

**STATE OF OHIO AND OHIO
CIVIL SERVICE EMPLOYEES' ASSOCIATION
VOLUNTARY LABOR ARBITRATION
PROCEEDING**

In The Matter of the Arbitration Between:

The State of Ohio, Department
of Transportation

-and-

OCSEA/AFSCME, Local 11,
AFL-CIO

Grievant: Charles Woodson (Removal)

Grievance No.: 31-06-(09-17-97)-38-01-06

**Arbitrator's Opinion and Award
Arbitrator: David M. Pincus
Date: December 1, 1998**

Appearances

For the Employer

Ed Flynn

Pat Morgan

Jill Dible

Tina Krueger

Matthew Long

Bette Mendenhall

Douglas Barber

Advocate/Labor Relations
Administrator

OCB

Advocate/LRO ODOT

OCB

Investigator/CLC

Investigator

HW-4

For the Union

Charles Woodson

Herman Whitter

Tim Rippeth

Wayne Wood

John Dersoon

Grievant

Assistant Director of Dispute

Resolution/Attorney

Staff Representative

TM-I

TM-2

I. Stipulated Issues

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

II. Stipulated Facts

1. Grievance #31-06(09-17-97)38-01-06 is properly before the Arbitrator.
2. The Grievant was employed by the Ohio Department of Transportation from June 13, 1977 to September 5, 1997.
3. The Grievant was removed from employment with ODOT effective September 5, 1997.
4. The Grievant was employed as a Highway Maintenance Worker at the time of the removal.

III. Introduction

This is a proceeding under the grievance procedure of the Agreement between The State of Ohio, Department of Transportation, hereinafter referred to as the "Employer," and the Ohio Civil Service Employees' Association, AFSCME, Local 11, AFL-CIO, hereinafter referred to as the "Union," for the period of 1997 - 2000. The arbitration hearing was held on September 9, 1998. The parties had selected David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit

post hearing briefs. The parties submitted briefs in accordance with the guidelines agreed to at the hearing.

IV. Pertinent Contract Provisions and Work Rules
A. Contract Provisions

11.04

The Employer and the Union recognize that violence against employees is serious and requires violence prevention programs. Agencies will develop practices and procedures aimed at reducing risk of job-related violence.

24.01

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.

29.02

Sick leave shall be granted to employees who are unable to work because of illness or injury of the employee . . . or other ongoing treatment.

29.04

It is the policy of the State of Ohio to not unreasonably deny sick leave to employees when requested. It is also the policy of the State to take corrective action for unauthorized use of sick leave and/or abuse of sick leave. Misuse of sick leave is use of sick leave for that which it was not intended or provided.

B. Work Rules

H-O-0208

3. If the owner cannot be located, the item shall be removed to the county garage or outpost for a 30 day period to give the owner an opportunity to claim the item. Subsequently the item shall be moved to the district garage or appropriate location for disposal in accordance

with DH-O-305. **No materials shall be taken by employees for personal use!**

H. OHIO DEPARTMENT OF TRANSPORTATION DISCIPLINARY GUIDELINES

<u>VIOLATIONS</u>	<u>PROGRESSION</u>
6. Fighting/striking with a fellow employee or non-employee on State time or State property. Threatening a superior, fellow employee, or non-employee.	Suspension/Removal
7. Unauthorized/misuse of State equipment or vehicle.	Reprimand/Suspension
16. Unauthorized absence in excess of 30 minutes.	Reprimand/Suspension
18. Willfully falsifying any official document.	Suspension/Removal
22. Theft, in or out of employment. (Nexus established)	Removal

V. CASE HISTORY

The Grievant, Charles Woodson, was formerly employed as a Highway Worker 4 for the Ohio Department of Transportation. He was terminated on September 5, 1997, after 20 years of service, for having violated Directive WR-101, Items H-6, Threatening a supervisor; H-18-Falsifying an official document; H-22-Theft in or out of employment; H-7-Unauthorized/misuse of State equipment or vehicle; and H-16-Unauthorized absence in excess of 30 minutes (Joint Exhibit 3c).

**A. THE GRIEVANT'S THREATENING REMARKS ABOUT
HIS SUPERVISOR**

On April 17, 1997, at about 8:30 a.m., the Grievant telephoned his Supervisor, Wayne Wood, requesting a few hours of "emergency" personal leave to go to the ODOT District Office to speak to Labor Relations Officer, Jill Dible, about Mr. Wood's previous denial of the Grievant's request for compensatory time off. The Grievant telephoned Mr. Wood from his wife's place of employment. (Joint Exhibit 11). He admittedly was upset with Mr. Wood's having denied his request for compensatory time. Wood denied the Grievant's request for emergency personal leave and instructed him to report to his job at the Worthington outpost.

Instead of reporting to the Worthington, the Grievant telephoned Dible informing her that he intended to come to the district office to discuss Mr. Wood's denial of his compensatory time. Initially, Dible told the Grievant to report to Worthington. But upon hearing the Grievant say he would hurt Mr. Wood if he reported to work, Dible told the Grievant to report to the district. While at the district, the Grievant repeated several times that he would hurt Mr. Wood if he had to show up to work that day. The Grievant's statement about hurting Mr. Wood was witnessed by Business and Human Resources Administrator, Andy DiLoreto and Administrative Assistant, Ron Robinett.

During the Grievant's meeting at district with Dible, the parties met with the Union's steward, Brida Coates, in an effort to calm the Grievant down. Coates and the Grievant also met privately about his issues. After receiving the Union's assurances that the Grievant was no longer a danger to Mr. Wood or to his co-workers, the Grievant was released to return to

work and reported back to his job at Worthington. The Grievant continued to work that day without any further incident with Mr. Wood. (Joint Exhibits 5, 8, 9, and 10).

B. THE FALSIFICATION OF SICK LEAVE

The Grievant had requested sick leave time off on April 24 and 25, 1997 for an earache and sinus infection (Joint Exhibit 20). On April 25, the Grievant was videotaped at 9:30 a.m. by ODOT Investigator, Matthew Long, handling large pieces of wood from his landscaping trailer. Long also videotaped the Grievant leaving his home around 10:00 a.m. and fueling his landscaping truck at a nearby gas station. At approximately 12:00 p.m. and at 2:00 p.m., the videotape showed the Grievant and his loaded landscape trailer still not at home. At 5:25 p.m., the Grievant was back at home performing yard work. He was also shown unloading a dolly, an edger, and a wheel barrow at this time. The Grievant has not denied engaging in personal business on April 25.

C. THEFT OF PROPERTY AND UNAUTHORIZED USE OF STATE EQUIPMENT

In early June 1997, the ODOT work crew at the Grove City outpost discovered some steel on the berm of I-71, near the SR665 exit. They picked up the steel and placed it on the Grove City outpost's scrap pile. They later discovered that the steel belonged to the Universal Limited Company (Joint Exhibit 6).

Prior to the time the Universal Limited Company's representative attempted to pick up the steel, the Grievant had expressed an interest in it. Directive H-0208, however, prohibited state property or material of any kind

to be taken by any employee (Joint Exhibit 17). It also prohibited any employee to allow anyone else to take any state property or materials regardless of their condition or location. (Joint Exhibit 3d).

The Grievant had previously asked fellow Highway Maintenance Worker 4, Doug Barber, if he could have the steel. The Grievant alleges Barber allowed him to take the steel and that he relied on Barber's status as a leadman upon taking it.

The Grievant also asked Grove City outpost mechanic, Tom Morehead, if he could use the garage's torch to cut up the steel. The Grievant claims Morehead allowed him to do so and that the Grievant cut up the metal to use in making his private workbench. The steel was worth approximately \$1,892. ODOT eventually had to pay Universal Limited Company \$1,642 for the steel (Joint Exhibit 6).

D. UNAUTHORIZED ABSENCES

The Grievant's first unauthorized absence occurred when he failed to report to his job at the Worthington outpost on April 17, 1997. The Grievant had requested and was denied personal emergency leave to talk to Ms. Dible about Mr. Wood's denial of his compensatory time. Because the Grievant had not received approval for personal leave until Ms. Dible directed him to report to District, the Employer believes his failure to show up to work at Worthington before his meeting with Dible was unauthorized leave.

The Grievant's second unauthorized leave occurred on July 1, 1997, when he called in at 8:40 a.m. for a doctor's appointment, even though his report-in time was 7:00 a.m. that day.

VI. THE MERITS OF THE CASE

THE EMPLOYER'S POSITION

The Employer believes just cause existed to terminate the Grievant. In the Employer's opinion, it has proven each instance of misconduct and that the Grievant's removal is commensurate with the proven offenses.

The Employer cites company witnesses and the Grievant's admissions about his anger and comments to Dible about hurting Mr. Wood as evidence of a violation of Directive H-6. The Employer's videotape of the Grievant working in his personal business on April 25, and the Grievant's admission that he did so, supports a violation of Directive H-18.

The Employer believes the Grievant's conversion of the steel in the Grove City scrap pile and his use of a State blow torch to do so were violations of Directives H-22 and H-7. The Employer rejects any claim that fellow Highway Worker 4, Doug Barber, had the apparent authority to allow the Grievant to take the steel for his own personal use. In any event, Directive H-O208 prohibited use or possession of State property. The Employer had to pay \$1,600 to the owner of the steel because of the Grievant's conversion of it for his own purposes.

The Employer believes the Grievant's absences on April 17 and July 1, 1997 were unauthorized absences in violation of Directive H-16. The Grievant had no right to unilaterally take personal time off to go to district to discuss a work related matter. Neither did the Grievant provide any evidence that he had called earlier than 8:40 a.m. on July 1 regarding his need to see a doctor that day.

THE UNION'S POSITION

The Union does not believe the Grievant's expression of frustration about Mr. Wood's denial of his compensatory time to Labor Relations Officer

Dible is a threat contemplated by Directive H-6. The Grievant never made a direct threat to Wood. He was ultimately sent back to his job on April 17 without further incident.

The Union believes an employee who recovers from his illness during a sick day is entitled to engage in personal affairs without being disciplined for falsification of sick leave. Sick leave is an earned benefit, and if an employee feels better before the end of the day, he is entitled to engage in his normal life activities. Nothing in the parties' Agreement prohibits an employee from engaging in personal business when he recovers from his illness while on sick leave.

The Union denies that the Grievant stole a piece of steel in the Grove City outpost scrap pile. The Grievant was given expressed permission by his acting supervisor to take the steel. The Employer cannot rely on an outdated and rescinded work rule to create theft. The Grievant took the steel and converted it for his own use with a State blow torch in plain view without any suspicious conduct.

Finally, the Grievant was entitled to personal leave on the morning of April 17 because of an emergency. He was very upset with his supervisor's denial of his compensatory time and he needed to be counseled by the Employer's labor relations representative to avoid a confrontation with his supervisor. By taking time off to go to district and address the matter, the Grievant was acting responsibly and should not be punished for his conduct. The Employer also has failed to provide any rebuttal evidence that the Grievant did not call off for a doctor's appointment on July 1 earlier than 8:40 a.m.¹

¹The Union also raises a due process issue because of the 75 day time period that elapsed

VI. THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, and a complete and impartial review of the record, including pertinent contract provisions and the parties' briefs, it is this Arbitrator's opinion that the Grievant was terminated for just cause. This Arbitrator believes that the violation of the directives individually and collectively were adequate grounds to terminate the Grievant and that the Employer met its burden of proof on these issues. This is especially true with respect to the directives dealing with falsification of sick leave and theft.

Because this Arbitrator's opinion and award is based in significant part on the Grievant's falsification and abuse of sick leave and theft of property, he will address these two issues first. He will then address the secondary issues of threatening a superior and unauthorized absences.

The Grievant's falsification and abuse of sick leave on April 25, 1997 is indisputable. He applied for sick leave on April 25 and told his supervisor he had an earache and sinus problem that day (Joint Exhibit 11, page 2). He corroborated Investigator Long's videotape of him working in his landscaping business on April 25 (Joint Exhibit 11). The Grievant therefore used sick leave on April 25 for personal business reasons, which is a violation of directive H-18 and is grounds for a suspension or immediate removal.

In addition to the Grievant's undisputed use of sick time for personal reasons on April 25, this Arbitrator also infers the Grievant's intent to falsify

between when the facts of the grievance arose and when the Grievant was disciplined. The Union never developed this argument significantly during the hearing and has failed to present any evidence of how the Grievant has been prejudiced by this delay. This Arbitrator has therefore chosen not to address this issue and has treated it as a *di minimis* allegation.

sick leave by his conduct toward his supervisor and his answers to Investigator Long in a June 12, 1997 investigation. In that June 12 investigation, the Grievant indicated that his job made him sick because of his supervisor (Joint Exhibit 11). The Grievant also admitted being angry at Mr. Wood because he had denied his request for compensatory time off prior to April 17. This Arbitrator believes the Grievant's time off on April 24 and 25, 1997 was a substitution for the personal time off Mr. Wood had previously denied. This Arbitrator can readily infer the Grievant's intent to falsify sick leave from these facts.

The Union's argument that sick leave is an earned benefit that can be used at the Grievant's discretion so long as he was sick upon initially requesting the sick leave is untenable. Although sick leave is an earned benefit, it is a substitute for paid work time. An employee who is on sick leave therefore is being paid to recuperate instead of having to work. Thus, an employee on sick leave should either be recuperating from his illness or engaging in related activity, such as visiting a doctor or obtaining prescription drugs from a drug store during the time he would have been scheduled to work. Regardless of whether the employee "feels better" prior to the time his shift would have ended that day, he is not entitled to use the remainder of his sick leave that day or any subsequent day for personal reasons.

An employee appropriately may engage in personal business or pleasure on a sick leave day *after* the time his normal work schedule would have ended. Any arbitrator, however, would be justified in drawing negative inferences of sick leave abuse for any business or personal activity by an employee on sick leave prior to the time his workshift would have ended.

This Arbitrator also believes the Grievant's conversion of the steel from the Grove City scrap pile was theft in violation of Directive H-22. The facts of how the Grievant obtained the steel need only be examined. Nothing in the parties' Agreement requires the Employer to meet strict criminal elements for theft outlined under ORC Section 2913.02 or other Ohio criminal statutes. What is most relevant is whether the Grievant took the steel and why he did so.

Indeed, as noted by this Arbitrator in a previous theft case (Greg Hurst, 6-87-1494), only the following points are necessary to establish theft:

1. Personal goods of another must be involved.
2. The goods must be taken without consent of the other.
3. There must be some asportation.
4. The taking and the asportation must be done with the intent to deprive the owner of the property.

All of these elements have been met here. The steel was the property of the Universal Limited Company, essentially being held in bailment by the State

The Grievant also took the steel without Universal's consent. Neither was there approval by the State. This Arbitrator does not believe that Doug Barber, a Highway Maintenance Worker 4, was the Grievant's acting supervisor with apparent authority to allow the Grievant to take the steel. Barber testified credibly that he never had such supervisory authority and that he never gave the Grievant any permission to take the steel. His testimony was consistent with his June 12, 1997 affidavit outlining his conversation with the Grievant about the steel (Joint Exhibit 15). It was

also consistent with Bette Mendenhall's recollection that Barber told her that he never allowed the Grievant to take the steel (Joint Exhibit 12).

In any event, even assuming Barber had some kind of "apparent" supervisory authority, Directive H-0208 clearly prohibits materials to be taken by employees for personal use (Joint Exhibit 17). The Union offered no credible evidence to demonstrate that Directive H-0208 is no longer effective. The Grievant's twenty year tenure with the Employer is long enough to know about such an important work rule.

This Arbitrator did not believe Union witness Willie Barnes' testimony about Barber's allowing the Grievant to take the steel. Barnes appeared very nervous and was uncooperative and argumentative at times during cross examination. His June 16, 1997 affidavit to Bette Mendenhall also contains references to not being close enough to hear any conversation between Barber and the Grievant about the steel in the scrap pile (Joint Exhibit 16). Barber also testified credibly that Barnes was not around to hear any alleged conversation between Barber and the Grievant allowing the Grievant to take the steel (also see Joint Exhibit 15, pg. 2).

Asportation with the intent to permanently deprive the owner of the property also existed. The Grievant indisputedly used a State blow torch to cut the steel in pieces to be used in his private workbench at home. As a result, the State could not just return the steel to Universal. It was forced to pay for it because the steel was no longer in a condition of its originally intended use. Intent to permanently deprive the owner of the property is credibly established from the facts.

On balance, the preponderance of the evidence establishes that the Grievant took the steel from the Grove City scrap pile and used a State blow torch to convert it for his own use, which is a violation of Directive H-0208

and grounds for removal under Directive H-22. No credible evidence was presented by the Union to adequately explain the mitigating factors for the Grievant's conduct. The strongest impression from the evidence is that the Grievant took private property held by the State and converted it for his own use.

The Grievant's threatening statements toward Supervisor Wood were also adequately established. The Grievant admitted he was upset by Mr. Wood's previous denial of his compensatory time and that working with Mr. Wood made him sick (Joint Exhibit 11). He also insisted on reporting to district on April 17 because he could not work that day with Mr. Wood. This Arbitrator infers from these facts that the Grievant had the state of mind to make threatening comments.

In addition, the Union concedes the Grievant admittedly said he "felt like hurting" Mr. Wood on April 17 (Union brief, pg. 6). This admission is close enough to corroborate Dible's recollections that the Grievant said he would hurt Mr. Wood.

The Grievant's statement about hurting Mr. Wood is no less a violation of Directive H-6 because it was uttered to a third party instead of to Mr. Wood directly. The Union failed to bring forth any evidence that only direct threats are contemplated by the directive. In this Arbitrator's view, based on the evidence and a fair reading of Directive H-6, indirect threats to third parties about intended harm to others has the equal force of a direct threat.

Finally, the Grievant's hour and one half tardinesses on April 17 and July 1 were violations of Directive H-16. The Grievant did not have the contractual right to determine unilaterally that an emergency existed justifying his need for personal time on April 17. Had the Grievant perceived such an emergency to have existed, he was obligated to tell his

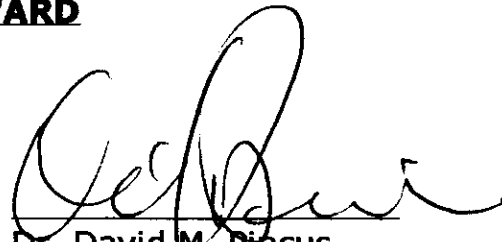
supervisor at the beginning of his shift at 7:00 a.m. and not telephone him from his wife's place of business at 8:40 a.m. Under these circumstances, the Grievant had put the cart before the horse by taking the time off first and then declaring it emergency personal leave.

No credible evidence was presented to rebut the Grievant's July 1 absence. Although the Grievant denied calling in late that day, he did not present any witness or exhibit to contradict the Employer's evidence that he reported to work at 8:40 a.m.

VII. AWARD

The Union's grievance is denied.

Dated: December 1, 1998
Cleveland, Ohio



Dr. David M. Pincus
Arbitrator

