Patton #4

VOLUNTARY LABOR ARBITRATION

In the Matter of Arbitration Between

Employer

AND

Union

ARBITRATOR'S OPINION AND AWARD
Arbitrator Anne T. Patton December 5, 2009

Chronology

Date of Grievance: April 8, 2008
Date of Hearing: August 27, 2009

Statement of Issues

1. Whether the City had proper cause, as required by Article IV of the Agreement, to discharge Employee 1 for violating Rules and Regulations, Section 2, Rule 1 by taking t-shirts without the permission of the owners, police officers employed by the City?

2. If so, what remedy is appropriate?

Brief Statement of the Award

The grievance is denied.

INTRODUCTION

This dispute involves the January 21, 2008 discharge of Radio Technician Employee 1, who had 11 months seniority, for violating Rules and Regulations, Section 2, Rule 1 which prohibits stealing City property or property owned by City employees. The t-shirts, allegedly taken by Employee 1, belonged to City police officers.

On April 18, 2008, this grievance was filed stating that:

> Grievant was discharged from City employment on January 31, 2008 for violation of City Rules and Regulations, Section II, Rule I, "Stealing, abusing, misusing, removing ... City property ..." (Alleged theft involving two (2) tee shirts) and he received notification of this discharge on April 3, 2008. This discharge is without proper cause.
>
> Joint Exhibit 2.

The grievance alleges violation of Articles XI, IV, and XXXIV of the Agreement. The Suggested Adjustment is to rescind the discharge, reinstate Employee 1 with all lost wages (regular and overtime), full seniority, full pension credit, all time measured benefits, other fringe benefits, and anything necessary to make him whole.

On April 21, 2008, the grievance was received by the City. Joint Exhibit 2.

On April 24, 2008, the City denied the grievance at Step 2. Joint Exhibit 2 at pages 2-3.

Bye-mail dated October 7, 2008, the Union appealed the grievance to arbitration.

On April 5, 2009, the parties met for the pre-arbitration conference. The Union asserted that the City's Step 2 Reply was not timely. The City counter asserted that the Union's Demand for Arbitration was not timely.

On June 25, 2009, the first day of arbitration was conducted at the Union's facility at the Employer. I ruled that the arbitrability issues should be bifurcated from the proper cause issue. On August 1, 2009, I issued my Opinion finding the grievance to be arbitrable.

On August 27, 2009, the second day of arbitration was conducted at the same location. Each party was provided ample opportunity to present evidence and argument. Each party timely filed a post-hearing brief. On October 12, 2009, upon receipt of the briefs, I declared the record closed.

STATEMENT OF FACTS

Background

Employee 1's Employment History

On March 19, 2007, the City hired Employee 1 as a Radio Technician in the Police Department. His position involved maintaining the departmental radio service. He worked the day shift from 8:00 a.m. to 5:00 p.m. Prior to City employmen4 he served in the Air Force for 20 years; seven of those years were spent with the White House Communications Department during the terms of President Ronald Reagan and President George Bush.

The Police Unity Tour and the National Police Memorial

Ten Departmental Police Officers volunteered for the "Police Unity Tour," a 300-rnile, pedal bicycle ride from New Jersey to Washington, D.C. to honor fallen law enforcement officers. Each of the ten officers had to raise $1700.00. The officers pooled their money to purchase a batch of t-shirts for fundraising

purposes. Printed on the front of the t-shirts was, "Fallen, but Not Forgotten." Names of fallen officers were printed on the back of the t-shirts. The officers riding in the Tour planned to sell the long sleeved t-shirts for $20.00 apiece and the short sleeved t-shirts for $15.00 apiece to raise funds for the Tour and for the National Police Memorial.

The January 31, 2008 Incident

Sometime shortly after 8:00 a.m., Officer 1 e-mailed all civilian and armed police personnel announcing a fundraiser for the "Police Unity Tour." Employee 1 did not read the e-mail sent by Officer 1.

From about 9:30 a.m. to about 11 :00 a.m., Officer 1 and Sgt. 1 brought dollies loaded with large boxes to the department motor pool for transport. The boxes contained the t-shirts, which would be sold during an auto show event at XYZ Hall. The boxes were not sealed. The only marking on the boxes was, "Fruit of the Loom." Nothing on the boxes or the t-shirts indicated a price. Officer 1 and Sgt. 1 left the boxes unattended for a few minutes while they retrieved additional boxes.

Employee 1 testified that while Officer 1 and Sgt. 1 were away, he helped maintenance Employee 2 load the van. According to Employee 1, Employee 2 asked him whether he wanted a t-shirt, adding they were giving them away free. Employee 2 encouraged him to take one. Employee 1 took a long sleeved t-shirt from an unsealed box and put it inside the duffel bag he brought to work containing warm clothes for performing an outdoor job. A few minutes later, Employee 1 took a second t-shirt with short sleeves. He took both t-shirts in full view of Employee 2, who said it was okay. Employee 1 put the second t-shirt in his duffel bag on top of the first shirt. After being told he would not have to do the outside job, Employee 1 removed his long underwear and put it in his duffel bag on top of the t-shirts. At arbitration, Employee 1 stressed that he had no intent to steal and asserted that Employee 2 also took a t-shirt for himself.

Unknown to Employee 1, Motor Services Employee 3 observed him taking the t-shirts.

When Officer 1 returned to the motor pool, Employee 3 asked her whether Employee 1 had made arrangements with her to pay for the t-shirts he saw Employee 1 take. He added that he observed Employee 1 "quickly" put a t-shirt under his arms and go into the back door of the radio services area. Employee 3 further reported that he saw Employee 1 return to the van, open the doors, go inside, and then leave with another t-shirt. According to Officer 1, Employee 3 said nothing about Employee 2 taking a t-shirt.

Based on Employee 3's report, Officer 1 checked with Sgt. 1 to ask whether he had made any arrangement with Employee 1. Sgt. 1 said he had not made any arrangement with Employee 1 or received any payment from him. Officer 1 concluded that Employee 1 had taken the t-shirts without permission.

About 45 minutes after Employee 1 took the t-shirts, Officer 1 entered the radio services area where Employee 1 was working. Also present was Employee 4, another Radio Technician. According to Officer 1, she calmly asked Employee 1 whether he took any t-shirts. Employee 1 hesitated, but then answered, "Yeah, is there a problem?" Officer 1 asked whether he took one or two t-shirts. Employee 1 replied, "One. Is there a problem Officer 1 explained that the t-shirts were not free, but being sold as part of a fund raiser. Employee 1 asked how much he owed. Officer 1 asked whether the one t-shirt he took was short sleeved, which cost $15.00, or long sleeved, which cost $20.00. Officer 1 asked him several more times whether he took one or two t-shirts. Employee 1 persisted in saying he took only one. Officer 1 asked to see the t-shirt Employee 1 took. Employee 1 opened his duffel bag, which was zipped shut, and removed a long sleeved t-shirt. Officer 1 asked whether it was the only shirt he took. Then, she asked for his permission to look into his duffel bag. Officer 1 looked into the bag and spotted another t-shirt under personal items. This one had short sleeves. In a raised voice, Officer 1 accused Employee 1, saying, "Employee 1, you just bold faced lied to me." Employee 1 gave her two twenty dollar bills. Officer 1 offered to get him change. Employee 1 told her to keep the change.

Employee 1 testified that Officer 1's account of their exchange was not accurate. According to Employee 1, Officer 1 entered the room "yelling" his name and asking whether he took some t-shirts. Employee 1

admitted he had taken some shirts. Officer 1 asked whether he knew they were for sale. Employee 1 replied no. Officer 1 asked which kind of t-shirt he took. He answered "short sleeved" and went to his unzipped duffel bag and pulled out one shirt and then the other one. Employee 1 denied telling Officer 1 he took only one t-shirt.

In support of Employee 1, Employee 4 testified that Officer 1 was "quite irate and yelling." He added that her voice had volume and an expression he had never heard her use. Employee 4 described Officer 1 as "sounding like she was talking to a suspect." On direct examination, Employee 4 testified that Officer 1 accused Employee 1 of theft. However, on cross examination, he stated that she did not accuse him of stealing. On cross examination, Employee 4 also testified that, other than Officer 1's description of her demeanor, he did not disagree with her testimony.

The January 31, 2009 Post Incident Interview of Employee 1

After her exchange with Employee 1, Officer 1 encountered Sgt. 2, who was in charge of the motor pool. She reported the incident to him. Officer 1 submitted a memo to Captain 1, Commander of Support Services Bureau, documenting an alleged larceny by Employee 1. Her memo was forwarded to Captain 1, who initiated a formal complaint with the Internal Affairs Unit.

During the evening of January 31, 2008, Lt. 1, Commanding Officer of the Internal Affairs-Unit, interviewed Employee 1 about the incident. Also present was the Union President. The interview was taped and the tape was transcribed. Employee 1 reviewed the transcript of the tape.

According to the transcript of the taped interview (Joint Exhibit 5), Employee 1 admitted taking two t-shirts, one short sleeved and one long sleeved, at different times when Officer 1 was not present in the motor pool. Employee 1 denied having any discussion with anybody about whether he could take the t-shirts. Employee 1 stated that when he took the shirts the "maintenance guys were hangin' around down there" but he didn't know whether they saw him.

Employee 1 explained that he took t-shirts because he "assumed" they were being given away at the auto show. He did not realize they would be sold until Officer 1 told him that later in the radio service area. Employee 1 admitted that during his exchange with Officer 1 he "was jerkin her around." When asked what he meant by 'jerkin her around," Employee 1 explained:

> I didn't really say I did and I didn't, you know. I asked her how much they were. She said, "Which one?' Ah, I said, 'The long sleeve.' She said, "Twenty dollars.' So I got out twenty dollars. She says, 'What about the other one?'
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> ***
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> And she . . . she knew I had the second shirt, so instead of coming right out front and said, 'Yes, I have the second shirt,' she kept going' round and round and round. I was goin' round and round and round. I ended up payin' for both shirts. I paid forty dollars for both shirts.
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> ***
>
> I never actually told her I had any shirts.
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> Pages 6-7.

When asked why he did not offer to pay for both shirts up front, Employee 1 replied, "Just to keep it goin' around, I guess." Page 7. Employee 1 also admitted that he was "not initially" truthful with Officer 1. Page 8.

During the interview, Employee 1 never mentioned that Employee 2 told him the t-shirts were free for the taking. At arbitration, Employee 1 explained his omission on the basis he was confused, still fixated on the exchange with Officer 1, confused, and overwhelmed. In short, he described himself as being “shut down” during the interview.

At the end of the interview, Employee 1 was placed on unpaid leave pending discharge.

The February 1. 2008 Suspension

By certified letter dated February I, 2008, the City Manager advised Employee 1 that LR Manager Person 1 and Chief Person 2 recommended that he be discharged from employment for violation of City Rules and Regulations, Section 2, Rule 1 which prohibits the stealing of property of the City or the property of City employees. Joint Exhibit 3. The letter details his tiling of two t-shirts and his subsequent exchange with Officer 1. Finally, the letter notified Employee 1 that his discharge hearing was scheduled for February 14, 2008.

The February 14. 2008 Hearing

During the discharge hearing on February 14, 2008, Employee 1 asserted, for the first time, that Employee 2 had told him that the t-shirts were free and encouraged him to take one. Later, Employee 2 encouraged him to take another t-shirt.

The February 14. 2008 Interview or Dan Employee 2

On February 14, 2008, the same day as Employee 1's discharge hearing, Lt. 1 interviewed Employee 2. The interview was taped and a transcript was made of the tape. At arbitration, the Union objected to the admission of the transcript because Employee 2 was not present to testify. (Employee 2 was unavailable for medical reasons.) I overruled the Union's objection and admitted the transcript as City Exhibit 7 with the proviso that direct and cross examination testimony of Employee 2 could be taken by telephone if the Union wished to do so. At the end of the hearing, the Union stated that it was "content" to rely on the transcript of Employee 2' interview and that a conference call for his testimony was not necessary.

The parties stipulated that Employee 2 was hired on February 10, 1992. During his interview, Employee 2 stated that he helped Officer 1 and Sgt. 1 load the van on the day of the auto show. At the time, he did not know whether the t-shirts would be given away or sold at the auto show. According to Employee 2, Employee 1 came over to the boxes while Officer 1 and Sgt. 1 were gone. Employee 1 opened a box, took out a long sleeved t-shirt, unfolded it and looked at it. Employee 2 then left and went back to the maintenance shop. Employee 2 last saw Employee 1 looking at the t-shirt he had taken from the unsealed box. Employee 2 did not see what Employee 1 did with the t-shirt he took from the box. Employee 2 did not see Employee 1 take a short sleeved t-shirt.

When asked what he said to Employee 1 about the t-shirts, Employee 2 replied:

> I just said, 'They're, They're havin' a ... they have a booth at the auto show for the police and ah, they have these t-shirts that they're giving away or selling. I don't know.
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> Page 10.

Employee 2 "categorically" denied telling Employee 1 the t-shirts were free and he could have one. Pages 10-12. He also denied that Employee 1 asked him whether he (Employee 1) could take a t-shirt. Page 10.

Employee 2 stated that he bought a t-shirt. He explained that he didn't take one because they weren't his to take. Page 17.

At arbitration, Employee 1 testified that Employee 2 did not tell the truth during his interview. He insisted that Employee 2 had a motive for lying -Employee 2 also took a t-shirt and would be in the same position as Employee 1. Employee 1 also testified that about two hours after he paid Officer 1 for the t-shirts, he bumped

into Employee 2 and reported that the t-shirts were not free. Employee 2 replied that he would give his t-shirt back if anyone asked him about it.

The Investigative Report Dated February 27, 2008

On February 27, 2008, Lt. 1 issued his Complaint Investigative Report. City Exhibit 6. The report summarizes his interviews of Officer 1, Employee 1, Employee 2, and Employee 4. Lt. 1 concluded that the Complaint was sustained for the following reasons:

> The conclusion reached the evening of the investigative interview and at the conclusion of this investigation are the same: Employee 1 took the shirts knowing he didn't have permission to have them. He concealed them in his personal bag and was not truthful when questioned about the shirts. Furthermore, Employee 1 was not truthful when questioned about the shirts. Furthermore, Employee 1 was not truthful during the investigation. During the investigative interview, he was asked repeatedly if anyone had told him he could have a shirt or if anyone told him that they were free. His answer each time was "No." During his discharge hearing Employee 1 claimed that a fellow employee had told him the shirts were free and he could have one. During a subsequent interview with this employee, the employee adamantly denied ever telling Employee 1 that he could take a t-shirt or that they were free.
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> City Exhibit 6.

LR Manager Person 1 testified that he and Chief Person 2 jointly recommended that Employee 1 be discharged. Person 1 concluded that Employee 1 had engaged in theft by taking the t-shirts and concealing them in his duffel bag and that he provided inconsistent statements during the investigation. Both Person 1 and Chief Person 2 emphasized that Employee 1 held a position of trust and his employment could not be maintained because he violated that trust by stealing and lying about it.

The April 3. 2008 Letter Confirming Discharge

By certified letter dated April 3, 2008, the City Manager advised Employee 1 that he was terminated effective January 31, 2008.

RELEVANT CONTRACT PROVISIONS

ARTICLE IV: MANAGEMENT RIGHTS

> Section 1. Except as otherwise specifically provided in this Agreement, the management of the Employer and the direction of the work force, including but not limited to the right to hire, the right to discipline or discharge for proper cause, the right to decide job qualifications for hiring, the right to layoff for lack of work or funds, the right to abolish positions, the right to make rules and regulations governing conduct and safety, the right to determine schedules of work, together with the right to determine the methods, processes, and manner of performing work, are vested exclusively in Management. Management, in exercising these functions, will not discriminate against any employee because of his or her membership in the Union.

ARTICLE IX: GRIEVANCE PROCEDURE

> Section 3, Step 3.B.c. Arbitration
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> c. The arbitration shall be conducted in accordance with the rules of the American Arbitration Association. The power of the arbitrator ·shall be limited to the interpretation and application of the express terms of this Agreement and he/she shall have no power to alter, add to, subtract from or otherwise modify the terms of this Agreement as written. Decisions on grievances

within his/her jurisdiction shall be final and binding on the employee or employees involved, the Union, and Management.

In disciplinary cases involving stealing by employees and/or possession or use of illegal drugs or narcotics during work hours or while on City property, the parties agree that such violation shall be considered proper cause for summary discharge. In such cases, the arbitrator shall be limited to a determination of facts only and shall have no authority to modify the penalty imposed. Such violation shall not be construed as exclusive proper cause for discharge.

POSITIONS OF THE PARTIES

The City's Position

The City takes the position it had proper cause to terminate Employee 1. It maintains that the evidence is clear and convincing that he took two t-shirts belonging to the ten officers participating in the Tour without first obtaining their permission. This is a blatant violation of City Rules and Regulations, Section II, Rule I that prohibits stealing, abusing and removing the property belonging to City employees.

The City also submits that that the evidence is sufficient to prove all the elements of larceny or theft: the taking and carrying away of personal goods or property; of any value; belonging to another; without consent; from any place; and with an intent to steal that property. It points out that Employee 1 took two t-shirts without the consent of the police officers who owned them. He removed them from the boxes and moved them to the radio service area where he concealed them in his personal duffel bag. By concealing them, Employee 1 conveyed his intent to deprive the owners of their property, even though the t-shirts remained within the building.

The City also contends that the evidence is sufficient to prove stealing. Article IX, Section 3, Step 3.B.c of the Agreement provides that stealing constitutes proper cause for summary discharge. The provision further prohibits the arbitrator from modifying the penalty of discharge when the evidence proves stealing. The City cites a prior Opinion and Award by Arbitrator Elaine Frost where she adhered to the restriction upon arbitral authority imposed in Step 3.B.c and declined to modify the penalty.

The City also responds to several arguments it anticipates the Union will make:

1. There is no evidence of disparate treatment based on the case of Employee 2. There is no evidence Employee 1 stole a t-shirt. Rather, Employee 2 maintains that he bought a t-shirt. Employee 1's testimony that Employee 2 also took a t-shirt should not be credited. Employee 1 provided inconsistent statements during the course of the investigation and, initially, made no such allegation regarding Employee 2.
2. The fact that Employee 1 paid $40.00 for the t-shirts does not negate the fact that he stole them. His intent was to conceal them and keep them without paying for them. Employee 1 paid only after being caught and confronted by Officer 1.
3. Employee 1's assertion that he was overwhelmed and confused during his first interview should not be used to discount what he said during the interview. Employee 1 was given every opportunity to present additional facts, and to confer with his Union representative who was present The City submits that the only confusion in this case derives from Employee 1's inconsistent and "ever changing story."

In conclusion, the City emphasizes that, “It is a sad state of affairs for an employee with less than one year of employment with the Employer ... to implicate a ... 17 year employee of committing theft as a defense for his own stealing.”

The Union's Position

The Union takes the position that the City failed to meet its burden of proving it had proper cause to discharge Employee 1. It points out the quantum of proof applied in cases involving allegations of stealing is higher than the preponderance of the evidence. The appropriate quantum of proof is "sufficient and convincing proof."

The Union argues that the City must prove the following elements to establish theft: the act of taking an item not belonging to the actor with an intent to permanently deprive the owner of its property. It stresses that intent is regarded by arbitrators to be a critical element as demonstrated by a long line of cases cited by the Union, where arbitrators reversed discharges for stealing when the employer failed to prove intent.

The Union contends that the evidence does not prove intent. First, Employee 1 took the t-shifts because he believed they were free. He did not know they were for sale. Second, Employee 1's assumption was logical. Employee 1 did not read Officer 1's e-mail. There were no markings on the t-shirts or the boxes containing them that the t-shirts were for sale. There were no price tags and the boxes were unsealed. Third, Employee 1 understood from his conversation with Employee 2 that the t-shirts would be given away. Fourth, Employee 1 took the t-shirts in full view of Employee 2 and Employee 3. Fifth, Employee 1 consistently admitted taking the t-shirts. Sixth, Employee 1 paid for the t-shirts as soon as he was advised they were for sale.

The Union contends that the arguments it anticipates the City will make should be rejected.

1. Employee 2' interview, in part, supports Employee 1's testimony. Employee 2 stated he did not know the t-shirts were for sale and he even admitted that he mentioned that the t-shirts might be given away. To the extent that Employee 2's statements conflict with those of Employee 1, Employee 2 should be discredited based on the fact he had an incentive to lie because he also took at-shirt.

2. Even if Employee 2's version is credited, his statements do not undermine Employee 1's assumption that the t-shirts were free for the talking.
3. Employee 1's failure to report Employee 2' statements during his January 31, 2008 interview is understandable given his state of mind at the time. He was still confused, "reeling from his confrontation with Officer 1," and not thinking straight. The Union maintains that Employee 1's explanation is reasonable and logical.
4. Officer 1's account of her confrontation with Employee 1 was contradicted by both Employee 1 and Employee 4. According to both, she was yelling and irate, not calm as she claimed in her testimony.
5. Employee 1 did not hide the t-shirts. Initially, he placed them on top of his duffel bag. Only after changing his clothes did the t-shirts end up at the bottom of the bag. In any case, Employee 1 permitted Officer 1 to search his bag. If he had something to hide, he would not have permitted Officer 1 to search his bag.

In summary, the Union describes the City's anticipated arguments as "nothing more than a smoke screen to hide the fact that the City lacks any evidence that Grievant possessed the requisite intent to steal." The Union stresses the City has proven only that Employee 1 took the t-shirts; it has failed to prove the critical element of intent.

ANALYSIS

The Proper Cause Standard

There is no real difference between the just cause standard and the proper cause standard. Each involves determining whether the employer has met its burden of proving the alleged misconduct. In the typical case, there is a second question when the misconduct is proven: whether the discharge is appropriate given the seriousness of the proven offense in view of the existence of any mitigating or aggravating circumstances. Here, however, the parties have pre-determined in Article IX, Section 3, Step 3.B.c that discharge is appropriate when the proven violation involves stealing.

In this case, the City has charged Employee 1 with stealing the property of City employees in violation of Rules and Regulations, Section 2, Rule 1. Thus, if the City succeeds in satisfying its burden of proving stealing, then the arbitrator is prohibited by operation of Article IX, Section 3, Step 3.B.c of the Agreement from addressing the second question in the analysis of proper cause --assessing the propriety of the discharge as the penalty. See, Case 27-91 (Ted Jarmon Discharge) issued by Elaine Frost on February 24, 1992. The discharge stands pursuant to the parties' agreement in Article IX, Section 3, Step 3.B.c that stealing warrants the penalty of discharge.

The final threshold consideration is the appropriate quantum of proof. The usual quantum is the preponderance of the evidence. However, the majority of arbitrators adhere to a higher quantum when the charge involves an offense which is arguably also a crime or involves a matter of moral turpitude or would seriously damage an employee outside the employment relationship by destroying his reputation or impairing his prospects for future employment. St. Antoine, *The Common Law of the Workplace*, BNA, 2'd Edition, at section 6.10, pp. 191-194. The higher quantum of proof is known as "clear and convincing evidence." Here, the higher standard of clear and convincing evidence is called for because the charge involves stealing, which, if proven, could also constitute a breach of law and could impair Employee 1's reputation and his prospects for future employment.

In Summary, the only issue before me is whether the City has proven by clear and convincing evidence that Employee 1 committed the alleged offense of stealing property belong to other City employees.

The Alleged Misconduct -Stealing Property Belonging to Other City Employees

The Elements Necessary to Prove the Charge of Stealing

Arbitrators commonly require that the employer prove the following four elements in order to establish stealing by an employee:

1. The goods at issue belonged to the employer, another employee, a customer or a member of the public;
2. The employee exercised control over the goods by engaging in asportation (carrying away or removing an item from the place where it had been deposited) or by converting the goods to his own use;
3. The goods were taken without the express or implied consent or authorization of the person who could have given such consent or authorization; and
4. The goods were taken with an "intent to steal or *animus furandi,* which is the intent to permanently deprive the owner of his property.

Brand, *Discipline and Discharge in Arbitration,* BNA, 2nd Edition, at page 295.

These elements incorporate the common law definition of theft, which requires some intentional wrongdoing. Thus, "intent" is the critical element in proving theft. See, *Unites States Smokeless Tobacco,* 126 LA 301, 306 (Wood, 2008); *Albertson's LLC,* 123 LA 1349 (McCurdy, 2007); *City of Berkeley, 106* LA 364 (pool, 1996); *Cummings lnc.,* 104 LA 1012 (Hart, 1995); *Kaiser Aluminum* & *Chemical Corp., 99* LA 609, 613 (Goldberg, 1992); *Georgia Pacific Corp.,* 94 LA 667 (Shearer, 1990); *Tucson Unified School District,* 92 LA 544 (Brokaw, 1989); *Grant Hospital,* 88 LA 587

(Wolff, 1986); and *Carnation Co.*, 84 LA 80 (Wright, 1985)..

In the area of employee relations, "intent to steal" is present when:

> [T]he employee, for personal gain, knowingly and willfully takes something belonging to another without permission, direct or implied. The terms 'knowing' and 'willful' serve to distinguish an act of theft from situations in which the employee exercised poor judgment, made an inadvertent error, was excusably ignorant, committed a good faith mistake, had implied permission, or intended to borrow and return.
>
> *Id.*

"Intent" is typically difficult to prove because people rarely express their intentions to commit theft or any other act of wrongdoing. For this reason, in1ent is often proven by implication, by circumstantial evidence, or by the employee's own actions. Consideration must be given to all the surrounding facts and circumstances. Finally, determining whether the employee possessed the requisite intent may also involve issues of credibility. *Id.*

Application of Requisite Elements to Evidence in this Case

1. There is no dispute that the two t-shirts at issue belonged to those police officers who were participating in the Tour.

2. The evidence proves that Employee 1 engaged in the act of asportation. He admits removing the two t-shirts from the boxes where they were packed for shipment, taking them to the radio service area, where he placed them initially on his personal duffel bag and ultimately inside that bag.

3. There is no evidence that any of the owners of the t-shirts gave Employee 1 express or implied consent, authorization, or permission to take the t-shirts and remove them to the radio service area. Even assuming the credibility of Employee 1's 1estimony that Employee 2 told Employee 1 the t-shirts were free for the taking, Employee 2 was not an owner. Further, no evidence establishes any of the owners authorized Employee 2 to give consent to, or permit, Employee 1's taking of the t-shirt.

   Further, Employee 1's reliance on Employee 2' alleged assurance that the t-shirts were free for the taking was neither logical nor reasonable. Even by Employee 1's account, Employee 2 did not reveal how he allegedly knew the t-shirts were free. Nor did Employee 2 claim to own the t-shirts himself. Employee 1's acting on Employee 2' alleged assurance without first ascertaining Employee 2' ownership, authority, or even the source of Employee 2' assurance, showed reckless and wanton indifference to whether the t-shirts were, in fact, free or whether they belonged to another.

4. Based on all the surrounding facts and circumstances, the evidence is sufficient to prove that Employee 1 intended to take the t-shirts in spi1e of the fact there was reason to believe they belonged to another. As discussed above, Employee 1 willfully and knowingly took the t-shirts without first verifying ownership or confirming Employee 2' assurance the t-shirts were free. The most reasonable and logical assumption under the circumstances was that t-shirts were not free. The t-shirts were not presented in any way to suggest they were free for the taking or to invi1e taking. Rather, they were folded and packed out of sight in boxes. Although neither the boxes, nor the t-shirts, bore price tags or identified an owner, their being packaged inside containers conveyed the message that they were not intended to be accessible for the taking by a passer-by. The message implicitly communicated by a boxed item is "leave it alone," not "take it away."

   Further, once Employee 1 took the t-shirts from the box, his actions revealed intent to keep them for himself permanently. He carried them to his work area and deposited them on, and then in, his personal duffel bag. He did not display the t-shirts to his Employee 4 and encourage Employee 4 to get himself a free t-shirt. Rather, Employee 1 kept the t-shirts secret and proximate to where he ultimately concealed them within his own property for transport home. The fact that Employee 1, when confronted by Officer 1, paid for the t-shirts does not overcome evidence that at the time of the talking he knowingly and willfully took them without permission of the owners and without making payment.

Employee 1's intent is also manifest in his failure to assert "the Employee 2' defense" from the first. Had he really believed the t-shirts were free based on what Employee 2 said, Employee 1 would have explained that when confronted by Officer 1. Instead, by his own admission, he 'jerked her around" and kept "going round and round and round." Why go "round and round, jerking" with Officer 1, if the simple and straightforward truth was that Employee 1 truly believed the t-shirts were free because Employee 2 told him so. Later, during the interview, Employee 1 again failed to raise "the Employee 2' defense" and even denied anyone told him he could take a t-shirt. It is not likely that confusion would have obscured from Employee 1's memory, Employee 2' assurance that the t-shirts were free, especially after Employee 1 was specifically asked whether anyone told him he could take a t-shirt. In short, "the Employee 2' defense" lacks credibility because it was not asserted until the end of the investigation and after Employee 1 had already provided statements inconsistent with “the Employee 2 defense.”

CONCLUSION

The City had proper cause, as required by Article IV of the Agreement, to discharge Employee 1 for violating Rules and Regulations, Section 2, Rule 1 by taking t-shirts without the permission of the owners. The evidence clearly and convincingly proves all the requisite elements of stealing. The parties agreed in Article IX, Section 3, Step 3.B.c of the Agreement that stealing shall be considered proper cause for summary discharge.

AWARD

The grievance is denied.

Arbitrator Anne T. Patton

Dated: December 5, 2009