

ARBITRATION DECISION NO.:

633

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Natural Resources

DATE OF ARBITRATION:

April 24, 1997

DATE OF DECISION:

April 27, 1997

GRIEVANT:

Dale Shoemake

OCB GRIEVANCE NO.:

25-12-(96-03-22)-0018-01-06

ARBITRATOR:

Anna DuVal Smith

FOR THE UNION:

Maxine Hicks

FOR THE EMPLOYER:

Shelly Ward

KEY WORDS:

Commercial Driver's

License

Dishonesty

Drug Detection

Drug Testing

Failure of Good

Behavior

Suspension

ARTICLES:

Article 24 - Discipline

§24.08-Drug Testing

Article 25 - Grievance

Procedure

§25.09-Expedited

Arbitration Procedure

FACTS:

An expedited arbitration was held on April 24, 1997, as provided for in Section 25.09 of the Agreement.

The grievant, who is not employed in a classification subject to random drug testing under Appendix M1 of the Agreement, allegedly misled the Employer into believing that he possessed a Commercial Drivers License (CDL). This led to the order to submit to a random drug test under the Federal Omnibus Transportation Employee Testing Act. The grievant resisted the test in a number of ways, including his admission that he did not possess a CDL, and refusing to take the test. This placed the grievant into the disciplinary procedure, which he protested by allegedly making certain statements in a threatening manner as well as filing this grievance. The charges against the grievant were: insubordination, dishonesty, failure of good behavior, and violating the Drug-Free Workplace Policy.

EMPLOYER'S POSITION:

The grievant reported to work and was advised that he was to report for a random drug test. As a result of that test it was determined that the grievant had reported to work under the influence of an illegal drug. An investigation was conducted and it was also determined that the grievant verbally threatened his supervisor and fellow employees. The grievant also told his supervisor and other employees that he possessed a CDL when he in fact did not. For these reasons, the Employer claimed that just cause existed for the discipline invoked.

UNION'S POSITION:

The Union contends that, because the grievant did not ever possess a CDL, he should not have been required to submit to the random drug test pursuant to the Federal Omnibus Transportation Employees Act. The grievant knew that he should not be tested, but he did not want to be insubordinate by refusing to do so. Additionally, the Employer did not present any evidence that the grievant ever claimed to possess a CDL.

ARBITRATOR'S OPINION:

The drug charge must be dismissed, as it is founded on a test that was conducted without the contractual requirement of reasonable suspicion. The entire sequence of events, however, was caused by the grievant's dishonesty about his qualifications. But for his misrepresentation, he would not have been subject to the random method of testing available to the Employer under the Federal Omnibus Transportation Employee Testing Act. The grievant's classification does not require a CDL, and the Agreement calls for the Employer to have "reasonable suspicion" before testing for any employees other than those listed in Appendix M1. The grievant then compounded his error by behaving in a threatening manner and making additional statements that proved to not be true. The grievant must be held accountable for his own actions.

AWARD:

The grievance is granted in part and denied in part. The grievant's ten-day suspension is reduced to a two-day suspension. The grievant is to be made whole for eight days lost wages, seniority, and benefits. The Employer is also directed to expunge the drug charge from his record.

TEXT OF THE OPINION:

VOLUNTARY EXPEDITED LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration

Between

**OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION
LOCAL 11, AFSCME, AFL/CIO**

and

**OHIO DEPARTMENT OF
NATURAL RESOURCES****OPINION AND AWARD****Anna DuVal Smith, Arbitrator****Case No.:**

25-12-960322-0018-01-06

Dale Shoemake, Grievant
Suspension**Submission**

A bearing in this matter was held on April 24, 1997, at the Office of Collective Bargaining, Columbus, Ohio, under §25.09, Expedited Arbitration Procedure, of the parties' Collective Bargaining Agreement. Presenting the case for the Ohio Department of Natural Resources was Shelly Ward. Presenting the case for the Ohio Civil Service Employees Association was Maxine Hicks. The parties stipulated the matter is properly before the Arbitrator for final and binding decision, and presented one issue on merits: Was the Grievant's ten-day suspension for just cause? If not, what shall the remedy be?

Opinion of the Arbitrator

This case came about when the Grievant who is not employed in a classification subject to random testing under Appendix M1, misled the Employer into believing that he possessed a Commercial Drivers License. This led to the order to submit to a random drug test under the Federal Omnibus Transportation Employee Testing Act, which the Grievant resisted in a variety of ways, including admission that he did not have a CDL, refusal to take the test, and various misrepresentations about the test and its results. This placed the Grievant into the disciplinary procedure, which he protested by making certain statements in a threatening manner as well as filing the subject grievance. The charges against him are: insubordination, dishonesty, failure of good behavior, and violating the Drug-Free Workplace Policy.

The drug charge must be dismissed, as it is founded on a test that was conducted without the contractual requirement of reasonable suspicion. However, the entire sequence of events was caused by the Grievant's dishonesty about his qualifications. But for his misrepresentation of himself, he would not have been subjected to the FOTETA random testing, for his classification does not require a CDL and the Contract calls for "reasonable suspicion" testing for all but Appendix M1's exceptions. The Grievant then compounded his error by behaving in a threatening manner, and making additional untruthful statements to the test facility and his supervisor. He must be held accountable for his own role in the affair.

Award

The grievance is granted in part, denied in part. The Grievants ten-day suspension is reduced to a two-day suspension. He is to be made whole for eight days lost wages, seniority and benefits. The Employer is directed to expunge the drug charge from his record.

Anna DuVal Smith, Ph.
Arbitrator

Shaker Heights, Ohio
April 27, 1997