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STATE OF OHIO AND OHIO CIVIL SERVICE

EMPLOYEES ASSOCIATION LABOR

ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, THE OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 8

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME, AFL-CIO

GRIEVANCE: Gary Redding (Discharge)

CASE NUMBERS: 31-08-07-22-89-67-01-06

ARBITRATOR'S OPINION AND AWARD

Arbitrator: David M. Pincus
Date: June 6, 1989

APPEARANCES

For the Employer

James Fyfe	Safety Supervisor
Don Banks	Equipment Superintendent
Mary Abel	ODOT-Deputy Director of Labor Relations
Carl C. Best	Advocate

For the Union

Gary Redding	Grievant

INTRODUCTION

This is a proceeding under Article 25, Section 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Department of Rehabilitation and Correction, Ohio State Reformatory, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986 - July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on March 22, 1989 at the Office of Collective Bargaining, Columbus, Ohio. The Parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would not submit briefs.

STIPULATED ISSUES

Was the Grievant terminated for just cause? If not, what shall the remedy be? (Joint Exhibit 2)

JOINT STIPULATIONS OF FACT

FACTS:

1) The issue is properly before the Arbitrator.

2) State vehicles T 8-691 and T 8-825 were illegally parked near the loading dock at the time of the May 4, 1988 incident in question.

3) The drivers of these vehicles, ODOT employees, were not disciplined concerning the May 4, 1988 incident.

PERTINENT CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

"Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08 (A) numbers 1-9."
(Joint Exhibit 27, Pg. 7)

ARTICLE 24 - DISCIPLINE

Section 24.01 - Standard

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

Section 24.02 - Progressive Discipline

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

A. Verbal reprimand (with appropriate notation in employee's file)
B. Written reprimand;
C. Suspension;
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."

...

Section 24.04 - Pre-Discipline

"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. 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. No later than at the meeting, 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 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."

On February 18, 1988, James A Fyfe, the Safety Supervisor, was notified by the District garage about the above incident. He, in turn, conducted an investigation of the incident on February 25, 1988. His review of the various Patrol reports and his discussion with the Grievant indicated that the accident was preventable because the Grievant failed to yield to through traffic.

On March 7, 1988, the District Deputy Director, Lloyd Wallace, recommended that an A-302 meeting be convened to deal with the above matter. He based this recommendation on the four preventable accidents/incidents engaged in by the Grievant in less than a two year period. Wallace, moreover, recommended that a ten day suspension should be imposed against the Grievant.

Prior to official notification concerning an upcoming A-302 hearing, the Grievant was engaged in an additional accident. On Tuesday, March 8, 1988, the Grievant was pulling out of the driveway of an auto parts store in Columbus, Ohio. As the grievant was engaging in a right hand turn out of the parking lot, a private citizen allegedly "squeezed" next to his van which precipitated a scraping of the two vehicles. The grievant stated that he completed his turn and then stopped to see what had transpired.

Upon exiting from his vehicle the Grievant spoke to the civilian who seemed upset and was crying. After jointly reviewing the damage, the Grievant acknowledged that he had recently been involved in an accident, that he did not need any

damage, and checking the schedule to determine which driver was assigned to the van on the day in question. This research prompted a meeting with the Grievant on or about March 24, 1988.

After reviewing the incident, Fyfe concluded that the accident was preventable because the Grievant engaged in an improper turn. On April 1, 1988, Wallace referred the matter to an A-302 hearing. He, moreover, recommended that the Grievant should be removed for all of his most recent violations.

On April 11, 1988, the Grievant was informed of a forthcoming A-302 hearing scheduled for April 15, 1988. A hearing was held on this date to review a proposed disciplinary removal. Louis F. Agoston, the Impartial Administrator, reviewed the disciplinary action and on April 18, 1988 authored a recommendation. In his opinion, the Employer had reasonable grounds to believe that the Grievant was negligent and did violate the work rules. He, therefore, supported the proposed discipline.

The above matter was held in abeyance as a consequence of an additional incident which took place on May 4, 1988. The Grievant testified that he was backing out of the loading dock area while attempting to avoid two illegally parked vehicles. Unfortunately, his van struck the right taillight assembly of a parked truck. The accident resulted in a broken lease and dented the right side of the vehicle.

Fyfe, again, investigated this matter and determined that the accident was preventable because of improper backing. On May

13, 1988, Wallace recommended that this particular violation should be incorporated and reviewed in conjunction with other incidents discussed in the A-302 hearing initially held on April 15, 1988. Wallace, moreover, recommended that the Grievant should be removed from employment with the Employer.

On May 17, 1988, the Union contacted the Employer and requested that the Parties reconvene the A-302 hearing held on April 15, 1988. This request was based upon additional violations of Directive A-301. The Parties mutually agreed to an additional meeting which was held on May 25, 1988. Again, Agoston maintained that the charges against the Grievant were true and should become part of the evidence previously presented to determine the proposed discipline.

On June 29, 1988, the Employer removed the Grievant from employment as a Delivery Worker I. The following pertinent particulars were contained in the removal order:

"...

The charges you have been found in violation of include:

Directive A-301, Item #1(b) - Neglect of duty (minor).

Directive A-301, Item #2(c) - Insubordination, failure to follow the written policies of the Director, District, or office.

Directive A-301, Item #18 - Misuse of a State vehicle, violation of a traffic code or for personal use.

Directive A-301, Item #19 - Damage to a State vehicle as a result of failure to operate vehicle in a safe manner.

Directive A-301, Item #27 - Failure to report accidents as

enumerated in Directive A-306.

Directive A-301, Item #33 - Violation of one or more of the statements embodied in Section III of Directive A-306.

..."

(Joint Exhibit 2)

On July 20, 1988, the Grievant contested the above disciplinary action by filing a grievance. The Grievance Form included the following critical accusations:

"...

Contract Article(s)/Section(s) Allegedly Violated:

Article 24 and/or any other article, directive related to this grievance

Statement of Facts (for example, Who? What? When? Where? etc.):

On July 14, 1988 I was given notice that effective July 15, 1988 I was removed from employment as a Delivery Worker 1 with O.D.O.T. I feel the State did not prove beyond reasonable doubt that I was guilty of the facts I was charged with. Nor that the disipline (sic) imposed was reasonable and commensurate with the supposed offense.

Names of Witnesses:

Remedy Sought:

The (sic) I be reinstated in the position I was removed from, that all leave balances be restored and all monies lost due to this disipline (sic) be returned or any other negotiated settlement. That I be made whole.

..."

(Joint Exhibit 2)

A Level III Grievance Meeting was held on August 18, 1988 to review the above grievance. The Employer denied the grievance for a number of reasons. First, the violations dealing with Sections 24.01, 24.02, and 24.05 were alleged but not supported

The Employer asserted that the March 8, 1988 incident was also preventable because the Grievant engaged in an improper right hand turn from a left hand lane, while a civilian attempted to turn right from a right hand turning lane. The Grievant, moreover, violated several other policies by leaving the scene of an accident without exchanging information and failing to notify the police department and his supervisor about the accident (Joint Exhibit 8, Joint Exhibit 6). Again, Fyfe was involved in the investigation which determined that the Grievant violated the above policies. For the most part, he relied on the initial investigations conducted by the police department because he was not notified about the incident until March 23, 1988; approximately fifteen days after the incident. He also

not parked in a designated parking area in direct violation of an I.O.C. dated December 9, 1986, and issued by Wallace. This I.O.C. specified that drivers who illegally parked could be subject to disciplinary action. Both statements indicated that one vehicle was parked on the loading dock ramp near the top of the incline on an angle and was left unattended. Another vehicle, moreover, was parked at the head of the walkway; was unattended, and at a different angle, which made the Grievant's attempt to maneuver his vehicle extremely difficult. The Union also emphasized that neither of these drivers were disciplined for their negligent activities.

A number of general progressive discipline issues were also raised by the Union. First, three accidents within three-and-one-half months should not render the progressive discipline process moot. The Employer, more specifically, was obligated to impose a lesser form of discipline prior to administering a removal decision. Corrective action should have been imposed so that the Grievant had an opportunity to improve his driving record. Second, the Employer should have continued to abide by its previous progressive discipline policies. In the past, the Employer merged several offenses and administered a reasonable penalty. For example, a written reprimand was issued on July 22, 1986 for speeding, failing to notify his supervisor of the citation, and improper backing of his vehicle (Joint Exhibit 14). A similar procedure was followed on April 20, 1987 when the Employer issued a three day suspension (Joint Exhibit 13). This

penalty was based upon a speeding violation, damage to a State of Ohio vehicle, and a series of tardiness occurrences. With respect to the present matter, the Employer again merged a series of offenses but the discipline penalty assessed was too severe.

Proper consideration of mitigating circumstances should have resulted in a less severe penalty. At the time of the second incident the Grievant was experiencing tremendous stress as a consequence of the initial disciplinary action and marital problems. The Employer's EAP arguments were also discounted by the Union. The Grievant, more specifically, maintained that the Employer did not assert itself sufficiently in terms of helping him obtain appropriate counseling services. Also, the Grievant's performance evaluations (Joint Exhibit 10) and statements provided by his supervisor at the hearing indicated that he had been a good employee for eight years.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, it is the Arbitrator's judgment that the Employer had just cause to remove the Grievant. If this Arbitrator was merely considering each of the violations as independent events an alternate outcome might have readily resulted. Unfortunately, the totality of the Grievant's conduct over an approximate three month period, and his inability to correct egregiously similar behavior, leave this Arbitrator with no other alternative but to uphold the Employer's decision.

The Grievant was provided with proper notice of the probable consequences associated with his conduct. [redacted] Warnings have two closely related functions. [redacted] discipline is likely to follow.3 Suspensions, moreover, serve as a critical aspect in the progressive discipline process because

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3Armco Steel Corp., 52 LA 101 (1969).

[redacted] wages [redacted] than a simple warning.[4]

When one applies the above principles to the present situation it becomes clearly obvious that the Grievant was provided with proper notice. The Grievant's prior warning (Joint Exhibit 13) and suspension (Joint Exhibit 14) fulfilled the notice requirement. These prior disciplines, moreover, dealt with some infractions which closely approximated those engaged in by the Grievant during the period February 18, 1988 to May 4, 1988. The inquiry initiated by the Grievant on August 26, 1986 concerning the search of his driving record (Employer Exhibit 6) also evidences a sufficient notice condition.

Each of the three incidents were properly investigated by the Employer and substantial evidence of proof was obtained proving that the Grievant was guilty as charged. All three accidents were preventable and the associated charges were also substantiated.

With respect to the February 18, 1988 incident the Grievant clearly failed to yield to through traffic. Evidence and testimony indicate that the grievant stopped at the intersection of S.R. 741 as he traveled in a southerly direction. As he edged away from the stop sign he was struck by a vehicle traveling in an easterly direction on S.R. 63 although this intersection has flashing caution lights. The vehicle traveling in an easterly direction clearly had the right of way. It appears quite

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4Rochester Telephone Corp., 45 LA 538 (1965).

probable that the Grievant's vision was impaired by the vehicle he allowed to turn west on S.R. 63 prior to his entrance into the intersection. Nonetheless, the Grievant's failure to yield was the primary cause of the accident.

DeHart's testimony regarding the hazardous state of this intersection does not mitigate the Grievant's behavior. The Grievant was not totally unfamiliar with this intersection and the associated hazards. His daily work routine required frequent travel through this intersection which should have sensitized the Grievant to these hazards. DeHart supported this premise under cross examination. He noted that he frequently confronted this intersection as he traveled to and from work. DeHart claimed that those individuals that frequent this intersection should be aware of the hazards, and thus, should exercise caution.

Whether the Grievant received or did not receive a formal citation by the State Highway Patrol is viewed as irrelevant by this Arbitrator. The documents introduced at the hearing and Fyfe's testimony indicate that the incident was preventable. It should be noted, moreover, that the original police report does specify a violation of O.R.C. Section 4511.43. This notation lends partial support to the Employer's contention that the Grievant was not formally cited because the police department was unable to locate him after the accident.

In a similar manner, the auto parts store accident was also preventable. A review of the Employee Vehicle Accident Report (Joint Exhibit 8) and the Grievant's own testimony clearly

evidence that the Grievant did indeed make an illegal right hand turn. It appears virtually improbable that the Grievant was properly in the right hand turning lane prior to the accident. He had to be in the left hand turning lane, engaging in a wide turn onto West Broad Street, which caused the contact with the civilian's vehicle. Even if his testimony was accurate, the Grievant should have observed the civilian's vehicle squeezing next to him prior to the turn. Such a lapse in driving protocol is viewed as an equally negligent act.

The additional charges were also clearly established by the Employer. The Grievant did not follow the existing vehicle accident reporting procedure, failed to notify his supervisor and the police department about the accident. The civilian's lack of cooperation and her alleged decision not to contact the police department do not absolve the Grievant of his responsibilities per the various directives promulgated by the Employer. The previous accident should not have impacted the Grievant's thought process regarding this incident. If in fact he was in the right, he should not have hesitated to file the appropriate reports and initiate the appropriate contacts. His actions, or lack thereof, taint his version of the events and dramatically dampen his credibility.

The primary defense offered by the Union regarding the last incident dealt with the impact of the two illegally parked vehicles. Once again, in this Arbitrator's judgment, this accident was obviously preventable. Even though these vehicles

were illegally parked, the Grievant's attempt to maneuver his vehicle under these circumstances clearly evidenced bad judgment on his part. He should have attempted other more reasonable options such as waiting for the drivers or soliciting their assistance prior to the maneuver.

The series of events culminating in the removal and Grievant's prior record indicate that an additional suspension was not required. [redacted] violate progressive discipline principles. [redacted] opinion, [redacted] arbitrary, capricious.[5] Cause for discharge, more specifically, is not necessarily found in the Grievant's final act of misconduct. [redacted] has [redacted] liability; a [redacted] infinitely to sustain [redacted]

The mitigation arguments proposed by the Union are not viewed as persuasive by the Arbitrator. Participation in an EAP program is a voluntary undertaking and it was made available to the Grievant after an initial discussion with Fyfe. [redacted] its obligation was completed, it [redacted] follow-up

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[5]Grand Haven Brass Foundry, 68 LA 41 (1977); Jackson County Medical Care Facility, 65 LA 389 (1975).

[6]Ampex Corp., 44 LA 412 (1965); Friden, Inc., 52 LA 448 (1969); Arden Forms Co., 45 LA 1124 (1965).

[redacted] that the Agreement (Joint Exhibit 1) places any additional [redacted] Employer. In a similar fashion, the Grievant's performance record (Joint Exhibit 18) does not serve as a sufficient mitigating factor to justify a penalty modification.

AWARD

The grievance is denied and dismissed.

David M. Pincus
Arbitrator

June 6, 1989