ARBITRATION DECISION NO.:
697

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

EMPLOYER:
Ohio Bureau of Employment Services

DATE OF ARBITRATION:
February 24, 1999

DATE OF DECISION:
March 15, 1999

GRIEVANT:
Joel Pall

OCB GRIEVANCE NO.:
11 09 (97 06 03) 0047 01 14

ARBITRATOR:
Jonathan Dworkin

FOR THE UNION:
Lynn Kemp, Advocate
Peggy Tansley, Chair

FOR THE EMPLOYER:
Jerry Lehman. Advocate, OBES
Lou Kitchen, OCB

KEY WORDS:
Burden of Proof
Double Jeopardy
Falsification of Records
Fraud
Intent
Just Cause
Mitigation
Progressive Discipline
Removal
Seniority
Theft

ARTICLES:
Articles 24 – Discipline
- §24.01 – Standard
- §24.02 – Progressive Discipline

FACTS:

The grievant, a Field Auditor for the Ohio Bureau of Employment Services, was a twenty seven year employee. His active discipline record was practically faultless; that is, any previous discipline expired, and was no longer in his file. His job was to audit payroll records of Ohio Employers to assure that unemployment contributions were in correct amounts. Typically, auditors made appointments with employer representatives (accountants or attorneys) to review the books of businesses targeted for examination. The Auditors worked with almost no supervision. They set their own schedules, and they fill out their own time sheets and their own payroll certifications.

After the grievant failed to keep a home office appointment because of an alleged schedule conflict, he was given a written reprimand for failure of good behavior. The Compliance Chief also became suspicious, and she spot checked two employer representatives whom the grievant claimed to have serviced. She found discrepancies. This led to a more thorough investigation. From information gathered, both written and verbal, she concluded that the grievant systematically falsified records and defrauded the State into paying him for time not worked. The Employer subsequently charged the grievant with submitting false and deceptive time and payroll records for January 9, 10, 16 and 22, 1997, showing that he was doing his job when he was not. The Employer removed him on May 22, 1997.

EMPLOYER'S POSITION:

The Employer presented key witnesses who gave written statements and testified under oath. They confirmed the Employer's argument that the grievant did not perform any audits on January 10 or 22, and he falsified records to make the Employer believe he did. In addition, the "oversight " on the grievant's January 16 time sheet revealed a plan to cover unauthorized time off with pay. Consequently, the Chief Compliance Officer could not find the mitigation that she was searching for. The Employer feels there is no choice but to request dismissal.

UNION'S POSITION:

The Union raised the defense of "double jeopardy" regarding the January 9 charge. The grievant had already received a written reprimand for "a false statement regarding the activities of that day." Double discipline is contrary to the principles of just cause.

The Union also argued that the Employer should have considered the grievant's twenty seven years of employment and his clean (active) disciplinary record as mitigating factors against the most severe discipline of discharge. In addition, Article 24.02 of the Agreement requires progressive discipline unless there is little or no 4ance that more lenient discipline would be corrective. The Employer offered no evidence or testimony to prove that the grievant's purported misconduct was not correctable.

The grievant was the only fact witness on the question of his innocence. He did not argue that his accusers were lying, just that "they were mistaken." The employer representatives in these audits do not sit with the Auditor while the audit is taking place. They do not necessarily know the exact amount of time that an Auditor would spend doing the audit, nor are they always at the office at the beginning or end of the audit.

ARBITRATOR'S OPINION:

The circumstantial evidence, which the Employee did not try to explain, shows a consciously deliberate scheme to defraud the Agency. Since the Employer met the initial burden of persuasion, the burden then shifted to the Union. The grievant's laconic testimony failed to rebut the case against him. In the Arbitrator's opinion, the grievant's statements were false, designed to fashion a defense rather than expose the truth.

The Arbitrator finds that the grievant committed fraud on January 10 and/or January 22, and derived unearned wages from his actions. The Employer accurately labeled the grievant's misconduct "theft."

Since the volume of evidence shows that the grievant painstakingly planned his deception, and since the grievant testified that he was completely innocent, depriving the Arbitrator of the opportunity to assess the grievant's correctability, the only potentially mitigating factor is the grievant's twenty seven years on the job. Tenure is not a pass to commit misconduct, however. In the absence of other mitigating factors, his tenure did not require the Employer to be lenient in the face of a purposeful design to cheat the Employer. Though the Arbitrator might have lessened the penalty out of sympathy, he could not hold that the Employer lacked just cause for the penalty it selected.

AWARD:

The grievance was denied.

TEXT OF THE OPINION: *** * ***

OCB OCSEA VOLUNTARY GRIEVANCE PROCEEDING
ARBITRATION OPINION AND AWARD

Arbitration Between:	*	
	*	Case No. 11-09-970603-0047-01-14
STATE OF OHIO	*	
Bureau of Employment Services	*	
	*	
and	*	
	*	Decision Issued:
OHIO CIVIL SERVICE EMPLOYEES	*	March 15, 1999
ASSOCIATION, OSCEA/AFSCME	*	
Local 11	*	

FOR THE EMPLOYER

Jerry Lehman	OBES Advocate
Lou Kitchen	Office of Collective Bargaining
Janice Viau	OBES
Bill Lind	OBES
Joanne Davis	Compliance Office Chief
Debra Rericha	Witness
Kenneth Blech	Witness
Mary Miller	Witness

FOR THE UNION

Lynn Kemp	OCSEA Advocate
Peggy Tanksley	OCSEA Chair

Joel Pall Grievant
Pat Lyons Witness

ISSUE: Article 24 Removal of twenty seven year employee on allegations of fraud for profit.

Jonathan Dworkin, Arbitrator
101 Park Avenue
Amherst, Ohio 44001
* * *

BACKGROUND AND ISSUE

This controversy involves the removal of a twenty seven year employee. Since 1960, Grievant served as Field Auditor for the Ohio Bureau of Employment Services. Though his active record of discipline[1] was practically faultless, the Agency removed him May 22, 1997. The charge was that Grievant submitted false and deceptive time and payroll records showing that he was doing his job when he was not. Conse quently, according to the Agency, Grievant fraudulently obtained at least eleven hours unearned pay together with mileage reimbursements. The Employer regarded the misconduct as theft, subject to summary discharge despite the Employee's long tenure.

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[1] During the arbitration, the Employer suggested and sought to prove that while Grievant's employment was long term, he was a candidate for discipline and a problem for Supervision throughout. The Union objected to any prior discipline submitted into evidence on the strength of Article 24, §24.06. It provides that memorandums of reprimands will "cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months" if the individual maintains a clear record for that period of time. The provision calls for removal of other disciplinary penalties in twenty four (24) months, with the same condition. The Arbitrator held that the State's proffers would be admissible only in rebuttal to an affirmative allegation that Grievant had long and spotless service. In other words, if the Union attempted to show that Grievant was always a good Employee, the Employer did not have to remain silent on stale discipline. The Union's arguments did not go that far, so any proffer of past record is rejected. **1**

Understanding the State's case against Grievant requires a grasp of how Field Auditors do their work. Their job is to audit payroll records of Ohio employers to assure that unemployment contributions are in correct amounts. Typically they make appointments with employer representatives (accountants or attorneys) to review the books of businesses targeted for examination. Since appointments have to meet the

representatives' convenience as well as the Auditor's, Grievant and others in his Classification work with almost no supervision. They have no time clocks to punch; they set their own schedules. The only limits on Auditor routines are daily time sheets and payroll certifications, which they themselves fill out.

As evidenced by the allegations here, the Agency had to place singular trust in the integrity of its field employees. It had no real or immediate control of their day today activities, and needed more. It received potentially greater control in 1994 when the Ohio Department of Labor Relations developed a follow up employer questionnaire for the Agency. The document contained six inquiries:

1. Did the auditor hold a pre audit conference with you and explain, to your satisfaction, the scope and purpose of the audit?

2. After the audit was conducted, did the auditor indicate that the audit was completed? **2**

Were you, to your satisfaction, informed of the results of the audit?

3. If the audit was not completed, was a follow up appointment made?

4. What period of time was the auditor at the above location on the above dates?[2]

5. Were all records available, and given to the auditor, as requested in the appointment letter?

6. Were there any occurrences during the audit which you feel warrant mentioning?

The questionnaire was in place three years before Grievant's removal. Yet it might have been dormant. There is evidence that the Agency did not use it until the Chief Compliance Officer decided to double check the information on this Employee's daily logs.

Grievant's difficulties began January 9, 1997. The Employment Services office had been short handed due to a Supervisor's retirement. The remaining staff was just one Secretary. That was not sufficient, so the Compliance Chief assigned an Auditor each day to stay in the office and conduct peer reviews.

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[2] Emphasis added. This is the question that was pivotal to the State's case. Responses by employer representatives differed significantly from Grievant's daily time records.

Office assignments were on a rotating basis; Grievant's turn was Thursday, January 9, 1997. But he had a conflict a scheduled field audit. According to his testimony, he arranged for another Auditor to cover the office for him that afternoon.

For some reason, the arrangement fell through. When the Compliance Chief telephoned the office, she found that the only person there was the Secretary. January 17, she met with Grievant for a predisciplinary interview. According to her testimony, "his explanation that someone had agreed to substitute for him was not verified." When the meeting ended, Grievant had a written reprimand for Failure of Good Behavior.

The interview left the Chief suspicious about Grievant, especially his truthfulness on daily logs and payroll verifications. So she began an investigation. She spot checked two employer representatives whom Grievant claimed to have serviced and found discrepancies. That led her to investigate more deeply. She made telephone calls to employer representatives and sent out follow up questionnaires. From the information she gathered, both written and verbal, she concluded that this Employee systematically falsified records and defrauded the State into paying him wages for time not worked.

The Chief initiated the discipline process and, consistent with Article 24, 24.04, a predisciplinary hearing convened April 10, 1997. The State opened the hearing by presenting thirteen separate instances of time records discrepancies. Hearing Officer Kathy Ferguson ruled that the evidence was inadequate to support most (but not all) the charges. Subsequently, the State cut back its charges to just four dates:

JANUARY 9, 1997: The Employee's Daily Field Report claims two hours' office time, 2.5 hours for travel to Ellison & Associates (an accounting firm), and 3.5 hours to audit the records of Alejo Sryvalin, M.D. The Employer does not contest the hours though it challenges the 2.5 hour travel time for an approximate eight mile trip. Its allegation centers on information that Grievant did both the Sryvalin audit and another for P. W. Garver, M.D. that day at Ellison & Associates. The State implies that his failure to note the Garver audit in his report laid a foundation for his claim that he did it Friday, January 10. What he allegedly did was give himself the opportunity to skip work and get paid. Also, it is alleged, he told the employer representative that the audit showed noncompliance, then filed a report of full compliance.

JANUARY 10, 1997: Grievant's Report showed 1.4 hours' office time, 1.9 hours' travel time (again to Ellison & Associates), and 4.7 hours auditing P. W. Garver,

M.D. Ellison's Secretary, Debbie Rericha, asserted verbally in a telephone conversation with the Compliance Chief, in writing after the call, and in sworn testimony at the arbitration hearing that the Employee was not at the office any time on January 10. Also, she recalled that Grievant did something peculiar that day; he telephoned and asked her to page him if anyone tried to contact him.

JANUARY 16, 1997: The Daily Field Report shows 1.4 hours' office time, 1.9 hours' travel time to Zinner & Co., and 4.9 hours auditing the books of General Surgery Associates, Inc. A Zinner Accountant and the Office Manager both told the Compliance Chief that the hours were incorrect. They said Grievant was there auditing from 9:45 a.m. to 12:30 p.m., broke for lunch and did not return. Attorney Kenneth A. Blech testified that Grievant was at his office that afternoon from 1:00 p.m. to 4:15 p.m. auditing his client, Parma Pierogies. Blech also maintained that the audit was concluded that day.

At first glance, this does not seem to be cause for discipline. It appears there was only an innocent

inaccuracy in a Field Report. Grievant worked eight hours on January 16 - as the Employer's own witnesses confirmed. However, the discrepancy set the stage for January 22, when Grievant claimed to have done the Parma Pierogies audit.

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JANUARY 22, 1997: The evidence for this day was the most damning. Grievant's time sheet showed office time, travel time, lunch, and **4.4 hours auditing Parma Pierogies**. According to firm testimony of Mr. Blech, Grievant was not there on January 22. He finished the audit a week earlier, on January 16.

* * *

May 20, 1997 the Agency sent the Dismissal Notice to Grievant. The charges were general and did not distinguish to what extent, if any, predisciplinary charges were withdrawn. The Notice said:

> Your employment with the Ohio Bureau of Employment Services is hereby terminated effective the beginning of business May 22, 1997.
>
> You are being removed as a result of the pre disciplinary meeting held April 10, 1997 for charges of falsifying, unauthorized altering, and/or removing official documents, i.e., travel reports, 165's, daily field reports, sign in/sign out sheets, and audit forms and misuse of funds, i.e., travel reimbursements and active work pay status for time not worked.
>
> Your actions violate OBES' Disciplinary Policy outlined in the Labor and Human Resources Policies and Procedures Manual, Section 9200 9250 and Administrative Directive No. 12 92 which thereby constitutes just cause for removal pursuant to Article 24 of the OCSEA/AFSCME labor agreement.

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Not until the arbitration, eleven months later, did the Agency inform the Union (and Arbitrator) that it would proceed on the occurrences of January 9, 10, 16, and 22 only.

There was a timely grievance. Management denied it at each level, and the Union appealed to arbitration. The predominant issue is whether the Employer's action exceeded the Article 24 contractual restrictions on its disciplinary authority. Those restrictions appear in § §24.01 ("Disciplinary action shall not be imposed upon an employee except for just cause.") and 24.02 ("The Employer will follow the principles of progressive discipline.").

There are several subordinate issues as well. First among them stems from Grievant's testimony. He denied the allegations against him. He claimed those who accused him were mistaken that he put in full workdays on all the dates covered by the charges. Therefore, it is the task of the Arbitrator to assess the conflicting evidence and testimony, bearing in mind the §24.01 mandate: "The Employer has the burden of proof to establish just cause for any disciplinary action." If Grievant

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committed no misconduct, as he maintains, his discipline had to be unjust and without cause.

The Union also raised the defense of "double jeopardy" regarding the January 9 charge. Grievant had received a written reprimand, primarily for disobeying instructions by leaving the office on that day. The document recited that misconduct, and stated: "**Further, you made a false statement regarding the activities of that day."** The Union contends that the reprimand stood as discipline for any inappropriate acts or omissions that occurred on January 9. It argues that repeating identical charges to support the later removal subjected the Employee to two penalties for the same offense. Double discipline, according to the Union, is contrary to the principles of just cause.

In addition, the Union contends that the State's summary discharge lacked consideration, recognition, and appreciation of Grievant's twenty seven years' employment. Most arbitrators who deal with just cause recognize that a long term employee acquires significant insulation against severe discipline where a more moderate penalty might suffice. Some arbitrators characterize this as an older employee's "reservoir of leniency." **9**

FINDINGS ON "DOUBLE JEOPARDY"

The problem with the phrase "just cause" in a collective bargaining agreement is that it usually stands alone, without contractual definition. Labor and management negotiators consistently leave the matter of defining the term to arbitrators. Over several decades, those arbitrators fashioned a kind of common law. Rightly or wrongly, many of the common law precepts of just cause came from criminal law and procedure. The necessity of due process and the requirement that employers carry the burden of persuasion (burden of proof) are two examples. Another is the prohibition against double jeopardy. Just as no person is constitutionally subject to double penalties for the same crime, it is widely held that no employee can be disciplined twice for the same misconduct. Though arbitral decisions may carve out exceptions, the rule itself is universally accepted. It has existed and has been followed so uniformly that one must assume it was part of the negotiators' mutual understandings when they put the words "just cause" into this Agreement.

It is unclear from the evidence what the Chief Compliance Officer meant when she included a false statement charge in the written reprimand. That lack of clarity favors the Union since the Employer had the burden of proving just cause. For these reasons, the Arbitrator finds that Grievant's written reprimand was his discipline for

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submitting a false record on January 9. Once issued, the reprimand foreclosed the State's right to impose another penalty for the same misconduct. Therefore, allegations that the Employee submitted false records on January 9 are dismissed and will not be considered further.

It should be observed, however, that the facts surrounding January 9 are pertinent to the January 10 charge. Those facts are admitted, but only as background.

ADDITIONAL FACTS & ARGUMENTS

The Agency presented a solid case for its position. It furnished the Arbitrator with witness statements; also, it presented key witnesses who testified under oath at the hearing. The written statements and testimony matched; they confirmed the essence of the Employer's position, which was:

> He [Grievant] did not perform any audits on January 10, 1997 and he falsified the record in an attempt to make us believe he did. He did not perform any audits on January 22, 1997 and he falsified the records once again to make us believe he did. He received his normal pay from the State both days and he submitted a fraudulent travel expense report in his effort to deceive Management.
>
> . . .

> We think those actions constitute theft from the Employer and support the action taken by the Bureau Management.[3]

If just the Employer's evidence had been presented, the Arbitrator would have no alternative but to find that Grievant committed the misconduct charged. It should be recalled that Grievant's daily time sheet claimed that he conducted an audit for P. W. Garver at Ellison & Associates January 10. In response to a request from the Compliance Chief, Ellison's office Secretary, Debbie Rericha, wrote back: "[Grievant] showed up on Jan. 9th at 10:20 a.m. He took an hour lunch break. He stayed at our office until 3:30 p.m. He did NOT return on Friday, Jan. 10th . He did call & ask me to page him if anyone tried to contact him on Friday." Ms. Rericha also said she was concerned that Grievant might charge their client with noncompliance if she cooperated with the Agency and disclosed anything that could result in discipline. After struggling with the possible consequences, "I decided to tell the truth. I just didn't want to cover for [Grievant]."

In the Arbitrator's opinion, Ms. Rericha's testimony was cogent and believable. It shifted the burden to the Union and Grievant to account for the January 10.

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[3] Employer closing argument (recorded at hearing).

Equally persuasive was the combined testimony of Mary Miller, Office Manager, Zinner & Co., and Attorney Blech. They accounted for all Grievant's time on January 16. If their statements were accurate, Grievant arrived at Zinner about 10:00 a.m. to audit General Surgery Associates, Inc. He left at 12:25 p.m. after finishing the audit, and did not return. Mr. Blech testified that Grievant was at his office 1:00 p.m., completed the audit of Parma Pierogies, and left at 4:15 p.m. The discrepancy is that Parma Pierogies does not appear on the Employee's January 16 time sheet. The records, which he created, stated that he spent the whole day auditing General Surgery at the Zinner accounting office. Blech insisted that he could not have been wrong, because he stayed in the office a half hour after Grievant said "good night" and left.

Of course, Grievant might have committed an excusable oversight on his Jan

uary 16 record. But it also could have been part of a plan to cover unauthorized time off with pay. From the perspective of the Agency's suspicions, it fits perfectly with the January 22 time sheet. On it, Grievant claimed a whole day auditing Parma Pierogies at Attorney Blech's office. According to Mr. Blech, the audit was finished on January 16, and he billed Parma Pierogies for his completed services that day. If

his statements are true, Grievant could not have been doing the Parma Pierogies examination; the claim on his time sheet would then stand out as fraudulent.

From the beginning, the Agency regarded Grievant's misconduct as warranting discharge. Nevertheless, consistent with her obligation to preserve just cause, the Chief Compliance Officer interviewed Grievant with a view to finding mitigation, mistake, or something that would untangle the discrepancies. So she carefully avoided accusations. Typically, she would hand him a time sheet and the written statement from an employer representative and ask him if he could account for the discrepancy. She did not find the mitigation she was searching for: "I tried to obtain any mitigating circumstances regarding the dates and the discrepancies and there didn't appear to be any. So / just felt that there was no choice but to request dismissal " [Emphasis added.]

The Union strenuously denounced the Chief Compliance Officer's rationale. She said she could find no mitigating factors. In the Union's judgment, she was face to face with a most significant factor throughout her investigatory interview. Across the desk from her was the Grievant, a man who had worked for the State of Ohio twenty

seven years most of his productive adult life. The Union maintains that the State could not just put an individual with that many years' service on the street and deprive him of his livelihood for such questionable allegations of misconduct.

Likewise, the Union challenges the Chief's declaration that: "there was no choice but to request dismissal." There were plenty of choices. Article 24, §24.02 of the Agreement set them forth in mandatory terms. Corrective discipline is the theme of the provision. The choices (short of discharge) that lay before the Chief were:

A. One or more oral reprimand(s) (with appropriate notation in employee's file);

B. one or more written reprimand(s);

. . .

D. one or more day(s) suspension(s).

An axiom of just cause requires management to issue the lowest disciplinary imposition that is likely to correct an employee's misbehavior. The only exceptions are those few instances (1) where the misconduct is so hostile to an employer's interests that it actually severs the employment relationship and (2) where there is

little or no chance that more lenient discipline will be corrective. The Union contends that the
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Agency offered no evidence or testimony to prove that Grievant's purported misconduct was not correctable. Not only did this Employee have twenty seven years with the same Employer, he also had a clean (active) disciplinary record until receiving the written reprimand January 9.

These Union arguments are relevant only if Grievant was guilty of the charges lodged against him. Should proven innocence or the Agency's failure to prove guilt be the Arbitrator's finding, there will be no need to explore esoteric ideas of just cause. The Employee will be exonerated and returned to work with full compensation for his losses.

Grievant was the only fact witness on the question of his innocence. The Union Advocate paved the way for his testimony in opening statement:

> "CPAs [employer representatives] in these audits do not sit with the Auditor while the audit is taking place. Nor do they necessarily know the exact amount of time that an Auditor would spend doing the audit nor are they always at the office at the beginning or end of the audit."

That was the substance of what Grievant said in arbitration. He did not argue that his accusers were lying or in a conspiracy to rob him of his job; just that "they were mistaken." **16**

According to the Employee, the nature of his work made such mistakes possible. Ordinarily, he would meet the employer representative just before the audit, then retire to a private office or space provided for him to do his work. He was not in sight and sometimes not in hearing of office personnel. They could not know his comings or goings with any precision.

Regarding January 10, Grievant insisted that his time reports were correct. He did not refute Ms. Rericha's testimony about asking her to page him if anyone called, but said that was not unusual: "I always give my pager number, both on the letter setting up the audit and verbally at the meeting so that people can contact me if they have problems."

Attorney Blech remembered Grievant was in his office and signed compliance forms January 16. According to Grievant, that was in error. He signed the forms a day earlier January 15. He needed more time to complete the examination, but had another audit scheduled January 16. So he arranged to finish the job on January 22. According to his sworn testimony, **he was at Attorney Blech's office January 22 and concluded the Parma Pierogies matter then**. **17**

In sum, Grievant's whole defense was his assertion that all entries on his time sheets were correct. He was where he said he was; testimony to the contrary was simply incorrect.

ARBITRAL FINDINGS & CONCLUSIONS

A

Guilt or innocence: As the parties know, an arbitrator has no unique access to truth. All s/he can do in a case like this is apply his/her intellect and experience to determine probabilities. Disputes of this kind are won or lost by arbitral findings about what is probable and what is not.

In assessing evidence, an arbitrator must not lose sight of the fact that the employer has the initial burden of persuasion. To succeed here, the Agency had to present evidence of sufficient quality to overbalance Grievant's denials. If the evidence is indecisive so that no clear picture emerges, the Union will prevail.

Not only did Grievant's laconic testimony fail to rebut the case against him, it did not even rise to of meet it. In the Arbitrator's opinion, the Employee's statements were false, designed to fashion a defense rather than expose the truth. Most telling was what he said about the pager. Ms. Rericha of Ellison & Associates clearly remembered that he was not there January 10 but telephoned and asked her to contact his

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pager if anyone was looking for him. That was profoundly different from Grievant's explanation:

Q. Did you give Debbie [Rericha] your page number and ask her to page you if you weren't there?

A. yeah.
Q. And is that something you normally do?
A. Yeah. I put it [the pager number] on the appointment letter.

As well as I tell most people, including her. If she needed to reach me for some reason to page me. Especially this account that's this far away from the office.

If Grievant was at Ellison & Associates all day January 10, why did he ask the secretary to page if anyone tried to contact him? He was there, according to his testimony; all the secretary had to do was ask him to pick up the phone.

This question was neither asked nor answered at the hearing. It is troubling to the Arbitrator, and strongly suggests that Grievant lied. Even if he could explain this apparent discrepancy, it would not be enough to overcome the volume of evidence against him.

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The Arbitrator finds that Grievant committed fraud on January 10, January 22, or both, and derived unearned wages from his actions. This finding, however, does not end the discussion. There are remaining issues over whether the penalty discharge violated just cause.

B

The Seriousness of Grievant's Offense: The Employer accurately labeled Grievant's misconduct, "theft." Through misdirection, the Employee stole wages for time not worked. But theft is a broad word covering a myriad of sins. A person who takes an unearned coffee break is a thief. Robbery and embezzlement also fall within the definition of "theft." Obviously, not all instances of theft are of equal gravity. The Employer would never think to remove an employee with Grievant's length of service for taking an

unauthorized coffee break.

Grievant's violation of his employment responsibilities might have been nondischargeable theft were it not for one inescapable point. The circumstantial evidence, which the Employee did not try to explain, shows a consciously deliberate scheme to defraud the Agency. It is not as if he took unauthorized time off on the spur of the moment, then tried to cover himself with a falsified time sheet. The pattern that emerges from his behavior is too slick for that conclusion. He did not report that he

finished the Garver audit January 9, placing it instead on his time sheet for January 10. This leads the Arbitrator to believe that he painstakingly planned his deception. Like reasoning applies to Parma Pierogies, which he concluded on January 16 but reported on his January 22 time sheet.

It may be that these actions authorized the State to remove Grievant summarily, without evaluating and applying the elements of just cause. The Arbitrator does not make this finding. The Employee was still due substantive justice based on his years of service and any other moderating factors.

C

Just Cause Conclusion: When modifying discipline, an arbitrator must balance the merits of the employee against the severity of his/her offense. Typically, length and quality of service and the employee's remorse are influential to awards reducing or removing penalties. Remorse, or at least believable assurance that the employee will not repeat the offense in the future, sometimes is pivotal. If established, it shows that the individual can be redeemed by corrective rather than terminal discipline.

Unfortunately, from the Union's perspective, the Arbitrator cannot assess Grievant's correctability. The reason is that the Employee took the high road in this

dispute, testifying that he was completely innocent. That tack deprived the Union of the opportunity to prove that Grievant could have been rehabilitated.

The only potentially mitigating factor is the Employee's twenty seven years on the job. Often, such exceptional longevity will influence an arbitrator to modify a penalty. But tenure is not a pass to commit misconduct. It does not allow an individual to break rules with impunity; it does not insulate people from removal for conduct totally inimicable to an employer's fundamental interests.

The central obligation of every employee, endorsed by management and the union alike, is to put in a full day's work for a full day's pay. The evidence convinces the Arbitrator that Grievant executed a conscious plan to avoid fulfilling the work obligation and continue receiving full days' wages. After twenty seven years, he must have understood that, if caught, he risked discharge. He took the risk and profited from it. Then he was caught.

Nevertheless, the Union argues that, as a long term worker, he was insulated from removal. The Arbitrator disagrees. While length of service had considerable weight in most discipline cases, it will not exonerate Grievant here. In the absence other mitigating factors, his tenure did not require the Employer to

be lenient in the face of a purposeful design to cheat the Agency. Though the Arbitrator might have

lessened the penalty out of sympathy, he cannot hold that Management lacked just cause for the penalty it selected. Accordingly, the grievance will be denied.

AWARD

The grievance is denied.

Decision issued at Lorain County, Ohio March 15, 1999.

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Jonathan Dworkin, Arbitrator

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