#875

IN THE MATTER OF THE ARBITRATION BETWEEN:	*
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The State of Ohio, Ohio Department of Transportation	*Grievance Number *31-12-(10-6-92) *18-01-06
-and-	*Grievant: *Clarence J. Castellano
Ohio Civil Service Employees Association Local 11 AFL-CIO	* *

ARBITRATOR: Mollie H. Bowers

APPEARANCES:

For the Employer:
Thomas Durkee, Labor Relations Advocate
Georgia Brokaw, LCB, Second Chair
Anthony DiPietro, Assistant District Deputy Director
Jim Ford, Superintendent, Geauga County ODOT
Martie Williams, Clerk, H&H Hardware
Joseph Stehlik, Patrolman, Middlefield Police Department

For the Union:
Steve Lieber, Staff Representative
Clarence J. Castellano, Grievant
Ron Weich, Shop Steward, Local 11
Kirk Adams, ODOT Employee
Jeff Palmer, ODOT Employee
Jim Milnar, ODOT Employee
Rick Rizzo, ODOT Employee
Carl Sanborn, ODOT Employee

The Hearing was held in the ODOT District 12 Conference Room, Cleveland, Ohio, at 9:00 a.m. on April 20, 1993. Both parties were represented and had a full and fair opportunity to present all evidence and witnesses in support of their case and to cross-examine those presented by the other party.

ISSUE

Was the removal of the Grievant for just cause? If not, what should the remedy be?

EXHIBITS

JX-1	Collective Bargaining Agreement, 1/1/92 to 1/31/94.
JX-2	Discharge File.
JX-3	Grievance File.
JX-4	Disciplinary Action Directive, 5/5/92.
JX-5	Grievant's prior disciplinary record.
JX-6	Letter from Valerie H. Boulware, M.D., 4/27/92.
EX-1	Letter from Mrs. David McQuiston, 4/17/92.
EX-2	Police Incident Report, 2/19/92.
EX-3	Judgement from Chardon Municipal Court, 1/26/88.
EX-4	Grievance, 3/28/91.
EX-5	Grievance, 9/18/91.
UX-1	ODOT Directive re: State Property, 5/5/92.
UX-2	Letter from Robert Schnear, 4/12/92.
UX-3	Letter from Robert Schnear, 9/20/92.
UX-4	Blank EAP Participation Agreement.
UX-5	ODOT Daily Work Report, 9/29/92.
UX-6	Arbitration Award of Frank Keenan, 8/2/92.
UX-7	Arbitration Award of Marvin J. Feldman, 3/24/92.
UX-8	Arbitration Award of Hyman Cohen, 9/19/91.

CONTRACT CLAUSES & OTHER PERTINENT REGULATIONS

ARTICLE 2 NON DISCRIMINATION

2.02 Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by the Agreement, nor shall reassignments be made for these purposes.

ARTICLE 5 MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific article and sections of the Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement.

ARTICLE 24 DISCIPLINE

24.01 Standard

Disciplinary Action shall not be imposed upon an employee except for just cause.

24.02 Progressive Discipline.

The Employer will follow the principles of progressive discipline.

24.05 Imposition of Discipline

... Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

24.09 Employee Assistance Program.

In cases where disciplinary action is contemplated and the affected employee elects to participate in an Employee Assistance Program, the disciplinary action may be delayed until completion of the program. Upon completion of the program, the employer will meet and give serious consideration to modifying the contemplated disciplinary action.

H. OHIO DEPARTMENT OF TRANSPORTATION DISCIPLINARY GUIDELINES

	Progression	Violation
29.	Theft, in or out of employment (Nexus established)	Removal

BACKGROUND

Mr. Clarence J. Castellano (hereinafter "the Grievant") began his employment with the Ohio Department of Transportation (hereinafter "the Employer" or "ODOT") on August 19, 1982. He was a Highway Maintenance Worker II at the time of his discharge on October 5, 1992. The Grievant was a member of the bargaining unit represented by a shop steward for the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO (hereinafter "the Union").

The Grievant was working the day shift on February 19, 1992, when, shortly after 12:00 p.m., he entered the H & H Hardware Store in Middlefield Village. He asked for help in locating some metric bolts from store clerk Martie Williams. Ms. Williams located the bolts, placed them in a store envelope, marked the price thereon and told the Grievant to pay the cashier at the front of the store. He then left the store without paying for the items. Ms. Williams attempted to catch the Grievant but could not. She did see him enter ODOT truck #663 and drive away. She contacted Superintendent Jim Ford at the local ODOT facility and told him what had transpired. Mr. Ford identified the Grievant, notified District Headquarters, and contacted store Owner Don Hunter to advise that if he thought a theft had occurred, then he should contact the police. Patrolman Joseph Stehlik subsequently stopped the Grievant, and still co-worker, Carl Sanborn, who were driving the ODOT truck in question. The Grievant initially denied being in the store, but when questioned about the store envelope visible in his pocket, he asked to be given a "break" because this incident could cost him his job. The Grievant declined to make a written statement regarding the events and was later charged with theft.

In March of 1992, the Grievant entered into the Employee Assistance Program (EAP) and was diagnosed by Dr. Valerie H. Boulware as a person who, "meets the diagnostic criteria for Kleptomania." She recommended that the Grievant become involved in

Shoplifters Anonymous (JX-6).[1] The Grievant then sought to enter into a Participation Agreement with the Employer (UX-4), but was denied.

On September 10, 1992, after a jury trial, the Grievant was found guilty and sentenced to serve five days in jail, fined $500.00 and placed on two years' probation (JX-2, pp. 9 & 10).

The Employer notified the Grievant by letter of September 14, 1992, that it would be conducting a Predisciplinary Hearing for his violation of ODOT Work Rule 101 (JX-4). The Hearing was held on September 21, 1992, and on September 30, 1992, the Grievant was notified he would be discharged effective October 5, 1992 (JX-2).

The Grievant submitted a written grievance (JX-3) protesting this discharge, asserting it was not for just cause and citing alleged violations of the Agreement (JX-1). The matter was not satisfactorily resolved through the Grievance Procedure and is now before this Arbitrator for decision.

In accordance with the terms of the Agreement, the parties have stipulated to the following facts:

* The Grievant's date of employment.
* Two prior disciplinary actions against the Grievant.
* The Grievant's conviction of theft by a jury and that the verdict is being appealed.

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[1]The Grievant gave unrebutted testimony that he participated in Gamblers Anonymous because there was no Shoplifters Anonymous in his area and because gamblers often have problems with theft to support their addiction.

* The matter is properly before the Arbitrator and there are no procedural issues to be resolved.

EMPLOYER POSITION

The Employer believes the evidence and testimony presented at the Hearing conclusively prove the Grievant was discharged for just cause. The testimony of hardware store clerk Martie Williams, Police Officer Joseph Stehlik and ODOT Superintendent Jim Ford, prove that on February 19, 1992 the Grievant stole two metric bolts from the store. To further establish motive, Mr. Ford testified that, earlier on the day in question, he observed the grievant near the ODOT supply bins that hold bolts and heard him ask an ODOT employee about the availability of metric bolts.

To demonstrate the existence of nexus, the Employer stressed that the Grievant was working at the time of the theft and was driving an ODOT vehicle. Further, through the testimony of Assistant Deputy Director Anthony DiPietro, it was shown that this witness received a number of calls from the media and from citizens, and that the publicity resulting from the incident placed the Employer in a negative light. Documents regarding the news coverage of the event and a letter from one citizen were introduced (JX-2, pp. 11 through 16 and EX-1).

The Employer disputes the Union's contention that it rushed to discharge the Grievant, noting that seven months passed between his arrest and his discharge. Also, the Employer points out that after his conviction, the Grievant was notified of and participated in a

Predisciplinary Hearing before the decision was made to terminate him (EX-2).

According to the Employer, Mr. DiPietro's comments to the print media did not reflect a prejudgement of the Grievant's case. It contends that Mr. DiPietro's comments merely outlined actions that could be taken given the nature of the case. It further notes that Mr. DiPietro was not involved in the predisciplinary hearing nor was he the deciding official for the discipline meted out.

The Employer also disputes the Union's assertion that the Hearing Officer, Mr. Weems, engaged in prejudicial actions by refusing to grant an extension of the hearing date and that he failed to take into consideration mitigating circumstances. It contends that the evidence regarding the meeting (JX-2, p. 4) reflects a continuance was granted and that consideration was given to the letter from Dr. Boulware, the Grievant's involvement with the EAP and the letters from Mr. Robert Schnear (id. p. 3).

The Employer acknowledges that it refused to enter into a "participation agreement" with Grievant but defends this action by pointing out that such an agreement is an option, not a requirement, under the Agreement.

"Surprise" was claimed by the Employer regarding the Union's allegation of disparate treatment. The Employer maintains that this charge was not made at either the Predisciplinary Hearing or at the third step of the Grievance Procedure, but was only mentioned generally, three days before this Hearing. This, the Employer argues, should render this contention untimely.

The Employer asserts that the Union is mistaken in its contention that the penalty of discharge was not progressive in nature nor commensurate with the offense charged. According to the Employer, its work rules permit a discharge for a first offense of this type, and, in the instant case, the propriety of the discipline is affirmed by the fact that the Grievant had a prior conviction in 1988 for theft and at that time received a lesser form of discipline.

For these reasons the Employer believes it has shown just cause for the termination and thus, asks that the grievance be denied.

UNION POSITION

While acknowledging the Grievant's arrest and conviction for theft (but noting the conviction is under appeal), the Union offers a multi-faceted attack upon the Employer's actions in this case. The Union argues that the Grievant's discharge was not for just cause based upon the following reasons:

* The Employer did not conduct a fair and objective investigation prior to making the final decision;
* The discipline taken was neither progressive in nature nor commensurate with the offense charged;
* The Employer improperly refused to enter into a participation agreement with the Grievant and failed to give consideration to his treatment and rehabilitation as required by Article 24.09 of the Agreement;

* The Grievant was subjected to disparate treatment because another employee was allowed to enter into two participation agreements and because other supervisors and employees have engaged in similar conduct but were not discharged; and
* The Employer's actions were predicated upon anti-union animus based on the Grievant's position as a Shop Steward.

The Union claims the evidence shows the Employer took only ten days from the Grievant's conviction to determine that he should be terminated. This, it contends, evidences a lack of a fair and objective investigation. Additionally, the comments made by Mr. DiPietro to the print media in April and September (JX-2, pp. 11, 13, 14, 15, 16) indicates the Employer's predisposition to terminate the Grievant prior to any investigation or hearing.

Next, the Union argues that the offense committed by the Grievant amounts to only "petty theft" (UCS, p. 1) which the Employer should have dealt with without involving the police (UCS, p. 2). This type of offense, the Union asserts, hardly merits the most severe penalty that can be imposed. It also asks the Arbitrator to consider that the Employer's work rules were promulgated unilaterally and were not the subject of management-union negotiations.

The Union then presented testimony and evidence (UX-5) that it believes proves disparate treatment of the Grievant. The first incident occurred in either 1987 or 1989 (the witness could not

remember the exact time). Mr. Jeff Palmer testified that he observed several people removing "grits" from the Montville Facility but, when he reported it, nothing was done because a Supervisor had given permission to take the material. According to the Union, this act violates Employer Work Rule 203 (UX-1). The second event involved the delivery of wood chips and hay to Superintendent Ford's home by ODOT employees using ODOT equipment on ODOT time. Mr. Ford received a Written Reprimand for this violation of Work Rule 203 states the Union. The third event testified to involved the demolition of a salt shed and permission given by Mr. Ford to some employees to take the wooden remanent. The Union alleges this permission violates Work Rule 203, but no action was taken against Superintendent Ford.

The Union's final argument is that the severity of the discipline imposed is motivated by the Employer's enmity toward the Grievant because he was a Shop Steward. To support this claim, the Union points to EX's 4 and 5, grievances filed by the Grievant alleging harassment, the Grievant's own testimony regarding an Unfair Labor Practice he filed against the Employer and the testimony of the current Shop Steward Ron Weich regarding the Employer's opinion of the Grievant.

Three arbitration awards were introduced by the Union on the subject of disparate treatment (UX-6), awareness of written rules, disparate treatment and progressive discipline (UX-7) and a lack of proof of guilt (UX-8) that it believes support its position on these matters in the instant case.

For these reasons the Union asks that the Grievance be sustained and that the Grievant be restored his former position and be made whole for all lost pay and benefits. In the alternative, the Union asks that if the Grievance is dismissed, then the Arbitrator retain jurisdiction until a decision has been made on the Grievant's appeal of his criminal conviction (UCS, p. 32).

DECISION

The record in its entirety was carefully considered in reaching a decision on this matter. First, it was noted that it is not a matter in dispute that on February 19, 1992, while working for ODOT and in the H & H Hardware Store, the Grievant committed an act of theft for which he was later arrested and convicted. It is also a fact that the Grievant's arrest and trial generated adverse publicity about him and about ODOT. For these reasons, it is determined that a nexus has been established between the crime committed and the Grievant's position as an ODOT employee.

It is also a fact that the Employer has promulgated work rules, one of which involves the act of theft, where nexus is established, and fixed the punishment as removal for a first offense. No evidence or testimony was presented that the Union ever grieved this rule as being unreasonable. The record further shows that the Union did not claim that the rule was not well publicized. These facts support the conclusion that the Grievant was discharged for just cause in accordance with a reasonable rule.

Nevertheless, the Union argues that the discipline still should not stand because the Employer failed to meet several other recognized tests for just cause. For example, the Union contends that a fair and objective investigation was not conducted. The evidence and testimony presented at the Hearing was examined and this allegation was found to be without merit. Approximately seven months elapsed between the Grievant's arrest and his termination. While it is true that only ten days passed between his conviction and discharge, this does not, in and of itself, prove a "rush to judgement." The Employer is not required to conduct a de novo investigation of the theft since the Grievant has never denied his complicity. The documents contained in Joint Exhibit 2 show that the Grievant and the Union were notified of the charge against him, attended a Predisciplinary Hearing and were given an opportunity to respond to the charge. The evidence also shows the Employer was aware of Dr. Boulware's evaluation of the Grievant and of his participation in Gamblers Anonymous prior to making the decision to terminate him.

The fact that the Employer did not opt to enter into a participation agreement with the Grievant is not fatal to the Employer's case. The Agreement explicitly states that such participation is voluntary for both parties. The Union's claim of disparate treatment of the Grievant vis-a-vis an employee with a drug problem who had been allowed to participate twice, did not

make the Union's case. The information presented was anecdotal and lacked specific information necessary to establish a similarity to the Grievant's case.

The Union's assertion that certain statements made by Mr. DiPietro to the press were prejudicial and indicated a predisposition to terminate the Grievant was considered. The articles were reviewed and it was found that Mr. DiPietro merely described the types of penalties that could be imposed, but did not state what action would be taken. In reaching this conclusion, note was also taken of the fact that Mr. DiPietro did not participate in the Predisciplinary Hearing nor did he make the decision to terminate the Grievant.

According to the Union, the penalty imposed was neither progressive nor commensurate with the offense committed. This contention also fails based on several factors. The provisions of Article 24.02 of the Agreement require only that the Employer follow the principles of progressive discipline and do not prescribe any specific escalation of penalties. It is well established in industrial jurisprudence that, based on the seriousness of the offense, an employee may be discharged for a single, first time, offense. Further, although the Employer's Work Rules were promulgated unilaterally, there is no evidence or testimony that the Grievant or the Union were unaware of these rules and the penalties attached thereto. These rules also provide specifically, in relevant part that, "certain offenses warrant severe disciplinary action on the first offense (JX-4, p. 1) and

"NOTE: THIS SECTION SHOULD BE VIEWED AS A GUIDELINE. THE DIRECTOR MAY IMPOSE LESSER OR GREATER DISCIPLINE AS THE SITUATION DICTATES" (id. p. 3). In concluding that the penalty was appropriate for the offense, the fact that the Grievant was convicted of a similar theft offense in 1988, but was not discharged by the Employer, was given considerable weight. For these reasons, the Union's claim of a lack of progressive discipline and of a penalty not commensurate with the offense is found to be without merit.

With respect to the allegation of disparate treatment, the recitation by Union witnesses of three events wherein little or no discipline was taken was evaluated. Each of the three events involve apparent mishandling of ODOT materials but the testimony regarding each was contradictory, sparse, and failed to provide an informed basis, in two instances, for determining whether there had been any wrongdoing. While it is a fact that Superintendent Ford received a written reprimand for his involvement in the "wood chips" and hay incidents, this alone does not prove disparate treatment. In contrast to the instant case, for example, there was no showing that Superintendent Ford's conduct was made known to the public. Thus, the Arbitrator found the Union failed to demonstrate that the events its witnesses described were so similar to the case at bar as to prove disparate treatment of the Grievant.

The Grievant's claim of disparate treatment due to his position as a Shop Steward and to anti-union animus was considered next. It was noted that he did file two grievances claiming harassment in 1991, and that he testified to filing an unfair labor

practice in the past. No evidence or testimony was introduced about the specific nature of the unfair labor practice charges or how it and the grievances were resolved. (All that is known about the unfair labor practice is that a hearing was held and a settlement was reached). Consideration was given to the testimony of the current Shop Steward, Ron Reich, that the Employer had Mr. Ross McClintock (and others) manually dig a ditch around the paint shop because of Mr. McClintock's refusal to assist the Employer in an investigation that concerned the Grievant. If the Employer's actions were truly improper, then the Arbitrator is at a loss to understand why no grievance was filed by Mr. McClintock and by others similarly affected, including the Grievant, about the paint shop assignment. Carl Sanborn testified that Superintendent Armenti denied him the right to representation by the Grievant and described the Grievant as a "harsh type" of Steward. This testimony was unrebutted by the Employer. Even if these occurrences are true as alleged, however, they do not overcome the facts that the Grievant committed theft, that nexus was established, and that a reasonable publicized rule exists which provides the guidance that when such conditions are present, discharge should be the penalty imposed.

The three arbitration awards submitted by the Union were reviewed for application to the merits of the instant case. The 1989 award by Frank A. Keene (UX-6) dealt with the removal of pieces of sheet metal from an ODOT facility for which the Grievant was discharged. Part of the Union's argument in that case was

that, although two employees were involved, only one was discharged while the other received no punishment at all. The disparity in that case was obvious. The facts of the case at bar are significantly different and, thus, this award was given no weight by the Arbitrator. The 1992 award by Marvin J. Feldman (UX-7) involved a discharge based on dishonesty and the employees' lack of awareness of his inappropriate act. Lack of awareness is not an issue in the case at bar. Whether or not the Grievant acknowledged that he was a Kleptomaniac at the time of the incident on February 19, 1992, his testimony is crystal clear that he knew he had been a thief for nearly 61 years. The Feldman award was, therefore, given no weight in this decision. The third award (UX-8) by Hyman Cohen involved the theft of gasoline by an ODOT employee. Mr. Cohen found that a theft had not occurred (see p. 20) and the discharge was overturned. Since it is an uncontroverted fact that the Grievant was guilty of theft in the instant case, this Arbitrator gave no weight to the Cohen award.

As a final defense, the Union asserted mitigating circumstances beginning with the fact that the Grievant had over ten year's service with the Employer. It is never a welcome opportunity to administer the capitol punishment of industrial jurisprudence. This task becomes even less attractive as an employee's years of service increase. However, committing theft while on ODOT time, while driving an ODOT vehicle, acts for which nexus is established, raises the severity of the offense beyond the petty cash value of the items taken. This is a fact that cannot be

overcome by long service.

As mitigation, the Union also offers the Grievant's diagnosis by Dr. Boulware and his involvement in Gamblers Anonymous. While the Arbitrator commends the Grievant for these efforts, she does not find his past facto diagnosis to militate against the penalty of discharge. The Arbitrator found Patrolman Stehlik's testimony to be more credible than that of the Grievant about the events which transpired at and after the arrest. Patrolman Stehlik has nothing to gain from these proceedings whereas the stakes for the Grievant are even higher than a reinstatement and make whole award. The Arbitrator noted that the Grievant knew as soon as he was arrested that he could lose his job. In an effort to prevent this, he asked the police for a break and then went to see Don Hunter to try to prevail on him not to press charges. These efforts came to no avail.

Based upon the date of Dr. Boulware's letter (JX-6), the Arbitrator believes that the Grievant then seized upon the last remaining opportunities, diagnosis and a twelve step program, to try to salvage his career. It must be recalled that the Grievant was a Shop Steward and knew or should have known that nexus had been established by the fact that Ms. Williams identified him as an ODOT employee by the truck he was driving. Also, as a Shop Steward, the Grievant knew or should have known that the penalty set forth in the Work Rules for theft where nexus is established, is discharge. While it may be true that the Grievant suffers from Kleptomania, this Arbitrator was not persuaded that his efforts

affirmed a reasonable expectation of rehabilitation rather than a resort to a twelve step program as a refuge against discipline meted out for just cause.

As a result of the foregoing analysis, the Arbitrator has determined that the Grievant's discharge was for just cause.

AWARD

The grievance is denied. The Arbitrator also declines, as inappropriate, the Union's request for retention of jurisdiction.

Mollie H. Bowers May 18, 1993
ARBITRATOR DATE