

IN THE MATTER OF THE ARBITRATION

BETWEEN

**THE STATE OF OHIO
DEPARTMENT OF TRANSPORTATION
DEFIANCE COUNTY GARAGE**

AND

**THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME, AFL-CIO LOCAL 11**

Arbitration Date: March 12, 2019

GRIEVANT, Lynda Norden
CASE NO. DOT - 2018 - 02176-09

BEFORE: Arbitrator Craig A. Allen

Advocate for the Employer:

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Advocate for the Union:

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I. HEARING

The hearing was held at the OCSEA Union Hall on March 12, 2019. The hearing commenced at 8:55 A.M.

The Joint Issue before the Arbitrator is "Was the Grievant terminated for Just Cause?"

Testifying for the Ohio Department of Transportation (ODOT) were Ohio State Patrol (OSP) Trooper Tyler Rachel; Edward V. Waters, Acting Investigator for ODOT; Bobby Johnson, Labor Relations Administrator; Victor Dandridge, Labor Relations Administrator.

Testifying for the Ohio Civil Service Employees Association, Local 11 AFSCME ("The Union") were Deborah A. Herr, Steward; Karen Vroman-Ellis, Staff Representative; and Lynda Norden, the Grievant.

II. STATEMENT OF THE CASE

On May 22, 2018, the Grievant, Lynda Norden, was arrested by the Ohio State Highway Patrol for Driving Under the Influence (DUI) and Open Container. The Grievant was removed June 27, 2018 for violations of ODOT Policy 17-015 CP, Work Rules and Discipline, Items 4 (1)- Any act that may discredit, embarrass, undermine or interfere with the mission of the Agency, including, but not limited to, that appearing on social media; 6 (A) Sale, Consumption, or possession of alcoholic beverages while on duty or on State property, including State vehicles; and 18-other actions that could harm or potentially harm the employee, a fellow employee or a member or members of the general public. The Union timely filed a grievance and the case is properly before the Arbitrator.

III. THE EMPLOYER'S CASE

The Employer's first witness was Trooper Tyler Rachel of the OSP. Trooper Rachel

has been with the OSP for six (6) years. His duties are to assist the Public and enforce the traffic laws, including arresting motorist for DUI. The procedure for DUI is to administer the Standard Field Sobriety Test and if the Motorist fails the test, then they are arrested.

Trooper Rachel testified that the Post received calls that there was a motorist engaged in reckless driving. Trooper Rachel was referred to Exhibit J 3 Page 21 which is his Court report. He testified that this outlines the events and charges. Trooper Rachel reviewed Exhibit J 3 Page 20 and said this was an E-Mail concerning the Grievant's reckless driving, which was received in addition to the two (2) phone calls.

Trooper Rachel testified that he went to the passenger side of the vehicle, smelled alcohol and saw a silver container in the car. Trooper further testified that the Grievant smelled of alcohol. The Grievant failed one field test and did not take the other two. Trooper Rachel said Exhibit J 7 Page 38 is the Impaired Driver Report. He said the Grievant had all six clues of alcohol impairment. Trooper Rachel said the Grievant was upset. Trooper Rachel testified Exhibit 9 Page 40 is the Blood Alcohol Test results. The legal limit is .08 and the Grievant's results were .147. The test was given at the Defiance OSP Post. The Grievant was cited for operating a State vehicle under the Influence and for failure to wear a seat belt.

Trooper Rachel said the Grievant admitted drinking and there was a silver container on the passenger seat. Trooper Rachel read Exhibit J 10 Page 41 and testified that this is the lab report concerning the contents of the silver container. He further testified that the report showed the contents of the silver container were 7.4% alcohol.

Trooper Rachel said Exhibit J 11 Pages 42-48 is his records search concerning the Grievant. The search showed three violations, all of which were given to the Court.

On Cross-Examination Trooper Rachel testified that he gave the Grievant the implied consent warning and the Grievant took the test. He was then asked if he was familiar with the case of Birchfield v North Dakota which held that a warrantless Breathalyzer test was OK. Trooper Rachel said: "Yes".

The Employer's next witness was Edward V. Waters. Mr. Waters is the Acting Investigator for ODOT. Prior to this he was a Deputy Investigator. He retired from the OSP

Mr. Waters said he was notified by the Administrator of Labor Relations that the Grievant was arrested while driving a State vehicle.

Mr. Waters testified that Exhibit J 3 Pages 10 - 20 are allegations against the Grievant and that his findings are on Page 24.

Mr. Waters testified that his findings were: "The allegation that Lynda Norden committed actions that could harm or potentially harm the employee, a fellow employee or a member or members of the general public by operating an ODOT vehicle while under the influence of alcohol is founded. The allegation that Lynda Norden consumed and possessed alcoholic beverages while on duty or on State property, including State vehicles is founded."

Mr. Waters testified that the OSP tested Grievant and she tested .147 BAC. He said she worked at Defiance garage and then would go to the garage at Paulding. Mr. Waters also testified that he contacted the OSP Post Commander and was told motorists called and E-Mailed complaints.

Mr. Waters had photographs that showed the Grievant stopped near the back of the garage property by the OSP The Grievant had left the Paulding Post and got to Defiance one hour later.

Mr. Waters testified that DAS suspended the Grievant for three years from driving an ODOT vehicle.

Mr. Waters testified that the OSP Post had received an E-Mail from Mr. Mack. Mr. Mack said the Grievant was left of center and forced a pickup truck off the road. The Grievant also ran off the road. Mr. Waters also said Trooper Rachel's report showed the Grievant was belligerent.

Mr. Waters interviewed the Grievant. The Grievant said it was usually a 20 - 30 minute drive from Paulding to Defiance but it took her an hour because she had stopped to call her husband. He also said the Grievant admitted to being arrested.

Mr. Waters testified that Exhibit 3 Pages 15 and 16 are videos of the Grievant leaving Paulding and Page 17 is a video of the Grievant arriving at the Defiance garage with the Patrol in the back ground.

Mr. Waters then testified that Exhibit J 3 Page 19 is the DAS letter about cancellation of insurance and Exhibit J 3 Page 20 is Mr. Mack's E-Mail to OSP

Mr. Waters said Exhibit J 3 Page 24 was his interview with the Grievant. Mr. Waters testified that the Grievant said from Monday through Thursday she divided her time between Defiance and Paulding. On Friday she would spend all day at Paulding. The Grievant said she saw the Troopers as she was pulling in to the Defiance garage. The Grievant said she was wearing a seat belt. Mr. Waters said he explained to the Grievant the liability the State incurred when she operated a State vehicle DUI. The Grievant said she understood. Mr. Waters testified the Grievant told him she was seeing a therapist for alcohol and she had an AA meeting that day. Mr. Waters also testified that ODOT did not order the BAC test. The Grievant was given the

choice to take the test.

On Cross-Examination Mr. Waters testified that ODOT tells employees not to use cell phones while driving. He also said the Grievant was fair and honest.

The Employer's next witness was Bobby Johnson. Mr. Johnson has been a Labor Relations Administrator for six (6) years. His duties are to oversee Collective Bargaining Agreement grievances. He reviews blood and alcohol testing. In addition he reviews all disciplines and is responsible to see all disciplines statewide are uniform.

Mr. Johnson testified that Exhibit J 5 Page 35 is an E-Mail from the Deputy Director to him and he referred the Case to Investigation. Mr. Johnson then read Exhibit J 12 Page 49 and identified it as the letter placing the Grievant on administrative leave due to her being a danger to the public and the arrest.

Mr. Johnson testified that the Grievant received the investigation report. Page 23 is the Office of Investigative Services staff interviewing form.

Mr. Johnson testified that on Page 25 the Grievant admitted to the DUI and tested .147 BAC. There was also an alcohol container in the car. The Grievant said she was going to AA.

Mr. Johnson testified he did not consider mitigation as the Grievant had run people off the road and was a danger. He also testified that the Contract does not require the Employee Assistance Program to be considered. He said Exhibit 3 Page 4 is the Just Cause Letter and two citizens had reported to OSP and the Grievant admitted the use of alcohol.

Mr. Johnson said Exhibit J 4 Page 26 is the Work Rules and Discipline. He testified that the penalty for violating the Rules for which the Grievance is cited are Suspension or Removal. Mr. Johnson also testified there are no mitigation factors.

Mr. Johnson read the CBA Page 247, Sec. 2 of Appendix M and said it shows the management test permitted. The OSP test was for a DUI. He was then referred to Page 251 of the Contract which is Section 6 Disciplinary Action in Appendix M. This section refers to a stay of disciplinary action for EAP. Mr. Johnson testified this does not apply to this case.

Mr. Johnson said Exhibit J 14 Page 51 is the Alcohol Testing Policy. He then read Page 53 Sec. VII and testified that the Grievant violated this section. Mr. Johnson was given Exhibit M-1 which is Grievant's training history and testified Grievant had Drug and Alcohol testing. He said Exhibit J 15 Page 55 is DAS motor vehicle policy which says you cannot operate a motor vehicle under the influence.

Mr. Johnson was given Exhibit M-2 which is the Jeffrey B. Appleton Arbitration (Appleton). The Grievant was driving a State vehicle 80 mph in a 65 mph zone while under the influence of alcohol. Management refused to mitigate due to EAP. The grievance was denied.

On Cross-Examination Mr. Johnson testified that Section VII of the Alcohol Testing Policy says the Employee may not refuse the blood or alcohol test. It doesn't address law enforcement test. He said the same breathalyzer test is used by ODOT and OSP

Mr. Johnson was asked if law enforcement tests a CDL driver would you use the same test. He said - post accident is another test. Mr. Johnson testified that the Grievant in Appleton had been on the job less than 2 years and this Grievant 28 years.

The Employer's next witness was Victor Dandridge. Mr. Dandridge has been with the Office of Collective Bargaining (OCB) for seven (7) years and is the Labor Relations Administrator. He is the Lead Advocate for all matters with state wide implications. Mr. Dandridge negotiates contracts and is at main table for OCSEA negotiations. He also provides

training.

Mr. Dandridge testified that the State of Ohio has a Drug-Free Work Place Policy and pages 247 and 248 of the Contract lists the State tests.

Mr. Dandridge was asked: " Does the OSP conduct these tests?" He said, "No. There is an Arbitration decision that says State employees can't be used for testing."

Mr. Dandridge testified that the OSP has its own guidelines and there is no connection to the testing referred to in the Contract. He further testified that Section 6 Page 251 concerning Disciplinary Action in Appendix M does not apply to this Grievant. The Grievant was arrested for DUI and tested by the O.S. P. Also the Grievant does not qualify for a Last Chance Agreement.

On Cross-Examination Mr. Dandridge testified that Exhibit M-2, the Appleton decision was prior to the arbitration decision forbidding State employees to administer tests. He then testified that this Grievant did not qualify for Appendix M protection.

On Re-Direct examination Mr. Dandridge was referred to Exhibit M-2 and said the employee should have been fired.

IV. THE UNION'S CASE

The Union's first witness was Deborah A. Herr, Steward. Ms. Herr identified Exhibit J 2 Page 2 as the Grievance. Ms. Herr testified that she was involved in the Pre-Disciplinary hearing. She said the Grievant showed remorse and admitted her actions.

Ms. Herr testified that a letter from OJA Behavioral was presented at the Pre-Disciplinary hearing showing the Grievant was in treatment and had sixteen (16) sessions.

Ms. Herr testified that the Grievant said she was in EPA well before the DUI incident.

Ms. Herr said she works in the Finance Office as a Senior Financial Analyst. Prior to that she was a Financial Analyst 2.

Ms. Herr testified that she was a manager and that the Grievant was “over the top” and an “awesome worker”. Ms. Herr said she ordered supplies for the District and the Grievant was very helpful to her. She said the Grievant was well liked and did her job well.

On Cross-Examination Ms. Herr said she represented the Grievant at the Pre-Disciplinary hearing. She said the Grievant was in treatment but still got arrested.

The Union’s next witness was Karen Vroman-Ellis. Ms. Vroman-Ellis is the domestic partner of the Union Advocate. Ms. Vroman-Ellis was involved in the termination of Gary Eley. The Employer objected because the Eley case had been settled. The Arbitrator ruled there could be no testimony regarding the Eley case and testimony would be limited to research on Appendix M.

Ms. Vroman-Ellis was given a print-out of the 1992-1994 Contract and referred to Section 5, Disciplinary Action and said it reads, “as confirmed by testing pursuant to this policy.” She then read Exhibit J 2 Page 3 and said it says “testing pursuant to policy” and the current Contract has the same language as the prior Contract.

Ms. Vroman-Ellis was referred to Exhibit M-2, which is the Appleton Decision. She said the decision is dated May 14, 1996 and refers to Appendix M.

Ms. Vroman-Ellis then read the Annotated Appendix to Appendix M for the 1997-2000 Contract. Ms. Vroman-Ellis then testified that Sec 5 now Sec 6 is a clarification of Last Chance Agreements. Certain Last Chance Agreements can now run longer than five (5) years. She said under the current Contract the Last Chance Agreement Terms are the same.

On Cross-Examination Ms. Vroman-Ellis read Page 9 of Exhibit M-2, the Appleton Decision. It says Appendix M is used for a person found under the influence and nothing else. The Arbitrator also said that an employee under the influence of alcohol who committed gross substandard conduct was not covered by Appendix M. Ms. Vroman-Ellis said Page 247 of the Contract refers to the type of testing.

On Re-Direct Ms. Vroman-Ellis testified her research was directed to law enforcement cases. She said in her opinion Appendix M applies to law enforcement cases.

Bobby Johnson was then called by the Union. The Arbitrator reminded Mr. Johnson that he was still under oath. Mr. Johnson testified that Exhibit M-2, the Appleton Decision, was dated May 14, 1996.

Mr. Johnson reviewed the Annotated Contract, Sec 5 now Sec 6 and testified Appendix M changed after the Appleton Decision.

The Grievant, Lynda Norden, was the Union's last witness. The Grievant was hired in 1990 and was a Highway Worker for nine (9) or ten (10) years. She was then a Construction Clerk for nine (9) or ten (10) years and was promoted to the Defiance garage. She is now an Administrative Professional 2. The Grievant testified she asked the OSP for professional courtesy as one of the Patrol was her neighbor. She said her husband had business dealings with him.

The Grievant said OSP Dunfee said no favors and she said she didn't want any. The Grievant testified that Exhibit J 13 Page 50 was her job description and it did not require her to drive. She then said she has always driven a State vehicle.

The Grievant testified that the Paulding County Clerk became injured and she did both garages since the other Clerk was injured.

The Grievant then identified Exhibit J 18 Pages 73 and 74 as her yearly evaluations. The evaluations showed the Grievant had a positive attitude and meets or exceeds expectations. She has no prior discipline in twenty-eight (28) years.

The Grievant testified that she discussed alcohol treatment at the Pre-Disciplinary Conference. She had a letter from Mercy Health which said she was remorseful and the letter asked that she be given a second chance.

The Grievant introduced a letter from Dr. Mercado, Psychiatrist, dated February 25, 2019 saying she shows remorse and recommending she be given her job back. She also had a letter from Recovery Services dated February 28, 2019 saying she attends treatment sessions. The Grievant introduced a letter from Tom Boals, her AA sober support sponsor. She attends two (2) AA meetings a week and has meeting verification. Two (2) AA meetings a week are required by Recovery Services.

The Grievant testified that at the end of December or first part of January she became aware of anxiety and depression and contacted EAP voluntarily. She said she knew alcohol was becoming a problem in October 2017. The Grievant then testified that her Mother-in-law died. Her Mother has dementia and she is the sole case care giver. Also her husband had to sell his business. The Grievant testified she was passed over for promotion at the Paulding County garage and turned to alcohol. She loves her job and will do anything to get her job back. She said she was told by ODOT not to use cell phone while driving, so she had to pull over.

The Grievant testified she didn't know the difference between an OS P test and an

ODOT test.

The Grievant then testified that her brother-in-law tested positive twice for marijuana and got a Last Chance Agreement. He got caught again and got another Last Chance Agreement.

On Cross-Examination the Grievant testified she admitted the offense at the Pre-Disciplinary Conference. She said her brother-in-law was a random test.

The Grievant also testified she admitted alcohol problem to her Counselor in 2018.

Hearing adjourned at 12 P.M. and parties agreed to submit Closing Arguments by close of business on April 15, 2019.

VI. OPINION AND AWARD

The Advocates for the parties have done an outstanding job presenting their case.

The Grievant has been employed for twenty-eight (28) years and has no prior discipline history.

The Employer points out that the Grievant was trained on the Drug and Alcohol Testing Policy and had prior knowledge of the consequences of the violations. The Employer cites: "An employee who violates the provisions of this policy shall be subject to disciplinary action up to and including termination of employment on a first offense as specified in policy 17-015 (P)- Work Rules and Discipline."

The Union argues that this case is controlled by Appendix M to the Collective Bargaining Agreement (CBA) or in the alternative by Article 24 of the CBA.

The Union recites its contention that Appendix M was designed to create a framework dealing with the multiple issues created by substance abuse. The Union contends that with the

recognition of substance abuse as a disease the landscape of industrial justice changed.

The Union cites: the John E. Dodson OCB #1040, Jeanette Sammons OCB #745, and Roger Napier OCB # 775 grievances to show Arbitrators prior to Appendix M created ad hoc and treatment compliance programs in the Awards. The Arbitrator does not find these cases relevant as they pre-date Appendix M.

The Employer recites the undisputed facts:

Grievant was driving a State vehicle license (#1T48) while under the influence of alcohol.

Grievant had possession of an alcoholic beverage in the State vehicle at the time of her arrest.

Grievant failed a field sobriety test conducted by the OSHP in the parking lot of the Defiance County garage.

Grievant was tested by the OSHP at the Defiance Patrol Post on 5/22/2018. The Grievant tested .147 BAC.

Grievant was arrested by the OSHP on 5/22/2018 for violation of OVI, possession of alcohol, and a seatbelt violation.

The Employer also argues that the OSHP had received reports from several private citizens that the Grievant went left of center 3 - 4 times, almost forced an on-coming pickup truck off the road and was twice in the stones on the side of the road. A second caller told the OSHP that the vehicle was down in the grass in the median of US 24.

The Employer also argues the testimony of Ed Waters, the OIS investigator. Mr. Waters concluded that the Grievant committed actions that could harm or potentially harm the employee, a fellow employee or a member or members of the general public by operating an ODOT vehicle

while under the influence of alcohol. He also found that she consumed alcohol during State time and in a State vehicle and possessed an alcoholic beverage on State property.

The Union argues that the Grievant was a twenty-eight (28) year employee with exceptionally good performance reviews and no prior discipline history. The Grievant has accepted her diagnosis and has aggressively sought and continues treatment for her condition, and sought treatment before her arrest.

The Union contends the Grievant is entitled to the protection of Appendix M. The Union argues that the intention is clear that an allegation of an employees on duty impairment must be confirmed by objective besting whether criminally or administratively.

The Employer argues that the testimony of Bobby Johnson, ODOT Labor Relations Administrator is to the contrary. Mr. Johnson testified that termination was the consistent level of North Dakota discipline imposed for this type of offense, and the Contract does not require EAP to be considered for these types of severe offenses.

The Employer cites Arbitrator Feldman's decision, which says in part: "However when someone is under the influence of drugs or alcohol and gross substandard conduct therefore results, the use of Appendix M does not provide a defense."

The Employer also argues that the testimony of Victor Dandridge is conclusive. Mr. Dandridge is the Labor Relations Administrator for the State Office of Collective Bargaining. Mr. Dandridge testified that only three types of testing are authorized by Appendix M, i.e. Reasonable suspicion, Rebuttable presumption and Random testing. He also said testing is to be done off-site by non-state personnel.

The Union contends that the US Supreme Court Case Birchfield, v. North Dakota made

compliance with testing mandatory and authorized warrantless breathalyzer test is controlling.

The Arbitrator does not find this case relevant.

The Union relies, in part, upon the testimony of Karen Vorman-Ellis. Ms. Vroman-Ellis says the language in Appendix M means all testing is pursuant to this policy. The specific items are listed [in a Contract] and they intend to exclude unlisted items. For this premise the Employer cites: How Arbitration Works, 2012 Eklouri and Elkouri Ch 9.3.A.X1. This is, in fact, a basic rule of Arbitration. The Arbitrator is bound by the express Contract language and is not free to add to its provisions.

The Union also refers to the Federal Omnibus Transportation Employee Transportation Act of 1991 and argues it recognizes law enforcement criminal investigation post-accident drug and alcohol testing in lieu of the employer having to conduct separate drug and alcohol testing. The Arbitrator does not find this relevant as there was no accident in this case.

The Arbitrator finds that the plain language of Appendix M does not afford the Grievant its protection. The Arbitrator also finds, in the manner of Arbitrator Marvin Feldman, that the Grievant's conduct was "grossly substandard."

The Union next argues that the Employer violated Article 24 of the CAB. The Union cites the Arbitration cases of Napier, Sammons and Dodson (Citations Supra). The Union offers these decisions to show there was no "Just Cause" for the termination. The Decisions are also an argument in mitigation.

In the Napier case the Grievant was convicted for driving under the influence of alcohol. The Grievant was off duty and driving his own vehicle. The facts of this case are so different the

Arbitrator does not find Napier persuasive.

The fact pattern in the Sammons case is also much different. The Grievant had attendance problems due to alcohol but the trigger event was her arrest for smoking marijuana in her car on State property. The conviction was for a minor misdemeanor. The Arbitrator was primarily concerned about the degree of the drug offense

The Arbitrator finds the facts in Sammons are not similar to this case.

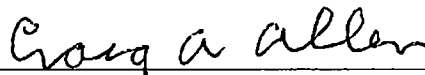
In the Dodson case the Grievant and a Co-Worker went out to dinner in a State vehicle and ended up drinking in a bar until 2:30 A.M. The Grievant was arrested for OVI. The Arbitrator did consider seniority and no prior discipline and did reinstate the Grievant with conditions. However, the Grievant apparently was arrested before he created danger to members of the general public.

The Employer argues that it did have "Just Cause". The evidence is that the Grievant violated all three (3) rules for which she was charged. The Employer argues that the undisputed testimony is that incidents of this nature have been consistently enforced and handled on a statewide level.

The basic problem for this Grievant is her substandard conduct endangered herself and members of the general public.

The Grievance is denied.

Issued at Ironton, Ohio this 30th day of April, 2019.



Craig A. Allen
Arbitrator