ARBITRATION DECISION NO.:
508

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

EMPLOYER:
Department of Transportation
Fifth Avenue Garage - Columbus

DATE OF ARBITRATION:
March 5, 1993
April 1, 1993

DATE OF DECISION:
July 8, 1993

GRIEVANT:
Nathan E. Wilson

OCB GRIEVANCE NO.:
31-06-(92-08-0l)-0029-01-06

ARBITRATOR:
Rhonda Rivera

FOR THE UNION:
Robert W. Steele
John Gersper

FOR THE EMPLOYER:
Thomas Durkee
Don McMillan

KEY WORDS:
EAP
CDL
Prior Discipline
Falsification
Dishonesty
Removal
Just Cause
Nexus

ARTICLES:
Article 9 - Employee Assistance Program
- § 9.01 - Joint Promotion
- § 9.02 - EAP Advisory Committee
- § 9.03 - EAP Steward Training
- § 9.04 - Employee Participation in EAP

Article 24 - Discipline
§ 24.01 - Standard
§ 24.02 - Progressive Discipline
§ 24.04 - Pre-Discipline
§ 24.05 - Imposition of Discipline
§ 24.06 - Prior Disciplinary Actions
§ 24.09 - Employ Assistance Program

FACTS:

At the time of his removal, the grievant was a Highway Maintenance Worker II assigned to the ODOT Fifth Avenue garage in Columbus; he had a long history of prior discipline. Initially, the grievant was disciplined for allegedly: 1) yelling at a co-worker in violation of ODOT Directive A-601, Item #3; 2) using loud, abusive, and/or insulting language towards a supervisor and a co-worker and making a racial remark to his supervisor in violation of Item #5; 3) failing to return from a meeting with the District Deputy Director in a timely manner in violation of Item #2b, and 4) refusing to fill out an accident report for an accident which occurred on December 3, 1991 also in violation of Item #2b.

The parties agreed to resolve the initial discipline by signing an Employee Assistance Program (EAP) Participation Agreement. The contemplated discipline was held in abeyance contingent upon the grievant's successful completion of the EAP program. Ultimately the grievant was removed for violating the terms and conditions of his EAP Agreement. Specifically, the State alleged that the grievant: 1) took an improper lunch break on April 21, 1992 in violation of Items #2a, #2c, and #33 (later dismissed); 2) gave "the finger" to his supervisor and 2 co-workers on April 20, 1992 in violation of Item #3; 3) misrepresented the status of his Commercial Driver's License (CDL) on April 28 and 29, 1992 in violation of Item #33, and (4) failed to provide information to his case monitor.

EMPLOYER'S POSITION:

The grievance was untimely filed. The Union waived its right to object to the pre-EAP issues by failing to file a grievance; therefore, discipline was effectively imposed. The State claimed there was no need to re-address the pre-EAP charges at the post-EAP pre-disciplinary meeting because the State had previously found just cause to remove the grievant on those charges at the first pre-disciplinary meeting. The State contended that, through credible witnesses and exhibits, it had fully proved each charge against the grievant.

UNION’S POSITION:

The State improperly raised the pre-EAP charges at the arbitration hearing because they were not addressed at the pre-disciplinary meeting. Also, since the discipline for the alleged incidents was never meted out, no grievable event. ever occurred; therefore, the State could not at this late date raise these issues. Moreover, the record contained numerous inconsistencies. Throughout the entire procedure the Union was forced to guess which violations the grievant was charged with and which charges the Union would be expected to defend. The State frequently added charges without giving the Union adequate notice or an opportunity to prepare.

The State failed to prove just cause to remove the grievant. The grievant did not violate the terms and conditions of his EAP Participation Agreement. The grievant consistently denied the allegations which led to his removal and provided corroborating statements and witnesses in support of his position.

ARBITRATOR'S OPINION:

The Arbitrator decided that neither position was consistent with the spirit of the Contract; therefore, she accepted evidence relating to the pre-EAP charges and considered the issues under advisement. Although it would have been preferred that the discipline be actually imposed prior to removal, the Arbitrator interpreted the Contract as permitting the State to delay contemplated discipline pending the completion of the EAP. However, since the State chose to wait until after the grievant's participation in EAP to impose discipline, no grievable event occurred until the grievant was finally terminated on July 24, 1992. Thus, the

grievance was timely.

Despite the numerous inconsistencies in the correspondence from the State to the Union regarding which charges it was expected to address, the Arbitrator concluded that the Union was on notice that termination was a possible form of discipline. The Arbitrator rejected the Union's lack of proper notice argument, particularly since the grievant signed the EAP agreement in the presence and on the advice of his Union representative. The Arbitrator noted that the EAP agreement itself stated that the contemplated discipline would be implemented should the employee violate the Contract in any part.

The Arbitrator emphasized the grievant's poor disciplinary record. She noted that in over 7 years, he was never able to keep his record free long enough to have any discipline expunged from his record. The Arbitrator concluded that the grievant was unable to work peaceably with others or at the direction of his supervisors, a requisite for successful performance of his job.

The pre-EAP charges were that:

1) The grievant verbally assaulted a co-worker. The Arbitrator found that the charge lacked merit because a more full and fair investigation would have disclosed that both employees were involved in a heated exchange which probably should have resulted in discipline for both employees.

2) The grievant used loud, abusive, insulting language towards a co-worker and his supervisor and used a racial slur against his supervisor. The Arbitrator held that this claim was proven by the State through the presentation of credible witnesses.

(3) and (4) The Arbitrator found that the State proved that the grievant failed to return from his meeting in a timely manner and to respond to the Outpost's radio calls. The grievant contended that he had vehicular problems which had prevented him from returning in a timely manner. Further, he claimed (and provided corroborating testimony) that he did respond to the radio calls. However, the State proved that the grievant could have relayed his transmission through another garage when no response from the Columbus Outpost was forthcoming. To the Arbitrator, his failure to do so indicated that the rest of explanation of his whereabouts was also suspect.

The Arbitrator found that the State would have had just cause to discipline the grievant on the pre-EAP issues had discipline been imposed and grieved.

The arbitrator's findings concerning the post-EAP charges were:

1) The first charge was dismissed.

2) The Arbitrator found the State's witnesses most credible in concluding that the grievant drove past an ODOT worksite and gave his supervisor and 2 co-workers "the finger", thereby violating his EAP agreement. Even though the grievant was off-duty when the incident allegedly occurred, there was sufficient nexus because the grievant voluntarily injected himself back into the "workplace" by his behavior.

3) The Arbitrator determined that the grievant was deceitful in the manner in which he approached taking the CDL test by maintaining that he was not required to take the skills (the driving portion of the test) test because he already possessed a valid CDL. In fact, the grievant intentionally falsified his CDL application to avoid having to take the skills test.

4) The arbitrator did not rule on the issue because the previous issues provided ample basis for ODOT to properly remove the grievant.

In sum, the Arbitrator determined that the grievant's credibility was not great and that the State proved its

imposition of discipline was for just cause and that the discipline was commensurate with the offenses.

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.:
31-06-92/08/01-0029-01-06
Grievant:
(Nathan E. Wilson)
Hearing Dates:
March 5, 1993 and
April 1, 1993
Brief Date:
June 5, 1993
Award Date:
July 8, 1993

Arbitrator:
R. Rivera

For the Employer:
Thomas Durkee
Don McMillan

For the Union:
Robert W. Steele Sr.
John Gersper

Present at the Hearing in addition to the Grievant and Advocates were John Dersoon, Highway Superintendent 1 (witness), Robin Johnson, Clerical Specialist (witness), Kevin Gay, BMV (witness), Mike Charlton (witness), Charles Dersoon (witness), Nate Washington (witness), J.R. Maynard (witness), Ken

Palmer (witness), Wayne Wood (witness), John Porter (witness), Kim Browne, Arbitration Clerk (observer), William Anthony (observer), Bill Adams, ODOT, L.R.0, Nick Nicholson, Labor Relations, ODOT, Lawrence E. Claar, 5th Ave. Highway Worker 4 (witness), Clarence Norwood, Superintendent (witness) and Mary Ringler, OCSEA (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.

Joint Exhibits

1. Contract
2. Disciplinary Trail consisting of 19 pages
3. Grievance trail
4. a) Gayle Stanford's letter of June 30, 1992
   b) E.A.P. Agreement
   c) Release of confidential information
5. Letter from Physicians Health Care dated February 25, 1993 and November 12, 1992
6. Disciplinary history
7. Work Rules

Employer Exhibits

1. Disciplinary Trail leading up to E.A.P. Agreement
2. Map of Columbus area highways
3. IOC from William Buckley, Safety Supervisor, to Clarence Norwood, Franklin County Superintendent dated March 17, 1992
4 IOC from William Buckley, Safety Supervisor, to Grievant dated April 21, 1992
5. BMV print-out on Lawrence Claar
6. Abstract Driver Record of Grievant dated March 1, 1993
7. A series of BMV documents pertaining to Grievant
8. Radio Log dated August 20-August 22
9. Notice of Examination for Grievant on March 25, 1992 at 9:48 a.m.

Union Exhibits

1 . Grievant's work evaluations from April 5, 1985 to March 5, 1992
2. Copy of Grievant's license dated April 27, 1992
3. Diagram of office
4. Employee Vehicle Accident Report dated December 3, 1991
5. Drivers License Check Sheets - Fifth Avenue Outpost dated May 15, 1992 to July 24, 1992
6. Notice of Examination for Grievant on April 20, 1992 at 10:15 a.m.
7. Return receipt dated July 20, 1992

Stipulated Facts

1. Grievant has 1-1/2 years of service with Ohio Department of Transportation.

2. At time of removal the Grievant was a Highway Maintenance Worker 2.
3. Grievant's prior disciplinary history is listed on Joint Exhibit 6.
4. The memorandum submitted by Tim Doty is an accurate reflection of the events of April 28, 1992.
5. The letter of February 25, 1993 by Ms. Debra Leno is an accurate reflection of Grievant's participation in the Employee Assistance Program.
6. The specification of the long lunch hour is deleted from the removal order and the Arbitrator is instructed not to make a finding on this issue.

Stipulated Issue

Was the removal of Grievant on July 27, 1992 for just cause?
If not, what should the remedy be?

Relevant Contract Sections

ARTICLE 9 - EMPLOYEE ASSISTANCE PROGRAM

§ 9.01 - Joint Promotion

The Employer and the Union recognize the value of counseling and assistance programs to those employees who have personal problems which interfere with their job duties and responsibilities. The Union and the Employer, therefore, agree to continue the existing EAP and to work jointly to promote the program.

§ 9.02 - EAP Advisory Committee

The parties agree that there will be a committee composed of nine (9) union representatives that will meet with and advise the Director of the EAP. This committee will review the program and discuss specific strategies for improving access for employees. Additional meetings will be held to follow up and evaluate the strategies. The EAP shall also be an appropriate topic for Labor-Management Committees.

§ 9.03 - EAP Steward Training

The Employer agrees to provide orientation and training about the EAP to union stewards. All new stewards shall receive EAP training within a reasonable time of their designation. Such training shall deal with the central office operation and community referral procedures. Such training will be held during regular working hours. Whenever possible, training will be held for stewards working second and third shifts during their working time. If the Employer initiates programmatic changes which would impact upon the EAP programs, all stewards shall receive training on the new program within a reasonable time.

§ 9.04 - Employee Participation in EAP

A. Records regarding treatment and participation in the EAP shall be confidential. No records shall be maintained in the employee's personnel file except those that relate to the job or are provided for in Article 23. In cases where the employee and the Employer have entered into a voluntary EAP participation agreement in which the Employer agrees to defer discipline as a result of employee participation in the EAP treatment program, the employee shall be required to waive confidentiality to the extent required to provide the Employer with reports regarding compliance or non-compliance with the EAP treatment program.

B. If an employee has exhausted all available leave and requests time off to have an initial appointment with a community agency, the Agency shall provide such time off without pay.

C. The Employer or its representative shall not direct an employee to participate in the EAP. Such participation shall be strictly voluntary.

D. Seeking and/or accepting assistance to alleviate an alcohol, other drug, behavioral or emotional

problem will not in and of itself jeopardize an employee's job security or consideration for advancement.

ARTICLE 24 - DISCIPLINE

§ 24.01 - Standard (emphasis added)

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 (emphasis added)

THE EMPLOYER WILL FOLLOW THE PRINCIPLES OF PROGRESSIVE DISCIPLINE. DISCIPLINARY ACTION 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.

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.

§ 24.04 - Pre-Discipline (emphasis added)

AN EMPLOYEE SHALL BE ENTITLED TO THE PRESENCE OF A UNION STEWARD AT AN INVESTIGATORY INTERVIEW UPON REQUEST AND IF HE/SHE HAS REASONABLE GROUNDS TO BELIEVE THAT THE INTERVIEW MAY BE USED TO SUPPORT DISCIPLINARY ACTION AGAINST HIM/HER.

An employee has the right to a meeting prior to the imposition of, a suspension or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. Absent any extenuating circumstances, failure to appear at the meeting will result in a waiver of the right to a meeting. An employee who is charged, or his/her representative, may make a written request for a continuance of up to 48 hours. Such continuance shall not be unreasonably denied. A continuance may be longer than 48 hours if mutually agreed to by the parties. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The Employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to ask

questions, comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

§ 24.05 - Imposition of Discipline (emphasis added)

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall **MAKE A FINAL DECISION ON THE RECOMMENDED DISCIPLINARY ACTION AS SOON AS REASONABLY POSSIBLE BUT NO MORE THAN FORTY-FIVE (45) DAYS AFTER THE CONCLUSION** of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. The OCSEA Chapter President shall notify the agency head in writing of the name and address of the Union representative to receive such notice. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

DISCIPLINARY MEASURES IMPOSED SHALL BE REASONABLE AND COMMENSURATE WITH THE OFFENSE AND SHALL NOT BE USED SOLELY FOR PUNISHMENT.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except that in cases of alleged abuse of patients or others in the care or custody of the State of Ohio, the employee may be reassigned only if he/she agrees to the reassignment.

§ 24.06 - Prior Disciplinary Actions (emphasis added)

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.

The retention period may be extended by a period equal to employee leaves of fourteen (14) consecutive days or longer, except for approved periods of vacation leave.

§ 24.09 - Employee Assistance Program (emphasis added)

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 MEET AND GIVE SERIOUS CONSIDERATION TO MODIFYING THE CONTEMPLATED DISCIPLINARY ACTION.** Participation in an EAP program by an employee may be considered in mitigating disciplinary action only if such participation commenced within five (5) days of a pre-

disciplinary meeting or prior to the imposition of discipline, whichever is later. **SEPARATE DISCIPLINARY ACTION MAY BE INSTITUTED FOR OFFENSES COMMITTED AFTER THE COMMENCEMENT OF AN EAP PROGRAM.**

Introduction

This grievance requires the Arbitrator to answer three questions: First, whether the Exhibits C, D, & E that were made part of the Union's closing and brief could be received in evidence? Second, what alleged incidents were properly before the Arbitrator when a prior contemplated discipline had been held in abeyance pursuant to Contract Article 24.09? Third, was just cause found for the termination of the Grievant?

PART I

Attached to the Union's Closing Argument and brief were Exhibits A through H. Subsequently, the Advocate for the Employer wrote to the Arbitrator with a copy to the Union advocate objecting to Exhibits C, D, & E on the grounds that these items had never been placed in evidence during the hearing. The Arbitrator reviewed the evidence and concluded that the Employer's Advocate was correct. Therefore, the Arbitrator has excluded those items from consideration.

PART II

To understand the problem that arose under Article 24.09, a chronology is necessary. No disagreement exists between the Union and Employer as to this chronology.

1. The Grievant begins to work for ODOT in 1985 at the Delaware outpost. He receives his first evaluation (probationary) on 4/5/85. The evaluation is basically average. No problems are noted.

2. The Grievant receives a second evaluation (probationary) on June 7, 1985. The evaluation is slightly improved over the first evaluation.

3. The Grievant receives a third probationary evaluation; the rating is exactly the same as the 4/5/85 rating.

4. Grievant received a 1 day Suspension for violation of A-301, #3: Abusing or insulting language.

5. On February 4, 1986, the Grievant received his annual evaluation. The evaluation was very similar to the previous evaluations, except that the rater noted that the Grievant "needs to work on improving his attendance."

6 The Grievant receives another evaluation called Probationary-Final Promo. The evaluation was average.

7. On November 21, 1986, the Grievant received a Written Reprimand for violation of A-302 #15 "Extended lunch hour."

8. On February 4, 1987, the Grievant received an Annual evaluation. The Evaluation was basically the same as previous evaluations.

9. No evaluations were placed in evidence for the year 1988.

10. The Grievant received a 7 day suspension on April 21, 1988 for violation of A-301 #1a "Neglect of Duty" and #2c "Insubordination" (Policies).

11. The Grievant received a 30 day suspension on September 18, 1989 for violation of A-301 #1a "Neglect of

Duty" and #2c "Insubordination" (Policies).

12. The Grievant received a Written Reprimand on January 16, 1990 for violation of A-301 #13 "Leaving the Work Area Without Permission."

13. On March 6, 1990, the Grievant received an evaluation for the period February 4, 1989 to February 4, 1990. The Grievant's evaluation was that he "met" expectations in all areas. (The form had been changed.)

14. On March 6, 1991, the Grievant received his annual evaluation for the period February 4, 1990 to February 4, 1991. In the evaluation, the Grievant met expectations in all areas.

15. On March 19, 1991, the Grievant was given a Written Reprimand for violation of A-601 #6 "Fighting with another employee." (A-301 was replaced with A-601.)

16. On April 16, 1991, the Grievant was given an Oral Reprimand for violation of A-601 #23 "Unauthorized Absence."

17. On July 22, 1991, the Grievant was given a Written Reprimand for violation of A-601 #11 "Damage of a State Vehicle."

18. On October 16, 1991, the Grievant was given a Written Reprimand for violation of A-601 #2b "Insubordination-Willful Disobedience of a Direct Order."

19. On November 18, 1991, the Grievant was given an Oral Reprimand for violation of A-601 #19 "Sleeping on Duty."

20. On November 20, 1991, the Grievant was given an Oral Reprimand for violation of A-601 #11 "Damage to a State Vehicle."

The Grievant's record stood as above when the incidents that gave rise to this arbitration occurred.

On December 2, 1991, Mr. Dersoon, Assistant Superintendent, again requested discipline for the Grievant. The charges listed were violations of A-601 #3 "Using obscene, abusing, language towards another employee" and A-601 #5 "Acts of Discrimination or insult on the basis of race, color." These incidents were alleged to have happened on November 27, 1991 and November 29, 1991. (Employer's Exhibit #1 pp. 12-13)

On December 12, 1991, Mr. Dersoon, Assistant Superintendent, requested discipline for the Grievant. The charges listed were violations of A-601 #2 "Willful disobedience of a Direct Order by a Supervisor," A-601 #3 "Using obscene, abusing or insulting language towards another employee," and A-601 #5 "Acts of Discrimination on the basis of race or color." These events were alleged to have occurred on December 10, 1991. (Employer's Exhibit #1, pp. 10-11.)

On March 5, 1992, the Grievant was sent a letter notifying him of a pre-disciplinary meeting on these charges to be held January 2, 1991. (Employer's Exhibit #1 p 7.)

This pre-disciplinary meeting was held on March 11, 1992 before hearing officer Gabriel. Officer Gabriel filed his report on March 13, 1991 in which he found just cause for discipline for violation of A-601 Items #2b, #3, and #5. (Employer's Exhibit #1, 3-5)

On March 19, 1992, Bill Adams, LRO, wrote to Mary Ringler, President and Chief Steward of the Union, in which he offered “[i]f the Union and the employee would enter into an EAP agreement, the contemplated level of discipline would be held in abeyance upon completion of the Agreement." (Employer's Exhibit #1 p. 1)

On March 31, 1992, Bill Adams, LRO, wrote to District Deputy Director and recommended that the Grievant be terminated. (Employer's Exhibit #1 p. 2).

On April 15th, the Grievant signed an EAP agreement with the Employer. Mary Ringler signed for the

Union. (Joint Exhibit #4),

That Agreement reads in full as follows:

"The Ohio Department of Transportation (ODOT) and Grievant (employee) agree to enter into a contract wherein the employee voluntarily agrees to seek assistance from a Health Care Provider under the Ohio Employee Assistance Program (Ohio E.A.P.), **TO DEAL WITH THE PROBLEM OF INSUBORDINATION: USING OBSCENE, ABUSIVE OR INSULTING LANGUAGE TOWARDS ANOTHER EMPLOYEE, A SUPERVISOR OR THE GENERAL PUBLIC; AND/OR ACTS OF DISCRIMINATION OR INSULT.**

The employee agrees to participate in a plan for a period of ninety (90) days. Said plan will be developed by the Health Care Provider. The employee agrees to meet all of the requirements set forth in that plan. The employee also agrees to verification as to whether or not the employee is keeping scheduled appointments and is in compliance with the agreed to plan. Said verification will be made by the Case Monitor assigned in accordance with the employee's health plan contract.

A Participation Outline, including the lengths of the various aspects of service and the frequency of appointments or treatment sessions, shall be attached to and made a part of this agreement as soon as possible, but not later than within thirty (30) days from the date of signing.

If the agency is unable to secure information from the Case Monitor, it shall be the employee's responsibility to provide the employer representative with such information.

The employee further agrees to participate in follow-up care as recommended and/or required by the Health Care Provider, and agrees that such follow-up is to be verified to ODOT by the Case Monitor.

ODOT agrees that, so long as this contract is complied with in its entirety, **THE DISCIPLINE RECOMMENDED FOR THIS EMPLOYEE PURSUANT TO THE LETTER DATED MARCH 5, 1992 SHALL BE HELD IN ABEYANCE. THE PROPOSED LEVEL OF DISCIPLINE IS TERMINATION. SHOULD THE EMPLOYEE VIOLATE THIS CONTRACT, IN ANY PART, THE RECOMMENDED DISCIPLINARY PROCEDURE WILL BE IMPLEMENTED.**

THE EMPLOYEE UNDERSTANDS AND AGREES THAT FURTHER OCCURRENCES OF THE PROBLEM DESCRIBED IN PARAGRAPH 1, MAY RESULT IN THE IMMEDIATE IMPLEMENTATION OF THE PROPOSED DISCIPLINE.
By signing this agreement, **THE EMPLOYEE AND UNION AGREE TO WAIVE ANY CONTRACTUAL TIME RESTRICTIONS REGARDING THE IMPOSITION OF DISCIPLINE.**

The employee by signing this contract acknowledges that he/she has received a copy of this contract, and has been fully informed of the terms and consequences of it, and hereby voluntarily enters into said contract after having been advised by his/her representative, if applicable.

ODOT further agrees that if the employee successfully completes the agreed to plan, as certified by Ohio E.A.P. or its designee, ODOT will review the proposed discipline and seriously consider modification of the discipline imposed. (Joint Exhibit #4) (Emphasis added.)"

Mary Ringler testified that, to her knowledge, both she and the Grievant signed the Agreement voluntarily and that both of them received copies.

Apparently, on the same day, April 15, 1992, the Grievant signed an Authorization for Release of Information. (Joint Exhibit #4 p 4.)

On June 8, 1992, the Grievant was notified of a pre-disciplinary meeting to be held June 16, 1992. The

pre-disciplinary notice specified that "termination" was contemplated. The charges were violations of ODOT Directive WR-101, in particular, Item #2 Insubordination (a) failure to carry out assignment and (c) Failure to follow policies of the Director. Item #3 Posting or displaying obscene or insulting material and/or using obscene, abusing or insulting language towards another employee, a supervisor, the general public. Item #33 Violations of Section 124.34 of the Ohio Revised Code, specifically Dishonesty. On page 2, the Notice of the Pre-disciplinary Meeting stated as follows:

"In addition, if just cause for discipline is substantiated on the above incidents, **YOUR ACTIONS WILL HAVE ALSO CONSTITUTED A VIOLATION OF YOUR PRIOR EMPLOYEE ASSISTANCE PROGRAM PARTICIPATION AGREEMENT** entered into by you and the Agency on April 15, 1992. (Joint Exhibit #2 pp. 7-8) (Emphasis added.)"

The Pre-disciplinary Meeting was held on June 16, 1992 and reported on June 22, 1992. The Hearing Officer found just cause for all three charges. (Joint Exhibit #2 pp. 3-4). On June 26, 1992, Bill Adams, LRO, recommended that the Grievant be terminated. (Joint Exhibit # 2, p. 2)

On June 22, 1992, Gayle Stanford of the Ohio EAP Program wrote to the Grievant claiming that a release was never returned "for your treatment provider." The letter said that without that information he was "out of compliance" with the EAP. (Joint Exhibit #4 P. 1)

On July 24, 1992, the Grievant was terminated. The letter stated the cause as follows:

"On April 16, 1992 an Employee Assistance Program (EAP) Participation Agreement was finalized between yourself and the Ohio Department of Transportation. As such, your original termination from employment for violations listed upon your pre-discipline meeting notice dated March 5, 1992, was held in abeyance pending the successful completion of your EAP program and no further occurrence of the problem specified in your EAP Participation Agreement. On June 16, 1992, a pre-discipline meeting was held because of further violations), as noted in your EAP Participation Agreement. Just cause was found for a violation of Directive WR-101, Item #3 - Posting or displaying obscene, abusing, or insulting language towards another employee; a supervisor, the general public; and Item #33 - violation of Section 124.34 of the Ohio Revised Code - Dishonesty. **THESE VIOLATIONS AND YOUR FAILURE TO PROVIDE INFORMATION TO YOUR CASE MONITOR CONSTITUTE A VIOLATION OF YOUR EAP PARTICIPATION AGREEMENT**. (Joint Exhibit #2) (Emphasis added.)"

A grievance was filed on July 31, 1992. (Joint Exhibit 3 p. 4)

A Step III Grievance meeting was held on August 25, 1992. The Union Advocate made an initial objection on the grounds that the June 16, 1992 meeting did not deal with the violation of the EAP and, therefore, the violation of the EAP could not be used as a basis of the termination. (Joint Exhibit #3 p. 2). The Hearing officer rendered his report on September 29, 1992. He found that the termination was justified as follows:

"Management stated the Grievant was terminated from employment as a Highway Maintenance Worker 2 as a result of his violation of an Employee Assistance Program Participation Agreement, finalized on April 16, 1992, which held in abeyance an earlier decision by the Department to terminate the Grievant. The Agreement required the successful completion of the EAP program and no further occurrence of the problems specified in that Agreement. The Grievant did in fact violate the Agreement when, on April 20, he "fingered" Supervisors Norwood, Claar, and Wood as they were meeting at approximately 10:00 a.m. on State Route 161. This was a violation of the Participation Agreement and item #3 of WR-101, displaying obscene language to a supervisor.

In addition he was found to be in violation of item #33, a violation of Article 124.34 of the Ohio Revised Code - Dishonesty. On two occasions the Grievant was intentionally deceptive. On April 21, 1992, he led his lead worker to believe he had not taken a lunch period by claiming he had not eaten. He had, in fact, spent his

lunch period sitting in a State vehicle while others in his crew ate lunch and then caused that crew to sit idly waiting while he ate lunch at another establishment at a later time. on April 28, 1992, he misled his superintendent when he traveled from Columbus to Lima, Ohio, to take a Commercial Drivers License test knowing that he already had in his possession such a license. (Joint Exhibit #3)"

Discussion

An Arbitration Hearing was held on March 5, 1992. The Union Advocate objected to any presentation of facts with regard to the incidents of November and December 1991 on two grounds: first, the pre-disciplinary meeting of June 16, 1991 did not deal with those issues, and hence, the Employer had no right to bring those items up in this Arbitration and second, since the discipline for those alleged incidents had never been meted out, no grievable event had occurred, and the Employer could not at this late date raise these issues.

The Advocate for the Employer pointed out that the Notice of the Pre-disciplinary meeting of June 8, 1992 clearly indicated that if just cause was found for the incidents enumerated in that notice, that a violation of the EAP had occurred; therefore, the Union was on notice. Moreover, no need existed to have a pre-disciplinary meeting on the November and December incidents because a pre-disciplinary had been held on March 11, 1992, and just cause found at that time. Second, the Employer claimed that the Union's failure to grieve the termination resulting from the November and December incidents meant that the discipline should be considered as imposed. The Union quickly pointed out that since no termination letter had ever been sent with regard to the November and December incidents, no grievable action had ever occurred.

The Arbitrator suggested that neither of their arguments were completely consistent with the words nor the spirit of the EAP provision in the Contract. The Arbitrator decided to hear evidence on the November and December incidents and take the issue under advisement. The Arbitrator requested and received briefs on the issue.

First, what problems were the genesis of the EAP Agreement of April 15, 1992 between the Grievant and the Employer. The Agreement lists three alleged violations: 1) insubordination, 2) using obscene, abusive or insulting language towards another employee, a supervisor, or the general public, and 3) acts of discrimination or insult. These three charges are the same as the December 2, 1991 and December 12, 1991 Requests for Discipline and the same as the charges enumerated in the Pre-disciplinary Hearing notice of March 5, 1991 and as stated in the March 13, 1991 report by the hearing officer.

Second, what discipline was held in abeyance? The EAP Agreement referenced the March 5th letter for the contemplated discipline. The Union is correct that the March 5th letter referenced both suspension or termination. However, the EAP Agreement only states that "termination" was the proposed discipline. This latter reference is consistent with the letter written to Flynn by Adams on March 31st. (Employer's Exhibit #1, P. 2) The EAP Agreement is subsequent to that letter and is signed by both the Appointing Authority, the Grievant, and the Union. (Joint Exhibit #4) The EAP Agreement is, therefore, internally inconsistent. However, the Grievant and the Union were both on notice that termination could occur.

Third, was the correct procedure followed to implement the EAP Agreement, while holding the discipline in abeyance? The Union in FN#1 of their brief describes what the Union calls the "proper" procedure and references the Robinson grievance trail. While the Robinson procedure may be preferable, it is not mandatory. A close reading of Article 9.01-9.04 and 24.09 illustrates that the procedure used by the Employer in this case was equally proper under the Contract. (Supra p. 9) Section 24.09 applies "In cases where disciplinary action is contemplated"; the section does not require that the disciplinary action actually be imposed only contemplated. "In cases where the disciplinary action is contemplated," and the record is clear that the Employer "contemplated" disciplinary action AND "where the affected employee elects to participate in an EAP, the discipline MAY be delayed until the completion of the program." The delay is not mandatory on the Employer. "Upon successful completion of program, the Employer will meet and give serious consideration to modifying the contemplated disciplinary action." Note that the section specifically allows separate disciplinary action for offenses committed after the commencement of the EAP. In conclusion, the Arbitrator notes that a formal imposition of the discipline prior to the EAP Agreement might have made for a neater procedure but the Contract does not require it.

If the Employer had imposed the discipline and given the Union notice, then the ability to grieve the discipline would have become available. In this case, however, the discipline was not imposed, and, hence, no action occurred to grieve until the termination notice of July 24, 1992. The Employer's preliminary argument that the Union had failed to grieve the prior contemplated discipline is without merit. Not until July 24th did an event occur that the Union could have grieved.

The Union claims that procedural defects failed to give the Union proper notice that the contemplated discipline for which the EAP was effectuated would be considered in this Arbitration. That claim will not stand. First, the Union was on notice on April 15th, 1992 that discipline was being held in abeyance. The EAP Agreement was negotiated and signed by a Union official. The Pre-disciplinary notice of June 8, 1992 specifically and clearly warned that if just cause was found for these new alleged violations the Employer considered the EAP Agreement breached. The EAP Agreement signed by the Grievant and the Union stated "should the employee violate this contract IN ANY PART, the recommended disciplinary procedure will be implemented." The Agreement explicitly stated: ."The Employee understands and agrees that further occurrences of the problem described in paragraph 1 may result in the immediate implementation of the proposed discipline."

The Union is correct that the June 22, 1992 Report of the Pre-disciplinary Hearing did not reference the EAP. This absence is not fatal. The Hearing Officer's duty was to solely determine the just cause for the specific items charged. Once he determined that just cause existed for discipline, he did his job. Arguably, the behaviors at issue might have been totally different than the behaviors for which the prior discipline had been contemplated. In that case, the EAP would not have been broken by the new behaviors even though discipline might have resulted. In this case, however, some of the alleged misbehaviors were the same and arguably automatically breached the Agreement. The July 24, 1992 termination letter put the Grievant and the Union on notice that the breach of the EAP constituted part of the basis of discipline. Moreover, the issue was raised by the Union at the Step III. The Arbitrator finds that the Union was on Notice that the prior discipline would be at issue in the Arbitration. (The Arbitrator also notes that the Arbitration Hearing was continued a second day to prevent any question of unfairness due to "notice".)

A reading of 24.09 does not instruct the parties or the Arbitrator as to the correct procedure to invoke that section. The Arbitrator would agree that a cleaner procedure would require prior imposition of the discipline (rather than its mere contemplation) so as to give a grievable event. In that sense, the Robinson methodology has much to recommend it. Moreover, while the Contract does not prescribe a separate finding on the breach of the EAP Agreement, such a finding would certainly clear the procedural air.

The Arbitrator concludes that evidence of charges for November and December 1991 was properly included in the Arbitration.

PART III

Background

The Grievant was employed by ODOT for approximately 7+ years when these incidents arose. At the time of the alleged incidents, the Grievant was a Highway Maintenance Worker II; his worksite was at the 5th Avenue Garage in Columbus, Ohio. At the garage, the Grievant, of necessity, interacted with about 20 other employees. As a Highway Maintenance Worker II, the Grievant usually would work as a member of a team, under the functional supervision of a Highway Worker 4 (who was also a member of the Bargaining Unit.) The main function of such teams is to carry out highway maintenance for the convenience and safety of the public.

The evaluations of the Grievant indicated that he was an average employee. (Union Exhibit #1) However, his disciplinary record was dismal. Since his employment in 1985, he had never gone long enough without a discipline to expunge his records. (See § 24.06, p. 8) Moreover, many of the disciplines indicated an inability to work peaceably with fellow workers or under the direction of his superiors: abusive language (once), insubordination (3 times), fighting with other employee (once). (See Joint Exhibit #6). The Grievant must have realized that his job was in serious jeopardy when he signed an EAP Agreement that held in abeyance

contemplated discipline, listed as "termination."

The first incident occurred on November 27th. The facts are not much at issue. Mr. Claar and Ms. John were working in the office one morning. Mr. Dersoon, the Superintendent, had called in and reported off late. The Grievant came into the room and asked Claar where Dersoon was and why wasn't Dersoon there. Claar attempted to explain to the Grievant that the personnel matters of the Superintendent were not his (Grievant's) business. The Grievant was very quick, loud, and persistent. Ms. Thomas apparently interrupted the conversation and informed the Grievant that keeping time was her job and not his. The Grievant responded to the interruption by telling Ms. Johnson to "Shut up and mind her own damn business." Ms. Johnson testified at the Arbitration Hearing that the Grievant was very loud and that he frightened her by his manner. Mr. Claar said that subsequent to these words, the Grievant had persisted in his loud questioning and had even followed him. Subsequently, John Porter, the functional supervisor, spoke to two of the parties (Johnson and the Grievant) and counseled them to avoid such acrimony in the workplace. Porter told Johnson that she should not have "butted" in and told the Grievant that he should not have used loud and abusive language. Porter thought his counseling had ended the matter. However, Mr. Claar reported the conversation to Superintendent Dersoon, his superior. On November 29th, Mr. Dersoon took both Mr. Claar and the Grievant into a room to hear both sides. He indicated that he had a time limit on the conversation. He told Mr. Claar to begin. The Grievant interrupted Claar, jumped up and called Claar a "liar" and was quite loud and persistent. Mr. Dersoon told the Grievant to sit down and calm down and let Mr. Claar finish his side of the story. He did. Claar finished. The Grievant told his side. At that point, Mr. Dersoon told both parties that he would have to finish with the discussion at a later time. The Grievant protested loudly. When Dersoon agreed to stay a little longer, the Grievant muttered under his breath "that's mighty white of you." The Grievant claimed he did not say the last remark. On this issue, Mr. Claar and Mr. Dersoon were more credible. Mr. Dersoon indicated that the interview was fruitless and at an end.

As a result of these incidents, Mr. Dersoon charged the Grievant with using obscene, abusing, or insulting language toward other employees (i.e. Johnson and Claar) and with an act of discrimination against himself (Dersoon) by the use of the phrase "that's mighty white of you." Technically, those charges were correct; a better charge might have been "unable to control one's mouth and one's temper." However, with regard to the altercation between Johnson and the Grievant, the evidence showed that Mr. Dersoon did not fully investigate that incident when he refused to interview John Porter and Mr. Huff. Such an investigation might well have resulted in a reprimand for Ms. Johnson. We will never know. The lack of a full and fair investigation causes the Arbitrator to strike the use of abusive language to Johnson.

The next incident occurred on December 10th. The Grievant was to be at the District Director's office in Delaware around 8 a.m. He was given a truck to transport him. When he had not returned by 10:30 a.m., Mr. Dersoon called the District Office and learned that the Grievant had departed from the District Office at 8:45 a.m. The normal time for such a return trip would be 40 minutes at worst. Mr. Dersoon had the Grievant paged on the radio approximately three times between 10:30 a.m. and 11:50 a.m. He never acknowledged receipt. The Grievant stated that he had heard the calls and did respond. Two co-workers indicated that they heard his response. However, both the Grievant and his co-workers indicate that no acknowledgment was heard from the Garage. The common practice is to acknowledge transmissions. All parties agreed that if one's transmission is not acknowledged, that one attempts to relay one's transmission through another garage. The Grievant testified that he was aware of the common practice and had used it on other occasions. He admits he did hear the calls and states that he did answer the calls but gave no explanation for his failure to use a relay when his answers were not acknowledged by his home base.

When the Grievant arrived back at 5th Avenue, he was seen by Clarence Norwood, a Highway Supervisor I, and an ODOT employee since 1963. Mr. Norwood told the Grievant that Mr. Dersoon was looking for him. The Grievant then went to lunch; the Grievant claims Mr. Dersoon was not around; Mr. Dersoon indicates that he was in his normal office and that Grievant never checked. When Grievant returned, he did go to Dersoon's office. Mr. Norwood was present. Mr. Dersoon asked the Grievant where he had been "all that time?" The Grievant replied that he had been at the District Office. Mr. Dersoon then told the Grievant that he (Dersoon) had called the District Office and was told that the Grievant had left the

District office at 8:45 a.m. Then Mr. Dersoon again asked the Grievant where he had been. The Grievant refused to answer without Union representation; Mr. Dersoon asked a second time and received the same reply. Dersoon did not ask again; rather he told the Grievant that he had to fill out an accident report on a prior accident. The Grievant refused, saying that he did not have to fill out the report. Dersoon told him again to fill it out; the Grievant refused and left the office. Mr. Norwood essentially corroborated Mr. Dersoon's version, and both their versions differ little from the Grievant's.

Testimony at the Arbitration Hearing by Mr. Maynard, a Health and Safety Investigator, revealed that prior to that day he had informed the Grievant that he (the Grievant) did not have to fill out the report at issue and only later had Maynard realized that he had been in error. Therefore, on the 10th, Maynard called Mr. Dersoon and asked him to have the Grievant fill out the report. Apparently, at the time of their discussion, neither Dersoon nor the Grievant knew this background.

Mr. Dersoon testified that when he asked the Grievant where he had been, he considered the question a legitimate question and not an investigation. When the Grievant stated that he had been at District headquarters, Dersoon warned him that he had other knowledge that conflicted directly with the Grievant's statement. Then he asked again. The Grievant refused to answer without a union representative present. Dersoon asked a third time. The Union criticizes the asking of the question the third time without union representation because arguably an investigation had begun. (See S 24.04) This question is a close one. However, the error is harmless because the Grievant refused to answer, and then Dersoon quit questioning about that issue.

A subsequent investigation revealed that the truck that Grievant had used had been driven 104 miles by the Grievant. The normal mileage for the round trip to district headquarters is 80. When asked why it took him so long to get back to Fifth Avenue from the District Headquarters, the Grievant claimed that he had trouble with the truck, and he could not get the vehicle up to normal speed. He alleged that the truck had a fuel line problem, perhaps water in the fuel.

At the Pre-disciplinary Hearing, the Grievant produced a trip-ticket dated 12/10 that indicated on the bottom of the form that the truck would not go over 5 mph. Mr. Dersoon brought a different trip ticket to the pre-disciplinary that he stated was originally turned in but showed no reference to a truck problem. (See Employer's Exhibit #1 pp. 15 & 16) To the Arbitrator's eye, the trip-ticket produced by the Employer seems to have been filled in by the same person who filled in the one produced by the Grievant except that the date of the alleged original had been filled out by another hand. However, the vehicle number and the mileage appeared to be in the same hand as the ticket produced by the Grievant. To the Arbitrator, the evidence falls on the side of the Employer's ticket being the original. This conclusion is buttressed by the testimony of Nate Washington. Mr. Washington is an 11 year employee of ODOT and a bargaining unit member. He is a Mechanic II. His job was to maintain the trucks used at the Fifth Avenue garage. He said that he replaced the fuel filters on the truck at issue on December 4, 1991, and he testified in detail why, on the 10th, no fuel line problem could exist on that truck. Moreover, he testified that had the trip-ticket proffered by the Grievant been submitted, he (Washington) then would have had to fix the truck after the 10th, and he did not do so.

At the Arbitration Hearing, the Grievant said that he had spent some time at the District Office talking to his mother who worked there. He said that subsequent to his conversation the truck bogged down. He said that he did not see Mr. Dersoon when he returned so he went to lunch. With regard to the trip ticket called the original, he admitted he had filled it out except for the date. With regard to the trip ticket that he presented at the Pre-disciplinary Hearing, he said "I filled it in and turned it in as soon as I saw that the ticket on p. 15 was at the meeting." The Arbitrator took this statement as an admission that the trip ticket was filled in long after the day at issue and only in response to the disciplinary proceedings.

These paragraphs have described the Grievant's position at the time of entering into the EAP Agreement. Had the Employer imposed the contemplated discipline and had the Arbitrator been called upon to rule on Just Cause at that moment in time, what would have been decided? From the testimony, the Arbitrator would have found just cause to discipline: first, the Grievant did use abusive and insulting language twice; namely, he called Mr. Claar a liar and shouted at him, and secondly, he said. "that's mighty white of you" to Mr. Dersoon. (The Arbitrator has been unable to discover the exact etiology of that phrase and cannot clearly cast it as a discriminatory remark coming from a black man to a white man, but the Arbitrator is

sure that such a remark is insubordinate to a superior.) The Arbitrator also finds that the Grievant ignored a direct order from his supervisor. Mr. Dersoon told the Grievant twice to fill out the report; twice he refused. The background testimony from Mr. Maynard does not change the situation; the Grievant refused a legitimate order; the rule of the shop is obey now, grieve later. The only exception is if the order involved a situation that was not safe or healthy. Neither of those elements were present here. (Last but hardly least, the Employer could have charged the Grievant with neglect of duty. The Arbitrator believes that the Grievant was on a detour and frolic with the truck that morning and lied about it.)

The Arbitrator concludes that the Employer had just cause to discipline the Grievant based on the November and December incidents. Would the Arbitrator have upheld a dismissal at that point? Immediately prior to these incidents, the Grievant had had 6 disciplines in 11 months, including a discipline for fighting with another employee. The Grievant was an employee of 7-1/2 years, not a short timer, but the whole 7+ years were rife with discipline. Termination was neither incommensurate, given the past record, nor non-progressive. The Arbitrator would have probably suggested a last chance agreement. In essence, that last chance agreement is what the Grievant received when he signed the EAP Agreement. That Agreement put the Grievant clearly on notice to monitor his behavior.

On April 20th, 1992, five (5) days after the signing of the EAP Agreement, the Grievant failed to monitor his behavior. On that day, Mr. Claar, Mr. Norwood, and Wayne Woods were meeting in the median of I-270. Both Mr. Claar and Mr. Norwood heard honking, looked up, and saw the Grievant giving them the finger. Both Mr. Claar and Mr. Norwood were absolutely sure of whom they saw. They both said the Grievant was driving a small yellow foreign car. The Grievant stated at the arbitration hearing that he owned a small yellow Toyota and had driven it that day. Mr. Woods said that he had his back to the traffic and did not see the person in question. However, he did testify that both Claar and Norwood interrupted their conversation with him and said "Did you see what (the Grievant) just did?" The Grievant claims to have been at a doctor's appointment and no where near the place in question.

The Arbitrator believes Mr. Claar and Mr. Norwood. Why on earth would two adults in good standing at their work make up such a story? Why would they go to such an extreme and risk that Woods would turn around and see nothing? How could they risk that the Grievant might have an ironclad alibi? Contrary to what the Grievant claims, the alibi was not ironclad. Given the facts, the Grievant could very well have been in that area. The testimony of the Grievant on this issue was misleading and disingenuous.

The Union argues that the conduct is off duty and, therefore, not relevant because no nexus exists. The Arbitrator finds a nexus. The Grievant deliberately inserted himself back into the workplace by his behavior. On a public highway, he made a rude and obscene sign to his superior and fellow workers while they were at work. This action by itself constitutes a breach of the EAP Agreement.

The Employer has charged the Grievant with dishonesty with regard to the possession of a CDL (Commercial Driver's License). The possession of a CDL-A or CDL-B is a requisite of the Grievant's job. The State of Ohio had recently changed the requirements for truck drivers and imposed a requirement that persons who formerly had chauffeur licenses and who wished to drive certain trucks and other vehicles had to obtain new licenses. Certain persons could be "grandfathered in." Such a person would only have to take a written test and could skip the skills test.

While the matter of the Grievant's license is highly confusing, the paper record can provide guidance. On Tuesday, March 17th, the Grievant passed Test 4. (See Employer's Exhibit #7 p. 3) On Tuesday, March 31st, the Grievant performed the air brake test proficiently. His eyes and ears had also been tested by that point. (See Employer's Exhibit 7, p. 3) Then, the Bureau of Motor Vehicles (BMV) gave the Grievant a form to have his skills test waived. That form was signed by Mr. Dersoon on Tuesday, March 31, 1992. (See Employer's Exhibit #7, p. 1) Apparently, on Wednesday, April 22nd, the Grievant returned to BMV. On that day, the applicant verification was completed by BMV. (See Employer's Exhibit #7 p. 1) Also on that day, the Grievant filled out the CDL Certification Form. (See Employer's Exhibit #7 p. 7 & 8) [The Grievant admittedly lied on the CDL Certification Form when he said that he had had NO violations during the past two years. The Grievant claimed at the Arbitration Hearing that the falsification was an unintentional oversight.] However,. according to the BMV expert witness, that falsification made the Grievant eligible for a CDL-B without taking the skills test. On April 22, 1992, the BMV issued a D class license (standard operator's

license) to the Grievant. (See Employer's Exhibit #7, p. 9) The copy of the license is unsigned but has the number QF398164. Then on Monday April 27th, the BMV issued a permanent CDL-B. (See Employer's Exhibit #7, p. 4) to the Grievant. (No. 326894)

According to the BMV expert witness, the CDL-B was issued to the Grievant in error. Under the law, the BMV had sixty days to cancel the license. Moreover, the expert witness said that the normal procedure includes proper notice to the license holder. In this case, the expert was embarrassed to admit that no record of notice was found in the file. The Grievant testified that he had never heard from BMV on this issue.

The Grievant's Abstract Driver Record (BMV) (done March 1, 1993) indicates that his only valid license is a standard operator's license #QF398164 issued April 22, 1992. (Employer's Exhibit #6, p. 1) Note that the number..on this license is the same operator's license issued five days before the CDL-B. (See Employer's Exhibit #7) The more explicit record of the current status (See Employer's Exhibit #6 p. 2) indicates that the Grievant's prior license was a CDL-B (QF326894), but the record does not indicate why that license is no longer valid. Using the BMV records, the license of the Grievant presented by copy in Union Exhibit #2 is no longer valid.

The Arbitrator has gone to some length to decipher this record because of the confusion generated at the Hearing over these matters. However, the status of the driver's license is not, in itself, the central issue involved in the violation allegedly committed by the Grievant. Rather, the Employer charged the Grievant with deceiving and misleading his supervisor on April 28, 1992.

On March 17, 1992, Clarence Norwood, Franklin County Superintendent, received an IOC from William Buckley, Safety Supervisor, with regard to the "Driving Status of Grievant." The IOC read as follows:

“We just realized that Grievant did not renew his license with a CDL which makes him illegal to drive anything except for a pickup truck, a van, or a car. This order will stay into effect until Grievant gets a CDL, or until April 1, 1992. After that date, the administration will decide on what they will do with all the employees who did not obtain a CDL. It will be up to Grievant to get the CDL and present it to me before he can drive the CDL equipment. (Employer Exhibit #3)”

Mr. Dersoon testified that he saw this memo and discussed it with Ken Palmer of Safety and Mr. Main. Subsequently, he discussed the issue with the Grievant and urged him to obtain the proper CDL. The Grievant had already participated in some training for the CDL (11/5/91, 11/6/91, 11/25/91, 11/26/91, 3/10/92, 3/16/92, and 3/18/92) (see Joint Exhibit #2, p. 13). On April 21, 1992, William Buckley, Safety Supervisor (by Ken Palmer) sent the Grievant an IOC that stated as follows:

“Your classification and position description require you to obtain a Commercial Drivers License (CDL) by the expiration date of your current license or April 30, 1992, whichever is earlier. Our records indicate that your current license expired on March 17, 1992. You have approximately 2 weeks to obtain your CDL. You are urged to schedule an appointment to take the required examination as soon as possible. If you do not take the examination prior to the deadlines stated, you will be liable for disciplinary action because your inability to effectively carry out the duties of your position.

If there are any questions feel free to contact our office at any time. (Employer's Exhibit #4)”

On April 23, 1992 and April 24, 1992, the Grievant participated in more training. On April 27, 1992, the Grievant told his superior, Mr. Dersoon, that he needed to go to Lima on the 28th to take his CDL test. Mr. Dersoon provided the Grievant with a vehicle that he was allowed to take home so he could leave directly for Lima the next morning. The next morning the Grievant called in and told Dersoon that the truck was broken down. Mr. Dersoon provided a van as a replacement, and the Grievant went to Lima. Next, Dersoon received a call from the Grievant saying he had arrived at Lima but did not need to take the test because he (the Grievant) already had a CDL.

Timothy Doty, a Highway Maintenance Worker Supervisor, was in Lima at the test site. He stated his recollections of that morning as follows: (Note that the parties have stipulated that this Exhibit represents that which Doty would have testified.)

“On April 28, 1992 Grievant was scheduled to take his CDL test from 9:00 a.m. - 11:00 a.m. We received a message that morning that he would be late getting there because of truck trouble. He arrived after 11:00 a.m. for his test. When I asked to see his paperwork and his driving license, he told me that he didn't have any papers. I looked at his license and saw that he had a class B license. I then asked him if he wanted a class A test, to which he replied yes. I told him that he would need a temporary permit in order to take his test. He told me that no one had told him anything but to go to Lima and take his test. He asked me where he could find a phone so that he could call his supervisor.

I took Grievant over to the other building to use the phone. I stood in the room with him while he talked to his supervisor. I heard him say that he couldn't be tested because he needed a permit. He also made the statement, "John, I told you I got my CDL a couple months ago." After talking a while, Grievant handed me the phone. The person on the other end of the line identified himself as John Dersoon. John asked me if Grievant had a CDL and I said, yes sir, he has a class B license that was issued on 4-27-92. John told me to send Grievant back and that they would reschedule him for another test. (Joint Exhibit #2 p. 12.)”

Mr. Dersoon testified that the Grievant had never informed him before the telephone call on April 28, 1992 that he possessed a CDL-B license. He said that the Grievant had led him to believe that he had no CDL license and had to take the test on April 28, 1992 to meet the deadline.

When questioned about these incidents, the Grievant could offer no coherent explanation. He was asked why he was scheduled for April 28, 1992. He answered "I don't know." "Had Ken Palmer told you that you didn't have to go?" He answered "yes." He was asked "did you tell Dersoon this?" The answer "no." "So why did you go?" “I didn’t know that I didn’t have to go.” "If Palmer talked to you and said you did not have to go, when did he talk to you?" "don't recall." These answers were elicited on cross-examination. On re-direct, the Union Advocate asked the Grievant, "did you believe you had a valid CDL license on April 27, 1992?” Answer, "Yes, I did."

Quite frankly, finding a rational explanation of the Grievant's behavior has eluded the Arbitrator. Apparently, on April 27, 1992, the Grievant was issued a facially valid CDL-B license. He stated clearly when asked by his own advocate and, apparently after careful thought, that he believed that license to be valid. Yet that same day, he asked Mr. Dersoon for a state vehicle to use on the 28th ostensibly to take the CDL skills test in Lima. He then drove up to Lima and encountered Mr. Doty. When he phoned Mr. Dersoon and announced that he already had the license, Dersoon surprised asked "how long have you had it?" The Grievant answered within Doty's hearing "I told you I got my CDL license months ago." Yet, the records showed that the CDL-B was only issued the day before this conversation.

The Arbitrator can find no reason for this behavior unless the Grievant was playing some kind of immature game with Mr. Dersoon. The Grievant seems to have a serious problem with telling the truth. The Grievant testified that he could not have given the finger to the persons in question because he was at the doctor’s. He said he remembered explicitly what route he took because this visit was the very first visit to this location, and he was worried that he would have trouble finding it; therefore, he claimed he had carefully followed the route outlined on the map provided by the doctor's office. (That marked route did not take him by the place where the personnel in question were standing.) During cross-examination, the Grievant was again asked if April 20th was the first visit to that location. "YES," he answered. The Employer's Advocate then produced a letter showing a visit on March 25, 1992 at the same location. Then, and only then, the Grievant admitted that he had visited a doctor at that location prior to the 20th of April.

The Employer also charged that the Grievant had deceived his supervisor on one occasion with regard to a double lunch hour and that he had failed to provide proper documentation with regard to his EAP program. The Arbitrator is not going to attempt to straighten out the conflicting stories in those instances as she had done with the issues previously discussed. The instances already discussed provide sufficient basis for decision. However, the Arbitrator does want to respond to the Grievant's argument that he was cut off from his chance at success because the termination cut off his ability to still see his EAP counselor.

The letter from D. Leno (Joint Exhibit #5) is hardly a bright picture. Ms. Leno describes the Grievant as

"somewhat cooperative" and says that the Grievant "had done as well as could be expected, considering he was "in treatment because work ordered it." This letter hardly paints the picture of a cooperative person seeking genuinely to resolve problems.

The Arbitrator finds just cause to discipline the Grievant. He was abusive in his speech to his supervisor and a fellow employee. He made obscene gestures to a superior and to fellow employees. He deceived his supervisor, and, consequently, state equipment and state money was wasted. He lied under oath to the Arbitrator. The discipline of termination is both progressive and commensurate. While the Grievant has been with ODOT for 7 years, he has been only an average employee with significant discipline. At least two of his acts occurred after the Grievant had signed an EAP notice putting him clearly on notice of the consequences of his behavior.

Award

The Grievance is denied.

Date: July 8, 1993
RHONDA R. RIVERA, Arbitrator