

American Arbitration Association
VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

the Union

Case: Mazurak #1

- and -

the Employer

CASE NUMBER: 54 39- ----- -- (Gr: M.C.)

Re. Discipline of M.C.

Appearances:

For the Union:

Mr. C.M.,
Representative

Mr. M.C.,
Grievant

D.K.,
Associate Representative

Mr. K.R.,
Forest Technician

Mr. S.C.
For. Fire Mgt. Spec.

For the Employer:

Ms. J.M.
Representative

Ms. C.F.
Personnel Liaison

Ms. S.P.
Human Resources

Mr. J.T.
Program ser. Sec. Mngr.

The parties selected the undersigned to hear the grievance dated December 9, 2002, concerning the ten day suspension of Mr. M.C. (Grievant). The undersigned was selected pursuant to that provision and the rules of the American Arbitration Association. The hearing in this matter was conducted on Tuesday, December 9, 2003. Grievant was fully and fairly represented by the Union in this matter. Each party submitted post-hearing briefs to the American Arbitration Association, the last of which was received on January 21, 2004. The matter was submitted for decision as of that date.

STATEMENT OF THE CASE

This matter involves the ten day suspension of Grievant without pay for the removal of a door and mirror from state-owned property known as the L... House in the area near Kalkaska, Michigan. Mr. K.R., a Forest Technician, is the employee that has been assigned to monitor the condition of the House to be sure that it was not vandalized and that it was secure against the elements. He checks on the house on a regular basis a couple of times a month, usually in conjunction with his other duties that bring him into the locale of the House. While in previous years there had been several items missing from the use in 2001 the locks were changed. K.R. and his supervisor were the only employees who had keys to the new lock. Since that time vandalism on the House had been significantly reduced.

On October 1, 2002, K.R. was approached by a citizen at a meeting he was attending about something strange that the person had observed at the House. The individual told K.R. that he had seen a state truck out at the property and the person driving the truck had not used the regular gate, but had gone around it into the yard by the House. K.R. had checked the House only the weekend before, which he recalled was the last weekend of the trout season. K.R. went out to the House the next day and noticed that while the door was still locked to the House there was a special swinging door and a mirror that had been mounted on the wall that was missing from the property. These items had been present when he had checked the House at the end of September.

K.R. was suspicious that Grievant may have taken these items since Grievant had expressed an interest in the door on previous occasions. K.R. approached Grievant later that day at the field office. Grievant initially denied taking the items, but then admitted that he had the door. Grievant said he did not have the mirror. K.R. thought about giving Grievant a key to the house to return the door, but then thought better of that idea and decided to ask Grievant to return the items to the field office. He sent Grievant an e-mail (Jt. Ex. 7) that read in part:

We need the mirror too. Plus anything else what was removed when you were there. If you don't have it, then you know who does. The stuff was there Saturday - I saw it with my own eyes.

I reconsidered giving you a key - that is not an option. Just put the stuff in the garage or somewhere out back here at

the office. I will be going out today to do a more complete inventory comparison.

Grievant instead of returning the items to the office decided to place them back at the House. He did this by going in through an unsecured window, the same method that he had used to initially remove the items. K.R. went out to the House the next day and saw that the items were returned. He then sent Grievant another e-mail thanking him for the prompt attention to this matter" and advising him not to go "near the house for any reason." Jt. Ex. 7. K.R. did not report this matter to his supervisor or anyone else in management because he did not feel that it would do any good. Jt. Ex. 6.

Several weeks later K.R. became aware that an investigation into this matter was occurring in management. Apparently his supervisor had heard about the incident when K.R.'s wife, who also works for Employer, told her supervisor about the matter. That person then told the supervisor of Grievant and the investigation commenced. At that time K.R. was approached by Grievant who was angry and thought that K.R. had turned him in to his superiors. Em. Ex. 1. K.R. told Grievant that he didn't know anything about the matter, but K.R. did asked for assistance from his superiors about how to handle the matter.

Employer had concluded its investigation at about this time and decided to impose discipline upon Grievant for his actions. By Notice of Discipline dated November 21, 2002, Employer notified Grievant that he was suspended without pay from November 25 through December 6, 2002. Jt. Ex. 9. This grievance was filed on December 9, 2002. Jt. Ex. 2. The matter was appealed through the grievance steps to this arbitration.

DISCUSSION

At first glance it does not appear that a ten day suspension for taking state property without permission is too strict of a punishment for Grievant. But the Union and Grievant raised several issues both at the time of the hearing and in their post hearing brief as to why they felt that this punishment was inappropriate and not for just cause. I will address each of these reasons and provide my explanation of why I feel that they do not change the result in the matter.

Union and Grievant state that what Grievant did was not inappropriate since it was commonly known that the Livingstone House was set to be destroyed and that all of the items therein would be discarded as scrap or abandoned. They say that all that Grievant did was to "scavenge" the items. Even if this was true, and the evidence does not agree with their position, there is no question that at the time Grievant took the items they had not been abandoned or scrapped by Employer. As such they remained the property of Employer regardless of what Employer may ultimately decide to do with them. Moreover, Grievant knew this to be true because when he was first approached by K.R. on October 2 about the

matter he denied that he had taken the items. This is not the response of one who feels that the items are available to whoever wanted them.

The Union and Grievant also assert that the house was not secure and open to all. As such, they feel that it was open to the public to take whatever was available. The evidence does not support this position either. There is no question that the House had locks on the door and was not open to the public. Grievant obtained entrance to the House by going through a window he knew was unsecured. This is not the action of someone who thought that the items were there for the taking. While the grounds surrounding the house were apparently available to the public for access to the river, a lock on a door signified that the House was not open to the public. Grievant was on notice that access to the House was limited and that he did not have permission to remove the items.

The Union and Grievant assert that K.R. "looked the other way" when items were taken previously to this occasion. I heard the evidence in a different voice. Previously an employee had lived at the House and shared the place with others including Grievant. When that employee ceased living at the House there were numerous people who had keys to the House. Items disappeared at that time but Employer could not trace who may have taken the items. Employer changed the locks on the House and the items stopped disappearing. There is no evidence that K.R. failed to pursue any person that he knew or thought had taken items from the House. Rather, the problem was that there was not any information who took the items so the persons responsible could not be pursued. In this case, K.R. was alerted by an individual that someone with a state truck had been on the premises. When he found out what was missing and knew that Grievant had expressed an interest in those items he properly concluded that Grievant may have taken the items. His discussion with Grievant on October 2 confirmed this. I do not find that there was any disparate application of Employer's rules and policies toward Grievant on this occasion.

The Union and Grievant assert that the investigation of Grievant's involvement in this matter was unfair. They say that reliance on the statements of the person who had advised K.R. about the activities at the House and the failure of Employer to interview that individual fatally flawed the investigation. They assert that this was inadmissible hearsay. The problem with their claims in this regard is that when Employer became officially involved in this matter it already had been established that Grievant had removed the items from the House. Perhaps if Employer had not heard about Grievant's actions in the matter from third parties the facts would have remained just between K.R. and Grievant. But once Employer learned about the situation it was well within its rights to investigate the matter and pursue discipline.

It did an investigation and interviewed Grievant. Em. Ex. 2. Grievant's responses to these questions established a *prima facie* case for discipline.

Employer obtained responses from K.R. about his involvement in the case. Jt. Ex. 6. These two documents and the discussions surrounding them constituted an adequate investigation of the matter. Employer then charged Grievant with "misconduct, specifically stealing, including unauthorized removal of Department property, personal use of Department property without proper authorization and misuse of Department property." Jt. Ex. 9, Notice of Discipline dated November 21, 2002. These charges were well-founded based upon the investigation that was conducted. An interview of the individual who informed K.R. about the matter would have been superfluous and would have unnecessarily involved the public into an internal personnel matter.

The Union and Grievant assert that Employer did not have policies or procedures covering this situation. I cannot agree that the evidence established that Employer had a policy of permitting workers to "salvage" items that the employees felt were not valued by the Employer without the knowledge or permission of Employer. Grievant knew what he did was wrong as evidenced by his initial denial to K.R. that he took the items and by the fact that during the investigative interview he acknowledged that what he did embarrassed himself and others. See response to question 17, Employer's Exhibit 2. Common sense dictates that you don't go into a locked house through a window and remove something that does not belong to you.

I am satisfied that Grievant knew that his actions were wrong and against the rules and policies of Employer. Grievant's failure to return the items to the office as he was requested, but instead returning of the items to the House, also indicate a level of culpability of Grievant. If he had done nothing wrong he should not have been concerned about returning the items to the office. Rather he gained entrance a second time to the locked House to replace those items he had taken. Grievant's actions demonstrate that he knew what he did was wrong.

I find no improper application of selective enforcement of the rules and policies of Employer to the detriment of Grievant in this matter. As mentioned above, if third parties had not become involved in this matter it is likely that Grievant would never have been disciplined because K.R. was not going to report the matter to his superior. The fact that K.R. did not like Grievant because he did not feel that Grievant was a good example of a state employee because of these actions, and perhaps others, is not relevant to the discipline in this case since it appears that K.R. did not instigate the investigation. Rather, he was surprised when Grievant confronted him about the matter and was required by his supervisor to respond to a series of questions concerning the facts in the case. Em. Ex. 1 and Jt. Ex. 6.

Based upon these facts I find that Employer sustained its burden of proof in a theft case of coming forth with sufficient evidence to convince me beyond any reasoned doubt that Grievant committed the acts charged. I now address the severity of the punishment.

The parties in the Agreement "recognize the authority of the Employer to suspend, demote, discharge or take other appropriate disciplinary action against employees for just cause." Article 8, Section G. The parties also provide that:

Discipline, when invoked, will normally be progressive in nature, however, the Employer shall have the right to invoke a penalty which is appropriate to the seriousness of an individual incident or situation. Article 9, preamble.

In this case Employer decided that a ten day suspension without pay was the appropriate penalty for Grievant's actions. In this regard it considered the seriousness of the actions of Grievant, his longevity with Employer and his previous good record. Based upon these factors I find that a ten day suspension is an appropriate penalty, perhaps even on the lenient side. These were serious infractions by Grievant, but he did ameliorate the seriousness by admitting to his actions and returning the items that he had improperly taken from his Employer. There is a range of punishment that Employer could have imposed in this case and still be within the zone of appropriate discipline. The ten day suspension that Employer chose is within that range and was not too severe based upon this record.

AWARD

Based upon the evidence presented in this case the grievance is denied.

Respectfully submitted,

Stephen A. Mazurak
Arbitrator

Dated: February 18, 2004