ARBITRATION DECISION NO.:
605

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

EMPLOYER:
Department of Transportation - District 12, Independence Yard

DATE OF ARBITRATION:
March 21 and April 2, 1996

DATE OF DECISION:
May 14, 1996

GRIEVANT:
Jeffery Appleton

OCB GRIEVANCE NO.:
31-12-(95-10-11)-0026-01-06

ARBITRATOR:
Marvin J. Feldman

FOR THE UNION:
Harold Bumgardner, Staff Representative
Anne Light Hoke, Associate General Counsel

FOR THE EMPLOYER:
Edward A. Flynn, Advocate
Lou Kitchen, Labor Relations Specialist

KEY WORDS:
Driving Under Influence of Alcohol
Employee Assistance Program (EAP)
Just Cause
Non-Discrimination
Progressive Discipline
Removal

ARTICLES:
Article 2 - Non-Discrimination
§2.01 - Non-Discrimination
Article 24 - Discipline
§ 24.01 - Standard
§ 24.02 - Progressive Discipline
§ 24.09 - Employee Assistance Program

FACTS:
The grievant was employed for a year and a half as a Highway Worker 2 at the Independence Yard in

Cuyahoga County, which is a facility operating in District 12 of the Ohio Department of Transportation.

The grievant had requested permission to attend the information exchange entitled "Team Up Ohio" to be held on September 15, 1995 at Columbus State Community College. ODOT 12 District Deputy Director, Bryan Groden, had given his permission for the grievant to attend the meeting on state time and also had allowed him to use state vehicle T-12-43 for the trip. The grievant left the Independence Yard at 3:55 p.m. on September 14 and was arrested at approximately 8:30 p.m. that night while driving the state vehicle southbound on Interstate 71. He was charged with speeding for going 80 miles per hour and driving under the influence of alcohol. Arrangements were made for the District 3 Safety Supervisor to pick up and inspect the vehicle. The Supervisor found an opened bottle of rum in the trunk of the vehicle with a sales slip indicating the alcohol was purchased earlier that afternoon. On September 18, the vehicle was retrieved from District 3 and the bottle of rum was removed from the trunk at the District 12 headquarters.

On September 25, the grievant received a termination letter from District 12 Director Jerry Wray. The letter stated that grievant violated District Directive WR-101, item #7 (unauthorized/ misuse of state equipment), item # 10 (Sale, consumption, or possession of alcoholic beverages while on ODOT property), item # 16 (Unauthorized absence in excess of thirty minutes), item #26 (Other actions that could harm or potentially harm the employee, another employee(s), or the general public), and item #27 (Other actions that could compromise or impair the ability of employee to effectively carry out his/her duties). The letter emphasized that the seriousness of the violations provided just cause for the grievant's removal.

EMPLOYER'S POSITION:

The employer contended that the conduct of the grievant did not merit progressive discipline. Paragraph (g) of the preamble of the rules of the work place and Article 24.02 of the contract both clearly indicate that the disciplinary action taken shall be commensurate with the seriousness of the offense. The rules of the facility outline 27 offenses that could result in termination, and the grievant committed 5 of those offenses. Because the agency's rules were readily available to the grievant and because the grievant's violations of these rules were of such a serious nature, the employer argued that just cause existed for the employee's removal.

The employer also noted that although the grievant elected to enroll in an Employee Assistance Program, his request for a delay or mitigation of discipline did not have to be granted. Article 24.09 only mandates that "the employer will meet and give serious consideration to modifying the contemplated disciplinary action". The Article does not require that an EAP agreement be reached; it only requires that it be considered. Since there are no guidelines provided by the contract for considering EAP agreements, the determination is left solely to the discretion of the immediate supervisor. The grievant's request for mitigation was fully considered by his supervisor and, therefore, no violation of Article 24.09 occurred.

Finally, the employer contended that the grievant's allegation of disparate treatment, based on a similar situation with another employee charged with a violation of item #10, was not warranted because of the differences between the two cases.

UNION'S POSITION:

The Union claimed that the grievant was entitled to corrective and progressive discipline since this was his first incident of wrongdoing in eighteen months of employment. Furthermore, the Union argued that the grievant's removal was not for just cause because the rules of the facility were never published and because the termination letter was written on the same date as the disciplinary hearing, which led the Union to conclude that the termination of the employee had been decided prior to the hearing. The Union also denied that the grievant had purchased the alcohol.

In addition, the Union argued that the grievant was entitled to mitigation of his discipline because he voluntarily entered into an EAP program at the time of the disciplinary hearing. The Union cited Section 5 of Appendix M, entitled "Drug Free Work Place Policy", which requires that no disciplinary measures be taken against a first time offender if he/she completes an EAP program, as support for this contention.

Finally, the Union maintained that the grievant had been the victim of discrimination, based on the disparate treatment another employee charged with a violation of rule #10 received when he requested an

EAP agreement.

ARBITRATOR'S OPINION:

The Arbitrator emphasized that both the contract and the facility rules do not require the use of progressive discipline in determining penalties for violations but only require that the punishment be commensurate with the action for which the employee is being disciplined. He pointed out that progressive discipline is reserved for violations that are relatively minor in nature and agreed that the grievant's conduct did not merit such discipline. The Arbitrator also stressed that whether the alcohol belonged to the grievant or not was of little importance in determining the seriousness of the his conduct. The Arbitrator further indicated that because the grievant had worked as a steward for the Union and had used the cited rules in grievance meetings, he was probably in possession of a copy of them. Finally, the Arbitrator stated that just because the termination letter was written on the same date as the disciplinary hearing did not necessarily mean that a decision was made prior to the hearing . Based on these determinations, the Arbitrator found the grievant was not entitled to progressive discipline and his removal was for just cause.

The Arbitrator also confirmed that the delay or mitigation of discipline was not required by Article 24.09 but was at the discretion of the supervisor. He indicated that Appendix M was to be used only for employees who were found to be under the influence of drugs or alcohol while working and nothing more. The appendix, therefore, would not be relevant in this particular case. Instead of the automatic mitigation of discipline provided by the appendix, the Arbitrator stated that the seriousness of the activity determined whether or not an EAP agreement or mitigation should be entered into by the state. Furthermore, he agreed with the employer's view that driving a state vehicle under the influence of alcohol was sufficient to deny the use of an EAP agreement.

Lastly, the Arbitrator held that no discrimination occurred in denying the grievant's request for an EAP agreement, because the Union provided no evidence that other employees were granted agreements under similar circumstances.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

VOLUNTARY ARBITRATION PROCEEDINGS
THE DISCHARGE OF JEFFERY APPLETON
CASE NO. 31-12-(95-10-1I)-0026-01-06

THE STATE OF OHIO
The Employer

-and-

THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL NO. 11, AFL-CIO
The Union

OPINION AND AWARD

APPEARANCES

For the Employer:

Edward A. Flynn, Advocate
Lou Kitchen, Labor Relations Specialist
Heather L. Ruse, Labor Relations Specialist
Bill Tallberg, Labor Relations Officer, ODOT
Trooper Chad W. Enderby, Witness
Bill D. Harkins, Witness

For the Union:
Harold Bumgardner, Jr., Staff Representative
Anne Light Hoke, Associate General Counsel
Thaddeus Kilgore, Local Union President
Jeffery B. Appleton, Grievant

MARVIN J. FELDMAN
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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 hearings in this cause were scheduled and conducted on March 21, i996, and April 2, 1996, whereat the parties presented their evidence in both witness and document form. The hearings were conducted at the District 3, Department of Transportation Headquarters in Ashland, Ohio. The parties stipulated and agreed that this matter was properly before the arbitrator; that the witnesses should be sworn but not sequestered and that concurrent post hearing briefs would be filed. 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 had been employed at the facility for a period of less than two years. His employee performance review forms revealed that he met his expectation ratings in each of the three review periods ending March 30, 1994, December 1, 1994, and November 1, 1993. In reviewing the evaluation forms, it is noted only positive comments concerning the grievant are stated. The grievant had no prior discipline to the incident at hand.

The contract of collective bargaining under which the grievant was employed contained several important clauses pertinent to the activity in this particular case. One such important clause was found at Article 24.01. It is stated in that clause that the disciplinary action imposed upon an employee must be imposed for just cause. The languageof Article 24.01 revealed the following:

"ARTICLE 24-DISCIPLINE

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the case or custody of the State of

Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02."

It is also noted that the employer is obligated to follow the principles of progressive discipline. At Article 24.02, the following pertinent information was revealed:

"24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. (Emphasis ours)
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. a fine in an amount not to exceed two (2) days pay for discipline related to attendance only; to be implemented only after approval from OCB;
D. one or more day(s) suspension(s);
E. termination."

It is further noted that paragraph (g) of the preamble of the rulesof the work place revealed the following:

"G. PROGRESSIVE CONSTRUCTIVE DISCIPLINE

Uniform guidelines have been developed to assist in complying with this policy. These guidelines will serve to notify employees of the type of discipline that will be given for specific violations of the rules and regulations of the State of Ohio and of the Department of Transportation.

The degree of seriousness of the offense(s) will determine which appropriate disciplinary action will be imposed.

Disciplinary actions are placed in an employee's personnel file. Bargaining unit employees are to consult the Labor Agreement for when such records can be expunged from the file.

NOTE: THIS SECTION SHOULD BE VIEWED AS A GUIDELINE. THE DIRECTOR MAY IMPOSE LESSER OR GREATER DISCIPLINE AS THE SITUATION DICTATES."

The rules at the facility stated twenty-seven violations for which discipline or discharge may be invoked. Those rules were promulgated by the employer by way of unilateral activity of the employer and were posted in a conspicuous place at the facility. The grievant in this action was charged with the violation of five of those rules. Those rules, rule 7, 10, 16, 26 and 27, revealed the following:

"7. Unauthorized/misuse of State equipment or vehicle

10. Sale, consumption, or possession of alcoholic beverages or illegal drugs while on duty or ODOT property.

16. Unauthorized absence in excess of 30 minutes.

26. Other actions that could harm or potentially harm the employee, a fellow employees or amember or

members of the general public.**

27. Other actions that could compromise or impair the ability of the employee to effectively carry out his/her duties as a public employee.**

**The appropriate discipline depends on the severity of the incident."

It might be noted that the termination letter dated September 25, 1996, was rendered to the grievant and revealed the following:

"September 25, 1995

Jeffery B. Appleton
19518 Raymond
Maple Heights, Ohio 44137

Dear Mr. Appleton:

This letter is to inform you that you are hereby terminated from employment as a Highway Worker 2 assigned to the Independence Yard, effective at the close of business Thursday, September 28, 1995. After reviewing the recommendation of the WR-102 Hearing Officer and others, it has been determined that just cause exists for this action. You are found to have violated Directive WR-101, items #7 - Unauthorized/misuse of State equipment or vehicle #10 - Sale, consumption or possession of alcoholic beverages or illegal drugs while on duty or ODOT property, #16 - Unauthorized absence in excess of thirty minutes, #26 - Other actions that could harm or potentially harm the employee, a fellow employees or member or members of the general public, and #27 - Other actions that could compromise or impair the ability of the employee to effectively carry out his/her duties as a public employee.

Respectfully,

/s/Jerry Wray
Director"

In a disciplinary memo by the grievant's labor relations officer at District 12, it might be noted that the following was stated:

"I am requesting disciplinary action be taken against the above mentioned employee for the following reasons:

Jeffery Appleton, a Hwy. Maint. Wkr. 2 from the Independence Yard, Jeffery Appleton, requested permission to attend the information exchange entitled 'Team Up Ohio'. The meeting was held in Columbus at the Delaware Hall Gymnasium at Columbus State Community College between 9:00 A.M. and 4:00 P.M. on Friday, September 15, 1995. ODOT 12 District Deputy Director, Bryan Groden gave his permission for Appleton to attend the meeting in Columbus to be held Friday, September 15, 1995 on state time, and also allowed him to use state vehicle T-12-43 for the trip to Columbus on September 15, 1995, in which, Appleton left the Independence Yard at 3:55 P.M. on Thursday, September 14, 1995. At approximately 7:30 A.M. on Friday, September 15, 1995 I received a call from Ruth Schaffer, Secretary to ODOT District 3 Deputy Director, Jim Mawhorr. Ruth informed me that Deputy Director Jim Mawhorr had received a call at approximately 9:15 P.M. on Thursday, September 14, 1995 from the Ohio State Highway Patrol Mansfield

Barracks, informing him that an ODOT employee named Jeffery Appleton had been arrested at approximately 8:30 P.M. that night while driving state vehicle Plymouth reliant license 12-T-43 southbound on I-71. He was charged with speeding over 80 miles per hour in a 65 mph zone and driving under the influence of alcohol and Appletons operators license was placed under Administrative License suspension immediately upon arrest.

Arrangements were made on Friday, September 15, 1995 for District 3 Safety Supervisor Bill Harkin to pick up the District 12 vehicle, 12-T-43 from the Ohio State Highway Patrol Barracks in Mansfield and bring it to District 3 headquarters until arrangements could be made for District 12 employees to pick up the vehicle on Monday, September 18, 1995.

Bill Harkins was also asked to inspect the vehicle for anything unauthorized to be in it, and to take pictures of whatever he might find. Mr. Harkinfound an opened bottle of Ron Rico Rum in the trunk of T-12-43 with a sales slip indicating the alcohol was bought at 4:10 P.M. on Thursday, September 14, 1995 at the B & L Beverage store, 5481 Warrensville Center Rd.

Mr. Harkin was also asked to get copies of the arresting officers report, the citations issued to Appleton, and the Breath Alcohol Test Results from the OSHP, which are attached. There is also a bill for $40.00 from the company that towed T-1243 from the arrest site on I-71 to the Mansfield OSHP barracks.

After T-12-43 was retrieved from District 3 headquarters on Monday, September 18, 1995, the opened bottle of Ron Rico Rum was taken from the trunk of the car at District 12 headquarters.

Jeffery Appleton did not attend the meeting in Columbus on Friday September 15, 1995 nor did he contact his supervisor that day to request leave time and was considered unauthorized for the whole day."

The grievant was cited by the State Highway Patrol while heading south on Interstate 71. A description of the offense stated the following:

"DESCRIPTION OF OFFENSE: Did operate a motor vehicle while under the influence of alcohol and or a drug of abuse."

The officer who made the arrest testified. He testified substantially the same as his statement revealed. There was also placed into evidence a copy of a statement that the trooper wrote on or about the 14th day of September, 1995, the date of the arrest. That statement revealed the following:

"YOUR HONOR,
WHILE ON PATROL NORTHBOUND ON I-71, I WAS DRIVINGOUT OF THE CONSTRUCTION ZONE WHEN I NOTICED A SMALLER VEHICLE THAT APPEARED TO BE PULLING AWAY FROM TRAFFIC. AS I CAUGHT UP WITH THE VEHICLE I NOTICED IT WAS A STATE ODOT CAR. I PACED (SIC) THE VEHICLE FOR APPROX. 3/4 OF A MILE AT SPEEDS IN EXCESS OF 80 MPH. WE GOT STUCK BEHIND A FEW CARS THAT WERE IN THE LEFT HAND LANE, IT WAS AT THAT TIME WHEN THE DRIVER TURNED ON THE YELLOW FLASHING LIGHTS, MOVED TO THE RIGHT LANE AND PASSED TRAFFIC. AS WE APPROACHED EXIT 169 THE DEFENDANT (SIC) PULLED INTO THE RIGHT LANE AND DROVE NEAR THE SPEED LIMIT. I PASSED THE VEHICLE AND MOVED OVER TO THE RIGHT LANE. JUST AFTER EXIT 165 THE VEHICLE PASSED ME AT A HIGH RATE OF SPEED. AT THE TIME I WAS PASSED I WAS DRIVING 65 MPH. THE VEHICLE WAS THEN STOPPED UPON CONTACT WITH THE DRIVER JEFFREY APPLETON. I NOTICED THE STRONG ODOR OF AN ALCOHOLIC BEVERAGE ABOUT HIS PERSON. I HAD MR. APPLETON SIT IN THE FRONT SEAT OF MY PATROL CAR. AGAIN I NOTICED THE STRONG ODOR OF ALCOHOL. I PERFORMED THE HORIZONTAL GAZE ON MR. APPLETON. ALL SIX CLUES WERE OBSERVED. MR. APPLETON WAS GIVING A PBT TEST RESULTS

.15% MR. APPLETON WAS TAKEN TO THE REAR OF MY PATROL CAR TO PERFORM OTHER TESTS, RESULTS CAN BE FOUND ON THE IMPAIRED DRIVERS REPORT. MR. APPLETON WAS PLACED UNDER ARREST, HANDCUFFED AND PLACED IN THE REAR OF MY PATROL CAR. HE WAS READ HIS MIRANDA RIGHTS AND TRANSPORTED TO R.C.S.O. FOR A TEST. WHILE WAITING FOR THE TOW MR. APPLETON TOLD ME TO TAKE THE HANDCUFFS OFF AND TO TAKE MY BELT OFF AND HE WOULD 'GO RIGHT UP MY FUCKIN ASS'. HE ALSO TOLD ME THAT SINCE HE WAS GOING DOWN I COULD FUCK OFF. MR. APPLETON ALSO STATED TO ME THAT HE KNEW HE WAS SPEEDING AND HE WAS FUCKED UP AND SHOULD HAVE STAYED HIS ASS AT HOME.

ON STATION HE WAS READ AND SHOWN THE BMV 2255, MR. APPLETON GAVE A SAMPLE OF HIS BREATH. RESULTS .168% HE WAS CITED FOR SPEED AND DUI.

/s/ Trooper C.W. Enderby, U-21, Ohio State Highway Patrol"

When a pick up was made of the vehicle Mr. Appleton was driving, it was noted by the Ohio Department of Transportation officer that there was some rum in a bottle so marked in the trunk of the car. The picture was taken of the rum. There was also a bag in which the rum was found and that bag contained a cash receipt for that rum, that receipt wasfrom a beverage store on Warrensville Center Road, made at approximately 4:10 P.M. on the 14th of September, 1995. The grievant denied that purchase.

It might be noted that Article 24.09 of the contract contained language concerning an Employee Assistance paragraph. The language of the paragraph revealed the following:

"24.09 - Employee Assistance Program

In cases where disciplinary action is contemplated and the affected employee elects to participate in an Employee Assistance Program, the disciplinary action may be delayed until completion of the program. Upon notification by the Ohio EAP case monitor of successful completion of the program under the provisions of an Ohio EAP Participation Agreement, 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 with five (5) days of a predisciplinary 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."

At the time of the pre-disciplinary meeting, it was noted that the grievant had become a member of the Employee Assistance Program of the State of Ohio. At that time, the employer refused to enter into any agreement with the union so as to allow any delay in the disciplinary action pursuant to the terms of the indicated contractual clause. The employer also refused to mitigate any disciplinary action even though the grievant was in the Employee Assistance Program. It might be revealed that there were no guidelines for the employer to follow underwhich acceptance of an EAP agreement or mitigation be made. The officer of the State testifying in that regard said it was a personal choice of that supervisor to allow an EAP agreement or a mitigation of penalty. That witness also stated that the seriousness of the offense, and the frequency of the disciplinary activity of the grievant triggered EAP acceptance or mitigation.

It might be further noted that the parties agreed to certain stipulated facts and they revealed the following:

"STIPULATED FACTS

1. Grievant was employed as a Highway Worker 2 with the Ohio Department of Transportation from November 1, 1993 to September 28, 1995.

2. Grievant was charged with driving under the influence of alcohol on September 14, 1995.

3. Grievant was convicted of driving under the influence of alcohol on December 26, 1995, as a result of his activity in the arbitration case."

It might be further noted that the grievant indicated on his grievance form that he was removed without just cause. It was further noted that the remedy sought on the protest form revealed the following:

"Remedy sought:
That Mr. Appleton be put back on payroll with all back pay, file expunged and to be made whole."

It is noted in the Step 3 decision regarding the grievance, that management contended the following:

"Management Contention

The Grievant was a Highway Maintenance Worker 2 at the Independence Yard in Cuyahoga County. He received permission from Management in District 12 to attend a meeting in Columbus on Friday, September 15, 1995 and he was given permission to take a State car to attend this meeting. On Thursday, September 14, 1995 the Grievant took State vehicle number T-1243 home. At approximately 9:15 p.m. on September 14, 1995 the District Deputy Director in District 3 received word that an ODOT employee, in an ODOT car, had been picked up by the Ohio State Patrol in District 3 at about 8:30 p.m.

On September 15, 1995 District 3 made contact with District 12 and advised him of the situation. The District 3 Safety Supervisor picked up the vehicle on September 15, 1995 and looked through the car. He found an open bottle of Ron Rico Rum in the car trunk. The bottle was in a bag with a sales receipt in it dated September 14, 1995 at time of 4:10 p.m. The sales receipt indicated that it had been purchased at the Warrensville Center Road in Cuyahoga County in District 12.

The Ohio State Patrol cited the employee for driving while under the influence of alcohol as a result of a breathalyzer test which had a reading of .168 and for speeding.

The Grievant did not attend the meeting as scheduled on September 15, 1995. He also did not go to Independence Yard to work nor did he apply for any leave time for the day.

The Grievant came back to work on the following Monday and then took time off on FMLA leave.

The Grievant had failed to advise District 12 that he intended to drive the vehicle to Columbus on the evening prior to the meeting.

As a result of his citation by the Ohio State Patrol, the Grievant lost all driving privileges until October, 10, 1995.

Regarding the alleged disparate treatment with reference to Mr. Evans, Management noted that the circumstances were considerably different. Mr. Evans was tested for reasonable suspension and as such under the provision of the contract he was permitted to enter into an EAP Agreement with theState. The discipline regarding his being under the influence of drugs or alcohol was held in abeyance.

A pre-disciplinary meeting was held on September 25, 1995 for a violation of Directive WR-101, items as follows:

Item #7-Unauthorized/misuse of State equipment or vehicle.

Item #10-Sale, consumption, or possession of alcoholic beverages or illegal drugs while on duty of ODOT property. This charge was for the possession of alcoholic in a State vehicle not for having been found under

the influence of alcohol in a State vehicle nor for an open container of an alcoholic beverage in the car.

Item #16-Unauthorized absence in excess of 30 minutes.

Item #26-Other actions that could harm or potentially harm the employee, a fellow employees or a member or members of the general public. This referred to the Grievant speeding and a citation DUI as a result of his breathalyzer test at .168.

Item #27-Other actions that could compromise or impair the ability of the employee to effectively carry out his/her duties as a public employee. As a result of his administrative licenses suspension for 14 days.

Management denied any violations of the contract stating that there was no discrimination nor disparate treatment of the employee. The Grievant's request for an EAP Agreement was given proper consideration. His voluntary entry into an EAP Program was not viewed negatively by Management in any fashion relating to his termination from Employment.

Management also noted that under Appendix M1 (D) the Grievant as an employee of the State of Ohio did in fact exercise his full right-s under that paragraph.

Finally, with regards to Article 24 the discipline imposed was for just cause, was commensurate with the offense and in no way resulted from any supervisor intimidation."

Paragraph 2.01 of the contract of collective bargaining has a nondiscrimination clause which revealed therein the following:

"2.01 - Non-Discrimination

Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio or Executive Order 83-64, 87-30, or 92-287V of the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, disability, sexual orientation, or veteran status. Except for rules governing nepotism, neither party shall discriminate on the basis of family relationship. The Employer shall prohibit sexual harassment and take action to eliminate sexual harassment in accordance with Executive Order 87-30, Section 4112 of the Ohio Revised Code, and Section 703 of Title VII of the Civil Rights Act of 1964 (as amended)."

Placed into evidence in this matter by the union was the contents of Appendix M entitled "Drug Free Work Place Policy" as one of the defenses to the matter at hand. In that regard, the union cited Section 5 of that appendix found on page 278 of the contract and it revealed the following:

"Section 5. Disciplinary Action

On the first occasion in which any employee who is determined to be under the influence of, or using, alcohol or other drugs, while on duty, as confirmed by testing pursuant to this policy, the employee shall be given the opportunity to enter into and successfully complete a substance abuse program certified by the Ohio Department of Alcohol and Drug Addiction Services. No disciplinary action shall be taken against the employee, provided he/she successfully completes the program and is never again found to be under the influence of, or using or abusing, alcohol or other drugs, while on duty."

It might be noted that Section 2 of that particular appendix, revealed the following:

"Section 2. Drug-Testing Conditions

Employees covered by this Agreement may be required to submit a urine specimen for testing for the

presence of drugs or a breath sample for the testing of the presence of alcohol:

Where there is reasonable suspicion to believe that the employee, when appearing for duty or on the job, is under the influence of, or his/her job performance, is impaired by alcohol or other drugs. Such reasonable suspicion must be based upon objective facts or specific circumstances found to exist that present a reasonable basis to believe than an employee is under the influence of, or is using or abusing, alcohol or drugs. Examples of reasonable suspicion shall include, but are not limited to, slurred speech, disorientation, abnormal conduct or behavior, or involvement in an on-the-job accident resulting in disabling personal injury requiring immediate hospitalization of any person or property damage in excess of $2,000, where the circumstances raise a reasonable suspicion concerning the existence of alcohol or other drug use or abuse by the employee. In addition, such reasonable suspicion must be documented in writing and supported by two witnesses, including the person having such suspicion. The immediate supervisor shall be contacted to confirm a test is warranted based upon the circumstances. Such written documentation must be presented, as soon as possible, to the employee and the department head, who shall maintain such report in the strictest confidence, except that a copy shall be released to any person designated by the affected employee."

Thus, it appeared that the union contended that the activity of the employer was not for just cause since this was the first incident of wrong doing in eighteen months of employment; that the rules under which the grievant was disciplined were never published to the grievant; that if in fact the grievant should be disciplined under the rules, then theprogressive discipline prescribed in the contract and the rules should be used; that the letter of the director terminating the grievant's seniority was written on the same date as the disciplinary hearing which makes the union believe that the termination of the grievant was concluded prior to any pre-disciplinary hearing; that the rum in the trunk of the state car was not purchased by the grievant; that there were no standards and guidelines indicated either in the contract or in the rules which allow the employer to enter into a EAP agreement and/or mitigation or not and that the use of appendix M is a valid defense under the terms of the contract.
It was with all these thoughts that this matter rose to arbitration for Opinion and Award.

III. OPINION AND DISCUSSION

Rules, in order to be a proper predicate for discipline must be published, must be reasonable and must be evenhandedly applied. The bargaining unit did not contest the reasonableness of the rules or whether or not the rules were evenhandedly applied. The bargaining unit indicated and stated that the grievant never received publication of the work rules. The evidence revealed and it was not contested by the union that the rules were posted at the facility. The evidence further revealed that the grievant, on occasion, had worked as a steward on the floor of the facility and that he had used the rules in grievance meetings. Given those facts without contestation by the union, it is apparent and this arbitrator believes therefore that the grievant in fact had a copy of the published rules of the facility.

The bargaining unit also sought to defend this particular matter on the basis that the grievant had not received progressive discipline but rather a discharge for the first event of substandard conduct. The bargaining unit argued that both the contract and the rules demanded that progressive discipline be used at the facility. It is noted in the contract t hat the discipline must be commensurate with the activity disciplined. It is also noted in the rules that progressive discipline is only used as a guideline when considering use of the rules as a predicate for discipline. I do not believe that anybody on either side of the table in this particular cause or elsewhere would believe that serious substandard events would be disciplined with a counseling. In this particular case, the grievant used a state vehicle; drove that vehicle to very high speed; endangered not only his own life but the lives of the citizens using the roads in Ohio and could have caused serious damage to the vehicle in which the grievant was driving. That type of conduct does not merit progressive discipline but rather termination, if proven.

Corrective progressive discipline is reserved for that type of event that is relatively minor in nature and in which the discipline could correct the employee who commits sub-standard conduct. However, when the

conduct is severely sub-standard, then in that instance, discharge may be the answer even if that is the first event of substandard conduct created in the grievants work history and even if the language of the contract concerning progressive discipline is as it is stated in the contract of collective bargaining in this particular matter.

The union further argued that Director Wray was never given an opportunity to review all of the facts in this particular case. The union further argued that the State of Ohio had made up its mind even prior to the pre-disciplinary hearing that the grievant would be terminated. The union thought that since the date of Director Wray's letter was the same date of the hearing that the letter of termination had been prepared even before the hearing was had. There is no evidence that the letter was typed prior to the hearing. The fact that the same date of hearing appears on the termination letter is not sufficient proof to show that the employer in any way violated the procedural aspects of the agreement.

The activity in this particular case also revealed that in addition to the grievant speeding his way to Columbus at a very high rate of speed, there was in the state car a open bottle of rum. Whether the bottle belonged to the grievant or not, is of little importance. That fact is not dispositive of the issue and further discussion of it is unnecessary.

The union has further argued in this particular cause that there are no standards or guidelines for entering into an EAP agreement with the union for the benefit of the grievant or no standards or guidelines for the use of mitigation when such timely EAP activity of the grievant is shown. The fact of the matter is, the employer testified that the seriousness of the activity determined whether or not an EAP agreement or mitigation should be entered into by the state. In this particular case the employer felt that using a state vehicle while under theinfluence of alcohol. and it was admitted, was sufficient to deny the use of an EAP agreement and/or mitigation for the benefit of the grievant. This arbitrator has no fault with that decision making by the employer.

There was an indication by the union that appendix M of the contract should be used as a defense in this matter especially Section 5 thereunder. It is noted on a full reading of appendix M that the use of that particular appendix is for someone found to be under the influence while working and nothing more. It does not indicate that appendix M should be used for an activity resulting from drug use or while under the influence while at work. In other words, if an individual is found under the influence of a drug or alcohol and meets the indications of appendix M, then in that event Section 5 under appendix M is to be used. However, when someone is under the influence of drugs or alcohol and gross substandard conduct therefore results, the use of appendix M does not provide a defense.

The union has further indicated and stated that the employer acted in a discriminatory manner to the grievant. There was no definitive evidence of race discrimination, sexual harassment, or any other type of discrimination. The union indicated and stated that others may have been treated differently in that they were allowed the use of a EAP agreement or mitigation under such conditions. There was no evidence placed into the record showing by way of fact that as a matter of fact, others had been given an EAP agreement and/or mitigation of discipline under the same or similar factual circumstances as the grievant wasinvolved in this particular case.

The grievant is a relatively short time employee. While his behavior pattern at the facility met expectations of his supervisors, the grievant's behavior on September 14, was grossly substandard. He endangered the lives of the citizens, he endangered his own life and he certainly endangered state property. While nothing occurred, the fact of the matter is, the grievant's conduct was grossly substandard and was just cause for discharge.

IV. AWARD

Grievance denied.

MARVIN J. FELDMAN, Arbitrator

Made and entered
this 14th day
of May, 1996.