

ARBITRATION NO.:

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UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Department of Youth Services

DATE OF ARBITRATION:

September 16, November 11, November 26, 1997

DATE OF DECISION:

December 10, 1997

GRIEVANT:

Dawn R. Hollie

OCB GRIEVANCE NO.:

35 18 (96 09 30) 0052 01 03

ARBITRATOR:

Marvin J. Feldman

FOR THE UNION:

Dave Justice
Brenda Latham

FOR THE EMPLOYER:

Brad Rahr, LRO
Heather Reese, OCB
Aisha J. Saunders, LRO

KEY WORDS:

Credibility of Witnesses
Just Cause
Removal
Theft

FACTS:

Management removed the grievant, a Juvenile Correctional Officer (JCO), for allegedly making unauthorized purchases of personal items on a State credit card. The specific charge was theft of property.

The grievant and a co employee, Mr. Johnson, were assigned the duty to transport shackled juveniles from one facility to another in a state owned vehicle on 12/19/95. Grievant stipulated that she stopped at the BP gas station, and made purchases in the amount of \$155.18. The applicable departmental rule regarding State credit card usage states that State credit cards may only be used for "routine operations needs such as gas, oil, and minor repairs per the instruction listed on the reverse side of the credit card. No employee shall charge any expense in excess of \$75.00 without the express consent of his/her superintendent or designee". The grievant reported the charges as miscellaneous in nature

A State Highway Trooper reported witnessing grievant and Johnson making unauthorized purchases on the date in question as well as on two or three prior occasions. The Trooper also obtained the security videotape from the BP station. This tape was later lost, and the State had to rely on a copy of the tape at arbitration. The camera was of the type that only took a picture every eight seconds. The film did not show conclusively whether the grievant had made personal purchases or not. It should be noted that prosecutors chose not to pursue criminal charges against the grievant.

Co employee Johnson was also disciplined for this incident. He was given an offer, which allowed him to resign rather than being removed, in exchange for his testimony against grievant Johnson made an initial statement indicating

that he and the grievant had indeed purchased personal items with the State credit cards. He stated specifically that the grievant had made personal purchases in the amount of \$10 Johnson later recanted this story stating that he could not remember the grievant making personal purchases with the card. He further stated that his previous story was untrue and made under duress. Specifically, Johnson stated that he only made the statements to avoid going to jail.

EMPLOYER'S POSITION:

The State argued that the grievant committed theft of State property by making personal purchases with a State credit card. Furthermore, the State believes that it met its burden of proof. The basis for this contention is the videotape, Johnson's initial statement, and the statement of the Trooper who reported witnessing the incident

UNION'S POSITION:

The Union argued that the grievant was not removed for just cause because the Employer failed to prove she committed theft. The grievant admitted using the card on the date in question, but denied using it for purchases of a personal nature at any time. Grievant contended that she was responsible for the maintenance of the vehicle, and that on the day in question, she purchased gas, oil, transmission fluid, window washer fluid, and wiper blades. The grievant stated that Johnson initially lied when he inculpated her with his prior statements.

ARBITRATOR'S OPINION:

The arbitrator held that there was not ample evidence to prove that the grievant used the card for personal purchases. He felt that the videotape was nondispositive due to an inability to ascertain any substantial facts from it. He also held that the testimony of Mr. Johnson was not reliable given the volatility of his responses. Although he did feel that the charges seemed high, he held that insufficient evidence existed to support a removal. The arbitrator also took note of the fact that prosecutors did not pursue . criminal charges to help support his decision for insufficient evidence.

AWARD:

Grievance was granted. The grievant shall be reinstated with full back pay and benefits, and seniority less money earned from other sources during the period of suspension.

TEXT OF THE OPINION: * * *

VOLUNTARY ARBITRATION PROCEEDINGS
CASE NO. 35 18(093096)OO52 01 03
THE DISCHARGE OF DAWN R. HOLLIE

STATE OF OHIO
The Employer

and

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME LOCAL 11 AFL CIO
The Union

OPINION AND AWARD

APPEARANCES

For the Employer:

Brad Rahr, Labor Relations Officer
Heather Reese, OCB

Aisha J. Saunders, Labor Relations Officer
James K. Lowe, Observer
Donald L. Whipple, Trooper
Donald Feldkamp, Superintendent, Circleville Youth Center
Rebecca Martin, Assistant Chief Inspector
Antonio Johnson, Former employee

For the Union

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Dave Justice, Staff Representative
Dawn Hollie, Grievant
Brenda Latham, Chief Steward
Annie Williams, Observer
Cheryl Dixon, Witness
Gwendolyn Shealey, Witness

.MARVIN J. FELDMAN
Attorney Arbitrator
1104 The Superior Building
815 Superior Avenue, N.E.
Cleveland, Ohio 44114
216/781 6100

1. SUBMISSION

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This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties, the parties having failed resolve prior to the arbitral proceedings. The hearing in this cause was scheduled and conducted on September 16, 1997, (OCB, Columbus, Ohio), November 11, 1997. (OCSEA, Columbus, Ohio) and November 26, 1997, (OCB, Columbus, Ohio). The parties stipulated and agreed that this matter was properly before the arbitrator; that the witnesses should be sworn and sequestered and that post hearing briefs would not be filed. It was upon the evidence and argument that this matter was heard and submitted and that this opinion and award was thereafter rendered.

II. STATEMENT OF FACTS

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At the outset of hearing the parties entered into certain written stipulations concerning the merit presentation of this matter. Those stipulations revealed the following:

“DAWN HOLLIE ARBITRATION
OCTOBER 16, 1997

JOINT STIPULATIONS

- 1) THE GRIEVANT'S SENIORITY BEGAN 5/6/90 (6 YRS 4 MONTHS).
- 2) THE GRIEVANT WAS EMPLOYED LAST AS A JUVENILE CORRECTIONAL OFFICER.
- 3) THE GRIEVANT WAS AWARE OF DYS DIRECTIVE CHAPTER B 19 GENERAL WORK RULES.
- 4) THE GRIEVANT WAS AWARE OF CYC TRANSPORTATION DEPARTMENTAL PROCEDURE MANUAL, SECTION A 5.
- 5) THE GRIEVANT HAS BEEN DISCIPLINED TEN (10) TIMES DURING HER .EMPLOYMENT WITH DYS.
- 6) THE GRIEVANT DOES NOT DISPUTE THAT HER SIGNATURE APPEARS ON A GAS RECEIPT DATED DECEMBER 19, 1995.

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7) THERE ARE NO PROCEDURAL ERRORS IN DISPUTE FOR THIS ARBITRATION.

8) THE VIDEO TAPE USED BY THE HIGHWAY PATROL IN THE CRIMINAL INVESTIGATION, WAS INADVERTENTLY TAPED OVER DURING VIEWING BY MANAGEMENT AND THE UNION.

9) THE PARTIES MUTUALLY AGREE TO SUBMIT THE GRIEVANCE SETTLEMENT FOR ANTONIO JOHNSON, JCO, WHO ALSO WAS REMOVED FOR THIS INCIDENT. THE PARTIES FURTHER AGREE THAT THIS ACTION IS NOT PRECEDENT SETTING, NOR DOES IT VOID THE PARTIES PRESENT PRACTICE AND AGREEMENT AS STATED IN THE BODY OF THE GRIEVANCE SETTLEMENT FORM."

The grievant in this particular matter was employed as a juvenile security officer at the Department of Youth Services, her work location being the Circleville (Ohio) Youth Center. While in that position she had garnered a discipline record which record revealed the following:

"DISCIPLINE RECORD

RECEIVED	TYPE	VIOLATION
1) SEPTEMBER 22, 1996	REMOVAL	MISUSE OR THEFT
2) JANUARY 11, 1996	WRITTEN REPRIMAND	TARDINESS
3) JULY 25, 1996	WRITTEN REPRIMAND	TARDINESS
4) NOVEMBER 3, 1995	10 DAY SUSPENSION	AWOL/FAILURE TO NOTIFY
5) SEPTEMBER 3, 1993	5 DAY SUSPENSION	TARDINESS
6) JANUARY 24, 1993	3 DAY SUSPENSION	TARDINESS
7) NOVEMBER 18, 1992	WRITTEN REPRIMAND	FAILURE TO NOTIFY SUP
8) SEPTEMBER 2, 1992	1 DAY SUSPENSION	FAILURE TO PROVIDE DOC
9) MAY 17, 1992	WRITTEN REPRIMAND	FAILURE TO PROVIDE DOC
10) APRIL 14, 1992	VERBAL REPRIMAND	TARDINESS
11) FEBRUARY 13, 1992	WRITTEN REPRIMAND	FAILURE TO PROVIDE DOC"

In place at: the time of the instant incident was a departmental rule which revealed the following:

"D. State Credit Cards users may purchase only routine operational needs, such as gas, oil, and minor repairs per the instruction listed on the reverse side of the credit card. No employees shall charge any expense in excess of \$75.00

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without the expressed consent of his/her superintendent or designee."

It was determined by the superintendent of her work location that the grievant was violative of that rule and on September 17, 1996, by memo to the grievant the grievant's seniority was terminated and that memo revealed the following:

"It has been determined that on or about that you used the State credit card to make personal purchases. Further it has been determined that on or about June 14, 1996 you gave false information regarding her usage of the State credit card. This is violation of DYS Directive B 19, work rule #4 Deceitfulness which states, 'Dishonesty while on duty or engaged in State business, including, but not limited to, deliberately withholding, giving false or inaccurate information, verbally or in writing, to an Supervisor or appropriate authority, i.e., Highway Patrol, State Auditor, etc.:'; work rule #34 Destruction, Damage, Misuse or Theft of Property, which states, 'Destroying, damaging, concealing, removing and/or stealing the property of the State, other employees, the youth or visitors' and work rule #46 Violation of O.R.C. 123.34, which states, 'Includes, but is not limited to such offenses as incompetency inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of Administrative Services of the commission or the commission of any other failure of good behavior, or any other acts of misfeasance or nonfeasance in office.'

As a result of these infractions, you are hereby being REMOVED for your position as Security Officer I effective: 22 Sept 96.

Your last paycheck will be issued only if your uniform and identification badge are turned into Human Resources. Your contact with the facility is limited to the Superintendent and Personnel Officer. A copy of this letter will be placed in your personnel file."

The superintendent of the facility (Circleville), who testified,
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stated he acted under guidance from the investigative summary_result of the grievant and another. That investigative summary revealed the following:

"INVESTIGATIVE SUMMARY:

The institution advised of the allegation. Trooper Whipple has already completed the criminal investigation surrounding this allegation.

The investigator went to the institution and obtained copies of credit card receipts. Trooper Whipple has the original receipts. Trooper Whipple also has a tape made by BP/Belville on December 19, 1995, of Dawn Hollie and Antonio Johnson making personal purchases amounting to \$46.49. The receipt was signed by Dawn Hollie. Indicated on the receipt was 'Misc.' items. In addition to that purchase, a total of \$155.18 in miscellaneous purchases were made by Mr. Johnson and Ms. Hollie.

.Ms. Hollie was interviewed and denied making any purchases for personal items, but stated she was aware what DYS policy permitted her to purchase with the State credit card.

Antonio Johnson was interviewed. He admitted to using the State credit card on two or three occasions for personal purchases.

Additionally, he stated that he witnessed Ms. Hollie making personal purchases with the State credit card on two or three occasions as well. One of these occasions included the purchase made at the BP in Belville that Ms. Hollie denied making.

Mr. Johnson said he was aware of what DYS directives were governing the use of the State credit card.

Both employees had Union Representative John Williams present at their interview.

CONCLUSION:

Both Dawn Hollie and Antonio Johnson used the State credit card to purchase personal items. When interviewed, Ms. Hollie was dishonest in regards to her fraudulent purchases.
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Due to their dishonesty, Ms. Hollie and Mt Johnson placed the department at risk. The exact amount of fraudulent purchases cannot be determined, but is at least \$155.18.

ACTIONS RECOMMENDED:

Recommend appropriate administrative action against Dawn Hollie and Antonio Johnson."

The writer of that summary testified and revealed in that oral testimony the same result as her reported and written investigation of July 12, 1996, revealed. A co worker of the grievant, Antonio Johnson also had his seniority terminated for the same event but he was allowed to resign under a settlement dated January 8, 1997, made with his employer. Mr. Johnson admitted buying items with the credit card and implicated the grievant by written statement in that regard. The exact words of Johnson's resignation revealed, in part, the following:

"1. Grievant will immediately submit resignation effective 8/26/96.

2. Grievant agrees to neither apply nor accept employment with DYS or any other state agency again.

3. Employer agrees to provide neutral references to all non state agencies.

4. Grievant agrees to be available to provide testimony in an arbitration case with the co-worker who was removed for same offense Dawn Hollie."

The grievant in this matter refused resignation and filed a timely protest. That protest was predicated upon the following:

"24.01 24.02 24.04 Due Process
O.R.C. 24.05 Any other articles in the contract
that is applicable to this grievance. **6**"

I. I was released without just cause management failed to provide that the employee purchased personal items on the state credit card. The evidence presented at the Pre D meeting proved MISC. items were purchased but not personal items.

II. The evidence to determine did not include at the Pre D meeting:

- A. The receipt for \$46.49
- B. Video tape

In the Chief Inspectors report my word V.S. Tony Johnson was taken without actual proof of any wrongdoing on my part.

III. Pre D meetings are to guarantee due process according to the O.R.C. This was not afforded to me (see attachment #9) as well as the following statement where they stated I would not be postponed until I could defend myself. Along with the union statement from:

- A. Danny Haynie
- B. B. Gwen Shealey
- C. Attachment #9 (medical)

Plus memo to the record from Gwen Shealey, who was allowed to witness the proceeding where she felt management did not present their side and the hearing officer was not impartial but was management."

It might be noted at Article 24 of the agreement of collective bargaining under which this matter occurred the following clause appeared:

"ARTICLE 24 DISCIPLINE

24.01 Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action."

The employee performance reviews were reviewed by this arbitrator

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and found to be nondispositive of the issues at hand. Evidence further showed, as revealed by the grievant's mother and a friend (co employee) that the grievant's reputation for honesty and credibility and veracity were excellent. it might be noted that in this particular matter the grievant was entrusted with a state credit card; was entrusted with a state vehicle; transported youth offenders from one correction institution to another and it was. during the course of those duties that

the employer discovered certain charges of a miscellaneous nature after reviewing the charge slips from various gas stations and that the discharge thereafter occurred. An investigation was conducted by the State Highway Patrol of the State of Ohio, but prosecution did not ensue. The prosecutor to whom the investigation was referred referred it back to internal handling by the employer state agency.

It might be further indicated that the various charge slips complained of were placed in the record. They were obtained by both the department investigator as well as the State of Ohio Highway Patrol investigation. The union did not contest placing the credit slips into the record nor did the union contest the genuineness of those slips. The investigation of the State Highway Patrol revealed that the clerks at the station at which the miscellaneous and allegedly personal items were purchased, remembered nothing. A tape taken by the station by way of automatic video and viewed by the arbitrator also revealed no evidence dispositive of this matter. It might be noted that the original tape was erased before the arbitrator viewed it.

An inspection of the receipts of the service station were made. It was revealed from those receipts that in addition to fuel, that

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miscellaneous purchases were added to the purchase. The grievant stated that she would purchase oil, washer fluid, blades, fluid for the transmission, all for the vehicle owned by the State of Ohio, that the grievant used on her trips of transporting juveniles from Circleville to other facilities. The grievant stated that she never purchased any personal items and charged them to the state on the credit card furnished. The grievant further testified that she knew of no reason why Johnson, her assigned traveling partner, would indicate to the contrary. The grievant flat out stated that he lied. At hearing, Johnson recanted from that which he revealed in his statement and stated he didn't remember any purchases whatsoever. The station help simply listed all items as miscellaneous without showing what type of merchandise was purchased. Nor could the station help remember what the miscellaneous listing represented.

It was upon that testimony that this matter rose to arbitration for opinion and award.

111. OPINION AND DISCUSSION

This particular case was continued over a period of three days. The parties had some difficulty in producing evidence both by film and by witness on the dates provided. Subsequent days were therefore assigned. Since this was a discharge case it was proper to extend the hearing to provide contractual due process to both the employer and the grievant.

The evidence in this case fell into several categories. First it must be stated that theft is sufficient cause for discharge. That is a

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very serious activity and cannot be taken lightly. When occurs it must be reacted in a forceful and immediate manner. Generally, employee theft deprives the employer of assets it would otherwise have had but for the inappropriate activity of the grievant. Suffice it to say that in this matter both parties are in agreement that theft triggers a just cause discharge. Further writings in that regard in this opinion and award is therefore unnecessary. Rules by the employer covered such activity.

Let us for a moment consider the evidence in this particular case. The first bit of evidence in this case is the charge receipt of the service station. According to the grievant, the grievant was responsible for maintaining the maintenance of that vehicle on the road "as if it were personally owned." The grievant stated that she purchased fuel, oil, transmission fluid, window washer fluid, wiper blades and would do anything to keep the vehicle moving to assigned duties. She was assigned with the duties of juveniles, in shackles, from one facility to another or to a court for a hearing. She was engaged in serious activity and keeping moving with those juveniles in it was her prime concern, according to her. The receipts for the purchases made by the grievant with the state credit card revealed that fuel and other "miscellaneous" items were purchased. The station did not indicate and state what those miscellaneous items were. Nor could the service facility employees remember what the miscellaneous items were. Thus, on their face, the receipts were not generally indicative of the allegations of the employer, i.e., that the grievant purchased personal items with a state credit card. However, the amounts on some of the receipts were high.

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The next item that concerned this writer was the fact that a co-employee by the name of Mr. Johnson was terminated by the employer and then later was allowed to resign for the same allegations that the grievant was also terminated. Mr. Johnson, the co employee and partner of the grievant in the motor vehicle activity involved in this matter, testified at hearing that he did not remember any purchases made by the grievant that was of a personal nature. Statements taken from Mr. Johnson at or near the time of the incident revealed that, in fact, the grievant herein made personal purchases on the credit of the state by and through those credit cards. Those statements taken on June 13, 1996, revealed the following:

"Q. How many times have you used the State credit card for personal use?

A. Maybe 2 + 3 times.

Q. How many times were you with Ms. Hollie when she used the State credit card for personal use?

A. 2 3 times.

Q. What is the most money you have charged for personal use on the State credit card?

A. \$6.00.

Q. When you made the stop in Mansfield at BP (12 19 95). How much of the purchase that Ms. Hollie signed for was personal items (ie: snacks)?

A. Maybe \$10.00."

Thus we have a written statement by Mr. Johnson taken on June 13, 1996, that personal purchases were made by the grievant and at hearing, an oral recanting of that testimony indicating and stating that he no longer remembered the incident. When asked on direct examination why Mr. Johnson gave the original statement that he did, the grievant quickly responded that he, Mr. Johnson, was lying. First Mr. Johnson agreed that the grievant made personal purchases and then he denied. Mr. Johnson indicated and stated that his statement was taken from him

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at the time when he was under duress by an armed state trooper who, according to Mr. Johnson, indicated that he would be lead from the questioning room by handcuffs to jail.

The record revealed that his statement was not taken by a state trooper. His statement of June 13, 1996, was written. That statement is very damaging to the grievant's case. But when was he telling the truth, at the time of statement taking or at the time of hearing?

The next item that was considered in this particular matter was the use of the video film taken at the gas station. It might be noted, as was stated in the stipulations, that the original film was inadvertently erased by subsequent showing. Thus, it is impossible for this arbitrator to determine from the film, that in fact the grievant was responsible for any inappropriate purchases. Furthermore, the film was a time sequence film in that only one frame every eight seconds was filmed. It was not a sequential film. Thus, the lack of sequence in the film and the inability to review the original film in which the grievant was involved at a time of the alleged incident makes the use of that film completely unnecessary because it is nondispositive of the issue in this particular case.

The evidence in this case is very tenuous. It may be that the grievant bought herself a candy bar and other items and it may be that she did not. The employer had a gut reaction that the grievant was involved in personal purchases because a few of her receipts were on the high side. It is difficult to prove a case with the evidence that was placed into the record of this particular matter. That is probably what

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the prosecutor felt who turned down prosecution in this matter. Simply put, there was no hard evidence upon which to predicate a just cause discharge. I simply could not find that there was clear and convincing evidence in the record that

the grievant was guilty of the acts complained of. Perhaps the accounting system of the employer needs improvement or perhaps a service station should be used at which all purchases are listed but whatever, the fact is that the evidence in this particular matter did not meet the test of being clear and convincing so as to prove the episodes of theft that the employer charged the grievant with. The grievant, of course, denied any inappropriate conduct and while her discipline or deportment record is not clearly on her side in this matter, there is only borderline evidence of theft. Her prior reported and disciplined conduct does not buttress the employer's charge of theft in this case.

I also reviewed the record relevant to the Darrell Hill discharge decided by Arbitrator Smith. In that particular case Arbitrator Smith was moved by testimony of a handwriting expert. That resulted in a discharge in that case. In this case there is no such hard evidence on which to base a just cause termination.

It is difficult to know if Mr. Johnson was lying at the time of his written statement or at the time of his oral testimony at hearing.

For all of these reasons, the grievance must be sustained.

IV. AWARD

The grievant shall be reinstated with full back pay and benefit and
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seniority less any monies earned elsewhere during the of her suspension. If in the event the parties are unable to agree as to monies received from other sources then in that event this matter shall be brought back to this arbitrator by way of letter for which jurisdiction is specially retained.

Made and entered
this 10th day
of December, 1997.

MARVIN J. FELDMAN, Arbitrator

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