ARBITRATION DECISION NO.:
118

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

EMPLOYER:
Ohio Department of Transportation

DATE OF ARBITRATION:
February 26, 1988

DATE OF DECISION
April 9, 1988

GRIEVANT:
Greg Hurst

OCB GRIEVANCE NO
G-67-1494

ARBITRATOR:
David M. Pincus

FOR THE UNION:
Daniel Smith
L. Haynes

FOR THE EMPLOYER:
Time Wagner
R.C. Ferguson

KEY WORDS:
Just cause
Lack of notice (24.02
Discipline commensurate (24.02)
Multiple offenses actually one
Procedure-failure to provide disciplinary documents (25.08)
Standard of proof-Moral turpitude offense

ARTICLES:
Article 25 – Grievance Procedure
§25.03 – Arbitration Procedures
§25.04 – Arbitration Panel

FACTS:

Grievant was employed by the Ohio Department of Transportation as an Equipment Operator 1 for five (5) years prior to removal. He worked on a two man crew that sprayed herbicides in the summer

and cut trees and ground-up stumps during the winter. Grievant and a coworker were cutting wood at a roadside. The two workers decided it was an opportune time to break for lunch. Grievant threw wood in the back of the truck to take to his residence during lunch. The two were observed by a State Trooper while the two were stopped to fill a rear tire with air. The trooper discussed the incident with his supervisor and documented the incident and sent the report to the Employer. Grievant was removed for theft, leaving work area without permission, unauthorized use and misuse of a state vehicle, unsafe act, neglect of duty and insubordination (failure to follow written policy).

EMPLOYER'S POSITION:

All of the alleged charges are adequate reasons for disciplinary action. Grievant had sufficient notice of probable discipline. All the offenses were listed in Directive A-301 which was clearly posted in grievant's work area. The theft offense did not require formal notification because it was socially unaccepted conduct. The Grievant stole the wood. He took it without permission, with intent to convert it to his own use. In fact, the supervisor had specifically told Grievant he did not have permission to take the wood. The group leader's permission should not be considered for two reasons. First, he does not have the authority to permit taking of property. Second, he did not testify that he gave Grievant permission. The argument that the wood had no value must fall because there were directives concerning the wood and a specific program for disposal of the wood. Based on the trooper's testimony and other facts, it is obvious that the activity could not have been authorized within the lunch break. Therefore, Grievant misused the truck on Employer's time. The disparate treatment of Grievant and the coworker was justified. The coworker merely assisted in the illegal activity and did not benefit personally. The disparate treatment claim was not properly raised prior to arbitration. The A-302 predisciplinary notice satisfied all procedural requirements contained in the contract. There were no due process violations relating to disclosure. The materials requested were not relevant or material, the disclosure issue was not raised in Step 3 or 4, the decisions cited by the Union are not precedent setting, and, even if defects exists, they are not fatal. The standard of proof for this discharge is proof that the Grievant committed theft and the penalty assessed was appropriate.

UNION'S POSITION:

The Employer did not have just cause to remove the Grievant. The Grievant did not have adequate notice of the possible consequences. It was accepted practice to take wood from the roadside. The removal of the wood was not theft. For theft to occur, there would have to be value. There had been only one board sale, and the wood was not sold. This indicates the lack of value. The discipline was not reasonably related to the seriousness of the offense. Grievant honestly believed he was permitted to take the wood and therefore, did not have sufficient bad intent. The unauthorized use and misuse of a state vehicle charges were not justified. The lunch hours were flexible and the entire incident occurred within the half hour period. All charges except the theft should be disregarded. They all are actually part of the primary discipline. In fact the coworker was involved and only received a suspension. The A-302 notice was not sufficiently specific. The suspension/removal penalty in the notice was boilerplate. This deficiency hampered the preparation because the Union did not perceive the seriousness of the charges. The Union formally requested predisciplinary recommendations and other documents. The Employer did not comply as required by previous arbitration decisions. Because the charge involved moral turpitude, the highest standard of proof was required.

ARBITRATOR'S OPINION:

The Employer obtained a substantial level of proof that Grievant engaged in theft. The blatant refusal to provide relevant information taints the discharge and, justifies modification. The Arbitrator did not

make a determination on those charges added after the predisciplinary notice. To prove theft, the Employer must prove four elements: (1) personal goods of another, (2) taken without consent, (3) some asportation and (4) the intent to steal or deprive another of use. All four elements were proved by the Employer. The wood belonged to either the Employer or landowners, not the Grievant. Neither of the potential owners consented. There was no evidence before the Arbitrator that the group leader gave Grievant permission to take the wood. There was sufficient asportation. Grievant took the wood from the roadside to his residence. The intent is more difficult to prove. If no permission was needed to take wood, Grievant would not have asked for permission. Grievant was aware of disposal procedures and no evidence was introduced that landowners had been given a opportunity to exercise their right of first refusal. Disparate treatment between Grievant and the coworker was justified by the fact that the coworker merely assisted. Other instances cited dealt with employees picking up wood after hours and in their personal vehicles. Additionally, the Union did not prove that the Employer treated like instances in a dissimilar fashion. The Employer gave sufficient notice. Theft is so patently unacceptable that notice may not have been required. The employer was bound by contract language in Section 25.08 to provide relevant information to the Union. There are three approaches in dealing with procedural defects: (1) nullify the whole action, (2) nullify only if prejudice is proved, or (3) failure to comply with procedure will be penalized in a reasonable measure. The Arbitrator chose the third and most popular method. The request by the Union was not a fishing expedition and should not have been ignored by the Employer. The Arbitrator does not possess the power to predict what could have happened had the Employer complied with the request. The Arbitrator cannot ignore language that the Employer agreed to follow.

AWARD:

- Reinstatement without back pay. Denial of back pay is to underscore the seriousness of Grievant's conduct.

TEXT OF THE OPINION: * * *

STATE OF OHIO AND OHIO CIVIL SERVICE

EMPLOYEES ASSOCIATION LABOR

ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, OHIO DEPARTMENT OF TRANSPORTATION

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME, AFL-CIO

GRIEVANCE: Greg Hurst (Discharge)

CASE NUMBER: G-87-1494

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: April 9, 1988

APPEARANCES

For the Employer

R. M. Skelding	Trooper, Ohio State Patrol
H. E. Morris	Equipment Operator I
R. Cameron	Supervisor
T. Wagner	Office of Collective Bargaining
R. C. Ferguson	Labor Relations Officer

For the Union

G. Hurst	Grievant
B. Kurfess	Steward
B. Green	Chapter President
D. Calcamuggio	Highway worker II
L. Haynes	Staff Representative
D. Smith	General Counsel

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INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Ohio Department of Transportation, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFLCIO, hereinafter referred to as the Union for July 1, 1986-July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on February 26, 1988 at the Office of the Ohio Department of Transportation. The hearing was continued and additional testimony and evidence were introduced on March 1, 1988. The latter hearing took place at the Lucas County Garage in Toledo, Ohio. The Parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would not submit briefs.

ISSUE

The stipulated issue in this grievance: Did the Department of Transportation discharge Mr. Gregory Hurst for just cause in accordance with Article 24 of the contract? If not, what shall the remedy be?

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STIPULATION OF FACT

1. Mr. Gregory Hurst was employed with the Department of Transportation From June 28, 1982 until May 29, 1987. Mr. Hurst was removed from employment with the Department effective May 29, 1987.

2. Mr. Hurst held the classification of Equipment Operator 1 during his employment with the Department.

3. Mr. Hurst received a Written Reprimand on August 26, 1986 for violating Directive A-301, Item # 7 - Carelessness with tools, keys and equipment resulting in loss, damage or an unsafe act.

4. Mr. Hurst received verbal counseling on January 27, 1987 for allegedly loitering in the District Garage and disrupting other employees at work.

5. An A-302, pre-suspension and/or removal meeting, was held at the District Two office complex on May 1, 1987. Mr. Hurst was represented by OCSEA/AFSCME at the hearing.

6. Patrolman Skelding, Ohio State Highway patrol, gave a statement to his superior Lieutenant Zwayer. Lieutenant Zwayer signed the statement and gave it to the Department for further investigation.

7. Directive A-301 was clearly posted in Mr. Hurst's work area.

8. Mr. Hurst had not read Directive A-302, A-107 and/or Directive DH-0-117 but did have ready access to Directive A-301. **3**

9. This grievance is properly before the arbitrator for a determination.

10. Immunity of witnesses was agreed to by the Parties with specific reference regarding Dale Calcamuggio's testimony provided on March 1, 1988 at the Lucas County Garage, Toledo, Ohio.

11. The Parties mutually agreed to waive the thirty (30) day requirement contained in Section 25.03 (Joint Exhibit 1, Pg. 40).

(Joint Exhibit #8)

PERTINENT CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

"Except to the extent expressly abridged only by the specific articles and sections of this Agreement,

the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08 (A) numbers 1-9."

(Joint Exhibit 1, Pg. 7)

ARTICLE 24 - DISCIPLINE

Section 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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse." **4**

Section 24.02 - Progressive Discipline

"The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

A. Verbal reprimand (with appropriate notation in employee's file)
B. Written reprimand;
C. Suspension;
D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process."

. . .

Section 24.04 - Pre-Discipline

"An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that time and documents known

of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges."

Section 24.05 - Imposition of Discipline

"The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the predisciplinary meeting. At the discretion of the Employer, the forty-five (45) days requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment."

(Joint Exhibit 1, Pgs. 34-37)

ARTICLE 25 - GRIEVANCE PROCEDURE

. . .

Section 25.08 - Relevant Witnesses and Information

"The Union may request specific documents, books, papers or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied."

CASE HISTORY

G. Hurst, the Grievant, has been employed as an Equipment Operator I since June 28, 1982. At the time of the disputed incident, he was assigned to a two (2) man roadside improvement crew. These crews spray herbicides during the summer months and cut down trees and ground up tree stumps in the fall and winter months.

On March 17, 1987 the Grievant and H. E. Morris, a coworker, continued a job that was previously assigned by their supervisor, R. Cameron. The task involved the cutting of trees at the Lemoyne overhead on State Route 20. At approximately 11:00 a.m. the Grievant and Morris determined that a lunch break would be in order because they reached an opportune stage in their assignment. Both individuals testified that roadside improvement crews were allowed to schedule flexible break periods based upon their activities on any particular assignment. Before they departed the scene for lunch, the Grievant threw some of the wood in the back of the Employer's pickup truck because his residence was a short distance from the work site.

Trooper H. M. Skelding testified that he observed the pickup truck while on duty at approximately 11:00 a.m. He, moreover, maintained that the vehicle was overloaded with firewood and that the right rear tire was low. Further surveillance indicated that the Grievant pulled into a gas station to pump up the low tire, and he then proceeded to a convenience market. Skelding testified that he confronted the Grievant at the market and explained why he was stopped.

During the course of the conversation Skelding asked the Grievant about the wood in the back of the pickup truck. The Grievant remarked that he was taking the wood to his house, and that his supervisor gave him permission to transfer the wood. Farmers were allegedly arguing about ownership rights and the supervisor told the Grievant he could take a load home because he burned wood for energy purposes.

The Grievant and Morris proceeded to the Grievant's home, unloaded the wood and returned to the work site. Skelding testified that he subsequently drove past the Grievant's home where he observed a number of loads on the Grievant's lawn.

Skelding eventually discussed the incident with his supervisor who asked him to document the incident in the form of a written statement (Joint Exhibit 7). This document and the particulars surrounding the incident were forwarded to the Employer.

Approximately one (1) month after the above mentioned incident R. Cameron, the Grievant's immediate supervisor, initiated an investigation after the statement (joint Exhibit 7) was brought to his supervisor's attention. After conducting an investigation, Cameron recommended that disciplinary action should be taken. He, more specifically, requested that an A-302 Hearing be initiated by his superior. Cameron specified the following violations of Directive A-301 (Joint Exhibit 3) in making this request on April 10, 1987:

". . .

Mr. Hurst is in violation of the following according to Directive A-301:

#8 - Deliberate destruction damage, and or theft.

#13 - Leaving the work area without permission.

#17 - Unauthorized use of a State vehicle.

#18 - Misuse of a State vehicle.

#34 - Violation of the Ohio Revised Code Section 124.34."

(Employer Exhibit 1)

In response to this recommendation, the following Inter-Office communication notifying the Grievant of an A-302 Pre-Suspension and/or Removal Meeting was issued on April 17, 1987:

Notice is hereby given that your Supervisor has requested that disciplinary action be taken regarding your employment with the State of Ohio, Department of Transportation. Therefore, a meeting will be held pursuant to ODOT Directive A-302 at 8:30 A.M. on May 1, 1987 in the second floor conference room at the District Office Complex.

The purpose of this meeting is to provide you with an opportunity to tell your side of the story, explain why you should not be suspended and/or removed from employment with the State of Ohio, Department of Transportation, and to provide you with the evidence and facts on which the State is basing this proposed discipline.

The evidence on which this charge is based is that on March 17, 1987 you was observed by the Ohio Highway Patrol hauling wood in a State vehicle. You admitted to the patrolman that you was taking the wood to your home, although you had not been given permission to be hauling wood. Therefore, since Ron Cameron, Roadside Supervisor, has recommended that disciplinary action be taken, he will be present throughout the meeting. This action is in violation of the following Sections of ODOT Directive A-301:

Item 8 - Deliberate destruction, damage, and/or theft of State Property.

Item 13 - Leaving the work area without the permission of the Supervisor.

Item 17 - Unauthorized use of a State vehicle.

Item 18 - Misuse of State vehicle (violation of Traffic Code or for personal use).

Item 34 - Violation of Section 124.34 of the Ohio Revised Code. (The severity of the discipline imposed should reflect the severity of the violation)

This notice is your formal notice of the meeting. If there are any changes, you will be notified by another IOC, and if there are no changes, you will receive no further IOC's. You are directed to attend the meeting unless you wish to waive your rights to the meeting by informing your District Deputy Director, in writing, stating that you accept the proposed discipline action which is suspension and/or removal from employment with the State of Ohio. If you decide to attend the meeting, you may obtain the assistance of a Union Representative. The Ohio Department of Transportation will present you with a list of witnesses and copies of any known exhibits at the meeting.

. . ."

(Joint Exhibit 2, Pg. 3)

The A-302 Meeting was held on May 1, 1987. It appears that the following charges were added by the Employer, after the meeting, as a consequence of the discussion:

"Additional Charges to be added
Item 7 unsafe act
Item 1-B Neglect of Duty
Item 2-C Insubordination-Failure to follow written policy"

(Joint Exhibit 2, Pg. 4)

The above particulars were incorporated into the final removal order. The removal order and the particulars supporting the removal were contained in the following letter authored by Warren J. Smith on May 15, 1987:

". . .

Dear Mr. Hurst:

This letter is to inform you that you are hereby removed from employment as a Equipment Operator 1, assigned to Road Side Improvement, effective May 29, 1987.

After reviewing the recommendation of the impartial administrator and others, it has been determined that just cause exists for this action.

The charges you have been found in violation of include:

Directive A-301	1b	Neglect of Duty - minor
Directive A-301	2a	Insubordination, refusal to carry out assignments
Directive A-301	8	Theft of State property

Directive A-301	13	Leaving a work area without permission of a supervisor
Directive A-301	17	Unauthorized use of a state vehicle
Directive A-301	18	Mis-use of a state vehicle
Directive A-301	34	Violation of Ohio Revised Code 124.34

Very truly yours,

/s/

Warren J. Smith Director"

(Joint Exhibit 2, Pg. 2)

The Grievant responded to the removal by filing a grievance on May 28, 1987. The Grievance Form contained the following critical components:

" ...

Contract Article(s)/Section(s) Allegedly Violated:

Based on but not limited to 24:01, 24:02, 24:05

Statement of Facts (for example who? what? when? where? etc):

I was working on the Lemoyne overhead on Rt. 20. We were cutting down some trees. My Superintendent told that the wood is there for whoever wants it. I took some home. We feel the discipline is to harsh.

Names of Witnesses:

Dick Morris **11**

Remedy Sought:

To be reimbursed for days lost. To be made whole and anything else deemed necessary by an arbitrator.

Signature: Gregory F. Hurst Date: 5-28-87
(Grievant/Union Representative)

". . .

The Union requested a step three (3) hearing as a consequence of the removal (Joint Exhibit 2, Pg. 5). The Employer granted this request on June 11, 1987 and a meeting was scheduled on June 18, 1987 (Joint Exhibit 2, Pg. 6).

N. Eugene Brundige, Deputy Director for Labor Relations, issued a Level lll decision regarding the above mentioned grievance on June 29, 1987. The decision contained the following Management Contention and Finding which denied the grievance in its entirety:

" ...

MANAGEMENT CONTENTION

Management denies any violation of the Contract especially Articles 24.01, 24.02, and 24.05. The grievant was accorded his limited due process rights under the State Supreme Court Standard of a "Loudermill" pre-disciplinary meeting. The impartial administrator for the Department has the right and obligation to talk to either side, prior to and following proposed discipline, either about the case or on other matters.

Management found just cause due to the facts that:

1. The grievant did take the wood.
2. He was told it was improper to take the wood.
3. Witnesses verified his knowledge.
4. He used a State vehicle to transport it home for personal use
5. He performed this function (or part of it) on State time.

The punishment was commensurate to the violation. Management is not held rigidly to a 5-step discipline **12**

procedure of verbal, written, suspension, major suspension, and termination on every violation.

The pre-disciplinary meeting was held May 1, 1987, and the grievant was removed on May 29, 1987. Consequently, Article 24.05 was also complied with. Article 5 gives Management numerous rights, including the right to discipline up to and including termination. The facts were verified by the O.S.P., and a witness.

FINDING

Management was proper and had just cause to terminate the grievant for theft of State property. Directive A-3011 Section 8, clearly provides for this remedy on the first offense. Management is not held to a rigid progressive discipline grid for such serious violations. The Ohio State Patrol, the Superintendent, and Mr. Morris all corroborate prior knowledge as well as verifying the act of theft. At no time did Mr. Cameron, Superintendent, give the grievant permission to take the wood. The grievant violated many other sections of Directive A-301, as cited in the termination letter.

Management is also required to accord the grievant certain rights under the "Loudermill" Supreme

Court standards for limited due process. The A-302 pre-disciplinary meeting complies with those standards. Regardless of whether the impartial administrator has seen or conferred with the Superintendent proposing discipline just prior to the meeting; this in no way violates the "Loudermill" standards, nor does it violate Department policy.

In regard to Article 24.05, the A-302 meeting was held on May 1, 1987. The Director decided on the discipline on May 15, 1987, and it was served to the employee a few days later. The termination was effective May 29, 1987. Clearly this is within the 45-day guidelines of Article 24.05. For the above reasons, the grievance is denied in its entirety.

/s/ 6-29-87
N. Eugene Brundige, Deputy Director for Labor Relations" Date
(Joint Exhibit 2, Pgs. 8-9)

On July 20, 1987, the Employer issued a Step 4 response which denied the grievance for the reasons cited in Brundige's Step 3 response (Joint Exhibit 2, Pg. 10). The Grievance is properly before the Arbitrator. **13**

THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer that the Grievant was removed for just cause. The removal was based on a number of related particulars including theft of State property, misuse of a State vehicle, unauthorized use of a State vehicle, and violation of O.R.C. 124.34. All of these allegations are documented as possible reasons for the imposition of disciplinary action in Directive No. A-301 (Joint Exhibit 3).

The Employer maintained that the Grievant was adequately given forewarning or foreknowledge of the possible or probable consequences of the Grievant's disciplinary conduct (Employer Brief, Pg. 1). The Employer noted that the above offenses were contained in Directive No. A-301 (Joint Exhibit 3), and that this Directive was clearly posted in the Grievant's work area. Cameron also testified that two (2) additional Directives dealing with the related particulars were also available for review purposes. He noted that Directive No. DH-0-117 dealing with the handling and disposal of items removed from the roadway by department personnel (Joint Exhibit 6), and Directive No. A-107 dealing with stolen or missing state property (Joint Exhibit 5), were accessible but that he doubted if the Grievant ever read them.

The Employer further argued that the theft offense did not require formal notification (Employer Brief, Pg. 1). It was alleged that taking of State property, or theft, was socially

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disapproved and that this type of misconduct did not require an express notice that discharge is a probable consequence.

The Employer emphasized that the Grievant did steal the wood. Both the Grievant and Morris testified that the Grievant took the wood to convert it for his own use. Testimony and evidence were also provided concerning the authorization of this activity. Cameron testified that he never gave the Grievant permission to take the wood. He, however, remarked that a few weeks prior to the incident the Grievant asked for permission and it was refused by Cameron. The Grievant was allegedly told that if he took the wood "he would be on his own." Morris confirmed Cameron's testimony by stating that he never heard Cameron give the Grievant permission and that it was improper for employees to take wood home (Employer Brief, Pg. 2)

The Employer also contested the argument dealing with A. Sander's involvement in the incident (Employer Brief, Pg. 2). As a group leader, he had no authority to grant permission to the Grievant without prior approval by a management representative. The Employer also viewed this argument as contrived because permission was granted by a group leader during a supervisor's absence. Sander's involvement, moreover, was not raised at prior steps of the grievance procedure and he failed to testify on the Grievant's behalf at the arbitration hearing.

The Employer maintained that theft did take place because wood found in the right-of-way has some value (Employer Brief, Pgs. 1-2). The issuance of two (2) Directives dealing with the handling and disposal of items removed from the roadway and

stolen and missing State property (joint Exhibits 5 and 6) evidenced that the Employer placed some value on these items; regardless of employees' perceptions. In addition to these Directives, the Employer argued that a specific wood disposal procedure has been in effect for a number of years (Employer Brief, Pg. 2) This procedure has a number of disposal alternatives. The wood is initially offered to the property owner as a public relations tactic. If the wood is not accepted by a property owner, then the wood is taken to a site for Bulletin Board sale or for landfill use. Cameron, Morris, and the Grievant acknowledged some awareness of this procedure. The Grievant, more specifically, testified that he was aware that property owners had the right of first refusal. He, however., never acknowledged that he, nor anyone else, solicited a decision from the property owner in the immediate area.

The Employer, moreover, argued that the Grievant was guilty of unauthorized use of a State vehicle and misuse of a State vehicle (Employer Brief, Pg. 1). Both of these charges dealt with the Grievant's use of a State vehicle to transport wood for personal use and for performing these activities on the Employer's time. Emphasis was placed on the testimony provided by Trooper Skelding and the time frames contained in his testimony. The Employer contended that the various activities engaged in by the Grievant could not have taken place within a one-half hour lunch period. Thus, the Grievant's unauthorized activity had to take place on the Employer's time, and the Employer's vehicle was used in an unauthorized manner.

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The Employer maintained that the Union's disparate treatment claim was not properly raised prior to the arbitration hearing (Employer Brief, Pg. 3). The Employer noted that the Grievant's advocate was repeatedly asked for documentation dealing with this claim during the week preceding the arbitration hearing. The Union, however, was unwilling or unable to provide the requested information until the date of the arbitration hearing.

Even if the disparate treatment claim was properly before the Arbitrator, the Employer contended that it applied its rules, orders and penalties even-handedly without discrimination to all employees (Employer Brief, Pg. 3). Justification was provided for the different penalties assessed against the Grievant and Morris. The Employer maintained that these individuals engaged in different violations of Directive A-301 (Joint Exhibit 3). That is, Morris aided a coworker by unloading the wood and failed to inform a supervisor of unauthorized activities, yet, he did not benefit from these activities because he did not convert the wood for his own use.

The Employer also contested the procedural defect claims argued by the Union. These claims dealt with pre-discipline notice requirements (See Pg. 5 of this Award for Article 24 -Discipline, Section 24.04 - Pre-Discipline) and relevant information requirements (See Pg. 6 of this Award for Article 25 - Grievant Procedure, Section 25.08 - Relevant Witnesses and Information) contained in the Agreement (Joint Exhibit 1).

The Employer maintained that its pre-disciplinary notice procedure complied with the due process requirements contained in

the Agreement (See Pg. 5 of this Award for Article 24 -Discipline, Section 24.04 - Pre-Discipline). That is, the A-302 Notice (Joint Exhibit 2, Pg. 3) was written and contained the alleged violations and the potential consequences associated with such violations; and informed the Grievant about the location and time of a forthcoming meeting. The Employer, moreover! contended that the Union's alleged lack of

preparation was not the Employer's responsibility, nor a function of due process deficiencies. Kurfess acknowledged that theft was a serious violation and that termination and/or suspension were equally serious offenses. Thus, the contents of the A-302 notice and the severe nature of the allegations (Joint Exhibit 2, Pg. 3) should have provided the Union with sufficient notice for preparation purposes (Employer Brief, Pg. 3).

For a number of reasons, due process violations concerning the disclosure of relevant information were also refuted by the Employer (Employer Brief, Pgs. 3-4). First, the Employer maintained that the materials requested were not relevant or material, and thus, not discoverable by the Union. Second, the disclosure issue was not in front of the Arbitrator and was not raised at Step III or Step IV of the grievance procedure. Third, the arbitration decisions cited by the Union are not precedent setting, and none of them assert that the information to be released is relevant or material. Last, even if a procedural defect exists it should not be viewed as a fatal flaw. The provision in dispute (See Pg. 6 of this Award for Article 25 -Grievant Procedure, Section 25.08 - Relevant Witnesses and

Information), moreover, does not impose any penalty upon the Employer for any violation.

The Employer also maintained that the highest standard of proof should not be invoked when deciding violations of moral turpitude (Employer Brief, Pg. 4). The Employer argued that it was virtually impossible for any arbitrator to precisely quantify the amount of proof required to sustain a discharge action. What is, however, required is that the Employer prove that the Grievant committed the act or infraction for which he was charged, and that the penalty assessed was appropriate.

The Position of the Union

It is the position of the Union that the Employer did not have just cause to discharge the Grievant. This position was based on several critical just cause principles as well as evidentiary considerations.

The Union maintained that the Grievant was not given adequate warning concerning the possible consequences of his conduct (Union Brief, Pg. 2). Since it was a permitted and accepted practice to take wood left on the roadside, the Grievant could not anticipate the possible consequences associated with such a removal. Several witnesses corroborated the Grievant's testimony concerning the practice of picking up roadside wood by employees for their own benefit.

Although the Grievant admitted that he took the wood, the Union argued that the circumstances surrounding the incident did not support the removal of wood as theft (Union Brief, Pg. 2).

For theft to have taken place, some value had to be attached to the wood. The Union alleged that the testimony clearly indicated that the wood had no commercial value. Kurfess testified that he could only remember one (1) previous board sale, and that wood was not sold. By not selling or using the wood, the Employer did not place any value on the wood removed by the Grievant.

The Union emphasized that the penalty imposed was not reasonably related to the seriousness of

the offense (Union Brief, Pg. 3). Circumstances surrounding this incident clearly indicated that the actions engaged in by the Grievant did not evidence an intent sufficient for removal. The Grievant, more specifically, was honest in his beliefs and acts, and thus, his character and integrity should not be questioned.

The Union also contested the charges dealing with the unauthorized use of a State vehicle and misuse of a State vehicle (Union Brief, Pg. 1). Both the Grievant and Morris testified that they had a great deal of flexibility in terms of scheduling their one-half hour lunch break. on the day in question, they decided to take their lunch period at 11:00 a.m. because their activities indicated that this was a logical stopping point. The removal and transport of the wood, therefore, were viewed as permissive activities engaged in off the clock during a lunch break period. The Grievant emphasized that the loading of the vehicle, pumping up the low tire, the discussion with the State Trooper, unloading the wood at his home, and the return trip to the work site were all accomplished within the scheduled one-half hour lunch period. Thus, in the Union's opinion, these

activities should be viewed as authorized and proper because they were not engaged in while on the Employer's time.

In a related matter, the Union urged the Arbitrator to disregard all of the violations other than the theft offense in rendering the Award (Union Brief, Pg. 3). These offenses were viewed by the Union as falling under the primary theft offense; and their inclusion as particulars served to exaggerate and justify the removal.

Several disparate treatment allegations were raised by the Union. First, the Union maintained that other similarly situated employees were engaged in the removal of wood for their own purposes, and yet, they were not disciplined. The Grievant and Morris testified that this practice was condoned by the Employer and frequently engaged in by other employees. D. Calcamuggio, a Highway Worker II, provided specific examples of similar activity engaged in by employees performing work out of the District garage. Second, the Union contended that the Employer failed to provide sufficient justification for the penalties assessed against Morris and the Grievant. Morris, more specifically, was equally involved in the incident and was charged with similar violations. The Union charged that the added offense dealing with the misuse of a State vehicle did not justify the elevation of the penalty from suspension to discharge (Union Brief, Pgs. 23).

Several procedural defect claims were raised by the Union. One claim dealt with notice requirements while the other

concerned requests made by the Union for documents relevant to the grievance under consideration (Union Brief, Pgs. 3-5).

With respect to the first alleged violation, the Union maintained that the Employer failed to provide proper notice in violation of the Grievant's due process rights as specified in Section 24.04 (See Pg. 5 of this Award for Article 24 -Discipline, Section 24.04 - Pre-Discipline). The Union argued that the A-302 Notice (Joint Exhibit 21 Pg. 3) was grossly deficient because it lacked sufficient specificity. The

"suspension/removal" penalty contained in the notice (Joint Exhibit 2, Pg. 3) was viewed as boilerplate because the same language is used for all employees scheduled for a disciplinary hearing. Meaningful notice would have been provided if the Employer had designated the specific penalty contained in the Employer's Disciplinary Actions Directive No. A-301 (Joint Exhibit 3). This deficiency hampered the Union's preparation for the predisciplinary hearing because they did not perceive the seriousness of the charges. Union representatives, more specifically, did not know that the Grievant was charged with a dischargeable offense prior to the meeting.

The second due process defect dealt with a violation of Section 25.08 of the Agreement (See Pg. 6 of this Award for Article 25 - Grievance Procedure, Section 25.08 - Relevant Witnesses and Information). L. Hayes, a Staff Representative, testified that she formally requested documents dealing with the predisciplinary report and other disciplinary recommendations dealing with the grievance (Union Exhibit 3). Compliance with **22**

this request, however, was not agreed to by the Employer. This refusal was viewed as highly egregious because it conflicted with a number of previous arbitration decisions which stated that such documents must be provided by the Employer. The Union argued that this recalcitrance justified a reduction in the penalty even if the Employer proved that the Grievant was engaged in theft of Employer property.

The Union maintained that the theft charge was a crime of moral turpitude which necessitated a close scrutinity by the Arbitrator (Union Brief, Pg. 5). The Union argued that the highest standard of proof was required in these types of circumstances.

THE ARBITRATOR'S OPINION AND AWARD

It is the opinion of this Arbitrator the Employer obtained a substantial level of proof that the Grievant engaged in theft of Employer property. Such a determination, however, does not necessarily satisfy the just cause requirement contained in the Agreement (See Pg. 4 of this Award for Article 24 Discipline, Section 24.01 - Standard). By blatantly refusing to provide the Union with relevant information, the Employer's action is tainted with a procedural defect which necessitates a modification of the removal penalty.

A brief comment seems necessary concerning the other particulars contained in the final Removal order (Joint Exhibit 2, Pg. 2). The charges listed indicate an attempt to "bootstrap" a number of allegations to the theft offense. Differences also

exist between the charges contained in the A-302 Pre-Suspension and/or removal notice (joint Exhibit 2, Pg. 3), including the added charges (Joint Exhibit 2, Pg. 4), and the final Removal Order (Joint Exhibit 2, Pg. 2). The Employer, moreover, failed to introduce any evidence dealing with the neglect of duty, insubordination, and the violation of Ohio Revised Code 124.34 charges. Confusion concerning differences and similarities between the unauthorized use of a State vehicle and the mis-use of a State vehicle also took place at the hearing. These ambiguities, and insufficient evidence and testimony, prevent a specific determination on these issues. Some testimony related to these matters, however, is pertinent in terms of determining the veracity of the Grievant's version of the events as it relates to the

theft issue.

In proving that theft has taken place, the Employer must prove the following necessary elements: (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. (Imperial Glass Co., 61 LA 1180, Gibson, 1973; Southern California Edison Co., 61 LA 803, Helbling, 1973). It is the opinion of the Arbitrator that these elements were proven by the various testimony and exhibits introduced by the Employer at the hearing.

The wood taken by the Grievant was property that either belonged to the Employer or the landowners in the vicinity. In **24**

either case, however, the wood did not belong to the Grievant. The ultimate use of the wood, or the value of the wood to the Employer, are not deemed to be critical aspects which distinguish theft versus legitimate activities. These determinations are solely within the Employer's domain of responsibility. Even if the wood was scrap, it belonged to the Employer and not the Grievant.

The wood was taken without the consent of authorized managerial personnel. Testimony provided by Cameron and the Grievant clearly indicate that Cameron never gave the Grievant permission to take the wood home. Cameron's response to the Grievant's request was not ambiguous but clearly placed the Grievant on notice that removal of the wood would not be condoned. A reasonable person would have viewed Cameron's response as a warning placing one in jeopardy if adherence to the warning was rejected. Cameron's testimony was also supported by Morris. He, more specifically, testified that he never heard Cameron give the Grievant permission to take the wood home.

Testimony dealing with the permission granted by Sanders is also viewed as contrived by this Arbitrator. Sanders did not testify on the Grievant's behalf. The Union, moreover, failed to introduce a statement by Sanders supporting this assertion. Such a critical feature of the Grievant's defense requires documentation or testimony if it is to be given any weight by this Arbitrator.

Asportation has been defined as the removal of things from one place to another, typically with felonious intent (Black's **25**

Law Dictionary, 4th Edition, West Publishing Co., Page 147). The Grievant removed the wood, during his shift, by placing the wood in the Employer's pickup truck and transporting it to his residence.

The intent element is often the most difficult to prove because it must often be inferred from the facts or circumstances surrounding an altercation. Several glaring inconsistencies indicate that the Grievant intended to deprive the Employer of his property.

First, if the practice of removing roadside wood for personal use was well established, the Grievant did not need to request permission from Cameron. Obviously, permission was required otherwise the request would have been superfluous. In a like fashion, Sander's alleged permission would have been

equally redundant if permission was not required.

Second, the Employer's disposal alternatives, and the procedures used to implement them, were known by the Grievant. He, more specifically, testified that landowners in the immediate vicinity were given the right of first refusal. The Grievant, however, never acknowledged whether the landowners in the vicinity of the incident were given this opportunity. In addition, the justification the Grievant provided Skelding was never proffered at the hearing. This justification dealt with the alleged arguments engaged in by farmers over ownership rights. These inconsistencies indicate that the landowners were never contacted, or if they were, the Grievant absconded with the wood before the problem was resolved. **26**

The Union's arguments dealing with disparate treatment were not supported by either evidence or testimony. The Employer, more specifically, was able to distinguish the facts surrounding Morris' involvement from the activities engaged in by the Grievant. Morris, more specifically, aided the Grievant with the loading and unloading of the wood but he did not engage in these activities for his own betterment

In a like fashion, Calcamuggio's testimony dealing with similar unpenalized violations at the District garage can be distinguished from the present grievance. one example dealt with employees following a supervisor's directives regarding the removal of wood to a relative's premises. Other examples dealt with the removal of wood by employees in their own vehicles after work. These examples differ dramatically from the activities engaged in by the Grievant. He, more specifically, was not directed in these activities by a supervisor, he transferred the wood in a State vehicle, and it is questionable whether he did so during an authorized break.

Successful disparate treatment claims, moreover, require that the Employer was aware of certain irregularities, condoned these irregularities, and treated like instances in a dissimilar fashion. These pertinent factors were not sufficiently established by the Union.

The Union did not establish that the Employer violated Section 24.04 (See Pg. 5 of this Award for Article 24 - Discipline, Section 24.04 - Pre-Discipline) by failing to provide proper notice. The notice was sufficiently specific because it **27**

designated the specific penalty contained in the Employer's Disciplinary Actions Directive No. A-301 (Joint Exhibit 3).

Although proper notice was provided, it might not have been necessary in this particular instance. The consequences of stealing property are so patently unacceptable that employees should know that discipline can be expected. Notice, therefore, is implied by the characteristics surrounding the misconduct (Memphis Light, Gas and Water Div., 77-1 ARB P 8202, 3886-87, Flanagan, 1977). Arbitrators have taken various positions in discipline and discharge cases where the employer has engaged in procedural defects. These approaches were summarized by Arbitrator Fleming in the following manner:

"... (1) that unless there is strict compliance with the procedural requirements the whole action will be nullified; (2) that the requirements are of significance only where t employee can show that he has been prejudiced by failure t comply therewith; or (3) that the requirements are important, and that any failure to comply will be penalize but that the action taken is not thereby rendered null and void."

(Fleming, R.W. The Labor Arbitration Process
Urbana: University of Press, 1965, Pg. 139).

The third approach is the most prevalent. As this Arbitrator has previously noted, he concurs with this approach because it has the virtue of penalizing failure to comply with contractual requirements, but does not necessarily obviate all that has been done.

The Parties have negotiated language dealing with the Union's request for information relevant to the grievance under consideration (See Pg. 6 of this Award for Article 25 - Grievant procedure, Section 25.08 - Relevant Witnesses and Information). **

In this Arbitrator's opinion the request was proper because it was specific (union Exhibit 3), relevant to the grievance, and reasonably available from the Employer. The request, moreover, was initiated prior to the Arbitration hearing and was not a "fishing expedition" by the Union. Arguments provided by the Employer dealing with policy considerations, and aiding the Union in the development of its case, provide weak justifications in light of the specific language negotiated by the Parties. If the Employer never intended to provide this type of information, it should have refused to accept the language at the bargaining table, not in an arbitration forum. This Arbitrator is not in a position to determine whether proper disclosure could have resulted in a possible settlement. Similar language, however, has been negotiated by other parties to expedite the grievance settlement process.

Even though the Agreement does not contain a specific penalty attached to such a violation, the Arbitrator cannot in clear conscience disregard language mutually agreed to by the Parties. To minimize the importance of this language would subtract from or modify the terms of this Agreement (Joint Exhibit 1, Pg. 40) which is clearly outside the scope of this Arbitrator's authority.

AWARD

The grievance is sustained in part and denied in part. The Grievant is to be reinstated without back pay and with loss of seniority. The severity of this Award should underscore the seriousness of the Grievant's conduct.

April 9, 1988

Dr. David M. Pincus

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