#1857

IN THE MATTER OF ARBITRATION

BETWEEN

OHIO STATE TROOPERS ASSOCIATION

AND

STATE OF OHIO, DEPARTMENT OF PUBLIC SAFETY
DIVISION OF HIGHWAY PATROL

Before: Robert G. Stein
Case # 15-03-050810-0105-04-01
Grievant: Douglas G. Shockey

Advocate(s) for the UNION:

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INTRODUCTION

This matter came on for a hearing before the arbitrator pursuant to the terms of the Collective Bargaining Agreement (herein "Agreement") between the State of Ohio, Department of Public Safety (herein "Employer" or "Patrol") and the Ohio State Troopers Association, (hereinafter "Union").

The hearing was held September 22, 2005 and the parties submitted briefs in lieu of making oral arguments. Both parties agreed to the arbitration of this matter pursuant to the grievance procedure contained in the Collective Bargaining Agreement.

ISSUE

The parties agreed to define the issue as follows:

> Was the Grievant, Douglas G. Shockey, removed for just cause? If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

For reference see grievance and parties' briefs

BACKGROUND

The Grievant in this matter is Trooper Douglas G. Shockey ("Shockey"), who has been employed with the Ohio State Highway Patrol since September 28, 2001.

The central focus of this dispute is over the Employer's actions in terminating the Grievant's employment on July 27, 2005 for violation of rules: 4501: 2-6-02 (B)(5), Performance of Duty and 4501: 2-6-02 (Y)(2), Compliance with Orders. According to the Employer, sometime between April 1, and May 31, 2005 the Grievant stole two (2) to three (3) gallons of gasoline from the Marion Post ("Post") gasoline pump for use in his personal vehicle. The Employer contends this alleged theft took place near the end of the Grievant's 6:00 a.m. until 2:30 p.m. shift and was witnessed by Brian Bender("Bender"), a Maintenance Repair Worker assigned to the Post. The Employer contends the Grievant admitted to taking between two (2) and three (3) gallons of gasoline without informing or gaining the permission of his supervisor of his actions. Although Bender observed the Grievant take the gasoline, he apparently did not mention it to anyone until July of 2005 when he overheard some employees talking about the Grievant running out of gas in his personal vehicle.

The Grievant's approximate four (4) years of service with the Employer also included over eleven (11) months of absence from work during which he was on leave due to his 2002 discharge and a disability

leave. In addition to verbal and written warnings, the Grievant's deportment record contains a five (5) day suspension related to a violation of the False Statement/Truthfulness Rule (The Grievant was initially terminated for this offense and reinstated by Arbitrator Jerry Sellman). In addition to this five (5) day suspension, the Grievant's deportment record includes a three (3) day suspension for a Compliance to Orders rule violation, a three (3) day suspension for sleeping on duty, and a seven (7) day suspension in March of 2005 for being involved in a verbal confrontation and for failing to decontaminate a suspect after spraying him with mace. Some of these suspensions were held in abeyance by the Employer.

EMPLOYER'S POSITION

The Employer argues that the Grievant's conduct in the instant matter, coupled with his disciplinary record accumulated over a short tenure of employment justifies his termination. The Employer's arguments are detailed in its brief and are as follows:

> **Argument**
>
> **I. Why the Union's Disparate Treatment Argument Fails**
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> The burden of proving disparate treatment lies with the Union. Arbitrator Rhonda Rivera explained the process of proving disparate treatment in the following way:
>
> > Where an employer has shown a prima facie case of just cause for an employee's discipline, the allegation of disparate treatment shifts the burden of proof to the Union...the Union must, at a minimum, provide evidence that other employees in a similar situation to Grievant were treated differently. Showing a 'similar situation involves showing a number of important factors:

Step 1. The Union must show that other employees have committed the same or a very closely analogous offense and have received different discipline.

Step 2. Once the proof of employees with similar offenses being disciplined differently has been shown, the question becomes do relevant factors exist (aggravating or mitigating) which rationally and fairly explain the different treatment. These factors could include, but are not limited to, the following:

a. The degree of the employees fault

b. The employee's length of service

c. The employee's prior discipline

Factored into this appraisal must be some restriction that absolute homogeneity of discipline in a work force is impossible.

See, Ohio Civil Service Employees Association v. Ohio Department of Mental Health, Case number 23-06-891113-0121-01-03 (Rhonda Rivera, 1989).

The Union's attempt at making a disparate treatment argument involves the submission of three Joint Documents. Each will be contrasted and compared to the instant case.

Joint Exhibit Four is an administrative investigation on Sergeant Click from the Delaware Post. It was found that he had violated the Performance of Duty Rule between January 1st and June 27th of 2002 by reporting late to duty several times. He committed several tardiness violations and the post commander failed to take any action because he was not aware of the violations. The sergeant in this case received a one-day suspension and the Post Commander received a written reprimand. Page 15 of Joint Exhibit Four shows that Sgt. Click was appointed trooper on September 6, 1985. The pristine deportment record of the almost 17 year sergeant is deeply contrasted to Grievant's two page deportment record with numerous entries. Grievant had 3 years and 10 months of service before his most recent discharge. If you take into consideration the approximate 5 months he was discharged in 2002 and the approximate 6 months he was on disability in 2004/2005, Grievant actually had less than three years time working as a trooper.

Joint Exhibit Five, an administrative investigation that was completed in May of 2001, concerned Captain Watts who was assigned to the training academy. He was charged with a Performance of Duty rule violation for completing homework from college courses while on duty. He also had secretaries complete some typing and research for these courses during the work day. The investigation revealed that the complaints were founded and partially founded. Total on duty time estimated by the secretaries was two hours and twenty-six minutes. His discipline entailed reimbursing the State of Ohio with a check for $42.10, forfeiting 24 hours of vacation and serving a one-day suspension. *See, Joint Exhibit 5, p. 2, 3, and 6*

Captain Watts' deportment record prior to this entry was pristine. It contained not a single entry and he started as a trooper with the patrol in January of 1978.

Joint Exhibit Six concerns an investigation on Major Cassidy for using his state issued cellular phone for personal calls and failing to reimburse the state. Major Cassidy stated he did not exceed the plan minutes for local calls so there were no charges. He was also asked if he reimbursed the state for long distance calls when he used his cell phone. He said that he failed to compensate the state for the long distance calls and that it was an oversight on his part. Major Cassidy reimbursed the state with a check for $98.55 and received a one-day suspension for violating the Compliance to Orders rule. Major Cassidy's deportment record, much like Captain Watts' deportment record did not contain a single entry. The tenure date, or the date he was commissioned as a trooper, was October 9, 1974. He had almost 29 years of service when the discipline was imposed in this case. *See, Joint Exhibit 5, p. 2*

Grievant's deportment record shows his propensity to violate rules and regulations of the Highway Patrol on a consistent basis. *See, Joint Exhibit 3* In fact, when asked the date of his termination by the Employer's Advocate, Grievant quipped by asking "Which time?" Obviously, the instant case was not the first time Grievant was discharged by the Employer. He was discharged previously for violating the False Statement/Truthfulness Rule. However, Arbitrator Sellman determined that the penalty was too severe. He stated, "The Arbitrator finds that the Employer did have just cause to discipline the Grievant for violation of its Rules and Regulations, but said discipline is too severe under the circumstances present. The appropriate discipline in this proceeding is a five day suspension with a written warning that any further violations of the Employer's Rules and Regulations surrounding its Core Value of Honesty will subject the Grievant to immediate termination."

The arbitrator was clear that Grievant would not have to violate the False Statement, Truthfulness rule but he only had to be charged with a rule that was related to the Core Value of Honesty. Certainly theft from the Employer is a dishonest act and violates the Core Value of Honesty. The Employee and the Union were placed on notice when the arbitration award from Arbitrator Sellman was received.

This is not the only suspension Grievant has on his record. He received a three day for a Compliance to Orders violation and another three day suspension for sleeping on duty. In March of 2005, the employee received a seven day suspension for his involvement in a verbal confrontation and for failing to decontaminate a suspect after spraying him with mace. The Employer at time has cut Grievant some slack by holding some of the discipline in abeyance.

The Union will probably argue that the MRW Brian Bender committed an act of theft by stealing 3-5 minutes of time from the Employer when he drove Dispatcher Reichelderfer's vehicle to the gas station and fueled her vehicle. The Employer would argue that in hindsight an Administrative Investigation should have been conducted on MRW Bender, and based on the facts, Grievant would have been charged with a Tardiness violation for not reporting to duty at his appointed start time.

The Union's disparate treatment argument does not hold water. They are trying to compare apples and oranges. Tardiness violations committed by Sgt. Click and MRW Bender are not similar to stealing fuel. An oversight by Major Cassidy concerning long distance telephone bills does not compare with stealing fuel for personal use. According to the Union's theory, the arbitrator should find that if any state employee did not put in eight hours of work in an eight hour day that they are stealing time from the Employer. The Union would have the arbitrator believe this behavior is analogous to Grievant's theft of fuel. If the Employer held its employees to that strict of a standard, there would be very few employees left in state government. One has to also look at the relevant factors or reasons why the others were not disciplined the same as the Grievant. Major Cassidy, Captain Watts and Sgt. Click are all long term employees with 17-28 years of state service and crystal clear deportment records. The Grievant on the other hand is a short term employee, approximately three years on the road and has numerous reprimands and suspensions on his record.

II. Grievant's Inconsistent Interviews and Testimony

Contained on Grievant's deportment record is a five day suspension for dishonesty. The act of taking gasoline from the Employer for use in a personal car is also a dishonest act. Although Grievant did admit to taking 2-3 gallons of gasoline for his personal vehicle, there are many other inconsistencies in his testimony and interviews. In the administrative investigation, he attempts to use MRW Bender as a scapegoat for his actions. S/Lt. Zurcher questioned Grievant whether anyone saw him take the fuel and Grievant responded that Mr. Bender did. Grievant claimed that Bender gave him permission to take the fuel. S/Lt. Zurcher asked, "Do you think that he had authorization to give you permission to do that?" Grievant responded, "Yes I did. I figured he did. He was in charge of the gas sheets and the gas pump and running the tests and the calibration tests, I felt he was." *See, Management Exhibit 1 p. 15*

Later, S/Lt. Zurcher asked if he reimbursed the Division for the fuel he took and he responds that he did not. He is asked why and his response was, "I didn't think I had to I asked permission. I was given permission to take the gas." Grievant knows the maintenance man is not his supervisor. He states, "I'm not saying he's a supervisor. I'm just saying he's allowed...I thought I had every right to take gas because I asked him." *See, Management Exhibit 1, p. 17* However, when you listen to the criminal interview with Sgt. Rogols, he asked Grievant if he knew he couldn't take the gas to use in his personal vehicle. Grievant responded by saying, "I knew we couldn't, but he said go ahead." Later in the interview Sgt. Rogols states,

"You can't take the gas, you admit that?" Grievant responds "Umm Hmm." *See, Management Exhibit 1a, time 6:56 & 8:26, compact disc*

Grievant knew he was not allowed to take the fuel for his personal car but did it anyway. He asked the maintenance repair worker for permission to take the fuel only in an attempt to justify his actions should a supervisor find out what he did. Remember, he never asked a supervisor for permission to take fuel, he never told a supervisor after the fact that he took the fuel, and he made no attempt to reimburse the Employer for the fuel he took. Additionally, he failed to make a notation on the gas log that he dispensed the fuel. All of this resulted in a cover-up that did not surface until the MRW had concerns that this was not the first time Grievant had run out of fuel.

This concern came when MRW Bender heard other troopers and a dispatcher talking about Shockey's personal vehicle being out of gas and that he had to call his mother at 3 o'clock in the morning to give him a ride home because no one at the post was available at that time. According to Tpr. Walsh who was interviewed in the criminal investigation, Grievant asked him for a ride home because he was out of gas the night he called his mother. He also stated that Grievant asked him and he gave him a ride home the previous night to this incident because Grievant stated he was out of fuel. Once again, Grievant's story does not match that of other witnesses. S/Lt. Zurcher asked him about the incident when he had to call his mother at 3:00 a.m. to give him a ride home. Grievant said the reason he called her was that he was going on time off and did not want to be accused of being out drunk somewhere. S/Lt. Zurcher asked him if there have been any incidents where he got a ride home because he was low on fuel. Grievant responded, "No, not that I'm aware of no." *See, Union Exhibit 3, p.8*

The other discrepancy in Grievant's reiteration of the "facts" concerned when he actually took fuel for his personal use. According to the statement he gave to S/Lt. Zurcher, it occurred over a year ago. S/Lt. Zurcher presses him further and he stated that it was probably 13-14 months ago. This would have meant the incident occurred in May or June of 2004. However, during the arbitral hearing, Grievant now claims the incident could have occurred in 2003. It appears Grievant does not know when he took fuel from the post for use in his personal vehicle, or maybe he did so on more than one occasion.

Another inconsistency noted between Grievant's testimony and his interview with S/Lt. Zurcher concerned his response regarding the presence of a supervisor. During the administrative investigation, S/Lt. Zurcher asked, "Did you ask...were any supervisors here?" Grievant responded, "I don't recall if there were or not." S/Lt. Zurcher asked again, "Did you ever ask a supervisor for permission to do that?" He responded, "No I just asked the maintenance man. I don't know if a supervisor was here. I don't know if there was or not." *See, Management Exhibit 1, p. 16* The answers to these questions indicate that he never looked for a supervisor in order to seek permission. If he had, his answers to these questions would have been much different. However, during the arbitral hearing Grievant clearly states that there was not a supervisor working when he took the fuel for his personal vehicle.

Although, all of these inconsistencies may seem minor, when they are taken into consideration with Grievant's past termination for dishonesty, and the theft of state property in this case, his overall credibility is certainly diminished.

As you know, the *Brady v. Maryland* decision has had an impact on law enforcement and possible credibility issues. As a result of *Brady v. Maryland*, prosecutors bear a personal responsibility to make the Court aware of any materials possessed by an investigative agency that are helpful to the defense. Any materials that call into question the credibility of the officer, or any information contained in the Grievant's personnel file that reflects on his credibility must be presented to the prosecutor and in turn to the defense. Obviously, a false statement charge and a charge related to stealing 2-3 gallons of gasoline as noted on the statement of charges will certainly tarnish Grievant's credibility in any future legal forum.

Conclusion

Given the Joint Documents stipulated to by the parties, the Union can not prove a disparate treatment case. The Union can not show that the employees were similarly situated and certainly the deportment records and service times mitigated the discipline those employees received. Grievant knew what he did was wrong. He told Sgt. Rogols he knew that he could not take fuel for his personal use. His

arcane rationalization for having permission to use the fuel relies on you believing that the maintenance repair worker Bender had the authority to allow him to use the fuel. Obviously, the MRW does not fall in Grievant's chain of command. At the post level there are four sergeants and a lieutenant who serve in a supervisory capacity.

Tpr. Ferguson, a classmate who graduated from the Academy with Grievant, relayed to Sgt. Rogols his feelings about Grievant taking fuel for his personal vehicle in the criminal investigation. He stated he "should have known better." Ferguson also added that "it should have been abundantly clear from day one that gas was for patrol use only." Not only do we have a class mate of Grievant's who received the same training at the Academy but we have a policy that specifically prohibits using state fuel in personal vehicles. Policy 303.06 specifically states, "Fuel should not be dispensed to non-ODPS vehicles. Gasoline received or dispensed from patrol facility storage tanks will be recorded on the DPS-0049, including tenths of gallons, at the time he gasoline is dispensed or received." Grievant violated both aspects of the cited portion of the policy. He did not log the fuel he took and he placed the fuel in a non-departmental vehicle. *See, Management Exhibit 1, p. 27*

Absent from Grievant's testimony and interviews were any acknowledgement that he had done anything wrong. He showed no remorse for his actions at the hearing and continued to blame the maintenance repair worker for his downfall. As S/Lt. Zurcher stated, there were many avenues the Grievant could have taken before stealing the fuel for his personal use. He could have had someone take him to a gas station to buy some fuel. He could have called a family member, as he has done several times in the past, to give him a ride or to take him to get fuel. As a last resort, S/Lt. Zurcher stated he could have pumped fuel into a gas can with supervisory approval, placed that amount in his personal vehicle and driven his personal vehicle to the gas station and refill the can to reimburse the state of Ohio. The taxpayers of Ohio would certainly not be pleased to learn that a trooper was placing fuel in his personal vehicle because of his poor planning. Keep in mind, the closest fuel station was just over one mile away. Grievant's rule violations can not be tolerated any more. He has tarnished his credibility and lost the public trust. He is still facing a misdemeanor theft count in criminal court. The discipline imposed in this case was not arbitrary, capricious, or discriminatory and the Employer will ask that you deny the grievance in its entirety.

UNION'S POSITION

The Union and the Grievant argue that the Employer did not have just cause to terminate the Grievant's employment based upon the incident in question and disparate treatment.

The Union's arguments are detailed in its brief and are as follows:

ARGUMENT

THE CHARGES

Mr. Stein, if I were an arbitrator, with a case submitted before me, the first thing I would do is review the Opening Statements of the advocates. Now, of course, I am not an arbitrator, and I don't know what your procedure is, but, to me it makes sense to see what counsel thought was their best argument in support of their case before the evidence was submitted. Certainly, the opening statement is a map of sorts that proposes to lead the trier of fact through the evidence, hopefully to a desired conclusion. It's a fair question at the conclusion of a case to ask, did the evidence admitted meet the obligations of the opening statement?

The Employer's Opening Statement

Trooper Doug Shockey was fired and the formal language of his termination read as follows: "*It is charged that sometime between April 1, and May 31, 2005, you stole two (2) to three (3) gallons of gasoline from the Marion Post fuel tank for use in your personal vehicle.*" (Joint Ex. #3)

The Employer has stated that Doug Shockey is a thief and as such has engaged in criminal behavior that precludes his service in law enforcement. The Employer's counsel offered his theory of the case in his Opening Statement by telling you, Mr. Arbitrator, what the Employer would prove at the arbitration hearing. "*The evidence will show,*' he said, " *that during the spring of 2005, grievant was working the afternoon shift and had his personal vehicle on post. Before leaving to travel back home, grievant asked Maintenance Repair Worker Brian Bender if he could pump some gas into his personal vehicle because he was out of fuel. Mr. Bender responded by stating that's up to you. It's not my gas. I'm not the yes or no person, and there's a camera right there. By grievant's own admission, he pumped 2 to 3 gallons of fuel into his personal vehicle. ... The evidence will show that grievant's rationalization for taking the fuel can only be described as bizarre.*" The seriousness of the offense was underscored by the Employer's counsel in declaring to the arbitrator that Doug Shockey "was', in addition to being fired, '*charged criminally with a misdemeanor theft offense*". (T 7,8, and 9)

Of the elements of the offense as delineated by counsel in the Employer's Opening Statement quoted above, the only averments that proved to be partially supported by the evidence were that: (1) on one occasion, and only one occasion Doug Shockey, under circumstances at variance with the circumstances set out by the Employer, put two to three gallons of gasoline from the Post tank into his vehicle and (2) the Employer was successful in having him criminally charged with theft. The surrounding facts of how, when and why the Grievant came to use two or three gallons of fuel from the Employer's tank were wholly at variance with the Employer's Opening Statement, and certainly far from bizarre. There is bizarre conduct in this case but it is not that of the grievant.

Union's Opening Statement

I too offered an Opening Statement. It too amounted to a theory of the case. It set out what we believed the evidence would demonstrate to the Arbitrator. Our theory was that the attendant circumstances of the readily admitted use of two gallons of fuel was, under the circumstances, not a theft in concept, design, intention or implementation. Further our theory of the case was that the termination response by he Employer constituted disparate treatment and could not but reflect a predisposition to terminate Doug Shockey.

My Opening Statement was not written in advance and suffered from a little too much rambling, but it presented what the Grievant proposed to prove to, you, the trier of fact in this case. On behalf of Doug Shockey I said that the Grievant "*had a target on his back for sometime for reasons unrelated to his performance of duty, for which you will have performance evaluations submitted to you which shows him to be a capable and qualified trooper...*" (T 10-11) I said that Trooper Shockey went on disability leave as a result of an off duty acknowledged problem with alcohol. He moved home with his parents and as I said in my Opening Statement, he underwent treatment; followed the Employee Assistance Program (EAP) , agreed and accepted by both the Employer and the Union. He was, restored to active duty having been medically cleared. (T 11)

It was, and is, the Unions position that Employer knew it could not terminate the Grievant on the basis of an off duty alcohol problem for which he sought and received appropriate treatment. The Employer did, understandably, watch him very carefully to see if the perceived off duty drinking problem presented itself at work. Even under the kind of scrutiny and observation that Trooper Shockey faced, both before his treatment and after, there was never any evidence that he was drinking on the job or that alcohol was impairing his performance. It was, and is, the Union's theory of the case that Shockey was subjected to harsh and disparate treatment culminating in his termination because the nature of his disability leave was widely known.

In our opening, I said that the fact that the Employer was factually precluded from making a case against the Grievant for work related alcohol abuse, did not mean that the Employer did not want rid of this less than perfect Trooper. It did want him gone, and the litany of Administrative Investigations and discipline over alleged misconduct as minor as using the expression "bullshit", I said would give evidence of the Employer's mind set as it related to Doug Shockey. I said that the evidence would lead you, Mr. Arbitrator, to conclude that when, in the summer of 2005, the civilian employee Bender told his Lieutenant of an occasion where Doug Shockey had used fuel from the Post tank in his private vehicle, the Employer saw the opportunity to get rid of Doug Shockey.

Securing a criminal charge was simply added leverage to encourage his departure. However, *"The evidence will show'*, I said, *'that Doug Shockey is a fighter, that this is what he wanted to do. His twin—brother is also a State Highway Patrol trooper, and this is the nature of the work that he wants to pursue."* The reason Doug Shockey sought treatment instead of quitting and has lived with rumor and innuendo, is because he loves being a Trooper. I said the evidence would show that he works "off the clock" on sharpening his law enforcement skills; that he is not averse to coming to the Post, off the clock, to administratively see to his work. Far from being a thief, our theory of the case was that the evidence would show that Doug Shockey was a young man who had dedicated his career to law enforcement. He was a "giver" and not a "taker" and not the conniver the Employer's charges portray.

I told you in my Opening Statement *"There were two separate investigations in this case, both a criminal investigation and an administrative investigation... Trooper Shockey fully cooperated with*

both." (T 13) He invoked no privilege and readily acknowledged the event that on one and only one occasion caused him to use gasoline from the Post pump. I told you that his statements in the Criminal Investigation and in the Administrative Investigation were clear, un-wavering and identical. I said the evidence would disclose that Shockey, on one occasion, having left the Post at the end of his shift was headed home when his car gave every indication of running out of gas. He was able to return to the Post; sought out the civilian in charge of the pumps and asked to put in enough gas to get to the gas station located a short distance from the Post. The gas station was located in the opposite direction of his route in leaving the Post. I said that he asked the maintenance person responsible for monitoring the fuel in the tank if he thought it would be all right to use some to get to a station. I said *"The evidence will show that uniformly, there was no trooper who indicated any knowledge of any concerted or repeated attempt on the part of Trooper Shockey to fill his automobile at the expense of the patrol".* (T 14) I said that the evidence will show that far from being a slacker or a chiseler, Doug Shockey was exactly the opposite. I said that the evidence would show *"the dispatcher that worked with him most, noted that Trooper Shockey would call the post for additional information on accidents that he was working and for which reports would be generated, that trooper Shockey, on his won time, in the middle of the night would come into the post to submit accident reports that he was working on, all without pay, all without indicating additional hours."*(T 15)

I said that the presentation of the Employer in its Opening would prove to be wrong on the basis of the evidence you would hear introduced. Wrong as to the date, the season, and even the year. Wrong as to the time of day. Wrong as to the assertion that the Grievant had conversation with Mr. Bender before he started for home at the conclusion of his shift. Wrong as to what Bender had said to him. I said in my Opening that Bender has said different things to different investigators including having told of saying nothing when Doug Shockey asked him if he would have a problem with using a little gasoline to get to a gas station. I said that Mr. Bender would prove to be an unreliable witness. I said that *"you will conclude from the evidence that the credibility of witness Bender cannot be established....he doesn't really know what happened or when it happened". (T 23)* I said in my opening statement that you will conclude that Doug Shockey is both an honest witness as to the event itself, the reason for the event, and the fact that no theft was planned or intended, as the *mens rea* requisite for a theft offense was not present.

Mr. Arbitrator, I submit that every major element of the Union's case that I represented to you in the opening statement, has proved to be supported by the evidence you heard and received at the trial of this matter, including the disparate discipline given to Doug Shockey in comparison to other higher ranking officers who engaged in demonstrated conduct far more questionable than that of Doug Shockey. Conduct, I might add, that more readily could have resulted in the filing of criminal charges as opposed to the "bizarre" filing of criminal charges in this case.

The Criminal Charge

The criminal charges secured by the Employer were undoubtedly intended to offer the Grievant an option to elect a dismissal of charges in return for not contesting his termination. It's been done before, as in the Byrd case you yourself heard. The existence of the criminal case, which had no business even being presented to you, will be dismissed and/or will result in a verdict favorable to Doug Shockey. The American justice system is often convoluted, but it is not warped.

THE EVIDENCE

The Employer's Offer of Proof

Direct Examination of Brian Bender

The Employer presented as its primary witness as to the facts, Mr. Brian Bender, an employee at the Marion Post for over 19 years. He is currently a civilian maintenance worker and had previously served the Post as a Dispatcher for over ten years.

In his direct examination he was asked whether he had any responsibilities related to the fuel pump and tank. In response to the question of whether he had any responsibilities concerning the fuel pump. He responded, "*My primary responsibilities were to make sure that there's no leaks, everything was operating like it should, and water detection*". (T-27). As to the facts of the case Bender testified that near 2:30PM on a warm spring day in 2005, Doug Shockey asked him if he could put fuel into his personal car. Doug was completing his shift. He said Doug's car was parked on the south side of the lot when Doug first approached him. He testified that the conversation took place in the garage. Inexplicably, Bender, who had been interviewed three times including being prepped by the Employer's counsel, testified that he, Bender, was in the garage and that Doug Shockey came into the garage and *"said he was out of fuel and wanted to know if he could pump a little bit of gas in his car. And I said, you know, that's fine with me. I – you know, it's not—it's not my gas. If you want to do it. Do it."*... (T-28).

When prodded by the Employer's counsel, he further testified that he told Shockey *" I told him there was a camera right there, you know, you need gas, get it."*

The Employer was faced with different testimony than it expected from Mr. Bender. I understand the quandary. Bender had given different statements in both the criminal and administrative interviews, and now his testimony offered less than damning of Shockey's conduct in seeking him out as one Shockey obviously believed should be contacted before taking enough gasoline to permit him to get to a gas station.

The Employer took a different tack, and asked it's witness if Shockey asked Bender to drive him to the gas station. The inference would be that such a request would have been a logical and/or permissible course of conduct. In fact, it would not have been as it would have had Bender while on duty leave his assignment. *"Did Shockey ask you to drive him to the gas station and get fuel for his vehicle?* Bender responded, *"He might have. I don't remember specifically him asking me, but he might have. But I would have said no..."* (T-29). It's not that Mr. Bender is not to be believed, it's that he just doesn't remember much at all, and what he does remember is not damaging to the Grievant. Stripped of what he was thinking, Bender testified that Doug asked him first before getting *"a little bit of gasoline"*, and Bender did not think the request, under the circumstances, unreasonable.

Mr. Bender then testified that he told his supervisor of the event two or three months later. Why? *"I waited because I really didn't think it was much of a big deal"*(T-30). According to Mr. Bender, he told his supervisor shortly after he heard Troopers talking about Doug Shockey having to have his mother come pick him up because he was out of gas "again". Bender testified that it was then he thought that maybe it wasn't just a one time event for Shockey. Maybe Shockey made a practice out of using the Post's gasoline. Still on direct, Mr. Bender then acknowledged that on one occasion he had left is assignment to go to the gas station for a Dispatcher who reported she was nearly out of gas. (T-33) This was on direct examination

<u>Cross Examination of Brian Bender</u>

On cross-examination, Mr. Bender remained a little 'loose' as to his recollection of the facts of the incident that forms the basis of this case. His lack of clarity or consistency persisted even though had every opportunity to strengthen his recollection. Mr. Bender had been interviewed by S/Lt Zurcher as part of the Administrative Investigation; Sergeant Rogols as part of the Criminal Investigation and most recently by Lieutenant Linek, the Advocate for the Employer in preparation for his testimony at the arbitration hearing.

I pointed out to Mr. Bender that he had just testified, on direct, that in response to Doug Shockey asking him if it were all right with him if he took some fuel, he had said *"that's fine with me"*. He said he followed up the comment *"that's fine with me"* with the comment *"its not my gas"*. (T-36). I then asked him if he told Sgt. Rogols when he was interviewed in the Criminal Investigation, that he had said nothing at all to Shockey. He responded, *"I don't recall"* (T-37).

On direct he was asked about the time he went and filled up the Dispatcher's truck. On cross examination, he was unsure as to the month but was pretty clear about her request being before his start time of 6:00AM. (T-39). In response to a later question by the Arbitrator, he acknowledged that a few minutes of the time he took to fill $20 worth of gasoline for the Dispatcher would have been during his regular shift time. The Dispatcher later established the time of day as between 6:00 AM and 7:00 AM.

Mr. Bender on cross-examination testified that he had provided gasoline to motorists in need of gasoline and reported such fuel as having been used by his tractor. He testified that there was no policy that permitted such allocation of fuel to a fictitious use. He also testified that Troopers assigned to the Post would wash their personal cars at the Post facility. (T-40).

With regard to what prompted his reporting the Shockey incident to the Post Commander, Mr. Bender testified that on the day the fuel tank was to be removed or drained permanently, he took part, or overheard, a discussion within the garage. He testified that he heard 'someone' say that Doug Shockey recently had to call his mother to pick him up because he his personal vehicle was out of gas. with. It was at that time Bender testified, that he determined to go to Lt. Church, the Post Commander, with the fact that Doug had on one occasion used Post fuel to get to a gas station when his personal vehicle ran out of fuel He testified that he knew that there might be a 'reckoning' as to how much gasoline should be in the tank. (T-44) As to responsibility for the tank itself, he acknowledged having made the statement that he feared being held accountable for a deficit, *"you know, why is there a deficit"* He acknowledged making an earlier statement *"so you know, to cover my own butt, I'm thinking he could have taken just a couple of gallons that day, who cares, I don't care, but if he's making a habit out of it, which it sounds like he's running his car out more that once, then I become concerned"* (T-46)

As far as responsibility for the maintenance of the fuel logs for the tank, Mr. Bender held to the position that it was the Dispatcher's responsibility. *"As far as I know it gets turned in to the dispatcher. She enters it and files it."* (T-55) S/Lt Zurcher later challenged Mr. Bender's interpretation of his lack of perceived responsibility for maintaining the logs. Still, Mr. Bender testified that he engaged in various other interactions with the pumps, which included calibrating the pumps. However, from the testimony of Mr. Bender, it is pretty clear that records relating to the pumps, their gauges, their calibrations, their records of usage, were all pretty haphazard.

S/Lt. Christopher Zurcher

Direct Examination of Chris Zurcher

The other witness called by the Employer was the investigator who conducted the Administrative Investigation; S/Lt. Chris Zurcher. He testified that his investigation incorporated the interviews and findings of the Criminal Investigation conducted by Sgt. Mark Rogols. He testified that he elected not to independently interview witnesses interviewed by Rogols with the exception of Doug Shockey and Brian Bender. Zurcher's AI found that Shockey had a history of running out of fuel. The language of his investigation would lead the reader to conclude Shockey's fuel problems were of a continuing nature. His investigation states that that he reached that determination from a number of sources including two troopers and a dispatcher. *"all three of them verified that Trooper Shockey had, at some point or the other, over the course of the last few months, asked for or needed a ride home because his vehicle was at post either low or out of fuel"* (R-71). His conclusion was not based upon an interview of any of the "all three". He relied upon Rogols, who was not called to testify.

Cross Examination of Zurcher

Upon cross-examination, S/Lt Zurcher was forced to amend his earlier testimony when confronted with the Rogols' investigation which clearly stated that Dispatcher Reichelderfer had no knowledge, that *"Shockey had, at some point or the other, over the course of the last few months, asked for or needed a ride home because his vehicle was at post either low or out of fuel"* independent of being told by that by a Trooper Carpenter. Trooper Carpenter was in all probability the source of Trooper Walsh's alleged confirmation or verification of Doug Shockey's difficulty with running out of gas. The *"all three of them verified"*, turned out to be no such thing. The impression however was that Shockey was undependable, and careless. It's not hard to add the unspoken "like most alcoholics".

On cross-examination, S/Lt Zurcher was less than clear with regard to his contact with the Rogols criminal investigation. He listened to the interviews, and did not re-interview witnesses. But, he did independently interview Mr. Bender. I asked if Mr. Bender's statements in the Criminal Investigation to Rogols and Bender's statements to him in the Administrative Investigation were consistent. S/Lt. Zurcher testified they were. I then confronted him with the obvious conflict in the two statements. He told Rogols that he made no comment to Shockey when Shockey asked if he could get enough gas to get to a gas station. To Zurcher he recited in substance the lines credited to him in the Employer's Opening Statement. His testimony at the Arbitration hearing was different again, but clearly stated that a conversation had taken place. Zurcher was less than candid and honest in refusing to acknowledge the inconsistency. Instead he stated that it was Rogols Summary that noted Bender made no comment to Shockey, not the tape of Bender's interview. Asked if he had reason to doubt Rogols accuracy as a Criminal Investigator, Zurcher said that he only recently met Sgt. Rogols, implying that he did not have sufficient basis to judge the criminal investigators veracity.

I cannot account for this type of artful dodging by S/Lt. Zurcher. One wonders how someone as hesitant as Zurcher claimed to be to accept as accurate the work of the criminal investigator would choose to adopt wholesale the investigative interviews of Rogols in place of his own interviewing of witnesses for his Administrative Investigation.

Zurcher testified with demonstrated pride, just how he and the Post Commander carefully, and cleverly, worked to arrive at April 18, 2005 as the date of the incident. A date wholly repudiated by subsequent evidence that disclosed Doug Shockey did not have the vehicle identified by Bender on April 18, 2005. I asked him about the discrepancies in the tank readings as evidenced by a generated form. He said that he reported the discrepancies up the chain of command to his Captain, a Captain Maxey. To his knowledge no action was taken as a result of the discrepancies. I handed him the gas logs and asked him about missing information as to how much fuel was pumped by a particular Trooper. I asked him who was responsible for maintaining the records. His response was that *"Mr. Bender was expected to complete the forms correctly"* (T-86). Bender had denied it was his responsibility and said it was the Dispatcher's responsibility. Of course, if Zurcher, a former Post Commander, thought it was Bender's responsibility to account for the Post's gasoline usage, it would seem logical that Doug Shockey might think likewise.

Whether its use of time, or gasoline, or soap, water and electricity, the issue of private use of public resources would seem to be the central issue of this case. In any such usage the attendant circumstances would dictate if, when, how, how much, and to what extent such private usage can be permitted or will be tolerated. S/Lt Zurcher testified that using the Post's soap and water to wash private vehicles is *"Generally permitted, yes"*. (R-92) He thought better of that response when I repeated with some incredulity *"It is permitted, hmm"*. He then

volunteered *"It's not stopped yet"*. (R-92). He acknowledged that OHP policy does not permit such activity, and yet, he knew of no enforcement action by the Patrol against anyone who uses the OHP facility and OHP soap and water to wash their private vehicles.

I questioned him about the potential of stealing 'time" from the Employer. After some hesitancy, he did acknowledge that someone could steal time from the Employer, but that he had never investigated such a case. On redirect examination he stated that he would not investigate the private use of Patrol material and resources through to wash personal cars. Contrary to his testimony, I am fully confident that he investigates anything his superiors direct that he investigate.

Direct Examination of Dispatcher Reichelderfer

Dispatcher Reichelderfer testified thoroughly consistent with what my Opening Statement indicated would be her testimony. She worked with Doug Shockey. She had no independent knowledge of any time Doug ran out of gas and needed a ride home as a result. She watches the screen for the camera that includes the pumps as she is concerned since she often works nights and alone at the Post. She has never observed Doug Shockey pumping gas into his personal vehicle. She told all this to Sergeant Rogols but was not interviewed by S/Lt Zurcher for the Administrative Interview. She was on duty the night that Doug sought a ride home at 3:00AM. *"The only time I was aware of him needing a ride was when he stayed over to work 11:00 PM to 3:00AM overtime, and he called for a parent to pick him up at the post."* (R-125).

As to the issue of what type of Trooper Doug Shockey is, Dispatcher Reichelderfer offered the following about Shockey's doing patrol work at home on his own time and coming to the post on his own time to in furtherance of his job. She was asked if Shockey would call the post while off duty. She said *"He might be following up on a crash, doing the paperwork at home on his own time, call for a time of the crash, what time he cleared the crash."* (R-122)

That brings us to Doug Shockey's testimony. The most glaring thing about Shockey's interviews to both Rogels and S/Lt. Zurcher and his testimony at the Arbitration Hearing is that he is entirely and completely consistent. There is no hedging, no failed recollection, no conflicting interpretation, no prodded memory. There was one time and one time only that Doug ever used gasoline from the Post for his personal vehicle. It was not April 18, 2005 nor was it even in 2005. He did not have the use of the vehicle in question from August 4, 2004 until April 29, 2005.

WE furnished documentation to the Arbitrator that confirms that his vehicle was not in his possession on the date S/Lt Zurcher so carefully determined to be the date in question. The simple, unabridged, and openly acknowledged facts of the instant case have been consistently related by Doug Shockey. In the winter of 2003-2004 Doug completed his 11:00 PM to 7:00AM shift and began to drive to his home located five or six miles from the Post. He had not traveled far when he his vehicle began to sputter and give signs of being out of fuel. Was this an occurrence of any frequency? Of course not. Doug realized the signs of being out of fuel from his early years, *"Growing up, 16-year old kid, I've had it happen". (R-135)*

A gas station was located in the opposite direction from the Post from the direction of his travel. He managed to return his car to the Post. He did not drive his car to the pump. *"Brian Bender was standing outside. I approached him, I asked if it was okay if I got a gallon of gas out of the pump so I could make it down to the gas station."* Bender said it was OK, to take two or three, "no big deal", that he had to run the leak test anyhow. *"Don't worry about it".* (R-136)

If you close your eyes, you can clearly see Brian Bender saying just that. Now there may be an issue of whether Brian Bender had the authority to give gasoline to anyone. We know he gave it out to the public when a motorist was in need. We know he accounted for his having done so by falsely ascribing the gasoline as being used in his tractor. We know that such a practice although neither approved nor provided for in the OHP policy nor in the gas logs, was not policed or actively prohibited by the Employer. We know that despite Mr. Bender's denials that he had responsibility for the pumps, saying that it was the Dispatcher who had responsibility for the accuracy of the gas logs, in fact, it was probably Mr. Bender who held such responsibility. Certainly Mr. Bender, custodian of the pumps held enough apparent responsibility that he would be the logical person for Doug Shockey to approach with is emergency. We also know that Shockey did not presume to go directly to the pumps and put gasoline in his vehicle before talking with Brian Bender.

I would bet the farm that Doug is exactly correct when he says that Bender said, sure go ahead and get what you need. Bender, himself came close to admitting, to the chagrin of opposing counsel, that he said, "sure go ahead and get a gallon or two".

Did Doug know that using the fuel from the Post was "wrong". Of course he knew it was wrong. It's wrong like leaving your line assignment and driving home while on patrol to check on your sick child is wrong. It's wrong like making a personal call on the Post phone to see if the furnace got fixed. It's wrong like officially recording fuel usage as used for OHP equipment when in fact it was used to aid a motorist. All the above examples and countless others are "wrong" but depend upon the circumstances as to whether it is considered so "wrong" as to justify disciplinary action on the part of the Employer.

The question for the Arbitrator is, was it Doug Shockey's intent to steal from his Employer? Did he commit a theft offense? That is what the Employer has charged in support of its Termination of Doug Shockey. The answer, on the basis of the evidence in this case, is that he did not intend to steal from his employer and he did not commit the criminal offense of theft.

Doug Shockey did not possess the requisite "mens rea" to be charged or held accountable for theft. In American jurisprudence the concept of *Mens rea* is an essential element in determining criminal accountablity. *Mens Rea* comes from the Latin phrase; *Actus non facit reum nisi mens sit rea,* translated it means that an act does not make a man guilty unless his mind be also guilty. *Mens rea* roughly translates to guilty mind. The elements of *Mens Rea* include that the act be undertaken "Purposely, for the express purpose of committing a crime; Knowingly, knowing that the act would certainly result in a crime; Recklessly, with reckless disregard of the consequences of the act; or Negligently, in "gross deviation" from the standards of normal conduct.

Doug in his testimony Doug as to the central issue of this case:

Q. Did you at the time believe that you were stealing gasoline?

A. No, I didn't.

Q. Do you believe know that you were stealing gasoline.

A. I had no criminal intent at all. I never believed that and I still don't believe that I did that, no. (T-138)

As to Brian Bender, Doug testified:

A.I felt since he was responsible for it (the pumps) he had some kind of – he was the only one there. I'd rather ask somebody than not ask somebody at all. That's why I asked somebody. (T-140)

Q.You failed to ask Lt. Church (Post Commander) though didn't you.

A. He wasn't there.

Finally, Mr. Arbitrator there is the issue of disparate treatment accorded Trooper Doug Shockey. There are a number of Exhibits before you, Mr. Arbitrator.

The first is that of a Sergeant who in a period of six months was late reporting to work twenty times. He did not indicate that he should be off payroll for the time not worked. He effectively was paid for time not worked. After an Administrative Investigation, he received a one (1) day suspension. (Joint Ex. #4)

The second is that concerning a Captain (now a Major and Commandant of the OHP Academy) An anonymous call to the Colonel charged that the Captain "sits in his office and does "homework" all day. The AI, conducted by the Major he worked for and then replaced upon the Major's retirement, conducted an AI. In the AI, one witness, estimated that the Captain spent between 40 to 75 hours during a two month period. Another witness estimated the time at "around 50" (hours). The Captain himself during the investigation admitted that he "has read from his college textbooks or worked on his desktop computer". (OHP computer) The Captain was unable to ascribe a number of hours but the AI determined that "there is no specific, detailed evidence indicating he spent the majority of his daily time doing his "homework". The Captain was also alleged to have used his subordinate employees to type up his homework while they were on OHP time. The AI found that the Captain had used four different subordinates on a total of seven projects specifically related to his outside college work.

The Administrative Investigation concludes with the investigator writing "What he did was wrong. He has admitted it, and he will not repeat his error in judgment." Pretty amazing stuff isn't it. For personally stealing this time (which amounted to at a minimum over a week) and for redirecting the work of four subordinates from their official duties to serve his private affairs, the Captain received the following discipline. He was suspended for one day and he was required to pay the state back a total of $42.10. As mentioned earlier he was subsequently promoted to the position of Major and Commandant of the Ohio Highway Patrol Academy. (Joint Ex 5)

The third case is that of an OHP Major. He was the subject of an Administrative Investigation in 2003. The investigation related to personal cell phone/office phone usage and the time the Major was spending away from his assigned duties. The AI determined that it could document that the Major used his office phone to make long distance phone calls and had not reimbursed the OHP. More in point, the investigation determined that the Major had engaged in personal calls while on duty a documented total of "3,754 minutes or about 63 hours." The investigative summary states "He (the Major) said he often calls home to check on his grandson and talk to his wife". For this conduct, the Major was required to pay back the long distance calls and he further received as discipline a one working day suspension.

The three examples above were secured with a Freedom of Information

Request. Did the three OHP officers above "steal" time; convert to their personal use material and personnel of the OHP? I guess that it depends upon the circumstances.....and the officers being investigated.

Mr. Stein, there is little left to say. Trooper Doug Shockey must be restored to his position with full back pay.

DISCUSSION

Generally, in an employee termination case, an arbitrator must determine whether an employer has proved clearly and convincingly that

a discharged employee has committed an act warranting discipline and that the penalty of discharge is appropriate under the circumstances. *Hy-Vee Food Stores, Inc. and Local 747, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, 102 LA 555 (Bergist 1994). If an employer does not meet this burden, then an arbitrator must decide whether the amount of discipline is reasonable. In making this determination, the arbitrator may consider, among other circumstances, the nature of the Grievant's offense(s), the Grievant's previous work record, and whether the employer has acted consistently with respect to similar previous offenses. *Presource Distrib. Servs., Inc. and Teamsters Local 284*, FMCS No. 96-01624 (1997). The right of an arbitrator to change or modify penalties found to be improper or too severe is inherent in the arbitrator's power to determine "just cause." This right is also inherent in the arbitrator's authority to finally resolve a dispute. An arbitrator should think carefully prior to substituting his own judgment for that of an employer unless the challenged penalty imposed is deemed to be excessive, given any mitigating circumstances. *Verizon Wireless and DWQ, Local 2236*, 117 LA 589 (Dichler 2002).

> Discharge from one's employment is management's most extreme penalty against an employee. Given its seriousness and finality, the burden of proof generally is held to be on the employer to prove guilt of a wrongdoing in a disciplinary discharge or to justify or show "good cause" for terminating an employee. This is especially true in cases, like this one, where the parties have agreed that the collective bargaining agreement requires "just cause" for disciplinary action, including discharge.

Int'l Assoc. of Machinists and Aerospace Workers Union, Dist. 160 and Intalco Aluminum Corp., 00-2 Lab. Arb. Awards (CCH) P 3608 (Nelson 2000).

When a collective bargaining agreement reserves to management the right to establish reasonable rules and regulations and the right to discharge for "just cause," but does not define what constitutes "just cause," it is proper for an arbitrator to look at employer policies, rules, statutes, and regulations to determine whether or not a discharge was actually warranted. *E. Associated Coal Corp. and United Mine Workers of Am., Dist. 17*, 139 Lab. Arb. Awards (CCH) P 10,604 (1998).

> "Just cause" is the contractual principle that regulates an employer's disciplinary authority. It is an amorphous standard, ordinarily open to arbitral interpretation on a case-by-case basis. Before an arbitrator will uphold a penalty, he ordinarily looks to the circumstances of the misconduct, mitigating factors, and whether the aggrieved employee received his/her contractual and legal due process protections.

State of Iowa, Iowa State Penitentiary and Am. Fed'n of State, County and Mun. Employees, AFSCME State Council 61, 01-2 Lab. Arb. Awards (CCH) P 3923 (Dworkin 2001). The existence of "just cause" is generally recognized as encompassing two basic elements. First, the Employer bears the burden of proof to show that the Grievant committed an offense or engaged in misconduct that warranted some form of disciplinary action. The second prong of "just cause" is to determine whether the severity of the responsive action taken by the employer was

commensurate with the degree of seriousness of the established offense. *City of Oklahoma City, Okla. and Am. Fed'n of State, County and Mun. Employees, Local 2406*, 02-1 Lab. Arb. Awards (CCH) P 3104 (Eisenmenger 2001). The proof must satisfy both the question of any actual wrongdoing charged against an employee and the appropriateness of the punishment imposed. "Just cause" requires that employer policies and rules be fair and reasonable and that they be equally, even-handedly, and consistently applied to all employees. *Int'l Assoc. of Machinists and Aerospace Workers Union. Dist. 160 and Intalco Aluminum Corp.*, 00-2 Lab. Arb. Awards (CCH) P 3608 (Nelson 2000).

In this discharge matter, a determination of "just cause" often hinges on the credibility of witness testimony. It is the role of an arbitrator to observe the witnesses and determine who is telling the truth. *Givaudin Corp.*, 80 LA 835, 839 (Deckerman 1983).

> The arbitrator must look beyond actual testimony and search to expose any bias or motivation for the testimony given. Where there is a conflict in testimony, this does not necessarily mean that any party may be deliberately misrepresenting or falsely testifying. Hearings may be replete with good faith conflicting testimony as to what the witnesses thought they heard or saw.

Am. Baking Co., Merita Div. and Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am., Local No. 28, Dist. 65, 87-1 Lab. Arb. Awards (CCH) P 8176 (Statham 1986). In addition to determining the credibility of witnesses, the arbitrator also determines the weight to be accorded the evidence submitted by the parties. *Minn. Teamsters Pub.*

and Law Enforcement Employees Union, Local No. 320 and City of Champlin, State of Minn., 00-2 Lab. Arb. Awards (CCH) P 3499 (Berquist 2000). Because reliability resolution is often the most difficult fact for any fact-finder to resolve, it is proper to take into account the appearance, manner, and demeanor of each witness. While testifying, a witness' apparent frankness, intelligence, capacity for consecutive narration of acts and events, and the probability of the story related by him is significant. It is also important to assess the advantages he appears to have had for gaining accurate information on the subject, the accuracy of his memory, the lapse of time affecting it, the intonation of his voice, and his certainty in testifying. *Racing Corp. of West Virginia d/b/a Tri-State Race and Gaming and United Steelworkers of Am., ALF-CIO*, 00-2 Lab. Arb. Awards (CCH) P 3625 (Frockt 2000).

> In resolving the issues presented in any case, an arbitrator must determine the weight, relevancy, and authenticity of evidence. He must weigh and consider the exhibits received into evidence, any stipulations of the parties, and the testimony—both on direct and cross-examination—presented during the hearing. With regard to the testimony presented, an arbitrator must determine whether and to what extent the testimony of each witness is to be believed, as well as the significance of the facts educed . . . To assist in making the necessary credibility determinations, although the best weapon is probably common sense, arbitrators utilize various guidelines. They consider, *inter alia*, the conduct, appearance, and demeanor of each witness who appears and gives testimony, weighing, of course, his or her frankness or lack of frankness, any inconsistencies between his testimony and any previous statements he may have made, any inconsistencies between his testimony and that of other witnesses, his character as indicated by his past history and conduct, any relationship with or feeling for or against the grievant or either of the

> parties which the witness may have, the factual probability or improbability of the testimony offered, the witness's opportunity for observation or acquisition of information with respect to the matters about which he testified, and any possible motive or lack of motive he may have had for testifying the way he did or any interest or lack of interest he may have in the outcome of the dispute.
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> *Startran, Inc. and Amalgamated Transit Union, Local 1091*, 00-2 Lab. Arb. Awards (CCH) P 3490 (Richard 2000).

In the instant matter the Grievant admitted to taking two (2) to three (3) gallons of gasoline for use in his personal vehicle on one occasion. The Employer could not establish that the Grievant took any more gasoline from the Post pump. The Employer's central witness in this case is Brian Bender ("Bender"), maintenance repair worker, who had responsibilities for the gas pump during the time that the Grievant appropriated gasoline from it. On the day in question, which Bender stated was sometime in the Spring of 2005, he was asked by the Grievant if he could put some gas in his personal vehicle. Bender stated to the Grievant, "go ahead if that's...you know, you need gas, get it" ..... "That's fine with me, then I followed up with it's not my gas (see transcript). The closest gasoline station to the post is a little over one mile away. Bender's home is approximately five (5) miles from the post (Tr. 130). Bender did not report the Grievant's appropriation of the gasoline from the pump until he became aware of the pump being scheduled for shut down. The facts also reveal the Grievant, with the exception of Bender, did not ask anyone else if he could take the gas, and did not report taking it to a supervisor.

Moreover, the Grievant did not log the taking of gas in records kept by the Employer and did not pay (or offer to pay) for it (Tr. 70, 71, 117).

However, it also appears that the Grievant did not attempt to conceal his taking of the gasoline, having done so in view of an employee and a camera. In spite of this, the Grievant readily admitted under examination by the Employer's advocate that he knew taking the gas from the pump for his personal vehicle was wrong. However, he felt his circumstances were extenuating in light of what is done for stranded motorists (Tr. 117, 137,138, 142). The Grievant did not believe he stole the gasoline (Tr. 138). In spite of his beliefs, the fact remains he took something of value that belonged to the Employer for his personal use.

By way of comparison, the parties submitted into the record three (3) examples of other employees who were disciplined for conduct related to honesty in the workplace. In Joint Exhibit 6, Major Cassidy did not conceal his conduct and did not believe he was doing anything wrong when he made an average of five (5) hours of personal calls per month over an extended period. He stated he did not feel he was dishonest because his personal telephone calls did not exceed the "allowed minutes to his plan, which didn't cost the state any additional money" (see pp. 22). The Patrol felt otherwise, and Major Cassidy had to reimburse the state $98.55 and received a one (1) day suspension for Compliance with Orders rule violation. He was permitted to use a day of

vacation in lieu of the suspension. In Joint Exhibit 5, Captain Watts admitted that by doing schoolwork while on "the clock" and directing secretaries to type some of the work, he was wrong and violated the Employer's rules and regulations (see pp. 19). Captain Watts reimbursed the State $42. 10 and was suspended for one (1) day for violation of rules related to inefficiency. Both Cassidy and Watts were long-term employees with no prior discipline on their records. In Joint Exhibit 4 there was a lack of enforcement of tardiness rules that was not addressed in a timely fashion until an audit was performed. Sgt Click was the employee with several undocumented episodes of tardiness. He was charged with a Performance of Duty/ Inefficiency rule violation and was suspended for one (1) day. He also had no prior discipline on his record.

The Union argues that these three (3) employees were not treated in the same manner as the Grievant even though their conduct involved the theft of time and conversion of state resources for their personal use. It is reasonable to conclude that all of the cases presented as joint exhibits involve the misappropriation of state resources and acts, which arguably involve the Employer's Core Value of Honesty. Whether they rise to the level the theft is not clear, but it is noted that the charges against the Grievant are similar to those levied against Cassidy, Watts, and Click. They all represent misjudgments by employees in appropriating time and/ or resources without permission. And in one way or another they involve

the Employer's Core Value of Honesty. Apparently, in the rule violations committed by Cassidy, Watts, and Click, the Employer determined that these situations warranted corrective action rather than discharge. The Employer determined that the level of deceit involved did not irreparably damage the employment relationship. In essence, the Employer in terms of disciplining their employees was satisfied with firing the proverbial "shot across the bow" in order to place these employees on notice to correct their behavior.

In the instant matter involving Trooper Shockey, the "shot" by the Employer was "amidships," but was preceded by numerous warning shots. In clear-cut cases involving theft, many employers make no allowance for prior service or record of same. In such cases the bond of trust between employee and employer is often irreparable. The Union suggests that the disparate treatment of Cassidy, Watts, and Click, versus the Grievant has more to do with rank and who is involved. While the Union provided a strong argument for this position, it is often the employment record of the individuals that create the context within which corrective action should be measured. This is typically the case, providing the employee's action is not so egregious that no amount of corrective action can overcome what was done.

There was no evidence presented that Cassidy, Watts, and Click, failed to respond to progressive corrective discipline. On the other hand,

there is considerable evidence to suggest the Grievant does not readily learn from his mistakes. In spite of Mr. Bender's somewhat inconsistent testimony regarding what he conveyed to Trooper Shockey, the fact remains that Shockey knew Bender was not his supervisor, and that he was wrong in taking something of value without chain of command permission. He knowingly committed another act of wrongdoing after previously being issued ten (10) performance related disciplines (including 4 suspensions) from the period of March 6, 2002 to March 9, 2005. Again, it is noted that during this three (3) year period the Grievant was off the job for the better part of one year. By any measure this is a considerable amount of discipline, much of it related to poor judgment. Most employees after "dodging so many bullets" would be reluctant to purposefully appropriate gasoline from a state pump without securing the permission of his/her own immediate supervisor, or at the very least, without replacing (or paying for) what was taken.

One of the suspensions sustained by the Grievant was a five (5) day suspension that was converted from a termination by an arbitrator. It also contained a written warning that "any further violations of the Employer's Rules and Regulations surrounding its Core Value of Honesty will subject the Grievant to immediate termination." The Union makes a convincing argument that the conduct of Cassidy, Watts, and Click also involved dishonest or deceitful conduct involving the misappropriation of resources

without permission. However, in the context of the Grievant's record, I find that the Employer's actions meet a just cause standard for termination. The appropriation of fuel from a state pump without having specific permission of a direct superior, particularly in the context of a paramilitary organization, can reasonably be characterized as misconduct surrounding the Core Value of Honesty. In the light of the Grievant's entire work record and in particular the specific warning provided to the Grievant by Arbitrator Sellman, the Employer's actions were reasonable.

AWARD

The grievance is denied.

Respectfully submitted to the parties this 21st day of December 2005.

Robert G. Stein, Arbitrator