

**ARBITRATION DECISION NO.:**

166

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Transportation

**DATE OF ARBITRATION:**

January 4, 1989

**DATE OF DECISION:**

January 13, 1989

**GRIEVANT:**

Phillip Payne

**OCB GRIEVANCE NO.:**

G-87-2989

**ARBITRATOR:**

Harry Graham

**FOR THE UNION:**

Daniel Smith

**FOR THE EMPLOYER:**

Mary Abel

**KEY WORDS:**

Just Cause

False Application

Failure To Appear At Hearing

**ARTICLES:**

Article 24 - Discipline

§24.01-Standard

**FACTS:**

The Grievant was employed with the Department of Transportation in Marion, Ohio. The Grievant committed many breaches on his employment contract and had received numerous reprimands. On August 25, 1987, the Grievant called his supervisor and asked permission for sick leave. The supervisor granted his request and later in the day was notified by another employee that the Grievant was not sick but was instead in jail. The employer checked into these allegations and found them to be true. In addition, the employer discovered that the Grievant had previous

convictions of which two were felonies. When applying for his employment the Grievant had stated on his application that he had no previous felony convictions. Upon discovering that the Grievant improperly completed his application for employment and also improperly sought and was granted sick leave the Grievant was discharged.

**EMPLOYER'S POSITION:**

The State argued that it had just cause for the discharge of the Grievant. It points out that the Grievant had only worked for the employer for a period of one year and during that time he had been disciplined twice previously. It now asserts the two additional charges of obtaining employment under false pretenses and requesting sick leave improperly. Given his short time of service with the State and the indifferent record he compiled as well as the serious nature of the offense which are charged against him, discharge is an appropriate remedy.

**UNION'S POSITION:**

The Grievant was discharged without just cause. It asserts that the State was aware of the felony convictions and in fact told the Grievant to falsify his employment application. The Union also asserts that the Grievant's supervisor told him to falsify his request for the use of sick leave. As the State was aware at all times of the Grievant's criminal record and his arrest on August 25, 1987, the grievance should be sustained and the Grievant should be restored to employment and made whole in the Union's opinion.

**ARBITRATOR'S OPINION:**

The arbitrator held that the State had just cause for termination of the Grievant. The arbitrator stated these reasons for his decision. First, the Grievant falsified his application for employment by stating he had never been convicted of a felony. If the State had known of the Grievant's prior conviction they would have never hired the Grievant in the first place. Second, the arbitrator felt that the Grievant had a poor employment record with multiple disciplinary actions. Third, the Grievant failed to appear for his hearing. In conclusion, the arbitrator felt the Grievant was dismissed for just cause under the Contract.

**AWARD:**

The Grievance is denied.

**TEXT OF THE OPINION:**

In the Matter of Arbitration  
Between  
**OCSEA/AFSCME Local 11**  
and  
**The State of Ohio,  
Department of Transportation**

**Case No.:**  
G 87-2989

**Appearances:**

**For OCSEA/AFSCME Local 11:**

Daniel Smith  
General Counsel  
OCSEA/AFSCME Local 11  
995 Goodale Blvd.  
Columbus, OH. 43212

**For State of Ohio:**

Mary Abel  
Department of Transportation  
C/O Office of Collective Bargaining  
65 East State St.  
Columbus, OH. 43215

**Background:**

Pursuant to the procedures of the parties a hearing was held in this matter on January 4, 1989 before Harry Graham of South Russell, OH. At that hearing both parties were provided complete opportunity to present testimony and evidence. The hearing commenced in mid-morning of January 4, 1989 as inclement weather prevented the Arbitrator from arriving in Columbus in time for the 9:00 AM scheduled starting time. The Grievant was apprised by the Union of the revised starting time. When the hearing commenced the Grievant had not arrived. After all concerned waited approximately one-half (1/2) hour the State was permitted to present its case. A recess was taken to wait for the Grievant to arrive at the hearing site. After approximately a half hour (1/2) hour recess the Grievant failed to present himself and the Arbitrator directed that the Union go forward with its case. It did so. When the Union concluded its case and the Grievant had failed to appear the Arbitrator declared the hearing to be closed.

**Issue:**

At the hearing the parties agreed upon the issue in dispute between them. That issue is:

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

**Background:**

The Grievant, Phillip Payne, was first employed with the Department of Transportation in early Fall, 1986. His work site was the ODOT facility in Marion, OH. In the course of his employment he received a verbal reprimand on February 13, 1987 for improper backing of a State vehicle. On June 3, 1987 he was given a one day suspension for sleeping on duty.

On August 25, 1987 Mr. Payne telephoned his supervisor, George Ferguson, and asked for permission to use sick leave. That permission was granted. Later that day another employee in Marion facility approached Mr. Ferguson and told him that Payne was not ill. Rather, he had been arrested the prior evening and was in jail according to this employee. Mr. Ferguson went to City Hall in Marion and viewed the Grievant to satisfy himself that the story of arrest and incarceration was true. The Grievant had, indeed, been arrested. It was alleged he had committed a variety of traffic offenses.

Later that day, August 25, 1987 another employee told Mr. Ferguson that Payne had been arrested on prior occasions and had been convicted of felonies. Upon receipt of that information the Department of Transportation commenced an investigation and found that Payne had been arrested and convicted for two felony offenses: breaking and entering and Burglary. He also had a record replete with traffic offenses.

When a person completes an application for employment they must respond to a number of questions on the application form. Among those questions is "Have you ever been convicted of any felony?" Mr. Payne checked the "no" box in response to that question. Upon discovering that he had improperly completed his application for employment and also improperly sought and been granted use of sick leave, the Grievant was discharged.

A grievance was filed protesting the discharge and processed through the procedure of the parties. No resolution of the grievance was reached and the parties agree it is properly before the Arbitrator for determination on its merits.

### **Position of the State:**

The State insists it had "just cause" as specified by the Labor Agreement and that the discharge should be sustained. It points out that the record, Employer Exhibit 2, shows without contradiction that the Grievant was convicted of the felony counts of burglary and breaking and entering. The evidence also shows that when he applied for sick leave on August 25, 1987 he was not sick. He was in jail. His application for sick leave under false pretenses is an additional reason for sustaining its position in this dispute according to the State.

The Grievant had approximately one year of service with ODOT prior to this incident. During that time he had accumulated two other disciplinary entries. These were a verbal reprimand and a one day suspension. Given his short time of service with the State and the indifferent record he compiled as well as the serious nature of the offenses with which he is charged in this situation, discharge is the appropriate penalty according to the State.

### **Position of the Union:**

In the Union's view the State did not have "just cause" to discharge the Grievant. It asserts that the State was aware of the felony convictions and in fact told the Grievant to falsify his employment application. The Union also asserts that the Grievant's supervisor told him to falsify his request for use of sick leave. As the State was aware at all times of the Grievant's criminal record and his arrest on August 25, 1987, the Grievance should be sustained and Mr. Payne should be restored to employment and made whole in the Union's opinion.

### **Discussion:**

The version of events presented to the Arbitrator by the State is fully supported by the record and testimony provided at the hearing. The Grievant has been convicted of burglary and breaking and entering. He was arrested in August, 1987 and requested use of sick leave to compensate him for the time he spent in jail. His application for employment was falsified. He did not inform the State of his felony convictions. This is a clear cut violation of the directive on the application which requires certification that the answers to the questions on it are true. The Grievant lied. His falsehood was not minimal, it was of a very serious nature. The State would not offer employment to a person who has a felony conviction on his record.

During the course of his employment with the State the Grievant compiled an indifferent record.

Over the course of approximately one year he received two disciplinary entries. There are no facts on the record before the Arbitrator that would prompt any consideration of reversal or modification of the State's action.

Attention must be devoted as well to the Grievant's failure to appear at the hearing. All concerned waited fruitlessly for him to appear. Obviously, his failure to do so is held against him. The Union should not expect that when its principal witness does not testify in his own behalf that it could prevail in this dispute. The record establishes without any doubt that the State met the contractual standard of "just cause" in this situation.

**Award:**

The Grievance is denied.

Signed and dated this 13th day of January, 1989 at South Russell, OH.

Harry Graham  
Arbitrator