

ARBITRATION DECISION NO.:

486

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Transportation

DATE OF ARBITRATION:

December 11, 1992

DATE OF DECISION:

January 18, 1993

GRIEVANT:

Mark Holcomb

OCB GRIEVANCE NO.:

31-12-(92-06-09)-0007-01-06

ARBITRATOR:

Mollie H. Bowers

FOR THE UNION:

Steve Wiles

FOR THE EMPLOYER:

William A. Tallberg,
Labor Relations Officer,
District 12, ODOT

KEY WORDS:

Removal
DUI
Driver's License Suspension

ARTICLES:

Article 24 - Discipline
 §24.01-Standard
 §24.02-Progressive Discipline

FACTS:

The grievant worked as a Highway Maintenance Worker 2 at the Ohio Department of Transportation from August 21, 1986 until he was removed on May 29, 1992. The parties stipulated to the following facts: On February 13, 1992 the grievant was convicted of driving under the influence (DUI). Consequently, the grievant's drivers license was suspended for 120 days, from February 13 to June 13, with no driving privileges for the first 33 days. On approximately April 8, 1992 the grievant received notification that he had accumulated 14 points on his driving record. On approximately April 15, the grievant was notified that he had a 12 point suspension commencing on May 5. The grievant appealed the 12 point suspension and was

granted occupational driving privileges from June 3 to December 3, 1992.

EMPLOYER'S POSITION:

The grievant was removed for just cause because he was convicted for DUI. The State argued that the grievant failed to maintain a valid driver's license during all times of his ODOT employment, a minimum qualification for the grievant's position. Pursuant to the suspension, the grievant was completely unable to perform his functions of his job from February 13 to March 13, and from March 16 to June 13 the grievant had no driving privileges. The State maintained that the grievant's inability to work during the peak winter months placed the agency in a difficult position when the agency's services were in high demand. Finally, the State claimed that because the grievant could not be covered under the employer's self-insurance, the potential liability justified removing the grievant.

UNION'S POSITION:

The Union alleged that the State violated the principle of progressive discipline specified in Article 24.02 by removing the grievant. The Union emphasized that prior to his removal the grievant's only other disciplinary action during the course of his six-year career was a written reprimand. The Union also insisted that removal was too severe considering that the grievant did not receive the DUI while on official status, but while driving his personal vehicle during off-duty hours. Moreover, the grievant complied with ODOT policies and directives including obtaining a modification order for work-related driving, securing proper insurance and attending a driving course. Finally, the Union contested the State's reliance upon the 12 point suspension as an alternative basis for the removal. The Union insisted that because the issue was not raised until the 3rd Step hearing, the grievant was not afforded due process.

ARBITRATOR'S OPINION:

The grievant was removed for just cause; therefore, the State did not violate Articles 24.01 and 24.02 of the Contract. The State proved that the removal was just; the Arbitrator was especially persuaded by the fact that ODOT's self-insurance policy did cover employees with suspended licenses and ODOT policy forbade employees from operating ODOT equipment without a documented modification order. Further, the Arbitrator reasoned that if the grievant had occupied a position in which driving was not a major duty, the removal might be viewed as unreasonably punitive. However, unrefuted evidence revealed that more than 70% of the grievant's duties required driving except in the winter months where 100% of the grievant's duties required driving. Consequently, the Arbitrator concluded that the State acted reasonably under the circumstances.

In addition, the Arbitrator determined that the State did not violate the principle of progressive discipline. ODOT policies specifically authorized the State to remove an employee for violating ODOT Directive No. WR-101, Item 35. Considering the grievant's responsibilities to the agency and the public, the Arbitrator reiterated that the removal was for just cause. Lastly, since there were sufficient grounds to remove the grievant on the basis of his DUI suspension, the State's failure to raise the 12 point suspension as an alternative theory prior to the 3rd Step hearing was harmless error.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

IN THE MATTER OF THE
ARBITRATION BETWEEN:

**Ohio Civil Service
Employees Association**

-and-

Ohio Department of Transportation

Case No.

31-12(06-09-92)07-01-06

ARBITRATOR:

Mollie H. Bowers

APPEARANCES:

For the Association:

Steve Wiles,
Staff Representative
Mark Holcomb, Grievant

For the Agency:

William A. Tallberg,
Labor Relations Officer,
District 12, ODOT
Tim Wagner, OCB
Linda Dillard,
Health, Safety & Claims
Don McMillen, OCB
Nick Nicholson, Labor
Relations Officer (Observer)
Walter Biel,
Highway Maintenance
Superintendent 2 (District 12)

The Hearing was held on December 11, 1992 at 9:00 a.m. in the OCB conference room, 106 North High Street in Columbus. Both parties were represented and had a full and fair opportunity to present testimony and evidence in support of their case and to cross-examine that presented by the opposing party. No post-hearing briefs were submitted. The entire record has been carefully reviewed by the Arbitrator.

ISSUE

The parties offered the following stipulated issue.

“Was the Grievant Mark T. Holcomb removed from employment with the Ohio Department of Transportation for just cause? If not, what shall the remedy be?”

PERTINENT CONTRACT CLAUSES

Article 24 - Discipline

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. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02.

24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary shall be commensurate with the offense. Disciplinary action shall include:

- A. One or more oral reprimand(s) (with appropriate notation in employee's file);
- B. One or more written reprimand(s);
- C. One or more suspension(s);
- D. Termination...

EXHIBITS

- JX-1 Collective Bargaining Agreement in effect at time of grievance (1992-1994)
- JX-2 Recommendation for Disciplinary Action from Walter J. Biel, dated 2/25/92
- Notice of pre-disciplinary meeting to Grievant, dated 4/7/92
- Termination notice, dated 6/26/92
- JX-3 Memorandum of written reprimand, dated 8/21/91
- JX-4 Disciplinary Actions-Directive No. A-601 (12/10/90)
- JX-5 Disciplinary Actions-Directive No. WR-101 (5/5/92)
- JX-6 Motor Vehicle Operator's License-Directive No. SA-202 (5/5/92)
- JX-7 Motor Vehicle Operator's License-Directive No. A-209 (11/15/90)
- JX-8 State Motor Vehicle Liability Program (Directive No. 8921)
- JX-9 Cleveland Municipal Court Cuyahoga County Modifying Court Order (dated 3/13/92)
- JX-10 Cleveland Municipal Court Criminal Branch-record of suspension of Grievant's driving rights (3/13/92)
- JX-11 Ohio Bureau of Motor Vehicles - record of 12 point suspension (4/8/92)
- JX-12 Certificate of completion of defensive driving course (4/28/92)
- JX-13 Certificate of completion of driver attitude training course (4/28/92)
- JX-14 Ohio Bureau of Motor Vehicles - reinstatement of license
- JX-15 Ohio Bureau of Motor Vehicles - Notice of suspension (4/15/92)
- JX-16 Report of Court Action (6/3/92)

Management Exhibits

- MX-1 Position Description - Highway Maintenance Worker 2
- MX-2 Memo regarding Modifying Order in Lieu of Driver License (Resulting from Court Action) (1/15/92)
- MX-3 Driver record output (3/31/92)
- MX-4 Driver record output (4/16/92)
- MX-5 Ohio Bureau of Motor Vehicles - modified suspension (6/19/92)

BACKGROUND

The Ohio Civil Service Employees Association, AFSCME Local 11 (hereinafter "the Union") brought this matter to arbitration asserting that Article 24, Section 24.02 of the parties' collective bargaining prohibited the Employer from terminating Mark Holcomb, (hereinafter "the Grievant"). The Grievant was employed as a Highway Maintenance Worker 2 by the Ohio Department of Transportation, District in Cleveland from August 21, 1986 until his termination on May 29, 1992.

The parties stipulated to the facts as follows. On February 13, 1992, the Grievant was convicted of driving under the influence (DUI) and received a penalty of license suspension for 120 days from February 13, 1992 to June 13, 1992 with no modified driving privileges for the first 33 days. On or about April 8, 1992, Grievant received notification that he had 14 accumulated points on his record. On or about April 15, 1992, Grievant received notification that he had a 12 point suspension to begin on May 5, 1992. The Grievant

appealed the 12 point suspension to the Cleveland Municipal Court and was granted occupational driving privileges effective June 3, 1992 to December 3, 1992.

UNION POSITION

The Union argues that Grievant's termination was unjust because it violates Article 24, Section 24.01, which embodies the principle that disciplinary action be imposed for just cause; and the discipline imposed on Grievant violates Section 24.02, because it was not progressive since Grievant's only other disciplinary action was a written reprimand. The Union acknowledges that Grievant received a DUI, but notes that he did not receive it while in an official status, but was driving his personal vehicle on off-duty hours. The Union argues that Grievant did everything in accordance with Employer's policies and directives and should not have been terminated, noting that once Grievant Holcomb received the DUI, he immediately notified his supervisor and complied with the Employer's requests to obtain a modification order from the court for work-related driving, proper insurance, and participate in a defensive driving course. Grievant testified that he thought he did everything he was required to do in order to get a modified driving order. Further, the Union notes that Grievant Holcomb, in his six-year employment tenure with the Employer, had only one prior discipline: a written reprimand in 8/21/91.

The Union also makes a due process argument based on the Employer raising another basis for the termination, Grievant's 12 point suspension. The Union objects to the timing of this issue of Grievant's 12 point suspension not being raised until the 3rd step grievance hearing. The Union argues that Grievant was entitled to notice and an opportunity to defend himself at a predisciplinary notice on the issue of the 12 point suspension. Since the Employer now cites the 12 point suspension as a basis for termination, Grievant's was not afforded due process.

The Union maintains that the Grievance did comply with ODOT directive A-601, item 35, by obtaining a modifying court order, complying with proper insurance requirements, and completing a defensive driving course by April 28, 1992, before he was terminated on May 29, 1992.

EMPLOYER POSITION

The Employer contends that Grievant Holcomb was terminated for just cause because he was convicted of driving under the influence (hereinafter "D.U.I.") and did not possess at all times of his employment a valid Ohio driver's license, the minimum job qualification for a Highway Maintenance Worker 2. The Employer also noted that the minimum requirement was upgraded to a valid Commercial Driver's license as of April 1, 1992, in accordance with Federal Law.

The Employer notes that Grievant was unable to perform the functions of his job, from February 13, 1992 to March 16, 1992, and because Grievant failed to comply with the requirements of the modifying order, he was not able to obtain limited driving privileges March 16, 1992 through June 13, 1992. The Employer asserted in testimony from Walter Biel, Grievant's supervisor, that his lack of a valid drivers license prevented him from being able to perform his job and caused a hardship to the Agency. Mr. Biel noted that the Employer was particularly adversely affected by Grievant's lack of driving privileges during the winter season, when its services are in high demand.

The Employer argues that termination is just in this case because of the potential liability that it could incur as a result of Grievant's lack of driving privileges. Linda Dilliard, a Safety Officer for the Health, Safety, and Claims Section, testified that the Agency is self-insured and that its rates would be adversely affected if Grievant drove, without driving privileges, and an accident occurred.

OPINION

Based upon all the evidence and testimony of record, the Arbitrator finds that the Employer's actions did not violate Sections 24.01 and 24.02 when it terminated Grievant and, thus, the grievance is denied. An adverse action against an employee may only be taken for cause.

Just Cause

The Employer maintains that it terminated Grievant for just cause. The principle of just cause is described in How Arbitration Works (Elkouri and Elkouri, 4th edition) (citing Arbitrator Joseph D. McGoldrick from Worthington Corp., 24 LA 1, 6-7 (1955):

“It is common to include the right to suspend and discharge for 'just cause', 'justifiable cause', 'proper cause', 'obvious cause', or quite commonly simply for 'cause.' These exclude discharge for mere whim or caprice. They are, obviously, intended to include those things for which employees have traditionally been fired. They include the traditional causes of discharge in the particular trade or industry, the practices which develop in the day-to-day relations of management and labor and most recently they include the decisions of courts and arbitrators....They constitute the duties owed by employees to management and, in their correlative aspect, are part of the rights of management. They include such duties as honesty, punctuality, sobriety, or, conversely, the right to discharge for theft, repeated absence or lateness, destruction or company property, brawling and the like. Where they are not expressed in posted rules, they may very well be implied, provided they are applied in a uniform, nondiscriminatory manner.”

As cause for its termination of Grievant, Employer charged employee with violation of state directive A-601 #35 "other actions which could compromise or impair the ability of the employee to effectively carry out their duties of a public employee. The Employer's "Disciplinary Action" policy, effective December 10, 1990 states that the "appropriate discipline depends on the severity of the incident." (JX-4)^[1]

It is an undisputed fact that the Grievant's commercial driver's license was suspended due to a D.U.I. conviction. The Grievant was aware that a valid driver license was a requirement of his job. (MX-1) The Grievant was aware of the seriousness of not having a valid drivers license as indicated by his actions in notifying his supervisor the next day after receiving the D.U.I.

The Employer persuasively argued that the termination was just through its witnesses and other evidence of record. Dilliard testified that the Department had a self-insurance program that does not cover employees who are operating under license suspension or revocation, as was Grievant. Further, Employer enacted a policy on January 15, 1992 that prohibited any Department of Transportation employee from operating or driving any Departmental equipment unless or until their modifying order is documented on the employee's driving record at the Bureau of Motor Vehicles. (MX-2) The Union did not challenge the policy in a grievance.

The Union's argument that termination was not for just cause is not persuasive given the nature of the Grievant's duties and the concept as is widely understood. If Grievant had been in a position where driving was not a major duty, the termination might be viewed as unreasonably punitive. Unrebutted testimony was provided by the Employer which described more than 70% of Grievant's duties consisting of driving trucks or equipment. During winter and snow season, unrebutted testimony was provided that described 100% of Grievant's time as operating snow equipment. Additionally, Grievant never complied with the requirements for receiving a modifying order of the D.U.I. that would have provided him limited driving privileges.

The Employer acted reasonably under the circumstances. The Employer has a right to expect its employees to meet minimum requirements of the job. It is especially critical here that employees be able to perform their job functions because of the Department's responsibilities to the public and health and safety concerns. The Department faced a great potential for liability if Grievant were to have an accident during the period of license suspension. Given such potential for liability, the Employer's actions were justified.

Progressive Discipline

The Union argues that the Employer's imposition of the, adverse action of termination violates the principle of progressive discipline. Progressive discipline is defined in the parties' collective bargaining and

directives addressing disciplinary action. (JX-1, JX-4 JX-5) The directives provide, in part, that "Disciplinary actions should be imposed at the lowest level possible with the intent of giving the employee the opportunity to correct his/her behavior so long as the discipline is commensurate with the infraction." (JX-5, at "C")

The Union's argument that a violation of the principle of progressive discipline fails in light of a complete reading of the Employer's policies. For the same reasons that the argument challenging the termination as unjust fails, so the Union's argument regarding progressive discipline fails. The Employer's policy language clearly gives it authority to remove employees who violate #35. Given the responsibilities of Grievant and his job requirements balanced with the Department's responsibility to the public, the termination was for just cause.

Due Process

The Union also argued that Grievant's due process rights had been violated when the Employer raised at the third step grievance Grievant's 12 point suspension. The Union maintains that the Employer was prohibited, on due process grounds from bringing this issue at the third step. Since the Employer had enough grounds to terminate Grievant on the basis of his D.U.I. suspension, this constitutes harmless error.

AWARD

Grievance denied.

Mollie H. Bowers
Arbitrator

January 18, 1993
Date

[1] Violation #35 was included in New Directive No WR-101 which supersedes Directive A-601.