

**ARBITRATION DECISION NO.:**

364

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Mental Health,  
Western Reserve Psychiatric Hospital

**DATE OF ARBITRATION:**

June 25, 1991

**DATE OF DECISION:**

July 17, 1991

**GRIEVANT:**

Joe Cipriani, Jr.

**OCB GRIEVANCE NO.:**

23-18-(90-11-30)-0580-01-06

**ARBITRATOR:**

Patricia Thomas Bittel

**FOR THE UNION:**

Robert Robinson  
Gerald Burlingame

**FOR THE EMPLOYER:**

Linda J. Thernes  
Paul Kirschner

**KEY WORDS:**

Removal  
Theft of State Property  
Disparatament Treatment  
Mitigation

**ARTICLES:**

Article 24 - Discipline  
    §24.01-Standard  
Article 25 - Grievance  
Procedure

**FACTS:**

The grievant was discharged on November 9, 1990 for theft of State property. The parties stipulated that grievant took copper tubing and spouting from the grounds of Western Reserve Psychiatric Hospital without authorization, sold it to a recycling center, and that the grievant had been criminally charged and pled guilty.

The focus of the Union's challenge to grievant's discharge was disparate treatment; it maintained that

others who have committed comparable offenses received much less discipline. Management denies that the cases of disparate treatment cited by the Union are at all comparable.

**EMPLOYER'S POSITION:**

Management argued grievant's case was plainly theft as he profited at State expense. The State claimed that the citing of offenses by others involving fighting and carrying weapons are totally dissimilar offenses and cannot be compared with theft, and that the Union's examples of disparate treatment did not involve the offense of theft and must therefore be discounted. Management maintained that the grievance should be denied in its entirety as there was just cause for removal.

**UNION'S POSITION:**

The Union argued there was no just cause for grievant's removal based on Management's inconsistent application of the disciplinary grid. The Union claimed that other offenses which called for the same penalty as theft did not bring about the same results. It maintained that in a prior case an employee who was involved in a knife fight received only a two-day suspension, and in another case an employee who brought a shotgun on the premises received merely a verbal reprimand. Therefore, the Union maintained the grievant's removal must be modified to a suspension.

The Union pointed out that grievant had no other discipline on his record. His performance was average and his time cards proved he was conscientious about coming to work. While admitting that a suspension is warranted, the Union seeks grievant's reinstatement.

**ARBITRATOR'S OPINION:**

The Arbitrator found that this case turned on whether grievant was the victim of disparate treatment and it was found that he was not.

There is nothing within the collective bargaining agreement that prohibits the disciplinary grid Management has established. With regard to the examples of carrying weapons onto the grounds or fighting, it should be noted that Management is free to select appropriate disciplinary penalties within the grid so long as it does not favor some employees over others guilty of the same offense.

By its terms, the grid builds in flexibility for Management to exercise discretion when dealing with different offenses having penalties within the same range. While the Union made a valid point that management enforces some offenses more strictly than others, reasonable distinctions are the prerogative of Management.

The evidence falls short of showing grievant was the victim of disparate treatment. There was no example of another employee actually guilty of theft who received a lesser penalty.

Though grievant's truthfulness and remorse were found to be much to his credit as was his record of nine years, worthy service, theft is an extremely serious offense. Management is well within its rights to protect its property interests and work force integrity by removing grievant from employment.

**AWARD:**

The discharge of grievant in this case was for just cause; the grievance is denied.

**TEXT OF THE OPINION:**

July 17, 1991

In the Matter of Arbitration  
between

**The Ohio Civil Service  
Employees Association  
Local 11, AFSCME, AFL-CIO**

and

**The State of Ohio,  
Department of Mental Health**

**APPEARANCES**

**For the State:**

Linda J. Thernes,  
Labor Relations Officer  
Paul Kirschner,  
Labor Relations Specialist  
BettyLou Milstead,  
Labor Relations Officer  
James V. Orndorf,  
Police Lieutenant  
Jim Baroni, Building  
Construction Superintendent

**For the Union:**

Robert Robinson,  
Staff Representative  
Joe Cipriani, Jr., Grievant  
Yancey Jones,  
Vice President  
Gerald Burlingame,  
Staff Representative  
Betty Williams, President  
Billy Powe, Steward  
Emmett Tolbert,  
Past Employee

**Arbitrator:**

Patricia Thomas Bittel

**BACKGROUND**

This matter was heard on June 25, 1991 at the Western Reserve Psychiatric Hospital (hereinafter referred to as WRPH) in Northfield, Ohio before the neutral arbitrator Patricia Thomas Bittel, mutually selected by the parties in accordance with Article 25 of the Collective Bargaining Agreement.

The Grievant in this case was discharged on November 9, 1990 for theft of State property. The grievance protesting the just cause of his discharge was filed on November 23, 1990 and was fully processed, culminating in the instant arbitration proceeding. The parties have stipulated that Grievant took copper tubing and spouting from the grounds of WRPH without authorization, sold it to a recycling center, was criminally charged and pled guilty.

The focus of the Union's challenge to Grievant's discharge was disparate treatment; it maintains others who have committed comparable offenses received much less discipline. Management denies that the cases of disparate treatment cited by the Union are at all comparable.

**EMPLOYER'S EVIDENCE AND ARGUMENT**

Building Construction Superintendent Jim Baroni testified he supervised the carpentry shop where

Grievant worked. He said employees were allowed to take tools home for personal projects so long as they asked permission. He explained employees brought the tools back in the same condition they were in when taken. He distinguished tubing and spouting as fixed items which cannot be borrowed and returned.

Baroni described a situation where a carpenter was allowed to borrow a table saw without his knowledge. The saw was brought back after the employee was asked to return it, he said. He claimed the paint shop lead worker had given the employee permission to take the table saw and contended it was not stolen because the employee had approval for its removal. He did not recall any discipline being given for this saw incident.

Baroni claimed Grievant had been issued a set of tools valued at approximately \$200 for which he signed a card, and asserted Grievant did not return these tools when he left employment. He said no one in carpentry knew where Grievant's tools were and his card was missing. This allegation was not part of the reason for Grievant's removal.

Hospital Police Lieutenant James Orndorf stated the commissary was closed in approximately August of 1989. He said he made known his desire to give the commissary dishwasher to an organization he belonged to. Several months later Orndorf claimed he received permission from Property Management to take the dishwasher. He said he did, then received a call to bring it back and returned it.

He claimed the incident was investigated by the Police Chief, the Ohio State Highway Patrol and a Police Lieutenant with the department. Orndorf said he was not charged with theft. He denied that the motor was taken out of the machine.

Management argued Grievant's case was plainly theft as he profited at State expense. It claimed fighting and carrying weapons are totally dissimilar offenses and cannot be compared with theft. It distinguished the Union's property examples inapposite. Management asserted the Union's examples of disparate treatment did not involve the offense of theft and must therefore be discounted. Management maintained the grievance should be denied in its entirety as there was just cause for the removal.

## **UNION'S EVIDENCE AND ARGUMENT**

Emmett Tolbert testified he was president of the Union for approximately ten years but had been discharged due to a conviction for grand theft forgery which occurred off premises. He explained his case had gone to arbitration and a decision was pending.

Tolbert claimed two Fraternal Order of Police members stopped him and one said he had been asked to load a dishwasher into Orndorf's truck. They advised Tolbert the motor had been taken out of the dishwasher and was in the police garage, he said. Tolbert's understanding was that Orndorf took the motor out of the dishwasher before asking permission in order to make the dishwasher appear like scrap. He claimed he saw the dishwasher show up in a junk yard without a motor.

Tolbert said the investigation of Orndorf started when he reported his information. He claimed he did not think the investigation would be fair because Orndorf was a lieutenant.

Tolbert gave another example of discipline involving an employee who allegedly brought a shotgun on the grounds. The employee only received a verbal reprimand, stated Tolbert. He pointed out that on the disciplinary grid established by Management, both possession of weapons on the premises and theft carry a penalty of a six-day suspension or removal for a first offense.

He gave another example involving an employee who was fighting and had a knife but was not removed from his job. In his view, since fighting, carrying weapons and theft all carry the same disciplinary penalty on the grid, they are valid examples of disparate treatment.

OCSEA Vice President Yancey Jones stated he filed the grievance in this case. He said he was aware of the table saw being taken from maintenance for over a year's time. He said the paint shop work leader advised him the saw was missing. He contended he had no knowledge of anyone giving permission for its removal and doubted the work leader gave permission because he is the one who complained about the saw being gone.

Food service worker and Union steward Billy Powe testified about an incident where one employee used a fork to inflict an injury on another during a mealtime fight. He stated this incident resulted in suspensions

but not removals. The suspensions, he said, were of six days' duration. He admitted the fork was not a weapon brought on to the premises but was already on site when the fighting broke out.

Grievant testified he was employed by WRPB for nine years. He said he was a Carpenter I for three years and had worked in food service prior to that. He claimed he left his tools in the carpentry shop when his employment ended, explaining they were left in a pouch in the tool room.

Grievant stated he was deeply sorry for having taken State property and sincerely regretted his actions. He insisted he would not take State property again. He pointed out that he had never denied taking the property and had made restitution by paying the scrap company back. He said everything had been resolved in court. He admitted he was convicted of misdemeanor theft prior to his employment at WRPB, explaining he was only eighteen and stupid at the time. This time, he said, he had money problems.

In the Union's view, the Orndorf incident constituted larceny by trick in that Orndorf removed the motor to make the dishwasher look like scrap. As to the table saw, the Union viewed this incident as theft because the saw was gone for an entire year.

The Union argued there was no just cause in Grievant's removal based on Management's inconsistent application of the disciplinary grid. It claimed the same penalty offenses did not bring about the same results. It maintained the employee who was involved in a knife fight received only a two-day suspension, and the offense of bringing a shotgun onto the premises resulted in a mere verbal reprimand. It contended other disciplines paled decisively next to Grievant's and his removal must be modified to a suspension.

The Union pointed out that Grievant had no other discipline on his record. His performance was average and his time cards proved he was conscientious about coming to work, it claimed. WRPB's inconsistency in administering its own disciplinary grid speaks against the severity of this discipline, argued the Union. Admitting a justifiable suspension is warranted, it seeks Grievant's reinstatement.

## **DISCUSSION**

The question of just cause in this case turns on whether Grievant was the victim of disparate treatment. My finding is that he was not.

There is nothing within the collective bargaining agreement that prohibits the disciplinary grid Management has established. It creates a range of penalties for dissimilar offenses. With regard to the examples of carrying weapons onto the grounds or fighting, it should be noted that Management is free to elect appropriate disciplinary penalties within the grid so long as it does not favor some employees over others guilty of the same offense.

By its terms, the grid builds in flexibility for Management to exercise discretion when dealing with different offenses having penalties within the same range. While the Union makes a valid point that Management enforces some offenses more strictly than others, reasonable distinctions are the prerogative of Management, so long as there is no dissimilar treatment where the same offense is involved. Only when Management is inconsistent in its discipline for the same offense is just cause jeopardized.

The table saw incident is not comparable because the employee who had possession of the saw made no attempt to hide this fact from Management. While there was no intent to deprive the State of the saw, Grievant made every attempt to deprive the State of the tubing and even sold it for profit.

The dishwasher incident pits the firsthand testimony of Lieutenant Orndorf (that he had permission to remove the dishwasher and did not remove the motor) against the largely hearsay testimony of Tolbert. There is no rebuttal of Orndorf's statement that he had permission to remove the dishwasher. He waited until he received permission before removing it from the premises. As with the saw, Orndorf made no attempt to hide the fact that he had possession of the dishwasher, and he promptly returned it when asked.

Even if Orndorf removed the motor to make the appliance look like scrap, his possession of the machine was at all times subject to the permission of Management. These facts are not comparable to Grievant's plain theft and sale of copper tubing.

The evidence falls short of showing Grievant was the victim of disparate treatment. There was no example of another employee actually guilty of theft who received a lesser penalty.

Theft is an extremely serious offense. Grievant's truthfulness and remorse are much to his credit as is his record of nine years' worthy service. Yet even these factors fail to outweigh the overwhelming severity of

theft as an offense. Management is well within its rights to protect its property interests and work force integrity by removing Grievant from employment.

**AWARD**

The discharge of Grievant in this case was for just cause; the grievance is denied.

Respectfully Submitted,

Patricia Thomas Bittel

July 17, 1991