ARBITRATION DECISION NO.:
362

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

EMPLOYER:
Department of Transportation

DATE OF ARBITRATION:
June 14, 1991

DATE OF DECISION:
July 14, 1991

GRIEVANT:
Raymond E. Brown

OCB GRIEVANCE NO.:
31-02-(91-01-11)-0003-01-06

ARBITRATOR:
Anna D. Smith

FOR THE UNION:
Lois Haynes, Advocate

FOR THE EMPLOYER:
Rebecca C. Ferguson, Advocate
Paul Kirschner, Second Chair

KEY WORDS:
Removal
Theft of State Property
Mitigation

ARTICLES:
Article 24 - Discipline
§24.01-Standard
§24.02-Progressive Discipline
§24.05-Imposition of Discipline
§24.08-Employee Assistance Program

FACTS

The grievant, a twenty year employee of ODOT, was removed from his Highway Worker I position for allegedly stealing state property. On November 15, 1990, the grievant was assigned to do yard work at the Oak Harbor garage, but at about 11:10 a.m., he was observed by a Highway Maintenance Superintendent 2

transporting and dumping a load of stone on private property while using a state truck. The approximate value of the stone was $30. After being confronted about the incident, the grievant initially denied having taken the stone. However, the grievant later admitted to removing the stone without permission. As a result, the grievant was removed from state employment.

EMPLOYER'S POSITION

The employer asserted that the grievant was removed for just cause. The employer recognizes that the grievant had been an excellent employee prior to the theft. Nevertheless, the employer takes theft very seriously and finds removal an appropriate course of action even if it is a first offense. The employer recognizes that the amount of stone that was taken was a minor amount but the employer tolerates theft of no amount. The fact that the grievant was under stress during the time when this incident occurred is of no consequence. The employee had good knowledge of the Employee Assistance Program before the incident, but did not bring up the stress issue until after he lost his job. Furthermore, the employer argued, being under stress does not excuse theft.

UNION'S POSITION

The union did not deny that the grievant took the stone, however, it argued that the penalty of removal is inappropriate under the circumstances. First, the union asserted that the grievant was under stress at the time of the incident and he was not thinking clearly and needed help. Secondly, the union maintained that the amount of stone taken from ODOT was minimal and did not warrant a removal for a first offense. Thirdly, the union asserted that the grievant offered to return the stone or pay for it. The union cited another ODOT case where an employee was permitted to return a stolen engine in exchange for reducing his removal to a 30 day suspension. Consequently, argued the union, the employer has established precedent in theft cases which should be followed in this case.

ARBITRATOR'S DECISION

The arbitrator found that the grievant was removed for just cause by the employer. The arbitrator held that theft of property of <u>any</u> value is so violative of the necessary bond of trust between employee and employer that discharge on the first offense is reasonable. The arbitrator distinguished the previous ODOT theft case from this case by pointing out that the employee in the prior case actually believed the engine which he took was left for scrap; by contrast the grievant in this case was under no such impression concerning the stone. Additionally, the arbitrator recognized that the grievant was suffering from personal problems at the time of the theft. However, the arbitrator found that Article 24 of the Contract does not obligate the employer to persuade an employee to get professional help. The arbitrator felt that it was the employee's responsibility to seek help when he/she is having personal problems.

AWARD

The removal of the grievant was for just cause. The grievance was denied.

TEXT OF THE OPINION:

In the matter of Arbitration
Between

**STATE OF OHIO,
DEPARTMENT OF TRANSPORTATION**

and

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

OPINION

Anna D. Smith, Arbitrator

Case:
31-02-(01-11-91)-03-01-06
Raymond E. Brown, Grievant
Removal

I. Appearances

For the State of Ohio:
Rebecca C. Ferguson, Advocate,
Ohio Department of Transportation
Paul Kirschner, Second Chair,
Office of Collective Bargaining
Bill Dunn, Highway Maintenance
Superintendent 2, Ohio Department
of Transportation, Witness
Herbert Behrman, Project
Engineer 5, Ohio Department of
Transportation, Witness.

For OCSEA Local 11, AFSCME:
Lois Haynes, Advocate, OCSEA
Raymond E. Brown, Grievant
Brenda Vincent, Steward
Melvin L. Tice, Witness.

II. Hearing

Pursuant to the procedures of the parties a hearing was held at 10:00 a.m. on June 14, 1991 at the Ohio Department of Transportation District 2 Headquarters, 317 E. Poe Road, Bowling Green, Ohio before Anna D. Smith, Arbitrator. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn, and to argue their respective positions. No post-hearing briefs were filed in this dispute and the record was closed at the conclusion of oral argument, 12:15 p.m. June 14, 1991. The opinion and award is based solely on the record as described herein.

III. Issue

By agreement of the parties, the issue is:

Did the Department of Transportation discharge Mr. Raymond Brown for just cause in accordance with Article 24? If not, what shall the remedy be?

IV. Joint Exhibits and Stipulations

Joint Exhibits

1. 1989-91 Contract between the parties;
2. Grievance Trail;
3. Directive A-301 (Disciplinary Guidelines);
4. Directive A-302 (Pre-Disciplinary Hearing Procedure);
5. Directive A-107 (Stolen or Missing State Property Policy);
6. A-302 Notice of Hearing;
7. Prior Discipline of Grievant:
   ºOne-day suspension, 5/26/89
   ºWritten reprimand, 7/20/88;

8. Inter-Office Communication from Bill Dunn to Herb Behrman, 11/15/90;
9. MR-502 Form (Daily Work Report), 11/15/90;
10. M & R 698 Form (Notice of Tree Removal and Right of Entry);
11. MR-558, Inventory Card;
12. Performance Reviews of Grievant, 12/3/88-12/3/89 and 12/3/89-12/3/90;
13. Certificates of Training and Awards to Grievant.

Joint Stipulations of Fact

1. From June of 1961 through September of 1969 Mr. Raymond Brown worked off and on for the Department as a Laborer. Mr. Brown was hired into a full time permanent position on December 3, 1973 as a Highway Worker 1 assigned to the Ottawa County garage. The garage is located in Oak Harbor. At the time of Mr. Brown's removal he was a Highway Maintenance Worker 3 assigned into a Temporary Work Level as a Highway Maintenance Worker 4. He had been in the Temporary Work Level since September 9, 1990. Mr. Brown's total service with the Department is slightly over twenty-one (21) years.
2. Mr. Brown's supervisors were Mr. Bill Dunn, Highway Maintenance Superintendent 2, Mr. Dennis Daup, Highway Maintenance Superintendent 1 and Mr. Fred Newton, Highway Worker Supervisor.
3. Mr. Bill Dunn's supervisor is Mr. Herbert Behrman, Project Engineer 5. Mr. Behrman is the District Engineer in charge of operations.
4. Mr. Brown was an OCSEA/AFSCME Steward for the Ottawa County garage.
5. Directives A-301 and A-107 were posted in Mr. Brown's work location.
6. Mr. Brown's prior disciplinary record reflects a written reprimand on July 20, 1988 for insubordination (failure to report off properly) and a one-day suspension on June 7, 1989 for insubordination and unauthorized absence.
7. On November 15, 1990 Mr. Brown was assigned, by Mr. Daup, to do yard work around the Oak Harbor facility. At approximately 11:10 a.m. Mr. Dunn observed Mr. Brown on Toussaint Portage Road in dump truck number T-2-631 pulling into a private drive. Mr. Dunn then observed Mr. Brown dump a load of #1 stone on the property.
8. On November 15, 1990, at approximately 11:40 a.m., Mr. Brown admitted to Mr. Dunn and Mr. Daup that he took the vehicle and the #1 stone to the private property on Toussaint Portage Road.
9. In accordance with Directive A-302, a pre-disciplinary meeting was held at the District Headquarters in Bowling Green on November 29, 1990.
10. Mr. Brown attended the meeting and was represented by Mr. David Kiser, OCSEA/AFSCME Steward. Also present were Mr. Dunn, Ms. Ferguson, Labor Relations Officer, and Ms. Brenda Vincent, Highway Maintenance Worker 2 and Steward-in-Training.
11. At the pre-disciplinary meeting Mr. Brown stated he did not have authorization to take the stone. Further, he knew the stone was State property and that he loaded, transported and dumped it on State time with State Equipment. Mr. Brown offered to pay for the stone.
12. Mr. Brown was removed on January 4, 1991 and a grievance was properly filed.
13. A level 3 grievance meeting was held on February 6, 1991 at the Oak Harbor garage. Again, Mr. Brown admitted taking the stone without authorization.

14. The Department of Transportation, under different circumstances, has issued lesser forms of discipline for charges of theft.
15. The case is properly placed before the Arbitrator for determination.

V. Relevant Contract Provisions

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....

§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. One or more verbal reprimand(s) (with appropriate notation in employee's file);
B. One or more written reprimand(s);
C. One or more suspension(s);
D. Termination....

§24.05 - Imposition of Discipline

. . .

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

§24.08 - Employee Assistance Program

In cases where disciplinary action is contemplated and the affected employee elects to participate in an Employee Assistance Program, the disciplinary action may be delayed until completion of the program. Upon successful completion of the program, the Employer will meet and give serious consideration to modifying the contemplated disciplinary action.

VI. Summary of Facts

As the foregoing stipulations indicate, there is considerable agreement concerning the events that gave rise to the grievance. Additional pertinent facts were gleaned through the testimony of witnesses and through documentary evidence, warranting a summary of the case.

On November 15, 1990, the Grievant was assigned to do yard work at the Oak Harbor garage, but at about 11:10 a.m. he was observed by Bill Dunn, Highway Maintenance Superintendent 2, transporting and dumping a load of stone on private property by means of a State truck (T-2-631). The approximate value of the stone was less than $30. The Grievant, Raymond Brown, did not have his employer's authority to take the stone or permission to use the dump truck; neither had written right of entry to the private property been obtained. Upon being confronted by Dennis Daup (Highway Maintenance Superintendent 1) and Mr. Dunn back at the garage, Brown appeared confused. He initially denied having taken the stone, but shortly admitted to the charge. He has not since recanted this admission, but fully acknowledges what he did and expresses regret. He has also attempted to make restitution by replacing the stone at his own expense, but without the consent of the Department. A pre-disciplinary meeting was properly held, following which the Grievant was removed on January 4, 1991, for infractions of Rule 6 (theft) and Rule 18 (misuse of state vehicle). A grievance was filed on January 7 and properly processed through to arbitration.

The rules which the Grievant is charged with violating were promulgated by Directive A-301, May 1, 1987, which was posted at Brown's work location, as was Directive A-107, clarifying the Department's policy with respect to stolen and missing state property.

At the time the incident occurred, Brown had over 21 years of service with the Department, had received

awards and substantial training in connection to his employment (and some tangential to it), had received good performance evaluations, was a Union Steward, was well liked and considered honest. In fact, his supervisor testified that he had not wanted him removed. Brown had two prior disciplinary actions on his record, a written reprimand and a one-day suspension for call-off and absence violations. The Grievant and other witnesses testified that he had been under stress for some time as the result of family members' illnesses and hospitalizations. This fact was generally known by co-workers and by Mr. Dunn, but it was not brought up by either party to the dispute until Brown raised it as a defense on his grievance.

The Grievant was aware of the Employee Assistance Program in his role as a steward and, according to the testimony of Dunn, in connection with his own prior discipline. However, Mr. Dunn did not counsel Brown to seek assistance for his problems, nor did Brown request participation in the EAP at his pre-disciplinary hearing.

VII. Positions of the Parties

Position of the Employer

The Employer points out that the Grievant admits he took the stone and used State equipment to do so without authorization. There is thus no question that theft occurred. In response to Union arguments of mitigating factors, the Department first says that it does all it can to make employees aware of the Employee Assistance Program, but it cannot be expected to read the minds of its employees and is under no obligation to ensure that they enroll in the EAP where indicated. In this instance, the employee had good knowledge of the EAP option before the event, but did not bring up the stress issue until after he lost his job. In any event, the Employer argues that being under stress does not excuse theft.

With respect to the record of the Grievant, the Department acknowledges that he has been an excellent employee and that his removal had an impact on its operations. Because of his record, the facts were carefully reviewed in considering disciplinary action. Nevertheless, the Department takes theft very seriously, seeking removal on a first offense absent mitigating and extenuating circumstances. In this case, circumstances warranting a lesser penalty do not exist, and returning an employee to the workplace after an admitted theft would have an undesired impact.

Another point brought out by the evidence is the value of the stone taken and the Grievant's attempt to make restitution. The Department admits it is a minor amount and constitutes a minor loss of efficiency, but the Employer tolerates theft of no amount and argues that replacement of the stolen material was a last ditch effort of an employee fighting to save his job. The Department refers the Arbitrator to her Wharton decision in which she held that it is not "unreasonable for an employer to terminate an employee who steals the employer's property of whatever value."

In conclusion, the Department claims it has acted in accordance with §24.02 and §24.05 of the Contract, and asks that the grievance be denied and the removal upheld.

Position of the Union

The Union does not deny that the Grievant took the stone. However, it argues that the penalty of removal is inappropriate under the circumstances.

First, the Grievant was under stress at the time. The Union puts forth the view that a good employer would want to help a good employee, and claims that this was not done. Despite the Department's contention, Dunn did not talk to the Grievant about his situation. The Union goes on to argue that it does not matter that the Grievant was a steward. Under his personal circumstances he was not thinking clearly and needed help.

Under the Department's policy, this clearly is a case of minor theft. By the disciplinary guidelines, a suspension is called for, claims the Union, and removal is overkill. According to Article 24, discipline is to be corrective, not punitive. Where is the correction here?

The Union contends that ODOT has set a precedent in cases where restitution is made, citing the theft of an engine from the Lima garage referred to in the Snyder case. In this case, the employees voluntarily

returned the engine and received 30-day suspensions, thus setting the precedent for restitution. The Arbitrator heard how the Grievant made two offers of restitution, tried to do so by replacing the stone, and how the Employer treated these actions.

In the Snyder case, Arbitrator Keenan held that "one standard which emerges from these concepts is that where, as here, the nature of the offense (theft) is the same, but other circumstances vary, variations in the discipline imposed must nevertheless be reasonably appropriate to the variations in the other circumstances." In the Union's view, the discipline is not "reasonably appropriate." The removal is punitive. The Union therefore seeks a suspension of whatever length the Arbitrator deems appropriate.

VIII. Opinion of the Arbitrator

There being no dispute as to what the Grievant did--committed theft and misused the Employer's vehicle--nor any issue with respect to the process by which discipline was imposed, the only question for the Arbitrator is whether the penalty of removal is justified under the circumstances. The Union asks the Arbitrator to consider several factors.

One is the small value of the product taken. As this Arbitrator has previously held, theft of property of any value is so violative of the necessary bond of trust between employee and employer that discharge on the first offense is reasonable. That this theft was "minor" in its dollar value does not in and of itself make termination unreasonable. It is true that the Employer's policy guidelines make provision for suspension on the first offense, but, as the Employer argues, this is in anticipation of circumstances warranting mitigation in penalty. Value is not one of these.

The Union also points out that the Grievant's attempts at restitution have been ignored by the Employer, who has previously imposed a 30-day suspension when restitution was made. While these actions of the Grievant speak in his behalf, they do not amend the breach in the bond of trust, and the Arbitrator cannot require the Employer to adjust the penalty because of them. This would send an inappropriate signal to the workplace that one can escape discharge for first acts of detected theft if restitution is made. The Arbitrator also does not agree with the Union that a precedent for mitigation-on-restitution was established by the Lima garage case referred to in Snyder, because the facts of that case suggest a previously lenient theft policy which has since been tightened up (p. 14) and the employees' belief that the engine was scrap or junk. There is no evidence here of a relapse in enforcement of the theft rule, that the Grievant mistook the stone for scrap, or that such a mistake--had it existed--should have been taken into account. In other words, the differences between the engine case and the instant one justify differences in treatment.

A third mitigating factor offered by the Union is the Grievant's state of mind at the time of the incident. It is unquestioned that the Grievant's personal circumstances were unfortunate and that this was generally known, even to Management. His functioning was no doubt affected, but to what extent and in what way cannot be ascertained from the record. The Arbitrator is mystified as to why this incident occurred, given the Grievant's record and reputation, but does not see how theft is a consequence of the stress of family illness.

The Union would have the Arbitrator believe that the Employer was derelict in a duty to get the Grievant assistance for his problem. The Arbitrator agrees that employers generally have an interest in supporting their employees' satisfactory job performance, but current society requires some respect for the individuals privacy. Mr. Dunn appeared to draw the line in a reasonable way and within the bounds of contractual just-cause and EAP standards. He knew of the situation, accepted the Grievant's explanations for leave usage, and thought the EAP was brought up in connection with the one-day suspension. Beyond this he evidently chose not to go, out of respect for Brown's privacy. He, or any other ODOT employee at the garage might have said more, but the Arbitrator does not read Article 24 to mean that the Employer is obligated to persuade employees to get professional help. Ultimately, it is the employee's responsibility to avail himself of known opportunities or face the consequences of failing to do so. Mr. Brown surely was well aware of the EAP, and yet did not raise the stress issue until after removal was imposed or, for that matter, ever offer to participate in EAP.

The Union cites the Grievant's long and good record with the Department. Such a record would, for many infractions, justify mitigation of the penalty. Not so here. Theft of employer property is such a breach that

extraordinary circumstances are required to justify overturning a removal imposed without discrimination. Good and long service is commendable, but it does not constitute an extraordinary mitigating and extenuating circumstance.

Finally, it must be pointed out that against the minor value, restitution, stress and tenure factors must be weighed two aggravating factors: in the commission of this theft, the Grievant used both the Department's truck and the Department's time without authorization.

As painful as it is to uphold the removal of a valued employee who is in a difficult situation, the Arbitrator must and does find that the discharge was reasonably appropriate to the circumstances.

IX. Award

The discharge of Raymond Brown was for just cause in accordance with Article 24. The grievance is denied.

Anna D. Smith, Ph.D.
Arbitrator

July 14, 1991
Shaker Heights, Ohio