ARBITRATION DECISION NO.:
237

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Transportation
District 8
Clermont County Garage

DATE OF ARBITRATION:
January 23, 1990

DATE OF DECISION:
March 5, 1990

GRIEVANT:
Mark McCleese

OCB GRIEVANCE NO.:
31-08-(89-05-12)-0034-01-06

ARBITRATOR:
Rhonda Rivera

FOR THE UNION:
Mike Temple

FOR THE EMPLOYER:
Carl Best

KEY WORDS:
Insubordination
Gambling
Notification of Work Rules
Suspension

ARTICLES:
Article 24-Discipline
§24.01-Standard

FACTS:
The grievant, an Auto Mechanic I, was called in by the Ohio Department of Transportation to work overtime. During the grievant's lunch break a supervisor discovered the grievant in a stockroom playing cards with another employee and noticed money on a table between them. The supervisor assumed that the grievant was gambling and ordered the grievant back to work. The grievant returned to work and, due to this incident, was suspended for ten days for insubordination.

EMPLOYER'S POSITION:

The grievant was playing cards and probably gambling on state time while in an area that is off limits to employees. All workers were verbally warned against gambling and card playing; the grievant had adequate notice. It is questionable whether the grievant was actually on his lunch break. Even if he was on his break, during overtime lunch breaks are considered to be work time. The ten day suspension is a just discipline for ignoring work rules and a supervisor's warning.

UNION'S POSITION:

The grievant was on his lunch break and was playing cards. There was no gambling taking place. The loose change on the table was money the grievant was paying back to the other employee for lunch. The ban on card playing is not consistently enforced. The only reason the supervisor told the grievant to quit playing cards is the supervisor's bias towards what he thought was gambling. Card playing is not prohibited during lunch and even if it is prohibited during overtime lunch breaks, the grievant had no notice of this work rule. The grievant was not insubordinate. He immediately returned to work without comment.

ARBITRATOR'S OPINION:

There is insufficient evidence to prove gambling; the supervisor clearly disapproves of gambling and did not fully investigate. In fact, card playing is only prohibited during working hours. The grievant might have been on his lunch break. Even if the grievant's lunch break during overtime is considered to be work time the grievant was not notified of this work rule. The State also failed to prove or even offer evidence that the grievant disobeyed an order. The grievant returned to work immediately after being told to do so by the supervisor. The work rule of no card playing is also believed by the arbitrator to be inconsistently enforced. The only charge the grievant was suspended for was willful disobedience which the employer did not prove.

AWARD:

The grievance is sustained; grievant to be made whole.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

Ohio Department of Transportation
Employer,

and

OCSEA, Local 11
AFSCME, AFL-CIO
Union.

Grievance:
31-08(89-05-12)0034-01-06
Grievant:
(Mark McCleese)
Hearing Date:
January 23, 1990
Award Date:
March 5, 1990

For the Employer:
Carl Best

For the Union:
Mike Temple

Present in addition to the Grievant and the Advocates were the following persons: Mike Duco (OCB) and Bill Hancock, Superintendent ODOT (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. All witnesses were sworn.

Joint Exhibits

J-1 Contract

J-2 Directive A-301 (ODOT)

J-3 Directive A-302 (ODOT)

J-4 Grievance Trail

J-5 Prior Discipline

Issue

The issue before the Arbitrator is that of determining whether or not the Employer acted with just cause in imposing a ten (10) day disciplinary suspension on Mark McCleese on May 1, 1989. If not, what shall the appropriate remedy be.

Stipulated Facts

1. Mr. Mark A. McCleese was hired by O.D.O.T., District Eight on April 22, 1985 and assigned to the Clermont County garage as an Assistant Auto Mechanic.

2. On May 24, 1987, Mr. McCleese was promoted to the position of Auto Mechanic I, a position he held at the time of the ten (10) day suspension now in question.

3. On May 29, 1986, Mr. McCleese was issued a verbal reprimand for unexcused tardiness.

4. On November 28, 1986, he was issued a written reprimand for carelessness resulting in damage to State property.

5. On October 28, 1987, Mr. McCleese was suspended for one (1) day for unauthorized absence.

6. On July 12, 1988, Mr. McCleese was suspended for three (3) days for unauthorized absence.

7. On November 14, 1988, he was suspended for five (5) days for a vehicle moving violation that involved a serious accident. On January 18, 1990, Arbitrator Craig Allen reduced the aforementioned five (5) day suspension to two (2) days.

Facts

The suspension letter of April 26, 1989 states that Grievant violated Directive A-301, Item 2(b) Insubordination, willful disobedience of a direct order by a superior. In its opening statement, the Employer said that the Grievant was suspended "for gambling during work hours while in an overtime status on February 3, 1989 at 7:18 p.m." which behavior the Employer deemed to be Insubordination.

On the day in question, the Grievant and others were working voluntary overtime from 4 p.m. to midnight to deal with snow and ice. Mr. Hancock, Assistant Superintendent, was the Grievant's direct supervisor that night. Mr. Hancock testified that on overtime, no lunch break is scheduled, but that workers can take a 1/2 hour. He said that on overtime, this half-hour break is not the employee's time as it is on regular shift, but is "state-time". On February 18, Mr. Hancock remembers the Grievant and Mr. Bundy leaving the garage, apparently for lunch. The time was 5:40 p.m. which, according to Mr. Hancock, would require the Grievant to be back at work at 6:10 p.m. Mr. Hancock took his own break subsequently and returned to the garage at 7:15. At 7:18 returning from the bathroom, he found the Grievant and Mr. Bundy playing cards and "gambling" in the stockroom. He told them to return to work which they did. Mr. Hancock testified that he reached the conclusion that they were gambling because $1 - $1.50 in loose change was scattered on the table. He said that "he (Mr. Hancock) kept his money in his pocket" and that "I don't gamble". Mr. Hancock testified that all workers had been verbally warned about card playing. The Employer introduced Employer's Exhibit E-1 a statement of "Guidelines" allegedly posted at the workplace.

#2 read "No playing cards during work hours"
"Stockroom is off limits to employees"

The Grievant testified that he took his lunch break from 7:00 p.m. to 7:30 p.m. He admitted that he and Mr. Bundy were playing cards in the stockroom at 7:18 p.m. He denied gambling however; he said the change on the table came from Mr. Bundy who was repaying him for previously loaning Bundy money for lunch. The Grievant testified that the "ban" on card playing was inconsistently enforced, depending on the work to be done and the Superintendent's mood.

Discussion

Neither A-301, A-302, nor Employer's Exhibit #1 directly prohibit "gambling" and only E-#1 prohibits card playing "during work hours". The Arbitrator concludes that insufficient evidence was presented to prove "gambling". Mr. Hancock who clearly disapproves of gambling, formed an opinion without investigation.

Card playing, according to the Guidelines (Employer Exhibit #1), is only prohibited "during work hours". The evidence is insufficient to clearly show that at 7:18 the Grievant was not on his lunch break. The Employer maintains that even if the Grievant were on lunch break, he still was playing cards "during working hours" because on overtime no lunch breaks are required. Hence, the Grievant was on "State" time. No where was a notice of this latter rule, even if appropriate, introduced as evidence into the hearing.

No where in his testimony did Mr. Hancock allege a direct order given to the Grievant which was disobeyed. Quite the contrary, the only direct order he gave was immediately obeyed (i.e., return to work). Insubordination as delineated in 2(b) is a serious charge. It requires a direct order and willful disobedience. No where in the hearing was evidence introduced to support the willful disobedience of a direct order.

Admittedly, the Grievant was playing cards. The evidence about the timing of the Grievant's lunch break was at best inconclusive. The Grievant said he was unaware that lunch breaks on voluntary overtime were not his time to use as he wished. No evidence was introduced to support the contention that he was "on

notice" with regard to the status of luncheon breaks.

The Arbitrator believed the Grievant's testimony that enforcement of the "No" card playing rule had been inconsistent. The sole charge of the April 26, 1989 suspension letter was 2(b) "willful disobedience of a direct order by a superior". The Arbitrator finds no such direct order nor any willful disobedience.

Award

Grievance sustained; Grievant to be made whole.

Date: March 5, 1990
Rhonda R. Rivera
Arbitrator