job in jeopardy. In a meeting on January 21, 1992 the grievant was warned about his violating various rules and was reminded about the rule regarding the door. He was told that any violation of the rules could lead to his termination.

More important than the door in the salvage area being open is the fact that the grievant was dishonest. Despite the convincing testimony of Flynn and Yingling, the grievant insisted at the arbitration hearing that the door was not open. The employer does not have to continue to tolerate dishonesty especially in an area where it must be able to rely upon its employees to protect the security of valuable materials. The grievant by his continued dishonesty

terminated himself.

Based upon the above analysis the grievance must be denied.

AWARD

The grievance is denied.

Nels E. Nelson
Arbitrator

April 10, 1993
Russell Township
Geauga County, Ohio