ARBITRATION SUMMARY AND AWARD LOG
OCB AWARD NUMBER: #1415

OCB GRIEVANCE NUMBER:	**31-08-990528-0008-01-06**
GRIEVANT NAME:	Charles E. Burns
UNION:	OCSEA/AFSCME Local 11, AFL-CIO
DEPARTMENT:	Department of Transportation
ARBITRATOR:	Anna DuVal Smith
MANAGEMENT ADVOCATE:	Carl C. Best
2ND CHAIR:	Rhonda Bell
UNION ADVOCATE:	Michael Muenchen
ARBITRATION DATE:	November 9, 1999
DECISION DATE:	December 14, 1999
DECISION:	Sustained in part and denied in part
CONTRACT SECTIONS:	Article 24

HOLDING: The Arbitrator found the Grievant guilty of the unauthorized use of State equipment and leaving work without permission when the Grievant took a load of dirt to his personal property while hauling dirt for the State. The Arbitrator overturned the Employer's discharge concluding the Grievant did not commit theft.

COST: $1,400.00

#1415

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. 31-08-990528-08-01-06
and	*	
	*	Charles E. Burns, Grievant
OHIO DEPARTMENT OF	*	Removal
TRANSPORTATION	*	

APPEARANCES

For the OCSEA/AFSCME Local 11, AFL-CIO:

Michael Muenchen
OCSEA/AFSCME Local 11, AFL-CIO

For the Ohio Department of Transportation:

Carl C. Best
Ed Flynn
Ohio Department of Transportation

Rhonda Bell
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:15 a.m. on November 9, 1999, at the Ohio Department of Transportation Region 8 headquarters in Lebanon, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Department of Transportation (the "State" or "ODOT") were Gary Middleton, Transportation Administrator; Tony Haley, Highway Maintenance Worker 4; Dennis Stanton, Transportation Manager 1; Fred N. Stern, Transportation Manager 2; and Thomas Jordan, Highway Maintenance Worker 2. Testifying for the OCSEA/AFSCME Local 11, AFL-CIO (the "Union") were William "Eddie" Smart, Highway Maintenance Worker and Union Steward; Dwayne DeWeese, Auto Mechanic; John Dix Brown, Transportation Technician 2; Bruce Boggs, Highway Maintenance Worker 2; Douglas Jansen, Chief Steward; and the Grievant, Charles E. Burns. A number of documents were entered into evidence: Joint Exhibits 1-4, State Exhibits 1-8, and Union Exhibits 1-4. The oral hearing was concluded at 3:45 p.m. on November 9, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

At the time of his dismissal from State service for misuse of a State vehicle, leaving the work area without permission, and theft of State property, the Grievant had been an employee of good record for ten years. On March 26, 1999, he was working as a Highway Maintenance Worker 2 for the Ohio Department of Transportation, assigned to the Clinton County Garage. His job assignment that day, which he received from the lead man Tony Haley, was hauling dirt to fill a ditch on Route 350. After passing out directions to his crew, Haley left for the morning, returning to the garage after lunch. When he returned, a member of his crew, Jeff Estep, asked him who besides himself was hauling dirt that day. Haley got the impression Estep was the only one doing so, so he spoke to his supervisor, Dennis Stanton, who told him to ask everyone what they had been doing that day. When Haley asked the Grievant, the Grievant told him he had hauled dirt for himself and his friends. The Grievant testified he was asked in a sarcastic way and responded in kind. He does, however, admit that he took one load for himself that day. His co-worker, Tom Jordan, who was dumping the trucks, testified they needed five loads of dirt that day and wrote a statement that he actually saw the Grievant haul three to the site. He also said that around 1 p.m., after the Grievant brought the fourth load, the two talked and listened to gospel music for about an hour while they waited for the fifth load. Department records show the Grievant put 101 miles on his dump truck that day, while Estep put 150 on his. When Haley told Stanton what the Grievant had said, Stanton asked the men in the garage if they knew what was going on, but did not speak to the Grievant. Since the manager of the Clinton County Garage, Gary Middleton, was not in that day, Stanton

conferred with Transportation Manager 2 Fred Stern. The two decided not to do anything until Middleton returned.

Middleton heard about the matter when he returned from vacation on April 5. He interviewed the Grievant a couple of days later in the presence of Stanton and Union Steward Eddie Smart. Not thinking he had done anything wrong, the Grievant admitted he took a load of dirt. He testified he mentioned seeing other employees do the same. He also testified Middleton told him that it was, "No big deal. We can eat a load of dirt" and that what happened would be kept in the county. After the meeting, Middleton called the district's labor relations officer. He also directed Stern to go out to the Grievant's property and take photographs, and started to collect witness statements. The photographs taken on April 9 show a dirt pile which Stern testified was two or three loads in size, but which his statement has as being "at least one ...and possibly two loads." It appears to be of two different types, one fresher than the other. Stern testified the fresher looking dirt was the same texture as what was hauled on March 26.

The Grievant turned in his written statement on April 14. He and Union Steward Smart, who was present at the time, testified he had prepared three statements, at least one of which named others who had removed State property. The Grievant testified that if he was going to be disciplined, he wanted it known that he was not the only one who had taken materials. Middleton disputes this account, saying the subject of what others may have done did not come up that day, and that the Grievant was both remorseful and insistent that he be told what level of discipline to expect. Middleton testified he only answered that discipline could range from an oral reprimand to termination depending on the rule violation. Middleton

further said he did not indicate this meeting constituted a counseling to resolve the matter. In any event, the Grievant did turn in a written statement on April 14 admitting he took "extra left over dirt" to his home, about 10 minutes away from the site, during his lunch hour. He further states in part,

> It's been policy & culture here, when you have left over material such as wood, dirt, wood chips, grinding. We get rid of it at nearest dump site, or if a by passer ask [sic] for it, we take it too [sic] them. I'm sorry. I didn't feel I did anything wrong. (Joint Ex. 4)

A pre-disciplinary meeting notice was properly issued on April 20, 1999, with the meeting held on April 23. The Grievant was charged with violation of Directive WR-101 #7 (Unauthorized use of State equipment), #13 (Leaving the work area without authorization), and #22 (Theft of State property). The dirt taken was said to be not waste dirt, but not top soil either, and that the Grievant did return it using his own private vehicle. The Union raised a defense of it being common practice in the county to take extra material home, but no specific employees who had done so were named. The hearing officer nevertheless found grounds for discipline.

The Grievant's removal was effective May 21, 1999, and promptly grieved, alleging violation of Article 24.01 and 24.02. At Step III the matter of lax local enforcement came up again. Middleton testified he agreed to provide a statement that this activity had been condoned by management in the past if the Union would specify dates of such incidents and the names of people involved. No such information was provided. At a later meeting, he testified, Steward Smart told him about the statements the Grievant had prepared which could implicate others, but Middleton never saw these statements until the Union introduced one at

arbitration. This statement, dated April 13, names a number of employees who either took wood, borrowed a State vehicle for personal use, or both, within weeks of the incident leading to the Grievant's termination. Middleton testified he was aware of one of these incidents and that the wood in question was waste material being disposed of. In August, two months after the Step 3 meeting, and another investigation of theft, management met with the employees in the garage, telling them it was a new day in the county and to expect the rules to be enforced.

Being unresolved in the grievance procedure, the case came to arbitration where it presently resides, free of procedural defect, for final and binding decision.

III. ISSUE

Did the Employer violate the Contract in terminating the Grievant, Charles Burns? If so, what is the remedy?

IV. ARGUMENTS OF THE PARTIES

Argument of the State

The State contends it has proven by a preponderance of the evidence that the Grievant was terminated for just cause. The vast majority of the facts are undisputed. The Grievant admitted to taking at least one load of State dirt to his home with a State truck without permission during his 30 minute lunch period. Testimony showed this could not have been done in the ten minutes the Grievant claimed it took. The Grievant's own testimony has it that he told Jordan he could use a load if there was enough to spare, but Jordan placed this conversation after lunch. The Grievant, who has experience with theft and knows right from wrong, took the State's dirt under the cloak of secrecy. His action was so egregious that it

called into question how much work he did that day, yielding up complaints from co-workers and ultimately coming to management's attention.

The Grievant has ten years of good service and is in a position of trust. The value of the dirt is small, as is the time and value of using the State truck to transport it. No one of these alone would likely have called for termination, but the sum total and the violation of trust does. Were it not for the theft, a lesser penalty would be justified. But because of the theft, the State had no choice but to terminate him.

As to the Union's defense, the State points out that two long-standing Union representatives acknowledged there were no procedural errors in the discipline of the Grievant. With respect to what occurred during the investigation and what the Grievant and Union thought would be the outcome, the Union submits that it cannot control what feelings people get or what they assume. Middleton made no promises in exchange for information. Smart's testimony was confusing but he confirmed that Middleton issued no reprimands. The fact that Middleton made no such promises and that there were two additional meetings should have been indicative of the seriousness of the matter. Smart's testimony that Middleton said the matter would not leave the county is not credible given that Middleton picked up the phone and called district headquarters right after that meeting.

The claim of lax enforcement and disparate treatment is a third-grade defense, says the State. The proper thing to do when co-workers violate the rules is to report them, not to follow their example. It is uncontroverted that the Grievant was so well liked by managers that they recommended him for outside work and hired him, themselves, to do private work. His foreman even invited him to attend his church. As to Brown's 3-day suspension for improper

use of a State vehicle in 1988, the State submits that the rules then and now call for a reprimand or suspension on a first offense, depending on the severity of the act. Any lax enforcement occurred under the leadership of a county administrator who has been dead for five years. When Middleton became the county manager two years ago, he met with employees, announcing it was a new day. The recent examples of employees taking State property are different from what the Grievant did. There are standing orders to dispose of waste wood as economically as possible. The foreman was thus acting within his authority when he was observed taking a load of wood. What the Grievant took was not waste dirt. ODOT does look for ways to get rid of grubbing material, but that dirt is different from dirt acquired from commercial sources and stored in a secure area. The Grievant knew this. He also knew the new practices under Middleton and has even complimented him for them.

In conclusion, the State refers the Arbitrator to four panel decisions, including one of her own, setting forth the elements of theft and sustaining discharge even where the value of the property taken was small, where a practice of trash-picking was alleged, and where there were allegations of disparate treatment or procedural deficiencies. It asks that just cause for discharge be found and the grievance denied.

Argument of the Union

The Union reminds the Arbitrator that the employer had the burden to prove just cause for disciplinary action. One element of theft is lack of consent. This means that the State has to prove it did not give its consent to the Grievant. In fact, says the Union, the State cannot do this because it gave its consent by implication. Testimony shows that county management condoned the practice of employees taking materials such as wood and dirt. This practice did

not end with Webb's leadership, but continued under Middleton's. Wilkinson took dirt to his farm with consent. Just three weeks prior to the incident leading to the Grievant's termination, the foreman drove wood away from the garage with Middleton's consent while the Grievant watched. What Stern did when he found out about the Grievant was not to call the police or Middleton, or immediately to take pictures, but to wait to see if this was going to be tolerated as it had in the past.

The Union argues that the investigation was flawed. The steward testified Middleton assured him and the Grievant that the matter would be handled within the county. Indeed, Middleton had an interest in keeping it within the county because it would reflect badly on him if it became known by upper management what was going on under his leadership. He was therefore not a detached, disinterested investigator and this flawed his investigation, which the Union showed to be incomplete inasmuch as he did not take statements from everyone and he did not follow up on the incidents of lax enforcement brought to his attention early in the investigation. The Union submits that the Grievant was irreparably harmed by this incomplete investigation.

The Union asks the Arbitrator to review the procedural requirements set forth in Article 24 and weigh the State's failure to afford the Grievant all his rights. In particular, the Arbitrator should give consideration to the delay in the State's decision to initiate the disciplinary process.

The main value of dirt is in the State equipment used to haul it. As can be seen from State documents, misuse of the vehicle is what Middleton was initially investigating, not theft.

When the investigation became one of theft, the Grievant showed remorse and made amends. At most, misuse of a vehicle is what the State proved, not theft. Misuse of a vehicle calls for a suspension, not termination. Finally, the Union submits for the Arbitrator's consideration, panel cases wherein employees were reinstated where it was not clear the employee took something without consent. For all these reasons, the Union asks that the grievance be granted.

V. OPINION OF THE ARBITRATOR

Looking first at the procedural issues, the Union is grasping at straws. The interviews conducted by Middleton were investigatory, not pre-disciplinary hearings. It is clear the Contract's pre-discipline protections were complied with. What is more, Middleton was not the biased investigator covering up his own lapses as alleged by the Union. If he were continuing the lax practices of one of his predecessors, it is more likely he would have kept the matter within the county than to call district headquarters immediately after his first interview of the Grievant. As for the delay, which amounts to only 10 days between the incident and first interview, this is readily explained by Middleton's vacation and two weekends. Once Middleton returned and heard about the incident, the investigation proceeded. Finally, even if I accept as credible the testimony that the Grievant specifically named others during one or more of the April interviews, Middleton would have no reason to investigate them since he was already aware of the incidents and/or they fell under standing orders regarding disposal of waste material.

Turning now to the alleged offenses, the Grievant admits that he took a load of ODOT dirt with the intent to use it on his farm, and that he used a State truck to transport it, diverting

the dirt from its intended place on Route 350 to his own property. The Grievant also admits that he did not ask a person in authority for permission to do so. The only question of any substance is whether the Grievant knew or should have known that taking this dirt without explicit consent was wrong. Clouding this issue are two situational factors. One is that ODOT handles a variety of materials, some of which are waste, some of which are not. The second is the history of enforcement in Clinton County.

The State admits practices in the county were lax at one time, but that this was under the administration of a former Superintendent. The question, then, is whether current practices led employees in general, and the Grievant in particular, to believe truckloads of dirt are free for the taking.

Most of the cases cited by the Union as evidence of management condoning employee conversion of State materials to their own or others' use involved wood, which is routinely offered to the owner of the property where it is cut, but removed and disposed of if the owner chooses not to keep it. The record establishes that foremen have standing orders to get rid of this wood as economically as possible and that employees are routinely given such wood and allowed to carry it away in State trucks. The Grievant's long employment with the Department convinces me he knew or should have known the dirt being used on March 26 was not in the same category as this waste wood, for which ODOT had no use and which it was eager to dispose of. The Grievant knew the Department had uses for it. However, this fill dirt was also not something bought and paid for, like gasoline, gravel or topsoil, which a person might take to avoid paying for it himself. It was abundant and free, its only monetary value being in the cost of its transportation and storage. In this sense it was somewhat like scrap. Because it

is a "free good," employees may need an explicitly stated policy to know that taking fill dirt is a dischargeable offense. The fact that some dirt, albeit grubbing material, was taken by employees with the knowledge and apparent consent of management would only serve to cloud the issue, particularly in the context of the county's prior history. The District was evidently aware it had a problem with employee expectations in this county because it later held a meeting at the garage to clarify that, whatever the practices before, rules would henceforth be enforced. In short, I believe the Grievant did not know he was doing anything wrong because the value of this dirt was so little and indirect as to not be evident to him. I therefore find he was not guilty of theft because he did not intend to deprive the State of value. He did show poor judgment in not seeking permission, but he has suffered in the months since with his job in limbo. No doubt he will not make this mistake again.

However, the Grievant did use a State truck to divert the material to his own property, did so on State time and without consent. He is therefore guilty of unauthorized use of State equipment and leaving the work area without permission. For these he will receive a suspension of thirty (30) days.

VI. AWARD

The grievance is sustained in part, denied in part. The Employer did not have just cause to terminate the Grievant and, in so doing, violated the Contract. The Grievant is to reinstated to his former position forthwith, with a 30-day suspension for violations of Directive WR-101 #7 (Unauthorized use of State equipment) and #13 (Leaving the work area without authorization). He is granted back pay less thirty days, plus benefits and seniority. The State may deduct earnings the Grievant may have had between the end of his suspension and the date

of this award on account of his unjust termination. It may also require him to supply reasonable evidence of same. Further, the Grievant's record is to be expunged of all mention of the theft charge. The Arbitrator retains jurisdiction for a period of sixty (60) days to resolve any dispute which may arise in the implementation of this award.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
December 14, 1999

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