

ARBITRATION DECISION NO.:

417

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Bureau of Employment Services

DATE OF ARBITRATION:

January 14, 1992

DATE OF DECISION:

February 10, 1992

GRIEVANT:

Gisela Babette

OCB GRIEVANCE NO.:

11-09-(89-09-19)-0017-01-09

ARBITRATOR:

Anna Smith

FOR THE UNION:

Brenda Goheen
Staff Representative

FOR THE EMPLOYER:

Victoria Ullmann
Advocate
Lou Kitchen
Second Chair

KEY WORDS:

Suspension
Elements of Theft
Transfer of Employee
Double Jeopardy

ARTICLES:

Article 24-Discipline
§24.01-Standard

FACTS:

The grievant was a Data Processor II at the Ohio Bureau of Employment Services, and was suspended in 1989 for thirty days for alleged theft of a magnetic tape under the custody of the Bureau, and for unauthorized personal use of Bureau information. The grievant was transferred to a job with different duties, but without loss of rank or pay.

The magnetic tape removed from the Bureau's premises was a payroll tape belonging to the State

Auditor, which, although certain information on the tape is publicly available, is collectively considered by the Bureau to be confidential. The grievant testified that she took the tape home on a Friday because she believed the tape contained information which would aid her in deciding what other State positions she might be interested in applying for. She testified that she intended to return the tape on Monday "so it would not be missed," but that her attempt to have the tape read failed, and the tape subsequently disappeared. The grievant informed a co-worker of the tape's disappearance, but she did not notify her supervisor.

The tape librarian supervisor reported that the tape was lost, and the State Highway Patrol found the tape while investigating another matter. The Assistant Director of Data Processing conducted an investigatory interview with the grievant, who admitted taking the tape. A pre-disciplinary conference was held and the grievant was ordered suspended for thirty days.

EMPLOYER'S POSITION:

The Employer argued that the grievant removed a physical item from the worksite without authorization, and that whether the item contained confidential information was not the point. The grievant was aware of the essence of her job, which was to provide security, and was aware that the tape was not to be removed unless signed for by an authorized person. Her failure to sign the log raises doubt as to her claim that she was only borrowing the tape.

The Employer argued that a transfer along with a suspension does not constitute "double jeopardy," and that it is allowed to protect its information, confidential or not, as it sees fit. The grievant did not suffer a demotion, and a thirty-day suspension is reasonable discipline for an unauthorized removal of State property.

UNION'S POSITION:

The Union asserted that the four tests for theft articulated by arbitrator Pincus in the Hurst decision should be applied. The test requires that 1) Personal goods of another must be involved; 2) The goods must be taken without the consent of the other; 3) There must be some asportation (movement of the item taken); 4) Both the taking and the asportation must be with an intent to steal, or an intent to deprive the owner of his property permanently.

The Union argued that the element requiring intent to deprive was missing in this case, since the grievant meant only to borrow the tape. The information contained on the tape was public information available from the Ohio Department of Administrative Services, and the grievant testified that she gained nothing by removing the tape.

The Union argued that the dual penalties of transfer to another position and thirty-day suspension constitute double jeopardy, since the penalties were for the same conduct. The Union further claims that a thirty-day suspension is not commensurate with the violation, especially since the grievant was a relatively new employee with no prior discipline, and since the Employer offered no proof that the grievant knew of the Bureau's policy of confidentiality. Under these circumstances, counseling would have been the proper remedial action.

ARBITRATOR'S OPINION:

The Employer failed to prove the element of intent, and the grievant's testimony that she intended only to borrow the tape was credible. The grievant was accordingly found not guilty of theft. However, the removal of the tape was forbidden by the Employer, and the grievant was aware of this. Thus she behaved surreptitiously, and must be held accountable.

The Union's double jeopardy contention is denied, since double jeopardy means that a person is prosecuted twice for the same offense, not that a person receives two punishments. The transfer of an employee who breaches institutional security from what is essentially a security function to a less sensitive position is an action reasonably related to the Bureau's operation. The transfer was not a disciplinary measure because the grievant suffered neither loss of rank or pay.

The thirty-day suspension was not reasonably related to the seriousness of the offense. The offense was more serious than mere carelessness, but justifies a corrective minor suspension.

AWARD:

The employer improperly removed the Grievant because the Employer failed to provide sufficient

evidence to support the patient abuse charge, and the Employer had the burden of proof and persuasion for the charge. The grievance is sustained, and the Grievant is to be reinstated to his former position with full back pay, seniority and other benefits, less interim earnings. The removal to be expunged from the Grievant's personnel file.

TEXT OF THE OPINION:

**In the Matter of Arbitration
Between
STATE OF OHIO,
BUREAU OF EMPLOYMENT SERVICES**

and

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11,
A.F.S.C.M.E., AFL/CIO**

OPINION and AWARD

Anna D. Smith, Arbitrator
Case 11-09-890919-0107-01-09
Gisela Babette, Grievant
Discipline

Appearances

For the State of Ohio:

Victoria Ullmann; Legal Counsel,
Ohio Bureau of Employment Services; Advocate
Lou Kitchen; Assistant Chief of Contract Compliance,
Ohio Office of Collective Bargaining; Second Chair
Jerald C. Mann; Assistant Director, Data Processing, Ohio
Bureau of Employment Services; Witness
Ada Jones; Chief of Operations, Data Processing,
Ohio Bureau of Employment Services; Witness

For OCSEA Local 11, AFSCME:

Brenda Goheen; Staff Representative, OCSEA Local 11,
AFSCME, AFL-CIO; Advocate
Gisella Babette Fritzsche; Grievant
Frank Ebner; Staff Representative, OCSEA Local 11,
AFSCME, AFL-CIO; Witness

Hearing

Pursuant to the procedures of the parties a hearing was held at 9:15 a.m. on January 14, 1992, at the offices of the Ohio Civil Service Employees Association, Local 11 AFSCME, AFL-CIO, Columbus, Ohio before Anna D. Smith, Arbitrator. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded, and to argue their respective positions. The record was closed upon conclusion of oral argument at 11:30 a.m., January 14,

1992. This opinion and award is based solely on the record as described herein.

Issue

By agreement of the parties, the issue to be decided by the Arbitrator is:

Was the discipline of the Grievant for just cause?
If not, what is the remedy?

Joint Exhibits

1. 1989-91 Collective Bargaining Agreement
2. Discipline and grievance trail.

Case History

The Grievant in this case, a Data Processor II at the Ohio Bureau of Employment Services, was suspended in 1989 for thirty days for theft of a magnetic tape under the custody of the Bureau and unauthorized personal use of Bureau information. The conduct that gave rise to this discipline also resulted in her transfer to a job of different duties, but without loss of rank or pay. The question before the Arbitrator is whether the discipline was imposed for just cause and, if not, what the remedy should be.

The tape the Grievant admits taking is a payroll tape belonging to the State Auditor. Certain information on the tape is publicly available, but collectively it is considered by the Bureau to be confidential. While in the possession of the Bureau (which was responsible for its safe return to the Auditor), the tape was kept in a secured area with access--including removal--limited to authorized personnel.

At the time she removed the tape from the Bureau's premises, the Grievant was a control clerk, receiving and distributing magnetic material and computer runs. As such, she had physical access to the tape. She had become interested in applying for other State positions and so took the tape home on a Friday, intending to have it read over the weekend to yield information she thought would be helpful to her in deciding what jobs to bid on. She meant to return it on Monday "so it would not be missed" (Grievant's testimony). However, the attempted reading was unsuccessful and the tape disappeared. The Grievant told a coworker about its disappearance, but not her supervisor.

Management came to learn of the missing property in two ways. First, the tape librarian supervisor reported it as lost on July 7, 1989, and an in-house search was launched. Then, on July 12, 1989, the Highway Patrol reported it had discovered the tape while investigating another matter.

The Assistant Director of Data Processing, Jerald Mann, conducted an investigatory interview with the Grievant, who admitted taking the tape. A pre-disciplinary conference was held and discipline recommended. On September 6, 1989, the Grievant was ordered suspended for thirty days, effective beginning September 11. This action was subsequently timely grieved, alleging violations of Article 24 (Discipline) and any other relevant articles of the Contract, state and federal laws. The remedy sought is that the Grievant "be reinstated to her position and to be reimbursed for lost time and benefits. For the grievant to be made whole" (Joint Ex. 2). The parties being unable to resolve their differences, the grievance was ultimately appealed to arbitration, where it presently resides for final and binding decision.

Arguments of the Parties

Argument of the Employer

The Bureau argues that whether the tape contained public or confidential information is not the point. The fact is that the Grievant removed a physical item without authorization. She was well aware by the

essence of her job, which is to protect security, that the tape was not to be removed unless signed for by an authorized person. That she did not sign the log raises doubt as to her claim that she was only borrowing the tape.

The Bureau further argues that despite testimony about lax application of policy within the secure area, control of materials in and out of the area was not lax. The tape was not to leave the area except according to policy.

Regarding the Union claim of double jeopardy by both suspension and transfer, the Bureau says it is allowed to protect its information whether confidential or not, and it has the right to transfer employees to achieve that end. The Grievant did not suffer a demotion, losing neither rank nor salary. A thirty-day suspension, the Bureau maintains, is reasonable discipline for an unauthorized removal of State property.

Argument of the Union

The Union argues for application of the four tests for theft cited by Arbitrator Pincus in the Hurst decision (Parties' G87-1494):

- 1) Personal goods of another must be involved;
- 2) The goods must be taken without the consent of the other;
- 3) There must be some asportation;
- 4) Both the taking and the asportation must be with an intent to steal, or an intent to deprive the owner of his property permanently.

What is missing here is intent to deprive, for the Grievant only meant to borrow the tape, which contained public information available from the Ohio Department of Administrative Services. Moreover, the Grievant testified there was nothing she gained by removing the tape. Arbitrator Drotning, in a similar case (Hosier, #31-07-890323-0020-91-06) held that without intent to steal there was no theft, only an error in judgment warranting a written reprimand. Here, the Grievant was removed from her job, placed in another (which she argues is below her capabilities) and given a thirty-day suspension. These are two penalties for the same conduct and constitute double jeopardy.

The Union further claims a thirty-day suspension is not commensurate with the violation. She was a fairly new employee, having only 9-10 months of employment with the State, and no prior discipline. There is also no proof she knew of the Bureau's policy of confidentiality. Under the circumstances, counseling would have been the proper remedial action.

Opinion of the Arbitrator

Although it was clearly established that the Grievant took the tape without authorization, the State has not proved the difficult element of intent. On the contrary, the Grievant's testimony that she intended merely to borrow the tape is credible, given that the tape itself was of no value to her except as a medium for the information it contained. I thus find her to be not guilty of theft.

However, it is also quite clear to me that what she did was forbidden by her employer and that she knew it at the time. Why else would she fail to sign the tape out and plan on returning it after the weekend "so it would not be missed?" I conclude she behaved surreptitiously because she knew she would be in trouble if caught. How she came to know taking the tape was unacceptable -- through training, by the essence of her job, or otherwise--is irrelevant. She knew it was wrong, but removed it anyway. For this she must be held accountable.

The Union argues that the discipline was not commensurate with the offense and constitutes double jeopardy. I agree with the former, but not the latter. The meaning of double jeopardy is that a person is prosecuted twice for the same offense, not that a person receives two punishments. The problem with the disciplinary action here is not that it is the result of two prosecutions or that there are two prongs to it, as the Union argues, but that it is unreasonable for the actual offense. Transferring an employee who breaches

institutional security from what is essentially a security function to a less sensitive one is certainly an action reasonably related to the Bureau's operation. Although the Grievant may not feel challenged by her new duties, she suffered neither loss of rank nor pay. I therefore cannot find that the transfer was a disciplinary measure, that it was uncommensurate with the offense, or that it was taken solely for punishment.

The thirty-day suspension is another matter. While it is a lenient penalty for theft, as the Employer points out, it is not reasonably related to the seriousness of the offense that was proved: unauthorized use of State property. I do not, however, think the offense was as trivial as the Union apparently does because the essence of the Grievant's job was security, yet she deliberately violated the Bureau's security when she took the tape off site, evidently allowed someone else to handle it, and finally lost it. It is fortunate the tape did not contain more sensitive information, that no harm came to it, and that it was ultimately found and returned. This offense is more serious than mere carelessness and justifies a corrective minor suspension. Accordingly, the discipline is reduced to a one-day suspension.

Award

The grievance is granted in part, denied in part. The discipline of the Grievant was not for just cause. She is guilty of unauthorized use of State property for which she will serve a one-day suspension without pay or benefits. Her personnel record will be expunged of the theft charge for which she is found not guilty and she will be made whole for 29 days lost pay and benefits.

Anna D. Smith, Ph.D.
Arbitrator

February 10, 1992
Shaker Heights, Ohio