

ARBITRATION DECISION NO.:

398

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Highway Safety,
Bureau of Motor Vehicles

DATE OF ARBITRATION:

October 10, 1991

DATE OF DECISION:

November 20, 1991

GRIEVANT:

C. Christian

OCB GRIEVANCE NO.:

15-02-(91-04-30)-0040-01-09

ARBITRATOR:

Rhonda Rivera

FOR THE UNION:

Brenda Goheen

FOR THE EMPLOYER:

Ed Flynn
Paul Kirschner

KEY WORDS:

Removal
Falsification of Records

ARTICLES:

Article 24 - Discipline
 §24.01-Standard
 §24.02-Progressive
Discipline
Article 25 - Grievance
Procedure
 §25.03-Arbitration
Procedures
 §25.08-Relevant
Witnesses and Information

FACTS:

The grievance arises out of the Department of Highway Safety in the Bureau of Motor Vehicles.

Specifically, the grievant, a Salvage Processor, was charged with falsifying documents in the Distribution Center. The employees in this Center, including the grievant, are responsible for destroying goods which are considered unusable or dangerous. The grievant was responsible for signing off on forms after such goods had been destroyed. However, it was discovered that many of the goods for which the grievant had signed off had not been destroyed. Given the grievant's long history of disciplines, the grievant was removed from employment for this violation.

EMPLOYER'S POSITION:

The employer states that it is clear that the grievant signed for license plates that he audited and allegedly destroyed when, in fact, he had not destroyed them. For this misconduct the grievant has been disciplined three times. The employer claims that the initials on the forms in question are the grievant's because they are identical to other forms which the grievant admits signing. The employer maintains that it is essential that it employ only trustworthy employees and that the grievant has not proven himself trustworthy.

UNION'S POSITION:

The grievant denied that the documents in question bear his signature. The union pointed out significant differences in the slash marks. Further, the grievant's signature is an easy one to copy. The grievant's past disciplinary record should not be used to determine the question of his guilt in this case. A long term employee should not be removed if there is any doubt about whether he was guilty of the charge. Additionally, the union requested the name of certain witnesses from the employer but was not given these names in a timely and accurate fashion thus frustrating the union's investigation of the case.

ARBITRATOR'S OPINION:

The arbitrator found that a number of facts indicate that the grievant did sign the forms in question. The signatures in question are incredibly similar to the grievant's actual signature; the grievant has been engaged in similar activity in the past; the other Salvage Processor in the department has signatures and codes significantly differently than those of the grievant. No evidence was presented by the union to show that someone else could have made the signatures. Furthermore, the Union demonstrated no motive for someone else to do so. However, the employer made no investigation to determine if the grievant's allegation of forgery had any basis in fact. Just cause requires the employer to do so. The arbitrator notes that other departments in the State have hired handwriting experts to do such an investigation. Further, the union made a request from the employer that they deliver the name of the individual who delivered and picked up the forms and items in question. The employer was unclear and evasive in its answer making it difficult for the union to conduct a proper investigation of the grievance. Finally, it is important to keep in mind that the employer bears the burden in this case. The arbitrator finds that it did not meet this burden in this case. The arbitrator does not commend nor ignore the grievant's deplorable work record nor condone his past behaviors; however, a bad past record does not create current just cause.

AWARD:

Grievance granted in full. Grievant is to be reinstated and made whole.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

**OCSEA, Local 11
AFSCME, AFL-CIO**
Union

and

State of Ohio

Employer.

Grievance No.:

15-02(910430)40-01-09

Grievant:

(Christian, C.)

Hearing Date:

October 10, 1991

Closing Date:

October 19, 1991

Award Date:

November 20, 1991

Arbitrator:

R. Rivera

For the Employer:

Ed Flynn

Paul Kirschner

For the Union:

Brenda Goheen

Present at the Hearing in addition to the Grievant and Advocates were Bruce Watts, BMV District Center Manager (witness), Roger Elmer, BMV Supervisor (witness), Frank Bennett, BMV Supervisor (witness), and Jeff Giffin, Chief Steward (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. All witnesses were sworn.

Joint Exhibits

J1 Contract

J2 A BMV Work Rules

B Grievant's Signature Form for Work Rules

J3 Discipline Trail

A Incident Report

B Pre-disciplinary Meeting Notice - Termination

C Termination Notice - April 4, 1991 - Neglect of duty

D 10-Day Suspension - November 29, 1990 - Dishonesty/neglect of duty and excessive absenteeism

- E 1-Day Suspension - August 21, 1990 - Neglect of duty/excessive absenteeism and failure to follow proper notification procedures
- F 2-Day Suspension - July 30, 1990 - Neglect of duty/failure to perform job duties
- G Written reprimand - June 14, 1990 - Excessive absenteeism
- H Verbal Reprimand - June 14, 1990 - Excessive absenteeism
- I Written Reprimand - March 12, 1990 - Neglect of duty/excessive absenteeism and failure to follow proper call-in procedures
- J Verbal Reprimand - February 27, 1990 - Excessive absenteeism
- K 1-Day Suspension - February 15, 1990 - Failure to perform job duties
- L Counseling Session - June 6, 1989
- M Written Reprimand - May 15, 1989 - Neglect of duty/failure to perform job duties
- N Verbal Reprimand - November 21, 1988 - Neglect of duty/leave without pay
- O Counseling Session - April 12, 1988
- P Verbal Reprimand - January 27, 1988 - Neglect of duty/leave without pay
- Q Counseling Session - January 15, 1988

J4 Grievance Trail

- A Grievance Form
- B Step 3 Grievance Meeting Notice
- C Step 3 Grievance Response

J5 BMV Disposition of Deputy Registrar Inventory Forms (5609's)

- A 025868
- B 025869
- C 025871

Employer Exhibits

1. IOC to Chief M. Tarcia from F. Bennett, Supervisor, reporting infraction and requesting discipline against Grievant dated January 2, 1990 with 5609 form attached No. 057908.
- 2.
3. A BMV5609, No. 064731
B BMV5609, No. 013211
4. Salvage and Destruction Policy for Deputy Registrar Merchandise dated March 2, 1987
5. IOC dated January 29, 1991 to Bennett from Warner entitled "Obsolete Plates and Validation Sticker to be destroyed"
6. Confidential Discussion Draft of Memo from Auditor of State to Ohio Department of Highway Safety entitled "Internal Control"

Union Exhibits

1. 5609 No. 025868 dated January 29, 1991
2. 5609 No. 025871 dated January 29, 1991
3. Letter from Goheen to Flynn dated October 7, 1991
4. Affidavit of Major Matilda H. Walker
5. Medical Examination of Grievant dated September 19, 1991 and September 20, 1991

Issue

"Was Grievant terminated for just cause? If not, what shall the remedy be?"

Contract Sections

§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.

§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.

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.

§25.03 - Arbitration Procedures

Both parties agree to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the arbitrator.

The Employer or Union shall have the right to request the arbitrator to require the presence of witnesses and or documents. Each party shall bear the expense of its own witnesses who are not employees of the Employer.

Questions of arbitrability shall be decided by the arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute.

The expenses and fees of the arbitrator shall be shared equally by the parties.

The decision and award of the arbitrator shall be final and binding on the parties. The arbitrator shall render his/her decision in writing as soon as possible, but no later than thirty (30) days after the conclusion of hearing, unless the parties agree otherwise.

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

If either party desires a verbatim record of the proceeding, it may cause such a record to be made provided it pays for the record. If the other party desires a copy, the cost shall be shared.

§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.

Facts

This Grievance arises in the Ohio Department of Highway Safety with the Bureau of Motor Vehicles. The specific Section involved is the Distribution Center. Bruce Watts is the Manager of the Distribution Center. Materials used by the Bureau of Motor Vehicles (BMV) are stored by and distributed from this Center. Unused materials are returned to the Center to be salvaged or destroyed. Materials include license plates as well as other items. Mr. Bennett stated that an Audit performed by the State Auditor in October 1986 found that "new license plates and stickers are not stored in a secure manner, returned license plates from deputy registrars are not stored in an orderly manner and are not rendered unusable before being sold for scrap and proper annual inventories are not taken." The Audit recommended that BMV "develop a system of internal control that would provide accountability for the inventory of license plates and related stickers until final disposition:" (Employer's Exhibit #6). In response to this recommendation, Mr. Bennett designed BMV form #5609. This form is used for items returned to the BMV and, when used properly, will document proper disposition of the items involved. The form has an original (white) and 4 NCR copies (Green, Canary, Pink, and Goldenrod). Each form also has its own serial number (a copy of the form is attached). Under Mr. Watts are two (2) first line Supervisors -- Mr. Elmer who supervises the "special plate section" and Mr. Bennett who supervises the Salvage and Distribution Sections.

The Grievant is an employee of 10-1/2 years with the BMV. Joint Exhibit 2B indicates that on November 29, 1988, the Grievant received the Department of Highway Safety's Work Rules and Procedures, effective December 1, 1988 (Joint Exhibit 2B).

Prior to this discipline, the Grievant's file contained the following current discipline (Article 24):

1. January 15, 1988. The Grievant was counseled for "uncooperative behavior" by K. Wade and F. Bennett (Joint Exhibit 3Q).
2. January 27, 1988. The Grievant was verbally reprimanded by F. Bennett for absence from work without prior approval and failure to follow the call-off procedures (Joint Exhibit 3P).
3. April 12, 1988. The Grievant was counseled by B. Watts about use of leave time (Joint Exhibit 3O).
4. November 21, 1988. The Grievant received a Verbal Reprimand from B. Watts for having more than 8 hours of leave without pay since May 17, 1988 (Joint Exhibit 3N).
5. May 15, 1989. The Grievant was given a Written Reprimand which read as follows:

"On Wednesday, April 26, 1989, license plates and validation stickers were found in the Salvage Section with other materials that were held for possible re-consignment. A check of the inventory documentation shows these items were physically audited by you on Monday, February 27, 1989, Monday, March 13, 1989, and Tuesday, March 21, 1989 and should have been destroyed on those dates. As you are aware, BMV policy requires destruction of these items on the day of the audit.

This memorandum will serve as a Written Reprimand for neglect of duty and will be placed in your personnel file. It will also serve as a warning that future violations may result in more severe discipline."

6. June 6, 1989. The Grievant was counseled for failing to follow BMV Smoking Policy (Joint Exhibit 3L).
7. February 15, 1990. The Grievant was given a one (1) day suspension for "failure to perform your normal job duties" (Joint Exhibit 3K).
8. February 27, 1990. The Grievant received a verbal reprimand from B. Watts for accumulating over eight (8) hours of leave without pay (Joint Exhibit 3J).
9. March 12, 1990. The Grievant was given a Written Reprimand by F. Bennett for failure to report to work on time and failure to report off correctly (Joint Exhibit 3I).
10. June 14, 1990. The Grievant received a verbal reprimand from F. Bennett for sick leave pattern abuse and failure to provide a medical excuse (Joint Exhibit 3H).
11. June 14, 1990. The Grievant received a Second Written Reprimand for Excessive Absenteeism and failure to provide timely physician's statements (Joint Exhibit 3G).

12. July 30, 1990. The Grievant was suspended for two (2) days for neglect of duty/failure to perform job duties (Joint Exhibit 3F).
13. August 21, 1990. The Grievant was suspended for one (1) day for Excessive Absenteeism and Failure to follow Proper Notification Procedures (Joint Exhibit 3E).
14. November 29, 1990. The Grievant was suspended for 10 days for Dishonesty/Neglect of Duty and Excessive Absenteeism (Joint Exhibit 3D).

With regard to the subject of this Grievance, the Grievant was notified on March 6, 1991 of a Pre-Disciplinary Meeting to be held on March 13, 1991 and informed that the department was "considering terminating you for neglect of duty" (Joint Exhibit 3B). The Pre-Disciplinary Meeting was held, and, on April 4, 1991, the Grievant was terminated (Joint Exhibit 3C). The Grievance was filed on April 5, 1991 and alleged that no just cause existed pursuant to Article 24 and "applicable articles and ORC." A Step 3 was held on May 14, 1991 (Joint Exhibit 4B) and the Step 3 response which upheld the termination was rendered on June 24, 1991 (Joint Exhibit 4C).

On October 7, 1991, the Union Representative faxed to the Employer's Representative, a letter requesting documents and information for the Arbitration pursuant to Article 25.08 (Union Exhibit 3). That letter read as follows:

"Pursuant to 25.08 of the parties contract please provide me with the following information:

- 1) verification of items not destroyed and a list of such items; (provide visual proof or statement with chance to interview individual who did destroy);
- 2) attendance records for Calvin Smith and the Grievant from January 29 to March 4, 1991;
- 3) name of individual who delivered 5609's and picked up items from Ms. Warner;
- 4) copy of original 5609's with signature showing: (025868, 025869, 025870, 025871, 025872);
- 5) policy for processing of 5609's;
- 6) copy of 5609's processed by Grievant in January, February and March of 1991.

The Arbitration hearing was held October 10, 1991.

The Employer's first witness was Mr. Roger Elmer, Supervisor of Special Plates Section. Mr. Elmer testified that the license plates at issue in the Grievance "were stored in my section." He said that the duties of his section included receiving a form to destroy plates stored in his section. Upon receipt of such a form, the plates are pulled, checked against the form, and sent to the salvage area. The form used is the BMV5609. When goods are taken to "salvage" from "special plates" according to Mr. Elmer "they (salvage) sign off and return them (the forms) to us." The forms, he said, are "generated in the main building, and we follow the procedure." "We file the form to prove the process is done." The form usually accompanies the plates; at that time (when the form comes to his section), no signature or date exists in lower box entitled "Received at BMV Distribution Center," and his section does not put the "checks" on the form. The Employer's advocate asked Mr. Elmer "Who took the plates at issue to the salvage area?" Mr. Elmer responded "J. Conkey." At that point, the Employer turned Mr. Elmer over for cross-examination.

The Employer's second witness was Frank Bennett, Supervisor of the Distribution Center over the Salvage Section and the Distribution Section. Mr. Bennett was shown Joint Exhibit 3A. Mr. Bennett said that he wrote the IOC of March 4, 1991 to his boss to summarize the incident leading to the discipline of the Grievant. The IOC read as follows:

"Sometime last week an employee from the Special Plate Section approached me with a question as to how soon the Salvage Section would be able to process the materials from their area. The indication was that the paper work for these materials had already been sent to the Salvage Section with the Remainder of the materials held in the main building. It was also stated that Reservations had sent these materials to the warehouse several weeks prior to the inquiry from Roger's staff. At this point I started a search for the

5609's in question. I located these documents in the Salvage Section with the other paperwork for this quarters work.

Attached are copies of the 5609's in question, that indicate all the items have been verified and the document has been signed indicating that all items listed had been processed in the appropriate manner. This constitutes yet another incident of neglect of duty and I believe that discipline should be imposed."

Mr. Bennett indicated that the employee who contacted him was Mr. Conkey who said he wanted "certain materials" removed from the Special Plates section. Ms. Bennett testified that he told Mr. Conkey that he (Bennett) needed the paperwork. According to Bennett, Conkey told him (Bennett) that the paperwork had already gone to Salvage Section. Mr. Bennett said he went to the Salvage Section and found the paper work: BMV5609 No. 025868, No. 025869, No. 025871 (Joint Exhibits 5A, 5B, and 5C). According to these forms, the items listed on these forms had been destroyed. The forms were checked next to each item in green, the M code showed an "S" for all items, and forms were signed in the box entitled "Received at BMV Distribution Center." Bennett took the forms, returned to the Special Plates section, and found the majority of the items were not destroyed but were still on the shelves. He concluded that the signature was the Grievant's signature from having seen previous BMV's signed by the Grievant.

Bennett said that the Grievant had been disciplined on prior occasions for similar actions. On January 2, 1990, Bennett had reported a similar incident where the Grievant had signed a BMV 5609 (No. 057908) indicating that material had been destroyed, and the material had not, in fact, been destroyed (see Employer's Exhibit 1A). The signature on that BMV5609 (No. 057908) was in Mr. Bennett's opinion extremely similar to the signature on the BMV5609's involved in the incident leading to this discipline (see Employer's Exhibit 1B). The January, 1990 incident resulted in the one day suspension of February 15, 1990 (see Joint Exhibit 3K).

The Grievant had received a written reprimand for a similar incident in May of 1989 (see Joint Exhibit 3M).

A third similar incident occurred and resulted in the two (2) day suspension of July 30, 1990 (see Employer's Exhibit 3F). The two BMV5609's which were the evidence in that incident also showed signatures remarkably similar to the signature on the three BMV5609's at issue in this Grievance (see Employer's Exhibits 3A and 3B (BMV5609's No. 064731 and No. 013211)). This incident was described in a IOC dated June 6, 1990 by Mr. Bennett (see Employer's Exhibit 2). Mr. Bennett said that the Grievant had not appealed any of the prior disciplines dealing with BMV5609's which documented destruction of goods which had not, in fact, been destroyed.

The Union stipulated that all the signatures on the BMV5609's involved in the prior disciplines were the signatures of the Grievant. (The Union reiterated its position that the signatures on the BMV5609's in this case (025868, 025869, and 025971) were not the Grievant's signature. Mr. Bennett said that the Salvage Department had two employees, the Grievant and Mr. Calvin Smith. He admitted on cross-examination that hard feelings existed between Mr. Smith and the Grievant; he said that the discipline given the Grievant on January 15, 1988 for "uncooperative behavior" was based on personal animosity between the two men.

Mr. Bennett said that the proper method of Salvage was laid out in the policy dated March 2, 1987 (Employer's Exhibit 4). This policy was designed to implement a procedure to meet the criticisms of the audit and used BMV5609 as the principal control tool. That policy read as follows:

"In order to comply with the citations detailed in the recent State Auditor's Report, it will be necessary to implement a new salvage and destruction program at the Distribution Center for returned and unconsigned Deputy Registrar merchandise. Once the chopper and shredder become operational, the following policy and procedures will be in effect.

- 1) No items will be destroyed until the material verification audit (matching items listed on the 5609 form) has been completed and a determination has been made to re-consign or destroy the item(s).
- 2) If a determination has been made to destroy an item, it will be documented on the 5605 form under the

material handling code. Items that will not be re-consigned shall be destroyed immediately on a first in - first out (FIFO) basis.

3) In accordance with the regulations of the State Information Management Division of DAS the use of the shredder will be limited to the following items:

- Temporary Tag Placards
- Validation Stickers
- County I.D. Stickers
- Snowmobile/APV Decals
- Blank Drivers License Applications
- Blank I.D. Applications
- Blank Universal Registration Applications

4) All shredded merchandise will be disposed of on a daily basis through the regular waste service at the Distribution Center.

5) The metal chopper machine will be used to destroy all returned and unconsigned license plates to be salvaged. Destroyed license plates will be salvaged through a contracted metal dealer on a quarterly basis.

6) A Destruction Report (DF-565 form) will be submitted to the Investment Recovery Division of DAS on a quarterly basis.

In closing, the following policy and procedures captioned above shall be strictly adhered to and observed. Under no circumstances should this policy be deviated from unless approved by me. Please inform your staff of this change.

Should you have any questions on this matter, please contact me at extension 7876."

Mr. Bennett described the process as follows. The form (5609) should arrive with the materials at the Salvage section. (The Salvage section opens to the outside. Within the building, Salvage is within a fenced-in area with a gate. If procedures are working, access to the Salvage Area is limited.) When the materials and form arrive at Salvage, the Processor (Smith or Grievant) should audit the materials, i.e., make a green check next to each item indicating that the item is in the Salvage area and ready to be destroyed. When the items are destroyed, the processor should put an individual "S" on every M Code line next to description of each destroyed item. Then, the processor should sign the bottom box and fill in the date indicating that all the materials listed on that form have been destroyed.

Mr. Bennett said that when he found the forms indicating that all the materials at issue had been destroyed that, in fact, 90% of those materials were still in the Special Plates area and had apparently never gone to the Salvage Section.

Mr. Bennett explained that all the material represented by the 5609's at issue had not been delivered for destruction in one mass. Rather, a small amount of this group of materials (10%) had been sent from the Special Plates section in another building together with the form. This process had been initiated by Anne C. Warner. He had received a memo (Employer's Exhibit 5) which read as follows:

"Please pick up the obsolete plates and validation sticker from third floor, Special Plates. These items are to be destroyed. Part of these plates are also stored in warehouse."

Someone from his Section had been sent to pick up 10% of the materials with the BMV5609's. Normally either Smith or the Grievant would be sent to get the materials and the forms. Those forms and the 10% were taken to Salvage. However, before the BMV5609's could be properly audited and signed, the other 90% of the material had to be in the Salvage area. Only when all 100% of the material had been audited and destroyed should the 5609's have been completed. In this case, the Grievant had allegedly attested to the destruction of material which had not been destroyed.

On cross-examination, Mr. Bennett was asked if he did not find it odd that Mr. Conkey had initiated this

process by calling about the material? Bennett replied no. "Wasn't it odd, he was asked, since it was Mr. Conkey who took the forms and material to Salvage?" Mr. Bennett denied that Mr. Conkey had taken the material and the forms to Salvage. Mr. Bennett was asked then how he could maintain that Mr. Conkey had not done so when Mr. Elmer had testified that Conkey had done so? Bennett said he did not hear Mr. Elmer say that Mr. Conkey had brought the forms and the material to Salvage. Mr. Bennett was asked if the Grievant had denied that the signatures on the crucial BMV5609's were his. Bennett said "yes." Bennett was asked "did you investigate to determine if someone else had signed the Grievant's name?" Bennett said "no." Why not? he was asked. Because Mr. Bennett said, the signatures on these BMV5609's matched, in his opinion, the Grievant's signatures on the BMV5609's in the other disciplines.

The Grievant testified on his own behalf. He said that in, an average day he would receive 60-90 BMV5609's and that on an average day 2000-3000 items were processed (i.e., chopped or shredded). Usually, every arrival is processed the same day but sometimes they get behind. The BMV5609's come with the item usually in an envelope on top of the materials, next to the material, or under materials. The Grievant said the normal routine was to do nothing until all the material on a particular BMV5609 was available. Usually, according to the Grievant, someone from Special Plates would bring the 5609's, and normally all the material arrived with the BMV5609's. He said on occasion he had been sent to main building to pick up 5609's with some material. With regard to the 5609's at issue, the Grievant denied ever receiving them; he denied making any of the green marks; he denied signing the forms, and he denied making the S in the first M code line with the wavy line down the rest of the M codes. He said he had been instructed to place an S on every line, and therefore, the wavy line could not be his. He said he had never seen the originals of the 5609's at the pre-disciplinary hearing. He admitted that he had made errors similar to the incidents at issue here but that "I learned something last time." "I try not to make the same mistake again, it would be silly of me to do so," he said.

On cross-examination, the Grievant was shown two (2) BMV5609's dated December 3, 1990, admittedly signed by him, which had a wavy line under the S in the first M code line (Employer's Exhibits 7 and 8). He said yes, the wavy line was his -- "a bad habit was hard to break." The Grievant was shown a BMV5609 signed by Calvin Smith, his co-worker (Employer's Exhibit 9). He said the signature indicated not that the process was complete but that the signer had done the Audit (Green marks indicating that each item was there). The Grievant was then asked about the effect of past discipline on his behavior. He was asked if the discipline of August 21, 1990 (Joint Exhibit 3E) was given for similar prior behavior which resulted in discipline. The Grievant admitted that it had. He was asked if the November 29, 1990 behavior (Joint Exhibit 3D) was also repetitive? He said "yes, but he said he just hadn't had the time to appeal that discipline" and moreover, "it wouldn't have done any good." The Grievant said that the incident in November occurred because "a silly girl in the office fabricated it, lied, and distorted the truth." The Union introduced Union Exhibits 4 and 5 with regard to the discipline in November. (The November discipline is not at issue in this Grievance; the Arbitrator strikes the whole discussion of the incident as not relevant).

The employer provided the Arbitrator with the original BMV5609's (white 1st copy) of the following exhibits: Joint Exhibits 5A, 5B, 5C, Employer Exhibits 7, 8, and 9, which she was asked to return.)

Employer's Position

The Employer has shown that they have met their burden of proof in that Grievant was terminated for just cause.

The facts are clear. Grievant signed for license plates that he had audited and destroyed when, in fact, he had not destroyed them.

For this type of misconduct, Grievant had been previously disciplined on three (3) occasions. For other forms of misconduct, Grievant had also been disciplined repeatedly.

Grievant never appealed the prior discipline. As Grievant testified, he acknowledged guilt in all the disciplines but the ten (10) day suspension for neglect of duty, dishonesty and excessive absenteeism. Yet Grievant failed to appeal the ten (10) day suspension for neglect of duty, dishonesty and excessive absenteeism. Grievant did not appeal his suspension because he knew that he was dishonest. He falsified

leave forms for dishonest motives.

Grievant is a dishonest person, and his testimony was filled with contradictory statements. Grievant stated that the signature on the 5609's in question were not his. However, Grievant admitted, all of the other 5609's presented with the same signature were his.

Grievant further testified that some two years prior to January, 1991 he was told to change the way he filled out the M code column of the 5609. Specifically, he was told that he was to fill out each M code separately. However, when presented with a copy of a 5609 from December, 1990, Grievant admitted that one was in fact filled out by him and in the same manner as the 5609's in January, 1991. Grievant would have you believe that he was "set up. The Union presented no evidence that should lead you to believe the Grievant.

The mission of the Department, in part is to regulate driver licensing and vehicle registration. Because of our mission, BMV must keep accurate records. Without trustworthy employees, our Department could not maintain the trust of the public we serve.

The BMV cannot trust the Grievant. Grievant has failed to respond to corrective disciplinary action. Therefore, he left his employer with no option but termination.

The employer asks that the Grievant's grievance be denied.

Union's Position

Grievant was removed for allegedly signing off on 5609's. This signature means that the items on the 5609's have been received and destroyed by the Salvage Department.

The Union submitted a request for information to the Employer's advocate; Item #3 was a request for the name of the individual who delivered 5609's and picked up items from Ms. Warner.

While the Employer's advocate denies that he told the Union advocate the name of that individual to be Mr. Conkey, he did concede that he said that Mr. Elmer would be testifying on precisely that issue.

The Union developed a theory and did research of the case based on that information. For the State to introduce evidence to the contrary raises a procedural question. Grievant's defense was hampered by the scenario painted by the State. The Union raised the question why did Mr. Conkey call to alert Management that the items were still in the warehouse. If Mr. Conkey delivered the 5609's to the salvage area the items to be destroyed should have accompanied them.

Was Mr. Conkey disciplined for his failure to deliver the boxes? Why was not Mr. Conkey disciplined for this failure? Is it possible someone signed Grievant's name because they did not want to deliver the boxes?

Grievant denies that the documents in question bear his signature. The Union pointed out significant differences in the slash marks. Grievant's signature is an easy one to copy. The proof that this is Grievant's is slim. The benefit of the doubt should go to Grievant, a long-term employee. His past record should not be used to determine the question of guilt of the offense charged in this case.

A long-term employee should not be removed if any doubt exists. If the Arbitrator finds that the State proved its case, the Arbitrator should reinstate Grievant because of the procedural fault that the State committed when it told the Union one thing and then put on evidence on to the contrary.

We ask the Arbitrator to uphold this Grievance and grant the Grievant his remedy.

Discussion

Both the Grievant and Employer agree that when all the items on a BMV5609 are checked with a green mark and when the BMV5609 is signed at the bottom of the form, then all the items listed on the BMV5609 form are present in the Salvage Department to be destroyed. Both Employer and Grievant agree that a green S, whether on each individual line or on the top line with a wavy line down the column, means that all the items have been destroyed. Three BMV5609's were introduced in evidence which in their original form have every item checked and every item "S'd" (in the M code) and which are signed and dated in green at the bottom box. Thus, all those items were supposed to be destroyed. Yet, Mr. Bennett found 90% of the materials in the warehouse -- undestroyed.

The proper destruction of and accounting for those items is important to the mission of BMV. If not destroyed, such items could be illegally sold and used. The responsibility of BMV for the destruction is obvious. The Grievant says he did not sign those forms and thus, he did not misrepresent the status of those items nor violate work rules. A number of facts indicate that the Grievant did sign those forms:

1. The signatures on those forms are incredibly similar to the signatures on other BMV5609's which the Grievant admitted to be his signatures. The conclusion of Mr. Bennett that the signatures were one and the same was not entirely an unreasonable conclusion.
2. The method of making the "S" with the wavy line under it is identical to S's on other 5609's which the Grievant admits are his.
3. The Grievant has engaged in similar behavior three times in the past.
4. The other Salvage processor is Mr. Smith. His signatures and M codes are singularly different than Grievant's.

The Grievant offers the explanation that someone "forged" his signature. No one person was accused. The Union, by inference, suggests Mr. Conkey. Taking Mr. Elmer's testimony as factual, Mr. Conkey may have brought the original 10% of the material and the relevant BMV5609 forms to Salvage. However, no direct evidence links him to checking off all 100% of the items. Nor is any motive suggested for either Mr. Conkey or anyone else. Evidence indicated that, in 1988, the Grievant and his co-worker Mr. Smith had a disagreement. No evidence was introduced to show that Mr. Smith continued hostilities and possessed the requisite motive to forge the Grievant's name to forms.

Even if someone other than the Grievant was responsible for bringing the 90% of the material to the Salvage Section, the processor of those 3 forms was not supposed to check off missing items and represent them as "salvaged" when the items were, in fact, not destroyed. Serious evidence points to the Grievant as the person who irregularly and improperly made the marks at issue.

However, a number of issues remain unresolved. The testimony of Mr. Elmer contradicted the testimony of Mr. Bennett fundamentally on two issues.

1. The role of Mr. Conkey. Did he bring the form to Salvage with 10% of the material? Did he bring 100% with the form? Or did someone else pick up the form and the 10% of the material from the main building? Was that person the Grievant or Mr. Smith? Why was it Mr. Conkey who brought this material to Mr. Bennett's attention? How did he know to tell Mr. Bennett that the "paperwork" was already in Salvage?
2. How do materials and forms come to the Salvage area? Do all items go directly to Salvage? (Mr. Bennett). Do all items start with Special Plates? (Mr. Elmer). Whose responsibility was it to bring the 90% of the materials already in the warehouse to the Salvage Section?

Two other procedural problems exist.

1. Mr. Bennett said he made no investigation to determine if the Grievant's allegation of forgery had any basis in fact. Just cause requires a full and fair investigation regardless of the past record of the Grievant. The Arbitrator notes that other state departments have gone so far as to hire handwriting experts in similar situations.

2. The Union made a reasonable request on October 7, 1991 for information. In particular, the Union asked for the name of "the individual who delivered the 5609's and picked up the items from Ms. Warner" (Union Exhibit 3). The answer was not forthcoming in writing, and the Union and Employer advocates contested over what the Employer advocate had allegedly told the Union advocate. To fairly defend the Grievant, the Union needed and was entitled to a clear and definitive answer to that question. Apparently, no such clear and definite answer was made.

The Grievant, a 10-1/2 year employee, was terminated from his job. The Employer bears the burden under the contract to show just cause. Termination is a severe and obviously final level of discipline. While the Employer need not prove the employee engaged in the behavior beyond a reasonable doubt, the

evidence must be clear and convincing that just cause existed. The Employer has not met its burden in this Grievance. The Arbitrator cannot find just cause to discipline the Grievant for the charged infraction. The Arbitrator does not commend nor ignore the Grievant's deplorable work record nor condone his past behaviors; however, a bad past record does not create current just cause.

Award

Grievance granted in full. Grievant is to be reinstated and made whole.

Rhonda R. Rivera
Arbitrator

November 20, 1991
Date