ARBITRATION DECISION NO.:
196

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

EMPLOYER:
Department of Transportation

DATE OF ARBITRATION:
July 25, 1989

DATE OF DECISION:
August 14, 1989

GRIEVANT:
Gregory R. Peters

OCB GRIEVANCE NO.:
31-08-(88-07-22)-0068-01-07

ARBITRATOR:
Rhonda Rivera

FOR THE UNION:
Mike Temple

FOR THE EMPLOYER:
Carl Best

KEY WORDS:
Just Cause For Removal
Progressive Discipline
Consumption Of Alcohol
While On Duty
Intoxication While On Duty
Disparate Treatment

ARTICLES:
Article 24 - Discipline
§24.01-Standard
§24.02-Progressive
Discipline
§24.05-Imposition
of Discipline
§24.06-Prior

Disciplinary Actions
§24.08-Employee Assistance Program

FACTS:

The grievant, a Highway Worker II with the Department of Transportation, was removed from employment by the employer for a number of work rule violations. These violations included neglect of duty, insubordination, carelessness with equipment, possession and consumption of alcoholic beverages while on duty, misuse of a state vehicle, damage to a state vehicle, and other general provisions of work policy. On April 7, 1988, the grievant was driving a ODOT truck when he had an accident. The truck overturned in the center of a two lane highway. Another ODOT employee arrived on the scene shortly after the accident and helped the grievant out of the truck. The employee stated that during this time he noticed that the grievant smelled of alcohol. The grievant told the employee that he was forced off the road by a red car driven by a woman who was throwing wine bottles out of her car. The employee however stated that no red car passed him from the opposite direction even though he was following the same route as the grievant only 2-3 minutes behind him.

Later, a patrolman arrived and retrieved a wine bottle from the grievant's pants which the grievant said he was keeping as "evidence." A second patrolman performed 3 coordination tests required by the Patrol, and the grievant failed all 3 tests. The grievant admitted that he had one beer at lunch and was also taking some prescription drugs. The grievant refused an alcohol test. Furthermore, the patrolman observed beer cans and bottles within the truck and did not find any evidence to support the grievant's claim of a red car running him off the road. The patrolman stated that he had no doubt that the grievant was intoxicated. The grievant was charged with Driving Under the Influence and Failure to Maintain Control. Subsequently, the DUI charge was reduced to Reckless Operation. Thereafter, the grievant was removed from employment by the employer. The grievant had a written reprimand and a 1 day suspension in the two years prior to this incident, for non-alcohol related matters.

EMPLOYER'S POSITION:

The employer argued that there was sufficient evidence to show that the grievant consumed and possessed alcoholic beverages while on duty and was intoxicated when the accident occurred. The employer maintained that the discipline grid of ODOT permits the employer to remove or suspend an employee for these offenses and that it used proper discretion in removing the grievant. The employer argued that the discipline imposed was progressive and commensurate to the offense.

UNION'S POSITION:

The union argued that there was not clear and convincing evidence that the grievant consumed and possessed alcohol or was intoxicated. Even if these offenses can be shown the union maintained that the employer abused its discretion in imposing discipline and that the grievant should have been issued a suspension instead of a removal given his prior disciplinary record. The grievant only had 2 prior disciplines and they were for unrelated types of offenses. Finally, the union claimed disparate treatment by the employer and introduced evidence of the employer issuing less than a removal to employees who had alcohol related problems.

ARBITRATOR'S OPINION:

The arbitrator ruled that it was the employer's burden to prove by clear and convincing evidence that the grievant committed the alleged violations. The arbitrator found that the employer did not

meet this burden in showing that the grievant was in possession of alcoholic beverages while on duty. However, the arbitrator found clear and convincing evidence that the grievant consumed alcohol while on duty and was intoxicated and had an accident while intoxicated. The grievant actually admitted to the patrolman and at the hearing that he had at least one drink while on duty, thus he violated the work rule concerning consuming alcohol on duty. Additionally, the patrolman's testimony regarding the grievant's intoxicated condition was objective, thorough, and complete enough to show that the grievant was intoxicated. Both of these offenses carry with them suspension or removal for the first offense. The employer's choice to remove the grievant rather than to suspend him was not unreasonable. While the union cited 4 cases of discipline by the employer regarding employees with alcohol related problems in order to show disparate treatment, 3 of these cases were unrelated to the use of alcohol while driving a motor vehicle. The fourth employee was given a 30 day suspension for an alcohol related accident. All things considered, the union failed to show disparate treatment by the employer. While the arbitrator might have chosen suspension rather than removal, the arbitrator cannot substitute her judgment for that of the employer. The employer dismissed the grievant for just cause, and the discipline was commensurate and reasonable.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

OCSEA, Local 11,
AFSCME, AFL-CIO
Union

and

Ohio Department of
Transportation
Employer

Grievance No.:
(31-08-[07-22-88]-0068-01-07)

Grievant:
Gregory R. Peters

Hearing Date:
July 25, 1989

Opinion Date:
August 14, 1989

For the Union:

Mike Temple

For the Employer:
Carl Best

Present at the hearing in addition to the Grievant and the advocates named above were Officer Michael Quinn, Ohio State Patrol (witness), William Buchanan, Assistant Superintendent, ODOT, (witness), Dan Smith, Equipment Operator I, ODOT, (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. Witnesses were sequestered. All witnesses were sworn.

Issue

The parties agreed to the following issue:

The issue before the Arbitrator is one of determining whether or not Gregory R. Peters was removed from employment with the Ohio Department of Transportation for just cause and if not, what shall be the appropriate remedy?

Joint Exhibits

The parties agreed to the following joint exhibits:

1. 1986 Collective Bargaining Agreement
2. Grievance Trail
3. ODOT Directive A-301
4. ODOT Directive A-302
5. ODOT Directive A-306
6. Directional Map of Accident Area

Joint Stipulations

The parties agreed to stipulate to the following facts:

1. The April 24, 1988 promotion of Mr. Peters to Bituminous Plant Inspector was the result of his bid on a posted vacancy and a requirement under Article 17 of the Contract.
2. Gregory R. Peters was hired by ODOT June 15, 1981 as a Highway Worker II and assigned to the Clermont County Garage.

Relevant 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. Verbal reprimand (with appropriate notation in employee's file)
B. Written reprimand;
C. Suspension;
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.

§24.05 - Imposition of Discipline (in part)

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

§24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement.

§24.08 - Employee Assistance Program

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

Facts

The Grievant, at the time of the incident, was a Highway Worker II employed in the Clermont County Garage by ODOT. On the day at issue, April 7, 1988, the Grievant was driving an ODOT truck (No. T8-694) hauling berm. At approximately 2:30 p.m. on that day the Grievant had an accident whereby the truck was overturned in the center of a two lane highway. Mr. Danny Smith, another ODOT worker (Equipment Operator I) came upon the scene very shortly after the accident occurred. Mr. Smith was also hauling berm in a similar truck and was, at that time, following the same route. He immediately notified the ODOT garage of the accident. He testified that he helped the Grievant out of the overturned truck. Mr. Smith, at the hearing, said that as he helped the Grievant out of the truck he noticed that the Grievant smelled of alcohol. Mr. Smith could not explain his failure to mention the alcohol smell in his written statement made shortly after the incident.

The Grievant told Mr. Smith that he was forced off the road by a red car driven by a woman who was throwing wine bottles out of her car. Mr. Smith said that no red car passed him from the opposite direction, although he (Mr. Smith) was following the same route as the Grievant only 2-3 minutes behind him.

Mr. William Hancock, Assistant Superintendent, also testified at the hearing. Mr. Hancock arrived at the accident scene 3 to 5 minutes after the call was received from Mr. Smith. Mr. Hancock said that when the patrolman arrived at the scene and asked the Grievant for a driver's license, the Grievant returned to the overturned truck. From his vantage point, Mr. Hancock saw the Grievant pour liquid from a bottle and place the bottle inside his pants. Mr. Hancock told the officer of this behavior. Mr. Hancock then saw the officer sit the Grievant down on the highway and retrieve a bottle from the Grievant's pants. Mr. Hancock said the bottle was a wine bottle. The Grievant, he said, claimed he was keeping the bottle as "evidence". Mr. Hancock also testified that the damage to the truck was estimated at $2,000.00.

Trooper Michael Quinn was the second officer on the scene. The first officer was Trooper Baugus who continued investigation of the scene while Trooper Quinn dealt with the Grievant. Trooper Quinn indicated that he had been a trooper for 10 years and was trained at the academy to detect intoxication. He said that the Grievant was glassy-eyed, had slurred speech, and gave off a moderate odor of alcohol. The trooper performed 3 coordination tests required by the Patrol, and the Grievant failed all three tests. The trooper also found the Grievant was confused by the questions. Trooper Quinn also observed beer cans and bottles within the truck. He said he found "no evidence" to support the Grievant's claim of a red car which ran the truck off the road. The trooper took the Grievant to the post. The Grievant refused an alcohol test. The Grievant was charged with DUI and Failure to Maintain Control. Subsequently, the DUI charge was reduced to Reckless Operation. The trooper said he had no doubt that the Grievant was intoxicated. The Grievant admitted that he had had one (1) beer at lunch and also said he was taking some prescription drugs.

The Grievant said he had had one (1) beer at lunch. He maintained this action was permissible because "as long as you only have one or two, no one says anything." He says that he was pushed off the road by a red car driven by a woman who was throwing a bottle from the car. He was going up the hill, and she was coming down. He alleged that she threw a bottle over the top of the red car (to her right) and simultaneously swerved over the center line forcing him into the side, causing him to loose control and overturn the truck.

He said no beer or liquor bottles were in his truck, only Diet Coke containers. The Grievant presented evidence to show that on April 26, 1988 he was assessed by the Council on Alcoholism. The letter from the Council concluded:

"Mr. Peters is being discharged from the agency, as it is the consensus of clinical staffing that no further counseling is necessary at this time."

The Grievant also introduced evidence that he was drug tested on April 11th and found to be drug free. He said he underwent the drug screen to keep his position as a Volunteer Firefighter. As a Volunteer Firefighter, the Grievant received a commendation for saving the lives of children from a burning house.

At the hearing, the Grievant had trouble remembering if he had prior discipline. When shown exhibits under cross examination, he agreed that he had a written reprimand and 1 day suspension in the two years prior to this incident. The Grievant also stated, upon cross examination, that at the Step 3 hearing he denied he had an alcohol problem and refused EAP. At this hearing, the Grievant also denied an alcohol problem at the time of the accident.

Effective July 15, 1988, the Grievant was dismissed for violation of the following items.

Directive A-301, Item # 1(a) - Neglect of duty (major).

Directive A-301, Item # 2(c) - Insubordination, failure to follow the written policies of the Director, Districts or Offices.

Directive A-301, Item # 7 - Carelessness with tools, keys and equipment resulting in the loss, damage or an unsafe act.

Directive A-301, Item # 9 - Possession of alcoholic beverages or illegal drugs while on duty.

Directive A-301, Item #10 - Consumption of alcoholic beverages or illegal drugs while on duty.

Directive A-301, Item #18 - Misuse of State vehicle, violation of traffic code or for personal use.

Directive A-301, Item #19 - Damage to State vehicle as a result of failure to operate in a safe manner.

Directive A-301, Item #33 - Violation of one or more of the statements embodied in Section III of Directive A-306.
Directive A-301, Item #35 - Other action that could harm or potentially harm the employee, a fellow employee or a member of the general public.

Directive A-301, Item #36 - Other action that could compromise or impair the ability of the employee to effectively carry out his or her duties as a public employee.

The Union introduced evidence of discipline dealing with 4 other persons who had alcohol related problems. Three of the 4 persons had offenses unrelated to the use of alcohol while driving a motor vehicle. The fourth person was given a 30 day suspension for an alcohol related accident.

Discussion

The Grievant admitted to the trooper and at the hearing that he had at least one drink while on duty. He thus violated A-301, No. 10 -- consumption of alcoholic beverages while on duty. A first offense of this rule subjected the Grievant, under the ODOT grid, to suspension or removal on the

first offense. Some evidence exists to support a violation of No. 9 A-301, i.e., possession of alcoholic beverages while on duty; however, this evidence is not clear and convincing. However, the evidence is clear and convincing that Grievant was intoxicated and had an accident while intoxicated. This action is not a criminal one and a proof beyond a reasonable doubt is not required. However, the Employer's burden is to show violations by clear and convincing evidence. The trooper's testimony was objective, thorough, and complete. No prejudice was shown, and the Arbitrator is convinced of the witness's expertise. Moreover, the evidence of intoxication was corroborated by the observations of Mr. Hancock and Mr. Smith. Thus, the Arbitrator is persuaded that the Grievant also violated Rule #11 (A-301) "Reporting to work under the influence of an intoxicant (alcohol) . . ." This offense is also listed as removal/suspension on the first offense. Lastly, the Grievant violated No. 19 (A-301) "Damage to State vehicle as a result of failure to operate vehicle in a safe manner." (First offense - 1 day suspension.) The alleged violation of Items #1, #2(c), #7, #18, are either not proven or encompassed within the proven violations. Violations #33, #35, #36 are general offenses unnecessary where specific violations are clear and, in the mind of this Arbitrator, constitute "stacking".

Thus, the Employer had a choice between suspension or removal. The contract requires progressive discipline, commensurate to the offense. The Grievant has had 2 prior disciplines; however, they were for a different type of offense. The Grievant was a 7 year employee and had a record of heroism off the job. On the other hand, the Grievant has continually denied responsibility for the incident and denied the effect of the alcohol. Moreover, at the Step 3 he refused EAP. The Union claimed disparate treatment. However, the evidence offered fell well below the standard of clear and convincing.

The choice to remove the Grievant rather than suspend him was not unreasonable. While the Arbitrator might have chosen suspension, the Arbitrator cannot substitute her judgment for that of management in this institute. The Employer dismissed the Grievant for just cause, and the discipline was commensurate and reasonable.

Award

Grievance denied.

August 14, 1989
Date

Rhonda Rivera
Arbitrator