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In the Matter of Arbitration *
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Between * Case No.: 27-11-12-
* 29-89-0036-01-03
OCSEA/AFSCME Local 11 *
* Before: Harry Graham
and *
*
The State of Ohio, Department *
of Rehabilitation and Correction *
*

Appearances: For OCSEA/AFSCME Local 11:

Michael Temple
Staff Representative
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

For Department of Rehabilitation and Correction:

Nicholas G. Menedis
Chief of Labor Relations
1050 Freeway Dr. North
Columbus, OH. 43229

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on July 10, 1990 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument.

Issue: The parties agree upon the issue in dispute between them. That issue is:

Was Eddie Sizemore removed for just cause? If not, what shall the remedy be?

Background: The Grievant in this proceeding, Eddie Sizemore, has been employed for more than ten years as a Correctional

Officer in the Lebanon Correctional Institution in Lebanon, OH. Since 1976 he has accumulated twelve citations for Driving Under the Influence. (DUI). The Employer was unaware of Mr. Sizemore's driving history until late in 1989. On November 6, 1989 the Warden of the facility in Lebanon wrote to Mr. Sizemore and indicated that he was to be removed from his position as a Correctional Officer. It was the opinion of the Department that Mr. Sizemore was in violation of the Standards of Employee Conduct at Rules 6 and 35. Rule 6 is concerned in relevant part with failure to carry out a work assignment. Rule 35 deals with "other actions that could compromise or impair the ability of the employee to effectively carry out his/her duties as a public employee." Specifically, the Department had learned that the Grievant had had his driving privileges suspended from August 1, 1989 to August 1, 1999. It was the opinion of the Department that Mr. Sizemore's inability to drive for ten years rendered him incapable of performing the tasks associated with his position.

In order to protest Mr. Sizemore's discharge a grievance was filed. No resolution of that grievance was reached in the procedure of the parties and they agree it is properly before the Arbitrator for determination on its merits.

Position of the Employer: The Employer insists that the discharge under review in this proceeding is justified. It

points to Mr. Sizemore's driving history in support of that view. As shown in Employer Exhibit 1, a history of the Grievant's driving infractions, Mr. Sizemore has compiled a record replete with instances of DUI. Commencing in 1976 to August, 1989 he has repeatedly been found guilty of Driving Under the Influence. Finally, in August, 1989 the Court in Warren County, OH. suspended his driving license for ten years, to August, 1999. As a requirement for his position is possession of a driver's license and he does not and cannot have one, it is plain that Mr. Sizemore cannot perform his job. From time to time Correctional Officers may be called upon to drive in the course of their duties. This may occur as prisoners need transport to medical care, to pick up supplies or in the event of prison riots or escapes. The State has made possession of a driver's license a part of the requirements for the position of Correctional Officer. As Mr. Sizemore cannot meet one of the basic requirements of the job the State should not be required to retain him in its employ it insists.

The Employer readily acknowledges that certain errors have occurred in connection with Mr. Sizemore's ability to drive. Due to an administrative error his license was recorded as being suspended from August, 1989 to February, 1990. On February 20, 1990 the Bureau of Motor Vehicles returned Mr. Sizemore's driving license to him. He

has it in his possession to this day. He was advised to secure insurance or proof of financial responsibility. He did so. This sequence of events was erroneous. In fact, on February 22, 1990, upon learning that the Bureau of Motor Vehicles had restored Mr. Sizemore's license Judge Dallas P. Powers of the Warren County Court wrote to the Bureau of Motor Vehicles and informed it of its error and indicated that the Grievant's driving license was suspended for ten years, to August, 1999. As reflected on his driving record as maintained by the Bureau of Motor Vehicles Mr. Sizemore's license is indeed suspended. This means that Mr. Sizemore cannot drive and will not be able to drive. Consequently he will not be able to perform his duties. Under these circumstances discharge is appropriate the State urges.

In processing Mr. Sizemore's discharge the State asserts it has been scrupulously fair and has gone beyond the letter of the Agreement to assure due process. On November 8, 1989 the pre-disciplinary conference required by the Agreement was convened. Mr. Sizemore was not in attendance as he was lodged in the Warren County jail. In order to provide complete opportunity to the Grievant to deal with the charges against him a second pre-disciplinary conference was convened: this time in the Jail. The facts remained unaltered. Consequently, no reason existed for the State to alter its opinion that Mr. Sizemore's ability to perform his duties had been fatally

compromised by his loss of driving privileges.

The State points out that it will be unable to secure automobile insurance on Mr. Sizemore if he is reinstated to employment. He will not be permitted to drive. This is an impossible situation according to the State. For these reasons it insists the discharge be upheld.

Position of the Union: When the Grievant first entered State service at Lebanon there was no requirement that Correctional Officers have and maintain a driving license. That requirement for the position was added well after Mr. Sizemore's employment commenced. The State is attempting to hold him to a standard that was not in effect when he assumed his duties. This is not proper the Union asserts.

The requirement that Correctional Officers possess a driver's license has been recently instituted by the State. In order to protest it, employees at another correctional institution, in Hocking County, filed an Unfair Labor Practice charge with the Ohio State Employment Relations Board. A finding of "probable cause" has been made. Presuming the charge is ultimately sustained, this would mean that Mr. Sizemore has been discharged for violating a work rule which the State cannot institute. This cannot be permitted to occur in the Union's opinion.

In fact, for the past six years the Grievant has not had to do any driving for the State whatsoever. On a daily basis

he does not have to drive as part of his duties. To require him to possess a driver's license on the speculation that he would be required to drive should not be permitted to occur in the Union's view.

As was plain for all to see at the hearing, Mr. Sizemore does possess a valid driver's license. He showed it to all at the hearing. Furthermore, as the Bureau of Motor Vehicles requirements call for proof of financial responsibility he has secured such proof through the Progressive Insurance Company at great cost to himself. To the date of the hearing Mr. Sizemore has received no indication from the Bureau of Motor Vehicles that he does not have driving privileges. As far as he knows he possesses a valid driver's license. As this is the case, the State lacks the requisite just cause to discharge him.

In the opinion of the Union there is a significant procedural error in this case. Examination of the paper trail associated with Mr. Sizemore's discharge shows that the warden at Lebanon determined to discharge him on November 14, 1989. In fact, the contractually required pre-disciplinary meeting was not held until December 5, 1989. This is after the discharge was determined and effected by the Warden. A pre-discipline meeting cannot follow discipline. By its terms, it must precede it. As that did not occur in this instance and Mr. Sizemore was not afforded an opportunity to

present his side of the story before being discharged the State's action has been fatally compromised according to the Union

Similarly, relevant documents supporting the position of the State were not provided to the Union in timely fashion. The discharge action in this case is so riddled with procedural defects as to require it be overturned in the opinion of the Union.

Discussion: The imposition of a requirement that Correctional Officer have a driver's license is not unreasonable. As pointed out by the State, it occurred after a thorough study had been undertaken of the requirements for the multitude of occupations employed by the State. That the requirement was instituted after Mr. Sizemore was employed does not make it any less valid. Public and private sector employers alike routinely adjust the requirements for the various positions in their enterprises. Obviously possession of a driver's license is not unusual in present day society. No long course of training or specialized instruction is necessary to obtain one. Imposition of the requirement that Correctional Officers have and maintain a valid driver's license is not the sort of requirement that may prompt a valid protest. This is true notwithstanding that the requirement was adopted after Mr. Sizemore's employment with the State.

If imposition of the holding of the driver's license is

to be regarded as an Unfair Labor Practice that is not the province of the Arbitrator. Examination of the Unfair Labor Practice charge filed by Union members at Hocking Correctional facility indicates that the unilateral imposition of the standard is at issue. The Union is protesting the lack of collective bargaining over the imposition of the driver's license requirement. That is not at issue in this proceeding. Whether or not the State acted correctly in instituting possession of a driver's license as a requirement for the position of Correctional Officer is for the State Employment Relations Board to determine. It is not for an arbitrator to deal with.

It does not require any stretch of the imagination to believe that Correctional Officers may be required to drive from time to time in the course of their duties. That Mr. Sizemore has not had to drive for the past six years does not mean he would not have to do so in the future. He could be required to drive on the first day back on the job in the course of a prison riot or escape situation. It is precisely for those reasons that a driver's license is required for the position of Correctional Officer. It may well be that the probability of Mr. Sizemore being required to drive is low based upon his experience of the past six years. That does not mean it does not exist nor that a Correctional Officer may continue to be employed absent one of the basic

requirements for his position.

It is true that the Grievant has in his possession a driver's license. It is also true that he has it erroneously. The defense of the Union that as Mr. Sizemore has a driver's license and proof of financial responsibility the reason for his discharge no longer exists is simply wrong. As all in attendance at the hearing could see, the Bureau of Motor Vehicles mistakenly mailed Mr. Sizemore's license back to him after it had been confiscated. The court entry, signed by Judge Powers of the Warren County Court, makes it abundantly clear that the Bureau's records were incorrect. He informed the Bureau that Mr. Sizemore's license had been suspended until August 10, 1999. The Bureau has corrected its error as shown on Employer Exhibit 1, the computer print-out of his driving record. Mr. Sizemore cannot legally drive in Ohio. He cannot meet one of the basic and most fundamental requirements for his position as a Correctional Officer. Consequently, the State has ample reason to seek his discharge.

The argument of the Union that procedural error fatally compromises Mr. Sizemore's discharge focuses upon the trees and completely overlooks the forest. When the State conducted the second pre-disciplinary meeting at the Warren County jail in order to afford Mr. Sizemore the opportunity to be present it walked the extra mile in affording him complete due

process. Mr. Sizemore's procedural rights have not been compromised in any fashion by the action of the State in acting to discharge him or in the grievance procedure itself. The Union knew why Mr. Sizemore was being discharged. It cannot claim ignorance as a defense. The Grievant, the Union, and the State knew what had occurred with respect to Mr. Sizemore's loss of driving privileges. The discharge action is untainted by the sort of procedural error which could prompt its overturning by any arbitrator.

Rule 35 of the Department's "Standards of Employee Conduct" makes it an offense for a Departmental employee to "compromise" or "impair the ability" of the employee to carry out their duties as an employee of the Department. Twelve instances of Driving Under the Influence, coupled with a ten year suspension of driving rights in Ohio falls within the province of that rule.

Award: The grievance is DENIED.

Signed and dated this 21st day of July, 1990 at South Russell, OH.



Harry Graham
Arbitrator