ARBITRATION DECISION NO.:
571

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

EMPLOYER:
Department of Agriculture

DATE OF ARBITRATION:
March 29, 1995

DATE OF DECISION:
April 10, 1995

GRIEVANT:
John E. Dodson

OCB GRIEVANCE NO.:
04-00-(94-05-10)-0025-01-07

ARBITRATOR:
Marvin J. Feldman

FOR THE UNION:
Robert L. Goheen
Staff Representative

FOR THE EMPLOYER:
Barbara Valentine
Advocate
Edith Barlar
Second Chair

KEY WORDS:
Just Cause
Mitigation
O.R.C. Section 124.34
Progressive Discipline
Removal

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

FACTS:
The grievant was employed with the Department of Agriculture as an Amusement Ride and Game Inspector 2. On August 25, 1994, while traveling to Geauga Lake on business, the grievant and a co-worker went to a bar and stayed out until 2:30 a.m. On the trip back to the hotel, the grievant was arrested by the

Solon, Ohio, Police Department while driving the State vehicle assigned to him for the trip. He was charged with making an improper turn, weaving, and driving under the influence. His valid driver's license, which is needed for his employment, was revoked on the spot because of his refusal to take a breathalyzer test. The grievant was released on bond at 4:30 a.m., and went to work at 6:30 a.m. the next day without sleep.

Despite nineteen years of service with the State, a previously clean record, and voluntary rehabilitation efforts, the grievant was permanently discharged pursuant to the State's progressive discipline policy.

EMPLOYER'S POSITION:

The Employer argued that the grievant was discharged for just cause and that this discipline was commensurate with the offense under the progressive discipline provision of the Contract. The Employer claimed that the grievant violated numerous work rules as well as Ohio Revised Code, Section 124.34, as a result of his actions. These actions included charges of drunkenness, neglect of duty, endangering the life and property of the public, misuse of State property, actions that could knowingly harm or potentially harm a fellow employee or a member of the general public, insubordination based on failure to follow policies of a State owned vehicle, revocation of valid operator's license required for his position, and the use of poor judgment. The Employer removed the grievant due to the severity of the violations.

UNION'S POSITION:

The Union contended that the grievant should not have been discharged for several reasons. First, the grievant had worked for the State for over nineteen years and had no prior disciplinary action on his record. Second, the grievant's prior performance records revealed that the grievant was above his expectation ratings in at least four of seven categories on all of his performance reviews. Third, the grievant has attended many seminars and had taken a number of continuing education courses. Fourth, the co-worker who was present in the State vehicle was not disciplined in any manner, thus suggesting treatment that was not even-handed. Finally, the union cited an arbitration case where a similarly situated grievant received lesser discipline. (Arbitration Decision #441).

ARBITRATOR'S OPINION:

There are two issues in this case: (1) whether the State had just cause to discipline the grievant, and if so, (2) whether the remedy of permanent discharge was commensurate with the offense under the progressive disciplinary procedures of the Contract. The Arbitrator stated that seniority, a prior clean record, yearly reviews, and continuing education are all very important factors to consider in mitigating severe discipline. The experience of nineteen years in State service is a factor that must also be given great importance, especially in this particular case because of the type of skills necessary for the class title in which the grievant was assigned. The Arbitrator found that the grievant was experienced, knowledgeable and well-respected; the grievant had no previous discipline problems, had excellent performance reviews, and attended all of the seminars he could.

The Arbitrator found that the grievant was not treated differently than his co-worker present with him at the time of the arrest because the Employer did not have any evidence of substandard conduct to assert against that co-worker in the first place. The Arbitrator also found that the facts of this case were substantially different from the facts of case #441 and therefore are not applicable to the present case.

AWARD:

The grievance was granted, with conditions attached. The Arbitrator found that there was just cause for discipline, but the remedy of permanent discharge was too severe in light of the other relevant factors to consider under the progressive discipline provision of the Contract. The grievant was reinstated without back pay but without loss of seniority or benefits on condition that the grievant attend at least two alcohol rehabilitation sessions per week for the remainder of the length of the Contract. Failure to attend such classes or further substandard conduct of any nature may trigger an immediate just cause discharge by the employer. During this period, the grievant must also maintain a valid driver's license.

TEXT OF THE OPINION:

VOLUNTARY ARBITRATION PROCEEDINGS
The Grievance of John E. Dodson

THE STATE OF OHIO, OHIO DEPARTMENT OF AGRICULTURE
The Employer

-and-

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

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OPINION AND AWARD

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APPEARANCES

For the Employer:
Barbara Valentine, Advocate-Department of Agriculture
Edith Barlar, Second Chair Advocate
Mark List, Witness

For the Union:
Robert L. Goheen, Staff Representative
John E. Dodson, Grievant
04-00-(94-05-10)-0025-01-07

MARVIN J. FELDMAN
Attorney-Arbitrator
1104 The Superior Building
815 Superior Avenue, N.E.
Cleveland, Ohio 44114
216-781-6100

I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement, by and between the parties, the parties having failed resolve of this matter prior to the arbitral proceedings. The hearing in this cause was scheduled and conducted at the conference facility of the union, Columbus, Ohio, on March 29, 1995, whereat the parties presented their evidence in both witness and document form. The parties stipulated and agreed that this matter was properly before the arbitrator; that the witnesses should be sworn but not sequestered and that post hearing briefs would not be filed and to certain other indications of stipulations that will be indicated further on in this Opinion and Award. It was upon the evidence and argument that this matter was heard and submitted and that this Opinion and Award was thereafter rendered.

II. STATEMENT OF FACTS

The grievant at the time of the instant incident, was a nineteen year employee of the State of Ohio. Included in that nineteen years was an eight year tour with the Department of Agriculture, the current employer under which the instant incident occurred. The grievant was employed under the class title of amusement ride and game inspector two. Noted within the job duties of that class title was the following language:

"Minimum Class Qualifications For Employment:
Successful completion of 12 mos. training program sponsored by Department of Agriculture while employed as Amusement Ride & Game Inspector 1, 21581; valid driver's license.
-Or 18 mos. exp. in amusement ride maintenance, amusement ride safety inspection or amusement ride manufacturing; valid driver's license.
-Or alternative, equivalent evidence of the Major Worker Characteristics noted above."

It might be further noted that some of the additional job duties revealed the following:

"Independently inspects permanent amusement devices & carnival amusement rides of domestic or foreign manufacturers for safety & compliance with manufacturers' design & standards (e.g., checks adequacy of structure & moving parts by climbing on, around, under & over structure; determines adequacy of passenger carrying devices for safety, appearance & comfort; reads manufacturer's specifications & blueprints to ensure all characteristics of ride are in adherence), determines whether amusement rides are to be licensed, cites violations & takes necessary corrective action which includes temporarily revoking license of ride owner & conducts investigations of accidents occuring (sic) on amusement rides.

Conducts inspections of fairgrounds, games & novelties to ensure games are licensed in accordance with applicable state laws & rules & to protect public from use of illegal devices & unscrupulous games & concession owners at county, independent & state fairs (e.g., determines whether games are operable as game of skill or chance; identifies possible theft by deception; ensures concessionaires are licensed to continue operating & selling merchandise).

Attends seminars & training sessions & engages in individual studies to upgrade inspection skills & to keep current with changes in amusement ride technology; prepares required reports; provides guidance, work direction & field training to lower-level inspectors when assigned; meets with members of fair boards & concessionaires to explain laws & rules pertaining to concession operations."

It might be further indicated that the policy of the State of Ohio relevant to motor vehicles revealed in pertinent part the following:

"A. OPERATOR: Every driver of a State-Owned Vehicle must have a valid State of Ohio Operator License. Said license shall be carried on the drivers person when operating a State Vehicle. (Any restricted or limited permit shall not be considered a valid Ohio Operator License by this agency)."

Under that same set of policies, the operator is admonished to the following rule:

"B. OPERATOR: State-Owned Vehicles are to be utilized, and operated solely to conduct state business."

The grievant acknowledged receipt of those rules as early as August 30, 1988, when he signed-off as receiving a copy of those rules. That sign-off revealed in its exact language the following:

"I /s/John E. Dodson received a copy of the Ohio Department of Agriculture's Employee Policies Manual on 8-30-88.

I understand that this manual is the property of the Ohio Department of Agriculture and that it is my

responsibility to turn the manual in to my Division Chief upon termination of my employment with the Department."

With those job duties and with those rules in mind, the grievant was assigned a state vehicle for traveling to Geauga Lake Park in Northeast, Ohio. At about 9:30 p.m. on August 25, 1994, the grievant along with a co-worker went out for dinner in the state vehicle with the grievant driving. Instead of finding a restaurant that was available to them at that time, the grievant found a bar and ended up leaving that bar at approximately 2:30 a.m. On the way home from that bar while driving that state vehicle and with a co-worker on the passengers side, the grievant was arrested by the Solon, Ohio, Police Department. The arresting officer made the following observations:

"After speaking with Dodson for a period of time I noticed that his speech was 'Thick Tongued', his eyes had a bloodshot effect and there was a moderate odor of an alcoholic beverage coming from his breath and/or person. When asked how much he had to drink Dodson replied 'a couple'. Dodson agreed to submit to field sobriety tests with the following results. Balance obvious swaying side to side. Finger to nose-Left 1st attempt missed touching upper lip. Right 1st attempt bridge of nose, 2nd attempts with both hands slow and calculated. One leg stand-shuffled foot for being repeated 21. Heel to toe-Stepped off line during instructions, stepped off line 4 times going down, did not turn as instructed, stepped off line twice on return trip. Alphabet L-X continued to Z. Countdown good. HON- lack of smooth pursuit both eyes, nystgmus at maximum deviation. Dodson was arrested and transported to SPD where he was shown and read BMV 2255 along with his rights. After consulting with his attorney Bill Meeks, Dodson elected not to submit to chemical testing. Field tests repeated on station and taped. Dodson was booked and released on a $500.00 cash bond. Charges files Improper turn SCO 432.10(b) Weaving SCO 432.35 DWUI 5CO 434.01(A)(1) ALB issued. Court date of 8/30/95 given." (sic)

At any rate, the grievant was released by way of bond at 4:30 a.m., went to his hotel, showered and got himself ready for a 6:30 a.m. work date, again in Geauga Lake Park. This new day of work occurred without any sleep. The grievant reported this event to his supervisor and the grievant was placed on administrative leave effective September 2, 1994, under the following order:

"John E. Dodson
459 Courtland Lane
Pickerington, OH 43147

SUBJECT: Administrative Leave with pay pending Administrative Investigation

Dear Mr. Dodson:

Please be advised that you are being placed on Administrative Leave with pay effective 11:00 AM September 2, 1994. This action is in accordance with Article 24.05 of the Labor Management Agreement.

An investigatory interview will be conducted with you on Wednesday, September 7, 1994 at 2:00 PM in the Director's office at the Reynoldsburg Laboratory, to discuss the incident which occurred Thursday AM August 25, 1994, involving a State Vehicle.

You are entitled to the presence of a union steward at the meeting if you so choose.

Sincerely,

OHIO DEPARTMENT OF AGRICULTURE"

Transportation had to be arranged for the grievant since the grievant had his licensed stripped on the previous evening of arrest. The state vehicle was not confiscated at the time of his arrest, however, but had to be picked up from the Solon Police Department yard. The grievant by court ruling on October 31, 1994, had his license reinstated as of September 9, 1994. The court order of October 31, 1994, in its pertinent language revealed the following relevant to the grievant:

"THIS WILL CERTIFY THAT:
JOHN DODSON
459 COURTLAND LANE
PICKERINGTO, OH 43147 (sic)

CASE: 94TRC06973A

IS UNDER SUSPENSION OF HIS/HER DRIVING PRIVILEGES BY THE ORDER OF THE BEDFORD MUNICIPAL COURT OF THE STATE OF OHIO FOR A PERIOD OF 180 DAYS, BEGINNING 08/25/94 TO AND INCLUDING 02/20/95 EXCEPT FOR THE PURPOSE OR PURPOSES LISTED BELOW:

-GOING TO AND FROM PLACE OF WORK OR WHILE ON EMPLOYER'S BUSINESS -EFFECTIVE 9-9-94

THIS SPECIAL DRIVING PERMIT IS ISSUED SUBJECT TO ANY OTHER REQUIREMENTS AND/OR RESTRICTIONS WHICH MAY BE IMPOSED BY THE BUREAU OF MOTOR VEHICLES OF THE STATE OF OHIO.

THE FOREGOING PERMIT IS IN LIEU OF OPERATOR'S LICENSE NUMBER RD084386 ISSUED TO SAID JOHN E. DODSON BY THE REGISTRAR OF MOTOR VEHICLES OF THE STATE OF OHIO."

In effect at the time of the activity in this particular case, there was in use in this state, Ohio Revised Code Section 124.34 which revealed that an employee of the state may be suspended or removed and the code section in its own language revealed the following:

". . . and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office."

Also in use at the time of the activity in this particular matter, there were work rules number 24, 25 and 28. Rule 24 revealed the following:

"24. Intentional misuse of federal or state funds' or property."

Rule 25 revealed the following:

"25. Other actions that could knowlingly (sic) harm or potentially harm the employee, a fellow employee(s) or a member of the general public."

Rule 28 revealed the following:

"28. Violation of Section 124.34 of the ORC. Incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discouteous (sic) treatment of the public, neglect of duty, failure of good behavior, acts of misfeasance, malfeasance, or nonfeasance.

The severity of the discipline should be reflective of the offense."

The grievant was charged under the rules and under the Ohio State Code, The Level 3 Grievance Response of the employer indicated the management's contentions as follows:

"Management Contention

1. That Management had just cause to remove John Dodson from his position as an Amusement Ride Game Inspector 2 on September 28, 1994. That the discipline was commensurate with the offense.

2. That on August 25, 1994 while operating a State vehicle, Mr. Dodson was arrested at approximately 2:46 AM and charged with (1) Improper turn, (2) weaving, (3) Driving Under the Influence (DUI). His valid driver's license was revoked on the spot under refusal to take a breathlizer test.
3. That Mr. Dodson violated numerous disciplinary Grid items as a result of his actions including; 124.34 (drunkenness, neglect of duty) #30 (a) Neglect of duty (endangering life, property or public).

#24 Misuse of State Property (car).

#25 Other actions that could knowingly harm or potentially harm a fellow employee or member of the general public.

#5(b) Insubordination - Failure to follow policies to wit; Policy on the use of State Owned vehicles.

#33 Revocation of Licensure (Valid drivers license). Amusement Ride and Game Inspector 2's are required to have a valid operator's license, both in the P.D. and the class specification.

4. Mr. Dodson used poor judgement to drink while operating a state vehicle. Not only did he violate the numerous Disciplinary infractions cited above, but he jeopardized his life, the life of a co-worker riding with him and the potential for a real tragedy involving innocent victims of the general public."

The finding of the State of Ohio as a result of the hearing at Step 3 revealed the following:

"Finding

That John Dodson has violated all of the disciplinary citings raised in his removal notice.

That Management was told by Mr. Dodson that he would be going to court to request driving privileges on September 28, 1994.

The Special Driver's Permit was not presented to management until the third level grievance meeting.

Mr. Dodson's irresponsible action jeopardized his life as well as a co-worker on the morning of August 25, 1994.

Therefore grievance is denied."

The grievance that was filed in this particular matter requested the reinstatement of the grievant and that he be made whole. It might be noted that the final act of the State of Ohio relevant to the discharge of the grievant was a letter of September 26, 1994, which revealed the following:

"Dear Mr. Dodson:

On September 15, 1994 a pre-disciplinary meeting was held pursuant to Article 24 of the Labor Management agreement. The meeting was presided over by Deputy Director Sam Waltz.

The hearing officer heard testimony regarding the following charges:

Violation of ODA Disciplinary Grid #28, Violation of Ohio Revised Code 124.34, to wit: Drunkenness; neglect of duty, malfeasance and failure of good behavior. Violation of ODA Grid, #30(a): Neglect of duty, major (endanger life, property or public).

Violation of ODA Grid, #24: Intentional misuse of federal or state funds or property.

Violation of ODA Grid, #25: Other action that could knowingly harm or potentially harm the employee, a fellow employee(s) or a member of the general public.

Violation of ODA Grid #5, (b): Failure to follow work rules administrative regulations and/or written policies or procedures. . . to wit: ODA Policy on use of State Owned Vehicles.

Violation of ODA Grid #33. Revocation of Federal Licensure, Vet License, Poultry License, etc. (Classification Specification and Position Description for Amusement Ride and Game Inspector 2 require a valid driver's license for incumbent in this classification).

Testimony at the meeting revealed that at approximately 2:46 A.M. August 25, 1994 while in official travel status and while operating your assigned State vehicle (License #14329) you were pulled over by Patrolman Alestock of the Solon, Ohio Police Department and booked on the followings charges (1) Improper turn, (2) Weaving (3) DUI, Driving Under the Influence and your valid operator's license was revoked for (1) year.

After considering evidence presented at the hearing, I have determined that just cause exists to discharge you from your position as an Amusement Ride and Game Inspector 2 with the Ohio Department of Agriculture effective Wednesday, September 28, 1994, close of business.

I regret taking this action, but find it necessary in light of the evidence provided to me.

Sincerely,

/s/Fred L. Dailey
Director"

It might be noted that during all of this, the grievant entered and successfully completed the Ohio Employee Assistance Program as of January 16, 1995. The program was entered into subsequent to the incident that occurred in this particular matter. It is interesting to note that Article 24.01 of the contract in its first sentence revealed the following:

"ARTICLE 24 - DISCIPLINE

24.01 - Standard
Disciplinary action shall not be imposed upon an employee except for just cause."

The first sentence of paragraph 24.02 of the contract revealed the following:

"24.02 - Progressive Discipline
The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense."

The grievant had one prior discipline which has since been expunged and for the purpose of this arbitration it can be clearly stated that the grievant's prior record is clear as to discipline. The performance records of the grievance that were placed into evidence and there were six of them, revealed that the grievant was above his expectation ratings in at least four of seven categories on all of his performance reviews.

Also placed into evidence were copies of the grievant's completion certificates for seminars that he attended at the Columbus State Community College, at the National Association of the Amusement Ride Safety Officials, at seminars prepared by the Ohio Department of Agriculture on several occasions and by the Go-Cart Safety Seminar group who sponsored such teaching seminars. Also placed into the record was an Opinion and Award in which a member of the union herein received a citation for driving while under the influence of alcohol. It was an opinion that the undersigned wrote and the facts as revealed in that Opinion and Award in sum and substance are quoted as follows:

"On August 18, 1991, the grievant received a citation for driving while under the influence of alcohol. That activity occurred in the grievant's private vehicle and he was not involved on state duty at that particular time. The grievant immediately informed his employer. The court, at hearing, relevant to that matter, suspended his driver's license, but provided him a modification order which revealed that the grievant was granted limited driving privileges to operate a motor vehicle only during the period of his employment hours with and for the Ohio Department of Transportation."

In that particular case, it was revealed as follows:

"The grievant, however, does have some serious saving and mitigating behavior. His efficiency reports were not below expectation ratings for a period of two years. Further, his tenacity to become rehabilitated should be rewarded. He attended twelve sessions of rehabilitation and spent ten days in the rehabilitation center on a voluntary basis. His mother assisted him in that stay. Perhaps on the basis of that, the grievant deserves a second chance. Arbitrators are not prone to order their own industrial justice. There must be good reason in the record to modify. Such is the case in the instant matter. The record revealed some intense desire to rehabilitate. The record also revealed an employee who 'met expectations' in his workload when he did work. Based upon those two factors, the grievant deserves a modification of termination."

In the cited case the grievant had two years of seniority and had been employed as a highway maintenance person, the duties of that particular classification revealing that the individual therein must have a valid Ohio Chauffeur's license because that individual was scheduled to operate heavy motorized equipment over the road. The final award made in that case revealed the following:

"IV. AWARD

Provided the grievant has a valid modification order, the grievant shall be reinstated July 1, 1992, subject to the terms of the contract, without back pay but without loss of seniority. He shall receive a last chance to preserve and protect his employment. The grievant shall provide to his employer on a weekly basis for a period of six months commencing July 10, 1992, proof of attendance at some recognized alcoholic rehabilitation session for at least three times per week. Failure to attend or further substandard conduct of any nature may trigger an immediate just cause discharge by the employer."

It was on the basis of all of those facts that this matter rose to arbitration for Opinion and Award.

III. OPINION AND DISCUSSION

The grievant in this particular case had some nineteen years of service with the State of Ohio, the last eight being with the Department of Agriculture under which the instant incident occurred. On the night in

question the grievant after finishing a day of work, for his employer went carousing with a co-worker in a state vehicle. He ended up in a bar and stayed out until 2:30 a.m. and on the way back to the hotel, he was picked up by the Solon Ohio Police Department and cited for driving while intoxicated. His license was removed and he did not receive a return of license until October 31, which return of license was predated to September 9. At the time of the incident, a co-worker was in the car and the co-worker was not disciplined nor was there any evidence of any substandard conduct of the part of the co-worker at the time of the occurrence.

The defense that is raised in this case by the union are many. They include the grievant's seniority which evidently the union believes the employer did not consider. The union also points up the fact that the grievant's long record with the State of Ohio included only one discipline which was later vitiated by contractual language and therefore an impeccable record resulted. The union also pointed out the fact that the grievant's performance reviews were above average in four, five or six categories and there were six such reviews placed into the record. The union also points out that the co-worker of the grievant who also was in the bar with the grievant was not disciplined in any manner. From that, the union believed that there was treatment of the grievant that was not evenhanded. The union also placed their defense upon the decision that the undersigned rendered in the Roger Napier case. The union also based their thoughts upon the fact that the employer practices progressive discipline but they did not do so in this particular case. The union also based the defense upon the fact that the grievant is an experienced employee having attended many seminars. It was on the basis of those six or seven defenses that this matter must be analyzed.

Seniority while it is important in determining discipline is not in and of itself the most important factor in vitiating severe discipline. When the act is one is very serious, seniority may have a mitigating effect but not a determining effect. While the grievant has served some nineteen years in the employ of the State of Ohio, it is important to so note but this particular thought cannot in and of itself be a complete defense to the activity involved, especially when the activity is one of a rather serious nature.

The same is true for a record of no prior discipline. That certainly is a mitigating factor and the employer should consider that when making any final thoughts concerning discipline or discharge. Again a clean record is not in and of itself a determining factor. The same is true of the grievant's performance reviews. When reading the grievant's performance reviews. it was noted that the grievant for at least six reviewing periods was above his expectation ratings for a goodly number of the categories. That is certainly important. I am sure that that is true because of the grievant's continuing education that he participated in. Placed into the record were some six or seven seminar certificates indicating credit hours for courses attended. All of that is important when considering discipline.

Another thought that the employer should have considered in this particular matter is the grievant's experience. Just how difficult is it to replace a nineteen year employee who evidently performed his duties in better than average skill categories and who was always on the job and did not have a disciplinary record during that course of nineteen years. The experience factor is also an important thought especially in this particular case because of the type of skills necessary for the class title in which the grievant was assigned.

The contract denotes that the employer must have just cause to discipline or discharge and that progressive discipline will generally be invoked. Does progressive discipline mean that every event of substandard conduct should trigger the lowest next steps discipline? Of course not! Discipline must be invoked commensurate with the act if the activity is of such a serious nature, so as to be contrary to law, for example, then in that event progressive discipline while it may be generally practiced by the employer is not appropriate. The question in all of this is just how serious is driving a state car in a drunken condition in the wee hours of the morning so as to not only cause a safety problem to yourself and your co-worker and to the general public, but to the property owned by the tax payers of this state? The employer chose to take the path of discharge saying that the act was of such a serious nature that discharge was the only remedy. In addition, and impounded upon that total thought philosphy of the employer must be the thought that the grievant attempted some self rehabilitation by attending an employee assistance program even though it occurred subsequent in time to the August 1994 drunk driving incident.

Another thought is that no accident occurred and that there was no one injured in the event as it transpired on the date in question. In making a decision in this case all those thoughts must be involved

especially by the arbitrator who has been given jurisdiction to either affirm or deny or modify the activity of the employer in this particular matter. An overview of episode must be taken by the arbitrator and all of these various dove tailing defenses must be placed into their proper prospective in order to reach an educated and workable result. It must be noted, however, that an arbitrator cannot create his own industrial justice. An arbitrator cannot overrule an employer because he does not like the employer's thought process. There must be good and sufficient reason in the record to overrule an employer's decision, especially when the activity complained of is of such a gross violative nature so as to think discharge from the very first listening.

A review of the Roger Napier case has given some insight into this particular matter. In that particular case an individual with two years of seniority who was picked up for drunk driving his own vehicle, without accident, was terminated from his heavy-duty motor operation activity with the highway department. This arbitrator placed him back to work with certain conditions and those conditions are indicated here and above. My thoughts in that case were based upon the view that the grievant was not involved in the use of the state vehicle at the time of his intoxication, was not out carousing at 2:30 in the morning, did not find himself without sleep for the next days workload, and was not endangering the employer with possible financial loss. All of that activity was found in the present case which makes the facts of the Napier case drastically different than the facts of the Dodson case. The Dodson case is difficult indeed because of the many facets involved.

The grievant was a nineteen year veteran. The grievant attended all seminars he could. The grievant was experienced, knowledgeable and respected. The grievant had no discipline problems. The grievant had excellent performance reviews. The grievant was not treated differently than his co-worker in this particular matter and that defense must be held for naught. Simply put, the co-worker had no evidence placed against him by the employer or by anyone and it is difficult indeed for that defense to have been raised in the first place.

It is the opinion of this arbitrator under the facts of this case, and they are different than the Napier case, that the grievant be reinstated but with some severe conditions attached. It is for that reason that the following award is made.

V. AWARD

The grievant shall be reinstated as of June 1, 1995, without back pay but without loss of seniority or benefits. In order to maintain his position with the employer, the grievant will and must and shall attend for a period of the length of the contract (February 27, 1997) a recognized alcoholic rehabilitation session at least twice per week for the entire period which shall be reported to the employer on a monthly basis. Grievant shall execute a last chance agreement in which that condition is indicated. Failure to attend or further substandard conduct of any nature may trigger an immediate just cause discharge by the employer. During all of this the grievant must maintain a driver's license. This award is a modification of the discharge as rendered by the employer in this particular case for reasons stated.

MARVIN J. FELDMAN, Arbitrator

Made and entered
this 10th day of
April, 1995.