#1080

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 35-03-940608-24-01-04
and	*	September 22, 1995
	*	
OHIO DEPARTMENT OF	*	Darrell Hill, Grievant
YOUTH SERVICES	*	Discharge

Appearances

For the Ohio Civil Service Employees Association:

Dennis Falcione
Staff Representative
Ohio Civil Service Employees Association
Columbus, Ohio

For the Ohio Department of Youth Services:

Edie Bargar; Rachel Livengood (Second Chair)
Office of Collective Bargaining
Ohio Department of Administrative Services
Columbus, Ohio

Hearing

A hearing on this matter was held at 9:45 a.m. on August 22, 1995 at the offices of the Ohio Civil Service Employees Association in Fairlawn, Ohio before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were excluded and sworn or affirmed, and to argue their respective positions. Testifying on behalf of the Employer were Nicholas Discenza (Security Supervisor), Vernon Saunders (Security Administrator), Trooper Tom Esenwein (Ohio Highway Patrol), and Dr. Phillip Bouffard (Lake County Regional Forensic Laboratory). Testifying on behalf of the Union were the Grievant, Dorothy Brown (Chapter President), Arlene Goodman (Security Officer/Switchboard), Howard Turner (Duty Officer), and Valerie Dudley (Former Deputy Superintendent). The oral hearing concluded at 10:10 p.m., whereupon the record was closed. This opinion and award is based solely on the record as described herein.

Issue

The parties stipulated that the case is properly before the arbitrator. They further stipulated that the questions to be answered are:

Was the Grievant removed for just cause? If not, what shall the remedy be?

Statement of the Case

At the time of his removal for theft and falsification of documents, the Grievant was an Activities Therapist I at Cuyahoga Hills Boys School (CHBS), a State facility for the

incarceration and correction of felony youth offenders. The Grievant had been similarly employed by the Ohio Department of Youth Services (ODYS) for 14 years, during the course of which he had an exemplary, even stellar, career, receiving letters of commendation for his accomplishments with the youth under his care, positive performance evaluations, and no disciplinary actions. The misdeeds of which the Grievant is accused are the unauthorized use of an Employer credit card to make personal purchases and falsely signing other staff names to receipts to cover himself.

The institution's vehicle control system at the time the relevant events took place bears description. State vehicles received routine maintenance (including fueling) on site, but there was a credit card for each vehicle for occasions when it was likely the vehicle would need service while away from the institution, such as on out of town trips. The number of each credit card matched the license plate of its corresponding vehicle. Employees using the vehicles and cards were issued the keys, card, telephone and paperwork at the communications center in the facility and were supposed to sign for them when taken and upon their return. Separate logs for the vehicles and cards were maintained, but the records submitted are obviously incomplete. Witnesses disagreed on the freedom of employee access to the area where keys and cards were kept, but clearly the security of the entire system was lax at the time and the system was changed afterwards.

In early January 1994, the credit card for vehicle 53-124 was discovered to be missing. Security Administrator Vernon Saunders assigned Security Officer Discenza to investigate its disappearance. The logs were in too great a disarray to track the use of the missing card, but gas receipts that were still being turned in revealed that the card was in use after the

last date on the log. The grade of gasoline being purchased (in one case this was racing fuel), similarities in the signatures, and apparently forged signatures of three CHBS staff caused Ofc. Discenza to report to Saunders that they were dealing with a case of theft rather than misplacement. That most purchases were local and the later discovery that the vehicle had been out of service during part of the period strengthened this conclusion. On Jaunary 11, 1994, a Significant Incident Report was filed and the Ohio Highway Patrol notified in accordance with normal procedure.

Trooper Esenwein conducted the investigation for the Highway Patrol, during the course of which Saunders named several suspects, among them the Grievant. Saunders testified that the reason he suspected the Grievant was that his name had come up in connection with the disappearance of two other cards. Tpr. Esenwein's report shows that he submitted signatures of seven CHBS staff obtained from their personnel files to the Lake County Regional Forensic Lab on January 19 (State Ex. 3). Signatures of the three staff whose names were signed to some receipts as well as the four suspects named by Saunders were submitted, but not that of the person who last signed out the card or of personnel authorized access to the communications center, among whom was Ofc. Discenza. Dr. Phillip Bouffard, an expert in forensic document examination, testified that his preliminary examination showed a possible match between the Grievant's handwriting and that on the receipts. He requested additional samples. Tpr. Esenwein obtained exemplars from the Grievant and two of the staff whose names were signed to some of the receipts. He and Ofc. Discenza testified that the Grievant's took two-to-three times as long as the others to complete. The content of the Grievant's exemplar also differed from that of the other two

employees in that the latter were asked to provide signature specimens of only their own names while the Grievant provided specimens of four names in addition to his own. When these handwriting samples were delivered to Dr. Bouffard, he said the Grievant's showed signs of being deliberately disguised, so additional handwriting samples obtained from the files were provided to Dr. Bouchard. On March 7, 1994, Dr. Bouchard issued his report positively identifying the Grievant as the writer of the signatures on five sales receipts. A supplemental report on March 23 concerning five additional receipts and exemplars from two employees whose names were signed to newly-received receipts also named the Grievant. Tpr. Esenwein then took the case to the Cuyahoga County Prosecutor's Office.

On March 30, 1994, the Grievant was indicted on 12 counts of forgery, 12 counts of uttering and one count of theft in office. While he was awaiting trial, the Department's investigation continued. Based on its results, a pre-disciplinary hearing was held on May 6, 1994 and the Grievant was removed from his job at CHBS effective June 8, 1994. The removal order cites use of credit card #53-124 between October 21, 1993 and November 30, 1993 in violation of "Rule 2, Falsification of documents, Falsifying, altering or failing to accurately complete an official document; Rule 34, Destruction, damage, misuse or theft of property, Destroying, damaging and/or stealing the property of the state, other employees, the youth or visitors; Rule 46, Violation of ORC 124.34, Dishonesty, immoral conduct and/or misfeasance." (Joint Ex. 7) This action was promptly grieved, alleging violation of Article 24 (Discipline) and 24.01 (Standard) of the Agreement (Joint Ex. 8). The parties agreed to extend the grievance process deadlines pending outcome of the criminal trial.

Dr. Bouffard testified at both the criminal trial and arbitration hearing. In the latter, he testified he has no doubt that the Grievant signed the receipts. He is of the further opinion that he would have come to the same conclusion even if the others had written the same names as the Grievant. Acknowledging this testimony is at variance with what the trial transcript has him saying, he explained he does not remember the specific question put to him at the trial but believes his intent then was to testify that he would have looked at anything else submitted for his examination. The Union sought to admit a partial transcript of Dr. Bouffard's testimony, but the Arbitrator sustained the State's objection.

In any event, the Grievant was found not guilty of the criminal charges against him, and the grievance was taken up again, but denied at Step 3. It was thereafter appealed to arbitration where it presently resides for final and binding decision, free of procedural defect. In arbitration, as in all interviews and prior hearings, the Grievant steadfastly maintained his innocence. Four witnesses, including two from outside the bargaining unit, testified to their belief in his good character.

Arguments of the Parties

Argument of the Employer

Management argues that what matters in this case is not whether the Grievant had any reason to throw away his long and distinguished career, but whether he did, in fact, sign the credit card receipts. The latter issue, contends the Employer, is settled by the testimony of Dr. Bouffard and the handwriting he identified as being that of the Grievant. Management points out that no one refuted Dr. Bouffard's testimony. The Union might have called its own expert witness, but did not. From this fact, the Arbitrator is urged to

draw a conclusion adverse to the Grievant, uphold the penalty of removal that is appropriate for theft, and deny the grievance in its entirety.

Argument of the Union

The Union makes three arguments: (1) the investigation was not fair and objective, (2) there is insufficient proof of guilt, and (3) the penalty of removal is too severe.

With respect to the investigation, not all employees with authorized access to the area where the credit cards were kept were investigated or asked to provide exemplars, nor were the employees last known to have had possession of the card. Even the investigating officer, who himself had access, wanted to be taken off the case and have all authorized personnel investigated, but this did not happen. Instead, the investigation focussed on the Grievant, whom the logs show returned the card the last time he signed it out and who normally used vans to transport the sports teams rather than sedans like car #124. When it came to the Highway Patrol's investigation, the trooper had his mind made up before all documents were gathered and obtained different exemplars from the Grievant than from the other four employees. Thus, the investigation was neither full nor fair.

As to proof of guilt, Dr. Bouffard testified he changed his testimony from that given at the trial because he did not understand the question. But he did not seek clarification at the time. In response to the trial question about whether he would conclude the same way if the investigation had proceeded differently, he answered directly, "No." Thus, the State does not meet its burden of proof by the "reasonable doubt" standard required in cases of moral turpitude.

The Union's last argument is that the Employer should have mitigated the penalty by the Grievant's length of service and considerable achievements, as permitted by the Employer's own discipline policy that calls for flexibility. In the Union's view, the capital penalty is unreasonably related to the offense and the Grievant's past record, and constitutes punishment in violation of the Collective Bargaining Agreement because of its stigmatizing effect.

The Union concludes by reminding the Arbitrator of the Grievant's record, his denial of the charges, and the testimony of supporting witnesses. It asks that the grievance be sustained, the Grievant's work record be expunged, he be reinstated and made whole for all lost wages, benefits, seniority, and leaves.

Opinion of the Arbitrator

The Union alleges a procedural error that, if true, could constitute a fatal flaw such that would prevent reaching the question of guilt. For the reasons given below, I do not find such an insurmountable error.

The Union's chief argument is that the investigation was not full and fair because the outcome was a foregone conclusion and all relevant information was not obtained. I cannot agree. Although an individual (Ofc. Discenza) who himself had access to the storage area and who had signed out the card was involved in the investigation, the Grievant's name was initially provided, along with others, by Mr. Saunders. When the case went to the Highway Patrol, again a number of names were provided and their original source was not Discenza, but Saunders. While one could make something of the fact that Saunders, too, had authorized access and was technically a suspect, every security person at the insitution was

in the same category. Had the investigation stayed under the control of the security staff at the facility, or if there were credible evidence that Saunders and/or Discenza tried to pin the theft on the Grievant, the investigation would have been improper. Instead, several names were provided, the grounds for suspicion were neither arbitrary nor capricious, and an outsider took over the investigation.

The Union also raises questions about Tpr. Esenwein's role, contending that his mind was made up as evidenced by discriminatory treatment of the Grievant. Again, I cannot agree. There is no evidence that Esenwein attempted to lead Dr. Bouffard into identifying the Grievant as the possible writer when he presented the first set of writing samples. Rather, it is more reasonable to believe that the investigation grew more focussed as the evidence mounted. It was not until after Dr. Bouffard identified Hill as the probable forger that the exemplars at issue were collected. In addition, the set of exemplars at issue did not result in a positive identification, but only a request for more samples; and this request was reasonably based on indications of disguised handwriting. It was not until the third sample was collected and all material analyzed the Dr. Bouffard reached a conclusion. A follow-up report on a fourth set was later issued. This was not an investigation that hastily jumped to conclusions or failed to obtain the evidence that might have changed the course of the case. Neither the involvement of the institution's security staff nor the different content of the Grievant's exemplar was ideal. But in the context of the entire investigation that rested on outside investigators and multiple sources of data, and followed up not once but several times, it was full and fair.

The issue of completeness also comes up with respect to the quantum of proof. The Union contends that Dr. Bouffard might have concluded differently had he been given the same exemplars from all suspects. Dr. Bouffard readily admitted that the trial testimony shows he gave a different answer there than in arbitration, but he was so obviously mystified at how he could have given such an answer at the trial that I am satisfied he misunderstood the question. He was in all respects a credible witness, an expert highly competent in his field, and his conclusions were positive, well-grounded, and unchallenged by anyone qualified to do so. While the Employer might have had the handwriting of all possible suspects compared to the receipts, I cannot see that there was anything to be gained from it that might have helped the Grievant. I am convinced he was the person who signed the receipts at issue.

Finally there is the matter of the penalty. While it is true that the Contract requires the Employer to follow the principles of progressive discipline and the Employer's own policy permits flexibility in the penalty, the Contract and just-cause standards also demand that disciplinary action be commensurate with the offense. As I and many other arbitrators have frequently ruled, removal for theft is justified provided the employer is not arbitrary, capricious or discriminatory in its imposition. In this particular case, where the Grievant was in the position of being a role model for the youth under his care and where there is no evidence other employees charged with theft have received lesser penalties, the Employer's decision not to mitigate is justified, even though the Grievant has a long and distinguised career in the service of the State.

Award

The Grievant was removed for just cause. The grievance is denied in its entirety.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
September 22, 1995